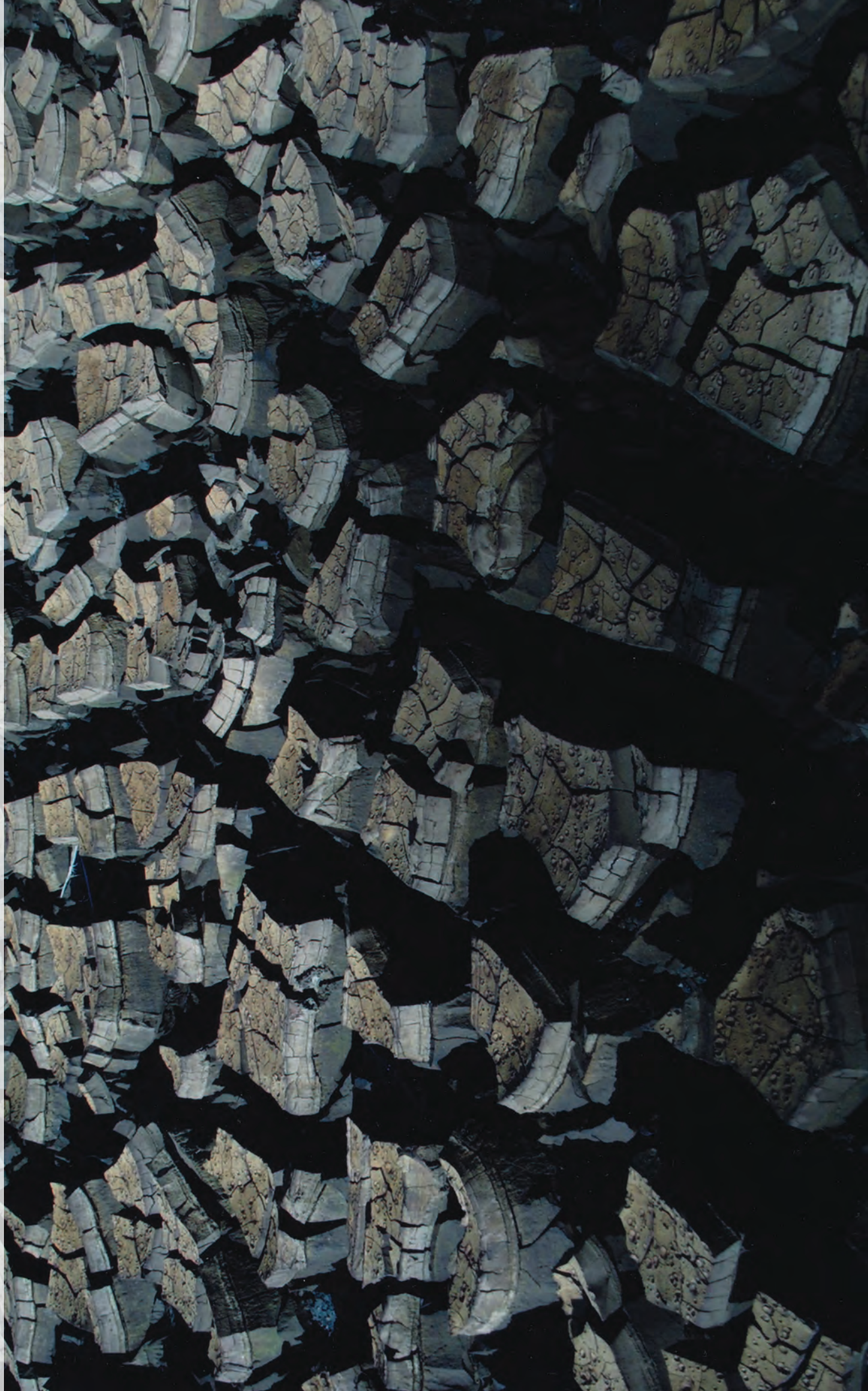


# Utah Bar® JOURNAL

Volume 25 No. 2  
Mar/Apr 2012







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*Dried, caked mud in reservoir in City Creek Canyon*, by Paul Amann.

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## Interested in writing an article for the Utah Bar Journal?

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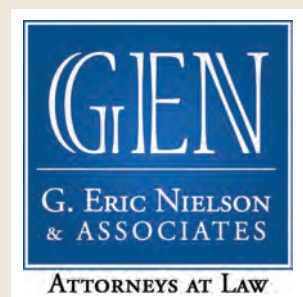
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# Letter to the Editor

Dear Editor:

In the Jan/Feb 2012 *Bar Journal* the Bar Commission announced a newly adopted “Diversity and Inclusion” policy. The policy broadens the term diversity to be inclusive of almost every personal, cultural, and economic characteristic imaginable. But, the policy is not new, it merely elucidates the Mission and Vision of the Bar; to create a just system, respected, and accessible to all. Why the new expansive definition of diversity?

The globalization of the term diversity implies that integration of racial and ethnic minorities into the legal profession is, Mission Accomplished. As the Bar President states in his message, “[Diversity] is No Longer Black and White.” Really? Attorneys racially or ethnically different than the majority of Bar members are treated as equals? Then how do you explain that soon there will only be 3/71 District Court Judges and 3/108 City Court Judges that are racially or ethnically diverse? The minority community representative on the Bar Commission has no vote. Can readers name a medium/large firm with a minority partner?

The policy acknowledges identifiable groups are treated differently. Rather than identify practices that inhibit equality the Commission passively expands the definition of “diverse” groups, encourages diversity training, and prints articles. Rather a timid response to acknowledged disparate treatment.

The article’s account of how aristocrat Robert Shaw led a Negro regiment to “Glory,” 150 years ago, echoes the myth that discrimination is a historical footnote. Discrimination doesn’t vaporize because we admire historical figures, celebrate a holiday, or pass superfluous policy. We must remain vigilant and cognizant of barriers to equal treatment. Is the Commission reluctant to identify obstacles?


I write not to offend, but to remind fellow lawyers that, theoretically, we seek *justice for all*, even our own. Is there no Robert Shaw among us to lead the diverse charge?

Michael N. Martinez

## Letter Submission Guidelines

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





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# President-Elect & Bar Commission Candidates

## Candidate for President-Elect

**Retention of President-Elect:** *Curtis Jensen has been nominated by the Bar Commission to serve as President-Elect in 2012-2013 and as President in 2013-2014, subject to a confirmation ballot submitted to all lawyers on active status. No other candidates petitioned the Commission to run for the office.*



### CURTIS JENSEN

It is an honor to be nominated by the Bar Commission as the next Bar President-Elect. For the past five years I have had the pleasure to serve with talented colleagues on the Bar Commission and within the Bar Office. These individuals love our profession and bring great energy, experience, judgment, and

dedication with their many hours of service. The Bar President has always set the tone for the Commission and, through collaboration, develops a consensus in setting goals and objectives to better serve the Bar and its membership. This is a charge that I will not take lightly. We will continue to focus on the core functions of the Bar and continue through our collective effort in nurturing civility and professionalism in our practice of law, improving and providing affordable and practical CLE, developing and implementing programs to improve the efficiency of legal services and access to justice, educating our members and the public about available resources and opportunities, and continuing fiscal prudence in Bar operations and expenditures.

Tremendous individuals have served as past Bar Presidents, individuals who have contributed much to our profession, the judiciary and our community. Winston Churchill once said, “[w]e make a living by what we get, but we make a life by what we give.” Service to our profession is something I will gladly undertake because of the great opportunities it has brought to my family and me. I was taught by wonderful parents. My father emphasized the value of hard work and doing your very best at whatever task you undertake. My mother showed by example the importance and joy of serving others and the rich rewards that come in return. Those values are part of the reason I became a lawyer and why service to others plays such an important role in my life. I look forward to serving and working with you and thank many of you for the unique privilege of

allowing me to get to know you better and associate with you. I will diligently serve you as your Bar President and respectfully ask for your support.

### Biography:

I am a shareholder of the Law Office of Snow Jensen & Reece, P.C. I practice in the following areas: real estate and construction; business and banking; commercial transactions; civil litigation; and mediation. I am currently serving as a Utah State Bar Commissioner from the Fifth Division and in this capacity function as liaison to the Ethics Advisory Opinion Committee, Southern Utah Bar Association, Sixth District Bar Association, Eastern Utah Bar Association, Uintah Basin Bar Association, Garfield County Bar Association, Women Lawyers of Utah, and several other practice area sections of the Bar. I am very proactive in my community, having served in many associations and boards, including currently President-elect of the Foundation for Students of Washington County Board, Southern Utah Habitat for Humanity Board, and Chairman of the Santa Clara City Planning and Zoning Commission. I enjoy working with the youth and participate in many youth groups and organizations. In my spare time, my wife and I enjoy taking motorcycle rides on Utah’s many back roads and scenic byways. I relish vacationing and spending time with my family. I am a sports enthusiast and enjoy lacing up my shoes for a friendly game of tennis, an intense game of basketball with my son and sons-in-law, or any other sport that involves a ball and friendly competition. I graduated from Gunnison High School, Snow College (AS), Brigham Young University (BS), and University of Tulsa College of Law (JD). There are several special family members in my life: my dear wife of thirty-one years, four daughters (three sons-in-law), my seventeen-year-old son, and five grandchildren.

## Third Division Candidates



### GRACE ACOSTA

I'd love the chance to represent the Third Division. I had the pleasure of sitting on the 2010-2011 Bar Commission as an ex-officio member representing the Utah Minority Bar Association. I'd like to continue my service. I graduated with honors from the University of Nebraska in

1997 and have practiced in Utah, Nebraska, California, and Idaho. I have practiced in medium to small law firms with an emphasis in insurance defense, personal injury, family law, workers compensation, real estate, and business. I believe that my experience gives me insight into the concerns of the 3rd division lawyer. I have served the Utah Legal Community as an officer (and past-president) of the Utah Minority Bar, served on the Utah Supreme Court Ethics and Discipline Committee, served as a member of Women Lawyer's of Utah career development committee, served as committee member and co-chair of the Fall Forum, and currently act as Circle Mentor to five young lawyers. I have lots of experience, energy, and enthusiasm and believe that I would serve you well. My goals would be to bring a fresh voice to the commission with an eye toward fiscal responsibility and social relevancy. I appreciate your vote.



### CHRISTIAN CLINGER

Dear Friends and Colleagues:

Thank you for your encouragement as I seek re-election as a Bar Commissioner for the Third District. While serving as a Bar Commissioner, I have served on the following Bar Commission Committees:

1. Bar Executive Committee (three years)
2. Communications/Public Relations Committee (Chair)
3. Bar Public Education Committee (Co-Chair)
4. Bar Operational Review Committee
5. Governmental Relations Committee
6. Spring and Annual Convention Committees
7. Law and Justice Building Review Committee (former Chair), and
8. Mentoring and New Lawyer Training Program Committee.

Additionally, I have served as a Bar Commission Liaison to the Litigation Section, the Business Law Section, the Dispute Resolution Section, and the Utah Minority Bar Association. I have come to appreciate the strength, integrity, and commitment to public service that members of the Utah State Bar share. I hope to continue in these traditions and to increase the Bar's governmental relations, public relations, and membership activity.

Through my dedicated service, I have proven my experience and leadership. I am prepared to continue to represent you and lend your voice to the deliberations and policy decisions before the Bar Commission. I appreciate your support, and I ask for your vote this coming April.



### JIM GILSON

Mr. Gilson has been practicing law for twenty-three years. He has been a Bar Commissioner since 2008. In that capacity he serves as co-chair of the New Lawyer Training Program, is on the Bar's Executive Committee, and chaired the committee tasked with reviewing the Office

of Professional Conduct.

Mr. Gilson graduated from the University of Utah (BA 1985, JD 1989). He practices law with Callister Nebeker & McCullough where he chairs the firm's litigation section. He was a law clerk to Judge Greene and later for Judge Benson of the U.S. District Court, was an Assistant U.S. Attorney, and was a shareholder at Van Cott, Bagley.

**Statement of Candidacy:** There are many opportunities and responsibilities that we as lawyers have to improve our ever changing and diverse profession. In these challenging economic times, I am committed to help the Bar operate efficiently and effectively, expand pro bono opportunities, mentor young lawyers, and support the judicial branch. There is much work to be done in these areas.

I would like to continue contributing by serving another term on the Bar Commission and to leverage the experience gained during my first term. Thank you for considering my candidacy.





### SUSANNE GUSTIN

It would be an honor to serve as a Bar Commissioner in the Third Division. I am a criminal defense attorney with nineteen years experience handling both misdemeanor and serious felony offenses. As a trial lawyer, I spend nearly every day in court and am familiar with the day-to-day workings of our

judicial system. Based upon this experience, I am aware of the strengths and weaknesses of our courts in ensuring justice for all.

The Utah State Bar, I believe, should play a role in making sure all persons have access to our judicial system and can afford competent representation. I will continue to promote the Bar's new lawyer mentoring program and Bar programs that promote the integrity of our profession.

I have experience in leadership positions, having served as president of the Utah Association of Criminal Defense Lawyers in 2002. Currently, I am president of the David K. Watkiss – Sutherland II Inns of Court. If elected, I will listen to your concerns and suggestions about how the Utah State Bar can better serve your needs. I ask for your vote and the privilege to serve as your Bar Commissioner in the Third Division.



### BENSON HATHAWAY

The twenty-eight years I have benefitted from those who have served in the administration of the Bar have imparted a sense of duty to contribute. I've therefore thrown my hat into the ring as a candidate for Bar Commissioner of the Third Division.

In the past I have participated in the Bar's Litigation, Construction, and ADR Sections assisting in areas of policy making and continuing education. More recently, I've served on the board of the Federal Bar Association's Utah Chapter and as its 2010-2011 president.

My practice has been in commercial litigation in the private sector, first with a medium size firm, then for eleven years with another partner founding a small litigation boutique, and for the past ten years as a shareholder at a larger firm. The years of litigation have imbued an acute appreciation for an independent judiciary, and my practice associations, an understanding of the diverse needs of Bar members from solo practitioners to attorneys in large firms.

My commitment to you is two-fold: first, to defend the separation of powers, and second, to ensure that mandatory membership in the Utah State Bar continues to add value to your practice. Thank you.

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### ANGELINA TSU

Like many of you, I came to Utah to attend law school – and forgot to leave. It was the best decision I never made. In 1999, I started at the S.J. Quinney College of Law. This year, I will attend my 10-year reunion. Over the years, I have served as a judicial clerk, a litigator at Ray Quinney & Nebeker, and now in-house

counsel for Zions Bancorp. I have had the privilege of meeting many bar members through my involvement in the Young Lawyers Division, the Utah Minority Bar Association, and Women Lawyers of Utah.

The Bar ultimately should be a resource to its members. As President of the Young Lawyers Division (2010-2011), I focused on this principle with the creation of three new committees (CLE, Recession Response, and Networking) designed to help young lawyers gain the skills necessary to succeed during difficult times. As an ex-officio member of the Bar Commission (2010-2011), I have observed and participated in the Commission's decision-making process and know how it can be used to enhance our resources. I would like to represent the Third District because I can focus on the critical task of providing significant and reliable resources for all of us.

## Fourth Division Candidate

**Uncontested Election:** According to the Utah State Bar Bylaws, “In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected.” Tom Seiler is running uncontested in the Fourth Division and will therefore be declared elected.



**TOM SEILER**

I have been the Fourth Division Bar Commissioner since July, 2009. During the last three years, I have enjoyed representing you with the Commission. The Utah State Bar has adopted the New Lawyer Mentoring Program, it has successfully turned back several bills in the legislature and has

raised the level of Continuing Legal Education offered in state.

In the Utah State Bar Fourth Division we have been honored to have outstanding Bar Commissioners over the years. Since I

began my practice in 1977, our division has seen substantial growth in the numbers of attorneys, the breadth of practice and the diversity of occupational and life choices amongst attorneys in our division. Although my practice remains a traditional civil litigation practice, attorneys in our division fill many roles, as CEO's, company presidents, authors, professors, as well as filling more traditional legal roles.

I will continue to work diligently to promote our division's interest inside the Utah State Bar Association and will work diligently to resolve problems of the bar and the judiciary generally.

## Fifth Division Candidate

**Uncontested Election:** According to the Utah State Bar Bylaws, “In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected.” Michael Leavitt is running uncontested in the Fifth Division and will therefore be declared elected.



**MICHAEL LEAVITT**

I heard a person once criticize attorneys in rural Utah, claiming we are all “buddies” and in the practice only to make money together. I smiled and disagreed, offering a different perspective. “Attorneys are like friends who play basketball against each other.” They may get along well, but once

the sneakers come on, those relationships take a back seat to doing whatever it takes to get the best outcome for their team. Elbows fly. Trash gets talked. And, after the dust settles, they're friends again – until the next game.

So it is with us. Where the bar is small and we work together so often, maintaining solid relationships with both client and fellow

counsel is vital. This is really part of the Utah State Bar's purpose. In furthering that purpose, if elected bar commissioner, I will promote efforts that:

- (1) Establish a forum in which the rules are clear and fair;
- (2) Provide attorneys the necessary resources to zealously represent our clients within that forum;
- (3) Create an atmosphere that allows us to work together to solve common problems and enjoy our practices; and
- (4) Ensure that the public better understands and appreciates the dynamics of our relationship with each other and with them.



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# *Lend a “Learned Hand” – Check Yes and Volunteer for a Pro Bono Matter*

by Rodney G. Snow

Judge Learned Hand was well known as a preeminent jurist and legal philosopher. He served on the United States District Court for the Southern District of New York and on the United States Court of Appeals for the Second Circuit. He has been quoted by the Supreme Court more often than any other judge. Judge Hand was an advocate for counsel for the underprivileged. In a speech to the New York Legal Aid Society in 1951, Judge Hand stated, “If we are to keep our democracy, there must be one commandment: Thou shall not ration justice.”

The Honorable Carolyn B. McHugh, Presiding Judge of the Utah Court of Appeals, reported last month at the leadership breakfast for “and Justice for all” that poverty is on the rise in Utah, with an increase between 2008 and 2010 of over 20%.

Utah Legal Services (ULS) fields, on average, 170 calls a day, of which thirty-three need attention for domestic violence, eighteen for disability issues, and fifteen for eviction. Overall, 23,000 cases last year were screened by a staff of twenty-four lawyers. Due to budget cuts for the Legal Services Corporation, ULS has had to reduce its staff. Last year Legal Aid Society of Salt Lake provided representation, advice and limited services to 10,334 clients. ULS provided representation for 10,414 low-income Utahns. ULS contracted for 334 hours of attorney time in rural areas and fifty-two volunteer attorneys provided 2328 hours of pro bono service last year.

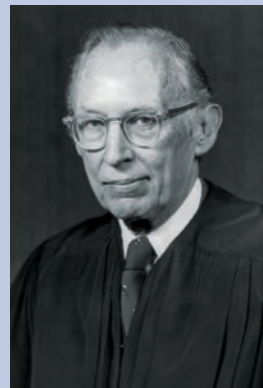
*“If we are to keep our democracy, there must be one commandment: Thou shall not ration justice.”*

*Judge Learned Hand*



*“[J]ustice should be the same, in substance and availability, without regard to economic status.”*

*Supreme Court Justice Lewis Powell, Jr.*



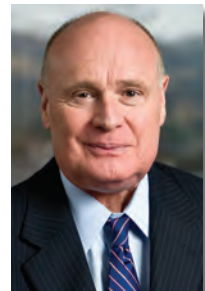
Judge McHugh further reported 67.5% of low-income households in Utah will face a civil legal need this year, and only 13% of these people will be assisted by a lawyer. The Presiding Judge stated, “shockingly, 87% of this population’s legal needs will be unmet.”

As you know, the caption over the United States Supreme Court is “Equal Justice Under the Law.”

“Equal Justice Under the Law” is not merely a caption on the façade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...it is fundamental that justice should be the same, in substance and availability, without regard to economic status.

Supreme Court Justice Lewis Powell, Jr.

*Rod expresses his appreciation to Shannon K. Zollinger, an associate at Clyde Snow & Sessions, for her research assistance.*





In July of last year, the Bar Commission created a committee to study ways of better meeting the unmet legal requirements of many of our citizens who are in dire need of legal assistance but cannot afford an attorney. The Committee is co-chaired by Robert Rice of Ray Quinney & Nebeker, Professor James Backman of the J. Reuben Clark Law School, and Sue Crismon, an attorney with ULS. This committee includes judges, the Deputy Clerk of the United States District Court for the District of Utah, the State District Court Administrator, and several prominent attorneys from government and the private sector.

The Pro Bono Committee has proposed, and the Bar Commission has preliminarily approved, with some modifications, a program successfully used in several of our sister states. In the survey recently completed by 52% of you, we learned that over 70% of our Bar is engaged in pro bono work on a weekly basis. This is commendable and demonstrates that the Utah Bar takes its pro bono obligations seriously. The voluntary, non-mandatory program we hope to implement over the next few months will

better organize our pro bono efforts and facilitate the delivery of legal representation to low-income families and individuals. The outline of the program is as follows:

1. When the license applications and renewals are sent out in May and June there will be a **"Check Yes"** box on the form that will allow you to volunteer to take a pro bono case or matter.
2. The Bar has hired a lawyer as the new Pro Bono Coordinator, Michelle Harvey. Michelle has experience handling pro bono cases and we welcome her to the Bar staff.
3. Michelle and the steady Lincoln Mead will maintain a database of all attorneys who have checked yes and/or volunteered for a pro bono matter or case.



*Michelle Harvey,  
Utah State Bar Pro  
Bono Coordinator*

# Lend a Hand

## to those that need it most

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4. Pro bono cases will be collected so that Michelle and others can determine which cases qualify for pro bono assistance pursuant to eligibility guidelines.
5. A Pro Bono Committee will be created in each of our judicial districts which will be co-chaired by a volunteer judge and the Bar Commissioner for that district or another lawyer. We may combine some of the districts. Each district committee will have access to the Bar's database and the names of the volunteer attorneys in their district.
6. Qualified pro bono cases will be sent to the judicial district where the client resides. Utilizing an efficient, automated matching system, cases will be offered to volunteer attorneys in respective districts. Each district Pro Bono Committee can decide how best to distribute cases. In many instances an e-mail will be sent to the list of volunteers with a brief description of the case, allowing volunteers to select a case, perform conflict checks, and contact clients. The district Pro Bono Committees, with Bar assistance, will also provide training, free CLE for volunteers, and recognize those who have taken cases in some appropriate fashion. We are excited about utilizing Pro Bono Committees at the district level so that pro bono legal services can be customized to suit needs at as local a level as possible.
7. A statewide Pro Bono Commission is also being created: The co-chairs for this Commission are Judge Royal Hansen, the Presiding Judge of the Third District Court, and Judge Michele Christiansen of the Utah Court of Appeals. This Commission will encourage law firms, corporate law departments, and government offices to adopt pro bono policies that will encourage attorneys to volunteer for pro bono service without adverse effects on their compensation or advancement. This Commission will facilitate the organization of the district committees as needed and will help develop means and incentives to encourage support for attorneys who are assisting those who are unable to pay for legal services, but are engaged in adversarial proceedings where basic human needs are at stake. The Commission will also oversee the program and recommend adjustments where appropriate. We anticipate that the Commission will consist of lawyers from large and small law firms, judges, corporate law departments, a ULS representative, law school representatives, a representative from the governor's office, and government lawyers.

