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"First Snow" from the top of Snowbird, by first-time contributor Susan Rose, Sandy, Utah.

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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.

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Dear Editor:

There is a prominent billboard currently located in Payson along I-15 that advertises for a law firm with the tagline “Just sue ‘em!” I am repeatedly disgusted whenever I must pass that sign and cannot believe that members of my own profession, a profession which since time immemorial has been fighting to rid itself of the negative stigma that the public places on the majority of its practitioners, continue to perpetuate the stereotype of the ruthless, court-loving, money-hungry lawyer.

Litigation is certainly necessary sometimes, and yes, does help to put food on my table at home, but I cannot help but think of people like Stella Liebeck and her hot McDonald’s coffee when I see that tagline. Spill coffee on yourself? Just sue ‘em!! Someone looks at you funny? Just sue ‘em! Someone cuts in front of you at the grocery check-out line? Just sue ‘em! While the courtroom is the proper venue for many disputes, “Just sue ‘em!” makes it

sound like court is the proper forum for all disputes, no matter how trivial. Our society is already too vengeful. Why would we encourage that kind of behavior? To pad our pockets? Have we really sunk that low? And do we really need another blow to our already far-too-blackened eye?

I call on the firm that has erected that sign to reconsider its action. I am way too tired of the jokes that inevitably come when people, including the pharmacist who gave me my flu shot a few weeks ago, find out what my profession is. I have only been a lawyer for a few years now. Don’t make things any harder than they already are, all right?

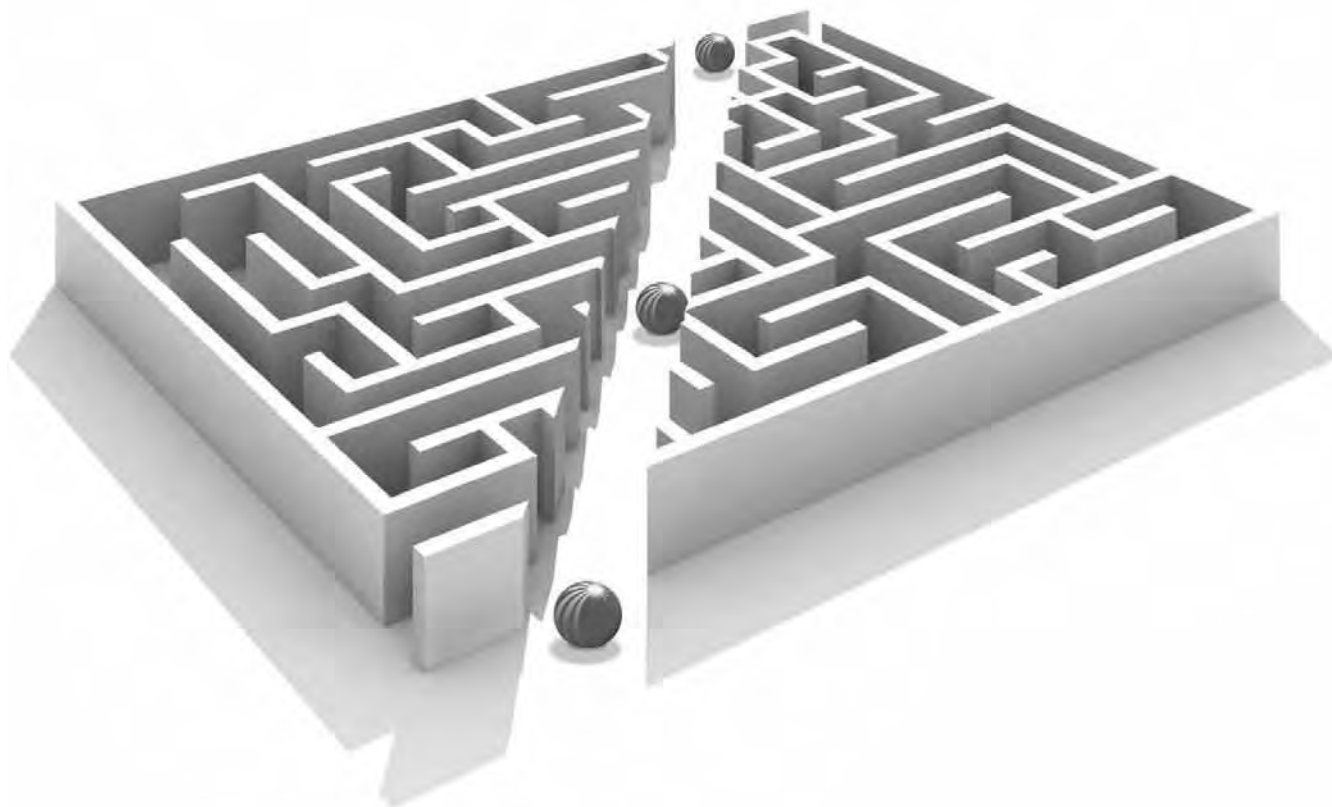
Sincerely,
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Eagle Mountain, UT

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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.
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The Pro Se Quandary

by Robert L. Jeffs

On October 13, over 300 new attorneys were admitted to practice in Utah. With the economic downturn, many law firms have curtailed hiring and, in some circumstances, laid off attorneys. As a result, the numbers of unemployed and underemployed attorneys, as well as attorneys who are trying to establish a new practice, have swelled.

While the decision of firms to limit their hiring may be due, in part, to decreases in demand for certain types of legal services, the demand for legal services in Utah in areas such as divorce, bankruptcy, etc. is actually increasing, as reflected in the substantial increase in court filings. In addition, the courts are being inundated with *pro se* litigants. That flood of *pro se* litigants bogs down the courts as the clerks' offices and courts try to shepherd cases without the expertise of attorneys. Other areas of practice such as foreclosures, loan workouts and modifications, collections, and business liquidations, to name a few, have also experienced increased demand. Yet, those same potential clients see our services as unattainable and beyond their means.

Programs and services like public defenders, Utah Legal Services, Legal Aid of Utah, the Disability Law Center, and Tuesday Night Bars throughout the state provide some limited legal representation for the poorest members of our community. But, for a large segment of the middle class, obtaining affordable legal services is more difficult. To an increasing segment of society, we are becoming less relevant.

Real or imagined, we are increasingly perceived by consumers as a service only available to the wealthy. I do not believe that the public perceives that attorneys are not needed to access the judicial process. On the contrary, the judicial system, with its abundant rules and procedures, as well as the mass of laws that govern a particular dispute, makes the services of an attorney exceedingly valuable, if not essential. But, therein lies the frustration of the public. Steve Burt, a perceptive public member of the Bar

Commission, expresses this frustration well with the observation that the judicial system is the only branch of government that "requires" an attorney for public access. Even if it does not "require" an attorney to access the courts, it is difficult without an attorney. There is a real danger that this frustration may result in changes to allow non-lawyers to represent individuals and businesses in areas currently requiring attorney representation.

I believe that our profession has an obligation to provide a means for the public to obtain more affordable legal services, and to assist the public in accessing the judicial system. Society is better served if our profession provides counsel and direction in the formation of business arrangements, in the formulation of estate plans, and in the myriad of other services that we provide. Our profession will reap long-term benefits by broadening the base of clients that enjoy legal representation. In addition, the efficiency of the courts would be improved if more litigants before them had attorneys representing them. I am not suggesting that the public has a right to legal representation without the obligation to pay a reasonable amount for those services. Rather, if we want to preserve our judicial system, and our right to practice our profession, we should have programs in place that make available reduced-cost legal representation for those with modest or limited means.

The public, the profession, as well as the judicial system would suffer if public frustration with the cost of legal services evolved into a movement to allow non-lawyers to represent individuals or businesses in areas previously limited to representation by attorneys. I have discussed with Bar leadership from other states their experiences with the nightmare of expanding representation of litigants to non-lawyers. The public becomes easy prey for quasi-professionals who have no



actual knowledge or expertise. The courts experience similar, if not heightened, difficulties dealing with non-lawyer representation that they struggle with from *pro se* litigants. The non-lawyer “professionals” are not subject to discipline or the rules of professional conduct like attorneys. Additionally, the clients of these supposed “professionals” are subjected to further injustice when being represented by individuals who are unable to effectively navigate the system and actually do harm to their clients’ causes. The resulting harm merely breeds further distrust of the judicial system.

Like many of the members of our Bar, I am a member of a small firm whose clientele has always been predominated by middle class individuals and small businesses. Creative fee structures such as contingent fees or blended fees of reduced hourly rates combined with a contingent fee component, flat

fees, and discounted legal services have long been a part of how we serve our core clientele. The rules adopted by the courts for limited-scope representation are an additional tool available for Bar members to use to provide legal services to a broader range of clients who may not be able to afford comprehensive representation.

The current market forces with increasing numbers of underemployed attorneys provide us an opportunity to reassess how we deliver our services, how those services are priced and to try to match those underemployed attorneys with the unmet needs of the public for more affordable legal services. The Bar intends to take a leadership role in forging a process or program to expand the availability of affordable legal services to the members of the public with modest means. I welcome your thoughts and suggestions.

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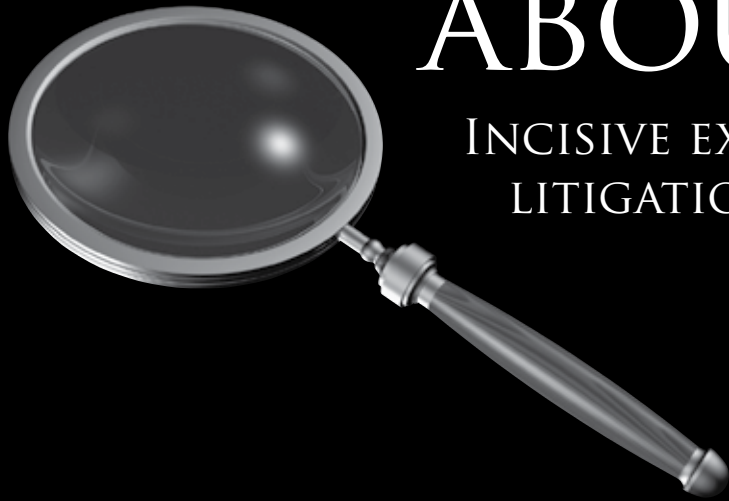
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Utah Standards of Appellate Review – Third Edition

by Norman H. Jackson and Lisa Broderick Thornton

EDITOR'S NOTE: This article is the third installment of a series of articles that first appeared in Volume 23, No. 4 July/August 2010 of the Utah Bar Journal.

D. Challenges in Specific Practice Areas

1. Challenges in Divorce Cases

a. Challenging Findings of Fact

(i) Clearly Erroneous Standard

Appellate courts give great deference to the trial court's findings of fact in divorce cases and will not overturn them unless they are clearly erroneous. See *Kimball v. Kimball*, 2009 UT App 233, ¶ 14, 217 P.3d 733; *Thompson v. Thompson*, 2009 UT App 101, ¶ 10, 208 P.3d 539; *Leppert v. Leppert*, 2009 UT App 10, ¶ 8, 200 P.3d 223; *Stonebocker v. Stonebocker*, 2008 UT App 11, ¶ 9, 176 P.3d 476; *Kelley v. Kelley*, 2000 UT App 236, ¶ 18, 9 P.3d 171. A finding of fact will be adjudged clearly erroneous if it violates the standards set by the appellate court; is against the clear weight of the evidence; or the reviewing court is left with a definite and firm conviction that a mistake has been made, although there is evidence to support the finding. See *Kimball*, 2009 UT App 233, ¶ 14; *Shinkoskey v. Shinkoskey*, 2001 UT App 44, ¶ 10 n.5, 19 P.3d 1005; *Kelley*, 2000 UT App 236, ¶ 18.

(ii) Marshaling Cases

The following are cases involving divorce proceedings in which appellate courts have addressed the marshaling requirement: *Kimball*, 2009 UT App 233, ¶¶ 20-22 (finding husband and wife both failed to adequately marshal evidence in challenging property issues); *Levin v. Carlton*, 2009 UT App 170, ¶ 16 n.5,

231 P.3d 884 (holding wife failed to marshal all record evidence that supported challenged finding); *Young v. Young*, 2009 UT App 3, ¶ 12, 201 P.3d 301 (determining husband failed to adequately marshal evidence, rather he simply reargued issues raised below); *Stonebocker*, 2008 UT App 11, ¶ 9 n.4 (finding husband met minimum threshold of marshaling burden); *Sweet v. Sweet*, 2006 UT App 216, ¶ 6, 138 P.3d 63 (mem.) (finding wife failed to marshal all evidence in support of the finding and then demonstrate that evidence was legally insufficient to support the finding even when viewing it in light most favorable to trial court); *Davis v. Davis*, 2003 UT App 282, ¶ 10, 76 P.3d 716 (rejecting marshaling effort by husband who simply reargued evidence he presented at trial and ignored factual support for trial court's decision to award wife alimony); *Wilde v. Wilde*, 2001 UT App 318, ¶¶ 29-30, 35 P.3d 341 (holding appellant failed to meet her obligation to marshal evidence, and thus the court assumed the record supported the trial court's finding); *Shinkoskey*, 2001 UT App 44, ¶ 10 n.5 (finding husband failed to marshal evidence); *Kelley*, 2000 UT App 236, ¶ 19 (determining husband merely reargued his view of the evidence rather than marshaling other evidence supporting court's findings).

(iii) Examples of Fact Questions

- (1) Whether the trial court properly valued the marital home. See *Olson v. Olson*, 2010 UT App 22, ¶ 9, 226 P.3d 751, *cert. denied*, 2010 Utah LEXIS 144 (Utah, July 1, 2010).
- (2) Whether a person has been served with process. See *Cooke v. Cooke*, 2001 UT App 110, ¶ 7, 22 P.3d 1249.
- (3) Whether husband was voluntarily underemployed and his

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earning capacity had not diminished. *See Arnold v. Arnold*, 2008 UT App 17, ¶¶ 5-6, 177 P.3d 89.

(4) Whether property was commingled such that separate property converted to marital property. *See Keiter v. Keiter*, 2010 UT App 169, ¶¶ 22-26, 235 P.3d 782; *Thompson v. Thompson*, 2009 UT App 101, ¶ 10, 208 P.3d 539 (discussing whether property is marital or separate).

(5) Whether a husband used money from forged or altered checks for family purposes. *See Kimball v. Kimball*, 2009 UT App 233, ¶ 22, 217 P.3d 733.

(6) Whether husband was in “receipt” of his social security benefits and whether the amount of the benefits was readily ascertainable. *See Young v. Young*, 2009 UT App 3, ¶ 12, 201 P.3d 301.

(7) Whether husband was able to pay alimony. *See Leppert v. Leppert*, 2009 UT App 10, ¶ 14, 200 P.3d 223.

(8) Whether a party misrepresented her income in a mediation or during subsequent enforcement proceedings. *See Arnold v. Arnold*, 2008 UT App 17, ¶ 9, 177 P.3d 89.

(9) Whether a line of credit was debt of the family home or debt of the business. *See Stonebocker v. Stonebocker*, 2008 UT App 11, ¶ 26, 176 P.3d 476.

(10) Whether husband had any active involvement in a limited liability company. *See Levin v. Carlton*, 2009 UT App 170, ¶ 16 n.5, 213 P.3d 884.

(11) Whether husband misappropriated funds from his children’s accounts. *See Shinkoskey v. Shinkoskey*, 2001 UT App 44, ¶ 10, 19 P.3d 1005.

(iv) Adequacy of Trial Court’s Factual Findings

To ensure that the trial court acted within its broad discretion, the facts and reasons for the court’s decision must be set forth fully in appropriate findings and conclusions. *See Connell v. Connell*, 2010 UT App 139, ¶¶ 5, 13, 233 P.3d 836 (holding trial court’s findings of fact regarding alimony were sufficient); *Thompson v. Thompson*, 2009 UT App 101, ¶ 15, 208 P.3d 539 (regarding premarital contributions to retirement account findings); *Kunzler v. Kunzler*, 2008 UT App 263, ¶ 15, 190 P.3d 497, *cert. denied*, 199 P.3d 970 (Utah 2008) (regarding property division findings); *Arnold*, 2008 UT App 17, ¶ 11 (“[A] district court exceeds its permitted discretion when it fails to make findings establishing an adequate and reviewable basis for its fee award.”).

The trial court must make sufficiently detailed findings on each

factor to enable a reviewing court to ensure that the trial court’s discretionary determination was rationally based upon the applicable factors. *See Ostermiller v. Ostermiller*, 2010 UT App 218, ¶ 7, —P.3d— (mem.) (“Detailed findings of fact and conclusions of law are necessary for this reviewing court to ensure that the trial court’s discretionary determination . . . was rationally based.” (internal quotation marks omitted)); *Keiter v. Keiter*, 2010 UT App 169, ¶ 17, 235 P.3d 782 (stating trial court’s findings “‘should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached’” (quoting *Stonebocker*, 2008 UT App 11, ¶ 16)); *Mark v. Mark*, 2009 UT App 374, ¶ 9, 223 P.3d 476 (concluding the absence of adequate findings of fact is a fundamental defect that warrants reversal unless the record is clear and uncontroverted such to allow appellate court to apply statutory factors as matter of law on appeal); *Leppert v. Leppert*, 2009 UT App 10, ¶ 14, 200 P.3d 223 (finding district court’s findings of fact addressing parties’ financial needs and husband’s ability to pay were not sufficiently detailed to disclose process court used in setting alimony award); *Hodge v. Hodge*, 2007 UT App 394, ¶ 3, 174 P.3d 1137 (mem.) (concluding property distribution must be based upon adequate factual findings); *Andrus v. Andrus*, 2007 UT App 291, ¶ 19, 169 P.3d 754 (holding trial court’s finding regarding husband’s ability to pay attorney fees failed to show steps it took in reaching its decision).

Formal findings of fact greatly help the parties determine if a basis for appeal exists, and, if the appeal is taken, significantly aid the appellate court in its review. *See Stonebocker v. Stonebocker*, 2008 UT App 11, ¶ 17, 176 P.3d 476 (noting that adequate findings are necessary for appellate courts to perform their assigned review function).

Appellate courts review the legal adequacy of findings of fact in divorce cases for correctness as a question of law. *See Kimball v. Kimball*, 2009 UT App 233, ¶ 13, 217 P.3d 733; *Levin v. Carlton*, 2009 UT App 170, ¶¶ 13, 20, 213 P.3d 884 (providing that findings of fact must be adequately supported by the evidence and the correct law); *Young v. Young*, 2009 UT App 3, ¶ 5, 201 P.3d 301; *Jensen v. Jensen*, 2009 UT App 1, ¶ 6, 203 P.3d 1020; *Wall v. Wall*, 2007 UT App 61, ¶ 7, 157 P.3d 341. If the findings are legally inadequate, the exercise of marshaling the evidence supporting the findings becomes futile and appellant need not marshal. *See Williamson v. Williamson*, 1999 UT App 219, ¶ 8 n.2, 983 P.2d 1103.

b. Challenging Discretionary Rulings

(i) Abuse-of-Discretion Standard

“Trial courts may exercise broad discretion in divorce matters

so long as the decision is within the confines of legal precedence.” *Connell v. Connell*, 2010 UT App 139, ¶ 45, 233 P.3d 836 (quoting *Childs v. Childs*, 967 P.2d 942, 944 (Utah Ct. App. 1998)). Where the trial court may exercise broad discretion, we presume the correctness of the court’s decision absent a clear and prejudicial abuse of discretion. *See Trubetzkoy v. Trubetzkoy*, 2009 UT App 77, ¶ 8, 205 P.3d 891 (noting that the trial court’s discretion is so broad “that its actions enjoy a presumption of validity” (internal quotation marks omitted)), *cert. denied*, 215 P.3d 161 (Utah 2009). While trial courts have broad discretion, that discretion must be exercised under the standards and parameters set by appellate courts. *See Connell*, 2010 UT App 139, ¶ 5; *Mark*, 2009 UT App 374, ¶ 6 (stating that appellate courts will not disturb alimony ruling as long as court exercises discretion within bounds and standards set by appellate courts); *Kimball*, 2009 UT App 233, ¶ 13 (noting that appellate courts will find an abuse of discretion if “there has been a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such inequity has resulted as to manifest a clear abuse of discretion” (internal quotation marks omitted)). Furthermore, to ensure the court acted within its broad discretion, the facts and reasons for the court’s decision must be set forth fully in adequate findings and conclusions. *See Connell*, 2010 UT App 139, ¶ 5; *Arnold v. Arnold*, 2008 UT App 17, ¶ 11, 177 P.3d 89 (“[A] district court exceeds its permitted discretion when it fails to make findings establishing an adequate and reviewable basis for its [decision].”).

(ii) Examples of Questions within the Trial Court’s Discretion

(1) Whether the trial court properly determined the amount and timing of an alimony award. *See Olson v. Olson*, 2010 UT App 22, ¶ 8, 226 P.3d 751, *cert. denied*, 2010 Utah LEXIS 144 (Utah, July 1, 2010); *Davis v. Davis*, 2003 UT App 282, ¶ 7, 76 P.3d 716.

(2) Whether the trial court properly terminated alimony and denied future alimony when wife began working full time. *See Connell*, 2010 UT App 139, ¶ 5.

(3) Whether the trial court properly ordered rehabilitative alimony. *See Mark v. Mark*, 2009 UT App 374, ¶ 6, 223 P.3d 476.

(4) Whether there has been a substantial and material change of circumstances sufficient to justify custody modification. *See Doyle v. Doyle*, 2009 UT App 306, ¶ 7, 221 P.3d 888, *cert. granted*, 225 P.3d 880 (Utah 2010); *Young v. Young*, 2009 UT App 3, ¶ 4, 201 P.3d 301, *cert. denied*, 211 P.3d 986 (Utah 2009).

(5) Whether the trial court properly decided mother’s entitlement to child support modification. *See Doyle*, 2009 UT App 306, ¶ 9 (“We will not upset the trial court’s apportionment of financial responsibilities in the absence of manifest injustice or inequity that indicates a clear abuse of discretion.” (quoting *Maughan v. Maughan*, 770 P.2d 156, 161 (Utah Ct. App. 1989))).

(6) Whether the trial court properly determined that proceeds from the wife’s stock were her sole and separate property. *See Kimball v. Kimball*, 2009 UT App 233, ¶ 13, 217 P.3d 733.



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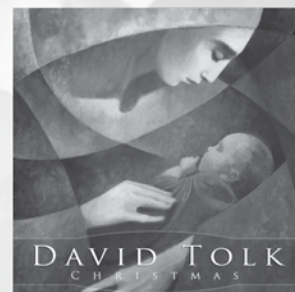
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(7) Whether the trial court properly awarded attorney fees in a divorce proceeding. *See id.* ¶ 19; *Mark*, 2009 UT App 374, ¶ 7, (considering whether the trial court properly ordered parties to pay their own attorney fees).

(8) Whether the trial court properly included the cost of maintaining health insurance coverage for a couple's two adult children in its alimony award. *See Olsen v. Olsen*, 2007 UT App 296, ¶ 8, 169 P.3d 765.

(9) Whether the trial court properly denied retroactive child support and nanny care costs. *See Connell v. Connell*, 2010 UT App 139, ¶ 7, 233 P.3d 836.

(10) Whether the trial court properly determined its award of parent-time. *See Trubetzkoy v. Trubetzkoy*, 2009 UT App 77, ¶ 7, 205 P.3d 891, *cert. denied*, 215 P.3d 161 (Utah 2009).

(11) Whether the marital property has been equitably divided. *See Keiter v. Keiter*, 2010 UT App 169, ¶ 16, 235 P.3d 782; *Thompson v. Thompson*, 2009 UT App 101, ¶ 5, 208 P.3d 539 (considering whether court erroneously denied husband principal and appreciated value of his separate premarital contribution to home and failed to award him appreciation on his premarital contribution to a 401(k)); *Trubetzkoy*, 2009 UT App 77, ¶ 8; *Stonebocker v. Stonebocker*, 2008 UT App 11, ¶ 8, 176 P.3d 476 (stating that courts have considerable discretion in property division).

