Utah Bar® JOURNAL

Volume 26 No. 4
July/Aug 2013

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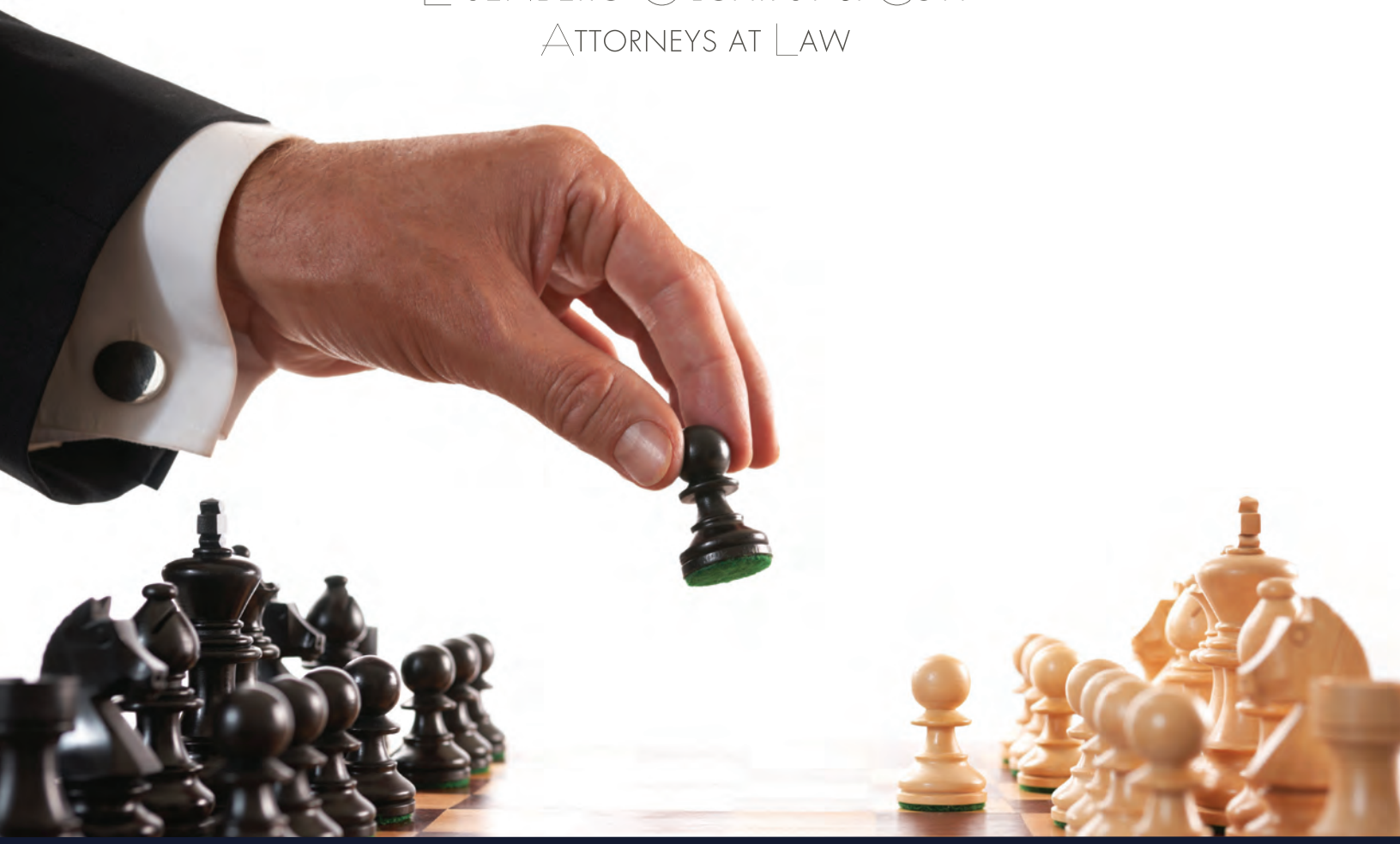

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Cover Art

Old Juniper near Sand Dune Arch, by first-time contributor, Kelly Walker of Salt Lake City.

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs (compact disk or print), along with a description of where the photographs were taken, to Utah Bar Journal, 645 South 200 East, Salt Lake City, Utah 84111, or by e-mail .jpg attachment to barjournal@utahbar.org. Only the highest quality resolution and clarity (in focus) will be acceptable for the cover. Photos must be a minimum of 300 dpi at the full 8.5" x 11" size, or in other words 2600 pixels wide by 3400 pixels tall. If non-digital photographs are sent, please include a pre-addressed, stamped envelope if you would like the photo returned, and write your name and address on the back of the photo.

The Utah Bar Journal

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Interested in writing an article for the Utah Bar Journal?

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

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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Letter to the Editor

Dear Editor:

On two earlier occasions a few years ago, your magazine listed a "Bruce L. Nelson" as the subject of discipline by the Utah State Bar. Because I share the same name as the disciplined attorney (who works in Utah County), there was a certain amount of embarrassment in seeing my name in print as being the subject of discipline by the bar.

To clarify the situation with my colleagues, I previously a) wrote a letter to the Editor of this magazine (which was published) explaining that I wasn't the individual under discipline, b) requested that a subsequent edition of the *Bar Journal* make a "Clarification" in the "Discipline Corner" of a future edition of the magazine (which was thankfully also done) and c) recommended that the *Bar Journal* make better identification in the Discipline Corner of which attorney is being disciplined in cases where more than one licensed attorney has the same name. (A former President of the Bar also previously had a similar unpleasant experience with this problem.) Unfortunately, the *Bar Journal* has not accommodated my latter suggestion above.

I now note that my namesake in Utah County has again been disciplined (suspended/placed on probation) – as listed in the May/June 2013 issue of this magazine.

Unfortunately, without proper identification in the Discipline Corner of which attorney with the same name is being disciplined, it leaves me with the need to again write a letter to the Editor confirming to my colleagues that I am not the same "Bruce Nelson" who is the subject of discipline and as noted in the last edition of this magazine.

I renew my suggestion that the Utah Bar more clearly designate or identify an attorney being disciplined in order to avoid embarrassment to similarly named attorneys.

Bruce J. Nelson
Nelson Christensen Hollingworth and Williams

Letter Submission Guidelines

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

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Looking Back – Look Forward

by Lori W. Nelson

This is my last President's Message. It has been a wonderful year and we have accomplished more than I thought we could, but I am pleased to turn the reins over to Curtis Jensen. He will be an amazing Bar President.

Like presidents before me, I want to thank the Bar Commission and acknowledge the untold hours of service they give to improve the operation of the Bar and the practice of law for all of us. The work of the Bar could not move forward without the time and effort donated by members of the Commission. You are fortunate to have such devoted commissioners working for the betterment of all. We also all owe a debt of gratitude to the various section leaders, committee leaders, and all the members who donate time and efforts to Bar matters. It has been such a privilege to get to know many of you and work with you in these joint endeavors.

It would be unforgiveable not to acknowledge and thank the great work performed by Bar staff. From John Baldwin, Executive Director, through each office to Edith DeCow at the front desk, the staff works very hard to accomplish the role of the Bar and the Commission's projects.

I want to thank my firm, Jones Waldo. It is such a privilege to go to work and be surrounded by exceptional lawyers who every day inspire me to be better. Their support has made it possible for me be Bar President this last year. I also want to thank all my mentors and friends. They are always there to listen, encourage and advise.

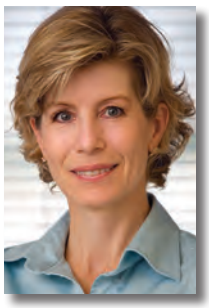
Most of all I want to thank my husband, Doug Haymore, and my family. They have stood behind me and picked up the slack, enabling me to devote the time I have needed to the Bar.

In looking back over the last year, the commission's efforts, led by Rob Rice, have resulted in getting the pro bono program firmly established in all but one judicial district. We are getting more and more referrals and becoming able to refer more cases to those of you who have volunteered. Let me take this opportunity to encourage you all, again, to "check yes" on your licensing form.

We got the Modest Means Lawyer Referral Program, headed by John Lund and Judge Su Chon, off the ground and are prepared to begin making matches for clients who meet the income qualifications and the attorneys who are willing to take a reduced rate case. One of the primary goals of this program is to match unemployed attorneys with clients that cannot afford the standard hourly rate. Because only 55.1% of all 2012 law school graduates were employed in full-time, long-term lawyer jobs, the Bar hopes this program will help attorneys begin their practices and establish a foothold. The program has also created panels of lawyers with more experience to serve as advisors to answer questions when a Modest Means attorney feels they need assistance.

The Modest Means Lawyer Referral Program will address the unmet needs of pro se parties who do not qualify for legal services or a pro bono attorney. Because we are able to deal with the unmet legal needs we will not have to look to other solutions in the same way as some of our sister states. Washington is presently in the process of creating a Limited License Legal Technician rule to deal with the unmet legal need of the underserved middle class. A similar rule in Utah would increase the size of our underemployed and unemployed attorneys. The Bar created the Modest Means Lawyer Referral Program to help our underemployed and unemployed lawyers obtain clients who would otherwise go without representation, addressing two problems faced by the Bar and society with one program.

The Bar continues to emphasize diversity. We have encouraged leadership in sections and committees to ensure there is diversity in their work. This includes promoting diversity in leadership and on CLE programs.



The emphasis this year has been on members and improving how the Bar does business

for the benefit of our members. We have repaired the heating, ventilation, and air conditioning system at the Law and Justice Center to make the building more usable for groups. We have changed the staff parking to have more available spaces for members when they use the building.

In focusing on our members, one of the Bar's principal projects has been to provide a higher quality of CLE for our members. One new option we are exploring is partnering with the courts to broadcast live CLE that originates in Salt Lake to courthouses outside the Wasatch front. This would get live CLE to attorneys that can't spare the time or don't want to drive all the way to Salt Lake for their CLE. We hope to perfect this program in the coming year.

Other things we have done this year to improve and streamline how we deliver benefits to our members include hiring a full-time communications director, Sean Toomey. This hire resulted from the survey responses that the Bar needed to do more to improve the perception of attorneys in the eyes of the public. Since Sean came on board in January, he has provided regular, consistent, timely information about the Bar's programs, services, events, and awards to the print and radio media. Because of his efforts, we have seen an increased positive presence of lawyers in the media. Sean's efforts included the Law Day insert, an improved set of Law Day activities, and a new radio campaign to increase awareness of the benefits a lawyer can bring to solving problems.

The new website was launched. It is hoped the new website will make it easier to make electronic payments, find information, and access member benefits. We are still interested in any comments you have regarding the website and have already made several changes based on your comments to make the site more useful to you.

One very fun and successful activity was Constitution Day, September 17, 2012. On that day, 174 judges, lawyers, and law students went into 193 classrooms in 15 counties to teach a constitution course to approximately 15,000 youth across the state. The bar believes this type of instruction is essential in ensuring our youth understand our form of government and have the information necessary to be active participants in our state and country.

In order to keep you informed about member benefits, we have started to highlight a member benefit each month. There are so many benefits available that are unknown to our members. I hope this monthly highlight will be a way to get the information out to you so you can take advantage of the benefits we currently have available. Robert Jeffs, past president, is making a careful review of all member benefits to see which we should keep, which we should eliminate, and what other benefits are out there that we can provide.

Several years ago we had a formal operations review. This year we began the process of a follow-up on that review. In addition to our public outreach, we will continue looking inward at our operations, services, and benefits (in light of the results of our member survey) to ensure the work we are doing benefits you. This endeavor will continue forward to improve the Bar and its functions to assist all of you.

You are very fortunate to have the leadership you have coming up. There is a strong, active commission whose members have devoted themselves to serving you. Curtis Jensen, incoming president, and Jim Gilson, incoming president-elect, are tremendous individuals. They have great concern for you and for how we can continue to make the Bar an efficient resource for every member.

Thank you for all your support this last year. It has been a tremendous honor to serve you in the capacity of Utah State Bar President. This job would not be possible without the countless hours of service given by members of the Bar Commission and the extremely skillful staff at the Bar offices. I thank them, and you, for allowing me the opportunity to see more closely the extremely high quality of attorneys we have in Utah. Thank you.

Fixing Our Third World Access to Justice Problem

by Keith A. Call

The World Justice Project recently completed its assessment of the extent to which ninety-seven world countries adhere to the rule of law. Its Rule of Law Index is an extensive quantitative study based on forty-eight "rule of law" indicators designed to focus on actual practice, not just theory. Over 97,000 people and 2,500 experts from around the world participated in the project. World Justice Project, *Rule of Law Index 2012–2013, available at* http://worldjusticeproject.org/rule-of-law-index.

In some areas, the United States scored very well. But in the category of "access to affordable civil justice" the U.S. scored very poorly. The United States was ranked sixty-seven out of ninety-seven countries, and fell behind countries such as China, Dominican Republic, El Salvador, Ghana, and Iran. *Id*. at pp. 174–75.

> *"[P]rovided you perform…within the scope of your statutory and ethical duties, you are immune from civil liability that could result from your service."*

One translation: If you are a poor or modest income person in need of legal remedies, you are better off in one of those other sixty-six countries than you are in the United States.

In a June 2010 speech, former Harvard Law Professor Lawrence Tribe stated, "The truth is that as a nation, we face nothing short of a justice crisis. It is a crisis both acute and chronic, affecting not only the poor but the middle class. The situation we face is unconscionable." Dan Froomkin, *Access to Justice in U.S. at Third-World Levels, Says Survey*, The Huffington Post, May 25, 2011, *available at* http://www.huffingtonpost.com/2010/10/14/access-to-justice-in-us-a_n_762355.html.

It is up to people like you and me to change this. What can you do to provide better access to justice for members of our society? Here are three specific ideas on how you can make a difference.

Be a Private Guardian *Ad Litem*

Every year, thousands of Utah children find themselves caught up in social and judicial systems they do not understand and cannot control. Such children are often caught in the middle of difficult family problems, including divorce, custody, and protective order proceedings.

Occasionally, a guardian *ad litem* is appointed to represent the interests of the child in domestic and other types of cases. Children in these dire situations are sometimes represented by the Utah Office of Guardian Ad Litem. However, because of recent changes in the law, the need for help from private attorneys has become critical. As of July 1, 2014 (assuming the recent legislative changes stick), the Office of Guardian Ad Litem will not represent *any* children in *any* district court cases.

It is estimated that 300 private attorneys in Utah are needed to fill this new gap. Children in need of an independent voice will be unrepresented unless *you* step up.

By registering to serve as a private guardian *ad litem*, you can be appointed to represent the interests of children in district

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. He is registered and approved as a private guardian ad litem.

court cases. The court can order the parents to pay fees for your services. You may also be asked to serve *pro bono* as needed. And, provided you perform in such capacity within the scope of your statutory and ethical duties, you are immune from civil liability that could result from your service.

Here's how to get started:
Log on to www.utcourts.gov/specproj/casa/pgal. You will find an application form and instructions on how you can help. You can also direct specific questions to Liz Knight at (801) 578-3800 or elizabethk@utcourts.gov. Guardian *ad litem* work can be well suited to litigators, even if you do not have experience in this area of law. Training is provided for all who participate.

Provide Modest Means Legal Assistance

There are many people in our community who make too much money to qualify for *pro bono* programs, but do not make nearly enough money to pay normal lawyer rates. This includes your friends and neighbors who are school teachers, nurses, first responders, and, well, even some lawyers. These people are not immune from legal problems, yet the courts are often inaccessible to them because of cost.

The notion that State Street is inaccessible to the man and woman on Main Street and Your Street is something we all need to own and change. The Utah Bar is doing that through the recently-launched Modest Means Program, but it will not work without your help.

Modest Means is a referral program that matches persons of "modest means" to lawyers who agree to provide legal assistance on a reduced fee basis. The reduced fees are usually in the range of $50–$75 per hour, depending on the client's income level. The range of legal problems and need for help is nearly limitless, but you can limit the types of cases you take based on your competency.

What a great opportunity to help real people with real problems.

Here's how to get started:
Log on to www.utahbar.org/volunteer/ and follow the links to learn more about the Modest Means Program. There is a simple registration process that is available online.

Get Involved in *Pro Bono* Work

Then there is good, old fashioned *pro bono* work for people in need. We all understand the "business of law" and the need to make money and provide for our families. But I suggest that if you are not currently handling at least one matter for the pure purpose of serving someone who needs your help, make time now to make a difference.

Pro bono cases are easy to get. They are now even easier to find with the help of the Utah Bar's Pro Bono Commission, newly formed in 2012. The Pro Bono Commission's goals are to recruit, train, retain, and reward attorneys for their *pro bono* efforts. More specifically, the Pro Bono Commission seeks to double the number of *pro bono* attorneys in 2013. Step up and be one of them.

Here's how to get started:
Log on to www.utahbar.org/volunteer/ and follow the links for the Pro Bono Commission. You can also contact the Access to Justice Department at (801) 297-7027 or email probono@utahbar.org.

Summaries of the Professionalism Counseling Board

The Professionalism Counseling Board is established pursuant to the Utah Supreme Court Standing Order No. 7. www.utcourts.gov/resources/rules/urap/supctso.htm#7. The Board is responsible for addressing complaints by lawyers, referrals from judges or Office of Professional Conduct counsel, and questions about professionalism from practicing lawyers. Complaints should be sent to Diane Abegglen, Appellate Court Administrator, Utah Supreme Court, P.O. Box 140210, Salt Lake City, UT 84114-0210; email address dianea@utcourts.gov.

Summary of a Matter Addressed by the Professionalism Counseling Board:

A lawyer in a family law matter representing one party (the "Complainant") asked the Board to review the conduct of the lawyer representing the other party (the "Subject Lawyer") that the Complainant allegedly violated Standard No. 1 of the Utah Standards of Professionalism and Civility ("[L]awyers shall treat all other counsel…in all proceedings in a courteous and dignified manner." Utah Standards of Professionalism and Civility 14-301(1)) and Standard No. 3 ("Lawyers shall not, without an adequate factual basis, attribute to other counsel… improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law." *Id.* 14-301(3)). In the complaint, the Subject Lawyer was alleged to have accused the Complainant of improper conduct without any basis and to have made personal attacks. The alleged conduct included, among other things, a written accusation that counsel intentionally left out key aspects of a court ruling when submitting a proposed order and a further accusation that counsel "seems intent on escalating the conflict." After reviewing the documents attached to the complaint, a panel of the Board met with the Subject Lawyer. The Subject Lawyer, while noting certain mitigating factors that she* thought should be taken into account, acknowledged that she may have overreacted to the situation, and that, while not intending the result, her conduct may have in fact contributed to the escalation of the conflict. The Subject Lawyer stated that she could see how her actions may have been counterproductive and that she would endeavor to better comply with the Standards in the future. The Board encouraged the Subject Lawyer to make every effort to comply with the Standards, not only because that is professionally the correct thing to do but also because it often leads to better results and lower fees for the clients.

