Utah Bar® JOURNAL

40 YEARS

Volume 26 No. 6
Nov/Dec 2013

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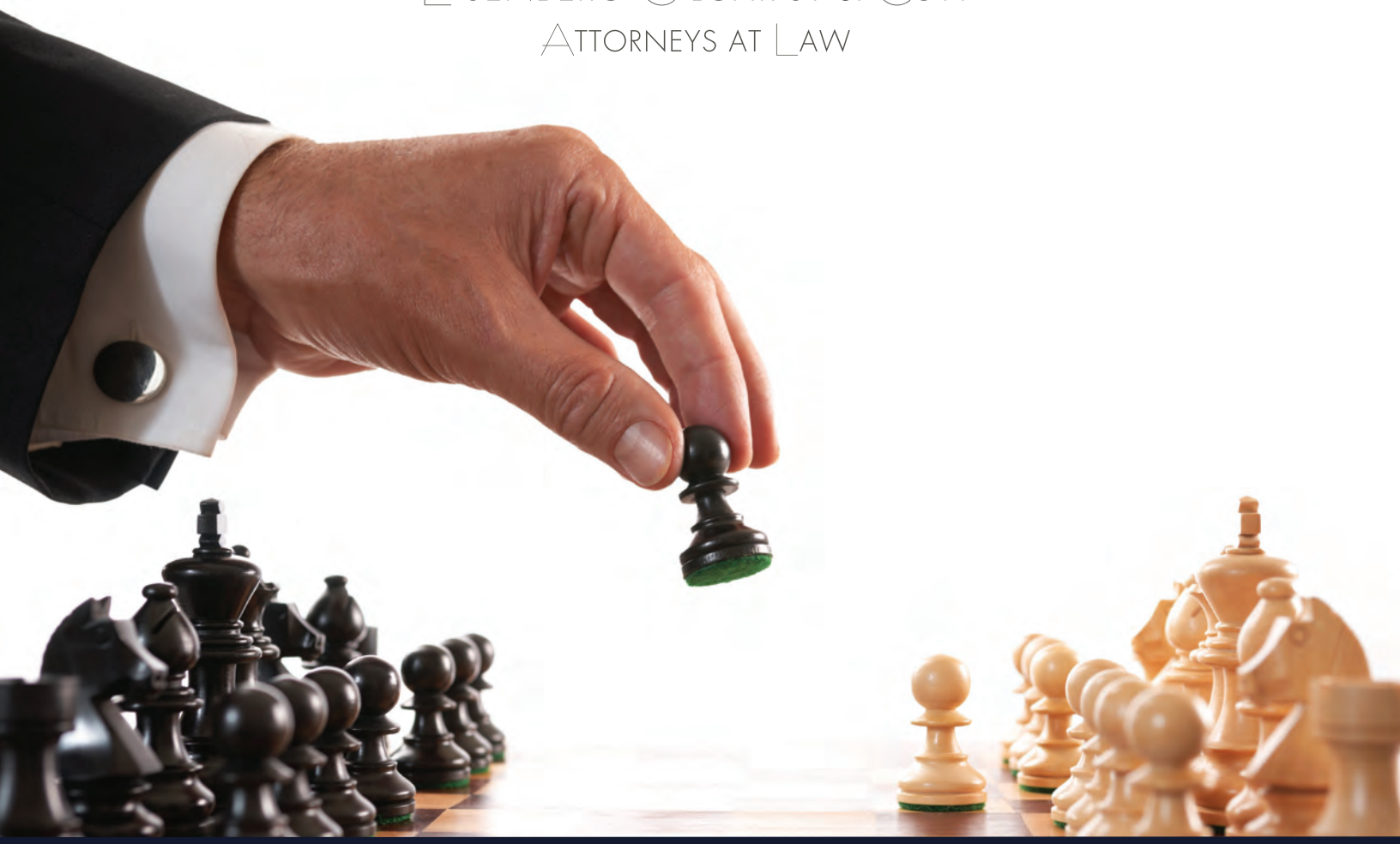

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Utah Bar JOURNAL

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Cover Art

Matheson Courthouse, by Steve Densley, American Fork, Utah.

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs (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.

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

Length: The *Utah Bar Journal* prefers articles of 5000 words or less. Longer articles may be considered for publication, but if accepted such articles may may be divided into parts and published 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.

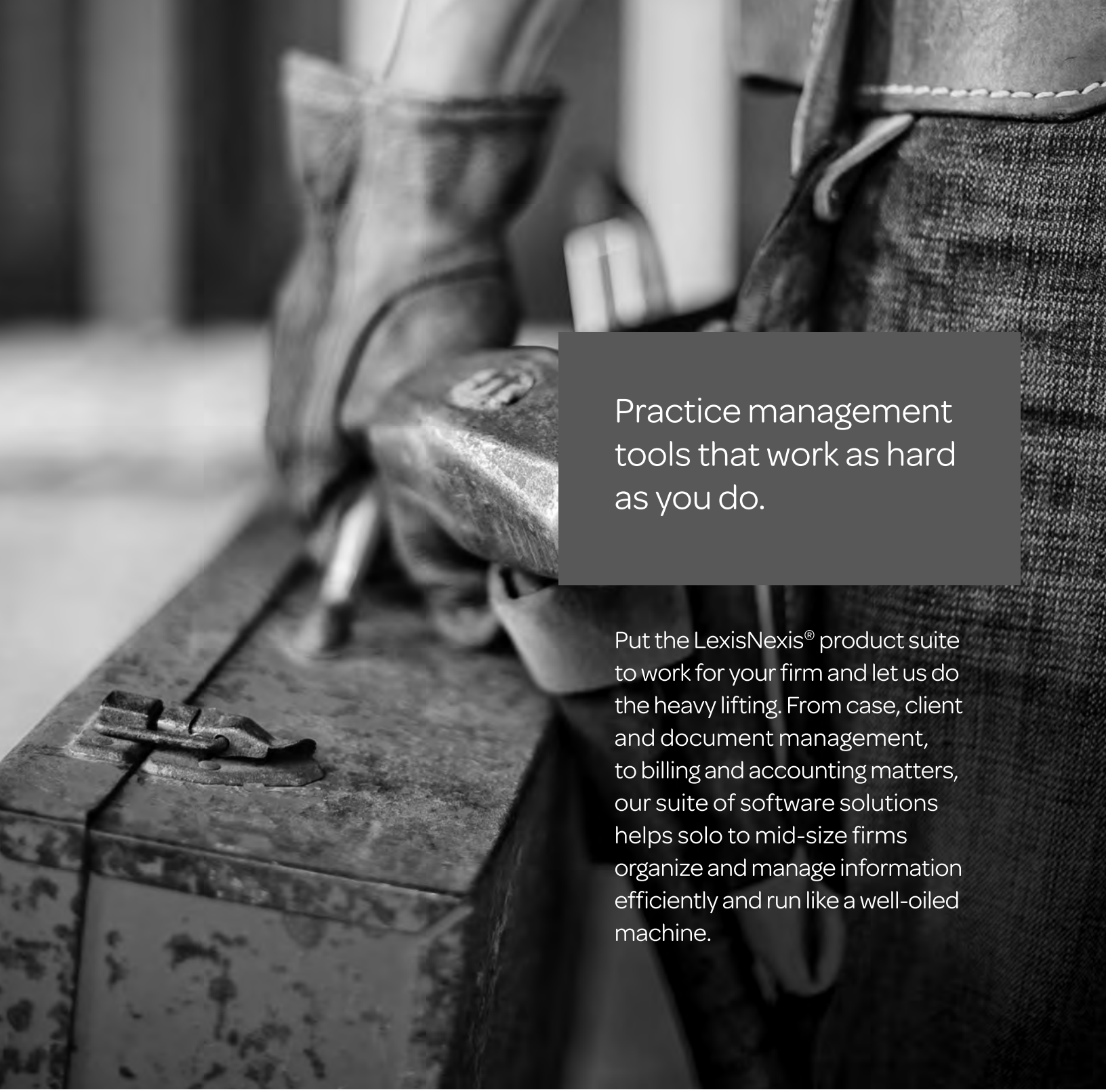
No Footnotes: Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial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

Celebrating 40 Years[1]

by William D. Holyoak

With this issue, we celebrate the 40th anniversary of the *Utah Bar Journal*. While there had been Bar publications prior to 1973, there had not been any for some time. Dean Samuel D. Thurman of the University of Utah College of Law, one of the organizers of the new *Utah Bar Journal*, noted in the inaugural issue:

> A professional *Bar Journal* for the State of Utah is long overdue. The earlier *Bar Bulletin*, published during a period of some thirty years…had given promise of developing into a publication that would meet the needs of the lawyers of the state but was discontinued in 1963 due largely to increased costs. [The intervening] years have seen only occasional newsletters and other less formal communications with members of the Bar. A publication more effective and more in keeping with professional objectives is clearly needed.

Randy L. Romrell, veteran editor of the Utah Bar Journal.

D. Ray Owen was the original editor, serving until the mid-1980s when Cal Thorpe took over. Cal labored until 1999 when he and his wife died in a car accident returning from the Bar's mid-year meeting in St. George. I have been the Editor since then. During my years as Editor, there have been many excellent members of the Editorial Board. Todd Zagorec, Judge Gregory K. Orme, Judge Catherine Roberts, and J. Craig Smith have all served ably for more than ten years.

But no one has equaled the sustained contribution of Randy Romrell. Randy was on the original task force charged with the responsibility of creating the new journal. Randy undertook a comprehensive study of bar journals from virtually all the other states and wrote a "white paper" that served as a resource and guide for the task force. His recommendations for the *Utah Bar Journal* continue to be followed. Other than for a period in the 1980s, Randy has served as an editor of the *Bar Journal* from the beginning until his retirement earlier this year. He has been the Principal Articles Editor, Associate Editor, and, most recently, the Art/Design Editor. With his keen eye, he has selected the beautiful photographs we feature on our covers. The accompanying photo shows him with his plaque acknowledging his many years of service.

The *Bar Journal* has also enjoyed tremendous staff support. For many years, Christine Critchley has been our Bar Staff Liaison and Laniece Roberts has been our Advertising/Design Coordinator. Both provide professional and essential services.

Additional information about the history of the *Bar Journal* and other Bar publications can be found in the following *Bar Journal* articles: Randall L. Romrell, *Questions You Might Ask About the History of the Utah Bar Journal*, 20 Utah B.J. 36 (Jan./Feb. 2007), and Mari Cheney, *Before the Utah Bar Journal*, 22 Utah B.J. 38 (Sept./Oct. 2009).

1. A careful reader may wonder why the 40th anniversary issue bears volume number 26. In 1988, the *Bar Journal* was updated and revitalized (more senior members of the Bar may recall the old 6" x 9" format) and the decision was made at that time to start over with volume number 1.

The People and Organizations Within the Bar

by Curtis M Jensen

One of the great honors of being Bar President is the opportunity to meet and associate with so many outstanding people and organizations. The Utah Bar is full of both. In this month's article, allow me to recognize and call your attention to three outstanding organizations within the Utah State Bar. Like many of the organizations within the Bar, these three have demonstrated outstanding service to their membership, to the State Bar as a whole, and to the public that has benefited from many of their events and programs. They are continuously giving of their time and energy and are touching many lives along the way. It has been my privilege to attend several of their functions during the past year and witness the public good they are doing.

UTAH MINORITY BAR ASSOCIATION

The Utah Minority Bar Association (UMBA) was founded in 1991 by twenty minority attorneys as a reflection of the rapidly-growing ethnic diversity in Utah. UMBA's purpose is to promote diversity within the law and address issues that impact racial and ethnic minorities, especially within the legal community. To accomplish its goal, UMBA offers its current 177 members, including twelve judges, a forum for minority attorneys to network and develop professionally. The organization also provides concrete support for legal scholarship and education through awarding scholarships to minority law students. UMBA membership is open to all Utah State Bar members in good standing. It is an incredible group of our colleagues who do focus so much time and energy on promoting opportunities in the law, not only for the UMBA membership, but also for many of the public members who benefit from its services and events. I attended the UMBA annual awards banquet last month and had an enjoyable time witnessing many of their good deeds and leadership at work.

Tyrone Medley, Utah's first African-American judge, gave the keynote address at the 2013 UMBA Awards Banquet and spoke about the importance of a diverse judiciary. UMBA also awarded nearly $35,000 in scholarships to twelve law students based on their academic achievement, their record of service to racial and ethnic communities, and their potential to positively impact and represent Utah's racial and ethnic communities in their future legal careers.

Since 2008, UMBA has awarded almost $150,000 in scholarships to fifty-two law students. The scholarships are funded by donations from law firms, UMBA members, and both the S.J. Quinney College of Law at the University of Utah and the J. Reuben Clark Law School at Brigham Young University.

In an extraordinary commitment to help each scholarship recipient have a successful legal career, UMBA has partnered with one of our local firms, Holland & Hart, in a student mentoring program, administered by Holland & Hart partner Cecilia Romero. Development workshops and consistent one-on-one mentoring meetings with committed Holland & Hart attorneys and their individual student mentees reinforce and enrich the students' legal studies and career preparation.

Other successful UMBA initiatives this past year include joining with the ACLU in co-sponsoring a screening of the Sundance Film Festival award-winning film, *Gideon's Army*, the story of three young public defenders in the deep South who courageously address the way America thinks about indigent legal defense. UMBA also held a networking party for members, law students, and their families to celebrate "Juneteenth," a nationally celebrated commemoration of the ending of slavery in the United States.

The strength of UMBA lies in the commitment and passion of its members and leaders, past and present, as they champion opportunity, diversity, and excellence in our business and legal

community. We commend UMBA for the wonderful job it is doing in building leadership, for the outstanding service it is rendering to our colleagues, and for making a difference in the Bar. To find out more about the Utah Minority Bar Association, please visit its web site at www.utahminoritybar.org.

