Utah Bar® JOURNAL

Volume 23 No. 4
July/August 2010

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Cover Art

Flowers in Payson Canyon, by first-time contributor, Steve Densley, American Fork, Utah.

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs, along with a description of where the photographs were taken, to Randy Romrell, Regence BlueCross BlueShield of Utah, P.O. Box 30270, Salt Lake City, Utah 84130-0270, or by e-mail .jpg attachment to rromrell@regence.com. If non-digital photographs are sent, please include a pre-addressed, stamped envelope for return of the photo, and write your name and address on the back of the photo.

Interested in writing an article for the Bar Journal?

The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea or would be interested in writing on a particular topic, please contact us by calling (801) 297-7022 or by e-mail at barjournal@utahbar.org.

Guidelines for Submission of Articles to the Utah Bar Journal

The *Utah Bar Journal* encourages the submission of articles of practical interest to Utah attorneys and members of the bench for potential publication. Preference will be given to submissions by Utah legal professionals. Submissions that have previously been presented or published are disfavored, but will be considered on a case-by-case basis. The following are a few guidelines for preparing submissions.

Length: The editorial staff prefers articles of 3000 words or fewer. If an article cannot be reduced to that length, the author should consider dividing it into parts for potential publication in successive issues.

Submission Format: All articles must be submitted via e-mail to barjournal@utahbar.org, with the article attached in Microsoft Word or WordPerfect. The subject line of the e-mail must include the title of the submission and the author's last name.

Citation Format: All citations must follow *The Bluebook* format, and must be included in the body of the article.

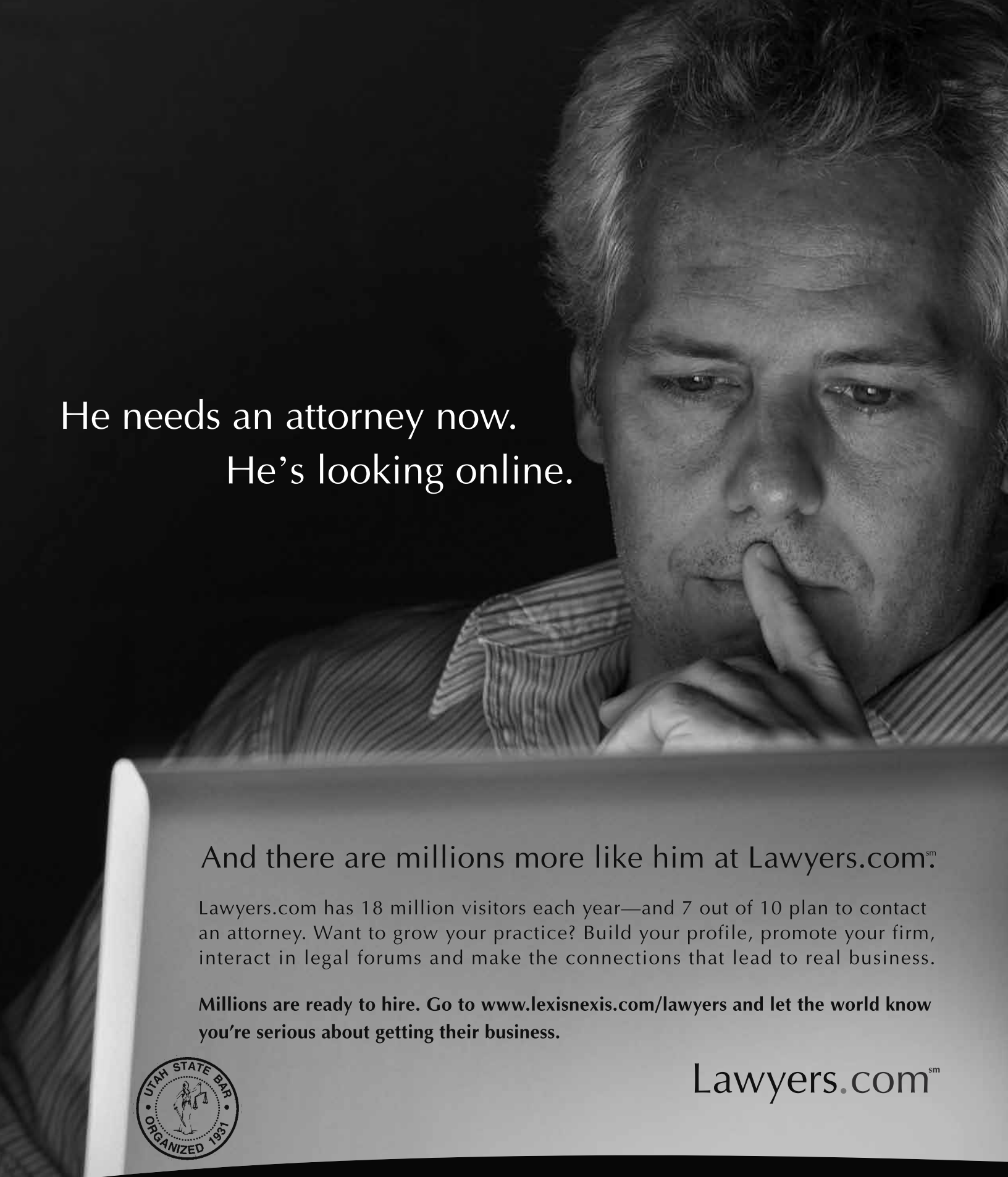
No Footnotes: Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial endnotes to convey the author's intended message may be more suitable for another publication.

Content: Articles should address the *Utah Bar Journal* audience – primarily licensed members of the Utah Bar. Submissions of broad appeal and application are favored. Nevertheless, the editorial board sometimes considers timely articles on narrower topics. If an author is in doubt about the suitability of an article they are invited to submit it for consideration.

Editing: Any article submitted to the *Utah Bar Journal* may be edited for citation style, length, grammar, and punctuation. While content is the author's responsibility, the editorial board reserves the right to make minor substantive edits to promote clarity, conciseness, and readability. If substantive edits are necessary, the editorial board will strive to consult the author to ensure the integrity of the author's message.

Authors: Authors must include with all submissions a sentence identifying their place of employment. Authors are encouraged to submit a head shot to be printed next to their bio. These photographs must be sent via e-mail, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

Publication: Authors will be required to sign a standard publication agreement prior to, and as a condition of, publication of any submission.



Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.

2. No one person shall have more than one letter to the editor published every six months.

3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal,* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.

4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.

8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

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

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

The Utah Bar Journal

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

Letters to the Editor

Dear Editor:

After reading Brent Armstrong's article, "Should Utah Lawyers Stop Forming Utah LLCs? A Response to Smith/Atwater," published in the Jan/Feb 2010 issue of the *Utah Bar Journal,* we write to clarify the premise of the article we wrote and to which he is supposedly responding. Our article highlights only three factors (and there are many, including costs, ease of filing, body of case-law interpreting the applicable LLC statute, etc.) that attorneys should consider when forming an LLC – whether that LLC be formed in Utah or elsewhere. Our article focuses on the client – how are the clients' interests best served? As attorneys, we have an obligation to zealously represent the interests of our clients (not their creditors or other third parties). The decision to form an LLC in Utah or in some other jurisdiction needs to be made based on what best accomplishes the clients' goals. Choosing a specific jurisdiction of formation is just one of many options available to attorneys to advance their clients' interests. If, for example, a client is interested in protection from creditors, then a Utah LLC may be inappropriate for that client regardless of the policy reasons for including a foreclosure provision in the Utah LLC statute. Mr. Armstrong's assertion that we recommend never forming Utah LLCs is entirely FALSE. In certain circumstances, a Utah LLC may best suit a client's interests. However, so long as Utah keeps its existing LLC statute (which national commentators have described as "hostile to businesses," a "Frankenstein statute" – due to its piece meal structure, and "one of the worst drafted LLC statutes") and there are business-friendly alternatives, we as attorneys will have an opportunity, if not an obligation, to choose which alternative LLC statutes best meet our clients' needs.

Russell K. Smith
Justin J. Atwater

Dear Editor:

There is often confusion when more than one attorney in Utah has the same name. Minor inconvenience aside, such confusion can escalate to embarrassment.

In the Attorney Discipline section of the Jan/Feb 2009 issue of the *Utah Bar Journal,* a "Bruce L. Nelson" (of Utah County) was listed as the subject of a public reprimand. Such attorney was not me.

At my request, the *Journal* published a subsequent clarification that I was not the attorney subject to the discipline, but to my disappointment and embarrassment, I note that "Bruce L. Nelson" is again listed as the subject of public reprimand in the May/June 2010 issue of the Journal. The *Journal* makes no attempt to explain which Bruce Nelson is intended.

I wish to clarify that I am not the "Bruce L. Nelson" in Utah County, the subject of both public reprimands in the past two years. I recommend the Journal consider more clarification as to whom is being disciplined in cases where there is more than one attorney with the same name. This might help me and others avoid future, additional embarrassment and help me preserve the reputation I have tried to maintain during my 33 year career as an attorney.

Bruce J. Nelson
Nelson Christensen & Helsten
Salt Lake County attorney

Keeping Our Core Values (and Sanity) in the Internet Age

by Stephen W. Owens

Passing the Baton

Thank you for the opportunity to serve as your President. I have enjoyed my year, and now turn the reins over to Rob Jeffs (president) and Rod Snow (president-elect), capable and grounded successors. I also thank my family and law partners for their support this past year.

I love being a lawyer and speaking up for lawyers. Our calling is to help people prevent and solve complex problems in a fair and peaceful way.

I recently felt a lot of pride in our profession when I heard a stirring speech by John Lewis, a Member of Congress from Georgia. Ten people spoke with Martin Luther King on the steps of the Lincoln Memorial when he delivered his "I Have a Dream" speech. John Lewis is the only one still living. He thanked the group of lawyers at the gathering and said, "I have been served by great lawyers. I was arrested and jailed 40 times between 1961-69 for nonviolent protests, and I had very good lawyers stand up for me and protect my rights."

The Practice of Law in the Internet Age

The practice of law, like everything else, is changing dramatically due to the internet. Here are some of the trends:

- Free or low cost electronic legal research replacing law libraries.
- E-mail replacing physical mail, faxes, hand deliveries, and, in some respects, legal secretaries.
- Specialized Internet CLE replacing live CLE.
- E-filing replacing traditional court filings.
- Electronic billings and payments replacing physical bills and checks.
- Phone conferences and emails replacing live meetings with clients.
- Computer templates replacing engraved letterhead.
- ListServes replacing lunch meetings and phone calls with colleagues.
- Laptops and cell phones replacing high overhead law firms.
- Internet advertising replacing phone book ads.
- Scanning and shredding documents replacing storage units.
- Social networking sites replacing mailing lists.
- Nonlawyers, out-of-state lawyers, and even out-of-the-country lawyers replacing traditional attorney competitors.
- Internet "reviews" of a lawyer's work replacing word-of-mouth referrals.
- Electronic news sources replacing printed versions.
- E-mail Bar communications, elections, licensing, and CLE reporting replacing mailings.
- E-mail court communications, including rule changes and judicial vacancies, replacing mailings.
- Video depositions of out-of-state witnesses replacing expensive trips across the country.
- Google and electronic searches of witnesses replacing private investigators.
- A national bar exam and seamless reciprocity with other states replacing protectionist and restrictive policies.
- Telecommuting and working from home (or vacation) replacing the traditional work week.

Maintaining Our Core Principles

These and other changes offered by the Internet Era bring speed and efficiency. However, we need to be careful that we do not lose our core values as a profession: Trusting relationships, understanding client needs and goals, civility, confidentiality, and competence.

It is hard to build trusting relationships with people you do not even meet or talk to in person. It is easier to be uncivil in an email when you have never spoken to the opposing counsel on the other end. It is easier to email away substandard work to get it off your Outlook "to do" list than to take the time to prepare a well-crafted product. It is easier to unwittingly violate a client's confidences when we send them into cyberspace.

These changes can be even more challenging for new lawyers. With firms not hiring due to the down economy, these new lawyers need mentors to show them how things should be done, how to build civility and pride in the profession, or how to manage a practice. In response to this, the Utah Bar has set up a mandatory mentoring program for new lawyers to pair them up one-on-one with sharp, veteran lawyers to try to teach practical skills and be their friends in the practice.

Maintaining Our Sanity and Enjoying the Ride

Life has gotten to be a bit over-stimulating. Three recent events in my life demonstrate this:

- As I closed a lengthy call with my client, I accidentally told him "I love you," my usual sign-off to my wife. I called him right back to apologize – he told me with a smile that he appreciated the comment.
- My wife sent me into the kitchen to get a prescription pill for her. On autopilot, I accidently took her pill.
- I was in a hotel in Price after a long day of depositions. Having taken off my suit and completed my room service meal, I wanted to remove the tray of uneaten food from my room. Ten seconds and a door slam later, I had managed to lock myself out of my room, leaving me in my underwear in the hallway with no key or identification.

The practice of law in the Internet Age is certainly exciting! While we embrace these technology-driven changes, we need to (1) maintain our role as problem preventers and problem solvers, (2) focus on what is important rather than what is merely urgent, and (3) filter all the static to see through problems to find the right answers for our clients.

Lawyers serve a vital role in our prosperous and peaceful society. It will always be so. We just need to make sure that we maintain our core values, our sanity, and our sense of humor while we enjoy the ride.

Utah Standards of Appellate Review – Third Edition

by Norman H. Jackson and Lisa Broderick Thornton

PREFACE TO THE THIRD EDITION: 2010/2011

This new edition of Judge Jackson's Utah Standards of Appellate Review revises and updates two prior *Utah Bar Journal* articles. The first was designated as a Collector's Issue, Vol. 7, No. 8, October 1994. The second was published as a Revised edition, Vol. 12, No. 8, October 1999. Judge Jackson discovered early in his appellate practice that there was no ready reference where the standard of review for a particular issue could be located. Thus, one of his initial acts as an appellate judge was to ask his first law clerk, Annina Mitchell, to begin compiling a summary of standards of review. In due course, that summary grew and was circulated at the appellate courts, the attorney general's office, and appellate practice seminars. Finally, it was cited by an attorney as legal authority in an appellant's brief at the Utah Court of Appeals. Accordingly, the first edition was compiled and published in 1994, seven years after Utah became the 37th state to have a two court appellate system. The second edition was published in 1999 and this third edition arrives over a decade later. To access the two prior articles, go to: http:// www.utahbar.org/barjournal/frequently_requested_articles.html. Lisa Thornton, Christensen Thornton, PLLC, has joined Judge Jackson as co-author of this series. Previously, she was the editor of the final draft of the first edition. The current edition will be published in a series of successive articles. However, the Outline of Contents below is the outline for the series. Thus, you should keep each article so your set will be complete. This first article provides an overview, commentary, analysis, and proceeds with text for the Outline to the end of Challenging Findings of Fact under Appeals from Trial Courts.

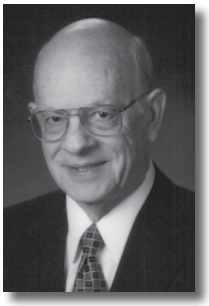
FOREWORD

In 1994, Judge Jackson wrote, "I recommend careful study of the following Utah appellate opinions: *State v. Pena,* 869 P.2d 932 (Utah 1994); *State v. Thurman,* 846 P.2d 1256 (Utah 1993); *State v. Ramirez,* 817 P.2d 774 (Utah 1991); *State v. Sykes,* 840 P.2d 825 (Utah [Ct.] App. 1992); [and] *State v. Vigil,* 815 P.2d 1296 (Utah [Ct.] App. 1991)." Judge Norman H. Jackson, *Utah Standards of Appellate Review,* 7 Utah Bar J. 9, 11 (1994). In 1999, Judge Jackson stated that though the four cases are all search and seizure cases,

> [t]hose cases remain essential to understanding how standards of review developed after the court of appeals joined the Utah appellate system. Moreover, they show the policy considerations and systemic concerns in keeping a proper balance between trial court discretion and appellate court deference. *Pena*, a landmark standard-of-review case, was published shortly before the 1994 article. In *Drake v. Industrial Commission,* 939 P.2d 177 (Utah 1997), counsel adroitly argued *Pena*, not to support the existing standard, but to change it. *See id.* at 180-82. When counsel convinced the Supreme Court to change the standard of review, he won the case. *See id.* at 180-84. *Drake* reveals astute appellate advocacy at its very best. Familiarity with *Pena's* prolific progeny, together with other standard-of-review law, will allow you to navigate carefully through the seas of appellate advocacy. My goal has been to help you by compiling a "users manual" or "ready reference" with which to begin charting your client's course.

Judge Norman H. Jackson, *Utah Standards of Appellate Review*

NORMAN H. JACKSON is Of Counsel to Christensen Thornton, PLLC in Salt Lake City, where he practices lawyer-to-lawyer consulting regarding litigation and appeals.



LISA BRODERICK THORNTON is an attorney with Christensen Thornton, PLLC; she practices with retired Judge Norman H. Jackson and attorney Steve S. Christensen in the firm's appellate and family law sections.

– *Revised,* 19 Utah Bar J. 8, 8 (1999). The authors hope that this series of articles will provide meaningful direction as you pilot your clients on their appellate journey.

INTRODUCTION

To Appeal or Not to Appeal – Thinking About Reversal Rates

An attorney's initial evaluation of whether to file an appeal is the most consequential of appellate activities. Attorneys who do not properly assess the appellate worthiness of their cases do a disservice to themselves, their clients, and Utah's appellate system. Attorneys should not file appeals unless their cases present realistic reasons for reversing significant and substantive trial court rulings. Low reversal rates in Utah reveal the need for attorneys to be more careful and cautious about their decision to appeal. Justice Cardozo made a similar observation some time ago. He estimated at least 90% of cases appealed "'could not, with semblance of reason, be decided in any way but one,'" i.e., affirmed. Ruggero J. Aldisert, *Opinion Writing* 111 n.20 (1990) (quoting Benjamin Cardozo, *Growth of the Law* 60 (1924)). In other words, he estimated that no more than 10% of cases appealed would be reversed. For the period ending March 31, 2009, the reversal rate for all U.S. Courts of Appeals was 9.6%. For the same period the Tenth Circuit reversal rate was 6.8%. Reversal rates at Utah Appellate Courts are even lower. During 1998, 577 appeals were filed with the Utah Supreme Court. In the same year, 40 cases resulted in some measure of reversal. The reversal rate was a mere 7%. In 1998, 711 appeals were filed in the Utah Court of Appeals and 50 reversals occurred, i.e., 7%. Utah Court of Appeals reversal rates for 2005-2007 continued to average 7%. In 2007, 564 appeals were filed in the Utah Supreme Court and 30 were reversed, i.e. 5.3%. The rate was also 5.3% for 2009. These reversal rates clearly demonstrate that many Utah attorneys fail to reach a realistic conclusion when they decide to file an appeal. They are as "[t]he metaphorical descendants of Don Quixote…out in full force tilting at windmills, seeking to overturn trial results that had been preordained from the moment the complaints were filed." Aldisert, *supra*, at 5. Attorneys need to be intellectually and dispassionately objective about the fact that trial court "determinations for the most part are final and binding, irrespective of impressive appellate briefs, thick volumes of records or eloquent argument. This reality of the judicial process is an aspect of the law lost upon most laypersons and many lawyers." *Id.* at 54. Here, for attorneys with prospective appeals, we present three essential "reality checks" to use in evaluating your odds for success on appeal. For brevity, the words "trial court" or "lower tribunal" are

meant to include administrative agencies.

REALITY CHECKS

Reality Check #1: Reversible Error. Has the trial court committed reversible error? "Error" that does not affect substantial rights of the parties is not reversible error, but harmless error. *See* Utah R. Civ. P. 61; Utah R. Crim. P. 30(a); *accord State v. Dominguez,* 2009 UT App 73, ¶ 12, 206 P.3d 640; *State v. Mora,* 2003 UT App 117, ¶ 22, 69 P.3d 838. This rule requires the appellant to show not only that an error occurred, but that it was "substantial and prejudicial." *See Olson v. Olson,* 2010 UT App 22, ¶ 7, 226 P.3d 751; *see Jensen v. Jensen,* 2008 UT App 392, ¶ 7, 197 P.3d 117. To demonstrate prejudice, appellants must show reasonable likelihood that without the error, there would have been a different result. *See Morra v. Grand County,* 2010 UT 21, ¶ 36, 230 P.3d 1022 ; *State v. Johnson,* 2009 UT App 382, ¶ 37, 224 P.3d 720; *State v. Davis,* 2007 UT App 13, ¶¶ 15-21, 155 P.3d 909. This likelihood must be high enough to undermine confidence in the outcome. *See State v. Ott,* 2010 UT 1, ¶ 40, – P.3d – ; *Taylor v. State,* 2007 UT 12, ¶ 56, 156 P.3d 739; *State v. Lafferty,* 2001 UT 19, ¶ 35, 20 P.3d 342. Utah Rule of Civil Procedure 61 is a mandate to courts – trial and appellate – not to disturb a verdict or judgment unless it is clear that refusing to do so would be substantially unjust. "Thus, the integrity of verdicts, orders, and judgments is the rule and disturbance thereof the exception." 7 James W. Moore & Jo D. Lucas, *Moore's Federal Practice* § 61.03 (2d ed. 1993). Counsel should be mindful that no party, whether in a civil, criminal, or administrative agency case, is entitled to a trial or hearing free of all error. Thus, unless the lower tribunal has committed reversible error, one should not pursue an appeal.

