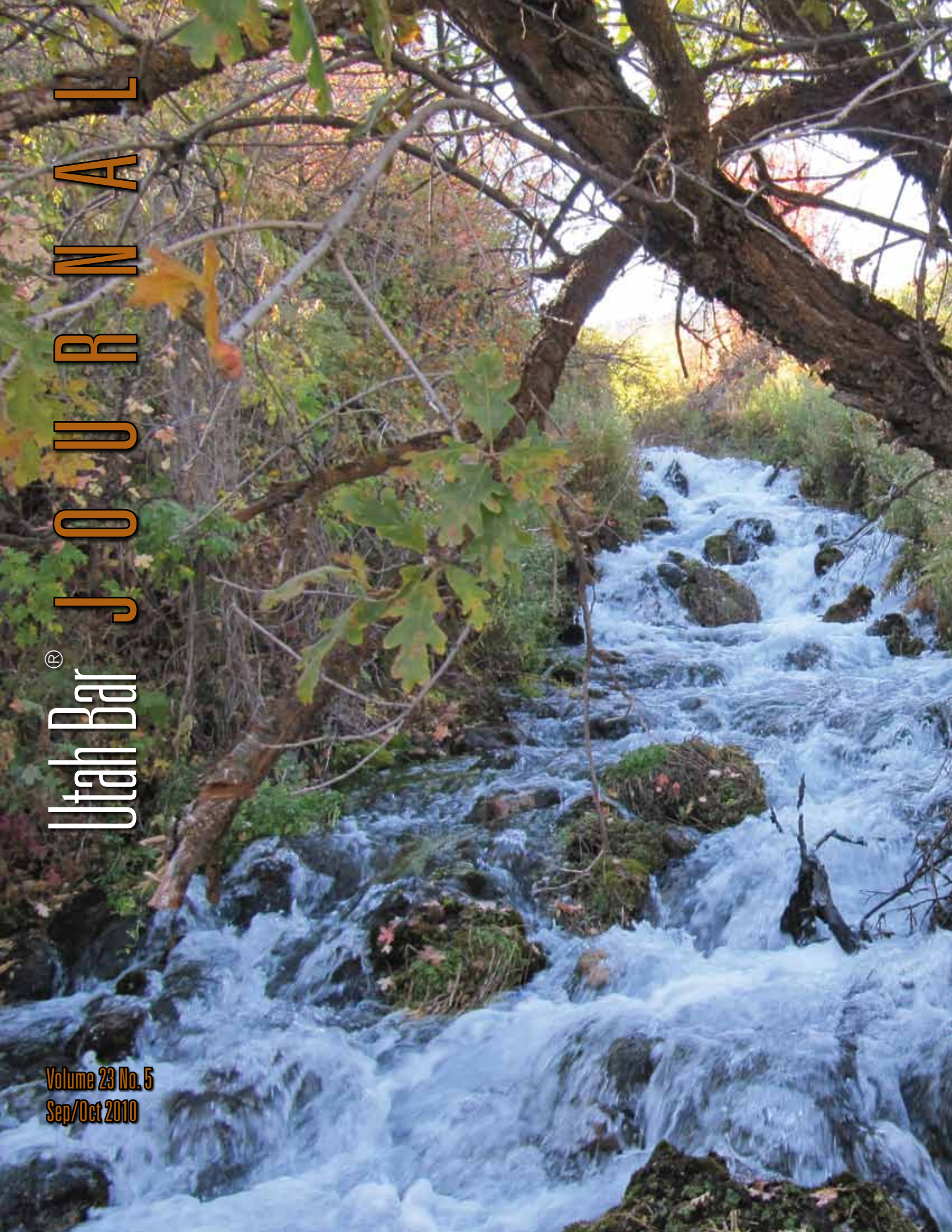

Utah Bar® JOURNAL

Volume 23 No. 5
Sep/Oct 2010

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Utah Bar® JOURNAL

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Cover Art

Cascade Springs, off the Alpine Loop, by first-time contributor, Susannah Thomas, Salt Lake City, 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.

The Utah Bar Journal

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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.*

Letters to the Editor

Dear Editor,

I was looking through the July/August 2010 edition of the *Utah Bar Journal* and noticed on page 54 that Aaron Thompson is described as a "paralegal specializing in diverse commercial insurance exposures..." Whenever I see a word like "specializing" or "specialist" in relation to the practice of law in Utah, a flag goes up, since Utah does not have a board of legal specialization, resulting in relatively few attorneys that can hold themselves out as specialists. So I have to ask: Is it okay for a paralegal in Utah to hold himself out as a specialist while the attorney for whom he works cannot? Whatever the answer may be, thanks for your good work on the *Journal*.

Glenn Halterman

Dear Editor,

I was pleased to see Professor Steve Wood's and my recent book, "Utah's Administrative Procedures Act: A 20-Year Perspective" reviewed by J. Craig Smith, an eminent water and property lawyer, in such encouraging terms in your July/August 2010 issue. It is, indeed, our intention that the book will "be a guide to an in-depth understanding of the UAPA and arguments that can be made by lawyers faced with administrative law issues." We wait with anticipation to see if Mr. Smith's prophecy, that our book "will be cited in future briefs" and appellate cases, will come true.

I write to clarify that I have never practiced tax law, contrary to what was stated by Mr. Smith. My nearly 30-year background in private practice moved from commercial litigation to securities-related transactions. More recently I have been a local government lawyer. Mr. Smith may have subconsciously thought of my brother, Gary, who is a well known tax lawyer and government relations professional.

Sincerely,
AR Thorup

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.

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Reflections on the Past, Image of the Future

by Robert L. Jeffs

The Annual Convention at Sun Valley was a refreshing pause with friends, family, and colleagues before my year of service to you as Bar President. Justice Clarence Thomas's keynote address provided a rare opportunity to glimpse the inner workings of the highest level of our third branch of government, to see the personal side of the members of the Court, their collegiality, and their ability to make decisions that guide our nation free from the political wrangling that is so pervasive in the other branches of government. At the Family Barbeque, I was able to visit with Justice Durham about the many benefits of an Annual Convention where Bar members can interact with Judges, other attorneys, and their families free from the pressures of advocacy in a particular case or transaction.

As I took the oath of office – committing my service to the Bar, as well as upholding the Constitutions of Utah and the United States of America – the weight of this undertaking hit me. Looking out at those members of the Bar, my family and friends in attendance, I could not avoid a wave of anxiety as a plague of random thoughts assaulted me. "Don't embarrass your family or firm! Make sure if your face hits the papers, it's not a mug shot! Would some unforeseen 'catastrophe' during my year as President of the Bar derail my 'best laid plans'?"

I am fortunate to take over the helm of the Utah State Bar from leaders who were not content to simply accept the status quo, nor content to oversee a static organization. Rather, those leaders recognized the need of a successful organization to continually re-evaluate itself, to evolve, to modify, and especially to improve, if the Bar is to remain relevant to its members and continue to be a meaningful resource for the profession. Past Presidents and Commissions had the foresight to chart a course three years ago to audit and evaluate the governance of the Bar. Following that audit they embarked on an in-depth evaluation of every aspect of Bar operations, resources, benefits, and programs. From the recommendations made through that process, the Bar Commission has adopted significant changes that will benefit the operation of the Bar and how it serves the membership. Those changes include: (1) a panel of senior lawyers who will participate in the screening of OPC cases for prosecution; (2) a new CLE Advisory Committee designed to improve the content quality of CLE and its availability through media such as video conferencing and new web-based programs; (3) the establishment of a Building Reserve for potential significant repairs and refurbishment; and, (4) the adoption of a plan for an updated, active communications, public education, and public relations program.

Those same leaders had the vision to completely re-engineer the way we train and transition new lawyers into the practice of law. All members of the Bar, not just the new admittees and mentors participating in the New Lawyer Training Program (Mentoring), will reap the benefits of this program with improved professionalism, proficiency, and collegiality for years to come.

Additionally, through a combination of efficient, conservative management of Bar operations and finances and the recent adoption of a necessary increase in licensing fees, the financial health of the Bar has been stabilized for the foreseeable future.

Current Bar leadership continues to look for ways the Bar can best fulfill its mission "to serve the public and legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of the law." The Vision of the Utah State Bar has been "[t]o lead society in the creation of a judicial system that is understood, valued, respected and accessible to all." Lawyers have historically filled a vital role in the formation and preservation of our democratic society and the institution of the "Rule of Law." As a profession, we have self-imposed standards of ethical conduct that exceed the demands of any other profession. Many of our members volunteer their time, contribute their income, and champion the causes of those segments of our society that are most in need.

It is disheartening to watch the erosion of

the esteem once enjoyed by our profession. Increasingly, we see the public's image of lawyers defined by the barrage of media painting lawyers in an unsavory light – the antics of the attorneys of Boston Legal, lawyer advertising that demeans the profession, and headlines of attorney theft and misconduct, to name a few. We as a profession and members of the Bar bear the lion's share of the blame for the deterioration of that image. The consequences of that deteriorating image are far-reaching. Our profession, as well as the courts, are increasingly viewed as hindering a productive, free society, as being irrelevant, antiquated or part of a system that is broken and in need of legislative control.

The only way we can hope to stem the tide of opinion and to re-establish our role in society is through a concerted effort by the Bar and each of its members. Efforts must be undertaken to temper lawyer advertising. Programs that give back to the community, like the Young Lawyer Division's Wills For Heroes, Cinderella Project, and Walk Against Violence, as well as individual and group efforts to provide pro bono legal services such as the Southern Utah Bar Association's Community Legal Center, provide a tangible, visible contribution to the community. Bar members need to be involved at every level of our political process, as state legislators, city council members, members of school boards, delegates in local and state caucuses. Bar Member participation in public education in our schools and civic organizations will provide both positive role models for our youth as well as invaluable civic education. Bar Members have much to offer the community in service, knowledge, and experience.

As a Bar we must take an active role to define the image of lawyers, to formulate the message we want the public to hear, but more importantly we must commit the time and resources necessary to take that message to the public. It is my vision, a vision I hope you share with me, that the Bar take an active role in re-forging the image of the judicial system as well as the image of the legal profession, to provide to the public a clearer understanding of the value of the services we provide to each individual and to our communities.

Utah Standards of Appellate Review – Third Edition

by Norman H. Jackson and Lisa Broderick Thornton

Editor's Note: *This article is a continuation of a series of articles that first appeared in Volume 23, No. 4 July/August 2010 of the* Utah Bar Journal.

B. Challenging Discretionary Rulings

1. Introduction

As discussed in the first article of this series, appellants often characterize issues as "findings of fact" when they are actually issues challenging discretionary rulings made by the trial court. The traditional "abuse of discretion" standard of review, as well as the discretion granted in mixed question situations, were discussed at length in *State v. Pena*, 869 P.2d 932, 936-40 (Utah 1994).

2. Traditional Abuse-of-Discretion Standard

The abuse-of-discretion standard flows from the trial court's significant role in pre-appellate litigation. The trial court has "'a great deal of latitude in determining the most fair and efficient manner to conduct court business.'" *Bodell Constr. Co. v. Robbins,* 2009 UT 52, ¶ 35, 215 P.3d 933 (quoting *Morton v. Cont'l Baking Co.*, 938 P.2d 271, 275 (Utah 1997)); *accord State v. Rhinehart*, 2006 UT App 517, ¶ 9, 153 P.3d 830. This is because the trial judge "'is in the best position to evaluate the status of his [or her] cases, as well as the attitudes, motives, and credibility of the parties.'" *Bodell*, 2009 UT 52, ¶ 35 (alteration in original) (quoting *Morton*, 938 P.2d at 275); *accord Rhinehart*, 2006 UT App 517, ¶ 25.

a. Civil Cases

Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and make that determination. *See Pena*, 869 P.2d at 939 n.5. A trial court abuses its discretion if there is "no reasonable basis for the decision." *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615 (internal quotation marks omitted); *accord Gudmundson v. Del Ozone*, 2010 UT 33, ¶ 10, 232 P.3d 1059 (stating trial court abuses its discretion if decision exceeds the limits of reasonability); *Richards v. Brown*, 2009 UT App 315, ¶ 12, 222 P.3d 69; *Williams v. Bench*, 2008 UT App 306, ¶ 7, 193 P.3d 640; *Riley v. Riley*, 2006 UT App 214, ¶ 15, 138 P.3d 84; *Lefavi v. Bertoch*, 2000 UT App 5, ¶ 16, 994 P.2d 817 (providing appellate court will affirm trial court's decision on appeal if reasonable basis exists for determination). A trial judge's determination will be reversed if the ruling "is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of discretion." *Anderson v. Thompson*, 2008 UT App 3, ¶ 11, 176 P.3d 464 (internal quotation marks omitted); *accord In re Weiskopf*, 2005 UT App 313, ¶ 1, 123 P.3d 453. An abuse of discretion may be demonstrated by showing that the trial court relied on an erroneous conclusion of law. *See Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957.

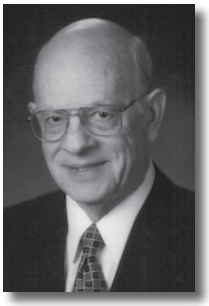
(i) Examples of Pretrial Discretion

(1) Whether the trial court properly denied a motion to change venue. *See Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 53, 233 P.3d 461; *United States Bank Nat'l Ass'n v. HMA, L.C.*, 2007 UT 40, ¶ 30, 169 P.3d 433.

(2) Whether the trial court properly granted or denied injunctive relief. *See Carrier v. Lindquist*, 2006 UT 105, ¶ 26, 37 P.3d 1112.

(3) Whether the trial court properly denied a motion to amend a pleading. *See Grantsville*, 2010 UT 38, ¶ 50; *Davencourt at*

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.

Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC, 2009 UT 65, ¶ 13, 221 P.3d 234 (regarding a motion to amend a complaint); *Red Cliffs Corner, LLC v. J.J. Hunan, Inc.*, 2009 UT App 240, ¶ 14, 219 P.3d 619.

(4) Whether the trial court properly conducted voir dire. *See Boyle v. Christensen*, 2009 UT App 241, ¶ 7, 219 P.3d 58; *Bee v. Anheuser-Busch, Inc.*, 2009 UT App 35, ¶ 8, 204 P.3d 204.

(5) Whether the trial court properly denied a motion to continue. *See In re V.L.*, 2008 UT App 88, ¶ 30, 182 P.3d 395.

(6) Whether the trial court should summarily enforce a settlement agreement. *See LD III, LLC v. BBRD, LC*, 2009 UT App 301, ¶ 13, 221 P.3d 867.

(7) Whether the trial court properly enforced a scheduling order. *See Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶ 23, 222 P.3d 775.

(8) Whether the trial court properly imposed discovery sanctions. *See Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶ 35, 215 P.3d 933; *SFR, Inc. v. Comtrol, Inc.*, 2008 UT App 31, ¶ 9, 177 P.3d 629.

(9) Whether the trial court properly ordered that a trial should be bifurcated. *See Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 9, 214 P.3d 865, *cert. denied*, 221 P.3d 837.

(10) Whether the trial court properly dismissed a case for failure to prosecute. *See Gillmor v. Blue Ledge Corp.*, 2009 UT App 230, ¶ 6, 217 P.3d 723.

(11) Whether the trial court properly refused to reconsider a nonfinal summary judgment order. *See IHC Health Servs. Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 27, 196 P.3d 588; *Chilton v. Young*, 2009 UT App 265, ¶ 4, 220 P.3d 171, *cert. denied*, 230 P.3d 127 (Utah 2010).

(12) Whether the trial court improperly failed to require the posting of a bond for a temporary restraining order. *See Kenny v. Rich*, 2008 UT App 209, ¶ 22, 186 P.3d 989.

(13) Whether the trial court properly granted or denied a motion to reconsider summary judgment. *See Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615; *Johnson v. Gold's Gym*, 2009 UT App 76, ¶ 10, 206 P.3d 302, *cert. denied*, 215 P.3d 161 (Utah 2010).

(ii) Examples of Discretion Exercised During Trial

Most examples of challenges to discretion exercised during trial arise in the evidence context, which will be covered in a later article.

(1) Whether the trial court properly determined not to award punitive damages. *See White v. Randall*, 2007 UT App 45, ¶ 23, 156 P.3d 849.

(2) Whether the trial court determined the proper amount for a punitive damage award. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 34, ¶ 12, 98 P.3d 409.

(3) Whether the trial court properly decided to award damages. *See Richards v. Brown*, 2009 UT App 315, ¶ 12, 222 P.3d 69.

(4) Whether the trial court properly ordered specific performance. *See Covey v. Covey*, 2003 UT App 380, ¶ 18, 80 P.3d 553.

(5) Whether the trial court properly fashioned an equitable remedy. *See Ockey v. Lehmer*, 2008 UT 37, ¶ 42, 189 P.3d 51; *Collard v. Nagle Constr. Inc.*, 2006 UT 72, ¶ 13, 149 P.3d 348; *In re Estate of LeFevre*, 2009 UT App 286, ¶ 10, 220 P.3d 476, *cert. denied*, 230 P.3d 127 (Utah 2010); *OLP, LLC v. Burningham*, 2008 UT App 173, ¶ 11, 185 P.3d 1138, *aff'd*, 2009 UT 75, 225 P.3d 177.

(iii) Examples of Post-Trial Discretion

(1) Whether the trial court properly denied a motion for a new trial. *See Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064; *State v. Pena*, 869 P.2d 932, 938 (Utah 1994) ("At the extreme end of the discretion spectrum would be a decision by the trial court to grant or deny a new trial based on insufficiency of the evidence."); *Wasatch Cnty. v. Okelberry*, 2010 UT App 13, ¶ 9, 226 P.3d 737; *Markham v. Bradley*, 2007 UT App 379, ¶ 14, 173 P.3d 865.

(2) Whether the trial court properly modified a final judgment. *See Dixon Bldg, LLC v. Jefferson*, 2010 UT App 34, ¶ 6, 127 P.3d 266.

(3) Whether a trial court should grant a motion for relief from a judgment. *See Davis v. Goldsworthy*, 2008 UT App 145, ¶ 10, 184 P.3d 626 (default judgment).

(4) Whether the amount of attorney fees awarded was proper. *See Kenny v. Rich*, 2008 UT App 209, ¶ 23, 186 P.3d 989; *Bonneville Distrib. Co. v. Green River Dev. Assocs., Inc.*, 2007 UT App 175, ¶ 44, 164 P.3d 433.

(5) Whether the trial court properly declined to award attorney fees. *See Fisher v. Fisher*, 2009 UT App 305, ¶ 8, 221 P.3d 845, *cert. denied,* 230 P.3d 127 (Utah 2010).

(6) Whether the trial court should award costs. *See Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶¶ 20, 78, 201 P.3d 966 (stating appellate courts review a trial court's denial of costs for abuse of discretion); *Dale K. Barker Co., PC v. Bushnell*, 2009 UT App 385, ¶ 8, 222 P.3d 1188 (same).

(7) Whether the trial court should grant, modify, or revoke probation, which is a civil proceeding. *See State v. Killpack*, 2008 UT 49, ¶ 58, 191 P.3d 17 (denying probation); *State v. Orr*, 2005 UT 92, ¶ 9, 127 P.3d 1213 (extending probation); *State v. Candedo*, 2008 UT App 4, ¶ 2, 176 P.3d 459.

(8) Whether the trial court properly determined the prevailing party. *See Crowley v. Black*, 2007 UT App 245, ¶ 6, 167 P.3d 1087.

(9) Whether trial court properly denied a motion for reconsideration. *See Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615.

b. Criminal Cases

A trial court abuses its discretion if its decision is beyond the limits of reasonableness. *See State v. Clopten*, 2009 UT 84, ¶ 6, 223 P.3d 1103; *State v. Alfatlawi*, 2006 UT App 511, ¶ 20, 153 P.3d 804. If the actions of the trial court are inherently unfair, it has also abused its discretion. *See State v. Valdez*, 2008 UT App 329, ¶ 4, 194 P.3d 195 (mem.), *cert. denied*, 200 P.3d 193 (Utah 2010). The exercise of discretion "'necessarily reflects the personal judgment of the trial court,'" and an appellate court can properly find abuse only if "'no reasonable [person] would take the view adopted by the trial court.'" *State v. Butterfield*, 2001 UT 59, ¶ 28, 27 P.3d 1133, *abrogated by State v. Clopten*, 2009 UT 84, 223 P.3d 1103 (alteration in original) (quoting *State v. Brown*, 948 P.2d 337, 340 (Utah 1997)); *accord State v. Hight*, 2008 UT App 118, ¶ 2, 182 P.3d 922.