*The actual gender of the person may or may not be correct. To avoid cumbersome language, the Board will refer to a person's gender in preparing these summaries, but this will be based on a random choice of which gender to assign to a particular person.

Summary of a Matter Addressed by the Professionalism Counseling Board:

A law firm sent to the Office of Professional Conduct of the Utah State Bar and to the Appellate Court Administrator what was labeled "Formal Complaint" against an attorney representing adverse parties in a civil case. The Appellate Court Administrator sent the Complaint to the Professionalism Counseling Board. The Complaint alleges violations of Standard No.1 of the Utah Standards of Professionalism and Civility which provides,

> Lawyers shall advance the legitimate interests of their clients, *without reflecting any ill-will that clients may have for their adversaries*, even if called upon to do so by another. Instead, lawyers *shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified matter.*

Id. 14-301(1) (emphasis added).

The Complaint also alleges violations of Standard No. 14 which provides in part, "Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights," *Id.* 14-301(14), and Standard No. 3 which states,

> Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. *Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries*. Neither written submissions nor oral presentations should disparage the *integrity, intelligence, morals, ethics, or personal behavior* of an adversary unless such matters are directly relevant under controlling substantive law.

Id. 14-301(3) (emphasis added).

Among other allegations, the Complaint asserted that the lawyer had characterized other counsel's approach to the dispute as "passive-aggressive, self-expectant, unprofessional, uncivil, and preemptively predatory." The accused lawyer did not accept the invitation of the Board to respond to the Complaint. The e-mails submitted show lack of professionalism and civility in communications to adverse counsel by the accused lawyer. The Board encouraged the lawyer to comply with the Standards which the Board suggested would make the lawyer more effective and a less expensive advocate.

Utah's New Asset Protection Trust Law

by Robert S. Tippett and Derek E. Brown

On March 28, 2013, Governor Herbert signed into law H.B. 222, Utah's new self-settled asset protection trust statute. The new law places Utah in the top tier of states that have enacted such laws (along with Alaska, Nevada, and Delaware) and arguably provides the greatest measure of asset protection and flexibility of any such law in the country. The new statute became effective May 14, 2013, and replaces Utah Code Section 25-6-14, the prior self-settled asset protection trust statute.

Under Utah's new law, a person can create and fund an irrevocable asset protection trust with his or her own property and can also be both a beneficiary and a co-trustee of the trust. As long as the requirements of the statute are satisfied, the settlor's future creditors will not be able to reach the trust assets, will not be able to force distributions from the trust, and will not be able to require the trustee to distribute directly to the creditor distributions that would otherwise be made to the settlor. The creditor must wait until the trust distribution is in the settlor's hands. Utah Code Ann. § 25-6-14(3).

> *"Over the years, some Utahans have gone next-door to Nevada to create their asset protection trusts. With this new law, Utah residents should create their asset protection trusts here in Utah...."*

The new law thus allows a person to create an irrevocable trust for the benefit of himself or herself and his or her family, fund it with a substantial portion of his or her assets, and shield the trust assets from future involuntary creditors. The settlor will be a beneficiary of the trust during his or her lifetime, and the trust can continue for the benefit of the settlor's children and grandchildren after his or her death.

In order for the trust to qualify as an asset protection trust, it must have at least one trustee who is a Utah resident or that is a Utah trust company. *Id.* § 25-6-14(5)(b). The settlor may serve as a co-trustee for purposes of managing and investing the trust assets, as long as he or she does not have the ability to participate in distribution decisions. *Id.* § 25-6-14(7)(a). The co-trustee (who would be responsible for making distribution decisions) can be a family member, a trusted friend or advisor, or a trust company.

There is no limit to how much property the settlor may contribute to the trust, nor is there any limit to the proportion of the settlor's net worth that he or she may contribute to the trust. Some settlors may set aside just enough for a nest egg or a safety net. Others may choose to contribute a substantial portion of their assets to the trust. But few settlors are likely to contribute most of their assets to a trust from which they will not be able to unilaterally withdraw funds. Moreover, as discussed below, transfers to the trust may not be so substantial that they render the settlor insolvent.

ROBERT S. (RUST) TIPPETT was the author of H.B. 222. Mr. Tippett is a partner at Bennett Tueller Johnson & Deere in Salt Lake City. He is also an Adjunct Professor at BYU Law School and the author of The Utah Law of Trusts & Estates, an online legal reference treatise.

DEREK E. BROWN was the sponsor of H.B 222. He is a member of the Utah House of Representatives, and teaches as an Adjunct Faculty Member at Brigham Young University.

There are no restrictions on what type of property may be contributed to the trust. The trust can hold marketable securities, closely-held business interests, and personal residences. The statute contemplates the transfer of a personal residence to the trust inasmuch as it permits the trust to authorize the settlor's use of real or personal property that is held in the trust. *Id.* § 25-6-14(7)(g). In addition, the statute provides that the settlor's use or occupancy of a residence held in the trust does not constitute a payment or delivery of trust assets to the settlor that could be reached by creditors. *Id.* § 25-6-14(2).

The asset protection benefits described above are thus available notwithstanding that the settlor can be both a co-trustee and a beneficiary of the trust.

An asset protection trust provides protection that no other Utah revocable or irrevocable trust can provide. Revocable trusts offer no protection from the settlor's creditors. Because a revocable trust is fully revocable and amendable by the settlor, it is treated as the settlor's *alter ego* for asset protection purposes. Utah Code Ann. § 75-7-505(1)(a) (LexisNexis Supp. 2012).

Nor do traditional irrevocable trusts of which the settlor is a beneficiary provide any meaningful protection from creditors. Under Utah law, a creditor of the settlor can reach the maximum amount that could be distributed to the settlor from a traditional self-settled irrevocable trust. *Id.* § 75-7-505(1)(b).

Prior to the enactment of H.B. 222, Utah's self-settled asset protection trust statute was generally thought to be unattractive, and very few trusts were created under it. There were two principal reasons for this. First, the statute required that any self-settled asset protection trust have a corporate trustee, and many settlors do not want to pay the fees charged by corporate trustees for a self-settled trust. Second, the statute described several types of creditors who would be able to access the trust property, notwithstanding the other protections offered by the statute. Not only did the presence of these "exception creditors" trim back the creditor protection provided by the statute, but they also increased the risk that the trust property would be included in the estate of the settlor for federal estate tax purposes at death under Internal Revenue Code Section 2036.

The new law corrects both of these perceived deficiencies. It neither requires that a self-settled asset protection trust have a corporate trustee, nor has any exception creditors.

Although child support creditors are not "exception creditors" *per se*, the statute does provide some assistance to child support creditors. At least thirty days before making a distribution to the settlor, the trustee must send notice of the proposed distribution to any child support creditor of the settlor. Utah Code Ann. § 25-6-14(5)(g). If the trustee fails to send this notice, the child support creditor can require the trustee to pay that distribution and future distributions directly to the creditor, but the creditor cannot attach the trust property nor can the creditor force distributions from the trust. *Id.* § 25-6-14(6)(b). In addition, at the time the settlor transfers assets to the trust, he or she may not be in default under any child support order, and he or she must sign an affidavit to that effect. *Id.* § 25-6-14(5)(m)(vi).

The trust can be (but does not need to be) a grantor trust for income tax purposes. If it is a grantor trust, income tax on income generated by the trust assets will be paid by the settlor – not by the trust or by beneficiaries who receive distributions.

Transfers to the trust can be designed as completed gifts to remove them from the settlor's estate for estate tax purposes, but they can also be designed not to be completed gifts, as the settlor prefers. However, practitioners should be cautious when attempting to implement completed gifts to an asset protection trust because the law in this area is continually evolving.

The statute expressly permits qualified personal residence trusts, charitable remainder trusts, and non-charitable unitrusts to qualify as asset protection trusts.

The trust does not protect any property that was transferred to the trust fraudulently. At the time the settlor transfers assets to the trust, he or she must sign an affidavit stating that the transfer does not render him or her insolvent and that the purpose of the transfer is not to hinder, delay, or defraud known creditors. *Id.* § 25-6-14(5)(m).

A creditor of the settlor who exists at the time the trust is created must bring an action to enforce his or her claim within the later of two years after the property is transferred to the trust or one year after the creditor could have reasonably discovered the transfer. Utah Code Ann. § 25-6-14(9). The settlor may shorten this limitations period to 120 days by sending notice to known creditors and publishing notice in a newspaper of general circulation in the county in which the settlor lives. *Id.*

It is this ability to shorten the limitations period that potentially makes the statute more attractive than similar statutes in other states. Several other states keep their exception creditors to a minimum and have two-year limitations periods. But Utah is unique in allowing the settlor to shorten the limitations period to only 120 days.

Over the years, some Utahns have gone next-door to Nevada to create their asset protection trusts. With this new law, Utah residents should create their asset protection trusts here in Utah for the following reasons: First, with a Utah trust, there is no need to find an out-of-state trustee. Second, with a Utah trust, there is no need to move assets to another state. Third, for a Utah resident, there is greater assurance that the asset protection benefits that are sought will be available through a Utah trust than would be the case with a trust created in another state. And fourth, in Utah the limitations period can be shortened to 120 days.

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The Importance of Judicial Evaluations

by Lori W. Nelson and John R. Lund

Judicial evaluations will be coming out soon. It is critical you complete each evaluation you receive. Some lawyers will only evaluate the judges whose performances they believe need criticizing. But that method diminishes the overall accuracy of the evaluation process. To be accurate and fair to the judges, the good reports also need to be submitted. Survey results reflecting how a broad spectrum of practitioners perceive members of the bench will produce the most reliable results. This is the only way to assure that good judges don't end up facing an election without the key recommendation for retention of the Judicial Performance Evaluation Commission ("JPEC").

JPEC was created by the Utah legislature in 2008. Although its function is to provide judicial evaluations for the public, it is not part of the Utah judiciary but rather an independent commission with both lawyer and layperson appointees by the Governor, the Legislature, and the Supreme Court. Since its creation, JPEC has replaced the Administrative Office of the Courts as the body which designs, administers, and reports the results of judicial evaluations by lawyers, court staff, and jurors. JPEC also operates a courtroom observer program and has recently been working on approaches for evaluating the judicial performance of appellate judges in their opinion writing. As JPEC has begun its work there have been some important changes in the method and manner of those evaluations. Since lawyers present the largest and perhaps best informed group to be doing evaluations of judges under JPEC's approach, we write to address some key aspects of that process.

Two things are important as you complete the evaluations: first, answer all questions for which you have personal knowledge. Hearsay is not useful and can be harmful. Second, add comments to your evaluation. The bench values the comments highly and reports that the comments are the most useful tool for improvement.

It is critical to understand how JPEC scores judges. By statute, a judge must receive "an average score of no less than 65% on each survey category." Utah Code Ann. § 78A-12-205(b)(1)(i) (LexisNexis 2012) (effective January 1, 2013). JPEC reports results in three separate statutory categories: Legal Ability, Judicial Temperament and Integrity, and Administrative Skills. For all the questions in each category, a scale of 1 to 5 is used with 1 being the lowest possible mark. This means that to reach the 65% level dictated by statute, and obtain the rebuttable presumption for a positive retention recommendation by the commission, a judge must receive an average score of 3.6 in each survey category. *Id.*

However, and this is critical, a score of 1 on the survey means: "Inadequate Performance" and a score of 5 means: "Outstanding Performance." One might presume that a score of 3 on the survey would be sufficient for retention. It is not! By giving a judge the middle score, you are contributing to the potential that that judge will not meet the 3.6 performance standard. The Bar does not desire to tell anyone how to vote their conscience. But it is important to note that if it is your core belief a judge should be retained, then the score should be a 4 or higher.

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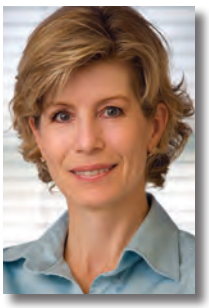

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There's more. Those of you who are quick with numbers may well say, "Wait a minute here. When I calculate 65% of 5, I get 3.2, not 3.6. Where did that additional .4 come from?" That may be especially true for the math-challenged attorneys among us. Because a picture is worth a thousand words, let's look at it pictorially. Yes, 65% of 5 is 3.2, but only when you assume that the scale starts at 0.

0%	20%	40%	60%	80%	100%
			65%		
0	1	2	3 3.2	4	5

The JPEC statute, however, mandates survey respondents score judges on a scale of 1 to 5. So for judicial evaluation purposes, the scale looks like this:

0%	25%	50%	75%	100%
			65%	
1	2	3	3.6 4	5

This means that a judge has to score closer to an average of 4 than to an average of 3 to avoid losing the presumption of retention.

If a judge does fail to achieve a score of 3.6 in one of the statutory categories, the Commission will then look at all the other available data. Each Commissioner will decide individually whether "substantial countervailing evidence" outweighs the presumption against retention. If the Commissioner believes that it does, then the Commissioner will vote to recommend retention. Conversely, a judge could also earn the retention presumption but have substantial countervailing evidence in the record that convinces a Commissioner to vote against retention. Overcoming a presumption, one way or the other, is a serious matter about which each Commissioner must carefully exercise judgment.

It is also vital you are as complete as possible in your answers, because JPEC members are afforded discretion to overcome a presumption either way depending on the additional evidence. Those filling out evaluations for the district court bench include district court staff, lawyers, and jurors. Those filling out evaluations for the juvenile court bench comprise of juvenile court staff, attorneys, and juvenile court professionals such as the Division of Child and Family Services and Juvenile Justice Services workers. Those filling out evaluations for appellate judges are attorneys and court staff. Attorneys have a larger exposure to more members of the bench, making their evaluations critical to the statistical accuracy of the final product.

Please consider this information carefully when you receive your evaluations this summer. We have a strong bench and we want to continue that tradition. Your careful consideration of your responses on the evaluations is a crucial piece of the analysis.

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.*

ASC Utah, Inc. v. Wolf Mountain Resorts, L.C., 2013 UT 24 (May 3, 2013)

After a seven-week trial in 2011, the jury awarded ASC Utah ("ASCU") $54,437,000 in damages against Wolf Mountain. The court ordered Wolf Mountain's real and personal property to be sold to satisfy the judgment. At the public sheriff's sale, ASCU purchased all of Wolf Mountain's claims in the litigation. When Wolf Mountain appealed from the judgment, ASCU argued the appeal was moot because the controversy was eliminated when it purchased Wolf Mountain's claims, including its appellate rights. The court found that the appeal was not moot because the term "claim" did not encompass Wolf Mountain's appellate rights; rather, it included only demands for affirmative relief. Nevertheless, the court affirmed the judgment on the merits.

Goggin v. Goggin, 2013 UT 16, 299 P.3d 1079 (March 15, 2013)

The trial court found that the husband was guilty of "reprehensible" and "contemptuous" conduct, including discovery abuses, and it sanctioned him with an award of attorney fees to the wife. The awarded fees exceeded the amount the wife claimed was actually caused by the bad conduct. The Utah Supreme Court identified the four bases for awards of fees as (1) contractual or statutory authorization (in this case, contempt); (2) sanctions under Utah Rule of Civil Procedure 37; (3) awards pursuant to the court's inherent equitable powers, usually where a party "acts in bad faith, vexatiously, wantonly, or for oppressive reasons," *id.* ¶ 34 (internal quotation marks omitted); and (4) sanctions under the court's inherent sanction powers, which are usually deployed against attorneys but may be deployed against a party to litigation. The amount of sanction cannot exceed the actual injury the misconduct caused the other party, and the court reversed the sanction award on that basis. Separately, the court held that the trial court abused its discretion by awarding wife the full value of assets dissipated by husband, holding that half of the dissipated assets belonged to husband, anyway. The court rejected the trial court's rationale that contempt sanctions could be used on an "equitable" basis to alter the marital property division. The court held that skewing the marital property division as a "sanction" violated the "actual loss or injury" requirement discussed above. Finally, the court held that husband was entitled to credit for premarital funds used to purchase the marital residence, even though in a separate case the residence itself had been found to be marital property.

Snow, Christensen & Martineau v. Lindberg, 2013 UT 15, 299 P.3d 1058 (March 12, 2013)

This is another in the string of cases spawned by the state's takeover and reformation of the United Effort Plan Trust (the

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"UEP Trust"). The law firm had represented the UEP Trust prior to the state's takeover and reformation. In this case, the fiduciary of the trust had sought discovery of attorney–client materials from the law firm, and to disqualify the law firm from representing claimants adverse to the UEP Trust. The issue was whether a trust was a legal entity capable of forming an attorney–client relationship, or simply a relationship between trustees and property, with the trustees being the real clients. The court relied upon Utah Rule of Evidence 504 to hold that the trust was "an entity not unlike a corporation," *id.* ¶ 32, and, thus, capable of forming an attorney–client relationship separate from its trustees. Although the court in previous cases had been constrained by its laches determination from deciding whether the reformation of the trust was consistent with the principles of *cy pres*, it held here that the reformation exceeded the bounds of *cy pres*. The court specifically held that "the district court's reformation of the trust by stripping it of its religious purpose so changed its purpose and identity that it is a different entity." *Id.* ¶ 43. Accordingly, the court held that the pre-reformation trust was not the same client as the reformed trust and reversed the trial court's disqualification order (which had been stayed since shortly after its issuance in 2008).

State v. Ginter, 2013 UT App 92 (April 18, 2013)

The state charged an individual with communication fraud and organizing a pyramid scheme. During jury deliberations, the jury said they were in a stalemate and asked the bailiff how long they had to "'sit and…do nothing.'" *Id.* ¶ 4 (omission in original). The bailiff communicated the sentiment to the district court judge. The judge asked the bailiff to deliver dinner order forms to the jury implicitly telling the jury the court did not intend to let the jury go. Two hours later, the jury was still in a stalemate. The judge called the jury to the courtroom and read a modified *Allen* instruction – an instruction to help deadlocked juries reach a unanimous verdict. Less than thirty minutes after the instruction, the jury reached a guilty verdict on both charges. The defendant appealed, arguing that the *Allen* instruction was coercive. On appeal, the court analyzed the instruction and found that it singled out the dissenting juror and asked her to reevaluate her opinion, while the majority jurors did not need to reconsider theirs. The court also found that the

amount of time from the *Allen* instruction to the guilty verdict indicated that the instruction contributed to an atmosphere of coerciveness. The Utah Court of Appeals held that the modified *Allen* instruction was coercive and deprived the individual of due process; therefore, it reversed and remanded the case to the district court.

Strohm v. ClearOne Communications, Inc., 2013 UT 21 (April 9, 2013)

A law firm brought an action against a company that refused to pay legal fees for defense of the company's former CFO against federal criminal charges relating to securities fraud. The court rejected the company's argument that the statutory standard of conduct governing indemnification of directors (good faith) also applied to officers. It held that the company had a statutory obligation to indemnify Ms. Strohm, who was an officer, because she had successfully defended the charges. The court rejected the company's argument that it had limited its obligation in its bylaws, holding that the statute authorizes such limitations only in the articles of incorporation, and limitations in the bylaws are not a proper substitute. The court also rejected a contract-based challenge to the award, and it offered a lengthy discussion of the process for analyzing the reasonableness of attorney fee awards.