Reality Check #2: Preservation. Did trial counsel preserve the error or issue for appellate review? The rationale for "preservation" is that the trial court, in fairness, ought to have the chance to correct its own errors. *See Arbogast Family Trust v. River,* 2008 UT App 277, ¶ 10, 191 P.3d 39 (stating preservation rule exists to give trial court an opportunity to address claimed error and correct it). Claims of error should be timely raised so thoughtful and probing analysis can begin in the early stages of the proceeding. If not, the claim is waived. *See Utah Dept. of Transp. v. Ivers,* 2009 UT 56, ¶¶ 28-30, 218 P.3d 583; *Arbogast*, 2008 UT App 277, ¶ 10; *State v. Biggs,* 2007 UT App 261, ¶ 7 n.4, 167 P.3d 544. When the trial court has not considered a matter, the appellate court has nothing to review (plain error and rare and exceptional circumstances aside). *See State v. Rhinehart,* 2007 UT 61, ¶ 21, 167 P.3d 1046; *In re D.N.,* 2003 UT App 262, ¶ 1 n.1, 76 P.3d 194. Specific and timely objections and motions must first be made before the lower tribunal and then identified for the appellate court. *See H.U.F. v. W.P.W.,* 2009 UT 10, ¶ 25, 203 P.3d 943; *State v. Low,* 2008 UT 58, ¶ 17, 192 P.3d 867. Further, "'issues not raised in the court of appeals may not be raised on certiorari [to the supreme court] unless the issue arose for the first time out of the court of appeals' decision.'" *Collins v. Sandy City Bd. of Adjustment,* 2002 UT 77, ¶ 19 n.3, 52 P.3d 1267 (quoting *DeBry v. Noble,* 889 P.2d 428, 444 (Utah 1995)). Through the years, many attorneys have overlooked this requirement, thus casting the burden on appellate courts to search the record for issue preservation. Now, Utah Rule of Appellate Procedure 24(a)(5)(A) requires counsel to cite to the record in briefs showing preservation in the trial court of each issue raised or appealed. If the issue was not preserved, counsel must state other valid grounds for review. *See* Utah R. Crim. P. 12(f); Utah R. App. P. 24(a)(5)(B). Counsel must search the record and confirm "preservation" of the suspected error. When it has not been preserved, an appeal has virtually no chance of success. If your case satisfies reality checks #1 and #2, turn your scrutiny to standards of review, your final checkpoint.

Reality Check #3: Standard of Review Burden. Will this challenge of the trial court's action satisfy the burden imposed by appellate standards of review? The appellate process consists of just three types of review. An attorney should forego filing an appeal unless he or she can objectively pursue one or more of the following three challenges:

(1) Challenge of Factual Findings: The appellant must show material findings are clearly erroneous by marshaling all evidence supporting the findings, then showing this evidence is legally insufficient to support the findings when viewed in a light most favorable to the trial court's findings. *See Gilmor v. Family Link, LLC,* 2010 UT App 2, ¶ 19, 224 P.3d 741 (stating clearly erroneous standard of review); *Chen v. Stewart,* 2004 UT 82, ¶ 19, 100 P.3d 1177 (stating marshaling requirement). For example, a challenge to findings of fact may be framed in written and oral arguments as follows: "The trial court's finding that appellant breached its duty to appellee is clearly erroneous."

(2) Challenge of Discretionary Rulings: The appellant must show the trial court exceeded the measure of discretion allotted or exceeded the boundaries set by principles or rules of law, *see Utah County v. Butler,* 2006 UT App 444, ¶ 7, 147 P.3d 963, by showing the decision exceeds the limits of reasonability, *See State v. Brink,* 2007 UT App 353, ¶ 4, 173 P.3d 183, or by showing it is a "capricious and arbitrary action." *Kelley v. Kelley,* 2000 UT App 236, ¶ 32, 9 P.3d 171. The term of art describing this kind of trial court action is "abuse of discretion." For example, a challenge to discretionary rulings may be framed in written and oral arguments as follows: "The trial court abused its discretion when it denied appellant's motion for a new trial." See the section below titled "Metaphors for Measuring Discretion vs. Deference."

(3) Challenge of Conclusions of Law: The appellant must show

legal error by the trial court in its use of fixed principles and rules of law, demonstrating the trial court incorrectly selected, interpreted, or applied the law. *See State v. Pena,* 869 P.2d 932, 936 (Utah 1994). For example, a challenge to a court's conclusion of law may be framed in written and oral arguments as follows: "The trial court incorrectly interpreted the statute's plain language." Vague assertions of trial court "error" or "mistake" and other similar challenges to trial court action will place a case among the high percentage that simply should not be appealed in the first place. Utah Rule of Appellate Procedure 24(a)(5) requires attorneys to identify the standard of review for each issue appealed. Further, attorneys should apply the standard of review in the legal analysis set forth in their briefs.

To summarize, an attorney can realistically determine the odds of success on appeal by prudently applying the three-point test at the outset. Attorneys who conduct proper reality checking of cases will select cases with high odds for winning on appeal. Appeals without reversible error, preservation, and the criteria for the standard of review are not likely to succeed regardless of careful briefing and presentation of oral arguments. Rather, success on appeal turns primarily on careful analysis of the principles set forth above. Attorneys who use the three-point test will be more likely to file appeals deemed worthy to reverse the trial court.

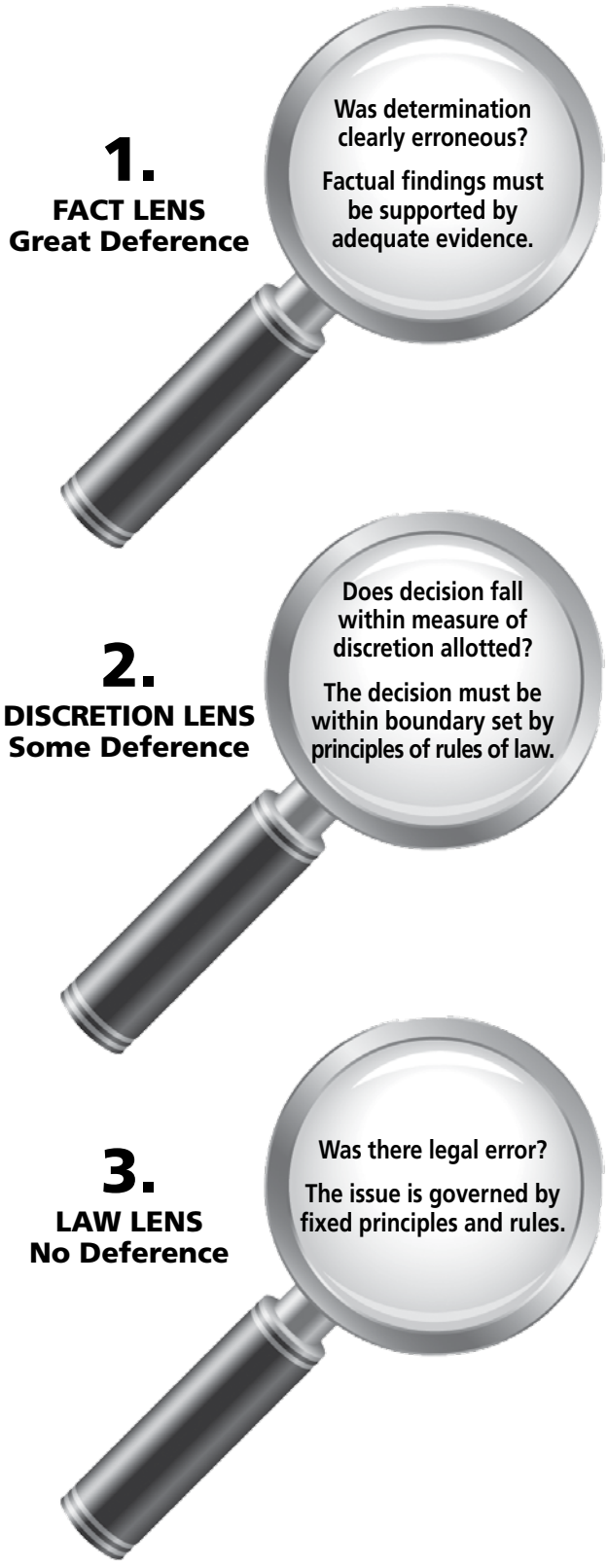
METAPHORS FOR MEASURING DISCRETION VS. DEFERENCE

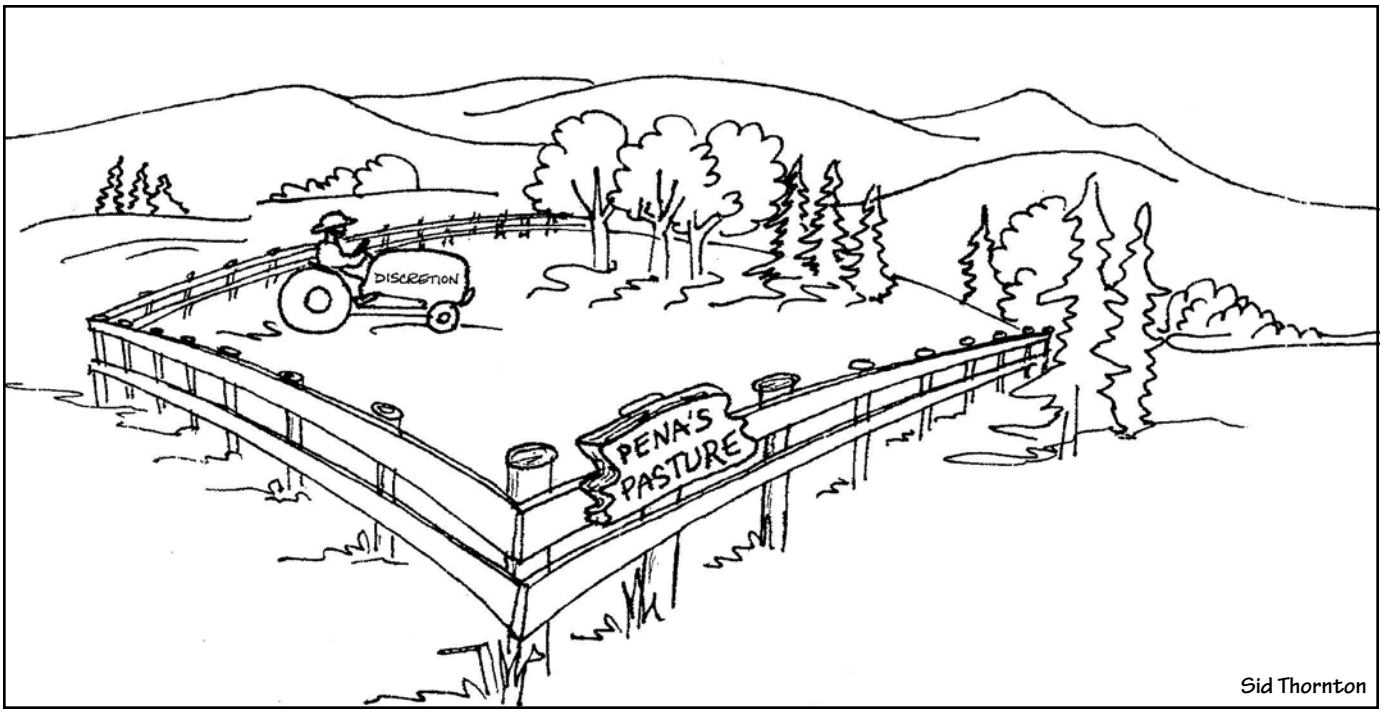
Pena introduced two new and distinct discretion metaphors into Utah's then limited universe of standard of review law: a spectrum and a pasture. Spectrum comes to us from the law of physics and represents the range of colors produced by passing a white light through a prism or lens. It is difficult to graphically illustrate the range of a rainbow in black and white. Thus, opinion writers have adopted words such as "scope, length, width, narrow, and degrees" when attempting to analogize this metaphor to judicial discretion. At times, their task has seemed to be as elusive as chasing rainbows. *Pena* conceded that the best we can do is to recognize that the spectrum of discretion exists and that the "closeness of appellate review…runs the entire length of this spectrum." *State v. Pena,* 869 P.2d 932, 938 (Utah 1994). It has been described as a "sliding scale of scrutiny" in a Utah Law Review article. Michael J. Wilkins, et al., *A "Primer" in Utah State Appellate Practice,* 2000 Utah L. Rev. 111, 129 (2000).

On the other hand, *Pena's* pasture metaphor proposes visual space bounded by fences and boundaries. However, the original pasture is not permanently fenced with pitchy pine or cedar posts planted in deep rocky holes with log pole panels all tied together with heavy duty wire. Rather, the boundaries of discretion are temporary and flexible. They can be moved from time to time and place to place much like the light metal fence panels produced by Powder

Standards of Appellate Review at a Glance

(The power of the lens through which an appellate court may examine an issue)



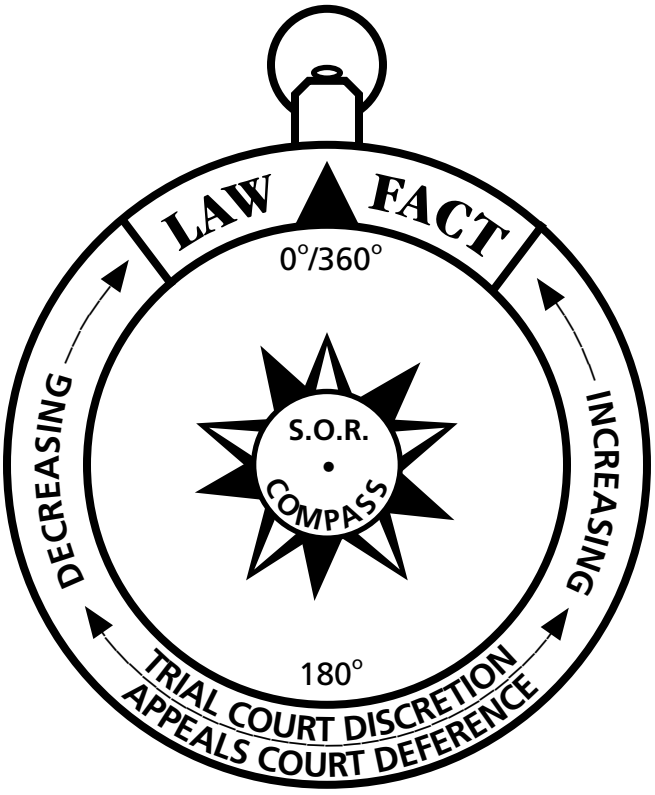


River. And it seems that the pasture has been on a side-hill with a seep of water creating a slippery slope for opinion writers. Our first edition has visual illustrations for both of Pena's metaphors. Because of the limitations described, neither is alleged to have attained perfection. However, each provides some useful perception and understanding of these concepts which have driven the development of Utah Standard of Review law for the past 16 years.

First, the spectrum of discretion suggests use of a prism or lens to allocate "power and responsibility between the trial courts and the appellate courts." The title of our first illustration is – Standards of Appellate Review at a Glance. The subtitle is – The power of the lens through which an appellate court may examine an issue. The illustration depicts three lenses of varying power. They demonstrate that the appellate process is reduced to three types of review: (1) The **Fact Lens** represents – Great Deference to the trial court or administrative agency on review of factual findings. The question asked is – was the determination clearly erroneous? Also, factual findings must be supported by adequate evidence. (2) The **Discretion Lens** represents – Some Degree of Deference to the trial court is given when reviewing the exercise of lower court discretion. The question asked is – does the decision fall within the measure of discretion allotted? Thus, the decision must be within the boundaries set by principles or rules of law. (3) The **Law Lens** – No Deference given to the trial court on review of conclusions of law. The question asked is – was there legal error? The issue is governed by fixed principles and rules of law.

Standards of Appellate Review Compass

(An illustration of the relationship between the appellate court's deference and the trial court's discretion.)



Our second illustration is a graphic drawing depicting a pastoral scene. Distant mountains with a few trees at the base form the background. In the center foreground is the corner of a fence with sturdy posts and two rails of lumber. A rough hewn board inscribed with the words "Pena's Pasture" is attached to the fence. The visible fence encloses three sides of a clear area in front and large trees at the back. Because the ground slopes to the rear and the right side of the scene, the view suggests that the pasture is not fenced at the back. Inside the fence is a tractor named "Discretion." A driver is seated at the controls ready to explore and measure the nature and extent of the pasture and perhaps do some plowing. The 2004 case of *State v. Brake,* 2004 UT 95, ¶ 13, 103 P.3d 699, states that the "pasture is judicial discretion, and is bounded by fences which reduce or enlarge access to the available crop of discretion"; and that the "fence line is *long* for pure questions of fact and *narrow* for questions of law." *Id.* (emphasis added). The court states that mixed questions pose a challenge to "those responsible for placing the fence lines *along* the spectrum of discretion." *Id.* (emphasis added). Thus, use of these metaphors and this mixing of the metaphors, opens standard of review opportunities for the astute appellate advocate. That is, *Pena* and its progeny have created uncertainty. And uncertainty provides "elbow room" sufficient to bring about change in standards of review. *See Drake v. Indus. Comm'n,* 939 P.2d 177 (Utah 1997).

In *Brake*, the Utah Supreme Court noted in a 3-2 opinion that it had already altered the standard of review in search and seizure cases without saying so. *See Brake,* 2004 UT 95, ¶ 15. Thus, the court announced abandonment of the standard, which extended "some deference" to the application of law to the underlying factual findings and moved to non-deferential review. *See id.* The court utilized pasture, fence line, crop, and spectrum analysis to reach this conclusion, and also commented that it has an unresolved debate about whether to "chart our own course" via the Utah Constitution or the Federal Fourth Amendment. *Id.* ¶ 16 n.2. That phrase directs attention to the Standards of Appellate Review Compass introduced and illustrated in our 1999 article – and again on the previous page of this article. In 2005, the court analyzed standards of review in a jury verdict negligence case. *See Jensen v. Sawyers,* 2005 UT 81, 130 P.3d 325. The court stated "[t]o the extent that *Pena* describes a two-dimensional standard of review universe that can be navigated using the coordinates of law and fact, the treatment of objective standards in jury trials exposes its limitations." *Id.* ¶ 74. "Such a two-dimensional interpretation does not account for other important review considerations which lend breadth and depth to the review selection enterprise." *Id.* The court noted that in *Pena*, the focus was where to place the reasonable suspicion inquiry on the "fact versus law continuum." *Id.* ¶ 75. And the court observed that measuring the "ratio" of law to fact, placing it on a "linear scale," and applying it to a particular point did not work well when reviewing a jury verdict. *See id.* ¶ 76. Thus, the court concluded that it did not present the "variety of options" available for the application of discretion as when performing "Pena-like" analysis. *Id.*

In 2006, the court confirmed that "[w]e consider multiple factors when determining how much deference to grant a district court's application of law to facts." *Searle v. Milburn Irrigation Co.,* 2006 UT 16, ¶ 16, 133 P.3d 382 (citing *Jeff v. Stubbs,* 970 P.2d 1234, 1244 (Utah 1998)). The court noted that it typically grants "some level" of deference to the lower court when reviewing mixed questions. *See id.* ¶ 17. *Searle* involved review of a district court review of an informal decision of the State Engineer. The third issue on appeal dealt with the standard of review for the trial court's rejection of a change application based on the probability that a vested water right would be impaired by the proposed use. The opinion identified this as a mixed question and stated that the measure of discretion afforded "varies" according to the issue being reviewed. *See id.* ¶ 16. The court conducted its analysis using the "three Pena factors": (1) the complexity and variation of the facts; (2) whether the context is novel or new; and (3) district court observations of witness demeanor and credibility versus the adequacy of the record. *See id.* ¶¶ 16-17. However, due to the important public policy concerning water rights, the court deemed it proper that the district court's discretion be "somewhat" constrained, and proceeded with its review. *See id.* ¶ 18.

A few months later, the court added "policy reasons" as factor 4 for review of mixed questions. *See State v. Virgin,* 2006 UT 29, ¶ 28, 137 P.3d 787. *Virgin* dealt with a magistrate's declining bindover because the evidence lacked sufficient credibility and reliability to form a reasonable belief that the alleged offense occurred, obviously an area warranting public policy concerns. That same year, the court rearranged and refined the factors back to three. *See State v. Levin,* 2006 UT 50, ¶ 3, 144 P.3d 1096. Factor 2 above was eliminated, factor 3 was modified as 2 and factor 4 became factor 3. *See id.* ¶ 25-31. The court stated that these revisions were made to "enhance the analytical consistency and clarity of the balancing test to be applied in *placing* different mixed questions *along* the spectrum of deference and discretion." *Id.* ¶ 27 (emphasis added). Thus, it appears that the *Pena* factors for review of mixed questions have been discarded in favor of a three factor "balancing test." *See id.* ¶ 28. The goal identified is "to allocate tasks between the trial and appellate courts based on their institutional roles and competencies." *Id.* ¶ 31. Then, the court announces its standard of review to be: whether a defendant was subjected to custodial interrogation is a mixed question of law and fact that we review for correctness. *See id.* ¶ 31.

In summary, the standard of review for mixed questions has been in a state of flux since *Pena*. Perhaps the slope of its pasture metaphor was too slippery and the colors of its spectrum too diffused to provide clarity. However, over time this state of flux opened the doors of opportunity to the creative appellate practitioner. Have those doors been closed? Will the three factor "balancing test" be the final word? Or, would a simply stated standard of review prove to be more serviceable? The United States Tenth Circuit Court of Appeals standard of review for mixed questions appears to have stood the test of time: "[o]ur review of mixed questions of law will be 'under the clearly erroneous or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles.'" *Roberts v. Printup,* 595 F.3d 1181, 1186 (10th Cir. 2010) (quoting *Estate of Holl v. Comm'r,* 54 F.3d 648, 650 (10th Cir. 1995)); *accord Armstrong v. Comm'r,* 15 F.3d 970, 973 (10th Cir. 1994). The choice between these two standards is not complicated. However, given recent developments in the Utah courts, the standard of review for mixed questions remains largely untested.

OUTLINE OF CONTENTS

I. APPEALS FROM TRIAL COURTS

A. Challenging Findings of Fact

1. Introduction

Historically, appellate advocates have had difficulty distinguishing factual issues from legal issues. Simple factual questions seem to give little trouble. However, when factual issues are part of subsidiary or underlying facts that lead to legal conclusions,

confusion has prevailed. Utah appellate courts have created some of this lack of certainty. *See State v. Pena,* 869 P.2d 932, 935 (Utah 1994) ("[T]his court and the court of appeals have created some confusion with regard to standards of review."). For example, the Utah Supreme Court in *State v. Mendoza,* 748 P.2d 181, 183 (Utah 1987), treated a reasonable suspicion determination under a clearly erroneous standard, usually reserved for questions of fact. Many appellate decisions followed this approach. *See, e.g., State v. Leonard,* 825 P.2d 664, 667-68 (Utah Ct. App. 1991); *State v. Robinson,* 797 P.2d 431, 435 (Utah Ct. App. 1990); *State v. Talbot,* 792 P.2d 489, 493 (Utah Ct. App. 1990). However, the supreme court in *Pena* clarified the matter by determining that whether a given set of facts gives rise to reasonable suspicion is a determination of law, reviewed nondeferentially for correction, as opposed to being a fact determination reviewable for clear error. *See Pena,* 869 P.2d at 939; *accord State v. Beach,* 2002 UT App 160, ¶ 7, 47 P.3d 932.