(i) Examples of Pretrial Discretion

(1) Whether the trial court properly denied a motion to remove a juror for cause. *See State v. Kell*, 2002 UT 106, ¶ 17, 61 P.3d 1019; *State v. Lafferty*, 2001 UT 19, ¶ 58, 20 P.3d 342.

(2) Whether the trial court should grant or deny a motion to sever offenses. *See State v. Balfour*, 2008 UT App 410, ¶ 10, 198 P.3d 471.

(3) Whether a trial judge properly decided to restrain the accused during trial. *See State v. Daniels*, 2002 UT 2, ¶ 16 n.1, 40 P.3d 611 (*citing United States v. Hack*, 782 F.2d 862, 867 (10th Cir. 1986)).

(4) Whether a trial court should deny or grant a motion for change of venue. *See State v. Stubbs*, 2005 UT 65, ¶ 8, 123 P.3d 407; *State v. Widdison*, 2001 UT 60, ¶ 38, 28 P.3d 1278.

(5) Whether the trial court abused its discretion in granting or denying a continuance. *See State v. Rogers*, 2006 UT 85, ¶ 18, 151 P.3d 171; *State v. Bernards*, 2007 UT App 238, ¶ 14, 166 P.3d 626.

(6) Whether the trial court properly conducted voir dire. *See State v. Robertson*, 2005 UT App 419, ¶ 4, 122 P.3d 895 (stating appellate court will reverse lower court's decision concerning a for cause challenge only if it determines the court "has exceeded the bounds of its permitted range of discretion"); *accord State v. Wach*, 2001 UT 35, ¶ 25, 24 P.3d 948.

(7) Whether a trial court properly found that a motion to substitute counsel was timely. *See State v. Barber*, 2009 UT App 91, ¶ 53, 206 P.3d 1223.

(8) Appellate courts review "a trial court's denial of a motion to withdraw a guilty plea under an abuse of discretion standard." *State v. Moa*, 2009 UT App 231, ¶ 3, 220 P.3d 162 (internal quotation marks omitted); *see State v. Alexander*, 2009 UT App 188, ¶ 5, 214 P.3d 889.

(9) Whether the trial court properly decided "to admit or bar testimony for failure to adhere to discovery obligations." *State v. McClellan*, 2008 UT App 48, ¶ 12, 179 P.3d 825 (internal quotation marks omitted).

(10) Whether the defendant needed an interpreter for trial. *See State v. Jadama*, 2010 UT App 107, ¶ 12, 232 P.3d 545.

(11) Whether the trial court properly denied a motion to withdraw a guilty plea. *See Moa*, 2009 UT 231, ¶ 3; *Alexander*, 2009 UT App 188, ¶ 5, *State v. Lebi*, 2003 UT App 212, ¶ 7, 73 P.3d 985.

(12) Whether defendant's request to substitute one public defender for another was properly granted or denied. *See State v. Barber*, 2009 UT App 91, ¶ 17, 206 P.3d 1223 (*citing State v. Pursifell*, 746 P.2d 210, 272 (Utah Ct. App. 1987)).

(13) Whether the trial court properly accepted or rejected guilty plea. *See State v. Loveless*, 2008 UT App 336, ¶ 5, 194 P.3d 202.

(14) Whether the trial court properly declined to *sua sponte* conduct further questioning of jurors during jury selection process. *See State v. King*, 2008 UT 54, ¶ 36, 190 P.3d 1283.

(15) Whether the trial court properly denied a request for a bill of particulars. *See State v. Gulbransen*, 2005 UT 7, ¶ 26, 106 P.3d 734; *State v. Bernards*, 2007 UT App 238, ¶ 13, 166 P.3d 626.

(16) Whether the trial court properly administered its docket in refusing to hold a murder trial before the burglary and theft trial. *See State v. Rhinehart*, 2006 UT App 517, ¶ 9, 153 P.3d 830.

(ii) Examples of Discretion Exercised During Trial

Most examples of challenges to discretion exercised during trial arise in the evidence context covered in a later article.

(1) Whether to allow a victim's mother to remain in the courtroom. *See State v. Billsie*, 2006 UT 13, ¶ 11, 131 P.3d 239.

(2) Whether the trial court should grant a motion for mistrial. *See State v. Allen*, 2005 UT 11, ¶ 39, 108 P.3d 730; *State v. Redding*, 2007 UT App 350, ¶ 9, 172 P.3d 319; *State v. Mahi*, 2005 UT App 494, ¶ 10, 125 P.3d 103.

(3) Whether a prosecutor's statements during closing arguments constituted prosecutorial misconduct. *See State v. Todd*, 2007 UT App 349, ¶ 14, 173 P.3d 170.

(4) Whether the trial court should bar a witness's testimony because a party failed to comply with discovery obligations. *See State v. Perez*, 2002 UT App 211, ¶ 24, 52 P.3d 451.

(5) Whether the trial court exceeded its authority in awarding restitution. *See State v. Johnson*, 2009 UT App 382, ¶ 19, 224 P.3d 720; *State v. Larsen*, 2009 UT App 293, ¶ 4, 221 P.3d 277 (mem.); *State v. Brown*, 2009 UT App 285, ¶ 6, 221 P.3d 273.

(iii) Examples of Post-Trial Discretion

(1) Whether the trial court properly granted or denied a motion for a new trial. *See Redding*, 2007 UT App 350, ¶ 8; Todd, 2007 UT App 349, ¶ 14.

(2) Whether a sentence imposed by the trial court was proper. *See State v. Yazzi*, 2009 UT 14, ¶ 6, 203 P.3d 984; *State v. Moa*, 2009 UT App 231, ¶ 4, 220 P.3d 162; *State v. Valdez*, 2008 UT App 329, ¶ 4, 194 P.3d 195 (mem.) (considering whether imposition of consecutive sentence constituted an abuse of discretion).

(3) Whether an order of restitution was proper. *See State v. Harvell*, 2009 UT App 271, ¶ 7, 220 P.3d 174.

(4) Whether the trial court properly set aside a sentence. *See State v. Tryba*, 2000 UT App 230, ¶ 10, 8 P.3d 274.

(5) Whether the trial court properly decided to address the merits of a motion to reconsider. *See State v. Ruiz*, 2009 UT App 121, ¶ 12, 210 P.3d 955.

3. Mixed Questions

a. Introduction

As discussed in the first article of this series, the standard of review for mixed questions has been in a state of flux since *State v. Pena*, 869 P.2d 932 (Utah 1994). We note that change has occurred primarily in criminal cases. In *Pena*, the supreme court discussed the "measure of discretion" given to trial courts. 869 P.2d at 936-39. When a legal rule is to be applied to a given set of facts, or, in

other words, when the trial court must determine "whether a given set of facts comes within the reach of a given rule of law," the trial court is given a de facto grant of discretion. *Id.* at 936-37. This is the mixed question category.

The analytical complexity of standards of review is at its height when an appellate court reviews a trial court's application of a legal concept to a given set of facts. When appellate courts review mixed questions of fact and law, "the considerations that favor a more-deferential standard of review and those that favor a less-deferential standard of review compete for dominance, and the amount of deference that results will vary according to the nature of the legal concept at issue." *State v. Levin*, 2006 UT 50, ¶ 21, 144 P.3d 1096; *accord Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 16, 133 P.3d 382 (stating that the measure of discretion afforded varies according to the issue being reviewed).

With regard to many mixed questions of fact and law, it is either not possible or not wise for an appellate court to define strictly how a legal concept is to be applied to each set new of facts. *See Levin*, 2006 UT 50, ¶ 22; *Pena*, 869 P.2d at 938-40. The application of such a legal concept incorporates a *de facto* grant of discretion to the trial court, and in those cases, appellate courts review the trial court's decision on the mixed question with deference commensurate to that discretion. *See Levin*, 2006 UT 50, ¶ 22; *Pena*, 869 P.2d at 937-39; *State v. Virgin*, 2006 UT 29, ¶ 27, 137 P.3d 787.

However, with certain mixed questions "uniform application is of high importance," and policy considerations dictate that the application of the legal concept should be strictly controlled by the appellate courts. In such cases, appellate courts grant no discretion to the trial court and review the mixed question for correctness. *See Levin*, 2006 UT 50, ¶ 23; *State v. Brake*, 2004 UT 95, ¶¶ 14-15, 103 P.3d 699.

As explained in *Pena*, appellate courts "decide how much discretion to give a trial court in applying the law in a particular area by considering a number of factors pertinent to the relative expertise of appellate and trial courts in addressing those issues." *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998) (citing *Pena*, 869 P.2d at 938-39). As described in the first standard of review article, the factors have changed over the last decade, and currently consist of the following: (1) the degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court's application of the legal rule relies on "facts" observed by the trial judge, "such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts;" and (3) other "policy reasons that weigh for or against granting discretion to trial courts." *Levin*, 2006 UT 50, ¶ 25 (internal quotation marks omitted). The goal in applying the above balancing test is to allocate tasks between the trial and appellate courts based on their institutional roles and competencies. *See id.* ¶ 31.

Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and make that determination. *See State v. Pena*, 869 P.2d 932, 939-40 n.5 (Utah 1994).

b. Examples of Mixed Questions in Civil Cases

(1) Whether a party has effectuated a waiver. *See United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 21, 140 P.3d 1200; *Chen v. Stewart*, 2004 UT 82, ¶ 23, 100 P.3d 1177 ("The issues of equitable excuse and waiver are mixed questions of law and fact and we therefore grant broadened discretion to the trial court's findings."); *Kenny v. Rich*, 2008 UT App 209, ¶ 18, 186 P.3d 989 (considering waiver of arbitration).

(2) Whether a notice of commencement of work filed pursuant to the mechanic's lien statute is enforceable. *See Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 7, 219 P.3d 918 (according "only a limited decree of deference to the district court's findings").

(3) Whether the district court erred in holding party liable for forcible detainer and wrongful eviction. *See Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt., Inc.*, 2005 UT App 326, ¶ 16, 121 P.3d 24.

(4) The issue of equitable excuse is a mixed question of law and fact and appellate courts therefore grant "broadened" discretion to the trial court's findings. *See Chen v. Stewart*, 2004 UT 82, ¶ 23, 100 P.3d 1177.

(5) Whether the trial court properly granted a separate set of peremptory challenges to co-defendants. *See Bee v. Anheuser-Busch, Inc.*, 2009 UT App 35, ¶ 7, 204 P.3d 204 (providing trial court is granted limited discretion in its determination; on spectrum of discretion, running from *de novo* to broad discretion, the appropriate discretion on this issue lies close to, although probably not at, *de novo* end).

(6) Whether the trial court properly determined that justice and equity require that a territory should be disconnected from a municipality in a disconnection action. *See Bluffdale Mountain Homes, LC v. Bluffdale City*, 2007 UT 57, ¶ 58, 167 P.3d 1016 ("[W]e review a trial court's 'justice and equity' determination as a mixed question of fact and law subject to substantial deference, but not so much deference that we will reverse such a determination only if clearly erroneous.").

(7) Whether the doctrine of unjust enrichment applies. *See Richards v. Brown*, 2009 UT App 315, ¶ 11, 222 P.3d 69 (stating that because of the factual-intensive nature of equitable doctrines, appellate

courts grant trial courts "broader discretion" in applying the law to facts); *Alpha Partners, Inc. v. Transamerica Inv. Mgmt., L.L.C.*, 2006 UT App 331, ¶ 16, 153 P.3d 714.

(8) Whether the equitable estoppel doctrine applies. *See Save Beaver Cnty. v. Beaver Cnty.*, 2009 UT 8, ¶ 9, 203 P.3d 937 (stating that because estoppel is extremely fact sensitive, significant deference is granted to district court); *RJW Media, Inc. v. CIT Group/ Consumer Fin., Inc.*, 2008 UT App 476, ¶ 32, 202 P.3d 291.

(9) Whether a party was personally liable for acts in the course and scope of employment. *See Bennett v. Huish*, 2007 UT App 19, ¶ 12, 155 P.3d 917 ("[W]e may…grant a trial court discretion in its application of the law to a given fact situation." (internal quotation marks omitted) (alteration in original)).

(10) Whether a party breached a fiduciary duty. *See id.* ¶ 10 (granting "ample" discretion).

(11) Whether a given individual or association has standing to request particular judicial relief. *See Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 9, 233 P.3d 461 (providing minimal deference is given to the district court's application of facts to the law); *Cedar Mountain Env't, Inc. v. Tooele Cnty.*, 2009 UT 48, ¶ 7, 214 P.3d 95.

(12) Whether the trial court properly found the parties enjoyed a confidential relationship and because of that relationship, there existed a presumption of undue influence. *See Davis v. Young*, 2008 UT App 246, ¶ 11, 190 P.3d 23 (stating appellate court grants "some discretion" to trial court in its application of law to facts).

(13) Whether the trial court properly found the party lacked good faith in an attorney fee award. *See Burton Lumber & Hardware Co. v. Graham*, 2008 UT App 207, ¶ 11, 186 P.3d 1012; *Gallegos v. Lloyd*, 2008 UT App 40, ¶ 6, 178 P.3d 922 ("'The wide variety of circumstances that might support a finding of such intent requires that we give a trial court relatively broad discretion in concluding that bad faith has been shown.'" (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998))).

(14) Whether the trial court properly categorized devisees. *See In re Uzelac*, 2008 UT App 33, ¶ 11, 178 P.3d 347 (providing that appellate courts accord some deference to the trial court).

(15) Whether a public highway has been established under the requirements of the highway dedication statute is a mixed question of law. *See Wasatch Cnty. v. Okelberry*, 2008 UT 10, ¶ 8, 179 P.3d 768 (stating appellate court grants the district court significant discretion in its application of the facts to the statute); *Jennings Inv., LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 5, 208 P.3d 1077, *cert. denied*, 215 P.3d 161 (Utah 2009).

(16) Whether the trial court properly concluded that the party was a "creditor," that she had a "claim" to the transferred properties, whether the other party had "actual intent" to fraudulently transfer property and whether the other party was "insolvent." *See Tolle v. Fenley*, 2006 UT App 78, ¶ 11, 132 P.3d 63 (providing that appellate courts "may still grant a trial court discretion in its application of the law to a given fact situation" (internal quotation marks omitted)).

(17) Whether the district court properly rejected a change of use of a water right application when the ground for that rejection was the probability that vested water rights would be impaired

by the use proposed in the application. *See Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 15, 133 P.3d 382 (stating district court should "enjoy significant, but not broad, discretion").

(18) Whether the trial court properly found interference with a water right. *See Wayment v. Howard*, 2006 UT 56, ¶ 9, 144 P.3d 1147 (granting broad deference to the trial court because issue is extremely fact dependent).

(19) Whether party put water to beneficial use. *See Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 2004 UT 67, ¶¶ 43-44, 50, 98 P.3d 1 (stating appellate court's afford trial court "significant, though not broad discretion").

(20) Whether the trial court appropriately applied the substantial hardship exception to the advocate-witness rule. *See D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C.*, 2006 UT 62, ¶¶ 20-25, 147 P.3d 414 (providing that court should grant district court "broad discretion" in applying substantial hardship exception).

c. Examples of Mixed Questions in Criminal Cases

The first two examples below still grant some discretion to the appellate courts. However, in the remaining examples, appellate courts no longer afford any measure of discretion or deference to the trial court's application of the facts to the legal standard.

(1) Whether the trial court properly denied a motion to quash a bindover order. *See State v. Virgin*, 2006 UT 29, ¶¶ 27, 34, 137 P.3d 787 (stating that magistrates have "some discretion" in making their bindover determinations); *State v. Balfour*, 2008 UT App 410, ¶ 9, 198 P.3d 471 (stating that court affords "limited deference" to magistrate); *State v. Ingram*, 2006 UT App 237, ¶ 11, 139 P.3d 286 (affording the lower court's decision "limited deference").

(2) Whether the trial court conducting a trial inside prison deprives defendant of fair trial. *See State v. Daniels*, 2002 UT 2, ¶ 19, 40 P.3d 611 (providing that the right to a fair trial merits a "certain measure of discretion").

(3) Whether the trial court properly granted or denied a motion to suppress evidence. *See State v. Richards*, 2009 UT App 397, ¶ 7, 224 P.3d 733; *State v. Morris*, 2009 UT App 181, ¶ 5, 214 P.3d 883 (providing that a trial court's decision to deny a motion to suppress evidence presents a mixed question of law and fact: appellate court reviews factual findings for clear error and its legal conclusion, including its application of the legal standard to the facts, non-deferentially for correctness); *State v. Wilkinson*, 2008 UT App 395, ¶ 5, 197 P.3d 96 (providing that challenges to suppression rulings present questions of law reviewed for correctness without deference to trial court's application of law to facts); *State v. Baker*, 2008 UT App 115, ¶ 8, 182 P.3d 935; *State v. Martinez*, 2008 UT App 90, ¶ 3, 182 P.3d 385 (providing that appellate courts give no deference to trial court's application of law to the facts); *State v. Weaver*, 2007 UT App 292, ¶ 8, 169 P.3d 760 (stating that suppression issue presents mixed question of law and fact); *State v. Adams*, 2007 UT App 117, ¶ 7, 158 P.3d 1134 (stating that appellate courts review a ruling on a motion to suppress for correctness, without deference to the district court's application of the law to the facts).

(4) Whether the trial court erred in trying a defendant *in abstentia* is a mixed question of law and fact. *See State v. Pando*, 2005 UT App 384, ¶ 13, 122 P.3d 672 (considering whether the trial court properly conducted the inquiry regarding the voluntariness of a defendant's absence is a question of law reviewed for correctness and whether the defendant was voluntarily absent is a question of fact).

(5) Whether the trial court erred in concluding a defendant had not been entrapped presents a mixed question of fact and law. *See State v. Haltom*, 2005 UT App 348, ¶ 7, 121 P.3d 42 ("Although we review factual findings for clear error and legal conclusions for correctness, due to the factually sensitive nature of entrapment cases we affirm the trial court's decision 'unless we can hold, based on the given facts, that reasonable minds cannot differ as to whether entrapment occurred.' Only when reasonable minds cannot differ can we find entrapments as a matter of law." (citation omitted)).

(6) Whether the defendant's due process rights were violated. *See State v. Hales*, 2007 UT 14, ¶ 35, 152 P.3d 321 (stating that due process claims presents a mixed question of fact and law that appellate courts review *de novo* for correctness; but the courts "incorporate a clearly erroneous standard for the necessary subsidiary factual determinations" (citation omitted)).

(7) Whether the trial court properly refused to disqualify an attorney is a mixed question of law and fact. *See State v. Balfour*, 2008 UT App 410, ¶ 11, 198 P.3d 471 (stating appellate court reviews factual conclusions under clear error standard and legal interpretation of particular ethical norms under a *de novo* standard when that interpretation implicates important constitutional rights).

(8) In cases where the trial court has already ruled on an ineffective assistance of counsel claim, "'the questions of [counsel's] performance and prejudice are mixed questions of law and fact.'" *State v. Moore*, 2009 UT App 386, ¶ 7, 223 P.3d 1137 (quoting *State v. Tennyson*, 850 P.2d 461, 466 (Utah Ct. App. 1993)). When the trial court has already ruled on the issue, appellate courts review the trial court's application the law to the facts *de novo*, with no deference to the lower court's conclusions. *See State v. McClellan*, 2009 UT 50, ¶ 17, 216 P.3d 956 (providing that in determining ineffective assistance of counsel claims, appellate courts review trial court's purely factual findings for clear error, but review application of law to facts for correctness); *accord Menzies v. Galetka*, 2006

UT 81, ¶¶ 56, 58, 150 P.3d 480 (reviewing ineffective assistance of counsel issue under three *Levin* factors, appellate court determined that it should review for correctness the trial court's application of the law to the facts); *State v. Mecham*, 2000 UT App 247, ¶ 19, 9 P.3d 777. However, ineffective assistance of counsel arguments raised for the first time on appeal are questions of law reviewed for correctness. *See State v. Vos*, 2007 UT App 215, ¶ 9, 164 P.3d 1258.

(9) Whether the trial court properly found a defendant voluntarily, knowingly, and intelligently waived the right to counsel is a mixed question of law and fact. *See State v. Cabrera*, 2007 UT App 194, ¶ 7, 163 P.3d 707 ("While [appellate courts] review questions of law for correctness, a trial court's factual findings may be reversed on appeal only if they are clearly erroneous." (citation omitted)); *State v. Pedockie*, 2006 UT 28, ¶ 23, 137 P.3d 716; *accord State v. Houston*, 2006 UT App 437, ¶ 4, 147 P.3d 543.