WOMEN LAWYERS OF UTAH

The Women Lawyers of Utah (WLU) was founded in 1981. WLU's primary goal is to encourage and assist the advancement of women in the legal system and the legal profession. To accomplish this goal, WLU's president, Aida Neimarlija, explained that, over the last year, WLU's Board and its members have worked hard to facilitate opportunities for women in the legal community to learn from each other and advance in the profession through networking, mentoring, providing hard-skills training opportunities, and sharing tips on work/life balance. Here are the highlights of some of WLU's keystone events, programs and ideas implemented over the last year.

Through the great efforts of Cheryl Mori, Mara Brown, Katie Woods, and Jaelynn Jenkins, WLU created three specific geographic sections – the Northern Utah, Southern Utah, and Central Utah Chapters – to help connect the women from all over our state. During the past year, Utah Supreme Court Justice Christine M. Durham welcomed WLU's Southern Utah members in St. George, and Utah Court of Appeals Judge Michele Christiansen welcomed WLU's Northern and Central Utah members.

Noella Sudbury and the Career Advancement Committee (CAC) organized WLU's annual Banter With the Bench at the Matheson Courthouse last Fall with a record number of judges and CLE attendees. Many of our female judges graciously greeted the WLU's members in an informal setting. CAC also organized WLU's annual Fireside Chat with Justice Durham, where members heard an insightful presentation from Justice Durham and WLU announced the 2013 Woman Lawyer of the Year, Heidi Leithead. WLU's next Banter With the Bench will be held on November 13, 2013.

The CLE Committee, headed by Jessica Peterson and Melinda Hill, organized the Free Monthly Lunch CLEs. WLU offered approximately ten free lunch CLEs over the last year or so, and will continue to do so over the next year with the assistance of a

generous host, Durham Jones & Pinegar. WLU put on mentoring socials and facilitated several opportunities for its members to meet with judges from all courts in an informal setting. Over the last year, WLU has put a lot of emphasis on developing the Judicial Mentoring Program to encourage well-qualified women to seek judicial positions.

WLU's Special Project Committee, under the able leadership of Cortney Kochevar, is also finalizing the *Utah Trailblazers in the Law* documentary, which will portray the First 100 Women admitted to practice in the state. This project is expected to be finalized early next year. For more information about Women Lawyers in Utah, please visit its web site: http://utahwomenlawyers.org/.

UTAH YOUNG LAWYERS DIVISION

The Utah Young Lawyers Division (YLD), with approximately 2,000 members, is one of the most active organizations within the Bar. All members of the Utah State Bar in good standing and under thirty-six years of age, as well as members who have been admitted to their first state Bar for less than five years, regardless of age, are automatically members of the YLD. Since October 1977, the Utah State Bar and YLD have sponsored a free legal advice program in Salt Lake City known as the Tuesday Night Bar. Its Wills for Heroes and Serving our Seniors programs continue to serve the community with distinction on a regular basis. Between Tuesday Night Bar, Wills for Heroes, Serving our Seniors, and the Veterans Clinic, YLD members have provided free legal services to thousands of people who could not otherwise afford legal help.

On November 8, the Utah YLD will be hosting Utah's first annual Young Lawyers Division Leadership Conference at the Waldorf Astoria Hotel in Park City. This will be a full-day event dedicated to training young lawyers in critical leadership skills. The classes and presentations go well beyond the limits of law school and normal CLE programs. Attendees will be challenged to completely rethink their role at their firms, within the legal community, and in the world in general as they see the impact great leaders can have on organizations of any size. The focus of the conference will be on how to lead clients effectively through a major legal or business crisis. That presentation will be followed by a series of panels of lawyers who are leading effectively in public service, at law firms and as in-house counsel for major corporations. In the afternoon, the conference will host a panel of distinguished members of the judiciary. The judicial panel will discuss the rules of professionalism and civility, and their application to young lawyers leading clients through the judicial process. The YLD has approximately ten networking events per year. For more information about the Young Lawyers Division, please visit its web site at http://younglawyers.utahbar.org/.

Becoming a better lawyer, building a network of colleagues and professional relationships, and just enjoying a great time with great friends is why we join these Bar organizations. All of us strive to do more – and to learn more – to help our clients and improve the justice system in which we work and serve. As we strive to duplicate the values of those who truly serve others, we will not only make ourselves better lawyers but will also help train and develop the next generation of Bar leaders. As president, I salute the Utah Minority Bar Association, Women Lawyers of Utah, and the Young Lawyers Division for all the wonderful and outstanding services they provide. To the rest of our volunteer organizations, thank you all for the incredible and vital services you are providing and for your tireless effort and hours of service you give each and every day.

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Judicial Activism, Restraint, & the Rule of Law

by Justice Thomas R. Lee

The public dialogue about the work of the judiciary is often salted with emotive terminology. When we want to denounce judges we often call them *activist*. To praise them we may call them *restrained*.

These are loaded terms. If you call someone a judicial activist you're not just disagreeing with them, you're hurling an insult. The converse is also true. When you characterize a decision as the product of judicial restraint, the intent is not just to express agreement but to praise a court for its humble statesmanship.

At this level of generality, we have near universal consensus on the meaning of these words. Restraint is good. Activism is bad. Restraint is an ovation. Activism is an epithet.

Unfortunately, the consensus ends there. Courts and their critics throw these loaded words around in ways that convey wildly different meanings. And too often the decision of which meaning to use is a matter of mere opportunism. A decision one strongly disagrees with is derided as activist, while a favorable decision with a similar effect is lauded as appropriate.

This is unacceptable. Our dialogue about the use and abuse of the judicial power is too important to be confounded by language that packs emotion but lacks substance. Unless we're going to banish these loaded terms from our legal lexicon (and I rather doubt our ability to do that), we should define them more carefully. Fighting words have no place in the judicial dialogue. We need a principled basis for differentiating laudable acts of judicial restraint from troubling forays into activism.

In the paragraphs below I will first demonstrate that our use of the terminology of "activism" and "restraint" is inconsistent and lacks a unifying theory. Second, I will attempt to offer a neutral ground for judging our judges (on the "activism" and "restraint" front). Specifically, I will suggest a way to conceptualize these terms in a manner building on a longstanding conception of the nature of the judicial power – a definition, in my view, that is aimed at ensuring governance by the rule of law and not the arbitrary will of a judge. Third, and finally, I will consider a recent Utah Supreme Court opinion under both the prevailing terminology and under the usage I propose, defending the opinion against a hypothetical charge of judicial activism.

Activism & Restraint: Empty "Fighting Words"

Our principal uses of the notion of judicial activism are rife with inconsistency and doublespeak. This "a" word is used in judicial opinions and public discourse in at least three different senses. None of them properly captures a principled ground for criticizing judicial decisionmaking. Before I explain the problems with the three main notions of activism in common usage, I will first describe them.

First, judges are sometimes criticized as "activist" when they hand down decisions that override instead of deferring to an act of another branch of government. Under this definition, the hallmark of activism is an assertion of power by the judicial branch at the expense of a coequal branch like the legislature or the executive. In 2012, President Obama made use of this notion of activism in public comments he made on the U.S. Supreme Court's consideration of the constitutionality of the health insurance mandate in the Affordable Care Act. In a

JUSTICE THOMAS R. LEE has been a member of the Utah Supreme Court since July 2010.

preemptive challenge to a decision possibly striking down this legislation under the Commerce Clause, the President said this:

> Ultimately, I'm confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress. And I'd just remind conservative commentators that for years what we've heard is, the biggest problem on the bench was judicial activism or a lack of judicial restraint – that an unelected group of people would somehow overturn a duly constituted and passed law. Well, this is a good example. And I'm pretty confident that this Court will recognize that and not take that step.[1]

This "example" of activism cited by President Obama focuses on the effect of the court's decision on the acts of the democratically elected branches of government. Because a "strong majority of [the] democratically elected Congress" came to terms on the Affordable Care Act, the President challenged the capacity of the "unelected group of people" on the court to overturn this "duly constituted and passed law."

This notion of activism is hardly unique to liberal critics of the court or to politicians on the left. When the Supreme Court handed down its recent opinions on the subject of same-sex marriage, conservatives were not exactly pleased. And some conservative critics of those decisions made an equal and opposite charge of activism in the form of overriding the will of the people. Consider this critique of the Proposition 8 decision by U.S. Senator Ted Cruz:

> We saw a decision from the US Supreme Court… [that] was an abject demonstration of judicial activism.… The citizens of California went to vote and they voted and said in the state of California we want marriage to be the traditional union of one man and one woman, and the US Supreme Court, as a result of its decision said you have no right to

define marriage in your state, we know better.[2]

Senator Cruz's invocation of the "a" word is much like President Obama's. Both charge "activism" when they mean to criticize a decision overriding the democratic will of the people. Cruz's main addition is in the adjective "abject." From what I can tell "abject activism" is even worse than regular activism.

A second notion of activism focuses on the effect of the court's decision not on other branches of government but on the court's own precedents. This definition paints as "activist" a judicial decision to overrule past precedent. Sometimes the justices themselves speak of activism in this way. The "a" word is seldom used these days in opinions of the Supreme Court – probably due to the fact that most people perceive it as one of those "fighting words" that contributes little light and much heat to the debate. But occasionally the members of the court still seek to tag their colleagues with this epithet, as in Justice Stevens's dissent from one of the Rehnquist Court's Eleventh Amendment decisions – a case called *Kimel v. Florida Board of Regents* – in which Stevens chided his colleagues for "judicial activism" in overruling *Pennsylvania v. Union Gas* as a "departure from the proper role of th[e] Court." 528 U.S. 62, 99 (2000) (Stevens, J., dissenting). More often, it's the politicians and the pundits that employ the "a" word to up the ante in criticizing judicial decisions. After the Supreme Court struck down the imposition of the death penalty on juveniles in *Roper v. Simmons*, for example, then-presidential candidate John McCain decried the court for its judicial activism, noting in part that the court's decision overruled past practice and precedent on this issue.[3]

> *"Although everyone agrees that judicial precedents are worthy of a degree of respect and deference, no one that I know of embraces an ironclad ban on overruling precedent in all circumstances."*

There is a third use of the "a" word that is perhaps even more common than the first two, at least among pundits and politicians. This final concept of activism cuts past the effect of the court's decision and goes straight to its merits. Under this approach, a decision is decried as activist if it is wrongly decided under the law. A conservative critic of the court's decision striking down DOMA as unconstitutional, for example, might say something like this: "*United States v. Windsor* is an activist decision; the Fourteenth Amendment is about race, not same-sex marriage." A left-leaning commentator speaking of the court's decision striking down section 4 of the Voting Rights Act, on the other hand, might speak in these terms: "The *Shelby County v. Holder* decision is written by activist judges who just don't understand the continuing realities of racism in America today."

Each of these three uses is problematic for its own reasons. But they all share a common, fundamental flaw: They all employ the rhetoric of activism in a manner that is both unprincipled and unhelpful.

The first two notions of activism suffer from the same problem: They are hopelessly overbroad and thus do not encompass any useful criteria for separating illegitimate uses of the judicial power from legitimate ones. As to decisions that override the acts of democratically elected branches of government, the obvious response is that at least since *Marbury v. Madison*, it has been a core part of the court's job to consider the constitutionality of legislation passed by Congress and signed into law by the President. If we accept *Marbury*, as most everyone properly does, then the judiciary cannot be deemed to be performing an *ultra vires* act – to be "activist" – when it performs one of the core functions recognized in its settled precedent. Thus, the court could not appropriately be derided as activist in the "Obamacare" case on the sole ground that its decision had the effect of striking down the "duly constituted and passed" Affordable Care Act. The "a" word label doesn't apply here any more than it does to the court's decision rejecting the appellate defense of Prop. 8 in *Hollingsworth v. Perry*. You can criticize either or both of those decisions as wrong on their merits. But you can't properly add the "activist" epithet to your criticism just because these decisions pit the unelected court against the elected branches of government. That's the unelected court's job under *Marbury*, not a ground for scornful use of the "a" word. If a court declined to do that job, *that* would be grounds for questioning

the legitimacy of its decision. (I suppose it wouldn't make much sense to call such dereliction "activism"; you'd have to coin a new term to capture it – "judicial abdication" comes to mind – but whatever you called it, it would certainly be worthy of scorn.)

The second notion of activism falters on similar grounds. Although everyone agrees that judicial precedents are worthy of a degree of respect and deference, no one that I know of embraces an ironclad ban on overruling precedent in all circumstances. With this in mind, we can also say that the judiciary cannot be deemed to be abusing its power whenever it overrules itself. The validity of such an overruling decision must instead be evaluated on the basis of its case-by-case merits, which will turn on settled criteria under the doctrine of *stare decisis*, such as whether the decision in question is demonstrably incorrect, whether it has been undermined or rendered unworkable by subsequent authority, and whether significant reliance interests have built up around it. Thus, again, *Kimel* and *Roper* cannot be derided as "activist" simply because of their effect on prior precedent. In fact, if the decisions they overruled merited no deference under the doctrine of *stare decisis*, then the court's decisions overruling them were not only *not* an abuse of judicial power but a perfectly appropriate use of it.

My point is easy to support with iconic examples of judicial decisionmaking. Some of the U.S. Supreme Court's most venerable decisions simultaneously overruled settled precedent while striking down legislation passed by the people's representatives in government. *Brown v. Board of Education* is a prominent example. It struck down settled precedent (*Plessy v. Ferguson*) while invalidating "duly constituted" legislation passed by the people's representatives in state legislatures throughout the South. Similarly, *Loving v. Virginia* invalidated legislation prohibiting interracial marriage and struck down over eighty years of precedent upholding such laws as constitutional. Yet almost no one derides *Brown* or *Loving* as activist decisions worthy of scorn. Today we see them as paragons of judicial propriety, not just despite but perhaps in part because they overruled

precedent and overrode the then-popular will of the people.

