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Cover Art

"Glistening Snow" at Guardsman Pass, by the late Heather Finch, Provo, Utah.

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

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

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Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal,* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

Get Involved!

by Robert L. Jeffs

One of the "perks" of being Bar President is the opportunity to meet with or speak with so many of the leaders of the Sections, Committees, and Divisions of the Bar about the projects and initiatives they are working on for the benefit of their members and the public. Like many of you, prior to my Bar service, I suffered from the myopia that is a symptom of the significant time commitments of a busy law practice. This last month, Isaac Paxman from the Executive Committee of the Litigation Section told me about the new Topic Bank launched by the Litigation Section through its website. This project helps law students identify important, interesting, and current topics for research and writing in law journals or law school projects.

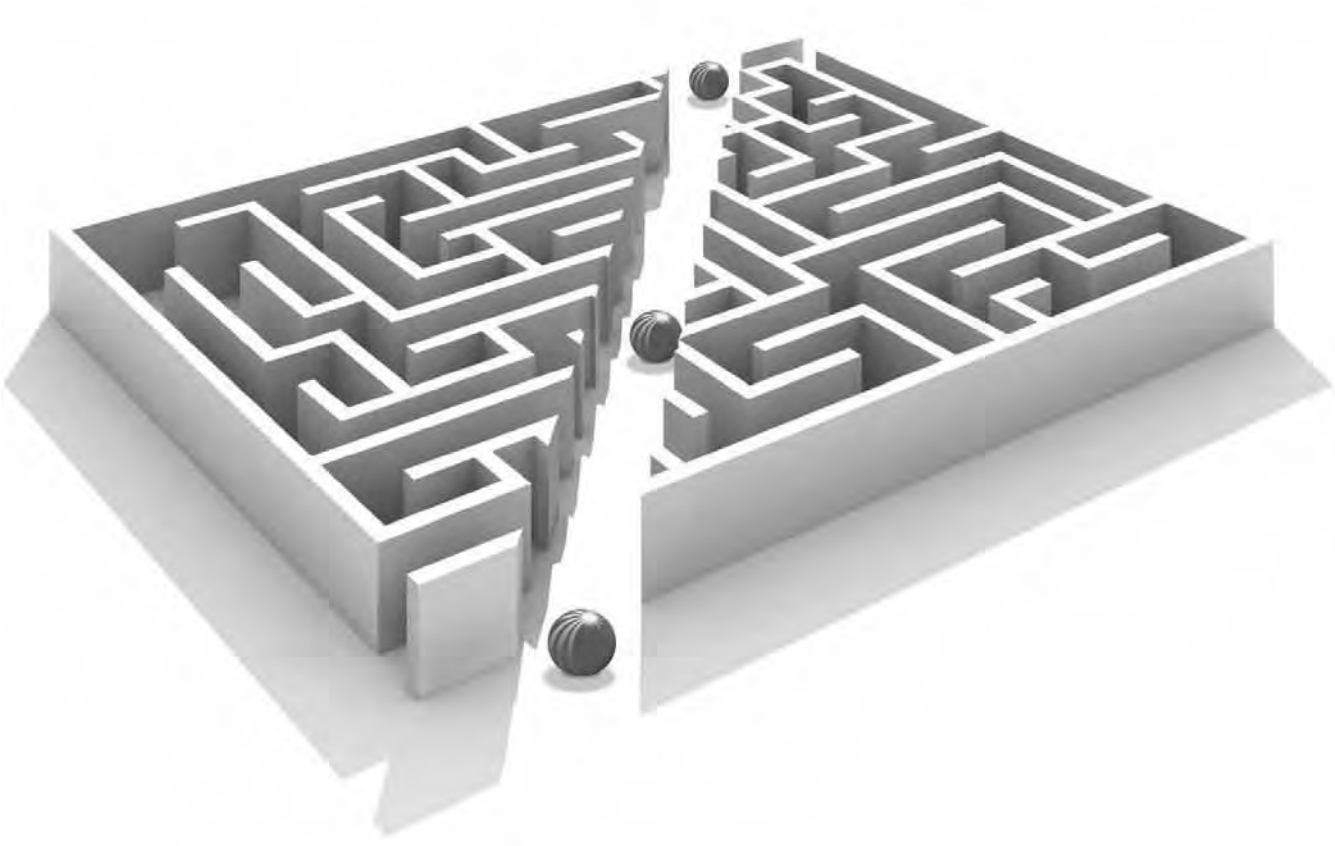
As I reflected on my discussions with Isaac, I realized that so much of the work done by the Bar is a product of our Committees and Sections. Philanthropic and pro bono programs include such programs as the Young Lawyers Division's "Wills For Heroes" and "Walk Against Violence," Women Lawyers of Utah's "Cancer Bites" fundraiser, as well as Tuesday Night Bar programs sponsored throughout the State by local Bar Associations. Ethics opinions provided to members by the Ethics Advisory Committee, the legislative work of the Governmental Relations Committee, the handling of fee disagreements by the Fee Arbitration Committee, and the peer to peer counseling by the Lawyers Helping Lawyers Committee are just a few examples of the many services our Committees provide to Bar Members. The time donated by the volunteers that serve on the various committees of the Bar collectively amounts to thousands of hours per year.

I have the chance to serve on the Committees for the Annual Convention, the Fall Forum, and the Spring Conventions. A representative from each of the Sections of the Bar participates on those convention committees. Those representatives take the lead in designing the CLE breakout sessions. The Sections are able to focus on the specific needs of the various practice groups, to identify those issues that their members are most interested in for continuing education. Sections provide a network for the sharing of best practice tips and contribute to the overall professionalism of the Bar by fostering collegiality through the interaction of Section members.

Universally, the members of our Bar that I meet with report that their Bar service, whether it is participation in a Section, Committee, Division, or local Bar Association is rewarding. The experience enhances their work day life as an attorney. I would encourage all Bar members to expand their involvement in the Bar. At the very least, join a Section that involves an area of law that will assist your practice, get out of the office, attend Section meetings, meet other members of the Bar with similar practices. Like me, I think you will see your enjoyment from the practice of law increase.

Coming Soon!

Get in. Get what you need. And go.



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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 fourth and final installment of a series of articles that first appeared in Volume 23, No. 4 July/August 2010 of the* Utah Bar Journal. *You can find Judge Jackson's two prior Appellate Review articles, as well as the entire current article, at http://utahbar.org/barjournal/Utah_Standards_of_Appellate_Review.html.*

II. Appeals From State Administrative Agencies

Judicial review of administrative decisions for cases is governed by the Utah Administrative Procedures Act (UAPA), *see* Utah Code Ann. § 63G-4-102(1)(b) (2008); *see also Utah Chapter of the Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 13, 226 P.3d 719; *In re Questar Gas Co.*, 2007 UT 79, ¶ 28, 175 P.3d 545; *Orchard Park Care Ctr. v. Dep't of Health*, 2009 UT App 284, ¶ 8, 222 P.3d 64.

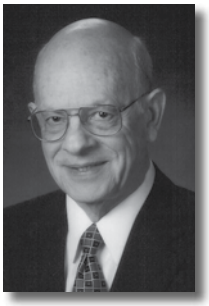
As an initial note, for a reviewing court to grant relief under UAPA, it must determine that the party has been "substantially prejudiced" by the agency action in question. *See* Utah Code Ann. § 63G-4-403(4)(d); *accord Nat'l Parks Conservation Ass'n v. Bd. of Trs.*, 2010 UT 13, ¶ 15, 231 P.3d 1193; *Sullivan v. Utah Bd. of Oil, Gas & Mining*, 2008 UT 44, ¶ 10, 189 P.3d 63; *Questar Gas*, 2007 UT 79, ¶ 48; *Orchard Park*, 2009 UT App 284, ¶ 8; *Whitaker v. Utah State Ret. Bd.*, 2008 UT App 282, ¶ 10, 191 P.3d 814; *Mendoza v. Labor Comm'n*, 2007 UT App 186, ¶ 5, 164 P.3d 447. In other words, appellate courts must be able to determine that the alleged error was not harmless. *See Nat'l Parks*, 2010 UT 13, ¶ 15; *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 12, 148 P.3d 960.

Further, the principle of exhausting administrative remedies is embodied in the general provisions of UAPA. A party may seek judicial review only after exhausting all administrative remedies available. *See* Utah Code Ann. § 63G-4-401; *id.* § 63G-3-602(2)(a); *Frito-Lay v. Utah Labor Comm'n*, 2009 UT 71, ¶ 30, 222 P.3d 55 (stating that the exhaustion requirement mandates that the litigant follow all outlined administrative review procedures prior to state court having subject matter jurisdiction to hear the case); *Salt Lake City Mission v. Salt Lake City*, 2008 UT 31, ¶ 6, 184 P.3d 599 (noting that a party must exhaust administrative remedies before challenging a municipality's land use decision); *Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶ 14, 34 P.3d 180; *Pen & Ink, LLC v. Alpine City*, 2010 UT App 203, ¶ 15, 238 P.3d 63 (mem.), *cert. denied*, 2010 Utah LEXIS 172 (Utah, Oct. 27, 2010); *Holladay Towne Ctr., LLC v. Holladay*, 2008 UT App 301, ¶ 6, 192 P.3d 302 (mem.) (providing that Utah law requires an aggrieved party to exhaust administrative remedies before challenging a land use decision in court); *Decker v. Rolfe*, 2008 UT App 70, ¶ 10, 180 P.3d 778 (stating that UAPA permits aggrieved parties to seek judicial review only after exhausting all administrative remedies except in a limited number of circumstances, including when other pertinent statutes do not require exhaustion); *TDM, Inc. v. State Tax Comm'n*, 2004 UT App 433, ¶ 4, 103 P.3d 190 (mem.) (per curiam) (noting that while parties need not exhaust administrative remedies if "it appears that exhaustion would serve no useful purpose," the introduction of a constitutional issue "does not necessarily avoid the requirement to exhaust administrative remedies").

A. Review of Informal Agency Proceedings

UAPA allows state agencies to promulgate rules designating as informal certain adjudicative proceedings. *See* Utah Code Ann. § 63G-4-202(1). Under UAPA, the district courts have jurisdiction to "review by trial de novo all final agency actions resulting from informal adjudicative proceedings." *Id.* § 63G-4-402(1)(a); *accord Friends of Great Salt Lake v. Utah Dep't of*

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



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

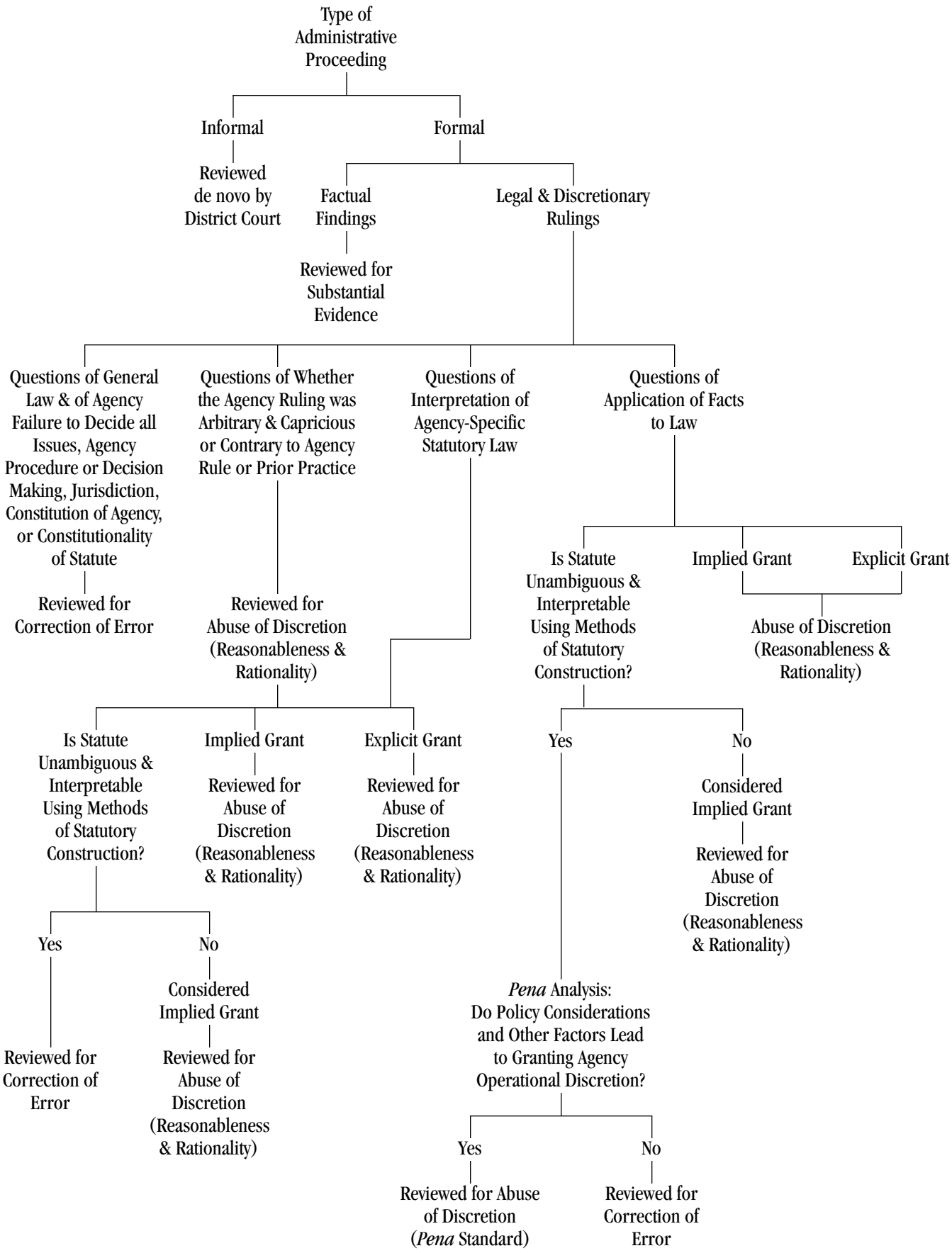
Natural Res., 2010 UT 20, ¶ 14, 230 P.3d 1014; *Taylor-West Weber Water Improvement Dist. v. Olds*, 2009 UT 86, ¶ 6, 224 P.3d 709; *Due S., Inc. v. Dep't of Alcoholic Beverage Control*, 2008 UT 71, ¶ 17, 197 P.3d 82. Section 63G-4-402(3)(a) requires that the trial court's review of informal adjudicative proceedings be accomplished by holding a new trial, not just by reviewing an informal record. *See Due S., Inc.*, 2008 UT 71, ¶ 17; *Gilley v. Blackstock*, 2002 UT App 414, ¶ 9, 61 P.3d 305; *Sorenson's Ranch Sch. v. Oram*, 2001 UT App 354, ¶ 16, 36 P.3d 528. The review of an informal agency proceeding by a new trial at the trial court level ensures that an adequate record will be created for appellate court review. *See Archer v. Bd. of State Lands & Forestry*, 907 P.2d 1142, 1144 (Utah 1995); *Cordova v. Blackstock*, 861 P.2d 449, 452 (Utah Ct. App. 1993).

The trial court's final orders and decrees from review of informal adjudicative proceedings of agencies may be appealed to the appellate courts. *See* Utah Code Ann. § 78A-3-102(3)(f) (2009); *id.* § 78A-4-103(2)(a); *Taylor-West*, 2009 UT 86, ¶ 2.

B. Review of Formal Agency Proceedings

Sections 63G-4-401, 403, and 404, *see* Utah Code Ann. §§ 63G-4-401, 403, 404 (2008) (formerly § 63-46b-16(4) (1997)), of UAPA outline the circumstances under which a reviewing court may grant relief from formal agency action. *See Desert Power LP v. Pub. Serv. Comm'n*, 2007 UT App 374, ¶ 11, 173 P.3d 218 (citing *Anderson v. Pub. Serv. Comm'n*, 839 P.2d 822, 824 (Utah 1992)). Some standards of review are explicitly set forth in section 63G-4-403(4). Others have been provided by appellate courts in interpreting the statute. *See, e.g., Exxon Corp. v. Utah State Tax Comm'n*, 2010 UT 16, ¶ 6, 228 P.3d 1246 (providing that the commission's interpretation of general law including "case law, constitutional law, or non-agency specific legislative acts" is reviewed under a correction of error standard with no deference given to the agency's decision (internal quotation marks omitted)); *Merrill v. Utah Labor Comm'n*, 2009 UT 26, ¶ 5, 223 P.3d 1089 (stating that the commission's conclusions as to legality or constitutionality of statute should be reviewed for correctness, with no deference to commission (citing *Amax Magnesium Corp. v. Utah State Tax Comm'n*, 796 P.2d 1256, 1258 (Utah 1990))); *Resort Retainers v. Labor Comm'n*, 2010 UT App 229, ¶ 11, 238 P.3d 1081 (reviewing an agency's application of its own rules to the facts is reviewed under "an intermediate standard, one of some, but not total deference" (internal quotation marks omitted)). The remainder of this administrative outline discusses the standards of review for formal agency proceedings and the diagram on the following page provides a flow chart for standards of review for formal agency proceedings.

Illustration of Standards of Review for State Administrative Agency Proceedings



1. Challenging Findings of Fact

a. Substantial Evidence Standard

Under UAPA, an agency's factual findings will be affirmed only if they are supported by "substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63G-4-403(4)(g); *accord Utah Chapter of the Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 13, 226 P.3d 719; *Mandell v. Auditing Div. of the Utah State Tax Comm'n*, 2008 UT 34, ¶ 11, 186 P.3d 335; Resort Retainers, 2010 UT App 229, ¶ 13, (stating factual findings must be "supported by substantial evidence based upon the record as a whole"); *Hymas v. Labor Comm'n*, 2008 UT App 471, ¶ 12, 200 P.3d 218, cert. denied, 2009 Utah LEXIS 75 (Utah, Apr. 1, 2009); *Desert Power LP*, 2007 UT App 374, ¶ 12.

"'Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.'" *Pen & Ink, LLC v. Alpine City*, 2010 UT App 203, ¶ 16, 238 P.3d 63 (mem.) (quoting *Caster v. W. Valley City*, 2001 UT App 212, ¶ 4, 29 P.3d 22), *cert. denied*, 2010 Utah LEXIS 172 (Utah, Oct. 27, 2010); *accord Kennon v. Air Quality Bd.* 2009 UT 77, ¶ 28, —P.3d—; *WWC Holding Co., Inc. v. Pub. Serv. Comm'n of Utah*, 2002 UT 23, ¶ 8, 44 P.3d 714; *Pac. W. Communities, Inc. v. Grantsville City*, 2009 UT App 291, ¶ 22, 221 P.3d 280, *cert. denied*, 2010 Utah LEXIS 29 (Utah, Jan. 20, 2010); *Desert Power LP*, 2007 UT App 374, ¶ 11. Substantial evidence is more than a "mere scintilla of evidence," though "something less than the weight of the evidence." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 35, 164 P.3d 384 (internal quotation marks omitted); *Harmon City, Inc. v. Draper City*, 2000 UT App 31, ¶ 60, 997 P.2d 321.