(10) Whether statements were made in the course of plea discussions. *See W. Valley City v. Fieeiki*, 2007 UT App 62, ¶ 17, 157 P.3d 802 (applying the three *Levin* factors, appellate court will "defer to the trial court's factual determinations but grant no deference to the trial court's ultimate conclusion").

(11) Whether there was consent to search. *See State v. Tripp*, 2010 UT 9, ¶ 36, 227 P.3d 1251; *State v. Hansen*, 2002 UT 125, ¶ 26, 63 P.3d 650 (providing that appellate courts afford little discretion to the district court because there must be state wide standards that guide law enforcement and prosecutorial officials; these standards ensure different trial judges will reach the same legal conclusion in cases that have little factual differences).

(12) Whether the trial court properly determined evidence was obtained as a result of an illegal search and seizure. *See State v. Brake*, 2004 UT 95, ¶ 15, 103 P.3d 699 (abandoning "the standard which extended 'some deference' to the application of law to the underlying factual findings in search and seizure cases in favor of non-deferential review"); *State v. Lowe*, 2010 UT App 156, ¶ 5, 234 P.3d 160; *State v. Harding*, 2010 UT App 8, ¶ 5, 223 P.3d 1148 ("We afford little discretion to the district court's determination in cases involving the legality of search and seizure."); *State v. Hogue*, 2007 UT App 86, ¶ 5, 157 P.3d 826; *State v. Naranjo*, 2005 UT App 311, ¶ 10, 118 P.3d 285 (stating that in search and seizure case, the ultimate question of whether a particular set of facts satisfied a given legal standard is a mixed question of law and fact; however, because courts need to ensure consistent disposition of similar cases, we review search and seizure issues for correctness).

(13) Whether a trial court properly determined that a person was or was not subjected to a custodial interrogation for the purpose of Fifth Amendment *Miranda* protections. *See State v. Levin*, 2006 UT 50, ¶ 4, 144 P.3d 1096 (providing that need for uniformity in custodial interrogation standard warrants nondeferential appellate review).

(14) Whether there was reasonable suspicion. *See State v. Chism*, 2005 UT App 41, ¶¶ 8-9, 107 P.3d 706 (stating that non-deferential or correctness standard applied when determining whether a given set of facts comes within the reach of a given rule of law).

C. Challenging Conclusions of Law

1. Introduction

Legal determinations, sometimes labeled "questions of law" "legal conclusions," "conclusions of law," "ultimate facts," or "ultimate determinations," are defined as "'those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances.'" *Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 14, 133 P.3d 382 (quoting *State v. Pena*, 869 P.2d 932, 935 (Utah 1994)); *accord State v. Palmer*, 2009 UT 55, ¶ 16, 220 P.3d 1198. "[A]ppellate review of a trial court's determination of the law is usually characterized by the term 'correctness.'" *Pena* 869 P.2d at 936; *accord State v. Jackson*, 2010 UT App 136, ¶ 9, – P.3d –; *Call v. Keiter*, 2010 UT App 55, ¶ 14, 230 P.3d 128.

"Utah case law teaches that 'correctness' means the appellate court

decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *Pena*, 869 P.2d at 935; *accord Clark v. Smay*, 2005 UT App 36, ¶ 7, 110 P.3d 140. Thus, the broadest scope of judicial review extends to questions of law. This is because "'appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction.'" *Levin*, 2006 UT 50, ¶ 20 n.18, (quoting *Pena*, 869 P.2d at 936) (citing Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 779 (1957)); *accord Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177; *State v. Daniels*, 2002 UT 2, ¶ 18, 40 P.3d 611.

It is important for the appellate advocate to be able to properly identify issues as legal rather than factual or discretionary so as to apply the appropriate standard of review. *See Drake v. Indus. Comm'n*, 939 P.2d 177, 181 (Utah 1997) ("Essential to any determination of the appropriate standard of review for an issue on appeal is the characterization of that issue as either a question of fact, a question of law, or a mixed question requiring application of the law to the facts."). Often, trial courts will label an issue as a factual finding when it is actually a legal conclusion. The appellate courts will use the standard of review that is in accord with the substance of the issue and not the title given it by the trial court. *See Russell v. Thomas*, 2000 UT App 82, ¶ 6 n.6, 999 P.2d 1244 (stating appellate courts disregard labels on factual findings and legal conclusions and look to substance).

Further, appellate advocates should also be aware of court opinions recognizing that a determination is often the sum of several rulings, each of which may be reviewed under a separate standard of review. *See Brighton Corp. v. Ward*, 2001 UT App 236, ¶ 14, 31 P.3d 594 (stating whether contract exists "may embody several subsidiary rulings" (quoting *Cal Wadsworth Constr. v. St. George*, 865 P.2d 1373, 1375 (Utah Ct. App. 1993))).

Thus, counsel should carefully examine an issue and explore all possible standards of review, rather than assuming only one standard applies. If counsel properly characterizes issues as legal, factual, or discretionary and in turn selects the proper standards of review, his or her brief and oral argument will be more effective, resulting in better judicial decisions.

2. Areas of Application

Appellate courts typically apply the correction-of-error standard of review to the following general categories:

(a) Challenges to the interpretation of the United States and Utah Constitutions:

Interpreting the constitution presents questions of law that appellate courts review for correctness, and appellate courts afford no deference to the lower court's interpretation. *See, e.g., State v. Poole*, 2010 UT 25, ¶ 8, 232 P.3d 519 (interpreting state and federal constitutions); *State v. Lane*, 2009 UT 35, ¶ 14, 212 P.3d 529 (interpreting the Utah Constitution); *Ford v. State*, 2008 UT 66, ¶¶ 6, 18, 199 P.3d 892 (interpreting state and federal constitutional claims); *Grand Cnty. v. Emery Cnty.*, 2002 UT 57, ¶ 6, 52 P.3d 1148 (interpreting the Utah Constitution); *State v. Casey*, 2002 UT 29, ¶ 19, 44 P.3d 756 (interpreting the Utah Constitution); *Hatch v. Davis*, 2004 UT App 378, ¶ 19, 102 P.3d 774 (interpreting the federal constitution).

(b) Challenges to the constitutionality of statutes and ordinances:

A trial court's conclusion that a statute or ordinance is constitutional presents a question of law reviewed under a correction-of-error standard. *See State v. Drej*, 2010 UT 35, ¶¶ 9-10, 233 P.3d 476 (special mitigation statute); *State v. Ross*, 2007 UT 89, ¶¶ 17-18, 174 P.3d 628 (death penalty statute); *State v. Green*, 2004 UT 76, ¶ 42, 99 P.3d 820; *Midvale City Corp. v. Haltom*, 2003 UT 26, ¶¶ 10-11, 73 P.3d 334 (business ordinance); *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 7, 67 P.3d 436; *Whaley v. Park City Mun. Corp.*, 2008 UT App 234, ¶ 8, 190 P.3d 1 (sound ordinance); *State v. Tenorio*, 2007 UT App 92, ¶ 5, 156 P.3d 854; *Provo City v. Whatcott*, 2000 UT App 86, ¶ 5, 1 P.3d 1113. A statute is afforded a presumption of validity, and any reasonable doubt is resolved in favor of constitutionality. *See W. Jordan City v. Goodman*, 2006 UT 27, ¶ 9, 135 P.3d 874; *State v. Willis*, 2004 UT 93, ¶ 4, 100 P.3d 1218; *State v. Morrison*, 2001 UT 73, ¶ 5, 31 P.3d 547; *Clearfield City v. Hoyer*, 2008 UT App 226, ¶ 6, 189 P.3d 94.

(c) Challenges to the constitutionality of rules:

A trial court's ruling on the constitutionality of a rule is reviewed for correctness. *See In re B.A.P.*, 2006 UT 68, ¶ 6, 148 P.3d 934.

(d) Challenges to the trial court's interpretation of statutes, rules, and ordinances:

The trial court's interpretation of statutes, rules and ordinances is a question of law reviewed for correctness. *See e.g., Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 10, 127 P.3d 256 (interpretation of statute); *Arbogast Family Trust v. River Crossing, LLC*, 2010 UT 40, ¶ 10, – P.3d – (interpretation of rule of procedure); *State v. Rodrigues*, 2009 UT 62, ¶ 11, 218 P.3d 610; (interpretation of rule of procedure); *N.A.R., Inc. v. Walker*, 2001 UT 98, ¶ 4, 37 P.3d 1068 (interpretation of judicial code); *Estate of Higley v. Dep't. of Transp.*, 2010 UT App 143, ¶ 5, – P.3d – (interpretation of statute); *Haynes Land & Livestock Co. v. Jacob Family Chalk Creek, LLC*, 2010 UT App 112, ¶ 9, 233 P.3d 529 (interpretation of statute); *State v. Barney*, 2008 UT App 250, ¶ 5, 189 P.3d 1277 (interpretation of statute); State v. Rowley, 2008 UT App

233, ¶ 8, 189 P.3d 109 (interpretation of statute).

A question of legislative intent associated with statutory interpretation is a matter of law, not of fact. *See Archuleta v. St. Mark's Hosp.*, Nos. 20080580, 20080572, 2010 Utah LEXIS 70, at *3-4 (Utah May 14, 2010); *State v. Steele*, 2010 UT App 185, ¶¶ 12, 16, – P.3d –. Whether a statute applies to a particular set of facts is a question of law. *See Slisze v. Stanley-Bostitch*, 1999 UT 20, ¶ 7, 979 P.2d 317 (Utah 1999); *State v. Pena*, 869 P.2d 932, 938 (Utah 1994).

(e) Challenges to the trial court's interpretation of common law:

Questions of common law interpretation are questions of law which the appellate court is well-suited to address, and thus gives no deference to the lower court. *See Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 46, 221 P.3d 256; *Ellis v. Estate of Ellis*, 2007 UT 77, ¶ 6, 169 P.3d 441; *State ex rel. Office of Recovery Serv. v. Streight*, 2004 UT 88, ¶ 6, 108 P.3d 690 ("'We consider the trial court's interpretation of binding case law as presenting a question of law and review the trial court's interpretation of that law for correctness.'" (quoting *State v. Richardson*, 843 P.2d 517, 518 (Utah Ct. App. 1992))); *State v. Steele*, 2010 UT App 185, ¶ 12; *Handy v. U.S. Bank*, 2008 UT App 9, ¶ 11, 177 P.3d 80.

(f) Challenges to the court of appeals' interpretation of a prior judicial decision, whether one of its own or one of another court. *See Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 131, 82 P.3d 1076.

3. Challenging Conclusions of Law in Civil Cases

a. Correction-of-Error Standard

A trial court's conclusions of law in civil cases are reviewed for correctness. *See Black v. Allstate Ins. Co.*, 2004 UT 66, ¶ 9, 100 P.3d 1163; *Kendall Ins., Inc., v. R & R Group, Inc.*, 2008 UT App 235, ¶ 8, 189 P.3d 114. This standard of review has also been referred to as a "correction-of-error standard." *Lunt v. Lance*, 2008 UT App 192, ¶ 10, 186 P.3d 978; *SRF, Inc. v. Comtrol, Inc.*, 2008 UT App 31, ¶ 10, 177 P.3d 629; *Crowley v. Porter*, 2005 UT App 518, ¶ 31, 127 P.3d 1224. As used by Utah's appellate courts, "correctness" means that no particular deference is given to the trial court's ruling on questions of law. *See Ellsworth Paulsen Constr. Co. v. 51-SPR- L.L.C.*, 2008 UT 28, ¶ 12, 183 P.3d 248; *DCH Holdings, LLC v. Nielsen*, 2009 UT App 269, ¶ 7, 220 P.3d 178.

b. Examples of Conclusions of Law

(1) Whether the trial court used the proper measure to calculate damages. *See Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2009 UT 81, ¶ 18, 222 P.3d 1164; *Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶ 25, 96 P.3d 893; *Richards v. Brown*,

2009 UT App 315, ¶ 47, 222 P.3d 69.

(2) Whether the trial court applied the correct interest rate. *See Knight Adjustment Bureau v. Lewis*, 2010 UT App 40, ¶ 2, 228 P.3d 754 (mem.); *Ron Case Roofing & Asphalt Paving, L.L.C. v. Sturzenegger*, 2007 UT App 100, ¶ 7, 158 P.3d 556.

(3) Whether a duty of care is owed. *See Lopez v. United Auto. Ins. Co.*, 2009 UT App 389, ¶ 8, 222 P.3d 1192 (negligence).

(4) Whether a party is entitled to summary judgment. *See Salt Lake Cnty. v. Holliday Water Co.*, 2010 UT 45, ¶ 14, – P.3d –.

(5) Whether a plaintiff is entitled to prejudgment interest. *See Lefavi v. Bertoch*, 2000 UT App 5, ¶ 22, 994 P.2d 817.

(6) Whether a court has personal or subject matter jurisdiction. *See Xiao Yang Li v. Univ. of Utah*, 2006 UT 57, ¶ 7, 144 P.3d 1142 (subject matter jurisdiction); *Hicks v. UBS Fin. Servs., Inc.*, 2010 UT App 26, ¶ 10, 226 P.3d 762 (subject matter jurisdiction).

(7) Whether a party is entitled to attorney fees. *See IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 38, 196 P.3d 588; *J. Pochynok Co., Inc. v. Smedsrud*, 2005 UT 39, ¶ 8, 116 P.3d 353; *Dale K. Barker Co., PC v. Bushnell & Bushnet, PC*, 2009 UT App 385, ¶ 3, 222 P.3d 1188; *Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶ 9, 222 P.3d 775; *Pugh v. N. Am. Warranty Servs., Inc.*, 2000 UT App 121, ¶ 13, 1 P.3d 570.

(8) Whether a lien constitutes a wrongful lien for purposes of the Wrongful Lien Injunction Act. *See Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 8, 219 P.3d 918.

(9) Whether the trial court erred in setting aside a sheriff's sale of property after the time period for redemption had expired. *See Pyper v. Bond*, 2009 UT App 331, ¶ 9, 224 P.3d 713.

(10) Whether a contract exists. *See Uhrhahn Constr. & Design, Inc. v. Hopkins*, 2008 UT App 41, ¶ 11, 179 P.3d 808; *NexMed, Inc. v. Clealon Mann*, 2005 UT App 431, ¶ 10, 124 P.3d 252.

(11) Whether the trial court correctly interpreted a contract. *See Richardson v. Hart*, 2009 UT App 387, ¶ 6, 223 P.3d 484; *Deer Crest Assocs. I, LC v. Silver Creek Dev. Group, LLC*, 2009 UT App 356, ¶ 6, 222 P.3d 1184; *Little Caesar Enters., Inc. v. Bell Canyon Shopping Ctr., L.C.*, 2000 UT App 291, ¶ 10, 13 P.3d 600.

(12) Whether a contractual term or provision is ambiguous on its face. *See Daines v. Vincent*, 2008 UT 51, ¶ 25, 190 P.3d 1269; *S. Ridge Homeowners' Ass'n v. Brown*, 2010 UT App 23, ¶ 1, 226 P.3d 758 (mem.) (stating whether ambiguity exists in contract is a question of law); *Park v. Stanford*, 2009 UT App 307, ¶ 10, 221 P.3d 877.

(13) Whether the trial judge should have recused himself. *See Lunt v. Lance*, 2008 UT App 192, ¶ 7, 186 P.3d 978.

(14) Whether *res judicata* bars collateral attack is a question of law reviewed for correctness. *See PGM, Inc. v. Westchester Inv. Partners, Ltd.*, 2000 UT App 20, ¶ 3, 995 P.2d 1252.

(15) Whether trial court properly denied a petition for post-conviction relief. *See Gardner v. State*, 2010 UT 46, ¶ 55, – P.3d –.

(16) Whether the statute of frauds was applicable. *See LD III, LLC v. BBRD, LC*, 2009 UT App 301, ¶ 13, 221 P.3d 867; *Bennett v. Huish*, 2007 UT App 19, ¶ 9, 155 P.3d 917.

(17) Whether an equitable remedy was available. *See In re Estate of LeFevre*, 2009 UT App 286, ¶ 10, 220 P.3d 476.

(18) Whether an attorney-client privilege exists. *See Moler v. CW Mgmt., Corp.*, 2008 UT 46, ¶ 7, 190 P.3d 1250.

(19) Whether the trial court properly interpreted a rule in the Utah Code of Judicial Administration. *See N.A.R., Inc., v. Farr*, 2000 UT App 62, ¶ 5, 997 P.2d 343.

(20) A certified question from the federal court presents a question of law. *See Egbert v. Nissan Motor Co.*, 2010 UT 8, ¶ 8, 228 P.3d 737.

(21) Whether an agent's knowledge should be imputed to a principal. *See Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, ¶ 14, 61 P.3d 1009.

(22) Whether the supreme court has jurisdiction to hear an appeal. *See Miller v. USAA Cas. Ins. Co.,* 2002 UT 6, ¶ 18, 44 P.3d 663.

(23) Whether the discovery rule and the statute of limitations apply. *See Ockey v. Lehmer*, 2008 UT 37, ¶ 34, 189 P.3d 51; *Colosimo v. Roman Catholic Bishop*, 2007 UT 25, ¶ 11, 156 P.3d 806.

(24) Whether a party has proven a *prima facie* case. *See Handy v. U.S. Bank*, 2008 UT App 9, ¶ 12, 177 P.3d 80.

(25) Whether a denial of a motion to dismiss based on governmental immunity was proper. *See Wheeler v. McPherson*, 2002 UT 16, ¶ 9, 40 P.3d 632; *Heughs Land, L.L.C. v. Holladay City*, 2005 UT App 202, ¶ 5, 113 P.3d 1024.

(26) The application of a statute of limitations is a question of law. *See Arnold v. Grigsby*, 2009 UT 88, ¶ 7, 225 P.3d 192; *Call v. Keiter*, 2010 UT App 55, ¶¶ 14-15, 230 P.3d 128.

(27) Whether the trial court's refusal to give a jury instruction is proper. *See Eddy v. Albertson's Inc.*, 2001 UT 88, ¶ 17, 34 P.3d 781; *Chapman v. Uintah Cnty.*, 2003 UT App 383, ¶ 6, 81 P.3d 761.

(28) Whether the jury instruction correctly stated the law. *See*

Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, ¶ 22, 221 P.3d 256; *see also Stevensen 3rd E., LC v. Watts*, 2009 UT App 137, ¶ 24, 210 P.3d 977.

(29) Whether a statute operates retroactively. *See Goebel v. Salt Lake City S. R.R. Co.*, 2004 UT 80, ¶ 36, 104 P.3d 1185; *Soriano v. Graul*, 2008 UT App 188, ¶ 4, 186 P.3d 960.

(30) Whether the trial court correctly determined that an agreement constituted an arbitration agreement. *See Kenny v. Rich*, 2008 UT App 209, ¶ 19, 186 P.3d 989.

(31) Whether a party has standing. *See Stocks v. United States Fid. & Guar. Co.*, 2000 UT App 139, ¶ 9, 3 P.3d 722.

(32) Whether *res judicata* or claim preclusion bars an action. *See Gillmore v. Family Link, LLC*, 2010 UT App 2, ¶ 9, 224 P.3d 741.

(33) Whether the trial court properly decided a motion to compel arbitration. *See Cent. Florida Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 10, 40 P.3d 599; *MacDonald Redhawk Invs. v. Ridges at Redhawk, L.L.C.*, 2006 UT App 491, ¶ 2, 153 P.3d 787.

(34) Whether a contract is unconscionable. *See Knight Adjustment Bureau v. Lewis*, 2010 UT App 40, ¶ 6, 228 P.3d 754 (mem.).

(35) Whether the trial court properly interpreted a prior judicial decision. *See Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 131, 82 P.3d 1076.

4. Challenging Conclusions of Law in Criminal Cases

a. Correction-of-Error Standard

A trial court's conclusions of law in criminal cases are reviewed for correctness. *See State v. Tiedemann*, 2007 UT 49, ¶ 11, 162 P.3d 1106; *State v. Lowe*, 2010 UT App 156, ¶ 5, 234 P.3d 156; *State v. Perkins*, 2009 UT App 390, ¶ 8, 222 P.3d 1198. "Correctness" means that an "appellate court decides the matter for itself and does not defer in any degree to the trial court's determination because it is the primary role of the appellate courts to say what the law is and ensure that it is uniform throughout the jurisdiction." *State v. Daniels*, 2002 UT 2, ¶ 18, 40 P.3d 611 (citing *State v. Pena*, 869 P.2d 932, 935 (Utah 1994)).

b. Examples of Conclusions of Law

(1) Whether the trial court strictly complied with the constitutional and procedural requirements for entry of a guilty plea. *See State v. Alexander*, 2009 UT App 188, ¶ 5, 214 P.3d 889; *State v. Gibson*, 2009 UT App 108, ¶ 8, 208 P.3d 543; *State v. Lehi*, 2003 UT App 212, ¶ 7, 73 P.3d 985.