(12) Whether the trial court properly denied an accounting and subsequent division of tangible business assets. *See Trubetzkoy*, 2009 UT App 77, ¶ 9.

(13) Whether the trial court properly disallowed testimony from wife's fact witness. *See Olson v. Olson*, 2010 UT App 22, ¶ 10, 226 P.3d 751, *cert. denied*, 2010 Utah LEXIS 144 (Utah, July 1, 2010).

(14) Whether there has been a substantial change of circumstances. *See Boyce v. Goble*, 2000 UT App 237, ¶ 9, 8 P.3d 1042.

(iii) Examples of Mixed Questions

(1) Whether cohabitation exists is a mixed question of fact and law. *See Myers v. Myers*, 2010 UT App 74, ¶ 10, 231 P.3d 815 (“While we defer to the trial court's factual findings unless they are shown to be clearly erroneous, we review its ultimate conclusion for correctness.”), *cert. granted*, 2010 Utah LEXIS 123 (Utah, July 27, 2010); *Jensen v. Jensen*, 2007 UT App 377, ¶ 2, 173 P.3d 223 (mem.).

(2) Whether the trial court properly determined husband waived his right to certain third party contractual provisions against wife is a mixed question of law and fact. *See Bayles v.*

Bayles, No. 20070334-CA, 2008 Utah App. LEXIS 99, at *1 (Mar. 20, 2008) (mem.) (“[W]e ‘grant broadened discretion to the trial court's findings’ when reviewing questions of waiver.” (quoting *Chen v. Stewart*, 2004 UT 82, ¶ 23, 100 P.3d 1177)).

(3) Whether the trial court properly applied statutory law to the facts. *See Clark v. Clark*, 2001 UT 44, ¶ 14, 27 P.3d 538; *Olsen v. Olsen*, 2007 UT App 296, ¶ 7, 169 P.3d 765.

(4) The determination of residency for divorce purposes is a mixed question of law and fact. *See Archibald v. Archibald*, No. 20030553-CA, 2005 Utah App. LEXIS 56, at *1-2 (Feb. 10, 2005) (mem.) (citing *Bustamante v. Bustamante*, 645 P.2d 40, 43 (Utah 1982)).

(5) Challenges to jurisdiction based upon improper service present a mixed question. *See Swapp v. Swapp*, No. 20040287-CA, 2004 Utah App. LEXIS 270, at *3 (June 10, 2004) (citing *Cooke v. Cooke*, 2001 UT App 110, ¶ 7, 22 P.3d 1249).

(6) Whether the trial court properly granted husband's motion to set aside a default decree of divorce. *See Cooke*, 2001 UT App 110, ¶ 7.

c. Challenging Conclusions of Law

(i) Correction-of-Error Standard

Although appellate courts give great deference to a trial court's factual findings, conclusions of law arising from those findings are reviewed for correctness and given no special deference on appeal. *See Keiter v. Keiter*, 2010 UT App 169, ¶ 16, 235 P.3d 782; *Leppert v. Leppert*, 2009 UT App 10, ¶ 8, 200 P.3d 223. “Controlling 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.” *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). “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.” *Id.* (citing Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 779 (1957)).

(ii) Examples of Conclusions of Law

(1) Whether the trial court should have held separate hearings on the change of circumstances issue and the best interests issue. *See Doyle v. Doyle*, 2009 UT App 306, ¶ 6, 221 P.3d 888, *cert. granted*, 225 P.3d 880 (Utah 2010).

(2) Whether the trial court properly determined a party is entitled to prejudgment interest. *See Kimball v. Kimball*, 2009 UT App 233, ¶ 18, 217 P.3d 733.

(3) Whether the trial court properly treated wife's federal social security benefits as marital assets because Congress has preempted the state's divorce laws related to social security. *See Olsen v. Olsen*, 2007 UT App 296, ¶ 7, 169 P.3d 765 (stating that decisions regarding whether a state law has been preempted by federal law are reviewed for correctness).

(4) Whether the district court properly interpreted the attorney fee statute in a divorce case. *See Connell v. Connell*, 2010 UT App 139, ¶ 6, 233 P.3d 836; *Fisher v. Fisher*, 2009 UT App 305, ¶ 8, 221 P.3d 845, *cert. denied*, 2010 Utah LEXIS 82 (Utah, Mar. 5, 2010).

(5) Whether the trial court properly characterized property as marital. *See Keiter v. Keiter*, 2010 UT App 169, ¶¶ 15-16, 235 P.3d 782.

(6) Whether the district court actually followed the terms of the stipulation. *See Lloyd v. Lloyd*, 2009 UT App 314, ¶ 6, 221 P.3d 884.

(7) Whether trial court properly granted a divorce due to irreconcilable differences, rather than adultery. *See Trubetzkoy v. Trubetzkoy*, 2009 UT App 77, ¶ 10, 205 P.3d 891, *cert. denied*, 215 P.3d 161 (Utah 2009).

(8) Whether the trial court misinterpreted the statutory requirements for an order of joint legal custody. *See id.* ¶ 6,

(9) Whether the court has subject matter jurisdiction. *See Johnson v. Johnson*, 2010 UT 28, ¶ 6, 234 P.3d 1100.

(10) Whether the defenses of mutual mistake and impossibility should have afforded husband relief under the facts. *See Robinson v. Robinson*, 2010 UT App 96, ¶ 6, 232 P.3d 1081.

(11) Whether the trial court violated husband's due process rights when it failed to hold an evidentiary hearing before enforcing a stipulation and entering a decree of divorce. *See id.* ¶ 8.

(12) Whether trial court made necessary factual findings to support determination. *See id.* ¶ 7.

(13) Whether the trial court placed the burden of proof on the appropriate party. *See Fisher v. Fisher*, 2009 UT App 305, ¶ 7, 221 P.3d 845.

(14) Whether party should have been given credit for payment of property taxes and water assessments on trust property. *See id.*

2. Challenges in Juvenile Court Cases

a. Challenging Findings of Fact

(i) Clearly Erroneous Standard

A juvenile court's findings of fact will not be overturned unless

they are clearly erroneous. *See In re adoption of Connor*, 2007 UT 33, ¶ 16, 158 P.3d 1097; *In re A.B.*, 2007 UT App 286, ¶ 10, 168 P.3d 820; *In re A.G.*, 2001 UT App 87, ¶ 4, 27 P.3d 562; *In re E.R.*, 2001 UT App 66, ¶ 11, 21 P.3d 680. In juvenile cases, appellate courts will find clear error if the findings are "against the clear weight of the evidence, or if the appellate court is convinced a mistake has been made." *In re T.M.*, 2006 UT App 435, ¶ 14, 147 P.3d 529; *accord In re S.Y.*, 2003 UT App 66, ¶ 11, 66 P.3d 601 (stating that a finding is clearly erroneous if the appellate court is left with "a definite and firm conviction that a mistake has been made"); *State ex rel. L.M.*, 2001 UT App 314, ¶ 11, 37 P.3d 1188; *State ex rel. C.K.*, 2000 UT App 11, ¶ 17, 996 P.2d 1059. Appellate courts give the juvenile court a "wide latitude of discretion as to the judgments arrived at" based upon not only the court's opportunity to judge credibility firsthand, but also based on the juvenile court judges' special training, experience and interest in this field." *In re K.F.*, 2009 UT 4, ¶ 18, 201 P.3d 985 (quoting *In re E.R.*, 2001 UT App 66, ¶ 11).

(ii) Marshaling Cases

For an appellate court to overturn a juvenile court's finding of fact, the appellant must "marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding when viewing it in a light most

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favorable to the court below.” *Id.* ¶ 44 (quoting *Wilson Supply v. Fradan Mfg. Corp.*, 2002 UT 94, ¶ 21, 54 P.3d 1177).

The following are cases involving appeals from juvenile court trials in which appellate courts have addressed the marshaling requirement: *In re G.C.*, 2008 UT App 270, ¶ 15, 191 P.3d 55 (finding that “[f]ather’s selective exclusion of unfavorable supporting evidence does not satisfy the marshaling requirement”); *In re A.B.*, 2007 UT App 286, ¶ 14 (finding that mother failed to comply with the marshaling requirement); *In re S.O.*, 2005 UT App 393, ¶ 12, 122 P.3d 686 (mem.) (per curiam) (determining party failed to marshal evidence supporting juvenile court’s findings); *In re S.D.C.*, 2001 UT App 353, ¶ 8, 36 P.3d 540 (stating that “when a party fails to challenge and marshal the evidence underlying ultimate findings, we assume the juvenile court’s judgment was correct”); *State ex rel. L.M.*, 2001 UT App 314, ¶¶ 15-16, (finding that parents “fail[ed] to properly discharge their duty to marshal” and, as a result, the appellate court assumed that the evidence supported the juvenile court’s findings); *In re J.W.*, 2001 UT App 208, ¶¶ 9-10, 30 P.3d 1232 (finding that party did not marshal evidence supporting juvenile court’s findings when party reargued the weight of the evidence “relying upon testimony favoring his innocence and ignoring the conflicting testimony against him”); *In re E.R.*, 2001 UT App 66, ¶ 11 (dismissing parents’ claim for failing to marshal the evidence).

(iii) Examples of Fact Questions

(1) Whether parents met the requirements of the service plan. *See In re E.R.*, 2001 UT App 66, ¶ 11.

(2) Whether party understood the consequences of signing the relinquishment petition, understood the permanent nature of those consequences, and signed the petition freely and voluntarily. *See In re A.G.*, 2001 UT App 87, ¶ 4, 27 P.3d 562.

(3) Whether the party understood and was capable of caring for two children with special needs. *See State ex rel. L.M.*, 2000 UT App 11, ¶ 10, 996 P.2d 1059.

(iv) Adequacy of Trial Court’s Factual Findings

The importance of adequate findings applies with equal force to cases in juvenile court. The following cases address the adequacy of the juvenile court’s factual findings: *In re S.H.*, 2005 UT App 324, ¶ 23, 119 P.3d 309 (finding that the juvenile court’s conclusion of a father’s fitness and ability to parent were supported by the court’s findings of fact). *In re G.B.*, 2002 UT App 270, ¶ 22, 53 P.3d 963 (concluding from the court’s detailed findings that the juvenile court had properly considered each statutory factor before deciding to terminate mother’s parental rights).

b. Challenging Discretionary Rulings

(i) Abuse-of-Discretion Standard

Juvenile courts are granted substantial discretion in making certain determinations. *See In re V.L.*, 2008 UT App 88, ¶ 15, 182 P.3d 395 (denying a request for continuance in a termination proceeding). A reviewing court will not reverse a juvenile court’s discretionary ruling “unless that discretion has clearly been abused.” *Id.* Appellate courts will not reverse a juvenile court’s discretionary ruling if it is “consistent with the standards set by appellate courts and supported by adequate findings of fact and conclusions of law.” *In re K.H.*, 2004 UT App 483, ¶ 4, 105 P.3d 967 (quoting *In re J.M.V.*, 958 P.2d 943, 947 (Utah Ct. App. 1998)).

(ii) Examples of Questions within the Trial Court’s Discretion

(1) Whether the trial court properly terminated parental rights. *See In re J.F.*, No. 20100447-CA, 2010 Utah App. LEXIS 228, at *1 (Aug. 19, 2010) (mem.) (per curiam) (stating that termination petition reviewed for abuse of discretion); *In re A.G.*, 2001 UT App 87, ¶ 7, (stating that whether termination of parental rights is in the children’s best interests is a “legal conclusion” that “we review for abuse of discretion”); *but see State ex rel. D.H.*, 2009 UT App 32, ¶ 9, 204 P.3d 210 (stating that whether parental rights should be terminated presents a mixed question of law and fact).

(2) Whether to appoint a different attorney for an indigent defendant who expresses dissatisfaction with court-appointed counsel. *See In re R.H.*, 2003 UT App 154, ¶ 9, 71 P.3d 616.

(3) Whether the juvenile court properly dismissed father’s ineffective assistance of counsel claim brought post-judgment on a rule 60(b)(6) motion. *See State ex rel. V.H.*, 2007 UT App 1, ¶ 8, 154 P.3d 867.

(4) Whether juvenile court properly determined that a transfer of custody was in the child’s best interest. *See State ex rel. F.W.*, No. 20020767-CA, 2003 Utah App. LEXIS 249, at *1 (July 3, 2003) (mem.) (citing *State ex rel. Summers v. Wulffenstein*, 616 P.2d 608, 611 (Utah 1980)).

(5) Whether the juvenile court properly denied a motion to withdraw an admission. *See In re K.M.*, 2006 UT App 74, ¶ 10, 136 P.3d 1230, *rev’d on other grounds*, 2007 UT 93, 173 P.3d 1279.

(6) Whether the juvenile court properly denied an updated assessment of the relationship between mother and child. *See State ex rel. A.M.D.*, 2006 UT App 457, ¶ 8, 153 P.3d 724.

(7) Whether the juvenile court properly allowed a witness to testify. *See State ex rel. A.M.S.*, 2000 UT App 182, ¶ 16, 4 P.3d 95; *State ex rel. A.M.D.*, 2006 UT App 457 ¶ 8 (expert witness).

(8) Whether the juvenile court erred in granting the State permission to administer psychiatric medications. *See In re E.R.*, 2001 UT App 66, ¶ 7, 21 P.3d 680.

(iii) Examples of Mixed Questions

(1) Whether to bind over a criminal defendant for trial is a mixed question of law and fact. *See State ex rel. I.R.C.*, 2010 UT 41, ¶ 12, 232 P.3d 1040; *State ex rel. D.K.*, 2006 UT App 461, ¶ 7, 153 P.3d 736.

(2) Whether paternity was substantively adjudicated by the juvenile court. *See In re D.A.*, 2009 UT 83, ¶ 13, 222 P.3d 1172.

(3) “Whether the juvenile court properly terminated Father’s parental rights ‘presents a mixed question of law and fact.’” *See State ex rel. D.H.*, 2009 UT App 32, ¶ 9, 204 P.3d 210 (quoting *In re B.R.*, 2007 UT 82, ¶ 12, 171 P.3d 435); *In re A.B.*, 2007 UT App 286, ¶ 10, 168 P.3d 820 (stating that in reviewing termination of parental rights, we give the juvenile court a wide latitude of discretion). *But see In re K.H.*, 2004 UT App 483, ¶ 4, 105 P.3d 967 (providing that the appellate court will not disturb parental rights unless the court has abused its discretion).

(4) “Application of statutory law to the facts presents a mixed question of fact and law. We review the juvenile court’s findings

for clear error and its conclusions of law for correctness, affording the court ‘some discretion in applying the law to the facts.’” *See In re S.H.*, 2005 UT App 324, ¶ 12, 119 P.3d 309 (quoting *In re G.B.*, 2002 UT App 270, ¶ 11, 53 P.3d 963).

(5) Whether reasonable reunification efforts were made is a mixed question of law and fact. *See In re T.M.*, 2006 UT App 435, ¶ 15, 147 P.3d 529.

c. Challenging Conclusions of Law

(i) Correction-of-Error Standard

In general, appellate courts apply a correction-of-error standard to the juvenile court’s conclusions of law. *See In re A.M.*, 2009 UT App 118, ¶ 6, 208 P.3d 1058; *In re C.D.*, 2008 UT App 477, ¶ 7, 200 P.3d 194, *cert. granted*, 211 P.3d 986 (Utah 2009). However, although legal conclusions are reviewed for correctness, appellate courts may still allow a juvenile court some discretion in applying the law to the specific fact scenario. *See In re C.D.*, 2008 UT App 477, ¶ 7; *In re A.C.*, 2004 UT App 255, ¶ 9, 97 P.3d 706.

(ii) Examples of Conclusions of Law

(1) Whether the juvenile court had subject matter jurisdiction. *See In re K.E.*, 2009 UT 4, ¶ 18, 201 P.3d 985; *In re A.M.*, 2009

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UT App 118, ¶ 6.

(2) Whether the juvenile court applied the correct standard of proof to determine paternity. *See In re S.H.*, 2005 UT App 324, ¶ 10.

(3) Whether a gag order violated the right to free speech. *See In re L.M.*, 2001 UT App 314, ¶ 13, 37 P.3d 1188.

(4) Whether a permanency plan was properly imposed. *See In re E.R.*, 2001 UT App 66, ¶ 5, 21 P.3d 680.

(5) Whether the juvenile court illegally considered the guardian *ad litem's* petition to terminate parental rights. *See id.* ¶ 6.

(6) Whether the juvenile court properly interpreted a rule of procedure. *See In re A.M.D.*, 2006 UT App 457, ¶ 7, 153 P.3d 724.

(7) Whether evidence constitutes hearsay in juvenile court. *See In re K.O.*, 2010 UT App 155, ¶ 7, 238 P.3d 59.

(8) Whether the juvenile court is required to making findings of fact and legally determine reliability of eyewitness identification before admitting such testimony. *See id.* ¶ 6.

(9) Whether a statute has been interpreted and applied correctly by the juvenile court. *See In re A.M.*, 2009 UT App 118, ¶ 6, 208 P.3d 1058.

(10) Whether a parent has been afforded adequate due process. *See id.* ¶ 10.

3. Challenges to Evidentiary Rulings

a. Introduction

In general, a trial court is granted a great deal of discretion in its decision to admit or exclude evidence. *See Cabaness v. Thomas*, 2010 UT 23, ¶ 31, 232 P.3d 486; *Daines v. Vincent*, 2008 UT 51, ¶ 21, 190 P.3d 1269; *Chen v. Stewart*, 2005 UT 68, ¶ 27, 123 P.3d 416; *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶ 10, 94 P.3d 193; *Gorostieta v. Parkinson*, 2000 UT 99, ¶ 14, 17 P.3d 1110; *Ottens v. McNeil*, 2010 UT App 237, ¶ 21, —P.3d—; *Vigil v. Div. of Child & Family Servs.*, 2005 UT App 43, ¶ 8, 107 P.3d 716. “An abuse of discretion may be demonstrated by showing that the district court relied on an erroneous conclusion of law or that there was no evidentiary basis for the trial court’s ruling.” *Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 32, 221 P.3d 256 (internal quotation marks omitted). The appellate court will not reverse “a trial court’s ruling on evidence unless the ruling ‘was beyond the limits of reasonability.’” *Daines*, 2008 UT 51, ¶ 21 (quoting *Jensen v. IHC Hosp., Inc.*, 2003 UT 51, ¶ 57, 82 P.3d 1076).

However, in keeping with the historic problematic standard of

review relating to the admissibility of evidence, a few court of appeal cases state that “whether evidence is admissible is a question of law, which we review for correctness.” *State v. Johnson*, 2008 UT App 5, ¶ 9, 178 P.3d 915 (quoting *Gallegos v. Dick Simon Trucking, Inc.*, 2004 UT App 322, ¶ 9, 110 P.3d 710); *accord Radman v. Flanders Corp.*, 2007 UT App 351, ¶ 4, 172 P.3d 668. Other cases break the analysis into steps, stating that although admissibility of a particular item of evidence is a legal question, the trial court has a great deal of discretion in determining whether to admit or exclude evidence and the ruling will not be overturned unless there is an abuse of discretion. *See, e.g., State v. Eberwein*, 2001 UT App 71, ¶ 9, 21 P.3d 1139 (citing *Gorostieta*, 2000 UT 99, ¶ 14).

b. Specific Standards of Review

(i) Relevancy Challenges

Determining whether a piece of evidence is relevant and therefore admissible is a task within the trial court’s discretion. *See State v. Fedorowicz*, 2002 UT 67, ¶ 32, 52 P.3d 1194; *State v. Schwenke*, 2009 UT App 345, ¶ 9, 222 P.3d 768, *cert. denied*, 230 P.3d 127 (Utah 2010). Whether a trial court properly admitted or excluded evidence under Rule 403 of the Utah Rules of Evidence is reviewed for abuse of discretion and will not be overturned unless it is “beyond the limits of reasonability.” *Ottens v. McNeil*, 2010 UT App 237, ¶ 21, (internal quotation marks omitted); *see also Daines*, 2008 UT 51, ¶ 21; *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 6, 63 P.3d 686; *State v. Jackson*, 2010 UT App 136, ¶ 9, —P.3d—; *Schwenke*, 2009 UT App 345, ¶ 9; *State v. Downs*, 2008 UT App 247, ¶ 6, 190 P.3d 17 (stating that appellate court will not overturn trial court’s ruling on admissibility under Rule 403 unless abuse of discretion is “so severe that it results in a likelihood of injustice” (internal quotation marks omitted)).

(ii) Challenges to Witnesses

An appellate court will review whether the trial court properly excluded a witness from the courtroom under an abuse of discretion standard. *See State v. Billsie*, 2006 UT 13, ¶ 8, 131 P.3d 239. Whether the trial court properly disallowed testimony from a fact witness is also reviewed under an abuse of discretion standard. *See Olson v. Olson*, 2010 UT App 22, ¶ 10, 226 P.3d 751, *cert. denied*, 2010 Utah LEXIS 144 (Utah, July 1, 2010).

(iii) Expert Testimony

Whether to exclude expert witness testimony is reviewed for abuse of discretion. *See Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 15, ¶ 5, —P.3d—; *State v. Clopten*, 2009 UT 84, ¶ 6, 223 P.3d 1103; *Welsh v. Hosp. Corp. of Utah*, 2010 UT App 171, ¶ 19, 235 P.3d 791. Appellate courts will overturn a trial

court's decision to strike expert testimony only when it "exceeds the limits of reasonability." *Eskelson*, 2010 UT 15, ¶ 5 (quoting *State v. Hollen*, 2002 UT 34, ¶ 66, 44 P.3d 794).

Whether a trial court properly determined that an expert witness is qualified is reviewed for abuse of discretion. See *Nguyen v. IHC Health Servs., Inc.*, 2010 UT App 85, ¶ 7, 232 P.3d 529 (quoting *Carbaugh v. Asbestos Corp.*, 2007 UT 65, ¶ 7, 167 P.3d 1063).

(iv) Hearsay Rulings

The standard of review for the admissibility of hearsay evidence is complex because the admissibility "often contains a number of rulings, each of which may require a different standard of review." *State v. Tiliaia*, 2006 UT App 474, ¶ 13, 153 P.3d 757 (quoting *State v. Workman*, 2005 UT 66, ¶ 10, 122 P.3d 639 (quoting Norman H. Jackson, *Utah Standards of Appellate Review*, 12 UTAH BAR J. 8, 38 (1999))). As a result, the appropriate standard of review of a trial court's decision to admit or exclude hearsay evidence under Rules 802 and 803 of the Utah Rule of Evidence depends on the particular ruling in dispute. See *Moss v. Parr Waddoups Brown Gee & Loveless*, 2008 UT App 405, ¶ 11, 197 P.3d 659; *TWN, Inc. v. Michel*, 2006 UT App 70, ¶ 9, 131 P.3d 882.

When reviewing rulings on hearsay, appellate courts review legal questions within the determination of admissibility for correctness, questions of fact for clear error, and assuming the correct application of law to facts is free from clear error, appellate courts review the final ruling on admissibility for abuse of discretion. See *Tiliaia*, 2006 UT App 474, ¶ 13; accord *State v. Jackson*, 2010 UT App 136, ¶ 9, 238 P.3d 59; *Scott v. HK Contractors*, 2008 UT App 370, ¶ 5, 196 P.3d 635, cert. denied, 205 P.3d 103 (Utah 2009); *State v. Rhinehart*, 2006 UT App 517, ¶ 10, 153 P.3d 830.

"Whether proffered evidence meets the definition of hearsay... is a question of law, reviewed for correctness." *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 44, 116 P.3d 271; see also *State ex rel. K.O.*, 2010 UT App 155, ¶ 7, 238 P.3d 59; *Moss*, 2008 UT App 405, ¶ 11; *Salt Lake City v. Alires*, 2000 UT App 244, ¶ 8, 9 P.3d 769 (considering whether a statement qualifies as an excited utterance thus violating a defendant's right to confront witnesses against him is a question of law reviewed for correctness).