That leaves the third notion of activism, which is essentially to hold up as "activist" a decision we disagree with on its merits. If the *Kimel* and *Roper* decisions are not "activist" merely by virtue of overruling precedent and overriding legislative acts, can they be deemed so because they were wrongly decided? No. One can criticize either or both of those decisions as wrongly decided. But it adds nothing to punctuate heartfelt disagreement with the epithet of activism. The "a" word gets used precisely because it carries a weighty negative connotation. And although the precise content of that connotation is hazy, there is no doubt that its use is intended to convey not just disagreement but disdain and contempt. Such language should be avoided, especially where the only basis for any contempt is mere disagreement on the merits and nothing more.

As Pam Karlan has noted, this kind of use of the "a" word is reminiscent of Bertrand Russell's notion of "emotive conjugation."[4] Emotive conjugation is a colorful illustration of our human tendency to describe our own behavior more charitably than that of others. It says that verbs like "to persist" are "irregular," to be conjugated as follows: "I am resolute. You are obstinate. And he is a pigheaded fool."[5] The counterpart for judicial activism purposes would go along these lines: "I made a minor oversight. You committed a blatant error. And he is a judicial activist."[6] The addition of the "a" word adds nothing but emotive conjugation. It therefore fails as a defensible notion of activism.

"[W]e ought to chide a judge's activism only where it exceeds that definition of judicial power, just as we ought to applaud a judge's restraint only where it respects that definition."

Much of this criticism of the "a" word applies conversely to prevailing uses of the term "judicial restraint." Where "judicial restraint" is used to blindly laud decisions deferring to past precedent or to the acts of the political branches of government, the label is empty and unhelpful. Such decisions may or may not be laudable, but their propriety turns on their merits. Blind deference to a plainly unconstitutional statute is hardly worthy of praise. That kind of "restraint," as I've said, would be better derided as abdication.

Not all uses of the "r" word, however, are vacuous. Some notions of restraint express important restrictions on the use of judicial power. A good example is the preference for decisions on narrow rather than broad grounds, and the related principle of declining to reach constitutional grounds for decision where a statutory basis is available. That principle appropriately channels judicial decisionmaking to grounds that can be overruled legislatively if the public finds a court's decision abhorrent, and away from grounds that would become entrenched and hemmed in by the super-majoritarian process of constitutional amendment. These principles of restraint are entirely sensible and appropriate.

At the same time, even these notions of restraint can be misused or perverted. The preference for the narrowest possible ground for decision, for example, cannot be taken to its literal extreme. Ultimately, the narrowest ground for a decision would be one that stated no legal principle at all but just rested amorphously on the conclusion that one side's position prevailed in light of all of the relevant facts to be evaluated on a case-by-case basis going forward. That would be narrow. But it would not appropriately restrain judicial power. It would perversely expand it by assuring that the outcome of future cases would be dictated not by a predictable principle of law but by the subjective impulse of the judge assigned to the next case.

The case law on constitutional avoidance also has the potential to be abused or perverted. I did not appreciate this problem as a law student or a young lawyer. I accepted the stated justification for constitutional avoidance in iconic cases like *NLRB v. Catholic Bishop* and assumed that this practice was entirely uncontroversial and appropriate. As I've come to think about this more over time, however, I have come to see it differently. I have come to conclude that although a limited principle of constitutional avoidance is appropriate, the modern approach to avoidance can lead to a problematic abuse of the judicial power.

Take the *Catholic Bishop* case itself. The question in the case was whether teachers at religiously affiliated schools were "employees" subject to collective bargaining rules under the NLRA. The court deemed them exempt from collective bargaining, but it did so without ever interpreting the language of the statute. It rested its decision on the conclusion that subjecting teachers at religiously affiliated schools *might* raise serious constitutional questions. In light of that constitutional question and given Congress's presumed intent to steer clear of constitutional problems, the court held such teachers beyond the reach of the NLRA.

That decision would make sense if the court had applied the doctrine of constitutional avoidance in the traditional way. The traditional doctrine would be implicated if (a) there were two plausible constructions of the statute in question and (b) one of them would cause constitutional problems. But there was a shell game at work in the *Catholic Bishop* opinion, in that the court never indicated that the statute was subject to two alternative constructions. (The word "employee" was defined, in fact, in a straightforward way, making such a conclusion difficult if not impossible.) And to compound the matter, the court not only didn't interpret the statute, it also didn't interpret the Constitution. It never decided that subjecting these teachers to collective bargaining would cause constitutional problems under the religion clauses of the First Amendment. It simply said that there could be serious questions about that matter. This strikes me as a terribly problematic decision. And it is hardly a decision of judicial restraint in the sense of minimalism. It is rather maximalist, in that the court ends up imposing its decision not on the basis of the meaning of the legislative text or of the import of the relevant provisions of the Constitution. By instead ruling the Catholic school teachers exempt because it *might* be unconstitutional to do otherwise, it seems to me that the court was expanding its will and its authority without rooting it in any principle of positive law. This again, in my view, is another perverse use of the notion of judicial restraint – another indication that our terminology is problematic.

Activism & Restraint: Toward a Neutral Principle

How should we respond to these many problems with our current use of the loaded language of restraint and activism? For years some judges and commentators have proposed that we banish these words from the judicial lexicon. That would certainly be one approach. But I'm realistic enough to know that any demands in that direction by a judge will surely fall on deaf ears. Loaded terms are unlikely to disappear from a process that the public cares about deeply. Since loaded language causes people to pay attention, it is unlikely to disappear from our dialogue.

That does not mean that we have to continue to use these loaded terms in vacuous and even perverse ways. If we're going to conjugate our verbs emotively á la Bertrand Russell, we have a responsibility to use our words advisedly and carefully. I would like to suggest a principled way of doing that. When we chide someone for judicial activism, it seems to me that we mean to convey criticism for their abuse of judicial power. And when we laud someone for judicial restraint, we intend the converse – that a judge has appropriately heeded limits on the judicial power even when his personal preferences might lead him in a different direction. If that's what we mean by activism and restraint, then our use of these terms ought to be informed by a careful delineation of the meaning of the nature of the judicial power. And we ought to chide a judge's activism only where it exceeds that definition of judicial power, just as we ought to applaud a judge's restraint only where it respects that definition.

With that in mind, let me try to trace briefly a definition of the judicial power. I would trace the seeds of that definition to Alexander Hamilton's characterization of the judicial power, in Federalist No. 78, as involving "neither force, nor will, but merely judgment." This principle, in turn, is encapsulated in the notion of a "government of laws, not of men," which originated in Aristotle's *Politics* and was planted in American law when John Adams inscribed it in the Massachusetts Constitution. In my view, these principles boil down to the proposition that judges should be bound by and follow the rule of law while eschewing the arbitrary rule of personal preference.

My thesis, in other words, is that "activism" of the sort that is worthy of disdain occurs when judges step beyond their appointed role of interpreting the meaning of governing legal text and choose instead to enforce their own preferences through the judicial decisionmaking process. Under this view, true restraint would be the converse – in which judges discipline themselves to follow the law as they interpret it even when it runs counter to their personal preferences.

If we are going to continue to use loaded terms like activism and restraint, they should be confined to these sorts of concepts rooted in first principles of the proper bounds of the judicial power. We should speak of activism only in the limited circumstances when it seems apparent that a judge has abdicated his role of interpreter of the law and arrogated the role of injecting his own will into his decisions. And we should laud restraint when it preserves the proper bounds of the judicial power – disciplining judges to judge on the basis of their interpretation of the meaning of the law (to assure the rule of law) and not to implement their personal will (to enforce the rule of man).

A Case Study in the Utah Supreme Court: Activism? Or Restraint?

To illustrate and to try to tie this all together in conclusion, let me close with a self-serving defense of an opinion I wrote for the Utah Supreme Court that implicates the concepts of activism and restraint that I have outlined above. It's an opinion in a case called *Carter v. Lehi City*, 2012 UT 2, 269 P.3d 141, concerning the scope of the initiative power under the Utah Constitution. Our opinion in that case overruled on constitutional grounds a decision by city officials to keep a citizen initiative off the November 2011 ballot. And in overriding an action of local government officials, our court overruled a series of precedents defining the initiative clause of the Utah Constitution. Those two facets of the *Carter* decision conceivably could put this opinion in the crosshairs of those who would decry it as activist under prevailing use of that term. After all, our *Carter* decision not only overrode Lehi City's decision to keep these initiatives off the ballot; it also overruled a line of precedent culminating in *Citizen's Awareness Now v. Marakis*, 873 P.2d 1117 (Utah 1994), which for decades had governed initiative and referendum cases under the Utah Constitution.

It would similarly be easy to criticize *Carter* for failing to follow the judicial restraint preference for the narrowest possible

ground for decision. We surely could have ruled against the City on a narrower basis, without revamping the law defining the scope of the initiative power under our Constitution. We could simply have held, for example, that the initiatives in question went beyond the "general purpose and policy" of existing law or that they were matters appropriate for voter participation (to cite two of the factors set forth in *Marakis*). Such a decision would have been narrower than the one we rendered, and we could therefore be criticized for failing to exercise judicial restraint.

That said, in my view none of those criticisms should stick. The opinion in *Carter* overruled precedent and reversed the decision of a city government, but I am proud of our decision and can easily defend it as a prudent use of judicial power, since it preserved the rule of law and foreclosed the prospect of judicial decisions dictated by personal preference and the rule of man. Here's how: The *Marakis* standard we overruled in *Carter* called for the courts to determine the scope of the initiative power on the basis of subjective imponderables like the degree of variance between existing law and the proposed initiative. And it purported to call on the judicial branch – the least politically accountable branch of government – to make a political, decidedly non-legal judgment whether a particular action was "appropriate" for resolution at the most grass roots political level possible. The whole framework of the *Marakis* opinion struck me as problematic from a rule of law standpoint. The power of the people to legislate is a fundamental protector of freedom and bulwark against tyranny. It is highly problematic to leave its preservation to the whims of a doctrine whose invocation turns on the discretionary decrees of the judicial branch. Of all the branches, we are least suited to decide on the wisdom of allowing the people to supplant their representatives in a particular field of regulation.

This problem became even more acute when we examined the historical origins of the *Marakis* test and considered the original meaning of the Initiative Clause of the Constitution. As we did that, it became clear that the *Marakis* framework we had been applying bore no relation to the original meaning of our Constitution. And it became equally clear that the initiatives at issue in the *Carter* case fell well within the scope of the people's legislative power as defined in our Constitution. With all of that in mind, I had no qualms at all about making a decision in *Carter* that I knew well could be decried, in the usual vacuous way, as activist. At the same time, I hoped – and continue to hope – that this decision and others can spark us to use loaded terms like activism and restraint in a more careful, analytically principled way. Doing so will improve our dialogue and debate over the use of the judicial power and ultimately improve the quality of justice in our courts.

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5. *See id.*
6. *See id.*

Preserving Issues in Utah Appellate Courts

by Noella A. Sudbury

The preservation rule is "an essential part of our adversary system," *In re Baby Girl T.*, 2012 UT 78, ¶ 42, 298 P.3d 1251, and whether or not advocates like it, preservation is always on the appellate court's mind. At the Utah State Bar Convention in July, Utah Supreme Court Justice Thomas Lee and Third District Court Judge James Blanch participated in an hour-long panel discussion exclusively devoted to preservation. The room was packed with lawyers who were full of questions.

So, what is there to talk about? While the preservation rule has been part of Utah's case law for several years, and its requirements are fairly straightforward, failure to preserve issues in the trial court continues to be a routine barrier to appellate review. Since January, approximately fifteen percent of the Utah Supreme Court's issued opinions have involved a preservation question. In the Utah Court of Appeals, this percentage is closer to twenty-five. In an environment where a lawyer stands a one-in-four chance of facing preservation problems on appeal, it is increasingly important for trial lawyers to understand what is required to preserve an issue in the trial court.

Under the preservation rule, counsel must present an issue "to the district court in such a way that the district court has an opportunity to rule on that issue." *Id.* ¶ 35 (citation and internal quotation marks omitted). This requires counsel to make a "timely" and "specific" objection, on the record, with evidence and legal authority to support it. *Id.* Though simple sounding, the preservation rule requires counsel to be on his or her toes, to provide objections with as much detail as possible and to follow through with his or her objections until they are complete with cited authority and the trial court has issued a ruling on the issue. The following three tips will help lawyers avoid common preservation pitfalls, making it more likely that an appellate court will reach the merits of the case.

The Objection Must Be Timely.

Timeliness is of utmost importance. The Utah Supreme Court has held that counsel must object when "the iron is hot." *See, e.g., State v. Harris*, 2012 UT 77, ¶ 17, 289 P.3d 591. In other words – once the unfavorable evidence is admitted, or the jury is sworn, or the instruction is given – it is too late to make an objection. A review of the past year's appellate opinions indicates that many claims are not preserved for appeal simply because the trial lawyer did not object soon enough. For example, in *Harris*, the Utah Supreme Court held that to preserve a *Batson* challenge for appeal, counsel had "an *absolute obligation* to notify the court that resolution [was] needed before the jury [was] sworn and the venire dismissed." *Id.* In another case, the Utah Court of Appeals concluded that counsel's statement in closing argument that a witness's testimony was potentially incomplete and inconsistent was not sufficient to preserve the argument on appeal that the witness's testimony should have been excluded. *In re Estate of Valcarce*, 2013 UT App 95, ¶ 39, 301 P.3d 1031. The court reasoned that by the time of closing argument, the testimony had already been admitted without any objection. *Id.*

One other timeliness problem is also worth emphasizing. Nearly ten percent of cases dealing with preservation issues involve untimely challenges to the trial court's factual findings. If a party wishes to challenge on appeal the adequacy of the trial court's findings, trial counsel must first raise "the objection in the *trial court* with sufficient clarity to alert the trial court to the alleged inadequacy." *See, e.g., Cook v. Cook*, 2013 UT App 57, ¶¶ 3–4, 298 P.3d 700 (emphasis added). Utah appellate courts have noted that "the responsibility for detecting error is on the party

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asserting it, not on the court," and "[i]t generally would be unfair to reverse a district court for a reason presented first on appeal." *See, e.g., N. Fork Special Serv. Dist. v. Bennion*, 2013 UT App 1, ¶ 25, 297 P.3d 624.