(2) Whether a defendant was properly served. *See State v. Jensen*, 2003 UT App 273, ¶ 6, 76 P.3d 188.

(3) Whether a probable cause statement adequately notified defendant of the factual allegations supporting the criminal charges. *See State v. Maese*, 2010 UT App 106, ¶ 6, – P.3d –;

State v. Norcutt, 2006 UT App 269, ¶ 8, 139 P.3d 1066.

(4) Whether a jury instruction correctly stated the law. *See State v. Housekeeper*, 2002 UT 118, ¶ 11, 62 P.3d 444; *see also Maese*, 2010 UT App 106, ¶ 7; *State v. Marchet*, 2009 UT App 262, ¶ 17, 219 P.3d 75; *State v. Weisberg*, 2002 UT App 434, ¶ 12, 62 P.3d 457; *State v. Tuckett*, 2000 UT App 295, ¶ 7, 13 P.3d 1060 (considering whether the trial court properly instructed the jury on the law of self-defense).

(5) Whether the trial court properly refused to give requested instructions to a jury. *See State v. Gallegos*, 2009 UT 42, ¶ 10, 220 P.3d 136; *State v. Bluff*, 2002 UT 66, ¶ 21, 52 P.3d 1210; *State v. White*, 2009 UT App 81, ¶ 16, 206 P.3d 646; *Chapman v. Uintah Cnty.*, 2003 UT App 383, ¶ 6, 81 P.3d 761; *State v. Stringham*, 2001 UT App 13, ¶ 17, 17 P.3d 1153.

(6) Whether the State was entitled to rescind a plea agreement. *See Stringham*, 2001 UT App 13, ¶ 10.

(7) Whether the trial court properly decided to grant or deny a motion to dismiss. *See State v. Bushman*, 2010 UT App 120, ¶ 6, 231 P.3d 833; *State v. Barnert*, 2004 UT App 321, ¶ 6, 100 P.3d 221; *State v. Horrocks*, 2001 UT App 4, ¶ 10, 17 P.3d 1145; *State v. Pierson*, 2000 UT App 274, ¶ 7, 12 P.3d 103.

(8) Whether one crime is a lesser included offense of another. *See Pierson*, 2000 UT App 274, ¶ 7.

(9) Whether the trial court erred in sentencing the defendant for third degree felonies. *See State v. Kenison*, 2000 UT App 322, ¶ 7, 14 P.3d 129.

(10) "Whether the State's destruction of potentially exculpatory evidence violated due process." *State v. Jackson*, 2010 UT App 136, ¶ 10, – P.3d –; *accord State v. Tiedemann*, 2007 UT 49, ¶ 12, 162 P.3d 1106; *see also State v. Mejia*, 2007 UT App 337, ¶ 8, 172 P.3d 315 (considering whether due process rights have been violated).

(11) Whether the trial court properly applied the *Shondel* doctrine and sentenced the defendant under a provision carrying a lesser penalty. *See State v. Green*, 2000 UT App 33, ¶ 6, 995 P.2d 1250.

(12) Whether counsel provided ineffective assistance of counsel, when the issue is raised for the first time on appeal. *See State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162; *State v. Walker*, 2010 UT App 157, ¶ 13, – P.3d –; *State v. Marchet*, 2009 UT App 262, ¶ 18, 219 P.3d 75; *State v. Perry*, 2009 UT App 51, ¶ 9, 204 P.3d 880; *State v. Chavez-Espinoza*, 2008 UT App 191, ¶ 8, 186 P.3d 1023.

(13) Whether court properly denied right to confront and cross-examine witnesses. *See State v. Gonzales*, 2005 UT 72, ¶ 47, 125 P.3d 878; *State v. Clark*, 2009 UT App 252, ¶ 10, 219 P.3d 631.

(14) Whether a trial court properly dismissed a jury and held a bench trial in absentia. *See State v. Boyles*, 2009 UT App 23, ¶ 4, 204 P.3d 184; *Orem City v. Bovo*, 2003 UT App 286, ¶ 6, 76 P.3d 1170.

(15) Whether the trial court "properly complied with a legal duty to resolve on the record the accuracy of contested information in sentencing reports." *State v. Scott*, 2008 UT App 68, ¶ 5, 180 P.3d 774 (internal quotation marks omitted); *State v. Veteto*, 2000 UT 62, ¶ 13, 6 P.3d 1133; *accord State v. Maroney*, 2004 UT App 206, ¶ 23, 94 P.3d 295.

(16) Whether an appellate court has jurisdiction to hear a criminal appeal. *See State v. Martin*, 2009 UT App 43, ¶ 8, 204 P.3d 875 (subject matter jurisdiction); *State v. Tenorio*, 2007 UT App 92, ¶ 5, 156 P.3d 854; *State v. Norris*, 2002 UT App 305, ¶ 5, 57 P.3d 238.

(17) Whether a district court has jurisdiction. *See Norris*, 2007 UT 6, ¶ 10; *State v. Reber*, 2007 UT 36, ¶ 8, 171 P.3d 406; *Salt Lake City v. Weiner*, 2009 UT App 249, ¶ 5, 219 P.3d 72.

(18) Whether an area is protected curtilage. *See State v. Perkins*, 2009 UT App 390, ¶ 17, 222 P.3d 1198.

(19) Whether a defendant's double jeopardy protections were violated. *See State v. Kell*, 2002 UT 106, ¶ 61, 61 P.3d 1019; *State v. Escamilla-Hernandez*, 2008 UT App 419, ¶ 7, 198 P.3d 997.

(20) Whether defendant was denied a fair trial because of the trial court's delivery of modified *Allen* instruction after the jury was deadlocked. *See State v. Harry*, 2008 UT App 224, ¶ 5, 189 P.3d 98.

(21) Whether the trial court should have merged defendant's kidnapping and assault charges. *See State v. Wareham*, 2006 UT App 327, ¶ 12, 143 P.3d 302; *State v. Diaz*, 2002 UT App 288, ¶ 10, 55 P.3d 1131.

(22) Whether the presiding judge improperly failed to remove the trial court judge after trial court judge refused to recuse himself. *See Wareham*, 2006 UT App 327, ¶ 13.

(23) Whether the trial court applied the proper legal standards in denying a motion for new trial. *See State v. Wengreen*, 2007 UT App 264, ¶ 12, 167 P.3d 516; *State v. Mitchell*, 2007 UT App 216, ¶ 6, 163 P.3d 737 (stating legal determinations made by trial court as a basis for its denial of a new trial are reviewed for correctness).

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Civil Crimes: The Effect of a Guilty Plea on an Insurance Policy's Criminal Act Exclusion

by Will Fontenot

Almost all criminal defendants are offered plea bargains, which present defendants with the choice of taking a case to trial or pleading guilty to a reduced charge and a lighter sentence. Defendants almost never consider the civil consequences of pleading guilty to a crime. Even without these civil considerations, the decision to accept or reject a guilty plea can be agonizing. When it is factored in that the guilty plea could also cause a defendant to lose all of his worldly possessions in a civil lawsuit, the decision to plead guilty can be excruciating.

During my first year in practice, I worked as a public defender for the Salt Lake Legal Defender Association. Most of my clients decided to accept plea deals in order to avoid harsher sentences and a negative criminal record. I often wondered if my clients' decisions to plead guilty would cause them any serious civil consequences, perhaps even more serious than being convicted of a crime.

Not long after I joined the civil litigation firm where I now work, I was asked to prepare liability insurance coverage opinions. As I had some criminal experience, I was asked to advise insurers on whether a homeowner's liability insurance policy required coverage for an insured who had committed a criminal act or even pleaded guilty to a criminal charge. Exploring the insurance consequences of a criminal plea brought me closer to answering many of the questions I had as a criminal defense lawyer. In this article, I will try to explain why pleading guilty to a crime may, or may not, allow a homeowner's insurer to deny coverage.

The typical problem arises when a plaintiff files a civil lawsuit against a defendant for bodily injury or property damage resulting from a criminal act. In these cases, by the time the civil lawsuit has been filed, the defendant has probably already pleaded guilty to the criminal act that resulted in the plaintiff's damages. If the plaintiff at least alleges in the complaint that the defendant acted negligently, the incident will likely qualify as an "occurrence," covered by the defendant's homeowners policy. Because the complaint has alleged a covered occurrence, the insurer is legally obligated to at least defend the lawsuit on behalf of the insured defendant, even though the insured caused the injury by a completely intentional act.

A homeowner's policy insurer will certainly be questioning whether it will be required to defend and indemnify an insured who is being sued in negligence for a criminal act to which the insured pleaded guilty. Many people would think that an insurer is justified in being outraged about paying for an insured's criminal acts that were intended to cause injury. After all, homeowners insurance policies are intended to cover accidents, and an insured should not be allowed to benefit financially from intentionally harmful misconduct. In order for an insured to avoid paying for the insured's criminal act, an insurer will need to show that the policy's criminal act exclusion applies.

Most homeowners insurance policies contain an exclusion that precludes coverage for an intentional or criminal act. The analysis to determine whether the criminal act exclusion applies starts with the language of the exclusion. A common such exclusion is as follows: "Coverage is excluded for any bodily injuries which the insured intends or which is reasonably expected to result from the insured's criminal act."

The language of this exclusion makes it plain that not every criminal or intentional act is excluded, only those that were committed with the intent to cause, or reasonable expectation of causing, bodily injury or property damage. The question then becomes whether the guilty plea to the criminal charge, by itself, will conclusively determine whether the criminal act was done intending or expecting to cause injury. A Utah opinion has yet to decide this precise issue. However, there are some Utah cases, and cases from other jurisdictions, that provide some guidance.

The intentional act exclusion is closely examined in *Benjamin*

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v. Amica. 2006 UT 37, 140 P.3d 1210 (Durham, C.J., Wilkins, J., Durrant, J., and Payne, Dist. Judge, concurring). In *Benjamin*, two women, Borthick and Allen, sued Benjamin civilly for sexual assault, but, for reasons not stated in the opinion, Benjamin was never charged criminally for sexual assault. The two women alleged intentional torts against Benjamin, but they also alleged that he "negligently and unintentionally inflicted emotional distress upon them." *Id.* ¶ 22. Benjamin defended himself by asserting that the encounter with Borthick was consensual, and that there was no sexual activity with Allen. *See id.* ¶¶ 3-4.

Benjamin tendered the defense of both cases to his insurer, Amica, pursuant to a homeowners policy and a Personal Excess Liability Policy. *See id.* ¶ 5. Amica initially defended both cases under a reservation of rights, but subsequently denied coverage after questioning Benjamin about the facts of both encounters. *See id.* ¶ 6.

A jury trial was held on the Borthick case, and the jury rejected all of Borthick's intentional torts. *See id.* ¶ 7. However, the jury found Benjamin liable for negligent infliction of emotional distress. *See id.* The trial court, however, entered a judgment notwithstanding the verdict, ruling that because Borthick was Benjamin's coworker, Borthick's exclusive remedy was workers' compensation. *See id.*

Benjamin then began settlement negotiations with both Borthick and Allen. *See id.* ¶ 8. He invited Amica to participate in negotiations, but Amica refused. Benjamin then settled both cases and asked Amica to indemnify him for the settlement amounts. Amica denied this request, as well. *See id.* Benjamin then sued Amica for breach of contract and bad faith for failing to defend and indemnify. *See id.* ¶ 9. The case eventually made it to the Utah Supreme Court where the issue was whether the intentional act exclusion applied to preclude coverage for the civil lawsuits. *See id.* ¶¶ 11, 13. Amica did not argue that the encounters with Borthick and Allen were not covered "accidents" under the policy. *See id.* ¶ 18. Instead, Amica argued only that the intentional acts exclusion applied because both Borthick and Allen alleged that Benjamin sexually assaulted them; therefore, Benjamin necessarily intended or expected to injure the plaintiffs. *See id.* ¶ 19. Amica also argued that the plaintiffs' negligence causes of action were included in the complaint as a mere pretext to trigger coverage, in an obvious attempt to circumvent the intentional act exclusion. *See id.*

The court rejected the last argument, stating that a plaintiff is allowed to plead alternative causes of action, even if they are contradictory. *See id.* ¶ 20. In fact, the court noted, the jury in the Borthick case found Benjamin liable only for negligent infliction of emotional distress, rejecting plaintiff's assault and battery claims. *See id.* ¶ 21. Apparently, the jury's negligence verdict was based on its finding that Borthick did not consent to sex, but that Benjamin unreasonably believed that she had. *See id.* ¶ 21 n.2. The court reasoned that the jury's finding showed conclusively that Benjamin's act of injuring Borthick was unintentional, and therefore, the intentional injury exclusion did not preclude coverage. *See id.* ¶ 22.

As an aside, the court's opinion did not mention the likelihood

that the intentional claims would have been ignored by both parties at trial, as both attorneys would have an incentive to focus on the negligence claims – the plaintiff's lawyer wanting the jury to find negligence so that insurance would pay the judgment, and the defense lawyer also wanting a finding of negligence so that his/her client would be indemnified for the judgment.

Benjamin tells us that where there is at least an allegation of negligence that resulted in bodily injury, the insurer has a duty to defend until the insurer can conclusively establish that the negligence claims are not supported by the facts. As long as there are fact issues in the case concerning the insured's intent that render coverage uncertain, the insurer must continue to defend the case. The court stated it is improper for an insurer to make assumptions and inferences concerning the insured's intent.

In addition, the insurer will have a duty to indemnify to the extent that a finder of fact decides that the insured is liable for negligence. *Benjamin* could also be interpreted to mean that an insurer will be required to indemnify if a settlement occurs before there is a finding of fact on the insured's intent to cause bodily harm.

The difficulty of *Benjamin* for the insurer is that even though the insurer is almost certain the insured committed a criminal act intending or expecting to cause injury, in order for the insurer to deny coverage, the insurer has to be certain that the crime was committed with the intention or expectation of causing injury. Two ways for an insurer to achieve such certainty are to have the question of intent decided: (1) by the finder of fact in a civil trial verdict, just as in the Borthick case from *Benjamin;* or (2) in a declaratory action filed by the insurer.

However, there might be a third option: An insurer might be able to deny coverage if the insured pleaded guilty to, or was found guilty of, a crime whose elements require an intention or reasonable expectation of causing injury. The third option is obviously the cheapest way for the insurer to avoid defending or indemnifying for a criminal act.

In Utah, the law is uncertain, therefore it is difficult to say whether the third option would actually operate to preclude the issue and allow an insurer to deny coverage solely based on the insured's guilty plea. The answer is unclear due to uncertainties in Utah's law of collateral estoppel or issue preclusion.

In Utah, the elements of collateral estoppel are as follows: (1) the issue decided in the prior adjudication was identical with the one presented in the action in question; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) the issue in the first case was competently, fully, and fairly litigated. *See Searle Bros. v. Searle*, 588 P.2d 689, 691 (Utah 1978).

Although there are no reported Utah opinions applying collateral estoppel to a guilty plea in insurance coverage litigation, we can find some guidance on the issue from other jurisdictions. There is a split in authority over whether a guilty plea has a preclusive effect on insurance coverage. *See State Farm Fire & Cas. Co. v. Fullerton*, 118 F.3d 374, 378 (5th Cir. 1997). The deciding issue seems to be whether a guilty plea is considered an actual or full litigation of the insured's intent. *See id*. Jurisdictions finding that the guilty plea conclusively establishes the insured's intent have decided that the plea itself qualifies as actually, or fully, litigating the issue of intent. Some courts in these jurisdictions have looked to the "factual basis," given during the plea colloquy, as actually litigating, and therefore, establishing the facts and elements upon which the plea is based. *See id*. at 379. In these jurisdictions, the criminal act exclusion will apply by virtue of the plea alone, and the civil parties will be precluded from arguing that, in reality, the act was done without the intent to cause bodily injury. In these jurisdictions, the insurer is able to deny coverage based on the fact that the guilty plea itself establishes that the criminal act exclusion applies, as long as the crime that was pleaded to requires the intent or reasonable expectation of causing injury.

Jurisdictions coming to the opposite conclusion have decided that a guilty plea does not preclude the civil parties from litigating the issue of whether the act was actually done with the intent to cause injury. These jurisdictions have decided that the issue of the insured's intent was not actually litigated by a criminal plea. *See Bradley Ventures, Inc. v. Farm Bureau Mut. Ins. Co.*, 264 S.W.3d 485, 491-93 (Ark. 2007). These courts reason that a criminal defendant chooses to plead guilty for all sorts of reasons, many of which have little or nothing to do with whether the defendant's conduct actually satisfies each element of the crime. For instance, defendants plead guilty to avoid a risk of incarceration, or because they lack an incentive or motivation to fight the criminal case. A guilty plea is very likely to be evidence in a coverage action, admitted as a declaration against interest, but it is not sufficient by itself to deprive the insured, and the civil plaintiff, of the protections of insurance. *See id*.

Courts in this group often cite to the Restatement of Judgments:

> A defendant who pleads guilty may be held to be estopped in a subsequent civil litigation from contesting the

> facts representing elements of the offense. However, under the terms of this Restatement such an estoppel is not a matter of issue preclusion, because the issue has not actually been litigated, but is a matter of the law of evidence beyond the scope of this Restatement.

Restatement (Second) of Judgments § 85 cmt. b (1982). This comment is either ignored or given very little weight by courts finding that a guilty plea satisfies collateral estoppel's requirement of actual litigation.

Utah's collateral estoppel rule does not say that an issue must be "actually litigated"; it only requires that an issue be "competently, fully, and fairly litigated." *Searle Bros.*, 588 P.2d 691. However, it appears that Utah courts still use the term "actually litigated" when analyzing a collateral estoppel issue. *See, e.g., Sacher v. Utah Dep't of Transp.*, 657 P.2d 1337, 1341 (Utah 1983) ("Thus, because the precise issue of whether the dugway road was a public thoroughfare was not *actually raised and litigated* in the 1967 litigation, the doctrine of collateral estoppel does not apply to preclude the plaintiff from maintaining his present cause of action." (emphasis added)).

It is difficult to safely say how a Utah court would decide how a prior guilty plea affects coverage. However, it seems likely that a Utah court would rule that a guilty plea does not conclusively establish the insured's intent for insurance purposes, given recent opinions finding coverage, and the courts' stated preference for finding coverage. *See N.M. on behalf of Caleb v. Daniel E.*, 2008 UT 1, 175 P.3d 566; *see also, LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857 (Utah 1988).

In addition, the Utah Supreme Court has acknowledged that a criminal defendant might plead guilty for many reasons that cannot be construed as an admission of actual guilt. *See Dixon v. Stewart*, 658 P.2d 591, 600 (Utah 1982). Such reasons include a "lack of financial ability or lack of desire to contest the charge." *Id*. The fact that the court acknowledged that a guilty plea does not conclusively determine whether an aspect of the offense actually occurred is a sign that the court would not give preclusive effect to a guilty plea on the issue of coverage. I hasten to add that a guilty plea to a non-traffic offense would almost certainly be admissible in the coverage action as a declaration against interest. *See id.*

An additional wrinkle appears when the insured pleads "no contest," sometimes referred to as an "*Alford* plea." *Alford* is a United States Supreme Court case wherein the defendant entered a guilty plea while continually proclaiming that he was innocent. *See North Carolina v. Alford*, 400 U.S. 25, 38 (1970). Alford wanted to plead guilty in order to take advantage of a favorable "plea deal," but he could not bring himself to admit that he was actually guilty. *See id.* at 37-38. The Court ruled that as long as there was a factual basis for the plea that supported a conviction, the defendant could plead guilty and be sentenced while still refusing to admit guilt. *See id*. at 38.

The *Alford* principle is embodied in Utah's "no contest plea." *See* Utah Code Ann. § 77-13-2(3) (2007); Utah R. Crim. P. 11. While a guilty plea is an acknowledgement that the accused is guilty of the offense charged, a no contest plea indicates that the accused does not challenge the charges, and is apparently not an acknowledgement of guilt. This distinction between a no contest plea and a guilty plea could make a difference to a Utah court applying collateral estoppel to the criminal acts exclusion. However, the no contest statute says that the no contest plea "shall have the same effect as a plea of guilty." Utah Code Ann. § 77-13-2(3). This statement could mean that both a guilty plea and a no contest plea have identical effects on insurance coverage.