The S.J. Quinney and J. Reuben Clark law schools are

committed to the program and will allow students to assist on pro bono cases. Thus, research and drafting assistance will be available to our attorney volunteers. The contribution of our law schools to this program cannot be overstated.

With over 70% of the Bar engaging in pro bono work, it is not surprising that a great deal has already been accomplished. There are far too many organizations offering free, but limited, legal services to recognize in this article. Some examples include:

In 2007, the Southern Utah Bar Association under the guidance of Lowry Snow and Adam Caldwell, established the Southern Utah Community Legal Center (CLC), a facility dedicated to the provision of pro bono assistance in Southern Utah. Dozens of volunteers provide legal services to those in need on a monthly basis. Last year the CLC held forty-eight free clinics. Ninety-five attorneys participated in approximately 380 appointments. While the CLC works with litigants utilizing our courts' Online Court Assistance Program, they also facilitate the assignment of pro bono cases.

In 2010, the J. Reuben Clark Law Society and the J. Reuben Clark Law School sponsored the Timpanogos Legal Center. Attorneys and law students work side by side to serve members of the community in need of legal advice and assistance. Hundreds of volunteers have participated. More than 100 BYU law students assist approximately seventy attorneys in client interviews, drafting documents, and preparing for hearings and trials. Professor James Backman, a co-chair of the Bar's Pro Bono Commission, was a driving force behind the legal center. Professor Backman brings his rich experience and enthusiasm for pro bono work to the Bar's new program.

The S.J. Quinney College of Law established its "Pro Bono Initiative" (PBI) in 2006. Law students volunteer to work with attorneys on pro bono projects in a variety of areas. The PBI co-runs the: American Indian Legal Clinic, Debtor's Counseling Legal Clinic, Family Law Clinic, Layton Family Law Clinic, Medical-Legal Clinic, Rainbow Law Clinic, and the Street Law Legal Clinic. All legal clinics are staffed by College of Law volunteer law students and volunteer onsite attorneys. The class of 2011 had a total of 4,585.5 volunteer hours of service in these various clinics. Since the inception of PBI, the total number of pro bono hours provided by law students as of the fall of 2011 was 29,980.25 hours. We have been inspired by the vision of Dean Hiram Chodosh for the delivery of affordable legal services.

Our respective law schools have worked together to provide

extraordinary public service to our communities, amounting to millions of dollars of donated time. We thank them and express our appreciation for their commitment to the Bar's new effort to better organize the delivery of pro bono services to our communities. So much good work goes on quietly, without fanfare or notice, by so many members of our Bar.

Many attorneys are heroes in their own right for pro bono service. Lawyers who have actively engaged in pro bono service have found the work exceptionally rewarding.

David Barlow was only recently sworn in as the new United States Attorney for Utah. A Utah native, David returned from the Chicago law firm of Sidley Austin, where he managed dozens of complex cases involving millions of dollars. Yet, David reports his most satisfying experiences were representation of victims of domestic violence. His pro bono work earned him the Domestic Violence League Clinic's Lawyer of the Year in 1999.

Last year, Tony Kaye, Steve Burt, Matthew Moncur, and Quinton Stephens, all of Ballard Spahr, donated 280 hours on a predatory lending case resulting in a successful settlement. They received the Pro Bono Attorney of the Year award for their dedicated service. Receiving the Law Firm Pro Bono Award last year was Strindberg & Scholnick, LLC for contributing hundreds of hours each year on pro bono cases for clients who otherwise would likely go unrepresented. And the Senior Pro Bono Attorney award went to Carolyn Morrow who had been working an average of twenty-five hours a week the past three years on cases others would not consider. She demonstrated a determination that leveled the playing field and brought justice to many of the almost homeless. These remarkable attorneys are continuing to provide pro bono assistance to low-income people who have a need.

In 2008, Alan Sullivan and Chris Martinez of the firm of Snell & Wilmer, along with Jense Anderson of the Rocky Mountain Innocence Center, filed an action on behalf of Debra Brown pursuant to the "Determination of Factual Innocence Act," which allows courts to review a conviction based on newly discovered evidence which may demonstrate innocence. Debra Brown had been

convicted of aggravated murder in 1995 and was serving a prison sentence. In January and February of last year, Alan and Chris tried the case to Judge DiReda in the Second District Court. Investigators, court reporters, and experts generously donated their time to the preparation of this case. On May 2, 2011, the Judge issued a 47-page opinion finding Debra Brown innocent, vacating her conviction and releasing her from prison. Alan reports, "I don't have to tell you how rewarding pro bono work can be." The case is on appeal. Alan and "Deb" have become good friends and Alan has great admiration for her.

The vast majority of pro bono cases will not involve the time described above. And you will have the option of turning a case down if the timing is not right for you. The Bar's new pro bono program

is simply a reorganization and hopefully revitalization of our efforts. It starts with the "**Check Yes**" box on the Bar license application. The program will greatly facilitate the delivery of worthy and qualified pro bono cases to those who have volunteered. This program is working well in several other states. Thank you for **checking yes** when you receive your Bar license

application this summer, and thank you for the pro bono service you are already providing.

Certainly, life as a lawyer is a bit more complex today than it was a century ago. The ever-increasing pressures of the legal marketplace, the need to bill hours, to market to clients, and to attend to the bottom line, have made fulfilling the responsibilities of community service quite difficult. But public service marks the difference between a business and a profession. While a business can afford to focus solely on profits, a profession cannot. It must devote itself first to the community it is responsible to serve. I can imagine no greater duty than fulfilling this obligation. And I can imagine no greater pleasure.

Justice Sandra Day O'Connor, 78 Or. L. REV. 385, 391 (1999). Remarks by Supreme Court Justice Sandra Day O'Connor in a speech delivered to the University of Oregon School of Law in 1999.

*"While a business can afford to focus solely on profits, a profession cannot. It must devote itself first to the community it is responsible to serve."*

*Supreme Court Justice Sandra Day O'Connor*

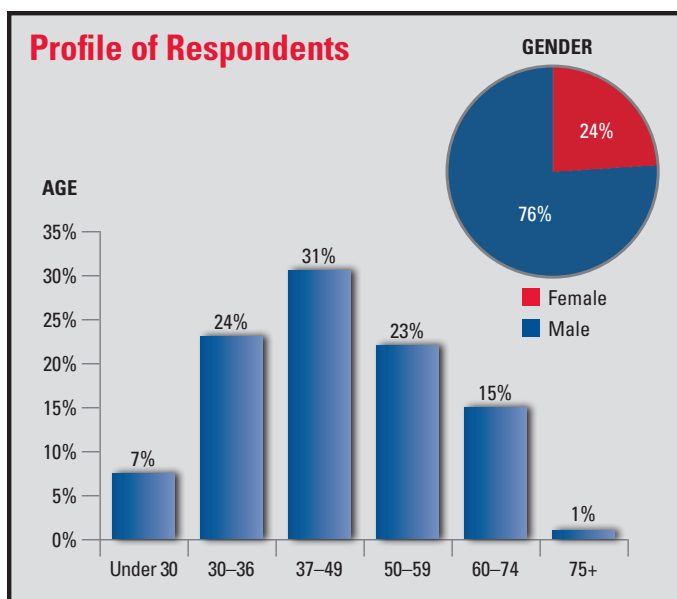




# Utah State Bar Member Survey Results

by Dickson Burton

Did you know that 67% of active members of the Bar are in private practice, and of those about two-thirds are in solo practice or in firms of less than ten attorneys? Or that more than one third of the Bar is younger than thirty-seven years old? Did you know that 32% of attorneys are now using a tablet computer? (I'm sure you won't be surprised to know which tablet computer is most popular). You may also be interested to know that 51% of attorneys now advertise in some media. This and much more data is now available thanks to a comprehensive survey of Bar membership conducted this past December. The Bar Commission is now pleased to share the results, which have proved to be most interesting and helpful, with Bar membership.



The purpose of Bar member surveys is to gather information that would be both interesting and useful to members in their practice and professional endeavors, and helpful to the Bar Commission in making important decisions regarding governance of the Bar. Topics of interest for the survey included law firm and law practice economics, job and career satisfaction, experience with the courts and the Bar, professionalism and civility, lawyer advertising, and use of technology

in the workplace. While we could not dive deeply into all of the topics of interest to the Bar and its members, we wanted to accomplish as much as possible, while at the same time obtaining useful and reliable results.

The Bar has conducted surveys in years past and has received some useful results. But because past surveys have been done "in-house" without the assistance of trained professionals, and because of a low response rate from Bar membership, there was always a concern about the reliability of past survey results. This time, the Bar decided to engage the services of true professionals in the field of survey market research and hired Dan Jones & Associates, which is now part of the Cicero Group here in Salt Lake City. The Cicero Group ([www.cicerogroup.com](http://www.cicerogroup.com)) and Dan Jones are well-known and highly regarded experts in market and survey research and, because of their frequent work with attorneys as experts and jury consultants, were pleased to work with the Bar at a discounted rate.

With the expert assistance of Randy Shumway, the CEO of the Cicero Group and Dan Jones & Associates, and Vice President Scott Hardy, we tried to design a survey that would get the highest participation possible and yield the most useful and reliable results. Among other things, Randy and Scott recommended that we divide the survey into four categories, so that each member of the Bar would actually take just one-fourth of the overall survey. This would significantly reduce the time required of each member to take the survey, thereby increasing participation. And with high enough participation, we would still get reliable results. They also recommended that we offer an incentive, such as a free iPad, to increase interest and participation. Thanks to contributions from the Litigation and Intellectual Property Sections of the Bar, we were able to give away three iPads, as well as nine free registrations to the Bar's Spring Convention, Annual Meeting, and Fall Forum for 2012.

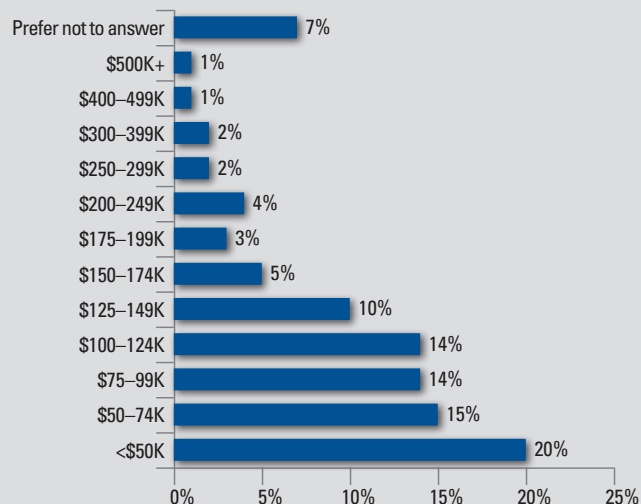


Past surveys have yielded participation of no more than 10-15% of Bar membership. This time, on the other hand, 52% of the active members of the Bar completed the survey! As a result, over 1000 members completed each of the four different surveys. According to our friends at Dan Jones, this level of participation is nearly unprecedented. More importantly, it

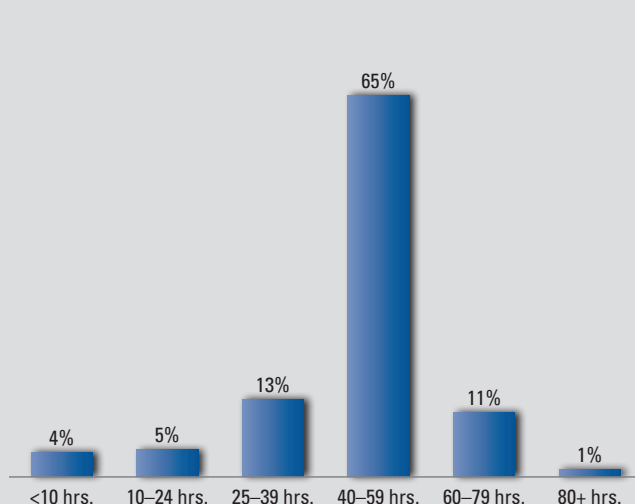
provides extremely reliable results for the Bar Commission and Bar members.

Complete survey results are available to members at the bar's website here: [www.utahbar.org/documents/2011\\_SurveyOfAttorneys.pdf](http://www.utahbar.org/documents/2011_SurveyOfAttorneys.pdf). We hope that you find the results both helpful and interesting!

### 2010 Personal Law-Related Income



### Average Hours Worked Per Week



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# *The Importance of Lawyers and Judges in American Life*

by Judge Dale A. Kimball

**EDITOR'S NOTE:** *The following is Judge Kimball's Keynote Address, given at the Utah State Bar Summer Convention in San Diego, California on July 7, 2011. We thank Judge Kimball for agreeing to let us share his speech with you here.*

This is a beautiful place. I am happy and honored to be giving this speech this morning. The title of my address is: "The Importance of Lawyers and Judges in American Life." You will, of course, note from that cleverly broad title that I can speak today about anything I choose. Let me admit that my remarks may be somewhat biased because I have now been a Federal Judge for a long time, perhaps too long. Evidence of that may be that on a very cold day this past spring, I realized as I was walking past Judge Benson's courtroom on the way to the elevator to go home that, instead of my overcoat, I had put on my robe over my suit.

Let me freely confess at the outset today that some of the ideas expressed in this speech have been borrowed from two of my prior speeches – two of many over the years. The first reason for doing this is that the particular borrowings are very relevant to today's subject matter. The second is that most of you will have forgotten the ideas borrowed from the prior speeches – even if you heard one or both of them.

Before I launch into the substance of my remarks, I want to say how grateful I am that finally someone has been nominated to fill my position. As some of you may know, I sent a letter to the President on May 4, 2009, advising him and various others that I was taking senior status at the end of November 2009, which I did. However, I kept a full case load until the end of November 2010 and since then have carried more than a 60% case load. My replacement will help greatly in easing the burden on Judges Benson, Stewart, and Waddoups. Hopefully, the nominee to fill Judge Campbell's position will follow shortly. In that connection, the firm of Snow, Christensen & Martineau has offered to the Utah Federal Court a donation of a bust of Justice George Sutherland, the only Utahn ever to sit on the United States Supreme Court. This gift is appreciated. At one of our judges' meetings this past winter, I

made a motion that when it arrives, the bust of George Sutherland be assigned a 50% case load. The motion nearly passed.

Now let me get into the substance of my speech. In 1968, Richard Nixon was the Republican Party candidate for President, Hubert Humphrey was the Democratic Party candidate, and George Wallace was the candidate of the American Independent Party. Wallace was the Governor of Alabama and has been called "the most influential loser" in 20th century United States politics. He ran for President four times, running officially as a Democrat three times and for the American Independent Party once. In 1968 Wallace carried five southern states and won almost ten million popular votes. It was the custom at the time for the LDS Church to make the Tabernacle available for serious Presidential contenders to make a campaign speech. Nixon, Humphrey, and Wallace all did this in 1968. A man named John Bash managed a facility for homeless men on South Main Street that I believe was under the auspices of the Catholic Church. He was a fierce opponent of George Wallace and appeared at the Tabernacle and loudly heckled the Governor during part of his speech. The Tabernacle ushers grabbed him and removed him from the Tabernacle and delivered him into the hands of the Salt Lake City Police. Mr. Bash was charged criminally in the Salt Lake City Court. My friend Roger Thompson and I, having then practiced at Van Cott, Bagley, Cornwell and McCarthy for the entire year that we had been out of law school, were asked to undertake the defense. The firm approved, and we did. After some initial maneuvering we filed a Motion to Dismiss the charge. Judge Maurice Jones, after an unusual evidentiary hearing on the Motion to Dismiss, granted it. Mr. Bash had been charged with

*JUDGE DALE A. KIMBALL is a United States District Court judge for the District of Utah. He was appointed by President Clinton in 1997. He assumed senior status in November 2009.*





trespass rather than obstructing a meeting or disturbing the peace or some other charge. Judge Jones appropriately observed, as we had argued, that everyone had been invited to the meeting so a charge of trespass could not stand. The case was dismissed, we and Mr. Bash were happy, there was some publicity, and Salt Lake City wisely forgot about the matter and did not recharge. We, of course, did not expect to get paid and we did not get paid. We had done our little bit in protecting a person's rights.

A person is entitled to a precise and accurate charge. A person is entitled to counsel. A person is entitled to due process. Lawyers and judges are responsible to see that these rights are preserved and protected, that they are meaningful when life and liberty are at stake. They perform this crucial function every day all over the country.

This experience inspired me to be more aware of opportunities now and then to help people legally when they need it, without any expectation of remuneration.

Over the years a series of relatives, friends, neighbors, and others connected with what I would call regular clients needed some, usually small, form of legal service. These were not all criminal defenses, although my relatives and friends did seem to include a criminal or two. However, many of these matters were small civil type services, which took but a little of my time and meant a great deal to them. I don't mean to leave the impression that I did a lot of this type of work. I am sure I did not do as much as I should have but we can all do a little and be a cog in seeing that people are properly represented and that problems are resolved short of open warfare.

The American Bar Association chose as its theme for Law Day 2011, "The Legacy of John Adams, From Boston to Guantanamo." As you know, in early 1770 British soldiers fired into a crowd of protesters who had gathered near the Customs House on King Street in Boston. Five colonists died. Some called the event a massacre and others a riot. Some argued provocation and some argued overreaction. The whole situation revolved around allegedly unfair taxes imposed by the British Parliament. Adams was a prominent resister to British Parliamentary authority but agreed to defend the soldiers. Of the nine defendants, seven were acquitted, including the captain. Two were convicted of manslaughter. John Adams suffered considerable opposition and much inflammatory rhetoric surrounding his defense of the soldiers. But he always maintained it was one of the most gallant and generous things he had ever done. Hence his legacy and hence the tradition of lawyers being willing to defend the accused and the unpopular.

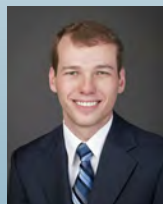
In an article published on May 2, 2011, in the *Salt Lake Tribune*, Chief Justice Christine Durham mentioned the various protections and rights that the Sixth Amendment to the Constitution affords the accused:

1. The right to a speedy and public trial by an impartial jury;
2. The right to be informed of the nature and the cause of the accusation;
3. The right to be confronted by the witnesses against him;
4. The right to have compulsory process for obtaining witnesses; and
5. The right to have the assistance of counsel for his defense.

These enumerated rights are meaningless without the last one – the right to counsel. Lawyers, juries, and judges ensure that these rights are upheld every day even in behalf of the unpopular, even in behalf of those accused of the worst crimes and even though many around us seem willing to presume guilt rather than presume innocence.

It is important that criminal defense attorneys, particularly for indigent defendants, provide a voice for people who, because of poverty, lack of education, mental illness, or neglect, do not

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have the ability to speak for themselves.

The day before Justice Durham's article appeared, the *Salt Lake Tribune* noted the honoring of Alan Sullivan and Chris Martinez for spending hundreds of unpaid hours in attempting to demonstrate the innocence of one Debra Brown, who had been in prison for seventeen years for a fatal shooting. I do not know Chris Martinez but know Alan Sullivan well. He has been honored so frequently that he is probably impervious to being honored further. Nevertheless, it is a wonderful thing that these lawyers would help an indigent defendant in that manner. Debra Brown received an innocence trial and the judge agreed with the defense. Although the ultimate outcome is now unknown because the decision has been appealed, regardless of the outcome these lawyers – and many like them – perform a magnificent service.

Of course, speaking of defense lawyers and judges in connection with the criminal justice system is only part of the story. The system could not flourish without able prosecutors. Prosecutors have enormous power given the way our criminal justice system has evolved. They basically decide who is charged, how the charge is framed, and certainly have the upper hand in plea negotiations. Generally speaking, in my experience these powers have been reasonably used. On occasion, I will hear a complaint that there seems to have been some overcharging or alleged unreasonableness in working out appropriate plea arrangements. It is so important that prosecutors are reasonable and careful and fair, and generally they are. Most local prosecutors are elected, which might create a problem of incentives skewed toward convictions and perhaps lead to a mindset of not respecting the rights of the accused. If prosecuting attorneys seek to win at all costs by concealing, withholding, and misrepresenting evidence, that creates difficult problems. Judges also should not condone or be complicit in any acts of concealing evidence, withholding evidence or misrepresenting evidence. Retrials and appropriate sanctions should be considered. One remembers the cautionary tale of the prosecution of Alaska Senator Ted Stevens, which was not conducted by elected prosecutors but by some associated with the Department of Justice. Prosecutors have important obligations to be honest, fair, and reasonable in their conduct and, fortunately, most are.

Almost all that we do in the criminal justice system should be and must be done in the light of day. As noted before, the Sixth Amendment to the Constitution requires that trials be public.

*"When perhaps the easy approach would be to seal proceedings because of difficulty, it is even more important that they be public."*

When perhaps the easy approach would be to seal proceedings because of difficulty, it is even more important that they be public. I conducted an approximately five week jury trial in November and December of 2010. The case was difficult for a number of reasons. Jury selection was complicated, the trial was long, much of the evidence was gritty, and the case attracted significant national and even international attention from the news media. It was the kind of case that would have been much easier to try in secret. But secret trials are not appropriate. We do things openly, we provide access, and people can attend regardless of additional management problems created by significant attention from the media. I walked out of the court house for dinner one evening and wondered if the Super Bowl was being played in our block. Media news tents and cameras and reporters seemed to be everywhere. Fortunately, robeless, I went to dinner in relative anonymity.

Speaking of juries and selecting juries, I heard the following not long ago. A judge asked a prospective juror whether there was any reason he could not serve as a juror in the case. The juror indicated that it would be a problem for him to be away from work that long.

The judge asked whether they could do without him at work for a while. The juror said yes, but he didn't want his employer to find that out.

I am aware of the tension created by Federal Courts by not permitting cameras in court rooms or usually in the court

house. We are all concerned about jury fears, witness fears, and incentives for lawyers to grandstand. However, the Federal Courts are going to do a pilot program permitting cameras in some kinds of cases. Judge Waddoups tells us that it is inevitable, so we should just grin and bear it and try to manage it as best we can.

Incidentally, in connection with the lengthy November/December trial I mentioned, the lawyers for the defense received some public criticism for their work. But they, and all of us associated with that proceeding, were just trying to do our jobs. Criminal defense lawyers have a duty to represent their clients zealously and to raise every argument that might be helpful to their clients. They do not deserve criticism for this.

Consider also the critical role played by lawyers with respect to civil problems. I quote from a speech given by James D. Gordon III, then acting dean of the J. Reuben Clark Law School, to entering law students on August 20, 2008:

Lawyers help make the rule of law possible. They do so as law clerks, judges, legislators, and members

of local governments. They do so by representing entities and private parties, by enforcing the law, by defending against government overreaching, by resolving disputes, by solving problems, and by helping the civil and criminal justice systems to function. They counsel and help people to comply with the law and protect and vindicate people's rights. They are essential to a free society.<sup>1</sup>

Incidentally, I am pleased to reveal that Jim Gordon started as a practicing lawyer in my old firm.

