Utah Bar JOURNAL

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Volume 26 No. 3
May/June 2013

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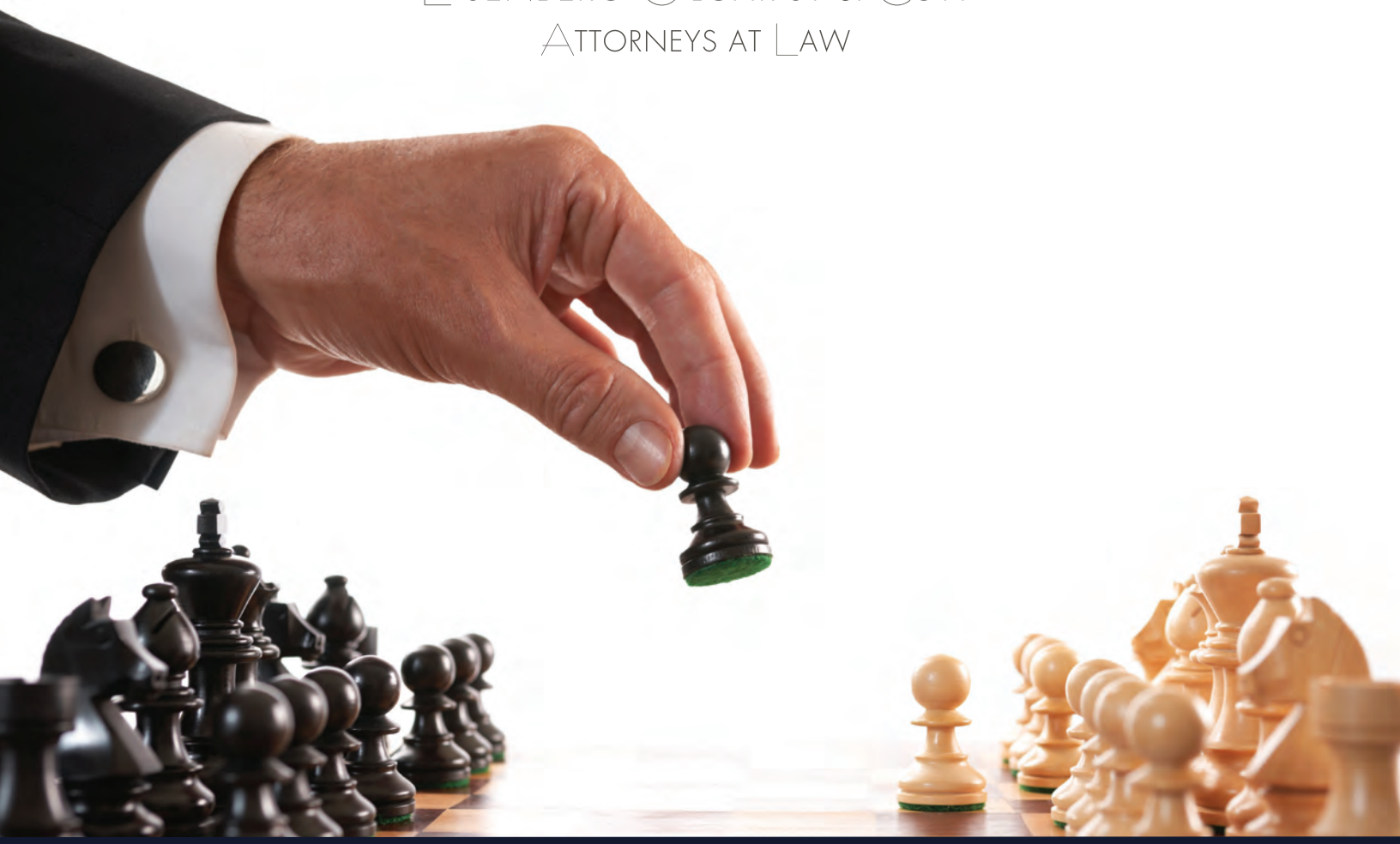

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Utah Bar JOURNAL

Volume 26 No. 3
May/June 2013

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Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

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

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

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

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

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

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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.

The Legal Profession Today and Into the Future

by Lori W. Nelson

I recently attended a conference that seemed to imply that the sky was falling regarding law practice as we know it. The message was that lawyers and firms need to plan and adapt or fail. Every generation of attorneys has been confronted with change. We are no different. Lawyers have always risen to the challenge, and I am pleased to note that many of the changes recommended by other presenters, and presented below have already been adopted by Utah firms, law schools, and the courts.

Based on the theory that knowledge is power, I thought I would share with you the thoughts of Frederic S. Ury and Thomas Lyons, who posited that there are five major trends impacting the practice of law: Globalization; Technology; Nature of clients; Demographics; and Legal education.

> *"[F]orm based websites allow clients to believe they solve problems when, in fact, they may be creating them."*

Globalization

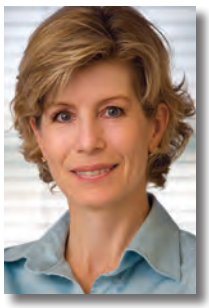
Ury and Lyons informed us that over one million lawyers in India are willing to work for much less than American attorneys, causing basic research and writing projects to be shipped overseas instead of being performed in-house by associates. This trend is changing because of the glut of American attorneys who are out of work. One aspect of globalization is the General Agreement on Trade in Services (GATS). Legal services are part of GATS. Because of this, American firms are being pressured to change and allow things such as non-lawyer ownership of law firms. Australia has two publicly traded law firms. The UK allows passive non-lawyer investment in firms. The ABA had before it, but did not consider, as part of Ethics 20/20, a change to the Rules of Professional Conduct that would allow American firms to have partial ownership by non-lawyers. Globalization is likely going to impact our practices. Knowing that gives us the chance to prepare for the upcoming change and decide in advance what we want to be as lawyers and law firms.

Technology

More than any single factor, technology has changed the practice of law. Now, small firms have the same access to legal resources as large firms. More importantly, clients have access to the same legal resources. As Ury and Lyons posit, "E-law firms, combined with outsourcing and co-sourcing, can build a nationwide network of law firms." This raises issues of confidentiality, conflicts of interest, and competence. Many freshly minted lawyers are now beginning e-law firms and avoiding the mentoring previously available to associates who work in firms. This makes strict compliance with our mentoring program essential to ensure that all new attorneys are given the necessary skills and professionalism to serve the public competently.

Nature of Clients

The new personality of clients is changing. Most younger clients grew up using the internet. There is substantial legal information available on the internet to address client's questions without having to ask an attorney. There are many websites offering forms for clients: LegalZoom, Docracy, Paperlex, etc. The problem is that these form based websites allow clients to believe they solve problems when, in fact, they may be creating them. One thing we can do is work on improving our websites to allow



clients access to basic information that will guide them to an attorney. This allows clients to do part of the work themselves but then turn to an attorney to provide the critical advice necessary, refining the legal work and separating it from what clients may view as merely document drafting. This adds value to the final product and perfects the collaborative process between client and attorney to ensure the client's needs are truly being met and the lawyer's skills are being maximized.

Demographics

Client demographics are also changing: in the 1960s 45% of the clients were corporate and 55% were individuals. Now, 64% are corporate and 29% are individuals. Corporations, which traditionally paid more, are now becoming more cost oriented. Corporations are becoming less willing to pay high hourly rates to train brand-new associates. The result is that more and more firms are hiring laterally instead of hiring law students. This allows the rates to remain constant and the work to be performed at what corporations believe to be a higher level.

Law firms are increasingly being asked to move away from the billable hour and charge by the job or result. Younger lawyers are also more mobile than lawyers of previous generations. Ury and Thomas stated that "Today's graduates will hold 10–14 jobs by their 38th birthday." More importantly, the statistics indicate that there is an aging lawyer population. The majority of lawyers nationally are 35 years old or older. The 25–29 age group is shrinking fast. This is the result of several factors, including graduates working in careers other than the law, leaving the practice because of dissatisfaction, and a reduced number of law school applications. The issue that will have to be addressed is ensuring quality representation by all attorneys and quality mentoring for younger attorneys.

Legal Education

Ury and Thomas ended their presentation discussing the current status of legal education. The cost of a legal education is rising faster than inflation while at the same time starting salaries are remaining relatively flat. Some law schools are pricing

themselves out of existence while student debt is becoming an unmanageable burden. As of 2011, the median starting salary was $60,000, while the large firms on the coasts paid over double that amount. Law salaries peaked in 2009, and have steadily declined since then. This makes a legal career less attractive, especially in light of increased costs and mounting debt. Many schools are looking at retooling and changing from the traditional method of instructing students to a more "practice-ready" model of instruction. In order for this new model to take hold, schools, bars, firms, and the judiciary will have to work in concert. The authors conjecture that failure to change could result in increased numbers of pro se parties and an increase in work sent overseas. Both law schools in Utah are ahead of the curve in this regard having already made significant changes in their clinical programs.

The challenges addressed were followed up by a presentation by Mark Fogg, Steve Crossland, and Jon Streeter who discussed the need to "Innovate or Die." Their suggestions were: create programs matching the middle income client with the underemployed attorney, change legal education to make graduates more "practice-ready," have self-help centers in courthouses, have a rule allowing unbundled legal services, and allow a limited license. I'm proud to say Utah has already adopted all of the innovations with the exception of a limited license. Given the great many attorneys currently underemployed, I don't see the limited license rule coming to Utah quickly, but I do see a huge opportunity for the Modest Means program to fill the gap. As our law schools, the Utah State Bar, the Utah State Courts, and firms have already innovated to address the changing future, the information provided by Ury and Thomas will allow us to continue innovating and changing to ensure our attorneys are the best in the nation and have secure employment.

The dreary prognostication also made me wonder if the changing legal world is what contributes to the overall view that attorneys are a "cynical, miserable lot." ABA Journal, *Are Lawyers more miserable than general population*, February 20, 2013. Dan Bowling, a "psychology guru" who teaches at Duke University, says lawyers really aren't all that miserable after all. He blogs that lawyers are "generally satisfied with their lives." Bowling also targeted the view of attorneys as cynics and says that while attorneys are critical thinkers, so are most holders of post-graduate degrees, drawing a distinction between critical thinking and cynicism.

An even more recent poll by Gallup demonstrated that attorneys are second only to physicians in job satisfaction and overall well-being. Workers in professions including attorneys self-reported especially high scores in physical health and among the least likely to suffer from any form or recurring pain. Statistically, lawyers, accountants, and engineers have an overall well-being score of 73.0% with a 90.4% job satisfaction percentage.

Because I've had access to the stories you have provided regarding your voluntary service to your communities, I am even more confident that the attorneys in Utah are a notch above the national average. We've already addressed the suggestions to avoid the legal apocalypse, we have the information available to make additional changes as needed, and we are, as a population, great contributors to the success of our communities. My message to you is take the information to use as you see it applies, and thank you for your service.

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Motions to Suppress: Understanding Burdens

by Judge Paul C. Farr

Motions to suppress seem to cause much confusion. The quality of these motions varies widely. Attorneys' expectations of how those motions and subsequent evidentiary hearings will be handled also vary greatly. I have written this article to provide some understanding regarding the burdens and issues involved with these motions.

Utah Court Rules

The Utah Rules of Criminal Procedure provide only minimal instructions regarding motions to suppress. Rule 12(c) provides that these motions must be raised at least five days prior to trial. *See State v. Smith*, 2012 UT App 370, ¶ 5, 293 P.3d 1148 (holding that Rule 12(c) requires only that the motion be raised five days prior to the actual trial date, and not the first date on which trial was scheduled but later continued). However, practice suggests that these motions should be filed weeks, if not months, in advance of trial. Otherwise, there is insufficient time to deal with the motion, and the trial date would likely be continued. Courts and counsel would be wise to discuss the necessity of motions to suppress at pretrial conferences and, if needed, schedule filing dates well in advance of trial.

> *"Clear arguments supported by citations that are on point are much more effective than several pages of citations to general Fourth Amendment case law."*

Rule 12(d) provides further direction in that it requires that motions to suppress: (1) describe the evidence sought to be suppressed; (2) set forth the standing of the movant to make the application; and (3) specify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them. Utah R. Crim. P. 12(d). Court rules do not provide much else in the way of guidance on procedures for motions to suppress. Nor do the rules discuss specifically the procedures involved in the subsequent evidentiary hearing. Rather, counsel is required to become familiar with case law in this area, as well as the general practice of the court.

Defendant's Burden When Filing a Motion to Suppress

The initial burden on a motion to suppress lies with the defendant. Rule 12(d), discussed above, provides that a motion to suppress must provide sufficient legal and factual grounds to support the requested relief. *Id*. This requirement has been explained and elaborated in case law, discussed below. These cases make clear that a defendant must set forth enough of a factual and legal basis to establish that there is a legitimate dispute over material facts. An evidentiary hearing is not going to be held unless a motion to suppress is actually filed, and the court determines that there is a sufficient basis to justify an evidentiary hearing.

In *State v. Clegg*, 2002 UT App 279, 54 P.3d 653, the Utah Court of Appeals explained:

> A defendant bears the burden of showing there are material facts in dispute, and an evidentiary hearing is only required when the motion to suppress raises factual allegations that are sufficiently

JUDGE PAUL C. FARR is the Sandy City Justice Court Judge, has been a member of the Utah State Bar since 2000, and has a B.S. in Criminal Justice from Weber State University and a J.D. from BYU.

> definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in issue. If no material fact is in dispute, then no evidentiary hearing is required.

Id. ¶ 6 (citations and internal quotation marks omitted).

This holding is consistent with cases in other jurisdictions. For example, in *United States v. Lilly*, 983 F.2d 300 (1st Cir. 1992), the First Circuit held:

> Federal courts are not obliged to provide evidentiary hearings on demand. Rather, we have developed a substantive test to be applied when a criminal defendant solicits an evidentiary hearing on a pre-trial or post-trial motion. In such situations, the movant must make an adequate threshold showing that material facts are in genuine doubt or dispute.

Id. at 310 (citation omitted). The court continued, stating that "[a] criminal defendant has no constitutional right to conduct a fishing expedition." *Id.* at 311.

The Tenth Circuit issued a similar holding in *United States v. Chavez-Marquez*, 66 F.3d 259, (10th Cir. 1995). In that case, the court stated:

> A trial court is required to grant a suppression hearing only when a defendant presents facts justifying relief. A defendant who requests a hearing bears the burden of showing that there are disputed issues of material fact. Similarly, a hearing is not required when [s]uppression [is] improper for a reason of law appearing on the face of the motion.

Id. at 261 (alterations in original) (citations and internal quotations omitted).

Well-reasoned and articulated motions to suppress are likely to result in an evidentiary hearing being scheduled. However, motions that have obviously been cut and pasted, make conclusory

allegations, and provide broad legal arguments and citations not specifically addressed to the actual issues, are not well received.

As a judge, I understand the legal principles involved and have generally read the applicable case law. Clear arguments supported by citations that are on point are much more effective than several pages of citations to general Fourth Amendment case law. Tell me specifically what your allegation is, identify the facts that support your allegation, and support it with applicable case law. If you do so, an evidentiary hearing is likely going to be scheduled. If you fail to do so, the motion will likely be denied without a hearing.

Prosecution's Burden in Response to Motion

Once the defendant has met his or her initial burden to establish a legitimate factual dispute, an evidentiary hearing will be scheduled and the burden then shifts to the prosecution. In *State v. Worwood*, 2007 UT 47, 164 P.3d 397, the Utah Supreme Court explained, "Once a valid constitutional challenge is made, the burden shifts to the State to prove that its warrantless action was justified." *Id*. ¶ 40.

Typically, the prosecution is not going to file a response to the motion to suppress. The parties will appear at the evidentiary hearing where the prosecution will put on its evidence in support of the challenged conduct. Generally, this court asks the parties if any argument is needed prior to the presentation of evidence. The prosecution then goes first, with the defense following, just as during a trial.

The prosecution's burden in such a situation is a preponderance of the evidence. In *State v. Delaney*, 869 P.2d 4 (Utah Ct. App. 1994), *overturned on other grounds by State v. Lopez*, 873 P.2d 1127 (Utah 1994), the court recognized:

> [T]he Utah Supreme Court in *State v. Brown*, 853 P.2d 851, 855 (Utah 1992), cited with approval the preponderance of the evidence standard enunciated in *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L.Ed 2d 242 (1974). In *Matlock*, the Supreme Court stated that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." 415 U.S. at 177–78 n.14.

Similarly, in *United States v. Kitchell*, 653 F.3d 1206 (10th Cir. 2011), the court held that at a suppression hearing the prosecution has the burden to demonstrate by a preponderance of the evidence that reasonable suspicion supported the officer's stop. *Id*. at 1216. In summary, the prosecution must present sufficient evidence to establish, by a preponderance of the evidence, that the search, stop or other procedure was constitutional.

Motions as a Result of Traffic Stops

A large number of motions to suppress are based on a challenge to evidence that is discovered during a traffic stop. The justification for the initial stop, the scope of the stop, and length of the detention are often targets of such a challenge. Keeping in mind the prosecutor's burden (preponderance of the evidence), it is important to correctly understand what the prosecutor must establish.

An officer is constitutionally justified in making a traffic stop if the stop is (1) incident to a traffic violation committed in the officer's presence or (2) when the officer has a reasonable articulable suspicion that the driver is committing a traffic or other criminal offense. *State v. Lopez*, 873 P.2d 1127, 1132 (Utah 1994).

It is also important to note that the inquiry is not whether an offense actually occurred, but whether the officer had reasonable suspicion of a violation. *United State v. Tibbetts*, 396 F.3d 1132, 1137 (10th Cir. 2005). As the court said in that case, "[a] traffic stop based on an officer's incorrect but reasonable assessment of the facts does not violate the Fourth Amendment." *Id*. at 1138 (citation and internal quotation marks omitted). Similarly, the U.S. Supreme Court stated, "to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded [of the police officer conducting a warrantless search or seizure]…is not that they always be correct, but that they always be reasonable." *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990). Further, "[a] determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277 (2002); *see also State v. Simons*, 2013 UT 3, ¶ 12, 296 P.3d 721 (discussed in further detail below); *United States v. Winder*, 557 F.3d 1129, 1134 (10th Cir. 2009).

Utah courts have also abandoned the pretext stop doctrine. After addressing the two occasions when a traffic stop is justified, the court in *Lopez* explained: "In either case, stopping the driver is constitutionally justified. This is so despite the officer's motivations or suspicions that are unrelated to the traffic offense." *Lopez*, 873 P.2d. In other words, the officer's actual

motivations for stopping a vehicle are irrelevant as long as a traffic violation occurred in his or her presence or the facts give rise to an objective reasonable suspicion.

When combined with the burdens discussed above, a prosecutor must establish by a preponderance of the evidence that the officer had reasonable articulable suspicion that a violation occurred. The officer's subjective intent is generally not relevant, and the court need not rule out other possibly innocent conduct or explanations.

Standard of Review

Two different standards of review apply to motions to suppress. First, a party could appeal the trial court's refusal to hold an evidentiary hearing. Addressing this issue, the court in *State v. Clegg*, 2002 UT App 279, 54 P.3d 653, recognized, "'We review a trial court's denial of an evidentiary hearing on a motion to suppress for abuse of discretion.'" *Id*. at 654 (quoting *United States v. Glass*, 128 F.3d 1398, 1408 (10th Cir. 1997)). It is therefore within the court's discretion whether to hold an evidentiary hearing.

The court's ultimate ruling on a motion to suppress is reviewed under a different standard. In *State v. Tripp*, 2010 UT 9, 227 P.3d 1251, the Utah Supreme Court held: "A trial court's ruling on a motion to suppress is reviewed for correctness, including its application of the law to the facts. The trial court's underlying factual findings are reviewed under the clearly erroneous standard." ¶ 23 (citation omitted). Further, when making this determination, the court is to view the facts "in a light most favorable to the trial court's ruling denying [a] motion to suppress." *State v. Marquez*, 2007 UT App 170, ¶ 2 163 P.3d 687 (alteration in original).

Utah's appellate courts issued two recent opinions providing further direction on this issue. The Utah Court of Appeals decided the case of *State v. Smith*, 2012 UT App 370, 293 P.3d 1148, on December 28, 2012. The court explained that it would "reverse an erroneous evidentiary ruling only if, absent the error, there is a reasonable likelihood that there would have been a more favorable result for the defendant." *Id*. ¶ 6 (citation and internal quotation marks omitted). That case was followed by *State v. Simons*, decided on January 25, 2013, wherein the Utah Supreme Court explained

> Because this case turns, in part, on the presence or absence of reasonable suspicion, we state the legal standard under which it is reviewed. Though reasonable suspicion is highly fact dependent and the fact patterns are quite variable, the determination that reasonable suspicion exists is not a factual one. Rather, whether a particular set of facts gives rise to reasonable suspicion is a question of law, which [we] review[ ] for correctness.