Appellate counsel may also add to this confusion by characterizing issues as factual, when they are actually issues of law or issues of discretion. *See Pena,* 869 P.2d at 936. Whether appellants are challenging a solitary finding of fact, an underlying fact, or a subsidiary fact, whatever the label, they must be able to distinguish factual questions and select the applicable standard of review.

The supreme court provided the following definition of factual issues: "Factual questions are generally regarded as entailing the empirical, such as things, events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as state of mind." *Id.* at 935 (citing Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels,* 74 Marq. L. Rev. 231, 236 (1991)); *accord State v. Barzee,* 2007 UT 95, ¶ 82 n.9, 177 P.3d 48; *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints,* 2007 UT 42, ¶ 26, 164 P.3d 384. Each section below includes examples of factual questions that may help in determining whether an issue is indeed factual. Each section also includes cases outlining the corresponding standards of review.

2. Marshaling Requirement

Recently, the Supreme Court adopted the language based on *Pena's* Pasture theme in a marshaling requirement discussion, stating that the party neither "corralled the evidence" nor reviewed the evidence in a light most favorable to the trial court findings. *See United Park City Mines Co. v. Stichting Mayflower Mountain Fonds,* 2006 UT 35, ¶ 40, 140 P.3d 1200.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires that "[a] party challenging a fact finding [must] first marshal all record evidence that supports the challenged finding." *Accord Beehive Tel. Co v. Pub. Serv. Comm'n,* 2004 UT 18, ¶ 15, 89 P.3d 131 (first alteration in original); *Traco Steel Erectors, Inc., v. Comtrol, Inc.,* 2007 UT App 407, ¶ 32, 175 P.3d 572; *Aspenwood, L.L.C. v. C.A.T., L.L.C.,* 2003 UT App 28, ¶ 44, 73 P.3d 947.

To fulfill the duty to marshal, a party must "present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *State v. Scott,* 2009 UT App 367U (mem.) (quoting *W. Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah Ct. App. 1991)); *accord Boyer v. Boyer,* 2008 UT App 138, ¶ 21, 183 P.3d 1068, *cert. denied,* 199 P.3d 367 (Utah 2008); *State v. Coonce,* 2001 UT App 355, ¶ 6, 36 P.3d 533. Every scrap of evidence includes all inferences from the evidence. *See State v. Valdez,* 2003 UT App 100, ¶ 20 n.11, 68 P.3d 1052.

Many appellants merely present carefully selected facts and excerpts of trial testimony supporting their own position, omitting negative facts. *See Roderick v. Ricks,* 2002 UT 84, ¶ 46, 54 P.3d 1119; *Guenon v. Midvale City,* 2010 UT App 51, ¶ 6, 230 P.3d 1032; *Hi-Country Estates Homeowners Ass'n. v. Bagley & Co.,* 2008 UT App 105, ¶ 20, 182 P.3d 417, *cert. denied,* 199 P.3d 970 (Utah 2008); *Chapman v. Uintah County,* 2003 UT App 383, ¶ 32, 81 P.3d 761. Others conveniently reargue the same case made before the trial court. *See Wayment v. Howard,* 2006 UT 56, ¶ 14, 144 P.3d 1147; *State v. Hodge,* 2008 UT App 409, ¶ 18, 196 P.3d 124, *cert. denied,* 207 P.3d 432 (Utah 2009); *Jensen v. Jensen,* 2008 UT App 392, ¶ 12, 197 P.3d 117; *Neely v. Bennett,* 2002 UT App 189, ¶ 12, 51 P.3d 724.

A complicated case does not excuse the marshaling burden, but "demands even more attentiveness to presenting a clear picture of facts and argument to this court, which, of course, does not have the benefit of having previously reviewed the evidence." *Tanner v. Carter,* 2001 UT 18, ¶ 19, 20 P.3d 332. Neither does the page limit for briefs excuse the requirement. *See Aspenwood,* 2003 UT App 28, ¶¶ 44-46 (noting that the party simply referred appellate court to its addenda, arguing that it could not marshal evidence within body of its brief because it was forced to stay within one-hundred page limit). Indeed, marshaling may often have the unexpected benefit of bolstering the cogency of the arguments advanced. *See United Park City Mines Co.,* 2006 UT 35, ¶ 25.

However, the marshaling requirement is not "an open invitation for appellants to bring [courts] their boxes." *Beehive Tel.,* 2004 UT 18, ¶ 15. Courts have cautioned strongly against using "everything-but-the kitchen-sink marshaling efforts" as being "almost completely unhelpful." *Id.* The evidence marshaled must contain an appropriate citation to the record pursuant to Utah Rule of Appellate Procedure

24(e). *See In re W.A.,* 2002 UT 127, ¶ 45, 63 P.3d 607. A mere reference to where evidence supporting the verdict can be located (i.e., in exhibits 11, 12, and 13) does not constitute marshaling; rather, marshaling requires that the party challenging the finding show appellate courts where the evidence can be located and list the specific evidence supporting the verdict. *See id.* (citing *Harding v. Bell,* 2002 UT 108, ¶ 19, 57 P.3d 1093).

Challenges to pure questions of law do not require marshaling. *See Utah Auto Auction v. Labor Comm'n,* 2008 UT App 293, ¶ 9 n.4, 191 P.3d 1252; *State v. Werner,* 2003 UT App 268, ¶¶ 10-11, 76 P.3d 204. However, courts have issued "frank, severe instruction" for "unsuspecting or overly creative" parties who dodge this duty by attempting to frame the fact-dependent questions issues as legal ones. *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds,* 2006 UT 35, ¶¶ 19, 25, 140 P.3d 1200. Further, if a party purports to challenge only a legal ruling, but the determination of the correctness of a court's application of the law is extremely fact-sensitive, the party has a duty to marshal the evidence. *See Chen v. Stewart,* 2004 UT 82, ¶ 20, 100 P.3d 1177; *accord Cache County v. Beus,* 2005 UT App 503, ¶ 11, 128 P.3d 63; *United Park City Mines,* 2006 UT 35, ¶ 25 (holding that challenges to issue containing mixed question of law and fact do not relieve party of marshaling task).

An appellant cannot wait to marshal the evidence until it files its reply brief. *See Atlas Steel, Inc., v. Utah State Tax Comm'n,* 2002 UT 112, ¶¶ 40-41, 61 P.3d 1053 (noting such "eleventh-hour" tactics are too late and allowing such a maneuver would deprive the appellee of any opportunity to respond and defend the sufficiency of the evidence and the findings of fact); *In re A.B.,* 2007 UT App 286, ¶ 14 n.8, 168 P.3d 820 (denying party's request to amend brief to comply with marshaling requirement even though party believed in good faith that requirement was inapplicable); *see also United Park City Mines,* 2006 UT 35, ¶ 26 (noting that appellant's failure to marshal puts a burden on appellee that is "unfair, ineffective and unacceptable").

While failure to marshal is not included in Utah Rule of Appellate Procedure 33(b)'s definition of a frivolous appeal, *see H.U.F. v. W.P.W.,* 2009 UT 10, ¶ 55, 203 P.3d 943, parties bear the risk of sanctions if there is no basis in fact for their appeal. *See Fay v. Rodgers*, 2010 UT App 20U (mem.) (granting rule 33(b) sanctions and party chastised for willfully failing to marshal evidence).

As stated above, if an appellant fails to properly marshal the evidence, appellate courts may assume the findings are correct

or adequately supported by the record. *See Chen,* 2004 UT 82, ¶ 19; *State v. Chavez-Espinoza,* 2008 UT App 191, ¶ 7, 186 P.3d 1023; *Tanner v. Carter,* 2001 UT 18, ¶ 17, 20 P.3d 332; *Houghton v. Miller,* 2005 UT App 303, ¶ 1 n.2, 118 P.3d 293. However, despite strong language implying that appellate courts *must* affirm the accuracy of an agency's or trial court's factual findings in the absence of marshaling, *see, e.g., United Park City Mines,* 2006 UT 35, ¶ 32 (stating that because defendant had failed to marshal the evidence supporting the award, "we cannot conclude that the trial court abused its discretion"), "the marshaling requirement is not a limitation on the power of appellate courts." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints,* 2007 UT 42, ¶19, 164 P.3d 384. "Rather, it is a tool pursuant to which the appellate courts impose on the parties an obligation to assist them in conducting a whole record review. It is not, itself, a rule of substantive law." *Id*. Indeed, appellate courts have exercised discretion to independently review the record when a party has failed to marshal the evidence. *See Utah County v. Butler,* 2008 UT 12, ¶ 12, 179 P.3d 775 (choosing to exercise its discretion and review factual findings of trial court even though party failed to marshal when case was decided in tandem with two companion cases); *Media-Paymaster Plus,* 2007 UT 42, ¶¶ 19-20; *State v. Green,* 2005 UT 9, ¶ 13, 108 P.3d 710 (determining that despite being justified in turning away the arguments for "want of marshaling," appellate court "elected to review several of them on their merits"); *Larry J. Coet Chevrolet v. Labrum,* 2008 UT App 69, ¶ 29, 180 P.3d 765.

After constructing this magnificent array of supporting evidence, the challenger must "ferret out a fatal flaw in the evidence" and demonstrate why the evidence does not support the trial court's finding. *W. Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah Ct. App. 1991); *accord Green,* 2005 UT 9, ¶ 28; *see Friends of Maple Mountain, Inc. v. Mapleton City,* 2010 UT 11, ¶ 10, 228 P.3d 1238 (stating appellant must educate court as to exactly how trial court arrived at each of the challenged findings); *Kimball v. Kimball,* 2009 UT App 233, ¶ 20 n.5, 217 P.3d 733 ("The pill that is hard for many appellants to swallow is that if there is evidence supporting a finding, absent a legal problem – a 'fatal flaw' – with that evidence, the finding will stand, even though there is ample record evidence that would have supported contrary findings"); *In re A.B.,* 2007 UT App 286, ¶ 13, 168 P.3d 820.

Stated in other words, the gravity of this "fatal flaw" must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous. *See Larry J. Coet Chevrolet,* 2008 UT App 69, ¶ 27 (noting that findings are so lacking in support as to be against clear weight of evidence, thus making them clearly erroneous); *Guenon v. Midvale City,* 2010 UT App 51, ¶ 5, 230 P.3d 1032 (stating that after marshaling evidence, party must show they are not supported by substantial evidence); *accord Carter v. Labor Comm'n Appeals Bd.,* 2006 UT App 477, ¶ 12, 153 P.3d 763; *Lefavi v. Bertoch,* 2000 UT App 5, ¶ 17, 994 P.2d 817. When challenging a civil jury verdict, a petitioner must marshal all the evidence supporting the verdict and then must show that the evidence cannot support the verdict. *See Water & Energy Sys. Tech., Inc., v. Keil,* 2002 UT 32, ¶ 15, 48 P.3d 888; *Holstrom v. C.R. England, Inc.,* 2000 UT App 239, ¶ 29, 8 P.3d 281.

The appellant must show that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision. *See Tschaggeny v. Milbank Ins. Co.,* 2007 UT 37, ¶ 31, 163 P.3d 615; *Kimball*, 2009 UT App 233, ¶ 20 n.5 (providing examples of legal insufficiency might include testimony that was later stricken by court, document that was used for impeachment only and had not been admitted as substantive evidence, document that was not properly admitted because it did not qualify under business record exception to hearsay rule, and testimony that seems to support finding was recanted on cross-examination); *Kendall Ins., Inc., v. R&R Group, Inc.,* 2008 UT App 235 ¶ 16, 189 P.3d 114 (stating party must marshal all facts used to support trial court's findings and then show that facts cannot possibly support conclusion reached by trial court, even when viewed most favorably to appellee); *State v. Larsen,* 2000 UT App 106, ¶ 11, 999 P.2d 1252.

If an appellant contends that the district court has no evidence to support its factual finding, then the appellee must present only a "scintilla" of evidence that would support the finding the district court made in order to show that the appellant did not meet his burden of marshaling the evidence. *See Orlob v. Wasatch Med. Mgmt.,* 2005 UT App 430, ¶ 20, 124 P.3d 269; *accord Parduhn v. Bennett,* 2005 UT 22, ¶ 25, 112 P.3d 495; *Wilson Supply, Inc. v. Fradan Mfg. Corp.,* 2002 UT 94, ¶ 22, 54 P.3d 1177.

To summarize:

> [t]he process of marshaling is…fundamentally different from that of presenting the evidence at trial. The challenging party must temporarily remove its own prejudices and fully embrace the adversary's position; [the challenging party] must play the devil's advocate. In so doing, appellants must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case. Appellants cannot merely present carefully selected facts and excerpts from the record in

> support of their position. Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact. Furthermore, appellants cannot shift the burden of marshaling by falsely claiming there is no evidence in support of the trial court's findings.

Chen v. Stewart, 2004 UT 82, ¶ 78, 100 P.3d 1177 (citations and internal quotation marks omitted); *accord Hi Country Estates Homeowners Ass'n v. Bagley & Co.,* 2008 UT App 105, ¶ 19, 182 P.3d 417; *State v. Clark,* 2005 UT 75, ¶ 17, 124 P.3d 235. The appellant must then demonstrate how the court found the facts from the evidence and then explain "why those findings contradict the clear weight of the evidence." *Chen*, 2004 UT 82, ¶ 78; s*ee also Kimball v. Kimball,* 2009 UT App 233, ¶ 20 n.5, 217 P.3d 733 (providing detailed description and rationale of marshaling requirement in response to "oft-expressed frustration of the bar with the marshaling requirement").

As shown in the outline, each section of this article includes a string cite of corresponding cases addressing the marshaling requirement.

3. Civil Bench Trial

a. Clearly Erroneous Standard

A trial court's findings of fact are reviewed under a clearly erroneous standard. *See Glew v. Ohio Sav. Bank,* 2007 UT 56, ¶ 18, 181 P.3d 791; *Chen*, 2004 UT 82, ¶ 19; *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.,* 2004 UT 67, ¶ 33, 98 P.3d 1; *Gilmor v. Family Link, LLC,* 2010 UT App 2, ¶ 19, 224 P.3d 741; *Uhrhahn Constr. & Design, Inc. v. Hopkins,* 2008 UT App 41, ¶ 7, 179 P.3d 808. This clearly erroneous standard of review comes from Rule 52(a) of the Utah Rules of Civil Procedure, which provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a). *See also Butler, Crockett & Walsh Dev. Corp.*, 2004 UT 67, ¶ 33.

A trial court's findings of fact are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence. *See Econ Utah, LLC v. Fluor Ames Kraemer, LLC,* 2009 UT 7, ¶ 11, 210 P.3d 263; *Chen*, 2004 UT 82, ¶ 19; *Wilson Supply, Inc. v. Fradan Mfg. Corp.,* 2002 UT 94, ¶ 12, 54 P.3d 1177; *Gilmor*, 2010 UT App 2, ¶ 19. If, viewing the evidence in the light most favorable to the trial court's determination, a factual finding is based on sufficient evidence, the finding is not clearly erroneous. *See Save Our Schs. v. Bd. of Educ.,* 2005 UT 55, ¶ 9, 122 P.3d 611; *Butler, Crockett & Walsh Dev. Corp.,* 2004 UT 67, ¶ 33; *Roderick v. Ricks,* 2002 UT 84, ¶ 27, 54 P.3d 1119.

The clearly erroneous standard is highly deferential to the trial court's decisions, because the witnesses and parties appear before the trial court and the evidence is presented there. *See Glew,* 2007 UT 56, ¶ 18; *Butler, Crockett & Walsh Dev. Corp.,* 2004 UT 67, ¶ 33; *Roderick*, 2002 UT 84, ¶ 27; *Macris v. Sculptured Software, Inc.,* 2001 UT 43, ¶ 14, 24 P.3d 984; *In re S.Y.,* 2003 UT App 66, ¶ 11, 66 P.3d 601; *Lefavi v. Bertoch,* 2000 UT App 5, ¶ 16, 994 P.2d 817. Thus, "in those instances in which the trial court's findings include inferences drawn from the evidence, [the reviewing

court] will not take issue with those inferences unless the logic upon which their extrapolation from the evidence is based is so flawed as to render the inference clearly erroneous." *Glew*, 2007 UT 56, ¶ 18.

b. Marshaling Cases

The following are cases involving appeals from civil bench trials in which appellate courts have addressed the marshaling requirement. *Commercial Debenture Corp. v. Amenti, Inc.,* 2010 UT 10, ¶ 14, – P.3d – (noting that party was thorough in ferreting out portions of the record that may have been at odds with the district court's ruling, but failed to describe how evidence in record that supported the court's findings was insufficient); *Traco Steel Erectors, Inc. v. Comtrol, Inc.,* 2009 UT 81, ¶¶ 16-17, 32, 222 P.3d 1164 (holding that party's failure to marshal evidence surrounding damage award precludes appellate review); *Encon Utah, LLC v. Fluor Ames Kraemer, LLC,* 2009 UT 7, ¶ 46, 210 P.3d 263 (finding that an addendum of excerpts without explanation does not show the evidence, and all reasonable inferences drawn, therefore, are insufficient to support the findings); *Ockey v. Lehmer,* 2008 UT 37, ¶ 34 n.32, 189 P.3d 51; *Wayment v. Howard,* 2006 UT 56, ¶ 14, 144 P.3d 1147 (finding appellant merely presented and reargued the opposing evidence presented by him at trial); *Roderick*, 2002 UT 84, ¶ 46 (concluding that party selectively highlighting evidence favorable to him in legal malpractice action did not satisfy marshaling requirement); *Tanner v. Carter,* 2001 UT 18, ¶ 18, 20 P.3d 332 (finding party raised issues in "scatter-shot fashion" with little or no attempt to marshal the evidence supporting its findings); *Kaealamakia, Inc. v. Kaealamakia,* 2009 UT App 148, ¶ 10, 213 P.3d 13 (noting that defendants wholly failed to properly marshal the evidence); *Davis v. Young,* 2008 UT App 246, ¶ 13, 190 P.3d 23 (determining that because party failed to marshal facts, appellate court accepted as fact that execution of quitclaim deed was based on undue influence compounded by mental incapacity); *Boyer v. Boyer,* 2008 UT App 138, ¶ 20, 183 P.3d 1068 (finding party failed to marshal evidence in quiet title action supporting trial court's determination that damages evidence was too speculative); *AWINC Corp. v. Simonsen,* 2005 UT App 168, ¶ 10, 112 P.3d 1228 (noting party failed to properly marshal but instead provided an incomplete list of evidence supporting trial court findings and then claimed findings were not supported by clear and convincing evidence); *Shar's Cars, L.L.C. v. Elder,* 2004 UT App 258, ¶ 31, 97 P.3d 724 (finding party did not even attempt to meet marshaling burden, rather simply repeated arguments raised to trial court); *Harris v. IES Assocs., Inc.,* 2003 UT App 112, ¶ 31, 69 P.3d 297 (finding party wholly failed to marshal the evidence supporting trial court's finding); *Covey v. Covey,* 2003 UT App 380, ¶¶ 27-28, 80 P.3d 553.

c. Examples of Fact Questions

The following cases have examples of factual issues requiring a clearly erroneous standard of review.

(1) Whether a contract is integrated. *See Tangren Family Trust v. Tangren,* 2008 UT 20, ¶¶ 9-10, 182 P.3d 326.

(2) Whether disconnection from a municipality was viable. *See Bluffdale Mountain Homes, LC v. Bluffdale City,* 2007 UT 57, ¶ 46, 167 P.3d 1016.

(3) Whether a prescriptive easement existed. *See Lunt v. Lance,* 2008 UT App 192, ¶ 18, 186 P.3d 978.

(4) Whether the parties "entered into a contract implied in fact that allowed them to agree orally to changes and extra work that deviated from the proposal agreement." *Uhrhahn Constr. & Design, Inc. v. Hopkins,* 2008 UT App 41, ¶ 7, 179 P.3d 808.

(5) Whether the parties adopted a writing as a complete integration of their agreement. *See Bennett v. Huish,* 2007 UT App 19, ¶ 8, 155 P.3d 917; *accord Spears v. Warr,* 2002 UT 24, ¶ 18, 44 P.3d 742, *overruled in part by Tangren Family Trust,* 2008 UT 20.

(6) Whether there were two assignments of a trust deed. *See Hill v. Estate of Allred,* 2009 UT 28, ¶ 52, 216 P.3d 929.

(7) Whether a party knew or should have known about an alleged conversion. *See Ockey v. Lehmer,* 2008 UT 37, ¶ 34, 189 P.3d 51.

(8) "'[W]hether an action is asserted in bad faith.'" *Utah County v. Ivie,* 2006 UT 33, ¶ 17, 137 P.3d 797 (quoting *Warner v. DMG Color,* 2000 UT 102, ¶ 21, 20 P.3d 868); *accord Gallegos v. Lloyd,* 2008 UT App 40, ¶ 6, 178 P.3d 922.

(9) Whether damages were proximately cased by the alleged breach. *See Hi-Country Estates Homeowners Ass'n v. Bagley & Co.,* 2008 UT App 105, ¶ 9, 182 P.3d 417.

(10) Whether alleged stalking conduct was directed at the plaintiff. *See Ellison v. Stam,* 2006 UT App 150, ¶ 17, 136 P.3d 1242.

(11) Whether there was actual or implied notice of a corporation's actions. *See Bingham Consolidation Co. v. Groesbeck,* 2004 UT App 434, ¶ 26, 105 P.3d 365.

(12) Whether the dealership was worth $3.1 million at the time of termination. *See Kraatz v. Heritage Imps.,* 2003 UT App 201, ¶ 7, 71 P.3d 188 (considering valuation of stock).