Lawyers have the capacity to provide a specialized type of service. Lawyers have unique knowledge and skills that most do not have. Lawyers have access to the systems provided to resolve disputes and settle differences in civilized and lawful ways. Lawyers have the duty and responsibility to counsel and to help others with respect to some of their most important and profound affairs.

Despite their being periodically maligned, this nation is generally fortunate to have most members of the legal profession as honorable, fair, effective, and reasonable advocates. Most lawyers I know believe in the rule of law. Consider the range of legal advice provided by lawyers to members of society. People sue over fence lines and boundaries. Most business arrangements require honest and careful lawyering to achieve the ends desired by the parties. Our employment relationships provide fertile areas for dispute resolution. We see honest disputes over benefits and retirement issues. Civil rights and freedoms are violated and must be defended and vindicated. There are many public and private land issues. There are interesting questions regarding patents, trademarks, trade names, domain names, and on and on and on.

Consider also the range of lawyers' involvement in representing clients interfacing with governmental agencies and regulatory agencies. Lawyers are in the middle of solving, resolving, and advising on tax questions. Lawyers give all manner of business advice. They draft leases and contracts and they guide merger and acquisition arrangements. It never ends. It is so critical that able, fair, intelligent, honest lawyers represent their clients with a commitment to the rule of law. Additionally, lawyers are often in the forefront of many service organizations, contributing time and money. In many respects we would be vastly poorer as a country without our able lawyers.

Lawyers have much power for good or ill in American life. Except for the most recalcitrant and belligerent clients, lawyers can calm and soothe. Lawyers can often impose sense and rationality on persons and situations leading to settlements or trials focused on real issues rather than on some of the peripheral nonsense that pervades some of our trials. Occasionally, in civil matters,

you may just have to walk away from a dishonest or impossible client even though it is economically painful.

Lawyers, indeed, seem to be everywhere. My younger brother is an orthopedic surgeon who said to me one day that "You lawyers and judges are so arrogant that you believe nothing important happens without your involvement. For instance, you are not involved in any medical procedures." While still reeling from the amazing charge of arrogance made by a physician, I responded that if something goes wrong in a surgical or medical procedure, we'll be involved soon enough.

As an aside, with all this involvement in some of the most important issues in American life and the involvement in issues that are of critical importance to your clients, lawyers ought to be happier than they are, doing what they do. Many surveys suggest that a disturbingly high percentage of lawyers do not enjoy the practice. I am genuinely sorry about that and wish it were not so. There is a delightful article in the February 2011 *ABA Journal* that discusses the various reasons why lawyers are and ought to be happy. These reasons include the trust reposed in lawyers by clients, the ability to make a difference for people, the intellectual challenges, the independence, the diversity of problems, the ability to be of service, the lack of boring-ness, and the breadth of potential careers.


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Remember that no job is just one happy high. I learned this growing up on a dairy farm. Every job for me, since then, has been a happy experience. Every profession, every job, and every endeavor has its challenges. Try to enjoy your work.

After I was appointed to the bench I was frequently asked if I missed practicing law. There were many aspects of the practice that I did and do miss. However, I have never missed obtaining clients, keeping them happy, billing clients, and collecting money from clients. Further, I have never missed participation in Law Firm Management with which I was involved for twenty-two and a half years. I did wake up some mornings and feel like I had been participating in the management of a law firm since I was in the fourth grade. I know and remember that many aspects of practice can be very stressful and very difficult. It is, as Judge Winder used to say, very tough out there. You will be better lawyers, though, if you are happy lawyers.

Since lawyers are involved in almost everything, let me suggest your consideration of some traits lawyers should demonstrate.

There are many intelligent, dedicated lawyers who exercise excellent judgment, who give their clients first-rate advice, who argue motions well, and who are superb in trying cases. There are brilliant and able practitioners who guide their clients through difficult business and tax transactions and who are very skilled at negotiating the complications associated in dealing with various administrative agencies.

And yet it is very disappointing to read incoherent briefs and listen to weak and rambling arguments. It is almost heavenly to listen to lawyers skillfully examine and cross-examine witnesses. It is painful to witness those who do not and to observe some lawyers who seem to have little acquaintance with the rules of evidence. We expect our mechanics, our doctors, our contractors, our accountants, our teachers, all of whom serve us and all on whom we rely, to know what they are doing.

My father, Griff Kimball, perhaps foreshadowing Donald Trump, said it this way, “You’re fired! You and Bob are fired!” This happened on a hot, summer day on my Dad’s farm in Draper, Utah. He suggested that my best friend and I, if we couldn’t or wouldn’t thin his sugar beets properly, could get out of his field. We left partly ashamed and partly hoping that, for a while at least, we did not have to continue one of the worst jobs on earth. We had been abysmal. We had been paying no attention whatsoever to a job that requires constant and close attention. We had been talking about baseball and girls and throwing, fairly successfully, dirt clods at each other. My Dad was right. Our lack of competence was going to cost him money in the fall when the beets were harvested. However, as he always did, a short time later he found us and said, “I am going to give you boys a chance to redeem yourselves.” He was big on redemption.

Thereafter we performed competently. We did good work.

I suggest also that commitment and diligence are critical in the law and with respect to any endeavor that matters. You can be highly competent but not be committed. A lawyer not committed is not much of a lawyer no matter how competent.

There is a great need for lawyers to be committed, to do what they say they will do, to be where they say they will be, to perform in a manner implied by their professional degree, and to finish what they start. These qualities do not seem to me to be too much to ask of anyone, let alone professionals. Was it Woody Allen or Kareem Abdul Jabbar who said (joined by many others I am sure) that much of success in life is assured by just showing up. Let us show up.

One of the greatest needs in our society generally is for more honesty. Not only should we be truthful, but we should not engage in the games of material omissions. Lawyers can have a disproportionate influence for good or for ill. Lawyers can often cut off fraudulent behavior at the inception. Lawyers can not only be honest themselves but also be good examples to those around them in connection with behaving honestly in business and personally.

With respect to being honest, Judge Bruce Jenkins had a good suggestion: “[L]et me suggest a rule of thumb – what I call my ‘Main and First South Rule.’ I probably ought to call it my Facebook rule, to keep it up-to-date. Basically, if you can’t do it on First South and Main Street at high noon (or if you can’t have it spread all over Facebook) then don’t do it.”<sup>2</sup>

Abraham Lincoln also had some interesting observations about the honesty of lawyers:

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief. Resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.<sup>3</sup>

Let me turn now to the importance of courts and judges in the American system. In his *Democracy in America* (1835), Alexis de Tocqueville, a French political scientist, historian and politician

indicated that in his view scarcely any question of importance arises in the United States that does not evolve, sooner or later, into a judicial question. He also remarked on the power vested in American courts of pronouncing a statute to be unconstitutional, and he suggested that that power is one of the most powerful barriers ever devised against tyranny. We have two key elements that make courts and judges extremely important in America. First is an independent judiciary. Second is the practice of what we call judicial review.

Let me briefly trace the history of the development of the notion of an "independent" judiciary. The Roman Law created a form of judicial independence in a system set up by Justinian between about 528 and 534 A.D. With the fall of the Roman Empire and the onset of what we call the Dark Ages, the independent courts were basically suspended. In England, the Romans held power during the early centuries A.D., but the Roman judges left England, probably in the fifth century. A variety of legal systems followed. They included trials by ordeal and laws made by successive kings. Not until the seventeenth century in England was there something like a system of law somewhat independent of the King's rule.

With this English history in mind, the educated colonists seemed to be sensitive to the necessity, in a free society, of an independent judiciary. Among the grievances leveled at the King of Great Britain in

the 1776 Declaration of Independence were these: "He has obstructed the administration of Justice, by refusing his assent to laws for establishing judiciary powers. He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." As Thomas Jefferson recognized, if judges are at the complete will of another branch of government for tenure and pay, their decisions will be improperly influenced. Questions will not be "What does the Constitution mandate?" "What do the statutes mean?" and "What do the case precedents require?" but rather, perhaps instead, "Will I be fired?" "Will my pay be abolished or diminished?" or "Will this decision be unpopular?"

In 1780, in Massachusetts, now a commonwealth, then a colony in rebellion, the citizens decided that they should have a written constitution. A constitutional convention was held. As stated by Benjamin Kaplan, a former justice of the Supreme Judicial Court of Massachusetts, "by a prodigy of good fortune, John Adams was the chief convention draftsman." The draft went to towns and villages throughout the Commonwealth. Nearly 200 communities sent in comments. The constitution was approved by a two-thirds vote of the public.

The Massachusetts constitution established a Supreme Judicial Court and other courts whose judges were to be appointed by the governor, with the consent of his council, to serve as long as

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they maintained good behavior. The constitution stated that the purpose was that judges should be “as free, impartial and independent as the lot of humanity will admit.”

Prior ideas about judicial independence influenced Adams and others, but as Justice Kaplan said, “their particular combination and expression in the [Massachusetts] constitution were a mighty invention.” Professor Samuel Eliot Morison called the idea of judicial independence as expressed in the Massachusetts constitution “one of John Adams’s profoundest conceptions.”

By the time of the debates and adoption of the Federal Constitution, the principle of judicial independence was almost a given. In The Federalist No. 78 Alexander Hamilton spends most of his time and energy discussing judicial review, a related principle to judicial independence which I will address momentarily.

The Federal Constitution was, of course, adopted with Article III thereof providing for an independent judiciary, with judges to hold their office during good behavior. All states have set up some sort of an independent judiciary in their constitutional framework. Most have not followed the federal model of judges

serving during good behavior. The worst have contested political elections for judges. Many have some form of retention procedure which does provide, in my view, for a healthy dose of judicial independence. Utah is in this category. Article VIII of the Utah Constitution establishes a separate, independent judicial branch of government. Since 1780, Massachusetts judges have been appointed for life by the Governor with the consent of the Governor’s Council. John Adams still holds sway there. However, in 1972 in Massachusetts, a mandatory retirement age of seventy was imposed by constitutional amendment.

Good judges are important to the law and to society. George Washington commented that he thought that judges would be the keystone of our new political fabric.<sup>4</sup>

Several years ago there was some talk of creating a committee of senators in Utah that would rule on the fitness of every judge who is up for a retention election. The theory was, as I understand it, that the committee would have had authority to keep a state judge off the retention ballot, effectively removing him or her from office. In commenting on this possible development, a *Deseret News* editorial of February 18, 2003, stated: “Obviously, this committee would be tempted to eliminate judges who had issued unpopular rulings,

regardless of how sound those rulings may be. They would also be tempted to use a judge’s political leanings as a guide.” The editorial went on to suggest that “perhaps all new lawmakers should be given mandatory training on the role of an independent judiciary in a free society. Banana republics and dictatorships allow politics to dominate their courts. Utah...should tread around that ground very carefully.” An editorial in The *Salt Lake Tribune* on March 11, 2003, pointed out that “the legislature and the courts are co-equal branches of government, with offsetting powers.” The legislature did not, to its credit, adopt the proposal. I am not even sure it was seriously considered.

I stated earlier that the concept of judicial review was a principle related to judicial independence. We are all acquainted with *Marbury v. Madison*. This case has been called by Chief Justice William Rehnquist “the most famous case ever decided by the United States Supreme Court.” The Court in that case, speaking through the great

Chief Justice John Marshall, recognized the power of judicial review to determine a law’s compliance with the constitution. The *Marbury* Court did not create judicial review out of whole cloth. It is reasonably clear that this concept was implicit in the separation of powers doctrine.

*“[I]ndependent courts and the power of judges to pronounce on the constitutionality of government action constitute the jewel in our Constitution’s crown.”*

For example, George Wythe, scholar, teacher, and patriot (and law mentor and teacher to John Marshall and Thomas Jefferson, among others) had spoken about and taught the concept. Further, judicial review had been adopted under the Virginia constitution six years before Virginia ratified the federal constitution. Wythe led both the successful effort to create Virginia’s constitution and the successful effort to ratify the federal constitution in Virginia. It is clear that Wythe and others expected a judicial check on the other branches of the federal government.

In addition, The Federalist No. 78 explained the principle of judicial review in some detail. Hamilton explained that with the existence of a written constitution which prohibits legislative authority from doing certain things, such as passing ex post facto laws, bills of attainder, or abridging freedom of speech or press (and many other things), such prohibitions and limitations can be preserved in practice no other way than through courts. It is the court’s duty “to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”

There are written constitutions all over the world, many of which have little practical meaning in protecting freedom when independent



courts lack the power to protect the stated fundamental rights from the exercise of unfettered legislative or executive power. How else can the fundamental constitutional rights of the people, particularly minorities, be protected? To again quote The Federalist No. 78:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

In *Marbury*, Chief Justice John Marshall was expounding well-known principles when he stated that “it is emphatically the province and duty of the judicial department to say what the law is.” It is no overstatement to proclaim, as have both Chief Justice William Rehnquist and Associate Justice Ruth Bader Ginsberg, that independent courts and the power of judges to pronounce on the constitutionality of government action constitute the jewel in our Constitution’s crown.

Later state constitutions explicitly recognized and adopted judicial review. The Utah constitution, Article VIII, Section 2, for instance, says, “The court shall not declare any law unconstitutional under this constitution or the constitution of the United States, except on the concurrence of a majority of all justices of the Supreme Court.” That seems to me a very reasonable proposition and a reasonable limitation on judicial review. Of course, if the requisite procedures are followed and sufficient majorities obtained, the federal constitution or any state constitution can be amended, and even theretofore fundamental rights altered or adjusted.

It should be noted, in passing, that almost all courts, most of the time, affirm the constitutionality of the acts of the other branches of government and of other governments as when, for instance, a federal court holds in a particular case that a branch of a state or municipal government did act constitutionally. This generally affirming role of the courts, I believe, provides confidence in all levels of government. And when, occasionally, acts are held invalid and unconstitutional, there is underscored the meaning and life of written and protected freedoms that can be celebrated and need protection by an independent judiciary.

So why do we permit (even encourage) this anti-majoritarian branch of government? Are there potential abuses in such a system? What are the potential problems? What are the competing realities that cure and manage and restrict the difficulties?

There are, of course, potential abuses in a system of judicial independence and judicial review. The *Dred Scott* decision in 1857, by the Supreme Court, held that the Missouri Compromise

of 1820 was unconstitutional. That compromise had prohibited slavery in the territories north of Missouri. The court basically said that Congress could not eliminate slavery. The Thirteenth Amendment overruled *Dred Scott*. Constitutional amendment, difficult as it may be, is a way to work and correct judicial abuse.

Judges may, and occasionally do, no doubt, decide cases based on their preferences rather than on what is their good faith understanding of the constitution, governing statutes, and precedents. When this happens, some dislocation and difficulty can occur. It still is true, though, that usually the courts affirm and give deference to the actions of the legislative and executive branches of government.

Consider how judges and courts are constrained and restrained. In the first instance, judges are nominated by the executive and confirmed by one branch of the legislature. There has to be a real case or controversy before a court can hear a case. Judges do not decide things out of thin air. With the exception of appellate courts exercising discretionary jurisdiction, judges do not choose what cases to decide. Parties bring specific and concrete cases before them. They must have standing. This means they must have a personal stake in the outcome in order to assure a concrete adverseness which sharpens and shapes the issues. An injury must be shown, there must be a causal connection between the injury and the conduct complained of and it must be likely that the injury will be redressed by a favorable decision. These requirements limit the cases a court can hear.

To some extent, also, legislatures are empowered, within constitutional limits, to determine the jurisdiction of courts – what cases a court can hear. Further, there is an elaborate system of appellate jurisdiction and rights of appeal. All of the foregoing limit and circumscribe what courts can hear and do. There truly are ample safeguards built into the system.

Consider the alternatives. If judges’ tenure and pay could be altered as punishment for a decision considered unwise by the executive or legislative branches of government, then as The Federalist No. 78 pointed out, there is absolutely no reason to have an independent judiciary. You should then have courts subservient to the other branches of government, unable to check in any meaningful way the occasional unconstitutional excesses of the other branches, which is the reason to have an independent judiciary in the first instance.

In short and in sum, the founders knew what they were about. Judicial review and judicial independence have had a large hand in making us what we are. Because of judicial independence and judicial review, then ABA President Alfred P. Carlton, Jr. stated that our third branch of government was the envy of the world. We can and will continue to be able to enjoy our liberties and celebrate our

freedoms in large part because of our belief and reliance on the principles and rationale underlying judicial independence.

I am unable to resist a word on the periodic charge that judges, or certain of them, engage in judicial activism. Usually, what this means is that a judge or a court has issued a decision with which the complainer disagrees.

Consider particularly that constitutional language, at least that which is most disputed, is often general, ambiguous and vague. Originally, the United States Constitution contained fewer than 8000 words. It has been added to, of course, by amendments. One cannot ignore in the work of constitutional interpretation the complicating overlay of the Civil War and the amendments following therefrom. The founders themselves argued among themselves about the appropriate reach of Federal power, the proper relationship between the Federal Government and the States, the proper reach of Presidential power, the proper relationship among the three branches of government, and the appropriate interpretation of several constitutional clauses including the “necessary and proper clause” and the “Commerce Clause.” Sometimes one of the founders would change positions on some of these issues. One could also argue that the nature and reach of commerce has expanded rather than that the Commerce Clause has been distorted to reach most kinds of commercial activities. Or you can plausibly argue the opposite, and various positions in between. Consider also the tension posed by the Pentagon Papers case where the Court had to consider competing constitutional considerations – the First Amendment and National Security. Constitutional directives are not always perfectly clear and many cases are not easy. The interpretation of statutes and regulations also calls for skill and judgment.

Consider, for instance, the on-going quarrel over what the Second Amendment really means. We currently have a national debate going on regarding whether certain parts of the Patriot Act are appropriate. How do we balance the rights of privacy against the concerns of national security? As George Washington indicated after taking the office of President, the Constitution was not really a precise blueprint for action nor did it answer many questions he had about his office and a variety of other things. His view was that the Constitution was, in many respects, a set of general guidelines whose many ambiguities required practical illumination.<sup>5</sup>

As an aside, statutes are often unclear and, therefore, invite or require courts to fill in blanks or resolve internal contradictions. Clarity in legislation would be helpful.

We ought to make an effort to recognize that the big arguments will be with us for a long time since we have been engaged in them basically from the beginning. Let us resist the urge to

demonize those who may disagree with us.

Perhaps I am oversensitive on this point, but I quote from a recent letter I received criticizing one of my decisions. “In my opinion, your actions were criminal and you should be treated as the criminal your actions attest to.” Communications of this sort are all too common these days, unfortunately. People of intelligence and good will are almost always found on various sides of the ongoing constitutional arguments, and on various sides of the great issues of the day. People are not necessarily stupid or corrupt or traitorous if they happen not to agree with me or with you.

Now let me wrap this up. By our training and in our careers, we generally become leaders and examples, whether we want to or not. It is sort of an expectation of a learned profession. Let me quote from Donald Lemons, President of the American Inns of Court, who recently wrote:

It is not simply that lawyers hold the keys to the courthouse door or that they speak and understand the language and principles of law. It is more than that. It is because historically, they have guided and helped to shape their communities by example and through leadership roles.

Lawyers have represented unpopular causes and despised defendants. They have championed movements of social and cultural change that were difficult in achieving. They have advocated for greater access to the courts so that constitutional promises are not empty ones. They have served in political office at every level of public service. They have coached children in sport, taught the illiterate to read, read for the blind, built and repaired houses for those with inadequate shelter, served as volunteer counsel for non-profit organizations, and taught in our nation's schools. This is leadership. This is professionalism.<sup>6</sup>

May we serve well. May we serve those who need us. May we be competent, committed, diligent and happy, and realize our important roles in American life. Thank you.

1. James D. Gordon III, *Lawyers and the Rule of Law*, CLARK MEMORANDUM, Spring 2009, at 4.
2. Judge Bruce S. Jenkins, *Professionalism and Civility*, 24 UTAH BAR JOURNAL, 32, 33 (2011).
3. THE WORDS OF ABRAHAM LINCOLN, 28 (Martin Lubin ed., Black Dog & Leventhal Publishers, Inc, 2005).
4. Ron Chernow, WASHINGTON: A LIFE, 601 (The Penguin Press, 2010).
5. *Id.* 590.
6. Donald Lemons, THE BENCHER, March/April 2011, at 2 (2011).

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# Young Living Essential Oils, LC v. Marin: *Clarifying the Limited Scope and Content of the Implied Covenant of Good Faith and Fair Dealing*

by Cory A. Talbot and J. Derek Kearl

“[S]hrouded in mystery.”<sup>1</sup> “[F]rustratingly elusive.”<sup>2</sup> “[I]nexact.”<sup>3</sup> Each phrase has been used to describe the implied covenant of good faith and fair dealing. In general terms, this implied covenant imposes a duty on contracting parties to act consistently with the parties’ agreed upon common purpose and to not do anything to destroy or injure the other party’s right to receive the benefits of the contract. See *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 43, 104 P.3d 1226; *St. Benedict’s Dev. Co. v. St. Benedict’s Hosp.*, 811 P.2d 194, 200 (Utah 1991). The doctrine “is based on judicially recognized duties not found within the four corners of the contract,” *Christiansen v. Farmers Ins. Exch.*, 2005 UT 21, ¶ 10, 116 P.3d 259, and, although it has long been a part of Utah law, continues to pose difficulties to contracting parties, practitioners, and judges alike.

*Young Living Essential Oils, LC v. Marin*, 2011 UT 64, 266 P.3d 814, represents the latest Utah Supreme Court decision on this important, but all-too-often misused and misunderstood, doctrine, and the *Young Living* court took the opportunity to “clarify...the proper scope” and emphasize that the court has “chart[ed] a limited role for the covenant of good faith and fair dealing.” *Id.* ¶¶ 1, 9. The result is a framework that should provide more predictability to Utah law, a very good thing.

This article briefly describes the decisions that have shaped the implied covenant of good faith and fair dealing in Utah and informed the court’s decision in *Young Living*, explores the reasoning

and holding in *Young Living*, and discusses the impact that *Young Living* will have on legal claims made pursuant to the implied covenant.

### Leading Up to *Young Living* – Good Faith and Fair Dealing in Utah Law

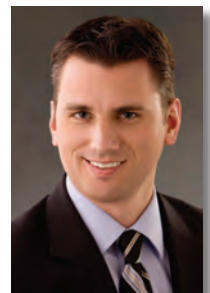
Utah courts adopted the implied covenant of good faith and fair dealing over the late 1970s and early 1980s and have continued to refine the margins and contours of that doctrine ever since. In doing so, these courts have admittedly experienced some difficulty, noting that the doctrine is “inexact” and “not susceptible to bright-line definitions and tests” and “should therefore be used sparingly and with caution.” *Berube v. Fashion Ctr, Ltd.*, 771 P.2d 1033, 1041 (Utah 1989); *Olympus Hills Shopping Ctr. v. Smith’s Food & Drug Ctrs.*, 889 P.2d 445, 450 (Utah Ct. App. 1994).