2013 UT 3, ¶12, 296 P.3d 721 (alterations in original) (citations and internal quotation marks omitted).

Conclusion

A motion to suppress can be crucial to a good defense. However, as discussed above, the defendant bears the burden of raising a legitimate issue, and the prosecution's subsequent burden is relatively low. A motion that is clearly insufficient, or does not raise a genuine issue but appears to be filed for purposes of gamesmanship, can significantly damage a party's or an attorney's credibility. Don't file a motion just to file a motion. Make sure it raises a legitimate issue. By gaining an understanding of the burdens and standards of review applicable to motions to suppress, parties can be more effective in making or opposing motions to suppress.

Confessing Sins to Clients Part II: Do You Risk Losing Malpractice Insurance Coverage?

by Keith A. Call

In our last issue, I discussed an attorney's ethical obligation to voluntarily report serious mistakes to a client. But when you make those confessions to your client, do you risk losing insurance coverage from your malpractice carrier?

Look in the glove box of your car. You will probably find a document from your automobile insurance company telling you what to do in case of an accident. That document probably says something like "DO NOT ADMIT FAULT EVEN IF YOU THINK THE ACCIDENT WAS YOUR FAULT."

Now, try digging through your office cabinets to find a copy of your malpractice liability policy. Your policy may have a "voluntary payments" clause that reads something like this:

> The INSURED, ***except at its own cost,*** will not admit any liability, assume any obligation, incur any expense, make any payment, or settle any CLAIM, without the COMPANY'S prior written consent.

See, e.g., Illinois State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., PC, 980 N.E.2d 1120, 1122 (Ill. App. Ct. 2012) (emphasis added).

> *"[L]isten to your insurer's advice, but don't allow the insurer to suck you into disclosing less than you are ethically obligated to disclose."*

Coverage Denied!

The defendant in the Illinois case, attorney Frank Greenfield, faced this dilemma. After his estate planning client died, Mr. Greenfield discovered he had made a mistake in the estate plan documents. *Id*. As he was ethically obligated to do, Mr. Greenfield sent a letter to the beneficiaries in which he admitted he had made a "scrivener's error" and that, but for the error, those beneficiaries would have realized an additional $800,000. *Id*. at 1121–24.

When Mr. Greenfield's efforts to persuade the trustees to "do the right thing" failed, the beneficiaries sued Mr. Greenfield for malpractice. *See id*. Adding insult to injury, Mr. Greenfield's malpractice carrier denied coverage, invoking the voluntary payments clause in the policy. *Id*. at 1121. The insurance company admitted that Mr. Greenfield had an ethical obligation to disclose his mistake to the beneficiaries. *Id*. at 1124–27. But it argued Mr. Greenfield's letter went too far. *Id*. at 1124. It complained that, rather than merely relating the "facts" of what happened, Mr. Greenfield admitted "liability." *Id*. The company also complained that Mr. Greenfield unduly delayed reporting his error to them. *Id*. at 1127. As the insurance company put it:

> [Mr. Greenfield] was not obliged to admit the elements of a legal malpractice action, as his letter did – certainly not before contacting his liability insurer to notify it of a possible claim for which the insurer might be responsible, and seek its advice in handling the delicate situation.

Id.

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

Saved by the Court

Luckily for Mr. Greenfield, the Appellate Court of Illinois held that the voluntary payments clause was unenforceable as a matter of public policy. *Id*. at 1128–29. The court opted not to jump into the mire of distinguishing "fact" from "admission of legal liability." *Id*. at 1128. As the court put it:

> [W]e are uncomfortable with the idea of an insurance company advising an attorney of his ethical obligation to his clients, especially since, as in the case at bar, the insurance company may advise the attorney to disclose less information than the attorney would otherwise choose to disclose.

Id. Wisely said.

Practice Pointers

The *Greenfield* case establishes the law of Illinois. But there is no known precedent in Utah. Hopefully a Utah court would reach the same result.

But just in case (and to give yourself the best chance of prevailing in case of a fight), your confessions to your clients should be limited to the facts. To the extent you can, relay all of the material facts without admitting legal liability. By all means don't say or do anything to suggest you are colluding with your clients to hang your insurer out to dry.

Better yet, get your insurer on board. Read your policy. Know and understand your reporting requirements under the policy. Call your broker if you have questions. Report potential claims early. Most insurers will respect an attorney's ethical obligations and will help you meet them. They can also provide valuable guidance on how to fix or minimize the problem.

Finally, listen to your insurer's advice, but don't allow the insurer to suck you into disclosing less than you are ethically obligated to disclose. As soon as you sense a conflict is beginning to develop, get outside help from an objective colleague. And trust in the court to protect you if your insurer plays heavy-handed.

On the Record Review: Efficiency for Environmental Permit Appeals in Utah and Other Recent Developments at the Utah Department of Environmental Quality

by James A. Holtkamp, Steven J. Christiansen, Megan J. Houdeshel

In the last ten years, the Utah Department of Environmental Quality (DEQ) has seen an increase in the number of challenges to environmental permits issued by the six divisions of the DEQ. Historically, under Utah Code section 19-1-301, each permit challenge required a trial-type proceeding before either one of the DEQ boards or a hearing officer appointed by such board. *See* Utah Code Ann. § 19-1-301 (LexisNexis Supp. 2012). These proceedings were often held up for years with motion practice and evidence gathering before the formal hearing was even scheduled.[1] Once a hearing was held before the hearing officer, the recommended decision was presented to the applicable division board for review. *See id.* § 19-1-301(6)(a)–(b). The boards were generally made up of more than ten people, many of whom were not lawyers, and were not familiar with the rules governing formal administrative hearings and review of a hearing officer or an Administrative Law Judge (ALJ) decision.

JAMES A. HOLTKAMP is a partner in the Salt Lake City law office of Holland & Hart. His practice emphasizes natural resources and environmental law. He has been practicing law for over 37 years.

STEVEN J. CHRISTIANSEN is a partner in the Salt Lake City law firm of Parr Brown Gee & Loveless. His practice emphasizes natural resources and environmental law. He has been practicing law for 31 years.

Moreover, the boards were caught between rulemaking functions and adjudicative functions creating potential conflicts of interest. In particular, it was often difficult for board members to shift from a role in which all public input was welcomed to that of an adjudicator who was supposed to avoid ex parte communications. All of this resulted in an inefficient process and inconsistent results.

In an effort to streamline the adjudicative process for permit appeals, create some decision-making consistency within DEQ, and eliminate the boards' multifunction conflict of interest, two bills were proposed in the 2012 legislative session: Senate Bill 21 (DEQ Boards Revision Bill) (SB 21) and Senate Bill 11 (DEQ Adjudicative Proceedings) (SB 11). To facilitate collaboration in drafting these bills, the Executive Director of DEQ, Amanda Smith, coordinated a Kaizen process in the fall of 2011 involving a diverse group of business, government, legal, and nongovernment/citizen stakeholders. All of the Kaizen process participants were devoted to improving DEQ's boards, procedures, and legal structure.

Both bills passed in the 2012 session of the Utah State Legislature with wide margins of bipartisan support. SB 11 passed the Utah Senate on January 25, 2012, with a favorable vote of 21-4 (4 abstentions) and passed the Utah House of Representatives on

MEGAN J. HOUDESHEL is an associate in the Salt Lake City law firm of Parr Brown Gee & Loveless. Her practice emphasizes natural resources and environmental law. She has been practicing law for 4 years.

February 1, 2012, with a unanimous vote of 73-0 (2 abstentions). The Governor signed the bill on March 22, 2012. SB 21 also passed the Utah Senate with a favorable vote on February 6, 2012, with a vote of 23-6 (0 abstentions) and passed the Utah House of Representatives on February 22, 2012, with a vote of 47-18 (10 abstentions). The Governor signed SB 21 into law on March 23, 2012.

The following is a brief history of the origins of both bills and an explanation of how the new procedures will generate better decisions and improve the efficiency of DEQ. As DEQ's budget has decreased in recent years, the agency has been required to do more with less. These bills provide the framework to achieve that goal.

History and Purpose of SB-11

SB-11 authorizes on-the-record adjudicative review of DEQ environmental permit decisions by an ALJ utilizing an appellate-type procedural format rather than the formal trial-type evidentiary hearing mandated by the Utah Administrative Procedures Act (UAPA). *See* Utah Code Ann. § 63G-4-206 (LexisNexis 2011). Nevertheless, UAPA hearing procedures continue to apply to DEQ proceedings that do not involve the issuance or denial of environmental permits such as, for example, civil enforcement proceedings.

The intent behind SB-11 is to adopt an administrative review procedure that is similar to that currently utilized by the U.S. Environmental Protection Agency's (EPA) Environmental Appeals Board (EAB). The procedure for review of federal environmental permits is codified at 40 CFR Part 124. The Part 124 procedures apply to virtually all EPA environmental permit decisions at the Federal level. Rather than a trial-type evidentiary hearing for permit challenges, the Federal system employs an on-the-record review of the agency's decision in granting the challenged permit. The review is limited to an administrative record with very little opportunity for additional evidence gathering.

Historically, EPA, like the State of Utah, utilized administrative trial-type hearings for adjudicative review of certain environmental permits most notably National Pollutant Discharge Elimination System (NPDES) discharge permits under the Federal Clean Water Act (CWA). This trial-type review procedure was employed by EPA, in large part, because of certain early United States Court

of Appeals decisions interpreting the CWA to require formal evidentiary hearings under the Federal Administrative Procedures Act (APA). *See, e.g., Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 (1st Cir. 1978) ("[T]he APA does apply to proceedings pursuant to [CWA §] 402."); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1264 (9th Cir. 1977); *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977).

During the 1980s, however, it became apparent that formal trial-type adjudicative hearings were an inefficient and unnecessary legal procedure for review of environmental permits. EPA therefore began to modify its adjudicative hearing rules moving away from formal trial-type evidentiary hearings in order to make the process more efficient. At the same time, the opinions of two federal appellate courts questioned the validity of the earlier decisions mandating formal evidentiary hearings. *See Chem. Waste Mgmt. v. United States Envtl. Prot. Agency*, 873 F.2d 1477 (D.C. Cir. 1989); *see also Buttrey v. United States*, 690 F.2d 1170, 1175 (5th Cir. 1982) (Congress did not intend that the "public hearings" called for in [CWA] section 404 be trial-type hearings on the record.). For example, in *Chemical Waste Management*, the D.C. Circuit approved procedural rules adopted by EPA under the Resource Conservation and Recovery Act authorizing informal procedures for administrative hearings. 873 F.2d at 1478. In addition, the appellate court specifically cited the *Seacoast* and *Marathon Oil* decisions and said, "we decline to adhere any longer to the presumption raised in [this line of cases]." *Id.* at 1481. Finally, the appellate court explained,

> it is not our office to presume that a statutory reference to a "hearing," without more specific guidance from Congress, evinces an intention to require formal adjudicatory procedures, since such a presumption would arrogate to the court what is…clearly the prerogative of the agency, *viz.*, to bring its own expertise to bear upon the resolution of ambiguities in the statute that Congress has charged it to administer.

Id. at 1482.

The trend away from formal adjudicatory hearings for Federal environmental permits continued during the 1990s, when, on February 21, 1995, the President directed all Federal agencies to review and eliminate obsolete or burdensome rules. In response, on December 11, 1996, EPA published in the *Federal Register* a proposed rule to Streamline the National Pollutant Discharge Elimination System Program Regulations. 61 Fed. Reg. 65268 (Dec. 11, 1996). Among other things, EPA determined that the procedural rules requiring trial-type hearings for review of CWA permits needed to be replaced: "today's notice…would revise the permit appeals process for EPA- issued NPDES permits by replacing the evidentiary hearing procedures…with a direct appeal to the Environmental Appeals Board." *Id.* at 65269. EPA justified its actions by referring to the formal evidentiary hearing procedures as unnecessary. *Id.* at 65275. In addition, one of EPA's primary arguments was that of efficiency: "EPA's experience with the evidentiary hearing process suggests that it causes significant delays in…permit issuance without causing noticeable improvements in the quality of the permit decisions made." *Id.* at 65276. Moreover, "EPA statistics suggest that "it takes an average of 18-21 months to complete the 2-part appeals process…[and] EPA has maintained the process primarily due to concerns about the legality of adopting less formal procedures.…[T]hese concerns no longer hold true." *Id.* Finally, from a legal perspective, the agency explained, "EPA has concluded that due to the progress of the law in the Courts of Appeals, the *Seacoast* and *Marathon* decisions are **no longer good law**, and that the CWA may be interpreted not to impose a formal hearing requirement." *Id.* (emphasis added).

"The various environmental boards consist of individuals who, by state statute, represent a particular constituency affected by the particular program overseen by the board."

On May 15, 2000, EPA finalized new administrative adjudicatory procedures, codified at 40 CFR Part 124, that adopt a single set of procedural rules for all environmental permits utilizing on-the-record appellate-type review in lieu of formal trial-type evidentiary hearing procedures. 65 Fed. Reg. 30886 (May 15, 2000). In the preamble accompanying the final rule, EPA

reported: "None of the comments received suggest that retaining formal adjudicatory proceedings is required under [CWA] section 402(a) or due process or consistent with the public interest. Therefore, EPA is today adopting the proposed rule, eliminating evidentiary hearing procedures." *Id*. at 30900. In the final rule itself, EPA specifically noted that: "EPA eliminated the previous requirement for…permits to undergo an evidentiary hearing after permit issuance." 40 C.F.R. § 124.21(b) (2012).

Following the promulgation of the streamlined permit review procedural rules in 2000, no one filed any appeal challenging the rule. Indeed, the revised EPA permit review procedures were subsequently upheld by reviewing federal courts. *See, e.g., Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 18 (1st Cir. 2006) ("The [EPA's] conclusion that evidentiary hearings are unnecessary and that Congress…did not mean to mandate evidentiary hearings seems reasonable…."). It is this federal model of on-the-record review proceedings that SB 11 is intended to emulate. DEQ realized, as had the EPA, that evidentiary hearings for permit review challenges was inefficient, caused significant delays, and did not produce consistent or more reasoned results. Instead, an on-the-record-review procedure for environmental permit challenges, implemented through SB 11, will result in better up-front permit drafting and more meaningful and efficient review.

History and Purpose of SB21

In addition to streamlining and improving the permit appeal procedures, DEQ was interested in reforming the DEQ division boards in both makeup and responsibility with the intent of making the boards more efficient. The DEQ boards had become too large in size to be able to create effective policy. Moreover, because they sometimes served in both adjudicative functions as well as rulemaking functions on the same matters, a potential conflict of interest existed that often made performing either task confusing and difficult.

The various environmental boards consist of individuals who, by state statute, represent a particular constituency affected by the particular program overseen by the board. Each board includes representatives of regulated industry, environmental groups, local governments, and public health professionals. The policy underlying the boards' makeup is to provide for input by affected stakeholders directly to board members representing their interests and to assure a diverse board membership.

As the number and complexity of permit appeals increased over the years, so did the tension between the board members' roles as policymakers and adjudicators. Conflicts of interest inevitably arose with regard to particular board members during contested adjudications, and some board members found it difficult to avoid ex parte contacts during such adjudications.

In an effort to address these concerns, in October 2011, the DEQ sponsored a two-day Kaizen process bringing a diverse group of stakeholders together to develop ideas to improve the procedures for adjudication and rulemaking within the agency. It was DEQ's intention to involve members of the public, members of the legal community, and members from state and federal regulatory agencies to collaborate on a bill that would improve all aspects of DEQ. A variety of stakeholders were invited to participate including non-governmental organizations, industry representatives and government representatives. After two long days of deliberation, the general contours of SB 21

were formed. The result was a framework for improving efficiency at DEQ.

The major ideas developed in the Kaizen process were to remove the adjudicative responsibilities of the boards and reduce the number of members on each of the boards. Additionally, the group agreed to give the Executive Director of DEQ the final adjudicative say on permit appeals after an on-the-record-review by an ALJ. These changes removed the potential conflict of interest between the boards' rulemaking and adjudicative functions and allowed the boards to fully function as a meaningful policy-making body.

Once these general ideas were established, more work was done to draft a bill that would put into law the results of the Kaizen process. It was the intention of SB 21 to capture the recommendations that came out of the Kaizen process. Specifically, SB 21 does this by reducing the number of representatives on each board to nine, one of whom is the executive director and the other eight are nominated by the executive director and appointed by the governor with the consent of the Utah senate. The make up of the boards under SB 21 includes one individual, who by training and expertise is an expert in the subject matters handled by the board; two non-federal government representatives; two representatives from the applicable regulated industry; one representative of a non-governmental organization; one public health representative; and one attorney with expertise in the particular subject matter. Additionally, some of the terminology in the previous statute was changed to better reflect applicable board responsibilities, such as changing the title of the heads of the various DEQ division heads to director rather than executive secretary. Many of the statutory board authorities were transferred to the directors, especially those that were purely administrative in nature, including issuance, amendment, renewal, or revocation of permits. By reducing the number of individuals on the boards and focusing the boards' responsibilities, SB 21 allows the boards to focus on more effective rulemaking and policy.

Legislative History of SB 11 and SB 21

Both SB 11 and SB 21 received an extraordinary amount of editing and critique before being signed into law in the spring of 2012. In September 2011, SB 11 was presented to the Natural Resource Agriculture and Environment Interim Committee. There was discussion about the purpose and history of the bill and how it would improve the DEQ adjudication process. No vote was held on the bill at this first presentation. Then, after the DEQ Kaizen process, both SB 11 and SB 21 were presented at a second gathering of the Natural Resource Agriculture and Environment Interim Committee in November 2012. After deliberation on both of the bills, they passed out of the Senate interim committee with favorable recommendations. The bills were further discussed and critiqued during the 2012 legislative session passing through the senate to the House Committees, where SB 21 was slightly amended. Finally, in May 2012, having passed through favorably on both chambers of the Utah Legislature, the Utah Governor signed the bills into law. This high level of scrutiny for both bills ensured the contents were well drafted and could be effectively implemented to improve the structure, efficiency, and functions of Utah's DEQ.

In order to fully implement this new legislation, the agency promulgated new procedural rules for administrative adjudication of DEQ permits. SB 21 gives the executive director of DEQ the authority to implement new rules that apply to all of the DEQ divisions. *See* Utah Code Ann. § 19-1-201(1)(d)(ii) (LexisNexis Supp. 2012). This grant of authority allows for continuity between the Divisions and allows for a streamlined rule adoption procedure. The new administrative adjudication rules were initially released for public comment in the Utah State Bulletin on August 15, 2012, when DEQ and the Utah Attorney General's Office published two notices proposing to delete the old DEQ administrative adjudication rules and to adopt new rules. In response to comments received on the new DEQ administrative adjudication rule, the DEQ published a revised rule on January 1, 2013, that took effect on January 31, 2013. The new rule will be codified in the Utah Administrative Code at R305-7. These new rules and the new legislation will provide the framework for the DEQ Divisions to draft comprehensive permits up front, and conduct a meaningful and timely review of those permits if a challenge is initiated. Overall, environmental permits in the state of Utah will be improved as a result of SB 11, SB 21, and the Agency's new implementing rules.

CONCLUSION

The two new DEQ statutes passed in the 2012 Utah General Session, SB 11 and SB 21, are intended to improve the efficiency and effectiveness of the DEQ divisions. SB 11 was modeled after the Federal EPA's adjudication procedure for review of environmental permits. This is a tested system that produces timely, consistent

and meaningful results for the EPA. Utah adopted similar procedures to what EPA had promulgated in order to improve the permit review adjudication procedures in the state of Utah. SB 21 was the result of a collaborative process where diverse stakeholders came together to brainstorm ways to improve the DEQ divisions. Those ideas were transformed into the language of SB 21, and will dramatically improve the rulemaking and policy functions of the DEQ division boards. The Utah DEQ has a continuing challenge to find ways to improve its function while dealing with a shrinking budget. These new bills allow the agency to do more with less.

The authors wish to thank State Senator Margaret Dayton, State Representative Bill Wright, Amanda Smith, and her colleagues at the Utah Department of Environmental Quality, Denise Chancellor and Laura Lockhart at the Utah Attorney General's Office, the Utah Manufacturers Association, the Utah Mining Association, the Utah Petroleum Association, the Utah Industry Environmental Coalition, and the many others who supported and assisted with the passage of the important legislation discussed in this article.

1. *Kennon v. Air Quality Bd.*, 2009 UT 77, 270 P.3d 417 (with respect to the same project as in the previous two cited cases, the Utah Supreme Court determined that despite the on-going multi-year litigation, the permit was invalid because the defendants had not commenced construction within the authorized statutory time period); *Utah Chapter of Sierra Club v. Air Quality Bd.*, 2009 UT 76, 226 P.3d 719 (five years after initial permit granted to defendants, the Supreme Court finally reached the merits of the case and affirmed in part and reversed in part the agency's decision); *Utah Chapter of Sierra Club v. Air Quality Bd.*, 2006 UT 74, 148 P.3d 960 (two years after initial permit was issued and Plaintiffs petitioned to intervene with request for agency action, Utah Supreme Court held that parties had standing to challenge the permit and matter was remanded back to agency); *See, e.g., Utah Chapter of Sierra Club v. Air Quality Bd.*, 2006 UT 73, 148 P.3d 975 (two years after initial permit was issued and Plaintiffs filed request for agency action, Utah Supreme Court held that Plaintiffs had standing to challenge permit and matter was remanded to agency).