From other jurisdictions, at least one court has stated that a no contest plea establishes nothing by itself, other than the fact that the defendant did not wish to contest the charges. *See Kerns v. CSE Ins. Group*, 106 Cal. App. 4th 368, 130 Cal. Rptr. 2d 754 (Cal. Ct. App. 2003). Other jurisdictions, however, have considered the Alford/no contest plea as identical to a guilty plea in its preclusive effect on the criminal act exclusion. *See, e.g., Merchs. Mut. Ins. Co. v. Arzillo*, 472 N.Y.S.2d 97 (N.Y. App. Div. 1984).

Addicted Employees: Dealing with Porn, Drugs, and Booze

by Sarah L. Campbell

Introduction

What does the Exxon Valdez oil spill of 1989 have in common with the 2008 collapse of the financial market? Both disasters have been linked to employees suffering from addictions. Joseph Hazelwood, captain of the Exxon Valdez, was a known alcoholic who was reported as being drunk at the time of the spill. *See* Exxon Valdez Remembrance Committee, *Corporate Hubris*, http://www.remembertheexxonvaldez.com/ (noting Exxon's "failure to act responsibly and firmly" in dealing with the captain who had a history of drinking aboard ship, had dropped out of an alcohol treatment program, and drank between five and nine double shots of vodka on the night of the spill). Similarly, news sources recently exposed more than thirty senior employees at the Securities and Exchange Commission whose pornography addictions led them to spend up to eight hours a day online viewing and downloading pornographic images while at work instead of policing Wall Street. *See* Daniel Indiviglio, *Did Porn Cause the Financial Crisis?*, (Apr. 23, 2010), http://www.theatlantic.com/business/archive/2010/04/did-porn-cause-the-financial-crisis/39414/; Jonathan Karl, *SEC and Pornography: Workers Spent Hours on Porn Sites Instead of Stopping Fraud*, (Apr. 22, 2010), http://abcnews.go.com/WN/sec-pornography-employees-spent-hours-surfing-porn-sites/story?id=10451508.

Although the above examples are extreme, the cost of addiction for employers is high and may include lost productivity, absenteeism, and employer liability for actions performed with impaired judgment.

As of 2002, the Office of National Drug Control Policy estimated that drug abuse resulted in $128.6 billion in lost productivity. Further, employees who use drugs are 2.2 times more likely to request time off, 3 times more likely to be late for work, and 3.6 times more likely to be involved in a workplace accident. *See* Substance Abuse and Mental Health Services Administration, *Drugs in the Workplace* (2008), *available at* workplace.samhsa.gov/Workplaces/pdf/WorkplaceDrugUseFactSheet.pdf. About 500 million workdays are lost annually due to alcoholism, and alcoholism is linked to nearly 40% of industrial fatalities. *See id.*

While employers should not have to tolerate certain behavior, the law provides protections to employees who qualify as "disabled." This begs the question of whether addictions are a type of disability recognized by the Americans with Disabilities Act (ADA) and/or a serious medical condition under the Family Medical Leave Act (FMLA) for which accommodation or leave is mandated. In some cases, the answer could be yes, and employers must understand what, if any, responsibility they have to accommodate or support recovering addicts.

A Widespread Problem

Likely, every employer has felt or will feel the detrimental effects of addiction on their business. Utah companies are no exception.

The National Survey on Drug Use and Health reported that in 2008, 22.2 million people aged twelve or older (8.9% of the population) were classified with substance dependence or abuse. *See* Substance Abuse and Mental Health Services Administration, *Results from the 2008 National Survey on Drug Use and Health: National Findings* (2009), *available at* http://www.oas.samhsa.gov/nsduh/2k8nsduh/2k8Results.pdf (reporting that substance dependence and abuse is 9.4% in the West – higher than any other region in the nation). Of that number, 15.2 million Americans were addicted to alcohol; 3.9 million were addicted to drugs; and 3.1 million were addicted to both. *See id.* Interestingly, 72.7% of illicit drug users and nearly 80% of binge drinkers are employed.

Researchers have begun to recognize Internet addiction, and specifically Internet pornography addiction, as a condition

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analogous to or worse than alcoholism or drug addiction – conditions that pose serious concerns for employers. *See* Donald L. Hilton Jr., MD, *He Restoreth My Soul* (2010) (describing the severe chemical changes to the brain as a result of pornography addiction); Blake R. Bertagna, *The Internet – Disability or Distraction? An Analysis of Whether "Internet Addiction" Can Qualify as a Disability Under the Americans with Disabilities Act*, 25 Hofstra Lab. & Emp. L.J. 419, 421-22, nn.12, 24 (2008) (citing to research legitimizing Internet addiction as a medical disorder). Last September, USA Today reported on the opening of the nation's first residential treatment center for Internet addiction. *See* Nicholas K. Geranios, *Internet addiction center opens in US*, Sept. 3, 2009, *available at* http://www.usatoday.com/tech/news/2009-09-03-internet-addiction_N.htm.

Approximately 20% of men and 13% of women admit accessing pornography while at work. These figures, however, are probably much higher given that more than 28,000 Internet users view pornography each second and pornographic search engine requests account for more than 25% of daily Internet traffic. *See* Jerry Ropelato, *Internet Pornography Statistics – Top Ten Reviews, available at* http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html#anchor1.

PROTECTIONS FOR EMPLOYEES

The solution to the addiction problem may seem as easy as firing employees who display inappropriate addictive behavior. Even so, companies should be aware of the legal protections available to employees who struggle with addictions in order to comply with the law and avoid expensive lawsuits.

The ADA

The ADA prohibits companies employing more than fifteen people from discriminating against a qualified individual on the basis of that person's disability. *See* 42 U.S.C. §§ 12111-12 (2000). An addiction only qualifies as a disability under the ADA if it physically or mentally impairs the employee and limits the employee in a major life activity. In such a case, an employer must make "reasonable accommodations to the known physical or mental limitations" of the individual. *Id.* § 12112(b)(5). But, an employer who does not know about a particular addiction has no duty to accommodate it.

The ADA defines a disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual." *Id.* § 12102(1). Major life activities include, but are not limited to, the following: learning, working, sleeping, sitting, standing, performing manual tasks, walking, seeing, hearing, and speaking. *See id.* § 12102(2)(A). Neurological and brain functions now qualify as major life activities. *See id.* § 12102(2)(B). In any case, an addiction will only qualify as a disability under the ADA if it physically or mentally impairs the employee *and* the employee is limited in a major life activity.

Because new research indicates that addiction is an actual physical or mental impairment, the issue lies in whether the limitation limits a major life activity. Several factors are considered in determining if an individual is substantially limited in a major life activity; these factors include "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2) (2009).

The FMLA

The FMLA requires employers of fifty or more people to provide employees with up to twelve weeks of requested leave per year for a "serious health condition" preventing the employee from performing

the functions of their job and insures employment benefits and reinstatement to the same or equivalent position. *See* 29 U.S.C. §§ 2612, 2614 (2000). A serious health condition is "an illness, injury, impairment, or physical or mental condition" involving inpatient care or continuing treatment by a health care provider, which could include substance abuse treatment or therapy. *Id.* § 2611(11).

ARE ADDICTIONS DISABILITIES?

Drugs

The United States Supreme Court in *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), considered a disparate-treatment theory that the petitioner refused to rehire the respondent, a former drug addict, because the petitioner regarded the respondent as disabled and/or because of the respondent's record of disability. A drug addict is only capable of achieving disability status if he or she is no longer using drugs and has been successfully rehabilitated or is participating in a supervised rehabilitation program. *See* 42 U.S.C. § 12114(b)(1)-(2); 29 C.F.R. § 1630.3(b)(1)-(2). Drug users are not protected from actions taken by their employer against them if the employee is "currently engaging in the illegal use of drugs, when the [employer] acts on the basis of such use." 42 U.S.C. § 12114(a). For example, an employee addicted to narcotic pain medications could still be required to comply with a company policy prohibiting the operation of motor vehicles while under the influence of drugs, legal or illegal. *See Quinney v. Swire Coca-Cola, USA*, No. 2:07-cv-788-PMW, 2009 U.S. Dist. LEXIS 42098, at *609 (D. Utah May 18, 2009). In other words, the ADA protects a disability but not disability-caused misconduct. *See generally Nielsen v. Moroni Feed Co.*, 162 F.3d 604 (10th Cir. 1998) ("[B]oth the ADA and the Rehabilitation Act clearly contemplate removing from statutory protection unsatisfactory conduct caused by alcoholism and illegal drug use.").

Alcohol

Alcoholism can also be a disability under the ADA. *See Renaud v. Wyo. Dep't of Family Servs.*, 203 F.3d 723, 730 n.3 (10th Cir. 2000) (noting the concurrence of several federal circuits). ADA protection does not, however, extend to cover alcohol use on the job. See 42 U.S.C. § 12114(c) (2000) (providing employers can prohibit drug and alcohol use at the workplace and require that employees not be under the influence). To qualify as a disability, both drug addiction and alcoholism must substantially limit a major life activity. *See Burris v. Novartis Animal Health U.S. Inc.*, 309 Fed. App'x 241, 250 (10th Cir. 2009) (applying the same analysis to alcoholism as used in the context of drug addiction and affirming summary judgment for employer on employee's ADA claim).

Internet Pornography

The law is unclear whether Internet pornography addiction qualifies as a protected disability. A recent case out of New York involved an employee's "long-standing internet addiction," yet the ADA discrimination analysis focused on Post Traumatic Stress Disorder as the applicable disability, not the Internet addiction. *See Pacenza v. IBM Corp.*, No. 04 Civ. 58311 (PGG), 2009 U.S. Dist. LEXIS 29778, 2009 WL 890060, at *10 (S.D.N.Y. Apr. 2, 2009). In any event, certain sexual behaviors that may be associated with an Internet addiction are excluded from the definition of disability under the ADA. The law exempts from the definition of disability "[t]ransvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." 29 C.F.R. § 1630.3(d)(1). Homosexuality and bisexuality are also not considered disabilities. *See id.* § 1630.3(e).

Employer Dos and Don'ts

While the legal ramifications of Internet pornography addiction are largely undefined, employers can look to current statements involving drug and alcohol addictions for guidance in creating workplace policies. Employers subject to the ADA are allowed to prohibit illegal drug use and alcohol use at the workplace and can require all employees to be free from the influence of such substances while on the job. *See* 42 U.S.C. § 12114(c)(1)-(2). Further, employers may also

> hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.

42 U.S.C. § 12114(c)(4).

In some cases, employers may be required to reasonably accommodate workers struggling with addictions.[1] But there is no requirement that an employee be given an indefinite recovery period without termination. *See id.* § 12111(9). Possible ways to accommodate employees include flexibility in scheduling to allow for attendance at recovery programs, counseling, or 12-step meetings; leave for rehabilitation or medical treatment; or modified work assignments to reduce exposure to certain tasks or substances.

The following tips may also help law firms and business clients avoid unwanted consequences of addiction within their company:

- Establish and circulate company policies prohibiting illegal drug use, alcohol use, and the viewing of pornography in the workplace.
- Freely discipline, discharge, or deny employment to current drug users and alcoholics whose use of substances impairs their job performance or conduct.
- Do not hold addicts to a different performance standard than other employees, but be consistent in enforcement.
- Do not refuse to hire, promote, or reward employees with a history of addiction (who are not currently using their substance of choice) on the basis of their addiction.

Conclusion

Addictions, whether known or undetected, pose serious problems in the workplace and may threaten the bottom line of any business. In certain cases, the law has treated alcoholism and drug abuse as legitimate disabilities warranting special treatment. The age of the Internet has ushered in yet another addiction that appears to be physically and mentally on par with drug and alcohol abuse. While Utah businesses may be familiar with their legal rights when it comes to drug and alcohol abuse, the landscape of Internet pornography addiction is largely uncharted. Employers should carefully examine their policies and procedures to ensure compliance with federal law and prepare for new challenges under the ADA and FMLA.

1. *See* 42 U.S.C.A. § 12111(9) (2000) ("The term 'reasonable accommodation' may include – (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.").

Small Claims Courts: Getting More Bang for Fewer Bucks

by Steven Rinehart

As the number of cases on district court dockets swell, so too does the temptation of the legislature and the judiciary to vest increasing amounts of power in small claims judges, who are usually judges *pro tempore* (judges serving temporarily in lower courts). With the jurisdictional limit on damage awards recently increased to $10,000, exclusive of court costs and interest, Utah small claims courts have the fifth highest small claims jurisdictional limit in the United States. *See* FreeAdvice.com, *Small Claims Court Information and Links*, http://law.freeadvice.com/resources/smallclaimscourts.htm (last visited Aug. 19, 2010). The overloaded district court docket, however, is only the most obvious of many reasons for attorneys to consider using small claims courts, even in cases involving controversies much higher than $10,000.

Because small claims judges adjudicate only civil cases, and do in minutes what may take district court judges months or years to do under the Utah Rules of Civil Procedure (URCP), the dollar sum of the cumulative civil judgments entered on a per hour basis by small claims judges exceeds the dollar sum of the cumulative civil judgments issued on a per hour basis by district court judges. *See* Western IP Law, *Complete 2009 Utah District Court Judgment Statistics, Judgments Entered*, http://www.uspatentlaw.us/content/?page=49 (last visited Aug. 19, 2010). And claimants securing judgments in small claims courts have better odds of collecting those judgments than judgments from district courts. *See id.* Small claims judges can accomplish in an evening what it usually takes district court judges months to sort through under the URCP.

Effective September 1, 2010, pursuant to Utah Rule of Judicial Administration 4-801 (as amended), all new small claims actions must be filed in justice court rather than in district court, unless there is no justice court with jurisdiction. Small claims proceedings are governed by the Utah Rules of Small Claims Procedure. Utah Rule of Small Claims Procedure 7(d) provides that small claims judges "may receive the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their business affairs. *The rules of evidence shall not be applied strictly. The judge may allow hearsay that is probative, trustworthy and credible.* Irrelevant or unduly repetitious evidence shall be excluded." Utah R. Small Claims P. 7(d) (emphasis added). Small claims courts thus provide an opportunity in which attorneys can introduce evidence that would otherwise be inadmissible in district courts, including hearsay, testimony from lay witnesses in areas generally reserved for experts, and unsworn written statements.

Either the winner or loser in small claims court may appeal the decision of the small claims court to the local district court for a trial de novo within thirty days. Interestingly, Utah Rule of Small Claims Procedure 1(b) provides that the Utah Rules of Small Claims Procedure "apply to the initial trial *and any appeal* under Rule 12 of all actions pursued as a small claims action." *Id.* R. 1(b) (emphasis added). Even more interestingly, law from other jurisdictions suggests that in *de novo* appeals of small claims decisions, the district courts may not be bound by the jurisdictional limit of $10,000 imposed upon the original small claims court. *See Gilbert v. Moore*, 697 P.2d 1179, 1182 (Idaho 1985) (holding that jurisdictional amount limitations did not apply to district court in a trial *de novo* of a small claims action); *see also Hardy v. Tabor*, 369 So.2d 559, 560 (Ala. Civ. App. 1978) (providing that in *de novo* appeals of small claims judgments the appellant is entitled to "recover an amount in excess of the jurisdiction of the lower court" (internal quotation marks omitted)).

Thus, a clever plaintiff's attorney preparing to litigate a large case heavily reliant on inadmissible hearsay evidence might well avoid the exclusionary effect of the Utah Rules of Evidence on that evidence by first trying the case in small claims court, then appealing the case to the district court for a de novo trial in which the jurisdictional limit does not bind the plaintiff and the Utah Rules of Evidence are abrogated by the Utah Rules of Small Claims Procedure. Following

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this proceeding, even more convenient for the plaintiff, the legislature has seen fit to strip defendants of the right to seek appellate review unless the district court "rules on the constitutionality of a statute or ordinance." Utah Code Ann. § 78A-8-106 (2009).

Additionally, Utah Code section 78A-8-102(3), unlike the law in some other jurisdictions, provides that

> [c]ounter claims may be maintained in small claims actions if the counter claim arises out of the transaction or occurrence which is the subject matter of the plaintiff's claim. *A counter claim may not be raised for the first time in the trial* de novo *of the small claims action.*

Id. § 78A-8-102(3) (emphasis added). Small claims courts present an opportunity for plaintiffs to assert claims against defendants in an environment in which defendants are less likely to interpose counterclaims because they are less likely to seek advice of counsel. Utah small claims courts could arguably be used preemptively to eliminate a troublesome counterclaim under the doctrine of *res judicata* before filing a second action in another jurisdiction to which that counterclaim would be compulsory. *Compare Thirion v. Tutoki*, 703 N.E.2d 378 (Ohio Mun. Ct. 1998) (dismissing suit as a compulsory counterclaim to a prior small claims suit between the same parties); *see also Freeman v. Sears, Roebuck, & Co.*, 180 P.3d 697 (Okla. Civ. App. 2008) (determining that failure of the defendant in a small claims action to assert a compulsory counterclaim precluded assertion of the claim in later proceedings in higher court); *Osman v. Gagnon*, 876 A.2d 193, 195 (N.H. 2005) (same); *see also* David E. West, *Claim Preclusion from the Small Claims Court*, Utah Trial Journal, Fall 2005, at 32, *available at* http://www.utcourts.gov/scjudges/Claim%20Preclusion.West.pdf.

While *res judicata* appears to bar claims brought in district court that could or should have been brought originally as counterclaims in an earlier small claims action, it is common practice for small claims judges to advise litigants securing $10,000 judgments capped only by the jurisdictional limit that *res judicata* does not prevent litigants from seeking the damages exceeding the jurisdictional

limit in subsequent actions in district court where the claim was properly raised in small claims upon its filing. Consequently, small claims courts can provide attorneys with a forum to "test run" a case, and a glimpse of a defendant's litigation strategy, before moving on to either *de novo* review or additional proceedings in the district courts. Furthermore, in practice if not in law, the decisions of small claims judges are persuasive in *de novo* proceedings and/or additional proceedings on the same claims in district court. In my experience, small claims judges are less likely to be reversed in *de novo* proceedings before the district court than district court judges are to be reversed in the appellate courts.

Furthermore, there are no discovery or disclosure requirements in small claims courts. Unlike the URCP, the Utah Rules of Small Claims Procedure contain no prohibition on "surprise" lines of argument. Parties can be ambushed, unexpected witnesses can be called, hearsay testimony can be introduced, hours spent on cases can be drastically reduced, and failures of other parties to prepare can be exploited on the fly. The filing fees in small claims courts are much lower than the district courts, and most small claims courts provide free mediators on demand who are competent and eager to help. Additionally, the fact that a case brought in district court could have been brought in small claims court is a factor that may be considered by district court judges in reducing attorney fees awards. "'When the party could have brought the action in the small claims division but did not do so, the court may, in its discretion, allow or deny costs to the prevailing party, or may allow costs in part in any amount as it deems proper.'" *Adams v. CIR Law Offices, LLP*, 2007 WL 2481550, at *4 (S.D. Cal. Aug. 29, 2007) (quoting Cal. Civ. Proc. Code § 1033(b)); *see also 985 Assocs., Ltd. v. Chiarello*, 2004 WL 5582914, at *1 (Vt. Feb. Term 2004) (upholding trial court's reduction in attorney fees awarded because the case could have been brought in small claims); *Smith v. Afflack*, 2004 WL 1888989, at *4 (Cal. Ct. App. Aug. 25, 2004) (exercising discretion not to award attorney fees because the action could have been brought in small claims); *Silva v. Stockton Further Processing, Inc.*, 2003 WL 550152, at *3 (Cal. Ct. App. Feb. 27, 2003), *rev'd in part on other grounds*, 2004 WL 2457831 (Cal. Ct. App. Nov. 3, 2004); *Essex Cnty. Corr. Officers Ass'n v. Shoreman*, 2005 Mass. App. Div. 30 (Mass. Dist. Ct. 2005) (recognizing statute providing that courts may preclude attorney fee awards in cases that could have been brought in small claims).