In short, raising a timely objection requires counsel to be attentive, prepared, and ready to speak up before the issue arises. This will ensure that the door does not close before counsel's objection is lodged.

The Objection Must Be Specific

"Merely mentioning an issue does not preserve it," *Brady v. Park*, 2013 UT App 97, ¶ 38, 302 P.3d 1220, and an "objection at trial based on one ground…does not preserve for appeal any alternative ground for objection." *Salt Lake Cnty. v. Butler, Crockett & Walsh Dev. Corp.*, 2013 UT App 30, ¶ 32, 297 P.3d 38. In the recent opinion *In re Baby Girl T.*, the Utah Supreme Court took a somewhat lenient approach to the specificity requirement, but the majority and dissent clashed over how specific an attorney's objection must be. 2012 UT 78, 298 P.3d 1251. The majority opinion, authored by Justice Durham, concluded that a due process issue was adequately preserved in the trial court notwithstanding counsel's failure to use the words "due process" until a motion to reconsider filed after the district court's ruling. *Id.* ¶ 36. According to the majority, the "briefing in the district court was infused with due process implications, argument, and cases," and application of the preservation rule "cannot turn on the use of magic words or phrases." *Id.* ¶¶ 36, 38. In a dissenting opinion, Justice Lee, joined by Chief Justice Durrant, concluded that the due process argument was not preserved because more specificity was required. *Id.* ¶¶ 41–51. According to the dissent, the majority's decision "distorts the law of preservation" stretching the doctrine "beyond recognition." *Id.* ¶ 43. In the dissent's view, preserving an issue for appeal requires – and always has required – the lawyer to assert a very specific claim with relevant legal authority and evidence to support it. *Id.* ¶¶ 45–51. To avoid being on the wrong side of the specificity debate, counsel should make detailed objections and cite statutory language, rules, constitutional provisions, or case law to support them.

Counsel Must Make a Record

It is trial counsel's obligation to make sure all objections and arguments are on the record. This means that when counsel participates in a sidebar or in-chambers conference, counsel must request that the conference be held on the record or is later put on the record. *See, e.g., State v. Prawitt*, 2011 UT App 261, ¶ 9, 262 P.3d 1203 ("When [counsel] did not request that the conferences be held on the record or otherwise create a record of his objections, he failed to preserve his objections for appellate review."). If counsel fails to make a record of his or her objections, counsel may forfeit the ability to challenge the court's ruling on appeal. *Id.*

What do you do if the trial judge won't let you make a record? While most judges understand the importance of making the record for appeal, sometimes judges may grow impatient with counsel or want to move the proceedings along. In such cases, counsel must be very persistent. Because there is no exception to the preservation rule for "difficult judges," an advocate must politely stand his or her ground. Counsel should explain to the court that it is part of counsel's duty to the client to make a record and without a record the client will risk losing the ability to make arguments on appeal. *See, e.g., State v. Harris*, 2012 UT 77, ¶ 42, 289 P.3d 591 (Nehring, J., concurring) (agreeing with majority that objection was untimely but noting that "the record clearly communicates that the trial judge was

determined to move the proceeding along").

If the trial judge is not open to counsel's suggestions and is intent on moving forward, the following advice from *United States v. Adams*, 271 F.3d 1236 (10th Cir. 2001), may help a lawyer in making an offer of proof:

- First, counsel may submit to the court "a statement written by examining counsel describing the answers the proposed witness would give if permitted to testify." *Id.* at 1242. "Specificity and detail are the hallmarks of a good offer of proof." In contrast, "conclusory terms, especially when presented in a confused manner, mark poor ones." *Id.*

- Second, the "proponent of the evidence may introduce a written statement of the witness's testimony signed by the witness and offered as part of the record." *Id.* It should be marked as an exhibit and introduced into the record for proper identification on appeal.

It is worth emphasizing that, in the context of voir dire or jury instructions, counsel should make sure the language of any rejected questions or instructions also appears in the record. Similarly, in other contexts, it is important to include as much detail as possible concerning what a witness would have said if allowed to testify, or what an excluded item of evidence – such an exhibit or a deposition transcript – would have shown. Without this detail, an appellate court may be unable to evaluate how the claimed error affected the proceedings, and as a result, the court may decline to address the argument. *See, e.g., State v. Chettero*, 2013 UT 9, ¶¶ 29–30, 297 P.3d 582 (concluding that the defendant's broad assertion that statistical evidence was relevant to a police officer's credibility was insufficient to preserve his argument for appeal and that if the defendant "wished to preserve an objection to the trial court's failure to consider the relevant statistical evidence," he should have submitted a memorandum to the court "specifically explain[ing] just how the statistical evidence affected [the police officer's] credibility").

In sum, the preservation rule is not meant to be a trap, but to avoid its pitfalls, counsel must be alert, diligent, and prepared. Planning before trial for objections and having authority ready to support them is the best way to ensure that when the time comes, counsel will be ready to effectively tackle any preservation challenges head on.

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A Ghost Story

by Keith A. Call

I have ghosts in my house. They leave empty jugs of milk in the fridge, clog toilets, leave open bags of hot dogs under beds, and have lost, eaten, or ruined thousands of billable hours worth of household goods. I have examined and cross-examined my children, but none of them ever has any knowledge about these mysteries. So we have concluded it has to be ghosts. Of course, no one has ever been able to summon these ghosts, so they always escape liability. *Cf. United States ex rel. Mayo v. Satan & His Staff*, 54 F.R.D. 282 (W.D. Pa. 1971) (dismissing civil rights action against Satan and his servants for lack of personal jurisdiction and failure to provide instructions for service of process).

There is great power in anonymity. Throw a sheet over your head, cut out a couple of eye holes, and you can get away with all sorts of mischief. Or, just do it while nobody's looking.

Like ghostwriting someone else's pleading or brief.

"Lawyers, including those acting with anonymity, should at least have a reasonable professional opinion that the cause of action or legal argument has a basis in law and fact..."

But do Utah rules allow attorneys to hide under a white sheet? More specifically, is ghostwriting for a *pro se* client allowed? If it is, are there any boundaries? Let's briefly examine the rules.

Utah's Approach to Ghostwriting

According to the Utah Ethics Advisory Opinion Committee, ghosts are allowed in Utah courthouses.

> Under the Utah Rules of Professional Conduct, and in the absence of an express rule to the contrary, a lawyer may provide legal assistance to litigants appearing before tribunals *pro se* and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance.

Utah State Bar Ethics Advisory Op. 08-01, ¶ 2 (Apr. 8, 2008). Proponents of this rule have suggested that ghostwriting promotes access to the courts for middle and lower income litigants.

But lawyer ghosts must still follow the rules of ethics. *See id.* ("[P]roviding limited legal help does not alter the attorney's professional responsibilities."). For example, attorneys must obtain informed consent for unbundled services, and any limitation on the scope of representation must be reasonable. *Id.* ¶¶ 30–31. Moreover, the duty of competency still applies. Even if the representation is limited to ghostwriting a single document, the attorney "must be as thorough in identifying legal issues as an attorney who intends to continue with a case through its conclusion." *Id.* ¶ 33. Similarly, duties of diligence, communication, and confidentiality are in no way diminished by limited representation. *Id.* ¶ 34.

While ghosts at my house get away with various kinds of mischief, lawyer ghosts must not violate Rule 11 or other rules relating to frivolous claims or arguments, such as Utah Rule of Professional Conduct 8.4 (stating that misconduct includes conduct that is dishonest, prejudicial to the administration of justice, etc.). Lawyers, including those acting with anonymity, should at least have a reasonable professional opinion that the cause of action

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or legal argument has a basis in law and fact, and that they can be sanctioned if they intentionally assist a *pro se* party to file a frivolous case or memorandum. *See* Op. No. 08-01, ¶¶ 15–16, 27.

Are Ghosts Allowed in Federal Courts?

Be aware that the rules in federal court are different and are not consistent across the circuits. Emphasizing the duty of candor and Rule 11, the Tenth Circuit has held that attorneys must sign ghostwritten appellate briefs. *Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001). In contrast, the Second Circuit has determined that ghostwriting does not constitute misconduct. *In re Fengling Liu*, 664 F.3d 367, 373 (2nd Cir. 2011) (noting a division of authority). And the Eleventh Circuit recently reversed a bankruptcy court's ruling that a lawyer had committed fraud on the court and violated Florida's Rules of Professional Conduct by helping a client file an "ostensibly *pro se* bankruptcy petition in bad faith to stall a foreclosure sale." *In re Hood*, 2013 U.S. App. LEXIS18088, at *1–2 (11th Cir. Aug. 29, 2013).

Note that the rules vary in different courts and even appear to differ between Utah state and federal courts. Attorneys must therefore acquaint themselves with the rules that apply in each specific court.

Conclusion

It is worth noting that the Utah Ethics Advisory Opinion provoked a rare dissent. Utah State Bar Ethics Advisory 08-01 Dissent Opinion (April 8, 2008) (noting the rarity of dissents, discussing contrary ethics opinions, adopting a broad reading of *Duran*, and arguing that disclosure should be required for substantial legal services). The dissent and the differences of opinion among various courts underscore the extent to which the ethical dimensions of ghostwriting remain in flux. But it is clear that even lawyer ghosts must adhere to the Rules of Professional Conduct.

The author gratefully acknowledges the assistance of Nathanael Mitchell, an associate at his firm, who (but for this acknowledgement) ghostwrote portions of this article.

Management Duties Under the Utah Revised Uniform LLC Act (Effective 1/1/14)

Langdon T. Owen, Jr.

This article will analyze some key provisions of the Utah Revised Uniform Limited Liability Company Act (the "Revised LLC Act" or simply, the "Act") which becomes effective for new companies beginning January 1, 2014. This article will focus only on management duties and the closely associated topic of the indemnification of management persons, and it will not attempt even an overview of the entire Act, except to say that the Act, which becomes fully effective for all companies January 1, 2016, will make a very significant change in the law governing LLCs. The management duty provisions of the Act raise numerous questions. The Act, being so new and different, makes answering such questions at best speculative. Nevertheless, I will speculate as to some possible answers but will, more wisely perhaps, leave others unanswered.

MANAGEMENT DUTIES

The duty of management, whether in a manager-managed company or a member-managed company, encompasses duties to the company and to the members of loyalty and care. Utah Code Ann. § 48-3a-409(1) & (9)(a) (LexisNexis Supp. 2013).

Loyalty

The management duty of loyalty includes certain matters described in the Act. Note that the described matters are not necessarily the full extent of the duty. *See* Revised Uniform Limited Liability Company Act (2006), National Conference of Commissioners on Uniform State Laws (the "Uniform Act"), comment to Section 409(a) and (b). The described matters are to account for and hold as trustee property, profits, and benefits derived by the managing member or the manager, i.e., management persons in the conduct or winding up of the business, the use of company property, or the appropriation of company opportunities. Utah Code Ann. § 48-3a-409(2)(a) & (9)(a).

In addition to these described duties as to profits or benefits from operations or winding up, property use, and appropriation of company opportunities, the duty of loyalty also includes refraining from dealing with the company in the conduct or winding up of the business on behalf of anyone with an adverse interest to the company (presumably including the management person and third persons). *Id.* § 48-3a-409(2)(b) & (9)(a).

The duty of loyalty also includes the duty to refrain from competing with the business before dissolution. *Id.* § 48-3a-409(2)(c) & (9). For managers, this duty continues until the windup is concluded, but not for members with management authority in a member-managed company. *Id.* § 48-3a-409(9)(b). The duty to refrain from competing may be extended by agreement to members in a manager-managed company. *See id.* §§ 48-3a-409(9)(a), 48-3a-112.

With these specifically described duties of loyalty in mind, let's turn to whether these, or other duties, may be modified by agreement, then let's return to discuss the duty of care since the duty of care raises some special issues.

Limiting Duty by Agreement

The duty of loyalty or care, generally may not be eliminated, subject to some specific exceptions set forth in Utah Code section 48-3a-112(4). Utah Code Ann. § 48-3a-112(3)(e) (LexisNexis Supp. 2013). This section does not similarly say that "other" fiduciary duties may not be eliminated subject to exceptions; rather such other duties may be altered or eliminated if not unconscionable or against public policy under Utah Code section 48-3a-112(4)(c)(iv). Perhaps it is intended that other duties (presumably other than

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loyalty and care) should be more easily eliminated. The operating agreement may also alter or eliminate the listed aspects of the duty of loyalty described above, i.e., relating to holding profits or benefits in trust from operations or winding up, the use of property, and the appropriation of opportunities, refraining from acting for someone with an adverse interest, and refraining from competition, if not unconscionable or against public policy. *Id.* § 48-3a-113(4)(c)(i). Also, under Utah Code section 48-3a-113(4)(b), the operating agreement, under the not-unconscionable-or-against-public-policy standard, may identify specific types or categories of activities that do not violate the duty of loyalty. If provisions eliminating all the described aspects of the duty of the duty of loyalty and if provisions broadly describing the types of categories of conduct that will be allowed without violating the duty were contained in the operating agreement, the duty could be severely limited. It remains to be seen how much specificity will be required to eliminate or limit duties under an operating agreement. Perhaps more specificity will be required as to the specifically described aspects of loyalty than as to other duties.

Does "alter or eliminate any other fiduciary duty" mean that any not-specified duty of loyalty (remember the duty includes specified matters and those matters are not necessarily exclusive) may be altered or eliminated more easily like "other" duties generally? Probably so. According to the comments to the Uniform Act subsections 409(a) and (b), listed duties are not exclusive, but are "uncabined," that is, not contained only in the statute. Non-specified aspects of the duty of loyalty thus appear to fall into the "other" category, which likely may be eliminated with less specificity.

The wording of Utah Code subsections 48-3a-110(4)(c)(i) and (iv) relating to loyalty and the "other" fiduciary duties (the duty of care is separately treated in the Act) is "alter or eliminate." Does "alter" imply that loyalty and the other fiduciary duties may be expanded by agreement? The answer appears to be "yes." *See* comment to Uniform Act § 110(g).