(v) Additional Challenges to Evidentiary Rulings within the Court's Discretion

(1) Whether evidence of prior crimes or bad acts was properly admitted is reviewed for abuse of discretion. See *State v. Nelson-Waggoner*, 2000 UT 59, ¶ 16, 6 P.3d 1120; *State v.*

Pedersen, 2010 UT App 38, ¶ 10, 227 P.3d 1264, cert. denied, 2010 Utah LEXIS 151 (Utah, July 27, 2010); *State v. Verde*, 2010 UT App 30, ¶ 14, 227 P.3d 840, cert. granted, 2010 Utah LEXIS 122 (Utah, July 27, 2010); *State v. Marchet*, 2009 UT App 262, ¶ 19, 219 P.3d 75, cert. denied, 221 P.3d 837 (Utah 2009); *State v. Miller*, 2004 UT App 445, ¶ 6, 104 P.3d 1272; *Alires*, 2000 UT App 244, ¶ 7.

(2) Whether a trial court properly excluded impeachment evidence for lack of foundation is reviewed for abuse of discretion. See *Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 6, 214 P.3d 865, cert. denied, 221 P.3d 837 (Utah 2009).

(3) Whether the trial court properly excluded internal engineering documents and memoranda is reviewed for abuse of discretion. See *id.* ¶ 10.

(4) Whether a trial court properly admitted or excluded "testimony regarding the contents of magazines and photographs without requiring production of the original items under Utah Rule of Evidence 1002." *Vigil v. Div. of Child & Family Servs.*, 2005 UT App 43, ¶ 8, 107 P.3d 716.

(5) Whether a trial court erred in striking affidavits. See *Cabaness v. Thomas*, 2010 UT 23, ¶ 50, 232 P.3d 486.

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(vi) Additional Challenges to Evidentiary Rulings Reviewed for Correctness

(1) Whether there existed a privilege or exception to a privilege is a question of law. *See Staley v. Jolles*, 2010 UT 19, ¶ 9, 230 P.3d 1007; *State v. Worthen*, 2008 UT App 23, ¶ 9, 177 P.3d 664, *aff'd*, 2009 UT 79 (citing *State v. Blake*, 2002 UT 113, ¶ 6, 63 P.3d 56)).

(2) Whether a trial court properly determined that an evidentiary hearing was not necessary by rule to determine the admissibility of an alleged victim's sexual behavior is reviewed for correctness. *See State v. Clark*, 2009 UT App 252, ¶ 11, 219 P.3d 631, *cert. denied*, 225 P.3d 880.

(3) Whether trial court properly completely precluded rebuttal evidence. *See State v. Martin*, 2002 UT 34, ¶ 29, 44 P.3d 805. A ruling on the nature and extent of rebuttal evidence is reviewed for abuse of discretion. *See id.*

(4) Whether a photograph is gruesome is a question of law, reviewed for correctness. *See State v. Barber*, 2009 UT App 91, ¶ 18, 206 P.3d 1223.

c. Harmful Error

No evidentiary challenge will be successful without also showing that an error was harmful. *See State v. Loose*, 2000 UT 11, ¶ 10 n.1, 994 P.2d 1237; *Woods v. Zeluff*, 2007 UT App 84, ¶ 5, 158 P.3d 552; *State v. Bujan*, 2006 UT App 322, ¶ 30, 142 P.3d 581, (quoting *State v. Vargas*, 2001 UT 5, ¶ 48, 20 P.3d 271) (stating that a trial court's ruling on the admissibility of evidence will not be reversed if the error was harmless), *aff'd*, 2008 UT 47.

4. Rules of Civil Procedure – Examples of Standards of Review

(1) Rule 3 – Commencement of Action

Whether the failure to pay the filing fee under Rule 3 prior to the lapse of the limitation period is a jurisdictional requirement to the commencement of an action is a question of law. *See Dipoma v. McPhie*, 2000 UT App 130, ¶¶ 4, 8, 13, 29 P.3d 1225.

(2) Rule 4 – Process

Whether the requirements of Rule 4 have been met is a jurisdictional question which presents an issue of law. *See Jackson Constr. Co. v. Marrs*, 2004 UT 89, ¶¶ 8-9, 100 P.3d 1211.

Whether papers were served presents a question of fact and that decision will not be overturned unless the findings are against the clear weight of the evidence or if the appellate court reaches a definite and firm conviction that a mistake has been made. *See Kenny v. Rich*, 2008 UT App 209, ¶ 20, 186 P.3d 989, *cert. denied*, 199 P.3d 970 (Utah 2008).

Whether a parent has been afforded adequate due process through proper notice under Rule 4 is a question of law, reviewed for correctness. *See In re A.H.*, 2004 UT App 39, ¶ 8, 86 P.3d 745 (quoting *In re J.B.*, 2002 UT App 268, ¶ 7, 53 P.3d 968); *In re J.B.*, 2002 UT App 268, ¶ 8 (holding that the lack of proper notice to a father resulting in him being excluded as a custodian for his children constituted a violation of his due process rights).

(3) Rule 5 – Service and Filing

Appellate courts review the interpretation of Rule 5 of the Utah Rules of Civil Procedure as a question of law. *See Arbogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶¶ 10, 16, — P.3d —.

(4) Rule 6 – Time

Whether an order denying a motion to extend the time for filing a motion for substitution is reviewed for abuse of discretion. *See Stoddard v. Smith*, 2001 UT 47, ¶ 22, 27 P.3d 546.

(5) Rule 7 – Pleadings Allowed

An appellate court will review the trial court's compliance with Rule 7 of the Utah Rules of Civil Procedure for abuse of discretion. *See Jennings Inv., LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 6, 208 P.3d 1077, *cert. denied*, 215 P.3d 161 (Utah 2009) (stating that appellate court must determine “whether the district court abused its discretion in admitting as uncontroverted the facts Plaintiffs submitted in their cross-motion for summary judgment”); *Bluffdale City v. Smith*, 2007 UT App 25, ¶ 7, 156 P.3d 175 (affirming the trial court's use of discretion “in admitting as uncontroverted the facts submitted by Plaintiff in support of its request for summary judgment”).

(6) Rule 8 – General Rules of Pleadings

Whether the trial court failed to treat an affirmative defense as a counterclaim under Rule 8 is reviewed under an abuse of discretion standard. *See Berkshires, L.L.C. v. Sykes*, 2005 UT App 536, ¶ 12, 127 P.3d 1243 (turning to “federal decisions interpreting the identical federal rule” because Utah courts had yet to address the applicable standard of review for such issues).

(7) Rule 11 – Sanctions

The standard of review for evaluating the denial or imposition of Rule 11 sanctions “involves a three-tiered approach: (1) findings of fact are reviewed under the clearly erroneous standard; (2) legal conclusions are reviewed under the correction of error standard; and (3) the type and amount of sanctions to be imposed [are] reviewed under an abuse of discretion standard.” *Hess v. Johnston*,

2007 UT App 213, ¶ 6, 163 P.3d 747, *cert. denied*, 186 P.3d 957 (Utah 2008) (quoting *Morse v. Packer*, 2000 UT 86, ¶ 16, 15 P.3d 1021) (alteration in original); *accord Gillmor v. Family Link, LLC*, 2010 UT App 2, ¶ 10, 224 P.3d 741, *cert. granted*, 2010 Utah LEXIS 130 (Utah, May 13, 2010); *D.U. Co., Inc. v. Jenkins*, 2009 UT App 195, ¶ 8, 216 P.3d 360.

Whether to actually impose sanctions under Rule 11(c) for a violation of Rule 11(b) is within the trial court's discretion. *See Gillmor*, 2010 UT App 2, ¶ 10; *Crank v. Utah Judicial Council*, 2001 UT 8, ¶ 34, 20 P.3d 307 (stating that it remains in the trial court's discretion to apply sanctions under Rule 11(c) even if it finds a violation of Rule 11(b)).

Appellate courts review a district court's legal interpretation of Rule 11 for correctness. *See Crank*, 2001 UT 8, ¶ 32.

(8) Rule 12 – Defenses and Objections

Whether to grant or deny a motion for judgment on the pleadings under Rule 12(c) is a question of law affirmed “only if...the plaintiff could not recover under the facts alleged.” *Intermountain Sports, Inc. v. Dep't of Transp.*, 2004 UT App 405, ¶ 7, 103 P.3d 716 (quoting *Arndt v. First Interstate Bank of Utah, N.A.*, 1999 UT 91, ¶ 2, 991 P.2d 584); *See Straley v. Halliday*, 2000 UT App 38, ¶ 8, 997 P.2d 338.

Whether a trial court properly dismissed a claim based on a forum selection clause under Rule 12(b)(3) is reviewed for abuse of discretion. *See Coombs v. Juice Works Dev., Inc.*, 2003 UT App 388, ¶ 5, 81 P.3d 769 (citing *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 810 (Utah 1993)).

Whether a trial court properly dismissed a claim under Rule 12(b)(6) is a question of law that is reviewed for correctness. *See Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2010 UT 29, ¶ 10, 232 P.3d 999; *Walker v. Stowell*, 2009 UT 82, ¶ 7, 227 P.3d 242; *Mack v. Utah Dep't of Commerce*, 2009 UT 47, ¶ 12, 221 P.3d 194; *Summit Water Distrib. Co. v. Summit Cnty.*, 2005 UT 73, ¶ 12, 123 P.3d 437; *Miller v. State*, 2010 UT App 25, ¶ 6, 226 P.3d 743.

(9) Rule 14 – Third Party Practice

Whether a trial court properly denied a motion to join third parties under Rule 14 is reviewed for abuse of discretion. *See Red Flame, Inc. v. Martinez*, 2000 UT 22, ¶ 6 n.2, 996 P.2d 540.

(10) Rule 15 – Amended and Supplemental Proceedings

Whether a trial court properly denied a request to amend a pleading under Rule 15(a) is reviewed for abuse of discretion. *See Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 57,

221 P.3d 256 (citing *Fishbaugh v. Utah Power & Light*, 969 P.2d 403, 405 (Utah 1998)); *Red Cliffs Corner, LLC v. J.J. Hunan, Inc.*, 2009 UT App 240, ¶ 14, 219 P.3d 619; *Failor v. MegaDyne Med. Prods.*, 2009 UT App 179, ¶ 11, 213 P.3d 899.

Rule 15(b) has two provisions under which a court may address issues not raised in the pleadings. Under the first provision, the trial court must consider issues if the parties tried them by express or implied consent. A trial court's conclusion that the parties tried an issue by express or implied consent is a legal conclusion that the appellate court reviews for correctness. *See Eldridge v. Farnsworth*, 2007 UT App 243, ¶ 19, 166 P.3d 639. However, a trial court is given a “fairly broad measure of discretion in making that determination.” *Id.* (quoting *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 105 (Utah 1998)); *Haynes Land & Livestock Co. v. Jacob Family Chalk Creek, LLC*, 2010 UT App 112, ¶ 10, 233 P.3d 529. Whether a trial court properly applied Rule 15(b) is reviewed for correctness. *See Hill v. Estate of Allred*, 2009 UT 28, ¶ 44, 216 P.3d 929 (“[B]ecause the trial court's determination of whether the issues were tried with all parties' implied consent is highly fact intensive, we grant the trial court a fairly broad measure of discretion in making that determination under a given set of facts” (quoting *Keller*, 959



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P.2d at 105)).

Under the second provision, which applies once a party has objected to evidence because it was not raised in the pleadings, the appellate court applies a conditional discretionary review. That is, the trial court must first make a preliminary determination that “the presentation of the merits of the action will be subverted by amendment” and the “admission of such evidence would not prejudice the adverse party” in maintaining his action or defense on the merits. *Eldridge*, 2007 UT App 243, ¶ 19 (internal quotation marks omitted). The trial court has limited discretion in making these threshold findings, but once the findings have been made, “the trial court has full discretion to allow amendment of the pleadings; that is, it may grant or deny a party’s motion for amendment upon any reasonable basis, and the court’s decision can be reversed only if abuse of discretion appears.” *Id.* (internal quotation marks omitted).

(11) Rule 17 – Parties Plaintiff and Defendant

“[W]hether two or more persons are doing business together for purposes of Rule 17(d) is a ‘conclusion of law which we review for correctness.’” *Tan v. Ohio Cas. Ins. Co.*, 2007 UT App 93, ¶ 7, 157 P.3d 367 (quoting *Hebertson v. Willowcreek Plaza*, 923 P.2d 1389, 1392 (Utah 1996)).

(12) Rule 19 – Joinder of Persons Needed For Just Adjudication

A trial court’s determination that a party should be joined in an action is reviewed for abuse of discretion. *See Turville v. J&J Props., L.C.*, 2006 UT App 305, ¶ 24, 145 P.3d 1146; *Green v. Louder*, 2001 UT 62, ¶ 40, 29 P.3d 638; *Smith v. Osguthorpe*, 2002 UT App 361, ¶ 15, 58 P.3d 854 (stating appellate courts review a trial court’s Rule 19 determination under an abuse of discretion standard). However, the district court’s interpretation of Rule 19 is a question of law reviewed for correctness. *See Smith*, 2002 UT App 361, ¶ 15; *Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540.

(13) Rule 23 – Class Actions

“‘[W]hether [under Rule 23.1] a given individual or association has standing to request a particular relief is primarily a question of law, although there may be factual findings that bear on the issue.’” *LeVanger v. Highland Estates Prop. Owners Ass’n, Inc.*, 2003 UT App 377, ¶ 8, 80 P.3d 569 (quoting *Kearns-Tribune Corp. v. Wilkinson*, 946 P.2d 372, 373-74 (Utah 1997); accord *Angel Investors, LLC v. Garrity*, 2009 UT 40, ¶ 14, 216 P.3d 944. Those factual findings made by the trial court are closely reviewed but given deference. *See Angel Investors*, 2009 UT 40, ¶ 14; *LeVanger*, 2003 UT App 377, ¶ 8.

(14) Rule 24 – Intervention

A motion to intervene involves both questions of law and fact. *See Taylor-West Weber Water Improvement Dist. v. Olds*, 2009 UT 86, ¶ 3, 224 P.3d 709 (citing *Moreno v. Bd. of Educ.*, 926 P.2d 886, 888 (Utah 1996)). Appellate courts review the trial court’s legal determinations for correctness, affording no deference to its conclusions. *See id.* They will not disturb the district court’s factual findings unless they are clearly erroneous. *See id.* Because the district court has discretion in determining whether to grant permissive intervention, appellate courts review denials of Rule 24(b) motions to intervene under an abuse of discretion standard. *See id.* (“The district court abuses its discretion when it relies on an erroneous conclusion of law to come to its decision.”). However, mandatory intervention under Rule 24(a) turns on a legal determination, which requires *de novo* review. *See id.*; accord *In re Gonzalez*, 2000 UT 28, ¶ 16, 1 P.3d 1074.

(15) Rule 25 – Substitution of Parties

Whether a trial court properly dismissed a complaint under Rule 25 for failure to substitute a party within ninety days after the opposing party filed a suggestion of death is reviewed for correctness. *See Stoddard v. Smith*, 2001 UT 47, ¶ 4, 27 P.3d 546. “The interpretation of rule 25 is a question of law reviewed for correctness.” *Id.* (quoting *Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540).

(16) Rule 26 – General Provisions Governing Discovery

Whether a trial court properly denied a motion for protective order under Rule 26(c) is reviewed for abuse of discretion. *See Christiansen v. Farmers Ins. Exch.*, 2005 UT 21, ¶ 7, 116 P.3d 259; *Spratley v. State Farm Mut. Auto. Ins. Co.*, 2003 UT 39, ¶ 8, 78 P.3d 603; *In re Pendleton*, 2000 UT 77, ¶ 38, 11 P.3d 284. To the extent the denial of a protective order is based on the trial court’s interpretation of binding case law, appellate courts review the decision for correctness. *See Christiansen*, 2005 UT 21, ¶ 7.

(17) Rule 32 – Use of Depositions in Court Proceedings

Whether a trial court properly refused to allow the use of a deposition during the case-in-chief is reviewed for abuse of discretion. *See Evans v. Langston*, 2007 UT App 240, ¶ 7, 166 P.3d 621 (citing *Marshall v. Van Gerven*, 790 P.2d 62, 63 (Utah Ct. App. 1990)).

(18) Rule 36 – Request for Admission

The proper interpretation of Rule 36(a) is a question of law reviewed for correctness. *See State ex rel. E.R.*, 2000 UT App 143, ¶ 6, 2 P.3d 948. Appellate courts review the denial of a motion

to withdraw admissions under a “conditional discretionary standard,” first determining whether certain conditions have been met and then determining whether the trial court abused the discretion that is allowed once the conditions have been met. *See Barnes v. Clarkson*, 2008 UT App 44, ¶¶ 9, 11-12, 178 P.3d 930, *cert. denied*, 199 P.3d 367 (Utah 2008) (citing *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1060-61 (Utah 1998)); *accord State ex rel. E.R.*, 2000 UT App 143, ¶ 7.

(19) Rule 37 – Failure to Cooperate in Discovery; Sanctions

Whether a trial court’s imposition of a particular discovery sanction is proper is reviewed under an abuse of discretion standard of review. *See Welsh v. Hosp. Corp. of Utah*, 2010 UT App 171, ¶ 9, 235 P.3d 791; *Depew v. Sullivan*, 2003 UT App 152, ¶ 35, 71 P.3d 601. An abuse of discretion “may be demonstrated by showing that the district court relied on ‘an erroneous conclusion of law’ or that there was ‘no evidentiary basis for the trial court’s ruling.’” *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957 (quoting *Morton v. Cont’l Baking Co.*, 938 P.2d 271, 274 (Utah 1997)); *accord Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶ 35, 215 P.3d 933.

The abuse of discretion standard grants the trial court “‘a great deal of latitude in determining the most fair and efficient manner to conduct court business’ because the district court 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 (quoting *Morton*, 938 P.2d at 274-75).

(20) Rule 38 – Jury Trial of Right

Appellate courts review a trial court’s finding that a party waived his right to a jury trial under Rule 38 for an abuse of discretion. *See Covey v. Covey*, 2003 UT App 380, ¶ 15, 80 P.3d 553; *Aspenwood, L.L.C. v. C.A.T., L.L.C.*, 2003 UT App 28, ¶ 33, 73 P.3d 947.

(21) Rule 39 – Trial by Jury or by the Court

Whether there is a right to a jury trial is a question of law that appellate courts review for correctness. *See Kenny v. Rich*, 2008 UT App 209, ¶ 21, 186 P.3d 989, *cert. denied*, 199 P.3d 970 (Utah 2008). Granting or denying a request for jury trial under Rule 39(b) is within the sound discretion of the trial court. *See id.*; *Pete v. Youngblood*, 2006 UT App 303, ¶¶ 9, 33, 141 P.3d 629 (citing *Aspenwood*, 2003 UT App 28, ¶ 33).

(22) Rule 40 – Scheduling and Postponing a Trial

Whether a trial court properly denied a motion for continuance is reviewed for abuse of discretion. *See Roban v. Boseman*, 2002 UT App 109, ¶ 15, 46 P.3d 753; *Brown v. Glover*, 2000 UT 89, ¶ 43, 16 P.3d 540 (stating that abuse of discretion may

be found if party has made timely objections, has given necessary notice, and has made a reasonable effort to have the trial date changed for good cause).

(23) Rule 41 – Dismissal of Actions

Whether dismissal of an action under Rule 41(b) was proper is reviewed for correctness. *See Miller v. San Juan Cnty.*, 2008 UT App 186, ¶ 6, 186 P.3d 965 (citing *C&Y Corp. v. Gen. Biometrics, Inc.*, 896 P.2d 47, 53 (Utah Ct. App. 1995)).

(24) Rule 42 – Consolidation; Separate Trials

A trial court has broad discretion under Rule 42 to bifurcate trials, and appellate courts review the trial court’s bifurcation for abuse of discretion. *See Parker v. Parker*, 2000 UT App 30, ¶ 5, 996 P.2d 565 (citing *Olympus Hills Ctr., Ltd. v. Smith’s Food & Drug Ctrs., Inc.*, 889 P.2d 445, 462 (Utah Ct. App. 1994)).

(25) Rule 47 – Jurors

Whether a trial court properly managed jury *voir dire* is reviewed for abuse of discretion. *See Boyle v. Christensen*, 2009 UT App 241, ¶ 7, 219 P.3d 58, *cert. granted*, 221 P.3d 837 (Utah 2009); *Bee v. Anheuser-Busch, Inc.* 2009 UT App 35, ¶ 8, 204 P.3d 204 (stating trial court is afforded broad discretion but that discretion “must be exercised in favor of allowing discovery of biases or prejudice in prospective jurors” (internal quotation marks omitted)); *Alcazar v. Univ. of Utah Hosps. & Clinics*, 2008 UT App 222, ¶ 9, 188 P.3d 490 (citing *Barrett v. Peterson*, 868 P.2d 96, 98 (Utah Ct. App. 1993)); *Taylor v. State*, 2007 UT 12, ¶ 70, 156 P.3d 739; *Depew v. Sullivan*, 2003 UT App 152, ¶ 10, 71 P.3d 601.

Whether a trial court may grant separate sets of peremptory challenges for co-defendants under Rule 47(e) is a mixed question of law and fact. “[T]he trial court is granted ‘limited discretion’ in its determination” which, “[o]n the spectrum of discretion running from ‘*de novo*’ . . . to broad discretion . . .,” the court’s discretion in this situation lies close, though not at, the *de novo* end. *Bee*, 2009 UT App 35, ¶ 7, (quoting *Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 351, 353 (Utah 1997)).

Whether a trial court improperly communicated with a jury during deliberations is reviewed under a correction-of-error standard. *See Bearden v. Wardley Corp.*, 2003 UT App 171, ¶ 6, 72 P.3d 144 (citing *Bd. of Comm’rs, Utah State Bar v. Petersen*, 937 P.2d 1263, 1267 (Utah 1997)).

(26) Rule 50 – Motion for Directed Verdict and for Judgment Notwithstanding the Verdict

(a) Directed Verdict:

“When reviewing any challenge to a trial court’s [grant] of a motion for directed verdict, we review the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against, and will sustain the [grant] if reasonable minds could [not] disagree with the ground asserted for directing a verdict.”

U.S.A. United Staffing Alliance, LLC v. Workers’ Comp. Fund, 2009 UT App 160, ¶ 8, 213 P.3d 20 (alterations in original) (quoting *Mahmood v. Ross*, 1999 UT 104, ¶ 16, 990 P.2d 933); accord *Beard v. K-Mart Corp.*, 2000 UT App 285, ¶ 5, 12 P.3d 1015. A motion for directed verdict can be granted only when the moving party is entitled to judgment as a matter of law. See *Beard*, 2000 UT App 285, ¶ 5.

(b) Judgment Notwithstanding the Verdict: A denial of a motion for judgment notwithstanding the verdict will be reversed only if “viewing the evidence in the light most favorable to the party who prevailed, [the appellate court] conclude[s] that the evidence is insufficient to support the verdict.” *Holmstrom v. C.R. Eng.*, 2000 UT App 239, ¶ 29, 8 P.3d 281; accord *Brewer v. Denver & Rio Grande W. R.R.*, 2001 UT 77, ¶ 33, 31 P.3d 557; *Moore v. Smith*, 2007 UT App 101, ¶ 18, 158 P.3d 562. The motion can be granted only when the moving party is entitled to judgment as a matter of law. See *Moore*, 2007 UT App 101, ¶ 18.

(27) Rule 51 – Instructions to Jury; Objections

Rule 51(d) allows an appellate court to review errors in jury instruction in the interest of justice. However, “‘it is incumbent upon the aggrieved party to present a persuasive reason’ for exercising that discretion. . . and this requires ‘showing special circumstances warranting such a review.’” *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 8, 63 P.3d 686 (omission in original) (quoting *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991)). See also *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 13, 40 P.3d 1119.

(28) Rule 52 – Findings by the Court; Correction of the Record

“We review for correctness the issue of ‘whether in light of Utah Rule of Civil Procedure 52(a), the trial court adequately supported its decision to grant the . . . summary judgment motion.’” *Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 16, 183 P.3d 1059 (omission in original) (quoting *Gabriel v. Salt Lake City Corp.*, 2001 UT App 277, ¶ 8, 34 P.3d 234).