More Than Marriage: Utah's System of De Jure Denigration Goes Before the U.S. Supreme Court

by Jesse Nix and Chris Wharton

In the early 80s, Jesse Nix's mother moved to Utah from El Salvador to escape a violent civil war. She met his father, a young white Mormon boy from Sandy, and they fell for each other. Even though his mother only spoke Spanish and his father only spoke English, they shared the common language of love. Their marriage in 1983 was made possible sixteen years earlier by the Supreme Court decision in *Loving v. Virginia*, 388 U.S. 1 (1967), the case that invalidated laws prohibiting interracial marriage. That landmark decision made it possible for Jesse and millions of other children of interracial couples to grow up in families defined by love rather than race.

Now, a similar battle is being fought before the high court for lesbian, gay, bisexual, and transgender (LGBT) citizens. Jesse and I serve on the board of directors of the Utah Pride Center, a nonprofit based in Salt Lake City serving Utah's LGBT community. Once we heard the Supreme Court granted certiorari in *Hollingsworth v. Perry* (California's Proposition 8 ban on same-sex marriage) and *United States v. Windsor* (federal recognition of same-sex couples under the Defense of Marriage Act (DOMA)), we enlisted the help of two prominent attorneys to bring Utah's system of discrimination against the LGBT community to the Court's attention.

Brett Tolman, the Republican former United States Attorney for the District of Utah, and Paul Burke, founding member of the Utah Democratic Lawyers Counsel and Utah's 2012 "Pro Bono Lawyer of the Year," led a diverse legal team of attorneys that included John Mackay, Mica McKinney, Jacquelyn Rogers, and Adam Wentz. While the issues facing the Court concern marriage equality, our amicus brief focused on the broader issues of our state's system of *de jure* denigration that oppresses LGBT Utahns and treats them as second-class citizens under the law. Our brief was ultimately joined by the Campaign for Southern Equality, Equality Federation, and twenty-five other statewide equality organizations fighting similar laws in other states across the county. The following is a summary of our arguments and an analysis of the potential impact on the national legal debate over marriage equality.

Educational statutes passed by the Utah Legislature force public schools to demean and endanger gay children.

"Utah's ban against the 'advocacy of homosexuality' not only signals social disdain for homosexuality, but burdens gay students and children of gay families with moral disapproval from the State of Utah." Brief for Utah Pride Center, et al., as Amici Curia Supporting Respondents, at 5, *Hollingsworth v. Perry*, No. 12-144 (U.S. 2013), and *United States v. Windsor*, No. 12-307 (U.S. 2013). This means that a teacher in Utah may not be able to answer a student's question, "Is it okay to be gay?" State law currently prevents teachers from giving a response that

JESSE NIX is a public defender with the Salt Lake Legal Defender Association and is also President of the Utah Minority Bar Association.

CHRIS WHARTON is a criminal defense and family law attorney at Chris Wharton Law and is an active member of the Utah Association of Criminal Defense Lawyers and the Family Law Section of the Utah State Bar.

would make that child feel safe, loved, and normal. Instead, the law demeans same-sex families and LGBT students by sending denigrating messages that say it is acceptable to treat these individuals as inherently inferior. The message to LGBT students is: *You are not valued and you are lesser than your straight peers.*

Gay teenagers are targeted by regulations banning gay-straight alliances in public schools.

It is "more difficult for a gay teenager to start a school club than for a person to form a corporation" in Utah. Brief for Utah Pride Center, at 7. Our public education system has a statutory scheme that designates gay-straight alliances as "noncurricular," requiring parental consent to join. This law harms teenagers who are coming to terms with their identity and deprives them of a safe place of affirmation — a safety net that may be their only lifeline. The state's message is: *You don't belong in our schools. You are alone.*

Bans on same-sex marriage and adoptions harm same-sex couples and their children.

Bans on same-sex marriage and adoptions penalize children simply because their parents are gay. Thus,

> children being raised by same-sex couples are thus deprived of the stability and benefits of having two legally-recognized parents. This legal deprivation can affect every aspect of a child's life. These children must live with the specter of misfortune looming over their lives, as the death or disability of the legally recognized parent could cause a child to lose not just one but both parents.…

Id. at 11. Utah may want to deter or prevent gay people from forming families, but the reality is that gay Utahns have families, spouses, and children and should have the same rights as heterosexual families. This is the crux of the matter and the root of other forms of legal discrimination against gay citizens. The message to gay families: *Your love and commitment is unworthy of recognition.*

Heightened scrutiny is warranted to protect gay citizens from discrimination.

Heightened scrutiny is the judicial safeguard for fairness to the constitutional rights of minorities in the democratic process. Utah's LGBT community, which comprises less than three percent of the State's population, is impacted by the largest and most powerful political, economic, social, and religious institutions in the Intermountain West. They were and are powerless to combat the construction of a comprehensive system of *de jure* denigration that leaves them as virtual strangers to the law. The State's dominant political party has been unapologetically hostile to gay rights and has controlled the legislative and executive branches for over twenty-five years. With virtually no political influence at the state level, the LGBT community is politically powerless to change the law.

> *"Utah's LGBT community…is impacted by the largest and most powerful political, economic, social, and religious institutions in the Intermountain West."*

Court intervention is necessary to end *de jure* denigration of gay citizens in Utah.

In a nation as large and diverse as the United States, there will always be pockets of prejudice, places where the rights of minority groups can be vulnerable to the legislative whims of localized majorities… Fundamental rights and constitutional guarantees should not depend on residency in certain states. This Court has a proud tradition, acquitted by history, of deploying heightened judicial review to protect targeted minority groups from majoritarian abuse. All gay Americans — and not just those fortunate enough to live in certain communities or states — are entitled to equal protection and due process of law.

Id. at 17. The nation is now ready to support a decision recognizing the legal equality of its gay citizens. A majority of Americans believe the country will reach a consensus on gay rights; in fact, a consensus has already emerged among Americans between the ages of eighteen and twenty-nine, who overwhelmingly support legal equality for gay citizens. Notably, across the country and even in Utah, a higher percentage of

people now support marriage equality than supported interracial marriage before the *Loving v. Virginia* decision.

The arguments in our brief directly relate to the Supreme Court's analysis in *Hollingsworth* and *Windsor* and will have a lasting effect on LGBT advocacy in Utah. From the moment that oral arguments adjourned in these cases, people have asked us to predict all the possible outcomes and effects of the Court's ruling both nationally, and here in Utah. Lawyers, judges, scholars, journalists, and other commentators are all trying to read the tea leaves in hopes of predicting the answer to these questions. But even after observing the arguments in D.C., pouring over the transcripts, and reading commentary from all different perspectives, it is very difficult to say what the ultimate outcomes will be. As Justice Brennan once said, "With five votes you can do anything around here."

Before reaching the merits of each case, both present unique standing issues. In *Hollingsworth*, the executive officers who would customarily defend Proposition 8, the governor and attorney general of the State of California, are refusing to defend what they believe is an unconstitutional and discriminatory law. In the wake of their decision, a group of citizens who supported the measure hired private attorneys to defend the law on behalf of California voters. Similarly, in *Windsor*, President Obama directed the Unites States Attorney General to stop defending constitutional challenges to Section III of DOMA. That decision resulted in the House of Representatives hiring private counsel, instead of the United States Solicitor General, to argue in favor of upholding DOMA. The central standing issue in both these cases (which drew considerable attention from various Justices during argument) was whether those defending the law had the legal authority to be before the Court.

Turning to the merits of *Hollingsworth*, the Court could strike down Proposition 8 and rule that all similar bans on same-sex marriage — including Utah's Amendment 3, which effectively bars any legal recognition of same-sex couples, including civil unions — violate the Equal Protection and Due Process Clauses. A decision like this would almost certainly come from a consensus among the liberal members of the Court, joined by one or more of the conservative Justices. But it is unclear exactly whom that might be. Justice Kennedy, who is generally considered conservative, has a history of championing pro-LGBT equality opinions in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). On the other hand, some have speculated that Chief Justice Roberts, another generally conservative member of the Court, could be a swing voter, as he was in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012), (the "Obamacare" case). Another possibility in *Hollingworth* would be for the Court to strike down Proposition 8 and on the basis that California cannot give same-sex couples all the benefits of marriage through civil unions while simultaneously withholding the "marriage" label, harkening back to a "separate but equal" analysis. This outcome could provide valuable support for extending any existing legal protections for same-sex couples in certain states to include the institution of marriage.

In *Windsor*, most prognosticators seem convinced that the Court will reach the merits of the case and strike down Section III of DOMA — which says that the federal definition of marriage "means only a legal union between one man and one woman as husband and wife" — on the basis of equal protection, federalism, or some combination of both. A decision on these grounds would allow legally married same-sex couples to access the more than 1,100 legal benefits provided by the federal government. In states that do not recognize gay marriage, such as Utah, this outcome could potentially give federal benefits to same-sex couples legally married in other states. If the Court rules that DOMA is constitutional, the law would remain standing but could still be susceptible to a number of other challenges in the future, depending on how narrowly the Court's opinion addresses the various appellate court precedents which held the law invalid.

For Utah, at least one scenario is clear: the Supreme Court Justices heard our argument regarding *de jure* denigration of LGBT citizens and the Utah Pride Center's involvement in *Hollingsworth* and *Windsor* is only the beginning of its legal advocacy work in this state. As Brett Tolman stated, "This is the civil equality issue for our generation. Now is the time to stand up for the principle of equality under the law – for everyone." The Utah Pride Center will continue to work in the community and in the courts to achieve the next landmark decision that will allow same-sex families to be defined by love rather than gender.

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Employment Covenants: An Ounce of Prevention Is Worth a Pound of Cure

by Gregory M. Saylin and Tyson C. Horrocks

Benjamin Franklin once said that "an ounce of prevention is worth a pound of cure." An employer in a recent appellate court ruling may have found this out the hard way. In *Utah Telecommunication Open Infrastructure Agency v. Hogan (UTOPIA v. Hogan),* 2013 UT App 8, 294 P.3d 645, the employer sought to prevent an employee from disclosing confidential information pursuant to a professional services agreement. (While the "employee" in the case may be more accurately referred to as an independent contractor, the authors refer to him as an employee and the plaintiff as the employer to better discuss the application of the decision in the labor and employment law context.) The employer not only lost at the preliminary injunction hearing because the relied-upon contract language was found not to cover the threatened disclosure, but on appeal, to add insult to injury, the Utah Court of Appeals found that the employer may have to pay the employee's attorneys' fees and costs associated with the "wrongfully" issued temporary restraining order. This article explores the impact of the recent ruling on an employer's non-disclosure and confidentiality agreements, as well as newly identified risks in enforcement through injunctive relief.

Non-Disclosure, Confidentiality & Non-Compete Agreements

In our experience, many Utah employers choose to be "penny wise and pound foolish" in using the same protective covenants in their employment and professional services contracts that they have been using for years. In fact, in many cases, no one in HR can really remember where the contract forms came from in the first place. With the constantly changing legal landscape, employers should undertake a periodic review of their contractual language and identify circumstances when specially tailored language is needed for a particular employee, category of employees, or contractor.

The *UTOPIA v. Hogan* case presents a helpful backdrop for discussion. In that case, the employer sought to protect its confidential information by including the following provision in its professional services agreement with Hogan: "[Hogan] understands that the Services performed for UTOPIA are confidential and [Hogan] agrees to maintain such confidentiality." *UTOPIA*, 2013 UT App 8, ¶ 2 (alterations in original). When a dispute arose between UTOPIA and Hogan as to the termination of the agreement, Hogan's negotiations were interpreted by UTOPIA as threatening disclosure of sensitive information. *Id.* ¶ 3. While UTOPIA initially convinced the trial court to issue a temporary restraining order to prevent disclosure by Hogan until a preliminary injunction hearing could be held, the trial court ultimately found that a preliminary injunction would not issue because, among other reasons, "[i]t appears that all of the information that [Hogan]…threatened to disclose, is not prevented by this contractual provision." *Id.* ¶ 5 (alterations and omission in original). Thus, the temporary restraining order was dissolved and further injunctive relief denied. The employer's contractual

GREGORY M. SAYLIN is a trial partner in Dorsey & Whitney's Salt Lake City Office, and a member of the firm's Labor & Employment Law Group.

TYSON C. HORROCKS is an attorney in Dorsey & Whitney's Salt Lake City Office, and a member of the Trial Group and the Labor & Employment Law Group.

provision was not sufficiently specific to provide the employer with the protection it needed in a time of urgency and conflict.

While *UTOPIA v. Hogan* concerns a disgruntled former employee who is threatening disclosure of the employer's information to gain better leverage in ongoing negotiations, perhaps the most concerning and more common circumstance for employers is where a former employee has been hired away by a competitor and is now using the employer's information and trade secrets to aid the competitor's business. Employers must proactively guard against such attacks well in advance of the need to pursue litigation.

In drafting non-disclosure and confidentiality agreements, employers should resist the temptation to broadly protect every sort of information from disclosure, and should instead ensure that contract language carefully and specifically defines the confidential information and trade secrets sought to be protected. Broadly defined agreements are harder to enforce and much less effective. Therefore, employers should: (1) clearly define the duties of confidentiality or nondisclosure, and provide specific instructions as to when and to whom such information may be disclosed; (2) provide specific guidance as to the maintenance and protection of confidential and trade secret information; and (3) make clear that such obligations survive the termination of the employment or contract term. Employers should also include comprehensive non-disclosure and confidentiality policies in their employee handbooks or set forth as stand-alone policies. Both the form of such agreements and the implemented policies should be reviewed regularly to ensure that they continue to be tailored to the needs of the employer and the circumstances of employment. Periodic employee training on responsibilities for safeguarding confidential and trade secret information is highly recommended.

Well-drafted, specific agreements are particularly important when an employer desires to bind their employees to a non-compete agreement. For a non-compete agreement to be enforceable in Utah, the restrictive employment covenant must be (1) supported by consideration; (2) negotiated in good faith; (3) necessary to protect the goodwill of the business; and (4) reasonable in its restrictions as to time and geographic area. *See Sys. Concepts v. Dixon*, 669 P.2d 421, 425–26 (Utah 1983); *Allen v. Rose Park Pharmacy*, 237 P.2d 823, 828 (Utah

1951). As with confidentiality and non-disclosure agreements, covenants not to compete should be tailored to the employer's needs and circumstances, and reviewed regularly.

While it is unclear from the *UTOPIA v. Hogan* opinion whether better contractual language would have permitted UTOPIA to prevail on the merits of its claims, well-drafted contracts and employee policies are a significant aid to employers in preventing the misuse and disclosure of proprietary, confidential and trade secret information.

Enforcement Through Injunctive Relief

Perhaps the most significant impact of *UTOPIA v. Hogan* is its ruling in regards to the availability of fee awards where the employer is unsuccessful in securing a preliminary injunction. Historically, relying on Utah Rule of Civil Procedure 65A, Utah courts have ruled that if an "injunction was wrongfully issued, the enjoined party has an action for costs and damages incurred as a result of the wrongfully issued injunction." 2013 UT App 8, ¶ 21, 294 P.3d 645 (quoting *IKON Office Solutions, Inc. v. Cook*, 2000 UT App 217, ¶ 12, 6 P.3d 1143); *see also IKON Office Solutions*, 2000 UT App 217, ¶ 13. *UTOPIA* confirms the availability of a fee award in the employment context where an employer successfully obtains a temporary restraining order to prevent undesired disclosure but then loses at the preliminary injunction hearing. This opinion is significant for employers because attorney's fees associated with injunctive proceedings can be very expensive.

> *"[C]areful preparation of non-disclosure and confidentiality agreements and policies is an important and cost-effective method of defense."*

A common defense to a Rule 65A fee award is that wrongfully enjoined parties are entitled to only "those attorney fees which would not have been incurred but for the application for, and issuance of, the preliminary injunction. Fees which would have been incurred anyway, in the course of [the underlying litigation,] are not recoverable under Rule 65A." *UTOPIA v. Hogan*, 2013 UT App 8, ¶ 22 (quoting *Tholen v. Sandy City*, 849 P.2d 592, 597 (Utah Ct. App. 1993)). In many litigation matters, the very issues prepared and argued in support of a temporary restraining order or preliminary injunction are the core issues of the underlying litigation. Since UTOPIA dismissed its complaint following the trial court's determination that it was not likely to prevail on the merits, Hogan argued on appeal that the fees and costs he incurred in opposing the emergency injunctive relief would not have otherwise been incurred. *See id*. ¶ 23. The Utah Court of Appeals remanded the case back to the trial court "to determine the amount of attorney fees, if any, that should be awarded to Hogan.…" *Id*.

In the face of the *UTOPIA v. Hogan* decision, employers will now need to think twice before seeking a temporary restraining order – one of the principal enforcement weapons an employer has in an urgent situation where an employee or former employee is disclosing or about to disclose confidential or trade secret information. If the employer successfully obtains a temporary restraining order to halt any potential disclosure, the employer will want to have confidence that it will prevail at the preliminary injunction hearing which is usually held within ten days after the temporary restraining order issues. *See* Utah R. Civ. P. 65A. Since some courts are quick to issue a temporary restraining order to preserve the status quo, it is imperative that an employer conduct a risk-reward analysis before launching any legal effort to stop the former employee.

Unlike other actions, disputes involving injunctive relief move very quickly. Consideration of the relative strength of an employer's contractual protections must take place well in advance of the need for such quick action. Additionally, well-drafted agreements and policies will discourage an employee or former employee from deciding that disclosing company confidential information or trade secrets is a good risk, and perhaps avoid the need for injunctive relief altogether.

Conclusion

UTOPIA v. Hogan is a reminder to employers of the need for preparation and planning to protect confidential, proprietary and trade secret information from unauthorized disclosure and misuse. In our rough and tumble competitive world, where competitors may seek to poach away key employees or where disgruntled employees may use mass media or the Internet to disseminate an employer's sensitive information, careful preparation of non-disclosure and confidentiality agreements and policies is an important and cost-effective method of defense.

BARBARA POLICH, ESQ.

GARY SACKETT, ESQ.

JAMES ELEGANTE, ESQ.

ROBERT BABCOCK, ESQ.

KENT SCOTT, ESQ.

LANGDON OWEN, JR., ESQ.

DONALD DALTON, ESQ.

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Appellate Highlights

by Rodney R. Parker and Julianne P. Blanch

EDITOR'S NOTE: *The following appellate cases of interest were recently decided by the United States Tenth Circuit Court of Appeals, Utah Supreme Court, and Utah Court of Appeals. These summaries were compiled to provide a reference to practitioners who want to know in a five-to-ten-minute read what has been happening of significance in our appellate courts.*

Peak Alarm Co., Inc. v. Salt Lake City Corp., 2013 UT 8 (February 15, 2013)

The Utah Supreme Court held in this case that the Utah Governmental Immunity Act (the Act) "comprehensively governs claims against governmental parties such that plaintiffs are not bound to observe the statute of limitations that would apply to claims against private parties." *Id.* ¶ 2. Plaintiff had asserted defamation and false arrest claims against the city, both of which would ordinarily be governed by the one-year statute of limitations. He timely filed a notice of claim with the city. Suit was filed within one year after "denial" of the notice claim, but not within one year after the underlying claims originally accrued. The court held that the Act comprehensively governs claims against governmental entities, and that the claims are not barred as long as suit is filed within one year after the Notice of Claim is denied. The court states in a footnote that it does not consider in its opinion the interplay of the Act on claims where limitations periods of a different length have been established in the Utah Code for claims against the government. *Id.* ¶ 27 n.4. Specifically, the court declined to either reject or adopt reasoning in such cases as *Thorpe v. Washington City*, 2010 UT App 297, 243 P.3d 500, which had held that persons bringing suit under the so-called Utah Whistleblower Act must both comply with the Notice of Claim requirement and file suit within 180 days after the claim arises, a limitations period which is specified in the Whistleblower Act itself.

Antion Financial, LC v. Christensen, 2013 UT App 60 (March 7, 2013)

This case clarifies the liability of bidders and calculation of damages provided for in Utah Code section 57-1-27, which governs the public sale of property under a trust deed. *See* Utah Code Ann. § 57-1-27 (LexisNexis 2010). A creditor acquired property on its credit bid through a foreclosure auction after the highest and second highest bidders both failed to perform on their bids. The creditor then sued the second highest bidder for breach of contract, and was awarded damages after a bench trial. All bids at a trustee's sale are irrevocable, but only until the trustee accepts the highest bid. If the highest bidder fails to perform, the next highest bidder is liable for his bid only if he resubmits it. The proper measure of damages for a party who fails to perform its bid is the difference between the bid and the amount for which the property actually sold — which in this case amounted to one dollar. The damage award should also include incidental costs and attorney's fees incurred from the bidder's refusal to purchase the property, but not those incurred in pursuing litigation over that loss.