When reviewing an agency's decision under the substantial evidence test, the reviewing court "does not [conduct] a de novo review or a reweighing of the evidence." *Associated Gen. Contractors v. Bd. of Oil, Gas & Mining*, 2001 UT 112, ¶ 21, 38 P.3d 291 (internal quotation marks omitted); *accord Huemiller v. Ogden Civil Serv. Comm'n*, 2004 UT App 375, ¶ 2, 101 P.3d 394 (mem.). An appellate court will not substitute its judgment "as between two reasonably conflicting views," even though it may have come to a different conclusion had the case come before it for de novo review. *Carter v. Labor Comm'n Appeals Bd.*, 2006 UT App 477, ¶ 17, 153 P.3d 763 (internal quotation marks omitted). "It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences." *EAGALA, Inc. v. Dep't of Workforce Servs*, 2007 UT App 43, ¶ 16, 157

P.3d 334 (quoting *Grace Drilling Co. v. Bd. of Review of the Indus. Comm'n*, 776 P.2d 63, 68 (Utah Ct. App. 1989)); *accord Carter*, 2006 UT App 477, ¶ 17. When applying the substantial evidence test under UAPA, appellate courts must consider not only the evidence supporting the board's findings but also the evidence that fairly detracts from the weight of the board's evidence. *See Rd. Runner Oil, Inc. v. Bd. of Oil, Gas & Mining*, 2003 UT App 275, ¶ 15, 76 P.3d 692 (citing *Grace Drilling Co*., 776 P.2d at 68); *see WWC Holding*, 2002 UT 23, ¶ 8 (providing that in evaluating sufficiency of evidence, appellate court "will not sustain a decision which ignores uncontradicted, competent, credible evidence to the contrary"). Because a party seeking review of an agency order must show that the agency's factual determinations are not supported by substantial evidence, the reviewing court examines the facts and all legitimate inferences drawn therefrom in the light most favorable to the agency's findings. *See ABCO Enters v. Utah State Tax Comm'n*, 2009 UT 36, ¶ 1 n.1, 211 P.3d 382; *WWC Holding*, 2002 UT 23, ¶ 2.

b. Marshaling Cases

The following are cases involving appeals from administrative agencies in which appellate courts address the marshaling requirement. *See Kennon*, 2009 UT 77, ¶ 27 (determining that party properly marshaled all record evidence available to support board findings, namely a photocopy of a Post-it note and a letter from the division); *Ball v. Pub. Serv. Comm'n*, 2007 UT 79, ¶ 39, 177 P.3d 545 (finding that rather than properly marshaling evidence in support of the commission's finding, parties merely advocated their own position); *Martinez*, 2007 UT 42, ¶¶ 17-21; *WWC Holding*, 2002 UT 23, ¶¶ 8, 15 (finding that rather than properly marshaling the evidence, appellant simply pointed to testimony in the record favorable to its position); *Clements v. Utah State Tax Comm'n*, 2002 UT 1, ¶ 1, 16 P.3d 1250 (determining that party failed to meet obligation to marshal evidence and then demonstrate fatal flaw in that evidentiary support); *Associated Gen. Contractors*, 2001 UT 112, ¶ 34 (finding that party "utterly fails to marshal the evidence in support of the Board's finding"); *Morgan Cnty. v. Holnam, Inc.*, 2001 UT 57, ¶ 12 n.8, 29 P.3d 629 (finding that county failed to marshal evidence and thus, court would not disturb the commission's findings); *Beaver Cnty. v. WilTel, Inc.*, 2000 UT 29, ¶ 25, 995 P.2d 602 (finding party failed to marshal all relevant evidence); *Guenon v. Midvale City*, 2010 UT App 51, ¶¶ 5-6, 230 P.3d 1032 (mem.) (determining that officer omitted critical facts from his brief, thus failing to properly marshal evidence resulting in court accepting the board's findings of fact as true), *cert. denied*, 2010 Utah LEXIS 124 (Utah, June 11, 2010); *Utah Auto Auction v. Labor Comm'n*, 2008 UT App 293, ¶ 9 n.4, 191 P.3d 1252 (stating that party need not marshal when only challenging legal conclusions drawn from decision); *EAGALA*, 2007 UT App 43, ¶ 15 (finding that party properly marshaled the evidence in support of board's decision); *Carter v. Labor Comm'n Appeals Bd.*, 2006 UT App 477, ¶ 12, 153 P.3d 763; *Ameritemps, Inc. v. Labor Comm'n*, 2005 UT App 491, ¶ 27, 128 P.3d 31 (determining that petitioner's "selective recitation of the facts" did not meet the marshaling requirement), *aff'd*, 133 P.3d 437 (Utah 2006); *Save Our Canyons v. Bd. of Adjustment*, 2005 UT App 285, ¶¶ 15-17, 116 P.3d 978 (finding that party failed to marshal all evidence that supported findings); *Huemiller*, 2004 UT App 375, ¶ 6 (finding that party failed to mention pertinent facts in marshaling effort).

c. Examples of Fact Questions

The following cases contain examples of factual issues reviewed under the substantial evidence standard of review:

(1) Determining the "essential functions" of prior employment and ascertaining whether other work is "reasonably available." *Martinez*, 2007 UT 42, ¶ 23.

(2) Whether a party's own miscalculations, decisions, and actions affected timelines and caused delays. *See Desert Power LP v. Pub. Serv. Comm'n*, 2007 UT App 374, ¶¶ 15-16, 173 P.3d 218.

(3) Whether there are conflicting medical reports is a question of fact. *See Resort Retainers v. Labor Comm'n*, 2010 UT App 229, ¶ 24, 238 P.3d 1081.

(4) Whether party knew his expenses were improper. *See EAGALA, Inc. v. Dep't of Workforce Servs.*, 2007 UT App 43, ¶ 7, 157 P.3d 334.

(5) Whether a preliminary plat is part of an annexation agreement. *See Pen & Ink, LLC. v. Alpine City*, 2010 UT App 203, ¶ 17, 238 P.3d 63 (mem.), *cert. denied*, 2010 Utah LEXIS 172 (Utah, Oct. 27, 2010).

(6) Whether party provided its insurance carrier with written notice. *See Pinnacle Homes, Inc. v. Labor Comm'n*, 2007 UT App 368, ¶ 14, 173 P.3d 208.

(7) Whether employee established a causal connection between her complaint letter and her termination. *See Carter v. Labor Comm'n Appeals Bd.*, 2006 UT App 477, ¶ 13, 153 P.3d 763.

(8) Whether company took adverse action subsequent to a protected activity. *See Viktron/Lika Utah v. Labor Comm'n*, 2001 UT App 394, ¶ 5, 38 P.3d 993.

d. Adequacy of Agencies' Factual Findings

"'An administrative agency must make findings of fact and

conclusions of law that are adequately detailed so as to permit meaningful appellate review.'" *Arrow Legal Solutions, Group, P.C. v. Dep't. of Workforce Servs.*, 2007 UT App 9, ¶ 15, 156 P.3d 830 (quoting *Adams v. Bd. of Review of Indus. Comm'n*, 821 P.2d 1, 4 (Utah Ct. App. 1991)); *accord Wood v. Labor Comm'n*, 2005 UT App 490, ¶ 9, 128 P.3d 41 (quoting *LaSal Oil Co. v. Dep't of Envtl Quality*, 843 P.2d 1045, 1047 (Utah Ct. App. 1992)). An agency's failure to make adequate findings of fact on material issues renders its findings "'arbitrary and capricious unless the evidence is clear, uncontroverted and capable of only one conclusion.'" *Strate v. Labor Comm'n*, 2006 UT App 179, ¶ 16, 136 P.3d 1273 (quoting *Nyrehn v. Indus. Comm'n*, 800 P.2d 330, 335 (Utah Ct. App. 1990)); *accord Resort Retainers v. Labor Comm'n*, 2010 UT App 229, ¶ 14, 238 P.3d 1081 (stating appellate court will not overturn commission's factual findings "'unless they are arbitrary and capricious, or wholly without cause, or contrary to the one [inevitable] conclusion from the evidence'" (quoting *McKesson Corp. v. Labor Comm'n*, 2002 UT App 10, ¶ 25, 41 P.3d 468 (alteration in original))); *Utahns for Better Dental Health-Davis, Inc. v. Davis Cnty. Comm'n*, 2005 UT App 347, ¶ 7, 121 P.3d 39 (stating similar standard for findings regarding award of attorney fees).

An agency's failure to make adequate findings is prejudicial to the appealing party. *See Arrow Legal Solutions*, 2007 UT App 9, ¶ 15 (findings must be adequate to permit meaningful appellate review (citing *Adams*, 821 P.2d at 4) (recognizing that without adequate findings, petitioner challenging agency's factual findings cannot marshal evidence supporting findings)). When the agency's findings are inadequate, the case will be remanded unless the failure to make adequate findings of fact and conclusions of law is nevertheless harmless. *See id.* (stating that remand particularly appropriate when party was harmed by inadequate factual findings).

2. Challenging Discretionary Rulings

a. Challenging Agency's Interpretation of Statutes

Utah Code section 63G-4-403(4)(h)(i) states that an appellate court may grant relief if an agency's action is "'an abuse of the discretion delegated to the agency by statute.'" *See Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 24, 164 P.3d 384 (quoting Utah Code Ann. § 63-46b-16(4)(h)(i) (2004)); *Petro-Hunt, L.L.C. v. Dep't of Workforce Servs.*, 2008 UT App 391, ¶ 8, 197 P.3d 107 (stating that appellate court shall grant relief if the agency action is "an abuse of discretion delegated to the agency by statute" (internal quotation marks omitted)), *cert. denied*, 2009 Utah LEXIS 32 (Utah, Feb. 12, 2009). An agency's interpretation and application of statutory terms should be

reviewed under a correction of error standard. *See Heber Light & Power v. Pub. Serv. Comm'n*, 2010 UT 27, ¶ 6, 231 P.3d 1203; *ExxonMobile Corp v. Utah State Tax Comm'n*, 2003 UT 53, ¶ 10, 86 P.3d 706 (applying correction of error standard and granting no deference for agency interpretation of oil and gas valuation methods), *abrogated in part by Union Oil Co. v. Utah State Tax Comm'n*, 2009 UT 78, 222 P.3d 1158; *Wood v. Labor Comm'n*, 2005 UT App 490, ¶ 5, 128 P.3d 41. However, an exception to the rule is that appellate courts defer to an agency's statutory interpretation "'when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language.'" *Id.* (quoting *Esquivel v. Labor Comm'n*, 2000 UT 66, ¶ 16, 7 P.3d 777); *see also LPI Servs. & Travelers Indem. Co. of Conn. v. Labor Comm'n*, 2007 UT App 375, ¶ 8, 173 P.3d 858, *cert. denied*, 187 P.3d 232 (Utah 2008); *accord Rd. Runner Oil, Inc. v. Bd. of Oil, Gas & Mining*, 2003 UT App 275, ¶ 26, 76 P.3d 692 (citing *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 589 (Utah 1991)).

When such a grant of discretion exists, appellate courts will not disturb the agency's ruling unless its determination exceeds "'the bounds of reasonableness and rationality.'" *Rd. Runner*, 2003 UT App 275, ¶ 26 (quoting *Osman Home Improvement v. Indus. Comm'n*, 958 P.2d 240, 243 (Utah Ct. App. 1998)); *accord Salt Lake Cnty. v. Labor Comm'n*, 2009 UT App 112, ¶ 9, 208 P.3d 1087 (stating appellate court reviews the agency's action for reasonableness when the legislature has granted an agency discretion); *Rowsell v. Labor Comm'n*, 2008 UT App 187, ¶ 8, 186 P.3d 968 (mem.) (stating the statute's grant of discretion to commission to apply the law requires that appellate courts apply intermediate standard of review (citing *Johnson Bros. Constr. v. Labor Comm'n*, 967 P.2d 1258, 1259 (Utah Ct. App. 1998))); *LPI Servs.*, 2007 UT App 375, ¶ 8 (stating court assesses whether ruling is within the bounds of reasonableness).

This review for reasonableness and rationality is the same standard as the "abuse of discretion" standard mentioned in Utah Code section 63G-4-403(4)(h)(i). *See Sullivan v. Utah Bd. of Oil, Gas & Mining*, 2008 UT 44, ¶ 10, 189 P.3d 63; *WWC Holding Co., Inc. v. Pub. Serv. Comm'n*, 2002 UT 23, ¶ 8, 44 P.3d 714.

(i) Explicit Discretion

An explicit grant of discretion exists "when a statute specifically authorizes an agency to interpret or apply statutory language." *King v. Indus. Comm'n*, 850 P.2d 1281, 1287 (Utah Ct. App. 1993); *see Salt Lake Cnty. v. Labor Comm'n*, 2009 UT App 112, ¶ 10, 208 P.3d 1087. An explicit grant of discretion to the agency can be found in the following statutory language in the 2005 version of Utah Code section 34A-1-301: "'The [c]ommission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers.'" *Salt Lake Cnty.*, 2009 UT App 112, ¶ 10 (quoting Utah Code Ann. § 34A-1-301 (2005)); *Barnard & Burk Group, Inc. v. Labor Comm'n*, 2005 UT App 401, ¶ 5, 122 P.3d 700; *Ae Clevite v. Labor Comm'n*, 2000 UT App 35, ¶ 7, 996 P.2d 1072. An explicit grant can also be found in this statutory language in Utah Code section 34A-2-413(7)(f)(i): "'[t]he commission shall establish rules regarding part-time work and offset.'" *LPI Servs. v. McGee*, 2009 UT 41, ¶ 8, 215 P.3d 135 (quoting Utah Code Ann. § 34A-2-413(7)(f)(i) (2005)). Another example of an explicit grant of discretion can be found in Utah Code section 35A-4-405(2)(a), which states, "discharged for just cause…if so found by the division." *Albertsons, Inc. v. Dep't of Emp't Sec.*, 854 P.2d 570, 573 (Utah Ct. App. 1993) (omission in original) (citing former Utah Code Ann. § 35-4-5(b)(1) (Supp. 1992)).

(ii) Implied Discretion

If an agency has not been granted explicit discretion to interpret a statute, the agency may nonetheless have implied discretion. An implied grant of discretion may be found from statutory language such as "equity and good conscience." *McGee*, 2009 UT 41, ¶ 8 (citing *Salt Lake City Corp. v. Dep't of Emp't Sec.*, 657 P.2d 1312, 1316-17 (Utah 1982)); *Martinez*, 2007 UT 42, ¶ 44. Thus, "'when the operative terms of a statute are broad and generalized, these terms bespeak a legislative intent to delegate their interpretation to the responsible agency.'" *McGee*, 2009 UT 41, ¶ 8 (quoting *Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n*, 814 P.2d 581, 588 (Utah 1991)). Further, an implicit grant of authority exists when statutory language suggests that the legislature has left the particular issue in question undecided. *See id.* ¶ 9 (citing *Morton Int'l*, 814 P.2d at 588). Accordingly, when there is "'more than one permissible reading of the statute and no basis in the statutory language or legislative history to prefer one interpretation over another,'" the agency "'that has been granted authority to administer the statute is the appropriate body'" to interpret it. *Id.* (quoting *Morton Int'l*, 814 P.2d at 589); *accord Ekshteyn v. Dep't of Workforce Servs.*, 2002 UT App 74, ¶ 10, 45 P.3d 173; *see also R.O.A. Gen., Inc. v. Dep't of Transp.*, 966 P.2d 840, 843 (Utah 1998) (holding when legislative intent is not discernible by applying traditional rules of statutory construction, agency has implied grant of authority and decision is reviewed for reasonableness and rationality). "[I]n the absence of a discernible legislative intent concerning the specific question in issue, a choice among permissible interpretations of a statute is largely a policy determination. The agency that has been granted authority to administer the statute is the appropriate body to make such a determination." *R.O.A. Gen.*, 966 P.2d at 843 (internal quotation marks omitted);

accord McGee, 2009 UT 41, ¶ 9.

However, an implied grant is not found, and an appellate court grants no deference to an agency's interpretation of a statute, when that court is in as good a position as the agency to interpret the general statutory language in question, or when the legislative intent concerning the specific question at issue can be derived through traditional methods of statutory construction. *See McGee*, 2009 UT 41, ¶¶ 9, 11 (citing *Morton Int'l*, 814 P.2d at 589).

b. Challenging Agency's Application of Law

An agency's application of the law to the facts of a case is reviewed for correctness unless the agency is given a measure of discretion. See Utah Code Ann. § 63G-4-403(4)(d) (2008); *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 24, 164 P.3d 384 (stating that an abuse of discretion standard is used "when an agency has discretion to apply its factual findings to the law" (internal quotation marks omitted)); *Ae Clevite, Inc. v. Labor Comm'n*, 2000 UT App 35, ¶ 6, 996 P.2d 1072 (stating absent grant of discretion, appellate courts use correction of error standard in reviewing agency's application of statutory term); *Drake v. Indus. Comm'n of Utah*, 939 P.2d 177, 181 (Utah 1997); *Morton Int'l*, 814 P.2d at 587-88. The terms application of the law and mixed question of law and fact have been used interchangeably by the Utah appellate courts. *See Se. Utah Ass'n of Local Gov't v. Workforce Appeals Bd.*, 2007 UT App 20, ¶ 6, 155 P.3d 932.

The measure of discretion may derive from an implicit or explicit grant in the statute applied by an agency. *See Martinez*, 2007 UT 42, ¶¶ 25, 41 (citing *Morton Int'l*, 814 P.2d at 588-89); *Rd. Runner Oil, Inc. v. Bd. of Oil, Gas & Mining*, 2003 UT App 275, ¶ 26, 76 P.3d 692 (stating that grant of discretion may be made either expressly in the statute or implied from the statutory language). For a discussion of implicit and explicit grants of discretion, please refer to the above section addressing these topics in the context of agency interpretations of statute.

Otherwise, an agency may be granted a measure of discretion in applying the law to the facts of a case through the *Pena* analysis adopted by the supreme court in *Drake v. Industrial Commission of Utah*, 939 P.2d 177, 181-82 (Utah 1997) (citing *State v. Pena*, 869 P.2d 932, 935-39 (Utah 1994)), for use in administrative agency cases. *See Martinez*, 2007 UT 42, ¶¶ 27-28.

(i) Explicit Discretion

When a statute makes an explicit grant of discretion to an agency, the appellate court applies a reasonableness and rationality standard, and may only overturn the agency's conclusions of law if they are unreasonable and irrational. *See Ae Clevite*, 2000 UT App 35, ¶ 7 (stating when there exists a grant of discretion, appellate courts will not disturb the agency's determination unless it "exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion").

(ii) Implicit Discretion

The legislature may also implicitly delegate discretion to the agency to apply statutes. *See Martinez*, 2007 UT 42, ¶ 25.

(iii) *Pena* Factors and Case Examples

In general, the legal effect of specific facts "is the province of the appellate courts, and no deference need be given a trial court's resolution of such questions of law." *Drake*, 939 P.2d at 181. However, "policy considerations and other factors" may influence the appellate court "'to define a legal standard so that it actually grants some operational discretion to the trial courts applying it.'" *Id.* (quoting *State v. Vincent*, 883 P.2d 278, 282 (Utah 1994) (citing *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994))); *see Mandell v. Auditing Div. of the Utah State Tax Comm'n*, 2008 UT 34, ¶ 12, 186 P.3d 335 (stating discretion accorded under mixed questions of law and fact varies "'according to the nature of the legal concept at issue'" (quoting *State v. Levin*, 2006 UT 50, ¶ 21, 144 P.3d 1096)). Consequently, appellate courts may review an agency's application of the law to the facts,

depending on the issue, with varying levels of rigor ranging between de novo and broad discretion. *See Drake*, 939 P.2d at 181; *Pena*, 869 P.2d at 936-39; *see also Utah Chapter of the Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 14, 226 P.3d 719 (stating questions of "ultimate fact" or "mixed findings of fact and law," are reviewed under an "intermediate standard" that considers whether the agency's determination was rational (internal quotation marks omitted)); *Resort Retainers v. Labor Comm'n*, 2010 UT App 229, ¶ 11, 238 P.3d 1081 (reviewing an agency's application of its own rules to the facts is reviewed under "an intermediate standard, one of some, but not total deference" (internal quotation marks omitted)); *Pinnacle Homes, Inc. v. Labor Comm'n*, 2007 UT App 368, ¶ 8, 173 P.3d 208 (stating that because issue requires application of a statutory standard to the facts, it is reviewed with "some deference"); *EAGALA, Inc. v. Dep't of Workforce Servs.*, 2007 UT App 43, ¶ 9, 157 P.3d 334 (stating appellate court gives degree of deference when applying application of law to facts); *Utah Ass'n v. Workforce Appeals Bd.*, 2007 UT App 20, ¶ 6, 155 P.3d 932 (reviewing agency's application of law to particular set of facts, giving "a degree of deference" to the agency); *Arrow Legal Solutions Group, P.C. v. Dep't of Workforce Servs.*, 2007 UT App 9, ¶ 6, 156 P.3d 830 (stating appellate court grants board "moderate deference" in reviewing board's application of the law to the relevant facts); *Autoliv ASP, Inc. v. Dep't of Workforce Servs.*, 2001 UT App 198, ¶ 16, 29 P.3d 7.