(29) Rule 54 – Judgments; Costs

Whether a trial court properly awarded a prevailing party costs of the litigation is reviewed under an abuse of discretion standard.

See *Dale K. Barker Co., PC v. Bushnell*, 2009 UT App 385, ¶ 8, 222 P.3d 1188 (quoting *Jensen v. Sawyers*, 2005 UT 81, ¶ 140, 130 P.3d 325), cert. granted, 2010 Utah LEXIS 133 (Utah, June 10, 2010). “[T]o the extent the ruling on costs involves interpretation of” Rule 54, an appellate court will “‘review for correctness, giving no deference to the trial court’s conclusion.’” *Id.* (quoting *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.*, 2007 UT App 327, ¶ 5, 171 P.3d 465).

“Whether an order is eligible for certification under Rule 54(b) is a question of law which we review for correctness.” *UTCO Assocs., Ltd. v. Zimmerman*, 2001 UT App 117, ¶ 12, 27 P.3d 177 (citing *Kennecott Corp. v. Utah State Tax Comm’n*, 814 P.2d 1099, 1100 (Utah 1991)).

(30) Rule 56 – Summary Judgment

“An appellate court reviews a trial court’s legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the moving party.” *Martin v. Lauder*, 2010 UT App 216, ¶ 4, —P.3d— (mem.) (internal quotations marks omitted); accord *Cabaness v. Thomas*, 2010 UT 23, ¶ 18, 232 P.3d 486 (stating that because appellate court resolves only legal issues in reviewing a summary judgment, it is reviewed for correctness); *Wilkinson v. Washington City*, 2010 UT App 56, ¶ 4, 230 P.3d 136 (stating that appellate court reviewing grant of summary judgment on appeal affords trial court’s legal conclusions no deference and reviews them for correctness); *Jones & Trevor Mktg. v. Lowry*, 2010 UT App 113, ¶ 4, 233 P.3d 538, cert. granted, 2010 Utah LEXIS 125 (Utah, Aug. 26, 2010).

Whether the trial court properly admitted an affidavit pursuant to Rule 56(e) is reviewed for abuse of discretion. See *State Farm Fire & Cas. Co. v. Forced Aire, LC*, 2009 UT App 15, ¶ 15, 202 P.3d 299 (quoting *Johannessen v. Canyon Rd. Towers Owners Ass’n*, 2002 UT App 332, ¶ 13, 57 P.3d 1119).

Whether a trial court properly granted or denied a request under Rule 56(f) is reviewed for abuse of discretion. See *Gudmundsen v. Del Ozone*, 2010 UT 33, ¶ 10, 232 P.3d 1059 (reviewing the district court’s Rule 56(f) decision, asking whether the grant or denial exceeds limits of reasonability); *Jensen v. Smith*, 2007 UT App 152, ¶ 1, 163 P.3d 657 (mem.) (citing *Price Dev. Co. v. Orem City*, 2000 UT 26, ¶ 9, 995 P.2d 1237).

(31) Rule 59 – New Trials; Amendments of Judgment

Whether a trial court properly granted or denied a motion for a new trial and motion to amend the judgment based on the discovery of new evidence is reviewed for an abuse of discretion.

See *Florez v. Schindler Elevator Corp.*, 2010 UT App 254, ¶ 10, —P.3d— (motion for new trial); *In re Adoption of A.F.K.*, 2009 UT App 198, ¶ 17, 216 P.3d 980 (addressing whether trial court erred in denying motion for new trial and motion to amend judgment under abuse of discretion standard), *cert. denied*, 221 P.3d 827 (Utah 2009). The appellate court will reverse the trial court “only if there is no reasonable basis for the decision.” *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064.

(32) Rule 60 – Relief from Judgment or Order

An appellate court reviews the grant or denial of a motion to set aside a judgment under Rule 60(b) for abuse of discretion. See *Golden Meadows Props, LC v. Strand*, 2010 UT App 258, ¶ 3, —P.3d—; *Kendall Ins., Inc. v. R & R Group, Inc.*, 2008 UT App 235, ¶ 11, 189 P.3d 114 (quoting *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App 110, ¶ 9, 2 P.3d 114). However, when a motion to vacate a judgment under Rule 60 is based on a claim of lack of jurisdiction, it becomes a question of law reviewed for correctness. See *Johnson v. Johnson*, 2010 UT 28, ¶ 6, 234 P.3d 1100; *Franklin Covey*, 2000 UT App 110, ¶ 8.

(33) Rule 62 – Stay of Proceedings to Enforce a Judgment

Whether a trial court properly interpreted Rule 62 is a question of law reviewed for correctness. See *In re Estate of LeFevre*, 2009 UT App 286, ¶ 14, 220 P.3d 476 (quoting *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 42, 989 P.2d 1077), *cert. denied*, 230 P.3d 127 (Utah 2010).

(34) Rule 63 – Disability or Disqualification of a Judge

Appellate courts review the interpretation and application of Rule 63 for correctness. See *Edwards v. Powder Mountain Water & Sewer*, 2009 UT App 185, ¶ 14, 214 P.3d 120.

(35) Rule 65A – Injunctions

Whether a trial court properly granted a preliminary injunction is reviewed for abuse of discretion. See *Chen v. Stewart*, 2004 UT 82, ¶ 27, 100 P.3d 1177. Findings of fact set forth in granting or refusing injunctions are reversed only if they are clearly erroneous as demonstrated by the challenger’s marshaling of the evidence. See *id.*

Whether a trial court was justified in requiring posting a bond for a temporary restraining order to issue is reviewed for abuse of discretion. See *Kenny v. Rich*, 2008 UT App 209, ¶ 22, 186 P.3d 989 (citing *Corp. of the President of the Church of Jesus Christ of Latter-day Saints v. Wallace*, 573 P.2d 1285, 1287 (Utah 1978)), *cert. denied*, 199 P.3d 970 (Utah 2008).

Whether attorney fees and costs should be awarded under Rule 65A is a question of law, reviewed for correctness. See *IKON Office Solutions, Inc. v. Crook*, 2000 UT App 217, ¶ 9, 6 P.3d 1143.

(36) Rule 65B – Extraordinary Relief

Even if a party can show the district court abused its discretion, extraordinary relief under Rule 65(d)(2) is completely at the discretion of the appellate court. See *Fundamentalist Church of Jesus Christ of Latter-day Saints v. Lindberg*, 2010 UT 51,



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¶ 24, —P.3—; *State v. Laycock*, 2009 UT 53, ¶ 8, 214 P.3d 104; *Nemelka v. Ethics & Discipline Comm.*, 2009 UT 33, ¶ 8, 212 P.3d 52; *Bowen v. Utah State Bar*, 2008 UT 5, ¶ 7, 177 P.3d 611; *State v. Barrett*, 2005 UT 88, ¶ 23, 127 P.3d 682. Several factors inform the reviewing court's discretion to grant extraordinary relief, including the “egregiousness of the alleged error, the significance of the legal issue presented by the petition, the severity of the consequences occasioned by the alleged error,” and any additional factors that may be regarded as important to the case's outcome. *Fundamentalist Church*, 2010 UT 51, ¶ 24 (quoting *State v. Laycock*, 2009 UT 53, ¶ 7, 214 P.3d 104).

On certiorari or appeal from a grant of extraordinary relief, the legal reasoning of the court in granting the writ is reviewed for correctness. See *Hogs R Us v. Town of Fairfield*, 2009 UT 21, ¶ 6, 207 P.3d 1221 (citing *V-1 Oil Co. v. Dept. of Env'tl. Quality*, 939 P.2d 1192, 1195 (Utah 1997)).

(37) Rule 65C – Post-Conviction Relief

An appellate court will review “an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law.” *Gardner v. State*, 2010 UT 46, ¶ 55, 234 P.3d 1115 (quoting *Taylor v. State*, 2007 UT 12, ¶ 13, 156 P.3d 739).

(38) Rule 73 – Attorney Fees

“Whether attorney fees are recoverable in an action is a question of law, which we review for correctness.” *Kenny v. Rich*, 2008 UT App 209, ¶ 23, 186 P.3d 989 (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998)), *cert. denied*, 199 P.3d 970 (Utah 2008). However, “[c]alculation of reasonable attorney fees is in the sound discretion of the trial court... and will not be overturned in the absence of a showing of a clear abuse of discretion.” *Kenny*, 2008 UT App 209, ¶ 23 (alteration and omission in original) (quoting *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988)).

(39) Rule 74 – Withdrawal of Counsel

Whether the trial court correctly interpreted Rule 74 as a rule of procedure is reviewed for correctness. See *Migliore v. Migliore*, 2008 UT App 208, ¶ 10, 186 P.3d 973 (quoting *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 42, 989 P.2d 1077).

5. Rules of Criminal Procedure – Examples of Standards of Review

(1) Rule 4 – Prosecution of public offenses. Whether the trial court properly denied a motion for a bill of particulars under Rule 4(e) is reviewed for abuse of discretion. See *State v.*

Gulbransen, 2005 UT 7, ¶ 26, 106 P.3d 734; *State v. Bernards*, 2007 UT App 238, ¶ 13, 166 P.3d 626. Whether the trial court properly permitted the prosecution to amend the information under Rule 4(d) is reviewed for an abuse of discretion. See *State v. Hamblin*, 2010 UT App 239, ¶ 26, —P.3d—.

(2) Rule 11 – Pleas. A district court's ruling on a motion to withdraw a guilty plea involves both factual and legal determinations, and “thus invites multiple standards of review.” *State v. Lovell*, 2010 UT 48, ¶ 5, —P.3d—; *State v. Beckstead*, 2006 UT 42, ¶¶ 7-8, 140 P.3d 1288. An appellate court will overturn a district court's ruling on a motion to withdraw a guilty plea if convinced that the district court has abused its discretion. See *Lovell*, 2010 UT 48, ¶ 5; *Beckstead*, 2006 UT 42, ¶¶ 7-8; *State v. Moa*, 2009 UT App 231, ¶ 3, 220 P.3d 162, *cert. granted*, 225 P.3d 880 (Utah 2010); *State v. Alexander*, 2009 UT App 188, ¶ 5, 214 P.3d 889, *cert. granted*, 225 P.3d 880 (Utah 2010); *State v. Ruiz*, 2009 UT App 121, ¶ 12, 210 P.3d 955, *cert. granted*, 221 P.3d 837 (Utah 2009). The findings of fact supporting this decision will be overturned only if they are clearly erroneous. See *State v. Visser*, 2000 UT 88, ¶ 9, 22 P.3d 1242; *Lovell*, 2010 UT 48, ¶ 5 (quoting *Beckstead*, 2006 UT 42, ¶ 7). However, the “ultimate question of whether the trial court complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness.” *State v. Hittle*, 2004 UT 46, ¶ 4, 94 P.3d 268 (internal quotation marks omitted); *accord Moa*, 2009 UT App 231, ¶ 3.

(3) Rule 15 – Expert witnesses and interpreters. Whether the trial court properly refused to appoint an interpreter is reviewed for abuse of discretion. See *State v. Jadama*, 2010 UT App 107, ¶ 12, 232 P.3d 545.

(4) Rule 15.5 – Visual Recording of Statement or Testimony of Child Victim. Whether the trial court properly admitted into evidence a child witness's videotaped testimony is reviewed for correctness. See *In re J.B.M.*, No. 20020931-CA, 2003 Utah App. LEXIS 201, at *1 (Oct. 23, 2003) (mem.) (citing *State v. Snyder*, 932 P.2d 120, 125 (Utah Ct. App. 1997)). *But see In re L.N.*, 2004 UT App 120, ¶ 9, 91 P.3d 836 (holding that admission of videotaped testimony of children is reviewable for an abuse of discretion).

(5) Rule 16 – Discovery. Whether the trial court properly granted or denied a motion for discovery under Rule 16(c) is reviewed for abuse of discretion. See *State v. McNearney*, 2005 UT App 133, ¶ 8, 110 P.3d 183; *State v. Spry*, 2001 UT App 75, ¶ 8, 21 P.3d 675; *accord State v. Kearns*, 2006 UT App 458, ¶ 4, 153 P.3d 731. However, the proper interpretation of Rule 16 is a question of law reviewed for correctness. See *McNearney*, 2005 UT App 133, ¶ 8.

(6) Rule 18 – Selection of jury. A trial court’s decision to grant or deny a motion to remove a juror for cause is reviewed for an abuse of discretion. *See Taylor v. State*, 2007 UT 12, ¶ 80 n.3, 156 P.3d 739 (stating that the ultimate decision to remove a juror under Rule 18 lies within the discretion of the trial court); *State v. Kell*, 2002 UT 106, ¶ 17, 61 P.3d 1019; *State v. Robertson*, 2005 UT App 419, ¶ 7, 122 P.3d 895.

(7) Rule 22 – Sentence, judgment and commitment. The interpretation of Rule 22 is reviewed for correctness. *See State v. Tyree*, 2000 UT App 350, ¶ 5, 17 P.3d 587. Whether a sentence is illegal and qualifies for a review under Rule 22(e) of the Utah Rules of Criminal Procedure is reviewed for correctness. *See State v. Garner*, 2008 UT App 32, ¶ 10, 177 P.3d 637, *cert. denied*, 187 P.3d 1276 (Utah 2008); *State v. Thorkelson*, 2004 UT App 9, ¶ 9, 84 P.3d 854; *State v. Telford*, 2002 UT 51, ¶¶ 3-4, 48 P.3d 228 (per curiam).

(8) Rule 24 – Motion for new trial. Whether the trial court properly granted or denied a motion for a new trial is reviewed for abuse of discretion. *See State v. Mitchell*, 2007 UT App 216, ¶ 6, 163 P.3d 737 (stating the decision to grant or deny motion for a new trial lies within discretion of the district court); *State v. Pinder*, 2005 UT 15, ¶ 20, 114 P.3d 551; *State v. Montoya*, 2004 UT 5, ¶ 10, 84 P.3d 1183; *State v. Colwell*, 2000 UT 8, ¶ 12, 994 P.2d 177. However, the trial court’s conclusions underlying its determination are reviewed for correctness. *See Mitchell*, 2007 UT App 216, ¶ 6 (stating that legal determinations made by the trial court as a basis for its denial of a new trial motion are reviewed for correctness); *State v. Loose*, 2000 UT 11, ¶ 8, 994 P.2d 1237. The legal standards applied by the trial court in denying a motion for new trial are reviewed for correctness, while the trial court’s factual findings are reviewed for clear error. *See Pinder*, 2005 UT 15, ¶ 20.

(9) Rule 29 – Disability and disqualification of a judge or change of venue. Whether a trial court properly denied or granted a motion for change of venue is reviewed for abuse of discretion. *See Lafferty v. State*, 2007 UT 73, ¶ 42, 175 P.3d 530; *State v. Stubbs*, 2005 UT 65, ¶ 8, 123 P.3d 407 (stating that a trial court’s decision to grant or deny a motion to change venue is within the trial court’s sound discretion and will not be disturbed absent a finding that the court exceeded its discretion); *State v. Widdison*, 2001 UT 60, ¶ 38, 28 P.3d 1278.

6. Review of Attorney and Judge Disciplinary Proceedings

Attorney discipline cases are a unique class of cases. *See In re Discipline of Pendleton*, 2000 UT 77, ¶ 20, 11 P.3d 284 (quoting *In re Stubbs*, 1999 UT 15, ¶ 19, 974 P.2d 296). The Utah Supreme Court is charged with “governing the conduct and discipline of those admitted to practice law in this state.” *In*

re Discipline of Johnson, 2001 UT 110, ¶ 3, 48 P.3d 881. In attorney discipline cases, the supreme court reviews the factual determinations of the trial court for clear error but may also draw its own inferences from those factual determinations. *See id.*; *Pendleton*, 2000 UT 77, ¶ 20.

The court has a duty to review the sanction imposed by the trial court for correctness. *See In re Discipline of Ennenga*, 2001 UT 111, ¶ 9, 37 P.3d 1150 (citing *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998)); *see also In re Discipline of Doncouse*, 2004 UT 77, ¶ 9, 99 P.3d 837. While the court is required to seriously consider the rulings and factual findings of the trial court, it may make an independent determination as to the level of discipline warranted given the circumstances. *See Pendleton*, 2000 UT 77, ¶ 20 (quoting *In re Knowlton*, 800 P.2d 806, 809 (Utah 1990)).

Supreme court review of proceedings before the Judicial Conduct Commission is unlike an appeal from an administrative body. *See In re Anderson*, 2004 UT 7, ¶ 47, 82 P.3d 1134. Indeed, the court may raise, and rely on, issues not considered before the trial court or the Commission. *See id.* In such proceedings, the court is required to review the findings of the Commission as to both law and fact and may take additional evidence and “enter an order as seems to [the court] just and proper under the circumstances.” *Id.*

The supreme court reviews interpretations of the Rules of Professional Practice for correctness. *See Nemelka v. Ethics & Discipline Comm.*, 2009 UT 33, ¶ 9, 212 P.3d 525; *In re Welker*, 2004 UT 83, ¶ 11, 100 P.3d 1197. Appellate courts afford no deference to a panel chair’s interpretation of our rules. *See Nemelka*, 2009 UT 33, ¶ 9.

7. Contempt

In general, orders relating to contempt of court are within the trial court’s sound discretion and are reviewed for abuse of that discretion. *See Anderson v. Thompson*, 2008 UT App 3, ¶ 11, 176 P.3d 464 (stating that contempt decisions will not be disturbed on appeal unless trial court’s action is “so unreasonable as to be classified as capricious and arbitrary or a clear abuse of discretion” (internal quotation marks omitted)); *accord Chen v. Stewart*, 2005 UT 68, ¶ 44, 123 P.3d 416; *Shipman v. Evans*, 2004 UT 44, ¶ 39, 100 P.3d 1151. “On appeal from a contempt order following an evidentiary hearing, we recite the evidence in a light consistent with the trial court’s factual findings unless the findings are clearly erroneous.” *Chen*, 2005 UT 68, ¶ 1 n.1. *See also State v. Parke*, 2009 UT App 50, ¶ 5, 205 P.3d 104, *cert. denied*, 215 P.3d 161 (Utah 2009); *State v. Baker*, 2008 UT App 115, ¶ 8, 182 P.3d 935, *aff’d*, 2010 UT 18, 229 P.3d 650.

Raising a Successful Batson Challenge in Jury Selection

by Michael A. Worel and David G. Wirtes, Jr.

INTRODUCTION

Litigants are allowed to use peremptory strikes to control the composition of their juries, but the Equal Protection Clause of the Fourteenth Amendment prevents them from eliminating potential jurors based solely on race, and more recently gender. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (holding that “gender, like race, is an unconstitutional proxy for juror competence and impartiality”). A party can raise a “Batson challenge” to contest a peremptory strike that it suspects is motivated solely on the basis of one of these characteristics. A Batson challenge is the product of the criminal context and was traditionally used by defendants to object to the prosecutor’s mode of jury selection. *See, e.g., Powers v. Ohio*, 499 U.S. 400 (1991). This changed in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), when the Supreme Court explained that private litigants are prohibited from making racially discriminatory strikes as well. *See id.* at 630. While Utah courts have yet to review a civil case involving a Batson challenge, plaintiffs commonly use them in federal court, and a few state courts have addressed them as well. *See, e.g., Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1215 (10th Cir. 2002); *accord Felder v. Physiotherapy Assoc.*, 158 P.3d 877, 891 (Ariz. Ct. App. 2007); *Donelson v. Fritz*, 70 P.3d 539, 541 (Colo. Ct. App. 2002); *Jacox v. Pegler*, 665 N.W.2d 607, 612-13 (Neb. 2003); *Zakour v. UT Med. Grp.*, 215 S.W.3d 763, 767 (Tenn. 2007). Batson challenges are an effective means for parties to prevent improper manipulation of their juries and thereby ensure a level playing field. While the focus here is on the plaintiff, the following principles are equally applicable to civil defendants. This article describes the steps required to raise a Batson challenge and highlights the factual circumstances under which they have been most successful, both in civil cases and in Utah criminal cases.

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THE BATSON ANALYSIS

A Batson analysis involves three steps: first, the party opposing a peremptory strike must establish a *prima facie* case of discrimination (“step one”). *See Purkett v. Elem*, 514 U.S. 765, 767 (1995). Then, the proponent of the strike is required to provide a neutral explanation for the strike (“step two”). *See id.* Finally, the trial court evaluates whether the strike constituted purposeful discrimination (“step three”). *See id.* The ultimate burden of persuasion lies with the party opposing the peremptory strike. *See id.* at 768. Therefore, if the strike proponent offers a sufficiently neutral explanation at step two, then the party opposing the strike must convince the trial court at step three that the explanation is a pretext for purposeful discrimination. *See id.* As such, a party seeking to challenge discrimination in the jury selection process must be prepared to satisfy both step one and step three of the Batson analysis.

STEP ONE: ESTABLISH A PRIMA FACIE CASE

Proper Standard: Inference of Discrimination

To establish a *prima facie* case, the party opposing the strike must produce sufficient evidence to support an inference that discrimination has occurred. The Utah Supreme Court applied this standard for the first time in *State v. Cantu*, 750 P.2d 591, 595 (Utah 1988) (“*Cantu I*”). One year later, however, the court employed a different test requiring the defendant to establish a “strong likelihood” that the juror was struck because of her association with the group. *See State v. Cantu*, 778 P.2d 517, 518 (Utah 1989) (citing *People v. Wheeler*, 583 P.2d 748, 764 (Cal. 1978)) (“*Cantu II*”). The court returned to the inference standard without explanation in *State v. Colwell*, 2000 UT 8, ¶ 18, 994 P.2d 177, and the Supreme Court verified the standard five years later in *Johnson v. California*, 545 U.S. 162, 170-72 (2005) (explaining that the challenger was not required to prove his case at step one, but simply raise an inference that

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discrimination “may have infected the jury selection process”). The inference standard applies to the civil context as well. *See U.S. Xpress Enter., Inc. v. J.B. Hunt Transp., Inc.*, 320 F.3d 809, 812-13 (8th Cir. 2003); *Davis v. Baltimore Gas & Elec. Co.*, 160 F.3d 1023, 1026-27 (4th Cir. 1998); *Donelson*, 70 P.3d at 542; *Jacox*, 665 N.W.2d at 612-13. Cases applying the strong likelihood standard should still be helpful for factual comparison, since it is the more difficult test.

Evidence that Raises an Inference of Discrimination

A trial judge must ultimately consider all relevant circumstances before drawing an inference of discriminatory intent. *See State v. Valdez*, 2006 UT 39, ¶ 15 n.9, 140 P.3d 1219 (“The Supreme Court has consistently declined to specify what type of evidence the challenging party must offer to establish a *prima facie* case, and instead has relied on trial judges to determine whether ‘all relevant circumstances... give rise to an inference of discrimination.’” (quoting *Batson*, 476 U.S. at 96-97) (omission in original)). Even so, Utah courts have either found or indicated in dicta that certain evidence is particularly compelling. Other jurisdictions find this evidence equally convincing in civil cases.

Numerical Evidence

Numerical evidence that demonstrates a discriminatory pattern of peremptory strikes supports a *prima facie* case. *See State v. Alvarez*, 872 P.2d 450, 457 (Utah 1994). To raise suspicion, numerical evidence must demonstrate that the striking party either (1) excluded “most or all” minorities from jury selection or (2) used a disproportionate number of challenges on minority venire members. *See id.*

Most or All:

- Seventy-five percent reduction of minority jurors “might raise an inference of intentional discrimination,” but a twenty-seven percent reduction (three out of eleven) did not meet the “most or all” threshold. *State v. Rosa-Re*, 2008 UT App 472, ¶ 4 n.1, 200 P.3d 670 (“*Rosa-Re II*”).
- Fifty-percent reduction of minority jurors (two out of four) was not “most or all.” *Alvarez*, 872 P.2d at 458.