The Utah version has changed the standard as to modifying duties by agreement from "not manifestly unreasonable" under the Uniform Act as promulgated, *see* Uniform Act § 110(h) and the comment to § 110(h) of the Uniform Act, to "not unconscionable or against public policy." This appears to be intended to allow lesser levels of fiduciary duty by agreement than would be allowable under the Uniform Act. A provision could easily be manifestly

unreasonable but still not be found either unconscionable or against public policy. Unconscionability and violation of public policy are already limits to agreements under general contract law, and are narrow and difficult to demonstrate. The Utah statutory standard adds nothing and removes an important additional limitation.

The standard of unconscionability or violation of public policy is for the court to apply considering only circumstances at the time the provision in question entered the agreement. The court may invalidate the term only if, in light of the purposes, activities, and affairs of the company, it is "readily apparent" that the objective or the means to achieve an objective violates the standard, considering only circumstances at the time the challenged term became part of the operating agreement. Utah Code Ann.§ 48-3a-112(5) (LexisNexis Supp. 2013). It is clear that the allowance of contractual exceptions to fiduciary duties has a big bite.

Could some other agreement do what an operating agreement cannot do under Utah Code section 48-3a-112, or will it be treated as if it were part of the operating agreement? The latter seems most likely. *See id.* § 48-3a-102(16) (defining "operating agreement" as the agreement of the members "whether or not referred to as an operating agreement").

An operating agreement may expressly relieve a member of a member-managed company from responsibilities the member would otherwise have under the Act and impose that responsibility on another member, and to the extent it does this, the agreement may "eliminate or limit any fiduciary duty that would pertain to the responsibility." *Id.* § 48-3a-112(4)(b). This would include loyalty, care, and other duties. This relief is not available to managers of a manager-managed company. Thus co-fiduciary liability can be different with respect to each type of management structure.

In addition to the possibility of altering or eliminating the duty of loyalty, the operating agreement may specify a method by which a transaction in violation of the duty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of material facts. *Id.* § 48-3a-112(4)(a). Also, all members of a company, however managed, may authorize or ratify a transaction in violation of the duty of loyalty. *Id.* § 48-3a-409(6) & (9)(d). Can a later member, or remaining members, join in unanimously ratifying a deal which violated the duty when made, and thus hurt a person no longer a member at the time of ratification? Could the disinterested decisionmaker or other members ratify something after damage has been done? Are there limits to when any ratification must be done? Could ratification be done just before trial? After the other members have expelled and disassociated, *see id.* § 48-3a-602, the damaged, complaining member?

Further, under Utah Code section 48-3a-409(7), it is a defense to a claim of violation of the duty of loyalty under Utah Code section 48-3a-409(2)(b) (dealing on behalf of a person with an interest adverse to the company) that the transaction was fair to the company.

These issues of what the operating agreement can and can't do under the not-unconscionable-or-against-public-policy standard will also affect the duty of care, which we will discuss next.

Care

The duty of care is (note: not "includes" as is the case with loyalty) to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law. Utah Code Ann. § 48-3a-409(3) (LexisNexis Supp. 2013). Presumably "engaging in grossly negligent or reckless conduct" includes inaction and omissions, but the words relating to inaction were eliminated from the prior versions (which did not go into effect in 2013). As noted above, this duty, subject to exceptions, may not be eliminated, *Id.* § 48-3-112(3)(e) (LexisNexis Supp. 2013), but an operating agreement may alter the duty of care except to authorize intentional misconduct or a knowing violation of law. *Id.* § 48-3a-112(4)(c). Apparently under this section, gross negligence and recklessness may be authorized, and at least in some circumstances, a bad actor could argue that recklessness would not be against public policy or be unconscionable, or else the prospect of authorization would have been eliminated along with intentional misconduct. On the other hand, under Utah Code section 48-3a-112(3)(g) an operating agreement may not "relieve or exonerate a person from liability for conduct involving bad faith, willful misconduct, or recklessness." Does Utah Code section 48-3a-112(3)(g), trump section 48-3a-112(4)(c)? Presumably Utah Code section 48-3a-112(3)(g) would control, but this still leaves gross negligence as potentially waivable as to liability under an operating agreement, and potentially indemnifiable, too. This ability to relieve management of liability for gross negligence will leave victims of poor management with little recourse unless "bad faith" were to cover situations of gross negligence, perhaps where the gross negligence deprived a member of information the member would need to protect its interests, or unless bad faith, willful misconduct, or recklessness were to include closing one's eyes to potential problems. Perhaps more conduct will be held to be reckless rather than grossly negligent.

Does intentional misconduct, which under Utah Code section 48-3a-112(4)(c) cannot be authorized by agreement, include an intentional violation of law? Is an intentional violation of law different from a knowing violation? For example, if A knows it is against the law to be grossly negligent or reckless but engages

in grossly negligent or reckless behavior, is it intended that for these purposes A has not intentionally violated the law, but may have knowingly violated it? What if A commits an intentional act not knowing it is unlawful? Why should specific knowledge of the law be an element? What does "knowledge" mean here? Does knowledge of a fact under Utah Code section 48-3a-103 (specifying what constitutes knowledge of a fact) apply to the law? Does other law, e.g., case law, deem the law "known?" Thus, the power to alter by agreement leaves only these not totally clear types of reckless, intentional, or knowing wrongdoing as the matters which truly cannot be eliminated from the duty by those with a superior bargaining position.

The ratification process and the fairness defense applicable to the duty of loyalty (as discussed above) do not apply to the duty of care.

The Utah Act, in the description of the duty of care, has greatly changed the Uniform Act as originally promulgated. Under the Uniform Act at section 409(k), the duty of care "is to act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the member reasonably believes to be in the best interests of the company," subject, however, to the business judgment rule. The business judgment rule is effective under court-made principles and is not defined in the Uniform Act.

The Harmonization of Business Entities Code promulgated by the Commissioners for Uniform Laws (2011), which includes a uniform limited liability company chapter based on the Uniform Act, and on which Harmonized Code Utah's present provision is based, changed this care provision to prescribe that the duty "is to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." The Harmonized Code is much closer to the formulation in the Utah Revised Act, and, like the Revised Act, does not mention the business judgment rule. Under such a reduced standard of care, what is left to which the business judgment rule may apply? The business judgment rule is a presumption that a management official has met its duties and is overcome by a showing of lack of due care, i.e. negligence, or of an interest in the transaction, or other breach of duty in the decision-making process. *See* 18B Am. Jur. *Corporations* § 1470; *Chapman v. Troy Laundry Co.*, 47 P.2d 1054 (Utah 1935). Should the presumption apply to assist in the defense of conduct under the statutory standard of care? The answer should be no, unless the operating agreement provides a due care (negligence) standard for the duty of care owed by management persons.

Fiduciary Duty Based on Control

There is no fiduciary duty to the company or other members applicable to a member of a manager-managed company solely by reason of being a member. Utah Code Ann. § 48-3a-409(9)(f) (LexisNexis Supp. 2013). How about by reason of being a member with control? Does this go beyond solely by reason of being a member? The answer is yes. As noted in the comment to Uniform Act section 409(g)(5), "This paragraph merely negates a claim of fiduciary duty that is exclusively status based and does not immunize misconduct." The comment then goes on to give an example involving a controlling interest. This, with the "uncabined" concept described in the comments that the fiduciary duties described in the Uniform Act are not exclusive, would tend to indicate a role for other duties. This may become particularly important, given the Utah Act's treatment of the duty of care. It is also consistent with Utah case law. In Utah, control of a majority interest coupled with control of management creates a fiduciary duty to the minority even in a corporate context. *Nash v. Craigco, Inc.*, 585 P.2d 775 (Utah 1978) (duty to deal fairly and openly with minority); *see also Bingham Consol. Co. v. Groesbeck*, 2004 UT App 434, 105 P.3d 365 (the duty is particularly high where the majority is on both sides of transaction). The duties of controlling or majority shareholders are not limited to the closely-held corporation. *Harriman v. E.I. DuPont deNemours & Co.*, 372 F. Supp. 101 (D. Del. 1974) (providing the fiduciary duty arises from the majority's capacity as such). The duty arises not by reason of being a shareholder, or in the case of a limited liability company of being a member, but by reason of being in control.

Duty of Candor

The fiduciary duties of loyalty and care have specific provisions applicable to them. How about the traditional duty of candor? Is this an "other fiduciary duty" which can be eliminated? Would this be against public policy? Does a lack of candor indicate bad faith from which a management person may not be relieved or exonerated under Utah Code section 48-3a-112(3)(g)? Is candor covered by the contractual obligation of good faith and fair dealing? Is candor a duty in any confidential relationship, whether or not deemed fiduciary? The answer to this question is yes. *See Blodgett v. Martsch*, 590 P.2d 298 (Utah 1978).

The comments to Uniform Act section 409 point out that courts may use fiduciary duties to police disclosure obligations in member-member and member-company transactions. Are there other types of information which under certain circumstances must be provided so that the information rights provided by the Act are just the minimum, even if nothing further is specifically required by the operating agreement?

The duty of candor and disclosure continues as long as the confidential relationship exists and until all parties have equal access to relevant information. *Ong Intern. (USA) Inc. v. 11th Ave. Corp.*, 850 P.2d 447 (Utah 1993). *Ong* and the cases cited in *Ong* are helpful in obtaining a perspective about the sort of situation which might relieve a partner, and by close analogy, relieve a management person for a limited liability company, of the duty of full disclosure. The duty of disclosure continues during the relationship despite a deterioration of the working environment, *Walter v. Holiday Inns, Inc.*, 784 F. Supp. 1159 (D.N.J. 1992) (providing the nature of the relationship is reviewed under the totality of circumstances on sale of a party's interest to the other), and is only removed where the confidential relationship has ended and both parties have equal access to the partnership information, *Sugarhouse Fin. Co. v. Anderson*, 610 P.2d 1369 (Utah 1980) (negotiation of accord and satisfaction), and *Burke v. Farrell*, 656 P.2d 1015 (Utah1982) (providing the duty to disclose applies to the purchase of a partner's interest with respect to partnership matters but not as to the ultimate value of the sold interest where there was ready access to partnership records). Although the duty of disclosure applies during the relationship and applies to the management of the

dissolution process, it may not apply to the negotiation of the dissolution agreement itself (*see Fravega v. Secur. Sav. & Loan Ass'n*, 469 A.2d 531 (N. J. Super. Ch. 1983); however, as in the *Ong* case itself, failures to disclose during the relationship may void releases and redemption agreements made at its end.

In applying the remedy of dissolution under Utah Code section 48-3a-701(5)(a), the term "fraud," with respect to a fiduciary, such as a management person, would likely include failures to disclose because fiduciaries have an obligation to honestly and candidly disclose important matters. *See Nicholson v. Evans*, 642 P.2d 727 (Utah 1982); *see also First Sec. Bank of Utah N.A. v. Banberry Dev. Corp*, 786 P.2d 1326 (Utah 1989). Furthermore, where the fiduciary engages in a self-interested transaction, fraud may be presumed so that the burden to demonstrate the entire fairness of the transaction will be on the fiduciary. *Id.* Constructive fraud only requires a confidential relationship and a failure to disclose material facts; no fraudulent intention is necessary. *d'Elia v. Rice Dev., Inc.*, 2006 UT App 416, 147 P.3d 515 (individual controlling LLC may be liable for constructive fraud); *see also Jensen v. IHC Hosps., Inc.*, 944 P.2d 327 (Utah 1997). The sort of conduct which meets the standards of such statutory remedies provisions may well be interpreted through application of traditional fiduciary and confidential relationships principles.

Contractual Good Faith and Fair Dealing

In addition to the duties of loyalty and care applicable to management, all members (in any company, however managed), and all managers are subject to the nonfiduciary duty of discharging duties and of exercising rights under the Act or the operating agreement in a manner consistent with the contractual obligation of good faith and fair dealing. Utah Code Ann. § 48-3a-409(4), (9)(c) (LexisNexis Supp. 2013). This duty may not be eliminated but is made subject to the exceptions under Utah Code section 48-3-112(4). *Id.* § 48-3a-112(3)(f). The reference to Utah Code section 48-3a-112(4) seems to only mean that matters that are otherwise subject to those exceptions are not violations of good faith and fair dealing; the reference does not seem intended to create a separate level of exceptions for the duty of good faith and fair dealing.

The specific exception relating to good faith and fair dealing is Utah Code section 48-3-112(4)(f), which allows the operating agreement, to the extent not unconscionable or violative of public policy, to prescribe the standards by which to measure performance of the contractual obligation of good faith and fair dealing. The requirement that these standards must not be manifestly unreasonable was eliminated in the Act but was in the prior uniform version which did not go into effect in 2013. *See id.* § 48-3-110(4)(e). It is not clear under the Act whether an agreement provision for measuring the contractual obligation of good faith may be subject to an additional standard of reasonableness on public policy grounds. *See Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Utah 1996) (stating that the overriding requirement imposed by the implied covenant is that insurers act reasonably as an objective matter, in dealing with their insureds); *Borg v. Workman's Auto Ins. Co.*, 2004 UT App 74, 2004 WL584677. *See also Olympus Hills Shopping Ctr., Ltd. v. Smiths Food & Drug Ctrs., Inc.*, 889 P.2d 445, 457 (Utah Ct. App. 1994) ("[T]he test of good faith is one of reasonableness,"); *Res. Mgmt. Co. v. Weston Ranch & Livestock Co., Inc.*, 706 P.2d 1028 (Utah 1985) (exercise of sole discretion cannot be exercised arbitrarily).