Layton City v. Stevenson, 2013 UT App 67, 298 P.3d 1267 (March 14, 2013)

An individual was charged with patronizing a prostitute and entered into a plea in abeyance agreement that required him to commit no violations of law for eighteen months. About six months after the agreement, he was charged with sexual solicitation. Layton City filed a motion for an order to show cause, alleging violation of the plea in abeyance agreement. The defendant argued that he did not break the agreement because he was not convicted of the sexual solicitation charge, and therefore did not violate the law; the district court agreed. On appeal, the Utah Court of Appeals held that the plea in abeyance statute contemplates prosecution after a violation and does not require a conviction for conduct to rise to the level of a violation. The court reversed the district court's ruling and remanded the case.

***Discover Bank v. Kendall*,**
2013 UT App 87 (mem.) (April 11, 2013)

A bank sued to collect a debt but then failed to respond to the debtor's request for admission that the debt had already been paid within the twenty-eight days required by Utah Rule of Civil Procedure 36(a). The bank later submitted evidence showing the debt had not been paid, but it did not address its failure to respond to the request for admission. Both parties moved for summary judgment, which the district court granted in favor of the bank. On appeal, the court reversed, and instructed the district court to grant the debtor's motion for summary judgment based on the bank's admission, through its failure to respond within the required twenty-eight days, that the debt had been paid.

***Kemp v. Wells Fargo Bank*,**
2013 UT App 88 (mem.) (April 11, 2013).

A party's failure to respond to an argument challenging his standing proved fatal to his appeal. A homeowner sought a declaratory judgment that a bank had no right to collect payments on or foreclose his mortgage. The trial court dismissed the complaint on multiple grounds, including lack of standing. On appeal, the bank continued to argue that the homeowner lacked standing because the mortgage was not in default and the bank had not attempted to foreclose. The homeowner ignored the challenge to his standing in his reply briefing, stating merely that it was "irrelevant." The court found the homeowner failed to carry his burden to establish standing and dismissed the appeal.

***Western Energy Alliance v. Salazar*,**
709 F.3d 1040 (10th Cir. March 12, 2013)

Appellants ("Energy Companies") brought suit against the Secretary of the Interior for failing to issue lease parcels under the Mineral Leasing Act within sixty days of payment to the Bureau of Land Management ("BLM"). The district court held the BLM was not required to issue such leases within sixty days of payment but was required to determine *whether* it would issue such leases within that time and remanded to the BLM to make that decision. Energy Companies appealed. The Tenth Circuit held that the decision of the district court was not a final order under 28 U.S.C. § 1291, and that the court lacked jurisdiction under the administrative remand rule. The court

began by noting that it is well-settled that "remand by a district court to an administrative agency for further proceedings is ordinarily not appealable because it is not a final decision." *Id.* at 1047 (citation and internal quotation marks omitted). It explained that whether a district court decision is final is based on "the nature of the agency action as well as the nature of the district court's order." *Id.* (citation and internal quotation marks omitted). The court noted that while administrative action "may be essentially adjudicatory, essentially legislative, or some nonadversarial action such as grant of a license," the remand rule was most appropriate for adjudications. *Id.* (citation and internal quotation marks omitted). As applied, the court reasoned the BLM's issuance of leases was adjudicatory because it made a determination as to the Energy Companies' lease application and required the BLM to take action on the application. Accordingly, the administrative remand rule applied.

Penunuri v. Sundance Partners, Ltd., 2013 UT 22 (April 9, 2013)

Ms. Penunuri was injured while horseback riding with a guided group through the Sundance Resort. Before the ride, she signed a waiver releasing Sundance from liability for ordinary negligence. She sued Sundance for negligence and gross negligence. Thereafter, Ms. Penunuri filed a motion for partial summary judgment, alleging the waiver was unenforceable under the Equine Act. The district court denied her motion and dismissed her ordinary negligence claim. The Utah Court of Appeals affirmed, concluding that the waiver did not violate public policy under the Equine Act. The Utah Supreme Court granted her petition for writ of certiorari to consider whether the Equine Act permits releases of liability for ordinary negligence. The Equine Act shields equine activity sponsors from "inherent risks" associated with equine activities, which includes "the propensity of the animal to behave in ways that may result in injury." *Id.* ¶ 9 (internal quotation marks omitted). However, the supreme court noted that the Equine Act retains sponsor liability for injuries that are caused in part by a sponsor's own negligence, such as if the sponsor failed to make a reasonable effort to determine if the horse would act as a typical horse would during a horseback excursion. This retention of liability in the Equine Act, the supreme court concluded, was not tantamount to an invalidation of pre-injury releases. The court further determined that the waiver did not violate public policy: Unlike the Skiing Act discussed in the court's prior decision in *Rothstein v. Snowbird Corp.*, 2007 UT 96, 175 P.3d 560, the Equine Act does not express a public policy in its text. The supreme court declined to infer the purpose Ms. Penunuri advanced, that the Equine Act's purpose is to allow equine sponsors to purchase insurance at affordable rates. The supreme court affirmed the decision of the court of appeals.

Taylorsville City v. Taylorsville City Employee Appeal Board, 2013 UT App 69, 298 P.3d 1270 (March 14, 2013)

Taylorsville City (the "City") appealed the decision of the Taylorsville City Employee Appeal Board (the "Board") reversing the City's termination of a City police officer. In reviewing the City's decision, the Board reasoned that because the City failed to establish a standard of review for the Board's decisions, it could set its own standard of review based on what it believed was most appropriate. The court determined this was error. First, relying on case law dealing with civil service commissions, the court determined that the Board was required to affirm the City's sanction if it was "(1) appropriate to the offense and (2) consistent with previous sanctions imposed by the department." *Id.* ¶ 28 (citation and internal quotation marks omitted). Then, the court reasoned that where a city does not enact an ordinance adopting a standard of review for determining whether a particular sanction is warranted, the standard of review "is substantial evidence with respect to findings of fact and abuse of discretion with respect to the discipline selected." *Id.* ¶ 29. As applied, the court determined the Board exceeded its discretion by failing to defer to the Police Chief's advantaged position to evaluate discipline and in failing to consider the proper factors in determining the appropriateness of a sanction.

State v. Rasabout, 2013 UT App 71, 299 P.3d 625 (March 21, 2013)

Two minors were charged with discharging twelve bullets from a firearm while driving a vehicle. The trial court merged the charges into one charge. The Utah Court of Appeals determined whether the district court properly merged the charges. The district court had reasoned that the double jeopardy clause of the United States Constitution protects a defendant from multiple punishments related to a single offense. The determinative issue was whether the twelve discharges were discreet units of prosecution. Looking at the firearm discharge statute, the appellate court analyzed the plain context of the word discharge and found it means to fire a weapon. The plain meaning of the statute was that each act of firing a gun constitutes an individual unit of prosecution. Therefore, the trial court erred by merging the twelve counts into one.

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Efficient Use of Arbitration: Drafting of Arbitration Clauses

by Ralph A. Cantafio

The Use of Arbitration

State and Federal Courts use Alternative Dispute Resolution ("ADR") as a means to steer cases away from traditional litigation and towards other forms of controversy resolution, most commonly mediation and arbitration. Federal Courts resort to the use of ADR when they are not otherwise limited by other legal authority, such as a statute or the Code of Federal Regulations. State and Federal Local Rules strongly embrace the use of these nontraditional processes of resolution in an effort to conclude civil disputes. Courts recognize that early-on settlement efforts prior to incurring significant costs of litigation not only reduce caseloads on the courts but tend to increase the likelihood of settlement.

> *"A failure to define with specificity the issues that are subject to arbitration can easily result in the type of litigation that arbitration is specifically designed to avoid."*

Criticism of Alternative Dispute Resolution

ADR is typically a result of court order, contractual agreement by the parties, or other consensual participation. One of the significant perceived advantages of ADR, especially arbitration, is the reduction of costs incurred for attorney fees as well as the claim that justice can be secured more quickly. Yet, these goals are often frustrated. Virtually every attorney who focuses upon litigation in their practice is able to describe first-hand instances where participating in arbitration accomplished none of its perceived advantages of reduction of cost or delays but made such worse.

Often little can be done to amend arbitration terms and conditions when the arbitration is court ordered. Yet, to the extent arbitration is a consequence of either an arbitration agreement or, more typically, an arbitration clause in a contract, thoughtful drafting can significantly improve the arbitration process. This paper is an attempt to assist those drafting arbitration agreements and arbitration clauses in achieving the benefits of arbitration while minimizing potential frustration.

The Scope of Alternative Dispute Resolution

Where arbitration is the result of contract, parties will almost universally be required to participate in arbitration. Arbitration clauses are broadly interpreted mandating arbitration. Courts routinely grant stays where parties attempt to pursue traditional litigation despite an arbitration clause mandating arbitration. A significant exception where a contractual obligation to arbitrate is avoided involves core bankruptcy proceedings. Here, there exists a line of cases recognizing the primacy of the Bankruptcy Code above and beyond the traditional ability of parties to freely negotiate their terms and conditions of a contract. Otherwise, the preference of courts to require arbitration can result in even third party beneficiaries to a contract being required to arbitrate. Where it is found that parties either sought or

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received direct benefit from a contract and even acknowledging that the third party did not execute the contract containing the arbitration clause, arbitration often results. Only where an underlying contract containing an arbitration clause is found to be unconscionable do courts regularly refuse to enforce these arbitration clauses.

Suggestions as to Drafting Arbitration Clauses and Contracts

Of course, this begs the question as to how one should draft an arbitration clause or what terms should be placed in an arbitration agreement so as to reduce attorney fees and costs attendant to arbitration while moving a case more quickly forward through arbitration. I make the following suggestions:

Copy and Paste

Regrettably, lawyers often spend very little time thinking through the arbitration language used in their contracts. It is very common for attorneys to "copy and paste" grafting arbitration language used in other contracts by simply inserting that verbiage into another contract. This is unfortunate. While an arbitration clause may be perfectly suitable in one context it might be unworkable in a different one. It is disheartening to see an arbitration clause obviously designed for a domestic relations case placed in a master service agreement for an oil and gas project. Potential arbitration terms that could be better crafted are not considered when drafting possibilities are squandered by this mindless copy and paste process. The most basic rule of drafting arbitration clauses is do not just copy and paste.

Specificity

It is important to identify as precisely as possible what issues are going to be subject to arbitration. Where an arbitration clause does exist in a contract, it tends to be broadly interpreted not only in the favor of requiring arbitration, but typically also to include virtually all issues that might be subject to that contract. Generally speaking, courts tend to interpret arbitration clauses liberally for reasons including that arbitration creates less work for the courts. As such, if the drafter wants to exclude certain subjects from arbitration these subjects need to be clearly and unambiguously excepted in the arbitration clause. A failure to define with specificity the issues that are subject to arbitration can easily result in the type of litigation that arbitration is specifically designed to avoid. There is nothing more frustrating in the arbitration process than to appear in court just to have a court determine what is or is not subject to arbitration. This problem creates the type of increased expense and delay that undermine the arbitration process as conceived. The practice point emphasized here is to make sure to be specific pertaining to subject matters subject to and excluded from an arbitration clause.

Arbitration Rules

It also makes sense to communicate what rules should govern the arbitration. It is very common for generic arbitration provisions to state the arbitration will be conducted but not to identify the rules to be utilized. And to merely state that the parties to a contract will be utilizing the rules of the American Arbitration Association does not provide adequate direction. Be aware that there are several different types of rules available through the American Arbitration Association. There is nothing wrong with reviewing the various types of rules that are available through the American Arbitration Association to become familiar with these and decide whether or not these might be used. Also, recall that a commercial contract may be

subject to implied terms and conditions so that certain industry standards are incorporated. Be certain the rules of arbitration selected conform with both substantive and procedural law. This can also be a complication as to international contracts. Be mindful of the rules selected to avoid delay and cost. No one enjoys having to have a court intervene to select the rules under which the arbitration will be conducted.

Arbitrator Selection Process

It is very important to think through precisely how many arbitrators you would like: a single arbitrator or a panel. It is important to acknowledge there is nothing magic about having attorneys act as arbitrators. There is nothing wrong with thinking ahead as to the expertise that might be appropriate as to one who acts as an arbiter. For instance, one complication involving oil and gas industry related arbitration is that trial judges and jurors often have little understanding or appreciation of the terms, customs, processes, or anything else involving the oil and gas industry. Accordingly, if a contract involves the oil and gas industry, it might be appropriate to identify the skill set of the individual that would best be able to understand the underlying facts to come to a just result (a petroleum engineer, geologist, or title analyst, etc.). Also, if there is a single arbitrator, how is that individual going to be selected? If a panel is going to be used, how will the panel be selected? Think through these issues as well.

Multiparty Contracts

Issues pertaining to the treatment of nonparties to a contract that may be impacted by the same contract merit consideration at the drafting phase. It can become very expensive to determine who is subject to arbitration when there are parties and nonparties benefiting from or relying upon a contract. A common complication involves the circumstance where a contract is not bilateral such that there are more than two parties to a contract. It is not unusual to read a contract with arbitration clauses that were clearly drafted envisioning only a two party contract when the contract ultimately has three or more signators. These multiparty contracts need to more thoughtfully address the process of asserting and defending claims by multiple parties. Once again, the goal is to avoid having to appear before a court to establish that which could have been clarified by a well thought through arbitration clause.

Remedies

It is also important to consider the remedies that are available through arbitration. Arbitration clauses often focus upon financial damages without much thought about equitable relief or other types of nonfinancial awards, not to mention interest and costs. Significant expense and delay can occur when proceedings are bifurcated because it is a court that entertains issues involving Temporary Restraining Orders or Preliminary Injunctions while the remainder of a case is arbitrated. This type of hybrid litigation is extremely costly and produces significant delays. It can almost always be avoided through drafting.

Binding Arbitration

If it is the parties' intent for arbitration to be final, binding, and non-appealable, they should state so in the arbitration clause. As a practical matter, the setting aside of an arbitration award is very rare. Some of the grounds for vacating an arbitration award include an award that is the result of corruption, fraud, or the implementation of undue means; where the rights of a party are prejudiced by the significant impartiality of an arbitrator who fails to act as a neutral, acts in a corrupt fashion, or engages in misconduct or willful misbehavior; or where an arbiter has exceeded his or her power. Thus, the successful vacation of an arbitration award is rare. Nonetheless, if it is the intent of the parties to engage in binding arbitration, it merits a clear and concise statement of the objective. On the other hand, if the parties believe arbitration should not be binding, this should be stated as should the post-arbitration procedural steps. Be aware, courts tend to treat arbitration awards as binding even in cases where this term is not stated in the contract. It is important to be clear and unambiguous in drafting to avoid post-arbitration litigation that could otherwise be easily avoided.

Discovery

One of the most confounding issues involving arbitration is the cross-currents of the expense and cost in the discovery process. The conundrum is always how does an attorney meaningfully prepare for a case if there is no discovery. Remember, at the time of drafting an arbitration clause or contract, it is often not clear as to which party will have what information pertaining to the disputed topics or claims. Disallowing discovery results in the possibility of "trial by ambush." Depending upon the issues and who possesses what information, a lack of discovery could

be either good or bad. The point being made here is to attempt to think through discovery issues at the drafting stage of an arbitration clause. There is nothing wrong with limiting the number of depositions, the amount of time allotted per deposition, the number of interrogatories, the number of requests for production of documents, and the like in an arbitration clause. While these limitations may not be perfect, their inclusions tend to be a better alternative than appearing before a court to have a judge detail how discovery will or will not be pursued in your case.

Choice of Law Provision

While contracts often contain a choice of law provision, many contracts are silent on the issue. Parties are encouraged to think through this choice of law question at the time of drafting. Remember to at least look at the law of arbitration in the selected state at the time of drafting. In federal court, be acquainted with the Federal Arbitration Act. Above and beyond the choice of law issue, it also makes sense to designate where arbitration will occur. This is particularly so where there are multiple parties, several of whom have principal offices located in different states. One does not want to appear in a court simply to argue about the location of an arbitration.

Inconsistent Arbitration Clauses

Commercial contracts are often not stand alone propositions. When negotiating complex projects, or even projects that are not very complex, there are frequently numerous contracts, primary and ancillary, that define the totality of the transaction. It is not uncommon that a dispute will involve the alignment or reconciliation of various contracts. Where these differing contracts themselves have different forms of arbitration clauses, this can create significant complication in moving forward with arbitration. It is rare that a court would conclude that inconsistent arbitration clauses will negate the obligation to arbitrate. Nonetheless, one wants to be able to move forward with an arbitration that is consistent with the goals of decreasing attorney fees and reducing delay. When multiple contracts are

part of a project, efforts need to be made in the arbitration clauses to align these terms and conditions from the very beginning.

Arbitration Process

It is important to think through timelines and the process of arbitration. For instance, how much time will be allowed to select the arbitrators? It is also important to think through issues such as the amount of time to be allotted between the selection of the arbitrators and conducting the arbitration itself. It is necessary to think through how much time should elapse between the conclusion of the arbitration hearing and the publication of an award. The parties should also consider issues such as if there is a panel, whether the panel must rule unanimously or by majority. There exist issues pertaining to the content of the award. Do the parties want a formal award as would be issued by a judge with alignment of fact and law? Or, should an award simply state the amount of damages or some other form of relief without any benefit of analysis? The parties should also think through the mechanics of enforcing an award, including reducing the award to a judgment. I could go on and on. The point, however, is to think through the arbitration process and its timelines. Ultimately, the arbitration process should be designed to advance under circumstances where there is adequate time to consider and organize but not so much time that cases are allowed to languish.

"Unfortunately, many lawyers do not spend the time to draft a meaningful arbitration clause or contract. By resorting to the process of "copy and paste," the arbitration process is often built upon the weakest of foundations."

Attorney Fee and Costs Language

Lastly, it is very common for an arbitration clause to include awards of attorney fees and costs. Yet, it is not uncommon that this will include language such as "the prevailing party shall be entitled to their reasonable attorney fees and costs incurred in the arbitration process." Unfortunately, this type of language neither defines who is a prevailing party, except in only the most obvious of cases, nor does it define the relief a party is entitled to as a "prevailing party." Does an attorney fees award include a pre-arbitration award, a post-arbitration award, etc.? It does little to define whether or not attorney fees and costs will be addressed at the initial arbitration hearing itself or whether this issue will be bifurcated. Is the relief awarded a damage or a cost? The prevailing party language does address circumstances where there are various claims and defenses and certain parties prevail on some claims or defense and not others. Nevertheless, it is also important to be mindful of multiple party cases especially where there are claims or defenses asserted against some parties, but not others. The point here is not to go through all the various complexities that can occur pertaining to the dynamics of an award of attorney fees and costs. Rather, the focus is to emphasize that terms and conditions need to be thoroughly considered in the underlying contract. Otherwise, these issues might have to be determined by the court.