Disproportionate Number:

- Seventeen percent (two out of twelve) of peremptory challenges used on minority jurors was not a disproportionate number of challenges. *See id.*
- Seventy-five percent (three out of four) of peremptory challenges used on minority jurors was disproportionate and thus supported strike opponent’s *prima facie* case. *See State v. Pharrus*, 846 P.2d 454, 463 (Utah Ct. App. 1993); *Aristocrat Leisure*

Ltd. v. Deutsche Bank Trust Co. Americas, Case No. 04 Civ. 10014, 2009 WL 3321047, at *2 (S.D.N.Y. Oct. 9, 2009) (same for civil case).

- Sixty-six percent reduction of minority jurors (two out of three) was sufficient to establish a *prima facie* claim in *Jaquith v. S. Orangetown Cent. Sch. Dist.*, 349 Fed. Appx. 653 (2d Cir. 2009), a civil case. *See id.* at 654.

While numerical data can help demonstrate discriminatory intent, it is unclear whether this evidence alone can support a *prima facie* case. *See Pharrus*, 846 P.2d at 462. Numerical data complemented by evidence of suspicious questioning by the strike opponent, however, has proved sufficient. *See id.* at 463 (finding a *prima facie* case where the strike opponent demonstrated both a discriminatory pattern of strikes and deficient questioning by strike proponent).

Line of Questioning by Strike Proponent

Courts consider the strike proponent’s questions and statements during the *voir dire* as important potential evidence of discrimination. *See State v. Alvarez*, 872 P.2d at 450, 458 (Utah 1994) (upholding a finding that defendant failed to make a *prima facie* case, in part, because he did not point to any discriminatory questions or statements made by prosecutor). Unless the discrimination is blatant, the most obvious initial evidence of improper motive is

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a complete lack of questioning. *See Cantu II*, 778 P.2d at 519 (holding that the strike proponent's "desultory voir dire, uninvolved demeanor, and failure to pursue a studied or deliberate course of questioning regarding specific [juror] bias" supported a showing of purposeful discrimination).

Lack of Questioning:

- Strike proponent neglected to question one of the three excluded minority jurors entirely, which indicated that he made his decision solely on the basis of race and supported a *prima facie* case. *See Pharrus*, 846 P.2d at 463.
- Court would have considered the argument that the prosecutor's *voir dire* was "suspiciously sparse" had the challenger made it to the trial court. *State v. Harrison*, 805 P.2d 769, 777 (Utah Ct. App. 1991).
- Civil defendant used first three strikes on minority jurors, but trial court found a *prima facie* case for only one of them because the juror "hardly spoke throughout voir dire." Arizona appellate court upheld the finding. *See Felder v. Physiotherapy Assoc.*, 158 P.3d 877, 891 (Ariz. Ct. App. 2007).

Once the proponent articulates a reason for the strike, the challenging party can evaluate facially neutral questions to determine whether the proponent's line of questioning reflected her alleged concern with the juror. Although an analysis of the proponent's explanation is technically part of step three, the Eighth Circuit has considered this as evidence in reviewing a *prima facie* claim.

Questioning is Inconsistent with Stated Explanation:

- Civil defendant claimed he excluded a potential juror based on his medical background; because the defendant neglected to ask the juror questions related to his experience in the field or whether his occupation would affect his view the case, the court found a *prima facie* case of racial discrimination. *See U.S. Xpress Enter., Inc. v. J.B. Hunt Transp., Inc.*, 320 F.3d 809, 813 (8th Cir. 2003).

Similar Characteristics

Courts will often look to evidence of similarities between the stricken minority juror and various litigation participants to evaluate whether the strike raises an inference of discrimination. While this evidence is not conclusive, it can be supportive. *See Cantu I*, 750 P.2d at 597 (warning that strike opponents may not merely point to racial similarities between the prospective juror and the defendant, but concluding that the defendant did establish a *prima facie* case in light of all the facts and circumstances).

Between Excluded Juror and Party Opposing Strike:

The law initially required an excluded juror to be the same race as the

strike opponent. *See Batson*, 476 U.S. at 89; *Cantu I*, 750 P.2d at 595. In the wake of *Powers v. Ohio*, 499 U.S. 400 (1991), racial parity is no longer required, but courts still consider it as evidence tending to show discrimination. *See State v. Alvarez*, 872 P.2d 450, 458 (Utah 1994) ("[R]acial or ethnic 'identity between the [strike opponent] and excused prospective jurors' may make it easier to prove a *prima facie* case." (citation omitted)).

Between Excluded Juror and Victim:

Victim's gender was relevant to establishing an inference of discrimination because "the 'potential for cynicism is particularly acute in cases where gender-related issues are prominent.'" *Rosa-Re II*, 2008 UT App 472, ¶ 6 n.2 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994)). The holding was limited, however, to "typical" cases where the victim was female: in a case involving a male victim, the incentive to remove jurors of the same gender arguably did not exist (or there may have even been a reverse incentive for the prosecutor to retain male jurors). *See id.*

The Eighth Circuit considered plaintiff's experience as a rape victim to be a relevant circumstance where defendant struck three female jurors and ultimately upheld a district court finding of *prima facie* discrimination. *See Kable v. Leonard*, 563 F.3d 736, 740 (8th Cir. 2009).

Between Excluded Juror and Empanelled Juror:

- In *Cantu I*, the strike opponent argued that because an excluded juror had a "pro-prosecution" background and lived within a few blocks of an empanelled juror, the only plausible explanation for the strike was the juror's race. *See Cantu I*, 750 P.2d at 597. The court posited several potential reasons for this exclusion, but ultimately concluded that the challenger had presented sufficient evidence to meet his initial burden of establishing a *prima facie* case. *See id.*

Evidence that Counterbalances an Inference of Discrimination

Because courts are required to look at the "totality of the relevant facts" in a *Batson* analysis, evidence leaning toward an inference of discrimination may be counterbalanced by other factors. *See Rosa-Re II*, 2008 UT App 472, ¶ 6.

Minority Status of Strike Proponent's Witnesses:

- Evidence that the strike proponent intended to call witnesses from the same minority group as the excluded juror weighed against an inference of discrimination. *See State v. Alvarez*, 872 P.2d 450, 458 (Utah 1994). The court reasoned that this was because minority jurors might be "prone to find credibility" in minority witnesses, giving the strike proponent a neutralizing incentive to keep them on. *See id.*

Strike Opponent's Own Use of Peremptory Strikes:

- The fact that both parties struck three men and one woman was relevant with regard to the strength of the strike opponent's *prima facie* claim of gender discrimination. *See Rosa-Re II*, 2008 UT App 472, ¶ 6.

Minority Jurors on Final Jury:

- Evidence that two individuals with a minority background ultimately served on the jury detracted from the strike opponent's argument that opposing counsel's pattern of strikes raised an inference of discriminatory intent. *See State v. Harrison*, 805 P.2d 769, 777 (Utah Ct. App. 1991).
- Presence of jurors of the pertinent minority group on the final panel goes against a *prima facie* case, but only when the strike proponent has had an opportunity to eliminate them. *See Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1216 (10th Cir. 2002).

Waiver of Step One: *Prima Facie* Case Assumed

A *prima facie* case of discrimination is assumed if the strike proponent fails to challenge it. *See State v. Higginbotham*, 917 P.2d 545, 547 (Utah 1996). Generally, a strike proponent will waive an analysis of step one by jumping straight to step two and offering a neutral explanation for the strike. *See id.* ("Where the proponent of the peremptory challenge fails to contest the sufficiency of the *prima facie* case at trial and merely provides a rebuttal explanation for the challenge, the issue of whether a *prima facie* case was established is waived." (emphasis added)); *accord Davey*, 301 F.3d at 1215; *Davis v. Baltimore Gas & Elec. Co.*, 160 F.3d 1023, 1027 (4th Cir. 1998); *Jacox v. Pegler*, 665 N.W.2d 607, 612-13 (Neb. 2003). Thus, it may be very easy for a plaintiff to establish a *prima facie* case. Nevertheless, there is still reason to introduce *prima facie* evidence, as courts often consider it in evaluating the allegedly neutral explanation at step three of the analysis. In fact, the strength of a *prima facie* case can be influential in a court's decision as to whether the strike opponent ultimately proved purposeful discrimination. *See Rosa-Re II*, 2008 UT App 472, ¶ 6.

STEP THREE: PROVE PURPOSEFUL DISCRIMINATION

Once a plaintiff establishes a *prima facie* case and the defendant offers a facially neutral explanation for the strike, the goal at step three is to convince the trial court that this explanation is a pretext for purposeful discrimination. This evaluation largely depends on the credibility of the strike proponent's explanation and is only overturned if it is clearly erroneous. *See Higginbotham*, 917 P.2d at 548. But, "[t]o promote comprehensive analysis, trial courts must allow [strike opponents] an opportunity to attack the justifications offered by the [strike proponent] for

striking prospective jurors." *State v. Cannon*, 2002 UT App 18, ¶ 11, 41 P.3d 1153. It is important for plaintiffs to take advantage of this opportunity, not only because they have the ultimate burden of persuasion as the opponent of the strike, but also to develop the record for appeal. *See State v. Valdez*, 2006 UT 39, ¶ 15 n.10, 140 P.3d 1219; *see also Johnson v. Gibson*, 169 F.3d 1239, 1248 (10th Cir. 1999) (refusing to address pretext argument made on appeal because trial court had no independent duty to "pore over the record... searching for evidence of pretext, absent any pretext argument or evidence presented by counsel"); *Davis*, 160 F.3d at 1027 ("[Plaintiff's] failure to respond to [defendant's] explanation for its strikes could have been reasonably construed by the trial judge as Plaintiff's agreement that the expressed reasons were racially neutral.").

Utah courts have developed a list of circumstantial factors that cast doubt on the legitimacy of a strike proponent's explanation which include:

- (1) alleged group bias not shown to be shared by the juror in question,
- (2) failure to examine the juror or perfunctory examination, assuming neither the court nor opposing counsel had questioned the juror,
- (3) singling the juror out for special questioning designed to evoke a certain response,
- (4) [strike proponent's] reason is unrelated to the facts of the case, and
- (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.

Cantu II, 778 P.2d at 518-19 (internal quotation marks omitted); *See also Cannon*, 2002 UT App 18, ¶ 9. Arguments made at step three with regard to the strike proponent's questioning and similar characteristics between excluded and empanelled jurors will often overlap with the arguments made to establish a *prima facie* case. The difference is that, at this stage, the plaintiff can examine this evidence in light of the defendant's explanations.

CONCLUSION

Understanding the factual circumstances under which *Batson* challenges have been successful is essential for plaintiffs to recognize potential discrimination and prevent it from manipulating the composition of their juries. In other words, this doctrine adds an additional arrow to a plaintiff's quiver at trial. Utah has embraced the *Batson* framework in the criminal setting and it is firmly established that the framework applies to civil litigation as well. Fixing a keen eye on the jury selection process is critical in order for plaintiffs (and defendants) to maintain their share of control over the process and ensure its integrity throughout.

Author's Note: *Special thanks to Liz Silvestrini for her help with the article.*

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**New
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New Lawyer Training Program: First Year of Implementation

by Tracy Gruber

Once again, the Utah State Bar is expanding its membership, admitting over 300 new lawyers in October 2010. Fortunately, these newly-minted members of the bar will not be alone as they embark on the next stage of their professional development. The experienced members of the bar will be there to guide, assist, and mentor the new lawyers through the New Lawyer Training Program (NLTP).

It is difficult for the new lawyer to face the reality that law school does not fully prepare recent graduates to practice law. After all, three years of intensive study, up to \$100,000 in expenses, typically in the form of student loans, not to mention the many stressful months of preparing for the bar exam should prepare one for the profession. However, numerous studies continue to demonstrate that despite successfully teaching legal doctrine and analyses, and preparing one to “think like a lawyer,” law schools consistently fall short in providing the skills necessary for new lawyers to practice. The nature of the modern legal education is such that practical legal skills training is not the focus of the law school curriculum. Although this focus is changing with the expansion of law school clinical and externship programs, limited access to these programs for law students has failed to address the problem.

Brigham Young University Professor and member of the Supreme Court Committee on New Lawyer Training, James Backman, recently noted that law students are able to gain access to practical legal training through a variety of avenues, including law school clinical programs, externships, and summer clerkships. *See* James Backman, *Externships and New Lawyer Mentoring: The Practicing Lawyer’s Role in Educating New Lawyers*, 24 BYU J. PUB. 65, 73 (2009). However, these experiences are open to a limited number of students due to cost and the exclusive and competitive nature of summer clerkships, where typically only the top twenty percent of students are accepted into these programs. *See id.* at 73-74.

Although some large national firms attempt to address the training

gap by establishing practical legal training programs for new associates, most firms continue to be unwilling to make the financial investment necessary to establish these programs. Moreover, training programs in firms are only open to a small number of new lawyers, particularly during this current economic time when the majority of new lawyers are working in small firms or as solo practitioners with no access to practical legal training. This piecemeal approach to training is insufficient in preparing new lawyers for the practical demands of the profession.

The inadequacy with which the gap in legal training is being addressed has led bars, with the encouragement and support of the judiciary, to develop uniform and regulated mentoring programs for new attorneys. Although there has not been one solution successfully addressing the disconnect between the law school emphasis on legal theory and the skills and experiences needed to handle clients, bars are turning to one-on-one mentoring. Historically, mentoring has been an effective method of training lawyers in the culture, standards, and skills of the profession.

In 2008, the Utah Supreme Court and the Utah State Bar reached a similar conclusion and established the mandatory NLTP. “The Court had concerns that the economic pressures on the legal profession were diminishing the opportunities for young lawyers to receive guidance, supervision and training from more experienced lawyers,” explains Chief Justice Christine Durham. “The Court hopes that the NLTP will help launch productive legal careers and anchor new members of the profession in the fundamental values that a learned profession espouses.” The NLTP represents the practicing bar’s commitment to the next generation of lawyers

TRACY GRUBER is the Administrator of the New Lawyer Training Program. She relocated to Utah after briefly practicing labor law in Illinois.



and an acknowledgement that all new lawyers need guidance in the profession after law school.

The NLTP, which began as a bold idea in new lawyer professional development, is gaining nationwide attention as other bars consider similar programs. The NLTP was modeled after Georgia's mandatory mentoring program, "Transition Into Law Practice" and Ohio's optional "Lawyer to Lawyer" mentoring program. The success and positive feedback of the NLTP and mentoring programs in these states has led many jurisdictions to establish mandatory or pilot programs, including Maryland, Oregon, Wyoming, and Arizona, among others.

Members of the Utah State Bar have embraced the NLTP by applying to become approved mentors. Since the NLTP was adopted, over 590 experienced and respected attorneys have been approved as mentors by the Utah Supreme Court. The program matches mentors with new lawyers to participate side-by-side in a series of activities and experiences designed to improve the new lawyer's transition into the practice of law and more effectively teach ethics, civility, and professionalism.

The mentor and new lawyer relationship is central to the NLTP. Since starting in July 2009, there have been 311 new lawyers paired with 290 court-approved mentors. The program is benefiting both partners in this important relationship. In a recent anonymous survey conducted by the Utah State Bar, a mentor stated, "I feel

good about my renewed commitment to the profession through this program." Similarly positive, a new lawyer remarked, "I was assigned an amazing mentor who has helped introduce me to the local legal community, opened doors for me and helped me to have the confidence to open my solo practice." (For more feedback see "What Mentors and New Lawyers are Saying" on the next page).

During the twelve-month NLTP term, mentors and new lawyers work through a comprehensive mentoring plan designed by the new lawyer and his or her mentor using a set of required activities and elective learning opportunities established by the Supreme Court Committee on New Lawyer Training and included in the NLTP Model Mentoring. "The plan is intended to expose new lawyers to a broad variety of activities that are common to the practice while allowing the flexibility to individualize the plan based on the new lawyer's professional goals and interests," remarked Margaret Plane, Co-Chair of the Supreme Court Committee on New Lawyer Training. "The ability to individualize the plan helps make the first year CLE requirements meaningful and effective in transitioning new lawyers to the practice."

The plan includes a broad range of subjects for discussion often overlooked in the pressure of court deadlines and client expectations. These requirements in the plan include the following subjects: introduction to the legal community; ethics and professional conduct; conflicts and confidentiality; work-life balance; and law office management, among other subjects. "A well thought out war story can be an effective teaching tool," said Rodney Snow, Co-Chair of the Supreme Court Committee on New Lawyer Training,

The NLTP, however, is not designed for a string of war stories or for the repeating of the same. Rather, the NLTP and the mentoring plan are designed to enable new lawyers to safely ask the tough questions about the profession as they are being taught the skills, habits, tools and ideals necessary to practice law competently and with integrity.

As experienced attorney Elaina Maragakis put it, "law school teaches you where the courthouse is but it doesn't teach which bus to take to get there." The vision of the Utah Supreme Court and Utah State Bar in establishing the NLTP hopes that new lawyers will learn "which bus to take" to the courthouse and how to competently represent clients, be they working in a firm, business, non-profit or public sector.

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What Mentors Are Saying...

Upon completion of the NLTP mentoring term, participants are asked to comment on their experience in the program. Recent positive comments from mentors include the following responses:

The NLTP “helped me realize I have learned a lot about the practice of law and can pass this knowledge on to those with less experience.”

The NLTP “allowed me to have greater reflections on my own legal career – the good, the bad and the ugly.”

“I feel good about my renewed commitment to the profession through this program. I have hope for the future with these younger lawyers.”

The NLTP “helped solidify ethical concepts and issues.”

“Seeing the practice of law through the eager and fresh eyes of a new lawyer renewed my perspective.”

“I was forced to learn about some of the USB programs of which I had little or no familiarity.”

I “felt good about helping someone learn the ropes. [New Lawyer] also introduced me to new concepts/ways of doing things that were not available when I was in law school.”

The NLTP “required me to review new materials.”

The NLTP “reminded me of how far I’ve come and what it took to get here which, in turn, reminded me that I needed to be more empathetic and patient with my ‘mentee’ and new/younger lawyers in general.”

The NLTP “helped refresh my understanding of some of the issues I do not deal with regularly.”

“It was great to meet a new lawyer and see the world through his new ‘eyes’ and not my own jaded view.”

“The new attorney’s enthusiasm reminded me how exciting the work can be.”

What New Lawyers Are Saying...

The New Lawyers who were mentored provide similar positive feedback resulting from the experience in the NLTP:

“My mentor frequently gave tips on professionalism, ethics and civility when discussing cases, interaction with the courts and other attorneys.”

“I had the opportunity to work with an experienced criminal defense attorney.”

“My mentor and I had several discussions regarding professionalism issues that were based primarily on my mentor’s personal experiences. I found these discussions to be helpful and instructive.”

“My mentor was excellent and helped me to know what is ‘good’ practice, rather than just acceptable practice.”

“I was able to meet an expert in my field of practice, learn about his methods, and have an additional resource to turn to.”

“I was assigned an amazing mentor who helped introduce me to the local legal community, open doors for me and helped me to have the confidence to open my solo practice.”

“I learned more than I expected.”

“My mentor pointed out some shortcomings I was committing or inclined to commit.”

“There is no way I would have gotten the experience I have thus far in my legal development without my mentor.”

“While most of the tasks in my mentoring plan were tasks I would perform naturally on the job, the sit-down discussions provided good opportunities to receive mentoring I would not otherwise have received.”

My mentor and I “often discussed how to advance an argument or case without maligning opposing counsel or being offensive to the court.”

“It helps enormously to have someone whose judgment you trust to use as a sounding board when you’re venturing into uncharted waters.”

“My mentor was always available for questions I had. Without a mentor I would not have felt confident in going into solo practice alone, applying for and obtaining a public defender contract, and generally feeling capable as a new attorney.”

“I had a great mentor who understood what it was like to be a new criminal defense attorney.”

“My mentor was courteous, accommodating, knowledgeable, and enjoyable.”

The Evolution and Future of the Accredited Investor Standard for Individuals

by Michael L. Monson

Since as early as the 1930s, regulators and courts have struggled with how to protect individual investors in private offerings of securities while still allowing sufficient investment in private offerings to sustain the growth of start-up and other young companies – companies which have historically been responsible for much of the job growth in the United States. Eventually, the Securities and Exchange Commission (“SEC”) came up with the idea of “accredited investors.” Accredited investors are individuals or other entities that have sufficient wealth not to need the protection of federal and state securities laws to the same extent as non-accredited investors.

As the dollar thresholds within the definition of “accredited investor” have not changed to keep up with inflation, the number of individuals who qualify as accredited investors has grown significantly in the last twenty-eight years. On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law (the “Dodd-Frank Act”). The Dodd-Frank Act makes an important revision to the definition of “accredited investor” as it applies to individuals. This revision is effective immediately. The Dodd-Frank Act also requires the SEC to review periodically the individual accredited investor standard, in particular with regard to dollar thresholds, but leaves that difficult decision for another day.

This article briefly outlines the history of the accredited investor standard as it applies to individuals, describes important recent changes to that standard, and attempts to summarize the forces that will likely determine future changes to that standard.

History: Where the Accredited Investor Standard Came From
Companies desiring to sell stock, membership interests, or other securities must register with the SEC, find an applicable exemption from registration, or sell them illegally. Registration is very expensive and really only practical for large companies. Selling securities illegally is not an option for informed, law-abiding citizens. However, that does not mean it does not happen, and it may, in fact, be the most frequently-used method of selling securities. Informed, law-abiding, small and midsize companies, therefore,

must find an exemption if they want to raise capital through the sale of securities.

Section 4(2) of the Securities Act of 1933, *see* 15 U.S.C. § 77d, (the “1933 Act”) exempts from registration “transactions not involving any public offering.” *Id.* Unfortunately, the 1933 Act did not give any clarification on what would constitute a “public offering.”

In 1935, general counsel at the SEC articulated, and the courts generally adopted, four critical factors to be considered in determining whether an offering is “public” or “non-public.” Securities Act Release No. 33-285, 11 Fed. Reg. 10,952 (Jan. 24, 1935). Generally these four factors were: (i) the number of offerees and their relationship to each other and the issuer, (ii) the number of units offered, (iii) the size of the offering, and (iv) the manner of the offering. *See Campbell v. Degenther*, 97 F. Supp. 975, 977 (W.D. Penn. 1951). Despite these factors, attorneys had a hard time advising their issuer clients that any particular offering did indeed fit within the four factors because it was impossible to tell for sure how a court would apply the four factors in any given case.

To add additional confusion, for many years the SEC simply emphasized the number of people to whom securities were offered as the test for whether or not a transaction involved a public offering, arbitrarily choosing the number twenty-five and mostly ignoring the other three factors. *See Hill York Corp. v. Am. Int’l Franchises, Inc.*, 448 F.2d 680, 687-89 (5th Cir. 1971).

The United States Supreme Court eventually took up the issue in *Securities & Exchange Commission v. Ralston Purina Co.*, 346

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U.S. 119 (1953), and held that instead of looking at the number of individuals involved, the determination of whether a public offering has occurred turns on “whether the particular class of persons affected need the protection of the Act” or whether such persons are able “to fend for themselves.” *Id.* at 125.

Although somewhat helpful, the Supreme Court’s ruling in *Ralston Purina* was certainly no bright-line test that issuers of securities and their counsel could rely upon in determining whether an offering of securities involved a public offering, and thus whether it was exempt from registration. And, in fact, several courts, particularly in the Fifth Circuit, put very restrictive interpretations on the *Ralston Purina* holding, making it difficult for companies to make private placement offerings.