In deciding the degree of deference to allow an agency's application of law to fact, appellate courts consider the agency's expertise in a specific area of law. *See Terry v. Ret. Bd.*, 2007 UT App 87, ¶ 8, 157 P.3d 362; *EAGALA*, 2007 UT App 43, ¶ 9 (providing that appellate court grants "moderate deference" to Board's decision because Employment Security Act requires "little highly specialized or technical knowledge"); *Autoliv*, 2001 UT App 198, ¶ 16 (stating degree of deference accorded to agency's application of law to fact is determined by, among other factors, the agency's expertise).

As stated in the introduction to the first article in this standard of review series, "it appears that the *Pena* factors for review of mixed questions have been discarded in favor of a three factor 'balancing test'" set forth in *State v. Levin*, 2006 UT 50, ¶ 28, 144 P.3d 1096. Norman H. Jackson, *Utah Standards of Appellate Review*, 23 Utah Bar J. 10, 15 (2010). The Utah Supreme Court has applied the new three factor test in the administrative law context:

> To determine the standard of review for a mixed question of law and fact, we apply a test that considers (1) the complexity of the facts; (2) the degree to which the lower court relied on observable facts that cannot be adequately reflected in the record, such as witness demeanor and appearance; and (3) any policy reasons favoring or disfavoring the exercise of discretion.

Mandell, 2008 UT 34, ¶ 12.

The following cases contain examples of agency application of law to fact or mixed questions:

(1) Whether integrated gasification combine cycle is an available control technology. *See Sierra Club*, 2009 UT 76, ¶ 44.

(2) Whether a worker is an employee within the meaning of the worker's compensation laws. *See Pinnacle Homes, Inc. v. Labor Comm'n*, 2007 UT App 368, ¶ 8, 273 P.3d 208.

(3) The ultimate decision as to whether good cause exists is a mixed question of law and fact and should be affirmed only if it is reasonable. *See Autoliv ASP v. Dep't of Workforce Servs.*, 2000 UT App 223, ¶ 11, 29 P.3d 7.

(4) Whether company had any supervision or control over entity that warrants finding that a worker was entity's employee. *See Pinnacle Homes*, 2007 UT App 368, ¶ 18, 173.

(5) Whether employee's separation from company constituted a discharge rather than a "voluntary quit without good cause." *See Arrow Legal Solutions Group, P.C. v. Dep't of Workforce Servs.*, 2007 UT App 9, ¶ 6, 156 P.3d 830 (giving "moderate deference").

(6) Whether an employee is terminated for just cause. *See EAGALA, Inc., v. Dep't of Workforce Servs.*, 2007 UT App 43, ¶ 9, 157 P.3d 334 (providing appellate court grants "moderate deference" to the board's decision); *See Utah Ass'n of Local Gov't v. Workforce Appeals Bd.*, 2007 UT App 20, ¶ 6, 155 P.3d 932 (stating appellate courts give "a degree of deference to the agency").

(7) Whether the district court properly rejected a change of use of a water right application when the ground for that rejection was the probability that vested water rights would be impaired by the use proposed in the application. *See Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 18, 133 P.3d 382 (giving "significant, but not broad, discretion").

(8) Whether company should be equitably estopped from denying the existence of a policy after issuing a certificate. *See Terry v. Ret. Bd.*, 2007 UT App 87, ¶¶ 8, 14, 157 P.3d 362.

(9) Whether decision to terminate was an abuse of discretion. *See Sorge v. Office of the Attorney Gen.*, 2006 UT App 2, ¶ 17, 128 P.3d 566 (applying deferential standard).

(10) Whether the commission erroneously applied the Allen

test for proving legal causation is a mixed question of law and fact reviewed for reasonableness and rationality. *See Utah Auto Auction v. Labor Comm'n*, 2008 UT App 293, ¶ 8, 191 P.3d 1252; *Acosta v. Labor Comm'n*, 2002 UT App 67, ¶¶ 11, 18, 44 P.3d 819.

(11) Whether a special errand is within an employee's scope of employment. *See Martinez v. Media-Paymaster Plus/ Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 28, 164 P.3d 384 (citing *Drake v. Indus. Comm'n*, 939 P.2d 177 (Utah 1997)).

c. Challenging Determinations Contrary to Agency's Rule
Under Utah Code section 63G-4-403(4)(h)(ii), the appellate court reviews whether the agency action is contrary to a rule of the agency by applying an intermediate deference reasonableness and rationality standard of review. *Cf. Bradshaw v. Wilkinson Water Co.*, 2004 UT 38, ¶¶ 8, 32, 94 P.3d 242; *Westside Dixon Assocs. LLC v. Utah Power & Light Co./Pacificorp*, 2002 UT 31, ¶ 7, 44 P.3d 775 (citing Utah Code Ann. § 63-46b-1 to -22 (1997)).

d. Challenging Rulings Contrary to Agency's Prior Practice
Under Utah Code section 63G-4-403(4)(h)(iii), the appellate court reviews whether the agency action is contrary to the agency's prior practice and whether the inconsistency has a fair and rational basis. If the challenging party can prove by a preponderance of the evidence that the agency's action was contrary to prior practice, the agency's reason for the inconsistency or argument of consistency is reviewed under a reasonableness and rationality standard of review. *See Comm. of Consumer Servs. v. Pub. Serv. Comm'n*, 2003 UT 29, ¶ 13, 75 P.3d 481 (stating commission's safety rationale is "neither an adequate nor a fair and rational basis for departing from its prudence review standard"); *Questar Gas Co. v. Utah Pub. Serv. Comm'n*, 2001 UT 93, ¶¶ 18-19, 34 P.3d 218; *Brent Brown Dealerships v. Tax Comm'n*, 2006 UT App 261, ¶ 31 n.5, 139 P.3d 296 (stating that citation to one commission case involving a statutory violation different from the one at issue is insufficient to show departure from prior practice); *Rd. Runner Oil, Inc. v. Bd. of Oil, Gas & Mining*, 2003 UT App 275, ¶ 25, 76 P.3d 692 (finding petitioners failed to show that board's actions are inconsistent with actions involving a similar fact pattern); *Kelly v. Salt Lake City Civil Serv. Comm'n*, 2000 UT App 235, ¶¶ 29-33, 8 P.3d 1048 (determining that party failed to show inconsistency).

e. Challenging Agency's "Arbitrary and Capricious" Actions
Under Utah Code section 63G-4-403(4)(h)(iv), when a claim is brought alleging that an agency action was arbitrary and

capricious, the appellate court reviews the agency action for reasonableness and rationality. *See Rd. Runner,* 2003 UT App 275, ¶ 24 (finding that because the board based its decision upon substantial evidence, decision was reasonable and rational); *Utah Chapter of the Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 13, 226 P.3d 719 (determining that UAPA grants relief if agency action is "'otherwise arbitrary or capricious'" (quoting Utah Code Ann. § 63G-4-403(4)(d), (g),(h) (Supp. 2008)).

3. Challenging Conclusions of Law

If, as discussed above, an administrative agency has not been given discretion to interpret and administer a statute, under Utah Code section 63-46b-16(4)(d), appellate courts review the agency decision under a correction-of-error standard. *See Utah Chapter of the Sierra Club*, 2009 UT 76, ¶ 13; *LPI Servs. v. McGee*, 2009 UT 41, ¶ 7, 215 P.3d 135; *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶¶ 41-42, 164 P.3d 384; *Comm. of Consumer Servs. v. Pub. Serv. Comm'n*, 2003 UT 29, ¶ 8, 75 P.3d 481; *Salt Lake Cnty. v. Labor Comm'n*, 2009 UT App 112, ¶ 9, 208 P.3d 1087; *Ae Clevite, Inc. v. Labor Comm'n*, 2000 UT App 35, ¶ 6, 996 P.2d 1072. Appellate courts apply a correction-of-error standard not simply because the court characterizes an issue as one of general law, but because the agency has no special experience or expertise placing it in a better position than the reviewing courts to construe the law. *See Martinez*, 2007 UT 42, ¶ 45 (noting that grants of discretion should be limited to issues on which agencies have "'special experience or expertise placing [them] in a better position than the courts to construe the law'" (quoting *King v. Indus. Comm'n*, 850 P.2d 1281, 1286 (Utah Ct. App. 1993))); *WWC Holding Co. v. Pub. Serv. Comm'n*, 2002 UT 23, ¶ 8, 44 P.3d 714; *Level 3 Commc'ns, LLC v. Pub. Serv Comm'n*, 2007 UT App 127, ¶ 9, 163 P.3d 652.

a. Examples of Questions of Law

(1) Whether the department "decided all of the issues requiring resolution." *Orchard Park Care Ctr. v. Dep't of Health*, 2009 UT App 284, ¶ 8, 222 P.3d 64.

(2) An "interpretation of a contract presents a question of law." *Desert Power, LP v. Pub. Serv. Comm'n*, 2007 UT App 374, ¶ 12, 173 P.3d 218 (stating that when reviewing an application or interpretation of law, appellate court uses correction of error standard, giving no deference to commission's interpretation).

(3) A municipality's decision to deny a rezoning request is a question of law. *See Petersen v. Riverton City*, 2010 UT 58, ¶ 8, —P.3d—.

(4) Whether agency's actions violated a party's due process rights. *See Kennon v. Air Quality Bd.*, 2009 UT 77, ¶ 14, —P.3d—; *Resort Retainers v. Labor Comm'n*, 2010 UT App 229, ¶ 12, 238 P.3d 1081 ("Due Process challenges are questions of law that we review applying a correction of error standard." (internal quotation marks omitted)).

(5) Whether a party has standing. *See Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 12, 148 P.3d 960.

(6) Whether the commission's order dismissing a case with prejudice was enforceable as a judicial judgment is a question of law, reviewed for correctness. *See Rowsell v. Labor Comm'n*, 2008 UT App 187, ¶ 9, 186 P.3d 968 (mem.).

(7) "Burden of proof questions typically present issue of law that an appellate court reviews for correctness." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 41, 164 P.3d 384.

(8) Whether a state administrative rule is preempted by a federal statute. *See WWC Holding Co. v. Pub. Serv. Comm'n*, 2002 UT 23, ¶ 8, 44 P.3d 714.

(9) Whether a state administrative agency engaged in an unlawful decision-making process. *See id.*

(10) Whether subject matter jurisdiction exists is a question of law. *See Ameritemps, Inc. v. Utah Labor Comm'n*, 2007 UT 8, ¶ 6, 152 P.3d 298; *Beaver Cnty. v. Qwest, Inc.*, 2001 UT 81, ¶ 8, 31 P.3d 1147.

(11) Whether a contract has been formed. *See Terry v. Ret. Bd.*, 2007 UT App 87, ¶ 7, 157 P.3d 362.

(12) Whether an agency has jurisdiction. *See Mendoza v. Labor Comm'n*, 2007 UT App 186, ¶ 5, 164 P.3d 447.

(13) Whether res judicata bars an action presents a question of law. *See Strate v. Labor Comm'n*, 2006 UT App 179, ¶ 14, 136 P.3d 1273.

4. Appeals from the State Tax Commission

The appellate advocate should be aware of Utah Code section 59-1-610, which codifies a separate standard of review for appeals from formal adjudicative proceedings before the state tax commission. The standard of review for written findings of fact from formal adjudicative proceedings by the Utah State Tax Commission is a substantial evidence standard. *See* Utah Code Ann. § 59-1-610(1)(a) (2008); *ABCO Enters. v. Utah State Tax Comm'n*, 2009 UT 36, ¶ 7, 211 P.3d 382; *Mountain Ranch Estates v. Utah State Tax Comm'n*, 2004 UT 86, ¶ 7, 100 P.3d 1206 (stating that appellate court affirms commission's factual findings if they are supported by substantial evidence); *Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶ 21, 34 P.3d 180; *Brent Brown Dealerships v. Tax Comm'n*, 2006 UT App 261, ¶ 8, 139 P.3d 296; *Kennecott Utah Copper Corp. v. Utah State Tax Comm'n*, 2004 UT App 60, ¶ 10, 87 P.3d 751; *Bd. Of Equalization Summit Cnty. v. State Tax Comm'n*, 2004 UT App 283, ¶ 5, 98 P.3d 782. Substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Atlas Steel, Inc. v. Utah State Tax Comm'n*, 2002 UT 112, ¶ 16, 61 P.3d 1053 (internal quotation marks omitted); *Yeargin, Inc. v. Auditing Div. of the Utah State Tax Comm'n*, 2001 UT 11, ¶ 11, 20 P.3d 287. In order to challenge the findings of fact, the party must marshal the evidence in support of the decision of the tax commission, and then demonstrate the fatal flaw in that evidentiary support. *See Clements v. Utah State Tax Comm'n*, 2001 UT 1, ¶ 1, 16 P.3d 1250.

The standard of review for conclusions of law is the correction-of-error standard "unless there is an explicit grant of discretion contained in a statute at issue before the appellate court." Utah Code Ann. § 59-1-610(1)(b); *accord ABCO Enters.*, 2009 UT 36, ¶ 7; *Utah Ry. Co. v. Utah State Tax Comm'n*, 2000 UT 49, ¶ 6, 5 P.3d 652 (stating appellate court grants commission no deference concerning its conclusion of law, applying correction of error standard); *Brent Brown Dealerships*, 2006 UT App 261, ¶ 8; *Kennecott*, 2004 UT App 60, ¶ 10; *Alpine Sch. Dist. Bd. of Educ. v. State Tax Comm'n*, 2000 UT App 319, ¶ 6, 14 P.3d 125. "If the Commission is granted discretion by the statute at issue, then the standard of review is narrower. The court is to defer to the Commission's conclusions of law, applying a reasonableness standard." *Newspaper Agency Corp. v. Auditing Div. of the Utah State Tax Comm'n*, 938 P.2d 266, 268 (Utah 1997).

Utah Code section 59-1-610 does not establish a standard of review for mixed questions of law and fact. *See Utah State Tax Comm'n v. Stevenson*, 2006 UT 84, ¶ 20, 150 P.3d 521. Tax commission appellate cases state that the standard of review for mixed questions of law and fact varies "'according to the nature of the legal concept at issue.'" *Mandell v. Auditing Div. of the Utah State Tax Comm'n*, 2008 UT 34, ¶ 12, 186 P.3d 335 (quoting *State v. Levin*, 2006 UT 50, ¶ 21, 144 P.3d 1096).

> To determine the standard of review for a mixed question of law and fact, [appellate courts] apply a test that considers (1) the complexity of the facts; (2) the degree to which the lower court relied on observable facts that cannot be adequately reflected in the record, such as witness demeanor and appearance; and (3) any policy reasons favoring or disfavoring the

exercise of discretion.

Id. (quoting *Levin*, 2006 UT 50, ¶ 25).

a. Examples of Fact Questions

(1) Whether the commission erred in its appraisal methodology is a question of fact reviewed to determine whether substantial evidence supports the commission's methodology. *See Osborn v. Tax Comm'n*, 2009 UT App 222, ¶ 4, 217 P.3d 274, *cert. denied*, 2009 Utah LEXIS 241 (Utah, Nov. 23, 2009).

(2) Whether company does not use an electrometallurgical process in its production activities. *See Atlas Steel, Inc. v. Utah State Tax Comm'n*, 2002 UT 112, ¶ 37, 61 P.3d 1053.

(3) Whether company converted material into real property. *See Yeargin, Inc. v. Auditing Div. of the Utah State Tax Comm'n*, 2001 UT 11, ¶ 32, 20 P.3d 287.

(4) Whether the east side of the property was devoted to agricultural use for the relevant time period. *See Marsh v. Tax Comm'n & Bd. of Equalization of Box Elder Cnty.*, 2009 UT App 44U (mem.) (per curiam).

b. Examples of Agency's Discretion

(1) The tax commission has an explicit grant of discretion to define "establishment" for purposes of the sales tax exemption. *See Atlas Steel*, 2002 UT 112, ¶ 14 n.5; *Salt Lake Brewing Co. v. Auditing Div. of the Utah State Tax Comm'n*, 945 P.2d 691, 694 (Utah 1997).

(2) The tax commission was not granted an explicit grant of discretion to interpret "new or expanding operations." *See Atlas Steel*, 2002 UT 112, ¶ 14 n.5.

(3) Whether the commission's rule defining "normal operating replacements" is a reasonable interpretation of that term as used in Utah Code section 59-12-104(16). *See Newspaper Agency Corp. v. Auditing Div. of the Utah State Tax Comm'n*, 938 P.2d 266, 268 (Utah 1997) (stating appellate court applies a reasonableness standard to the commission's conclusions regarding "normal operating replacement [parts]" because statute provides explicit grant of discretion).

c. Example of Mixed Question of Fact and Law

(1) Whether a party is a real property contractor for the purposes of determining sales tax liability. *See Yeargin, Inc. v. Auditing Div. of the Utah State Tax Comm'n*, 2001 UT 11, ¶ 31, 20 P.3d 287,

(2) Whether a party willfully failed to collect a tax. *See Utah State Tax Comm'n v. Stevenson*, 2006 UT 84, ¶¶ 8, 22-23, 150 P.3d 521 (citing *State v. Pena*, 869 P.2d 932, 936 (Utah 1994)); *State v. Brake*, 2004 UT 95, ¶ 12, 103 P.3d 699.

(3) "Determining the true character and nature of the settlement proceeds presents a mixed question of law and fact[.]" *Mandell v. Auditing Div. of Utah State Tax Comm'n*, 2008 UT 34, ¶ 17, 186 P.3d 335; *see also id.* ¶ 20 (concluding that the three *Levin* factors "weigh in favor of according less deference to the Commission's application of the law to the facts").

d. Examples of Questions of Law

(1) Whether the tax commission properly interpreted a statute. *See Heber Light & Power Co. v. Utah Pub. Serv. Comm'n*, 2010 UT 27, ¶ 6, 231 P.3d 1203 (citing *Indus. Commc'ns, Inc. v. Utah State Tax Comm'n*, 2000 UT 78, ¶ 11, 12 P.3d 87); *MacFarlane v. State Tax Comm'n*, 2006 UT 25, ¶ 9, 134 P.3d 1116; *Mountain Ranch Estates v. Utah State Tax Comm'n*, 2004 UT 86, ¶ 7, 100 P.3d 1206; *ExxonMobil Corp. v. Utah State Tax Comm'n*, 2003 UT 53, ¶ 10, 86 P.3d 706, *abrogated in part by Union Oil Co. v. Utah State Tax Comm'n*, 2009 UT 78, ¶ 2, 222 P.3d 1158; *Atlas Steel, Inc. v. Utah State Tax Comm'n*, 2002 UT 112, ¶ 15, 61 P.3d 1053.

(2) The plain language application of contract provisions is a question of law reviewed for correctness. *See Envirocare of Utah, Inc. v. Utah State Tax Comm'n*, 2009 UT 1, ¶ 3, 209 P.3d 982.

(3) Whether the district court has subject matter jurisdiction to hear a case. *See Wasatch Cnty. v. Tax Comm'n*, 2009 UT App 221, ¶ 4, 217 P.3d 270.

(4) Whether the appellate court has jurisdiction to consider an issue. *See Bd. of Equalization of Summit Cnty. v. Tax Comm'n*, 2004 UT App 283, ¶ 6, 98 P.3d 782; *Bluth v. Tax Comm'n*, 2001 UT App 138, ¶ 4, 26 P.3d 882.

(5) Whether the term "gas" under the tax code includes nitrogen gas. *See Hercules, Inc. v. Utah State Tax Comm'n*, 2000 UT App 372, ¶ 6, 21 P.3d 231.

(6) Whether the tax division had authority under Utah statute to lower a school district's tax rate. *See Alpine Sch. Dist. v. State Tax Comm'n*, 2000 UT App 319, ¶ 6, 14 P.3d 125.