Nonetheless, a few key cases have served as guideposts in explaining the role of the implied covenant under Utah law. The first is *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (Utah 1985). In *Beck*, the Utah Supreme Court established that a claim for breach of the implied covenant of good faith and fair dealing sounds in contract, not in tort. See *id.* at 798. In rejecting a position taken by other courts, the *Beck* court held that the ability of a plaintiff to recover in tort for the breach of the implied covenant of good faith and fair dealing “has the potential for distorting well-established principles of contract law” and will

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not be permitted. *Id.* at 799; *Berube*, 771 P.2d at 1046 (citing the same). Thus, *Beck* established a more restrictive, contract approach to this doctrine.

The second key case is *St. Benedict's Development Co. v. St. Benedict's Hospital*, 811 P.2d 194 (Utah 1991). Perhaps more than any other decision up to that point, *St. Benedict's* established the parameters of the implied covenant. Noting that the "covenant of good faith and fair dealing inheres in most, if not all, contractual relationships," the court held that under the implied covenant, "each party impliedly promises that he will not intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract." *Id.* at 199. The court further held that "[t]o comply with his obligation to perform a contract in good faith, a party's actions must be consistent with the agreed common purpose and the justified expectations of the other party." *Id.* The purpose, intentions, and expectations of the parties are to be determined "by considering the contract language and the course of dealings between and conduct of the parties." *Id.* An examination of the contract's express terms alone is not sufficient to determine whether there has been a breach of the implied covenant. *See id.*

Third, and finally, in *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, 104 P.3d 1226, the Utah Supreme Court took the opportunity to further define the doctrine, holding that, while the covenant of good faith and fair dealing inheres to essentially every contract, the following general principles limit its scope:

First, this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante. Second, this covenant cannot create rights and duties inconsistent with express contractual terms. Third, this covenant cannot compel a contractual party to exercise a contractual right "to its own detriment for the purpose of benefitting another party to the contract." Finally, we will not use this covenant to achieve an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract.

*Id.* ¶ 45 (citations omitted). Relying on these guiding principles, the court rejected Oakwood's invitation to infer a promise that was not supported by, and in contradiction to, the express and unambiguous provisions of the relevant contracts. *See id.* ¶¶ 46, 56.



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It is within the context of these decisions that the court decided *Young Living*.

### The Facts Behind *Young Living*

*Young Living* was a breach of contract suit in which defendant Carlos Marin sought to define the contracting parties' rights under an agreement through the implied covenant of good faith and fair dealing. *See Young Living Essential Oils, LC v. Marin*, 2011 UT 64, ¶ 1, 266 P.3d 814. Marin and Young Living Essential Oils, LC ("Young Living") entered into an agreement whereby Marin would market and distribute Young Living's products. *See id.* ¶ 2. Among other duties set forth by the distributorship agreement, Marin agreed to meet certain sales quotas, or "performance guarantees." *Id.* In exchange, Young Living agreed to make monthly advance payments to Marin that would be offset by any commission payments due under Young Living's commission plan. *See id.* ¶ 3. The purpose of the advances was to assist Marin in focusing on contractual duties and to provide an incentive to develop a marketing base for Young Living's products. *See id.* The agreement contained an integration clause providing that no other representations or understandings would be valid under the contract. *See id.* There was no reference to marketing materials to be used in distributing the product. *See id.*

In spite of several advances by Young Living, Marin only met one performance guarantee. *See id.* ¶ 4. Young Living filed suit against Marin, alleging breach of contract for failing to meet the performance guarantees set forth by the agreement. *See id.* ¶ 5. In response, Marin claimed that his lack of performance under the contract was excused by Young Living's failure to provide him with the marketing materials necessary to assist him in meeting his performance guarantees. *See id.* Marin alleged that during the months he had difficulty meeting the performance guarantees, he had conversations with representatives of Young Living in which they acknowledged that they had failed to provide him with the marketing materials and indicated an understanding that those materials were essential to Marin fulfilling his duties under the contract. *See id.*

The trial court disagreed and granted Young Living's summary judgment motion, holding that the parol-evidence rule barred extrinsic evidence of a condition not set forth in the parties'

integrated agreement and that such a condition could not be inferred through the implied covenant of good faith and fair dealing. *See id.* ¶ 6. The Utah Court of Appeals affirmed. *See id.*

### The *Young Living* Court's Analysis of the Implied Covenant

The Utah Supreme Court granted certiorari "to review the court of appeals' treatment of the covenant of good faith and fair dealing in its affirmance of Young Living's summary judgment." *Id.* ¶ 7. The court began its analysis recognizing that the implied covenant "performs a significant but perilous role in the law of contracts." *Id.* ¶ 8. On the one hand, the implied covenant appropriately "infer[s] as a term of every contract a duty to perform in the good faith manner that the parties surely would have agreed to if they had foreseen and addressed the circumstance giving rise to their dispute," a critical function because "the parties to a contract cannot feasibly anticipate all possible contingencies nor reasonably

resolve how they would address them in writing." *Id.* On the other hand, "the judicial inference of contract terms is also fraught with peril, as its misuse threatens 'commercial certainty and breed[s] costly litigation.'" *Id.* (alteration in original) (quoting *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990)).<sup>4</sup> The court "balanced these concerns by charting a limited role for the covenant

*"This discussion of a 'new covenant' may come as a shock to practitioners who have relied on the court's prior statements that the implied covenant 'cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante.'"*

of good faith and fair dealing." *Id.* ¶ 9. This limited role finds expression in two types of implied contractual duties.

The first type of implied duty is proscriptive. Contracting parties have "an implied duty" to "refrain from actions that will intentionally destroy or injure the other party's right to receive the fruits of the contract." *Id.* ¶ 9 (additional internal quotations omitted) (quoting *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 43, 104 P.3d 1226). The Court found the rationale for such an implied duty to be self-evident: "To hold that one may employ another . . . to do a specific thing, and yet may with impunity deliberately prevent the other from doing that thing, is . . . plainly violative of good faith. . . ." *Id.* ¶ 9 n.3 (omissions in original) (quoting *Carns v. Bassick*, 175 N.Y.S. 670, 673 (App. Div. 1919)).

[This] duty advances the core function of the covenant, as no one would reasonably accede to a contract



that left him vulnerable to another's opportunistic interference with the contract's fulfillment. And that same fact protects commercial reliance interests, since a term that all reasonable parties would agree to is not likely to be imposed on the mere basis of a judge's subjective 'sense of justice.'

*Id.* ¶ 9 (quoting *Oakwood Vill.*, 2004 UT 101, ¶ 45).

The second type of implied duty is affirmative. The *Young Living* court made clear that it has "set a high bar for the invocation of a new covenant" and proceeded to set out a two-prong framework. *Id.* ¶ 10. Under this framework, a court may find that the parties are bound by an affirmative implied covenant "where it is clear" either "from [1] the parties' 'course of dealings' or [2] a settled custom or usage of trade that the parties undoubtedly would have agreed to the covenant if they had considered and addressed it." *Id.* As a further limitation, "[n]o such covenant may be invoked...if it would create obligations 'inconsistent with express contractual terms.'" *Id.* (quoting *Oakwood Vill.*, 2004 UT 101, ¶ 45).

The court explained the basis for this limited, two-prong framework as follows:

These limitations likewise protect the reliance interests of the parties to a contract and foreclose the imposition of a code of commercial morality rooted merely in judicial sensibilities. Where the court adopts a covenant enshrined in a settled custom or usage of trade, it is

simply endorsing a universal standard that the parties would doubtless have adopted if they had thought to address it by contract. Where the parties themselves have agreed to terms that address the circumstance that gave rise to their dispute, by contrast, the court has no business injecting its own sense of what amounts to "fair dealing." By enforcing these standards and limitations, our cases preserve the core role of the covenant of good faith while controlling against its misuse to the detriment of commercial security and reliance.

*Id.*

This discussion of a "new covenant" may come as a shock to practitioners who have relied on the court's prior statements that the implied covenant "cannot be read to establish new, independent rights or duties to which the parties did not agree *ex ante*." *Oakwood Vill.*, 2004 UT 101, ¶ 45. The *Young Living* court correctly recognized that this statement is really incomplete: "Properly conceived, however, that proviso merely restates the proscription against using the covenant to establish new rights or duties that are 'inconsistent with express contractual terms,' as the covenant would be completely negated if it could never establish any independent rights not expressly agreed to by contract." *Young Living Essential Oils, LC v. Marin*, 2011 UT 64, ¶ 10 n.4, 266 P.3d 814 (quoting *Oakwood Vill.*, 2004 UT 101, ¶ 45).

Measured against these standards, the court found that Marin fell "far short in his attempt to invoke the covenant of good faith



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and fair dealing.” *Id.* ¶ 11. Marin made no allegations that Young Living had violated any proscriptive implied duty “to refrain from actions that will intentionally destroy or injure the other party’s right to receive the fruits of the contract.” *Id.* (internal quotation marks omitted). Instead, Marin sought “to impose on Young Living an affirmative duty to provide a particular set of marketing materials by a certain date.” *Id.* But the court rejected that argument because such an affirmative duty was “not even allegedly based in a universally accepted obligation established through industry custom or the parties’ course of dealing.” *Id.* Thus, the court determined that Marin’s arguments – based on oral representations by Young Living personnel that Young Living would provide certain “marketing tools,” and suggestions by Young Living personnel that Marin’s inability to satisfy the performance guarantees under the contract would not affect his receipt of certain advance payments – did not “come close to establishing a basis for a judicially imposed covenant of good faith.” *Id.* ¶ 12.

The court further explained that any course of dealing must “conform to the core terms of the legal doctrine, by demonstrating a settled, longstanding pattern of dealing that the parties unquestionably would have relied on (but failed to memorialize) in entering into their contract.” *Id.* ¶ 15. Marin, however, could not point “to some universal industry custom or standard to that effect.” *Id.* In sum, the court declined to “impos[e] [its] own sense of commercial morality at the expense of the express terms of the parties’ contract.” *Id.*

Accordingly, the court affirmed the Utah Court of Appeals’ decision upholding summary judgment in Young Living’s favor. *See id.* ¶ 16.

### Import of This Case

*Young Living* sends a clear message to the Bar, the courts, and contracting parties: Utah law will not step in to add affirmative duties to contracts unless it is absolutely clear – through either course of dealing or industry custom – “that the parties undoubtedly would have agreed to the covenant if they had considered and addressed it.” *Id.* ¶ 10. The court is leery of overusing the implied covenant of good faith and fair dealing, whose application is “fraught with peril” and whose “misuse threatens ‘commercial certainty and breed[s] costly litigation.’” *Id.* ¶ 8 (alteration in original).

*Young Living* also provides practitioners with a viable and more transparent framework in which to analyze matters involving potential violations of the implied covenant of good faith and fair dealing. The *Young Living* court clarified that prior discussions of the implied covenant in *Oakwood Village* and *St. Benedict’s* provided this framework and were not merely selective examples of instances

where the implied covenant came into play. Thus, the implied covenant of good faith and fair dealing applies as follows:

1. Contracting parties have a proscriptive duty to “refrain from actions that will intentionally destroy or injure the other party’s right to receive the fruits of the contract.”

*Young Living Essential Oils, LC v. Marin*, 2011 UT 64, ¶ 9, 266 P.3d 814 (internal quotation marks omitted).

and

2. Contracting parties have an affirmative duty “where it is clear” either “from [1] the parties’ ‘course of dealings’ or [2] a settled custom or usage of trade that the parties undoubtedly would have agreed to the covenant if they had considered and addressed it.”

*Id.* ¶ 10.

This decision also sends a message that plaintiffs hoping to appeal to a court’s sense of justice and fairness by asserting this cause of action do so at their peril: The court will not impose “judicial morality” into contract cases, and should not subject contracting parties to a “vague standard of good faith” which would prevent them from “‘profitably us[ing] their contractual powers.’” *Id.* ¶ 8 n.2 (quoting *SW Sav. & Loan Ass’n v. Sunamp Sys., Inc.*, 838 P.2d 1314, 1319 (Ariz. Ct. App. 1992)).

*Young Living* by no means represents a sea change in Utah law regarding the implied covenant of good faith and fair dealing. But it provides much-needed clarity and the best guidance to date as to the application of the implied covenant – “limited.” *See id.* ¶¶ 9, 16.

1. Thomas A. Diamond & Howard Foss, *Proposing Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 HASTINGS L.J. 585 (1996) (declaring that “efforts to devise workable standards or relevant criteria for determining when the covenant has been violated have been unavailing”).
2. Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1033 (2003).
3. *Olympus Hills Shopping Ctr. v. Smith’s Food & Drug Ctrs., Inc.*, 889 P.2d 445, 450 (Utah Ct. App. 1994).
4. The court’s concern with the costs of litigation in *Young Living* is consistent with the court’s newly-promulgated rules of civil procedure regarding discovery, which were enacted “in an effort to reduce the cost and delay of civil litigation.” *See* June 6, 2011 Notice from Utah Supreme Court Adv. Comm., available at <http://www.utcourts.gov/resources/rules/comments/20110621/>.

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# *Blow the Whistle: The Dodd-Frank Act Creates New Incentives for Whistleblowers – and Compliance Issues for Utah Businesses*

by Barry Scholl and Kevin Timken

A new client makes an appointment to discuss an employment issue with you. When you talk, she tells you that she works in the warehouse for a widget distributor. Recently, right before the end of the prior fiscal year, her warehouse received an unusually large shipment of widgets from a public company. She heard her boss tell the public company's auditor that he requested the shipment and that the widgets were not returnable – but she also heard the public company's president thank her boss for accepting the unusual shipment and assure him that as soon as the audit was completed, he could return all of the widgets he had not sold. Her boss owns the company she works for, and when she mentioned the difference between what he told the auditor and what the agreement really was, he threatened to fire her.

Thanks to the Dodd-Frank Financial Reform and Consumer Protection Act (Dodd-Frank) signed into law in 2010, this is not only an employment law problem, but now also a securities law issue. *See* 15 U.S.C. § 78u-6 (2010).<sup>1</sup> Sometime this year, the Securities and Exchange Commission (SEC) is expected to pay its first rewards to whistleblowers who provided original information about violations of the federal securities laws that led to enforcement penalties. Those violations do not necessarily need to involve public companies – there are a number of ways in which a privately held company can violate the federal securities laws, particularly when it is seeking investors and selling securities.

Spurred by calls for greater oversight of Wall Street in the aftermath of the financial crisis, Dodd-Frank included provisions requiring the SEC to pay a bounty to financial insiders and others who voluntarily provide information about violations of the securities

laws. *See id.* § 78u-6(b). Tipsters whose original information leads to an SEC enforcement action resulting in monetary sanctions of more than \$1 million are to be paid between 10% and 30% of the money collected by section 78u-6(a)(1), (b)(1). Awards are available to employees, vendors, investors, financial analysts, and others – essentially anyone who provides “original information,” which is defined as information that is derived from an individual's independent knowledge or analysis, not exclusively derived from a judicial or administrative hearing, and not known to the SEC from any other source. *See id.* § 78u-6(a)(3).

Although the SEC had previously adopted rules paying bounties to those who reported insider-trading violations, this represents new ground for the SEC, and the new provisions continue to provoke strong reactions. Because the rules allow whistleblowers to go straight to the SEC and bypass internal reporting mechanisms, critics have expressed concern that they may divert important resources away from daily business and force companies to investigate and defend allegations of wrongdoing, regardless of the validity of the tips. Supporters, on the other hand, have praised the provisions as a giant leap for whistleblowers and a boon for employer-employee communications in the corporate sector.

Despite their disagreements, however, both detractors and supporters agree that the new whistleblower provisions have the potential to dramatically increase SEC enforcement activity. Since the rule became effective late last summer, the SEC has already begun to amass a growing pile of whistleblower tips. The SEC filed 735 enforcement actions in 2011, the most ever in a fiscal year. *See* U.S. Securities and Exchange Comm., FY2011

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Performance and Accountability Report (2011) at 2. It seems likely that number will increase – perhaps substantially – in 2012, given the SEC’s increasing commitment to enforcement and the new wave of whistleblower complaints to investigate.

### Significance of the Rules

In a recent report, the SEC said it received 334 whistleblower tips during the seven-week period between August 12, when the final rules became effective, and the end of the financial year on September 30. *See* U.S. Securities and Exchange Comm., Annual Report on the Dodd-Frank Whistleblower Program, FY, 2011 (2011) at 5. Two of those reports came from the state of Utah. *See id.* at Appendix B. According to a November article in *The Wall Street Journal*, the quality of the initial tips has been high, with many of the tips concerning senior employees at large entities – typically difficult sources to target in enforcement actions.<sup>2</sup> And this is just the first trickle from the faucet: it is widely predicted that tips, complaints, and referrals will continue to flood into the SEC each year under the new Dodd-Frank provisions.

### Eligibility and Awards

Reports to the SEC must be based on a reasonable belief that a possible violation of the federal securities laws has occurred, is

occurring, or is likely to occur.<sup>3</sup> In the situation discussed above, the employee has reason to believe that her boss and the public widget company are engaging in “channel-stuffing” – a scheme to use falsified shipments of products to make the public company’s financial statements look better than they otherwise would at the end of the fiscal year. If proven, “channel-stuffing” would be a violation of the federal securities laws. Lying to the auditor would constitute an additional violation.

As noted above, nearly anyone may be eligible for an award, other than officers and directors who learn about misconduct through an employee’s report to them, attorneys who obtain information in the course of representing a client, as either in-house or outside counsel, and accountants who obtain information while providing outside auditing services to a client. If your new client were to file a whistleblower complaint with the SEC, she would be eligible for a bounty if the SEC were able to collect monetary sanctions related to the violation. Even if she had knowingly given false information to the auditor at her boss’s request, she might still be eligible: the rules do not exclude individuals who may be responsible for a violation from receiving a bounty unless and until they are convicted of a crime related to the information they reported.

The award amount will range between 10% and 30% of the

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monetary sanctions collected by the SEC, at the SEC's discretion. *See* 15 U.S.C. § 78u-6(b)(1) (2010). Significantly, the monetary sanctions include "any monies, including penalties, disgorgement, and interest." *Id.* § 78u-6(a)(4)(A). The SEC has identified criteria that will both increase and decrease the size of an award. Criteria that may increase the size of an award include the significance of the information and the degree of assistance, law enforcement interest in making the award, and compliance with internal reporting procedures. *See* 17 C.F.R. 240.21F-6(a) (2011).<sup>4</sup> Criteria that may reduce the size of an award include culpability on the part of the whistleblower, delay in making the report, and interference with internal reporting procedures. *See id.* 240.21F-6(b). Whistleblowers can appeal the denial of an award directly to a United States Circuit Court of Appeals, but cannot appeal the size of an award that is within the statutory range. *See* 15 U.S.C. § 78u-6(f).

### Who Benefits?

Will attorneys benefit from the new provisions? Some financial and insurance industry insiders have argued that the new provisions may dramatically expand fraud prosecutions. Furthermore, the new rules allow whistleblowers to be represented by legal counsel and mandate that those whistleblowers who want to remain anonymous *must* be represented by legal counsel. An Internet search will quickly reveal a number of law firms that are advertising for Dodd-Frank whistleblowers. An attorney representing an anonymous whistleblower must certify that he or she has verified the whistleblower's identity and will provide the whistleblower's signed Form TCR to the SEC within seven days if the SEC has concerns about false statements or fraud. *See* SEC Form TCR, Section G. Despite a number of comments in response to the SEC's initial rule proposal requesting a ban on contingent fees, there is no limit on the amount or nature of fees charged by attorneys.

But if the new rules will impact the legal profession, they are likely to have an even greater impact on business entities. Although the SEC rules reward those who make internal reports before they file with the SEC, some industry observers have argued that potential tipsters will no longer be as willing to report suspected internal malfeasance to a company compliance officer if they believe it will reduce their chances of receiving an award. If reports to the SEC increase, which seems almost certain, companies will be forced to contend with greater scrutiny from regulatory agencies. Additionally, like cholera after a hurricane, private securities litigation is likely to follow in the aftermath of any SEC action. Forward-looking businesses are already increasing communication with employees in order to encourage prospective whistleblowers to work through

internal channels. At the same time, these companies are reviewing their compliance programs and anti-retaliation policies and educating employees about both their internal policies and the mechanics of the Dodd-Frank whistleblower provisions.

### The Award Mechanics

As one might expect, critics of the new provisions question the efficacy of the awards process and point out that there are a number of steps that must be completed before an eligible whistleblower receives an award. These steps include submitting information on a designated federal form, agreeing to testify if requested, entering into a confidentiality agreement if requested, and providing other forms of requested cooperation with the SEC investigation. Consequently, even if the SEC recovers the minimum of \$1 million and the tipster is deemed eligible, a period of years may transpire between the time a tipster provides information and when he or she receives an award.

### Evaluating and Enacting Corporate Compliance Controls

Attorneys representing companies with potential exposure should encourage them to fine-tune their compliance program and make sure that each employee is fully aware of what constitutes a "reportable event" under the new provisions. Whenever possible, employers should create a culture that encourages open communication, so that employees will feel comfortable reporting possible instances of internal misconduct first to their supervisor, company compliance officer, or in-house attorney, without fear of retaliation. To develop this culture, attorneys should encourage their corporate clients to provide a forum for anonymous tips about possible malfeasance. Companies should also consider drafting and distributing policy manuals, newsletters, and similar materials to make employees aware of what types of tips the company considers important. Larger companies should consider organizing an internal ethics committee made up of employees from various levels of seniority and different departments to review and make recommendations about company ethics policies. Some companies have gone as far as requiring employees to sign an annual acknowledgement that they have reported any potential issues about which they have information.

When an employee-whistleblower levels an internal complaint about a possible securities law violation, the company should have a well-organized system in place to assess, investigate, and respond to such complaint. What should a company do if it receives an anonymous whistleblower tip? Some sources have suggested that it should retain outside counsel to help it create a swift, nondiscriminatory approach to identifying the tipster. Although it is true that identifying the source may aid the company in investigating a claim and pinpointing



possible ulterior motives or inaccurate information, if a company proceeds along this path, it should do so with the utmost caution. Even supporters of this approach caution that if the identification of a whistleblower is perceived rightly or wrongly as a witch-hunt, it might prompt whistleblowers to go straight to the SEC in the future. It could also lead to liability for the company under the anti-retaliation provisions discussed below.

### Anti-Retaliation Provisions

It is likely that the best strategy for protecting the hypothetical client discussed above would be to have her file a whistleblower complaint with the SEC and to make sure her boss is aware of the complaint. Dodd-Frank makes it unlawful for any employer to “discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower.” 15 U.S.C. § 78u-6(h)(1)(A) (2010). The anti-retaliation provisions are not entirely new; they merely expand the anti-retaliation provisions adopted as part of the Sarbanes-Oxley Act of 2002 to match the scope of the new whistleblower provisions. If her boss were to take any adverse employment action against her after learning the whistleblower complaint was filed, she would appear to have an additional claim for retaliation.

It should be emphasized that the Dodd-Frank anti-retaliation provisions protect those who make a report based on a reasonable belief in accordance with the reporting procedures. *See id.* There is no requirement that the whistleblower received an award or that a violation was found to have occurred for the whistleblower to be protected against retaliation. *See id.*

Whistleblower confidentiality is also protected. The SEC may not disclose “any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower.” *Id.* § 78u-6(h)(2)(A). The provisions include a private cause of action for alleged retaliation for disclosure of information. *See id.* § 78u-6(h)(1)(B). Possible forms of relief include reinstatement, double back-pay, litigation costs, and attorney fees. *See id.* § 78u-6(h)(1)(C). Under Dodd-Frank, employee-whistleblowers can sue their employers civilly for up to six years after any alleged retaliatory conduct. *See id.* § 78u-6(h)(1)(B)(iii).