Conclusion

The drafting of an arbitration clause can be time consuming. Arbitration is sometimes, however, the recipient of a "black eye" as counsel and parties complain, sometimes rightfully, that the arbitration process neither saved attorney fees or costs, nor produced any better sort of justice or reduced delay. We see in this paper why that might be the case.

The axiom of "an ounce of prevention is worth a pound of cure" is applicable when it comes to arbitration clauses and contracts. The quality of arbitration is often dictated by the language used in the contract. Poorly drafted arbitration clauses and contracts complicate the parties' ability to resolve issues. This is unfortunate because most issues can be, if not eliminated, at least significantly narrowed by proper drafting. Unfortunately, many lawyers do not spend the time to draft a meaningful arbitration clause or contract. By resorting to the process of "copy and paste," the arbitration process is often built upon the weakest of foundations. Frequently when the primary objectives of the arbitration process are not realized this failure is not really the fault of the arbitration process but of lax drafting.

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Respectfully, Judge, We Disagree

by James C. Bradshaw and Ann Marie Taliaferro

In the May/June issue of the *Utah Bar Journal*, the Honorable Judge Paul C. Farr authored an article in the "Views from the Bench" section entitled, "Motions to Suppress: Understanding Burdens" wherein advice was offered to defense attorneys in both filing and arguing motions to suppress in criminal cases. Judge Paul C. Farr, *Motions to Supress: Understanding Burdens,* 3 Utah Bar Journal 12 (2013). Judge Farr's observations are well reasoned and shared by many other courts. He is to be commended for voicing his position on these issues. However, there is another perspective that we believe must be presented.

A Search for Truth?

A foundational goal of the legal system is the search for truth. Criminal defense attorneys use motions to suppress in order to advance that very search for truth – particularly, the truth of what actually occurred during a defendant's encounter with a law enforcement officer. Practicing defense attorneys understand all too well, however, that regardless of who is really more credible, factfinders tend to accept the testimony of a deputized law enforcement officer over that of a criminal defendant. This simple fact of life in the criminal defense world is the precise reason why prevailing on suppression motions is so difficult. It is also why, rather than trying to prove that the law enforcement officer is a "liar," the much more successful approach is to get the officer to endorse, through an evidentiary hearing, the facts needed to legally prevail. That is very difficult to do when, as Judge Farr's article suggests, a defendant's motion to suppress filed *before an evidentiary hearing* must include a roadmap of everything the officer needs to say or avoid in order to defeat the motion. By way of analogy, if this approach were applied to civil litigation, a court would be empowered to summarily deny a motion for summary judgment unless the movant fully briefed and set forth all controlling facts and legal issues *and disclosed all of the anticipated supporting facts* to a deponent *before* essential deposition testimony is actually taken.

> *"[B]eing required to script all factual and legal issues in advance of a hearing will only serve to skew the testimony."*

Taking evidence in any forum should be a search for truth. It seems clear, however, that being required to script all factual and legal issues in advance of a hearing will only serve to skew the testimony. This is precisely why telegraphing what facts are either needed or must be avoided makes it all the more difficult for the truth to get out.

Police Officers Always Truthful?

Make no mistake, there are many honest police officers who believe wholeheartedly that telling the truth is the essence of their job. There are, unfortunately, an increasing number of law

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enforcement officers who are more than willing to sacrifice the truth as the cost of doing business. For them, the end justifies the means. Fibbing, molding, or "remembering" facts to ensure that a criminal does not "get off on a technicality" is increasingly viewed as a necessity in the righteous war against crime and drugs. For a number of reasons, a trend has developed in courtrooms where, for many officers, the perceived nobility of the cause justifies abandoning the need for truth, the real bedrock of our process.

This trend seemingly coincides with changes in law enforcement practices. In 1994, the so-called "pretext doctrine" was judicially abandoned as unwieldy. Once enjoying near-uniform acceptance, the "pretext doctrine" addressed a common practice whereby law enforcement officers stopped motorists under the pretext of a minor traffic or equipment violation as a means to search for some other greater purpose. These stops were said to be "pretextual" because, usually, a traffic stop would not really be made for such reasons and the officer's motivation was not truly to enforce traffic laws but to fish for other more serious conduct. The pretext doctrine, then, called for the suppression of evidence found during a stop that was "not made because of the traffic violation but rather due to an unconstitutional motivation" – the "unconstitutional motivation" being the officer's desire to search for evidence of more serious crime. *State v. Lopez*, 873 P.2d 1127, 1134 (Utah 1994) (internal quotation marks omitted).[1]

In 1994, the pretext doctrine was abandoned and the simplified law became that, despite ulterior motives, police officers could permissibly stop a motorist based upon reasonable, articulable suspicion that one of any number of traffic or equipment laws was being violated. While this change allowed for brighter lines in the courtroom, it greatly expanded the ability of law enforcement to profile and then pull someone over to investigate. The only justification needed is an officer's claim that he had reason to believe the subject violated a traffic law, i.e., "Well, *it looked like* your registration tag was out of date" even though, as it turns out, the registration was fine.

This paradigm shift spawned notable changes in law enforcement practices. Under the current state of policing, most roadside-stop cases are generated by officers who are part of a so-called "task force" team. In this new order, profiling has largely replaced

patrol and investigation on the roadway. There are DUI task force members that spend every shift parked outside of a specific bar waiting for patrons to leave. Miraculously, every person detained is purported to have committed one of a small number of oft-repeated traffic offenses, such as: a burned out license plate light; a failure to stop before the sidewalk leaving the bar parking lot; a wide-turn out of the bar parking lot into the middle lane; encroaching upon the solid line when turning left at a red-light; and the ever infamous, two-second signal violation. Federal funds have also created "High Intensity Drug Trafficking Areas" where Utah Highway Patrol Troopers on the interstate openly profile, only bothering to detain a defined type of driver. In one case, the facts established that 99% of the drivers detained for traffic violations held out-of-state license plates; a form of profiling recently approved by the Utah Supreme Court in *State v. Chettero*, 2013 UT 9, 297 P.3d 582. Officers have acknowledged specific training in which they are taught how to justify these stops in their reports and in their court testimony.

As defense lawyers, we admittedly hear only one side of the story from our client who swears there was no traffic violation and that he or she was driving the same as every other motorist. While skepticism is a healthy necessity in this area of practice, after you hear the same story so many times that you can literally recite a script of events back to the client before they are able to finish their rendition, you begin to believe there must be something a little more sinister going on.

The Utah Rules of Criminal Procedure Require Only "Notice" Pleading

Because of the principles that motions to suppress are used as a search for truth surrounding our clients' encounters with law enforcement; because law enforcement officers are usually believed by the factfinder; and finally, because police officers sometimes lie, defense attorneys must not be forced to lay out all anticipated facts in initially filing a motion to suppress when challenging an encounter between a defendant and law enforcement. Neither the cases cited in the article, nor the Utah Rules of Criminal Procedure, support the position advanced by Judge Farr with regard to the specificity required in filing a motion to suppress.

Generally, a motion filed in a criminal case "shall state succinctly and with particularity the grounds upon which it is made and the relief sought. A motion need not be accompanied by a memorandum unless required by the court." Utah R. Crim. P. 12(a). With more specific regard to motions to suppress, which we define as motions to exclude evidence obtained through violations of our client's state or federal constitutional rights,[2] Rule 12(d) of the Utah Rules of Criminal Procedure provides that a motion to suppress evidence shall simply: (1) "describe the evidence sought to be suppressed," (i.e., the defendant's statements, the blood test results, etc.); (2) "set forth the standing of the movant" to make the motion, and most relevantly here:

> (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.*
>
> *If an evidentiary hearing is requested,* no written response to the motion by the non-moving party is required, unless the court orders otherwise. *At the conclusion of the evidentiary hearing, the court may provide a reasonable time for all parties to respond to the issues of fact and law raised in the motion and at the hearing.*

Utah R. Crim P. 12(d)(1)–(3) (emphasis added).

This rule of criminal procedure requires the defense to provide, initially, only enough information for a court to be able to determine what proceedings are appropriate and for the prosecutor to ascertain what constitutional violation is being asserted. We agree that the rule is not written in a manner that allows defendants to avoid detailed briefing and factual application but, rather, the rule envisions that the detailed legal analysis be given *after* the testimony is received.[3] Indeed, a prosecutor is not even required to respond to a motion to suppress in any manner until after the evidentiary hearing. Under this approach, the most truthful testimony possible is elicited at an evidentiary hearing, and thereafter, thorough and specific briefing on the legal issues can be provided from which the court can make a thoughtful determination. Because it is "notice" defense attorneys are required to initially give in filing

a motion to suppress, then "notice" is what should be initially given – both with regard to the law and to the facts.

The Police Officer's Intentions Are an Essential Part of the Hearing

In his article, Judge Farr also states that "the officer's actual motivations for stopping a vehicle are irrelevant as long as a traffic violation occurred in his presence or the facts give rise to an objective reasonable suspicion." Judge Paul C. Farr, *Motions to Supress: Understanding Burdens*, 3 Utah Bar Journal 12, 14–15 (2013). Respectfully, this is not a completely correct statement of Utah law.

When the pretext doctrine was eliminated there was a spirited debate as to whether abandonment would invite increased police misconduct. Ultimately, the Utah Supreme Court made clear that although the determination of "pretext" would no longer *control* the inquiry, an individual officer's intent *did remain relevant* to specific issues. The Utah Supreme Court guided,

> *Our decision today should not be interpreted to mean that evidence of an officer's subjective intent or departure from standard police practice is never relevant to the determination of Fourth Amendment claims. . . .*
>
> [A]n officer's subjective suspicions unrelated to the traffic violation for which he or she stops a defendant *can be used by defense counsel to show that the officer fabricated the violation.* The more evidence that a detention was motivated by police suspicions unrelated to the traffic offense, the less credible the officer's assertion that the traffic offense occurred. If the trial court finds no traffic violation, then the stop is not justified at its inception and is therefore unconstitutional.

State v. Lopez, 873 P.2d 1127, 1138–39 (Utah 1994) (emphasis added) (citations and footnote omitted).

Additionally, a police officer's motivations remain relevant in determining the validity of a defendant's later purported consent to searches or continued questioning. The Utah Supreme Court noted,

> *We have also held that a pretextual police purpose is one factor relevant to the question of attenuation.* Once a Fourth Amendment violation is established, courts must often decide whether a [defendant's] consent is sufficiently attenuated from prior police illegality to permit introduction of the resulting evidence. One factor relevant to this determination is the "purpose and flagrancy" of the Fourth Amendment violation. We [have written]:
>
> > [I]f the police had no "purpose" in engaging in the misconduct…suppression would have no deterrent value. At the other extreme, if the purpose of the misconduct was to achieve the consent, suppression of the resulting evidence clearly will have a deterrent effect and further analysis will rarely be required. Similarly, if the misconduct is flagrantly abusive, there is a greater likelihood that the police engaged in the conduct as a pretext for collateral objectives, and suppressing the resulting evidence will have a greater likelihood of deterring similar misconduct in the future.
>
> *Thus, for purposes of attenuation analysis, an officer's subjective motivation underlying a Fourth Amendment violation is relevant to decide whether suppression remains an appropriate sanction.*

Id. at 1139 (first and third alterations and omission in original) (emphasis added) (citations and internal quotations omitted).

In this way, an officer's subjective motivations for stopping a vehicle remain wholly relevant to issues of credibility.

Whether an Admitted Drug Possessor "Gets a Hearing" Should Matter to All of Us

So, who cares? Who really cares whether a court grants a criminal defendant, even an admitted drug possessor, a hearing on a motion to suppress? The defendant is guilty anyway – why complain that he isn't able to "get off on a technicality?"[4]

The answer is: It should matter to all of us!

During the past twenty years there has been a steady erosion of the fundamental rights provided to citizens under the Fourth and Fifth Amendments to the United States Constitution. Court decisions, political changes, technology, and fear on the part of the citizenry all seem to be on a collision course with our established rights to certain expectations of privacy and freedoms from unreasonable intrusion by the government. While at first blush it may appear that Fourth Amendment and other constitutional jurisprudence has little real impact on the lives of most law-abiding citizens, *it is in criminal cases* that the rights of the government, the power of the police, and the very protections to be afforded individual citizens are, and will continue to be, defined and shaped – in fact, defined and shaped on a daily basis.

"Recently, several law enforcement officers…have been exposed for abusive practices and misconduct. …[T]hese situations were first revealed through the suppression hearing process."

Recently, several law enforcement officers from both the Utah Highway Patrol and local city police forces have been exposed for abusive practices and misconduct. In great respect, these situations were first revealed through the suppression hearing process. A Utah Highway Patrol Trooper's abuse was first exposed when judges (initially in run-of-the-mill misdemeanor cases) became unwilling to accept her testimony. Prosecutors in various jurisdictions first began to refuse to file and are now beginning to reach-back and dismiss, numerous cases of certain other officers, in part because patterns of deceit were revealed during the course of conducting suppression hearings. Consequently, rather

than looking for ways to streamline or eliminate suppression hearings, *we all must recognize* that they are an essential part of the judicial process that molds our democracy. Adhering to the rule of law and requiring accountability on the part of law enforcement will continue to shape and define the rights afforded to every citizen – whether ever named a criminal defendant or not. The fight must go on.

1. The "pretext doctrine" has been explained as follows:

> In Utah, the pretext doctrine applies in cases where an officer claims to have stopped a vehicle for a minor traffic violation, but where the court determines the stop was not made because of the traffic violation but rather due to an unconstitutional motivation and, therefore, the officer has deviated from the normal course of action expected of a reasonable officer. We have articulated the pretext doctrine as whether a reasonable…officer, in view of the totality of the circumstances confronting him or her, *would* have stopped the vehicle.

State v. Lopez, 873 P.2d 1127, 1134 (Utah 1994) (omission in original) (citation and internal quotation omitted).

2. As opposed to motions in limine which deal with excluding evidence for other reasons such as reliability or exclusion under any number of Rules of Evidence.

3. In the article, Judge Farr takes issue with what he condemns as "cutting and pasting" and attorneys "making broad legal arguments," indicating that such motions are not well received. Judge Paul C. Farr, *Motions to Supress: Understanding Burdens*, 3 Utah Bar Journal 12, 13–14 (2013). But why? If a defendant has alleged a constitutional violation based upon police conduct, or misconduct, a court should want to insure that the issue is fully considered regardless of the drafting skill of the attorney. Additionally, in the practice of criminal law, certain issues tend to reappear time and time again. Defense attorneys work daily with search and seizure issues as well as issues surrounding the voluntariness of statements, or statements taken in violation of *Miranda v. Arizona*. There is nothing wrong with "cutting and pasting" the basic established law surrounding these issues. Regardless of source, providing the relevant authority to a court and the prosecutor should never be condemned, and, as set forth herein, the time for a fully-researched and briefed legal pleading is *after* the evidentiary hearing is held and the specific facts of the case are adduced under oath.

4. We of course say this tongue-in-cheek. We in no way believe that constitutional violations are ever "technicalities."

Life in the Law: Religious Conviction

by Eileen Doyle Crane

Life in the Law: Religious Conviction is the third volume in the Life in the Law series, edited and published by BYU Law School faculty Jane Wise, Scott Cameron, and Galen Fletcher. It is another excellent collection of essays that contribute to the literature on the role of religious conviction in the practice of law in whatever setting a person uses his or her degree. Authors from various areas of the law – the bench, the practice, the classroom, the courtroom – discuss ideas of civility, virtue, fairness, and service.

Readers will enjoy reading inspirational essays, which are mostly speeches that have been given at a variety of events such as law school graduations, honored alumni lectures, and devotionals. The goal of the series and this volume, too, is to address issues pertinent to the ethical Christian lawyer. Divided into sections including public service, professional excellence, fairness and virtue, and others; authors address the complicated roles of attorneys of problem-solving, case management, and litigation and the vital need for an internal moral compass to guide them (Authors Hawkins, Snow, Waxman, Daines, and Clayton). In addition, the essays also address the vulnerability of clients in relying on the professional skills and integrity of attorneys (Authors Jarvis and Durrant).

Many of the authors tell their personal stories – how they were introduced to the law, who mentored them in their pursuit of education in general and legal education specifically, how their lives and the lives of their families have been changed by gaining a law degree – which are very interesting (Authors Dominguez, Baradaran, Chin, and Jarvis). Utah history is discussed in a remarkable address by J. Reuben Clark, Jr., in which he extolled "those of the last wagon" at the 100th anniversary celebration of the pioneers entering the Salt Lake Valley. Although not directly about lawyering, given the Pioneer Day audience, it is full of sensitivity for those who are the most vulnerable in any endeavor, reminding lawyers of the great public trust instilled in them, all lawyer jokes aside.

Essays on ethical codes, the rule of law, and the importance of preserving religious freedom in America complete the book. Readers are warned, as well as encouraged, to work to fulfill our duties as lawyers as servants (Author Rasband), to use the law to check intrusion on individual rights of citizens (Author McKay), to create a culture of duty (Author Welch), to be kind in the use of our training (Authors Gerdy, Cameron, Thomas, and Scharffs), to obey our internal rules of professional responsibility (Authors Hafen and Morgan), and to the preservation of free speech, including religious speech (Authors Cook and Oaks), in order to contribute to a free society using our legal training.

Life in the Law: Religious Conviction, v. 3 (2013)
Edited by Jane H. Wise et al.,
Published by Brigham Young University Press
Paperback, $12.00

While the essays contribute to the tapestry of work about religious conviction as a whole, they could also work as individual works by themselves, to be used as resources for speeches, CLE topics, brown-bag luncheon topics, and as topics for sessions on law and legal practice at sectarian and non-sectarian conferences. Some attorneys would be interested to read more essays written by women lawyers as a valuable contribution to the breadth and depth of the discourse. Beautifully bound, this volume, as well as the entire set, makes a very nice addition to any law library and office. Practitioners, educators, and clients would be interested to read the essays and think about the issues raised in this book.

EILEEN DOYLE CRANE, J.D. is a University Prelaw Advisor at Utah Valley University.

Remembering Brian Barnard

by Andrea Garland

Half a year has passed, and I still feel the impulse to wave as I pass Brian Barnard's office when I walk to court. I think of him all the time. His accomplishments in the law were impressive: forcing the State of Utah to compensate the San Juan Navajos for money missing from their trust fund, compelling payment for work done by jail officers, changing laws that prohibited restaurants from advertising alcohol, even challenging the Utah State Bar's questions of aspiring lawyers concerning mental health and their (private) grounds for divorces. He represented people such as prison inmates whose rights would otherwise have been trampled. His kindness to emerging lawyers is less well known. I am just one of many lawyers grateful for the patience, wisdom, and generosity he showed us during his long career in Utah.