RODNEY R. PARKER is a member of the Appellate Practice Group at Snow, Christensen & Martineau.

JULIANNE P. BLANCH is a member of the Appellate Practice Group at Snow, Christensen & Martineau.

Peterson v. Martinez,
No. 11-1149 (10th Cir., February 22, 2013)

The Tenth Circuit held that carrying concealed firearms is not protected by the Second Amendment. *See id. available at* http://www.ca10.uscourts.gov/opinions/11/11-1149.pdf. Colorado law only permitted concealed handgun licenses to be issued to residents, and a non-resident was denied a permit and brought suit. On appeal, the court concluded that "concealed carry bans have a lengthy history" and that "the Second Amendment does not confer a right to carry concealed weapons." *Id*. at 25. In reaching this conclusion, the court relied on dicta in *Robertson v. Baldwin*, 165 U.S. 275 (1897), which stated that "'the right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons.'" *Peterson*, at 4 (quoting *Robertson*, 165 U.S. at 281–82). The court also relied on the more recent *District of Columbia v. Heller*, 554 U.S. 570 (2008), which stated that "'the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues,'" and explained that "'nothing in our opinion should be taken to cast doubt on longstanding prohibitions.'" *Peterson*, at 4 (quoting *Heller*, 554 U.S. at 626). Ultimately, the court reasoned that "[i]n light of our nation's extensive practice of restricting citizens' freedom to carry firearms in a concealed manner," the practice is not protected by the Second Amendment. *Id*. This conclusion creates an apparent split with the Seventh Circuit's recent decision in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

***State v. Smith*, 2013 UT App 52 (February 28, 2013)**

After a district court did not advise a defendant about the right to a preliminary hearing and failed to properly bind over a defendant, the Utah Court of Appeals held that the district court could not exercise its jurisdiction to accept the defendant's guilty plea. The State argued that a preliminary hearing can be waived, and that the denial of the hearing was nonjurisdictional, and could only be contested by a petition for post-conviction relief. The court agreed that the failure to hold the hearing was nonjurisdictional but focused on the lack of a bindover order. Because the district court did not complete a bindover order, the district court lacked jurisdiction to entertain defendant's guilty plea.

***State v. Collins*, 2013 UT App 42 (February 22, 2013)**

A district court, or counsel, must inform defendants about the right to appeal a sentence and inform the defendant about the deadline to file such an appeal. In this case, a district court sentenced the defendant but did not tell the defendant about the right to appeal. Defendant's counsel encouraged the defendant to appeal, but the defendant declined. Counsel told the defendant to contact counsel within two weeks if the defendant changed his mind. Two years later, the defendant asked counsel about the status of the appeal and counsel responded that there was no appeal. The defendant argued that he was deprived of his right to appeal because his counsel did not properly advise him about the right to an appeal. The court found that a defendant has a valid claim to reinstate the right to appeal if neither the sentencing court nor the defendant's counsel tells the defendant about the right to an appeal. Because the district court did not mention the right to an appeal, and counsel did not tell the defendant about the deadline for the appeal, the court found that the defendant was entitled to reinstatement of the time to appeal.

***Tomlinson v. NCR Corp.*,**
2013 UT App 26 (February 28, 2013)

This case illustrates the broad reach of *Cabaness v. Thomas*, 2010 UT 23, 232 P.3d 486, regarding at-will employment and language in an employee handbook/manual. The *pro se* plaintiff sued former employer NCR for wrongful termination, breach of covenant of good faith and fair dealing, and other claims related to his termination. The trial court dismissed the wrongful termination and breach of covenant claims on summary judgment, and the other claims under Utah Rule of Civil Procedure 12(b)(6). The wrongful termination claim was based on an alleged breach of NCR's Corporate Management Policy Manual. Plaintiff claimed he was a "core employee" and that the Manual limited NCR's right to terminate core employees so that they could be terminated only for cause. *See id*. ¶ 21. As support, plaintiff pointed to a Manual provision stating that "tactical employees" (another defined category) could be terminated at will, but the provision said nothing about "core employees" being at will. Relying on *Cabaness*, the court of appeals reversed on wrongful termination and breach of covenant, noting NCR's express at-will statement about "tactical employees," but saying nothing about core employees, suggests NCR intends core employees be terminated only with cause. *See id*. ¶ 36. This case also discusses the difference between a "policy" and a "practice" in the context of whether there is a contractual right to progressive discipline, and provides a good discussion of Rule 12(b)(6) standards on employment-related claims.

***Vorher v. Hon. Stephen L. Henriod*, 2013 UT 10 (February 22, 2013)**

The Utah Supreme Court reviewed Utah Code section 76-3-405(2)(b) and held that a district court can impose a stricter sentence than a justice court when a defendant appeals a justice court's sentence after a plea agreement. In this case, a defendant was charged with a class B misdemeanor for voyeurism, but the defendant pled guilty to disorderly conduct, which was a class C misdemeanor. The justice court sentenced the defendant to ninety days in jail and issued a fine. The defendant appealed the justice court's sentence to the district court; that court convicted the defendant for the original charge, sentenced the defendant to 180 days in jail, and issued a higher fine. On appeal, the Utah Supreme Court recognized a public policy to preserve state resources by incentivizing defendants to negotiate plea bargains without letting the defendant benefit by appealing the sentence after the plea bargain. The defendant argued that the United States Constitution forbids the imposition of stricter sentences at trial. The court held that to merit reversal the stricter sentence must be vindictive, that there is no presumption of vindictiveness, and that actual vindictiveness did not arise merely because the district court's sentence was higher than the justice court's sentence.

***Workers Compensation Fund v. Utah Business Insurance Co.*, 2013 UT 4 (January 25, 2013)**

An employer was insured under two separate workers' compensation policies covering the same period. One was issued by Workers' Compensation Fund (WCF), and the other was issued by Utah Business Insurance Company (UBIC). An employee was injured during the policy period. The employer notified WCF, who paid the workers' compensation benefits to the employee. Two years after the accident, WCF learned of the existence of the UBIC policy. It filed a complaint against UBIC, claiming that UBIC was solely or jointly liable for the employee's insurance benefits. The employer then notified UBIC that its intent was to have only WCF cover the claim. The employer asked UBIC to change the effective start date of the policy to a date after the date of the accident. UBIC did so. WCF filed a motion for summary judgment based on the "other insurance" clauses in both policies. UBIC filed a countermotion for summary judgment, asking the court to apply the "targeted tender" doctrine, a doctrine adopted in a minority of states in which the insurer does not become liable for a loss unless the policyholder tenders a claim to the insurer. The Utah Supreme Court held that the doctrine was incompatible with Utah's statutory workers' compensation scheme and that WCF was entitled to equitable contribution from UBIC.

***Smith v. McCord*, No. 12-2041 (10th Cir., January 29, 2013)**

The Tenth Circuit begins its decision with the observation that "[t]his case presents us with an unfortunate tale of poor lawyering." *Id. available at* http://www.gpo.gov/fdsys/pkg/USCOURTS-ca10-12-02041/pdf/USCOURTS-ca10-12-02041-0.pdf. Mr. Smith filed a Section 1983 lawsuit against police officers, alleging excessive force during his arrest. The officers moved for summary judgment on the ground of qualified immunity. Mr. Smith's lawyer opposed the motion by stating that a material issue of fact existed. However, he ignored the "heavy two-part burden" set forth in numerous cases of showing that the defendants violated a constitutional right, and that the right was clearly established at the time of the allegedly unlawful activity. His opposition brief failed to include the terms "qualified immunity" or "clearly established." Affirming the district court's grant of summary judgment, the panel concluded that "[t]his isn't to say Mr. Smith lacked (or possessed) a meritorious case. It is to say only we will never know because clients like Mr. Smith are usually bound by their lawyers' actions – or, as here, inactions." *Id.* at 5.

***State v. Adamson*, 2013 UT App 22 (January 25, 2013)**

Asking a defendant with a restricted license to provide proof that defendant complied with the restrictions did not impermissibly extend the time of a traffic stop. The Utah Court of Appeals found that a routine traffic stop must be reasonably related in scope to the circumstances that justified the stop. The court further noted that once the stop is made, it cannot last longer than necessary to carry out the purpose for the stop. However, reasonable suspicion of criminal activity allows the officer to extend the time of the search in order to dispel or confirm the new suspicion. Here, the officers pulled the defendant over for failing to signal while switching lanes. When the officers checked the defendant's license they discovered that the defendant had to have an interlock device in the car. The officer acted within the permissible scope of the traffic stop by asking a single question confirming the defendant's compliance with the restricted license; the question did not impermissibly extend the time frame for the stop.

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Giving Back: The Rewards of Pro Bono

by Lauren I. Scholnick and Edward M. Prignano

Maria Rodriguez[1] is anxious as she quietly waits for her turn to meet with law students at the Street Law Clinic. After a semester toiling in the law library, the first year law students have just been allowed to start working in the clinics. It is a busy night at the clinic and to prolong the wait, Maria needs students who speak Spanish. Luckily, 1L students Eddie Prignano and Steve Dent fit the bill. They learn that Maria is an undocumented Mexican immigrant who has been in the United States for nearly twenty years. She raised four children in the U.S. She has never before had trouble with the law or needed legal help, but now she is in deep trouble.

When Maria first came to the U.S., she bought a Social Security number for ten dollars from someone in California. She has used the number to be able to work in the country. Recently, she began working for McDonald's. But the true owner of the Social Security number became aware that someone else was using her number and hired a private investigator to locate Maria. Allegedly, the true owner attempted to apply for unemployment benefits in another state. Maria is at Street Law because she received a letter from the true owner demanding almost $10,000, claiming that she was unable to get unemployment benefits. The attorney representing the true owner implies that if Maria pays the demanded money, the true owner will not report Maria to law enforcement.

The case presents several interrelated legal issues, including a civil suit for damages by the true owner, possible deportation to Mexico and away from her immediate family, and criminal prosecution. The assignment is to figure out for Maria the likelihood that she will be prosecuted and/or deported and whether she can avoid those actions by making peace with the true owner by capitulating to the demand. To complicate matters, Maria has only the income from a minimum wage job to navigate these legal issues. But as a team of two law students and a lawyer, we agree to take on the challenge.

The 1Ls have been given weighty assignments and, not surprisingly, have a steep learning curve. They start with a call to opposing counsel in order to explore a settlement (with Maria's modest income) and, at the same time, investigate the out-of-state unemployment claim. They talk to their professor, Paul Cassell, to get some information on the interplay between immigration and criminal law. Meanwhile, Lauren contacts her colleagues in those practice areas for advice to ensure that the team, in its haste to resolve the looming civil claim, does not do anything to jeopardize Maria's freedom or her ability to stay in the country. On a hunch, the law students check XChange to see if any case has been filed against Maria, either recently or in the past. They discover that the State has already filed a criminal case against her for identity fraud, which opposing counsel never mentioned. We decide to reject the offer to settle the civil suit, but Maria is now facing criminal charges and deportation. We help her retain a criminal attorney, providing him with all the facts we gathered and ensuring that he has what he needs to defend her. The students agree to attend the initial criminal hearing to help explain the confusing and frightening process to Maria and her family. Maria's case is eventually transferred from our pro bono representation to a professional and compensated criminal and immigration law practitioner, but helping Maria through those first dark days was crucial for her and her family, not to mention preventing the true owner from taking advantage of her. Maria frequently, and sometimes tearfully, expressed how

LAUREN I. SCHOLNICK is a partner at Strindberg & Scholnick, LLC, which represents mostly employees in employment and labor matters. She was the Utah State Bar's Pro Bono Lawyer of the Year in 2004.

EDDIE M. PRIGNANO is a 2L at the S.J. Quinney College of Law and a law clerk at Strindberg & Scholnick, LLC. The law firm hired him after his stellar work with Lauren on this pro bono case.

important it was to have us help her through this process.

There are several lessons we learned from Maria's case that help remind us why we will continue to take on pro bono clients.

Opportunities to Teach and Learn

As Eddie said quite directly during this case, working on a pro bono case is "a whole lot more fun than reading a text book!" But both lawyers and students are exposed to a new area of the law or a new skill set during pro bono cases. For example, in Maria's case we learned of the obligation criminal defense lawyers have to inform their clients of possible immigration consequences (i.e. deportation) of a plea deal. Throughout the entire process of helping the client, Maria's team did legal research, interviewed witnesses, networked with other lawyers, negotiated with opposing counsel, and figured out how to track down out-of-state information. The students learned that only through ongoing communication with the client can they figure out all they need to know. They also learned that not everyone involved in the controversy is forthcoming. Perhaps the most valuable lesson the students learned, and that lawyers need to be reminded of, is that an attorney's role can certainly include some compassion. New lawyers need opportunities to hone their skills, and pro bono cases provide the perfect opportunity for new lawyers to act as lead counsel, take depositions and even do multi-day evidentiary hearings.

Law Works Best as Collaboration

Representing Maria was a group project. To paraphrase the former Secretary of State, it sometimes takes a village to properly represent someone. Maria's case involved advice from and assistance of Professor Paul Cassell; immigration attorney, Jonny Benson; criminal defense lawyer, Jeremy Delicino; immigration and criminal lawyer, Michael Langford; and my law partner, Kass Harstad. Pro bono cases like Maria's provide opportunities to collaborate with members of the bar and bench, which can help generate business and open up job opportunities. It also provides practicing lawyers the opportunity to meet, and, essentially, have an extended interview with law students they may want to hire as clerks or associates.

Small Investment to Provide Pro Bono Representation

Many lawyers do not take pro bono cases for fear of getting sucked into a protracted dispute that lasts for months on end. Maria's case was typical in our experience of the average pro bono engagement. Lauren spent about five hours over six weeks on the matter. Unlike much of our compensated litigation, pro bono cases can often be resolved with a letter or phone call on a client's behalf.

Job Satisfaction

Maria and her family were openly grateful for our work on her behalf. In our daily, working lives, we do not always get to experience this type of unfettered gratitude. Our clients can be unhappy with our legal services or the cost of those services. Some just take the help for granted. But in our experience, pro bono clients uniformly understand that if it were not for the lawyer's or law student's help they would have no voice in the legal system. Many of us went to law school to help people but have discovered that our careers do not often provide us that opportunity. Doing a little pro bono work puts us back in touch with that aspiration.

Law may be a business by which we put food on our tables and pay the bills, but there is a higher calling in law that we should not forget. We all have a role as public servants and law enforcement officers. The way to honor that role is to do public service in addition to helping our paying clients get private justice. Pro bono work give everyone access to justice.

1. Our client's name has been changed to protect her anonymity.

Do Your Clients Know Their Rights Regarding Brokerage Account Losses?

by Jan Graham

Most of your clients have at least one investment account with an investment firm: an IRA, a family trust, or annuity. It is safe to assume your clients do not understand the investments they have been sold; they trusted the financial advisor and firm — "the professionals." Unfortunately, when assets are lost due to mismanagement or, in rarer cases, fraud, your clients don't realize there is an accessible process for recovery of those losses. You can provide all your clients a great service by alerting them to the process and the remedies available.

All firms that sell securities in the U.S. are regulated by the Financial Industry Regulatory Authority (FINRA). Large firms, like Merrill Lynch and Morgan Stanley, as well as regional and small firms must comply with all FINRA rules. Those rules are designed to protect unsuspecting investors from unsafe or unwise investments. When FINRA members (firms and advisors) fail to follow those rules, their customers can lose precious assets, sometimes even life savings. When that happens, financial advisors often express regret but tell their customers "the market goes up and down; there is nothing you can do." Tragically, most customers believe that. Worse, they blame themselves, and the advisors encourage that notion.

The truth is, the fault is usually that of the professional, and a remedy is easily available. Any customer can file a claim for recovery in FINRA Arbitration; the process is relatively quick and affordable. Claims are not filed in court. Every brokerage firm in the U.S. has a mandatory arbitration clause in its customer contract that requires any claim to be filed with FINRA.

FINRA cases are decided by arbitrators (usually three) — members of the community who are often securities lawyers or business professionals. The quality of FINRA arbitrators varies with regions. We are fortunate in Utah to have a highly qualified panel of experienced and fair FINRA arbitrators. (FINRA is always looking for new arbitrators. Attorneys — regardless of the area of practice — are ideally suited. The pay is modest but the value of the service is inestimable. Information on how to apply is available at www.finra.org.

FINRA as a forum offers some advantages over filing in court: the time is short (usually about one year from filing to decision), the filing fees are reasonable, and discovery is limited (no depositions). Most FINRA cases settle before the final evidentiary hearing (trial), so most clients are able to avoid any confrontational encounter. Investment firms and their counsel are quite good at assessing potential liability and would prefer to pay a reasonable settlement to end the dispute.

Some would argue that a clear disadvantage of FINRA as a forum is that there is no right to a jury or to an appeal, but the absence of both contributes to a more streamlined process with a definite end.

All these factors mean your client may be able to recover all or part of investment losses in a fairly painless way. For retired persons who transferred their 401k accounts to professional advisors, only to have their life savings go down the drain in high risk stock market or private placement investments, that remedy can mean the difference between a comfortable retirement or one rife with stress and fear. Regardless of the size of the loss, it hurts, particularly when the customer has

JAN GRAHAM served as Utah Attorney General 1993–2000. She is the principal of Graham Law Offices, whose practice is exclusively representing public customers against financial advisors and investment firms in FINRA Arbitration.

been assured their funds are safe with "the professionals." Most firms that specialize in this work, like mine, work on a contingency fee basis, so that the clients, who already have suffered losses, are not asked to invest more hard earned funds in attorneys' fees.

The most common claims in FINRA cases are based on two types of conduct that sadly occur repeatedly in investment firms:

(1) Sales of unsuitable investments for the circumstances of the investor: the rules prohibit sales of investments that pose too high a risk of loss based on the needs of the customer;

(2) Fraudulent sales: FINRA rules as well as federal and state statutes prohibit the sale of any investment based on the misrepresentation or omission of a material fact.

In the latter case, the Utah Uniform Securities Act (Securities Act) is often the basis of claims filed in Utah FINRA cases. A violation of the anti-fraud provision requires only a showing of a misrepresentation or omission of a material fact in connection with the sale of a security. *See* Utah Code Ann. § 61-1-1. (LexisNexis 2011) Once a violation is proved, the remedy is mandated by the Securities Act: a return of the purchase price, plus interest at 12% since the date of purchase, a reasonable attorneys' fee, and costs. *See id.* § 61-1-22. Any return on the investment is deducted, of course. The goal of the Utah Securities Act is to make the investor whole; it provides an outstanding remedy for aggrieved investors.

In 2010, Keith Woodwell, the very able Director of the Utah Securities Division, issued a written directive to all Utah brokerage firms that the remedies of the Act are not discretionary with FINRA arbitrators; if there is a finding of a violation of the anti-fraud provision, the FINRA panel must award the full remedies. Both Utah's Securities Act and Mr. Woodwell's directive are powerful weapons in the cause of protecting public investors in Utah.

The stated mission of FINRA's Arbitration forum is to provide an accessible and fair process for customers to seek recovery of losses caused when professionals break the rules. That mission will be truly accomplished only when all customers are informed that FINRA is there for them. You can be the hero who provides that vital information to your clients.

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The Seven Deadly Sins of Legal Writing

Reviewed by Judge Gregory K. Orme

This is a pretty good (not a pretty, good) book. I have two primary complaints about it. The first complaint — the author's routine use of contractions — may seem petty or old-fashioned. But legal writing, while it should not be stilted or formulaic, is — and should be — quite formal. With that in mind, I tell my law clerks that if a contraction is in one of our opinions, it better be in quotation marks. So I chafed at the author's easy, off-handed use of contractions. It just doesn't set a good example.

The second complaint is that, while I agree with the importance of the precepts selected for discussion, it is an exaggeration to characterize them as "deadly sins." They are more like guidelines that should ordinarily be followed, but not invariably. That said, I realize that "Seven Important Precepts of Effective Legal Writing" would not make for a title as catchy as "The Seven Deadly Sins of Legal Writing."

The Seven Deadly Sins of Legal Writing
by Theodore L. Blumberg
Published by OWLWORKS
56 pages, $7.95

These are the sins the author identifies: passivity, abstraction, adverbiage, verbosity, redundancy, footnotes, and negativity. Avoidance of these, generally speaking, is a good rule of thumb. Take the author's concern about passivity. The passive voice is weak; the active voice is strong. Lawyers write to persuade, so they usually should use the stronger voice: "The judge overruled the objection" is better than "The objection was overruled by the judge." For one thing, why use seven words to make a point that can be made in five? For another, why make the judge sound like he was only incidentally involved? You may be arguing that this ruling was well within the sound exercise of the trial judge's discretion. You might choose to emphasize the judge's long tenure on the bench and the experience that has come with his distinguished service. So make the judge the subject of the sentence, not the objection he overruled. As general guidance, this is surely sound.