### Conclusion

Dodd-Frank significantly expanded the opportunities for whistleblowers to benefit financially from identifying possible securities law violations to the SEC. Attorneys practicing in areas outside the securities realm – and particularly in employment law – should be aware of the opportunity to report violations, the need for

corporate compliance to prevent violations and minimize those that occur, and the power of the anti-retaliation provisions.

1. The Securities Whistleblower Incentives and Protection provisions of the Dodd-Frank Act, codified at 15 U.S.C. § 78u-6 (2010), are commonly referred to as Section 21F of the Securities Exchange Act of 1934 (the “Exchange Act”). The Securities and Exchange Commission rules, published in the federal register at 17 C.F.R. 240.21F-1 to 240.21F-17 are commonly referred to as Exchange Act Rules 21F-1 to 21F-17. Where a provision is included in both the statute and the rule, we have cited to the statute.
2. Jean Eaglesham, *After Tip, the Claim for Reward*, WALL ST. J., Nov. 16, 2011, [http://online.wsj.com/article/SB10001424052970203503204577040443550817570.html?mod=WSJ\\_hp\\_LEFTWhatsNewsCollection](http://online.wsj.com/article/SB10001424052970203503204577040443550817570.html?mod=WSJ_hp_LEFTWhatsNewsCollection).
3. It is important to note that the SEC whistleblower program only applies to violations of federal securities laws. Accordingly, the Utah Legislature adopted the Securities Fraud Reporting Program Act (the “Utah Act”) in 2011. Patterned after the whistleblower provisions of Dodd-Frank, the Utah Act gives the Utah Division of Securities the authority to grant awards to reporters of securities violations and prohibits retaliation against them. *See* Utah Code Ann. §§ 61-1-101 to -106 (2011).
4. Because the amount of an award depends on the amount of monetary sanctions – including disgorgement – collected by the SEC, whistleblowers would seem to have an incentive to allow schemes to “ripen” to the point where the penalties – and therefore the award – would be the largest. This is particularly true when the securities violations involve fraudulently soliciting money from investors. For that reason, the SEC should consider increasing awards for reports that come in before securities violations have resulted in substantial losses. Additionally, awards should be increased when whistleblowers are able to identify the location of hidden proceeds from securities violations.

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# *The Civic-Minded Lawyer*

by Keith A. Call

In the summer of 1988, the lawyers at Fabian & Clendenin were kind enough to give me a job as a court runner. I now grin to think about how genuinely exciting it was for me, a small-town son of a country lawyer, to deliver important documents – complaints, thick motions, and even interrogatory answers – around town to court and other law firms. A few years later, I experienced an even more exhilarating feeling when I first signed my name as a bona fide lawyer on an actual complaint that was about to be filed in the Maricopa County Superior Court.

I still love representing clients and helping them resolve difficult legal problems, but somehow middle age has removed the pure, innocent exhilaration I felt about complaints, motions, and interrogatories. I think it may have something to do with that darn billable hour.

The billable hour is probably also largely responsible for the negative perception of lawyers, not only in modern popular culture but in ancient religious texts as well. Even the Bible gives a strong rebuke to lawyers: “Woe unto you also, ye lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.”<sup>1</sup>

One of the best ways I know to maintain a love for the legal profession and to improve our image as lawyers has a lot to do with civility. The word “civility” has the same etymology as words like civilization, civilized and civic. These words all come from the Latin root *civis*, which means “citizen.”

As a lawyer, are you being a civic-minded citizen? Presiding Judge Royal Hansen of the Third District Court has said, “Lawyers have unique skills, and therefore a unique ability to impact the community. No lawyer should abdicate to others his responsibility to give service.”<sup>2</sup>

There are many great examples all around us. In 1994 Debra Brown was sent to the Utah State prison on a life sentence after being convicted of a murder. She spent the next seventeen years of her life there. But Debra Brown was innocent. Debra would most likely still be in prison today except for the pro bono assistance of two Utah attorneys, Alan Sullivan and Chris Martinez. After spending untold hours and personal sacrifice, Alan and Chris were able

to overturn Debra’s wrongful conviction in 2011, developing new law under a “factual innocence” statute in the process. Instead of spending the rest of her life wrongfully imprisoned, Debra is now a free citizen, gainfully employed and happily living with her family. Alan reports this experience was “one of my most difficult and satisfying experiences as a lawyer.”<sup>3</sup>

Civic service need not be so dramatic to be satisfying and meaningful. Some of my most memorable and rewarding experiences as a lawyer involve helping people who were frightened and intimidated by the prospect of small claims court.

In addition, civic service need not be limited to pro bono or reduced-fee legal services. There are countless ways to use one’s legal training and skills to get involved and serve the community. I greatly admire lawyers who are willing to run for political office on national, state, and local levels. School boards, citizen review boards, and numerous other organizations can greatly benefit from what legal professionals have to offer.

Volunteer civic service will not only help those you serve, but it will also improve the reputation of lawyers generally. It is also a guaranteed way of making sure your practice maintains purpose for you personally. So make a point this year to give of yourself professionally. If you are not sure how to get involved, shoot me an e-mail and I’ll be happy to discuss some ideas with you.

1. Luke 11:46 (King James).

2. Interview with Presiding Judge Royal I. Hansen, Third District Court (October 12, 2011).

3. Telephone Interview with Alan Sullivan (December 29, 2011).

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



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# *The How to Win Trial Manual, Winning Trial Advocacy in a Nutshell, 5th Ed.*

by Ralph Fine

Reviewed by Andrea Garland

The best advice is “practice, practice, practice,” which is also Judge Ralph Fine’s advice for mastering the art of trial advocacy. Judge Fine, on the Wisconsin Court of Appeals since 1988, served as a judge on the Wisconsin circuit court from 1979 to 1988. This book provides great how-to instruction coupled with relevant, interesting examples from well-known trials. Judge Fine includes authentic trial transcripts with commentary on what the lawyers did right and wrong. It is a useful book for any trial lawyer.

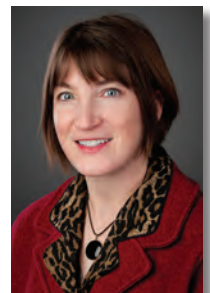
As a public defender, it warmed my heart to read how trial competence can be learned but not bought. I suppose it’s unseemly to smirk while reading trial transcripts of bad lawyering on behalf of Jeff Skilling, Martha Stewart, Ken Lay, and unlucky others, many of whom paid hundreds of dollars per hour for their lawyers to appear in court with really great haircuts but without having apparently having prepared to ask their clients much beyond “and then what happened?”

I liked Judge Fine’s practical focus on the individual tasks inherent in each case. From picking a jury to closing statements, Judge Fine lays out what needs to be done, points out common mistakes, and tells us how to avoid them. His section on direct examination was uncommonly informative. I have seen other lawyers ask a question and then seem to ask the same question in different ways so the jury repeatedly hears good facts, can understand them, and can remember them as true. I had never before heard the technique described as “Turning the Cube,” or understood how exactly to do it. Judge Fine also describes how to cross examine a lying witness so that witness’s testimony doesn’t matter except to establish the witness as a liar. He deflates as myth the “one question too many,” taboo by pointing out that if you don’t ask, the other side will, so it is better to have a plan to incorporate the answer into your case. He describes how to deliver an effective closing argument that eschews rhetoric but relates the facts of the case to jurors’ own life experiences and therefore rings true.

Actually, Judge Fine’s repeated insistence that the winning lawyer is the one perceived as the “truth-giver” is probably the book’s biggest weakness. Judge Fine’s perspective as a trial judge blinds him to a problem faced by some trial lawyers, namely, that truth may not be our client’s ally. We cannot tell a jury in opening “I will prove to you my client’s innocence,” nor should we, even if we think we have the facts on our side. It is easy to attempt to “Embrace bad facts,” but some are better ignored if not suppressed. If during a jury trial a jail officer testifies to finding a baggie of crack taped behind my client’s testicles, it serves my client better if I try to kick over the water cooler than try to embrace that testimony. He advises lawyers to not object unless the evidence is both objectionable and a “case loser,” yet appellate courts deny appeals every day for failure to preserve the record and it is not always clear precisely which fact loses the case. One other issue is the length of some of the transcripts: I can only learn so much from antitrust litigation involving earth-moving equipment before a snooze sets in.

There’s some great stuff in this book, however. Judge Fine explains why juries are more apt than judges to render accurate verdicts (“rebar strength”), and advises “You can get almost anything you want from a trial judge if you promise it will ‘save time.’” I recommend *The How to Win Trial Manual* for anyone who is about to try their first case, and also for those who have tried many cases but still strive to improve their skills.

*ANDREA GARLAND is a trial attorney at Salt Lake Legal Defender Association.*



# Become a Mentor



**Teach them what you  
wish you'd known when  
you were in their shoes**



**[www.utahbar.org/nltp](http://www.utahbar.org/nltp)**

## Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the January 13, 2012 Commission Meeting held at the Law & Justice Center in Salt Lake City.

1. The Commission nominated Curtis Jensen as Bar President-Elect Candidate.
2. The Commission approved WHW Engineering Fee Proposal to Prepare HVAC Retrofit Design Drawings.
3. The Commission approved Modest Means Committee proposals, including: (1) a \$25 charge per referral for clients using the service; (2) the listing of caps on attorney's fees according to the percentages at which clients are above the federal poverty level; (3) the requirement that lawyers have malpractice insurance; and (4) the limit for program participation at 300% above the federal poverty level.
4. The Commission approved the December 2, 2011 Commission Minutes via Consent Agenda with an amendment to show that Eve Furse was in attendance.
5. The Commission approved the list of February Bar admittees via Consent Agenda.
6. The Commission approved the Minutes of the December 9, 2011 Special Teleconference Meeting via Consent Agenda.
7. Commissioners agreed to serve as Co-Chairs of Judicial District Pro Bono Committees and will assist judges with their organization.

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

## Notice of Legislative Rebate

Bar policies and procedures provide that any member may receive a proportionate dues rebate for legislative related expenditures by notifying the Executive Director: John C. Baldwin, 645 South 200 East, Salt Lake City, UT 84111.

## SOCIAL SECURITY Disability Help

*When your client is injured, sick and cannot work for 12 months or more...why not recommend getting help for Social Security disability benefits? Social Security is all we do and we could help you and your client. Medicaid and Medicare insurance coverage can also help with medical care and prescription medication. We could also assist you in the collection of medical records. Could medical treatment, and an award of disability benefits strengthen your case?*



**Legal Representation  
by the Law Office of  
David W. Parker**

**6007 S Redwood Rd.  
SLC, UT 84123**

## Notice of Verified Petition to Reinstate to the Utah State Bar by Craig M. Bainum

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of Respondent's Verified Petition to Reinstate ("Petition") filed by Craig M. Bainum in *In the Matter of the Discipline of Craig M. Bainum*, Fourth Judicial District Court, Civil No. 040402603. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.



UTAH STATE BAR.



## July 18-21 • Sun Valley, Idaho • Reservation Request Form

### SUN VALLEY LODGE: (single or double occupancy)

Standard (1 queen-sized bed) . . . . .	\$200.00
Medium (1 king-sized bed) . . . . .	\$240.00
Medium (2 double sized beds) . . . . .	\$260.00
Deluxe (1 king-sized bed) . . . . .	\$280.00
Deluxe (2 queen beds) . . . . .	\$295.00
Lodge Balcony . . . . .	\$335.00
Family Suite . . . . .	\$420.00
Parlor Suite . . . . .	\$520.00

### SUN VALLEY INN: (single or double occupancy)

Standard (1 queen-sized bed) . . . . .	\$175.00
Medium (1 queen-sized bed) . . . . .	\$185.00
Medium (2 double-sized beds) . . . . .	\$240.00
Deluxe (1 king-sized bed) . . . . .	\$250.00
Deluxe (2 double or 2 queen-sized beds) . . . . .	\$270.00
Junior Suite ( king-sized bed) . . . . .	\$335.00
Family Suite (1 queen & 2 twin beds) . . . . .	\$340.00
Inn Parlor (1 king-sized bed) . . . . .	\$445.00
Three Bedroom Inn Apartment . . . . .	\$555.00

### DELUXE LODGE APARTMENTS & WILDFLOWER CONDOS:

Lodge Apartment Hotel Room . . . . .	\$215.00
Lodge Apartment Suite (up to 2 people) . . . . .	\$449.00
Two-bedrooms (up to 4 people) . . . . .	\$479.00
Three-bedrooms (up to 6 people) . . . . .	\$559.00

### STANDARD SUN VALLEY CONDOMINIUMS:

#### Atelier, Cottonwood Meadows, Snowcreek, Villagers I & Villagers II

Studio (up to 2 people) . . . . .	\$199.00
One Bedroom (up to 2 people) . . . . .	\$259.00
Atelier 2-bedroom (up to 4 people) . . . . .	\$279.00
Two Bedroom (up to 4 people) . . . . .	\$309.00
Three Bedroom (up to 6 people) . . . . .	\$329.00
Four Bedroom (up to 8 people) . . . . .	\$379.00
Extra Person . . . . .	\$15.00

(These rates do not include tax, which is currently 11% and subject to change.)

### RESERVATION DEADLINE:

This room block will be held until June 4, 2012. After that date, reservations will be accepted on a space available basis.

Confirmed reservations require an advance deposit equal to one night's room rental, plus tax. **In order to expedite your reservation, simply call our Reservations Office at 1-800-786-8259.** Or, if you wish, please complete this form and return it to our Reservations Office, P.O. Box 10, Sun Valley, Idaho, 83353.

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Phone: (day) \_\_\_\_\_  
(evening) \_\_\_\_\_

Accommodations requested: \_\_\_\_\_

Rate: \_\_\_\_\_ # in party: \_\_\_\_\_

Do you need complimentary Sun Valley Airport transfer (Hailey to Sun Valley Resort) ☐ Yes ☐ No

Airline/Airport: \_\_\_\_\_

Arrival Date/Time: \_\_\_\_\_

Departure Date/Time: \_\_\_\_\_

Please place the \$ \_\_\_\_\_ deposit on my \_\_\_\_\_

Card #: \_\_\_\_\_ Exp. Date: \_\_\_\_\_

Name as it reads on card: \_\_\_\_\_

(Your card will be charged the first night's room & tax deposit. We accept MasterCard, VISA, Am. Express, & Discover.)

**If you have any questions, call Reservations at 800-786-8259 or fax your reservation to 208-622-2030.**

A confirmation of room reservations will be forwarded upon receipt of deposit. **Please make reservations early for best selection!** If accommodations requested are not available, you will be notified so that you can make an alternate selection.

**Cancellation:** Cancellations made more than 30 days prior to arrival will receive a deposit refund less a \$25 processing fee. Cancellations made within 30 days will forfeit the entire deposit.

**Check in Policy:** Check-in is after 4:00 pm. Check-out is 11:00 am.

## ***Notice of Electronic Balloting***

Utah State Bar elections have moved from the traditional paper ballots to electronic balloting. Online voting reduces the time and expense associated with printing, mailing, and tallying paper ballots and provides a simplified and secure election process. A link to the online election will be supplied in an e-mail sent to your e-mail address of record. Please check the Bar's website at [http://www.utahbar.org/forms/members\\_directory\\_search.html](http://www.utahbar.org/forms/members_directory_search.html) to see what e-mail information you have on file. You may update your e-mail address information by using your Utah State Bar login at <http://www.myutahbar.org>. (If you do not have your login information please contact [onlineservices@utahbar.org](mailto:onlineservices@utahbar.org) and our staff will respond to your request.) Online balloting will begin April 1 and conclude April 15, 2012. Upon request, the Bar will provide a traditional paper ballot by contacting Christy Abad at [adminasst@utahbar.org](mailto:adminasst@utahbar.org).

## ***Three New Lawyer Legislators***

After publishing the 2012 Utah State Lawyer Legislative Directory in the Jan/Feb issue of the *Utah Bar Journal*, three more Utah attorneys were appointed to seats in the legislature. They are:



**Daniel McCay (R)** – District 52 (Appointed to House: 2012)

Education: Bachelors in Secondary Education, Utah State University; Masters in Instructional Design, Utah State University; J.D., Willamette University

Committee Assignments: Health and Human Services, Law Enforcement and Criminal Justice, Social Services Appropriations.

Practice Areas: Real Estate Transactions, Land Use, Civil Litigation



**V. Lowry Snow (R)** – District 74 (Appointed to House: 2012)

Education: BS., Brigham Young University; J.D., Gonzaga University School of Law

Committee Assignments: Business, Economic Development, and Labor Appropriations Subcommittee; Judiciary Committee; Public Utilities and Technology.

Practice Areas: Real Estate, Civil Litigation, Municipal and Land Use Planning, Telecommunications at Snow Jensen & Reece



**Todd Weiler (R)** – District 23 (Appointed to Senate: 2012)

Education: Business Degree, Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Retirement & Independent Entities Subcommittee (Chair), Social Services Subcommittee. Standing – Business and Labor; Judiciary, Law Enforcement, and Criminal Justice; Retirement and Independent Entities (Chair). Interim: Health and Human Services Confirmation, Retirement and Independent Entities Confirmation (Chair).

Practice Areas: General Counsel, Logistics Specialties, Inc.

## ***Mandatory Online Licensing***

The annual Bar licensing renewal process will begin June 1, 2012 and will be done only on-line. Sealed cards will be mailed the last week of May to your address of record. (*Update your address information now at <http://www.myutahbar.org>*). The cards will include a login and password to access the renewal form and will outline the steps to re-license. Renewing your license online is simple and efficient, taking only about five minutes. With the online system you will be able to verify and update your unique licensure information, join Sections and specialty bars, answer a few questions, and pay all fees.

### **No separate licensing form will be sent in the mail.**

You will be asked to certify that you are the licensee identified in this renewal system. Therefore, this process should only be completed by the individual licensee – not by a secretary, office manager, or other representative. Upon completion of the renewal process, you will be shown a Certificate of License Renewal that you can print and use as a receipt for your records. This certificate can be used as proof of licensure, allowing you to continue practicing until your renewal sticker, via the U.S. Postal Service. If you do not receive your license in a timely manner, call (801) 531-9077.

*Licensing forms and fees are due July 1 and will be late on August 1. Unless the licensing form is completed online by September 1, your license will be suspended.*

We are increasing the use of technology to improve communications and save time and resources. Utah Supreme Court Rule 14-507 requires lawyers to provide their current e-mail address to the Bar. If you need to update your e-mail address of record, please contact [onlineservices@utahbar.org](mailto:onlineservices@utahbar.org). If you do not have an e-mail address or do not use e-mail, you may receive a printed licensing form by contacting [licensing@utahbar.org](mailto:licensing@utahbar.org).

## ***2012 Summer Convention Awards***

The Board of Bar Commissioners is seeking nominations for the 2012 Summer Convention Awards. These awards have a long history of publicly honoring those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or [adminasst@utahbar.org](mailto:adminasst@utahbar.org), no later than Friday, May 18, 2012. The award categories include:

1. Judge of the Year
2. Distinguished Lawyer of the Year
3. Distinguished Section/Committee of the Year

### ***Did you know?***

Past issues of the *Utah Bar Journal* are available online, in both text and pdf format, at: [www.utahbarjournal.com](http://www.utahbarjournal.com)



*is pleased to announce that*

***Heather L. Thuet***  
*has become a SHAREHOLDER*

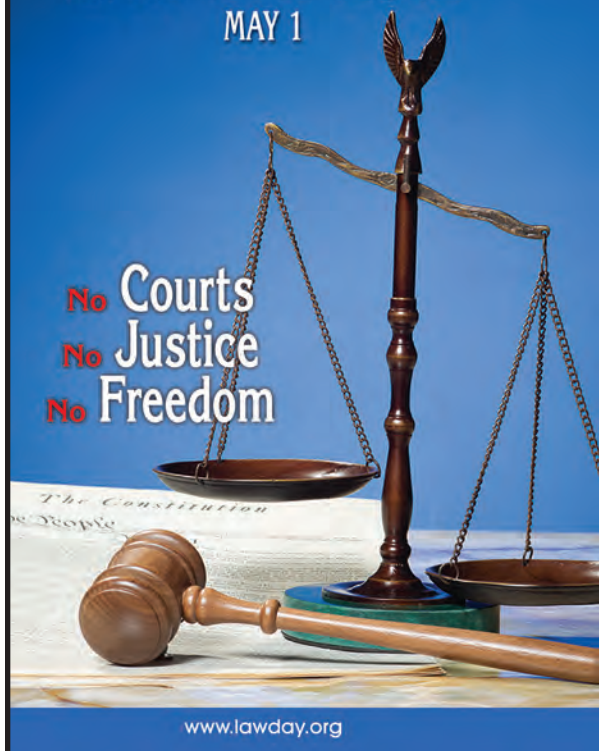
*Ms. Thuet's practice focuses primarily in the areas of real estate & land use, professional liability, construction defect and employment.*

Gateway Tower West  
15 West South Temple, Suite 800  
Salt Lake City, Utah 84101  
801-323-5000 • [cjlaw@chrisjen.com](mailto:cjlaw@chrisjen.com)



# LAW DAY 2012

MAY 1



## 2012 Law Day Luncheon

**Tuesday, May 1, 12:00 noon**  
**Little America Hotel**  
**500 South Main Street, Salt Lake City**

Awards will be given honoring:

- Art & the Law Project (Salt Lake County Bar Association)
- Essay Contest (Utah Minority Bar Association)
- Liberty Bell Award (Young Lawyers Division)
- Pro Bono Publico Awards
- Scott M. Matheson Award (Law-Related Education Project)
- Utah's Junior & Senior High School Student Mock Trial Competition
- Young Lawyer of the Year (Young Lawyers Division)

For further information, to RSVP for the luncheon and/or to sponsor a table please contact:

Tyson Snow, (801) 559-0020

Sponsored by the Young Lawyers Division

## The Utah State Bar is calling for nominations for the 2012 Pro Bono Publico Awards

The deadline for nominations is April 1, 2012.

The awards will be presented at the Law Day Celebration at the Little America Hotel on May 1, 2012.

To download a nomination form and for additional information please go to:  
[http://www.utahbar.org/probono/pro\\_bono\\_awards.html](http://www.utahbar.org/probono/pro_bono_awards.html)

If you have questions please contact:  
 Pro Bono Coordinator, Michelle Harvey, at [probono@utahbar.org](mailto:probono@utahbar.org) or 801-297-7027



“and **Justice** for all”

## 30th Annual Law Day 5K Run & Walk

May 19, 2012 • 8:00 a.m.

S. J. Quinney College of Law at the University of Utah

*“Celebrating 30 Years of Running for Courts, Justice & Freedom”*



**REGISTRATION INFO:** Mail or hand deliver completed registration to address listed on form (registration forms are also available online at [www.andjusticeforall.org](http://www.andjusticeforall.org)). **Registration Fee:** before May 2 – \$25 (\$10 for Baby Stroller Division), after May 2 – \$35. Day of race registration from 7:00 a.m. to 7:45 a.m. Questions? Call 801-924-3182.