(7) Whether a tax is constitutional. *See Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 8, 225 P.2d 153, *cert. denied, Denali, L.L.C. v. Utah State Tax Comm'n*, 2010 U.S. LEXIS 8081 (U.S., Oct. 12, 2010).

(8) Whether the tax commission ignored statutory directives when applying an appraisal methodology. *See Osborn v. Tax Comm'n*, 2009 UT App 222, ¶ 4, 217 P.3d 274, *cert. denied*,

2009 Utah LEXIS 241 (Utah, Nov. 23, 2009).

(9) Whether party is entitled to litigation expenses under the small business act. *See Salt Lake Cnty. Bd. of Equalization v. Tax Commssion*, 2004 UT App 472, ¶ 11, 106 P.3d 182.

(10) The tax commission's interpretation of the tax code is a question of law and appellate courts grant no deference to the commission's interpretation. *See Hercules, Inc. v. Utah State Tax Comm'n*, 2000 UT App 372, ¶ 6, 21 P.3d 231.

(11) The tax commission's interpretation of general law including "case law, constitutional law, or non-agency specific legislative acts" is a correction of error standard with no deference given to the agency's decision. *See Exxon Corp v. Utah State Tax Comm'n*, 2010 UT 16, ¶ 6, 228 P.3d 1246 (internal quotation marks omitted); *Union Oil Co. v. Tax Comm'n*, 2009 UT 78, ¶ 8, 222 P.3d 1158.

(12) Whether the district court's determination that a tax is constitutional is a legal question. *See Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 8, 225 P.2d 153, cert. denied, *Denali, L.L.C. v. Utah State Tax Comm'n*, 2010 U.S. LEXIS 8081 (U.S., Oct. 2, 2010).

(13) The determination of the meaning of gross receipts under Utah Code section 59-24-102 (5) is a question of law reviewed for correctness. *See Envirocare of Utah, Inc. v. Utah State Tax Comm'n*, 2009 UT 1, ¶ 3, 201 P.3d 982.

(14) Whether the court of appeals applied the correct standard of review is reviewed for correctness by the Utah Supreme Court. *See Utah State Tax Comm'n v. Stevenson*, 2006 UT 84, ¶ 19, 150 P.3d 521.

(15) The application of a limitations period presents a question of law reviewed for correctness, giving no deference to the Commission's determination. *See Beaver Cnty. v. Prop. Tax Div. of the Utah State Tax Comm'n*, 2006 UT 6, ¶ 16, 128 P.3d 1187.

(16) Whether a settlement agreement violates Utah law. *See Alliant Techsystems, Inc. v. Salt Lake Cnty. Bd. of Equalization*, 2005 UT 16, ¶ 27, 110 P.3d 691.

(17) Whether a tax applied to a one-way pager service falls under the statutory definition of telephone services. *See Indus. Commc'ns, Inc. v. Utah State Tax Comm'n*, 2000 UT 78, ¶¶ 1, 11, 12 P.3d 87.

(18) Whether an ambiguity exists in a contract. *See Level 3 Commc'ns, LLC v. Pub. Serv. Comm'n*, 2007 UT App 127, ¶ 9, 163 P.3d 652.

III. Challenges on Certiorari and upon Certification by Federal Courts

On certiorari, the supreme court reviews the decision of the court of appeals, not the trial court. *See Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 10, 182 P.3d 326; *J. Pochynok Co. v. Smedsrud*, 2005 UT 39, ¶ 8, 116 P.3d 353; *Salt Lake Cnty. v. Metro W. Ready Mix, Inc.*, 2004 UT 23, ¶ 11, 89 P.3d 155; *Grand Cnty. v. Rogers*, 2002 UT 25, ¶ 6, 44 P.3d 734; *Mitchell v. Christensen*, 2001 UT 80, ¶ 8, 31 P.3d 572. The court of appeal's decision is reviewed for correctness, and its conclusions of law are afforded no deference. *See State v. Harker*, 2010 UT 56, ¶ 8, 240 P.3d 780; *Arnold v. Grigsby*, 2009 UT 88, ¶ 7, 225 P.3d 192; *State v. Casey*, 2003 UT 55, ¶ 10, 82 P.3d 1106. When a question has been certified to the supreme court by the federal district court, the supreme court does not "refind the facts;" rather, the court answers only the certified question of law presented. *See TruGreen Cos., L.L.C. v. Mower Bros., Inc*., 2008 UT 81, ¶ 8, 199 P.3d 929; *Burkholz v. Joyce*, 972 P.2d 1235, 1236 (Utah 1998). A certified question presents a question of law, which the Utah Supreme Court reviews for correctness without resolving the underlying dispute. *See Egbert v. Nissan Motor Co*., 2010 UT 8, ¶ 8, 228 P.3d 737; *Smith v. Mosier*, 2009 UT 3, ¶ 5, 2001 P.3d 1001; *Tabor v. Metal Ware Corp*., 2007 UT 71, ¶ 5, 168 P.3d 814; *In re Kunz*, 2004 UT 71, ¶ 6, 99 P.3d 793.

CONCLUSION

Appellate judges often advise both lawyers and laymen that "trial courts search for truth and appellate courts search for error." This axiom advises that an appeal is not a re-trial. We stated at the outset that trial court determinations for the most part are final and binding regardless of impressive appellate briefs or eloquent oral arguments. Rule 61 of the Utah Rules of Civil Procedure is a mandate to courts – trial and appellate – to not disturb a judgment or a verdict, unless it is clear that refusal to do so would be substantially unjust. Accordingly, the integrity of orders, judgments and verdicts is the rule and reversal is the exception. Thus, while the attorney is focusing on the trial proceedings at hand, the attorney must also keep an eye on preserving and preparing the case for appeal. The best way to succeed on appeal is to prevail at trial.

While writing this edition of the Utah Standards of Appellate Review, we were called upon to consult regarding a case that was struggling to survive in the trial court due to two adverse rulings on motions to dismiss. A sports analogy seemed to best illustrate the status of the proceedings: You are at bat in the ninth inning with two out. You have just hit the ball down the base line and you are arguing with the umpire/judge whether the ball was fair or foul. Realistically, your odds of hitting a home run on appeal are very slim. Moreover, differences between trial practice and appellate process require different attorney skill sets. Typically, trial investigation, preparation, and presentation require aggressive, quick-thinking skills. On the other hand, appellate briefing and oral argument require deliberate research, writing, and oral advocacy skills.

Appellate judges in California were recently surveyed concerning the skills required for effective appellate advocacy. They reported a wide variety of deficiencies in writing styles, proof reading, and use of the trial court record. In civil cases, large numbers of appellate briefs lacked internal consistency with the main messages and failed to serve the best interests of the parties. Briefing in criminal cases rated higher approval. This was attributed to more experienced appellate practitioners handling those appeals. *See* Charles A. Bird & Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Methodologies in One California Appellate Court*, 4 Journal of Appellate Practice and Process 141, 156 (2002). In Utah, we have also observed that the attorneys who specialize in criminal appeals at the Utah Attorney General's office and the Salt Lake Legal Defenders are effective appellate advocates. Thus, we surmise that experience and familiarity with the appellate process, including standards of review, are of paramount importance.

Sooner or later, the drafters of Utah appellate briefs and opinions must come to terms with standards of review. They are the keystone to appellate court decision making. These "standards" serve several useful purposes which the drafter should understand and keep in mind. The standards of review: (1) improve the judicial system by balancing power between appellate and trial judges, (2) insure "judicial" economy in use of resources and time, (3) establish a standardized process of review, and (4) provide parties with a basis to evaluate the probability of success on appeal.

Standards of review are imperative and effective tools for outlining and framing the issues on appeal. Due to their significance, thorough research is required to identify, define, and apply the appropriate standard for each issue. The analysis of legal issues by attorney and judge alike must demonstrate fidelity to the standard from beginning to end. Their conclusions and results should confirm that they were reached within the limits imposed by the standard.

In summary, standards of review occupy a singularly vital role in the disposition of cases. They are the essential language of both appellate briefs and appellate opinions. Isolation of the correct standard of review should be the starting point for analyzing any appellate law issue. From the perspective of allocation of judicial power, a review standard allocates the positive authority an appellate court wields in its review function. The appellate court decides the nature and extent of error by the trial court and whether the error attained a reversible level. From the perspective of appellate practitioner, the practioner's skill in persuading the court to utilize the most favorable standard of review will make all the difference in the outcome.

As we conclude this third edition of Utah Standards of Appellate Review, we extend our thanks to those who contributed their time, talent, and energy to research, writing, and editing behind the scenes. They are: Christine Critchley, Laniece Roberts, Alisha Giles, Sam Sorensen, Rachel Spohn, Ben Lusty, Brent Clayton, Matthew Anderson, and Dorothy Hatch.

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Business Valuation Applications to Economic Damages for Lost Profits

by Matt Connors and Robert P.K. Mooney

This article is meant to convey the similarity of education, knowledge, skills, and training used in valuing a business with those needed for estimating lost profits a business may sustain. This skill set is held by a niche group of professionals, typically accountants, who have training and experience in matters related to business valuation and expert witness services. Qualified experts need to have a solid understanding of business valuation, accounting, finance, and other principles that are generally accepted in the expert community and need to use reliable principles and methods to ensure the highest level of client service and to have their work accepted by courts.

The Relationship Between Estimating Lost Profits and Business Valuation

A business valuation performed by a Certified Public Accountant is subject to the requirements of the Statement on Standards for Valuation Services promulgated by the American Institute of Certified Public Accountants ("AICPA").

A business valuation typically focuses on three approaches to arrive at a conclusion of value: (1) the asset approach, (2) the market approach, and (3) the income approach. Using these approaches, a business valuation is typically meant to arrive at a value for a business as a whole or a fractional ownership thereof. A detailed review of the various approaches and methods within each approach are outside the scope of this article. However, principles of the income approach form the basis of much of a lost profits calculation. The income approach is succinctly summarized as follows:

> the value of an asset is the present value of its expected returns. Specifically, you expect an asset to provide a stream of returns during the period of time that you own it. To convert this estimated stream of returns to a value for the security you must discount this stream at your required rate of return. This process of valuation requires estimates of (1) the stream of expected returns, and (2) the required rate of return on the investment.

Frank K. Reilly, Investment Analysis and Portfolio Management 434 (5th ed. 1997).

"Value today always equals future cash flow discounted at the opportunity cost of capital." Richard A. Brealey & Stewart C. Myers, Principles of Corporate Finance 73 (5th ed. 1996).

This approach is "the very heart of valuation." Shannon P. Pratt, Valuing a Business 152 (4th ed. 2000). Similarly, estimating lost profits requires the expert to estimate similar components: (1) the stream of lost profits and (2) an appropriate rate of return at which the lost stream of profits should be discounted to arrive at a present value.

Estimating lost profits is frequently done by estimating the present value of an earnings impairment as a result of some business interruption. Earnings impairment typically refers to decreased cash flow and can be temporary or permanent. A business can suffer an earnings impairment that reduces its earnings only partially or, in certain situations, the business can suffer a complete earnings impairment. Scenarios exist where the closer the earnings impairment comes to being a complete earnings impairment, the closer the lost profits engagement comes to estimating the value of an entire business. Thus the relationship between estimating lost profits and business valuation. The remainder of this article is devoted to the typical components involved in estimating lost profits, generally

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performed in the context of litigation.

Using a Business Valuation Background in Litigation Matters

In order to give expert testimony in a litigation matter regarding business valuation or lost profits, qualified witnesses must show that their "testimony is the product of reliable principles and methods." Fed. R. Evid. 702.

The AICPA has stated that business valuation may be performed for a variety of purposes including litigation, owner disputes, contractual disputes, bankruptcy, marital dissolution, employment disputes, intellectual property disputes, and dissenting shareholder or minority owner oppression cases. While the AICPA standard on valuation services does not apply to engagements that are limited to determining economic damages, such as lost profits, litigation engagements performed by a Certified Public Accountant that include an estimation of value are subject to the AICPA standard. However, even for lost profit analyses, courts recognize that testimony based on AICPA standards, if those standards are properly applied, are "the product of reliable principles and methods." *See Leon v. Kelly*, Case No. 07-0467 JB/WDS, 2009 WL 1300936, at **13, 20 (D.N.M. Jan. 12, 2009) (admitting lost profit opinion testimony that utilized the guidance in the AICPA practice aid on calculating lost profits).

Performing Qualitative and Quantitative Analysis

Qualitative and quantitative factors are considered in both a business valuation and a lost profits estimation. In a litigious matter, there are various qualitative factors that are unique to estimating lost profits. In estimating lost profits, the financial expert should "consider," "understand," and "be prepared to explain" the causal fact resulting in plaintiff damages. Roman L. Weil, Peter B. Frank, & Christian W. Hughes, Litigation Services Handbook: The Role of the Financial Expert 2.1-2.2 (4th ed. 2007). There is a distinction, however, in the legal requirement of causation and proof of the amount of damages. The plaintiff must show that damages were proximately caused by the defendant. The plaintiff expert must calculate a reasonable estimate of damages without undue speculation. Arriving at a reasonable estimate means that the expert should consider and take into account other factors that could be partially responsible for a plaintiff's lost profits. For example, a reasonable estimate considers capacity and market share constraints and factors these considerations into the estimated loss. Failure to adequately account for other factors contributing to lost profits not only hurts an expert's credibility, it can impair the reliability of an expert's testimony so as to render it inadmissible. *See, e.g.*, *MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1355 (Fed. Cir. 2005) ("While an expert need not consider every possible factor to render a 'reliable' opinion, the expert still must consider enough factors to make his or her opinion sufficiently reliable in the eyes of the court.").

In *Drug Mart Pharmacy Corp. v. American. Home Products Corp.*, 472 F. Supp. 2d 385 (E.D.N.Y. 2007), the court granted summary judgment against the plaintiff on a lost profit claim for failure to provide evidence of the lost profits after disregarding the report of the plaintiff's expert. *See id.* at 430-32. The court disregarded the expert's report because it failed to meaningfully factor out other causes for the plaintiff's losses. *See id.*

In estimating lost profits, the damages expert must not only consider other factors leading to the plaintiff's damages, the expert must also define the correct damages period. The damages period depends on the nature of the matter, but typically begins with a breach or business interruption and ends at the termination of a contract or when operations return to "normal." Conceivably, operations that are permanently affected may never return to "normal."

Defining the Appropriate Lost Cash Flows

Once the relevant qualitative factors have been considered, the expert should address quantitative factors. Experienced financial experts know the similarities and differences in defining the appropriate cash flow for a business valuation as opposed to a lost profits analysis. In a lost profits analysis the calculation typically begins with estimating lost revenues. Several methods are available to estimate lost revenues. The "before and after" method estimates lost revenues as the difference between a "but-for" scenario of unimpaired revenue and the actual revenues that were generated. The "yardstick" method estimates lost revenues based on some benchmark such as the performance of a plaintiff at a different location, the plaintiff's actual experience versus past budget results, or industry averages. The appropriate measure of lost revenues can also be based on the terms of a contract. Other methods exist and can be used to estimate lost revenues based on the facts and circumstances of the matter.

After estimating lost revenues, it is necessary to estimate costs that the plaintiff would incur to generate the lost revenues. These costs are typically referred to as avoided costs. Avoided costs in estimating lost profits are commonly categorized by accountants as one of two general categories, fixed or variable. Variable costs typically vary with production, while fixed costs generally remain constant over a range of production and time. Based on the circumstances of the matter, the relevant avoided costs should be identified and subtracted from lost revenues. This process frequently involves the expert gaining an understanding of the cost environment in which the plaintiff

operates based on historical operating costs.

The practitioner should also be mindful of the principle of mitigation. A plaintiff generally has the duty to mitigate losses. *See Watkins v. Ford*, 2010 UT App 243, ¶ 20, 239 P.3d 526. Whether the financial expert has been hired by the plaintiff or the defendant, mitigation should not be ignored as failure to mitigate can be raised as a defense. An expert should attempt to ascertain "whether actual sales during the period of the breach represented additional sales that would have occurred anyway or were replacement sales for the breached amount." Roman L. Weil, Peter B. Frank, & Christian W. Hughes, Litigation Services Handbook: The Role of the Financial Expert 3.9 (4th ed. 2007). Mitigation should be addressed so the expert can attempt to measure what, if any, steps were or should have been taken by the plaintiff to mitigate its loss.

Valuing Historical and Future Losses at Present Value

Typically, lost profits estimations have historical and future loss components. The financial expert is responsible to express past and future losses in terms of their present value. Using one method, the expert discounts cash flows to the date of loss, then calculates prejudgment interest to a future date, commonly the date of the award. Another method discounts only future lost profits to the date of trial, but may also apply prejudgment interest to historical losses. Whether historical lost profits should be discounted to the date of loss and carried forward to the date of trial at a rate of prejudgment interest and at what prejudgment rate is acceptable normally needs to be determined with the assistance of counsel based on the applicable statutory and case law.

Clearly, in order to perform any discounting, the appropriate discount rate needs to be established. In valuing a business, discount rates are typically based on a company's weighted average cost of capital ("WACC") or the cost of equity. The WACC and the cost of equity are differentiated as follows: the cost of equity is the required rate of return by an equity investor and the WACC is the blended required return of all debt and equity investors. This cost of capital, whether in the form of debt or equity, is the "expected rate of return the market requires in order to attract funds to a particular investment." Shannon Pratt, Cost of Capital: Estimation and Application 3 (2d ed. 2002). Economically speaking, the cost of capital can be related to the principle of substitution, that is, "an investor will not invest in a particular asset if there is a more attractive substitute." *Id*. While courts have allowed discounting at a risk free rate, using a discount rate based on a company's cost of capital is meant to account for the risk inherent in an investment. Various approaches are available for the expert to determine the cost of capital and are beyond the scope of this article.

The discount rate is highly important as it can have a large impact on the value of damages. For example, using a discount rate of 4.5%, a five year cash flow stream of $1 million each year growing at 3% per year has a present value of $4.65 million. Using the same cash flow, but a discount rate of 20%, the present value is more than 30% less, at $3.14 million. Because the discount rate can have such a significant impact on a final damages calculation, the expert must take care that the chosen discount rate is not deemed by the court to be arbitrary. The expert must be prepared to justify the designated discount rate by reference to generally accepted methodologies. Failure for an expert to do so can give rise to fertile admissibility challenges.

While performing a business valuation and estimating lost profits have different requirements, in terms of considerations made by the expert, many of the principles, skills, and knowledge used in business valuation are similar to those used in estimating lost profits. As an advocate, attorneys are advised to become familiar with professionals who are trained in business valuation practices, the rigorous exercise of estimating lost profits, and are accustomed to working in the legal environment so that as advocates, attorneys can provide the highest level of client service.

In Defense of Sales to Defective Grantor Trusts

by Jeffrey D. Steed

In what has become a near-landmark publication, Julie K. Kwon and Daniel J. Loewy, two senior analysts from Bernstein Global Wealth Management, published their article, *GRATs: On a Roll*, in the June 2005 issue of Trust & Estates Magazine. *See* Julie K. Kwon & Daniel J. Loewy, *GRATS: On a Roll*, Trusts & Estates, June 2005, at 33. In their article, Kwon and Loewy analyze the "probabilities of success" when comparing a rolling grantor-retained annuity trust ("GRAT") to other investment-driven gifting strategies for large estates, including a sale to a defective grantor trust ("DGT"). *See id*. Using a highly advanced wealth forecasting analysis model that simulated over 10,000 capital market scenarios across a wide spectrum of asset classes, Kwon and Loewy determined that, in almost all cases, a rolling GRAT strategy statistically outperforms other popular strategies for increasing the likelihood of successful wealth transfer. *See id*. According to Kwon and Loewy, the success of rolling GRATs is largely due to the ability to significantly decrease the inherent market risk associated with investment-driven estate planning strategies while, at the same time, capturing the upside of market volatility. *See id*. In other words, the ability to lock in wealth transfer gains from previous years in a rolling GRAT strategy has a greater probability to outweigh any advantage from lower interest-rate benefits and the avoidance of all mortality risk generally provided by a sale to a DGT.