Honestly, I performed poorly in law school, but thanks to Brian, it didn't matter. I had little patience and less focus where classes were concerned. On the other hand, it was easy to see the utility of researching and writing legal memoranda on issues that impacted actual clients. The issues were always interesting, involving complex constitutional matters, employment law, and Indian law. I remember skiing to his office on New Year's day to turn in a memo on usufructuary rights on public lands surrounding the Navajo Reservation. I spent week-long reading periods before exams researching issues of prisoners' rights and employees' procedural due process. The work felt important. Even better, Brian took the time to show me how he rewrote my writing when he incorporated it into his briefs. Brian's pointing out what I needed to change, where foundation was lacking, where I made no sense or had wandered into irrelevant territory illuminated legal writing for me. Clerking for Brian, more than any class or law school activity, prepared me to practice law.

Those of us lucky enough to have practiced as Brian's associates found the experience rewarding in a way that was really different from most other law firms. We enjoyed a familial atmosphere in the office, usually shutting down at noon to eat lunch together – often free lunches from Brian – and went on "office outings," to plays or the Arts Festival. When Brian argued before the Tenth Circuit, he took the whole office with him, and once his argument was over, we all explored Denver together.

Brian shared a lot of wisdom on the practice of law itself. He taught me how to meet with a client and draft pleadings. We met weekly to go over my case list and figure out the best course of action. I would tell him what I wanted to do, and he would say "Chess move: how will the other side respond and what are you going to do about it?" He discussed the importance of "toning down" written communications with exceptionally difficult opposing counsel. John Pace, another of Brian's former associates, recalled, "[H]e was extremely civil to those who were civil in return; and he could be a major pain to those who weren't."

James Harris, another of Brian's "alumni," said of Brian:

> He was, in every sense of the word, my one and only mentor in the law, and a great one at that.… His door was always open, and he would always take time to listen and give advice on various cases. His suggestions were often inventive, and were, more often than not, winning arguments.

John Pace recalled Brian's "eloquent simplicity" in court. "He would actually answer yes and no questions with a yes or no, and would sit down when he'd run out of things to say. He was always direct and to the point."

Anyone with a computer can google "Brian M. Barnard," and learn about the causes he undertook and the cases he won. Beyond those – and they are numerous – his example and his advice on how to practice law continues to inspire us.

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

Helping Our Clients Tell the Truth, Part II:
Revisiting Utah Rule Of Professional Conduct 2.1 in Conjunction with Rules 1.2 and 1.4, the ABA Standards for Criminal Justice, and *State v. Holland*

by Ted Weckel

Several years ago, I wrote an article about whether Utah Rule of Professional Conduct 2.1 allowed an attorney as a counselor-at-law to consult with his or her client about the merits of accepting responsibility for a crime, if the lawyer believed that the client was lying about the facts of the case and the facts obtained by investigation suggested that the client was in fact guilty. Ted Weckel, *Helping Our Clients Tell the Truth: Rules of Professional Conduct 2.1 in Criminal Cases*, 20 Utah Bar Journal 6 (2007). Rule 2.1 allows a lawyer to provide moral advice that may be relevant to a client's case. I indicated that such an approach was consistent with a lawyer's professional duties as an advocate to defend a client's case with zeal and loyalty (should the client reject the lawyer's advice and wish to proceed to trial), and conformed with Utah's and the American Bar Association's Model Rules of Professional Conduct. However, upon conducting additional legal research, I have discovered that the question is more complex than I had originally anticipated and that additional information is needed to fully address the issue.

> *"[I]t is unethical for a lawyer to take the client's version of the facts at face value…and proceed to trial without first investigating what the client has reported."*

Being able to provide moral advice effectively assumes that a relationship of trust has been established between the lawyer and the client. It also assumes that the lawyer will help the client understand the importance of candidly disclosing the facts to be in a position to effectively advocate the client's cause. Being able to provide moral advice effectively also involves the client understanding the respective roles of client and lawyer in terms of how a case is to be managed. Frequently, a client may believe that he or she has the right to dictate to the lawyer how a case is to be managed. When this occurs, a dispute can arise between the lawyer and the client.

Comment 1 to Utah Rule of Professional Conduct 1.2 does not prescribe how a lawyer is to resolve a dispute with the client over a tactical decision. Thus, if a client lies about the facts of the case, wishes to proceed to trial, or wants the lawyer to represent him or her and the lawyer is not permitted to withdraw, rule 1.2 does not indicate how such disputes should be resolved. For example, a client may wish to proceed with an actual innocence claim, while the lawyer may believe that it is in the client's best interest to proceed with a particular defense. However, rule 1.2 does allow the lawyer to consider "other law" which may be applicable. Undoubtedly, such "other law" in the criminal defense context pertains to the American Bar Association's Standards for Criminal Justice.

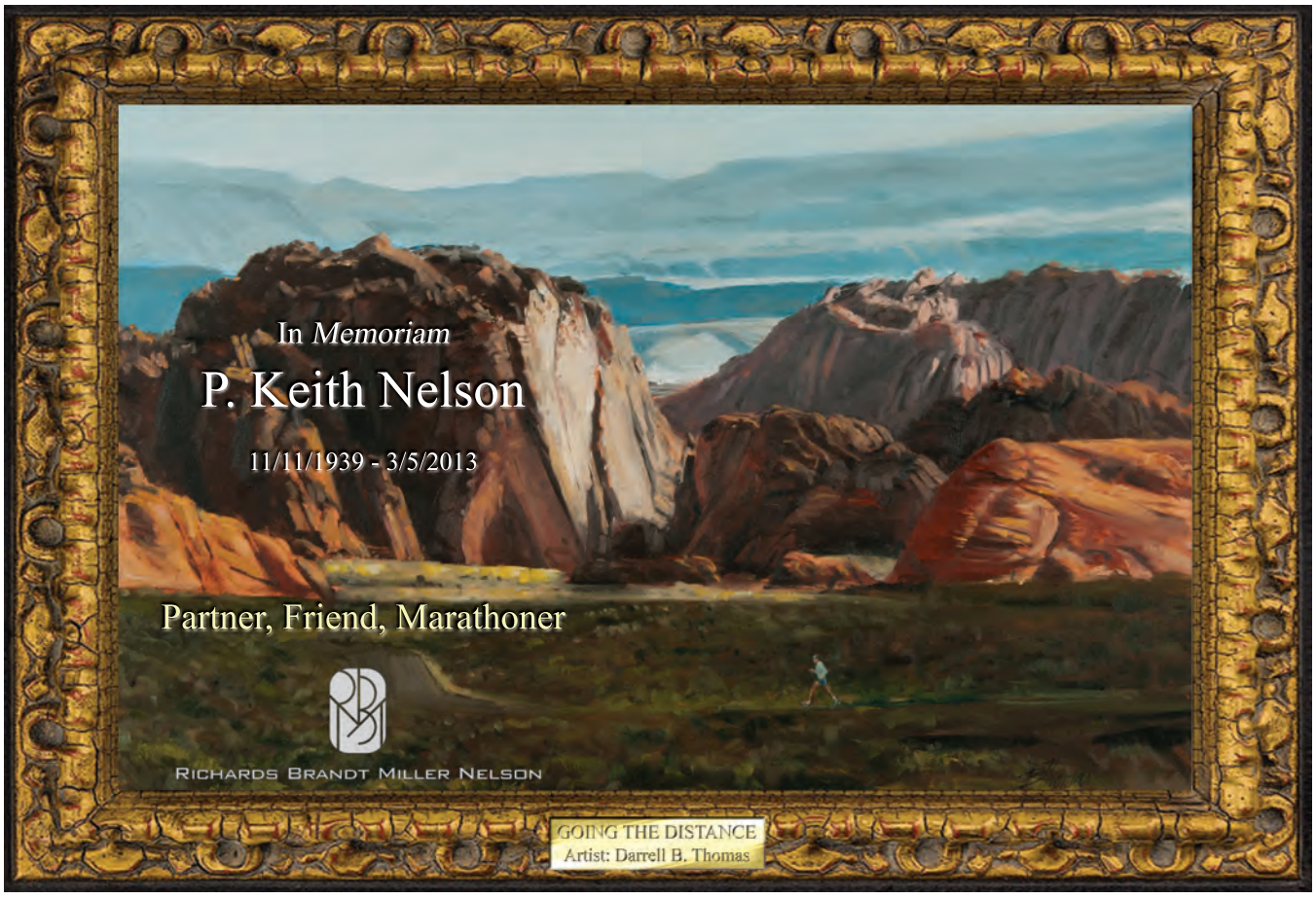
ABA Standard 4-3.1 requires a lawyer to establish a relationship of trust and confidence with the client. This involves, among

TED WECKEL practices in the areas of criminal defense, death penalty habeas appeals, family law, tax controversies, and civil litigation.

other things, educating the client as to the need for candid disclosure of the facts for effective representation. A client should know that lying about the facts will only lead to the lawyer being surprised at trial and thus being unprepared to defend against unknown facts presented by the prosecution. Communicating this future predicament can facilitate a client's candid disclosure of the facts, although if the charges are serious and the client has committed a crime, the client may be afraid to candidly disclose the facts for fear of receiving a long prison sentence or for fear of the lawyer not serving as a zealous advocate.

ABA Standards 4-3.2 and 4-4.1 require a lawyer to promptly interview the client, investigate the facts, and consult with the client regarding the result of the investigation and all viable defenses *before* deciding upon a course of action. *See Crandell v. Bunnell*, 144 F.3d 1213, 1217 (9th Cir. 1998), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000). Thus, it follows that it is unethical for a lawyer to take the client's version of the facts at face value (especially if the lawyer believes the client is lying) and proceed to trial without first investigating what the client has reported. Indeed, ABA Standard 4-3.2 prohibits a lawyer from telling the client that he or she should not be candid to allow the lawyer free rein to creatively manipulate the defense theory.

Additionally, ABA Standard 4-5.1(a) requires a lawyer to advise the client in all candor regarding all aspects of the case. ABA Standard 4-5.2(a) provides the client with exclusive control over whether to plead guilty or whether to accept a plea offer upon full consultation with the client's lawyer. Full consultation implies consideration of all facts and options – including moral advice. Therefore, it seems that under the "other law" provision of rule 1.2, rule 2.1 allows a lawyer to consult with the client about pleading guilty based upon the moral ramifications associated with committing a crime, e.g., paying restitution to victims or seeking drug rehabilitation, given the facts of the case and given the client's exclusive control over the decision to plead guilty.



Additionally ABA Standards 4-5.1 and 4-5.2 authorize a lawyer to veto the client's tactical decisions if the lawyer believes that it is in the client's best interest to do so. Thus, it follows that because the ABA Standards also require counsel to seek and obtain candid information from the client, the standards also require a lawyer to confront the client about a position that seems untruthful, and if the client persists in such a position, to be able to advise the client to accept responsibility for the crime as one alternative of many.

These conclusions are supported by the American common law. Indeed, blindly accepting a client's position without first investigating it and considering all available options can be a denial of a defendant's Sixth Amendment right to the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). In *Deluca v. Lord*, 77 F.3d 578 (2d. Cir. 1996), the Second Circuit upheld a finding of *Strickland* prejudice when defense counsel: (1) failed to explain to his client that a defense of extreme emotional disturbance would have likely resulted only in a conviction of manslaughter rather than second degree murder and (2) abandoned this defense by using other case theories that were substantially weaker. *Id*. at 585–88. In *Johnson v. Baldwin*, 114 F.3d 835 (9th Cir. 1997), the Ninth Circuit ruled similarly that a finding of *Strickland* prejudice was appropriate when counsel: (1) failed to interview witnesses to corroborate the defendant's indefensible alibi story, (2) failed to confront the defendant with the "utterly unconvincing" nature of his position, and (3) failed to assist the client in considering a more viable option. *Id*. at 839–40.

Baldwin also states that *Strickland* requires counsel to confront the client with the relative weakness of his position when the investigation warrants it. *Id*. This is because an attorney's failure to do so deprives the jury of hearing viable evidence and theories and undermines the fundamental fairness and outcome of the trial under the right to due process. *Id*. Furthermore, given the weight of the prosecution's evidence, and the hazards of litigation generally, a lawyer should also consider advising the client of the option to plead guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to avoid receiving a harsh sentence even if the client is innocent.

Violation of any of the Utah Rules of Professional Conduct can result in attorney discipline under rule 8.4. Nevertheless, providing moral advice in the context of criminal defense representation appears to conflict with the Utah Supreme Court's reasoning in *State v. Holland*, 876 P.2d 357 (Utah 1994). In *Holland*, the court stated,

> It is not the role of defense counsel to persuade a defendant to plead guilty because *counsel* concludes that the defendant committed a crime. Defense counsel's obligation is to explain the evidence against the defendant, the nature of all defenses that might be provable, all the various options the defendant has in pleading guilty or not guilty and going to trial, and the possible or likely consequences of those options.

Id. at 362. *Holland* goes on to imply that the only role for defense counsel is that of advocate. *Id*. at 362–63.

Indeed, *Holland* does not address the role of a lawyer as a moral advisor under rule 2.1. However, the role of a moral advisor is mutually exclusive of the role of advocate, and a defense lawyer must wear both hats at different times during representation. That is, a lawyer should be free to offer moral advice to his or her client as part of the candid discussion that occurs regarding likely outcomes and possible options under ABA Standard 4-5.1(a) and (b). Should the client reject counsel's advice, the lawyer remains under a constitutionally protected duty to zealously and loyally advocate for the client and maintain all confidences. Thus, it would seem under the authorities cited, that *Holland* should be modified to include a discussion of the importance of the of attorney–advisor role.[1]

Indeed, Comment 2 to Utah Rule of Professional Conduct Rule 2.1, which was amended effective November 1, 2005, states,

> Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.

Utah R. Prof'l Conduct 2.1, cmt. 2 (2013).

Comment 5 to Utah Rule of Professional Conduct 2.1 states:

> [W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation.

Id., R. 2.1 cmt. 5.

Proceeding to trial with a client's objective for acquittal, when the lawyer believes the client is lying about the facts and the investigation and discovery provide cogent evidence of guilt is not acting in the client's best interest – it's abdicating the lawyer's duty of loyalty by facilitating the imposition of a higher sentence than is necessary.

Indeed, Utah Rule of Professional Conduct 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objective are to be accomplished." *Id.* R. 1.4(a)(2). Thus, it follows that after a lawyer has conducted an investigation and has established a good rapport with the client and the lawyer believes that the client is lying about the facts, it is not only ethical but advisable to confront and consult with the client about the facts, and to advise the client of all of his or her options – including pleading guilty because of the moral ramifications associated with the commission of a crime (as well as the benefit of avoiding a harsher sentence). This option should be done as tactfully as possible so as not to erode the trust established in the attorney–client relationship. Providing moral advice is a viable option for the lawyer/counselor/advisor under Utah Rule of Professional Conduct 2.1 and the authorities cited in this article. Indeed, it also allows the lawyer to serve as an agent for change in society and to help the client in a more personal and significant way than a guilty plea or a verdict would allow.

1. In *Holland*, however, the lawyer abdicated his role as advocate and his duty of loyalty by failing to argue against his client receiving the death penalty. *State v. Holland*, 876 P.2d 357, 363 (Utah 1994).

Mandatory Online Licensing

The annual Bar licensing renewal process has started and can be done only online. Sealed cards have been mailed and include a login and password to access the renewal form and the steps to re-license online at https://www.myutahbar.org. *No separate form will be sent in the mail. 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.*

If you need to update your email address of record, please visit www.myutahbar.org. To receive support for your online licensing transaction, please contact us either by email to onlineservices@utahbar.org or, call (801) 297-7021. Additional information on licensing policies, procedures, and guidelines can be found at www.utahbar.org/licensing.

Upon completion of the renewal process, you should receive a Certificate of License Renewal that you can print and use as a receipt for your records. This certificate can be used as proof of licensure, allowing you to continue practicing until your renewal sticker, via the U.S. postal service. If you do not receive your license in a timely manner, call the Licensing Department at (801) 531-9077.

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: www. utahbar.org/bar-operations/history-of-utah-state-bar-award-recipients/.

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.

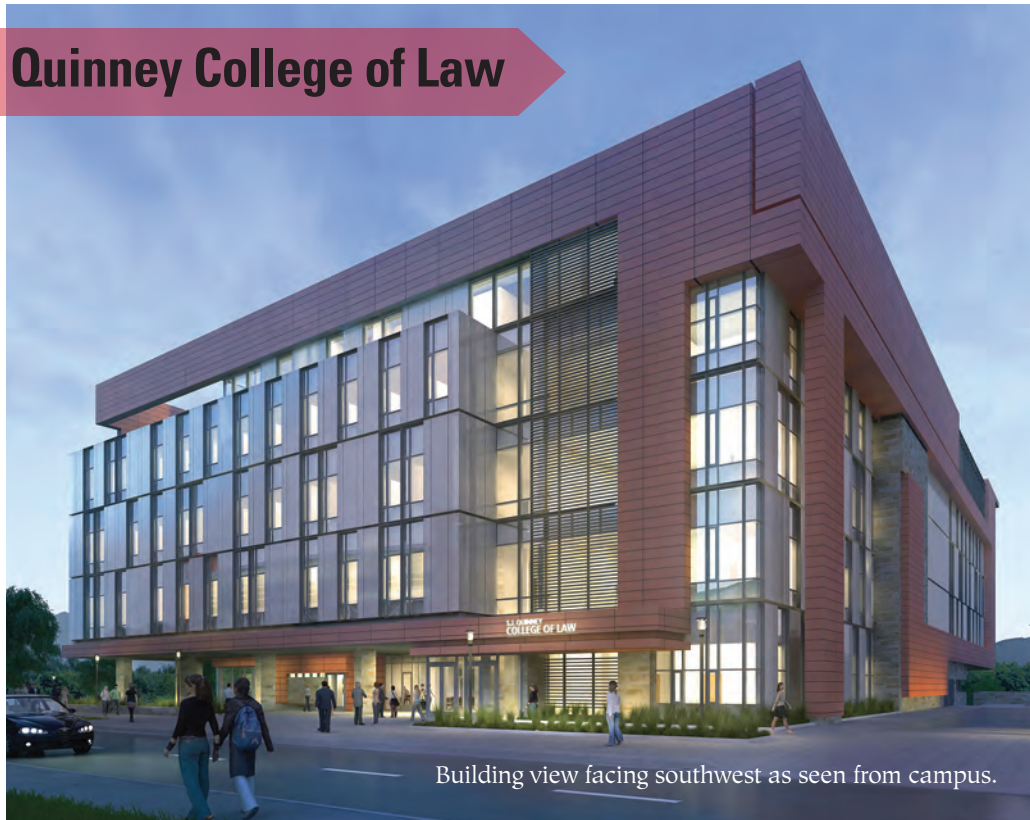
Active Status Lawyers complying in 2013 are required to complete a minimum of twenty-four hours of Utah approved CLE, which shall include a minimum of three hours of accredited ethics. **One of the ethics hours shall be in the area of professionalism and civility.** (A minimum of twelve hours must be 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.