(13) Whether a plaintiff knew or should have known if he or she has suffered a legal injury. *See Colosimo v. Roman Catholic Bishop of Salt Lake City,* 2004 UT App 436, ¶ 8, 104 P.3d 646; *Rappleye v. Rappleye,* 2004 UT App 290, ¶ 13, 99 P.3d 348.

(14) Whether notice was given to an insurance company of the addition of a new vehicle. *See Renegade Oil, Inc. v. Progressive Cas. Ins. Co.,* 2004 UT App 356, ¶ 5, 101 P.3d 383.

(15) Whether questions were allowed that were outside the scope of deposition notices. *See Harris v. IES Assocs.,* 2003 UT App 112, ¶ 24, 69 P.3d 297.

(16) Whether a party actually made the purchases. *See Mule-Hide Prods. Co. v. White,* 2002 UT App 1, ¶ 10, 40 P.3d 1155.

(17) "Whether a breach of a contract constitutes a material breach." *Orlob v. Wasatch Med. Mgmt.,* 2005 UT App 430, ¶ 26, 124 P.3d 269.

d. Adequacy of Trial Court's Factual Findings

Rule 52(a) of the Utah Rules of Civil Procedure provides that "the [trial] court shall find the facts specially and state separately its conclusions of law thereon." Utah R. Civ. P. 52(a). Utah appellate courts consistently stress the importance of adequate findings of fact. *See Parduhn v. Bennett,* 2005 UT 22, ¶ 24, 112 P.3d 495; *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.,* 2004 UT 67, ¶ 37, 98 P.3d 1. As stated above, to successfully challenge findings of fact, an appellant must prove they are clearly erroneous, *i.e.,* against the clear weight of the evidence. Therefore, if appellate courts are to determine whether the evidence before the trial court supports the trial court's findings, the findings must be sufficiently detailed and include enough facts to show the evidence upon which they are grounded. *See Parduhn,* 2005 UT 22, ¶ 24; *Armed Forces Ins. Exch. v. Harrison,* 2003 UT 14, ¶ 28, 70 P.3d 35. The findings must contain enough detail to reveal the trial court's reasoning process. *See Armed Forces Ins. Exch.,* 2003 UT 14, ¶ 28 (explaining that "[f]or findings of fact to be adequate, they 'must show that the court's judgment or decree follows logically from, and is supported by, the evidence'") (quoting *Acton v. Deliran,* 737 P.2d 996, 999 (Utah 1987)). In other words, the findings must be articulated so that the basis of the ultimate conclusion can be understood. *See Parduhn,* 2005 UT 22, ¶ 24.

The record must be complete and detailed, otherwise trial court findings are inadequate, and the reviewing court may remand for more detailed findings by the trial court. *See Armed Forces Ins. Exch.,* 2003 UT 14, ¶ 37; *Tangren Family Trust v. Tangren,* 2006 UT App 515, ¶¶ 13-14, 154 P.3d 180. "The absence of [adequate] findings by the trial court 'is a fundamental defect that makes it impossible to review the issues that were briefed without invading the trial court's fact-finding domain.'" *Armed Forces Ins. Exch.,* 2003 UT 14, ¶ 37 (quoting *Acton*, 737 P.2d at 999).

4. Civil Jury Trial Verdict

a. Substantial Evidence Standard

Because an appellate court owes broad deference to the fact finder, its power to review a jury verdict that is challenged on grounds of

insufficient evidence is limited. In reviewing a challenge to a civil jury verdict, the appellate court views all evidence in the light most favorable to the verdict. *See Jensen v. Sawyers,* 2005 UT 81, ¶ 100, 130 P.3d 325; *Smith v. Fairfax Realty, Inc.,* 2003 UT 41, ¶ 3, 82 P.3d 1064; *Water & Energy Sys. Tech., Inc. v. Keil,* 2002 UT 32, ¶ 2, 48 P.3d 888; *Holmstrom v. C.R. England, Inc.,* 2000 UT App 239, ¶ 2, 8 P.3d 281.

The appellate court must "'assume that the jury believed those aspects of the evidence which sustain its findings and judgment.'" *See Stevensen 3rd E., LC v. Watts,* 2009 UT App 137, ¶ 26, 210 P.3d 977 (quoting *Billings v. Union Bankers Ins. Co.,* 918 P.2d 461, 467 (Utah 1996)). *See also Brewer v. Denver & Rio Grande W. R.R.,* 2001 UT 77, ¶ 36, 31 P.3d 557 (noting that it is the exclusive function of jury to weigh evidence and determine credibility of witnesses). However, in some unusual circumstances, a reviewing court may reassess witness credibility if the testimony is "inherently improbable." *See State v. Robbins,* 2009 UT 23, ¶ 16, 210 P.3d 288 (citing *State v. Workman,* 852 P.2d 981, 984 (Utah 1993)); *Beard v. K-Mart Corp.,* 2000 UT App 285, ¶ 20, 12 P.3d 1015 (reversing a jury verdict because the record was insufficient to allow jury to consider whether surgeries were necessitated by negligence, and if so, what damage was suffered as a result of surgeries).

The verdict will be reversed if no substantial evidence, or insufficient evidence, supports it. *See Jensen,* 2005 UT 81, ¶ 100; *Stevensen 3rd E., LC,* 2009 UT App 137, ¶ 26. The evidence is insufficient if it "'so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case.'" *See Stevensen 3rd E., LC,* 2009 UT App 137, ¶ 26 (quoting *Billings*, 918 P.2d at 467).

b. Marshaling Cases

The following cases involve appeals from civil jury trials in which appellate courts have addressed the marshaling requirement: *Tschaggeny v. Milbank Ins. Co.,* 2007 UT 37, ¶ 31, 163 P.3d 615 (noting that party did not even provide trial transcript in marshaling attempt to substantiate her claims of jury error); *Campbell v. State Farm Mut. Auto Ins. Co.,* 2001 UT 89, ¶ 102, 65 P.3d 1134, *rev'd on other grounds,* 538 U.S. 408 (2003) (stating that party chose to argue selected evidence favorable to its position rather than marshal evidence properly); *Brewer v. Denver & Rio Grande W. R.R.,* 2001 UT 77, ¶ 36, 31 P.3d 557 (stating party was required to marshal the evidence, not simply attack its credibility or offer other contradictory evidence supporting its position); *Clayton v. Ford Motor Co.,* 2009 UT App 154, ¶ 20, 214 P.3d 865 (finding plaintiff failed to marshal evidence in support of jury finding because plaintiff failed to include extensive testimony and evidence presented at trial); *Martinez v. Wells,* 2004 UT App 43, ¶ 35, 88 P.3d 343 (finding that the party reinstated evidence in light of his own position rather than assuming "devil's advocate" role as required); *Chapman v. Uintah County,* 2003 UT App 383, ¶ 32, 81 P.3d 76, (noting that party "picked and chose the facts in favor of his position" and restated arguments below rather than properly marshaling evidence supporting jury verdict and explaining how, in spite of evidence, jury verdict should be overturned); *Bearden v. Wardley Corp.,* 2003 UT App 171, ¶ 10, 72 P.3d 144 (finding party failed to adequately marshal evidence in support of jury finding); *Eggett v. Wasatch Energy Corp.,* 2001 UT App 226, ¶¶ 41-43, 29 P.3d 668 (holding that party failed to marshal evidence because it neither provided the court with transcript from trial court's hearing or any other order from that hearing); *Dishinger v. Potter,* 2001 UT App 209, ¶ 14, 47 P.3d 76 (finding transcript of proceedings not required if party relies on jury's special verdict on appeal, not evidence presented at trial, and no marshaling is required if party is challenging trial court's application of the law to the jury's special verdict findings); *Holstrom v. C.R. England, Inc.,* 2000 UT App 239, ¶ 30, 8 P.3d 281 (noting that party "quite admirably fulfilled her marshaling duty, filling her brief with five pages of 'evidence conceivably in support of the verdict,' appropriately cited to the record," but then confusingly asserted there was "literally no evidence which would support a reasonable jury's determination") (emphasis omitted).

c. Examples of Jury Fact Questions

The following cases contain examples of factual issues requiring a substantial evidence standard of review.

(1) Whether an allegedly defamatory statement was substantially true. *See Jensen v. Sawyers,* 2005 UT 81, ¶ 96, 130 P.3d 325.

(2) Whether there was a misappropriation of trade secrets. *See Water & Energy Sys. Tech., Inc. v. Keil,* 2002 UT 32, ¶¶ 14-15, 48 P.3d 888.

(3) Whether there was gross negligence or willful misconduct. *See Stevensen 3rd E., LC v. Watts,* 2009 UT App 137, ¶ 49, 210 P.3d 977.

(4) Whether a prior lawsuit was brought without probable cause. *See Nielsen v. Spencer,* 2008 UT App 375, ¶ 27, 196 P.3d 616.

5. Criminal Bench Trial

a. Clearly Erroneous Standard

Trial courts are given the primary responsibility for making factual determinations. *See State v. Green,* 2005 UT 9, ¶ 25, 108 P.3d 710 (citing *State v. Pena,* 869 P.2d 932, 935-36 (Utah 1994)).

A trial court's findings of fact in a criminal bench trial are reviewed under a clearly erroneous standard. *See State v. Tripp,* 2010 UT 9, ¶ 23, 227 P.3d 1251; *State v. Briggs,* 2008 UT 75, ¶¶ 10-11, 197 P.3d 628; *State v. Morris,* 2009 UT App 181, ¶ 5, 214 P.3d 883, *State v. Piep,* 2004 UT App 7, ¶ 7, 84 P.3d 850; *Am. Fork City v. Rothe,* 2000 UT App 277, ¶ 4, 12 P.3d 108. This standard of review is derived from Rule 52(a) of the Utah Rules of Civil Procedure, which states, "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." UTAH R. CIV. P. 52(a).

A trial court's finding is clearly erroneous when it is against the clear weight of the evidence or, although there is evidence to support it, the court reviewing all the record evidence is left with a definite and firm conviction that a mistake has been made. *See State v. Keener,* 2008 UT App 288, ¶ 11, 191 P.3d 835; *State v. Gordon,* 2004 UT 2, ¶ 5, 84 P.3d 1167; *State v. Greuber,* 2007 UT 50, ¶ 8, 165 P.3d 1185 (reviewing court must rule clear error if factual findings are not adequately supported by record, and court should resolve all disputes in light most favorable to trial court's determination); *accord State v. Cornejo,* 2006 UT App 215, ¶ 12, 138 P.3d 97.

This clearly erroneous standard is highly deferential to the trial court's decisions, because the witnesses and parties appear before the trial court, and the evidence is presented there. *See Green*, 2005 UT 9, ¶ 25 (citing *Pena*, 869 P.2d at 935-36). The trial court is "considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record." *State v. Levin,* 2004 UT App 396, ¶ 21 n.1, 101 P.3d 846 (quoting *Pena*, 869 P.2d at 936); *accord State v. Hurt,* 2010 UT App 33, ¶ 15, 127 P.3d 271 (noting trial judge is "in a unique position to assess the credibility of witnesses and weigh the evidence" (internal quotation marks omitted)).

Further, when an appellate court reviews a trial court's verdict for insufficient evidence, the appellate court sustains the trial court's judgment unless it is "against the clear weight of the evidence," or if the appellate court reaches a "'definite and firm conviction that a mistake has been made.'" *State v. Briggs,* 2008 UT 83, ¶ 11, 199 P.3d 935 (quoting *State v. Goodman,* 763 P.2d 786, 786 (Utah 1988); *State v. Walker,* 743 P.2d 191, 193 (Utah 1987)); *State v. Nichols,* 2003 UT App 287, ¶ 24, 76 P.3d 1173; *State v. Larsen,* 2000 UT App 106, ¶ 10, 999 P.2d 1252. A conviction may be upheld only if "'supported by a quantum of evidence concerning each element of the crime as charged from which the [factfinder] may base its conclusion of guilt beyond a reasonable doubt.'" *State v. Piep,* 2004 UT App 7, ¶ 7, 84 P.3d 850 (quoting *Larsen*, 2000 UT App 106, ¶ 10) (alteration in original). Moreover, a guilty verdict is invalid if based exclusively "'on inferences that give rise to only remote or speculative possibilities of guilt.'" *State v. Eberwein,* 2001 UT App 71, ¶ 14, 21 P.3d 1139 (quoting *Spanish Fork v. Bryan,* 1999 UT App 61, ¶ 5, 975 P.2d 501).

b. Marshaling Cases

The following are cases involving appeals from criminal trial court rulings in which appellate courts have addressed the marshaling requirement. *See State v. Shipp,* 2005 UT 35, ¶ 20, 116 P.3d 317; *State v. Pinder,* 2005 UT 15, ¶ 40, 114 P.3d 551; *State v. Green,* 2005 UT 9, ¶ 12, 108 P.3d 710 (stating defendant's brief offers "a disjointed array of facts selected because they aid his cause"); *State v. Hurt,* 2010 UT App 33, ¶ 16, 127 P.3d 271 (stating brief failed marshaling requirement because it did not acknowledge certain facts); *State v. Orr,* 2004 UT App 413, ¶ 9, 103 P.3d 164; *State v. Earl,* 2004 UT App 163, ¶ 11, 92 P.3d 167 (noting defendant chose to reiterate his own testimony rather than present evidence that supported the trial court's finding); *Piep*, 2004 UT App 7, ¶ 6 n.3 (stating defendant "has notably complied with the marshaling requirement of rule 24"); *State v. Nichols,* 2003 UT App 287, ¶ 26 n.3, 76 P.3d 1173 (determining that defendant marshaled the evidence in his brief); *State v. Andreason,* 2001 UT App 395, ¶ 4, 38 P.3d 982 (noting that party adequately marshaled the evidence); *State v. Coonce,* 2001 UT App 355, ¶ 5, 36 P.3d 533 (stating defendant noted that he marshaled "most" of the evidence but admitted he did not include all relevant evidence and did not marshal inferences

created by the evidence); *State v. Larsen,* 2000 UT App 106, ¶ 14, 999 P.2d 1252 (stating defendant adequately marshaled evidence by citing to the evidence and testimony).

c. Examples of Fact Questions

The following cases contain examples of factual issues requiring a clearly erroneous standard of review.

(1) Whether an "opponent of a peremptory challenge has failed to prove purposeful racial discrimination." *State v. Cannon,* 2002 UT App 18, ¶ 5, 41 P.3d 1153; *see also State v. Rosa-re,* 2008 UT App 472, ¶ 2, 200 P.3d 670.

(2) Whether a defendant failed to meet the probation statute's requirements. *See State v. Offerman,* 2007 UT App 342, ¶ 5, 172 P.3d 310; *State v. Rodriguez,* 2002 UT App 119, ¶ 3, 46 P.3d 767.

(3) Whether the circumstances amounted to a situation that induced a mental state tending to block reflection and the reasoning process. *See State v. Allred,* 2002 UT App 291, ¶ 22, 55 P.3d 1158.

(4) Whether a defendant was in custody when he made the incriminating statements. *See id.* ¶ 13.

(5) Whether a defendant gave consent to search his vehicle. *See State v. Hansen,* 2002 UT 125, ¶ 48, 63 P.3d 650; *see also State v. Humphrey,* 2006 UT App 221, ¶¶ 14-15, 138 P.3d 590 (considering issue regarding consent to entry of defendant's home); *State v. Grossi,* 2003 UT App 181, ¶ 7, 72 P.3d 686 (considering issue regarding consent to entry of defendant's apartment).

(6) Whether a criminal defendant "knowingly and voluntarily entered his guilty plea." *State v. Smit,* 2004 UT App 222, ¶ 24, 95 P.3d 1203; *State v. Beckstead,* 2006 UT 42, ¶ 7, 140 P.3d 1288.

(7) Whether communications were made that triggered the running of the statute of limitations for child rape. *See State v. Green,* 2005 UT 9, ¶ 15, 108 P.3d 710.

(8) Whether defendant was remorseful. *See State v. Moreno,* 2005 UT App 200, ¶ 15, 113 P.3d 992.

(9) Whether a juror failed to truthfully answer a question posed during voir dire. *See State v. Shipp,* 2005 UT 35, ¶ 20, 116 P.3d 317.

(10) Whether the delay was caused by the state, the defendant, or neutral causes. *See State v. Cornejo,* 2006 UT App 215, ¶ 30, 138 P.3d 97.

(11) Whether the officer reasonably suspected that defendant was violating the traffic laws. *See State v. Applegate,* 2008 UT 63, ¶ 12, 194 P.3d 925.

(12) Whether defendant's waiver was clear, ambiguous, and not coerced. *See State v. Tiedemann,* 2007 UT 49, ¶¶ 18-19, 162 P.3d 1106.

(13) Whether a detective made threats, promises, misrepresentations, or used trickery during an interrogation. *See State v. Montero,* 2008 UT App 285, ¶ 14, 191 P.3d 828.

d. Adequacy of Trial Court's Factual Findings

Appellate courts stress the requirement and importance of adequate findings of fact. *See State v. Greuber,* 2007 UT 50, ¶ 6, 165 P.3d 1185; *State v. Harris,* 2004 UT 103, ¶ 29, 104 P.3d 1250 (noting trial court must adequately document its findings on the record in declaring a mistrial); *State v. Williams,* 2006 UT App 420 ¶ 25, 147 P.3d 497 ("[o]rdinarily, a trial court's failure to make required factual findings will result in a remand to the trial court for the entry of such findings."); *Keene v. Bonser,* 2005 UT App 37, ¶ 19, 107 P.3d 693 (noting that unless the record clearly and uncontrovertedly supports trial court's decision, absence of adequate findings of fact ordinarily requires remand for more detailed findings by trial court); *State v. Cannon,* 2002 UT App 18, ¶ 5, 41 P.3d 1153 (stating if trial court fails to make adequate findings, appellate court "'must remand the case to trial court for further proceedings'") (quoting *State v. Pharris,* 846 P.2d 454, 459 (Utah Ct. App. 1993)).

As stated above, to successfully challenge findings of fact, parties must prove they are clearly erroneous. *See* Utah R.Civ. P. 52(a); *see also State v. Tripp,* 2010 UT 9, ¶ 23, 227 P.3d 1251; *State v. Briggs,* 2008 UT 75, ¶¶ 10-11, 197 P.3d 628; *State v. Keener,* 2008 UT App 288, ¶ 11, 191 P.3d 835. Findings of fact are clearly erroneous if they are against the clear weight of the evidence. *See Greuber,* 2007 UT 50, ¶ 18 (affirming factual findings that defendant suffered no prejudice from his attorney's failure to investigate were adequate); *State v. Johnson,* 2006 UT App 3, ¶ 10, 129 P.3d 282 (finding that trial court made adequate findings at sentencing); *State v. Smith,* 2002 UT App 49, ¶ 2 n.1, 42 P.3d 1261 (noting that trial court findings more than adequately supported conclusion that counsel's performance was not deficient); *State v. Maestas,* 2000 UT App 22, ¶ 26, 997 P.2d 314 (holding trial court's findings of a parole violation were adequately supported by the evidence).

Deference to the trial court's findings can only be extended when the trial court's factual findings adequately reveal the steps by which the ultimate conclusion is reached. *See State v. Genovesi,* 871 P.2d 547, 549-50 (Utah Ct. App. 1994). However, Utah appellate courts will uphold the trial court even if it failed to make specific

findings on the record when it is reasonable to assume the trial court actually made such findings. *See State v. Pecht,* 2002 UT 41, ¶ 22, 48 P.3d 931; *State v. Weeks,* 2000 UT App 273, ¶ 17, 12 P.3d 110; *accord State v. Helms,* 2002 UT 12, ¶ 11, 40 P.3d 626 (citing *State v. Robertson,* 932 P.2d 1219, 1234 (Utah 1997)).

6. Criminal Jury Trial Verdict

a. Sufficiently Inconclusive or Inherently Improbable Standard

Because an appellate court owes broad deference to the fact finder, its power to review a jury verdict challenged on the ground of insufficient evidence is limited. *See State v. Boss,* 2005 UT App 520, ¶ 9, 127 P.3d 1236. In reviewing a jury verdict, the appellate court views "the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." *State v. Tanner,* 2009 UT App 326, ¶ 14, 221 P.3d 901 (quoting *State v. Rowley,* 2008 UT App 233, ¶ 15, 189 P.3d 109); *see also State v. Fedorowicz,* 2002 UT 67, ¶ 40, 52 P.3d 1194 (stating that court must assume jury believed evidence that supported verdict); *State v. Buck,* 2009 UT App 2, ¶ 9, 200 P.3d 674; *State v. Arave,* 2009 UT App 278, ¶ 8, 220 P.3d 182.

An appellate court "'will reverse a jury conviction for insufficient evidence only when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.'" *Rowley*, 2008 UT App 233, ¶ 8 (quoting *State v. Shumway,* 2002 UT 124, ¶ 15, 63 P.3d 94); *accord State v. Robbins,* 2009 UT 23, ¶ 14, 210 P.3d 288; *State v. Winfield,* 2006 UT 4, ¶ 25, 128 P.3d 1171; *State v. Van Dyke,* 2009 UT App 369, ¶ 19, 223 P.3d 465 (quoting *Robbins*, 2009 UT 23, ¶ 14; *State v. Schwenke,* 2009 UT App 345, ¶ 8, 222 P.3d 768 (quoting *State v. Johnson,* 774 P.2d 1141, 1147 (Utah 1989)); *State v. Patrick,* 2009 UT App 226, ¶ 17 n.4, 217 P.3d 1150 (quoting *State v. Hirschi,* 2007 UT App 255, ¶¶ 15-16, 167 P.3d 503).

As a general matter, appellate courts will not weigh conflicting evidence, nor will they substitute their own judgment for that of the jury. *See State v. Hamilton,* 2003 UT 22, ¶ 38, 70 P.3d 111. Moreover, "the existence of contradictory evidence or of conflicting inferences does not warrant disturbing the jury's verdict." *State v. Hardy,* 2002 UT App 244, ¶ 11, 54 P.3d 645 (quoting *State v. Howell,* 649 P.2d 91, 97 (Utah 1982) (internal quotation marks omitted)). However, "the definition of inherently improbable must include circumstances where a witness's testimony is incredibly dubious and, as such, apparently false." *Robbins*, 2009 UT 23, ¶ 18.