Remedy Limitations

Under the existing (non-uniform) Utah law which will be replaced by the Act, the damage remedy is removed for conduct not amounting to gross negligence, but the duty of care is not itself so reduced, leaving injunctions and other sorts of equitable relief available for such conduct. *See* Utah Code Ann. § 48-2c-807(1) (LexisNexis 2010). Under the Act, however, the duty itself has been reduced so that there is no duty to use due care (i.e., not to be negligent), and

thus the Act, on its face, leaves no remedy at all where there is no duty. Will the obligation of good faith and fair dealing imply an obligation not to be negligent so that in at least some circumstances damages or an injunctive remedy is available to stop a negligent course of conduct (e.g., an ill-conceived and rash transaction)? This seems generally inconsistent with the Act's definition of the duty of care and the limited role of the obligations of good faith; absent some support with a provision relating to the issue in dispute under the agreement itself, which under Utah Code section 48-3a-102(16) may be oral or written or some combination, one would generally not expect the implied covenant to provide assistance. However, the obligation of good faith typically implies a level of reasonableness in the performance of contracts, and thus unreasonable conduct could violate this duty in at least some circumstances.

Or, could negligence, in at least some circumstances, be in bad faith or be evidence of bad faith and thus subject the negligent person to liability which cannot be relieved by agreement under Utah Code section 48-3a-112(3)(g)? This is a plausible possibility but would involve a rather fact intensive showing of conduct or intention beyond mere negligence, and thus would not help in the case of mere negligence. Since it would appear just as appropriate as in the case of the covenant of good faith and fair dealing to require reasonableness in connection with the general requirement that a management person may not be relieved of liability for bad faith under Utah Code section 48-3a-112(3)(g), perhaps where some conduct is required by the agreement, a lack of reasonableness would move the conduct beyond mere negligence into the realm of bad faith.

Or will other non-waived duties be found to fill gaps, which could be some other fiduciary duty, or which (e.g., where all "other" fiduciary duties are effectively eliminated) could be duties not called "fiduciary," but perhaps are based on a confidential relationship? Given the flexibility of duty analysis in the law based on the type of relationship involved, this too may be a plausible possibility. Even if the term "fiduciary" is not used with respect to a given relationship, it still may be a confidential relationship subject to additional duties and remedies. It is the relationship that drives the duties within it. "Although the relationship between two persons is not a fiduciary relationship, it may nevertheless be a confidential relationship. Conversely, a fiduciary relationship may exist even though the parties do not enjoy a confidential relationship." Restatement (Third) of Trusts 2 (2003), comment b(1). *See d'Elia v. Rice Dev. Corp.*, 2006 UT App 416 (constructive fraud only requires a confidential relationship and a failure to disclose material facts; no fraudulent intention is necessary, and an individual controlling an LLC may be liable for participation in the LLC's constructive fraud and breach of fiduciary duty, which are treated as independent torts, without personal self-dealing and without the need to pierce the company veil under an alter ego theory).

INDEMNIFICATION

The Act provides that a company shall reimburse a management person for any payment made by the person in the course of the person's activities on behalf of the company complying with the rules of Utah Code section 48-3a-407 (relating to management authority) and Utah Code section 48-3a-409 (relating to standards of conduct). Utah Code Ann. § 48-3a-408(1). The Act also provides that the company shall indemnify and hold harmless a management person for any claim or demand against, or any debt, obligation, or other liability incurred by, the person in the course of the person's activities on behalf of the company if not in violation of Utah Code section 48-3a-405 (relating to distributions), Utah Code section 48-3a-407 (management authority), or Utah Code section 48-3a-409 (standard of conduct). Utah Code Ann. § 48-3a-408(2) (LexisNexis Supp. 2013). These reimbursement and indemnity provisions cover persons in both present and former capacities as management persons. The company may purchase insurance to cover the person even if the operating agreement could not limit or eliminate the person's liability under Utah Code section 48-3-112(3)(g) as to bad faith, willful misconduct, or recklessness. Such insurance can cover nonmanagement members as well. *Id.* § 48-3a-408(4).

It is unclear under the Act whether actions with respect to an employee benefit plan are indemnifiable; presumably, a plan fiduciary acts on behalf of the plan and its beneficiaries, not the company, and thus would not be covered by indemnity under the Act, and may not be covered at all without a separate agreement. Naturally, ERISA and other applicable specific limitations would apply in any event.

Advances of reasonable expenses including attorney fees and costs incurred by a person in the capacity of a former or present management person are allowable where the person promises to repay the company if ultimately the person is not entitled to indemnity. Such advances are "in the ordinary course of its activities and affairs" and thus are not subject to the special consent requirements for matters not in the ordinary course. *See id.* § 48-3a-407; *see also id.* 48-3a-408(3).

The Act at Utah Code section 48-3a-112(3)(g) provides that the operating agreement may not relieve or exonerate a person from

liability for conduct involving bad faith, willful misconduct, or recklessness. Other than this, the operating agreement may define indemnity and reimbursement, and, presumably, may indemnify or exonerate a person from liability for gross negligence. Traditionally, only liability for simple negligence could be shifted by indemnity without a violation of public policy. 6A Arthur Linton Corbin, *Corbin on Contracts*, § 1472, at 596–97 (1962) (those who are not engaged in public service may properly bargain against liability for harm caused by their ordinary negligence in performance of contractual duty; but such an exemption is always invalid if it applies to harm willfully inflicted or caused by gross or wanton negligence). Would an indemnity against gross negligence violate Utah Code section 48-3a-112 as an indirect alteration in duty which violates public policy?

There is a distinction between reimbursements and indemnity. This can make a difference where a person entitled to reimbursement but not indemnity runs out of money to pay a matter and thus there is nothing to reimburse. The insolvency of the entitled person in such a case protects the prospective payer (here the company). Indemnity includes "hold harmless" and thus is not merely a reimbursement but is an exoneration requiring payment even if the person has not paid the amount, e.g., defense costs, first.

Indemnity for Violation of Operating Agreement

There is no duty under Utah Code sections 48-3a-405, 407, or 409 (the specific provisions referred to in the Act's indemnity provision) for management's conduct to comply with the operating agreement before indemnification for such conduct is required. Actions violating the operating agreement may still be, by reason of the person's capacity as a management person for the company, subject to indemnity. It appears that damages for violation of contract would be indemnifiable, rendering the company and its members impotent to effectively enforce the agreement in a number of circumstances. A harmed member, for example, would lose value to its interest in the company when the company is required to indemnify the wrongdoer for the damages awarded against the wrongdoer to the harmed member. The wrongdoer may have been expelled for breach of the operating agreement under Utah Code section 48-3a-602(6) yet be able to claim indemnity based on his or her former position as a management person under Utah Code section 48-3a-408(2). Is indemnity for breach of the operating agreement an acceptable result? If not, then alternatives will be sought by parties and the courts.

Perhaps a liability for a flat breach of the operating agreement is not

to be treated as a liability incurred in the capacity of a management person of the company. *See* Utah Code Ann. § 48-3a-408(2) (LexisNexis Supp. 2013). This approach seems strained in the context of a breach of an operating agreement where the management person is not acting only (or perhaps mostly) in its own or someone else's behalf. Conduct which violates the agreement may still have occurred in the capacity of a management person. That the wrongdoer may benefit in some way does not of necessity imply the conduct was not in the capacity of a management person, particularly where such capacity is necessary to accomplish the result. *See id.* § 48-3a-409(5) (member does not violate duty solely because conduct furthers the member's own interest; this recognizes the distinction between management function and personal interest). For example, if the violation of a provision (perhaps a requirement to make a priority distribution) causes damage only to a member, the company may not itself suffer and could even benefit; such conduct would be in the capacity of a management person. Such conduct also would not violate the duty of loyalty where the management person's interest was not adverse to that of the company. *Id.* § 48-3a-409(2)(b). The focus of the indemnity provision is the capacity of the actor, not who is injured; even an injury to the company itself could be indemnifiable so long as it took management capacity to create the injury and no particular authorization process was required. *See id.* § 48-3a-407.

Does a flat violation of a specific provision of the operating agreement somehow also violate the contractual duty of good faith and fair dealing? The good faith duty has ordinarily been used to fill gaps to make express provisions work, not to be redundant with them. Thus, this would not appear to stop a reimbursement or indemnity. Does a contractual violation constitute "bad faith" or "intentional misconduct" or "recklessness"? Or would it constitute a violation of the duty of care as "grossly negligent or reckless conduct," "intentional misconduct," or a "knowing violation of law"? If so, indemnity may not be available. *Id.* §§ 48-3a-112(3)(g), -409(3). Wouldn't any such a reading conflate tort fault concepts with no-fault contract concepts, or conflate fiduciary duties with contractual ones? This line of reasoning to limit indemnity may lead to a dead end as to intentional misconduct, gross negligence, recklessness, or a knowing violation of law, but perhaps a mere contract violation could be, or be evidence of, bad faith. This stretches the concept when applied to a mere contract violation, and a court may be reluctant to use this as a decisional rule where the rule could create issues relating to all kinds of contracts.

Where the indemnity and reimbursement provisions do not clearly prevent reimbursement or indemnity for damages or defense costs related to a violation of the operating agreement or of any other contractual duty to the company, they are likely too broad. Are the courts, then, going to be called upon to stretch the concept of bad faith or to find some sort of exception to prevent indemnity or reimbursement in at least some cases? The standard based on unconscionability and public policy, for judging certain provisions in the operating agreement limiting fiduciary duties as limited by the restrictions on the courts under Utah Code section 48-3a-112(5) (only circumstances at the time the provision entered the agreement may be considered, etc.), may not apply here unless indemnity provisions are, in effect, indirect changes in duty. If inapplicable, such provisions cannot provide adequate protection for the company and its members; but, not being applicable, they also won't prevent other public policy principles from applying.

Some sort of exception outside the statute may need to be found by the courts. Indemnity of management officials has long been held to implicate strong public policy considerations. *See Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187 (Utah 1983); *Penunuri v. Sundance Partners, LTD*, 2013 UT 22, 301 P.3d 984. In order to prevent indemnity for the liability, prior (non-uniform) law contained a number of exceptions and limitations where a person claiming indemnity is liable to or has damaged the company, has not affirmatively acted in good faith, or has derived an improper personal benefit, including the need in some cases for a court order to approve the indemnity of defense costs only in special cases before any indemnity at all may apply where the company has suffered. *See, e.g.*, Utah Code Ann. §§ 48-2c-1802(4), 1805. None of this is in the Act except the requirement to obtain the often uncollectable promise of a management person to repay advances of defense costs, and, even here, no finding of prima facie entitlement is needed to make an advance. General public policy considerations at first glance do not seem to provide the courts much room to override an express statutory mandate of "shall indemnify" where the operating agreement does not restrict the indemnity. However, on second glance, without specific statutory guidance as to the scope of public policy, will the courts have even more room to apply general public policy considerations? An implied duty to follow the agreement, sufficient to preclude indemnity for failure to do so, seems a rather modest public policy excursion outside the statute. After all, the duty to follow the applicable instrument is express as to other fiduciary relationships. *See, e.g.*, *id.* § 75-7-801 (LexisNexis Supp. 2013) (duty of trustee to administer trust in accordance with its terms).

The Utah Bar Foundation Celebrates 50 Years of Service

by The Honorable Augustus Chin and Kim Paulding

Fifty years ago, Calvin Behle, James E. Faust, Earl D. Tanner, Julius Romney, and Charles Welch Jr. had the idea to form a charity that would promote legal education and increase the knowledge and awareness of legal services and needs in the community. This new organization would assist in providing funds for legal services to the disadvantaged, improvement to the administration of justice, and service worthwhile law-related education and public purposes. In December 1963, that idea became a reality with the founding of the Utah Bar Foundation.

In December 2013, the 50th anniversary of the Utah Bar Foundation will be celebrated. Over the last five decades, there have been many accomplishments. More than $5 million has been granted to organizations that help support the mission of the Utah Bar Foundation. In addition, scholarships and awards have been funded for law students from both the S.J. Quinney College of Law at the University of Utah and the J. Reuben Clark Law School at Brigham Young University, which have helped to keep the dream alive of providing access to the legal system for everyone in our community.

The Utah Bar Foundation has provided ongoing financial support for organizations such as the Utah Law Related Education, the Legal Aid Society of Salt Lake, Utah Legal Services, the Southern Utah Community Legal Center, the Salt Lake Community Legal Center, the Disability Law Center, the refugee resettlement/ immigration programs at both Catholic Community Services and Holy Cross Ministries, the Rocky Mountain Innocence Project, DNA People's Legal Services, Divorce Education Classes for Children, and Utah Dispute Resolution.

In 1983, the Utah Supreme Court authorized the creation of the IOLTA Program. IOLTA is the acronym for Interest on Lawyers' Trust Accounts. The IOLTA program allows attorneys to pool client funds in one interest-bearing client trust account. The Utah Supreme Court allowed the interest earned from these accounts to be remitted to the Utah Bar Foundation to fund law-related education and legal services for the poor.

IOLTA income has fluctuated between $100,000 to $800,000 annually depending on the short-term interest rates being offered by the Federal Government. The recent decline in the Federal Funds Reserve Rate to an historic low between 0.00% to 0.25% has resulted in the plummeting of IOLTA income. Amidst the economic challenges of declining IOLTA interest income, the Utah Bar Foundation continues to grant some funding to several of the aforementioned organizations.

The Utah Bar Foundation has enjoyed many strong leaders over the years. In the early days, the Foundation was "staffed" by the Board President's legal secretary. This was all done in a volunteer capacity and at the generosity of the law firm where the Board President was employed. In 1982, Zoe Brown was hired as the first paid Director of the Utah Bar Foundation. She served the Foundation exceptionally well in that role until her retirement in 2000. For the past thirteen years, Kim Paulding has served as the Executive Director, assisting the Board and the Foundation through numerous changes and severe swings in the economy that have impacted IOLTA revenue and Foundation goals.

HON. AUGUSTUS CHIN is a Judge for the Holladay City Courts. Judge Chin is also the President of the Utah Bar Foundation. Prior to his service with the Utah Bar Foundation, Judge Chin served as President of the Utah State Bar and has been involved on the Boards of numerous nonprofits in the community.