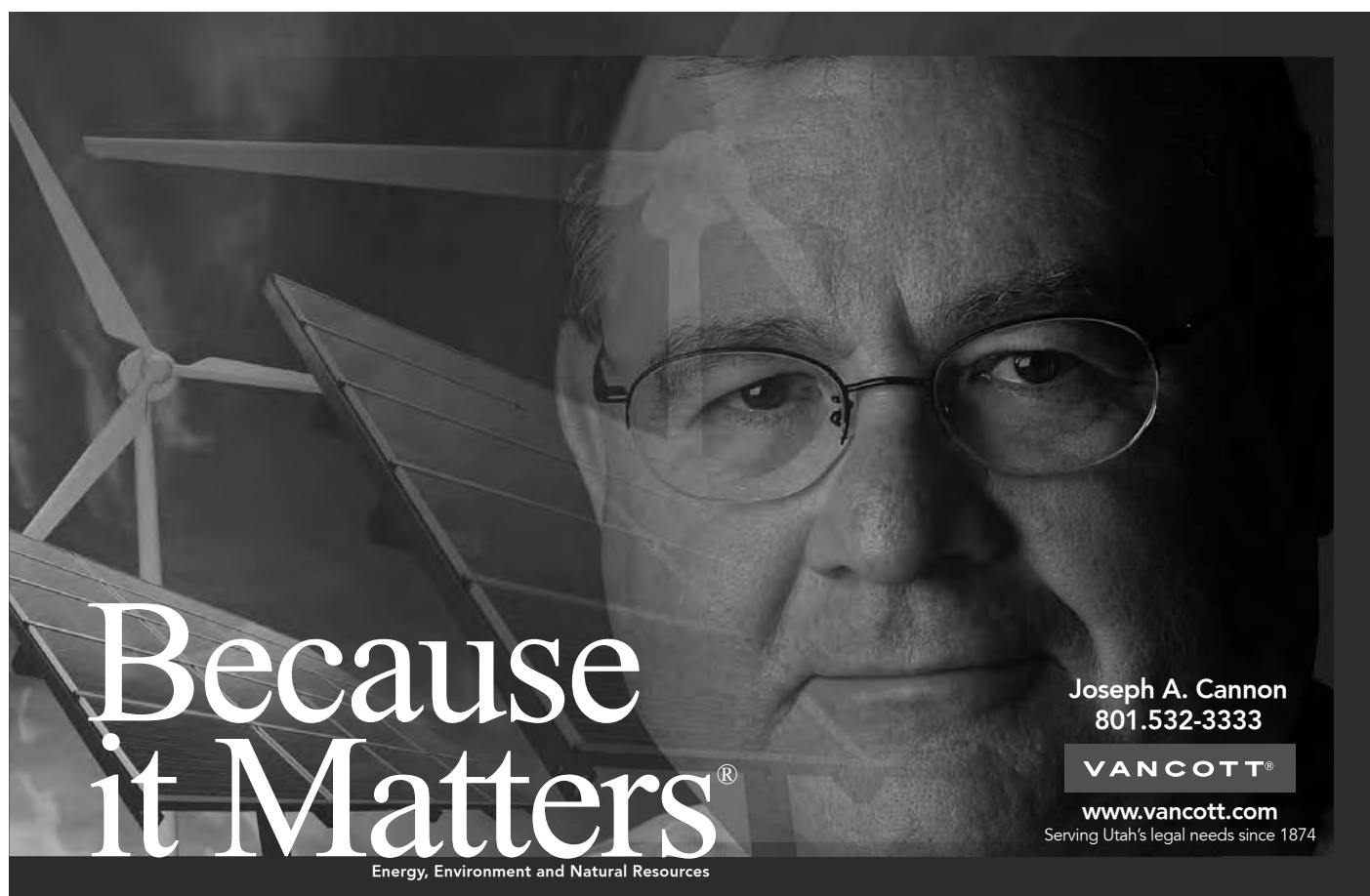
In 1974, the SEC adopted Rule 146 as a nonexclusive way of complying with the non-public requirements of Section 4(2). Rule 146 permitted companies to approach an unlimited number of people to sell securities to, but limited the number of people that could actually purchase securities. Rule 146 also did not allow for advertising the sale of securities and required companies to pre-screen potential purchasers and evaluate

their financial condition and sophistication. The standards under Rule 146 were the first incarnation of a standard for an accredited investor, someone who was wealthy enough and sophisticated enough not to need the full protection of federal law when investing in private offerings of securities.

In 1982, Rule 146(c) was superseded by Regulation D and Rules 501-503 and 506 under Regulation D. Rule 506, the most commonly used exemption from registration, provides that a company will not be deemed to have made a public offering for purposes of Section 4(2) if there are no more than thirty-five purchasers in the offering. However, “accredited investors” are not included when counting the thirty-five purchasers so, in effect, companies making offerings under Rule 506 may have an unlimited number of accredited investors and still not be deemed to have conducted a “public offering.”

Both the 1933 Act and the SEC rules gave a clear definition of what constitutes an accredited investor. For individuals, an accredited investor is:

any natural person whose individual net worth, or joint



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net worth with that person's spouse, at the time of his purchase exceeds \$1,000,000... [or] any natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.

17 C.F.R. § 230.501(a)(5)-(6).

The theory behind allowing an unlimited number of "accredited investors" to participate in unregistered private placement offerings is that accredited investors, based on their wealth, do not need the full protection of the federal or, after passage of the National Securities Markets Improvement Act of 1996, state securities laws because they either have the sophistication or the resources to obtain disclosure and to evaluate the merits of private securities offerings.

The criteria for determining an individual accredited investor (\$1,000,000 of net worth, \$200,000 of annual income, or \$300,000 of annual income with spouse) were established in 1982 and have not been adjusted for inflation since then.

Proposed Revisions to the Accredited Investor Standard

Because of sustained growth in wealth and income in the 1990s and, no doubt as a result of the housing boom in the early and mid 2000s, many otherwise unsophisticated, middle-class people began earning over \$200,000 per year and/or had become millionaires (at least on paper) through a sharp rise in home prices or otherwise. This new group of wealthy individuals greatly expanded the pool of accredited investors who, in theory, did not require the full protection of the federal and state securities laws.

The SEC eventually realized that to have \$200,000 of annual income or \$1,000,000 in assets in 2007 was not the same as having that income level or asset value in 1982, and that the pool of individuals qualifying as accredited investors had grown significantly. As the SEC put it, "[b]y not adjusting... dollar-amount thresholds upward for inflation, we have effectively lowered the thresholds in terms of real purchasing power." Revisions of Limited Offering Exemptions in Regulation D, Release No. 33-8828, 72 Fed. Reg. 45,116, 45,126 (Aug. 10, 2007).

The SEC's response came in 2007 in the form of Release No. 33-8828 which, among other things, proposed to adjust upward dollar-amount thresholds in the definition of "accredited investor" as applied to individuals starting in July of 2012 and readjusting

upward every five years thereafter. The SEC also proposed to add a new category of individual accredited investors – individuals who had at least \$750,000 in investments, excluding their personal residence.

Before the revisions to the definition of accredited investor, as it applied to individuals, reached the point of adoption, the housing market crashed, securities frauds of unprecedented magnitudes were perpetrated, and new leadership was put in place at the SEC. Apparently having bigger fish to fry, the new leadership at the SEC abandoned the proposals relating to accreditation for individual investors found in Release No. 33-8828.

Even though the SEC terminated its efforts to revise the definition of an individual accredited investor, Congress did not. Recently, the Restoring American Financial Stability Act of 2010 (the "Stability Act"), spearheaded by Senator Chris Dodd, initially proposed to change the wealth thresholds for individual accredited investors up from \$1,000,000 in assets or \$200,000 in income to an estimated initial threshold of \$2.3 million in assets or \$450,000 in income. According to a Kauffman Foundation study, this would have eliminated seventy-seven percent of the nation's potential accredited investors.

Senator Dodd's proposed revision to the accredited investor standards was met with fierce opposition from many groups, most notably the Angel Capital Association ("ACA"), a trade association of leading angel investment groups in North America. Presumably in response to ACA's and other interested parties' concerns, the Senate version of the Stability Act was revised to leave the dollar thresholds unchanged (i.e., \$200,000 in annual income or \$1,000,000 in assets). However, ACA acknowledged a compromise on the issue of not allowing individuals to count their primary residence in calculating the \$1,000,000 in assets threshold.

The Dodd-Frank Wall Street Reform and Consumer Protection Act

The outgrowth of the Stability Act, as well as the Wall Street Reform and Consumer Protection Act of 2009, was the Dodd-Frank Act. The Dodd-Frank Act is "the most comprehensive financial regulatory overhaul since the Great Depression." Ross Colvin, *Obama Signs Sweeping Wall Street Overhaul Into Law*, REUTERS, July 21, 2010, available at <http://www.reuters.com/article/idUSTRE66K1QR20100721>. It is beyond the scope of this article to cover everything contained in the over 800-page Dodd-Frank Act. However, Section 413 does affect the individual accredited investor standard.

Change in Net Worth Calculation

Section 413 of the Dodd-Frank Act provides that, effective immediately, the value of a primary residence can no longer be included when determining the net worth of an individual or the joint net worth with a spouse for purposes of the \$1,000,000 net worth standard for accreditation. *See* Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, § 413, 124 Stat. 1376, 1577-78 (2010). Unless the SEC indicates otherwise, it seems reasonable to assume that this new net worth accreditation standard only applies to investors after June 21, 2010, and that individual accredited investors who previously qualified as accredited based on the value of their primary residence will retain their accredited status as to past investments, and no remediation is necessary. However, it is not likely that such individuals will continue their accredited status as to future investments.

More difficult is the question of existing investors in a fund, such as a hedge fund, who were accredited under the old standard but are no longer accredited and who now want to make additional capital contribution to that fund. Their accreditation status should be determined at “the time of . . . purchase,” 17 C.F.R. § 223.501(a)(5)-(6), but it is not clear, under the new standard, whether “the time of . . . purchase” will be interpreted to mean initial purchase or whether a subsequent capital contribution would constitute a new purchase. Similarly, if an investor in a private equity fund made a capital commitment at a time that he or she was accredited, but is no longer accredited, is the fund able to make draw-downs of capital from such investor or will doing so be deemed to be accepting funds from an unaccredited investor? These transition issues are not dealt with in the Dodd-Frank Act, and counsel to issuers should stay abreast of clarifications, if any, from the SEC.

Future Changes to Dollar Thresholds

Section 413 also provides that the SEC may “undertake a review of the definition of the term ‘accredited investor,’ as such term applies to natural persons, to determine whether the requirements of the definition . . . should be adjusted or modified.” Dodd-Frank Act, Pub. L. No. 111-203, § 413 (b)(1)(A). The SEC is to apply three factors in determining whether to modify the definition of accredited investor for individuals. These factors are (1) the protection of investors, (2) the public interest, and (3) the state of the economy. *See id.*

Pursuant to Section 413(a), during the four-year period beginning on July 21, 2010, the net worth standard must remain at \$1,000,000 (excluding the value of the primary residence, as described above).

See id. § 413(a). However, the \$200,000-of-income-or-\$300,000-with-spouse standard for accreditation is subject to change at any time after completion of the SEC’s review and subject to notice and comment rule making. *See id.* § 413(b)(1)(B).

After July 21, 2014, and not less frequently than once every four years thereafter, the SEC is required to undertake a review of the definition of “accredited investor” in its entirety as it applies to natural persons to “determine whether the requirements of the definition should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy.” *Id.* § 413(b)(2)(A).

Conclusion

The question of how to properly regulate the private placement of securities is a vexing one. On one hand, you can protect unsophisticated investors with minimal assets by raising the threshold amounts for accredited investors and/or by not allowing a principal residence to be counted in determining assets necessary for accreditation. On the other hand, however, this approach has the potential to drastically reduce the pool of accredited investors and would likely have adverse consequences on investment in start-up companies (companies that are less than five years old), which have historically both relied on private investors and, according to the Census Bureau and the Kauffman Foundation, have generated all of the net new jobs in the United States over the last twenty-five years.

Congress has taken the first step in the direction of protecting investors by not allowing the value of a principal residence to be included in calculating net worth. Given the current state of the housing market, this change will have a more limited effect on the number of accredited investors than it would have had five years ago. However, this change may become very significant down the road if the economy improves. Congress has punted to the SEC on the more difficult question of raising the income thresholds to keep up with inflation. Unless the economy improves dramatically in the near future, it does not seem likely that the SEC will act quickly to make a dramatic change in income thresholds and eliminate a large portion of the individual accredited investor pool. However, the SEC is under pressure to avoid another Bernie Madoff disaster, and so further change to accreditation standards may be forthcoming. Regardless, counsel to issuers of securities must proceed carefully from here on out, as the accreditation standard that has remained unchanged for nearly thirty years is now subject to change at any time and from time to time.

Tribute to Bob Henderson

by Jeffrey D. Eisenberg

Unlike me, Bob did not waste any words. He once wrote me a response to a settlement demand that read:

Dear Jeff,

The answer is: No.

Best Regards,

For many years, Bob and I knew each other professionally, but we weren't close friends. Then, about five years ago, Bob asked me to represent him in a legal dispute. Over the next month, Bob and I spent many hours sitting on my deck, talking about whether he should or shouldn't file a lawsuit. There was a lot of money at stake, but over time it became clear to both of us that Bob did not really care about the money. He cared about how he'd been treated. He felt wronged, and Bob was not one to walk away from a fight.

Over the course of many weeks, what started out as a discussion of a lawsuit turned into a discussion about life, friendship, and what mattered most in life. Bob decided to forget the lawsuit and move on. From there, our "odd couple" friendship began to evolve.

Bob's accomplishments were spectacular. Bob graduated first in his high school class, where he was known as "Robin." He attended West Point — there his fellow cadets called him "Bullet Bob." Bob graduated first in his law school class and tried over 100 criminal cases as a military prosecutor and over 100 civil trials. We all knew him then as "Mad Dog."

With fifteen successful finishes in the West's most brutal ultra marathon, the Wasatch 100, twelve years as one of the state's top basketball coaches... If anyone I know had a reason to be haughty, it was Bob. But, Bob was just the opposite. I saw Bob say and do things to shock or amuse people, but never to impress anyone.

Bob was a soldier who hated hypocrisy and had no use for hypocrites. He would do absolutely anything for a friend. I once saw him check into a hotel so he could give his one bedroom

apartment to a friend who needed a place to stay for several weeks. That friend was me.

He was conscious of money but cared nothing for material possessions. He could put every object he owned, save one bed and one couch, in the back of his 1994 Camry.

Bob burned with a raging intensity to conquer challenges; to push himself to and beyond his own limits; and to win. Many trial lawyers share those qualities. But I've known few men who've competed with such an unwavering commitment to honesty and ethics.

Bob was the healthiest person I ever knew, until about six weeks before he died. The neurological disease that struck down Bob was almost unspeakably horrible. I witnessed Bob's bravery in his last days. West Point teaches its cadets well.

Bob, there are so many things I am missing now. You were such a character. You were almost ridiculously entertaining to be around. You always had interesting things on your mind, and there was no filter between your thoughts and your words. You had the spirit of life in you at all times. Sometimes you got right to the edge of crazy. You called bullshit on things when others wouldn't or couldn't.

Above all, I understand that you, Bob, are one of the rare persons who was not satisfied with making the most of yourself. Your mission was to bring out the best in everyone "on your team."

It's like Majerus said at your funeral; you were a great coach....

ROBERT HILL HENDERSON

1946–2010



The Power of Civility

by Keith A. Call

I was lucky enough to spend a warm evening last summer sitting next to one of the Giants of our Bar watching the Bees play baseball at Spring Mobile Ballpark. As we enjoyed the game, my mentor and friend told me about a large case involving several lawyers in town who retained a number of experts from various cities, some of which had Major League Baseball teams. The lawyers all agreed that, whenever practical, they would schedule the experts' depositions so they could attend a baseball game together when they visited those cities. And that is exactly what they did. I marveled at this story. It seemed remarkable that these lawyers would battle it out in depositions during the day, and then spend the evening eating hot dogs and watching the Cubs together in a far-away city.

The story reminded me of my father, who passed away several years ago. Dad was a small-town, country lawyer. I could never figure out how he successfully maintained a career as a prosecutor and civil trial lawyer in a small community where most clients and opponents were also neighbors. He used to duke it out in court with another lawyer in town we all considered a family friend. One of my great memories from youth is an overnight trip through the Zion Narrows with my dad, his courtroom opponent, and his son. I am certain it was not always easy or perfect for Dad, but the fact that he did it so successfully over the duration of his career is amazing to me.

Lawyers often struggle to be zealous advocates for their clients while at the same time maintaining a professional and civil, even friendly, decorum. Let's face it. Litigation is tough, and our adversarial system is just that — adversarial. Even transactional and other types of legal work can involve tough negotiations and other situations.

Fortunately, there are many great examples around us. There are some great lawyers among our Bar who have shown me by example that an opposing lawyer can be tough as nails, yet professional and civil. I am fortunate to count many of these opponents as friends. I consider them to be smart, capable, and effective. I admire

their emotional and social maturity. I would not hesitate to refer business in their direction because I am confident my referrals would receive first-class legal representation and would pay less in attorney fees than they would have to pay someone who is not known to be civil, professional, and reasonable.

As I contemplate my own experiences, it occurs to me that I have been a much happier human being overall during those times when I have been most successful at being both zealous and civil. Life is just better in general. Perhaps what is even more remarkable is that I think I have also been a better, more effective lawyer when I have succeeded at being more civil with my opponents. It is also striking that, at least in my view, the most successful lawyers in our community also have reputations for civility and professionalism. I doubt this is a coincidence. I suspect they have learned that civility and professionalism not only result in more effective legal advocacy, but also in more referrals.

All of this leads to the conclusion that lawyers who make civility and professionalism a priority are more effective as advocates, are more likely to obtain better books of business, and are generally more happy and pleasant people.

Being a civil and zealous lawyer simultaneously is not easy for most of us, but we can improve with effort and hard work. I am certainly far from perfect, and I do not know if I am yet big or mature enough to go to see the Yankees or hike the Zion Narrows with most of my opponents. But I do think I have gotten better over time, mostly thanks to the great examples of some of our Giants.

KEITH A. CALL is a shareholder at Snow, Christensen & Martineau. His practice includes professional liability defense, IP and technology litigation, and general commercial litigation.



The Creative Lawyer: A Practical Guide to Authentic Professional Satisfaction

by Michael Melcher

Reviewed by Teresa L. Welch

If you are faced with the Godzilla of work, don't battle it alone. Enlist Rodan to even out the contest.

Michael Melcher, *The Creative Lawyer: A Practical Guide to Authentic Professional Satisfaction*, 30 (2007).

If you have ever asked yourself whatever possessed you to become an attorney, I recommend Michael Melcher's book, *The Creative Lawyer: A Practical Guide to Authentic Professional Satisfaction*. Whether you are just starting out, or you need to reenergize a lackluster career, this book, released in 2007, contains timely advice. Now that the limping economy has resulted in increased case loads and slashed salaries for attorneys, your personal and work satisfaction are more important than ever. Melcher's book provides inspiring ideas and practical exercises for attorneys to help us achieve these goals. Melcher states that if we spend twenty minutes a day reflecting *on* our career, as opposed to *in* our career, we can achieve authentic professional satisfaction.

Why did you go to law school? Was it the promise of fame and fortune, or because you wanted to satiate your appetite for victory in verbal battle, initially whetted by late night television episodes of *Perry Mason* or *Law & Order*? Perhaps your reason was more personal: a neighbor or a friend in legal need, or even a moment in your life when you experienced an injustice that you vowed would never be repeated. For me, it was none of these reasons that led to that day when I signed up for the LSAT. My route to law school was much more... circuitous.

Approximately twenty years ago, I started college as a music major, after having played the violin from the age of four. It was from my college music professor's stories of his life of fear and starvation under the Stalin regime that I realized that doing justice to Shostakovich's music meant capturing these types of life experiences in the notes I was playing. Becoming a better musician involved gaining a better understanding of the human

condition. When I was not practicing the violin, I feasted on books by Dostoevsky, Camus, and Heidegger.

In the philosophy department, I became fascinated by concepts of individual freedom, choice, and responsibility. But after two degrees in philosophy and one degree in music, I thought the practical decision was to go to law school. I continued to play the violin, performing Tchaikovsky's *Nutcracker* thirty times while studying for finals and trying to fathom the mysteries of *res ipsa locuitur*. I knew I needed a rest from law when I began thinking of tort terms while playing. After graduation, when I began working as a public defender, I discovered that there was as much, if not more, value in listening carefully to what frightened my clients most, than in quickly analyzing their legal problems.

Melcher aptly points out that we are often our own worst enemies in achieving job satisfaction, because the analytic tool belt and skill set that we have acquired in becoming good attorneys ultimately interferes with our own personal happiness. He states:

"Issue-spotting" is identifying potential problems, inconsistencies, and unresolved conflicts. When we spot issues — when we "think like a lawyer" — we take things apart, look for flaws, compare possibilities against evidence, contemplate problems, see cracks in arguments, and contemplate risks... Issue spotting is an important legal

TERESA L. WELCH is a felony trial attorney at the Salt Lake Legal Defender's Association and an adjunct professor of criminal justice at Weber State University. Teresa is also a violinist and has performed with the Ballet West Orchestra, the Utah Festival Opera Company Orchestra, the Pioneer Theater Company Orchestra, and the Celtic band "Idlewild." Teresa has played the violin in backup orchestras for various recording artists.



skill. However, it's deadly when it comes to the process of creating the life you want. . . . When attorneys apply this kind of thinking to questions of their own careers, they tend to: analyze rather than explore, identify flaws and potential problems, look for clear precedents, require solutions of general applicability ("What would work for lawyers") rather than specific applicability. ("What would work for me?"), demand logical explanations, be skeptical about possibilities, defer action in situations of uncertainty, [and] avoid taking risks.

Id. at 8.

The Creative Lawyer

Melcher advises us that personal and job satisfaction require us to shed our issue-spotting cocoon in order to free the creative lawyer within. Spreading our wings as a creative lawyer is not figuring out how to turn the court room into a Broadway musical or an episode of *Glee*. Rather, the creative lawyer taps into his or her own creativity to take stewardship of one's individual life

and career goals. Melcher provides a road map to follow in doing this.

The specifics of being a creative lawyer are:

1. Understanding your own temperament, interests, and values as they actually are,
2. Assessing realistically how these connect, or don't connect, with the work you do,
3. Creating a plan for integrating who you are with what you do, making use of a group of tools that will take you from thinking to actually doing. . . . to be systematically creative. . . . means analyzing your desire, interest, temperament, and ambitions. It means designing goals related to things you're sure about and experiments about things you're not. It means mastering the present while anticipating the future.

Id. at 3.

Identifying Your Values

Every busy attorney has learned the importance of good time

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management and a reliable support staff. The creative lawyer builds on these assets by investing time each day to identify, analyze, and implement individual values into their personal lives and legal career, so the day-to-day work experience is more than just a hamster wheel. Values are not your morals or ethics; rather, they are qualities you add to your life to make it more meaningful and fulfilling. Some examples of values are physical fitness and health, civic and community contribution, family connections, financial security, travel, and life-long learning. Values are subjective, so Melcher provides exercises in his book to assist attorneys in identifying their core values. After you become adept at identifying your values, you can then move towards expressing them. He states,

When you fully express your values, the overall shape of your life changes. Some things become more important, and others less so. Living your values fully doesn't mean that work will no longer be important or demanding. Nor does it mean that you won't need, like or desire money. But when you invest in your values, you force yourself to draw on your creative powers to find ways to make the overall mix work better.

Id. at 32.

The result of identifying your values results in personal, as well as career, satisfaction. There is no one ideal method of career satisfaction, as each individual attorney has his or her own career motivations for and methods of practicing law. When analyzing your job, ask yourself: What are the job duties that I value most in my career? Is it the social aspect of speaking with clients, witnesses, and colleagues? Is it the courtroom time of arguing motions and speaking to a jury? Is it the office time spent researching and writing about the law? Is it all of these, or perhaps none of these? Do your answers to these questions match your current career choice or is there another job more suited to your work interests and passions? Melcher emphasizes,

Career satisfaction comes from a match between who you are and what you do. Who you are is a combination of many factors. It depends on your values, interest, and ambitions. It depends on how your personality works and how you prefer to navigate the world. And it depends on the kinds of visions you pursue. Law will neither make your identity nor erase it.

Id. at 19.