And the author himself recognizes three situations where the passive voice can be used to advantage: "To create ambiguity"; "To Underscore a word"; and "To Drain Emotion from your Writing." (I am not sure what explains his approach to capitalization.) He gives examples for each. Illustrative of the second situation is this sentence, which focuses attention on the key words "perjured testimony" without the annoyance of boldface type or italics: "The perjured testimony was repeated by the defendant on cross." I would add a fourth category where the passive voice may be in order: To describe events of unknown source or origin. I have used this a few times in opinions. If you had fuller knowledge of the details, you might say: "The DEA agent moved the locked box to the couch." But if that is unclear, and it might have been the co-defendant or a Metro Narcotics officer or the defendant's girlfriend who did the moving, it is prudent to use the passive voice: "The locked box was moved to the couch."

The point the author makes most persuasively is his discussion of the sin of abstraction. And I wish he would have spent more time on it. He must think the point is more obvious than it struck me as being. But I glean from the very apt example he offers that the point is to use simple English whenever possible. He says that, "[l]ike a supplicant consulting an oracle," he took the CPLR[1] from his shelf and "let it open at random." Here's what he read:

JUDGE GREGORY K. ORME has served on the Utah Court of Appeals since 1987. He is the Utah Bar Journal's *Judicial Advisor.*

> It is the intent of this article, which may hereafter be known and cited as the "New York State Equal Access to Justice Act," to create a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the State of New York . . . [.]

He has a field day with this. Mechanisms are for watchmakers, not lawyers. The provision has no intent, but its drafters did. Why refer vaguely to "certain actions?" "Tell us which ones." And I would point out that his take on "certain" itself reflects a lawyer's gloss. Normal people reading this provision would assume the potential availability of a fee award in actions against the state was limited to actions characterized by certainty, as opposed to the uncertain ones, the longshots. His suggested redraft is masterful:

> This Article authorizes the recovery of attorneys' fees and other reasonable expenses in the following kinds of actions against the State of New York . . . [.]

He condemns the sin of "adverbiage." And yes, it is debatable whether that is a real word. If it is not, perhaps it should be. He has no problem with the usual run of descriptive adverbs. If a car door was exceptionally hard to open, it is fine to say so. What he does not like are those lawyer adverbs: clearly, incredibly, irrefutably, etc. But to parrot the famous gem from First Corinthians,[2] the greatest of these is "clearly." I beg to differ with him slightly, and in doing so I recognize a bit of a double standard. When I was on my game as a lawyer, I avoided the dreaded lawyer adverbs. I wanted the strength of my argument to speak for itself. If anything, I found that understatement was a better friend than hyperbole. And as a judge, I resent seeing these adverbs in briefs, and often ask myself the rhetorical question, "If it were all that clear, why has it taken you 5 ½ pages to make the point?" But I see these words as having the occasional role to play in judicial opinions, as part of the nuancing[3] of judicial decisions.

Take statutory interpretation. Please! Judges are often called upon to interpret statutes. Some are models of clarity. Some, not so much. Still, we try to interpret them without resort to legislative history. In my experience, legislation "clear on its face" is not a matter of black and white but shades of gray. Using adverbs and their prepositional phrase equivalents are the keys to nuance. "Clearly, the Legislature intended . . ." demonstrates more confidence in an interpretation than "All things considered, it appears that

the Legislature intended . . . .” The first phrase is judge-speak for “this is a no-brainer”; the second suggests a cert petition might be in order. I think there is a rational basis for the admitted double standard: nuance has more of a role to play in judicial opinions than in an advocate’s brief.

With respect to the twin specters of verbosity and redundancy, of redundancy and verbosity, the author is forthright — yea, adamant — in his heartfelt condemnation of these harbingers of ineffectiveness, boredom, confusion, and insult to the intellectual capacities of right-thinking people everywhere, specifically including but by no means limited to, effective lawyers, who, of necessity, mean to be effective in the fabrication of their legal prose, their legal writing. Enough said.

The author does not like footnotes, in particular what he calls “speaking footnotes.” He follows the Bryan Garner rule that footnotes should be limited to citations, which can, indeed, be distracting when they appear in the middle of sentences, especially if they are long. He points out that the inclusion of cites right in the body of the brief dates back to a time when legal secretaries used typewriters, and it is close to impossible to do a good job of formatting footnotes when using a typewriter. In the computer age, of course, footnotes are just not a problem, technologically speaking.

I do not buy either aspect of his basic premise. If you quote some powerful language in your brief from a controlling Supreme Court case, why not immediately follow it right in the text with a citation to the case? Something is lost if I have to move my gaze to the bottom of the page to glean the source of this pronouncement. And some risk is run that I will just read on and not bother to scan the bottom of the page, missing entirely that the quoted material came not from a prior decision of my court, but from — key the trumpets — *Gideon v. Wainwright*.[4] The convention of some — to include the name of the case in the text and only its citation information in a footnote — is an improvement, but I think case names and their citations belong together. I do agree that long and cumbersome cites belong in footnotes and not the text. There is no better use for a footnote than to list the twenty-seven cases that support your statement that thus-and-so now represents the majority view among American jurisdictions.

There are, in my opinion, other appropriate uses of footnotes in

legal briefs. Chief among these are matters that will be of help to my law clerks, but of limited interest to me. Detailed explanations about the tapes on which the legislative history of some statute can be found is one example. Another is an exhaustive explanation about why something quoted in the opposing brief did not actually have majority support in a case that was decided 2-1-2. It is enough to tell me that the quoted statement did not have majority support. You can explain in a footnote, largely for the benefit of my clerks who will want to confirm that claim, why this is so given the interplay of the 2-justice plurality opinion and, say, Justice Stewart's separate opinion concurring in part, concurring in the result in part, and dissenting in part.

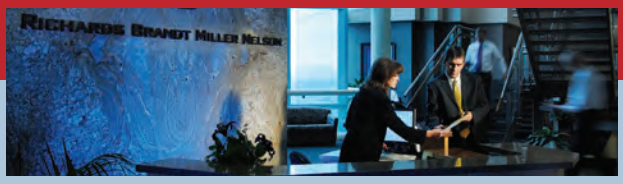
In judicial opinions — and anyone who has read my opinions over the years will see that footnotes and I are on a first name basis — footnotes are an appropriate place to make asides and observations not critical to the analysis at hand, but of possible interest to the reader. If I anticipate that a reader will puzzle over our failure to address what might appear to be a lurking Fourth Amendment issue, I may wish to include an observation that no Fourth Amendment issue was raised by the defendant. If I anticipate that particular analysis might be misconstrued, I may want to point out that the analysis is limited to, say, temporary support awards but would not apply in calculating an award of permanent alimony. I may not be able to resist a digression, likely to be of interest to only a tiny percentage of our readership, as to why we are unpersuaded by a line of cases from another jurisdiction or why we are not treating issues raised for the first time in a reply brief or at oral argument. I would rather not burden the body of my opinion with such ancillary matters. They seem right at home in footnotes.

But it is true that a price is paid in using footnotes. They are, by design, an interruption, and they can be distracting, especially if they are overused. Footnotes should be used sparingly and for a sound reason. When doing a final edit of your brief, memorandum, or opinion letter, pause at each footnote to consider if there is some good reason why the material in the footnote should not be in the text. If nothing comes *immediately* to mind, move it to the text. I plan to do the same with increased diligence when finalizing my opinions.

The seventh sin condemned by the author is negativity. Here, he does not have in mind that we should all put on a happy face and, as my sainted mother would have us do, "say nothing at all if we can't say something nice." Instead he has in mind the propensity of lawyers to use double negatives: "Instead of saying swimming is not prohibited, tell us it's allowed. If settlement is not unlikely, say it's likely or probable." He correctly points out that even if the alternative is a single negative, it is usually better to put the statement in the positive. He suggests that "at this firm, office romances are discouraged" is a better statement for a personnel manual than "at this firm, office romances are not encouraged." He does recognize a limited role for negativity when understatement or irony is an effective rhetorical device. Depending on whom you represent in a paternity action, this phraseology might well be in order: Given plaintiff's cavalier approach to "romance" and disinterest in birth control of any kind, her pregnancy, unwelcome though it may have been, could not have been completely unexpected.

I recently discovered a quaint little notebook filled with book reports I did as a third grader. Each had on the left side of the opened notebook a crudely written description of the book. I say "crudely" for two reasons. First, I was struggling to learn cursive — something I never mastered — and it showed. Less forgivably, if an eraser was not at hand I eliminated mistakes by means of moistening my thumb with my tongue and rubbing out the pencil writing that needed to be changed. It worked, but the result is not visually pleasing. On the right side of each report was a hand-drawn picture inspired by the book. Curious George in the hospital is particularly hilarious, and the problems of proportion and dimension that later ensured me no higher than a C grade in art are evident at this early age. I apparently never read a book I did not like. Each report ended with the same basic statement, varied only via the adverb "very." Some books I liked. Some books I liked very much. A few books I liked very, very much, and a couple of books I liked very, very, very, very, very much. I will spare you a drawing inspired by this book, but I will say I liked *The Seven Deadly Sins of Legal Writing*, and possibly very much. But I did not like it very, very, very, very, very much. Still, at eight bucks a pop, it would be the perfect souvenir to distribute at, say, an in-house CLE session on effective legal writing.

1. What is the CPLR, you ask? He did not say. Google tells me it is the New York Civil Practice Law and Rules. That acronym is fine when writing a brief to be submitted to a New York court. It should have been explained in a book intended for a national audience. Explaining terms of art, acronyms, and jargon is an important component of effective legal writing.
2. "And now abide faith, hope, love, these three; but the greatest of these is love." 1 Corinthians 13:13.
3. Here again, that may or may not be a word. And here again, if it is not, it should be.
4. 372 U.S. 335 (1963). Even if this were a footnote rather than an endnote, would you really rather have to look elsewhere for the cite than just have it immediately follow the case name in the text?



Richards Brandt Miller Nelson

— and —

Mohrman & Schofield PC

are pleased to announce their merger effective June 1, 2013.

Michael K. Mohrman

will rejoin Richards Brandt Miller Nelson as a shareholder and chairman of the firm's Family Law Section.

Jamie G. Pleune, Kari N. Dickinson and Heather J. Tanana will join as associates and members of the Family Law Section.

Ms. Pleune, who directs the Environmental Law Clinic at the S.J. Quinney College of Law, also assists businesses with their regulatory compliance, liability, and general litigation needs. She will also join the firm's Appellate Section.

Ms. Dickinson will practice exclusively in the area of family law, including divorce, child custody disputes, child support, alimony, property division and other related matters.

Ms. Tanana, a member of the Navajo Nation, who holds a Master's of Public Health from Johns Hopkins, will also continue her practice of environmental and Indian law.

Richards Brandt Miller Nelson
A Professional Law Corporation

WELLS FARGO CENTER
299 S. Main Street | 15th Floor
Salt Lake City, Utah 84111
P (801) 531-2000 **F** (801) 532-5506
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President-Elect and Bar Commission Election Results

Congratulations to **James D. Gilson** on his election as President-elect of the Bar. He will serve as President-elect for the 2013–2014 year and then become President for 2014–2015. Congratulations also go to **Kenyon D. Dove** who ran unopposed in the Second Division. In the Third Division **Susanne Gustin** and **John R. Lund** were elected from a group of very qualified commission candidates. Sincere appreciation goes to **Benson L. Hathaway, Janise K. Macanas,** and **Karthik Nadesan** for their great campaigns and thoughtful involvement in the Bar and the profession.

James Gilson
President-Elect

Kenyon D. Dove
Second Division

Susanne Gustin
Third Division

John R. Lund
Third Division

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the March 14, 2013 Commission Meeting held at the Dixie Convention Center in St. George, Utah.

1. Commissioners approved a written Bar policy on public use of the Law & Justice Center.

2. Commissioners approved revisions to Bar's Mission and Vision Statements and will continue to make refinements.

3. Commissioners were asked to serve on the Modest Means Program Advisory Boards.

4. Commissioners asked Bar Staff to continue to research and report back on Amtrak and flight transportation packages to Snowmass for the 2013 Summer Convention.

5. Commissioners asked Bar Staff to continue work on improving the Bar's new website, e.g., add "sections" under the "For Lawyers" tab, etc.

6. Commissioners agreed to promote more lawyer education on the Judicial Performance Evaluation Survey rating system.

7. Commissioners approved the Utah Nonprofits Association Standard of Ethics via the Consent Agenda.

8. Commissioners approved the January 25, 2013 Commission Minutes via Consent Agenda.

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

I do not insist that this is a full adventure, but it is the beginning of one, for this is the way adventures begin.

– Don Quixote

UTAH STATE BAR

2013 Summer Convention

SNOWMASS VILLAGE COLORADO

July 17-20

Try something new! Join us in Snowmass, Colorado.

Look for information & registration materials in the center fold of this *Bar Journal*.

Something new, something different!

- Hot Air Ballooning
- Rock Climbing
- Jeep Tours
- Backcountry Hiking
- Horseback Riding
- Trap/Skeet Shooting
- Choose between 156 Restaurants

www.snowmassvillage.com

MCLE Reminder

Odd Year MCLE Reporting Cycle
July 1, 2011 – June 30, 2013

Due to the change in MCLE reporting deadlines, please remember that your MCLE hours must be completed by June 30th and your report must be filed by July 31st. If you have always filed in the odd CLE year, you will have a compliance cycle that began July 1, 2011, and will end June 30, 2013.

Active Status Lawyers complying in 2013 are required to complete a minimum of twenty-four hours of Utah approved CLE, which shall include a minimum of three hours of accredited ethics. **One of the ethics hours shall be in the area of professionalism and civility.** (A minimum of twelve hours must be live in-person CLE.) For more information and to obtain a Certificate of Compliance, please visit our website at www.utahbar.org/mcle. If you have any questions, please contact Sydnie Kuhre, MCLE Director at sydnie.kuhre@utahbar.org or (801) 297-7035 or Ryan Rapier, MCLE Assistant at ryan.rapier@utahbar.org or (801) 297-7034.

Supreme Court Seeks Attorneys to Serve on Advisory Committee on the Rules of Civil Procedure

The Utah Supreme Court is seeking applicants to fill two vacancies on its Advisory Committee on the Rules of Civil Procedure. Any interested attorney should submit a resume and a letter addressing qualifications to Diane Abegglen, Appellate Court Administrator, Utah Supreme Court, P. O. Box 140210, Salt Lake City, UT 84114-0210 or to the e-mail address dianea@utcourts.gov. Applications must be received no later than May 31, 2013.

2013 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2013 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org by Friday, September 13, 2013. The award categories include:

1. Distinguished Community Member Award
2. Professionalism Award
3. Outstanding *Pro Bono* Service Award

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

Applicants Sought for Appellate Court Nominating Commission

The Bar is seeking applications from lawyers to serve on the Utah Appellate Court Nominating Commission. The Commission nominates judges to fill vacancies on the Utah Supreme Court and the Utah Court of Appeals. Two lawyers are appointed by the Governor from a list of six nominees provided by the Bar.

Commissioners must be citizens of the United States and residents of Utah. Commissioners are appointed for one term of four years. No more than four of the seven members of the nominating commission may be of the same political party.

Please identify your political party or if you are politically independent.

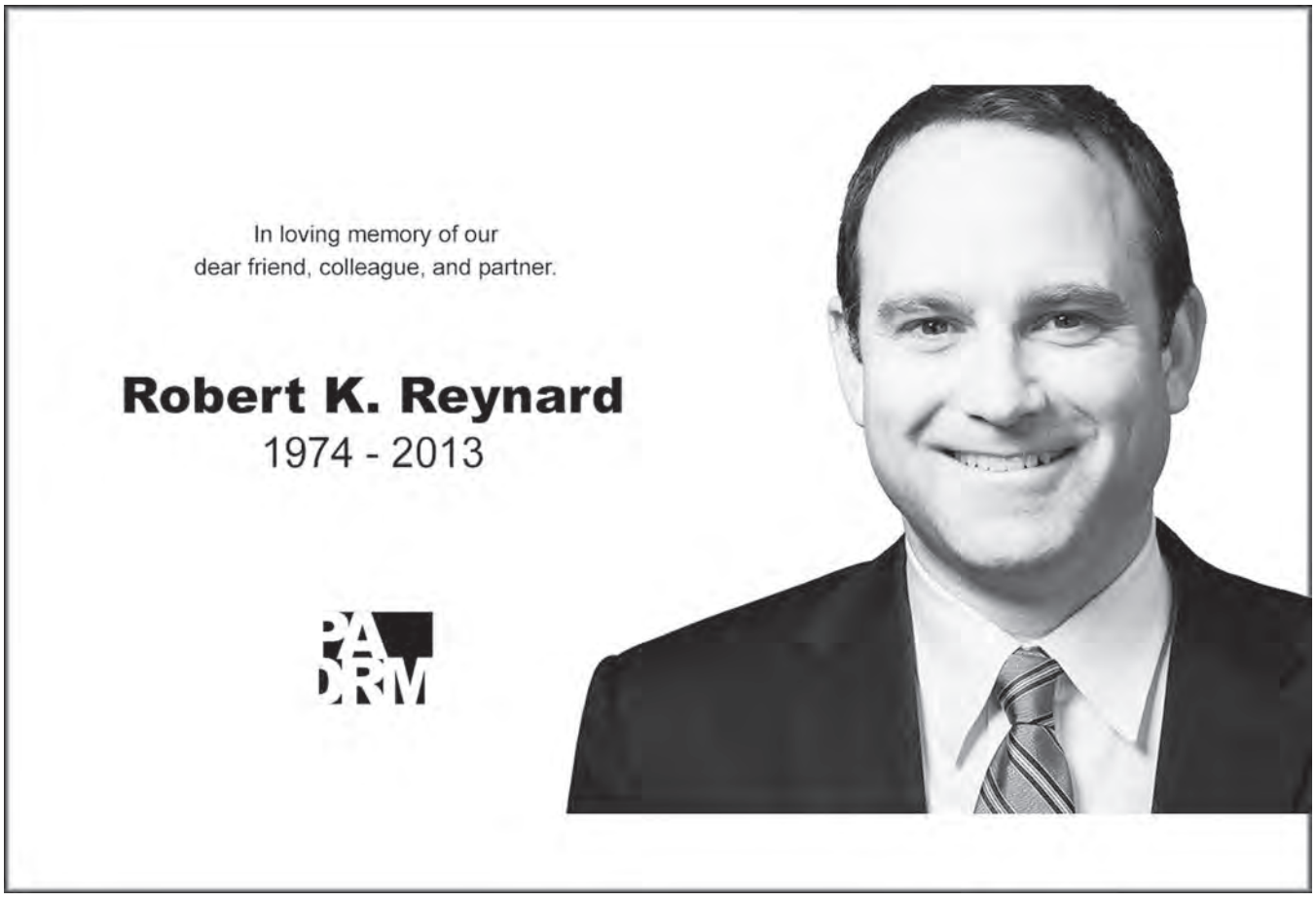
Submit resumes to John C. Baldwin, Executive Director, by e-mail at john.baldwin@utahbar.org, or by mail at 645 South 200 East, Salt Lake City, UT 84111.

Resumes must be received by Friday, May 31, 2013.

Notice of Ethics & Discipline Committee Vacancies

The Utah Supreme Court is seeking interested volunteers to fill vacancies on the Ethics & Discipline Committee of the Utah Supreme Court. The Ethics & Discipline Committee is divided into four panels, which hear all informal complaints charging unethical or unprofessional conduct against members of the Bar and determine whether or not informal disciplinary action should result from the complaint or whether a formal complaint should be filed in district court against the respondent attorney. Appointments to the Ethics & Discipline Committee are made by the Utah Supreme Court.

Please send a resume, no later than May 31, 2013, to: Utah Supreme Court c/o Diane Abegglen, Appellate Court Administrator, P.O. Box 140210 Salt Lake City, Utah 84114-0210 or to the e-mail address: dianea@utcourts.gov.



Utah State Bar 2013 Spring Convention Award Winners

During the Utah State Bar's 2013 Spring Convention in St. George the following awards were presented:

Charlotte L. Miller
Dorathy Merrill Brothers Award
For the Advancement of Women
in the Legal Profession

Cecilia M. Romero
Raymond S. Uno Award
For the Advancement of Minorities
in the Legal Profession

Supreme Court Seeks Attorneys to Serve on Advisory Rules Committees

The Utah Supreme Court is seeking applicants to fill potential vacancies on the following advisory rules committees:

Advisory Committee on the Rules of Appellate Procedure
Advisory Committee on the Rules of Criminal Procedure
Advisory Committee on the Rules of Evidence
Advisory Committee on the Rules of Juvenile Procedure
Advisory Committee on the Rules of Professional Conduct

Appointments are for a four-year term. Any interested attorney should submit a resume and a letter addressing qualifications to Diane Abegglen, Appellate Court Administrator, Utah Supreme Court, P. O. Box 140210, Salt Lake City, UT 84114-0210 or to the e-mail address dianea@utcourts.gov. Applications must be received no later than May 31, 2013.