**HELP PROVIDE LEGAL AID TO THE DISADVANTAGED:** All event proceeds benefit “and Justice for all,” a collaboration of Utah’s primary providers of free civil legal aid programs for individuals and families struggling with poverty, discrimination, disability, and violence in the home.

**DATE:** Saturday, May 19, 2012 at 8:00 a.m. Check-in and day-of race registration in front of the Law School from 7:00 – 7:45 a.m.

**LOCATION:** Race begins and ends in front of the S. J. Quinney College of Law at the University of Utah just north of South Campus Drive (400 South) on University Street (about 1350 East).

**PARKING:** Parking available in the lot next to the Law Library at the University of Utah Law School (about 1400 East), accessible on the north side of South Campus Drive, just east of University Street (a little west of the stadium). Or take TRAX!

**USATF CERTIFIED COURSE:** The course is a scenic route through the University of Utah campus. A copy of the course map is available on the website at [www.andjusticeforall.org](http://www.andjusticeforall.org).

**CHIP TIMING:** Timing will be provided by Sports-Am electronic race monitoring. Each runner will be given an electronic chip to measure their exact start and finish time. Results will be posted on [www.sports-am.com/raceresults/](http://www.sports-am.com/raceresults/) following the race.

**RACE AWARDS:** Prizes will be awarded to the top male and female winners of the race, the top male and female attorney winners of the race, and the top two winning speed teams. Medals will be awarded to the top three winners in every division, and the runner with the winning time in each division will receive two tickets to the **Utah Arts Festival**.

**RECRUITER COMPETITION:** It’s simple, the organization who recruits the most participants for the Run will be awarded possession of the Recruiter Trophy for one year. However, all participating recruiters are awarded a prize because success of the Law Day Run depends upon our recruiters! To become the 2012 “Team Recruiter Champion,” recruit the most registrants under your organization’s name. Be sure the Recruiting Organization is filled in on the registration form to get competition credit.

**SPEED TEAM COMPETITION:** Compete as a **Speed Team** by signing up five runners (with a minimum of two female racers) to compete together. All five finishing times will be totaled and the team with the fastest average time will be awarded possession of the Speed Team Trophy for one year. There is no limit to how many teams an organization can have, but a runner can participate on only one team. To register as a team, have all five runners fill in the same Speed Team name on the registration form.

**SPEED INDIVIDUAL ATTORNEY COMPETITION (Sponsored by Workman Nydegger):** In addition to the overall top male and female race times recognized, the top male and female attorneys with the fastest race times will be recognized. To enter, an individual must fill in their State Bar number in the space provided.

**BABY STROLLER DIVISION:** To register you and your baby as a team, choose the **Baby Stroller Division**. **IMPORTANT:** Baby Stroller entrants register **only** in the baby stroller division. Registration for the stroller pusher is the general race registration amount (\$25 pre-registration, \$35 day of). Simply add on \$10 for each baby t-shirt that you want to receive (baby shirts for day-of registrants will be sent out later). Don’t forget to fill in a t-shirt size for both adult and baby.

**WHEELCHAIR DIVISION:** Wheelchair participants register and compete in the **Wheel Chair Division**. An award will be given to the top finisher.

**“IN ABSENTIA” RUNNER DIVISION:** If you can’t attend the day of the race, you can still register in the **“In Absentia” Division** and your t-shirt and participation packet will be sent to you after the race.

**CHAISE LOUNGE DIVISION:** Register in the **Chaise Lounge Division**. Bring your favorite lounge chair, don your t-shirt, and enjoy a morning snack while cheering on the runners and walkers as they cross the finish line!



**REGISTRATION – “and Justice for all” Law Day 5K Run & Walk**  
**May 19, 2012 • 8:00 a.m. • S.J. Quinney College of Law at the University of Utah**

To register by mail, please send this completed form and registration fee to Law Day Run & Walk, c/o Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111. If you are making a charitable contribution, you will receive a donation receipt directly from “and Justice for all.”

First Name: \_\_\_\_\_ Last Name: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 City, State, Zip: \_\_\_\_\_  
 Birth Date: \_\_\_\_\_ Phone: \_\_\_\_\_ E-mail Address: \_\_\_\_\_

**DIVISION SELECTION - MUST SELECT ONE** (please mark ONLY ONE division per registrant)

- |  |  |
|--|--|
| <input type="checkbox"/> <b>Age Division FEMALE</b> _____<br>(AGE on May 19, 2012 - Must be filled in) | <input type="checkbox"/> <b>Wheelchair Division FEMALE</b>               |
| <input type="checkbox"/> <b>Age Division MALE</b> _____<br>(AGE on May 19, 2012 - Must be filled in)   | <input type="checkbox"/> <b>Wheelchair Division MALE</b>                 |
| <input type="checkbox"/> <b>Baby Stroller Division FEMALE</b>  | <input type="checkbox"/> <b>Chaise Lounge Spectator</b>                  |
| <input type="checkbox"/> <b>Baby Stroller Division MALE</b>  | <input type="checkbox"/> <b>In Absentia - “I’ll be there in spirit!”</b> |

**SHIRT SIZE** (please check one)

- ☐ Child XS ☐ Child S ☐ Child M ☐ Child L  
☐ Adult S ☐ Adult M ☐ Adult L ☐ Adult XL ☐ Adult XXL

**BABY SHIRT SIZE** (baby stroller participants only)

- ☐ 12m ☐ 18m ☐ 24m ☐ Child XS

**OPTIONAL COMPETITIONS** (Registrations **MUST** be received by May 2, 2012 to be entered in any of these):

**Recruiting Organization:**

**Speed Competition Team:**

**Speed Individual Attorney:**

\_\_\_\_\_ (must be filled in for recruiter’s competition)

\_\_\_\_\_ (team name)

\_\_\_\_\_ (Bar number)

**Payment**

Pre-Registration (deadline 05/02/12) \$25.00  
 Baby Stroller (add \$10 per baby) \$10.00  
 Late Registration Fee (after 05/02/12) \$10.00  
 Charitable Donation to “and Justice for all” \$\_\_\_\_\_  
**TOTAL PAYMENT** \$\_\_\_\_\_

**Payment Method**

☐ Check payable to “Law Day Run & Walk”  
☐ Visa ☐ Mastercard ☐ American Express  
 Name on Card \_\_\_\_\_  
 Address \_\_\_\_\_  
 No. \_\_\_\_\_ exp. \_\_\_\_\_

**RACE WAIVER AND RELEASE:** I waive and release from all liability the sponsors and organizers of the Run and all volunteers and support people associated with the Run for any injury, accident, illness, or mishap that may result from participation in the Run. I attest that I am sufficiently trained for my level of participation. I also give my permission for the free use of my name and pictures in broadcasts, video, web, newspapers, and event publications. I consent to the charging of my credit card submitted with this entry for the charges selected. I understand that entry fees are non refundable. I agree to return the timing transponder and its attachment device to an appropriate race official after the race. If I fail to do so, I agree to pay \$10.00 to replace the timing transponder.

Signature (or Guardian Signature for minor)

Date

If Guardian Signature, Print Guardian Name

**THANK YOU TO OUR MAJOR SPONSORS**





## ***Pro Bono Honor Roll: October 2011 – January 2012***

Aaron Owens	Christopher Wharton	Jeffery Simcox	Marcie Swenson	Russell Yauney
Adrienne J. Bell	Cindy Coombs	Jeffrey D. Teichert	Margaret Pascual	Sanna-Rae Taylor
Alain C. Balmanno	Clark L. Snelson	Jeffry Gittins	Maria-Nicolle Beringer	Sarah Beck
Alan S. Mouritsen	Clayton Cox	Jennifer Bogart	Mark E. Kittrell	Scott D. Thorpe
Alex McBean	Craig Barrus	Jennifer Reyes	Mark Jarvis	Scott Higley
Alisa Rogers	Craig Jorgensen	Jenny Jones	Marlene Gonzalez	Scott R. Jenkins
Alissa M. Mellem	Daniel E. Barnett	Jessica G. Peterson	Mary D. Brown	Scott Trujillo
Andrew R. Kolter	Darren M. Levitt	Joseph Caudell	MaryAnn Bennett	Shane Marx
Angilee Wright	David Cook	John M. Zidow	Matthew G. Wells	Sharon M. Bertelsen
Ann Tolley	David K. Broadbent	Jonathan Thorne	Matthew J. Ball	Shauna O'Neil
April Hollingsworth	David K. Heinhold	Jonny Benson	Matthew J. Thorne	Shawn Foster
Ashton J. Hyde	DeRae Preston	Jory L. Trease	Megan J. DePaulis	Silvia Pena-Chacon
Austin J. Riter	Donna Bradshaw	Jory P. Shoell	Megan J. Houdeshel	Solomon Chacon
Barney Saunders	Dorothy Gillespie	Joshua T. Collins	Melanie R. Clark	Stephanie Miya
Benjamin Gordon	Elizabeth L. Silvestrini	Julie Winkler	Michael A. Jensen	Steven Averett
Betsy Haws	Elizabeth Lisonbee	Karen Allen	Michael Thomas	Steven E. Tyler
Blaine Williams	Elizabeth S. Conley	Katherine A. Conyers	Michele Anderson-West	Steven K. Burton
Brandon Baker	Eric G. Maxfield	Kathie Brown-Roberts	Michelle V. Harvey	Steven K. Walkenhorst
Brent Hall	Erin T. Middleton	Keith Eddington	Morgan Wilcox	Steven R. Lawrence
Brian E. Arnold	Felicia B. Canfield	Kelly J. Latimer	Nathan Carroll	Steven Stewart
Brian Quesenberry	Floyd Holm	Kenneth Ashton	Nathan D. Miller	Stewart Ralphs
Brian Tanner	Glen E. Davies	Kenneth Carr	Nicholas Angelides	Ted Paulsen
Brittany Ratelle	Harry E. McCoy II	Kimberly Herrera	Nicholas Ushio Frandsen	Terrell R. Lee
Bruce L. Nelson	Heather Tanana	Kristin Rabkin	Paul Basmajian	Thomas D. Weber
Bryan Bryner	Jacob A. Santini	Kyle Hoskins	Paul G. Amann	Tiffany Blanchard
Bryan R. Nalder	James K. Slaven	Lamar Winward	Paul Waldron	Tiffany Panos
Bryce H. Pettey	James P. Allen	Langdon Fisher	Phillip S. Ferguson	Timothy G. Williams
Candice Pitcher	James Park	Laura L. Pressley	Rachel Otto	Tony Graf
Carolyn Morrow	James R. Baker	Lauralyn Cabanilla	Rachel S. Anderson	Tony Williams
Casey W. Jones	Jana Tibbitts	Lauren Scholnick	Randy M. Grimshaw	Tyson Horrocks
Celeste C. Canning	Jane Semmel	Laurie S. Hart	Rebecca Ryan	Virginia L. Sudbury
Chad D. Hoopes	Jared T. Hales	Leah Jensen	Richard Mellen	William Barlow
Christian Kesselring	Jay L. Kessler	Lena Cetvei	Robert Culas	William Morrison
Christiana L. Biggs	Jay Winward	Linda F. Smith	Robert R. Brown	Zack L. Winzeler
Christopher Preston	Jeannine P. Timothy	Lisa Semanoff	Robert Saunders	
	Jeffery Peatross	Lowry Snow	Roger Y. Tsai	

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 2011 through January 2012. Call Michelle V. Harvey (801) 297-7027 or C. Sue Crismon at (801) 924-3376 to volunteer.

## Utah Bar Foundation



### ***Notice of Utah Bar Foundation Annual Meeting and Open Board of Director Position***

The Utah Bar Foundation is a non profit organization that administered the Utah Supreme Court IOLTA (Interest on Lawyers Trust Accounts) Program. Funds from this program are collected and donated to nonprofit organizations in our State that provide law related education and legal services for the poor and disabled.

The Utah Bar Foundation is governed by a seven-member Board of Directors, all of whom are active members of the Utah State Bar. The Utah Bar Foundation is a separate organization from the Utah State Bar.

In accordance with the bylaws, any active licensed attorney, in good standing with the Utah State Bar may be nominated to serve a three-year term on the board of the Foundation. If you are interested in nominating yourself or someone else, you must fill out a nomination form and obtain the signature of twenty-five licensed attorneys in good standing with the Utah State Bar. To obtain a nomination form, call the Foundation office at (801) 297-7046. If there are more nominations made than openings available, a ballot will be sent to each member of the Utah State Bar for a vote.

Nomination forms must be received in the Foundation office no later than 5 pm on Wednesday, May 2, 2012 to be placed on the ballot.

The Utah Bar Foundation will be holding the Annual Meeting of the Foundation on Thursday, July 19, 2012 at 8:30 am in Sun Valley, Idaho. This meeting will be held in conjunction with the Utah State Bar's Annual Meeting.

For additional information on the Utah Bar Foundation, please visit our website at [www.utahbarfoundation.org](http://www.utahbarfoundation.org).

UTAH STATE BAR

**2012 Summer Convention**

**JULY 18-21 • SUN VALLEY, IDAHO**

Earn up to

**15**

hours CLE Credit\*

- Sports, Recreation, & Family Fun
- Family Carnival & Movie
- Networking Opportunities

\*Including up to 2 hrs. Professionalism/Civility, up to 3 hours Ethics, up to 4 hrs. Self-Study and 2 hrs. for the Salt Lake County Film Presentation. (Subject to change.)

## *Utah State Bar Request for 2012 – 2013 Committee Assignment*

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more of fourteen different committees which participate in regulating admissions and discipline and in fostering competency, public service and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name \_\_\_\_\_ Bar No. \_\_\_\_\_

Office Address \_\_\_\_\_ Telephone \_\_\_\_\_

E-mail Address \_\_\_\_\_ Fax No. \_\_\_\_\_

### **Committee Request:**

1st Choice \_\_\_\_\_ 2nd Choice \_\_\_\_\_

Please list current or prior service on Utah State Bar committees, boards, panels, or other organizations:

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Please list any Utah State Bar sections of which you are a member:

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Please list pro bono activities, including organizations and approximate pro bono hours:

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Please list the fields in which you practice law:

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Please include a brief statement indicating why you wish to serve on this Utah State Bar committee and what you can contribute. You may also attach a resume or biography.

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**Instructions to Applicants:** Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday.

Date \_\_\_\_\_ Signature \_\_\_\_\_



## Committees

1. **Admissions.** Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.
2. **Bar Examiner.** Drafts, reviews, and grades questions and model answers for the Bar Examination.
3. **Bar Exam Administration.** Assists in the administration of the Bar Examination. Duties include overseeing computerized exam-taking security issues, and the subcommittee that handles requests from applicants seeking special accommodations on the Bar Examination.
4. **Character & Fitness.** Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.
5. **CLE Advisory.** Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality, and conformance.
6. **Courts and Judges.** Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.
7. **Disaster Legal Response.** The Utah State Bar Disaster legal Response Committee is responsible for organizing pro bono legal assistance to victims of disaster in Utah.
8. **Fall Forum.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
9. **Fee Dispute Resolution.** Holds mediation and arbitration hearings to voluntarily resolve fee disputes between members of the Bar and clients regarding fees.
10. **Fund for Client Protection.** Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.
11. **Member Resources.** Reviews requests for sponsorship and involvement in various group benefit programs, including health and malpractice insurance and other group benefits.
12. **Spring Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
13. **Summer Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
14. **Unauthorized Practice of Law.** Reviews and investigates complaints made regarding unauthorized practice of law and takes informal actions as well as recommends formal civil actions.

**Detach & Mail by June 29, 2012 to:**  
**Lori Nelson, President-Elect**  
**645 South 200 East**  
**Salt Lake City, UT 84111-3834**

## 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](http://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](http://www.utahbar.org/rules_ops_pols/index_of_opinions.html).

### ADMONITION

On January 5, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

#### *In summary:*

The attorney missed a trial setting by failing to attend the trial. The attorney did not promptly inform the client of the missed trial. The attorney also tried to cover up the reason for missing the trial.

### ADMONITION

On January 6, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.4(a) (Communication), 1.7(a) (Conflict of Interest: Current Clients), 1.7(b)(4) (Conflict of Interest: Current Clients), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

#### *In summary:*

The attorney represented a client in a claim against a woman. At a supplemental proceeding hearing in the case, the woman informed the attorney that she objected to the amount of the claim against her and indicated she was trying to collect money owed to her by her ex-husband from their divorce settlement. The attorney filed a complaint on behalf of the woman against her ex-husband to obtain payment for his client. The attorney did not give the woman a chance to comment on the complaint. The attorney did not provide the woman a copy of the complaint after it was filed. The attorney did not alert the woman to the Motion to Dismiss filed in the case, even though it might adversely affect her rights. The attorney did not consult the woman as to the opposition of the Motion to Dismiss. Based on the brief conversation at the supplemental proceeding, the attorney did not communicate adequate

information and explain about the material risks of and reasonably available alternatives to the representation necessary for the woman's informed consent. The attorney did not obtain the woman's informed consent and therefore had an impermissible conflict. Even if the attorney had obtained the woman's informed consent to the conflict of interest, that consent was not confirmed in writing. The attorney's violations were negligent. The woman has suffered little injury.

### ADMONITION

On December 21, 2011, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of

**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](http://www.utahbar.org/opc/opc_ethics_hotline.html)

Rules 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*

The attorney and partner in a firm were representing a client. The firm dissolved and the attorney and the partner divided the cases that were pending. Upon dissolution of the law firm, the attorney should have, but did not, communicate with the client concerning who would be representing the client in the future. The attorney should have, but did not, ascertain who had the client's file. The attorney should have, but did not, see what, if any, fee should have been refunded as unearned to the client. The attorney who had appeared in the client's case should have formally withdrawn from the case.

**ADMONITION**

On January 11, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.4(a) (Communication), 1.7(a) (Conflict of Interest: Current Clients), 1.7(b) (Conflict of Interest: Current Clients), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*

The attorney represented a client in two collection actions. The attorney failed to adequately respond to the client's requests for information. The attorney also represented the client's daughter. The attorney did not obtain a waiver based on informed consent for the concurrent representation. The attorney did not explain the implications of the concurrent representation. The implications were highlighted during a hearing where the attorney could not fully respond to the complaint and could not disclose information about future problems facing his client because one of the clients had not consented, even though the information was obtained, at least in part, pursuant to the representation. To the extent that the attorney obtained waivers, the waivers were not confirmed in writing. The attorney did not promptly return his client's file when requested. The attorney's violation of the Rules was negligent and caused little or no injury beyond the toll on his professional relationship with his client.

*Aggravating factors:*

Length of time it took for the attorney to return the file and the attorney's position with respect to attorney-client privilege.

*Mitigating factors:*

Most of the work performed was uncompensated and this was the attorney's first offense.

**PUBLIC REPRIMAND**

On December 21, 2011, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against James F. Nichols, for violation of Rules 1.1 (Competence), 1.5(b) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*

At no time did Mr. Nichols and his client discuss the ultimate fee agreement or reach an agreement concerning fees and expenses. Mr. Nichols failed to communicate with his client about the true scope of the representation or how the fees and expenses were to be paid. Mr. Nichols did not possess the requisite legal knowledge, skills, and competence to properly advise the client concerning foreclosure matters and Mr. Nichols did not acquire those skills during the representation. There was actual injury in that the client expended unnecessary sums in attorney fees. Mr. Nichols acted negligently.

*Aggravating factors:*

No remorse and excuses contradicted by the Respondent's own evidence.

*Mitigating factors:*

Absence of prior record of discipline; personal or emotional issues; and inexperience in the practice of law.

**PUBLIC REPRIMAND**

On December 21, 2011, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against James F. Nichols, for violation of Rules 1.4(a) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*

Prior to his withdrawal as counsel, Mr. Nichols failed to inform his client of a pending Order to Show Cause that had been issued in the case. Since Mr. Nichols did not complete the work to be performed in this case, his retainer was unreasonable and excessive. Even though Mr. Nichols knew how to contact his client, Mr. Nichols took no steps for two months to withdraw. When Mr. Nichols did finally withdraw, he failed to inform his client of the withdrawal. Mr. Nichols did not advise his client concerning the status of the case. Mr. Nichols did not prepare, file and serve a "Notice to Appear or Appoint" as directed by the Court. There was actual injury in that Mr. Nichols's client had to hire new counsel and may have incurred additional fees. Mr. Nichols's mental state was negligent.



*Aggravating factors:*

No restitution; no sincere remorse; excuses contradicted by the evidence; and refusal to acknowledge wrongful conduct.

*Mitigating factors:*

Absence of prior record of discipline; personal or emotional issues; and inexperience in the practice of law.

**PUBLIC REPRIMAND**

On January 9, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Philip C. Patterson, for violation of Rules 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Lawyer), Rule 1.4(a) (5) (Communication), 1.5(c) (Fees), 1.16(a)(1) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*

Mr. Patterson knowingly failed to consult with his client and obtain her consent before he stipulated to the opposing party's Summary Judgment Motion and thereby failed to abide by his client's decision concerning the merits of the case. Mr. Patterson's conduct caused injury to the public and the legal system

because he deprived his client of the opportunity to have her case considered on the merits as she wished. Mr. Patterson failed to communicate to his client his belief that opposing the Summary Judgment Motion would be a violation of the rules. Mr. Patterson's failure to so communicate was knowing and such failure to communicate caused injury. Mr. Patterson negligently failed to enter into a written contingent fee agreement with his client. Mr. Patterson knowingly failed to withdraw from the representation when he knew that he and his client had fundamentally conflicting views concerning the merits of the case and Mr. Patterson believed that his continuing representation would violate the rules. Mr. Patterson's conduct caused injury to the public and to the legal system because it denied his client the opportunity to engage new counsel or represent herself and have her case decided on the merits.

*Aggravating factors:*

Vulnerability of the complainant due to her lack of legal knowledge and experience.

*Mitigating factors:*

Absence of prior discipline; absence of a dishonest or selfish motive; cooperative attitude in disciplinary proceedings; remorse and acceptance of responsibility.

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## PUBLIC REPRIMAND

On December 8, 2011, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Shawn D. Turner, for violation of Rules 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

### *In summary:*

Mr. Turner utilized as a paralegal a person he thought was a retired California attorney when the paralegal came to Mr. Turner with a legal problem of a friend. It was agreed that the paralegal would do as much “ministerial” work as possible to keep costs down and that Mr. Turner would review, correct, and sign pleadings and generally act as counsel. The paralegal prepared and Mr. Turner made “stylistic” changes to an Answer and thereafter an Answer, Counterclaim, and Third-Party Complaint. Mr. Turner communicated with the client through the paralegal. The client paid the paralegal for services rendered believing that the paralegal would pass the money to Mr. Turner. The client viewed the paralegal as his attorney. As a product of the client learning that the paralegal was not paying Mr. Turner and also learning that the paralegal was not a California attorney, the client terminated the services of the paralegal and Mr. Turner. Mr. Turner knew that the paralegal was not admitted to practice law in the State of Utah.