Being Realistic About the Tradeoffs

In every legal career there are tradeoffs. For me, eye strain from

long hours spent reading, fast food dinners, and sleep deprivation are some of the consequences of fighting the good legal fight. Melcher advises us to figure out those tradeoffs we can and cannot live with. Career satisfaction comes from distinguishing those things that frustrate us, but can be tolerated, from things in our professional life that violate a core sense of who we are. If tradeoffs deny you your personal values or make you feel like you are in a toxic working environment, then it is time to consider another job. Figure out which tradeoffs, if any, you cannot live with on any consistent basis. For instance, Melcher realized that he cannot be in a job where he is surrounded by unethical people, nor work a job that endangers his physical health, nor find any happiness where he does not have frequent access to intelligent people. We all have differing views of the tradeoffs we are willing to accept. Being realistic about the tradeoffs in our jobs is key to professional satisfaction. "Life is full of unresolved issues, compromises, and tradeoffs. Being clear about our tradeoffs is what frees us to go forward, without wasting energy on fighting reality." *Id.* at 44.

Relationships and Networking Matter

No man is an island, and in order to work and survive in our legal world, it is important to build and maintain relationships. Melcher states that "to live as a creative lawyer, you have to network." *Id.* at 103. Melcher states, "Networking involves three different things: 1. Building relationships, 2. Maintaining relationships, and 3. Accessing relationships." *Id.* at 103.

Melcher advises us to create our own personal board of directors, composed of people who know us, are concerned about our well being, and who give us useful perspectives. Have you ever noticed in your conversations that some people re-energize you while others deplete your mental and emotional energy reserves? The members of your personal board of directors are ones that energize you; be they colleagues, family members, or new or life-long friends. Although they may be very different from one another, what they all have in common is knowledge in a particular area that allows you to improve the quality of your work and life.

Melcher correctly points out that the keystone to networking is good communication, and the recipe of successful communication is being mindful about what your message is and how you convey it. Melcher states,

Good communication begins with self-awareness about who you are and what you want in life. The main work in communications preparation isn't anticipating what others will think of you – it's taking the time to figure out what you think of you. Your core communications

tool is the positioning statement. Your positioning statement gets across your key messages about you. No matter what the situation, you do this by basically covering two themes:

1. who you are, and 2. what you want.

Id. at 115.

Parallel Growth

Oddly enough, career satisfaction can be enhanced by the projects and interests we pursue when we are not at work. Parallel growth is the term Melcher uses to describe the learning that takes place outside of our job.

As you develop your legal career, you should also be developing things that are important to you that may have little or nothing to do with your legal career. . . . Growing one or more interests in parallel has a number of advantages. First, it provides balance. The more you cultivate an interest – whether it's running marathons, writing children's books, investing in real estate, or learning how to sea-kayak – the more it stands on its own and carves out space against the demands of your job. Second, it leads to meaningful engagement. Feelings of flow, or peak experience, are much more likely to come from activities where you have broad knowledge or deep expertise. The more established these pursuits are, the more easily you can step into them and experience optimal engagement. . . . And when you find parallel interests to engage in, you stop floating around in a miasma of unfocused energy.

Id. at 142.

Parallel growth is a process of taking meaningful action towards simultaneous and different goals. This entails figuring out what we need or want to learn based upon our individual values, figuring out where to go to get this knowledge, and most importantly, going after it. A balanced life is only one of the rewards for achieving parallel growth.

Ultimately, a satisfying legal career may require a job change or it may be found in your current job. Perhaps all you need to be more fulfilled at work is to take stewardship over your career in ways that Melcher suggests.

What are the factors that make up a fulfilling career? The degree of match between your core values and what you do, vision and strategy, attention to relationships and consistent networking, mindful communications, a habit of experimentation, parallel growth and lifelong learning, a willingness to tolerate ambiguity, shaping

your own story, and openness to interrogating personal taboos.

Id. at 9.

Coda

Recently, I was at a client meeting where I had to convey some serious felony charges to my client. He started sobbing. His tears had nothing to do with his case, or the usual tear triggers I had become adept at handling. My client was dying and his fragile body, shallow breath, and sunken cheeks evidenced this. He stared at me and said, "I'm scared." I had nothing I could say to him to make him feel better, certainly not about his case. "I know you're scared," I heard myself reply. I sat in silence and let him cry. As I looked at him, I felt I was staring directly at the human condition, and something that I had previously tried to understand in my studies of music and philosophy was now pumping through my veins. After a few minutes, my client thanked me for listening, told me I was a good attorney, and shook my hand. Without meaning to, my client reminded me of why I value being an attorney.

Ultimately, when I look back on my reasons for going to law school, they were not really profound or meaningful. Now that I am an attorney, I feel lucky to have a very meaningful job. As a public defender, I meet with a lot of different types of people every day. While a few of my clients may have broken moral compasses, most of them are earnestly struggling to make a living and to feed their kids in a society where they are often uneducated and combatting mental health and/or drug or alcohol problems. And, although my discussions with my clients center on the worst of their actions, I try to inspire them to be their better selves. I attempt to walk gracefully and treat everyone I encounter with human dignity in an adversarial system that sees the worst of human behavior discussed and depicted within the court room walls. I am continually inspired by my colleagues, prosecutors, probation officers, and judges who display legal creativity in navigating through the unique responsibilities we all have to individuals in our society. We, of course, are greatly helped in this process by the court clerks, bailiffs, and interpreters.

At a time when case loads are high, we are all constantly challenged to keep our jobs meaningful. According to Melcher, we do this best by staying in touch with our personal values and career motivations. As lawyers, we meet each other at the intersections of other people's choices, consequences, and problematic life experiences. These people give us a bedrock of material from which to draw out our own legal creativity. In living as creative lawyers, we not only help our clients, we help ourselves.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the September 24, 2010 Commission meeting held in Salt Lake City at the Law & Justice Center.

1. Commissioners approved the August 27, 2010 Commission Minutes via Consent Agenda.
2. Commissioners approved list of successful July Bar Examinees.
3. Commissioners agreed to buy a table at the Utah Minority Bar Association Dinner.
4. Commissioners approved: (1) Public Education / Image / Lawyer Advertising; (2) Judicial Independence / Advocacy for the Courts; and (3) Delivery of Affordable Legal Services / Facilitation of "Lo Bono" Legal Services as the Commission's Priorities for the year.
5. Commissioners approved Timothy B. Anderson for Professionalism Award.
6. Commissioners approved Kyle Hoskins for Pro Bono Award.
7. Commissioners approved Jay Kessler for Heart and Hands Award.
8. Commissioners appointed Carma Harper as Ex-Officio Paralegal Division Representative.
9. Commissioners appointed Dickson Burton, Su Chon, Peggy Hunt, John Lund, and Tom Seiler to review and revise the Membership Survey.
10. Commissioners will contact their liaison groups to encourage attendance at the Bar Leadership Luncheon on October 21st.
11. Commissioners will contact Rob Jeffs with specific ideas on what to accomplish within each Commission priority.
12. Rob Jeffs, Felshaw King, and Lori Nelson will review the Client Security Fund Committee's concerns with the Commission's petition for changes in the rules and will discuss their final recommendations with the Executive Committee for presentation at the next Commission Meeting.

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

Notice of Bar Election: President-Elect

Nominations to the office of Bar President-elect are hereby solicited. Applicants for the office of President-elect must submit their notice of candidacy to the Board of Bar Commissioners by January 1st, 2011. Applicants are given time at the January Board meeting to present their views. Secret balloting for nomination by the Board to run for the office of President-elect will then commence. Any candidate receiving the Commissioners' majority votes shall be nominated to run for the office of President-elect. Balloting shall continue until two nominees are selected.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1st with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15th.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1. space for up to a 200-word campaign message plus a photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform, or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions and two photographs no later than February 1st;
2. space for up to a 500-word campaign message plus a photograph on the Utah Bar Website, due February 1st;
3. a set of mailing labels for candidates who wish to send a personalized letter to Utah lawyers who are eligible to vote;
4. a one-time email campaign message to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate; and
5. candidates will be given speaking time at the Spring Convention: (1) five minutes to address the Southern Utah Bar Association luncheon attendees and, (2) five minutes to address Spring Convention attendees at Saturday's General Session.

If you have any questions concerning this procedure, please contact John C. Baldwin at (801) 531-9077 or at director@utahbar.org.

Notice of Bar Commission Election: First and Third Divisions

Nominations to the office of Bar Commissioner are hereby solicited for three members from the Third Division, and one member from the First Division, each to serve a three-year term. To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar.

Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Nominating petitions may be obtained from the Utah State Bar website, www.utahbar.org. Completed petitions must be received no later than February 1st, 2011 by 5:00 p.m.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1st, with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15th.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

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2. space for up to a 500-word campaign message plus a photograph on the Utah Bar website, due February 1st;
3. a set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division who are eligible to vote; and
4. a one-time email campaign message to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate.

If you have any questions concerning this procedure, please contact John C. Baldwin at (801) 531-9077 or at director@utahbar.org.

Applicants Sought for the Third District Trial Court Nominating Commission

The Bar is seeking applications from lawyers to serve on the Third District Trial Court Nominating Commission. The Commission nominates judges to fill vacancies on the district court and the juvenile court within the Third Judicial District. Two lawyers are appointed by the Governor from a list of six nominees provided by the Bar.

Commissioners must be citizens of the United States and residents of the Third District (Salt Lake, Summit, and Tooele Counties). Commissioners are appointed for one term of four years and may not serve successive terms. No more than four of the seven members of the nominating commission may be of the same political party.

You must identify your political party or if you are politically independent.

Submit resumes to John C. Baldwin, Executive Director, by email at john.baldwin@utahbar.org, or by mail at 645 South 200 East, Salt Lake City, UT 84111.

Resumes must be received by Tuesday, November 22, 2010.

Clayton Simms, LLC

TRIAL ATTORNEYS

is pleased to announce that

Jesse M. Nix

was admitted to the Utah State Bar and has joined the firm.



www.claytonsimms.com
www.saltlakecriminaldefense.com

Bar Thank You and Welcome to New Admittees

New admittees were welcomed into the Utah State Bar at a ceremony held at the Salt Palace on October 13, 2010. Many attorneys volunteered their time to review the Bar exam questions and grade the exams. The Bar greatly appreciates the contribution made by these individuals who assisted with the July 2010 Bar exam. A sincere thank you goes to the following:

BAR EXAM QUESTION REVIEWERS

Craig Adamson	Branden Burningham	Jeff Hunt	Langdon Owens, Jr.
Michael Allen	David Castleton	Gary Johnson	Bruce Reading
Carl Barton	Brent Giauque	David Leta	Robert Rees
Wayne Bennett	Elizabeth Hruby Mills	Terrie McIntosh	Robert Thorup

BAR EXAMINERS

Mark H. Anderson	Russ Fericks	Loretta LeBar	Stephanie Saperstein
Taylor Anderson	L. Mark Ferre	Greg Lindley	Liz Schulte
Ken Ashton	Andrea Garland	Patrick Lindsay	John Sheaffer, Jr.
Mark Astling	Michael Garrett	Amy Livingston	Leslie Slaugh
P. Bruce Badger	Kelly De Hill	Michael Lowe	Terry Spencer
Bart J. Bailey	Dave Hirschi	Elisabeth McOmber	Alan Stewart
J. Ray Barrios	Bill Jennings	Tony Mejia	Clint Stewart
Brent Bartholomew	Casey Jewkes	Lewis Miller	Charles Stormont
Karla Block	Craig R. Johnson	Anna Nelson	W. Kevin Tanner
Anneliese Booher	Randy K. Johnson	Michael Olmstead	Heather Thuet
Sara Bouley	Chris Jones	Kerry Owens	Padma Veeru-Collings
Brad Bowen	Lloyd Jones	Jonathon Parry	J. Kelly Walker
David Broadbent	Jim Kennicott	Rachel Peirce	Elizabeth Whitsett
Tiffany Brown	Lee Killian	Briant Platt	Jason Wilcox
Heidi Buchi	Karen Kreeck	Katherine Reymann	Travis Wilson
Gary Chrystler	Joanna Landau	Peter (Rocky) Rognlie	Brent Wride
Jane Clark	Derek Langton	Maybell Romero	Michelle Young
Drew Clawson	Catherine Larson	Keven Rowe	John Zidow
Anthony Ferdon	Susan Lawrence	Ira Rubinfeld	

Ethics Hotline

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For more information about the Bar's Ethics Hotline, please visit
www.utahbar.org/opc/opc_ethics_hotline.html

Pro Bono Honor Roll

Richard Aaron – Senior Center Legal Clinic	Bradley Brotherson – Domestic Case	J. Keith Henderson – SSI Case
Rick Adams – Wills/Estate Case	Mary D. Brown – Tuesday Night Bar, Legal Assistance to Military Program	April Hollingsworth – Guadalupe Clinic
Clark Allred – Protective Order Hearing	Robert R. Brown – Tuesday Night Bar	Melanie Hopkinson – Family Law Clinic
Rachel Anderson – Tuesday Night Bar	Kathie Brown Roberts – Senior Center Legal Clinic	David J. Hunter – Legal Assistance to Military Program
Sammi Anderson – Consumer Case	Bryan Bryner – Guadalupe Clinic	Mike Jensen – Senior Center Legal Clinic
Skyler Anderson – Immigration Clinic	Rex Bush – Tuesday Night Bar	Dixie Jackson – Family Law Clinic
Michele Anderson-West – Service Member Attorney Volunteer Program	Josh Chandler – Tuesday Night Bar	Michael Johnston – Tuesday Night Bar
Nicholas Angelides – Senior Cases	Tim Clark – Tuesday Night Bar	Scott Karren – Tuesday Night Bar
Richard Armstrong – Adoption Case/Mentor	Elizabeth Conley – Senior Center Legal Clinic	Jay Kessler – Senior Center Legal Clinic
Ken Ashton – Tuesday Night Bar	Doug Cummings – Senior Center Legal Clinic	Louise Knauer – Family Law Clinic
Mark Astling – Tuesday Night Bar	Denise Dalton – Family Law Clinic	Thomas King – Divorce Case
Lois Baar – Senior Center Legal Clinic	Tim Dance – Tuesday Night Bar	D. David Lambert – Adult Guardianship Case
Jim Backman – Tuesday Night Bar	Tess Davis – Divorce Case	Timothy Larsen – Bankruptcy Case
Jim Baker – Senior Center Legal Clinic	Zach Derr – Tuesday Night Bar	James Lavelle – Tuesday Night Bar
Matt Ball – Tuesday Night Bar	Jana Dickson Tibbitts – Family Law Clinic	Darren Levitt – Family Law Clinic, Tuesday Night Bar
Ron Ball – Ogden & Farmington Legal Clinics	Tadd Dietz – Guadalupe Clinic	Joel Linares – Domestic Case
Matthew Ballard – Tuesday Night Bar	Jennifer Falk – Protective Order Hearings/ Domestic Case	Michael Lofgran – Tuesday Night Bar
Lauren Barros – LGBT Law Clinic	Phillip S. Ferguson – Senior Center Legal Clinic	Nancy Major – Family Law Clinic
Melissa M. Bean – Tuesday Night Bar	Shawn Foster – Immigration Clinic	Jessica McAuliffe – Senior Center Legal Clinic
Gracelyn Bennett – Bankruptcy Hotline	Jason Fuller – Tuesday Night Bar	Darrick McCasland – Guadalupe & Family Law Clinics
Jonathan Benson – Immigration Clinic	Keri Gardner – Family Law Clinic	Harry McCoy II – Senior Center Legal Clinic
James Bergstedt – Guadalupe Clinic	Aaron Garrett – Consumer Case	Chad McKay – Consumer Auto Case
Maria-Nicolle Beringer – Bankruptcy Hotline	Chad Gladstone – Family Law Clinic	Sally McMinimee – Domestic Case
Andrew Berry – Adult Guardianship Case	Esperanza Granados – Immigration Clinic	Erin Middleton – Tuesday Night Bar
Sharon Bertelsen – Senior Center Legal Clinic	Jason Grant – Family Law Clinic	Aaron Millar – Guadalupe Clinic/ Foreclosure Scam Case
Christiana Biggs – Tuesday Night Bar	Christine Greenwood – Contract Case	Nathan Miller – Senior Center Legal Clinic
Michael D. Black – Tuesday Night Bar	Sheleigh Harding – Family Law Clinic	Susan Baird Motschiedler – Tuesday Night Bar
William Michael Black – Tuesday Night Bar	Kathryn Harstad – Guadalupe Clinic	Bao Nguyen – Immigration Clinic
Richard Bojanowski – Senior Center Legal Clinic	Laurie Hart – Senior Center Legal Clinic	Barbara Ochoa – Tuesday Night Bar
Kevin Bolander – Tuesday Night Bar	Cheylynn Hayman – Tuesday Night Bar	Shauna O’Neil – Bankruptcy Hotline/ Housing Case
Jennifer Bogart – Guadalupe & Family Law Clinics	Garth Heiner – Guadalupe Clinic	

Todd Olsen – Family Law Clinic	Lauren Scholnick – Guadalupe Clinic	Michael Thatcher – Tuesday Night Bar
Rachel Otto – Guadalupe Clinic & LGBT Clinic	Jane Semmel – Senior Center Legal Clinic	Scott Thorpe – Senior Center Legal Clinic
Tiffany Panos – Guadalupe & Family Law Clinics	Mary Silverzweig – Bankruptcy Hotline	Jeannine Timothy – Senior Center Legal Clinic
Bryce Pettey – Tuesday Night Bar	Linda F. Smith – Family Law Clinic	Jared S. Turner – Tuesday Night Bar
Candice Pitcher – LGBT Law Clinic	Jennifer Smock – LGBT Law Clinic	Taylor Turner – Tax Case
R. Christopher Preston – Guadalupe Clinic	Deborah Snow – Family Law Clinic	Chad Utley – Domestic Case
Austin Riter – Tuesday Night Bar	Saul Speirs – Tuesday Night Bar	Artemis Vamianakis – Tuesday Night Bar
Stewart Ralphs – Family Law Clinic	Doug Springmeyer – Tuesday Night Bar	Steve Walkenhorst – Tuesday Night Bar
Everett Robinson – Legal Assistance to Military Program	Steve Stewart – Guadalupe Clinic	Tracey Watson – Family Law Clinic
Jon Rogers – Consumer Case	Charles Stormont – Tuesday Night Bar	Orson West – Family Law Clinic
Joshua Rupp – Tuesday Night Bar	Catherine Sundwall – Protective Order Hearing	Timothy G. Williams – Senior Center Legal Clinic
Maria Saenz – Immigration Clinic	Lara Swensen – Tuesday Night Bar	Russell Yauncy – Adoption Case
Brent Salazar-Hall – Family Law Clinic	Swen Swenson – Tuesday Night Bar	John Zidow – Tuesday Night Bar
	Engels Tejeda – Tuesday Night Bar	

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in the last two months. Call Karolina Abuzyarova at (801) 297-7027 or C. Sue Crismon at (801) 924-3376 to volunteer.

Volunteer at the Debtor's Counseling Clinic

The Utah State Bar, Utah Legal Services, and the Pro Bono Initiative of the S.J. Quinney College of Law have partnered to establish an innovative Debtor's Counseling Clinic to help low income Utahns address issues of bankruptcy and collections. The Debtors Counseling Clinic kicked off in October 2010 and, starting January 2011, will run on **the fourth Thursday of the month from 6pm – 8pm**, excluding holidays, at the **Salt Lake City Public Library, 400 South 210 East, Salt Lake City.**

Register to volunteer at the Debtor's Counseling Clinic for two hours in 2011 and add up towards a minimum of fifty hours of pro bono publico legal services per year recommended by the Utah Rule 6.1 on Voluntary Pro Bono Legal Service.

**Contact Pro Bono Coordinator
at the Utah State Bar
Karolina Abuzyarova
801-297-7027 or
probono@utahbar.org
on this and other
pro bono opportunities.**

Utah State Bar[®] Spring
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March 17-19



DIXIE CENTER at St. George
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Full online Brochure/Registration
will be available January 10, 2011.

ACCOMMODATIONS:

www.utahbar.org

*Brochure/Registration
materials available in the
January/February 2011
edition of the
Utah Bar Journal*

2011 "Spring Convention in St. George" Accommodations

Room blocks at the following hotels have been reserved.
You must indicate you are with the Utah State Bar to receive the Bar rate.
After "release date" room blocks will revert back to the hotel general inventory.

Hotel	Rate (Does not include 11.45% tax)	Block Size	Release Date	Miles from Dixie Center to Hotel
Ambassador Inn (435) 673-7900 / ambassadorinn.net	\$99	10-DQ	2/17/11	0.4
Best Western Abbey Inn (435) 652-1234 / bwabbeyinn.com	\$109	20	2/17/11	1
Budget Inn & Suites (435) 673-6661 / budgetinnstgeorge.com	\$89-\$103	15-DQ/Suites	2/17/11	1
Comfort Inn (435) 628-8544 / comfortinn.com/	\$111	20	3/01/11	0.4
Comfort Suites (435) 673-7000 / comfordsuites.net	\$85	10	2/17/11	1
Courtyard by Marriott (435) 986-0555 / marriott.com/courtyard/travel.mi	\$139	8-Q 7-K	2/15/11	4
Crystal Inn St. George (fka Hilton) (435) 688-7477 / crystalinns.com	\$99	20-Q 5-K	2/17/11	1
Fairfield Inn (435) 673-6066 / marriott.com	\$95	5-DBL 20-K	2/10/11	0.2
Green Valley Spa & Resort (435) 628-8060 / greenvalleyspa.com	\$102-\$260	15 1-3 bdrm condos	2/15/11	5
Hampton Inn (435) 652-1200 / hamptoninn.net	\$105	25-DQ	3/03/11	3
Hilton Garden Inn (435) 634-4100 / stgeorge.hgi.com	\$129	20	02/17/11	0.1
Holiday Inn (435) 628-4235 / holidayinnstgeorge.com	\$85	15	2/24/11	3
LaQuinta Inns & Suites (435) 674-2664 / lq.com	\$99	5-K	2/24/11	3
Ramada Inn (800) 713-9435 / ramadainn.net	\$89	20	2/17/11	3

Notice of MCLE Reporting Cycle

Due to the change in MCLE reporting deadlines, please remember that your MCLE hours must be completed by June and your report must be filed by July. If you have always filed in the odd year you will have a compliance cycle that will begin January 1, 2010 and will end June 30, 2011. Active Status Lawyers complying in 2011 are required to complete a minimum of eighteen hours of Utah 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. If you have any questions, please contact Sydnie Kuhre, MCLE Board Director at skuhre@utahbar.org or (801) 297-7035.

2011 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2011 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, January 17, 2011. You may also fax a nomination to (801) 531-0660 or email to adminasst@utahbar.org.

1. **Dorathy Merrill Brothers Award** – For the Advancement of Women in the Legal Profession.
2. **Raymond S. Uno Award** – For the Advancement of Minorities in the Legal Profession.

Twenty-First Annual Lawyers & Court Personnel Food & Winter Clothing Drive for the Less Fortunate

Look for an e-mail from us regarding our joint effort with the Utah Food Bank where you can purchase one or more meals for families in need this holiday season.

Selected Shelters

The Rescue Mission

Women & Children in Jeopardy Program

Jennie Dudley's Eagle Ranch Ministry

(She serves the homeless under the freeway on Sundays and Holidays and has for many years)

Drop Date

December 17, 2010 • 7:30 a.m. to 6:00 p.m.

Utah Law and Justice Center – rear dock
645 South 200 East • Salt Lake City, Utah 84111

Volunteers will meet you as you drive up.

If you are unable to drop your donations prior to 6:00 p.m., please leave them on the dock, near the building, as we will be checking again later in the evening and early Saturday morning.

Volunteers Needed

Volunteers are needed at each firm to coordinate the distribution of e-mails and flyers to the firm members as a reminder of the drop date and to coordinate the collection for the drop; names and telephone numbers of persons you may call if you are interested in helping are as follows:

Leonard W. Burningham, Branden T. Burningham,
Bradley C. Burningham, Sheryl Taylor, or
April Burningham (801) 363-7411
Lincoln Mead (801) 297-7050

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Thank You!

What is Needed?

All Types of Food

- oranges, apples & grapefruit
- baby food & formula
- canned juices, meats & vegetables
- crackers
- dry rice, beans & pasta
- peanut butter
- powdered milk
- tuna

Please note that all donated food must be commercially packaged and should be non-perishable.