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year that begins July 1, 2013, and ends June 30, 2014. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its June 7, 2013 meeting.

The Commission is interested in assuring that the process includes as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, is available for inspection and comment at www.utahbar.org.

Please contact John Baldwin at the Bar Office with your questions or comments.

Telephone: (801) 531-9077
Email: jbaldwin@utahbar.org

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.

Mandatory Online Licensing

The annual Bar licensing renewal process will begin June 1, 2013, and will be done only online. 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 you receive 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 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.

Utah State Bar Ethics Advisory Opinion Committee Opinion No. 12–02 — Issued December 12, 2012

ISSUE

What are the ethical and practical considerations applicable to attorneys representing clients in the state of Utah under flat fee or fixed fee agreements (hereinafter referred to as "flat fee agreements")?

OPINION

The permissibility of flat fee agreements in Utah is well established, subject always to the requirements of the Utah Rules of Professional Conduct. Utah lawyers may use such agreements under circumstances that ensure that clients will not be charged an unreasonable fee, as prohibited by Rule 1.5, and that client funds will not be comingled with the attorney's funds as prohibited by Rule 1.15. Whether a flat fee arrangement complies with these rules depends heavily on an analysis of the applicable facts and circumstances. Except in rare circumstances where a fee may reasonably be earned upon receipt, as described in this opinion, fee agreements should not describe such fees as "non-refundable," as such fees are always subject to refund in the event they are or become unreasonable under the particular facts of the case. Representation that a flat fee is nonrefundable is deceptive and violates Rule 8.4.

Recent cases on the permissibility of flat fee agreements under the Utah Rules of Professional Conduct implicate several questions regarding the permissibility of such, as well as practical considerations faced by lawyers using such agreements. Such questions are addressed below.

ANALYSIS

What fee agreements are relevant to this opinion?

The term "flat fee" and "flat fee agreement" are used in this opinion to refer generally to fee agreements wherein the client agrees at the inception of a matter to pay a fixed sum to the attorney in exchange for which the attorney agrees to perform a particular scope of work.[1] Flat fees are essentially a species of advance payment retainers, wherein the client provides the attorney with payment at the beginning of the relationship in exchange for work to be performed later. Examples of flat fees include a criminal defense attorney that agrees to handle the defense of a misdemeanor case through trial for a fixed sum, a commercial litigator that agrees with a corporate client to conduct all aspects of the discovery phase of a particular case for a specified sum or a transactional or patent attorney that agrees to create and file specific documents or handle certain aspects of a transaction for a fixed sum.

Clients pursuing flat fee agreements often do so in order to avoid the negative consequences of the billable hour or to obtain representation where paying for legal services by the hour is not feasible. Hourly clients are generally required to make regular monthly or quarterly payments to the attorney, which may be undesirable or impossible for some clients. Attorneys paid by the hour are not rewarded for performing their work as efficiently as possible, which may increase costs. Corporate clients often use flat fee agreements to ensure that legal fees do not exceed pre-budgeted amounts. Certain types of collection or criminal defense cases raise the specter that any funds held by the client or in the attorney's trust account may be subject to seizure by the client's creditors or forfeiture by government officials, and thus become unavailable to compensate the attorney. Each of these concerns may be appropriately addressed by flat fee agreements.

Attorneys may prefer to enter into flat fee agreements to avoid the risk that the client will be unable (or unwilling) to periodically pay for services rendered at an hourly rate. Flat fee agreements are particularly attractive where, depending on the outcome of the litigation, the client may eventually be incarcerated, unemployed or insolvent. By entering into a flat fee agreement, the attorney is able to ensure collection in exchange for accepting the risk that the matter may be more expensive or time-consuming to resolve than anticipated at the outset. If the attorney correctly estimates the time and effort needed to perform the scope of work agreed, then the attorney may be able to earn a higher fee than would be possible under an hourly fee arrangement. Conversely, if the attorney does not accurately estimate the scope of work required to meet the client's needs, the costs and expenses of the matter may render the flat fee agreement unprofitable.[2]

What factors should be considered in determining the reasonableness of a flat fee?

Rule 1.5 lists several factors that should be considered in determining the reasonableness of fees. *See Long v. Ethics & Discipline Comm. of the Utah Supreme Court*, 2011 UT 32, ¶ 45, 256 P.3d 206; Utah R. Prof'l Conduct 1.5(a). Utah follows the practice of other jurisdictions in allowing attorneys to charge flat fees. *See* Utah State Bar Ethics Advisory Opinion No. 136; *Long*, 2011 UT 32 at ¶ 48; *Utah State Bar v. Jardine*, 2012 UT 67, ¶ 43, — P.3d —. In determining whether a fee is unreasonable, the Utah Supreme Court has indicated that each of the Rule 1.5(a) factors is relevant, specifically including (but not limited

to) the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Long, 2011 UT 32, ¶ 45; *see also Jardine*, 2012 UT 67 at ¶ 43.

The recent Utah Supreme Court decision of *Long v. Ethics & Discipline Comm. of the Utah Supreme Court*, illustrates some of the challenges faced by lawyers using flat fee agreements. In *Long*, the Utah Supreme Court indicated that sufficient evidence existed to support the screening committee's finding that the petitioner charged unreasonable fees in three criminal cases. *See id*. ¶¶ 48, 52.[3] The Court discussed evidence of the amount charged to each of the clients and the time spent by petitioner on the case. *See id*. In one case, the petitioner admitted to attempting to collect approximately $6,600.00 for six hours of work. *See id*. ¶ 57. In the other two cases, the screening committee compared the district court docket, which suggested that petitioner did very little work, with a narrative accounting created by petitioner after ethics complaints were filed that indicated that petitioner did between fifty and sixty hours of work on each case. *See id*. ¶ 21. The Utah Supreme Court determined that because petitioner's rebuttal evidence did not consist of contemporaneous documentation, "a reasonable mind might not give this 'accounting' much weight" in comparison with the district court docket. *See id*. ¶ 52.

The *Long* opinion does not indicate whether the Utah Supreme Court weighed the time spent by petitioner on his cases more heavily than other Rule 1.5 factors which might have shown that the fees were reasonable. Rather, the Court merely indicates that the evidence was sufficient to support the screening committee's finding based on the record. *See id*. ¶ 26. The only factor discussed in the opinion is the amount of time spent by petitioner on the cases. The Court's decision can therefore be read to suggest that, in defending his actions before the screening committee, petitioner faced a difficult problem of proof. It is unclear from the opinion itself whether petitioner submitted any evidence of other Rule 1.5(a) factors that supported his contention that the fee was reasonable.

Long demonstrates a difficulty that often arises with flat fee practice. Attorneys must prove the reasonableness of their fees when challenged. It is common for solo and small firm attorneys in some practice areas to forgo contemporaneous accounting for time spent on flat fee cases because of administrative costs and limited utility of such information in the flat fee context. While "the time and labor required" is only one of several factors to consider in determining whether a fee is reasonable,[4] in disciplinary cases, time spent by the lawyer often weighs heavily in the determination of the reasonableness of the fee. The failure by the lawyer to accurately and contemporaneously account for time spent on a particular matter is not itself a violation of the Rules. Indeed, the Utah Supreme Court has recently accepted an accounting prepared after the fact as sufficient evidence that the work performed in a particular case rendered a flat fee reasonable. *See Jardine*, 2012 UT 67, ¶¶ 44-46. However, failing to account may create practical difficulties in defending against disciplinary action. If maintaining contemporaneous time records is inconvenient, the attorney would be wise to include language in their fee agreement designating various benchmark events that correlate with work to be performed on the case, the occurrence of which will deem set percentages of the flat fee to have been earned.

When is the fee earned and can fees be non-refundable?

When the flat fee is earned depends primarily on the contractual arrangement between the attorney and client, subject to the rules of professional conduct. *See Ryan v. Butera, Beausang, Cohen & Brennan*, 193 F.3d 210, 214 (3d Cir. 1999). "A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses." Utah R. Prof'l Conduct 1.5(a). Nothing in the Rules of Professional Conduct or the case law reviewed by the committee suggests that the fee need only be reasonable at the outset of the attorney-client relationship. Rather, courts have consistently found that a fee may become unreasonable given circumstances that develop during the attorney-

client relationship. *See McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 101 (3d Cir. 1985); *Long*, 2011 UT 32, ¶ 48 (noting that, while a flat fee agreement was reasonable when signed, it was still improper to demand payment if such fee was unreasonable given the outcome of the representation); *Jardine*, 2012 UT 67, ¶¶ 37-39, 45 (examining two fee agreements for reasonableness in light of services performed and outcomes obtained); *In re Powell*, 953 N.E.2d 1060, 1063–64 (Ind. 2011); *see also* Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. Legal Prof. 113, 123 (2009). The Rules of Professional Conduct therefore require that fees be reasonable at all times during the representation. *See* Utah R. Prof'l Conduct 1.5(a).

The question of where the attorney must deposit the flat fee largely turns on when the fee is earned. The fee agreement may provide means by which the fee or portions thereof may be deemed "earned" and become the property of the attorney, subject always to the requirement that the fee agreement must not result in the attorney charging an unreasonable fee. The Utah Supreme Court has indicated that "[i]t is the attorney's responsibility to apply sound judgment and fairness in determining when this transition [from unearned to earned fees] occurs." *See Jardine*, 2012 UT 67, ¶ 50.

The flat fee remains property of the client until it is earned. *See Jardine*, 2012 UT 67 at ¶50; *Iowa Supreme Court Bd of Prof' Ethics & Conduct v. Apland*, 577 N.W.2d 50, 55-56 (Iowa 1998). The unearned portion of a flat fee must be kept separate from the attorney's personal funds. *See* Utah R. Prof'l Conduct 1.15(a) ("[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property"); *see also In re Kendall*, 804 N.E.2d 1152, 1155 (Ind. 2004). Keeping the unearned portion of the fee in trust provides some protection for client funds from the attorney's creditors.[5] Moreover, maintaining unearned fees in the client trust account assures that client property will be available for repayment in the event that the attorney is not able to complete the representation to an extent that would entitle the attorney to retain the entire fee.

Prior ethics opinions appear to allow flat fees to be non-refundable, subject to later disgorgement. *See* Utah State Bar Ethics Advisory Opinion No. 136; *Long*, 2011 UT 32, ¶ 48. However, the distinction between a refundable fee and a non-refundable fee subject to potential disgorgement, as discussed in Opinion No. 136, is somewhat unclear. The only practical difference seems to be that the latter shifts the risk of the attorney's default to the client. If the attorney collects a truly "non-refundable fee", that fee is the property of the attorney. The fee can be spent by the attorney or attached by the attorney's creditors. In the event that the fee later became unreasonable, the client may have no way to recover the unreasonable fee. This result is unsatisfying, particularly given that attorneys are required to hold fees in trust in other circumstances where the client may be entitled to a refund, e.g., where there is a dispute over the amount of fees, or where there is a dispute over ownership of funds held in trust. *See* Utah R. Prof'l Conduct Rule 1.15(e).

Given the prohibition on unreasonable fees under Rule 1.5, there is no such thing as a fully nonrefundable fee. It is well established that clients are entitled to a refund of unearned or unreasonable fees, regardless of language used in a fee agreement. *See id.* ("A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer *only as fees are earned or expenses incurred*" (emphasis added)). Utah attorneys should reasonably know that any flat fee may have to be refunded if it is unreasonable. Language in a fee agreement which states, without further explanation or qualification, that a flat fee or other advance payment retainer is nonrefundable is a misrepresentation. *See* Utah R. Prof'l Conduct Rule 8.4(c); *In re Dawson*, 8 P.3d 856, 859 (N.M. 2000). To the extent that Utah State Bar Ethics Advisory Opinion No. 136 suggests otherwise, it is hereby superseded by the instant opinion. Attorneys may avoid making this misrepresentation in their fee agreements by clearly explaining in plain language that fees will be refunded in the event they are unreasonable under the circumstances. If there are particular circumstances which render a flat fee (or portion thereof) reasonably earned at any time prior to the termination of the representation, the attorney should clearly explain such circumstances in the fee agreement, especially with regard to the factors indicated in Rule 1.5(a).

Permissible arrangements where fees may be "earned" prior to conclusion of the representation, thus allowing the attorney to transfer portions of the fee to the attorney's personal or operating account are numerous.[6] The attorney is not required to use a hypothetical hourly rate in determining when the fee is earned, though such an arrangement could be strong evidence of reasonableness. The fee agreement may designate reasonable events which correlate with the work performed by the attorney, which cause portions of the fee to be earned, such as completion of substantial discovery, filing of a notice of appearance or commencement of trial. Alternatively, an agreement could indicate that the fee is earned once the attorney is committed to the expenditure of substantial work and expenses, for example, where the attorney has appeared in a criminal case immediately prior to trial and is unable to withdraw. Again, where particular

circumstances are the basis for designating a certain portion of the fee earned prior to termination of the representation, the attorney should specifically identify such in the fee agreement.

Once a portion of the fee is "earned" under the terms of the fee agreement, it becomes the attorney's property and should not be kept in the trust account. *See* Utah R. Prof'l Conduct Rule 1.15(a). If retention of the fee (or some portion thereof) later becomes unreasonable, the attorney has an obligation to return such fees to the client. *See* Utah State Bar Ethics Advisory Opinion No. 136.

The committee notes that the practice of designating the majority of a flat fee as earned at the outset of the representation is often unreasonable, given that the attorney has not yet performed the services contracted for in the fee agreement. There are circumstances where such a practice might be reasonable, such as where "a lawyer of towering reputation provides a benefit just by agreeing to represent a client, or if the lawyer's commitment to be available has value in and of itself, or when, by accepting representation, the lawyer is disqualified from other representation." *See* Utah State Bar Ethics Advisory Op. 136 (July 29, 1993). However, such circumstances are comparatively rare. The Utah Supreme Court has noted that "if the lawyer must later defend his debits against a Bar complaint, it is his obligation to demonstrate that the money was earned before it was withdrawn, whether that happened at the moment the lawyer agreed to representation, or after many hours of work were performed." *See Jardine*, 2012 UT 67, ¶ 51.

If the attorney is subsequently terminated or is otherwise unable to carry out the object of the fee agreement, the attorney's ability to disgorge or repay fees becomes a critical question. In such a case, the client will almost certainly be entitled to a refund of all or part of the fee. Rule 1.5 directs that attorneys shall not "make an agreement for, charge or collect an unreasonable fee…" *See* Utah R. Prof'l Conduct 1.5(a).[7] By deeming the entire fee earned at the outset of the litigation, and transferring the fee to the operating account before the object of the representation, or any part thereof, has been accomplished, the lawyer has made "an agreement for" an unreasonable fee, if the object of the representation is not accomplished. *See id*. Under such circumstances, the attorney may have violated the requirements of Rule 1.5, as discussed by the Utah Supreme Court in *Long*.

CONCLUSION

When managed as required by the Rules, flat fee agreements provide substantial benefits to clients, attorneys and serve the interests of justice. Attorneys can manage financial risks so as to allow clients who could not otherwise afford counsel to obtain representation. Sophisticated clients are able to anticipate and accurately manage litigation expenses, and attorneys are able to avoid the administrative expenses of billing for their services by the hour. It is the committee's opinion that, as discussed herein, Utah attorneys may enter into flat fee agreements with clients where such agreements do not violate Utah Rules of Professional Conduct Rules 1.5, 1.15, or 8.4.

1. Flat fee agreements are also referred to in some of the relevant literature as a class of special or security retainers to distinguish them from general retainers, which are payments that give the client an option on the attorney's availability at some future time. *See* Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. Legal Prof. 113, 123 (2009); Tyler Moore, Note, *Flat Fee Fundamentals: An Introduction To The Ethical Issues Surrounding the Flat Fee after In re Mance*, 23 Geo. J. Legal Ethics 701 (2010); *see also Dowling v. Chicago Options Associates, Inc.*, 875 N.E.2d 1012, 1018 (Ill. 2007). However, flat fee arrangements also differ from typical security retainers, which are paid at the inception of a matter and held in trust to secure payment for work to be performed at hourly rates. While general and security retainers are still subject to the requirements of Rules 1.5 and 1.15, they are beyond the scope of this opinion.
2. While Rule 1.5 does not specifically list the risk undertaken by the attorney in undertaking the representation on a flat fee basis as a factor in determining whether the fee itself is reasonable, the Rule specifically indicates that the listed factors are not exclusive. *See* Utah R. Prof'l Conduct 1.5(a). The committee believes that the financial risk undertaken by an attorney taking on a particular case is a relevant factor that should be considered when evaluating the reasonableness of a flat fee agreement in subsequent disciplinary proceedings.
3. It is instructive to note that two of the three complaints filed against Mr. Long for violation of Rule 1.5 were referred to the Office of Professional Conduct by a district court judge that reviewed fees charged in two of Mr. Long's cases and found the fees to be excessive and unreasonable under the circumstances. The third complaint was brought after Mr. Long hired a collection agency to sue another client for unpaid fees.
4. Indeed, the Utah Supreme Court notes that "[t]hese factors do not represent an exclusive list, and each factor may not be relevant in every case." *Long*, 2011 UT 32, ¶ 45.
5. In certain cases, it may be reasonable for a client to give informed consent to allow the entire flat fee to be earned upon commencement of the representation in order to protect the client's ability to secure counsel. Adding such a provision to a fee agreement may benefit the client where government seizure of the client's funds is reasonably believed to be imminent. In such a case, the fee agreement should be drafted so as to clearly explain in plain language terms the risks of designating the fee as earned immediately upon receipt, and describe the benefits to the client of doing so given the facts of the client's particular case. *See Dowling*, 875 N.E.2d at 1022–23. In other words, even in such circumstances, the fee must comply with Utah Rules of Professional Conduct Rule 1.5.
6. Given the numerous factors which may be considered in determining whether a fee is reasonable under Utah Rules of Professional Conduct Rule 1.5(a), it is not possible to specify all of the potential circumstances which might cause a fee (or a portion thereof) in a particular case to be reasonably earned.
7. The comments to Utah Rules of Professional Conduct 1.3 note that the lawyer's duty of diligence may require a sole practitioner to "prevent neglect of client matters in the event of…death or disability," by preparing a plan to protect clients in such circumstances. *See* Utah R. Prof'l Conduct Rule 1.3 cmt. 5. In appropriate circumstances, Rule 1.5 may require an attorney holding substantial funds which may become subject to disgorgement to prepare a plan whereby such funds may be repaid if the attorney is unable to complete the object of the representation.