Stated in other words, appellate courts will affirm the jury verdict if "'there is some evidence, including all reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made.'" *State v. Mead,* 2001 UT 58, ¶ 67, 27 P.3d 1115 (quoting *State v. Boyd,* 2001 UT 30, ¶ 16, 25 P.3d 985); *accord Boss,* 2005 UT App 520, ¶ 9.

b. Marshaling Cases

Following are cases discussing the marshaling requirement for factual issues underlying criminal jury trial verdicts. *See State v. Clark,* 2005 UT 75, ¶ 17, 124 P.3d 235 (finding that defendant failed to marshal because he merely re-argued the factual case presented to the trial court rather than presenting all evidence); *State v. Pritchett,* 2003 UT 24, ¶ 25, 69 P.3d 1278 (stating defendant "fails entirely to address the evidence supporting aggravated sexual abuse – the crime for which he was convicted, focusing instead on the preliminary hearing transcript evidence supporting rape – the crime of which he was acquitted"); *State v. Widdison,* 2001 UT 60, ¶¶ 60-61, 28 P.3d 1278 (finding defendant failed to meet marshaling burden because she merely cited to portions of the testimony that favored her position and failed to set forth evidence in support of trial court findings); *State v. Maese,* 2010 UT App 106, ¶ 17, – P.3d – (finding that instead of presenting evidence in support of jury verdict, defendant selectively presented witness testimony that supported his assertions, omitting crucial and incriminating evidence from the "mountain of evidence" provided at trial); *State v. Chavez-Espinoza,* 2008 UT App 191, ¶ 21, 186 P.3d 1023 (finding defendant insufficiently marshaled evidence when he merely presented evidence in transcripts in addenda attached to brief); *State v. Waldron,* 2002 UT App 175, ¶ 15, 51 P.3d 21 (finding defendant failed to marshal when, through poor and selective citation to the record, his brief only pointed to parts of testimony that did not identify him as the perpetrator); *State v. Galvan,* 2001 UT App 329, ¶ 6, 37 P.3d 1197 (observing state failed to marshal evidence sufficient to challenge trial court's finding); *State v. Lopez,* 2001 UT App 123, ¶¶ 18-19, 24 P.3d 993 (noting that to marshal properly, defendant cannot ignore conflicting testimony against him); *State v. Silva,* 2000 UT App 292, ¶ 26, 13 P.3d 604 (stating that although defendant jeopardized his claim by using overly broad strokes to fulfill marshaling burden, the court addressed his claim of insufficient evidence because the broad strokes did not compromise efficiency and fairness objectives that marshaling requirement seeks to ensure).

c. Examples of Jury Fact Questions

The following cases contain examples of factual issues requiring a sufficiently inconclusive or inherently improbable standard.

(1) Whether the property in criminal securities fraud case in fact had any value. *See State v. Johnson,* 2009 UT App 382, ¶ 16, 224 P.3d 720.

(2) Whether defendant consumed enough alcohol to impair his ability to operate a vehicle safely. *See State v. Van Dyke,* 2009 UT App 369, ¶¶ 35-37, 223 P.3d 465.

(3) Whether a school bus driver is in a position of special trust. *See State v. Tanner,* 2009 UT App 326, ¶ 17, 221 P.3d 901.

(4) Whether defendant made untrue statements in relation to the transaction at issue. *See State v. Schwenke,* 2009 UT App 345, ¶ 15, 222 P.3d 768.

(5) Whether defendant held a position of special trust over victim in aggravated sexual abuse case. *See State v. Rowley,* 2008 UT App 233, ¶ 13, 189 P.3d 109.

(6) Whether party took computer with an honest belief that he had an ownership interest in it. *See State v. Buck,* 2009 UT App 2, ¶ 13, 200 P.3d 674.

(7) Whether the defendant's statements were willful rather than merely negligent or foolish. *See State v. Bolson,* 2007 UT App 268, ¶ 15, 167 P.3d 539.

(8) Whether the touching occurred through clothing. *See State v. Hirschi,* 2007 UT App 255, ¶ 17, 167 P.3d 503.

(9) Whether the value of the property was worth the requisite amount. *See State v. Greene,* 2006 UT App 445, ¶ 8, 147 P.3d 957.

(10) Whether item was registered as a security and whether defendant was licensed to sell securities. *See State v. Wallace,* 2005 UT App 434, ¶ 16, 124 P.3d 259.

(11) Whether defendant was the lawful owner of the property. *See State v. Hamilton,* 2003 UT 22, ¶¶ 20-22, 70 P.3d 111.

(12) Whether the defendant had a prior conviction. *See State v. Pirela,* 2003 UT App 39, ¶ 27, 65 P.3d 307.

(13) Whether defendant's intoxicated state prevented him from forming intent to commit aggravated kidnapping. *See State v. Lopez,* 2001 UT App 123, ¶ 19, 24 P.3d 993.

* * *

Editor's Note: *Please watch for the continuation of "Utah Standards of Appellate Review – Third Edition" in future issues of the* Utah Bar Journal.

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Damages Resulting From a Lost Opportunity: The Proper Damage Date in Utah Contract and Tort Cases

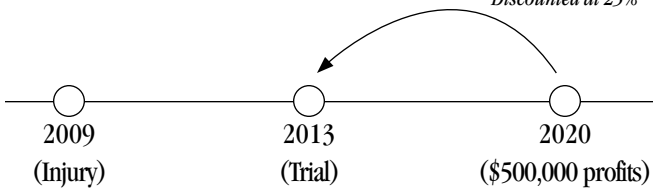
by Mark Glick and Cory Sinclair

The issue of how to calculate the damages from a lost opportunity often arises in contract and tort cases. For example, suppose a plaintiff is involved in a business venture that is impacted by a tort. The plaintiff contends that had the tort not occurred, plaintiff would have received substantial profits at some future date. Or, suppose a business enters into a contract to receive a crucial spare part used to operate its production facility. The part is not delivered on time and the business loses an opportunity to work with a large and important customer. In these types of cases, the plaintiff will normally contend that if the contract had not been breached, plaintiff would have made a windfall at some future time. In both of these situations, a damage expert will be asked to calculate the value of the predicted lost profits at the time of trial.

Experts that we have seen address this issue are profoundly inconsistent. Some experts will simply estimate the future profits number and then discount this number back to the date of trial. Other experts will take the future profits number, discount back to the date of the injury, and then bring that number forward using a rate of interest to the date of trial. While both approaches seem sensible, they result in significantly different damage calculations, thus proving that they cannot both be accurate at the same time. In fact, some experts provide both calculations and present them as alternatives.

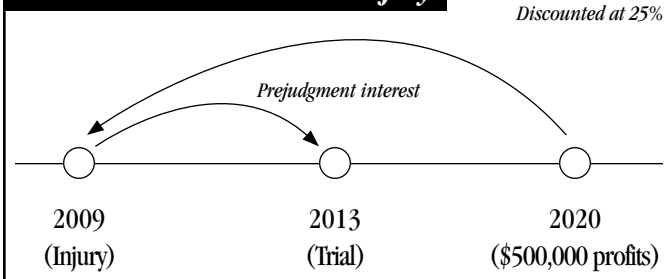
To illustrate this problem, suppose a plaintiff claims it lost an opportunity as a result of a breach of contract occurring on January 1, 2009, that would have resulted in net profits of $500,000 on January 1, 2020. The trial date is set for January 1, 2013. Both experts agree that the appropriate discount rate is 25%. Utah's statutory prejudgment interest rate for contract claims is a simple 10%. Under these facts let's compare the two calculation methodologies.

CALCULATION 1: *Discount to Trial*



DAMAGES UNDER CALCULATION 1: $104,857.60

CALCULATION 2: *Discount to Injury*



DAMAGES UNDER CALCULATION 2: $60,129.54

As is evident, the different damage dates makes a significant difference for the final damage number. Before explaining why we believe only the second calculation is correct, we first explain why the two calculations come to different conclusions.

REASONS FOR DIFFERENT DAMAGE NUMBERS

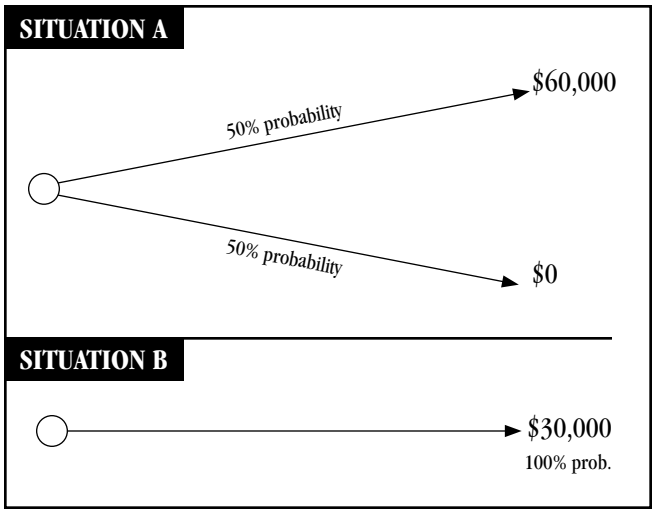
Two factors account for the difference between these two calculations. The first factor is the treatment of risk. The second factor involves the treatment of prejudgment interest. We consider each in turn.

MARK GLICK is a Professor of Economics at the University of Utah and Of Counsel with Parsons Behle & Latimer.

CORY SINCLAIR is an economist and an attorney with Parsons Behle & Latimer.

How Risk Factors Into a Damage Calculation

It is a fundamental tenet of economic theory that safer dollars are worth more than riskier dollars. Indeed, most of us will pay substantial amounts of money in the form of insurance to convert risky, uncertain dollars into safer dollars. It is an often-observed aspect of human behavior that people generally prefer a sure bet to a gamble even if the sure bet and the gamble have the same expected value. For example, consider the following two situations:



Both Situation A and Situation B have the same expected value, yet most people will prefer Situation B to Situation A. This is because people are generally risk averse and do not like gambles.[1] It follows that if a plaintiff alleges that a lost opportunity was the result of a risky venture (such as an investment in lottery tickets, or a new business) the plaintiff would be overcompensated at trial if awarded certain dollars in place of the risky dollars actually lost. Ignoring risk is tantamount to permitting the trier of fact to pretend that the plaintiff was going to garner profits from a riskless savings account rather than from investing in a risky venture.

How do experts account for risk? The general approach is to identify public data concerning projects that have a risk similar to the plaintiff's opportunity. Once such projects are identified, the expert must determine what the market requires to pay investors to induce them to add such investments to a diversified portfolio. The additional compensation required by investors above the risk-free rate of return is the risk premium.[2] Expert testimony is necessary to determine the appropriate risk premium because it requires knowledge of financial economics and an empirical study concerning how the market values risk that is similar to the risk at issue. An unaided jury is ill-equipped to make such a risk determination.

Once the risk of the opportunity that the plaintiff claims is lost is determined, damages are adjusted by discounting by the risk-adjusted rate of return appropriate for the project. Both Calculation 1 and Calculation 2 discount by the same discount rate, 25%. But notice that the assumption embedded in Calculation 1 is that the period of risk is from 2013 to 2020. This is because Calculation 1 only discounts back to the 2013 trial date. The hidden (and incorrect) assumption is that no risk exists between 2009 and 2013. Unless the plaintiff can explain why the lost project had no risk between the date of injury and trial, but does face risk after trial, Calculation 1 is inappropriate and should be excluded by the court's gatekeeper function.

In contrast, Calculation 2 discounts for risk over the entire period that the lost opportunity would have been undertaken. In general, this is a more consistent assumption. As a result, leaving aside the prejudgment rate of interest, Calculation 1 will always yield higher damages than Calculation 2. This difference grows whenever the trial date is extended because changing the trial date increases the period where Calculation 1 inappropriately assumes no risk.

Prejudgment Rate of Interest

A second reason why Calculation 1 and Calculation 2 come to different conclusions is that only Calculation 2 makes explicit its assumption about prejudgment interest. Prejudgment interest is the interest due to the plaintiff for the period of time between the injury date and the date of trial. To fully compensate the plaintiff, the plaintiff should be paid on the date of injury. In reality however, the plaintiff must wait until trial to be paid. Thus, the plaintiff should be compensated for being forced to wait to receive compensation. While this proposition is not controversial, the question remains, what interest rate should be used to accomplish this goal? The answer depends on the risk the plaintiff faced during the period between the injury and the trial. Typically, it is assumed that if the plaintiff prevails at trial, the plaintiff will be paid with certainty. Therefore, the proper prejudgment interest rate is the risk-free rate of return. Alternatively, if a default risk exists, possibly because the defendant is a credit risk, then the defendant's borrowing rate can be used. The defendant's borrowing rate is the rate that lenders charge the defendant. This rate will be equal to the risk-free rate of return plus additional interest to compensate the lender for the defendant's credit risk.

Some states provide a statutory rate for prejudgment interest. These rates differ in amount and applicability. In Utah, the prejudgment interest rate for a breach of contract case is set by statute at 10%, calculated as a simple, annual rate, unless the contract specifies otherwise. *See* Utah Code Ann. § 15-1-1 (2009). Under current Utah law, an award of prejudgment interest is only available if a party can establish that the injury and consequent damages are fixed as of a definite time, and the amount of loss can be calculated with mathematical certainty – a proof standard higher than reasonable certainty. *See Iron Head Constr., Inc. v. Gurney,* 2009 UT 25, ¶ 11, 207 P.3d 1231. If a party does not meet these requirements, it is not entitled to any prejudgment interest. *See Shoreline Dev., Inc. v. Utah County,* 835 P.2d 207, 211 (Utah Ct. App. 1992). In tort cases involving negligence, the statutory rate is 7.5%, and it is applied in exactly the same way as in breach of contract cases. *See* Utah Code. Ann. § 78B-5-824 (Supp. 2009).

Discounting damages to the date of trial, rather than the date of injury, improperly ignores the statutory prejudgment interest rate. This approach, as illustrated by Calculation 1, substitutes hidden prejudgment interest charges at effective rates that may be substantially higher than the statutory rate. This approach would also mean that the effective prejudgment interest rate would be different in every case – hardly what the legislature intended by fixing the prejudgment interest rate at 10% by statute. For example, the effective prejudgment interest rate in Calculation 1 above is approximately 36%, which far exceeds the statutory rate in Utah, and may also be inappropriate in other jurisdictions. This effective rate is the prejudgment interest rate that is necessary to make the method described in Calculation 2 equal to the result reached using Calculation 1. Not only can the methodology of discounting to the trial date result in an improperly high prejudgment interest rate, it can also permit the injured party to sidestep the proof requirements and be award prejudgment interest even if it would not otherwise qualify under applicable law. Lost profits, for example, are not eligible for prejudgment interest because they are not "definite" enough and cannot be proven with mathematical certainty. *See Clearone Commc'ns, Inc. v. Chiang,* 2009 U.S. Dist. LEXIS 35311, at *10 (D. Utah April 20, 2009).

IS THE LAW IN UTAH CONSISTENT WITH THE ECONOMICS?

Having established that Calculation 2 is the proper economic approach, in this section we consider whether contract law and tort law in Utah would dictate the choice of Calculation 2 in our above hypothetical.

Contract Law

Contract law is fully consistent with the economic approach we describe above for determining the appropriate damage date. In a breach of contract case, the date of injury typically is also the date on which the breach occurs. In Utah, and in most jurisdictions, damages for breach of contract are ordinarily measured at the

time of the breach. *See Smith v. Warr,* 564 P.2d 771, 772 (Utah 1977) ("The measure of damages where the vendor has breached a land sale contract is the market value of the property at the time of the breach less the contract price to the vendee."). Other courts that have considered this issue have reached the same conclusion. *See, e.g., Indu Craft Inc. v. Bank of Baroda,* 47 F.3d 490, 495-96 (2d Cir. 1995); *Sharma v. Skaarup Ship Mgmt. Corp.,* 916 F.2d 820, 825-26 (2d Cir. 1990); *Panike & Sons Farms, Inc. v. Smith,* 212 P.3d 992, 998 (Idaho 2009); *Peach State Roofing, Inc. v. 2224 S. Trail Corp.,* 3 So. 3d 442, 445-46 (Fla. Dist. Ct. App. 2d Dist. 2009); *J.J. Indus., LLC v. Bennett,* 71 P.3d 1264, 1269 (Nev. 2003).

There are some narrow exceptions to this general rule. The primary exception is when there is both a significant time gap between the breach and the trial and substantial inflation during the intervening years. In such cases, a few courts have endorsed a short-cut approach by allowing the damage date to be set as the date of trial rather than the date of breach. *See Anchorage Asphalt Paving Co. v. Lewis,* 629 P.2d 65, 68-69 (Alaska 1981); *Fairway Builders, Inc. v. Malouf Towers Rental Co.,* 603 P.2d 513, 525-27 (Ariz. App. 1979). While it may simplify matters to adopt Calculation 1 when there is inflation and a wide gap between breach and trial, we believe this short-cut is ill advised because it leads to a less accurate damage number for the reasons already described.

Tort Law

While it is true that from an economic point of view, contract actions differ from tort actions, these differences should not impact the selection of the damage date. The critical economic distinction between a contract and a tort is the ability of the parties to negotiate in advance of the violation. Torts typically involve what economists refer to as "externalities," which are effects of our behavior on third parties who are strangers. In situations where the plaintiff and defendant are strangers and no bargaining is possible, economic theory suggests that tort rules are required to reduce these externalities to efficient levels. *See* Robert Cooter & Thomas Ulen, Law & Economics 325 (5th ed. 2008) ("The economic essence of tort law is its use of liability to internalize externalities created by high transaction costs."). This inability to negotiate beforehand in tort situations appears to give rise to one difference between the limitations courts have placed on tort and contract damages. Since the landmark case of *Hadley v. Baxendale,* 156 Eng. Rep. 145, 151 (1854), contract damages have

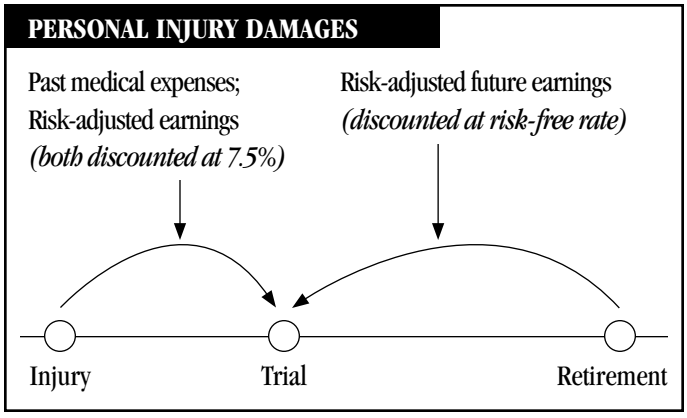
been limited to consequences that are foreseeable or contemplated by the parties. A plaintiff can overcome this limitation in a contract case, however, by informing the defendant of consequences that are specific to the plaintiff's situation. In tort cases involving strangers, this is not possible. As a result, some courts have justifiably lifted the foreseeability limitation in certain cases. *See* Restatement (Second) of Torts § 774A (1979) (stating that consequential damages from intentional interference need not be foreseeable at the time the contract was made). This section was adopted by the Utah Supreme Court in *TruGreen Cos. v. Mower Brothers,* 2008 UT 81, ¶ 22, 199 P.3d 929. Excepting out this difference, we see no reason why tort damages and contract damages should be calculated using different methodologies. Specifically, we contend that Calculation 2, which is mandated in contract cases, should also apply to tort claims.[3]

Negligence Cases

Most attorneys are familiar with the damage calculation in a negligence personal injury case. We show that the standard approach in such cases is to adopt a methodology equivalent to Calculation 2. As an initial matter, a cause of action in negligence arises when a defendant causes injury by failing to meet a reasonable standard of care. The most recognized method for establishing the appropriate standard of care was articulated by Judge Learned Hand in *United States v. Carroll Towing Co.,* 159 F.2d 169 (2d Cir. 1947). Judge Hand held that an alleged tortfeasor is negligent only if the cost of precaution "B" is less than the probability of injury "P" multiplied by the amount of the potential damage "L," or when B<PL.[4] Utah courts have adopted this approach to negligence. *See Shute v. Moon Lake Elec. Ass'n,* 899 F.2d 999, 1003 (10th Cir. 1990) (quoting *Little v. Utah State Div. of Family Servs.,* 667 P.2d 49, 54-55 (Utah 1983)) (applying Hand formula to determination of duty). The integrity of the tort system in Utah depends on whether actual damages awarded in negligence cases closely approximate "L," the potential harm that gave rise to the duty. Incorrect damage calculations result in inadequate social incentives to undertake the proper levels of precaution.[5]

The proper measure of damages in a negligence case must, therefore, be equal to the total harm caused to the victim, just like it is in a contract case. This amount in turn is the difference between the victim's pecuniary position absent the tort and the victim's actual pecuniary situation. In Utah, for example, accident victims can recover for (1) past and future medical costs, (2) past and future lost wages, and (3) pain and suffering or disfigurement. *See Duffy v. Union Pac. R.R. Co.,* 218 P.2d 1080 (Utah 1950); *Paul v. Kirkendall,* 261 P.2d 670 (Utah 1953). For negligence cases where past damages are measured and awarded, they are brought forward from the date of injury to the date of judgment using a statutory prejudgment interest rate of 7.5%. *See* Utah Code Ann. § 78B-5-824 (Supp. 2009). The methodology for applying this prejudgment rate is identical to that for contract disputes discussed above except that the rate is slightly lower in negligence actions by statute.