New & Used Winter & Other Clothing

- boots
- gloves
- coats
- sweaters
- trousers
- hats
- scarves
- suits
- shirts

New or Used Misc. for Children

- bunkbeds & mattresses
- cribs, blankets & sheets
- children's videos
- books
- stuffed animals

Personal Care Kits

- toothpaste
- toothbrush
- combs
- soap
- shampoo
- conditioner
- lotion
- tissue
- barrettes
- ponytail holders
- towels
- washcloths

UTAH STATE BAR

2010 FALL FORUM



November 18 & 19

Little America Hotel • Salt Lake City

Up to 8.5 hrs. of CLE Credit

including 1 hr. Professionalism/Civility Credit, up to 2 hrs. Ethics Credit,
1.5 hrs. CLE Credit for the Thursday Night Event, 7 hrs. CLE Credit for Friday

Register on-line at www.utahbar.org/cle

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

Call the Bar's Ethics Hotline at (801) 531-9110 Monday through Friday from 8:00 a.m. to 5:00 p.m. for fast, informal ethics advice. Leave a detailed message describing the problem and within a twenty-four hour workday period a lawyer from the Office of Professional Conduct will give you ethical help about small everyday matters and larger complex issues.

More information about the **Bar's Ethics Hotline** may be found at www.utahbar.org/opc/opc_ethics_hotline.html. Information about the formal Ethics Advisory Opinion process can be found at www.utahbar.org/rules_ops_pols/index_of_opinions.html.

ADMONITION

On August 2, 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) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney was hired to represent a client in a divorce matter. The client paid the attorney a portion of the agreed upon fee. The attorney failed to diligently pursue the case. The attorney failed to adequately communicate with the client including failing to return telephone calls and attend scheduled appointments. The attorney failed to inform the client of a pending hearing at which the client was expected to be present. The attorney admitted to failing to adequately represent the client but continuing to charge the client for the attorney's time, without discount. The attorney failed to timely provide the client with a copy of the client file and of records in the attorney's possession.

PUBLIC REPRIMAND

On August 2, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against S. Austin Johnson for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Johnson was hired to represent a client in an immigration matter. The client paid Mr. Johnson a retainer fee. Mr. Johnson failed to represent his client in a diligent matter. Mr. Johnson failed to notify his client of her INS approval which was later discovered by the client. Mr. Johnson failed to respond to his client's request for information. Mr. Johnson failed to reasonably consult with his client or to keep his client informed. Mr. Johnson failed to return phone calls, respond to letters or answer notes left at his unoccupied office. Mr. Johnson failed to perform or complete the work for which the fee was charged. Mr. Johnson refused to refund any of the portion of the fee. Mr. Johnson had no documentation for services or hours worked on his client's

case. Mr. Johnson failed to return his client's file upon request and termination of representation. Mr. Johnson's client suffered injury because she had to pay another retainer for another attorney, was delayed in permanent residency status, and loss of original documents in her file.

PUBLIC REPRIMAND

On August 3, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against S. Austin Johnson for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Johnson was hired by a client to represent her in an immigration (INS) matter. Mr. Johnson failed to represent his client in a diligent manner. Mr. Johnson lost the client's file and required the client to fill out INS forms multiple times. Mr. Johnson failed to respond to INS discovery requests. Mr. Johnson failed to respond to his client's requests for information. Mr. Johnson failed to reasonably consult with his client or to keep his client informed. Mr. Johnson failed to return phone calls, respond to letters or answer notes left at his unoccupied office. Mr. Johnson failed to return to his client the file once it was requested and his representation was terminated. Mr. Johnson caused injury to his client because the client had to pay another INS fee and suffered delays in her INS proceedings.

PUBLIC REPRIMAND

On August 3, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against S. Austin Johnson for violation of Rules 1.4(a) (Communication) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Johnson was hired to represent a client in an immigration matter. Mr. Johnson failed to respond to requests made by his client for information. Mr. Johnson failed to consult with his client or to keep his client informed. Mr. Johnson failed to return phone calls. Mr. Johnson failed to relay important developments or documents to his client. Mr. Johnson's client suffered a delay

in her immigration proceedings.

PUBLIC REPRIMAND

On August 3, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against S. Austin Johnson for violation of Rules 1.1 (Competence), 1.3 (Diligence), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Johnson was hired to assist his client with the distribution of a settlement check and real estate property that was awarded to his client. Mr. Johnson failed to handle his client's case completely and failed to secure ownership of the property in a timely and appropriate manner. Mr. Johnson could not account for his failure and did nothing to rectify it. Mr. Johnson failed to diligently perform the legal work he was hired to do. Mr. Johnson's client suffered injury because she lost any value that the property may have had.

PUBLIC REPRIMAND

On August 31, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Joe Cartwright for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Cartwright was hired to modify a divorce decree. Mr. Cartwright failed to get the initial stipulation signed and filed. Mr. Cartwright failed to keep his client informed of the status of the case.

Aggravating factors: Substantial prior record of discipline, pattern of misconduct with respect to diligence and communication.

Mitigating factors: Absence of dishonest or selfish motive, timely good faith effort to make restitution and rectify consequences, full cooperation with the Office of Professional Conduct, and disclosure to the client.

PUBLIC REPRIMAND

On August 31, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Jeanne Campbell-Lund for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.15(c) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Ms. Campbell-Lund was hired to represent a client in a DUI matter. Ms. Campbell-Lund repeatedly cancelled hearings in this matter. Ms. Campbell-Lund failed to appear for the pre-trial conference. Ms. Campbell-Lund also failed to appear at a hearing. Ms. Campbell-Lund called the court the morning of the hearing to

inform of her plan not to appear. Ms. Campbell-Lund missed the re-scheduled hearing that was set to accommodate her absence. Ms. Campbell-Lund failed to adequately communicate with her client, including keeping her client reasonably informed about the status of the matter. Ms. Campbell-Lund failed to provide copies of documents that were requested by her client. Ms. Campbell-Lund's client notified her of a DUI hearing. The client did not know that the pre-trial hearing dates had been missed, and the client did not know that the case had been remanded. Ms. Campbell-Lund failed to deposit her fee in the trust account until earned. Ms. Campbell-Lund provided no accounting of how, where, and when the fee was deposited. Ms. Campbell-Lund failed to provide the file to the client upon request; in this respect she did not return the file until approximately nine months after the request. The client eventually got his charge reduced, but only after having to hire new counsel and paying more fees, which caused him harm.

Aggravating factors: Prior record of discipline; pattern of misconduct, substantial experience in the practice of law, and lack of a good faith effort to make restitution or rectify consequences.

Mitigating factors: Absence of dishonest or selfish motive, personal problems, and remorse.

SUSPENSION

On August 10, 2010, the Honorable Denise P. Lindberg, Third Judicial District Court entered an Order of Discipline: Suspension for three years against Nathan N. Jardine for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.6(a) (Confidentiality of Information), 1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. Mr. Jardine has filed an appeal on this matter.

In summary there are four matters:

Mr. Jardine was hired to represent a client in a criminal matter and a domestic matter. The client paid Mr. Jardine to represent her in both cases. Mr. Jardine did not place the fee in a client trust account to be taken out as earned. Mr. Jardine did not keep his client's funds separate from his own. The client later hired another attorney because she was dissatisfied with Mr. Jardine's representation. The attorney sent a letter to Mr. Jardine requesting both the criminal and domestic files from Mr. Jardine. Mr. Jardine did not comply. Mr. Jardine sent the client both the criminal and divorce files, but included the file and personal information of another client without the other client's consent. Mr. Jardine did not reimburse the client for unearned fees at the close of his representation.

In the second matter, Mr. Jardine was hired to pursue a civil rights action against a state agency. Mr. Jardine did not inform his

client that the first Complaint he had filed had been dismissed. Mr. Jardine failed to prosecute the case and failed to serve the second Complaint on all of the parties in the case, so the case was dismissed. Mr. Jardine did not inform his client of the second dismissal. During six years of representation, Mr. Jardine communicated with his client only a few times.

In the third matter, Mr. Jardine and his client appeared in Salt Lake City Justice Court to set two cases for a jury trial and a pretrial conference. Mr. Jardine and his client failed to appear on both matters. As a result of Mr. Jardine's failure to appear, justice was impeded.

In the fourth matter, an employee of Mr. Jardine, hired Mr. Jardine to represent an elderly woman. Mr. Jardine accepted a check dated from the client. Mr. Jardine did not meet with his client or speak with her over the telephone at the time he accepted the check for his representation. Mr. Jardine did not contact his client's son nor anyone in his client's family to assess her capacity or her financial affairs. Mr. Jardine did not deposit the check into his trust account; instead, Mr. Jardine deposited the check into his general account. Mr. Jardine did not keep his client's funds separate from his own. Mr. Jardine did nothing in furtherance of the representation and did not meet with his client until months later when he was formally notified by a representative of a financial institution that his client's accounts were being drained.

Aggravating factors: Prior discipline, vulnerability of victim; selfish motive, multiple offenses; pattern of misconduct, refusal to acknowledge wrongful nature of the misconduct involved, substantial experience in the practice of law, and lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved.

Mitigating factor: Personal problems.

RESIGNATION WITH DISCIPLINE PENDING

On May 12, 2010, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Isaac B. Morley 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 October 7, 2009, Mr. Morley entered a guilty plea to one count of Concealment of Assets, a felony. Mr. Morley was sentenced to thirty-six months probation and \$100 assessment.

RESIGNATION WITH DISCIPLINE PENDING

On July 21, 2010, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Christopher W. Edwards for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication),

1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), 1.15(d) (Safekeeping Property), 3.2 (Expediting Litigation), 3.3(a) (Candor Toward the Tribunal), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary there are four matters:

Mr. Edwards was hired to file a quiet title action. The client made numerous telephone calls and made numerous walk-in visits to Mr. Edwards's office to inquire about the status of the case. The client eventually came to Mr. Edwards's office to find out about an order. Mr. Edwards went into his copy room and emerged with a document that was purportedly an Order Quietening Title drafted by the court. The order had been signed "By Order of the Court." The client questioned the authenticity of the document and took the document that Mr. Edwards had given him to the courthouse to see if it had been issued and signed by court personnel. The court clerk confirmed the client's suspicions that the document had not been drafted, issued, or signed by the court.

In the second matter, Mr. Edwards was hired to assist in a foreclosure proceeding. For two years, Mr. Edwards only communicated with the clients on a few occasions when they came to his office. Mr. Edwards misrepresented the status of the case on several occasions. Eventually, the client decided to check the status of the state court action and found that no case had been filed. Over the course of two years, Mr. Edwards told the clients that court proceedings were scheduled nine times when they were not. When Mr. Edwards told the client that there was a trial scheduled, the client demanded to see the Trial Notice. Mr. Edwards produced a Trial Notice purporting to have been drafted and sent by the court. The client took the Trial Notice to the court. The court clerk confirmed that the Trial Notice had not been drafted, issued, or signed by the court.

In the third matter, the OPC received a notice of insufficient funds from Mr. Edwards' financial institution regarding his client trust account. After Mr. Edwards failed to respond to the OPC's request, the OPC served a Notice of Informal Complaint ("NOIC") on Mr. Edwards by mail. The NOIC reminded Mr. Edwards of his obligation under Rule 10(a)(5) of the RLDD, to submit a written response within twenty days. Mr. Edwards failed to respond to the NOIC or to provide the documents that might have explained the NSF.

The OPC had two additional informal complaints pending against Mr. Edwards. One matter was initiated by an individual with information that Mr. Edwards had retained funds of two of his clients to which he was not entitled. Rather than using the money to pay the clients' creditors, Mr. Edwards kept the money and used it for his own purposes. Mr. Edwards told one of the clients that he had paid off his mortgage when in fact he had not. Mr. Edwards also sent a false cashier's check to one client to make the client think the mortgage had been paid.

Upcoming Events

Free YLD Seminar – “How to Write an Effective Cover Letter and Resume”

Date: November 16, 2010
 Time: 12:00 p.m.–1:00 p.m.
 Location: Utah Law & Justice Center
 645 South 200 East, Salt Lake City, Utah.

Bring your own bag lunch. No CLE credit will be provided.

Wills for Heroes – Salt Lake County Sheriff

Date: November 20, 2010
 Time: 10:00 a.m.–5:00 p.m.
 Location: TBD – Please check the website at www.utahyounglawyers.org

First responders should contact: Aubrey Valdez, AValdez@slco.org or (801) 743-5711

The Wills for Heroes program was predicated upon the alarming fact that an overwhelmingly large number of first responders – eighty to ninety percent – do not have simple wills or any type of estate planning documentation, although they regularly risk their lives in the line of duty. The objective of the Wills for Heroes program is to provide free estate planning documents to firefighters, police officers, paramedics, corrections and probation officers and other first responders and their spouses or domestic partners. Attorneys of all ages and experiences are encouraged to volunteer. For more information, and to register to volunteer visit the Wills for Heroes tab at www.utahyounglawyers.org.

Tuesday Night Bar

Dates: November 2, 9, 16, 30
 December 7, 14
 Time: 5:30 p.m.–8:00 p.m.
 Location: Utah Law & Justice Center
 645 South 200 East, Salt Lake City, Utah.

Since October of 1988, the YLD has coupled with the Utah State

Bar to provide a free legal advice program to help members of the community to determine their legal rights on a variety of issues. Each year, approximately 1100 individuals meet with a volunteer attorney for a brief one-on-one consultation at no cost. Individuals who wish to meet with an attorney must call eight days in advance to make an appointment, (801) 297-7037. Attorneys of all ages and experiences are encouraged to volunteer. To volunteer, please contact Rich Mrazik, rmrazik@parsonsbehle.com, or Chris Alme, alme.Chris@gmail.com.

Wednesday Night Bar (Spanish-language clinic)

Dates: November 4, 18
 December 2, 16
 Time: 6:00 p.m.–8:00 p.m.
 Location: Sorenson Multicultural Center
 855 West 1300 South, Salt Lake City, Utah

Spanish-speaking attorney volunteers are needed for a Spanish-language clinic held on the first and third Wednesday of each month. Attorneys of all ages and experiences are encouraged to volunteer. Contact Gabriel White for additional information at gabriel.white@chrisjen.com.

Young Lawyers Division Executive Board Meeting

Dates: November 4, 2010
 December 2, 2010
 Times: 12:00 p.m.
 Location: TBD

The YLD Executive Board meets once a month to discuss YLD business, projects, upcoming events, and how the YLD can benefit young lawyers and the community. YLD board meetings will no longer be held at the Utah Law & Justice Center; however, the locations for the November and December meetings have not yet been determined. The locations will be posted on the website at www.utahyounglawyers.org. If you would like to attend, or be involved in the YLD Executive Committee, please contact Angelina Tsu, YLD President, at Angelina.Tsu@zionsbancorp.com.

YOUNG LAWYERS DIVISION (YLD) – All members of the Utah State Bar in good standing under thirty-six years of age and members who have been admitted to their first state bar for less than five years, regardless of age, are automatically members of the Young Lawyers Division. For more information on YLD, or the events listed below, visit www.utahyounglawyers.org or contact Angelina Tsu, YLD President, at Angelina.Tsu@zionsbancorp.com.



Greetings from the Paralegal Division of the Utah State Bar!

by Carma Harper

This past year, the Paralegal Division participated in several activities. We started off a little bit early by doing a clothing drive in November/December and donating the items to the Homeless Shelter and other facilities needing assistance. Then a week later, a few of us got together and made over fifty fleece hats, and with some of the money donations we collected, we were also able to buy over fifty pairs of gloves to donate along with the hats. We will be doing this again in October if anyone would like to volunteer.

In March, we participated in the Wills for Heroes event in St. George at the Annual Spring Convention. If you have never participated in an event as a lawyer, witness, or notary, I strongly recommend that you do this at least once. You do not have to have any expertise in estate planning. You will be trained on what you need to do, and a computer program will walk you through the whole process. We also have an estate planning attorney available to answer any questions that you might have. April, May, and June found us participating in more Wills for Heroes events. I would like to thank everyone who volunteered for the last couple of years. Without the many volunteers, this program would not be such a success. There are hundreds of first responders and their spouses who have had the opportunity to have their wills, durable powers of attorney, and health care directives completed. What a comfort this must be for their families.

In April we helped to collect toys, assisting the Young Lawyers Division that was collecting new and gently-used toys to be donated to facilities that house children in the legal system who are waiting to be placed in foster homes. Please consider donating or assisting, as we will be assisting them again. If you end up cleaning out toy boxes prior to Christmas, we will be happy to take any new or gently used toys. Please contact

me at charper@strongandhanni.com, Danielle Price at dprice@strongandhanni.com, or any other member of the Paralegal Division Board.

In July, we were busy assisting the Young Lawyers Division with the carnival they sponsor every year at the Annual Convention in Sun Valley, Idaho. This is a fun event to participate in if you have not done so. There are lots of excited kids. It's great!!!

Throughout the year, we have been collecting used printer cartridges. We then recycle them and the money is donated to several elementary schools throughout the area to assist them with their yearly school supplies and activities. We accept all used printer cartridges from anyone who would like to participate. The more we collect, the more schools we can add to our donation list. Donate a used printer cartridge and help a child. Please contact Danielle Price to donate.

We plan on some fun new community service projects this year and would love to have as many volunteers and ideas as possible. Please contact Danielle Price, our new Community Service Chair, or me if you are interested in assisting the community.

Please always remember to "Pay it Forward!"

CARMA HARPER is employed at Strong & Hanni. She is currently serving as the Chair of the Paralegal Division.



A Tribute to Heather Johnson Finch

On August 24, 2010, the Chair of the Paralegal Division of the Utah State Bar, Heather Finch, was tragically killed in Nepal. Heather and her best friend, Leuzi Z. Cardoso, were on their dream vacation, which had been planned for two years. This vacation included the life-long dream of going to Mount Everest. While flying to the Lukla air strip, the only landing strip in the Everest region, their plane encountered problems and crashed in heavy rain. All fourteen people onboard died.

Heather had the kind of personality, laugh, and sense of humor that drew people to her. Each of us will have memories and thoughts of Heather and we will treasure those moments when something triggers a memory of something she said or did. Being around Heather was a good place to be.

Heather's distinguished career as a paralegal began in 1990 after graduating from Wasatch Career Institute majoring in Paralegal Studies. She worked at various law firms from 1989 to 1995. In 1995 she began working at the law firm of Howard, Lewis & Petersen in Provo, where she was the head litigation paralegal, always striving to provide quality service to clients, and taking the extra time and patience to obtain better outcomes for each. She performed her job with dedication and professionalism.

To illustrate this, attorney Mike Saunders of Houston, Texas writes

It was after midnight on a Saturday when I called to leave a voicemail on Heather's office phone about depositions each of our law firms were noticed to take on the following Monday and Tuesday. She answered the phone. She was still in her office organizing and summarizing medical records for the thirty or so depositions which had to be covered by us over a two day period. When I asked why she was still working past midnight, she laughed and simply answered that there was a lot of work to do and the lawyers and clients depended on her to do it. That was Heather. She never quit; she never complained; and she did things the right way. She was the best and most dedicated professional I have ever worked with in my 39 years as a trial lawyer.

Nate Alder, past president of the Utah State Bar writes, "Heather did not need to be taught how to be the consummate professional, how to extend courtesies, or how to be prompt. She was a natural."

Heather was dedicated to her profession and was a great example

and asset to the Paralegal Division. As the Chair of the Paralegal Division, Chair Elect, and Region Three Director, her many acts of service to the community and the Paralegal Division will continue to help others. Because of her selfless acts of service, and her dedication as a paralegal, Heather was nominated for and presented with the Distinguished Paralegal of the Year Award in 2009. As a volunteer, she assisted in collecting clothes for Women Helping

Women, the Homeless Teen program, and other homeless programs. She collected toys, games, and food for additional programs. She spent many Saturdays, once a month, volunteering at Wills for Heroes events; her warm personality provided first responders with a sense of security in an unfamiliar environment.

Friends, colleagues, and co-workers have been blessed by Heather's friendship; we feel an overwhelming sense of loss. She was a dear friend. Our thoughts go out to her family, her husband, Doug Finch, and her children. Her memory serves to remind us that leadership is invaluable, that being kind to others is essential, and that we all make a difference in each other's lives.



Many have expressed a desire to help in whatever way they can. Family and friends of Heather and Leuzi have established a memorial fund at AmBank. Contributions to the AmBank memorial fund will be given to the Finch and Cardoso families in order to defray the costs of bringing their remains home to be buried in Utah and for funeral expenses. Those interested in making a contribution to this memorial fund can do so at the AmBank branches in Heber, Lindon, or Provo.

Also, in an effort to maintain a lasting memory and to help preserve Heather's legacy as a leader, the Paralegal Division has partnered with Utah Valley University (UVU) to establish The Heather Johnson Finch Memorial Endowed Scholarship. Heather's scholarship will highlight the vital role of paralegals in our community and will begin to deepen the connections between higher education and the paralegal profession. Heather was a tireless advocate for educating paralegals and striving for professional success. Her character, values and determination inspire us. The scholarship will be available to promising paralegal studies students. UVU's paralegal studies program is one of only two programs in Utah approved by the American Bar Association. For more information and to donate to The Heather Johnson Finch Memorial Endowed Scholarship, please contact Nancy Smith at UVU, (801) 863-8896, Nancy.Smith@uvu.edu. A scholarship brochure is also available for viewing and printing on the Paralegal Division's website: www.utahparalegals.org.

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
11/18 & 19	 <h2>2010 FALL FORUM</h2> <p>Little America Hotel in Salt Lake City. Keynote: Sean Carter – Humorist at Law; Matthew Homann – LexThink; and William Chriss – “The Noble Lawyer.”</p>	Up to 8.5 including 1 hr. Profes./ Civility & up to 2 Ethics
12/07/10	Law Practice Management Series Part 1. Go-To-Meeting, 0 Hr. free seminar. BigHand digital dictation workflow software enables professionals to get more done at work using their voice. <small>*The Law practice Management series is intended to introduce you to up-to-date technologies that may be incorporate into your practice. These seminars are taught by the companies and teach how and why their product works for the legal practitioner. CLE is not approved for these courses because they are not substantive legal information and deal solely with a product or service. The products asked to participate in this series come from the ABA Tech Show. They will discuss pricing but this series is intended to be an educational demonstration.</small>	0
12/10/10	6th Annual Elder Law & Estate Planning Seminar.	TBA
12/16/10	Benson & Mangrum on Evidence. 8:15 am – 4:15 pm.	6.5 including 1 hr. Profes./ Civility
12/22/10	Clarence Darrow: Crimes, Causes, and Courtroom. 10:00 am – 1:15 pm webcast. \$189. Featuring Graham Thatcher as Clarence Darrow. Scene 1: The Loeb and Leopold Trial. Scene 2: The Henry Sweet Trial. Scene 3: The McNamara Brothers Trial. Scene 4: The Scopes Trial. Panel discussion and moderated online discussion to follow.	3 hrs. Self Study
12/29/10	Maxims, Monarchy, and Sir Thomas More. 10:00 am – 1:15 pm webcast. \$189. Featuring Graham Thatcher as Thomas More. Act 1: The Making of a Conflict Between Private Conscience and Duties as a Public Lawyer. Act 2: Resolution of Conflict Between Private Conscience and Public Loyalties. “Moral Moments” Hypotheticals and Chat Room Discussion.	3 hrs. Self Study
01/12/11	Evening with the Third District Court. Reception: 5:00–6:00 pm. Seminar: 6:00–8:00 pm	2
01/19/11	OPC Ethics School. 9:00 am – 3:45 pm.	6 including 1 hr. Profes.
01/19/11	Impeach Justice Douglas! 10:00 am – 1:15 pm webcast. \$189. Featuring Graham Thatcher as Justice William O. Douglas. Scene 1: The Life of the Man and the “Wilderness” Mind. Scene 2: Behind the Scenes of Brown v. Board of Education. Scene 3: The McCarthy Era. Scene 4: The Vietnam War. Panel Discussion and Online Chat room Discussion.	3 hrs. Self Study
01/20/11	Nuts and Bolts on Utah Real Property. 4:30 – 7:45 pm.	3
02/18/11	IP Summit. Little America.	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.

FOR SALE

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