Pro Bono Honor Roll

Allebest, Jared – Tuesday Night Bar

Anderson, Doug – Tuesday Night Bar

Anderson, Jared – Took TLC Pro Bono Case

Anderson, Mike – Tuesday Night Bar

Andreasen, Rob – Tuesday Night Bar

Andrews, Cristina – TLC Document Prep Clinic

Anthony, Tom – FJC Clinic

Ashton, Brooke – Tuesday Night Bar

Averett, Steven – TLC Document Prep Clinic

Bagley, John – Took TLC Pro Bono Case

Baker, Jim – Senior Center Legal Clinic

Barrick, Kyle – Senior Center Legal Clinic

Barrus, Craig – TLC Document Prep Clinic

Benson, Jonny – Immigration Clinic

Bergstedt, Jim – Street Law Clinic

Bertelsen, Sharon – Senior Center Legal Clinic

Black, Mike – Tuesday Night Bar

Bogart, Jennifer – Street Law Clinic

Buck, Adam – Tuesday Night Bar

Bulkeley, Deborah – Tuesday Night Bar

Chambers, Steve – Rainbow Law

Chandler, Josh – Tuesday Night Bar

Clark, Melanie – Senior Center Legal Clinic

Conley, Elizabeth – Senior Center Legal Clinic

Conyers, Kate – Tuesday Night Bar

Crismon, Sue – Employment Law Clinic

Crockett, Rob – Tuesday Night Bar

Davis, Burton – Tuesday Night Bar

Farr, Doug – Tuesday Night Bar

Farrell, Leah – Tuesday Night Bar

Ferguson, Phillip – Senior Center Legal Clinic

Flynn, Crystal – Rainbow Law

Gilbert, Graham – Street Law Clinic

Hart, Laurie – Senior Center Legal Clinic

Hawkes, Danielle – Street Law Clinic

Held, Rebecca – Tuesday Night Bar

Herrera, Kim – Immigration Clinic

Hogle, Chris – Tuesday Night Bar

Hyde, Ashten – Tuesday Night Bar

Jensen, Michael – Senior Center Legal Clinic

Johansen, Bryan – Tuesday Night Bar

Johnson-Gutierrez, Heather – Tuesday Night Bar

Kaas, Adam – Tuesday Night Bar

Kent, Jacob – Tuesday Night Bar

Kessler, Jay – Senior Center Legal Clinic

Koehler, Courtney – Took TLC Pro Bono Case

Latimer, Kelly – Tuesday Night Bar

Lee, Terrell – Senior Center Legal Clinic

Lillywhite, Andrew – Tuesday Night Bar

Long, Mike – Tuesday Night Bar, Immigration Clinic

Machlis, Ben – Tuesday Night Bar

Manderino, Chase – Tuesday Night Bar

Marx, Shane – Rainbow Law

Maughan, Joyce – Senior Center Legal Clinic

McCoy II, Harry – Senior Center Legal Clinic

McDonald, Kathleen – Tuesday Night Bar

Miller, Nathan – Senior Center Legal Clinic

Miya, Stephanie – Medical-Legal Clinic

Montoya, Sara – Tuesday Night Bar

Mount, Linda Barclay – TLC Document Prep Clinic

Munson, Edward – Tuesday Night Bar

Nalder, Bryan – Tuesday Night Bar

Olson, Tracy – Tuesday Night Bar

Ostler, Josh – Tuesday Night Bar

Otto, Rachel – Street Law Clinic

Pearson, Alex – Tuesday Night Bar

Pearson, Rachel – TLC Document Prep Clinic

Pinegar, Stanford – Tuesday Night Bar

Ratelle, Brittany – Took TLC Pro Bono Case

Rinaldi, Leslie – Tuesday Night Bar

Roberts, Kathie – Senior Center Legal Clinic

Romney, Walt – Tuesday Night Bar

Rosevear, Dallas – Tuesday Night Bar

Ryon, Rebecca – Tuesday Night Bar

Semmel, Jane – Senior Center Legal Clinic

Simcox, Jeff – Street Law Clinic

Snow, Rod – Tuesday Night Bar

Spjute, Robert – Tuesday Night Bar

Stewart, Jeremy – Tuesday Night Bar

Stewart, Steve – Street Law Clinic

Stoddard, Bryan – TLC Pro Bono Case

Sullivan, Landon – Tuesday Night Bar

Tanner, Brian – Immigration Clinic

Thomas, Michael – Tuesday Night Bar

Thorne, Jonathan – Street Law Clinic

Thorpe, Scott – Senior Center Legal Clinic

Tillotson, John – Guardianship Case

Timothy, Jeannine – Senior Center Legal Clinic

Waldron, Paull – TLC Document Prep Clinic

Williams, Timothy – Senior Center Legal Clinic

Worhen, Brock – Tuesday Night Bar

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in the October and November of 2013. To volunteer call Michelle V. Harvey (801) 297-7027 or C. Sue Crismon at (801) 924-3376 or go to https://www.surveymonkey.com/s/CheckYes2012 to fill out a volunteer survey.

Bar Thank You

Many attorneys volunteered their time to grade essay answers from the February 2013 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Paul Amann
John-David Anderson
Mark H. Anderson
Ryan Andrus
J.D. Ashby
Ken Ashton
Mark Astling
P. Bruce Badger
Justin Baer
Bart Bailey
Allyson Barker
Brent Bartholomew
Blake Bauman
James Bergstedt
Mike Boehm
Matt Boley
Sara Bouley
David Broadbent
James Burton
Elizabeth Butler
Callie Buys
Tim Bywater
Tim Considine
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Clemens Landau
Derek Langton
David Leta
Tanya Lewis
Greg Lindley
Patrick Lindsay
Nathan Lyon
Kelley Marsden
Elisabeth McOmber
Lewis Miller
Doug Monson
Steven Newton
Kerry Owens
Wells Parker
Charles Perschon
Briant Platt
Chad Platt
Josh Player
Keven Rowe
Ann Rozycki
Brandon Rufener
Scott Sabey
Melanie Serassio
Summer Shelton
Leslie Slaugh
James Sorenson
Ryan Stack
Craig Stanger
Charles Stormont
Engels Tejeda
Bob Thompson
Steve Tingey
Ann Tolley
David Walsh
Ben Whisenant
Colleen Witt
John Zidow

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

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

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

SUSPENSION/PROBATION

On January 8, 2013, the Honorable Judge David M. Connors, Second District Court entered an Order of Discipline suspending D. Michael Nielsen for one year, with the one year stayed and three years probation for violation of Rules 8.4(b) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Nielsen attempted to purchase cocaine from an undercover police officer in Salt Lake City, Utah. Mr. Nielsen was a city prosecutor for two cities at the time he attempted to purchase cocaine.

Aggravating factors:

Dishonest or Selfish Motive; Substantial Experience in the Practice of Law; Illegal Conduct, Including the Use of Controlled Substances; Mr. Nielsen was a prosecuting attorney at the time of his misconduct.

Mitigating factors:

Absence of a prior record of discipline; full and free disclosure to the client or the disciplinary authority prior to the discovery of any misconduct or cooperative attitude toward proceedings; good character or reputation; mental disability or impairment, including substance abuse; interim reform; imposition of other penalties or sanctions; and remorse.

PUBLIC REPRIMAND AND PROBATION

On February 4, 2013, the Honorable Judge Fred D. Howard, Fourth Judicial District Court entered an Order of Discipline: Public Reprimand and Probation against John W. Maddox for violation of Rules 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.4(b) (Communication), 1.8(f)(1) (Conflict of Interest: Current Clients: Specific Rules), 1.8(f)(2) (Conflict of Interest: Current Clients: Specific Rules), 3.3(a)(1) (Meritorious Claims and Contentions), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Maddox was asked to represent the husband of a client by a fellow attorney. The client of the attorney was seeking a guardian and conservatorship of her husband. At the attorney's request, Mr. Maddox met with the husband. Mr. Maddox was paid by the wife to represent the husband. The wife asked Mr. Maddox not to disclose to the husband the reason for the meeting, explaining that she feared that her husband would be violent with her if he understood that she was seeking a guardian and conservator for

him. Prior to meeting, Mr. Maddox had reviewed the report from the husband's medical doctor in which the doctor opined that the husband was in need of a guardian and conservator. Mr. Maddox met with the husband to assess his need for a guardian and conservator. When Mr. Maddox met with the husband, Mr. Maddox did not identify himself as an attorney, explain his role, or discuss the pending court proceedings. The husband did not directly hire Mr. Maddox as his attorney. Though it was not his intent, Mr. Maddox's conduct furthered the interests of the wife. A hearing was held, at which time the wife was appointed as guardian and conservator. The husband was not notified of the hearing by Mr. Maddox. Mr. Maddox appeared on behalf of the husband at the guardianship hearing and advised the court with respect to his observations from having met with the husband. Because Mr. Maddox did not explain to the court the nature of his visit with the husband nor the wife's requests about disclosure to the husband, the court was under the impression that Mr. Maddox was hired by the husband to be his attorney. Mr. Maddox did not correct the impression of the court. Mr. Maddox reported to the court his impression that the husband was in need of a guardian and conservator. The husband was not present at the hearing.

ADMONITION

On February 26, 2013, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law), 7.5(b) (Firm Name and Letterheads), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney is licensed in other states, but is not licensed to practice law in Utah. The attorney's name was put on a Utah client's bank account in which several checks were issued to the attorney's firm. The owner of the bank account was found to be in need of a Guardian and Conservatorship. The attorney identified a licensed Utah attorney as having oversight of the attorney's work. The Utah licensed attorney denied having such oversight or otherwise being actively involved. There was no evidence that the Utah licensed attorney actually reviewed or evaluated the legal work being done. The attorney's mental state was generally negligent. There was no evidence of injury to any of the parties due to the attorney's misconduct and the harm to the legal system was minimal.

ADMONITION

On January 22, 2013, 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), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney's firm was retained to represent a client in a criminal matter. The attorney's firm failed to adequately communicate with the client regarding the representation. The OPC sent the attorney a Notice of Informal Complaint ("NOIC"). By rule, the attorney was required to respond to the NOIC within twenty days. The attorney did not timely respond to the NOIC. There was no injury and that the attorney acted without intent.

Mitigating factors:
Absence of prior discipline; lack of dishonest or selfish motive; inexperience in practice.

SUSPENSION AND PROBATION

On February 1, 2013, the Honorable Judge Samuel D. McVey, Fourth Judicial District Court entered Findings of Fact, Conclusions of Law and Order of Discipline against Bruce L. Nelson for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. Mr. Nelson was suspended for one year with ninety days of the suspension stayed. He was also placed on probation for one year.

In summary, there are three matters:
In the first matter, Mr. Nelson was hired to represent a client in a civil matter. The client retained Mr. Nelson previously and had remaining funds from that retainer. Those funds were used to pay for the civil matter. Mr. Nelson filed an Answer for his client, but did nothing else. Mr. Nelson did not provide any billings to his client for work performed in the matter and did not provide any written billings or accountings to the client for the previous matter. Mr. Nelson did not provide copies of paperwork from the case to the client. The client left several telephone messages for Mr. Nelson requesting information about the case. Mr. Nelson did not communicate with the client about developments in the case. The plaintiff filed a Motion for Summary Judgment in the client's case. Mr. Nelson did not inform the client about the Motion. Mr. Nelson did not oppose the Motion and the court granted summary judgment to the plaintiff. Mr. Nelson did not notify his client about the ruling and a judgment was entered against Mr. Nelson's client. The OPC served a Notice of Informal Complaint upon Mr. Nelson requesting information from him concerning the client's informal complaint against him. Mr. Nelson failed to respond. Mr. Nelson also failed to appear at the Screening Panel hearing.

In the second matter, a client hired Mr. Nelson to oppose a request for modification of a Divorce Decree. The client paid Mr. Nelson an advanced fee. The client made numerous requests for status updates about the work Mr. Nelson had performed on the case. Mr. Nelson did not respond to many of his client's requests and did not keep the client informed about what was happening in the case. Mr. Nelson did not diligently pursue settlement and missed an opportunity to schedule mediation in the case. Opposing counsel tried to contact Mr. Nelson, however Mr. Nelson did not respond to many of opposing counsel's messages. Opposing counsel left several messages for Mr. Nelson to contact him to clarify whether Mr. Nelson was still representing the client. Mr. Nelson did not return these calls. The client eventually terminated Mr. Nelson's representation but Mr. Nelson never filed a withdrawal notice with the court. The client requested a refund and Mr. Nelson failed to respond. Mr. Nelson did not refund any unearned fees to the client until just before the Screening Panel hearing.

In the third matter, a client hired Mr. Nelson for representation in a divorce. The client paid Mr. Nelson an advanced fee. The client requested that Mr. Nelson file an Answer in his divorce case. Mr. Nelson did not file the Answer. Mr. Nelson did not keep the client informed about the status of his case. The client telephoned the court clerk about his case and learned that Mr. Nelson had not filed an Answer in his case. The client called Mr. Nelson and confronted him about failing to file an Answer. When the client called Mr. Nelson, Mr. Nelson lied about the Answer being filed. Opposing counsel filed a Motion for Entry of Default Judgment. Mr. Nelson did not oppose the Motion and a Default Judgment was entered against the client.

Aggravating factors:
Prior record of discipline; a pattern of misconduct; multiple offenses; obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority; submission of false evidence, false statements; and lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved.

Mitigating factors:

Personal or emotional problems; inexperience in the practice of law; physical disability; and remorse.

SUSPENSION

On January 24, 2013, the Honorable Judge Paul G. Maughan, Third Judicial District Court entered Findings of Fact, Conclusions of Law and Order of Suspension against Shayne R. Kohler for violation of Rules 3.2 (Expediting Litigation), 3.4(c) (Fairness to Opposing Party and Counsel), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(d) (Misconduct) of the Rules of Professional Conduct. Mr. Kohler was suspended for one year.

In summary:

Mr. Kohler represented a client in a civil matter. The court held a Law and Motion hearing wherein Mr. Kohler was ordered to prepare the Order from the hearing. Mr. Kohler never prepared the Order. The court held a Telephone Conference. Mr. Kohler was not in attendance at the court hearing, however, another attorney participated as counsel on his behalf. At the Telephone Conference the court stated, "A motion to allow Mr. Kohler to withdraw will be filed forthwith." Mr. Kohler never filed a Motion to Withdraw. At that same hearing, a new date for trial was set. Mr. Kohler did not appear at the Bench Trial. Mr. Kohler's client insisted on going forward pro se, without the benefit of counsel. The OPC issued a Notice of Informal Complaint ("NOIC"). The NOIC was sent to Mr. Kohler's address of record with the Utah State Bar. The NOIC was also sent to Mr. Kohler's home address. Mr. Kohler did not respond to the NOIC. A Calendar Notice of the setting of the Screening Panel hearing was sent to Mr. Kohler's address of record with the Utah State Bar. Mr. Kohler did not attend the Screening Panel hearing.

Aggravating factors:

Obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary authority; refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the disciplinary authority; and substantial experience in the practice of law.

2012 Salary Survey

by J. Robyn Dotterer

Though we had a good response to our survey this year, it was not as good as our last survey in 2008. This year we had eighty-four paralegals/legal assistants respond as opposed to ninety-nine responses last time. So keep this change in numbers in mind as it relates to percentages — we're still fifteen respondents off as it relates to comparisons from the last survey. Six of the respondents did not identify whether they were designated as a paralegal or legal assistant, but as in our last survey, the designation of Paralegal has gained tremendously in our industry over the past several years and 91% of the respondents identified as being employed as a paralegal, which is statistically the same as in our last survey.

Salt Lake County still employs the largest percentage of the respondents at 79.8% or sixty-seven of our eighty-four respondents. Box Elder County picked up one paralegal this year and Cache County lost their one paralegal from last survey. Davis County also picked up an additional paralegal and went from two to three respondents. Grand and Millard Counties either lost their paralegal or they were too busy to respond this year and show zero respondents. Summit County still has three responding paralegals and Utah County went from seven respondents to six this time. Wasatch County had a respondent this year and went to one from zero and Washington County stayed with only one respondent again this year. Weber County went down one from three to two respondents.

The gender spread in our profession changed slightly with an increase in male paralegals with the count going from seven to eight respondents, but they are still out numbered by the seventy-six female paralegals who responded.

The number of paralegals who work part time also decreased from six to four, but the percentage of full time paralegals employees remain at about 95% of respondents.

It's good to know that employers are hiring as the number of paralegals working for their current employer under one year increased from last survey from eleven to fifteen. That shows that almost 20% of our respondents have been able to find an employer within the last year. With the economy having been so slow for the past few years, it's nice to see that people have been able to find jobs. We were tied with twenty-seven paralegals having been with their current employer for one to five years and the same number for over ten years. The smallest group in this survey is the group having been with their current employer for six to ten years having changed from twenty-seven to thirteen. It seems that may have been the group changing jobs.

Only two of the respondents are brand-new paralegals as having been employed as a paralegal for less than one year, as opposed to our last survey where we had six new paralegals.

The Paralegal Division of the Utah State Bar and the Utah Paralegal Association have both attracted significant numbers of members from our respondents. NALA also has a fair showing of members at twenty-one of our eighty-four respondents. Only seventeen respondents do not belong to a paralegal association. I'm glad to see that they got the word about our survey and responded. And, as members of the associations, let's be sure all our co-workers and friends know about the survey and the CLE that is offered so they can also participate if they want to.

By and large, it appears that about 90% of the employers of the paralegals in Utah do not require national certification as a condition of employment. Even though employment may not hinge on national certification, I think it's a good direction to go and if you've taken the time and effort to get through a paralegal program, pursuing the national certification at graduation while your education is still fresh in your mind, would be worth considering. I recommend the NALA Certification, as I'm sure many of the members of both the Paralegal Division and the Utah Paralegal Association would also recommend checking it

J. ROBYN DOTTERER has worked in the legal field since 1988 and has been a certified paralegal since 1994. She works for Strong and Hanni in their Salt Lake City office as a litigation paralegal in the areas of insurance defense for bad faith, legal malpractice and personal injury.

out. Having a national certification will certainly set you apart from the crowd.

The level of education of the paralegals participating still shows that almost half of the respondents have a paralegal certificate, and almost 80% of those who responded to the question report that they obtained a certification from an ABA-approved program. The majority of employers do require a minimum education level to be hired as a paralegal and the majority of those who have that requirement do require a Paralegal Certificate from an ABA-approved program — the same as the previous survey so that appears to be an ongoing trend. An Associate's Degree in Paralegal Studies or a Bachelor's Degree are the next highest education requirements but at about half of the level as a Paralegal Certificate. The education level is a factor in setting the compensation level for about 60% of the respondents in both this and the prior survey.

Another interesting note is that, over time, we are transitioning from the designation of Certified Legal Assistant to Certified Paralegal for those of us who have taken the national certification exam from NALA.

The majority of paralegals do still work for private law firms, but in this survey the percentage of those in private law firms is smaller than the prior survey, and Government and Corporation employment opportunities have increased slightly.

Litigation defense is still the largest practice group with plaintiff litigation being the next largest practice area. Other categories that registered more than 10% participation were Real Estate, Family Law, Bankruptcy, and Wills/Estate Planning.

The majority of paralegals work with one to five paralegals in their place of employment which is similar to the prior survey. The next high groups are the organizations with six to ten paralegals, which tied with the organizations of over twenty paralegals. Most of us work in organizations with either one to ten attorneys or more than forty attorneys — actually split thirty-two/thirty-two in each group. The organization with eleven to twenty attorneys was third with nine paralegals, twenty-one to thirty attorneys had seven paralegals and the thirty to forty attorney organization had only four paralegals. I'm hoping that those groups have a lot of paralegals who did not have time to take the survey.

Microsoft seems to be the king of the software programs in our area, which is probably not surprising. Most of us use Microsoft Word, Microsoft Outlook, Microsoft Excel, and Powerpoint. Adobe Acrobat has also picked up a very large following. Many of us also use document database programs such as CaseMap, Concordance, Sanction, and Summation. I am also anticipating that we will start to see new notebook trial programs in the very near future being used as notebooks become more widely used by attorneys for trial presentation.

The amount of overtime worked by our paralegals stayed fairly close to the same percentage rates as our last survey. The majority of our paralegals work either no overtime or only one to five hours of overtime each month at about 35% for each group. Only about 15% of paralegals work six to ten hours of overtime, fewer work eleven to twenty hours of over time at 8% and even fewer work over twenty hours of overtime at 7%. Only a few paralegals work fewer than forty hours per week and most of us work forty hours per week or more which is where our overtime comes in.

In this survey it was quite close in how many of us bill our time to our clients, with the difference being only three fewer people do not bill clients as do bill clients at 51.8% who do and 48.2% who don't. This is a closer ratio than our last survey, when about 2/3 of the respondents billed their time and 1/3 did not, so more of us are billing our time.

Most of us who do billable time spent 75% of our time doing billable work for clients. And most of us (60% or more) spend less than 10% of our time on non-billable work for clients or

administrative work that is also non-billable. Those of us who do have supervisory responsibilities (twenty-three of eighty-one who responded) primarily supervise secretaries.

The number of employers that offer in-house training is a lower percentage in this survey — 46% versus 61% in the last survey. Of the employers that provide in-house training 42% provide six to ten hours per years and 36.2% provide one to five hours per year.

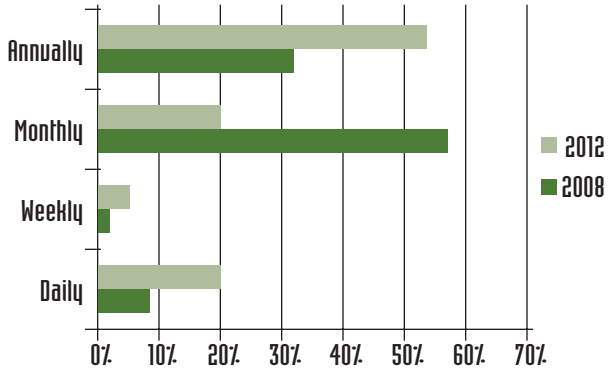
Employers of sixty-four respondents do pay for some outside CLE with 26% having a CLE budget for the year and 26% having no limit for local CLE events and 9% have no limit for CLE hours or events that will be paid for. This is a tremendous benefit for paralegals and is something that you should all be talking to your employers about if they do not provide this benefit for you. Most employers pay for the registration fees for CLE events but less than half pay for expenses for out-of-town CLEs.

The distribution of the types of tasks remained very similar to last year. Paralegals spend the greatest amount of time reviewing and analyzing documents, maintaining case calendars and files, maintaining document databases, drafting discovery responses, and drafting pleadings.

One of the most significant issues for paralegals is whether they have a billable hour requirement. In 2008, 48.9% of respondents did have a billable hour requirements and 51.1% did not – with ninety-four responses. In 2012, only 41.5% of the respondents had a billable requirement and 58.5% of respondents did not have a billable hour requirement.

The majority of respondents in the 2008 survey were measured on a monthly basis, but this survey had the majority being measured on an annual basis.