Groundbreaking

Former Utah State Bar President Rod Snow and current Bar President Lori Nelson help break ground for the new S.J. Quinney College of Law.

The University of Utah S.J. Quinney College of Law

After 50 years at its current location, the University of Utah S.J. Quinney College of Law broke ground on a much-anticipated new facility on June 4, 2013. The new building will boast 155,000 square-feet of space, specifically designed to more effectively teach the next generation of legal professionals. You can learn more about this exciting new facility by visiting: buildingjustice.law.utah.edu.



Building view facing southwest as seen from campus.

Pro Bono Honor Roll

Adams, John – Consumer Case
Alig, Michelle – Tuesday Night Bar
Allred, Landon – Post Conviction Case
Amann, Paul – Tuesday Night Bar
Anderson, Jared – Domestic Case
Anderson, Michael – Tuesday Night Bar
Anderson, Robert – Expungement Case
Angelides, Nicholas – Senior Cases
Anthony, Thomas – Domestic Case
Bagley, John – Bankruptcy Case
Baker, Jim – Senior Center Legal Clinic
Barrick, Kyle – Senior Center Legal Clinic
Bean, Melissa – Tuesday Night Bar
Beck, Sarah – Debtor's Clinic
Bennett, Gracelyn – Bankruptcy Hotline
Beringer, Maria Nicolle – Bankruptcy Hotline
Bertelsen, Sharon – Senior Center Legal Clinic
Billings, David – Predatory Lending Case
Blakesley, James – Collection Case
Bogart, Jennifer – Street Law Clinic
Bowman-Carter, Kristal – Domestic Case
Brinton, Jed – Tuesday Night Bar
Brinton, Jonathan – Contract Case
Bulkeley, Deb – Tuesday Night Bar
Bulson, Michael – Pubic Benefits Case, Small Claims Cases
Burghardt, Mark – Tuesday Night Bar
Cahill, Trent – Domestic Case
Call, Thaddeus – Domestic Case
Carr, Kenneth – Bankruptcy Cases, Domestic Case
Chandler, Josh – Tuesday Night Bar
Chipman, Brent – Domestic Case
Clark, Melanie – Senior Center Legal Clinic
Conley, Elizabeth – Senior Center Legal Clinic
Conyers, Kate – Tuesday Night Bar
Crismon, Sue – Expungement Clinic
Cundick, Ted – Bankruptcy Case
Davis, Nikki – Tuesday Night Bar
Deans, James – Contract Case
Denny, Blakely – Tuesday Night Bar
DePaulis, Megan – Tuesday Night Bar
Donovan, Sharon – Domestic Case
Dunbeck, Joseph – Domestic Case
Durrant, Kathryn – QDRO Case
Emmett, Mark – Bankruptcy Case
Erickson, Michael – Domestic Case
Evans, Christopher – Domestic Case
Ferguson, Phillip – Domestic Case, Senior Center Legal Clinic
Ferrin, Elizabeth – Domestic Case
Findlay, R. Bruce – Domestic Case
Fowler, Amy – Rainbow Law Clinic
Fowlke, Lorie – Domestic Cases
Gartside, Chloe – Tuesday Night Bar
Gillespie, Dorothy – Domestic Cases
Goodman, Ronald – Domestic Case
Halbasch, Christopher – Bankruptcy Case
Hales, Jared – Tuesday Night Bar
Hansen, Elicia – Bankruptcy Case
Harding, Sheleigh – Domestic Case
Hart, Laurie – Guardianship Case, Senior Center Legal Clinic
Hawkes, Danielle – Street Law Clinic
Hollingsworth, April – Street Law Clinic
Huntington, Barry – Domestic Cases
Hyde, Ashton – Tuesday Night Bar
Jensen, Michael – Senior Center Legal Clinic
Johnsen, Bart – Domestic Case
Kaufmann, Matthew – Tuesday Night Bar
Keller, Bryant – Tuesday Night Bar
Kennedy, Laura – Tuesday Night Bar
Kesselring, Christian – Domestic Case, Rainbow Law Clinic
Kessler, Jay – Senior Center Legal Clinic
King, Thomas – Domestic Case
Koehler, Courtney – Domestic Case
Kuhlmann, Gary – Domestic Cases
Latimer, Kelly – Tuesday Night Bar
Lawrence, Benjamin – Domestic Case
Lebenta, Aaron – Tuesday Night Bar
Lee, Terrell – Senior Center Legal Clinic
Littrell, Lindsey – Tuesday Night Bar
Lund, Niel – Domestic Case, Bankruptcy Case
Machlis, Ben – Tuesday Night Bar
Manderino, Chase – Tuesday Night Bar
Mares, Robert – Family Law Clinic
Marychild, Suzanne – Domestic Case
Maughan, Joyce – Senior Center Legal Clinic
McCoy II, Harry – Senior Center Legal Clinic
McDonald, Kathleen – Tuesday Night Bar
Mercer, Scott – Housing Case
Mettler, Amber – Tuesday Night Bar
Miller, Nathan – Senior Center Legal Clinic
Mills, Meghann – Domestic Case
Minas, Russell – Domestic Case
Miya, Stephanie – Medical Legal Clinic
Montoya, Sara – Tuesday Night Bar
Morales, Christopher – Domestic Case
Morrow, Carolyn – Domestic Case, Housing Cases, Family Law Clinic
Motschiedler, Susan – Tuesday Night Bar
Murphy, Michael – Custody Case
Nalder, Bryan – Tuesday Night Bar
Nelson, Trent – Domestic Case
O'Neil, Shauna – Bankruptcy Hotline
Otto, Rachel – Street Law Clinic
Paoletti, C. Jeffery – Consumer Cases
Pehrson, Chad – Tuesday Night Bar
Peterson, Jessica – Tuesday Night Bar
Price, Thomas – Domestic Case
Quist, Michelle – Domestic Case
Ralphs, Stewart – Family Law Clinic
Rappaport, Richard – Housing Case
Ratelle, Brittany – Domestic Cases
Reneer, Jere – Domestic Case
Riter, Austin – Tuesday Night Bar
Roberts, Kathie – Senior Center Legal Clinic
Rogers, Steven – Bankruptcy Case
Roman, Francisco – Immigration Clinic
Rosenbloom, David – Domestic Case
Rozycki, Ann – Tuesday Night Bar
Ryon, Rebecca – Tuesday Night Bar
Sanchez, Jeff – Tuesday Night Bar
Sansom, Stephen – Tuesday Night Bar
Scholnick, Lauren – Street Law Clinic
Scott, Kent – Consumer Case
Seiler, Thomas – Real Property Case
Semmel, Jane – Debtor's Clinic, Senior Center Legal Clinic
Shaw, LaShel – Tuesday Night Bar
Siddoway, Billie – Domestic Case
Silverzweig, Mary – Bankruptcy Hotline
Silvestrini, Liz – Tuesday Night Bar
Simcox, Jeff – Street Law Clinic
Singleton, Eric – Bankruptcy Case
Sjoblom, Andrew – Tuesday Night Bar
Smith, Linda – Family Law Clinic
Snow, Heath – Adoption Case, Domestic Case
Snyder, Robert – Immigration Case
Stevens, Adams – Tuesday Night Bar
Stewart, Jeremy – Tuesday Night Bar
Stoddard, Bryan – Domestic Case
Stolz, Martin – Bankruptcy Cases
Sutton, George – Tuesday Night Bar
Tanner, Brian – Immigration
Telfer, Diana – Tuesday Night Bar
Thomas, Jonathan – Domestic Case
Thorne, Jonathan – Street Law Clinic
Thorpe, Scott – Senior Center Legal Clinic
Timothy, Jeannine – Senior Center Legal Clinic
Trujillo, Scott – Protective Orders, Domestic Case
Turner, Jenette – Tuesday Night Bar
Walkenhorst, Steve – Tuesday Night Bar
Washburn, D. Loren – Tuesday Night Bar
Wharton, Chris – Rainbow Law Clinic
Wilkins, Brinton – Tuesday Night Bar
Williams, Camille – Domestic Case
Williams, Timothy – Senior Center Legal Clinic
Winzeler, Zach – Tuesday Night Bar
Wogenstahl, Emory – Domestic Case
Woods, Kristin – Domestic Cases
Wright, Angilee – Probate Case
Wycoff, Bruce – Tuesday Night Bar
Yancey, Sharia – Domestic Cases
Yauney, Russell – Domestic Case, Family Law Clinic
Ybarra, Daniel – Domestic Case
Zollinger, Shannon – 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 April and May of 2013. To volunteer please call Michelle V. Harvey (801) 297-7027 or C. Sue Crismon at (801) 924-3376 or go to https://www.surveymonkey.com/s/2013ProBonoVolunteer to fill out a volunteer survey.

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Red Moose Coffee Company
Sage's Cafe
Salt Lake Running Company
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Salt Lake Film Society
Salt Lake Legal
Salt Lake Sheraton
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Utah State Bar Ethics Advisory Opinion Committee Opinion No. 13–02 – Issued April 9, 2013

Issue

The requesting attorney seeks an opinion on several related matters, which the Committee has combined into three general areas of inquiry: (i) may an attorney pay a non-lawyer, directly or indirectly, for a referral; (ii) may an attorney enter into a joint marketing and/or cross-referral arrangement with a non-attorney; and (iii) may an attorney acquire an ownership or equity interest in, or making a loan to, a business, with the expectation of receiving referrals from the business.

Opinion

Subject to the exceptions outlined below, the opinions of the Committee regarding the stated issues are:

(i) The relevant Rules of Professional Conduct (the "Rules") expressly prohibit an attorney from giving anything of value to a person for a legal referral, and includes giving anything of value indirectly. Any compensation for a referral violates the Rules. Any agreement for reciprocal referrals violates the Utah Rules.

(ii) The relevant Rules do not expressly prohibit an attorney from engaging in joint advertising with a non-lawyer. However, due to the multitude of possible arrangements between the participants in any such joint advertising, the Committee does not and cannot give a general opinion endorsing the use of joint advertising or referrals between an attorney and a non-lawyer because of the high probability of violating other Rules, including the prohibition of giving anything of value to a non-lawyer for a referral.

(iii) The relevant Rules do not specifically prohibit an attorney from acquiring an ownership or equity interest in, or make a loan to, a business that is not a client with the expectation of receiving referrals from the business. The Rules specifically prohibit an attorney from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to a client, without complying with specific conditions. In any event, because of the multitude of possible arrangements between the participants in any such business arrangements, the Committee does not and cannot give a general opinion endorsing an attorney acquiring an ownership or equity interest in, or making a loan to, a business, with the expectation of receiving referrals from the business.

Background

The requesting lawyer explains that each question represents a practice that he believes is followed by lawyers in his practice area. Those questions, as combined by the Committee, which are stated in more detail hereafter, set forth the extent of the background relied upon by the Committee to provide the opinions and views expressed herein.

Analysis

Issue No. 1: The relevant Rules expressly prohibit an attorney from giving anything of value to a person for a legal referral, and includes giving anything of value indirectly. Rule 7.2(b) states that a "lawyer shall not give anything of value to a person for recommending the lawyer's services." The comments to Rule 7.2 reinforce this, stating that, subject to the exceptions discussed below, "[l]awyers are not permitted to pay others for channeling professional work." Utah R. Prof'l Conduct 7.2, comment 5.

This committee has not previously defined the scope of the "thing of value" element. Other jurisdictions, however, have generally interpreted it broadly. A Connecticut judicial decision held that "it is improper for an attorney to pay non-lawyer employees a $50 bonus for referring cases to the firm." *Rubenstein v. Statewide Grievance Comm.*, 2003 WL 21499265 (Conn. Super. Ct. 2003). Similarly, a Pennsylvania ethics opinion concluded that a lawyer may not give "gift certificates" in exchange for referrals, because gift certificates are a thing of value. Pa. Eth. Op. 2005-81.

Moreover, this Rule is not just limited to cash or a cash-equivalent. As noted, the Rule prohibits the exchange of "anything of value" for a legal referral. Utah R. Prof'l Conduct 7.2(b). "Indirect or nonmonetary compensation for referrals is considered 'something of value'" and is generally covered by this rule. ABA/BNA Lawyer's Manual on Prof'l Conduct § 81: 706 (2005). In a recent decision, a South Carolina ethics opinion accordingly concluded that a "quid pro quo exchange" of legal services for legal referrals would violate this rule, because a lawyer's time and skill are a "thing of value." S.C. Adv. Op. 06-13.

As noted, however, Rule 7.2 contains four exceptions under which such an exchange may be permitted. Only two of these exceptions are applicable to the questions presented in this

request: Rule 7.2(b)(1), which allows a lawyer to "pay the reasonable costs of advertisements or communications permitted by this rule"; and Rule 7.2(b)(2), which allows a lawyer to "pay the usual charges of a legal service plan or a lawyer referral service."

The scope of Rule 7.2(b)(1) exception for the payment of advertising or communications costs is addressed by the comment, which notes that a lawyer may pay for such things as "the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising." Utah R. Prof'l Conduct 7.2, comment 5.

The scope of Rule 7.2(b)(2)'s exception for the "usual charges of a legal service plan or a lawyer referral service" is also addressed by the comment. The comment defines a "legal service plan" as "a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation," and a "lawyer referral service" as "an organization that holds itself out to the public to provide referrals to lawyers with appropriate experience in the subject matter of the representation." Utah R. Prof'l Conduct 7.2, committee 6. This Committee also addressed the "lawyer referral service" exception in Opinion 07-01, concluding that, "[a]t a minimum," a "lawyer referral service be available to the public and…provide referrals to multiple lawyers and law firms, not to a single lawyer or a single law firm."

The requesting attorney specifically asks whether an attorney may: (1) hire a "marketer" and then pay the marketer a "fee or commission each time the marketer brings in a new client"; (2) hire a "marketer" who will "contact insurance agents, tow truck drivers, body shop owners, or employees and health care providers and request referrals to the attorney, if the marketer is paid a fixed salary rather than on a commission basis"; (3) "hire a marketer and pay the marketer with gift cards" each time the marketer brings in a case; or (4) pay a third party with either money or a gift card "for referring a new personal injury client."

As noted above, the answer to this question is plain: money or gift cards are "things of value" and, unless covered by an exception, cannot be given in exchange for a legal referral.

The next question is whether an exception applies. None of these scenarios implicate rule 7.2(b)(1)'s exception for reasonable advertising costs. The question, then, is whether these scenarios implicate rule 7.2(b)(2)'s exception for the "usual charges of a legal service plan or a lawyer referral service." In our view, none of these scenarios qualifies as a legal service plan, because none involve "a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation." Utah R. Prof'l Conduct 7.2, comment 6.

The question of whether these scenarios implicate a "lawyer referral service," however, depends on specific facts that are not provided by the request. Again, to satisfy this exception, the so-called "marketer" must be part of a "service" that "holds itself out to the public to provide referrals to lawyers," and this service must also "provide referrals to multiple lawyers and law firms, not to a single lawyer or a single law firm." Utah R. Prof'l Conduct 7.2, comment 6; Opinion 07-01.

Here, it is not clear from the request whether the "marketer" is actually holding himself out to the public as a referral service for multiple lawyers or law firms. If he is, the lawyer may pay him "the usual charges" associated with that service. But if the "marketer" is instead privately employed by the lawyer, does not generally make his services available to the public, or funnels work exclusively to this lawyer or law firm, the marketer would not qualify as a "lawyer referral service." In such circumstances, exchanging anything of value with the marketer for a legal referral would violate the rule. Although Utah has not adopted all of the Comments provided in the Model Rules, MR Comment 5 is instructive:

> "Moreover a lawyer may pay others for generating client leads, such as internet-based client leads, as long as the lead generator does no recommend the lawyer any payment….is consistent with Rule 1.5 and 5.4…and the lead generator's communications are consistent with Rule 7.1…. To comply with 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed the person's problems when determining which lawyer should receive the referral."

The request next asks whether an attorney may "hire a marketer/paralegal," "refuse to pay the marketer/paralegal for bringing in a new case," but then "pay the marketer/paralegal for gathering the police report, medical records, translation services, etc?"

A lawyer may, of course, pay a non-lawyer employee for their clerical or case preparation work. *See generally* Utah R. Prof'l

Conduct 5.4. But if the lawyer's payments to the non-lawyer employee are explicitly or even implicitly conditioned on that employee providing legal referrals, those payments must comply with rule 7.2. Thus, a lawyer's paralegal could not be compensated for providing referrals, because such paralegal would not qualify as a "lawyer referral service" that is "hold[ing] itself out to the public" and funneling referrals to "multiple lawyers and law firms." *See* Utah R. Prof'l Conduct 7.2, cmt. 6; Opinion 07-01. But nothing prohibits a lawyer from accepting a referral from an employee, so long as the lawyer does not give the employee anything of value for the referral.

The request also asks whether an attorney may agree to "pay marketing expenses for a third party referrer for a promise to refer an unspecified number of clients to the attorney," agree to "pay marketing expenses for a third party referrer if the third party referrer does not promise to refer clients to the attorney but actually refers clients to the attorney," or, "rather than paying for marketing expenses for the third party referrer," agree to "purchase[ ] multiple ad placements in newspapers, television, radio or some other medium and give[ ] some of the ad placements to the third party referrer?"

As noted, rule 7.2(b)(1) allows the attorney to pay "the reasonable costs of advertisements or communications." Thus, a lawyer "may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers." Utah R. Prof'l Conduct 7.2, comment 5. But, as discussed above, this does not permit the lawyer to otherwise "pay others for channeling professional work." Utah R. Prof'l Conduct, comment 5. A lawyer may therefore pay the third party's reasonable marketing expenses, but the lawyer could not compensate the third party any further based on any referrals that come from that advertising.

Utah's Rule 7.2 is slightly different from Model Rule 7.2 in that MR 7.2(b)(4) provides an additional exception for non-exclusive reciprocal referral agreements. In the Committee's view this difference does not render Utah's standard more permissive; if anything the absence of the exception makes Utah's standard stricter. MR 7.2(b)(4) provides this additional exception to not giving anything of value to a person for recommending the lawyer's services:

> Except a lawyer may. . . .refer clients to another. . . professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients to the lawyer if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement." MR7.2(b)(4).