## SUSPENSION

On December 8, 2011, the Honorable John R. Morris, Second Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Discipline suspending Bradley N. Roylance from the practice of law for a period of three years for violation of Rules 8.4(b) (Misconduct) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

### *In summary:*

On March 11, 2010, Mr. Roylance entered guilty pleas to two counts of Sexual Abuse of a Minor, class A misdemeanors. Mr. Roylance was sentenced to serve 180 days in the Davis County Jail, pay a \$400.00 fine, serve 24 months probation, complete DNA testing with payment of the fee, and abide by Group A sex offender conditions.

The Court found that the crimes of which Mr. Roylance has been convicted reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects.

### *Aggravating factors:*

Prior record of discipline; dishonest or selfish motive; multiple offenses; vulnerable victim; substantial experience in the

practice of law; and illegal conduct.

### *Mitigating factors:*

Good faith efforts to make restitution or rectify the consequences of his misconduct; cooperative attitude toward disciplinary proceedings; good character and reputation; interim reform; criminal penalties and sanctions; and remorse.

## DISBARMENT

On December 16, 2011, the Honorable Thomas Low, Fourth District Court entered Findings of Fact, Conclusions of Law and Order of Disbarment against Nelson A. Moak for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

### *In summary, there are two matters:*

Mr. Moak was hired to represent clients in a bankruptcy matter. At their initial meeting the clients signed a Flat Fee Payment Agreement. After their initial meeting, the clients called Mr. Moak several times to see if their Bankruptcy Petition (“Petition”) had been filed. Mr. Moak changed his office phone number without notifying his clients. Mr. Moak filed the Petition several months after the initial meeting. Mr. Moak failed to provide the Court with all the necessary documents for their bankruptcy filing. Mr. Moak did not appear at the Meeting of Creditors. Mr. Moak failed to perform sufficient work to earn the fee that he collected. Mr. Moak did not submit a response to the Notice of Informal Complaint (“NOIC”). Mr. Moak did not appear at the Screening Panel Hearing.

The OPC received three notices of insufficient funds from a financial institution regarding Mr. Moak’s attorney trust account. Several checks had been written on Mr. Moak’s attorney trust account causing insufficiencies. The OPC sent letters to Mr. Moak requesting a response. Mr. Moak never submitted a response to the OPC. Mr. Moak mismanaged his client trust account by allowing his attorney trust account to go into the negative. Mr. Moak either failed to deposit unearned fees into his trust account and/or withdrew funds that were not earned. The OPC sent a NOIC to Mr. Moak for all three notices of insufficient funds. Mr. Moak did not submit a response to the OPC. Mr. Moak did not appear at the Screening Panel Hearing.

### *Aggravating factors:*

Dishonest or selfish motive; Obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority; and substantial experience in the practice of law.

## The Green Utah Pledge

by Jon Clyde, Kelly J. Latimer, and Kallie A. Smith

One million two hundred thousand! This is the number of sheets of paper used by Clyde Snow on a yearly basis. This equates to 100,000 sheets of paper each month or 25,000 sheets each week. Lawyers tend to print out everything and rationalize the excessive printing in various ways: “it is just too hard to read double-sided copies” or because “it is easier to edit that way.” Without a doubt, the practice of law is one of the more paper-intensive professions. However, a large number of firms do not purchase recycled paper or recycle used paper. Instead, this paper finds its way to the landfill.

Until last June, Clyde Snow was one of those firms. The firm had no recycling, and employees would throw all of their paper, plastic, and cardboard directly into the trash. Clyde Snow has now implemented a full-scale recycling program, with the help of Momentum Recycling. Clyde Snow initially began with four of the big blue household recycling bins, which were to be collected monthly. However, within a week all four bins were overflowing. The firm now has a twice-monthly collection of six recycling bins. Thanks to the handy quarterly diversion reports received from Momentum, Clyde Snow is able to report that from June to December, it has recycled approximately 5060 pounds of waste and diverted around twenty-one cubic yards of waste from the landfill.

Unfortunately, there are a number of law firms, both large and small, that still have no recycling or environmental policies in place. In an effort to address this issue, Jenifer Tomchak, President of the Young Lawyers Division (“YLD”), asked us to help her implement a new program called the Green Utah Pledge. Her vision for this program is to raise awareness of environmental waste and to encourage firms and practitioners to adopt environmentally friendly practices.

*JON CLYDE is an associate at Clyde Snow where he practices in matters of natural resources including energy, water rights, and water quality.*



The goal of the Green Utah Pledge is to encourage local firms and practitioners to implement greener office practices by taking the modest steps necessary to participate in the American Bar Association (“ABA”)-Environmental Protection Agency (“EPA”) Law Office Climate Challenge (“Climate Challenge”). Law offices that take these steps become signatories of the Green Utah Pledge and will receive recognition from YLD, including public acknowledgment in the *Utah Bar Journal*. Further, we are working on creating additional marketing and membership benefits to reward those firms and practitioners that demonstrate leadership in the arena of environmental awareness.

### ABA-EPA Climate Challenge:

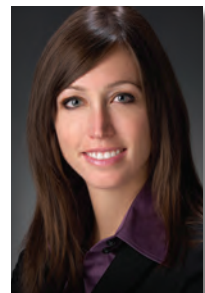
The ABA and EPA launched the Climate Challenge as a pilot program in 2007. It was designed to encourage law offices to take simple, practical steps to become better environmental and energy stewards. Interest in the program has grown steadily since its inception and currently more than 250 law firms participate on various levels, including the Utah law offices of Chapman and Cutler, LLP; Hobbs and Olson, LC; and Ban Law Office, PC.

The Climate Challenge program offers several ways for a firm to qualify as a Climate Challenge Partner or Leader. Specifically,

*KELLY J. LATIMER is an Attorney-Advisor for the United States Department of the Interior's Office of Hearings and Appeals, which serves as the Department's administrative trial court for cases involving the use and disposition of public lands and resources.*



*KALLIE A. SMITH is an associate attorney at Richards Brandt Miller Nelson. She has extensive experience across several areas of law, including work on commercial litigation matters, employment litigation matters, and commercial transactions.*





law offices may qualify by:

1. Implementing at least two of the following best practices for office paper management: (a) purchasing office paper with at least 30% post-consumer recycled content; (b) recycling mixed office paper; or (c) using double-sided copying and printing as the default setting for draft and internal documents.
2. Participating in EPA's WasteWise program. In addition to implementing at least two of the three best practices for office paper management described above, the WasteWise program requires an office to file an annual report quantifying both the amount of office paper waste avoided and the amount of attendant greenhouse gas emissions avoided (the WasteWise website has a number of resources to accomplish this).<sup>1</sup>
3. Participating in EPA's ENERGY STAR program by reducing at least 10% of its energy usage, if the law office owns its own building, or 10% of its electricity usage, if the law office is a tenant. A law office that achieves at least a 10% reduction in its energy or electricity usage will be recognized as a Climate Challenge Leader.

A law office that adopts two of the best practices for office paper management or meets the minimum requirements for participation in at least one of the EPA programs will qualify for recognition as a Climate Challenge Partner. A law office that achieves a higher level of participation in at least one of the EPA programs qualifies as a Climate Challenge Leader. The ABA and the EPA will formally recognize qualifying law offices and, for those offices that participate in EPA programs, the amounts of greenhouse gas emissions avoided by their actions will be posted on the ABA's Climate Challenge website.

### **EPA's Green Power Partnership Program:**

Law offices may also become a Climate Challenge Partner or Leader by participating in EPA's Green Power Partnership ("Green Power") program. This program requires that an office replace a minimum amount of its annual electricity usage through the purchase of green power (i.e., electric power generated by renewable energy sources, such as solar, wind, and geothermal energy). The required minimum replacements range from 20%, for offices with relatively low annual electricity usage ( $\leq 1,000,000$  Kilowatt-hours ("kWh")), down to 3% for offices with relatively high annual electricity usage ( $\geq 100,000,001$  kWh).

The Green Power program also provides a special calculation methodology for offices that lease their space. All Green Power Partners are recognized on the EPA's website. For details, go to: <http://www.epa.gov/greenpower>.

In Utah, EPA-qualifying green power can be purchased through Rocky Mountain Power's Blue Sky Renewable Energy Program ("Blue Sky Program"). Under the Blue Sky Program, residential and business customers can purchase renewable energy in 100 kWh "blocks" for \$1.95 per block per month. The Blue Sky charges are added to a customer's monthly bill and are in addition to any regular service charges.

Purchasing renewable energy through the Blue Sky Program does not result in any changes to the way electricity is transmitted to the customer or require any modifications to a customer's meter. Rather, for each block of Blue Sky energy a customer purchases, Rocky Mountain Power purchases an equivalent amount of renewable energy credits from newly developed

wind generation and other renewable energy facilities in the Western region. The amount of renewable energy purchased on behalf of Blue Sky customers is formally reported to the State of Utah and the program receives oversight by the Utah Public Service Commission.

*"[N]ot all firms or practitioners are willing to 'green' their offices. . . . However, even small efforts can work big change."*

Businesses qualifying as a Green Power Partner through the purchase of Blue Sky blocks can also qualify to enroll in Rocky Mountain Power's Blue Sky Business Partner program. Rocky Mountain Power actively promotes and recognizes Blue Sky Business Partners on its website, in press announcements, and in other promotional materials, which may include paid advertising. For details about the Blue Sky Program, go to: <http://www.rockymountainpower.net/env/bsre.html>.

### **The Utah State Bar:**

The Utah State Bar (the "Bar") has made a commitment to being an environmental leader within the legal community. The Bar has become a Climate Challenge Partner by adopting and implementing the Climate Challenge's recommended best practices for office paper management. The Bar qualified by: (1) ensuring that 100% of its copier/printer paper contains at least 30% post-consumer recycled content, and (2) establishing an office-wide policy of recycling discarded mixed office paper and assuring that all office personnel have ready access to

recycling bins. Additionally, the Bar strives to reuse paper as scrap paper and for the printing of draft copies.

Further, the Bar recently became a Champion Partner in the Blue Sky Business Partner Program by replacing 10% of its annual electricity usage with renewable energy. This equates to a replacement of 42,000 kWh per year with green power, resulting in an annual carbon dioxide offset of 50,331 pounds. This offset is the equivalent of planting 591 trees a year. However, the Bar's commitment to the environment does not end there.

The Bar has implemented a recycling program for non-paper goods, including plastic, aluminum, and cardboard, and has made recycling containers readily available throughout the Utah Law & Justice Center. The Bar also uses energy-saving light bulbs, turns off lights after hours and on weekends, purchases biodegradable disposable cutlery, and utilizes xeriscaping to conserve water.

Although we applaud the Bar's efforts, we recognize that many of these actions may not be possible for firms or practitioners that rent or lease office space within a larger building. We also understand that not all firms or practitioners are willing to "green" their offices to this extent. However, even small efforts can work big change. It doesn't necessarily take a major commitment of resources to become a more environmentally responsible office – even modest efforts to improve recycling, reduce paper use, and conserve energy can qualify an office to become a Climate Challenge Partner. We thus urge firms and practitioners to look at the many options available for meeting the Climate Challenge and consider customizing a plan that works for their office. Even small changes can have a large positive impact on the environment when considered in the aggregate.

Apart from benefits to the environment, such as improving air quality, reducing U.S. dependence on fossil fuels, and reducing greenhouse gas emissions, there are many tangible business benefits that may result from undertaking such actions and efforts. Initially, there can be a significant cost savings in reducing consumption. For example, reusing office paper for drafts or scratch paper and utilizing double-sided printing will reduce paper consumption. This can save an office a shocking amount of money. In 1995, Citigroup determined that if each employee used double-sided copying to conserve just one sheet of paper each week, the firm would save \$700,000 each year. See [www.reduce.org](http://www.reduce.org). Obviously, most law offices are not going to see such savings. Nevertheless, the cost savings that can be achieved will likely surprise you.

A significant amount of savings can also be achieved by reducing an office's energy use.

The Climate Challenge's "Law Office Guide to Energy Efficiency" reports that "[e]nergy represents 30% of a typical office building's operating costs, and is the single largest controllable operating expense."<sup>2</sup> This guide explains that by taking practical and reasonable steps, such as making sure your office's lighting system is up-to-date, making prudent purchases of energy-efficient office equipment as your older equipment wears out, and implementing best practices for office energy management (e.g., turning off office equipment on nights and weekends or when idle for more than two hours, turning off unneeded lights, using motion sensors to minimize unnecessary use of lights, and calibrating thermostats to adjust for seasonal changes), you can reduce your office's energy costs by 10% to 30%.

Similarly, taking a look at the purchasing habits of your office can result in cost savings. Are your employees using bottled water or plastic forks for lunch everyday? What are the costs of refilling these items? No doubt, a switch to reusable items would save money in the long run. The point being, there are cost savings to be realized by changing your habits, but it may require some creativity in the way you look at your office's consumption and use.

Promoting green law office practices is also beneficial to a firm's image and is good for business development. More and more companies are taking steps to make their businesses greener and are looking to work with green partners, including the attorneys they hire to be a part of their business team. This is particularly important for firms or practitioners that advise clients on environmental issues. Being committed to greener office practices can also serve as an important recruiting tool when hiring young lawyers. In sum, implementing green office practices not only results in environmental benefits, but results in significant cost savings, serves as a valuable marketing tool, and enhances a firm or practitioner's reputation as a good citizen.

If you have any questions about how to help your office become an ABA-certified Climate Challenge Partner or Green Utah Pledge signatory, please contact a committee member or visit the YLD website for more information. To learn more about the Climate Challenge or view the application and instructions for becoming a Climate Challenge Partner, visit [www.abanet.org/environ/climatechallenge](http://www.abanet.org/environ/climatechallenge). Kelly Latimer may be reached at [kellylatimer@gmail.com](mailto:kellylatimer@gmail.com). Kallie Smith may be reached at [Kallie-Smith@rbmn.com](mailto:Kallie-Smith@rbmn.com). Jon Clyde may be reached at [Jclyde@clydesnow.com](mailto:Jclyde@clydesnow.com).

1. See [http://www.americanbar.org/groups/environment\\_energy\\_resources/projects\\_awards/aba\\_epa\\_law\\_office\\_climate\\_challenge/office\\_paper\\_wastewise](http://www.americanbar.org/groups/environment_energy_resources/projects_awards/aba_epa_law_office_climate_challenge/office_paper_wastewise).
2. See <http://www.americanbar.org/content/dam/aba/migrated/environ/climatechallenge/lawofficeguide.authcheckdam.pdf>.

# DUI Law in a Flash

by Philip Wormdahl

**Editor's Note:** This article is part of a series summarizing CLE presentations given as part of the YLD's "Practice in a Flash" program.

More than 15,000 DUI arrests were made in Utah during 2010. Roughly two-thirds of those arrests were first-time offenders. With so many citizens facing DUI charges, most lawyers should expect that someone they know will need representation for DUI. Because of the volume of arrests, being able to competently handle a DUI case is a critical skill for attorneys working in criminal defense and a huge asset to attorneys looking to develop and grow their clientele. This article is meant to give a basic overview of the "typical" DUI case by exploring some of the most common procedures, hearings, and issues.

## THE OFFENSE

Driving Under The Influence of Alcohol and/or Drugs, or "DUI," is codified at Utah Code section 41-6a-502. *See* Utah Code Ann. § 41-6a-502 (LexisNexis 2010). The conduct prohibited by the statute is as follows:

### **Section 41-6a-502. Driving under the influence of alcohol, drugs, or a combination of both or with specified or unsafe blood alcohol concentration – Reporting of convictions.**

(1) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(a) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;

(b) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or

(c) has a blood or breath alcohol concentration of

.08 grams or greater at the time of operation or actual physical control.

*Id.* § 41-6a-502(1).

The first element of the offense requires that the subject be "operating" or in "actual physical control" of a vehicle. *See id.* § 41-6a-502(1). While "operating" may be self-explanatory, it is important to understand that a person can be convicted of DUI without actually "driving" a vehicle. Whether a person was in "actual physical control" of a vehicle is a question for the jury and is determined by the totality of the facts. A DUI attorney challenging "actual physical control" should look to *Richfield City v. Walker*, 790 P.2d 87 (1990), for a good primer of facts that may establish "actual physical control." Also, unlike most other violations of the traffic code, DUI does not require the vehicle to be on a public street. "Parking lot" and "driveway" DUIs are common.

Second, the statute requires that a person be at or above the statutory "per se" alcohol limit of 0.08 grams of alcohol, or be under the influence to a degree that renders the person incapable of safely operating a vehicle. *See* Utah Code Ann. § 41-6a-502(1)(a)(b). This means that a person under the "per se" limit of .08 could still be arrested for, charged with, and convicted of DUI.

It is clear from the language of the statute that a person can be prosecuted for DUI for both alcohol, and/or drugs. The definition of what counts as a "drug" is also specifically defined for DUI offenses in Utah Code section 41-6a-501 and is broad enough to include substances beyond "controlled substances." *See id.* 41-6a-501. A common example of this is a DUI that involves the use of household inhalants like paint, glue, or compressed air.

*PHILIP WORMDAHL runs the solo-firm Utah DUI Advocate and is also "of counsel" at the criminal defense boutique Brown, Bradshaw & Moffat. He regularly speaks on topics like DUI defense and solo-practice and is a member of the Utah Association of Criminal Defense Lawyers and Young Lawyers Division.*





In addition to a “traditional” DUI under section 41-6a-502, Utah drivers can be prosecuted for having “any measurable amount” of a controlled substance, or its metabolite, in their body while driving – regardless of whether they are impaired or noticeably affected by the substance. The “Metabolite DUI” statute is found at section 41-6a-517. *See id.* § 41-6a-517. It is common for citizens of California who are medical marijuana users to be arrested for Metabolite DUI while passing through Utah (unimpaired), because THC metabolites can remain in a person’s body for months after the active THC has left their system.

### **TAKING THE CASE**

If you have been hired to represent someone for DUI, you should already have a good sense of the facts of the case from your client’s perspective. In your initial interview, you would have asked them general questions about their background, substance use habits, and full criminal history. You would also ask about their memory of events from the arrest. You would know where the client had been, where they were going, what they had consumed, why they were pulled over, whether they took roadside field sobriety tests, and the circumstances of any chemical testing (blood, breath, or urine).

Your first steps after being hired are to (1) request a hearing with Driver’s License Division (“DLD”), (2) enter your appearance with the court, and (3) begin the discovery process.

### **Request DLD Hearing**

When a person is arrested for DUI, the arresting officer will take the arrested person’s Utah drivers license. The driver is then given a citation that may act as their temporary license for up to thirty days from the date of arrest. The driver only has ten days from the arrest to make a written request to DLD for a hearing. If no hearing is requested, the license is automatically suspended after thirty days when the temporary license (citation) expires. If a hearing is requested, it will be scheduled by the DLD, in the county of the arrest, prior to the expiration of the temporary license.

### **Enter Appearance with Court**

Like any other criminal case, once you are hired, you need to notify the court of your appearance. Send a “Notice of Appearance of Counsel” to the court so they know your client is represented and where to send notices. You may want to include some additional items in your Notice of Appearance, for instance, a request for a speedy trial by jury or an entry of a “not guilty” plea on your client’s behalf. Many municipal justice courts will strike a defendant’s Arraignment upon entry of your appearance.

### **Discovery**

DUI cases can turn on very small details, so understanding what evidence is out there, and how to get it, is key to a successful defense. Some examples of things you want are: police reports, videos from police station and patrol car “dash-cams,” certification reports for the breath-testing machine, and the arresting officer’s “POST” certification record. A general discovery request to the prosecutor under Rule 16 is a start, but sometimes that will not get you critical evidence quickly enough. *See Utah R. Crim P. 16.* For instance, if you need a “dash-cam” video for a driver’s license hearing, you will likely have to bypass the prosecutor and go directly to the source. Not all cases will have every kind of evidence available, so the best bet is to call the particular agencies and find out what evidence they “might” have and how they want you to request it, i.e., GRAMA request, subpoena, in-person pickup, mail or fax, etc. Discovery can be a bureaucratic nightmare in some cases, but usually if you are nice and ask in the right way, you can get what you need with basic efforts.

### **DRIVER’S LICENSE HEARING**

For many first-offense DUI clients, the prospect of license suspension is the primary concern. They need to drive to work, take kids to day care, and run errands. Utah has no privilege for limited driving when a license is suspended for DUI, so a win at a DLD hearing is something to cherish. Driver’s license hearings generally come in two basic flavors: (1) the “per se” suspension hearing and (2) the “refusal” revocation hearing.

The “per se” hearing is what you get if your client was arrested for DUI and submitted to every chemical test demanded by the officer. Typical suspension lengths for a “per se” hearing are 120 days for a first offense and two years for a subsequent offense.

The “refusal” hearing is what you get if your client was arrested for DUI and refused to take any of the chemical tests requested by the officer. Typical revocation length for a “refusal hearing” is eighteen months for a first offense and thirty-six months for a refusal with a prior administrative license action.

DLD hearings are civil “administrative” hearings, not criminal proceedings, so make sure you are prepared to operate under very relaxed evidentiary rules (hearsay freely comes in!) and don’t bother with fourth amendment challenges to the vehicle stop or subsequent detention, because the exclusionary rule does not apply. Also, officers usually appear telephonically and DLD hearing officers will tightly control your cross-examination of the arresting officer.

There are a few general points of attack for a successful DLD hearing. First, if the officer fails to appear for the hearing, either in person or telephonically, DLD will take “no action” on the license. If the officer appears and the hearing is conducted, be sure to focus on “procedural issues” and the “merits” of the DUI arrest. Procedural arguments include things like the officer’s failure to properly serve the driver with a copy of the citation and provide them notice of DLD’s intent to suspend the license. Additionally, officers are required to read certain verbal “admonitions” to arrested drivers to warn them of the potential consequences of providing (or not providing) a chemical sample to the officer. Making sure that the officer properly relayed the contents of the required admonitions is a key step at a suspension hearing. Attacking the merits of a DUI arrest at an administrative suspension hearing is similar to challenging probable cause for arrest in a court. The “bread and butter” for challenging the merits are the officer’s administration of the field sobriety tests, observation of any driving pattern (or lack there-of), and the officer’s observations of your client’s physical signs of impairment. All of these facts are to be considered under a “totality of the circumstances” standard. Officers are in a habit of documenting only the facts that point to your clients impairment, not the facts that point to sobriety, so if the officer didn’t make any note of your client’s speech, make sure that you create a positive fact in the record regarding unslurred speech, rather than leaving speech out. Same goes for other common observations like “swaying,” “red eyes,” “fumbled documents,” or “odor of alcohol.”

The priority at a DLD hearing is to protect your client’s driving privilege, but don’t be afraid to use the hearing as an opportunity to build the record for subsequent motion practice in the court. The officer will be placed under oath and the audio from the hearing will be recorded by DLD. Tie the officer to the report, get the officer to clarify any ambiguous language, and fill in any gaps. Sometimes a DUI case can be won by an officer’s testimony at a DLD hearing.

For concise information about suspension and revocation hearings, check the Utah Code, Title 53, Chapter 3 – The Uniform Driver’s License Act. The main points of interest for a DUI lawyer are Utah Code sections 53-3-220 through 53-3-231. See Utah Code Ann. §§ 53-3-220-231 (LexisNexis 2010, Supp. 2011).