In recent years, Kwon and Loewy's analysis has fueled somewhat of a trend in the estate planning and wealth management community to promote the superiority of GRAT strategies over sales to DGTs and other investment-driven estate planning tools. Notwithstanding the amazing benefits that rolling GRATs afford clients to effectively minimize potential estate tax liability and to lock in the upside of market volatility, the advantages of a rolling GRAT over a sale to a DGT should not be overstated. It is important to recognize various, overlooked advantages involving sales to DGTs which, when taken as a whole, may favor using a sale to a DGT over a rolling GRAT depending on a client's unique estate planning objectives.

There is no dispute that rolling GRATs are able to capture the upside of market volatility and have certain advantages over other investment-driven planning vehicles in their ability to consistently lock in wealth transfer gains as the strategy progresses. Nonetheless, rolling GRATs also have an increased interest-risk because of (1) the higher rate under Internal Revenue Code section 7520 mandated for all GRAT strategies; and (2) the decreased flexibility of GRATs to lock in lower interest rates in the long run during favorable rate markets. *See* I.R.C. § 7520 (2002) ("section 7520"). Present interest rates, including the Applicable Federal Rate and the section 7520 rate, still remain at near historical lows. A client today could take advantage of this current market scenario by executing a sale to a DGT and effectively lock in the lower rates of interest for the entire term of the DGT note. In contrast, a client utilizing a rolling GRAT strategy would only be able to lock in present interest rates for the next two years (i.e., the term of the first GRAT in the series). If interest rates were to increase during the comprehensive term of a GRAT strategy, which they are bound to do, so would the overall hurdle rate for the technique. While Kwon and Loewy purportedly took this increased interest-rate risk into consideration in their financial modeling, practitioners should understand that decreased investment risk does not essentially negate increased interest-rate risk.

It should be noted that the two most important advantages of a DGT strategy are the two main disadvantages of a rolling GRAT: (1) the ability of the DGT strategy to provide for a more flexible repayment structure on its obligations back to the grantor; and (2) the ability of the DGT strategy to allow for long-term generation-skipping transfer tax planning. Neither of these crucial and important advantages provided by DGTs were taken into consideration by Kwon and Loewy in their analysis. For example, Kwon and Loewy did not take into consideration that the note issued by a DGT for the assets sold to the trust could be drafted and even amended during the repayment term, so as to provide maximum flexibility in payment of the debt obligation owed by the trust. Depending on the circumstances, a DGT note could be drafted to provide for a either a short-term or a long-term payment period. The note could also require payments of either both principal and interest or interest only payments. Additionally, the note could be structured to allow for no annual payments at all, with one final balloon payment of principal and interest at the date of maturity. Most importantly, however, the terms of the DGT note could be renegotiated and revised depending on the changing circumstances of the rate markets – thus allowing the

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client to capture the upside of interest-rate volatility to maximize wealth transfer gains or retain the actual, original assets transferred to the trust without liquidation. The DGT note could also be "self-cancelling" to further decrease mortality risk, of course with a higher rate of interest (i.e., a higher hurdle rate).

In contrast, rolling GRAT strategies must calculate and pay annuity payments back to the grantor of the trust on at least an annual basis, and at an inherently higher rate of interest. The flexibility in payment structure of the DGT note over the inflexibility of the payment structure of the GRAT increases the probability of successful wealth transfer and maximizes the overall benefit to the client both by (1) effectively decreasing interest-rate risk; and (2) capitalizing on lower interest rates in depreciating asset markets.

Furthermore, while Kwon and Loewy noted that rolling GRATs have an advantage over other investment-driven techniques in capturing the upside of market volatility, this is largely due to the assumption that the original assets transferred to the trust could be kept in the trust without liquidation to pay the mandated annual annuity. These same benefits provided by a rolling GRAT strategy could be replicated in a sale to a DGT, where all principal and interest under the DGT note were deferred until the maturity of the note – especially in cases where the note could be modified during the repayment term. Due to a DGT's inherently lower hurdle rate, and by providing for a balloon payment of both principal and interest at the maturity date of the DGT note, a DGT is better situated than even a rolling GRAT to retain its originally contributed assets and to avoid potential liquidation of trust assets in unfavorable markets. This allows for the increased probability that, over the term of the DGT note, the assets sold to the DGT will realize a greater return than the hurdle rate. Moreover, a DGT's ability to structure and revise its payment obligations can assist clients to transfer not only the value of their property, but also the property itself without forced liquidation.

For this reason, a sale to a DGT is not only an effective investment-driven wealth transfer mechanism, but also an important business or real property succession tool. It is one thing if the client is transferring a highly diversified portfolio of marketable securities; it is another thing entirely where the assets are closely-held business interests or real properties, which have been in the family for multiple generations. By providing greater flexibility for payments on the DGT note to the grantor, a sale-to-a-DGT strategy is better able to avoid situations where the trust would be forced to sell the interests in a family's business or real property in a poor income-producing year. The abilities of a DGT strategy to (1) transfer the assets to a newly formed LLC to obtain a lack-of-marketability discount and (2) qualify for the lower AFR rate only amplify the benefit of potentially avoiding a forced liquidation of a family's assets by making it easier for the trust to make payments to the grantor according to the terms of the DGT note.

However, the most important advantage a sale to a DGT has over a rolling GRAT is the ability to engage in multi-generational planning. Of critical importance is that a grantor of a GRAT cannot allocate his generation-skipping transfer tax exemption to "leverage" property contributed to a GRAT under the estate tax inclusionary period rules of the Internal Revenue Code. On the other hand, property sold to a DGT may be made exempt from generation-skipping transfer tax due to the grantor's allocation of his or her generation-skipping transfer exemption at the inception of the DGT. In the long term, such a trust would be able to provide tax-free distributions to "skip" persons for multiple generations. Now that several states, including Alaska, have wholly done away with their rules against perpetuity, a DGT with a trust situs of Alaska could create a vehicle exempt from generation-skipping transfer tax that lasts for centuries.

In summary, both GRATs and sales to DGTs are effective estate planning tools practitioners can use to help clients avoid taxation when transferring their property to future generations. Notwithstanding advances in quantitative modeling and capital markets forecasting, the outperformance of rolling GRATs over sales to DGTs, as calculated by Kwon and Lowery, should not be overstated. The single-minded advocacy of one strategy over the other is generally neither advantageous nor effective in maximizing overall benefits to a client's estate. Attorneys and wealth managers should remain objective in deciding which investment-driven techniques are best suited for their clients' goals based on a comprehensive and complete analysis of the circumstances. It should not be forgotten that a sale to a DGT can be powerful investment-driven strategy – especially in cases where the client desires for the beneficiaries to succeed to control of the original trust assets and avoid potential forced liquidation. This is important where the assets being transferred are long-held family business interests, or real properties where the client desires to maximize the benefits of long-term, multigenerational planning.

The 2010 Medical Malpractice Amendments: A Summary of Major Changes

by Patrick Tanner

Introduction

During the last session, the Utah Legislature made significant changes to the statutes governing medical malpractice claims in Utah. Senate Bill 145, the Medical Malpractice Amendments, has three major aspects: First, it replaces the escalating cap on non-economic damages with a fixed cap; second, it limits the circumstances in which an "ostensible agency" claim may be asserted; and third, it adds an affidavit of merit requirement to the prelitigation panel hearing process. While the full implications and practical effects of these changes will become clear only as new cases are litigated, practitioners will need to consider the changes in evaluating and preparing to bring and defend medical malpractice claims.

Return to a Fixed Non-economic Damages Cap

Utah's medical malpractice non-economic damages cap is found in Utah Code section 78B-3-410. *See* Utah Code Ann. § 78B-3-410 (Supp. 2010). As originally enacted in 1986, it limited non-economic damages to $250,000. It remained in place until the 2001 amendments increased the cap to $400,000 and implemented an annual inflation adjustment. Under this adjustment, the cap generally increased each year and in 2009 was $480,000. Senate Bill 145 eliminated the adjustment provision, returning the cap to a fixed amount of $450,000, such that any further adjustment to the cap would require statutory amendment.

However, it will be some time before all cases fall under the new cap. Any action arising before July 1, 2001, is subject to the original $250,000 cap. Actions arising during each succeeding year through May 15, 2010, are subject to the cap effective for that year. (The Utah Courts website contains a useful reference table listing years and cap amounts.) Therefore, in each case, practitioners must determine when the claim arose in order to determine the applicable non-economic damages cap.

Limitation of "Ostensible Agency" Liability

A second change made to the Utah Health Care Malpractice Act is the addition of a statute limiting "ostensible agency" liability in medical malpractice cases. (The concept is also known as "apparent agency," "apparent authority," and "agency by estoppel.") Generally speaking, ostensible agency imposes vicarious liability on a putative principal for an apparent agent's actions where there is no actual agency relationship. In Utah, establishing apparent authority requires showing

> (1) that the principal has manifested his consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; (2) that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority, has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal.

Luddington v. Bodenvest, Ltd., 855 P.2d 204, 209 (Utah 1993). As of this date, no reported Utah case has applied ostensible agency in the medical malpractice context. However, other jurisdictions have used it to significantly expand hospitals' liability for acts or omissions of non-employed physicians practicing within the hospital, particularly in the emergency room. Such courts seem swayed by the perception that patients

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often are ignorant of the fact that most physicians are not hospital employees and also by a desire to expand the resources available to compensate injured patients. In the effort to expand hospital liability, some courts have effectively abandoned various elements of the traditional ostensible agency test, reducing the required showing to the point of imposing what amounts to a non-delegable duty on the hospital, establishing a per se inference of ostensible agency whenever a patient is treated at a hospital, and making the hospital an involuntary excess insurer of non-agent physicians. *See, e.g., Mejia v. Cmty. Hosp. of San Bernardino*, 122 Cal. Rptr. 2d 233, 238-40 (Cal. Ct. App. 2002) (acknowledging these changes); *Clark v. Southview Hosp.*, 628 N.E.2d 46, 54-56 (Ohio 1994) (Moyer, C.J, dissenting) (criticizing departure from traditional elements); *Pamperin v. Trinity Mem'l Hosp.*, 423 N.W.2d 848, 858-61 (Wis. 1988) (Steinmetz, J., dissenting) (criticizing majority's erroneous application of elements). In contrast, other jurisdictions insist on adherence to the traditional ostensible agency elements, rejecting claims which fail to meet those elements. *See, e.g., Baptist Mem'l Hosp. Sys. v. Samson*, 969 S.W.2d 945, 948-50 (Tex. 1998) (rejecting nondelegable duty and requiring demonstration of elements of apparent agency); *Garrett v. L.P. McCuistion Comty. Hosp.*, 30 S.W.3d 653, 655-56 (Tex. App. 2000) (applying *Samson*, affirming summary judgment for failure to meet apparent agency elements).

Senate Bill 145 adds Utah Code section 78B-3-424 to the Utah Health Care Malpractice Act, which limits ostensible agency liability in cases arising after July 1, 2010. Section 424 defines an "ostensible agent" as someone who is **not** an agent of the health care provider but whom "the patient reasonably believes is an agent of the health care provider because the health care provider intentionally, or as a result of a lack of ordinary care, caused the plaintiff to believe that the person was an agent of the health care provider." Section 424 provides that if the following requirements are met, the health care provider does not incur ostensible agency liability: (1) the ostensible agent has practice privileges with, but is not an actual agent of, the health care provider; (2) the health care provider has ensured compliance with any insurance requirements in the medical staff bylaws or contracts or other health care rules and regulations; (3) any such required insurance was in place at the time of the alleged acts or omissions; and (4) in response to assertion of agency or ostensible agency in a claimant's notice of intent, the

healthcare provider within sixty days lists each person the claimant has identified that the healthcare provider asserts is not an agent of the healthcare provider.

Changes to the Prelitigation Panel Hearing Process

The 1985 amendments to the Utah Health Care Malpractice Act (the Act) established the prelitigation panel hearing process. Before then, potential medical malpractice plaintiffs were only required to serve potential defendants with a notice of claim. Implementing the Act's stated purpose of "expedit[ing] early evaluation and settlement of claims" Utah Code Ann. § 78B-3-402(3), this notice had to be served at least ninety days prior to filing suit, *see id.* § 78B-3-412. The notice provided an opportunity to evaluate the claim and determine whether early resolution was appropriate, which was further facilitated by extending the statute of limitations when the notice was served close to expiration of the statute of limitations.

> *"…if the panel finds the claim nonmeritorious, then the claimant must produce sworn expert testimony supporting the claim before filing suit."*

The prelitigation panel hearing process afforded further input for this pre-lawsuit evaluation by requiring submission of the claim to a panel for evaluation. This panel and review process is administered by the Division of Occupational and Professional Licensing of the Utah Department of Commerce ("DOPL"). The panel, consisting of an attorney member, a lay member, and one health care provider of the same specialty as each health care provider, considers the patient's malpractice claim and the health care provider's response to the claim and renders an opinion regarding the claim's merit or lack thereof. *See id.* § 78B-3-418 (2008). This determination consists of two parts: first, whether the health care provider breached the standard of care; and second, whether this breach injured the patient. The claim is only "meritorious" with both a breach of the standard and resulting injury. Although this hearing process is "compulsory as a condition precedent to commencing litigation," *See id.* § 78B-3-416(1)(c), the hearing proceedings and panel findings are inadmissible in court. In addition, the claimant and the health care provider may by stipulation waive the prelitigation panel hearing. *See id.* § 78B-3-416(3)(c). Upon issuance of the panel's opinion or if the parties waive the hearing, DOPL issues a certificate that the claimant has complied with the prelitigation requirements and the claimant may then file suit in court. Under the prior statute, the statute of limitations was tolled upon the request for a prelitigation hearing, and that tolling continued until sixty days after the process concludes. *See id.* § 78B-3-416(3)(a).

A. The "Affidavit of Merit" Requirement

Senate Bill 145 made substantial changes to the prelitigation panel hearing process. The most significant change is a new statute, Utah Code section 78B-3-423, requiring that a medical malpractice claimant obtain an "affidavit of merit" in certain cases before suit may be filed in court. Essentially, this requirement applies if the prelitigation hearing panel finds that the claim lacks merit, either for lack of breach of the standard of care or for lack of resulting damage. *See id.* § 78B-3-423(1)(a)(I) (2010). If that occurs, the claimant cannot receive a certificate of compliance (and thereby may not proceed to court) unless the claimant first provides an affidavit of merit.

The "affidavit of merit" actually consists of two affidavits. First, the attorney (or pro se claimant) must execute an affidavit stating that the attorney or claimant (1) has consulted with and reviewed the facts of the case; (2) with a health care provider; (3) who has determined after review of the medical records and other relevant information; and (4) "that there is a reasonable and meritorious cause for the filing of a medical liability action." *Id.* § 78B-3-423(2)(a) (2010). Second, the affidavit of merit must also include an affidavit signed by an appropriately licensed health care provider. (If one of the respondents is a physician or osteopath, the health care provider must be a physician or osteopath with an unrestricted license; if none of the respondents is a physician or osteopath, then the health care provider must be licensed in the same specialty as the respondents. *See id.* § 78B-3-423(3)). The required elements of the health care provider affidavit vary depending on whether the panel found both breach and causation of injury lacking. If the panel found both elements absent, the affidavit must state that, in the opinion of the health care provider, "there are reasonable grounds to believe that the applicable standard of care was breached" and that the breach proximately caused injury, and then must set forth the reasons for these opinions. *See id.* § 78B-3-423(2)(b). If the panel found breach of the standard but not causation

of injury, the health care provider affidavit only must include the opinion that injury was caused by the breach and the reasons for that opinion. *See id.* § 78B-3-423(2)(c). Essentially, the affidavit of merit functions as a second opinion to the panel's conclusions. If the panel finds merit, the affidavit of merit is not required; however, if the panel finds the claim nonmeritorious, then the claimant must produce sworn expert opinion testimony supporting the claim before filing suit.

By allowing a retrospective challenge, the new statutes also anticipate defense claims that the affidavit of merit is in fact without merit or not credible and did not properly support a lawsuit. If the health care provider successfully defends the lawsuit by obtaining judgment or dismissal, then the provider may obtain an award of attorneys' fees and expenses by showing that the affidavit of merit contained allegations that were without reasonable cause and untrue in light of the information available to the plaintiff when the affidavit was submitted. *See id.* § 78B-3-423(5). To help make this showing, the defendant health care provider may depose the health care provider who provided the affidavit of merit and may introduce the affidavit into evidence. *See id.* § 78B-3-423(5)(b), (c).

This new affidavit of merit requirement applies to all causes of action arising on or after July 1, 2010, *see* Utah Code Ann. § 78B-3-423(7) (2010), except for claims against dentists. Because the statutes now exclude claims against dentists from the certificate of compliance requirement, the statutes effectively exempt such claims entirely from the prelitigation panel process, including the subsidiary affidavit of merit requirement. *See id.* § 78B-3-412(1)(a), (b).

B. Changes to Timing and Procedure

1. Certificate of Compliance.

The changes to the prelitigation panel procedure include several procedural and timing changes which reflect the new affidavit of merit requirement and address other procedural issues. One such change is the express provision for a certificate of compliance, which was not previously included in the statute, although DOPL had established a certificate of compliance procedure by rule. *See* Utah Admin. Rules R156-78B-14(3) (January 21, 2010). Section 78B-3-418 now expressly requires a certificate of compliance and further expressly states that the certificate "is proof that the claimant has complied with all

conditions precedent under this part prior to the commencement of litigation as required in Subsection 78B-3-412(1)." *Id.* The inclusion of the certificate of compliance procedure in the statutes reflects the fact that it is used to enforce the affidavit of merit requirement and also relates to the changes to the deadline for completing panel review and to the changes to the tolling provision.

2. 180-day Deadline for Completion of Panel Review.
Under the prior statute, filing a request for prelitigation panel review triggered a 180-day period within which the prelitigation panel hearing must be completed. *See* Utah Code Ann. § 78B-3-416(3)(b)(I) (2008). Absent the parties' written stipulation to extend that 180-day period, at the end of that time DOPL would automatically lose jurisdiction over the matter and the claimant would be deemed to have satisfied the prelitigation panel review requirements (and therefore be free to file suit). *See id.* § 78B-3-416(3)(b)(ii). Although DOPL has established scheduling requirements and rules aimed at facilitating timely completion of panel review, *see* Utah Admin. Rules R156-78B-9 (January 21, 2010), scheduling disputes nevertheless still arise. In addition, there have been cases where claimants appear to attempt evasion of the panel hearing requirement by delaying action on the hearing until the 180-day period expires.

Under the 2010 amendments, the expiration of the default 180-day period no longer results in a loss of DOPL jurisdiction and termination of prelitigation. (The amended statute still permits parties to stipulate to a longer period). Instead, if the panel hearing has not occurred by then, the claimant must either submit an affidavit of merit or must submit an affidavit alleging that the respondent has failed to reasonably cooperate in scheduling the hearing. *See* Utah Code Ann. § 78B-3-416(3)(c) (2010). If the claimant decides to offer an affidavit of merit, that must be filed within sixty days of the end of the 180-day period. *See id.* § 78B-3-423(1)(a)(ii). In contrast, if the claimant takes the second option and files an affidavit alleging non-cooperation, it must be filed within the original 180-day period. *See id.* § 78B-3-416(3)(c)(ii). Upon receiving an affidavit alleging non-cooperation, DOPL has fifteen days to determine whether either respondent or the claimant failed to cooperate in scheduling. *See id.* § 78B-3-416(3)(d)(ii). If DOPL concludes that the claimant cooperated but the respondent did not, then DOPL will issue a certificate of compliance, *see id.* § 78-B-3-416(3)(d)(ii)(A), essentially excusing the claimant from the prelitigation hearing requirement and the need for an affidavit of merit. If, however, DOPL makes any other finding (*i.e.*, that the claimant did not cooperate or both did not cooperate), then the claimant must submit an affidavit of merit within thirty days of DOPL's determination in order to obtain a certificate of compliance. *See id.* §78B-3-416(3)(d)(ii)(B); *id.* § 78B-3-418(3)(c).