Hence, in jurisdictions governed by this MR a lawyer and chiropractor or insurance agency may have a referral agreement provided that the agreement is not exclusive and any clients thus referred are informed of the agreement. Under Utah's rule there is no safe harbor for non-exclusive, announced reciprocal referral agreements. Hence any non-disclosed referral agreements are things of value that violate Utah Rule 7.2

Issue No. 2: The request seeks an opinion on the propriety of joint marketing efforts and cross-referrals between an attorney and non-attorney, such as a chiropractor or insurance agent. Rules 7.1 through 7.3 do not expressly prohibit an attorney from engaging in joint advertising with a non-lawyer using shared or common advertising media, and then dividing the associated expenses. However, because even slight modifications in the format or substance of the advertising, the arrangement between the participants, the method of sharing the costs, possible inferences that can be drawn from the advertising, among other things, the Committee is unable to provide a general opinion regarding compliance with the Rules concerning the use of joint advertising by an attorney and non-lawyer. Accordingly, the Committee does not and cannot give an opinion endorsing the use of joint advertising between an attorney and a non-lawyer because of the high probability of violating Rules 7.1 through 7.3, including other Rules that do not directly relate to advertising.[1]

If an attorney were to attempt to engage in joint advertising with a non-lawyer, the attorney, among other things, must insure that any such advertising clearly discloses that the lawyer and non-lawyer are separate and distinct, and not engaged in a common business enterprise. The advertising must affirmatively disclose that there is no expressed or inferred endorsement of the participants. Additionally, the expense for the advertising must be shared or divided on some type of equitable basis directly related to the cost of the advertisement, and not in any manner based upon fees or income generated from the advertising, or an arrangement where the lawyer pays for all of the advertising with the expectation of future referrals by the non-attorney. There are other aspects of Rules 7.1 through 7.3, and 5.4, that may also apply to the joint advertising, depending on the media of the advertising, the information conveyed, the relationship of the parties, and the sharing of costs, among other things.

Regarding the obligations of the attorney to assure compliance by the non-lawyer with the Rules in a joint advertising arrangement, Comment 7 to Rule 7.2 is instructive. The Comment states that an attorney participating in a lawyer referral program or legal services plan must act reasonably to assure that the activities of the operators of the plan or service are compatible with the attorney's professional obligations. This same obligation can apply to the joint advertising by a lawyer and a non-lawyer. Rule 5.3 and Rule 8.4 prohibit a lawyer from directing others to do what the lawyer cannot ethically do herself. Accordingly, if an attorney engages in joint advertising or cross-referrals with a non-lawyer, the attorney may not encourage, permit, allow, assist, participate or ratify, implicitly or otherwise, a violation of the Rules by the non-lawyer related to the advertising, and should take reasonable effort to assure that the non-lawyer's activities are compatible with the attorney's professional obligations.

Joint advertising can be misleading in several respects, and thereby violate Rule 7.1. For example, the proposed form of the advertising could imply that the attorney and non-lawyer have formed some type of partnership or other prohibited enterprise. *See e.g.* Rule 5.4(d) (regarding the practice of law in an enterprise with a non-lawyer); *see also* New Mexico Ethics Advisory Opinion Committee, Advisory Opinion 1993-1 (concluding that it would be misleading under Rule 7.1 for a network of professionals to advertise their members' services jointly, and that there is a substantial likelihood that the public would believe that there was joint business arrangement between the participants). Similarly, the advertising could imply an improper endorsement between the parties. *See* Committee on Professional Ethics of the Association of the Bar of the City of New York, Opinion 1987-1 (Feb. 23, 1987) (among other things, concluding that it was improper for a lawyer to let the lawyer's professional name enhance a non-lawyer's practice or to give any appearance that they were in business together). There is also a risk that the advertising could imply that the attorney is engaged in a field of practice that is false, depending upon the profession of the advertisers. *See also* Rule 7.4 (Communication of Field of Practice). Of course, any advertising must substantively comply with Rules 7.1, as well as Rule 7.2, regarding content.

Additionally, there is a potential for violation of Rule 7.2, which prohibits the giving value by a lawyer to a person who recommends the lawyer's services. Although there may not be a direct payment for such a recommendation in a joint advertisement relationship, the sharing of the associated costs under some circumstances could be construed as such.[2] Likewise, depending on the arrangement, there could be an improper sharing of fees prohibited by Rule 5.4 ("A lawyer or law firm shall not share legal fees with a nonlawyer.…").

Although not addressed in your inquiry, there is also concern regarding the exclusivity of referrals between the participants in the joint advertising. In Utah Ethics Advisory Op. 07-01 this issue was addressed. The Opinion states that an arrangement that "contemplates the exclusive funneling of referrals to one lawyer or firm, is not permitted, as it violates Rule 7.2(b), which prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services." If the joint advertising arrangement also contemplates an exclusive referral system, there could be a violation of Rule 7.2(b). *See also* New York Committee on Professional Ethics, Op. No. 765, dated Jul 22, 2003, regarding discussion of reciprocal referral agreements.

The request also seeks an opinion on the propriety of paying a third party, such as towing company, for its list of customers and then send a letter to those customers presumably soliciting business. Obtaining the customer list from the third party by itself is not a violation of a Rule. *See e.g.* Ill. S. Bar Ass'n Opinion 97-01. However, the use of the customer list and contact with potential clients is governed by Rules 7.1 through 7.4. Since the request does not provide a specific description of the proposed contact between the lawyer and the prospective client, the Committee cannot opine as to the whether the proposed contact complies with the applicable Rules.

The foregoing is not intended to be an exhaustive list of the Rules that may effect or apply to joint advertising between an attorney and a non-lawyer. Those Rules were only discussed to demonstrate the point that an arrangement for joint advertising can lead to the violation of many Rules. Therefore, the Committee is reluctant to opine on the propriety of such an arrangement under the Rules.[3]

Issue No. 3: The request seeks an opinion on whether an attorney may acquire an ownership or equity interest in, or make a loan to, a business, such as an insurance agency or tow truck company, with the expectation of receiving referrals from the business. An expectation of referrals from a business owned by the attorney is not in violation of an expressed provision of any Rule. However, various Rules are implicated by the proposal, as discussed hereafter. Of course, nothing of value may be given directly or otherwise for any referrals, including an undisclosed mutual referral agreement, as discussed above. *See also* Rule 5.4(a) and 7.2(b); *see also* Utah Ethics Advisory Op. 07-01; New York Committee on Professional Ethics, Op. No.

765, dated Jul 22, 2003, regarding joint business enterprises and reciprocal referrals.

This issue was addressed in part in Utah Ethics Advisory Op. No. 98-08, dated September 11, 1998. The question posed in Opinion No. 98-08 was: "May a law firm wholly own an accounting-practice subsidiary that is staffed by employees other than the firm's lawyers and would perform services for the lawyer's clients and others?" The response: "Yes, although the law firm will be subject to the Utah Rules of Professional Conduct with respect to the provision of these law-related services in certain circumstances." The response was based upon the prior Rule 5.7 "Responsibilities Regarding Law-Related Services." Since that Opinion, Rule 5.7 has been amended to provide:

> Rule 5.7. Responsibilities Regarding Law-Related Services.
>
> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
>
> > (a)(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
> >
> > (a)(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to ensure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client–lawyer relationship do not exist.
>
> (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Although we do not have specifics regarding the potential relationship between the attorney and the other business, it is possible that a client could believe that certain businesses, such as an insurance agency, just as accounting services, could be provided "in conjunction with and in substance related to" the legal services. *See also* Utah Ethics Advisory Op. No. 151 (The Rules apply to a lawyer acting as an appraiser, unless the lawyer makes clear to the client, in writing, that she is not providing legal services and that an attorney–client relationship is not established.). Accordingly, Rule 5.7 may apply in the subject circumstances and the attorney would be required to make clear the distinction in the services provided and/or otherwise keep the business ventures distinct.

There is clearly a possibility of a conflict under Rule 1.7, Conflict of Interest: Current Client, which provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict exists if:
>
> > (1) The representation of one client will be directly adverse to another client; or
> >
> > (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The interest that the attorney has in the other business could create a material limitation on the attorney's responsibilities to a client who is dealing with the other business, and, therefore, could create a conflict under Rule 1.7.

There is also the potential that having an ownership interest in a business with a client may lead to a violation of Rule 1.8(a). Rule 1.8(a) provides:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (a)(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (a)(2) the client is advised in writing of the desirability of seeking and is given a reasonable

> opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (a)(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Various ethical opinions have concluded that Rule 1.8(a), as well as Rule 1.7, are implicated when an attorney refers a client to an attorney-controlled business. *See e.g.* Ariz. Committee on the Rules of Professional Conduct, Op. 05-01 ("A lawyer may not refer a current client to such a program, however, unless the lawyer meets the 'heavy burden' of showing compliance with ER 1.7 and 1.8(a.)"); Arkansas Professional Ethics and Grievance Committee, Advisory Op. 98-01 ("the possibility of referral of legal clients to another business of the lawyer introduces an extraneous and potentially conflicting motive, which can threaten or interfere with the lawyer's independence of judgment."). The New Jersey Advisory Committee on Professional Ethics, Opinion 688, dated March 13, 2000, stated regarding referrals of clients to an attorney owned business:

> Without barring the possibility of such a referral entirely, we conclude that a lawyer may only refer a legal client to a business the lawyer owns, operates, controls, or will profit from, if the lawyer has (1) disclosed to the client in writing, acknowledged by the client, the precise interest of the lawyer in the business, and that the same services may be obtained from other providers, and (2) advised the client, orally and in writing, of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel of the client's choice as to whether utilization of the business in question is in the client's interest.

Rule 1.8(a) would also apply to the relationship between the attorney and the agency or other business, depending on the arrangement and ownership interest.

It is also possible that the supervisory responsibilities of an attorney provided in Rules 5.1 and 5.3 may apply. Those Rules provide in essence that the lawyer is responsible for the ethical conduct or misconduct of non-lawyers, as well as lawyers, whom the lawyer directs or controls in the context of offering legal services. Clearly, an attorney is held to the same ethical standards of a lawyer when performing non-legal services. *See* Utah Ethics Advisory Op. 5 (attorney selling life insurance is held to the ethical standards of an attorney in both professions); Utah Ethics Advisory Op. 17 (lawyer engaged in a real estate business is held to the ethical standards of a lawyer in both occupations); Utah Ethics Advisory Op. 30 (attorney who is president of a title company must comply with the ethical rules of a lawyer in both occupations); Utah Ethics Advisory Op. 108 (attorney who is a licensed CPA may so indicate on letterhead but must be alert to protect the attorney–client privilege). If the legal services and insurance services (or other business services) are not distinguished, the attorney would also have the obligations contained in Rule 5.1 and 5.3 regarding the employees of the agency.

Finally, as discussed above, Utah Ethics Advisory Op. 07-01 addressed the impropriety of an exclusive referral arrangement between the attorney and the business, which could result in a violation of Rule 7.2(b).

The foregoing does not purport to discuss all of the Rules that could have an effect on an attorney who has an ownership interest in a business, and anticipates referrals. Other Rules could become applicable based upon the circumstances.

1. The Connecticut Professional Ethics Committee, Informal Opinion 97-12, dated June 4, 1997, reached the conclusion that joint advertising by a family law attorney and a family counselor was permissible. The Connecticut Committee was considering a proposed newspaper advertisement in a box format that depicted the name and logo of the lawyer's office in one corner and the name and logo of the counseling center in the other. A phone number to call for information or an appointment was printed between the logos. The advertisement was titled at the top in bold capital letters "Attorney Therapist Divorce Mediation." The text of the advertisement stated that the lawyer and counselor had formed an interdisciplinary team approach to divorce mediation with the team consisting of a mental health professional and an attorney. The Connecticut Committee determined that the advertisement did not violate any ethical rules including those concerning false or misleading advertising, or imply that the lawyer and counselor are practicing in the form of partnership or any business form prohibited by the Rules of Professional Conduct. The Committee also concluded that the lawyer or non-lawyer is allowed to pay for all or part of the advertising expense under Rule 7.2(a). The Committee did caution that the lawyer cannot make payments to the non-lawyer for generating or referring business to the lawyer, either directly or indirectly, and that any payments made to the non-lawyer are clearly identified as for advertising only. *See also* Connecticut Professional Ethics Committee, Informal Opinion 95-25, dated July 6, 1995, regarding misrepresentations in joint advertising.
2. In the Committee's view, the exception contained in Rule 7.2 permitting the payment by an attorney to a third party for reasonable costs for advertising may not apply to the payment for joint advertising, and, therefore, is not a safe harbor for joint advertising.
3. For opinions regarding joint advertising between lawyers, *see* Michigan Committee on Professional Ethics, Op. RI-200, dated March 29, 1994 (The lawyers [who are not members of the same firm] may use joint advertising, as long as the advertising clearly delineates the relationship between the firms by disclosing that the independent lawyers do not operate as one firm."); Utah Ethics Advisory Op. 00-07, dated June 2, 2000 (same).

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

On March 1, 2013, the Honorable Christine Johnson, Fourth District Court entered an Order of Discipline suspending Jerry D. Reynolds for six months and one day for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), 3.2 (Expediting Litigation), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary there were two matters.

In the first matter, a client hired Mr. Reynolds and his firm to represent her in a consumer protection matter. The client paid Mr. Reynolds's firm for the representation. The client had purchased software, which was defective, and the client rescinded the contract with the retailer. The retailer continued to bill the client and turned her over to collections. The client hired Mr. Reynolds to get the retailer to pull its billing back from collections so that her credit could be restored. Mr. Reynolds did nothing in furtherance of his client's objectives. The client tried to reach Mr. Reynolds on numerous occasions, but calls and e-mails were not returned. Mr. Reynolds worked at a firm at the time he accepted the representation of the client. During the representation, Mr. Reynolds terminated his employment at the firm. Mr. Reynolds did not provide notice to the client that he was changing firms. Because he did not provide notice to the client, Mr. Reynolds did not give the client the opportunity to obtain new counsel. The client called the firm and was told that Mr. Reynolds was no longer there and that her case was closed.

In the second matter, a client hired Mr. Reynolds to represent the client with respect to a dispute between family members over trust monies. The family members claimed that the client had disbursed funds inappropriately as trustee for the estate of her mother. Mr. Reynolds was hired to defend the client in the lawsuit filed against her. Mr. Reynolds made misrepresentations to opposing counsel about what the client would pay to settle the case. The client was not sent correspondence or pleadings relative to her case. Mr. Reynolds was supposed to file papers to change venue but failed to complete that process. Mr. Reynolds failed to file an Answer. Mr. Reynolds failed to respond to a Motion for Summary Judgment. Eventually, the case was dismissed on Summary Judgment and a judgment entered against the client. Mr. Reynolds misrepresented to the court his reason for not responding to the Motion Summary Judgment. After the judgment was entered, Mr. Reynolds filed a Motion to Set Aside the Judgment. The court denied the Motion. Mr. Reynolds then filed papers with the court demanding that the court set aside the judgment. The pleadings filed contained

inflammatory and inappropriate language. The court found that the manner in which Mr. Reynolds addressed the court and opposing counsel was "wholly inappropriate."

PUBLIC REPRIMAND

On April 8, 2013, the Honorable Michael D. Lyon, Second Judicial District Court entered an Order of Discipline: Public Reprimand against Michael P. Studebaker for violation of Rules 1.1 (Competence), 1.15(d) (Safekeeping Property), 1.15(e) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Studebaker was retained to represent a client in a civil rights matter. The client signed a Medical Reports and Chiropractor's Lien with a chiropractor. Pursuant to the Chiropractor's Lien, the client authorized Mr. Studebaker to pay the chiropractor out of any settlement funds for the medical services he provided. Mr. Studebaker signed the Chiropractor's Lien. Pursuant to the lien, Mr. Studebaker agreed to abide by the terms of the agreement and withhold from any settlement sums necessary to pay the chiropractor. Mr. Studebaker settled the client's case, but failed to inform the chiropractor that he settled the case and received settlement funds. The chiropractor sent Mr. Studebaker a letter stating his understanding that the case had settled and inquiring about reimbursement. Mr. Studebaker sent a letter to the chiropractor stating that the settlement did not relate to any past care. Mr. Studebaker further stated that under Utah law the settlement was considered "new money," and there was nothing with which to satisfy the lien. The chiropractor sued the client for the outstanding medical bill. A judgment was entered against the client.

ADMONITION

On April 13, 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 1.3 (Diligence), 1.16(a)(2) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Attorney represented a defendant in a lawsuit. The plaintiff served interrogatories and requests for production of documents on the defendant. The client provided the attorney with responses to the discovery requests. The attorney failed to respond to the discovery requests. The plaintiffs filed a Motion to Compel. The court granted the Motion and ordered that the defendant respond to the discovery requests within ten days. The attorney failed to respond to the discovery requests within ten days. The Court awarded sanctions against the client for failing to comply with the Order. The Court also found the attorney was responsible for the failure to comply with the Order. The attorney was experiencing personal issues during the time he was representing the client. The Panel found that there was little or no injury to the client and that the attorney's mental state was negligent.

Mitigating factors:
The attorney was forthcoming in the response to the OPC and the Panel; and was very remorseful and recognized the missteps.

PUBLIC REPRIMAND

On April 2, 2013, the Honorable Judge Vernice Trease, Third Judicial District Court entered an Order of Discipline: Public Reprimand against Rex L. Bray for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.5(b) (Fees), 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: General Rule), 1.8(b) (Conflict of Interest: Prohibited Transactions), 1.8(f) (Conflict of Interest: Prohibited Transactions), 1.15(a) (Safekeeping Property), 1.15(b) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 4.1(b) (Truthfulness in Statements to Others), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary, in four matters:
Mr. Bray failed to represent his client competently and diligently by failing to obtain an extension to respond in a mechanics lien case; by failing to prepare and submit discovery responses in a timely manner; by failing to send a demand letter; by failing to attend his client's arraignment; and by failing to act reasonably and promptly in setting depositions and in providing information to his clients.

Mr. Bray failed to reasonably communicate with his client by abandoning his representation of a client without communication of any kind; by failing to explain to the client why no work was done on the case; by failing to explain what his plan was for completing work for the client; and by failing to communicate with the client regarding the proposed mediation.

Mr. Bray charged a client for work not completed, or completed without meaningful results.

Mr. Bray, in one matter, collected twice the amount of the actual fee charged for the representation. He also misrepresented to the client the amount he would require to represent the family members.

Mr. Bray breached his duty of loyalty to a client by failing to keep information in a case confidential; by representing a client's family member in another matter adverse to the client; and by failing to communicate with and obtain informed consent from all clients regarding the potential conflicts.

Mr. Bray breached his fiduciary duty by having insufficient funds in his trust account, thereby creating an overdraft and by giving the client's money to the client's family member instead of to the client.

Mr. Bray failed to take steps to protect his client's interests when he withdrew from the representation; failed to return any files to the client including any unearned fees and failed to provide notice of his constructive termination of the representation.

Mr. Bray also, in two matters, failed to respond to the Notices of Informal Complaint and failed to attend the Screening Panel Hearings.

Mitigating factors:
During the relevant time period to the events contained herein, Mr. Bray's wife suffered a serious injury which eventually led to her death in March of 2011 and Mr. Bray suffered his own medical issues that required hospitalization and serious medical treatment.