*“Any attorney handling a DUI case with breath evidence should have the certification records of the specific machine used in the case.”*

## FIELD TESTS

Most officers will subject a suspected impaired driver to roadside tests. The common three-test battery, known as the Standardized Field Sobriety Tests include: the Horizontal Gaze Nystagmus Test (“HGN”), the Walk and Turn Test, and the One Leg Stand Test.

**HGN** – Horizontal Gaze Nystagmus is an involuntary jerking of the eyes as they move from side to side. The HGN test is administered by having a driver follow a stimulus (usually a pen or finger held twelve to fifteen inches from the subject’s face) with their eyes. The subject is instructed to keep the subject’s head still and follow the stimulus with his or her eyes only while the officer makes several “passes” with the stimulus. As the stimulus is moved horizontally across the subject’s field of vision, the officer looks for certain “clues” in the subject’s eyes. The officer is looking for three different clues in each eye, for a total of six possible clues: lack of smooth pursuit, distinct and sustained nystagmus at maximum

deviation, and onset of nystagmus prior to forty-five degrees. Four out of six is considered a fail.

**Walk and Turn** – The Walk and Turn Test involves having a subject walk a straight line with nine heel-to-toe steps, turn, and take nine steps back. The

test begins by putting the subject in a heel-to-toe “instructional” position while the officer explains and demonstrates the test. When the instruction is complete the officer has the subject perform the “walking stage” of the test. The officer is looking for eight impairment clues during the test, including: starting the test too soon, failing to maintain the instructional position, taking the wrong number of steps, raising the arms more than six inches from the sides, missing heel to toe contact by more than half of an inch, stepping off line, making an improper turn, or stopping walking during the test. Two out of eight is considered a fail.

**One Leg Stand** – The third test in the battery is the One Leg Stand. For this test, the officer has the subject raise one of his or her legs out in front of them with the foot approximately six inches from the ground. Both of the subject’s legs should be kept straight and the sole of the raised foot should be parallel with the ground. The subject then counts out loud, “One thousand and one, one thousand and two,” until told to stop. The officer times the test for thirty seconds. The officer watches for four clues on the one leg stand test, including: hopping, putting

down their foot, swaying, and raising the arms more than six inches from the sides. Two out of four is considered a fail.

This three-test battery was validated by the National Highway Traffic Safety Administration (“NHTSA”) as reliable enough to use in court for the purpose of showing impairment in drivers. However, the reliability of these tests is predicated on the tests being administered in the correct, standardized way. The NHTSA testing manual explicitly states that the “validation applies only when: the tests are administered in the prescribed standardized way,” and cautions that “if any one of the . . . test elements is changed, the validity is compromised.” All of the specific testing procedures are contained in Session VIII of the NHTSA manual. Any attorney who is handling a DUI case should have read at least Section VIII of the NHTSA manual and be well-versed in the proper administration and scoring of the validated tests.

#### CHEMICAL TESTING

One of the most damning pieces of evidence in a DUI case is the chemical evidence. Although officers may ask for breath, blood,

and urine, the most common test administered is the breath test. Utah uses the Intoxilyzer 8000 breath-testing machine made by CMI. Pursuant to Utah Administrative Code R714 – 500, et seq., evidentiary breath-testing machines must be certified “on a routine basis not to exceed 40 days.” Any attorney handling a DUI case with breath evidence should have the certification records of the specific machine used in the case.

Also, prior to the administration of a breath test, the officer must observe a “deprivation period” to ensure that the subject’s mouth is free from foreign objects. Foreign objects in the mouth, particularly mouth alcohol, can artificially inflate the machine’s blood alcohol calculation and call into question the reliability of the result. The principal concern is the presence of mouth alcohol. The deprivation period is casually referred to as the *Baker* period or observation, taking its name from the defendant in the seminal case. See *State v. Baker*, 355 P.2d 806 (Wash. 1960). The Utah case that established the observation period is *State v. Vialpando*, 2004 UT App 95, 89 P.3d 209. For the observation period to be properly observed, the officer must

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check the subject's mouth for foreign objects to determine it is clear, and then observe the subject for fifteen minutes prior to the time the breath sample is taken. *Vialpando* established that the observation requirement is satisfied when: "(1) the suspect was in the officer's presence for the entire period; (2) it is clear that the suspect had no opportunity to ingest or regurgitate anything during the minimum observation period; and (3) nothing impeded the officer's powers of observations during the observation period." *Id.* ¶18.

If the officer failed to meet the requirements of the observation\ deprivation period, a *Baker* challenge is appropriate to exclude the result of a breath test from trial.

Blood testing is also used frequently in DUI prosecutions, especially if the officer suspects drugs, rather than alcohol, are causing the subject's impairment. For blood tests, your first line of defense is to investigate the "chain of custody" of the sample. In other words, you want to know where the blood went when it left your client's arm. Who took it? Where did they take it? Under what conditions was it kept, and who tested it? Breaks in the chain of custody call the reliability of the blood testing into question and can lead to exclusion from court.

### NEGOTIATING PLEAS

The most common charge reduction in a DUI case is a plea to "Impaired Driving" under Utah Code section 41-6a-502.5. *See* Utah Code Ann. § 41-6a-502.5 (LexisNexis, 2010). Impaired Driving replaced "Alcohol Related Reckless Driving" or "Wet

Reckless." The biggest advantages to an Impaired Driving conviction over a DUI is that Impaired Driving has no mandatory jail sentence, and a conviction for Impaired Driving will not trigger a license suspension, nor require a person to maintain an ignition interlock device in their vehicle on a first offense. Outside of Impaired Driving, anything is possible. The deal you are able to secure for your client will depend on the facts of your case and your negotiation skills. Usually, the lower the blood alcohol level, the better your position. Also, evidentiary issues, like an officer's failure to properly observe *Baker*, will help you sweeten the deal.

### CRIMINAL SENTENCING

Much of the typical DUI sentence is predetermined by statute. Some things that are open for argument by a DUI attorney are the amount of jail time, community service, fine amount, and conditions of probation. Some of the main consequences are outlined below, but a DUI attorney should carefully read section 41-6a-505 for a more comprehensive picture. *See* Utah Code Ann. § 41-6a-505. Additionally, more information regarding typical sentencing practices can be found in the DUI sentencing matrix at: <http://publicsafety.utah.gov/highwaysafety/documents/2010DUISentencingMatrix.pdf>.

Other resources may be found at: [http://publicsafety.utah.gov/highwaysafety/docs/DUI\\_BEST\\_PRACTICES.pdf](http://publicsafety.utah.gov/highwaysafety/docs/DUI_BEST_PRACTICES.pdf) and at: <http://publicsafety.utah.gov/highwaysafety/documents/2010DUIAnnualReport.pdf>.

## ***Thank You to Tuesday Night Bar Volunteers***

The Young Lawyers Division (YLD) would like to express its appreciation to all of the volunteers of the Tuesday Night Bar (TNB) program. In particular, YLD recognizes the outstanding efforts of the team leaders for 2012: Paul Amann, Rachel Anderson, Mike Black, Josh Chandler, Kelly Latimer, Kathleen E. McDonald, Rebecca Ryon, Jory Shoell, Saul Speirs, Sanna-Rae Taylor, D. Loren Washburn, and Zack Winzeler. Finally, YLD appreciates the Utah State Bar's support of TNB, including the able assistance of the Bar's Pro Bono Coordinator, Michelle V. Harvey.

TNB is a pro bono legal clinic designed to assist members of the public in determining their legal rights. Volunteer attorneys meet briefly with individuals on a one-on-one basis to provide preliminary counseling and general legal information. TNB is not "means tested," or focused on a particular area of law. Accordingly, volunteer attorneys meet with individuals from all income levels on an array of legal problems, with most issues arising in the areas of Family Law, Employment Law, Criminal Law, Landlord/Tenant Law, and Estate Planning. TNB is held on Tuesdays between 5:30 p.m. and 7:30 p.m. at the Utah Law & Justice Center, 645 South 200 East.

## Renewals

As a reminder for Paralegal Division members, online renewals begin on April 1 and go through April 30. Be sure to renew online during this period to avoid late fees. E-mails will be sent with your login information to complete the online renewal process. Additionally, paralegals interesting in becoming new members of the Paralegal Division can find application forms on our website: [www.utahbar.org/sections/paralegals/](http://www.utahbar.org/sections/paralegals/).

Utah's Paralegal Day Celebration will be held on May 17, 2012, at the Salt Lake Sheraton. Information can be found on the Paralegal Division website at [www.utahbar.org/sections/paralegals/](http://www.utahbar.org/sections/paralegals/). Invitations will be mailed as well.

Paralegal Day was proclaimed by the Governor of the State of Utah as the third Thursday of May each year. The Paralegal Division of the Utah State Bar and the Utah Paralegal Association co-host a CLE luncheon event to recognize the contributions that Utah paralegals make in their employment and their communities. Membership in either organization is not required to attend the luncheon and supervising attorneys are encouraged to attend.

## The Paralegal of the Year Award

The Paralegal of the Year Award is presented by the Paralegal Division of the Utah State Bar and the Utah Paralegal Association. It is the top award to recognize individuals who have shown excellence as a paralegal. We invite you to submit nominations of those individuals who have met this standard. Please consider taking the time to recognize an outstanding paralegal. Nominating a paralegal is the perfect way to ensure that their hard work is recognized, not only by their organization, but by the legal community. This will be their opportunity to shine. Nomination forms and additional information are available by contacting Suzanne Potts at [spotts@clarksondraper.com](mailto:spotts@clarksondraper.com).

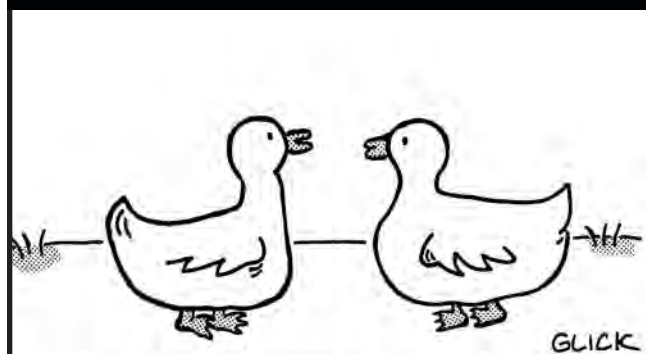
The deadline for nominations is April 2012. Reminders will also come via E-bulletin as well as announcements at the Mid-Year Meeting in March in St. George. The award will be presented at the Paralegal Day luncheon held in May 2012.

## 2012 Paralegal Salary/Benefits Survey

Go online now to the Paralegal Division website at: <http://www.utahbar.org/sections/paralegals/Welcome.html> to find the link for the survey. The survey will be open for responses between April 1, 2012 and April 30, 2012. Reminders will also come via e-bulletin as well as announcements at the Mid-Year Meeting in March in St. George. Put it on your calendar NOW to remember to take the survey and tell all your paralegal friends to participate. They don't have to be a member of the Paralegal Division of the Utah State Bar to participate. The more participants we have, the more helpful the information will be!

We are excited to also announce that included in the 2012 summary of the salary results, we will be providing a comparison of the salary results by county to make the information as useful as possible. So if you know of, or work with, paralegals employed in a county in other regions, please encourage their participation.

## Jest is for all...



*"How should I know that the man who was feeding me breadcrumbs was a doctor? I said 'quack,' and immediately he threatened to sue me for defamation."*

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
03/08/12	<b>Casemaker Elite Training.</b> (Advanced Course) FREE.	1 hr. live credit
03/08/12	<b>An Evening With the Fourth District</b> 6:00 – 7:30 pm with refreshments and networking to follow. Utah County Courthouse, room 201, 125 North 100 West, Provo. Featured speakers include: Hon. Samuel D. McVey and M. Dayle Jeffs, followed by a Judges panel Q&A. Sponsored by the Litigation Section and Utah State Bar CLE Department. FREE.	1.5 hrs.
03/14/12	<b>Closing a Probate:</b> 1:00 – 2:00 pm. \$35 per session or all three for \$99. Topics include: Decision to Close Formally or Informally, Pleadings, Final Accounting, and How to Close a Probate (Filing Process)	1 hr. self-study
03/22/12	<b>Casemaker Elite Training Webinar.</b> (Advanced course.) 12:00 – 1:00 pm. \$15.	1 hr. self-study
03/28/12	<b>Get the 411: The Judicial Selection Process Demystified.</b> 8:00 am – 12:00 pm. Valuable information and interview tips at all levels of the process including ethical responsibilities to consider when applying for a judicial position. This seminar will be of particular interest to those who want the inside scoop on the judicial application process for the Third District Court. \$95 for Pre-Registration, \$105 at the door, \$75 for UMBA Members. All proceeds go to the Utah Minority Bar Association.	3 hrs, including 1 hr. Ethics
03/30/12	<b>Best Practices in Mediation Advocacy for 2012.</b> (Advanced Course) 8:00 am – 1:00 pm. Join us for a half-day seminar covering the latest trends in appellate mediation, a view of mediation from veteran clients, and ethics and professionalism in mediation. During lunch, listen as a panel of judges from state and federal court explain the ever-changing perspectives on mediation from the bench. \$160 for attorneys, \$145 for DR Section members, \$120 for students (lunch provided).	4 hrs, including 1 hr. Ethics/Prof.
04/03/12	<b>Casemaker Elite Training.</b> (Advanced Course) FREE.	1 hr. live credit
04/12/12	<b>Estate Planning Seminar.</b> (Intermediate level) Day long program. To prepare for this seminar attend a “Wills for Heros” event (check the YLD Division website) and a “Serving Our Seniors” event. Contact Sara Spencer at <a href="mailto:sarah.spencer@chrisjen.com">sarah.spencer@chrisjen.com</a> . Additional information TBA.	TBA
04/25/11	<b>Annual Business Law Seminar.</b> (Advanced level) 7:45 am – 1:00 pm. Additional information TBA.	TBA
04/26/12	<b>New Lawyer Required Ethics Program.</b> 8:30 am – 12:30 pm. \$75. <i>Satisfies New Lawyers Ethics &amp; Prof./Civilty credits for 1st compliance period.</i>	
05/03– 05/05/12	<b>Southern Utah Federal Law Symposium.</b> Dixie State College Gardner Center, 225 South 700 East, St. George. 7:00 am – 5:00 pm. Members of the Federal Bar Assoc., Litigation Section, or SUBA: \$150 (\$325 for others) includes conference, breakfast, lunch, all CLE. Add one year FBA membership for \$75. Add golf: (includes breakfast at the course, green fees, chance at prizes) \$50. Add Supreme Court Admission: \$200. Golfer guest fee: \$75.	Up to 8.5 incl. 1 hr. Ethics
05/08/12	<b>Literature and the Law.</b> 8:30 am – 12:00 pm. Weber State University, Ogden. Local judges, attorneys, and professors will present on the essential relationship of great literature to the law. This is not a theoretical exercise in enjoying literature. This event will show how the literary works that have moved the world increase the power of advocacy, negotiation, clients interviews, the drafting of pleadings, and all aspect of the law. This conference will establish the utility of the practical application of literature to the law – and the participant will enjoy it!	TBA
05/11/12	<b>Family Law Annual Seminar.</b> (Advanced level) Day long seminar focused on practicing before the Family Law Commissioners. Location: University Guest House Convention Center. Additional information TBA.	TBA
05/16/12	<b>Annual Real Property Seminar.</b> (Advanced level) 8:30 am – 2:00 pm approx. time. Grand America. Additional information TBA.	TBA
05/16/12	<b>Introduction to Law Office Management for New Lawyers.</b> 12:00 – 1:30 pm. Presenters include: Russell Minas, Russell Y. Minas, P.C.; Lincoln Mead, Utah State Bar; Denise Forsman, Marsh Insurance; Kim Paulding, Utah Bar Foundation. FREE.	NONE
06/28/12	<b>Law Firm Practice Management: How to Successfully Start a Law Practice.</b> with Virginius “Jinks” Dabney. 8:00 am – 12:00 pm. Cost is \$99 for members of Your Lawyer and/or Solo, Small Firm, and Rural Practice Sections; \$149 for other bar members. Subjects include: <ul style="list-style-type: none"> <li>• Finding a Good Office Location</li> <li>• The Importance of Identifying and Using a Mentor</li> <li>• Running your Law Practice like a Business</li> <li>• How to Make a Good Living and a Good Life in the Practice of Law.</li> <li>• Setting up an Office</li> <li>• Hiring Employees</li> <li>• Marketing 101, 201 and 301</li> </ul>	3 hrs. (add'l hrs. pending.)



## RATES & DEADLINES

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**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.

## NOTICE

### LEGAL SERVICES CORPORATION Notice of Availability of Competitive Grant Funds for Calendar Year 2013.

The Legal Services Corporation (LSC) announces the availability of competitive grant funds to provide civil legal services to eligible clients during calendar year 2013. A Request for Proposals and other information pertaining to the LSC grants competition will be available from [www.grants.lsc.gov](http://www.grants.lsc.gov) during the week of April 9, 2012. In accordance with LSC's multiyear funding policy, grants are available for only specified service areas. To review the service areas for which competitive grants are available, by state, go to [www.grants.lsc.gov/about-grants/where-we-fund](http://www.grants.lsc.gov/about-grants/where-we-fund) and click on the name of the state. A full list of all service areas in competition will also be posted on that page. Applicants must file a Notice of Intent to Compete (NIC) through the online application system in order to participate in the competitive grants process. Information about LSC Grants funding, the application process, eligibility to apply for a grant, and how to file a NIC is available at [www.grants.lsc.gov/about-grants](http://www.grants.lsc.gov/about-grants). Complete instructions will be available in the Request for Proposals Narrative Instruction. Please refer to [www.grants.lsc.gov](http://www.grants.lsc.gov) for filing dates and submission requirements. Please e-mail inquiries pertaining to the LSC competitive grants process to [Competition@lsc.gov](mailto:Competition@lsc.gov).

## FOR RENT

**VACATION RENTAL:** Time share at any Vida Vacation Club resort for \$2550 per week. Luxxe locations are Nuevo Vallarta and Riviera Mayan. Grand Luxxe Villa includes two bedrooms 2-1/2 bathrooms, den (with foldout bed), full kitchen, private butler service, 16 rounds of golf, unlimited use of Brio spa and fitness center, two massages, kids club, unlimited access to pools, beaches, decks, etc. Unit accommodates up to 10 people. Weeks of Christmas, New Years and Easter are unavailable – all other weeks are open. Grand Luxxe Villa <http://www.grandluxxeresidence.com/> and Grand Mayan (Nuevo, Riviera Mayan, Acapulco and Cabo) <http://grandmayan.net/> Contact Connie Howard: 801-809-5162.

## POSITIONS AVAILABLE

**FILLMORE SPENCER LLC, in Provo, Utah**, a growing, mid-size, full-service law firm, seeks a corporate/transactional attorney with at least 3-4 years experience at a recognized law firm (securities, tax and/or real estate expertise a plus). Must have superior academic record, excellent work ethic, good writing skills, and a willingness to be involved in community activities. Forward resume to William Fillmore, senior partner, at [wfillmore@fslaw.com](mailto:wfillmore@fslaw.com).

**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](http://www.cils.org/Lazarski.htm). Contact CILS, Matzenkopfgasse 19, Salzburg 5020, Austria, email [cils@cils.org](mailto:cils@cils.org), US fax (509) 356-0077, US tel (970) 460-1232.

**Stucki, Steele & Rencher, a downtown Salt Lake City law firm** is seeking a full-time attorney with at least 4-5 years of experience. Ideal candidate should possess: • High level of proficiency in litigation skills, including case management and strategy, legal research, drafting significant dispositive and other motions, legal briefs and other legal documents, conducting depositions and defending clients in depositions, and/or trial preparation and trial advocacy. • Solid academic credentials. • Experience in insurance defense litigation. • Excellent verbal analytical and legal writing skills. • Strong oral communication skills. To apply, send resume to [Jeanette@ssrfirm.com](mailto:Jeanette@ssrfirm.com).

**VISITING PROFESSORSHIPS** – Short-term pro bono teaching appointments for lawyers with 20+ years' experience Eastern Europe and former Soviet Republics. See [www.cils3.net](http://www.cils3.net). Contact CILS, Matzenkopfgasse 19, Salzburg 5020, Austria, email [professorships@cils.org](mailto:professorships@cils.org), US fax 1 (509) 356-0077.

**OFFICE SPACE / SHARING**

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**Small downtown law firm with established real estate, construction, and litigation practice** seeks attorneys to partner or office share. Attorneys are sought with established practices in business transactions, tax, intellectual property, complex commercial litigation, bankruptcy, or other areas to take spill over work complementary to firm's current expertise. Firm offers attractive offices, conference rooms, convenient location, state of the art technology, congenial and professional office environment and as much or little staff support as needed. Please send inquiries to Confidential Box #1, Attn: Christine Critchley, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111, or e-mail [ccritchley@utahbar.org](mailto:ccritchley@utahbar.org).

**Perfect Court Access Location.** Seven office suite in the Salt Lake Stock and Mining Exchange Building, 39 Exchange Place, full service with reception/secretarial area and individual restrooms. Ideal for a 4 or 5 person firm. Also available one large main floor office 16' X 28' full service. Unsurpassed tenant parking with free client parking next to building. Contact Richard or Michele (801) 534-0909 or [richard@tjblawyers.com](mailto:richard@tjblawyers.com).

**Class A Office Space Available.** Growing eight attorney firm is looking to lease a portion of their unique and beautiful office space in Holladay. Excellent easy to access location from anywhere in the Salt Lake Valley. Beautiful views of Mt. Olympus. Three large offices with large windows, work room, and private entrance with reception area; approximately 1288 square feet of rentable space. Plenty of parking available. Must see to appreciate. Please call Jeff Skoubye of Olsen Skoubye & Nielson, LLC at 801-365-1030.

**PRIME OFFICE SPACE:** Downtown law firm has 1 to 3 newly remodeled offices available. Located on the top floor of the University Club building on South Temple and State Street. Includes a large boardroom with a breathtaking view, reception area, receptionist, access to a fitness room, large windows, kitchen, and access to copier and fax machine. Referral of overflow work is likely. Contact Jeremy at [jjohnson@andersoncall.com](mailto:jjohnson@andersoncall.com) or 801-521-3434.

**Office Space in Bountiful Near I-15.** Large (20' x 12') or mid-size (10' x 12') office space. Upstairs with breathtaking view of Wasatch or Oquirrh Mountains or downstairs (to help minimize rental costs). Located in The Square at 2600. Shared conference room and waiting room/reception area, fax/copier/scanner, Internet, break room. Storage available. Plenty of free tenant/client parking. Prices starting at \$200 per office per month and optional month-to-month or long term agreement available. Two months free Internet and utilities with lease. If you are interested and would like more information please contact Sean @ (801) 397-2223.

**Park City sublease:** Two offices available in prime Park City office building with shared conference room, kitchen, and bathroom. Please contact Maria at 435-731-1135.

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Charles M. Bennett, 505 E. 200 S., Suite 200, Salt Lake City, UT 84102-0022; (801) 521-6677. Fellow, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.

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

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