In these cases experts typically calculate lost wages and medical costs in a manner that is equivalent to Calculation 2. The standard approach to the calculation of damages in a personal injury case is to adopt the trial date as the damage date. But this is because both the issue of risk adjustment and prejudgment interest are addressed separately from the discount rate. The types of damages that are incurred between the injury and the trial typically consist of past medical expenses and lost wages. By the time of trial, past medical costs have actually been incurred with certainty, so they do not need to be risk adjusted. However, past lost wages are hypothetical and must be risk adjusted. Assume an accident results in a plaintiff losing the ability to perform in plaintiff's earlier employment. Past lost wages typically begin with the wage levels of the job the victim actually had. But then these wages are risk adjusted by reducing them by the probability of a layoff (proxied by the local unemployment rate) and the probability of the victim voluntarily leaving the labor force (the local labor participation rate). Since these are the two primary risk factors, and an adjustment is made directly to past wages, no discounting is required to the date of injury. Rather, the statutory prejudgment interest rate is applied to past damages until the date of trial. Thus, only because past wages are first converted to certainty equivalents do experts discount future losses to the date of trial, rather than to the date of injury. We illustrate this calculation below:



A similar calculation is not possible when measuring lost opportunities to a business. There is no method to obtain a certainty equivalent for past damages as in a personal injury

case except discounting to the date of injury. That is why only Calculation 2 should be used in business tort cases. Only the method in Calculation 2 is both consistent with contract cases as well as the personal injury area of torts.

Conclusion

The central point of this article is to illustrate that in both contract and tort cases, judges and practitioners should require that the damage date be set at the date of injury, not the date of trial. The reason is that except in special cases, where there is a certainty equivalent for past damages, like personal injury cases, discounting to the date of trial inflates damages because it treats risk and prejudgment interest improperly.

1. This is only one of several behaviors people exhibit when faced with uncertain outcomes. *See* Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decisions Under Risk, 47 Econometrica 263 (1979).

2. Thus, the rate of return on a government bond (low risk) is lower than on a corporate bond (higher risk), which is lower than a stock (higher risk), and lower in turn than an unproven venture (very high risk). Suppose in the above example a 50% rate of return is required to induce people to chose Situation A over Situation B. If a plaintiff then loses the opportunity to invest in Situation A, he has not lost $30,000, but instead $20,000 (= $30,000 ÷ 1.5). This is because if the plaintiff were given $20,000, he could invest it in a venture just as risky as the one he lost and obtain $30,000 (= $20,000 x 1.5).

3. Another tort claim where damages should be measured as of the date of the alleged injury is an interference with contract claim. Utah law and fundamental logic dictates that damages from a breach of contract and a claim of tortious interference with contractual relations should be identical. Damages from an interference with contract and a breach of contract should be the same because there is a common impact – the contract is not performed. The Utah Supreme Court recognized this similarity in *TruGreen Cos. v. Mower Brothers,* 2008 UT 81, ¶ 24, 199 P.3d 929 . In *TruGreen*, the court unanimously held that damages for tortious interference with contractual relations should be measured by the same standard as a breach of contract. *See id.* (citing *KForce, Inc. v. Surrex Solutions Corp.,* 436 F.3d 981, 984 (8th Cir. 2006); *see also KForce, Inc.,* 436 F.3d at 985 (stating "such tort damages are the direct and natural consequences of the breach as per the contract claim"). In reaching its conclusion, the court in *TruGreen* relied heavily on *American Air Filter Co. v. McNichol,* 527 F.2d 1297 (3d Cir. 1975), wherein that court also held that, where there are only pecuniary losses, the measure of damages for interference with contractual relations "will be identical" to that for breach of contract.

4. Actually, the correct standard compares marginal rather than absolute quantities as Hand suggests. However, since record evidence is usually only available for small changes in these quantities, the Hand formula closely approximates the correct economic formula in practice.

5. The fact that people are deterred by the threat of liability is evidenced by taking appropriate steps that assure that their diagnosis is accurate (often referred to as "defensive medicine"). *See Tame Aggressive Drivers,* Salt Lake Tribune, Aug. 11, 1996, at AA-7 (asserting that drivers in Salt Lake City take insufficient care while driving).

Commentary: Harry Truman's Lessons for Lawyers

by Gary L. Johnson

As the managing attorney at a law firm, I have the enviable prerogative of requiring a captive audience for my ruminations and pontifications every so often during the year. This is otherwise known as "Associate Training." Recently, I talked to our associates about what Harry Truman could teach them concerning their practice of the law. I thought that our discussion would be of some interest to you, my colleagues.

About fifteen years ago, David McCullough wrote a pretty good biography of Harry Truman. In it, he noted that Truman lived his life according to a set of guidelines, which he identified as: *work hard, do your best, speak the truth, assume no airs, trust in God and have no fear.* Because I thought each of these admonitions was extremely pertinent to a lawyer's practice, and could be discussed in reference to the Utah Rules of Professional Conduct, we examined them each in turn.

Work Hard

I no sooner got the words out of my mouth than our associates (to my surprise, I must admit), quickly shouted out, "Rule 1.3." Now, for those of you who do not have the wording of that rule on the tip of your tongue, it states simply: "A lawyer shall act with reasonable diligence and promptness in representing a client." Utah R. Prof'l Conduct 1.3. It was not just the formal words of the rule, however, with which I was concerned. We then parsed the important words found in comment [1] to Rule 1.3, which points out that a lawyer should pursue a matter on behalf of a client "despite opposition, obstruction or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." *Id.* cmt.

We have seen lately, in political blogs and the endless commentary on cable television, attacks on those lawyers who, despite personal inconvenience, zealously advocate for their clients no matter how despised or unpopular those clients and their views might be. If we are true to our Rules of Professional Conduct, we will take every opportunity, public and private, to defend those lawyers who do what almost all of us have neither the time nor inclination to do. Such lawyers are a true necessity in a nation that purports to be governed by laws, not the whims of individuals in power. Lawyers who make such sacrifices, regardless of what the public at large may think, deserve our praise.

We also talked that day, with some surprising passion, about how a lawyer must be both committed and dedicated to the interests of the client and act "with zeal" in advocating upon the client's behalf. As we probed the boundaries of zealous advocacy, I reminded the associates that our Rules of Civility, adopted by the Utah Supreme Court, were entirely consistent with the commentary to Rule 1.3, which provides also that the "duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." *Id.* A lawyer should be steadfast and resolute, not asinine and obnoxious.

Do Your Best

Again, I was pleasantly surprised when several of our associates immediately proffered Rule 1.1 as the counterpart to this Truman epistle. Rule 1.1 mandates that lawyers shall provide competent representation to a client. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Utah R. Prof'l Conduct 1.1. Often, in my sessions with the associates, we talk about lawyers long gone. One such lawyer whom we have discussed is Louis Nizer, and I reminded them of one of his famous quotes which is: "Yes, there's such a thing as luck in trial law but it only comes at 3:00 o'clock in the morning. You'll still find me in the library working for luck at 3:00 o'clock in the morning."

I also reminded our young, budding Louis Nizers that in order to do their best, they would have to maintain the requisite knowledge and skill necessary to keep abreast of changes in the law and its practice. Lawyers are in the knowledge business, and we discussed that treating CLE like it is an opportunity for a personal vacation is both a betrayal of their future partners and of their present clients. A lawyer's commitment to excellence is a lifelong process.

Speak the Truth

This is a principle about which there can be little debate for a lawyer. The attorney's oath in Utah requires us not only to support, obey, and defend both the United States and our State Constitutions, but also to "discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty, fidelity, professionalism and civility;. . . ." Utah R. Prof'l Conduct, Preamble: A Lawyer's Responsibilities, [1]. Stated simply, we should not lie to our clients, we should not lie to the court, and we should not lie to other counsel. Indeed, in making sure we speak the truth to our clients, I reminded the

GARY L. JOHNSON is the Managing Attorney at the law firm of Richards Brandt Miller Nelson in Salt Lake City, Utah. The views expressed in this article are solely those of the author.

associates of comment [6] to Rule 1.0 (the terminology section), which talks about the necessity of informed consent in order for clients to adequately make decisions concerning their representation. Here we are told that the lawyer must make reasonable efforts to ensure that the client possesses information reasonably adequate to make an informed decision. This will normally require the lawyer to include a disclosure of the facts and circumstances giving rise to the situation, and any explanation reasonably necessary to inform the client of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's options and alternatives. Speaking the truth sometimes requires us to speak clearly and plainly.

Assume No Airs

Now, you have to remember, I am talking to lawyers. I quoted Proverbs 8: pride goeth before destruction, and a haughty spirit before a fall. I reminded my young charges that there are different models for the practice of the law. Some models these days portray the practice of the law as only a business to be pursued in order to maximize profit. There are, however, alternative models, such as the one discussed by Sol Linowitz in his book *The Betrayed Profession.* This model recognizes that law firms, while they are economic entities, are, in a very real sense, engaged in a public service when they are engaged in the practice of the law.

Paragraph [6] of the Preamble of the Rules of Professional Conduct really says it best. In that paragraph, we are reminded that lawyers should further the public's understanding of and confidence in the rule of law in our justice system because legal institutions in a constitutional democracy depend on positive participation and support to maintain their authority.

> A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance and therefore, all lawyers should devote professional time and resources and use civic influence in their behalf to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.

Utah R. Prof'l Conduct, Preamble: A Lawyer's Responsibilities, [6]. We are reminded at the end of this paragraph that a lawyer should help the state bar to "regulate itself in the public interest." *Id*.

Trust in God

This may sound somewhat unusual for someone who loves Utah as much as I do, but I am not a particularly religious person. Because I live in Utah, however, I am particularly cognizant of

the positive contributions made by people of faith – precisely because of their faith. I related to our associates that in the Preamble of the Rules of Professional Conduct, there is a section entitled: "Scope." Paragraph [16] of this section points out to the lawyer that the Rules do not "exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of the law." *Id.* [16]. Just as our Federal Judges draw on federal common law to fill the interstitial spaces found with irritating regularity in ERISA, so each lawyer must draw on a moral framework as we move through our practice, and the sources for that framework clearly can include one's religious beliefs.

And Have No Fear

This was one admonition that I did call into question. I debated with our young lawyers whether it was better to "have no fear" or, to be prepared to alternatively "conquer that fear," or "control the fear." Fear is not necessarily a bad thing. Giving into fear for a lawyer, however, requires one to rethink one's choice of profession. As I mentioned above, we often talk about other "role model" lawyers. One such role model lawyer is Percy Foreman, a criminal defense lawyer out of Texas who, sadly, passed away about 20 years ago.

One of the things Percy Foreman told us is that: "Courage in the courtroom is more important than brains. If I was hiring a lawyer and had to choose between one that was all brains and one that was all guts, I would take the guts." I told our associates I would pick one that had a lot of brains and a lot of guts.

Courage for lawyers is not giving up in the face of overwhelming odds or overwhelming setbacks. I related a number of instances from the history of my own practice in which things had not gone well at the start of a case but through perseverance (far more than any skill that I might have possessed), we were able to achieve positive outcomes for our clients.

In particular, I pointed out it was the courage of one's convictions that could separate a lawyer from the mass of practicing attorneys. I reminded them of what Learned Hand said, that "of those qualities on which civilization depends, next after courage, it seems to me, comes an open mind, and indeed the highest courage is, as Holmes used to say, to stake your all upon a conclusion which you are aware tomorrow may prove false."

Some people's lives are lessons from which we all can learn. I do not claim such status.

I admonish my associates not to do as I have done, but to do as I tell them (the goal is that their reach should exceed my grasp). In our country today, commentators too often seek to tie the message to the personal worth of the messenger. If the messenger has any blemish, then of course, what was said must be both immoral and incorrect. Just because the messenger may have feet of clay (and Harry Truman had his faults), this should not diminish the message. Harry had some good advice for lawyers.

Ten Tips for Persuading Judges

by Paul M. Warner

Where you stand on an issue depends on where you sit. I practiced law for over thirty years before I joined the federal bench. I was always a trial lawyer. I thought I knew how to persuade judges and juries. Now that I have been on the bench for a few years, I have a little different perspective. I will not guarantee that what I am going to share with you will work with every judge, but I suspect that it will help you with most of them.

1. An ounce of credibility is worth a pound of cleverness. Credibility begins with being prompt and ready to go. Be courteous and respectful. Never mislead the court. Be sure to tell the judge if you are arguing novel or new theories that will require the court to depart from established precedent.

2. Ensure that your memoranda and briefs are free of errors. Typos and citation mistakes reflect poorly on your credibility and attention to detail. Be temperate in your writing. Judges are not persuaded by the use of inflammatory language or rhetorical questions. Nor are they persuaded by the overuse of bold type, italics, underlining, exclamation points, etc. Resist the temptation to use any of these techniques. They do nothing but harm your credibility and the merit of your arguments.

3. Be prepared. Be thoroughly familiar with the facts and the law as they pertain to your case. Anticipate questions from the court. Be ready for questions by being prepared to cite applicable facts, rules, statutes, and cases to the judge when asked.

4. Be brief and concise, both orally and in writing. Most judges have heavy dockets. Time is a precious commodity for the courts. Therefore, remember no judge appreciates verbosity. Question every word you put in your brief or memorandum. Get to the point quickly when speaking in court. It has often been said, "I would have written you a shorter letter, but I did not have the time."

5. Do not overstate the facts or the law. Save hyperbole for someone who will appreciate it. The judge will not. Make sure the cases you cite really stand for the proposition cited. Also ensure that any cases you have cited have not been recently overruled.

6. Make your argument in court, but do not "argue" with the court. Professionalism and demeanor both go to credibility. Style counts. You can be right, but you can also be dead right if you turn off the judge because of rude or boorish behavior directed to either opposing counsel or the court.

7. Be a good listener. Answer the question that is asked, and do so directly. If you do not know the answer, say so. Do not guess. In terms of persuading the court, here is a golden nugget: good answers to the judge's questions are much better than good arguments.

8. Concede the obvious if it does not kill your case. Virtually every case or argument has strengths and weaknesses. Your willingness to acknowledge weaknesses actually enhances and strengthens your position with the court. It also helps your personal credibility with the judge.

9. Be yourself. Work within your own personality. Do not try to imitate others, even if you are impressed with their courtroom style. It rarely works. Persuasive advocacy comes in many shapes and sizes. Use what fits you.

10. Life is tough, but it is tougher if you are stupid or do stupid things. This principle applies with equal weight in the courtroom. When preparing to come to court, do not forget to bring your common sense, and a host of other human qualities that will impress the court and make the judge want to rule in your favor.

PAUL M. WARNER is a United States Magistrate Judge.

Everything You Wanted (and Didn't Want) to Know About the Utah Administrative Procedures Act

A Review of: Utah Administrative Procedures Act – a 20 Year Perspective

by Alvin Robert Thorup and Stephen G. Wood

Reviewed by J. Craig Smith

Who would ever expect that a book chronicling the Utah Administrative Procedures Act, from its gestation over 20 years ago to the present, would ever be written? This is exactly what Alvin Robert Thorup, a local attorney, and Stephen G. Wood, a law professor at the J. Reuben Clark Law School, have done. Their book, "Utah's Administrative Procedures Act, a Twenty Year Perspective" was recently published by Xlibris and is available at local book stores and online.

The authors are considerable authorities on the Utah Administrative Procedures Act ("UAPA"). They were intimately involved in its conception, creation, and ultimate passage back in 1987. Their keen, even extreme, interest in UAPA is understandable. Wood teaches administrative law, while Thorup practiced tax law. Administrative tax proceedings are the most common administrative actions governed by UAPA.

The book provides a brief history of administrative law in the United States. It recounts the conception and drafting of UAPA and the considerable efforts to secure its passage through the Utah Legislature. Prior to UAPA, Utah was one of a minority of states that had no uniform procedure for handling the appeal of decisions by its administrative agencies. The pre-UAPA administrative law in Utah can accurately be described as a hodgepodge, with different agencies each having their own unique administrative appeal procedures.

While the political machinations that led to the passage of UAPA in 1987 are largely and properly forgotten, it may be of some interest to those over 40 to see the names of prominent political leaders and lawyers from the 1980s and the role each played in the UAPA enactment process. As can be expected, over twenty years later most have left the public stage.

Following its glimpse into the legislative process (often accurately analogized and compared with the making of sausage) from which UAPA emerged, the book then shifts to a critique of post-passage, legislative amendments that affected the applicability and scope of UAPA on various state agencies and their administrative proceedings.

Bemoaning the lack of anyone assuming "ownership" of UAPA, the book is uniformly critical of post-passage changes to UAPA. The authors characterize these amendments as tinkering, largely aimed at creating exemptions and loopholes to UAPA's scope. Particular disdain is heaped upon those loopholes and exceptions that were not placed in UAPA, but instead in governing legislation of various agencies.

Next, the book's focus shifts to judicial treatment of UAPA. The book critiques appellate court opinions which did, or should have, addressed UAPA. The authors are not hesitant to point out errors they believe are found in various opinions. The book examines opinions addressing determination of finality of the administrative proceedings for purposes of appeal, as well as the appropriate standards of review for judicial review of agency actions. Appellate courts' interpretations of statutory exemptions to UAPA are also discussed.

It would be fair to say that the book is even more critical of judicial treatment of UAPA than it is of the subsequent legislative tinkering. Accordingly, the benefit of the book to practitioners, beyond those interested in the history of administrative law in Utah, will be as a guide to an in-depth understanding of UAPA and arguments that can be made by lawyers faced with administrative law issues. It will undoubtedly be cited in future briefs and is a readily available and convenient source of Utah administrative law.

The book is 290 pages including appendices. It is well written and easy to read. It makes an excellent reference source on UAPA for bar members who find themselves involved with state administrative law.

J. CRAIG SMITH is a partner at Smith Hartvigsen, PLLC in Salt Lake City.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the April 23, 3010 Commission meeting held in Salt Lake City at the Law & Justice Center.

1. The Commission nominated Frank A. Allen, Ann Marie McIff Allen, Jenny T. Jones, and Jeffrey N. Starkey to the Governor for appointment to the Fifth District Judicial Nominating Commission.

2. The Commission determined that Bar convention chairs will continue to be appointed by the Bar President or President-Elect.

3. The Commission approved permanent seats on the CLE Advisory Committee for two-year appointments for representatives of the Litigation Section, Real Property Section, Family Law Section, Young Lawyers Division, and Utah Women Lawyers. Smaller sections may have representatives on a revolving basis.

4. The Commission approved March 18, 2010 minutes and approved the successful Bar admittees on consent agenda.

5. The Commission designated the following Action Items for follow-up:
   - Operations/Technology/LJC Review Committee Report: June meeting
   - Communications Review Committee Report on RFP: June meeting
   - Client Security Fund Policy Committee Final Report: June meeting
   - CLE Review Committee Report: June meeting
   - Legal Research Review Committee Report: July meeting
   - Database Review Committee Report: December meeting

The minute text of this and other meetings of the Bar Commission are available at the office of the Executive Director.

MCLE Cycle Change

Recent Supreme Court rule revisions conform MCLE and the Bar's licensing periods to run concurrently. **Even year compliance attorneys' cycle began January 1, 2009 and will end June 30, 2010.** Odd year compliance attorneys will have a compliance cycle that will run January 1, 2010 and will end June 30, 2011. Active Status Lawyers complying 2010 and 2011 are required to complete a minimum of 18 hours of accredited CLE, including a minimum of two hours of accredited ethics or professional responsibility. One of the two hours of ethics or professional responsibility shall be in the area of professionalism and civility. *(A minimum of nine hours must be live CLE.)* Please visit www.utahmcle.org for a complete explanation of the rule change and a breakdown of the requirements.

2010 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2010 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, September 3, 2010. The award categories include:

1. Distinguished Community Member Award

2. Professionalism Award

3. *Pro Bono* Lawyer of the Year

View a list of past award recipients at: http://www.utahbar.org/members/awards_recipients.html.

IMPORTANT NOTICE:

Licensing Renewals

Utah State Bar license renewals will now be done only on-line. Sealed notices are being mailed to each lawyer with a case-sensitive login and password, and each lawyer will need to complete and submit the electronic renewal individually.

A lawyer will need to complete and submit the electronic renewal form individually. He or she may then either pay by credit card on-line when the form is submitted electronically or pay with a check by mail after submitting the form. If the lawyer chooses to pay with a check by mail, the lawyer must include a cover sheet with his or her name and Bar number.

A firm or organization may pay for everyone with a single check by mail after each lawyer has submitted his or her renewal form electronically, but the firm or organization will need to include a cover sheet with the check that lists each lawyer's name, Bar number, and the total amount paid for each lawyer. Renewals will not be accepted until both the completed forms, with all mandatory information, and the check have been received. You should keep copies of each completed form.

A $100 late fee will be assessed if the completed form and the payment have not been received by 5:00 pm on July 31, 2010. If both have not been received by 5:00 pm on August 31, 2010, the lawyer will be administratively suspended for failure to renew and a $200 reinstatement fee will be assessed.

Please also note that the Supreme Court has approved the Bar's petition to increase licensing fees for the first time in 20 years. The new license fees are: Active – $425.00; Active, Under 3 – $250.00; Inactive, Full Service (Includes *Bar Journal*, free Casemaker legal research, Mailings and Notices) – $150.00; and Inactive, No Service – $105.00. A $10 fee for the Fund for Client Protection will be added to all active licenses.

If you have questions, please contact onlineservices@utahbar.org or 801-297-7051. License information may be found at www.utahbar.org/licensing.

Ethics Advisory Opinion Committee Seeks Applicants

The Utah State Bar is currently accepting applications to fill vacancies on the 14-member Ethics Advisory Opinion Committee. Lawyers who have an interest in the Bar's ongoing efforts to resolve ethical issues are encouraged to apply.

The charge of the Committee is to prepare and issue formal written opinions concerning the ethical issues that face Utah lawyers. Because the written opinions of the Committee have major and enduring significance to members of the Bar and the general public, the Bar solicits the participation of lawyers who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in résumé or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.) and substantive areas of practice, and
- A brief description of your interest in the Committee, including relevant experience, ability and commitment to contribute to well-written, well-researched opinions

Appointments will be made to maintain a Committee that:

- Is dedicated to carrying out its responsibility to consider ethical questions in a timely manner and issue well-reasoned and articulate opinions, and
- includes lawyers with diverse views, experience and background.

If you want to contribute to this important function of the Bar, please submit a letter and résumé indicating your interest by September 3, 2010 to:

Ethics Advisory Opinion Committee
C/O Christy J. Abad, Executive Secretary
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

Notice of Increase in Pro Hac Vice Fee

Effective July 1, 2010, the Utah Supreme Court approved an increase in the pro hac vice fee from $175 to $250. The remainder of requirements under Rule 14-806 have not been modified.