KIM PAULDING has had the pleasure of serving as the Executive Director of the Utah Bar Foundation for the past thirteen years.

The Board of Directors has always played an instrumental role in the structure of the Utah Bar Foundation. Founded by five influential leaders in the 1960s, the Foundation has been fortunate to continue to attract leaders in the community and friends in the support of access to justice. The Utah Bar Foundation Board now consists of seven attorneys who must be licensed in Utah, active and in good standing with the Utah State Bar. The Board has continued the tradition of having leaders from various areas in the legal community serving the very community in which we all reside. The current Board of Directors includes the Honorable Augustus Chin, President (Holladay City); Barbara Melendez, Vice President (Kuck Immigration Partners LLC); Walter Romney, Secretary/Treasurer (Clyde Snow & Sessions), Lois Baar (Holland & Hart); Adam Caldwell (Bingham Snow & Caldwell, LLC); Hugh Cawthorne (solo practioner), and Richard Mrazik (Parsons Behle & Latimer).

The Utah Bar Foundation is pleased to announce that an Open House will be held on Thursday, December 5, 2013, from 5:30–7:00 pm at the Utah Law & Justice Center. Brief remarks will be made at 6:15 pm by Utah Supreme Court Chief Justice Matthew B. Durrant. Attorneys and members of the community are invited to join in this 50th Anniversary Celebration.

For information, please visit our website: utahbarfoundation.org. To RSVP for the event, please email kim@utahbarfoundation.org or call the Foundation office at (801) 297-7046.

50th Anniversary

UTAH BAR FOUNDATION

THURSDAY, DECEMBER 5, 2013
Open House 5:30–7:00 pm

Brief remarks at 6:15 pm
by
Utah Supreme Court Chief Justice
HONORABLE MATTHEW B. DURRANT
and
HONORABLE AUGUSTUS G. CHIN
Utah Bar Foundation Board President

Hors d'oeuvres and beverages

UTAH LAW & JUSTICE CENTER
645 South 200 East, Salt Lake City

RSVP by NOVEMBER 22nd
to Kim at 801-297-7046
kim@utahbarfoundation.org

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*Joseph Jones	65–71
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Appellate Highlights

by Rodney R. Parker and Julianne P. Blanch

EDITOR'S NOTE: *The following appellate cases of interest were recently decided by the United States Tenth Circuit Court of Appeals, Utah Supreme Court, and Utah Court of Appeals.*

***Bushco v. Shurtleff*,**
–F.3d–, 2013 WL4779612 (10th Cir. September 9, 2013)

A licensed sexually-oriented businesses sued the Utah Attorney General for declaratory and injunctive relief claiming that certain amendments to Utah's sexual solicitation statute were overly broad, unconstitutionally vague, and in violation of free speech rights. The Tenth Circuit held that (1) amendments to the sexual solicitation statute were not unconstitutionally overbroad because they did not encompass "a substantial amount" of constitutionally protected conduct, and only imposed "incidental restrictions" on First Amendment rights, *id*. at *13; (2) the provision describing the prohibited acts was not void for vagueness because it gave fair notice of what conduct it prohibits, noting, in particular, that the amendment had a "scienter" ("objectively verifiable") requirement – "with intent to engage in sexual activity for a fee" or "pay another person to commit any sexual activity for a fee" – thereby "mitigat[ing]" any potential vagueness and precluding arbitrary or discriminatory enforcement, *id*. at *11 (citation and internal quotation marks omitted); and (3) the subsection providing that "intent to engage in sexual activity for a fee may be inferred under the totality of the existing circumstances" was not unconstitutionally vague because by requiring that the fact-finder cannot infer intent from an isolated fact, it does not broaden police discretion to authorize or encourage arbitrary and discriminatory enforcement, *id*. at *12 (citation and internal quotation marks omitted).

***United States v. Washington*,**
– Fed. Appx. –, 2013 WL 4828139
(10th Cir. September 11, 2013)

The Tenth Circuit held that a criminal suspect generally has no reasonable expectation of privacy to a motel room in which he or she is staying after check-out time. It also concluded that a suspect had no reasonable expectation of privacy in the evidence (a phone) where the suspect "clearly abandoned the phone under the sink, smashing the screen and making it unusable, and he apparently intended that it remain there after his rental period for the room expired." *Id*. at *1.

***United States v. Avila*,**
– F.3d –, 2013 WL4437610 (10th Cir. August 21, 2013)

The Tenth Circuit held that the district court's assurance that defendant would retain the right to appeal even if he entered an unconditional guilty plea, without advising defendant how such a plea would limit his appeal rights, falsely suggested that defendant would retain unlimited appeal rights and rendered his plea involuntary.

***Turner v. University of Utah Hospitals & Clinics*,**
2013 UT 52 (August 16, 2013)

In this medical malpractice case, the Utah Supreme Court rejected the "cure-or-waive" rule, which required a party to expend all available peremptory challenges on jurors who had been unsuccessfully challenged for cause in order to preserve the issue of jury bias for appeal. The plaintiff had challenged four jurors for cause, but when those challenges were denied, she removed only two of the challenged jurors using peremptory challenges,

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and used her last challenge on a juror she suspected of harboring a "secret bias." The hospital argued that tactical use of peremptory challenges was not protected, and by failing to use all of her peremptory challenges on the four jurors, the plaintiff had failed to preserve her claim that a biased juror had been selected. The court abandoned the prior "cure-or-waive" rule and, in its place, adopted a new standard that protects tactical use of peremptory challenges. Under the new rule, the issue is preserved so long as the challenging party has used all of its peremptory challenges, and there is no requirement that those challenges be used on the jurors previously challenged for cause.

***Torrie v. Weber County*, 2013 UT 48 (August 6, 2013)**

Law enforcement officers were asked to locate and apprehend a sixteen-year-old who had taken his family's vehicle. The boy was ejected from the vehicle and fatally injured after leading the officers on a high speed chase. In an issue of first impression, the Utah Supreme Court found that law enforcement owe a duty of care to fleeing suspects, under Utah Code section 41-6a-212's provision of exemptions to traffic laws for emergency vehicles. The statute authorizes law enforcement to "exercise the privileges granted under this section when…in the pursuit of an actual or suspected violator of the law." Utah Code Ann. § 41-6a-212(1)(b) (LexisNexis 2010). It also provides, "[T]he privileges under this section do not relieve the operator…of the duty to act as a reasonably prudent emergency vehicle operator in like circumstances." *Id.* The court applied a plain language analysis of this statutory language and found that it supported imposing a duty toward all persons, including fleeing suspects.

***Francis v. State*, 2013 UT 43 (July 19, 2013)**

In a 3-2 decision, the Utah Supreme Court held that a black "bear is not a 'natural condition on publicly owned or controlled lands,'" *id.* ¶ 4 (citation omitted), even though the species is native to Utah. Parents of a child killed by a bear while camping sued the State for negligent failure to warn about previous bear attacks at the boy's campsite. The court held that a duty of care arose because the State took specific actions to protect users of the campsite, thus creating a special relationship. Second, the court held that wildlife does not fall within the Governmental Immunity Act's "natural condition" exception. *Id.* It reasoned that "one would not ordinarily refer to a bear, or wildlife generally, as a 'condition' on the land." *Id.* ¶ 42. Rather, a "'condition on the land'" "connote[s] features that have a much closer tie to the land itself, such as rivers, lakes, or trees." *Id.* Based on this reasoning, it limited "application of the natural condition exception to those conditions that are closely tied to the land or that persist 'on the land' – conditions that are topographical in nature." *Id.*

***Carbon County v. Workforce Appeals Board*, 2013 UT 41 (July 9, 2013)**

The Utah Supreme Court determined that "[l]itigants are free to use the undisputed evidence in the record to make legal arguments," *id.* ¶ 11, on appeal even though those facts were not included in a judge's order. At the Utah Court of Appeals, the court refused to consider such undisputed evidence because the appellant "fail[ed] to alert the ALJ or the Board of this gap in

the evidence" and therefore failed to preserve the issue for appeal. *Carbon Cnty. v. Dep't of Workforce Servs.*, 2012 UT App 4, ¶ 7, 269 P.3d 969. On certiorari, however, the supreme court clarified that while a challenge to the "legal sufficiency of a judge's factual findings" must be presented to the trial judge to preserve the issue for appeal, there is no requirement that a party "request that a judge add undisputed facts to a ruling in order to preserve those facts for appeal," when the legal sufficiency of the ruling is not being challenged. *Carbon Cnty.*, 2013 UT 41, ¶ 11.

Brown v. State, 2013 UT 42 (July 12, 2013)

Fourteen years after being convicted of aggravated murder, Debra Brown obtained post-conviction relief on the ground of factual innocence under the Post-Conviction Remedies Act, *see* Utah Code Ann. §§ 78B-9-101, -405 (LexisNexis 2010). Brown had an alibi for all of the time during which the murder might have taken place, except for a three-hour time period on Saturday morning. At the original trial, the evidence was that the victim had last been seen alive on Friday, but in the post-conviction hearing, a witness testified to having seen the victim alive on Saturday afternoon and that testimony was corroborated by a note in the detective's case sheet at the time of the original investigation. That witness had been identified on Brown's witness list at the original trial but had not testified. Another witness, apparently unknown at the time of the original trial, offered similar testimony. The State argued that the Act requires factual innocence to be established entirely from newly-discovered evidence, but the supreme court disagreed, holding that the post-conviction court must examine the "newly discovered evidence with all the other evidence to determine whether the petition has met the threshold requirements for a hearing." *Brown*. 2013 UT 42, ¶ 46 (citation and internal quotation marks omitted).

State v. Canton, 2013 UT 44, 308 P.3d 517 (July 23, 2013)

In a dispute about what the phrase "out of the state" means in Utah's criminal tolling statute, the Utah Supreme Court found that the phrase means a person is not physically in Utah. The defendant was indicted on federal charges for coercion and enticement of a fifteen-year-old girl. Utah released the defendant to New Mexico – his home state – for a trial on those charges. While awaiting trial, the defendant became grievously ill and asked the court to dismiss the federal charges without prejudice; that court obliged. Two months later, Utah filed charges against the defendant for enticement of a minor. The defendant filed a motion to dismiss under the two-year statute of limitations, but the district court denied that motion because the time limit was tolled while the defendant was out of the state. On appeal, the defendant argued that while he was physically out of the state, he had a legal presence within the state because he was bound to Utah's legal authority while he was in New Mexico. The Utah Supreme Court reviewed the dictionary definition of the phrase "out of the state" but found that it was imprecise because the dictionary defined parts of the phrase rather than the phrase as a whole. After analyzing the phrase as a whole, the court found that the phrase refers to physical presence outside of the state's physical territory.

Nelson v. City of Orem, 2013 UT 53 (August 19, 2013)

In this case, the Utah Supreme Court clarified the inquiry necessary when the Utah Court of Appeals reviews an employee appeals board's decision relating to employee discipline. The court of appeals had held that a police officer needed to satisfy a two-part test in order to overturn his termination: "'(1) that the facts d[id] not support the action taken by [the board] or (2) that the charges d[id] not warrant the sanction imposed.'" *Id.* ¶ 23 (quoting *Harmon v. Ogden City Civil Serv. Comm'n*, 2007 UT App 336, ¶ 6, 171 P.3d 474). The court of appeals had broken the second part down into two questions: (1) whether the sanction was proportional and (2) whether "the sanction [was] consistent with previous sanctions imposed by the department pursuant to its own policies." *Id.* (emphasis omitted) (quoting *Harmon*, 2007 UT App 336, ¶ 6). While approving of the court of appeals' application of the abuse of discretion standard as required by statute, the high court cautioned that the two-part test applied "should not be viewed as a stand-alone test." *Id.* ¶ 29. Although it recognized the potential usefulness, it stated that "the only question the court of appeals must address in reviewing [a b]oard's decision is simply this: given [the board's] policy and its stated reasons for terminating [the employee], did the [b]oard 'abuse[] its discretion or exceed[] its authority' in upholding the termination[.]" *Id.* (last two alterations in original).

State v. Arriaga–Luna, 2013 UT 56 (August 27, 2013)

During a custodial interrogation, the defendant confessed to shooting a female victim. The district court granted his motion to suppress the confession on the grounds it was coerced based on the detectives' use of the defendant's children as a method to get a confession. After clarifying that a confession is involuntary if the will of the accused has been overcome, the Utah Supreme Court reversed, holding that, under the totality of the circumstances, the defendant's free will was not overcome. Therefore, the district court erred in concluding coercive police tactics rendered Defendant's confession involuntary. Specifically, the supreme court stated, "The ultimate test in any case involving

the voluntariness of a confession is whether the defendant's will has been overcome under the totality of the circumstances." *Id.* ¶ 14. Telling the defendant he would not see his daughters again, that resources were available for his daughters, and suggesting that his daughters would respect him if he told the truth did not overcome his will.

***Johnson v. Montoya*,**
2013 UT App 199, 308 P.3d 566 (August 8, 2013)

This case concerned the admissibility of testimony of a vocational expert. The Utah Court of Appeals held: (1) the expert's methodology had sufficient indicia of reliability because the information gathered by the expert through her questionnaires was "consistent with other evidence not challenged here, such as the medical and worker's compensation reports as well as the vocational expert's own observations of [Plaintiff]," *Id.* ¶ 11; (2) the trial court did not abuse its discretion in admitting the testimony because the expert testified that others in her field used the statistics, notwithstanding that the defense expert testified he was unaware of anyone else in the field using them; (3) Plaintiff's testimony provided sufficient evidence of the facts such that the court could not conclude that no reasonable person would take the view adopted by the trial court; and (4) consistent with *State v. Barzee*, 2007 UT 95, 177 P.3d 48, the expert did not rely on general statistics in isolation, but also considered her own assessment of Plaintiff, medical records, accident reports, workers' compensation records, and multiple sources of employment data, and demographic information.