Attorneys who consider themselves too distinguished to appear before small claims courts betray a proper understanding of the power of small claims courts and their growing role in Utah's system of jurisprudence. In fact, the reasons to consider using small claims courts before commencing litigation are so compelling that clients in other jurisdictions have successfully maintained legal malpractice actions against attorneys for not advising them of the availability and benefits of small claims proceedings, and judges have sanctioned litigants for unnecessarily skirting small claims courts. *See, e.g.*, *Triestman v. Soranno*, 2006 WL 3359416, at *6 (N.J. Super. Ct. App. Div. Nov. 21, 2006) (reviewing, but ultimately overturning, sanctions imposed on a litigant for bringing a small claim unnecessarily in a court of superior jurisdiction).

Small claim judges focus entirely on civil matters, while district court judges spend as much as three-fourths of their time dealing with criminal matters. Although small claims judges are unable to grant equitable/injunctive relief, they are free to use equitable discretion in admitting hearsay evidence, hearing testimony from lay witnesses in areas generally reserved for experts, ordering mediation or arbitration, setting the case aside, and weighing evidence that would otherwise be inadmissible in district court. In this sense, small claims judges arguably have greater equitable power than district court judges in many matters.

The jurisdictional limit of small claims courts likely will continue to increase as dockets overflow at the district courts, potentially implicating new defenses to small claims judgments. Because small claims judges are not vetted by the legislative branch like higher judges, it is worth considering whether a rapid escalation in the jurisdictional limits of judges *pro tempore* might eventually cross a state constitutional line. In my experience, however, I have never had a desire to attack a small claims award on that basis, nor have I ever appeared before a judge *pro tempore* who seemed unfit to adjudicate cases.

My experience is that judges *pro tempore* endeavor with dignity to issue logical, well-reasoned decisions, to treat litigants fairly, and to bring honor to the judiciary. For this reason, we address small claims judges acting in their official capacities by the same title that we do the higher judges: *Your Honor.*

Don't be fooled by the lack of the full-bottom wig behind the bench or other informalities in small claims courts. There is opportunity in the Small Claims Division, and it is available to smart attorneys who know how to avail themselves of it when circumstances so necessitate. No litigator is too good to write small claims out of his or her strategic tool box.

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New Lawyer Training Program

Declining Representation: What Next?

by Keith A. Call

Whenever you consult with a prospective client and decline the representation (or are not hired), there are several things you should consider and do. Here is a list of three of the most important things you should remember.

Keep confidences and follow URPC 1.18 if you decide to represent an adverse party.
You have an obligation to keep the confidences of a prospective client if you decide not to represent him or her. Utah Rule of Professional Conduct 1.18, adopted in 2005, firmly establishes that a duty of confidentiality attaches when a person discusses with a lawyer the possibility of forming a client-lawyer relationship, even if no client-lawyer relationship is ever established. Do not "use or reveal" information you learn in the consultation with a prospective client, except as specifically allowed by Rules 1.6 and 1.9. Protect it the same as you would protect information learned from an actual client.

May you or another lawyer in your firm subsequently represent someone directly adverse to your former prospective client? The answer is "yes, but only if certain conditions are met." Rule 1.18 prevents you (or another lawyer in your firm) from representing a client with interests materially adverse to those of the prospective client in the same or substantially related matter, unless: (i) you received no information from the prospective client that could be significantly harmful to the prospective client, (ii) you obtain informed consent (in writing) from both the client and prospective client, or (iii) the "infected" lawyer received no more disqualifying information than was reasonably necessary, is adequately screened, receives no apportionment of the fee, and the prospective client is promptly notified in writing. (Consult Rule 1.18 for all the fine details.) Note that these provisions are slightly more liberal than the Rule 1.9 counterpart dealing with former clients.

Send a declination letter.
There is no ethical rule that strictly requires a declination letter when you decline representation (or when you are not hired). But it is always a good idea to send one. For an example of how a declination letter might have prevented a large malpractice judgment against a law firm, *see Togstad v. Vesely, Otto, Miller & Keefe,* 291 N.W. 2d 686 (Minn. 1980) (per curiam).

A "best practice" would be for you to send a declination letter whenever you decline a request for representation, whenever you provide services to less than all of the related parties in a case or transaction, whenever a third person might claim to be the beneficiary of your services, or when there is a risk that a claim for negligent misrepresentation might be made. *See* Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, § 2:12 (2010 ed., West). Failure to do so would not, of course, automatically result in a client-lawyer relationship, but doing so can sure help avoid headaches.

Your declination letter should clearly state that you do not represent the former prospective client (*i.e.*, that no client-lawyer relationship was formed), that you did not receive any confidential information (or that it was limited), and that you did not receive (or are returning) the prospective client's documents. If applicable, it is also a good idea to inform the prospective client of important deadlines, such as statutes of limitation or deadlines for responding to a complaint. Avoid expressing opinions about the merits of the matter in your letter.

Keep track of prospective clients in your conflict database.
Even if you decline the representation, it is important to keep a record of prospective clients with whom you have communicated. Failure to do this can allow unknown conflicts to slip through the door and make compliance with your obligations under Rule 1.18 much more difficult. Keeping track of prospective clients in your database can help you recognize potential problems before they mature into real problems.

Following these simple guidelines can help you avoid misunderstandings and potential claims. It is also good (prospective) customer service.

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Technology: Friend or Foe of the Modern Lawyer? A Book Review of "The End of Lawyers?"

by Dr. Richard Susskind

Reviewed by Jason S. Wilcox and Aaron S. Bartholomew

In his book, *The End of Lawyers?*, Dr. Richard Susskind argues that emerging technologies pressure the standard law firm economic model that has historically meant prosperity for the profession. Although some lawyers continue to succeed, there is an ever-increasing number of lawyers without work or who are leaving the profession entirely, sometimes before a legal career begins. In the last several years lawyers have experienced unprecedented change in the profession. We read the doomsday news of law firms across the country cutting thousands of attorney positions, large numbers of lay-offs in Big Law, and the lowest 3L hiring rate in a generation.

Dr. Susskind is no alarmist: he has been studying – and accurately predicting – the ways technology affects the legal profession and the nature and delivery of legal services for nearly thirty years. Emerging technologies have been, and continue to be, the primary catalyst and accelerant for change in our profession. Furthermore, if Dr. Susskind is right, the bleak employment outlook for lawyers and recent law school graduates is just the beginning of the profession's fight for survival.

In Dr. Susskind's view, legal services can be placed on a continuum starting with tailor-made, or "bespoke" services; i.e., those that are performed and highly customized for a specific client, on the right side of the scale. Moving left on the scale, services evolve through phases including standardized, systematized, and packaged. Finally we reach a completely commoditized product. Standardized products develop when legal tasks become recurrent and the lawyer or law firm seeks to avoid "re-inventing the wheel." Standardization occurs in two identifiable ways: process or substance. Process standardization occurs where lawyers rely on checklists or procedure manuals that dictate good practice principles for a specific type of matter or document. Substance standardization involves lawyers using past work-product or templates that have been used in the past.

Legal services become systematized when law firms develop internal systems for producing legal work. Systemization goes beyond storage of standard procedures and documents to a truly internal interactive checklist or electronic workflow management method. This allows document preparation and production to move beyond cutting and pasting standardized text towards automatic document assembly where the practitioner obtains a polished, finished document after responding to a series of questions without any appreciable word processing.

It is a simple move from systematized to packaged services. The internal systems of a law firm need only be made accessible to its clients, which can be done over the internet. Law firms could allow their clients direct access to their internal systems to allow clients to generate their own products. The law firm's systems and the knowledge contained therein become "packaged" for the client's convenience. Of course, law firms can also place their packaged services directly into the marketplace without moving through the three previous phases. An example of this is by packaging a law firm's research on issues and making it available as an on-line legal reference service, which many practitioners have already done in the name of advertising.

Dr. Susskind's definition of "commoditized" is admittedly narrow, in that he views commoditized legal services as similar or identical products available from a variety of sources at prices generated

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by competition (read: prices lower than they already are now). As legal services become commoditized, or move toward the left side of his scale, the price of those services drops from the cost to produce, to the cost to reproduce. The cost may ultimately decrease to zero.

There are a few things to note about placing legal services in this kind of scale. First, some legal services cannot be commoditized by their very nature, for example, a great trial lawyer's courtroom manner is unique to that specific lawyer, and very few others, if any, could reproduce it effectively at any cost. Second, the legal services on the left side of the scale can successfully maintain the hourly billing fee structure that is so beneficial to attorneys. On the other hand, services toward the right side of the scale are fixed fee, or possibly, no fee endeavors.

In essence, while legal services have not measurably changed, delivery of those services has. Emerging technologies improve the speed, accuracy, efficiency, and cost-effectiveness of legal services. Many advances in technology have been embraced by lawyers, such as email and virtual offices, which have helped lawyers become more efficient as service providers. However, many more developing technologies are creating increased competition among lawyers, driving consumers/clients from the current legal marketplace, and drastically reducing revenues to law firms.

In his book, Dr. Susskind details the disruptive legal technologies to which lawyers and law firms must adapt to remain cost-competitive and relevant in an increasingly changing legal environment: (1) automated document assembly; (2) relentless connectivity; (3) electronic legal marketplace; (4) e-learning; (5) online legal guidance; (6) legal open sourcing; (7) closed legal communities; (8) workflow and project management; and, (9) embedded legal knowledge.

Most lawyers are familiar with automated document assembly in heavily form-driven practices like estate planning, bankruptcy, and business formation. In today's world, the relentless connectivity between people in social networking, email and cell phones, makes attorneys, should they or the client desire, omnipresent to clients.

However, our profession is struggling with adapting to several of these technology-driven advances:

The Electronic Legal Marketplace

While it has readily been accepted by lawyers as a means of advertising, the internet is also emerging as an outlet for an electronic legal marketplace, where clients and prospective clients can "window-shop" for legal services, and even buy legal services directly. While a lawyer's clients have historically not been interconnected, the internet creates that connectivity between clients. Through consumer demand and initiative the internet will inevitably become a means of quality-control and price comparison for legal services consumers, as it has already become for other professions. Our profession should preempt that inevitability by the creation of our own, lawyer-controlled forum for consumers.

E-Learning

Multi-media applications allow us to transfer knowledge in more than a two-dimensional way. As technology improves, e-learning will transform the teaching, training and education of lawyers. However, e-learning is a mixed blessing. Humans tend to learn more from the interaction between people, be they clients or senior attorney mentors, rather than the printed page. E-learning could become a disruptor by making face-to-face training less necessary. Clients are affected as well: rather than paying a lawyer for a consultation, the client will be able to watch an online training in a topic and then determine exactly what services are necessary from the lawyer prior to discussing the issue with a lawyer.

Online Legal Guidance

Increasingly, current and prospective clients are turning to the internet – rather than a lawyer – for legal advice. From the client's perspective, the information is readily available and free, night or day. From a lawyer's perspective this information may undermine the attorney-client relationship, may not be reliable or accurate, likely comes from a non-lawyer, and may mislead clients into an erroneous course of action without any recourse (i.e., professional liability). Nevertheless, online legal guidance is here to stay and will only increase with time to include commercial and business clients as well. Lawyers may never be able to adapt to this concern as it is a malpractice minefield, but lawyers must be aware of the competition from online legal guidance.

Closed Legal Communities

The interconnectivity of the internet has created closed communities of legal service consumers. These consumers share documents, work product, knowledge, and experience with each other in lieu of consulting with an attorney regarding common, and sometimes complex, issues. Additionally, these closed communities function as clearinghouses for clients to share their good and bad experiences, provide attorney recommendations and the like. These interactions substantially drive down costs for commercial clients and are a primary factor in recent losses by Big Law. Dr. Susskind argues that law firms need to confront the reality of these interactions by facilitating their own voluntary client communities that can be controlled.

According to Dr. Susskind, adapting to these emerging technologies will not only be good business, but a practical imperative for the robust survival of our profession. The End of Lawyers? should be integrated in every law practice's strategic planning to meet the needs and expectations of the continually evolving legal marketplace.

Utah Auto Law: Utah Law of Motor Vehicle Insurance and Accident Liability

by Randall Bunnell

Reviewed by John F. Fay

Recently Randy Bunnell published a book. But after you read it, you won't call it a book; you will call it the *Utah auto law bible*. Jurists statewide will nickname it *The Judge's Bench Book*. To say the text is comprehensive is modest. The topics range from the commonplace to the rare and sometimes once-in-a-career factual situations. The book is a must for auto plaintiff and defense attorneys, as well as auto claims adjusters.

Randy addresses commonplace questions like the collateral source rule and mitigation of damages; loss of use and the discovery of the insurer's file; equitable subrogation, the common fund rule, the made-whole and the sudden-peril doctrines; the different statutes of limitations, claim notices for governmental immunity cases, the arbitration of auto liability claims between family members, and arbitrating UM and UIM claims; who is covered by PIP; stacking of PIP, UM, and UIM coverages, the absence of threshold requirements in UM claims; rental car liability coverage; pedestrians, bicyclists, motorcyclists, emergency vehicles, unattended vehicles and common carriers; the duty to take evasive action notwithstanding one's right-of-way, open and controlled intersections, left turn cases, and many other commonplace topics.

Some of the less typical issues he addresses are vicarious liability for punitive damages, first party and third party insurance bad faith, proving a pre-existing medical condition through welfare payments; the use of prior crashes in same location to prove the present collision; step down coverages, judicial notice of headlights of a passing vehicle obscuring a driver's vision; the failure to sound one's horn, the intentional acts exclusion, who is an independent contractor or employee and why; the problems attendant to misrepresentations in an insurance application; the requirements to validly cancel an insurance policy, newly acquired vehicle coverage; icy roads as causation; no contact accidents, railroad crossings, the duty to remove obstructions constituting traffic hazards, lead vehicle rear-end collisions; the comparative negligence of passengers, negligent entrustment, road rage liability as well as other issues.

Throughout the text Randy addresses the once-in-a-legal career questions such as conflicts of law, auto owner liability for leaving the key in the ignition where the thief causes a crash; bodily injury liability release avoidance, auto agent liability for failure to procure insurance, failure of a governmental entity to maintain roadway manhole covers and semaphores; negligent road design, liability of joint venture passengers, exceptions to coming and going rule, dramshop liability, passenger liability for wrongful acts, and police officer liability while directing traffic, etc.

In the workers' compensation arena of exclusive remedy, he addresses issues including the loaned servant, fellow servant, and special employee rules; the going and coming rule, the special errand and the special hazard exceptions; the personal comfort rule, and issues surrounding being on the work premises, before and after work.

There is a comprehensive discussion of government immunity, wrongful death, survival actions, and various liens asserted in an auto injury case: PEHP, ERISA, medicare, medicaid, hospital, attorney, workers compensation, crime victims' reparation, and child support.

JOHN F. FAY is a sole practitioner in Salt Lake. He is an experienced litigator in jury trials and arbitrations and has written extensively on personal injury, arbitration and trial work.

These specific points I found enlightening:

1. How the differences between *the right to control the operation* of the vehicle and *the right to control the destination* can be determinative of agency.

2. Liability coverage can be available where there is *implied permission* from the owner to the driver. One can show implied permission by evidence of acquiescence and the course of past dealings between the driver and the vehicle owner. Implied permission can even extend to a *secondary permittee* driver unknown to the owner.

3. Liability coverage is available up to the statutory, minimum coverage with intentional acts, notwithstanding a policy's intentional acts exclusion. In determining, *intentional*, one looks to see if the *result* was intended or expected, not whether the act was intended or deliberate. It is not the foreseeability, but whether any injury was expected.

4. Why PIP's $20 per day loss of services coverage is not limited to $20 per day.

5. What do the terms *regular use, arising out of* and *in the course of* mean?

   What constitutes a *theft* for property damage coverage?

   Why the unavoidable accident instruction is always improper?

   What constitutes a *proper lookout,* or an *immediate hazard?*

6. When does an agent's duty to procure insurance coverage create a contract to procure coverage? …the expression of a desire to obtain insurance followed by an oral affirmation of that desire is not enough to create a contract to procure insurance.…Rather, the contract can arise, when the agent has definite directions from the insured to consummate a final contract; when the scope, subject matter, duration, and other elements can be found by implication; and when the insured gives the agent authority to ascertain some of the essential facts.

7. That there is no government duty to install roadway lighting. But once installed, there is a duty to properly maintain it and to insure that the lighting itself does not create a hazard.

8. Whether a misrepresentation in an insurance application is *material* does not depend upon what the insured or the insurer may think about the importance of the misrepresentation but rather: What those engaged in the insurance business, acting reasonably and naturally in accordance with the usual practice among insurance companies under such circumstances, would have done had they known the truth; that is, whether reasonably careful and intelligent men would have regarded the facts stated as substantially increasing the chances of the happening of the event incurred against so as to cause a rejection of the application.

   Interestingly, a contract of insurance is voidable, not void *ab initio,* at the election of the insurer where there has been material misrepresentation. Thus, the insurer's subsequent acts can waive its right to void the contract.

9. When responding to an emergency call, the operator of an authorized emergency vehicle has the following privileges: (a) to park or stand his vehicle irrespective of the provisions of the traffic code, (b) to proceed past a red or stop sign "but only after slowing down as may be necessary for safe operation," (c) to exceed the maximum speed limit and, (d) to disregard regulations governing direction of vehicle movement or turning in specific directions. The driver's right to use greater speed appears related to the seriousness of the patient's condition.

10. No claims are available against the government or its agents for negligence caused to a member of the public unless one can show that: (a) there was a breach of duty owed to the member as an individual [not merely a breach owed to the general public]; or, (b) a special relationship between the government and the individual.

Randy's treatise is supported by in depth analysis of hundreds of statutory and case law authorities. No doubt, some of this stuff you already know but it is secreted away in the cobwebs of your mind. Now you will know how to quickly dig out these treasured points, including the supporting authority. Randy's book brings it all together in an organized and logical way. Settling and litigating auto accident cases is tough even in the best of circumstances. Do yourself a favor, get a head start on the governing law on virtually every auto insurance, vehicle, and roadway situation possible. Get yourself a copy of this treatise. I promise, you will be able to leave work earlier on Saturdays.

To buy it, go to http://www.lexisnexis.com/store/catalog/productdetail.jsp?prodId=prod1030831.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the July 14, 2010 Commission meeting held in Sun Valley, Idaho at the Summer Convention.

1. After the report given by Matt Anderson of the Insurance Review Subcommittee, the Commission approved the placement of the following disclaimer whenever the Bar's endorsement appears:

   > The Bar's endorsement does not guaranty that Liberty/Marsh is the right provider for you. Be sure to analyze the many factors in choosing legal malpractice coverage, including cost of premium, stability, coverage, and customer service. Liberty is an A Rated company that donates a percentage of its premiums to Utah Lawyers Helping Lawyers.

   The Commission also instructed that financial contributions from Liberty/Marsh be paid directly to Lawyers Helping Lawyers in lieu of passing through the Bar.

2. The Commission approved increasing the public relations/communications funding to $50,000 as a line item in budget and designated Love Communications as the Bar's new public relations/communications service provider.

3. The Commission approved revising Client Security Fund (CSF) Rule 14-913 to add a per attorney lifetime claim limit of $250,000.

   The Commission approved revising CSF Rule 14-913 to provide

   > In the event that the Committee determines that there is a substantial likelihood that claims against an attorney may exceed either the annual or lifetime claim limits, such claims shall be paid on a pro rata basis or otherwise as the Board and the Committee determines is equitable under the circumstances.

   In addition, Commissioners approved revising CSF Rule 910(b) as follows: "The claim for reimbursement shall be filed within two years after the claimant discovers or through the use of reasonable diligence should have discovered the loss." CSF rule changes are to be applied retroactively.

4. The Commission approved restoring the Law Related Education budget allocation to $45,000 and approved the budget allocation of $27,330 to Lawyers Helping Lawyers (LHL). Commissioners also agreed to consider additional funding upon receipt of a new request which would include: (a) a copy of the recent ABA Report on LHL; (b) a current and complete profit/loss statement; and (3) a description of the numbers of lawyers helped and the types of issues being addressed.

5. The Commission approved a contribution of $20,000 to Utah Dispute Resolution and a budget allocation of $30,000 to Young Lawyers Division (YLD).

6. The 2010-2011 budget was approved as amended, above.

7. The Commission ratified Rod Snow's resignation as a Commissioner and the appointment of Dickson Burton to a one-year term from the Third Division.

8. The Commission approved designated Bar Committee chairs.

9. The Commission approved the appointment of Ex-officio members: Steve Owens (past president), Larry Stevens and Margaret Plane (ABA Representatives); Charlotte Miller (ABA Delegate); Grace Acosta (Utah Minority Bar Association); Peggy Hunt (Women Lawyers of Utah); Heather Finch (Paralegal Division); James Rasband (BYU Law School Dean); Hyrum Chodosh (U of U Law School Dean); and Angelina Tsu (YLD).