Billable Hour Requirement Measured



Interestingly, in the 2008 survey, the billable rates of the paralegals differed by the client or type of work being done fairly significantly. Only 41.5% said yes it did and 58.5% said no. In 2012, it was evenly split, 50/50.

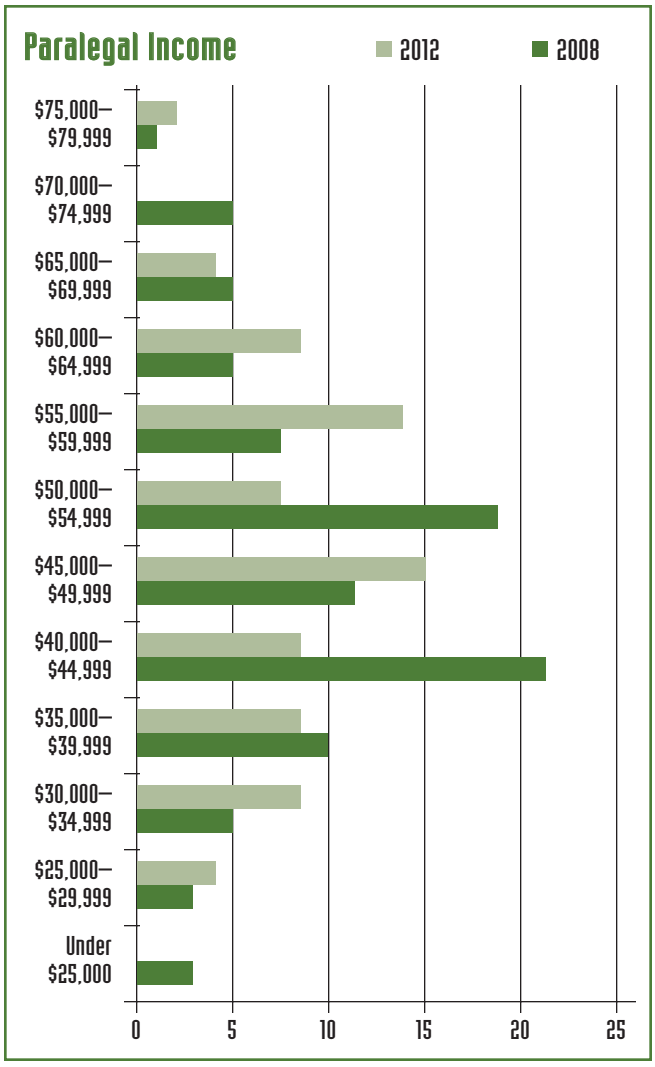
The average billable hours rate also change from 2008 to 2012, in a couple of ways. In 2008, fifty-three paralegals responded and forty-six skipped the question. In 2012, there were thirty-eight paralegals who responded and forty-six skipped the question.

Billable Hourly Rates

HOURLY RATE	RESPONSE %		RESPONSE COUNT	
	2008	2012	2008	2012
Under $25	7.9%	3.8 %	3	2
$25-$50	2.6%	1.9%	1	1
$50-$75	5.4%	5.7%	2	3
$75-$100	39.5%	34.0%	15	18
$100-$125	18.4%	41.5%	7	22
$125-$150	21.1%	13.2%	8	7
$150-$200	5.3%	0.0%	2	0
Over $200	0.0%	0.0%	0	0

The rate that paralegals charge for freelance work remained fairly consistent with only six paralegals responding to this question in 2012 and only nine responding in 2008. It would seem that freelance work is not something that is done by very many of the respondents. The majority of respondents billing under $25 per hour with five paralegals in 2008 and three in 2012. In 2008 one paralegal billed between $100 – $125 per hour and three paralegals billed at $125 – $150 per hour. In 2012, an additional category was added. There was one paralegal who bills at $75 – $100 per hour, one paralegal bills at $125 – $150 per hour, and this year we also had an additional category with one paralegal billing at $150 – $200.

The question most commonly asked of paralegals is what a paralegal can expect to make in Utah. This one is a little hard to answer. So much of it depends on the area of law and whether you work for a private firm, a corporate firm or a governmental agency. We had eighty-three responses in 2012 and ninety-five responses in 2008. In 2008, there were three paralegals who responded who made less than $25,000. We had no one respond to that category in this survey so perhaps minimal salaries have gone up. And on the high end, in 2008, there was one paralegal respondent who made more than $100,000. No one responded to that category this year so maybe the job is gone or the paralegal just did not have time to fill out the survey this year. Other than that one response in 2008, the highest category in both surveys is the amount between $75,000–$79,999. In 2008, there was one respondent and this year there were two.



In 2012, it was split pretty evenly between employers who paid a bonus at forty-two respondents and employers who do not at forty-one respondents. In 2008, there were also forty-two respondents who worked for employers with bonus structures and there were fifty-three respondents who did not.

The bonuses are based on billable hours for about 25% of the respondents and only about 4% are based on fees collected. The largest number of respondents identified a number of other reasons for the bonuses. The responses included a number of similarly-described reasons based on salary, efficiency, billable percentage, flat rates for all support personnel, cases settled, merit bonuses, company profits, years of service, and corporate incentive programs based on the company's yearly success.

In 2008 and 2012, the majority of the respondents did receive a bonus within the prior twelve months. The number was higher in 2008 with eighty-six respondents receiving a bonus and nine not receiving a bonus.

The numbers are not as good for 2012, with fifty-five respondents receiving a bonus and twenty-six respondents not receiving a bonus. Perhaps this is reflective of the bad economy. It is clear that the vast majority of paralegals only received a bonus of between 1–3%, which is not very much, and it is down from 2008.

The majority of paralegals are hourly with fifty-two responding as being hourly and thirty-one being salaried in 2012. In 2008, the spread was similar with sixty-four respondents being hourly and thirty-two being salaried.

The majority of paralegals are also paid overtime at time and a half, with forty-nine responding yes in 2012, and sixty responding yes in 2008. The next highest response category is comp time at approximately one third of the respondents receiving comp time instead of overtime.

Benefits are paid by the employers at differing levels, and though it does appear that the benefits are spread fairly evenly between the 2008 and 2012 respondents, the number of respondents differs. Most paralegals receive standard benefits of health insurance for themselves and their families, and dental insurance for themselves and their families, with a lessor number receiving vision insurance. Most respondents also receive free or reduced parking, a free or reduced transit pass, and only a few receive daycare. The majority also enjoy the benefits of a 401(k) plan, a lesser number receive a profit sharing plan, and still a lesser number receive some other pension/retirement plan. Other benefits for some respondents include life insurance, long and short term disability, maternity leave, cafeteria plan, and flex-spending plans.

The majority of vacation or paid time off is determined by the length of employment in both 2008 and 2012. Only about a third of the respondents did not have this requirement.

The majority of the respondents in both 2008 and 2012 are given six to ten paid holidays a year and close behind are the paralegals who received more than ten paid holidays. A few of the paralegals are only given one to five holidays a year and only one paralegal had no paid holidays in 2012.

It appears that things have not changed significantly since 2008. Salaries for the majority group have gone up within the respondents from the $50,000 to $54,999 range in 2008 to the $55,000 to $55,999 range in 2012. Though we cannot do a straight-across comparison because of the difference in the number of respondents, it does seem like we have improved in the marketplace.

The complete salary survey with all the responses will be posted on the website. We appreciate your participation and hope that this information is valuable for you to use in your salary negotiations with your employers and that the employers will find it valuable in establishing the benefit plans for their paralegals.

CLE Calendar

Seminar Location: Utah Law & Justice Center, unless otherwise indicated.

05/06, 05/08, and 05/10/2013 | 8:00 am – 12:30 pm each day — **11 hrs.**

Court Visitor Volunteer Program Training. Matheson Courthouse, 450 South State Street, Salt Lake City, 1st floor, Conference room B and C. To register please contact Court Visitor Program Coordinator, Karolina Abuzyarova at karolinaa@utcourts.gov or 801-578-3925. CLE is FREE for attorneys who commit to volunteer in the program for 1 year, 8–10 hours per month. For more information about the program and to apply online please visit www.utcourts.gov/visitor.

05/08/2013 | 8:00 am – 1:30 pm — **4 hrs. (includes 1 hr. Profes./Civility)**

Spring Corporate Counsel Seminar. Topics include: "Indemnification Clauses in Common Jurisdictions," "Entity Creation and Governance: Liability and Tax Issues," "Protecting Your Brand," and "Professionalism and Civility." $20 for current section members, $120 for others. Includes continental breakfast and lunch.

05/08/2013 | 8:15 am – 1:30 pm — **4 hrs.**

Business Law Annual Meeting. Grand American Hotel. Best Practices in Forming LLCs under the New Utah Revised Uniform Limited Liability Company Act. Presenters include: John Cunningham, nationally recognized presenter and author of "Drafting Limited Liability Company Operating Agreements." $60 for section members, $105 for all others.

05/09/2013 – 05/11/2013 — **9 hrs. (includes 1 hr. Ethics Profes./Civility)**

6th Annual Southern Utah Federal Law Symposium. Thursday, 6:00–8:30 pm at the Tuacahn Center for the Arts, Ivins, Utah – Reception with Judges and entertainment. Friday, 7:30 am–5:00 pm at the Mariott Courtyard, St. George. Saturday, Breakfast 7:30–8:30 am, Golf 8:30 am at the Coral Canyon Golf Course. Cost: TBA.

05/10/2013

Annual Family Law Section Seminar. 8:30 am – 5:00 pm at the University Guesthouse.

05/10/2013 – 05/11/2013 — **4 hrs. (includes 1 hr. Ethics)**

Annual Real Property Seminar & Golf. Eaglewood Golf Course, 8:00 am – noon, golf following. Special speaker: Sean Carter, Humorist at Law

05/15/2013 | 10:00 – 11:25 am — **1 hr. online self-study (Ethics/Profes.)**

Webcast: Ben Franklin on Ethics. In this engaging and informative program, Ben Franklin (portrayed by Christopher Lowell, internationally acclaimed actor, historian, and Franklin scholar) challenges today's lawyers to expand their own notion of ethics much as he, himself, did during his own life. Cost: $59 for Legal Aid Attorneys, $79 for Bar Members, $99 for others.

05/16 and 17/2013

Litigation Section Trial Academy. Agenda pending.

05/22/2013

Finding Purpose in Professionalism and Civility: Working with Intention and Drive in the Law. 8:30 am – noon. Panel of judges includes: U.S. District Court Judge David Nuffer, Third District Court Judge Randall Skanchy, and Holladay Justice Court Judge Augustus Chin with moderator Michelle M. Oldroyd. Sponsored by Law Related Education.

05/29/2013 | 10:00 am – 12:45 pm — **2.5 hrs. online self-study (Ethics/Profes.)**

Webcast: Thurgood Marshall's Coming! Using Marshall's own writings and reflections, the play explores racism and civil rights and provides an engaging tool to facilitate discussion about these issues, not only in the legal profession, but in society at large. Cost: $119 for Legal Aid Attorneys, $139 for Bar Members, $169 for others.

06/05/2013

Annual Criminal Law Section Seminar. Co-sponsored with the Rocky Mountain Innocence Center.

06/12/2013 | 10:00 am – 1:20 pm — **3 hrs. online self-study (Ethics/Profes.)**

Webcast: Impeach Justice Douglas! Anecdote, humor and painful remembrances are used to explore some of the most explosive issues of William O. Douglas' thirty-six year tenure on the U.S. Supreme Court. Cost: $139 for Legal Aid Attorneys, $159 for Bar Members, $189 for others.

06/19/2013

Beyond the Basics II: Utah Personal Injury Practice. Full day seminar. Agenda pending.

06/21/2013

Utah Ethics in Review. Get an in depth review of what's taking place in discipline, ethics, professionalism and civility. Billy Walker, Sr. Counsel, Utah State Bar Office of Professional Conduct; Herschel Bullen and Diane Akiyama, Asst. Counsel, Utah State Bar Office of Professional Conduct.

06/26/2013 | 10:00 am – 1:20 pm — **2.5 hrs. online self-study (Ethics/Profes.)**

Webcast Double Feature – Ben Franklin on Ethics & Lincoln on Professionalism: Featuring Christopher Lowell. Both programs are accompanied by a live moderated chat room. Cost: $109 for Legal Aid Attorneys, $139 for Bar Members, $169 for others.

06/27/2013 | 8:30 – 11:45 am & 1:45 – 4:30 pm — **3 hrs.**

Law Firm Management: How to Start a Successful Law Practice. Jinks Dabney has started three successful law practices in three different cities and has mentored more than 100 lawyers in creating their own law practices as well. $109 for new lawyers under 5 years; $129 for lawyers over 5 years, under 10 years; and $149 for lawyers 10 years and over.

Classified Ads

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

Classified Advertising Policy: It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For display advertising rates and information, please call (801) 910-0085.

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

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

POSITIONS AVAILABLE

Utah County's largest law firm, Fillmore Spencer LLC, seeks transactional associate: at least 3 years experience with medium or large U.S. law firm, substantial experience with corporate and LLC formation and governance matters, private placements, acquisitions, licensing and other commercial contracts. Contact William L. Fillmore at wfillmore@fslaw.com.

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Offices available: small upper floor office – $275 or daylight basement offices – $200 each (two basement offices avail). Rent includes utilities, telephone, use of copy machine, fax machine, breakroom (with fridge and microwave), meeting room, law library, wi-fi and separate mens and womens restrooms on each floor. For a nominal fee, receptionist is available. Great South Ogden location with ample parking, numerous years experience with other attorneys, located at 3856 Washington Blvd., Ogden. Contact Kelly Cardon at 801-627-1110 or 801-814-1112.

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Certificate of Compliance

UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077 / Fax (801) 531-0660

For July 1 _____ through June 30_____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____ Email: _____

_____

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

1. Active Status Lawyer – Lawyers on active status are required to complete, during each two year fiscal period (July 1–June 30), a minimum of 24 hours of Utah accredited CLE, which shall include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of the ethics or professional responsibility shall be in the area of professionalism and civility. Please visit www.utahmcle.org for a complete explanation of Rule 14-404.

2. New Lawyer CLE requirement – Lawyers newly admitted under the Bar's full exam need to complete the following requirements during their first reporting period:

- Complete the NLTP Program during their first year of admission to the Bar, unless NLTP exemption applies.
- Attend one New Lawyer Ethics program during their first year of admission to the Bar. This requirement can be waived if the lawyer resides out-of-state.
- Complete 12 hours of Utah accredited CLE.

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

EXPLANATION OF TYPE OF ACTIVITY

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

1. **Self-Study CLE:** No more than 12 hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit www.utahmcle.org for a complete explanation of Rule 14-413 (a), (b), (c) and (d).

2. **Live CLE Program:** There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at a Utah accredited CLE program. **A minimum of 12 hours must be obtained through attendance at live CLE programs during a reporting period.**

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

Rule 14-414 (a) – On or before July 31 of alternate years, each lawyer subject to MCLE requirements shall file a certificate of compliance with the Board, evidencing the lawyer's completion of accredited CLE courses or activities ending the preceding 30th day of June.

Rule 14-414 (b) – Each lawyer shall pay a filing fee in the amount of $15.00 at the time of filing the certificate of compliance. Any lawyer who fails to complete the MCLE requirement by the June 30 deadline shall be assessed a $100.00 late fee. Lawyers who fail to comply with the MCLE requirements and file within a reasonable time, as determined by the Board in its discretion, and who are subject to an administrative suspension pursuant to Rule 14-415, after the late fee has been assessed shall be assessed a $200.00 reinstatement fee, plus an additional $500.00 fee if the failure to comply is a repeat violation within the past five years.

Rule 14-414 (c) – Each lawyer shall maintain proof to substantiate the information provided on the certificate of compliance filed with the Board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders, or materials related to credit. The lawyer shall retain this proof for a period of four years from the end of the period for which the Certificate of Compliance is filed. Proof shall be submitted to the Board upon written request.

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

A copy of the Supreme Court Board of Continuing Education Rules and Regulation may be viewed at www.utahmcle.org.

Date: _____ Signature: _____

Make checks payable to: **Utah State Board of CLE** in the amount of ***$15*** or complete credit card information below. Returned checks will be subject to a $20 charge.

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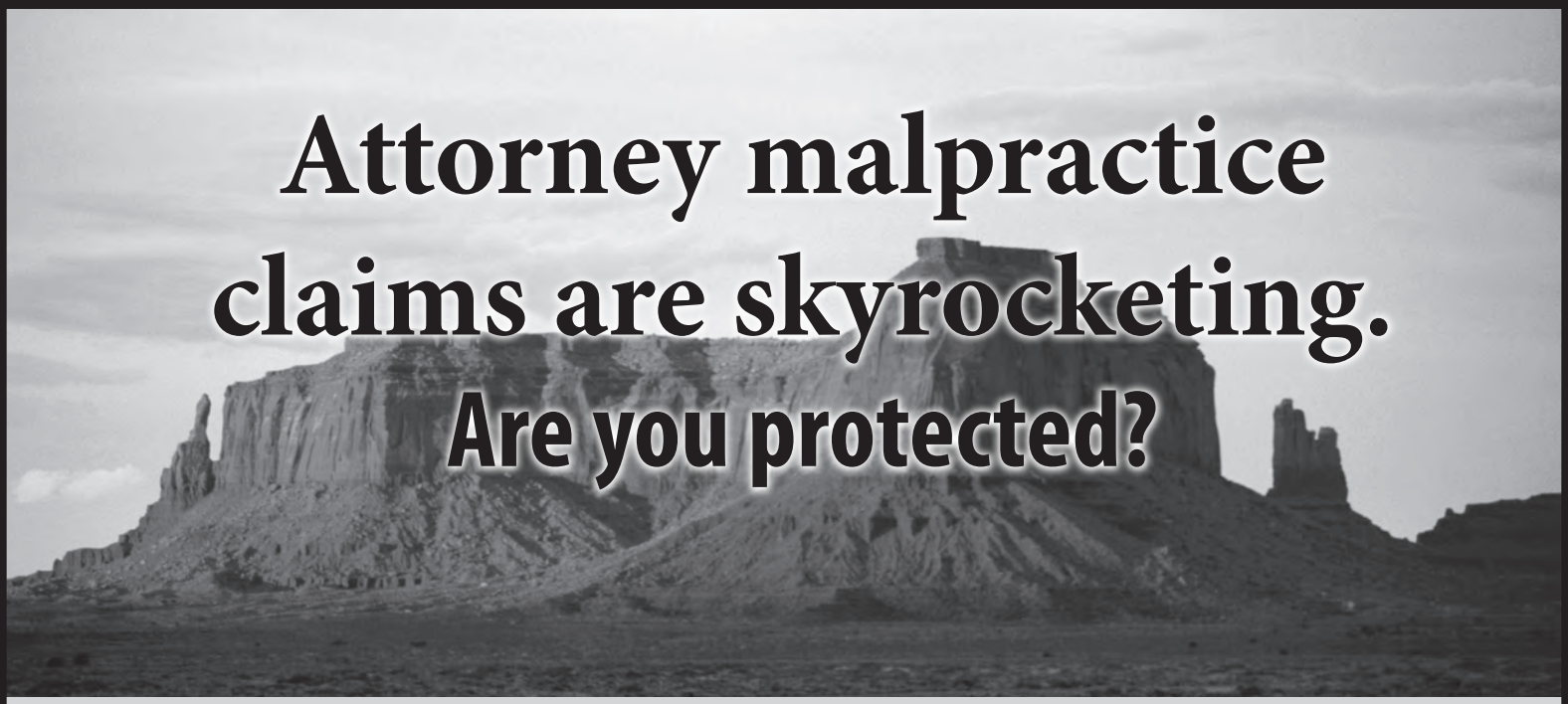
Card Type: ☐ AMX ☐ MC ☐ VISA

Account # _____ Expiration Date: (e.g. 01/07) _____

Name on Card: _____

Cardholder Signature _____

Please Note: Your credit card statement will reflect a charge from "BarAlliance"



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The number of legal malpractice claims has increased by more than 50% over the last several years, according to a 2012 report from the American Bar Association. What's more, the number of claims with more than $500,000 in total dollars paid increased by 100%.[1]

In this increasingly risky environment, **can your current professional liability coverage give you the *right* protection?**

The **Utah State Bar** endorses the **Malpractice Program from Marsh U.S. Consumer**, a service of Seabury & Smith, Inc., when it comes to protecting Utah State Bar members. The Lawyer Malpractice Program is underwritten by Liberty Insurance Underwriters Inc. (a member company of Liberty Mutual Insurance Group) and administered by Marsh U.S. Consumer, a service of Seabury & Smith, Inc. **Marsh draws on more than 40 years of experience** with lawyers' professional liability insurance.

Marsh U.S. Consumer's Lawyer Malpractice Program can help protect you against negligent acts, errors and omissions. Once you purchase insurance coverage, you have reduced your risk.

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[1] *"Profile of Legal Malpractice Claims: 2008–2011," American Bar Association, September 2012.*

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