CLARIFICATION

There are two Bruce Nelsons licensed with the Utah State Bar. In the last edition of the *Bar Journal*, the attorney discipline listed a Suspension for Bruce L. Nelson, not to be confused with Bruce J. Nelson who has not been disciplined.

Paralegal of the Year

The Paralegal Division of the Utah State Bar and the Utah Paralegal Association presented their 8th Annual Distinguished Paralegal of the Year Award to Paula Christensen, CP, on May 16, 2013 at this year's Paralegal Day Celebration. The Selection Committee consisted of the committee Chair from the Paralegal Division, Danielle Davis, CP; the Utah Paralegal Association representative, Ramona Gray; Justice Michael Zimmerman; Judge Todd Shaughnessy; and Katherine Fox, General Counsel for the Utah State Bar.

Paula was nominated by William Hansen, Karra Porter, and Nathan Alder. Paula has worked at Christensen & Jensen for thirty-four years and has been a certified paralegal since 2010. Following are some excerpts from the nomination submitted by the attorneys with whom she works:

We are honored to nominate Paula Christensen for the Distinguished Paralegal of the Year Award. We firmly believe that there is no more deserving candidate than Ms. Christensen. Paula exemplifies the qualities this prestigious award is intended to promote.

It is difficult to describe in writing the reasons that make Paula so deserving of this award. Everyone – clients, co-workers, opposing counsel – who has dealings with Paula comes away with a positive experience, impressed with her compassion, her willingness to help, her upbeat attitude, her sense of humor, her dedication to the job, and her intelligence. In a world where many people are overwhelmed with their own problems and often unable to be of assistance, it is refreshing to work with someone like Paula who is willing to put forth the effort to do a job right, and who never fails to rise to the occasion. She is calm and centered and she imparts a steady confidence in her interactions with others.

Paula has worked in the legal profession virtually all of her adult life. She started as a secretary at Christensen & Jensen thirty-four years ago. She has worked as a secretary, office manager and paralegal, taking some time off when her children were born. In 2002, Paula became a full-time paralegal. We all knew that she had the skills to be an excellent paralegal. However, we have been pleased at just how exceptional she would be. Since beginning her work as a paralegal, Paula has distinguished herself as the "go to" paralegal for everyone in the firm, including other paralegals, secretaries, and even attorneys. She provides invaluable assistance on a wide variety of cases, from routine personal injury cases to complex, document-intensive commercial litigation cases. Her attention to detail is so remarkable that she is the designated cite- and fact-checker for our appellate division. She has also taken the time to become proficient on a number of different software programs, including Summation, Concordance, Sanctions, and PerfectLaw.

Paula's dedication to her job is unsurpassed. For example, earlier this year she stayed late to help meet a deadline for an appellate brief when she had planned to be at a family birthday party. As an additional example, Paula recently organized a complex, document intensive case with hundreds of thousands of documents. She prepared a spreadsheet that listed all the work done by our firm's client, correlated that with the documented-related work done by other co-defendants, included a data field that showed the specific claims made by plaintiffs for each entry, and referenced each data point to the source document, literally distilling the evidence from thousands of documents. Her efforts in that one case alone have reduced an overwhelming case to a manageable one, rendering invaluable service to our client and our firm.

She studied after work and on the weekends to prepare for the National Association of Legal Assistants examination, and became a "Certified Paralegal." These examples are typical of Paula's desire to excel.

Clients absolutely love Paula and rave about her work. Here is a portion of a letter from a client:

> Paula was one of the most impactful people around me

while I was recovering physically, emotionally, and financially from a car accident I was in. I feel that she went far and above what anybody's responsibility toward a client would be under any circumstance. She aided me in navigating me through a complex healthcare billing system and eventually took over the filing and organization of those bills. She talked me through how to deal with the various insurance companies I was in communication with. She was always prompt in calling me back and walking me through the smallest problems. Every time I spoke with her on the phone, which was multiple times per week, I felt that she was truly worried about me and was genuinely concerned about my well-being. She made me feel completely comfortable with sharing my feelings and my health status with her.

I felt that Paula was wholeheartedly my advocate and that she made herself completely available to me. It was an emotional period for me and I, honestly, feel that Paula's help and caring was a big part of my recovery and return to normalcy.

These comments reflect how virtually all of our clients who work with Paula feel about her.

Paula is also well-qualified to receive this award because of her public service and her organizational involvement, as set forth below:

- **Organizational Involvement –** Paula has been an active member of both the Paralegal Division of the Utah State Bar and the Utah Paralegal Association. She faithfully attends their monthly meetings and the annual Paralegal Day Luncheon. She also attends various continuing education seminars to improve her skills.

- **Service to Community –** Among her activities, Paula has recently been involved in the Utah State Bar's Wills for Heroes program. On her personal time, she has spent substantial effort helping those who could not afford a will. Paula is always anxious to be of service in the community in other ways. Recently, she attended a race in California to support her daughter-in-law to help raise money for cancer victims. Also, she has shared her home with others who did not have a place to stay.

- **Pro Bono Work –** Paula has performed substantial pro bono work under the direction of attorneys for numerous people who could not afford it. This has included doing paralegal work in areas outside her field of expertise, such as doing probate work and helping with criminal matters.

It is an honor for the Paralegal Division to recognize Paula and add her to the ranks of the past recipients of this award. We are already looking forward to next year and the opportunity to introduce another outstanding paralegal at the annual Paralegal Day Celebration.

Message from the Chair

by Thora Searle

As the 2012-2013 year comes to a close, I want to thank the Board of Directors for the Paralegal Division for all of their support and hard work this year. We have enjoyed assisting the Young Lawyers Division with their Wills for Heroes, Serving our Seniors, and the Cinderella project. It is an awesome feeling to know that we have been of service to others who put their lives on the line for us on a daily basis. If you haven't participated in the "Wills for Heroes," you should consider volunteering when the opportunity presents itself. It's a great opportunity to "pay it forward."

The highlight of our year's activities is our Paralegal Day Luncheon. This year we had somewhere near to 190 participants at this event. It is a time when we honor a paralegal for her accomplishments and efforts as a paralegal. These recipients are always worthy of the honor.

Another change is that the renewals/new membership period will run from June 1, 2013, through July 31, 2013. This is the same time as the attorney renewals, and we hope the change will be beneficial to our members. Remember that your CLE has to be completed by June 30, 2013, and your new membership year will be July 1, 2013, through June 30, 2014.

We would really like to see more members willing to work on the various committees and for service on the Board of Directors. We want your input, suggestions, and participation as we move forward with various projects, especially with our CLE and Community Service Committees. Please, as you complete your application for renewal, don't forget to fill out and forward the page asking for volunteers to Carma Harper at charper@Strongandhanni.com along with your Affidavit of Supervising Attorney and CLE Certification. You can send them via the postal service to Carma at: 9350 South 150 East, Suite 820, Sandy, UT 84070.

The Scholarship that was created in honor of Heather Johnson Finch is very close to our goal of $30,000. We appreciate very much the efforts of Nate Alder and Julie Eriksson in working to make this a success. We are hoping to be able to begin awarding scholarships for the fall or at least by the winter semester. We are very excited about being able to help a potential paralegal with her education and look forward to the very first award.

As the year wraps up, Danielle Price of Strong & Hanni will take over as Chair of the Paralegal Division. I have great admiration and respect for Danielle's leadership qualities and have enjoyed working with her on the Board. It has truly been a great experience and I have appreciated again all the hard work and efforts of our current Board. Without them, our Division would not be successful.

CLE Calendar

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

07/10/13 | 9:00 am – 3:45 pm — **6 hrs. Ethics, including 1 hr. Professionalism**

OPC Ethics School. $225 before 7/1/13, $250 after.

07/17–07/20/13 — **up to 15 hrs., incl. up to 2 hrs. Ethics, up to 2 hrs. Prof./Civ., and up to 3 hrs. self-study**

2013 Summer Convention in Snowmass Village, Colorado. Keynote speaker – U.S. Supreme Court Justice Antonin Scalia. Dozens of informative breakout sessions and networking opportunities. Amazing outdoor activities and adventures including: golf, flyfishing, paragliding, four-wheeling, hot air ballooning, and river rafting. Affordable lodging and kids programs are also available. For more information or to register visit: summerconvention.utahbar.org.

08/02/13 — **6.5 hrs.**

Mangrum and Benson on Experts in Utah. S.J. Quinney Law School. $210, includes a 200+ page manual.

08/09/13 | 8:30 am – 12:00 pm — **3 hrs.**

Construction Law CLE & Golf. Homestead Resort. Agenda pending.

08/09/13 | 3:30 – 4:30 pm

Annual Securities Law Section Workshop. Snowmass, Colorado, Viceroy Hotel.

08/16/13 | 8:30 am – 12:00 pm — **3 hrs.**

Litigation Section CLE & Golf – Litigating Trust, Estate, and Elder Care Issues. Hobble Creek, Canyon Road, Springville, UT. Agenda pending.

08/21/13 | 5:30 – 8:00 pm

Evening With the Third District Court. The latest news from the Third District Court and Q & A with the judges panel. Social starting at 5:30. Agenda pending.

08/30/13 | 8:30 am – 1:00 pm

Litigation Section – Utah County CLE & Golf. 5984 Hobble Creek Canyon Road, Springville. CLE only: $40 for Litigation Section members and CUBA members, $90 for others. CLE & Golf: $45 for Litigation Section members and CUBA members, $95 for others.

09/13/13 | 8:30 am – 1:00 pm

Litigation Section – Cache County CLE & Golf. 550 East 100 North, Smithfield. CLE only: for Litigation Section members and Cache Co. Bar members $30, $45 for others. CLE & Golf: $40 for Litigation Section members and Cache Co. Bar members, $65 for others.

09/20/13 | 3:45 – 4:45 pm

iSymposium (fka Utah Cyber Symposium). Adobe Offices, Lehi, UT. Agenda pending.

09/27/13 | 9:00 am – 4:30 pm — **7 hrs. including 1 hr. Prof/Civ**

Twin Crises in the Law. 1) Underserved middle class clients; and 2) under-employed lawyers. $25 if you sign up with Pro Bono and Modest Means, $210 otherwise.

Classified Ads

RATES & DEADLINES

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

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

WANTED

Top $ for your law practice. Would you like to retire and sell your practice of law? Utah attorney desires to purchase an established law practice from a solo practitioner who desires to retire. Call (801) 317-8402 for more information.

POSITIONS AVAILABLE

Prominent, AV-rated, downtown Salt Lake City law firm seeks an attorney with a minimum of three years of experience in: business formation, mergers and acquisitions; corporate, LLC and governance matters; licensing; and commercial contracts. Opportunity to experience highest professional standards in a pleasant work environment. Please send resume to maattad@gmail.com.

Cohne, Rappaport & Segal, P.C., is seeking attorneys or groups of attorneys who have an established client base to join our expanding practice. As a mid-size firm, we offer a professional, but relaxed, atmosphere. Our overhead is reasonable and compensation is directly tied to personal efforts and results. Send inquiries to: crs@crslaw.com.

LAW OPPORTUNITIES IN EUROPE: VISITING PROFESSORSHIPS – Pro bono teaching assignments East Europe and former Soviet Republics. Requires 20+ years' experience. www.cils.org/sl. LLM IN TRANSNATIONAL COMMERCIAL PRACTICE – Two-week sessions in Salzburg, Budapest, and Warsaw. www.legaledu.net. Center for International Legal Studies, US Tel 1-970-460-1232. US Fax 1-509-356-0077, Email office@cils.org.

OFFICE SPACE / SHARING

4190 S. Highland Drive Office Space 500 to 1,600 S/F offices available. Private parking and elevator, continuous glass around the building with beautiful views. You choose your layout with some built in office furniture, full service lease, in house maintenance, exterior marquee, great location. Contact Barbara at 801-450-3135.

Downtown Salt Lake City Office Space Available – conveniently located in Salt Lake City near freeway exit and courthouse. Large newly remodeled office suite approximately 176 square feet. Plenty of parking space. Common conference room, break room, copy machine and receptionist within an office sharing environment. Please contact Mr. Mark Nelson or Mr. Wade Taylor at (801) 538-0066 or mark_nelson@integra.net or wadetayloresq@yahoo.com. Available August 1st!

Have the feel of a well-established larger law office by subleasing a new Executive office for as low as $499 a month, close to downtown courts, 5th floor Main Street views & warm associations with seasoned lawyers at Terry Jessop & Bitner. Contact Richard at (801) 534-0909 or richard@tjblawyers.com.

Executive office share to suit any need! Just off 1-15 in Bountiful, located in The Square at 2600. Convenient and free parking. Offices between 120 and 350 square feet. Shared conference room and reception area, fax/copier/scanner, Internet, break room. Storage available. Prices starting at $200 per office per month. Month-to-month available. $100 off per month and free internet with 2 year lease. If you are interested please contact (801) 397-2223. VIRTUAL SPACE ALSO AVAILABLE FOR $100/month (unlimited conference room use to meet clients and you can use this address as your business address). Owner flexible.

Ogden Office Space Available – conveniently located on Wall Avenue near freeway exit and courthouse. Three large furnished offices with use of large conference room, break room, kitchen, and private restrooms located on second floor of business building. Additional small conference room on main floor. Security system and plenty of outside parking. Please call Jeannine Timothy at 801-269-1950.

VIRTUAL OFFICE /PRIVATE OFFICE SPACE – Whether you are a sole practitioner or your firm is looking for a satellite office, myWorkBar provides VIRTUAL OFFICE SERVICES and private office space. We offer specialized assistance for the legal industry. Use of a Professional Business Address w/mail handling services. Receptionist call answering/screening. Local or national phone numbers available. Private meeting rooms. Office timeshare options for $199/month. Drop-in workstations. 24/7 access. Website, legal assistant, marketing, and business identity services. www.myworkbar.com. Kathryn@myworkbar.com. 801-713-3500.

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

Two beautiful, large downtown law offices with separate secretary stations available within an office sharing environment. Possible firm affiliation may be considered for select applicants. Walking distance to Federal and 3rd District Courts. Common library, receptionist, copy machine, and break room. One office suite available full-time mid-June, the other available immediately on a half-time or arranged share basis. Please contact Mr. Julian Jensen or Mr. John Cawley at (801) 531-6600 or jjensen@jdcdj.com.

SERVICES

Attorney To Attorney Services: Estate and business planning attorney with 15 years of experience is available for attorney-to-attorney work. Increase the services you can offer your clients without having to hire more employees. Reasonable rates and very fast turnaround. Email Pattie Christensen at pchristensen@utahestateplanners.com for more information

Looking for alternative care but can't stand the thought of a nursing home? We provide close personal attention, honoring freedom of individual choice in a ranch setting for stroke, heart recovery, cancer, or dementia residents. Pets allowed. Reasonable rates. Private pay. Relax and let us help! Jordana Bryan, CNA, 208-308-2600.

CALIFORNIA PROBATE? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, North Salt Lake. (801) 292-6400 or (888) 348-3232. Licensed in Utah and California – over 35 years experience.

Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics: Consultant and expert witness. Charles M. Bennett, 505 E. 200 S., Suite 200, Salt Lake City, UT 84102-0022; (801) 521-6677. Fellow, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.

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

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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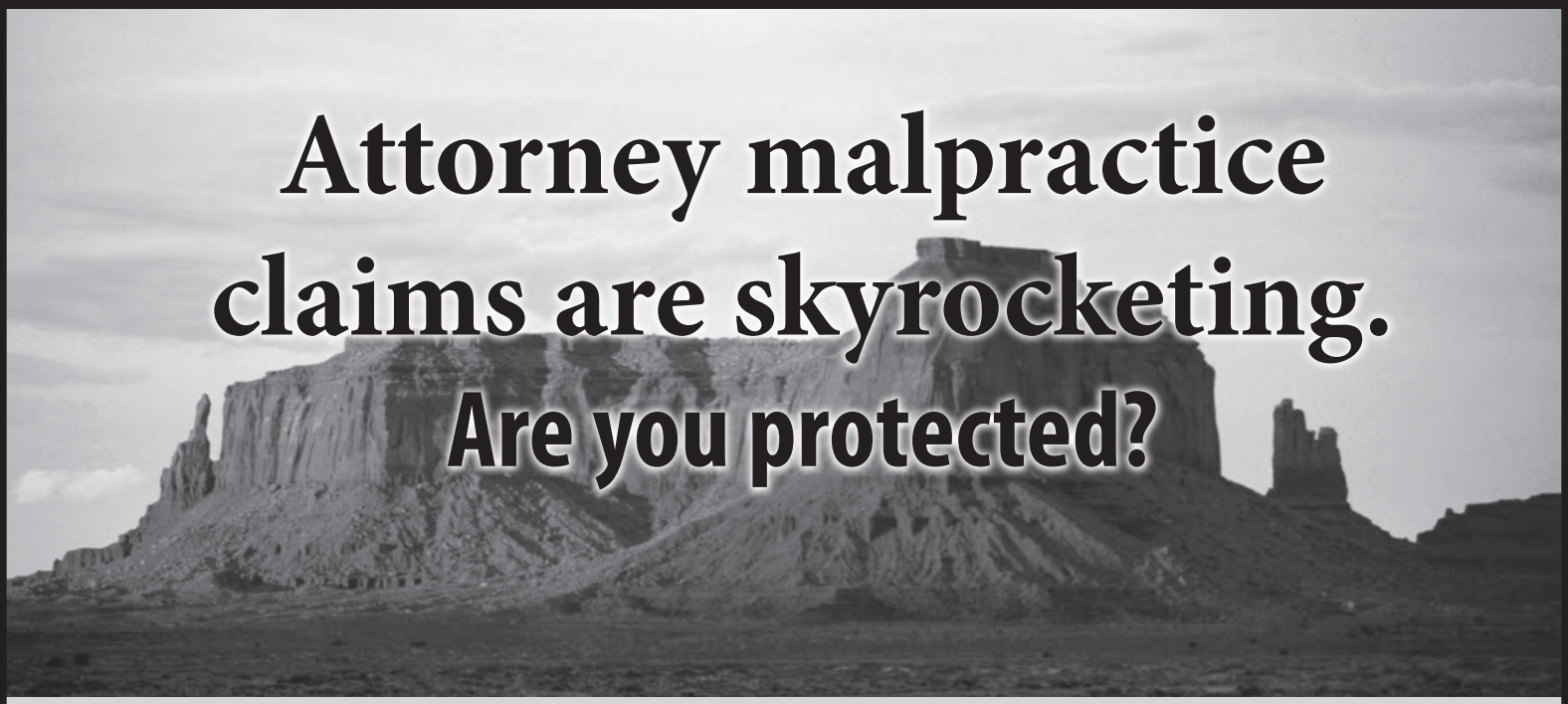

Attorney malpractice claims are skyrocketing.

Are you protected?

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.

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or visit **www.proliability.com/lawyer**

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

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