10. The Commission approved Commission Executive Committee members: Rob Jeffs, Rod Snow, Lori Nelson, Christian Clinger, and Curtis Jensen and approved the resolution to designate Commission Executive Committee members as bank signators.

11. Finally, the Commission approved the June 2010 Commission meeting minutes via consent agenda.

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

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.

Bar Election Information Available on the Web

Nominating petitions for Commission elections in the First and Third Divisions for the 2011 election may be obtained on the Bar's website at http://www.utahbar.org/elections/commission_elections.html. Completed petitions must be received no later than February 1, 2011.

MCLE Cycle Change

Recent Supreme Court rule revisions conform MCLE and the Bar's licensing periods to run concurrently. Odd year compliance attorneys will have a compliance cycle that will begin January 1, 2010 and will end June 30, 2011. Active Status Lawyers complying in 2010 and 2011 are required to complete a minimum of eighteen 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.

Unauthorized Practice of Law Committee Accepting Applications

The Utah State Bar is currently accepting applications to fill vacancies on the Unauthorized Practice of Law (UPL) Committee. The UPL Committee reviews and investigates all complaints regarding unauthorized practice of law and makes recommendations to the Board of Bar Commissioners as appropriate for formal action. The UPL Committee also engages in special projects involving public awareness of UPL issues that affect the community, e.g., distributing pamphlets and media releases among the immigrant communities. If you want to contribute to this important function of the Bar, please submit a letter and résumé indicating your interest at your earliest convenience to:

Unauthorized Practice of Law Committee
C/O Nancy Rosecrans
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111
Or *via email* to: Nancy.Rosecrans@utahbar.org

A Call for Topic Ideas for Law Student Papers and Articles

Remember the burden of trying to find a meaningful topic to write about during law school? What would you have given to pick the brain of a judge or seasoned attorney who could pluck an idea or two from his or her robust caseload? Does it not seem a little odd that law students are asked to come up with cutting-edge topics before they have begun to practice? Yet law students face this challenge every year.

One section of the bar, the Litigation Section, has decided to try an experiment to see if we can help. The concept is simple: get topics from practitioners to law students. Our tools: an email address and a webpage.

As a practicing lawyer or judge, you brush up against interesting legal topics on a regular basis. We ask you to turn on your topic sensors, so that you'll recognize when you've encountered something a law student could write about. When you do, just type us an email about it – stream of consciousness even – and hit send. It is that simple. If we all start to do this, we can amass an impressive number of topics in no time.

The email address for topic submissions is topicbank@utahbar.org. Please put this email address somewhere you can find it, such as on a note on your monitor. Also, please feel free to send us test messages so that the email address will populate automatically the next time you type the word "topic" in the "To" line of an email.

There is no need to develop or refine your topic idea. Law students can sift and shape the ideas as they see fit. What we need from you is the basic direction or thought from which a paper might be developed. Of course, if you prefer to carefully polish your idea (and if you have the time to do so), please send us your more refined product. But we would rather get an imperfect idea than none at all.

And do not fret about being judged by the quality of the topics you submit or the way you write them up. All topics will be listed anonymously – without any information about you whatsoever – unless you tell us you want to be identified. If a law student later requests your identity or contact information (such as to ask a follow-up question or see if you are interested in collaborating on a project not for credit), we will give it out only with your prior approval.

As for the scope of suitable topics, we are imposing no restrictions based on jurisdiction or type of law. The only thing we ask is that the topic be suitable for either a law-school-course paper or an article in a law-review-type journal or bar journal.

Our goal is to get 300 topics posted by the end of the year. With the number of attorneys licensed in Utah, we could easily exceed that. Would you make a goal to send us one or two reasonably good topic ideas within the next two weeks (or month)? We hope you will make it a habit to regularly send us topics as you come across them. But starting the habit is critical, so please consider making a submission within the next few weeks.

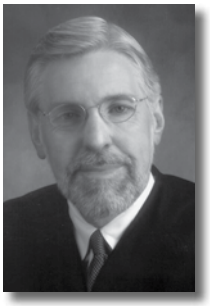
The topic ideas will be posted online at http://litigation.utahbar.org/topic-bank.html. Law students at the University of Utah and Brigham Young University will be invited to review the website and claim any topic they are interested in. We will then follow up with the students, so that if they end up abandoning a topic, we can make it available to others again.

Because our primary goal is to help law students here in Utah, for the first six months after a topic is posted, only students at the U of U or BYU will be allowed to claim the topic. Thereafter, other writers (including law students elsewhere, law professors, judges, and practicing attorneys) can claim the topic.

We are excited to help law students in this way and hope this project will ultimately help not only students, but also the bench and bar as more is written about topics dug from the trenches of our practices. For more information on this project, please visit http://litigation.utahbar.org/topic-bank.html. And thank you in advance for any topic ideas you can send.

2010 Summer Convention Award Recipients

The following awards were presented at the 2010 Summer Convention in Sun Valley. We congratulate the recipients and thank them for their service.



Judge Robert K. Hilder
Judge of the Year

Randy L. Dryer
Lawyer of the Year

Kathy D. Dryer
Special Service Award

Judge Pamela T. Greenwood
Distinguished Judicial Service

Military Law Section
Section of the Year

Bar Examiner Committee
Committee of the Year

2010 Utah Cyber Symposium

SPONSORED BY THE CYBERLAW SECTION

Learn, Lead, and Network

Come join other attorneys and business professionals to learn more about legal and business challenges and opportunities faced by companies in the high tech industry today. In addition to our keynote speakers, key local legal and business leaders will address these issues and ways to improve the performance of your business and that of your clients. Individual presenters and panels of knowledgeable experts in business innovations, entrepreneurship, laws, and regulations will conduct specialized breakout sessions throughout the day.

KEYNOTE SPEAKERS:

Paul Allen, Internet Entrepreneur and 2010 Cyber Pioneer Award Recipient
Pete Ashdown, XMission

For further details or registration information, please visit our website at www.utahcyberlaw.com or contact Dave Langeland, chair of the Cyberlaw Section, at 801-530-7324 or dlangeland@cnmlaw.com.

Garden Visitors Center
Thanksgiving Point, Lehi, UT

Friday, September 17
7:30 am — 4:30 pm

7 hrs. CLE, including 1 hr. Professionalism & Civility

$150 for Section Members

$170 Become a Member & Register

$180 for Non-Members

For more information:
www.utahcyberlaw.com

National Pro Bono Celebration

October 24–30, 2010

www.celebrateprobono.org

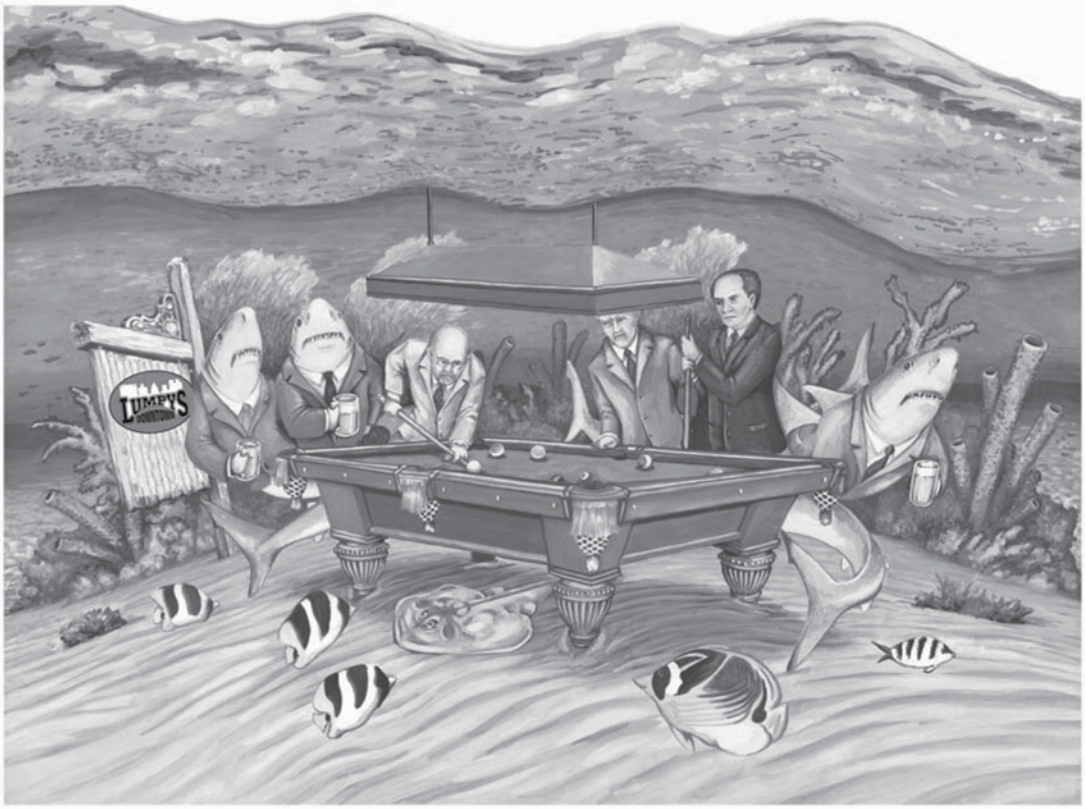
To find out about events in Utah please contact the Utah State Bar at 801-297-7027, probono@utahbar.org, or Utah Legal Services at 801-924-3376.

UTAH DISPUTE RESOLUTION

is offering Valuable Training for Lawyers, Paralegals, & other Legal Staff:

- Basic Mediation Training [September 15, 16, 17, 20, 21] [February 2, 3, 4, 7, 8 2011]
- Cultural Awareness [September 29]
- Basic Mediation Refresher [January 11, 2011]
- Domestic Law Basics [November 3]
- Domestic Violence Awareness and Screening for Mediators [November 8]
- Parent Coordinator Training [September 30, October 1, 2]
- Basic Mediation Mentorship [any time]
- Domestic Mediation Mentorship [any time]

Find detailed information at:
www.utahdisputeresolution.org • [801] 532-4841



"BAR SHARKS FOR JUSTICE"

UTAH STATE BAR YOUNG LAWYERS DIVISION

Ninth Annual Pool Tournament & Social

October 21st & October 28th, 2010

Thursday Evenings Starting at 6:00
Match Times To Be Announced

Lumpy's Downtown
145 W. Pierpont Ave, Salt Lake City

To register a team
Go to www.andjusticeforall.org to download a registration form or call 801-924-3182.
Registration deadline is October 8, 2010.

To join in the social festivities
Simply come to Lumpy's on any or all of the nights of play. You can socialize with old friends, meet new colleagues, and cheer on your favorite team.

Proceeds benefit "and Justice for all"
a non-profit organization providing free civil legal aid to the disadvantaged in Utah

Printing Sponsor, Orange Legal Technologies

ORANGE LEGAL TECHNOLOGIES

Presenting Sponsor
CIT Bank

CIT

Venue Sponsor, Lumpy's Downtown

LUMPY'S DOWNTOWN

Lumpy's will also donate 10% of food sales

"Bar Sharks for Justice" Team Registration Form

Team Contact _____

Sponsoring Organization _____

Phone ( ) _____ Email _____

☐ **$250 Team Sponsor ($100 for Government & Non-Profit Organizations)**

Each team consists of a two-player team. However, teams have the option to switch either or both of the two players between matches (you may add/change alternate names at any time). Benefits include:

- Registration for 1 two-person team
- Two t-shirts
- Name listed on event web page & t-shirt
- Recognition in Utah Bar Journal ad following the event
- Included in "AND JUSTICE FOR ALL" newsletter

Player 1 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

Player 2 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

☐ **$500 Team Sponsor**

Each team consists of a two-player team. However, teams have the option to switch either or both of the two players between matches (you may add/change alternate names at any time). Benefits include:

- Registration for up to 2 two-person teams
- Four t-shirts
- Business name, logo, and link on event web page
- Logo on t-shirt
- Recognition in Utah Bar Journal ad following the event
- Included in signs at the event
- Included in "AND JUSTICE FOR ALL" newsletter

Player 1 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

Player 2 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

Player 3 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

Player 4 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

Payment

☐ Check payable to "Utah State Bar"

Send to Utah State Bar
645 S. 200 E.
Salt Lake City, UT 84111

☐ Visa ☐ Mastercard ☐ AMEX ☐ Discover

Name on Card_____
Address_____
No. _____ exp. _____
Signature_____

Registration and fee must be received by October 8, 2010.
If you would like to order additional shirts or have questions, please call Metra at (801) 924-3182

Pro Bono Honor Roll

James Ahlstrom – Tuesday Night Bar
Skyler Anderson – Immigration Clinic
Nicholas Angelides – Senior Cases
Ken Ashton – Tuesday Night Bar
Mark Astling – Tuesday Night Bar
Jim Backman – Tuesday Night Bar
Susan Baird Motschiedler – Tuesday Night Bar
Brandon Baker – Service Member Attorney Volunteer
Ron Ball – Ogden & Farmington Legal Clinics/Housing Case
Alain Balmanno – Legal Assistance to Military, Service Member Attorney Volunteer
Jason Barnes – Adoption Case
Carl Barton – Tuesday Night Bar
Melissa Bean – Tuesday Night Bar
Gracelyn Bennett – Bankruptcy Hotline
Jonathan Benson – Immigration Clinic
Maria-Nicolle Beringer – Bankruptcy Hotline
Andrew Berry – Adult Guardianship Case
Christiana Biggs – Tuesday Night Bar
Mike Black – Tuesday Night Bar
Jennifer Bogart – Guadalupe & Family Law Clinics
Kevin Bolander – Tuesday Night Bar
Ryan Bolander – Tuesday Night Bar
Ann Boyle – Habeas Case
Bob Brown – Tuesday Night Bar
Mary D. Brown – Family Law Clinic, Tuesday Night Bar
Bryan Bryner – Guadalupe Clinic
Ken Burton – Divorce Case
Steve Burton – Tuesday Night Bar
Josh Chandler – Tuesday Night Bar
Brad Christopherson – Tuesday Night Bar
Tim Clark – Tuesday Night Bar
Bruce Clotworthy – LGBT Clinic
Katherine Conyers – Tuesday Night Bar
Rita Cornish – Tuesday Night Bar
Robert Crockett – Tuesday Night Bar
Ted Cundick – Guadalupe Clinic
Tim Dance – Tuesday Night Bar
Kevin Deiber – Family Law Clinic
Zach Derr – Tuesday Night Bar
Jana Dickson Tibbitts – Family Law Clinic
Tadd Dietz – Guadalupe Clinic
Kyle Fielding – Guadalupe Clinic
Shawn Foster – Immigration Clinic
Keri Gardner – Family Law Clinic
Jeffry Gittins – Guadalupe Clinic
Chad Gladstone – Family Law Clinic
Ronald Goodman – QDRO Case
Benjamin Gordon – Housing Case
Trevor Gordon – Tuesday Night Bar
Paul Gosnell – Consumer Case
Esperanza Granados – Immigration Clinic
Jason Grant – Family Law Clinic
Jacob Gunter – Two Domestic Cases
Sheleigh Harding – Family Law Clinic
Kathryn Harstad – Guadalupe Clinic
Garth Heiner – Guadalupe Clinic
Rori Hendrix – QDRO Case
April Hollingsworth – Guadalupe Clinic
Melanie Hopkinson – Family Law Clinic
Sean Hullinger – Habeas Case
Dixie Jackson – Family Law Clinic
Kristin Jaussi – Guadalupe Clinic
Bryan Johansen – Tuesday Night Bar
Casey Jones – Tuesday Night Bar
Stephen Julien – Domestic Case
Scott Karren – Tuesday Night Bar
Mark Kittrell – Tuesday Night Bar
Courtney Klekas – Family Law Clinic
Louise Knauer – Family Law Clinic
Stephen Knowlton – Legal Assistance to Military, Service Member Attorney Volunteer
Jennifer Korb – Guadalupe Clinic
Gary Kuhlmann – Protective Order Case
John Larsen – Bankruptcy Case
Kelly Latimer – Tuesday Night Bar
Jennifer Lee – Legal Assistance to Military
Leslie Lewis – Domestic Case
Nancy Major – Family Law Clinic
Jennifer Mastrorocco – Family Law Clinic
William Marsden – Guadalupe Clinic
Walter Merrill – Legal Assistance to Military
Leona Meyer – Guadalupe Clinic
Christina Micken – Tuesday Night Bar
Erin Middleton – Tuesday Night Bar
Adam Miller – Adoption Case
Bryan Nalder – Tuesday Night Bar
Robin Nalder – Guardianship Case
Trent Nelson – Family Law Clinic
Bao Nguyen – Immigration Clinic
Wolfgang Nordmeyer – Family Law Clinic
Barbara Ochoa – Tuesday Night Bar
Ellen O'Hara – Family Law Clinic
Shauna O'Neil – Bankruptcy Hotline/ Housing Case
Todd Olsen – Family Law Clinic
Rachel Otto – Guadalupe Clinic
Kristie Parker – Park City Legal Clinic
Candice Pitcher – LGBT Clinic
Christopher Preston – Guadalupe Clinic
Michelle Quist – Family Law Clinic
Stewart Ralphs – Family Law & LGBT Clinics
Josh Randall – Tuesday Night Bar
Austin Riter – Tuesday Night Bar
Francisco Roman – Domestic Case
Rebecca Ryon – Protective Order Case
Brent Salazar-Hall – Family Law Clinic
Stephanie Saperstein – Tuesday Night Bar
Leslie Schaar – LGBT Clinic
Lauren Scholnick – Guadalupe Clinic
William Shinen – Family Law Clinic
Cobie Spevak – Domestic Case
Linda F. Smith – Family Law Clinic
Charles Stewart – SSDI Case
Shawn Stewart – Tuesday Night Bar
Charles Stormont – Tuesday Night Bar
Virginia Sudbury – LGBT Clinic
Jessica Taylor – Family Law Clinic
Michael Thomas – Tuesday Night Bar
Matt Thorne – Tuesday Night Bar
Roger Tsai – Immigration Clinic
Jenette Turner – Tuesday Night Bar
Maile Verbica – Tuesday Night Bar
Robyn Wicks – Tuesday Night Bar
Paul Waldron – Adoption Case
Steven Walkenhorst – Tuesday Night Bar
Joy Walters – Bankruptcy Hotline
Tracey Watson – Family Law Clinic
Murry Warhank – Guadalupe Clinic
Scott E. Williams – Protective Order Case
Troy Wilson – Estate Planning/Probate Case
John Zidow – Tuesday Night Bar

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 or Karolina Abuzyarova at (801) 297-7027 to volunteer.

Attorney Discipline

RESIGNATION WITH DISCIPLINE PENDING

On June 23, 2010, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Martin J. MacNeill 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 June 4, 2009, Mr. MacNeill entered a guilty plea to two counts of Aggravated Identity Theft and Aiding and Abetting, both felonies. Mr. MacNeill was sentenced to a prison term of 48 months.

On September 21, 2009, Mr. MacNeill entered a guilty plea to one count of False/Inconsistent Material Statements, a second degree felony, one count of Recording False/Forged Instruments, a third degree felony, and one count of Accepting Benefits from False or Fraudulent Insurance Claim, a third degree felony. Mr. MacNeill was sentenced to a prison term of 365 days, for each count, and placed on 72 months probation.

ADMONITION

On May 26, 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 1.4(a)(1) (Communication), 1.15(a) (Safekeeping Property), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct).

In summary:

A client was involved in an automobile accident and contacted an attorney's office for representation in a personal injury case. The attorney was living out of the country at the time of initial contact. The attorney asked two individuals to receive the mail, scan it and email it to the attorney. The client spoke to one of the individuals who indicated they worked for the attorney's law firm and that the attorney would be handling the case. Without the client's knowledge or consent, the individual negotiated a settlement. The client did not receive any of the settlement proceeds. As part of their work for the attorney, the individuals received all correspondence, pleadings, and money for the clients. The individuals were responsible for filing court documents for the attorney's clients. It was not possible for the attorney to adequately supervise the individuals when the attorney was out of the country. The attorney failed to establish procedures to ensure that the individuals conducted themselves in a manner consistent with the attorney's ethical obligations. The attorney failed to inform the clients that the individuals would be assisting the attorney on their cases.