Disability Law Center Receives a Pete Suazo Social Justice Award

On Friday, April 9, the University of Utah College of Social Work presented the Disability Law Center (DLC) with a Pete Suazo Social Justice Award. The awards were created to honor the life of the late Senator Suazo by recognizing the work of those who fully dedicate themselves to the goal of social and economic justice. Pictured here are Adina Zahradnikova, Acting Director of the DLC (front row left), and the other 2010 recipients of the Pete Suazo Social Justice Awards.

Pro Bono Honor Roll

Kevin N. Anderson – Domestic / Criminal Case

Skyler Anderson – Immigration Clinic

Andres Alarcon – Family Law Clinic

Nicholas Angelides – Senior Cases

Mark Arnold – Foreclosure Scam Case

Justin Ashworth – Family Law Clinic (Pranno)

Enny Audrey – Guadalupe Clinic

Ron Ball – Ogden & Farmington Legal Clinics

Alan Balmanno – Service Member Attorney Volunteer Program

Lauren Barros – Family Law / LGBT Law Clinics

Joseph Bean – Domestic Case

Gracelyn Bennett – Bankruptcy Hotline

Jonathan Benson – Immigration Clinic

Tyler Berg – Ogden Legal Clinic

Maria-Nicolle Beringer – Domestic / Bankruptcy Cases

Jennifer Bogart – Guadalupe Clinic

Bryan Bryner – Guadalupe Clinic

Daniel Burton – Bankruptcy Hotline

Douglas Cannon – Consumer Auto Case

Joe Cartwright – Guardianship Case

Ted Cundick – Guadalupe Clinic

Tess Davis – Domestic Case

Kevin Deiber – Family Law Clinic

Jana Dickson Tibbitts – Family Law Clinic

Tadd Dietz – Guadalupe Clinic

Shawn Foster – Immigration Clinic

Keri Gardner – Family Law Clinic

Donald Gilbert – Consumer Case

Jeffry Gittins – Guadalupe Clinic

Esperanza Granados – Immigration Clinic

Jason Grant – Family Law Clinic

David Hamilton – Domestic Case

Jason Hardin – Domestic / Criminal Case

Kathryn Harstad – Guadalupe Clinic

Lincoln Harris – Bankruptcy Case

Garth Heiner – Guadalupe Clinic

Craig Helgesen – Domestic Case

Richard Henriksen – Domestic case

April Hollingsworth – Guadalupe Clinic

Melanie Hopkinson – Family Law Clinic

Isaac James – Family Law Clinic

Paul H. Johnson – Consumer Case

Richard Kennerley – Collection Case

Mark Kittrell – Domestic/Criminal Case

Stephen Knowlton – Family Law Clinic / Service Member Attorney Volunteer Program

Jennifer Korb – Guadalupe Clinic

Steven Kuhnhausen – Domestic Case

John Larsen – Bankruptcy Hotline

Darren Levitt – Family Law Clinic

Kim Luhn – LGBT Law Clinic

Nancy Major – Family Law Clinic

Jennifer Mastrorocco – Family Law Clinic

William Marsden – Guadalupe Clinic

Leona Meyer – Guadalupe Clinic

Nariman Noursalehi – Family Law Clinic

Holly Nelson – Family Law Clinic

Trent Nelson – Family Law Clinic

Bao Nguyen – Immigration Clinic

Wolfgang Nordmeyer – Family Law Clinic

Ellen O'Hara – Family Law Clinic

Shauna O'Neil – Bankruptcy Hotline / Family Law Clinic

Todd Olsen – Family Law Clinic

Eliza Van Orman – Domestic Case

Rachel Otto – Guadalupe & LGBT Law Clinics

Sam Pappas – Public Benefits Case

Candice Pitcher – LGBT Law Clinic

Albert Pranno – Family Law Clinic

Christopher Preston – Guadalupe Clinic

DeRae Preston – Domestic Case

Michelle Quist – Family Law Clinic

Stewart Ralphs – Family Law Clinic

Rebecca Ryon – Protective Order Case

Brent Salazar-Hall – Family Law Clinic

John Sheaffer – Family Law Clinic

Lauren Scholnick – Guadalupe / LGBT Clinics

William Shinen – Provo & Family Law Clinics

Linda F. Smith – Family Law Clinic

Linda D. Smith – QDRO Case

Steven Stewart – Guadalupe Clinic

Virginia Sudbury – Family Law Clinic

Jessica Taylor – Family Law Clinic / Protective Order Case

Jonathan Thorne – Guadalupe Clinic

Roger Tsai – Immigration Clinic

Joy Walters – Bankruptcy Hotline / Family Law Clinic

Tracey Watson – LGBT Clinic

Murry Warhank – Guadalupe Clinic

Curtis White – Provo Clinic

Utah Legal Services and the Utah State Bar wish to thank these volunteers for accepting a pro bono case or helping at a clinic in the last two months. Call Brenda Teig at (801) 924-3376 to volunteer.

Thank you to all the sponsors of the
2010 "AND JUSTICE FOR ALL" Law Day 5K Run & Walk

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Gold Gavel Sponsors

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Utah State Bar

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Utah Arts Festival

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Red Butte Cafe
Repertory Dance Theatre
Stella Grill
Salt Lake Bees
Salt Lake Running Company
Starbucks
Swortz Signz & Design
Target
Tear-A-Part Auto
Utah Office Supply/ Blue Fin
Vantus Law Group, P.C.
Robyn Volk
Workman Nydegger

Good Karma of Pro Bono

The Utah State Bar offers a variety of opportunities to practice pro bono work that you will find beneficial both if you just joined the Bar or have been practicing law for decades. If you are a new attorney, were recently admitted to the Bar and are still looking for a job, pro bono work will get you started by providing great networking opportunities, experience working with clients, and above that you will also be helping people who otherwise would not be able to get legal assistance. If you are a seasoned attorney, working either for a big law firm or a corporation, pro bono work will be a refreshing and different experience from your daily routine.

The Utah State Bar President, Stephen Owens, recently shared: "Always have a pro bono case. You will be a hero to someone who is in over his or her head and needs a hero. You will always remember these cases." Senior corporate counsel, Robert Brown, volunteers every Tuesday Night Bar unless he is out of town, and when asked why he comes every Tuesday to give free legal advice, said: "It gives me an opportunity to do something different outside of the scope of my daily responsibilities. It also helps if pro bono work is expected as part of the firm's culture and is rewarded in the same way as other work."

There are plenty of opportunities to be involved with pro bono work in Utah. To begin with the Bar has its own Pro Bono Project that encompasses several programs:

- Tuesday Night Bar coordinated by the Young Lawyers Division assists the public every Tuesday night at the Law & Justice Center in determining their legal rights and provides referral service (you don't have to be a young lawyer to participate!).

The Tuesday Night Bar would love to have more volunteers joining our teams. If you want to practice leadership skills and have a wide network of contacts in the legal community, we are currently in the process of recruiting more team leaders. It is a great opportunity for people who have been just admitted to the Bar and looking to gain experience, but anyone can participate – the more people helped the better! It is a truly rewarding experience and even one 30-minute consultation counts, just ask anyone who has done it before.

- Legal Assistance for Military Program (LAMP) helps active or deployed military personnel in need of pro bono legal assistance for civil issues. Requests to place cases come either from the local Judge Advocate General office or the American Bar Association;
- Service Member Attorney Volunteer Program (SMAV), initiated in April 2010 by the Utah State Courts provides active duty service members facing default judgment with protections in civil cases on a limited representation basis.

The Utah State Bar has been working together with the Utah State Courts on the Service Member Attorney Volunteer Program (SMAV). The first training for volunteer attorneys was held on April 23, training for District Court Judges took place on May 20, another training for volunteer attorneys is scheduled for June 28 in St. George. Please visit our pro bono calendar webpage to register.

- Habeas Corpus cases are placed by the Bar upon request of the Utah State Courts to find pro bono counsel for the incarcerated.

- Senior Legal Clinic Program is coordinated by the Elder Law Section of the Utah State Bar and provides legal advice to senior citizens at senior citizen centers within Salt Lake County.

In addition to the Bar's Pro Bono programs there are other opportunities for volunteering. If you are interested in immigration issues and don't know where to begin, one of the options is to contact Barbara Szweda at the Health and Human Rights Project or Leonor Perretta at the Utah chapter of the American Immigration Lawyers Association. On May 27, 2010, together with the Salt Lake Immigration Court, they conducted Pro Bono Detained Master Clinic to train volunteer attorneys on representation of detained immigrants. The next training on how to represent asylum seekers is planned for August 2010.

The Family Law Clinic at the Matheson Courthouse is jam packed every first and third Wednesday of the month where within a two-hour time period eight to ten volunteer attorneys serve around 70-80 people seeking help with family law issues. We need more volunteer attorneys to help support this very important Clinic. We ask that every member of the Family Law Section of the Bar volunteer at least three times per year. These six hours would make a tremendous difference. Let us know today if you would like to be on the call or email list.

Looking into the future the Utah State Bar together with Utah Legal Services, the S.J. Quinney College of Law Pro Bono Initiative, the Utah State Courts' Self-Help Center and the State Law Library have started planning for the Pro Bono Celebration week taking place all around the country on October 24-30, 2010. Let us

know if you would like to be involved or have ideas that you would like to share.

According to the Utah Access to Justice Council, one of the areas of unmet legal needs in Utah is consumer law. Starting up a Consumer Law Clinic that will help individuals address collection law and small claims issues can be a tangible solution brought together by the public legal service providers with support of the Utah State Bar. Among other tasks that the Pro Bono Department of the Utah State Bar plans to address is to increase participation of government attorneys and corporate counsels in pro bono or low bono work. A way to achieve it would be to encourage adoption of formal pro bono policies by the law firms, development of administrative systems and management structures. The Utah State Bar would be happy to help your law firm incorporate pro bono element and make it part of the firm's culture.

Finally, the Utah State Bar would like to encourage every one of you to take on a pro bono case or volunteer at any of the legal clinics in the state. To find out more about pro bono feel free to email Karolina Abuzyarova, Pro Bono Coordinator at the Utah State Bar, at probono@utahbar.org or apply to volunteer for pro bono today on our website http://www.utahbar.org/probono/volunteer_form.html.

Meet the Pro Bono Coordinator – *Prior to joining the Utah State Bar in April 2010 Karolina Abuzyarova was Director of Member Services at the Utah Association for Justice. Karolina Abuzyarova holds M.A. in Comparative Politics and Public Administration from the University of Utah where she was a Muskie Fellow 2003-2005, and B.A. in English/Spanish from Zaporozhye State University, Ukraine. Upon graduation Karolina worked in the international development sector and was building democracy in her home country. She interned for non-profit organizations in Washington, D.C. and New York City. Karolina is excited to be part of the Utah State Bar to promote pro bono participation among Utah's legal community.*

Update on Utah Minority Bar Association: A Continued Commitment to Diversity in the Law

The Utah Minority Bar Association "UMBA" has had an exciting and productive year and we would like members of the bar in general to know all of the great things the organization has accomplished in the last year and hopes to accomplish in the years to come.

Complimentary Membership to New Lawyers

Our newest change has been that we now provide a complimentary membership to all new admittees to the Utah State Bar for the duration of their first licensing period, beginning July 2010. Our hope is that once new admittees see the wonderful projects that UMBA supports they will continue their membership and service to the community. As always, other State Bar members in good standing are welcome to join UMBA, regardless of race, ethnicity, religious affiliations, or national origin. For more information about joining UMBA, its mission or events, visit www.umbalaw.org or contact umbalaw@utahbar.org.

We also encourage others (whether or not a member of UMBA) to attend our regular meetings. The Executive Board meets the 2nd Wednesday of each month at Noon at the Law Firm of Dunn & Dunn, P.C., 505 East 200 South, 2nd Floor, Salt Lake City, UT 84102. Our next meetings are set for July 14, and August 11. Please come or attend by phone (phone-in details are sent out by email in UMBA's periodic "411"). We would love your thoughts and ideas about how to make UMBA more productive.

The Utah Minority Bar Foundation is Created

UMBA is pleased to report that, effective October 5, 2009, the Internal Revenue Service granted the Utah Minority Bar Foundation "UMBF" its 501(c)(3) non-profit status. UMBF was created with the purpose of acting as UMBA's charitable branch. Through the UMBF, all donations, to the extent permitted by law, are tax deductible, thereby enhancing UMBA's ability to offer student scholarships and, in the future, to perhaps offer grants. Moreover, the tax-exempt status should provide a benefit to the supporters of our annual banquet and scholarship program.

Annual Scholarship Banquet Set for October 22, 2010

The 19th Annual Scholarship and Awards Banquet will occur on October 22, 2010, at Little America. The keynote speaker has yet to be confirmed, but other arrangements for this banquet are well underway. For example, we have already mailed letters seeking sponsors for student scholarships, and Strong & Hanni has already committed to provide a generous scholarship. UMBA would like to extend its gratitude to the law firm of Strong & Hanni for becoming the first sponsor for 2010. If your firm did not receive a request, or if you can direct our attention to the most appropriate firm contact, please email Chrystal Mancuso-Smith (cmancuso@dunndunn.com) to make a donation.

We are also accepting donations for the Silent Auction, the proceeds of which go directly to funding student scholarships. Through the generosity of donors and the support of both the BYU and the University of Utah law school's matching fund programs, in 2009, UMBF was able to provide over $20,000 in scholarships to deserving students. We hope to meet (if not exceed) this amount in 2010.

UMBA Celebrates 20 Years in 2011

2011 marks UMBA's 20th year anniversary and the current board is planning a big celebration in honor of the monumental achievement. One project currently in the works is to create an "oral history" of practicing law in Utah as a minority. Our hope is to create video journals of key minority and minority-supporting attorneys who have seen the changes (good and bad) in practicing law in Utah. Our goal is to reveal this video at the 2011 banquet and preserve this part of Utah history for generations to come. We need volunteers for this committee and if you would like to join, please contact UMBA at gacosta@dunndunn.com.

UMBA Has Accomplished Many Things This Year

On January 23, 2010, UMBA co-sponsored the Mentoring Marathon with the Young Lawyers Division and the Utah State Bar. Approximately 40 students attended. On March 11, 2010, UMBA sponsored a 4-hour CLE that educated its audience regarding the overlap that exists between Immigration and various legal areas. On April 20, 2010, UMBA sponsored an essay contest for high school juniors and seniors, resulting in three scholarships, as part of Utah's Annual Law Day Program. On May 13, 2010, UMBA co-sponsored with the Young Lawyers Division the 2nd Annual Speed Networking Event at the Alta Club.

The board also approved sponsoring the S.J. Quinney College of Law's "Kids Court" program. This law-student-run program teaches civic responsibility and basic legal principles to students at Rose Park Elementary. UMBA would like to thank the law firm of Holland & Hart for being the first ever law firm to subsidize UMBA's sponsorship of this program with a generous donation. UMBA's sponsorship will assist in the hiring of a law student to coordinate the Kids Court program and, hopefully, expand it to other schools.

In addition to the October banquet, UMBA also hopes to sponsor another networking event this year. The focus of that event will be to bridge the gap between current law students and practicing attorneys.

UMBA would like to thank those members and supporters who have made the first half of the year truly remarkable. Keep up the good work.

Thank you for your service at the Tuesday Night Bar!

Adam Stevens, Kirton & McConkie
Allison Behjani, Parr Brown Gee & Loveless
Allyson Barker, Attorney at Law
Angilee Wright, Wall & Wall Attorneys at Law
Artemis Vamianakis, Fabian & Clendenin
Austin Riter, Attorney at Law
Benjamin Forsgren, Attorney at Law
Bradley Christopherson, Attorney at Law
Brandon Mark, Parsons Behle & Latimer
Brian Johnson, Attorney at Law
Bryan Johansen, Parr Brown Gee & Loveless
Bryan Nalder, GE Capital
Bryce Pettey, Utah Attorney General's Office
Carl Barton, Holland & Hart
Casey Jones, Strong & Hanni
Christina Micken, Bean & Micken
Christopher Martinez, Snell & Wilmer
Clark Snelson, Utah Attorney General's Office
Darren Levitt, Law Offices of Darren M. Levitt
Darren Reid, Holland & Hart
David Hall, Parsons Behle & Latimer
David Heinhold, Parsons Behle & Latimer
Derek Kearl, Holland & Hart
Elizabeth Schulte, Parsons Behle & Latimer
Eric Robinson, Kirton & McConkie
Erin Middleton, Durham Jones & Pinegar
Gavin Reese, Holland & Hart
Glenn Davies, Utah Attorney General's Office
Jacob Crockett, Holland & Hart
James Lavelle, Attorney at Law
Jennifer Merchant, Jenna S. Merchant Attorney at Law
Jessica Peterson, Durham Jones & Pinegar
Jessica Taylor, Attorney at Law
Joanna Radmall, Holland & Hart
John Ruple, University of Utah, Institute for Clean & Secure Energy
John Zidow, Utah Attorney General's Office
Joshua Chandler, Durham Jones & Pinegar
Joyce Maughan, Maughan Law Firm
Katherine Conyers, Snell & Wilmer
Katherine Martinez, Snell & Wilmer
Kelly Latimer, U.S. Department of the Interior
Kenneth Ashton, Snell & Wilmer
Lamont Richardson, Parr Brown Gee & Loveless
Laurie Noda, Utah Attorney General's Office
Leslie Orgera, Anderson & Karrenberg
Mark Astling, Durham Jones & Pinegar
Mark Glick, Parsons Behle & Latimer
Mark Kittrell, Fabian & Clendenin
Matthew Ball, Parr Brown Gee & Loveless
Matthew Wells, Holland & Hart
Michael Thatcher, Holland & Hart
Michael Thomas, Snell & Wilmer
Michelle Allred, Ballard Spahr LLP
Michael Black, Parr Brown Gee & Loveless
Patrick Johnson, Durham Jones & Pinegar
Rachel Anderson, Fabian & Clendenin
Rachel Terry, Fabian & Clendenin
Richard Mrazik, Parsons Behle & Latimer
Robert Brown, Rhodes International, Inc.
Robert Crockett, Fabian & Clendenin
Robin Wicks, Parr Brown Gee & Loveless
Roger Tsai, Parsons Behle & Latimer
Ryan Bolander, Attorney at Law
Ryan Pahnke, Durham Jones & Pinegar
Sandra Allen, Utah Attorney General's Office
Shawn Stewart, Holland & Hart
Steven Burton, Intermountain Legal
Steven Walkenhorst, Utah Attorney General's Office
Susan Motschiedler, Parsons Behle & Latimer
Timothy Clark, Fabian & Clendenin
Timothy Dance, Snell & Wilmer
Tom Schofield, Kirton & McConkie
Trevor Gordon, University of Utah, Office of Sponsored Projects
Tyler Buswell, Kirton & McConkie

Christine M. Durham Woman Lawyer of the Year Awarded

The Women Lawyers of Utah have named Christine Soltis as the Christine M. Durham Woman Lawyer of the Year. This annual award is given to an exceptional woman attorney who has demonstrated professionalism, integrity, excellence and dedication to furthering opportunities for women in law.

Ms. Soltis is a Utah Assistant Attorney General who has made a career of training and helping prosecutors. Her qualifications for this award are numerous.

Ms. Soltis graduated from the University of Utah S.J. Quinney College of Law in 1975, where she served as president of the Association of Women Lawyers. At that time, she was one of approximately twelve women in her class. She began her practice as a trial attorney for the Salt Lake Legal Defenders Association, where she worked from 1975-78. The Association has employed hundreds of women since its inception. Ms. Soltis was the second.

She served from 1978-81 as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the District of Utah. She was the first woman prosecutor for the office. After that, she was in private practice from 1982-89. During this period she also served as an Adjunct Professor at the University of Utah College of Law, teaching trial advocacy.

In 1989, Ms. Soltis joined the Utah Attorney General's Office and has worked as an Assistant Utah Attorney General from 1989 to the present. During this period, she served as Director, Statewide Assistance to Narcotics Enforcement (1990), Section Chief, Criminal Appeals Division (1990-93), and Division Chief, Criminal Appeals Division (1993-99).

In her position as Division Chief, Ms. Soltis supervised and reviewed the work of all division attorneys addressing appeals of serious violent crimes in the state, such as murder, kidnapping, arson, rape, and drug crimes, as well as white collar crimes, including securities and communications fraud. In addition to supervising others during this period, she has always carried a personal caseload, appearing herself before the courts in these matters.

She resigned as Division Chief in 1999 when health concerns prompted her to reduce her workload. She continues, however, to prosecute criminal appeals for the State. Due to her expertise, she represents the State in a large percentage of the most difficult and complex appeals.

Ms. Soltis has also been involved in numerous professional associations and activities. Among others, she served as president of the Utah Chapter of the Federal Bar from 1988-89. She was the second woman president of the Chapter and, at the time of her service, the first woman to serve in over a decade. She served in other capacities in the Chapter, including secretary, president-elect, and executive advisory board member. She also served as a commissioner for the Utah Governor's Commission on the Status of Women from 1981-85. In 1982, she served on the Governor's Task Force on Sex Discrimination, Utah Chapter, Fifty States Women's Project. Since 2005, Ms. Soltis has served on the Utah Supreme Court Advisory Committee on the Rules of Evidence.

Ms. Soltis has also made numerous presentations to judges and prosecutors throughout the state and was also given the award for the Appellate Attorney of the Year in 1998-99.

The Attorney General's office issued a press release quoting Utah Attorney General Mark Shurtleff:

> "It is a great honor to have one of our dedicated attorneys receive this prestigious award…. Chris Soltis has shown time and again throughout her selfless career that protecting the people of Utah is her number one priority. I join with the people of Utah in saying congratulations and thank you for your devoted service."

Congratulations to Ms. Soltis on her great achievements!

Congratulations to Utah's Newest Lawyers

Congratulations to the new lawyers sworn in at the joint admissions ceremony to the Utah Supreme Court and the U.S. District Court of Utah held on May 18, 2010.