Where the affidavit of merit is required because of a non-meritorious panel opinion, it must be filed with DOPL and served on defendants within sixty days of the date of the panel opinion. *See id.* § 78B-3-423(1)(a)(I), (b). The claimant may obtain an extension of this affidavit of merit deadline of up to sixty days by – no later than sixty days after the panel's non-meritorious opinion and with notice to DOPL – submitting to respondents an affidavit averring that the statute of limitations would impair the action and that the affidavit of merit could not be obtained before the expiration of the statute of limitations. *See id.* § 78B-3-423(1)(a)(I), (4). (The statute's specific reference to the panel opinion implies that the deadlines for submitting an affidavit of merit in other contexts may not be extended in this way.)

3. Changes to Tolling Provision
The amendments also change the tolling provision. Previously, the filing of a request for prelitigation panel review tolled the statute of limitations until the **earlier** of sixty days after issuance of the panel opinion or sixty days after DOPL jurisdiction ceased. *See id.* § 78B-3-416(3)(a) (2008). With the amendments, filing a request for hearing still tolls the statute of limitations, but the tolling now extends to the **later** of (1) sixty days following the issuance of a panel opinion or the issuance of a certificate of compliance or (2) 180 days from the request for prelitigation panel review. *See id.* § 78B-3-416(3)(a) (2010). Because the amended statutes provide at least six routes to a certificate of compliance, *see id.* § 78B-3-418(3), which have varying time lines, the time when tolling ends may vary substantially depending on which procedural route has been followed.

Conclusion
The 2010 Medical Malpractice Amendments introduced the first significant changes to the statutes governing medical malpractice litigation in Utah in nearly a decade. It remains to be seen how these changes will affect the nature of this area of practice. However, all attorneys practicing in this area will need to become familiar with these changes and their impact on the medical malpractice litigation process in order to effectively represent clients in such matters.

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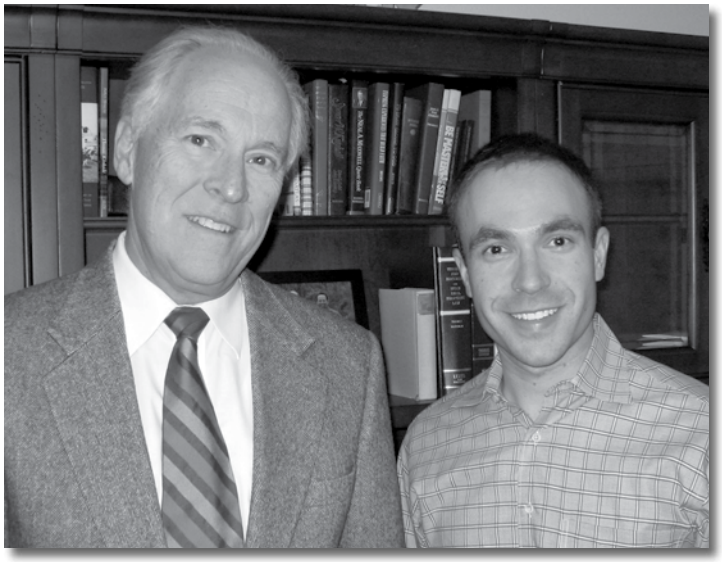
New Lawyer Training Program: Helping Lawyers through The Great Recession

by Zachary W. Derr

After my swearing-in ceremony at the Salt Palace, I received congratulations from some of the older members of the Bar. We spoke about the difficult economic times and pro bono opportunities for new lawyers. The conversation then turned to thoughts on the New Lawyer Training Program ("NLTP"). Although I did not have much to say, I specifically remember their enthusiasm about the program; they were anxious to see it implemented. Initially, I was eager to finish the requirements and move on with being a lawyer. However, the NLTP has been a fantastic learning experience and aided me in setting up my own law practice.



NLTP mentor Jim Backman with new attorney Zachary Derr.

In many ways, my experience, both as a new lawyer and as a participant in the NLTP is typical of new lawyers throughout the state. Like other lawyers, I have seen major changes in the profession during 2009 and 2010. New attorneys should be glad to have a program like the NLTP during this difficult economic time to help them in their practice.

I was fortunate to select as my mentor Jim Backman, an accomplished professor at the J. Reuben Clark Law School at Brigham Young University and one of the authors of the NLTP program.

The business of law is changing, and I believe the change is here to stay. Few law firms are hiring and cash-strapped state and municipal budgets have reduced the number of opportunities for attorneys to work in government. As a result, many new attorneys are starting their own firms and trying to make a living as solo practitioners.

I graduated from The George Washington University School of Law in 2009 during the worst legal market since the Great Depression. I was lucky to have an offer at a small firm in Lehi. I took the job, but, because of slow work, the firm could not afford to keep me on salary. For several months, I looked for a job and had some interviews but no offers. As I was looking, a good friend and mentor referred a small business owner to me to write a letter of intent for a contract. This small business owner gave me more work and I gradually picked up a few more clients. In May, I stopped sending out resumes, and set up my firm, Foxhall Legal, LC.

Working on my own has been a great learning experience. My mentor also taught me a great deal. Below are some things I have learned during this first year of practice:

1. Solo Practice Offers Great Freedom

I became a solo practitioner out of necessity, but I enjoy it. I love the freedom it offers, which is something rare in the legal profession. For example, I go skiing every Thursday. If I want to spend time with my family during the day, I can work in the early morning or after my children go to bed without worrying about face time at the office.

The main challenge in solo practice is keeping up with the day to day demands of running the business. It's easy to put off filing and recording mileage and expenses. It's also tedious to send invoices and worry about collecting fees.

My mentor helped me through all the phases of setting up my own firm. He put me in touch with other solo practitioners and

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pointed me to information about setting up a practice in the digital age.

2. Network and Find Helpful Colleagues

When I was at a firm, I could walk down the hall and ask other attorneys questions. As a solo practitioner, I have learned to rely on emails, instant messaging, and phone calls to colleagues. Fortunately, I received advice, forms, and assistance from mentors, law school friends, and attorneys I met through networking. It's nice to talk through things with another attorney to see if I am on the right track. My mentor helped talk me through some tough situations and prepare for hearings.

Getting the right forms has saved me a lot of work and helped me in drafting documents. Most of my work has been transactional and getting the right forms has made all of the difference in developing my practice. However, I've found it's important to know how to use the forms and how to change them to fit the needs of clients. Forms can be dangerous. Even with the right forms, areas can be more complicated than they appear on the surface. I would advise anyone using forms to spend the necessary time getting familiar with the area of practice before using the form. My mentor helped me find forms and the underlying legal concepts.

3. Be Courteous but Stand Firm

When I started my solo practice, I expected opposing counsel to be courteous and accommodating. Most of the attorneys I've encountered have been very pleasant and professional. However, I was disappointed to find that in other cases, opposing counsel often tried to bully me and take advantage of my inexperience.

In one case, the opposing side tried to use hardball tactics to get me to reveal information about the case that would have been detrimental to my client. At first, I doubted myself and worried that I should be giving them this information. In this situation, it was invaluable to have a mentor to help me recognize I was being bullied and that I should stand my ground. My mentor even took my frantic call when he was on a family vacation.

The Bar has made a tremendous effort in advocating civility, but, unfortunately, many attorneys still "play hardball." In these situations, I've found that it still pays to be courteous and accommodating.

4. Spend Money Wisely

When I first started my business, it was hard to spend money on anything that was not absolutely necessary. I initially had a friend do my website for free, resulting in a very nice website that was essentially an online business card. No one would find it online unless they had the web address. I decided to invest in a marketing and web design company to redesign my website and help me with search engine optimization to actually direct potential clients to my websites.

A virtual office has worked well for my practice. I pay under $100 a month and have a conference room available, an office number, live answering, and an office address. Renting an office space and paying for staff can be very expensive and may be initially unnecessary.

5. Avoid Non-Payment

It only takes not being paid once for most attorneys to change the way they bill clients. Although it may scare some clients away, a retainer protects the attorney and ensures prompt payment. Although most of my clients have paid, some have waited a month or two to send payment. A retainer provides immediate payment; after billing the client, I can simply withdraw earned fees. When charging a flat fee, get the money upfront to avoid headache down the road.

In short, I've discovered that I enjoy solo practice; I've been fortunate to find helpful colleagues and learned to stand my ground, invest in my business and get paid for my work. My first year has been a great experience, in large part thanks to the help of a great mentor. The NLTP helped me as a new lawyer and I hope that I can be a mentor sometime in the future.

Avoiding Ethical Landmines: A Review of the 2010 OPC Annual Report

by Keith A. Call

The Utah Constitution gives the Utah Supreme Court authority to adopt and enforce rules governing the practice of law in Utah, including attorney discipline. *See* Utah Const. Art. VIII, § 4. In turn, the Utah Supreme Court has given the Office of Professional Conduct broad authority to receive, investigate, and in some cases prosecute claims of attorney misconduct. *See* Supreme Court Rules of Professional Practice, Rule 14-501 et seq.

The OPC currently consists of ten full-time employees, which include Senior Counsel, five Assistant Counsels, two Paralegals, one Legal Secretary/Assistant to Counsel, and one Intake Clerk. The OPC is charged with (among other things) screening allegations or information relating to lawyer misconduct, performing investigations, and prosecuting lawyer misconduct cases on behalf of the Bar. Every year it prepares an annual report describing its work and the work of the Ethics and Discipline Committee. Its August 2010 Annual Report is currently available online at www.utahbar.org/opc/Assets/2009_2010_annualreport.pdf.

The Report contains several interesting facts and statistics. For example, during its fiscal year July 1, 2009 to June 30, 2010, the OPC opened 1085 new cases. 313 of those new cases were "informal complaints." (An "informal complaint" is a written, notarized, and verified document alleging attorney misconduct. It is not a "formal complaint" that one would file with a District Court.) 765 of the new cases were "requests of assistance." A "request for assistance" can range from an informal inquiry to a serious allegation of attorney misconduct, but lacking the formality of a notarization or verification.

During the same fiscal year, the OPC closed 1068 cases. (Because cases do not open and close neatly in each fiscal year, statistics regarding closed cases do not directly correspond to opened cases, but they are instructive.) 57 cases (about 5% of all cases closed) concluded with orders of discipline. 37% of those orders of discipline were by stipulation. The orders of discipline included one disbarment, 17 public reprimands, 17 suspensions, 10 resignations with discipline pending, and 12 admonitions.

The OPC declined to prosecute 73 informal complaints and 556 requests for assistance, a total of about 59% of all cases closed. The total number of informal complaints or requests for assistance that were closed due to dismissal (after investigation, screening panel hearing, or summary disposition), the OPC's decision not to prosecute, or that were returned to the complainant for notarization was 981, or 92% of all cases closed during the fiscal year.

The Annual Report also provides a breakdown of disciplinary orders according to the ethical rules that were violated. A summary chart of that breakdown appears in the accompanying window.

Given all the public discourse I have seen and heard regarding conflicts of interest, I was surprised to see violations of Rules 1.7 and 1.8 so low on the list. I was disappointed to see ethical violations that apparently involve dishonesty and deceit so high on the list. And I was heartened to see that many of the violations high on the list appear to be mistakes that are correctable with careful education, training, and practice. These include problems such as poor client communication, lack of diligence, improper supervision of others, and missing court appearances. Watch for practice pointers addressing some of these high-rate, but correctable, offenses in future editions of *Focus on Ethics and Civility.*

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Fiscal Year 2009-10 Disciplinary Orders by URPC rule violation. Note that percentages of actual rule violations exceed 100% because each order of discipline generally includes multiple rule violations.

Percentage	Rule		Percentage	Rule	
35.1%	1.15	Safekeeping Property	7.02%	8.4(d)	Misconduct Prejudicial to the Administration of Justice
31.6%	1.4	Communication	7.02%	7.5	Firm Names and Letterheads
21.1%	1.3	Diligence	7.02%	4.2	Communication with Persons Represented by Counsel
15.8%	8.1	Bar Admission & Disciplinary Matters	5.26%	3.3	Candor Toward the Tribunal
15.8%	1.5	Fees	5.26%	1.8	Conflict of Interest: Current Clients: Specific Rules
14.0%	5.3	Responsibilities Regarding Nonlawyer Assistants	5.26%	1.6	Confidentiality of Information
14.0%	1.2	Scope of Representation and Allocation of Authority Between Client & Lawyer	3.51%	5.5	Unauthorized Practice of Law; Multijurisdictional Practice of Law
12.3%	8.4(c)	Misconduct – Deceit, Fraud, Misrepresentation	3.51%	1.14	Client with Diminished Capacity
10.5%	8.4(b)	Misconduct – Criminal Act	1.75%	5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
10.5%	1.1	Competence	1.75%	3.2	Expediting Litigation
8.8%	1.16	Declining or Terminating Representation	1.75%	1.7	Conflict of Interest: Current Clients

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 3rd. 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 1, 2011, with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15, 2011.

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 1, 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 15, 2011.

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 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.

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2011 Utah State Lawyer Legislative Directory

Patrice Arent (D) – District 36 (Elected to House: 1996, Elected to Senate: 2002, Re-Elected to House 2010)

Education: B.S., University of Utah; J.D., Cornell University

Committee Assignments: Education, Law Enforcement & Criminal Justice, and Higher Education Appropriations

Practice Areas: Adjunct Professor, S.J. Quinney College of Law – University of Utah; Past experience: Former Division Chief – Utah Attorney General's Office, Former Associate General Counsel to the Utah Legislature, and private practice

F. LaVar Christensen (R) – District 48 (Elected to House: 2002, Re-elected 2010)

Education: B.A., Brigham Young University; J.D., University of the Pacific, McGeorge School of Law

Committee Assignments: Education (Vice Chair), Judiciary, and Public Education

Practice Areas: Mediator and Dispute Resolution, Real Estate Development and Construction, Civil Litigation, Family Law, General Business and Contracts.

Derek Brown (R) – District 49 (Elected to House: 2010)

Education: B.A., Brigham Young University; J.D., Pepperdine Law School

Committee Assignments: Business & Labor, Judiciary, and Infrastructure & General Government

Practice Areas: General Business, Education, Technology, and Intellectual Property.

Kenneth R. Ivory (R) – District 47 (Elected to House: 2010)

Education: B.A., Brigham Young University; J.D., California Western School of Law

Committee Assignments: Public Utilities & Technology, Judiciary, and Public Education

Practice Areas: Mediation, General Business, Commercial Litigation, and Estate Planning

Brian King (D) – District 28 (Elected to House: 2008)
MINORITY ASSISTANT WHIP

Education: B.S., University of Utah; J.D., University of Utah College of Law

Committee Assignments: Judiciary; Revenue & Taxation; Ethics; Executive Appropriations; Business, and Economic Development & Labor

Practice Areas: Representing claimants with life, health, and disability claims; class actions.

Kay L. McIff (R) – District 70 (Elected to House: 2006)

Education: B.S., Utah State University; J.D., University of Utah College of Law

Committee Assignments: Higher Education and Judiciary (Chair)

Practice Areas: Former presiding judge for the Sixth District Court, 1994–2005. Before his appointment, he had a successful law practice for many years, most recently as a partner in the McIff Firm.

Kraig J. Powell (R) – District 54 (Elected to House: 2008)

Education: B.A., Willamette University; M.A., University of Virginia; J.D., University of Virginia School of Law; Ph.D., University of Virginia Woodrow Wilson School of Government

Committee Assignments: Education, Government Operations (Vice Chair), and Social Services

Practice Areas: Powell Potter & Poulsen, PLLC; Municipal and Governmental Entity Representation; and Zoning and Land Use

Lyle W. Hillyard (R) – District 25 (Elected to House: 1980; Elected to Senate: 1984)

Education: B.S., Utah State University; J.D., University of Utah College of Law

Committee Assignments: Executive Appropriations (Chair), Public Education, Education, Judiciary, and Law Enforcement & Criminal Justice

Practice Areas: Family Law, Personal Injury, and Criminal Defense

Daniel R. Liljenquist (R) – District 23 (Elected to Senate: 2008)

Education: B.A., Brigham Young University; J.D., University of Chicago Law School

Committee Assignments: Commerce & Workforce Services, Health & Human Services, Business and Labor, Government Operations and Political Subdivisions, and Retirement & Independent Entities (Co-Chair)

Practice Area: Focus Services, LLC

Mark B. Madsen (R) – District 13 (Elected to Senate: 2004)

Education: B.A., George Mason University, Fairfax, VA; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Transportation, Environmental Quality, National Guard and Veterans' Affairs, Judiciary, Law Enforcement & Criminal Justice, Workforce Services & Community and Economic Development (Chair), and Senate Rules

Practice Area: Eagle Mountain Properties of Utah, LLC

Benjamin M. McAdams (D) – District 2 (Appointed to Senate: 2009)

Education: B.A., University of Utah; J.D., Columbia Law School

Committee Assignments: Executive Offices and Criminal Justice Appropriations, Senate Revenue and Taxation Committee, Senate Judiciary, Law Enforcement, and Criminal Justice

Practice Area: Salt Lake City Corporation

Ross I. Romero (D) – District 7 (Elected to Senate: 2004)
MINORITY WHIP

Education: B.S., University of Utah; J.D., University of Michigan Law School

Committee Assignments: Executive Appropriations, Higher Education, Judiciary, Law Enforcement & Criminal Justice, and Revenue and Taxation

Practice Areas: Civil Litigation, Labor & Employment, Intellectual Property/Information Technology, and Government Relations & Insurance Tort

Stephen H. Urquhart (R) – District 29 (Elected to House: 2000; Elected to Senate: 2008)

Education: B.S., Williams College; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Higher Education, Business and Labor, and Transportation & Public Utilities & Technology (Chair)

John L. Valentine (R) – District 14 (Elected to House: 1988; Appointed to Senate: 1998; Elected to Senate: 2000)

Education: B.S., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Higher Education, Business and Labor (Chair), Revenue and Taxation, and Ethics

Practice Areas: Corporate, Estate Planning, and Tax

Congratulations to New Admittees

Congratulations to the new lawyers sworn in at the joint admissions ceremony to the Utah Supreme Court and the U.S. District Court of Utah held on October 13, 2010.