PUBLIC REPRIMAND

On May 26, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Robert D. Atwood for violation of Rules 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.6(a) (Confidentiality of Information), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Atwood represented a client in a guardianship/conservatorship proceeding with respect to her father. While it was not clear to all of the parties whether Mr. Atwood also represented other siblings, some of the other siblings had separate counsel. At one point, Mr. Atwood sent an email to all of the siblings and their attorneys as well as to the father's attorney. The email included statements that he disagreed with his client's position and that he did not believe that his client's father needed a guardian/conservator. Mr. Atwood also revealed through his email that he had a potential conflict with his client. Mr. Atwood also indicated in a subsequent email that he was going to withdraw, even though he had not discussed this with his client before this time. Mr. Atwood included in the email the basis for his decision to withdraw. Mr. Atwood had not discussed with his client the contents of the email prior to sending it and had not obtained his client's informed consent or permission to disclose the information. The contents of the email were later used by opposing counsel to attempt to disadvantage the client.

Aggravating factors: Refusal to acknowledge the wrongful nature of misconduct; substantial experience in the practice of law.

PUBLIC REPRIMAND

On July 20, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Edward W. McBride for violation of Rules 3.5(a) (Impartiality and Decorum of the Tribunal), 4.4(a) (Respect for Rights of Third Person), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. McBride represented an heir to an Estate. Mr. McBride sent a letter to four District Court judges who were presiding over the estate matters. In his letter Mr. McBride purposefully revealed that he initiated OPC proceedings against the complainants. Proceedings before the OPC are confidential. In his letter Mr. McBride accused the complainants of perpetrating a fraud upon the Court. Mr. McBride also sent letters to the complainants in an attempt to convince them to accept his point of view regarding the underlying litigation through

use of coercion and threats of criminal proceedings. Mr. McBride's letters to complainants had no substantial purpose other than to embarrass and burden them.

PUBLIC REPRIMAND

On July 20, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Dusten L. Heugly for violation of Rules 1.7(b)(4) (Conflict of Interest: Current Clients), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Heugly agreed to represent clients in a family court matter. Mr. Heugly expressed that if he were to be retained by the clients he would clearly have a conflict of interest based on the fact that his parent was a counselor and court appointed supervisor. Mr. Heugly did not get a written waiver for this conflict and entered an appearance in the parental rights case. Mr. Heugly's actions caused harm by undermining the confidence in the proceedings and calling into question the fair, impartial, and just administration of the case.

RECIPROCAL DISCIPLINE

On May 25, 2010, the Honorable Paul G. Maughan, Third Judicial District Court entered an Order of Discipline: Public Reprimand against Daniel P. McCarthy for violation of Rules 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. This was a reciprocal discipline order based upon an Order from the United States Patent and Trademark Office ("USPTO").

In summary:

The original complaint was made to the USPTO and alleged that Mr. McCarthy made derogatory and scandalous statements in patent applications, failed to take appropriate action to remove those statements from the public record, and misrepresented that those statements would be removed. In particular, Mr. McCarthy had caused to be placed in the public record "derogatory and scandalous" statements regarding an applicant and patentee. The statements were later found by the USPTO to be derogatory and scandalous.

In mitigation the OPC considered the following: (1) Illness; and (2) Mr. McCarthy has made recent efforts to remove the language from the patent applications.

DISBARMENT

On July 19, 2010, the Honorable David Mortensen, Fourth District Court entered an Order of Discipline: Disbarment against Jerome R. Hamilton 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:

After being charged with theft, a third degree felony, for keeping a laptop computer, notwithstanding a number of requests for its return; on July 16, 2008, Mr. Hamilton entered a No Contest plea to Wrongful appropriation, a Class A misdemeanor. Mr. Hamilton's plea was held in abeyance for 36 months. Mr. Hamilton ultimately returned the computer.

2010-2011 Paralegal Division Board of Directors

by Heather Finch

Back Row: Aaron Thompson, Steven Morley, Jennifer Nakai, Julie Eriksson, & Heather Nielson. Middle Row: Carma Harper, Danielle Price, Lorraine Wardle, & Jessica Christensen. Front Row: Tally Burke & Heather Finch. Board Members Not Pictured: Colleen Wrigley, Thora Searle, Suzanne Potts, & Deb Calegory

As the new Chair of the Paralegal Division, I am pleased to introduce to you the new officers and directors of the Paralegal Division for 2010-2011. I am honored to be working with such a wonderful group of professionals and am looking forward to the coming year. The Paralegal Division works hard to provide affordable and free Continuing Legal Education seminars, professional networking, job postings, community service opportunities, Bar Journal articles relevant to the Paralegal profession, Paralegal Day events, and many other benefits. I would like to encourage all of you to get involved with the Paralegal Division. There are leadership opportunities and many committees that could always use your help.

If you would like more information about the Paralegal Division, please visit our website at www.utahparalegals.org.

Our officers and board of directors for 2010-2011 are:

Chair – Heather Finch: Heather has over twenty years of paralegal experience and she is the senior litigation paralegal with the firm of Howard, Lewis & Petersen, P.C., in Provo, where she has worked since 1995. She works primarily in the areas of civil litigation, plaintiffs' medical malpractice, plaintiffs' personal injury, and plaintiffs' product liability. Heather received her paralegal certification in 1990 from Wasatch Career Institute. She was honored to be selected as Utah's Distinguished Paralegal of the Year in 2009.

Region I Director & Chair Elect – Carma Harper: Carma serves the counties of Davis, Morgan, Weber, Rich, Cache, and Box Elder. She works for Strong & Hanni in the areas of insurance defense, personal injury, construction litigation, and product liability. Carma received her paralegal certification from Wasatch Career Institute in 1989. Carma has been very active on the Paralegal Division's Community Service Committee and this year will be Co-Chair for Membership.

Region II Director – Danielle Price: Danielle serves the counties of Salt Lake, Tooele, and Summit. She works for Strong & Hanni where she concentrates in insurance defense. She has worked as a paralegal for eighteen years with experience in various practices of law including civil litigation, personal injury, bankruptcy, construction law, adoption, collections, and family law. She has achieved her Certified Paralegal designation from NALA. She was the chair for the Paralegal Division of the Utah State Bar for the term of 2005-2006. She is currently the Community Service Chair for the Division and the Young Lawyers Division Liaison.

Region III Director, Secretary – Jennifer Nakai: Jennifer serves the counties of Juab, Millard, Utah, Wasatch, Duchesne, Uintah, and Daggett. She currently works for the Utah County Attorney's Office. She has worked in the legal field since 1986 and received her Associates Degree in Paralegal Studies in 1995. She is a certified paralegal with NALA and recently earned her Advanced Certified Paralegal Credential in Trial Practice.

Region IV Director – Colleen Wrigley: Colleen serves the counties of Carbon, Sanpete, Sevier, Emery, Grand, Beaver, Wayne, Piute, San Juan, Garfield, Kane, Iron, and Washington. Colleen is a paralegal at the law firm of Clarkson Draper & Beckstrom in St. George, Utah, working primarily in the areas of estate planning and business entity creation and planning. She earned her B.S. at Brigham Young University. Colleen will be assisting as co-chair for the Paralegal of the Year Committee and CLE.

Director-at-Large – Thora Searle: Thora has worked in the legal field since 1972 and is currently a Judicial Assistant for the Honorable William T. Thurman at the United States Bankruptcy Court for the District of Utah. She previously worked for Judge Thurman for twenty-one years while he was practicing at McKay, Burton & Thurman. Thora is the Education/CLE Co-Chair for the Paralegal Division.

Director-at-Large – Suzanne Potts: Suzanne has been a paralegal for over twenty years. She is employed at Clarkson Draper & Beckstrom in St. George, Utah. She works primarily in civil litigation. Suzanne is also a mediator having completed her basic mediation training through the Utah State Bar, Alternative Dispute Resolution in 2001. She is a volunteer for the Southern Utah Community Center and mediator for the Juvenile Court Victim Offender Mediation Program. Suzanne is the chair for the Paralegal of the Year Committee as well as the Chair for Ethics & Professional Standards.

Director-at-Large, Parliamentarian – Deb Calegory: Deb is a certified Paralegal who works for the St. George office of Durham, Jones & Pinegar. She certified as a Paralegal in 1986 through the American Paralegal Association. Deb has extensive experience in the areas of real estate, litigation, business, and transactional law. Deb has been active in the paralegal profession over the course of her career. She was a charter member of the Paralegal Division of the Utah State Bar. Deb has served in numerous leadership positions for the Division, including the Chair of the Division from 2001-2002. In 2008, Deb was honored by being selected as Utah's Distinguished Paralegal of the Year.

Director-at-Large – Tally Burke: Tally has over fifteen years of paralegal experience and currently works as a paralegal in the corporate legal department of Inthinc, Inc., located in West Valley City, which focuses on telematics, fleet solutions, and driving safety technologies. Tally received her Legal Assistant Certificate in 1996 from Salt Lake Community College. She also received her Associate of Applied Science, with a major in Paralegal Studies in 1997 and her Associate of Science in 2005 from Salt Lake Community College. In 2006, she earned her bachelor's degree in Criminal Justice from Weber State University with a minor in Criminal Law and an emphasis in paralegal studies. Tally is a past Chair of the Paralegal Division (2004-2005) and currently serves as the Co-Chair on the Paralegal Utilization Task Force.

Director-at-Large – Jessica Christensen: Jessica has worked as a Paralegal in the Asset Forfeiture Unit at the United States Attorney's Office for over two years. Prior to working at the United States Attorney's Office, Jessica worked in the area of family law. Jessica has an Associate's Degree in Paralegal Studies from Salt Lake Community College and is currently working on her Bachelor's Degree at Utah Valley University. Jessica is the Membership Chair for the Paralegal Division.

Director-at-Large, Finance Officer – Julie Eriksson: Julie has been a paralegal for seventeen years and currently works for Christensen & Jensen in the area of civil litigation. She has been an active participant in the Paralegal Division since its

Membership Benefits

Members of the Paralegal Division are afforded the benefits that are available to the Bar membership through the efforts of the Bar's Member Benefits Committee. For further information refer to: http://www.utahbar.org/members/member_benefits.html.

- **Membership includes the *Utah Bar Journal* which is published six times per year.**
- **Paralegal Division members are welcome to join various sections of the Bar.**
- **Counseling services for no additional charge through Blomquist Hale.**
- **CLE: Free CLE Brownbag Luncheons**

Get Connected by Joining Today!

Voluntary membership in the Division will help sustain a high level of leadership and professionalism in the legal community. Get involved.

- **Membership Cost – $75 per year**
- **Membership forms are available on our website:**

  http://www.utahparalegals.org or http://www.utahbar.org/sections/

inception. Julie served as CLE Chair of the Paralegal Division from 2007-2008. In 2007, she became Chair-Elect of the Paralegal Division and served as the Division's Governmental Relations Liaison to the Utah State Bar's Governmental Relations Committee. Julie is also a member of LAAU and is currently the Chair for the Paralegal Utilization Task Force.

Director-at-Large – Steven A. Morley: Steven is a paralegal in the Asset Forfeiture Unit at the United States Attorney's Office and has been working there for over four years. Steven graduated with a B.S. degree in Paralegal Studies from Utah Valley University. He also worked as a military paralegal in the United States Air Force Reserve for nearly three years concentrating in military justice. Steven serves the Division as the Marketing & Publications Committee Chair and *Bar Journal* Liaison.

Director-at-Large – Heather Nielson: Heather has been a paralegal for over thirteen years. She is currently employed by the United States Attorney's Office as a paralegal specialist, primarily in the area of Asset Forfeiture law. She earned her Bachelor's Degree in Paralegal Studies and Criminal Justice from Utah Valley University. Heather serves the Division as the LAAU Liaison and the UMBA Liaison.

Director-at-Large – Lorraine Wardle: Lorraine Wardle is the Senior Paralegal at the firm of Victoria Kidman & Associates, claims litigation counsel for State Farm Insurance. Lorraine also has extensive insurance defense experience. Lorraine is the Education/CLE Chair for the Paralegal Division.

Ex-Officio Director (Immediate Past Chair) – Aaron Thompson: Aaron is a paralegal employed by the legal department of Headwaters Incorporated, concentrating in commercial insurance. He earned his B.A. and Paralegal Studies degree from Westminster College. Aaron's paralegal career experiences have varied from working with the Utah Attorney General's Office in the Commercial Enforcement and Consumer Protection division to working with local and national organizations, gubernatorial, Senate, Congressional and Presidential campaigns around the United States. In 2008, Aaron directed Governor Bill Richardson's Presidential campaign in Utah. Aaron is currently the Government Relations Chair. He is also responsible for maintaining and updating the Paralegal Division's Website and Facebook page.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
09/10/10	**Cache County Golf & CLE.** 9:00 am – 12:00 pm. Birch Creek Golf Course, 550 E. 100 North, Smithfield, UT. Litigation and Cache County Bar Assoc. Members – CLE only: $30, CLE & Golf: $40. All others – CLE only: $45, CLE & Golf: $55. "Proposed Amendments to the URCP," Janet Smith, Ray Quinney & Nebeker. "Effective Written and Oral Mediation Tactics," Judge Gordon Low (retired); Judge William Bohling (retired); and Marty More, Bearnson & Peck	3 including 1 Ethics
09/17/10	**Utah County Golf & CLE.** 8:00 am – 12:00 pm, golf following. The Ranches, 3688 East Campus Drive, Eagle Mountain, UT. Litigation Section and CUBA Members – CLE only: $60, CLE & Golf: $45. Non-Members – CLE only: $60, CLE & Golf: $75. "Proposed Amended Rules," Judge Derek Pullan. "Effective Written and Oral Advocacy in Our Court" and "Ethics Case Studies," with Judge Derek Pullan, Judge David Mortensen, and Judge Thomas Low. Lunch on your own.	3
09/17/10	**2010 Utah Cyber Law Symposium.** 7:30 am – 4:30 pm. Thanksgiving Point, Lehi, UT. Section Members – $120 before 8/31/2010, $150 after. Register and join section – $140. Others – $180. Keynote Speakers: Pete Ashdown, XMission; and Paul Allen, Internet Entrepreneur and 2010 Cyber Pioneer Award Recipient. Visit www.utahcyberlaw.com for more details and the full agenda.	7 including 1 hr. Profess/Civility
09/23/10	**Family Law Basics.** 4:30 – 7:45 pm. $80 for three years and under, $95 all others. Speakers include: Hon. Douglas B. Thomas and Comm. Catherine S. Conklin. Topics include: "Resources for the Practitioner New to Family Law," and "How to Gain Practical Experience Without Inviting a Malpractice Suit."	3
10/07/10	**Being "the Nicest Guy" in the Courtroom.** 4:00 – 7:15 pm.	3 hrs. Ethics
10/21/10	**New Lawyer Required Ethics Program.** 8:30 am – 12:30 pm. $65. Fulfills new lawyer ethics requirement.	fulfills new lawyer ethics requirement
10/22/10	**Annual ADR Academy.** Details coming soon.	TBA
10/28/10	**Mentor Training and Orientation Program.** 8:30 – 11:30 am. Free. *This event is only open to Utah Supreme Court Approved Mentors.*	1 Ethics 1 Profess/Civility
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."	9 including 1 Profess/Civility 2 Ethics
12/10/10	**6th Annual Elder Law & Estate Planning Seminar.**	TBA
12/16/10	**Benson & Mangrum on Evidence**	TBA

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

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.

WANTED

Selling your practice? Retiring or just slowing down? Estate Planning, Elder Law, Personal Injury, Business Law, Real Estate, Title & Escrow. Call or email attorney Ben E. Connor, (800) 679-6709, Ben@ConnorLegal.com.

I am looking to buy an inexpensive set of either Utah Reports or Pacific Reporter Reports from 847 P.2d forward. Call Ted at (801) 883-9333 or email utahfamilytriallawyer@yahoo.com.

OFFICE SPACE/SHARING

Attorney Office Sharing space available in attractive two-story corner building with ten attorney window offices located in downtown historic Provo. Receptionist, office manager, copier, fax, conference rooms, telephone, internet, malpractice insurance, 1/2 full-time legal secretary per attorney in established "firm." Possible overflow and referrals. Located 3 blocks from court house. Please visit www.esplinweight.com or call 801-373-4912 for more information. 290 West Center Street.

POSITIONS AVAILABLE

VISITING PROFESSORSHIPS – Pro bono teaching assignments at law schools in East Europe and former Soviet republics. See www.cils3.net. Contact CILS, Matzenkopfgasse 19, Salzburg 5020, Austria, email cils@cils.org, US fax (509) 356-0077, US tel (970) 460-1232.

LLM IN INTERNATIONAL PRACTICE – LLM from Lazarski University, Warsaw, Poland, and Center for International Legal Studies, Salzburg, Austria. Three two-week sessions over three years. See www.cils.org/Lazarski.htm. Contact CILS, Matzenkopfgasse 19, Salzburg 5020, Austria, email cils@cils.org, US fax (509) 356-0077, US tel (970) 460-1232.

APPLICANT FOR CRIMINAL CONFLICT OF INTEREST CONTRACT – The Salt Lake Legal Defender Association is currently accepting applications for several trial and appellate conflict of interest contracts to be awarded for the fiscal year 2011. To qualify for the trial conflict of interest contract, each application must consist of two or more attorneys. Significant experience in criminal law is required. Application due on or before November 24, 2010. Please contact Lisa, 801-933-8703.

NEW LAW OFFICE POSITIONS

Nationwide Trial Division, with offices across the United States, will open a new Trial Division office in the Salt Lake City area Fall 2010. Applications are being accepted for:

MANAGING ATTORNEY: The Managing Attorney is the on-site person responsible for leading the delivery of legal services to clients and claims customers, and will directly supervise attorneys and paralegals in the trial office. Utah licensure, 8 years litigation experience and prior management experience are ***absolute prerequisites;*** Idaho licensure would be beneficial. Proven knowledge of litigation practices and procedures, claim processes and management principles and practices are also required.

TRIAL ATTORNEY: This is a high profile, litigation intensive position requiring considerable initiative, legal creativity and the ability to relate with business clientele. Utah licensure and minimum 3-5 years civil litigation experience ***required***; Idaho licensure would be beneficial. The successful candidate must possess excellent verbal/written communication skills, ability to interpret and apply statutes and appellate decisions.

PARALEGAL & LEGAL SECRETARY positions also available.

We offer challenging opportunities, competitive salaries and benefit packages. Interested candidates should fax their resume to Mark R. Rudoff at 314/966-2904 and/or apply online at www.nationwide.com. EOE/M/F/D/V

Main Street SLC law firm seeks 1-2 attorneys with existing clientele to join an association of 8 lawyers. Established and diverse group of seasoned lawyers focusing on business transactions and litigation. Newly-renovated office space. Please send inquiries to Confidential Box #2, Attn: Christine Critchley, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834 or by email ccritchley@utahbar.org.

SERVICES

Utah real estate attorney and licensed broker employs a unique approach to solving foreclosure problems: initiate a quiet title action to invalidate the trust deed! Stop dealing with the realtors, stop dealing with the bank's servicing companies, hire Walter T. Keane and get your trust deed nullified! Affordable litigation primarily paid for after the nullification of the trust deeds OR out of the real estate commission should the client choose a short sale solution. Walter was recently quoted in a Salt Lake City Tribune article on the foreclosure crisis. Contact Walter at 801-990-4422 or visit him on the web at www.voidyourtrustdeed.com.

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.

CHILD SEXUAL ABUSE – SPECIALIZED SERVICES. Court Testimony: interviewer bias, ineffective questioning procedures, leading or missing statement evidence, effects of poor standards. Consulting: assess for false, fabricated, misleading information/ allegations; assist in relevant motions; determine reliability/validity, relevance of charges; evaluate state's expert for admissibility. Meets all Rimmasch/Daubert standards. B.M. Giffen, Psy.D. Evidence Specialist (801) 485-4011.

Language – CTC Chinese Translations & Consulting Mandarin and Cantonese and other Asian languages. We have on staff highly qualified interpreters and translators in all civil and legal work. We interpret and/or translate all documents including: depositions, consultations, conferences, hearings, insurance documents, medical records, patent records, etc. with traditional and simplified Chinese. Tel: (801) 573-3317, Fax: (801) 942-1810, e-mail: eyctrans@hotmail.com.

Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics: Consultant and expert witness. Charles M. Bennett, 257 E. 200 S., Suite 800, Salt Lake City, UT 84111; (801) 578-3525. Fellow, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.

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NEW LAWYER
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(801) 297-7026

CONSUMER ASSISTANCE
COORDINATOR
Jeannine Timothy
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