Rick D. Adams
Jon B. Allen
Skyler K. Anderson
Michelle Miramontes Armitstead
Gage H. Arnold
Mario Alonso Arras
Michael James Arrett
John P. Bagley
Joseph W. Barber
Christiana L. Biggs
Daniel N. Brinton
Bret P. Bryce
Wendy J. Bucy
Christopher J. Buntel
Kent A. Burggraaf
Jennifer M. Carlquist
Nicholas Isaac Chamberlain
Denise E. Ciebien Strong
Adam G. Clark
Jill L. Coil
Jessica S. Couser
Fred L. Donaldson
Andrew E. Draxton
Hillary Drennan
Timothy C. Dudley
Alan M. Fisher
Derek S. Fonua
David V. Fowler
Geoffrey N. Germane
Richard D. Gordon
Heath R. Haacke
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Attorney Discipline

RESIGNATION WITH DISCIPLINE PENDING

On April 14, 2010, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning R. Bradley Neff for violation of Rules 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

On September 23, 2008, Mr. Neff entered into a plea in abeyance to three Class A Misdemeanor counts of Attempted Failure to Render a Proper Tax Return. Mr. Neff was required to complete 40 hours of community service and pay restitution of $13,936.37 in addition to the $197,139.57 previously paid.

SUSPENSION

On March 11, 2010, the Honorable Denise Lindberg, Third District Court entered an Order of Discipline: Suspension for one year and Probation for one year against David VanCampen for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.5(b) (Fees), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary there are two matters:

In the first matter, Mr. VanCampen was retained to file modification papers in a divorce and custody case. Mr. VanCampen was paid and provided with the client's information. Almost a month later, the client initiated contact with Mr. VanCampen at which time he reported that he lost the information that his client had provided and requested it be provided again. The client provided the information to Mr. VanCampen a second time. Mr. VanCampen failed to file any papers with the court on the case. The client attempted to contact Mr. VanCampen on numerous occasions. Mr. VanCampen failed to return all but three of her calls. During the three calls, Mr. VanCampen provided no real assistance and made promises to perform services that were never performed. Mr. VanCampen failed to return his client's file, provide an accounting, or return unearned fees to his client. Mr. VanCampen failed to provide meaningful legal services necessary to prosecute his client's case. Mr. VanCampen was served a Notice of Informal Complaint ("NOIC"), but failed to timely respond.

In the second matter, Mr. VanCampen was hired to file documents to seal the client's case and attempt to negotiate an expungement. The client called Mr. VanCampen's office several times, but did not receive a call back. Mr. VanCampen's assistant told the client that there was a hearing scheduled. When the client appeared for the hearing, Mr. VanCampen did not appear. Mr. VanCampen failed to contact the client to explain what was going on in the case despite numerous calls by the client to speak with him. Mr. VanCampen failed to return unearned fees to his client, failed to return his client's file, and failed to provide the legal services for which he was hired. Mr. VanCampen was served a NOIC, but failed to timely respond.

Aggravating circumstances include: prior record of discipline; pattern of misconduct; multiple offenses; and substantial experience in the practice of law.

Mitigating circumstances include: personal or emotional problems.

ADMONITION

On May 10, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney was informed by a friend that a couple wanted to petition the Court to obtain the excess proceeds from a foreclosure sale. The attorney was never retained by the couple. The attorney prepared a pleading and signed it as if he were representing the couple. The attorney delegated to the attorney's non-lawyer assistant the responsibility of filing the pleading. The attorney used the non-lawyer's address and phone number on the pleading. The attorney made no reasonable efforts to ensure the non-lawyer acted responsibly under the Rules of Professional Conduct. By failing to supervise the nonlawyer, the attorney exposed another party and the legal system to potential injury by causing a contested action where there was no dispute. The attorney had adequate time and opportunity to correct the misconduct, but did not.

ADMONITION

On May 10, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.15(c) (Safekeeping Property), 7.5(a) (Firm Names and Letterheads), 7.5(d) (Firm Names and Letterheads), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney retained a law firm to assist in a case involving division of real estate transaction fees. The attorney handled the client's matter due to the partner in the firm going on inactive status. The attorney failed to timely prepare, file and provide to

the client, a complaint in the matter. The attorney failed to alert the client that the attorney would be unavailable or unable to complete the complaint in the specified time period. The attorney failed to notify to the client that the attorney had removed part of the retainer from the trust account as earned fees. The attorney had earned those fees; however, the attorney failed to timely account for the fees and provide invoicing to the client. The attorney's letterhead and firm name that were utilized were somewhat misleading because the partner was not practicing in a partnership at that time.

ADMONITION

On May 10, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 7.5(a) (Firm Names and Letterheads), 7.5(d) (Firm Names and Letterheads), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

A client spoke to a partner in a firm about retaining the partner to assist in a legal matter. The partner was going on inactive status and referred the case to the other partner within the firm. At the time of initial contact with the client, the attorney utilized a letterhead and firm name indicating two partners within the firm. The attorney used that letterhead a significant portion of the time during which time the attorney was in contact with the client. The attorney's letterhead and firm name were somewhat misleading, due to the partner not being in a partnership.

SUSPENSION

The United States District Court for the District of Utah has entered an order suspending D. Scott Berrett from the practice of law in the federal court for a period of 90 days, commencing June 10, 2010. Mr. Berrett failed to communicate with a client in a criminal case and failed to respond to the request of the magistrate judge to meet regarding the criminal case.

CLARIFICATION

There are two Bruce Nelsons licensed with the Utah State Bar. In the last edition of the *Bar Journal,* the attorney discipline listed a Public Reprimand for Bruce L. Nelson, not to be confused with Bruce J. Nelson who has not been disciplined.

21st Anniversary in the 21st Century

by Aaron Thompson

Recipient of Utah's 2010 Distinguished Paralegal of the Year Award

Each year the Utah Bar Paralegal Division ("Paralegal Division") convenes on the third Thursday in May to honor a paralegal who, "over a long and distinguished career, has by their ethical and personal conduct, commitment and activities, exemplified for their fellow paralegals and the attorneys with whom they work, the epitome of professionalism; who has also rendered extraordinary contributions," in promoting the efforts of the Paralegal Division.

Sanda Flint – Paralegal of the Year

On May 20, 2010, the Paralegal Division and the Legal Assistants Association of Utah (LAAU) gathered together at the Sheraton hotel in Salt Lake City to celebrate the 21st anniversary of Paralegal Day. The history of this gubernatorial declaration dates back a little over two decades to June 15, 1989, when it was signed by Governor Norman Bangerter. Over the years Governors Michael Leavitt and Olene Walker made additional declarations in 1994 and 2004, respectively.

The attendees of this year's event had the fortunate opportunity to hear from Salt Lake City Mayor Ralph Becker who instilled a wealth of advice as he spoke on the topic, "Lifelong Leadership Beyond the Legal Profession." Mayor Becker recalled the various stages of his non-traditional career route of putting his legal education to work serving the residents of Utah, by balancing his life through leadership in the Utah Legislature, while working as an advocate for governmental reform, and as a college educator in Environmental Assessment and Planning. The 5th Annual Distinguished Paralegal of the Year Award was also presented at this luncheon. The award this year went to a paralegal who has equally served the local and legal communities as a cornerstone of the Utah paralegal profession since 1989. This year's award naturally found its rightful place in the hands of Sanda Flint.

Sanda is a paralegal with the law firm of Strong & Hanni working primarily in the areas of insurance defense, personal injury, construction litigation, and products liability. She received her paralegal certification from the School of Paralegal Studies, Professional Career Development Institute with a specialty in litigation. She was Chair of the Paralegal Division of the Utah State Bar from 2003–2004. She served as the Paralegal Division's first Bar Liaison, sitting as an ex officio member of the Board of Bar Commissioners of the Utah State Bar from 1996–2000. Sanda has worked as a paralegal for twenty-one years. Throughout these years, Sanda chaired the CLE committee several times, educating the State's paralegals through various brown bag luncheons and Bar Conference breakout sessions, among many other seminars and other events.

Over the years since my graduation from Westminster's paralegal program in 1997, I have been professionally motivated by Sanda's collaborative nature, magnetic optimism, and exemplary service to the Paralegal Division and to the Utah paralegal community. With her years of instrumental participation on the Paralegal Division's Board and many events, it is difficult not to attribute, in part, years of our Division's growth and success to her tireless dedication. Only a small cadre of paralegals have ever served as long, as often, or in as many capacities on the Board as Sanda. I believe that part of Sanda's secret to success lies in her constant hunger to always pursue continued legal education and her unwavering ability to not be afraid of change. Sanda has always

AARON THOMPSON is a paralegal specializing in diverse commercial insurance exposures and risk management with Headwaters Incorporated and is the current Chair of the Utah State Bar Paralegal Division.

been eager and excited to adapt to new methods of promoting and accomplishing the purposes of our Division. Sanda will be sorely missed on the Board as she will be assuming a brief hiatus on June 18th.

Sanda was nominated for Paralegal of the Year by her attorneys and fellow paralegals. The following are a few excerpts from the nomination forms.

"Sanda brings a high degree of professionalism…and is a very strong advocate for the Paralegal Division."

"Sanda has enhanced paralegals' participation in public service…."

"Sanda always goes out of her way to ensure people feel welcome and included and leads not just through procedure and professionalism but by example."

"If all paralegals could model their careers and professional and personal dedication to making a difference… this profession will continue to grow in size, respect, professionalism, and continue to make great contributions…in this state."

Chair Farewell Message

This past year as the Chair of the Paralegal Division has been very rewarding. I am extremely proud of our Board members, their accomplishments this year, and the arduous discussions we have had in the attempt to best serve our membership. These discussions have provided me with the fortunate opportunity to learn a great deal about the passions of our members. With the recent addition of some new Board members we have experienced a diverse balance of recommendations that has led us to improve our processes and renew our fiscal stewardship to our membership, all while experiencing a renewed enthusiasm to proactively participate in the progress of our Division.

Within this past year we have seen the implementation of state electronic court filings, the Bar's acceptance of credit card transactions, and integration of attorney online license membership renewal. Our Board members have worked exhaustively to follow the Bar's lead by implementing similar 21st-Century developments into our website. In part, the Utah State Bar Staff and Commissioners should receive some credit for our Division's innovative changes. As a Board, we followed their model to move to plastic membership cards to save publishing costs and paper waste. Much like the Bar's goal to find a better resource to effectively communicate its efforts and initiatives, we have been implementing new methods to engender a larger identity and awareness of our Division's initiatives through the promotion of our new logo on our various forms of Paralegal Division communications.

The greatest lesson I have learned this year is that the paralegal community will change around us whether or not we are willing to adapt to it. To quote the Greek philosopher Heraclitus, "the only constant is change." It is my hope that every member will always be eager to adapt and implement innovative methods, to always be genuinely collaborative and absorb non-traditional recommendations, and equally strive to match Sanda's dedication to continued education and inherent stewardship to our Division members' development and progression in the Utah paralegal community.

I have thoroughly enjoyed my time serving with Utah Bar President Steve Owens and the Bar Commissioners. It has also been a great pleasure to serve as Chair of the Paralegal Division, working to anticipate and serve the dire needs of our members in a suffering economy. On June 18th, at the Annual Meeting, we will see the induction of our new Chair, Heather Finch. Heather is the head litigation paralegal with the firm of Howard, Lewis & Petersen, P.C., where she works in the areas of civil litigation, plaintiffs' medical malpractice, plaintiffs' personal injury, and plaintiffs' product liability. She has worked as a paralegal since 1989 and has been employed with Howard, Lewis & Petersen since 1995. I am very excited about turning over the reins to Heather who has such a diverse set of expertise to successfully carry our Division even further with the adoption of other 21st Century innovations. I know she shares in my belief that it is essential to continue to reach out and engage new members, encouraging them to take a proactive role in the Board's leadership and on its committees to shape the future of our Division. I am confident that through principles of diverse collaboration, mentoring the next generation of Board leaders, and adoption of 21st century innovations, we will see our membership significantly increase as well as ensure the longevity and growth of the paralegal profession in Utah.

The members of the Paralegal Division and LAAU wish to congratulate Sanda Flint on all of her accomplishments and on being named Utah's 2010 Distinguished Paralegal of the Year.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
07/14–07/17	**2010 Summer Convention** in Sun Valley Idaho.	Up to 15
07/21/10	**OPC Ethics School.** 9:00 am – 3:45 pm. This seminar is designed to answer questions and confront issues regarding some of the most common practical problems that the Office of Professional Conduct assists attorneys with on a daily basis. Learn about: how to avoid complaints; how to set up a trust account; your duty to clients; law office management; professionalism & civility; avoiding conflicts of interest; how to effectively respond to complaints. $175 before 07/09/2010, $200 after.	5 including 1 hr. Professionalism /Civility
08/13/10	**Construction Law CLE & Golf.** Homestead Resort. 8:30 am – 12:00 noon. CLE then Golf.	3
08/20/10	**Annual Securities Law Workshop.** Annual Case Law Update, State & Federal Securities Update and more.	8 approx.
09/16/10	**New Lawyer Required Ethics Program.** 8:30 am – 12:30 pm. $65. Fulfills new lawyer ethics requirement.	fulfills new lawyer ethics requirement
09/17/10	**Cyber Law Symposium.** Thanksgiving Point. Details to follow.	TBD
09/23/10	**A Basic Course on Family Law.** 4:30 – 7:45 pm.	3
11/18 & 19	**2010 Fall Forum.** Little America Hotel in Salt Lake City. Keynote: Sean Carter – Humorist at Law; Matthew Homann – LexThink; and William Chriss – "The Noble Lawyer."	TBD

For more information or to register for a CLE visit: **www.utahbar.org/cle**

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New Lawyer Training Program

Classified Ads

RATES & DEADLINES

Bar Member Rates: 1-50 words – $50 / 51-100 words – $70. Confidential box is $10 extra. Cancellations must be in writing. For information regarding classified advertising, call (801) 297-7022.

Classified Advertising Policy: It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For display advertising rates and information, please call (801)538-0526.

Utah Bar Journal and the Utah State Bar do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

CAVEAT – The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: April 1 deadline for May/June publication.) If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

FOR SALE

Law practice for sale: Practice areas include Immigration, personal injury and criminal defense with primarily Spanish-speaking clientele. Clients located in Utah County and Salt Lake City area. Law firm established 10 years ago. Revenues average about $200,000 per year. Seller may carry financing and continue working relationship to generate clients. Contact Austin, saj3orem@comcast.net.

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Mid-size AV rated Salt Lake firm seeks lateral/associate with 10 years litigation experience. Real property/mechanics' lien experience preferred. Send inquiries to Confidential Box #5, Attn: Christine Critchley, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834 or by email ccritchley@utahbar.org.

The trial firm of Stirba & Associates seeks an attorney with 2 + years of experience. Stirba & Associates specializes in section 1983 civil rights cases, working with doctors on licensing issues with DOPL, white collar criminal defense, and an array of other trial and appellate work. The successful candidate should possess strong legal research and writing skills and have a desire to work with a variety of different clientele. Pay commensurate with experience. Please send resume and cover letter to: Nathan Crane, 215 South State Street, Salt Lake City, UT 84111, ncrane@stirba.com, Fax: (801) 364-8355.

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CALIFORNIA PROBATE? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, North Salt Lake. (801) 292-6400 or (888) 348-3232. Licensed in Utah and California – over 35 years experience.

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Nancy Rosecrans
General Counsel Assistant
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E-mail: choward@utahbar.org

Marion Eldredge
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OFFICE OF
PROFESSIONAL CONDUCT
(801) 531-9110
Fax: (801) 531-9912
E-mail: opc@utahbar.org

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Senior Counsel
(801) 297-7039

Diane Akiyama
Assistant Counsel
(801) 297-7038

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Assistant Counsel
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Certificate of Compliance

Modified CLE Requirements 2009 - 2010

Recent Supreme Court rule revisions conform MCLE and the Utah State Bar's licensing periods to run concurrently. Even year compliance attorneys' cycle began January 1, 2009 and will end June 30, 2010. Odd year compliance attorneys will have a compliance cycle that will run January 1, 2010 and will end June 30, 2011.

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Date of Activity	Sponsor Name/ Program Title	Activity Type	Regular/ NLCLE Hours	Ethics Hours	Professionalism & Civility	Total Hours
		Total Hours				

1. Active Status Lawyers – Lawyers on active status who are complying in 2010 and 2011 are required to complete a minimum of 18 hours of Utah approved CLE, including a minimum of two hours of accredited ethics. One of the ethics hours shall be in the area of professionalism and civility. Please visit www.utahmcle.org for a complete explanation of the rule change and breakdown of the requirements.

2. New Lawyers Admitted in 2008 - Because of recent Supreme Court rule revisions, new lawyers who were admitted in 2008 under the Bar's full exam will need to complete a modified version of the NLCLE program as follows:

- Attend one NLCLE required ethics seminar which is offered bi-annually by the Bar. This requirement can be waived if the lawyer resides out-of-state.
- Accrue 9 credit hours of approved live NLCLE courses sponsored by the Bar. This requirement can be fulfilled by self-study credit if the lawyer resides outside of Salt Lake County.
- Accrue 9 credit hours of Utah approved CLE

3. House Counsel – House Counsel lawyers must file with the MCLE Board by July 31 of each year a Certificate of Compliance from the jurisdiction where House Counsel maintains an active license establishing that he or she has completed the hours of continuing legal education required of active attorneys in the jurisdiction where House Counsel is licensed.

EXPLANATION OF TYPE OF ACTIVITY

Rule 14-413. MCLE credit for qualified audio and video presentations; computer interactive telephonic programs; writing; lecturing; teaching; live attendance.

1. **Self-Study CLE**
   No more than nine hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit www.utahmcle.org for a complete explanation of Rule 14-413 (a), (b), (c) and (d).

2. **Live CLE Program**
   There is no restriction on the percentage of the credit hour requirement, which may be obtained through attendance at an accredited legal education program. **A minimum of nine (9) hours must be obtained through attendance at live continuing legal education programs during a reporting period.**

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION, SEE RULE 14-409 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Rule 14-414 (a) - Each lawyer subject to MCLE requirements shall file with the Board, by July 31 following the year for which the report is due, a certificate of compliance evidencing the lawyer's completion of accredited CLE courses or activities which the lawyer has completed during the applicable reporting period.
Rule 14-414 (b) – Each lawyer shall pay a filing fee in the amount of $15.00 at the time of filing the certificate of compliance. Any lawyer who fails to complete the MCLE requirement by the June 30 deadline shall be assessed a $100.00 late fee. Lawyers who fail to comply with the MCLE requirements and file within a reasonable time, as determined by the Board in its discretion, and who are subject to an administrative suspension pursuant to Rule 14-415, after the late fee has been assessed shall be assessed a $200.00 reinstatement fee, plus an additional $500.00 fee if the failure to comply is a repeat violation within the past 5 years.
Rule 14-414 (c) – Each lawyer shall maintain proof to substantiate the information provided on the certificate of compliance filed with the Board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders, or materials related to credit. The lawyer shall retain this proof for a period of four years from the end of the period for which the Certificate of Compliance is filed. Proof shall be submitted to the Board upon written request.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Rule 14-414.

A copy of the Supreme Court Board of Continuing Education Rules and Regulation may be viewed at www.utahmcle.org or http://www.utahbar.org/mcle/.

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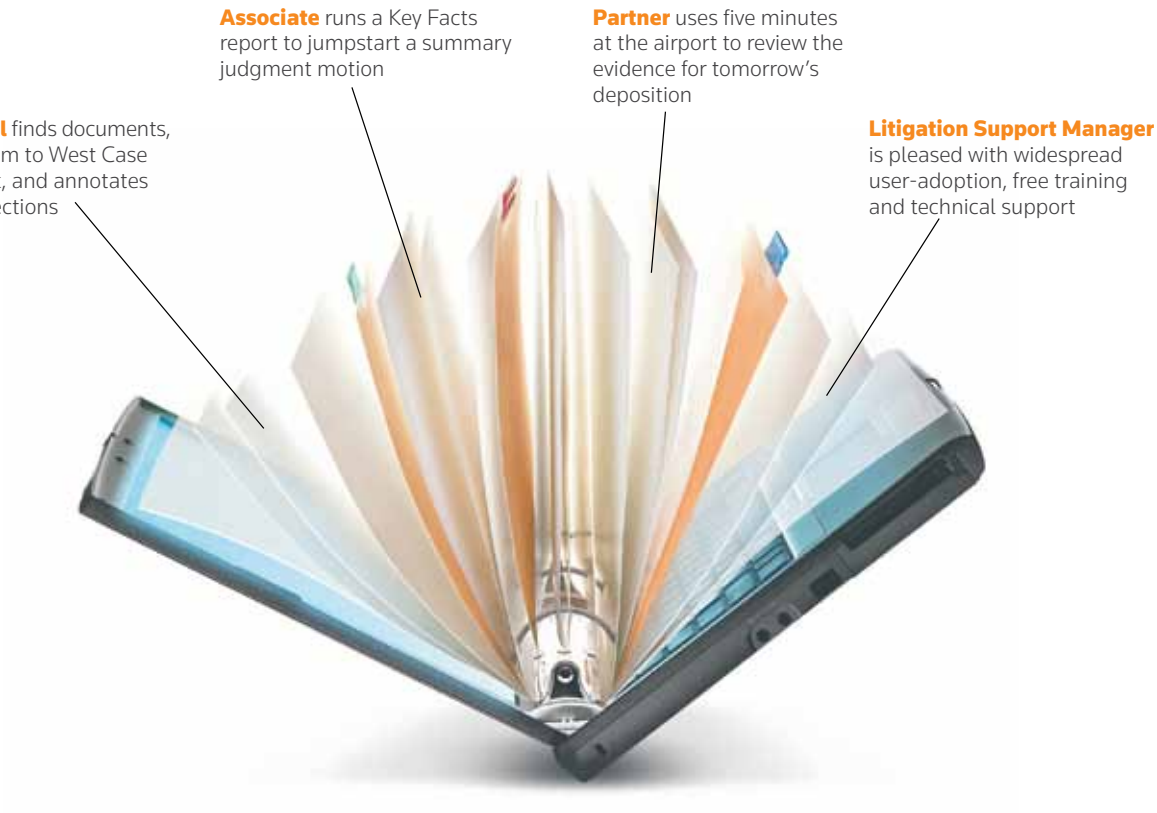

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