Levi S. Adams
Adam Alba
Chaudhry M. Ali
Christopher M. Alme
A. Douglas Anderson
Jessica Lee Anderson
John-David Anderson
Darrell J. Andrew
Dirk Gregory Anjewierden
Jason T. Baker
Amirali Daniel Barker
Maren Barker
Dana A. Barnhill
Benjamin T. Beasley
Christine C. Beck
Eldon W. Beck
Adrienne J. Bell
MaryAnn Bennett
Aaron K. Bergman
Geoffrey Kris Biehn
Einar C. Bjarnson
Annette N. Borchardt
Melinda K. Bowen
Sarah N. Box
April E. Bradley
Donna M. Bradshaw
David E. Brown
Marco C. Brown
S. Spencer Brown
John R. Bucher
Britton R. Butterfield
Jason J. Butterfield
Callie Buys
Paul Cabrera
David T. Call
Brittany R. Cameron
Joshua B. Cannon
Nathan G. Caplin
Anthony J. Capone
Mark L. Carlson
Joseph R. Caudell
Jess A. Cheney
Ariel Chino
Jeffrey K. Christensen
John W. Christiansen
Chayce David Clark
Ryan G. Clark
Eric W. Clarke
James L. Colvin
Timothy M. Considine
Kirk C. Coombs
Kent R. Cottam
Robert J. Coursey
Curtis C. Cox
Jill Elizabeth Crane
Carol Sue Crismon
Bret J. Crowther
Brady L. Curtis
Peter A. Daines
John P. Davis
Kristen L. De Pena
Timothy S. Deans
Daniel F. Degener
Benjamin L. Demoux
D. Grant Dickinson
Cameron Brady Diehl
Jacob W. Dowse
Marie B. Durrant
Jonathan B. Dykema
Mariah Dylla
Mark A. Echohawk
Laura Edwards
Miriah R. Elliott
Elizabeth L. Ellis
Scott W. Ellis
Joshua B. Erekson
Douglas P. Farr
Darin S. Featherstone
Robin Lee Filion
Christopher Jon Finley
April A. Fletcher
F. William Fountain
Kelly A. Fowler
Elizabeth M. French
Ruthanne Frost
Jeffrey D. Fullmer
Amber N. Fullwood
Chad E. Funk
Harvey D. Gailey
Daniel T. Gardiner
Dustin D. Gibb
Robert W. Gibbons
Darcy M. Goddard
Sarah E. Goldberg
Megan J. Grant
Jerry Gray
Garrett A. Gross
Robert Scott Gurney
Beau D. Hancock
Melanie M. Haney
Landon A. Hardcastle
Abram K. Hardy
Michelle V. Harvey
Aunnaley M. Hasler
Tyler M. Hawkins
Ron W. Haycock
Jason D. Haymore
David S. Head
Christian K.G. Henrichsen
Austin J. Hepworth
Bryan Ray Hepworth
Justin D. Hess
Julie Hibbert
Lorie Z. Hobbs
David T. Holman
Ryan Nelson Holtan
Samuel A. Hood
Daniel A. Hopkinson
Allison R. Hughes
Jared D. Hunsaker
Ashton J. Hyde
D. Russell Hymas
Rachel Jacques
Peter A. Jay
Matthew J. Jeffs
Steven K. Jensen
Bradley A. Jeppsen
Justin C. Jetter
Steven J. Joffee
Brent H. Johnson
David P. Johnson
K. Ray Johnson
Jonathan M. Jones
Paul A. Jones
Robb B. Jones
Tyler B. Jones
Paul J. Justensen
Adam M. Kaas
Jason E. Kane
Michelle K. Kang
Michael D. Karras
Michelle W. Kasteler
Kennard J. Keeton
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Brian Knox
Jonathan Paul Koerner
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Jennifer C. Langi
Adam G. Larson
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Emily E Lewis
Elisabeth Liljenquist
Jenifer C. Lloyd
Matthew David Lorz
Courtney N. Lyle
Gregory B. Lyle
Jacob W. Macfarlane
Valerie Ann Macris
Bradley W. Madsen
Christopher O. Madsen
Ryan D. Marsh
Shane A. Marx
Philip A. Matthews
Sarah W. Matthews
Mary Ann C. May
Emily McKenzie
Mary M. McMahon
Brandon S. Mecham
Alissa M. Mellem
Jason M. Merrill
Breanne M. Miller
Brian Alan Mills
Benjamin Todd Miskin
Emily E. Moench
Joseph D. Montedonico
Raquel Myers
Daniel Gary Nelson
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Greg Morris Newman
Brian Jay Nicholls
Platte Seth Nielson
Tara Nielson
Jesse M. Nix
Tracy J. Nuttall
Ryan T. Oldroyd
Robert A. Oliver
Matthew Tyler Olsen
Paul E. Ordyna
Shane A. Orians
Rueann Ormand
Matthew J. Orme
Edrick Jay Overson
Michael D. Palumbo
Tiffany P. Panos
Michael G. Pate
Jennifer O. Patel
David Alan Petersen
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Brandon C. Pond
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Matthew J Prieksat
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Jordan K. Rolfe
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Scott O. Stratton
Nathanael L. Swift
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Heather J. Tanana
Colleen C.Tanner
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Brian A. Taylor
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How Utah Celebrated Pro Bono

On the last week of October 2010 Utah joined other states throughout the country in festivities around National Pro Bono Celebration week. The American Bar Association launched the Pro Bono Celebration initiative in 2009 due to the increasing need for pro bono services during harsh economic times and the unprecedented response of attorneys to meet this demand. Goals for the celebration included recruiting more pro bono volunteers and increasing legal services to poor and vulnerable people, mobilizing community support for pro bono, fostering collaborative relationships, and recognizing the pro bono efforts of America's lawyers.

Utah met all of the above-mentioned goals. Together with Utah Legal Services and Pro Bono Initiative of the S.J. Quinney College of Law, the Utah State Bar started planning for the events six months in advance. Utah Governor, Gary Herbert; Salt Lake County Mayor, Peter Carroon; and Salt Lake City Mayor, Ralph Becker issued official proclamations that announced the last week of October 2010 as Pro Bono Celebration week in their jurisdictions.

The Pro Bono week started on Monday, October 25th, with an opening ceremony followed by a reception at the S.J. Quinney College of Law that featured guest speakers, Lt. Governor Greg Bell, Bar President Robert Jeffs, and Dean of the S.J. Quinney College of Law, Hiram Chodosh. The Bar President lead the meeting and emphasized the importance of serving the community we live in. Brenda Teig, former Utah Legal Services Director, announced names of attorneys that provided outstanding pro bono service and handed out awards. Lt. Governor Bell, an alumni of the S.J. Quinney College of Law, talked about his experience as a lawyer and why it is important to give back. The keynote speaker, Dean Hiram Chodosh, spoke about the Service Academy initiative that focuses on providing service in various professional areas and how the S.J. Quinney College of Law is working on implementation of the model.

Keynote Speaker, Dean Hiram Chodosh, at the Opening Ceremony of the Pro Bono Celebration Week

The week featured expanded state-wide legal clinics that included Tuesday Night Bar, Guadalupe Legal Clinic, and Tuesday Night Clinic at the Utah Valley University in Orem. Free CLEs on Bankruptcy conducted by an experienced bankruptcy attorney, David Berry, and Basics of Divorce and Child Custody conducted by Stewart Ralphs of the Legal Aid Society of Salt Lake, were offered to attorneys who volunteer to do pro bono legal work.

A highlight of the week on Wednesday, October 27, 2010, was a free public screening of the feature film "Chasing Freedom" followed by a panel discussion on immigration. The Utah State Bar partnered with the Salt Lake Film Society that donated Tower Theater to hold the event. International Company Entertainment One gave permission to the Utah State Bar to show the film without charge, taking into account the charitable focus of the event. Panelists included Barbara Szweda, Legal Director of the Health and Human Right Project, Leonor Perretta, Immigration attorney with fifteen years of experience and Chair of the Utah Chapter of the American Immigration Law Association, and Jon Hill, a Court Administrator for the Salt Lake City Immigration Court. Attorneys that attended the event and the general public were able to learn about the difficulties that immigrants and asylum seekers face while entering the country and how the initiative of individual attorney volunteers can help them overcome these barriers. Barbara Szweda regularly conducts trainings on representing asylum seekers and she had about fifteen volunteers that expressed interest and signed up to participate in the training.

Finally, on Thursday, October 28, 2010 a kick off of the Debtor's Counseling Clinic took place. This is an innovative clinic that was established by the partnership between the Utah State Bar, Utah Legal Services, and the Pro Bono Initiative of the S.J. Quinney College of Law. The initiative is aimed to help low income Utahns address issues of bankruptcy and collections. The Utah Bankruptcy Lawyers Forum was very supportive of the initiative, particularly Jory Trease, who conducted training for the students, provided materials for the public and volunteered at the opening of the Clinic, and Adelaide Maudsley, who spoke at a bankruptcy CLE to help recruit volunteers for the Clinic. Starting January 2011 the Debtors Counseling Clinic will run on the 4th Thursday of the month from 6:00 pm – 8:00 pm excluding holidays at the Salt Lake City Public Library, 4th floor

conference room, 400 South 210 East, Salt Lake City. Please contact Utah State Bar if you are interested in getting involved.

Following the Pro Bono Celebration week was a Homeless Veterans Stand Down at the George E. Wahlen Department of Veterans Affairs Medical Center on November 5, 2010. Among other services veterans were able to get brief legal advice from attorneys that volunteered at the event. The Utah State Bar and the Utah Association for Justice partnered in reaching out to attorneys to provide legal assistance at the Stand Down. We would like to thank Joel Ban, Tammy Georgelas, Diana Cannon, and Elaine Cochran for their help. Please let us know if you are interested in providing legal assistance to the veterans in future.

Opening session of the Debtor's Counseling Clinic at the Salt Lake City Public Library

The Utah State Bar would like to thank all the partners and volunteers that helped make Pro Bono Celebration week a success, and we are also always grateful to those of you who continuously give back to the community despite you busy schedules. The Utah State Bar will in turn continue providing you with an exciting variety of opportunities to serve our community.

Karolina Abuzyarova is the Utah State Bar Pro Bono Coordinator. For information about pro bono opportunities, please contact her at (801) 297-7049 or by email at Karolina.Abuzyarova@utahbar.org.

Fall Forum Award Recipients

Congratulations to the following members of the legal community who were honored with awards at the 2010 Fall Forum:

Timothy B. Anderson
Professionalism Award

Kyle D. Hoskins
Pro Bono Award

Linda Sappington
Community Member of the Year

Did you know… *Utah Bar Journal* archives are available online at www.utahbarjournal.com. Look for us on Facebook too!

WE'RE GROWING TO SERVE OUR CLIENTS

Kirton & McConkie welcomes six new attorneys...

- Richard Page — *International*
- Adam Kaas — *Litigation*
- Carly Williams — *Litigation*
- Lynn McMurray — *Immigration*
- Ronald Maines — *Information Technologies*
- Adam Wahlquist — *Litigation*

WE'RE MAKING A DIFFERENCE

Kirton & McConkie, through the efforts of Shawn Richards, an associate in the firm's Business Litigation section, received the Federal Bar Association's prestigious Pro Bono Firm of the Year Award. At the request of United States District Court Judge Bruce S. Jenkins, Mr. Richards represented pro bono a client in seeking to overturn a 15-year-old criminal conviction.

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Pro Bono Honor Roll

Aaron Tarin – Immigration Court Detained Masters

Adam Crayk – Immigration Court Detained Masters

Alissa Mellem – Tuesday Night Bar

Allen Sims – Domestic Case

April Hollingsworth – Guadalupe Clinic

Asael T. Sorensen – Legal Assistance to Military Program

Barbara Ochoa – Tuesday Night Bar

Barbara Szweda – Immigration Court Detained Masters

Bibiana Ochoa – Immigration Clinic

Brad Christopherson – Tuesday Night Bar

Brent Hall – Family Law Clinic, Domestic Case

Brian Lofgren – Immigration Court Detained Masters

Brian W. Steffensen – Debtor's Clinic

Bryan Nalder – Tuesday Night Bar

Bryan Bryner – Guadalupe Clinic

Candice Pitcher – Rainbow Law Clinic

Charles Roberts – Tuesday Night Bar

Chaudhry Ali – Habeas Corpus case

Chris Martinez – Tuesday Night Bar

Christina Micken – Tuesday Night Bar

Christine Eschenfelder – Immigration Court Detained Masters

Christopher Stout – Tuesday Night Bar

Christopher Eggert – Domestic Case

Christopher Wharton – Rainbow Law Clinic

Clark Snelson – Tuesday Night Bar

Clint Hendricks – Legal Assistance to Military Program

Courtney Klekas – Domestic Case

Cynthia Gordan – Immigration Court Detained Masters

Daniel O'Bannon – Tuesday Night Bar

Daniel Burton – Bankruptcy Hotline

Daniel Robison – Bankruptcy Case

David Pearce – Tuesday Night Bar

David Peterson – Debtor's Clinic, Family Law Clinic

David Wilding – Family Law Clinic

Deb Badger – Domestic Case

Denise Dalton – Family Law Clinic

Diana Cannon – Homeless Veterans Stand Down

Dixie Jackson – Family Law Clinic

Doug Anderson – Tuesday Night Bar

Douglas Springmeyer – Tuesday Night Bar

Elaine Cochran – Homeless Veterans Stand Down

Elizabeth Conley – Needs of the Elderly

Elizabeth Schulte – Tuesday Night Bar

Elizabeth Toscano – Tuesday Night Bar

Emily E. Lewis – Guadalupe Clinic

Eric Paulson – Domestic Case

Esperanza Granados – Immigration Clinic

Francisco Roman – Immigration Clinic

Garth Heiner – Guadalupe Clinic

Gracelyn Bennet – Bankruptcy Hotline

Harry mcCoy II – Needs of the Elderly

Heather Tanana – Guadalupe Clinic

Jacob Santini – Tuesday Night Bar

James Shinault – Domestic Case

Jana Tibbitts – Family Law Clinic

Jane Semmel – Needs of the Elderly

Jason Grant – Family Law Clinic

Jay Kessler – Needs of the Elderly

Jason Kane – Bankruptcy Hotline

Jeannine Timothy – Needs of the Elderly

Jeffrey Aldous – Domestic Case

Jeffry Gittins – Guadaulpe Clinic

Jenette Turner – Tuesday Night Bar

Jennifer Merchant – Tuesday Night Bar

Jeremy McCullough – Bankruptcy Case

Jerry D. Reynolds – Domestic Case

Jessica McAuliffe – Needs of the Elderly

Jesse Nix – Rainbow Law Clinic

Jim Baker – Needs of the Elderly

Joel Ban – Homeless Veterans Stand Down

John Zidow – Tuesday Night Bar

John C. Heath – LL/Tenant Case

Jonathan Benson – Immigration Clinic

Jory Trease – Debtor's Clinic

Judith LC Ledkins – Family Law Clinic

Kalin Ivany – Immigration Court Detained Masters

Karen Allen – Rosevelt Legal Clinic

Kass Harstad – Guadalupe Clinic

Kathie Brown Roberts – Needs of the Elderly

Kelly Latimer – Tuesday Night Bar

Ken Prigmore – Domestic Case

Kerry Willets – Bankruptcy Case

Kevin Bolander – Tuesday Night Bar

Kyle Fielding – Guadalupe Clinic

Lance Starr – Immigration Court Detained Masters

Langdon Fisher – Family Law Clinic

Laurie Hart – Needs of the Elderly

Lauren Barros – Rainbow Law Clinic

Lauren Scholnick – Guadalupe Clinic

Leonor Perretta – Immigration Court Detained Masters

Leslie Kay Orgera – Tuesday Night Bar

Linda F. Smith – Family Law Clinic

Lois Baar – Needs of the Elderly

Louise Knauer – Family Law Clinic

Maria Saenz – Immigration Clinic

Mary Z. Silverzweig – Bankruptcy Hotline

Matt Thorne – Tuesday Night Bar

Matt Well – Tuesday Night Bar

Melanie Clark – Needs of the Elderly

Melanie Hopkinson – Family Law Clinic
Michael Thatcher – Tuesday Night Bar
Michael Thomas – Tuesday Night Bar
Michael Gehret – Tuesday Night Bar
Michael Melzer – Family Law Clinic
Mike Jensen – Needs of the Elderly
Mona Burton – Tuesday Night Bar
Nathan Miller – Needs of the Elderly
Nicholle Beringer – Bankruptcy Hotline
Paul Amman – Tuesday Night Bar
Phillip S. Ferguson – Needs of the Elderly
Philip Jones – Bankruptcy Case
Rachel Otto – Guadalupe Clinic
Rebecca Ryon – Tuesday Night Bar
Rex Bush – Tuesday Night Bar
Richard Mrazik – Tuesday Night Bar
Robert Brown – Tuesday Night Bar
Robert Scott – Tuesday Night Bar
Robert Froerer – Domestic Case
Roberto Culas – Domestic Case
Roger Hoole – Tuesday Night Bar
Russell Yauney – Family Law Clinic, Debtor's Clinic
Ryan Bolander – Tuesday Night Bar
Ryan Oldroyd – Immigration Clinic
Sara Becker – Tuesday Night Bar
Sarah Hardy – Domestic Case
Scott Sabey – Tuesday Night Bar
Scott Thorpe – Bankruptcy Case, Needs of the Elderly
Shauna O'Neil – Family Law Clinic, Bankruptcy Hotline, Debtor's Clinic
Sharon Bertelsen – Needs of the Elderly
Shawn Stewart – Tuesday Night Bar
Shawn Foster – Immigration Clinic, Immigration Court Detained Masters
Shellie Flett – Bankruptcy Hotline, Bankruptcy Case
Simon Cantarero – Tuesday Night Bar
Skyler Anderson – Immigration Clinic, Immigration Court Detained Masters
Stacey Schmidt – Domestic Case
Stacy McNeill – Guadaulpe Clinic
Stephen Knowlton – Family Law Clinic
Steve Stewart – Guadaulpe Clinic
Steven Tyler – Tuesday Night Bar
Steven Burton – Tuesday Night Bar
Stewart Ralphs – Family Law Clinic
Susan Griffith – Family Law Clinic
Tadd Dietz – Guadalupe Clinic
Tammy Georgelas – Homeless Veterans Stand Down
Tiffany Smith – Tuesday Night Bar
Tiffany Panos – Family Law Clinic, Guadalupe Clinic
Timothy G. Williams – Needs of the Elderly
Todd Anderson – LL/Tenant Case
Tom Schofield – Tuesday Night Bar
Tracey M. Watson – Family Law Clinic
Trevor Bradford – Tuesday Night Bar
Trevor Gordon – Tuesday Night Bar
Tyler Waltman – Guadalupe Clinic
William Downes Jr. – Tuesday Night Bar

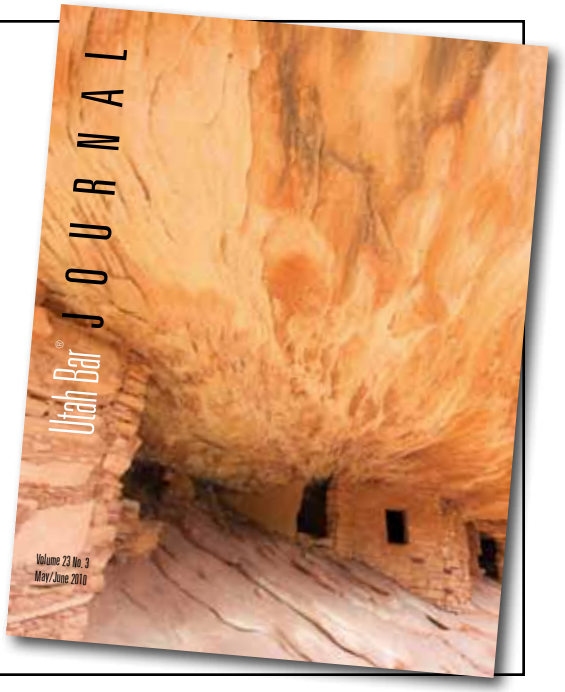
The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in October and November 2010. Call Karolina Abuzyarova at (801) 297-7027 or C. Sue Crismon at (801) 924-3376 to volunteer.

2010 Utah Bar Journal *Cover of the Year*

The winner of the *Utah Bar Journal* Cover of the Year award for 2010 is second-time contributor, George Sutton, of Salt Lake City, Utah. His photo, "House on Fire," was taken near Blanding, Utah. It appeared on the cover of the May/June issue.

George is one of eighty-two members of the Utah Bar, or Paralegal Division of the Bar, whose photographs of Utah scenes have appeared on covers since August, 1988. Five out of six of the cover photos in 2010 were submitted by first-time contributors.

Congratulations to George, and thanks to all who have provided photographs for the covers.



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.

Notice of MCLE Reporting Cycle

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.

Thank You…

Thank you to all participants and volunteers for their assistance and support in the 21st Annual Lawyers & Court Personnel Food and Winter Clothing Drive. This year's efforts more than doubled the cash raised last year and will benefit countless people in need throughout our community.

More than $42,000 in cash was collected for the Utah Food Bank alone. These funds will provide nearly 154,000 meals in the coming weeks. An additional $7000 was collected for Jennie Dudley's Eagle Ranch Ministry Distribution Center and will provide more than 300 complete turkey or ham meals, assorted vegetables and fruits, and other holiday related food items for homeless individuals and others in need. Other charities benefitting from the annual drive included the Women & Children in Jeopardy Program of the YWCA and the Rescue Mission. The generosity of the legal community is sincerely appreciated.

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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.

PUBLIC REPRIMAND
On November 4, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Kerry F. Willets for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Willets was hired to seek relief under Chapter 7 of the US Bankruptcy code. Mr. Willets received from his client an executed Reaffirmation Agreement. Mr. Willets claims that the Reaffirmation Agreement was sent to the bank, however, Mr. Willets admitted that he failed to confirm that the bank (1) had received the necessary document and (2) filed it. The failure of having the Reaffirmation filed caused the client to have his car unnecessarily repossessed, to miss work, and to re-open and remedy his bankruptcy action pro se. When notified by the client that the bank repossessed the vehicle, Mr. Willets failed to take any action to rectify the situation and failed to communicate with his client. Mr. Willets did not respond to the OPC's Notice of Informal Complaint ("NOIC").

Mitigating factors:
After the client re-opened his own bankruptcy case, Mr. Willets reimbursed fees and costs paid and worked with the client and the bank to relieve the client of any penalties.

Aggravating factors:
Prior record of discipline for similar rule violations; Obstruction of the disciplinary proceeding by failing to comply with the Rules to respond to the OPC's NOIC.

PUBLIC REPRIMAND
On October 29, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against James H. Alcala for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Alcala was hired to represent a client in legal matters. Mr. Alcala failed to follow-up with any regularity regarding the scheduling of an interview for his client with the Mexican Consulate, resulting in the client failing to appear. Mr. Alcala failed to return any calls or emails to his clients, demonstrating a severe lack of diligence. Mr. Alcala failed to keep his clients reasonably informed of the status of their immigration case. Mr. Alcala failed to return phone calls. Mr. Alcala required the paralegals in his office to communicate with his client rather than Mr. Alcala having some level of direct contact with his clients. Mr. Alcala failed to timely return the client's file after it was requested numerous times.

Mitigating factors:
Remoteness and relatively low level of severity of prior offenses and absence of a dishonest or selfish motive.

Aggravating factors:
Prior record of discipline; multiple offenses; and vulnerability of the clients.

PUBLIC REPRIMAND
On October 29, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against James H. Alcala for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Alcala was hired to represent a client in matters relating to the consular process and obtaining an I-601 waiver. Mr. Alcala failed to act with reasonable diligence in advancing the client's case. Mr. Alcala failed to timely communicate critical information to the clients, including the fact that the immigration case had been closed. Mr. Alcala failed to keep his client reasonably informed of the status of his immigration case. Mr. Alcala failed to keep his client informed of the progress on his case, including that an interview at the Mexican Consulate had been scheduled, and later, that the case had been dismissed. Mr. Alcala failed to

keep his client informed, so that the client could make necessary informed decisions.

Mitigating factors:
Remoteness and relatively low level of severity of prior offenses; absence of a dishonest or selfish motive; and Respondent refunded fees to the Complainants.

Aggravating factors:
Prior record of discipline; multiple offenses; and vulnerability of his client.

PUBLIC REPRIMAND
On October 29, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against James H. Alcala for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(b) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Alcala was hired to provide legal services to a client and the client's husband in a family-based immigration petition and adjustment of status. The client later signed a second agreement for an appeal on the adverse decision issued in the first matter. Mr. Alcala failed to offer evidence that the labor certification filed by the client's husband's employer was approvable when filed, as required by applicable statute. Mr. Alcala failed to provide the court with updated tax returns for the individuals sponsoring the client's husband, which should have been submitted prior to the trial. Mr. Alcala refused to take the continuance offered by the judge to obtain the necessary tax returns and evidence related to the certification. Mr. Alcala failed to act with diligence by failing to obtain and present the necessary documentation in advance of the trial. Mr. Alcala failed to adequately explain the decisions available to the clients at trial, including failing to explain the consequences of their decisions.

Mitigating factors:
Remoteness and relatively low level of severity of prior offenses; absence of a dishonest or selfish motive; and legitimate belief in the correctness of the legal position taken at trial.

Aggravating factors:
Prior record of discipline; multiple offenses; and vulnerability of the clients.

PUBLIC REPRIMAND

On October 1, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Matthew G. Nielsen 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:
Mr. Nielsen forged prescriptions for a controlled substance. Mr. Nielsen pleaded no contest to a crime of forging prescriptions. Mr. Nielsen's plea was held in abeyance. Mr. Nielsen successfully completed Drug Court and completed all his urine tests, and Mr. Nielsen attended all hearings. Mr. Nielsen did not harm any clients by his prior drug addiction.

Mitigating factors:
No prior criminal history; no prior discipline history with the OPC; remorse; commitment to continuing drug treatment; and plan for recovery.

RECIPROCAL DISCIPLINE
On October 27, 2010, 2010, the Honorable Keith Kelly, Third Judicial District Court, entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence), 1.16(a) (Declining or Terminating Representation), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. This was a reciprocal discipline order based upon an Order from the United States Court of Appeals for the Tenth Circuit.

In summary:
An individual filed a pro se notice of appeal and a case was opened with the attorney designated as counsel of record. The attorney was sent a case opening letter containing specific directives with regard to the filing of an entry of appearance, payment of the filing fee, filing a docketing statement, and filing a transcript order form. Instructions were provided as to the obligations under Appellate rules and the attorney was encouraged to contact the court with any questions about operating procedures. No action was taken by the attorney. Later, the court sent the attorney a notice that the attorney had not complied with the court's directives. The attorney was advised that the attorney had not filed a copy of the transcript order form or a statement of why a transcript was not ordered in compliance with the Appellate rules; the attorney had not filed an entry of appearance as required by the Appellate rules; that the attorney had not filed a docketing statement as required by the Appellate rules; and that the prescribed fee for the appeal had not been paid. The attorney was given an extension of time to perform these obligations. Again, no response of any kind was forthcoming. Later, the court issued an order to the attorney directing the attorney to the attorney's obligations or be subject to the risk of a disciplinary sanction. Again, no response of any kind was filed. The court subsequently removed the attorney as counsel of record in the appeal due to neglect of the case and failure to comply with court orders. The attorney subsequently filed a response to the show cause order by counsel. The attorney did not dispute the facts that resulted in the Appellate disciplinary proceeding. The attorney asserted, however, that other

circumstances should be taken into consideration. Specifically, the attorney asserted that the attorney was under the impression that the attorney had been discharged by the client and that there were no further obligations as to the representation of the client. Respondent acknowledged that the attorney's understanding of the attorney's duties was erroneous.

In mitigation the OPC considered the following: personal problems.

INTERIM SUSPENSION

On October 20, 2010, the Honorable Keith Kelly, Third Judicial District Court, entered an Order of Interim Suspension Pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, suspending Gary W. Nielsen from the practice of law pending final disposition of the Complaint filed against him.

In summary:

On March 22, 2010, Mr. Nielsen entered a guilty plea to one count of theft, a 2nd degree felony. Based on that guilty plea, on July 26, 2010, a Judgment and Commitment was entered against Mr. Nielsen. The interim suspension is based upon the felony conviction.

INTERIM SUSPENSION

On October 18, 2010, the Honorable Denise P. Lindberg, Third Judicial District Court, entered an Order of Interim Suspension pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, suspending Stephen T. Hard from the practice of law pending final disposition of the Complaint filed against him.

In summary:

On December 3, 2009, Mr. Hard was found guilty of one count of conspiracy and eight counts of wire fraud, aiding and abetting, all felonies. The Judgment and Probation/Commitment Order based on the guilty verdict was entered June 23, 2010. The interim suspension is based upon the felony convictions.

PROBATION

On October 13, 2010, the Honorable Denise P. Lindberg, Third District Court, entered an Order of Discipline: Probation against Nathan Drage for violation of Rules 1.4(b) (Communication), 1.7(a)(2) (Conflict of Interest: Current Clients), 1.8(a)(1) (Conflict of Interest: Current Clients: Specific Rules), 1.8(a)(2) (Conflict of Interest: Current Clients: Specific Rules), 1.15(a) (Safekeeping Property), 1.15(b) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Drage and an individual have had an attorney-client relationship on previous legal matters. Mr. Drage and the individual have had business dealings in the past where there was no attorney-client relationship. The individual and his wife were served with a Complaint from a credit card company. Mr. Drage agreed to represent the individual and his wife in the credit card matter. Mr. Drage decided on a strategy allowing entry of a Default Judgment against the individual and his wife. Mr. Drage did not inform or explain the basis of his strategy to the individual or his wife. Mr. Drage also represented the individual in connection with a merger. The individual was promised 15,000 shares of stock from the merger. The individual received 10,000 shares. The individual sued for the remaining 5000 shares. The suit could not be handled by Mr. Drage because Mr. Drage had business dealings with the principals involved in the merger. Mr. Drage did not clarify the terms of his various business transactions with his clients. Mr. Drage did not disclose in writing information necessary to clarify the business relationships in a manner that could be understood by his clients. Mr. Drage did not inform his client in writing of the desirability of seeking independent legal counsel on the business transactions. Mr. Drage did not keep client funds related to a legal matter in a separate account. Mr. Drage intermingled his own funds with his legal client's funds. Mr. Drage did not segregate business funds from funds related to his legal practice; examples of this are nine checks written on Mr. Drage's trust account were returned for insufficient funds.

DISBARMENT

On September 16, 2010, the Honorable Robert Faust, Third District Court, entered an Order of Discipline: Disbarment against Reed R. Braithwaite for violation of Rules 1.15(a) (Safekeeping Property), 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Braithwaite represented a client's son in a personal injury case. Mr. Braithwaite effectuated a settlement in the personal injury case and received settlement funds. Mr. Braithwaite deposited the settlement funds in his attorney trust account. Mr. Braithwaite then proceeded to transfer the settlement funds from his attorney trust account to his operating account. Mr. Braithwaite transferred money to pay his attorneys fees. Mr. Braithwaite transferred money to pay a medical lien regarding the client's case. Mr. Braithwaite anticipated money from his federal income tax refund. Mr. Braithwaite removed the remaining settlement funds from his trust account to pay operating expenses. Mr. Braithwaite loaned himself money from his trust account with the intent of paying back the money from his receipt of his tax refund. The tax refund was intercepted due to Mr. Braithwaite's delinquent student loan accounts, thus Mr. Braithwaite never received his federal income tax refund. Mr. Braithwaite was unable to give his clients the amount due to them under the settlement agreement. Mr. Braithwaite transferred the client's remaining settlement amount from his trust account to pay his expenses without the permission of the client.

Ethics Hotline

(801) 531-9110

Fast, free, informal ethics advice from the Bar.

Monday – Friday
8:00 am – 5:00 pm

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

Who Needs Pro Bono?

by Angelina Tsu

In 2010, the Utah State Bar conducted a Member Survey. The survey asked members to, among other things, comment on the Bar's pro bono projects. The comments ran the spectrum of extremes from mildly funny to truly disturbing. Some of the more colorful comments appear below.

"[Q]uit asking me to give away 'Wills for Heroes' or give books and coats to the poor…. [These] 'programs'…are not worth the expense and embarrassment."

"[T]he Bar should not be assisting the public. [It] should be our union, not a vehicle [that]…enables cheapskates to get free legal services. If you want children ow [sic], or want to do drugs, don't demand free lawyers."

"Stop trying to GIVE away legal services. Help our members make a living."

Logical fallacies and questionable subject association aside, these people are asking the same basic question: "Who needs pro bono?" I think it's a legitimate question.

> *"If you have an hour a week, an hour a month, or an hour a year and a desire to participate in pro bono or other service, the YLD has a project for you."*

I had my first pro bono experience while working as a second-year associate at a downtown law firm. I was a member of the firm's Tuesday Night Bar Team. If I had to describe the experience in one word, it would be: demoralizing.

My first case involved a person who looked as if he had more than a few brushes with law. It turned out he had only committed a handful of misdemeanors and wanted advice on how to have his criminal record expunged. As he walked me through a laundry list of crimes, I discretely Googled the word "expunged" on my Blackberry. Nearly two hours later, I sent him on his way with a list of things that I (or maybe Google) thought he needed to do. As he walked out the look on his face was unmistakable. He didn't say it, but he didn't have to. I knew what he was thinking: "You made it through law school?"

Because my first encounter took so much time, I was only able to take one other case. This case involved a store owner seeking payment for services performed for a customer. It seemed like a simple breach of contract case. The conversation was a lot better than my prior case. The discussion flowed more freely and I felt like I might actually be able to help this person. Before I was able to offer any advice, he asked me out on a date. It was my first time at Tuesday Night Bar, but I was pretty sure that this was not a part of the services to be provided – so I politely declined.

The horror that was my Tuesday Night Bar experience continued for two more weeks. By the fourth Tuesday, I desperately needed moral support so I invited my friend, Jeremy Delicino, to participate in the "fun." I was paired with Jeremy during his first two appointments to assist if any complicated issues arose. But my assistance was not needed. Jeremy quickly identified the issues and provided the clients with appropriate advice and referrals. His clients repeatedly asked if they could hire him to represent them – he politely (and appropriately) declined. I should've been happy, but I was completely demoralized. I had participated in Tuesday Night Bar three times and nobody had ever asked me to represent them. Indeed, most of my Tuesday Night Bar clients seemed relieved that I would not be representing them.

What I didn't realize at the time was that there were a lot of factors favoring Jeremy as the better candidate for a positive Tuesday Night Bar experience. The biggest was his work experience. I was technically a second-year associate, but having spent my first year as a judicial clerk, I had been at the firm for just six months. My experience with clients consisted of quietly taking notes during meetings while

partners asked questions, framed issues, and resolved problems. Jeremy's experience was completely opposite. In his eighteen months as an attorney, Jeremy completed hundreds of client interviews and two jury trials. While my practice consisted of working on small pieces of large litigation, Jeremy was running his own cases, working with clients and making decisions on strategy. He was confident interacting with clients, and it made a difference.

If my personal experience at the Tuesday Night Bar had been my only encounter with pro bono work, I likely would have authored one – or more – of the comments listed above. Fortunately, I was able to watch a good friend have a very positive pro bono experience. It helped me to see that pro bono can be a productive positive experience for both attorneys and clients. Eventually, I was able to find a pro bono project that matched my interest and skill set. My experience with Tuesday Night Bar helped me to see the importance of finding the right fit in a pro bono project.

As president of the Young Lawyers Division one of my primary goals is to promote a wide range of pro bono and other service projects that allow attorneys of all levels of experience and expertise to have positive pro bono experiences. If you have an hour a week, an hour a month, or an hour a year and a desire to participate in pro bono or other service, the YLD has a project for you. For example, if you've always enjoyed visiting with your grandparents, perhaps our newest project, Serving our Seniors, would interest you. If you want to try trusts and estate work as a change of pace from the courtroom or drafting contracts, maybe Wills for Heroes can be your project. If you're feeling burned out on legal work, the Cinderella Boutique can be truly inspiring. Some of these projects allow us to use the training we have gained as lawyers, others give us a chance to serve the community and give us balance to our work lives.

So to answer the question posed above; "who needs pro bono?" I would say that we all do, with this caveat – find the project that's right for you. I hope that you will join the YLD for a pro bono project in the upcoming year. More information on available projects can be found at the YLD website: www. utahyounglawyers.com/probono. You can also find us on Facebook by entering "Utah Young Lawyers" in the search feature.

Upcoming Events

January 12, 2011 – Paralegal Brown Bag CLE at SLCC Downtown Campus. Topic: Legal Writing presented by Mara Brown

January 15, 2011 – Wills For Heroes in Spanish Fork.

February 9, 2011 – Paralegal Brown Bag CLE at SLCC Downtown Campus. Topic: TBD

March 3, 2011 – Paralegal Brown Bag CLE at SLCC Downtown Campus. Topic: TBD

March 17-19, 2011 – Utah Bar Spring Convention in St. George. Topic: Concealed Weapons presented by Phil Leiker

Seeking Nominations for Distinguished Paralegal of the Year

The Paralegal Division of the Utah State Bar and Legal Assistants Association of Utah are seeking nominations for "Distinguished Paralegal of the Year." Nomination forms and additional information are available online at www.utahbar.org/sections/paralegals and www.utahparalegals.org or you may contact Suzanne Potts at spotts@clarksondraper.com. The deadline for nominations is April 15, 2011. The award will be presented at the Paralegal Day luncheon.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
01/09	**Evening with the Third District Court.** Reception: 5:00–6:00 pm. Seminar: 6:00–8:00 pm. Topics to be discussed include: Changes at the Third District Beginning 2011, Observations from the Bench, Recommendations for Effective Advocacy, Q&A. Hon. Robert K. Hilder, Hon. Anthony Quinn, and Hon. Sandra N. Peuler. $15 YLD, $25 section members, $60 others.	2 hrs.
01/19	**OPC Ethics School – What they didn't teach you in law school.** 9:00 am – 3:45 pm. $175 before 01/07/11, $200 after. Avoid complaints, trust account issues, conflicts of interest and more.	6 hrs. Ethics including 1 hr. Profes.
01/19	**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	**Nuts and Bolts on Utah Real Property.** 4:30 – 7:45 pm. $75 for active under 3 years, $90 others.	3 hrs.
01/21	**Through the Legislative Looking Glass: Observations on the Utah Legislature.** 9:00 am – 12:00 pm. $90. Topics include: Uniform Law Commission, moderated by Michael J. Wilkins and featuring Functions and Duties, Role of Utah Practitioners in the Uniform Law Process, Panel Discussion with Uniform Law Commissioners. Office of Legislative Research and General Counsel, moderated by John L. Fellows and featuring Functions and Duties, Interacting with the Legislature, and Panel Discussion with Legislative Attorneys. Ethics and the Legislature, moderated by Michael J. Wilkins with the Independent Legislative Ethics Commission.	3 hrs.
02/09	**Law Practice Management: Communications, Applications, and Mobility.** 9:00 am – 12:00 pm. $90. Topics include: Practice Management Software, Mobile Technology, and Telecom Technology. Presenters include: Steve Blomquist, Lincoln Mead, and Chris Seeley.	3 hrs.
02/09	**Lincoln on Professionalism.** 10:00 – 11:00 am. Webcast. Bar members $79.	1 hr. self study
02/18	**IP Summit.** Little America.	TBA
02/23	**Utah State Bar Day at the Legislature.** Morning. Price and agenda TBA.	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.

FOR SALE

PRACTICE FOR SALE. Take advantage of reciprocity with Oregon. Established, highly successful practice for sale in Bend, Oregon with focus on litigation, business, real estate, personal injury, criminal, etc. High gross/net income. Owner willing to work for and/or train buyer(s) or new lawyer/buyer(s) for extended period. Owner terms available. Please direct inquiries to John at PO Box 1992, Bend, Oregon 97709 and I will call you back promptly.

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.

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POSITIONS AVAILABLE

Small firm seeking attorney with 3-5 years commercial litigation experience. Please send resume and writing sample to: Christine Critchley, Confidential Box # 6, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. Must be motivated, hard working, a self-starter, able to meet deadlines and perform in a fast-paced environment.

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

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

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

When 2010 Olympic skeleton racer and World Cup Champion Noelle Pikus-Pace, a business owner and mother, started www.snowfirehats.com, she came to Clayton, Howarth & Cannon for legal counsel. We helped Noelle protect Snowfire's intellectual property rights with the proper patent, trademark, and copyright filings and counseling.

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Prince Yeates is pleased to announce the addition of four attorneys.

Thomas D. Boyle

Mr. Boyle joins the firm with over 25 years of experience in Texas and Utah, practicing most recently at Clyde, Snow & Sessions in Salt Lake City. He has handled a wide range of cases in Utah and Texas involving mediation, trade-secret disputes, insurance disputes, child abuse, personal injury, and environmental contamination.

Matthew S. Wiese

Mr. Wiese joins the firm from Clyde, Snow & Sessions in Salt Lake City. He has over 14 years of experience, with a practice primarily focused on federal taxation, estate planning, trust and estate administration, and business law.

Charles L. Perschon

Mr. Perschon joins the firm from Hill, Johnson & Schmutz in Provo, Utah. He is a graduate of the University of Connecticut School of Law and has experience in commercial litigation, real estate litigation, and appellate work.

Callie Buys

Ms. Buys joins the firm after her recent graduation from the George Washington University Law School. Her practice is primarily focused on general litigation.

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