***Bennett v. Bigelow & Board of Pardons*,**
2013 UT App 180, 307 P.3d 641 (July 26, 2013)

The Utah Court of Appeals determined that in close cases, trial courts must support a ruling under Rule 4(e) of the Utah Rules of Appellate Procedure with factual findings. Rule 4(e) allows trial courts to "extend the time for filing a notice of appeal 'upon a showing of excusable neglect or good cause.'" *Id.* ¶ 10 (quoting Utah R. App. P. 4(e)). In this case, the trial court rejected an incarcerated individual's Rule 4(e) motion without analysis, despite his argument that the rule's "good cause" and "excusable neglect" requirements were met because he was never served with the trial court's executed order. On appeal, the court reversed and remanded, with instructions to the trial court to make further factual findings supporting its decision. It noted that attention should be given to whether "a particular justification relates to factors within or beyond the party's control, applying a more liberal good cause standard when a proffered justification implicates factors beyond the party's control," and if neglect was a factor, "whether that neglect should, on balance, be excused." *Id.* ¶ 13 (citation and internal quotation marks omitted).

***Jones v. Jones*,**
2013 UT App 174, 307 P.3d 598 (July 11, 2013)

The Court of Appeals held that Utah's grandparent visitation statute, *see* Utah Code Ann. § 30-5-2 (LexisNexis 2007), was unconstitutional as applied in that case. Not long after the parents had separated, the father of the eighteen-month-old child died and the father's parents sought visitation under the statute, which contained a rebuttable presumption that the parent's decision should control, which could be overcome based on several factors listed in the statute. In a previous case, the Utah Supreme Court upheld the same statute against constitutional challenge by imposing a requirement of proof by clear and convincing evidence, but the court of appeals here asserted that "the clear and convincing standard is a standard of evidentiary proof, not a level of constitutional scrutiny." *Id.* ¶ 16. The court held that the mother's parental rights are fundamental rights. Applying strict scrutiny, the court held that the statute's infringement on parental rights was not narrowly tailored to achieve a compelling state interest because it did not require a showing that denial of grandparent visitation would harm the child. Although harm to the child was one factor the court could consider under the statute, the statute permitted a more general "best interests" analysis. In the court of appeals' view, the constitution requires proof of harm to the child in order to overcome the decision of a fit parent to refuse grandparent visitation.

For questions and comments regarding the appellate summaries, please contact Rod Parker at 801-322-7134 or rrp@scmlaw.com.

The Uniform Law Commission: What You Know Can Help Us

by Justice Michael J. Wilkins

INTRODUCTION

The Uniform Law Commission (ULC) was formed in 1892 to promote voluntary uniformity of laws of the States in situations where uniformity is both possible and also helpful to the citizens of the States. The ULC is composed of delegations from each of the States (including the District of Columbia, as well as Puerto Rico and the U. S. Virgin Islands). Delegations are selected and financed by their individual States. Delegates must be members of the bar, and are commonly drawn from state legislatures (legislators and legislative staff lawyers), law school faculties, the practicing bar, and the judiciary. Extended service with a state delegation is common, although terms are set by individual States. *See generally About Us*, Uniform Law Commission, http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC (last visited September 27, 2013).

Perhaps the best known and most widely-accepted product of the ULC is the Uniform Commercial Code, a fixture in the law school curriculum for more than sixty years. The ULC is also the author of such common guideposts of practice as the Uniform Probate Code, the Uniform Child Custody Jurisdiction and Enforcement Act, the Uniform Anatomical Gift Act, the Uniform Declaratory Judgments Act, the Uniform Enforcement of Foreign Judgments Act, the Uniform Electronic Transactions Act, the Uniform Fraudulent Transfer Act, the Uniform Interstate Family Support Act, the various Uniform business entity acts (partnership, limited partnership, LLC, etc.), and many more.

The work of the ULC is ongoing. Efforts to study, draft, revise, and get the States to adopt the ULC's "products" are as active today as ever in its history. The purpose of this article is to alert members of the Bar to the opportunity you have to help shape this powerful body of law, now and in the future.

WHAT THE ULC DOES

The ULC is composed of approximately 385 Commissioners from the fifty-three member jurisdictions. The entire body meets annually, usually in mid-July, for seven or eight days. This annual conference is the primary working meeting. During the annual conference, all 385 commissioners jointly review proposed uniform acts, consider them word by word, and approve or reject them as products of the ULC. For purposes of approval or rejection, each State has a single vote, with a majority vote needed for a proposed act to be advanced to the legislative bodies of the States for consideration.

To be considered at the annual conference, proposed acts generally follow the same path: proposal, study, drafting, style, reading for comment, and final reading. Let me describe each of these steps briefly to highlight opportunities for your direct influence. The real significance of early influence is that it precedes action of any kind by the Utah Legislature.

Proposal

Anyone who perceives a need for uniformity among the States in a particular area of law may submit a proposal to the Scope and Program Committee of the ULC. Although most proposals come through commissioners, submissions from others are welcomed.

Proposals are considered on their merits, with primary focus on areas of law that lend themselves to uniformity among the States and that may realistically expected to be reasonably well received by the majority of States.

Study

If the Scope and Program Committee is convinced that a proposal represents a topic worthy of the expense and effort to study, a committee is appointed to undertake a careful examination of the subject. In addition, a reporter is appointed from among those legal scholars who are experts in the subject area. The work of study committees is usually completed within two years,

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most often by telephone conferences and electronic exchanges.

The task of the study committee is to develop an understanding of the issues and interests underpinning the proposed subject of uniform law sufficient to recommend for or against further action by the ULC. In reaching this conclusion, the study committee will reach out to those who represent stakeholders, such as ABA committees, industry and government groups, and other interested parties.

One of the most important tasks of a study committee is to build a list of parties who may be invited to act as "observers" in the study and drafting process. Observers are most often offered a seat at the table, as well as full participation in the work of the committees. Consequently, they are placed in positions of significant influence over the content of the committee report.

Drafting

If a study committee reports to the ULC leadership that a proposed topic warrants further efforts, a drafting committee may be appointed. The drafting committee is given a specific charge within which to work, usually as a reflection of the recommendation of the study committee. The committee is composed of commissioners, one or more expert reporters, and observers.

During the first year a drafting committee prepares a preliminary draft of a uniform act addressing the subject. The draft is presented at the annual conference of the ULC and read line by line. The drafting committee reads the proposed act aloud, and commissioners who are in attendance at the annual meeting offer comments on the proposal.

Following the "first reading," the drafting committee spends the second year refining the draft, incorporating comments from commissioners and written comments from other interested parties. The goal is to have ready a final draft for the next annual conference.

Style

The ULC Committee on Style reviews all proposed acts for clarity and consistency with other acts.

Final Reading

After the second year of work by a drafting committee, as well as the final review by the Committee on Style, the drafting committee again appears before the full conference of commissioners at the annual meeting to read, line by line, the final draft. Commissioners review, debate, and often amend the final draft.

At the conclusion of the annual conference, each proposed act

that has been presented for final reading is voted on by the States (the commissioners from each State decide whether or not to approve each uniform act, as there is only one vote per State). If an act receives a majority vote it becomes an official product of the ULC, and each State delegation is expected to seek its introduction and enactment in their home State.

YOUR OPPORTUNITY

When a new proposed Uniform Act is presented to the State legislature, the views of the Bar and impacted others are always solicited and welcomed. Unfortunately, by the time a new act reaches the legislature, much of the policy debate has concluded. Significant changes are harder to make. On the other hand, as with so many policy formation processes, early input has much greater influence.

Individuals, Bar sections, institutions, and other interested parties are encouraged to make their views known on subjects under consideration by the ULC at all stages of the process. Comments can be made by communicating directly with committee chairs or members. Proposals for consideration of new topics are also welcome, and may be submitted directly to the ULC Scope and Program Committee.

To give you a sense of what is currently in the works, the following projects are being studied or drafted by various ULC committees:

Appointment and Powers of Real Estate Receivers
Athlete Agents Act
Criminal Records Accuracy and Access
Enforcement of Child Custody and Child Support Orders
Family Law Arbitration
Fiduciary Access to Digital Assets
Firearms Information
Fraudulent Transfers Act
Home Foreclosure Procedures Act
Interjurisdictional Recognition of Substitute Decision Making Documents
Out-of-State Unsworn Declarations
Portability and Recognition of Professional and Occupational License of Military Spouses
Recognition and Enforcement of Canadian Domestic Violence Protection Orders
Registration of Foreign Judgments
Residential Landlord and Tenant Act
Residential Mortgage Foreclosure
Revised Uniform Unclaimed Property Act
Social Media Privacy
Third Party Child Custody and Visitation
Tribal Probate Code
Trust Decanting
Trust Protector Act
Veterans Court Act
Wage Garnishment Act

HOW TO ACCESS THE ULC

The ULC website, www.uniformlaws.org, lists acts being considered or drafted, the names and contact information for the various committees, and the process for submitting a proposal to the Scope and Program Committee to consider a new issue. A periodic review of the website offers an accurate view of what is being studied, drafted, and promoted. The contact information for reporters is included in the committee listings, and reporters are especially receptive to thoughtful ideas and suggestions regarding drafts being considered.

In addition, Utah has eight commissioners, any one of whom will be happy to discuss activities of the Uniform Law Commission:

Senator Lyle W. Hillyard, Logan
lyle@hao-law.com | 435-752-2610

Representative V. Lowry Snow, St. George
vlsnow@snowjensen.com | 435-628-3688

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CONCLUSION

Since before Utah's statehood, the Uniform Law Commission has been crafting and promoting statutes for submission to the States to promote uniformity among the States. The expertise and insight of members of the Utah Bar are a valuable resource in that effort. We welcome your participation. The more the merrier. The sooner the better.

Civility Revisited

by Donald J. Winder

In May 2009, the *Utah Bar Journal* published my article on the movement toward civility in our profession and enforcement of our responsibility in this regard. Donald J. Winder & Jerald V. Hale, *Enforcing Civility in an Uncivilized World*, 22 Utah B.J. 36 (May/June 2009). Since publication of that article, various jurisdictions across the country have, like Utah, pushed the concept of civility from the periphery of professional responsibility to the forefront. Accordingly, I update the earlier work to highlight these changes in Utah and around the country.

Recent cases from Utah courts underscore the growing recognition that the concept of civility is no longer merely aspirational. *See, e.g., Arbogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶ 43, 238 P.3d 1035, 1043 ("We encourage lawyers and litigants to follow [the Utah Standards of Professionalism and Civility.]"); *Featherstone v. Schaerrer*, 2001 UT 86, ¶ 16, 34 P.3d 194 ("[C]ourts are endowed with the inherent authority to regulate attorney misconduct."); *Robinson v. Baggett*, 2011 UT App 250, ¶ 27 n.14, 263 P.3d 411 (citing the Utah Standards of Professionalism and Civility as authority); *State v. Doyle*, 2010 UT App 351, ¶ 12, 245 P.3d 206 (stating conduct of all lawyers "should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms" (citation and internal quotation marks omitted)); *Superior Receivable Servs. v. Pett*, 2008 UT App 225, ¶ 12, 191 P.3d 31 (mem.) (citing to Standard 1, Utah Standards of Professionalism and Civility while reiterating a previous Utah Supreme Court case holding incivility may warrant sanctions and will often diminish a lawyer's effectiveness); *Advanced Restoration, LLC v. Priskos*, 2005 UT App 505, ¶ 37 n.13, 126 P.3d 786 (citing Standard 3, Utah Standards of Professionalism and Civility, that "[d]erogatory references to others or inappropriate language of any kind has no place in an appellate brief" (citation and internal quotation marks omitted)).

The Utah Supreme Court has made clear counsel should comply with the Utah Standards of Professionalism. In *Arbogast Family Trust*, the court stated,

> A party's counsel can and should simultaneously comply with the rules of civil procedure and the standards of professionalism and civility. Our standards of professionalism and civility often promulgate guidelines that are more rigorous than those required by the Utah Rules of Civil Procedure and the Utah Code of Professional Conduct. Adherence to those standards promotes cooperation and resolution of matters in a "rational, peaceful, and efficient manner." Utah Standards of Professionalism and Civility pmb1. The rules of civil procedure establish minimum requirements that litigants must follow; the standards of professionalism supplement those rules with aspirational guidelines that encourage legal professionals to act with the utmost integrity at all times.

2010 UT 40, ¶ 40. The court highlighted the commitment to enforcement of civility in the practice of law in Utah noting, "We encourage lawyers and litigants to follow [the Utah Standards of Professionalism and Civility 14-301 (16)], and we caution that lawyers who fail to do so without justification may open themselves to bar complaints or other disciplinary consequences if their conduct also runs afoul of the Utah Rules of Professional Conduct." *Id.* ¶ 43.

As another example, in *Doyle*, the Utah Court of Appeals called into question certain tactics a prosecutor used in failing to fully respond to discovery requests. Highlighting the need for civility in this particular context, the court cited to the Utah Standards of Professionalism and Civility and observed, "[F]or all lawyers, and especially for prosecutors, 'conduct should be characterized at all times by personal courtesy and professional integrity in

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the fullest sense of those terms…[and] we must be mindful of our obligations to the administration of justice, which is a truth-seeking process.'" 2010 UT App 351, ¶ 12 (omission and second alteration in original) (citing Utah Standards of Professionalism & Civility 14-301).

Likewise, in *Pett*, the Utah Court of Appeals reiterated the dangers of incivility in written briefs and correspondence as detailed in *Peters v. Pine Meadow Ranch Home Ass'n*, 2007 UT 2, 151 P.3d 962 , a case highlighted in my 2009 article. While not ruling directly on the issue, the court felt compelled to make special note of its dismay for the tactics used by respondent's counsel in their briefs. Specifically, the court noted,

> Our Standards of Professionalism and Civility provide that "lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner" Utah Standards of Professionalism & Civility 1. [Respondent's] appellate brief's description of the district court's ruling as "inane" and "a most incredible leap of illogical, irrational, unreasonable, fallacious, and specious lack of reasoning" fails to grant the district court the dignity and respect it deserves. We also caution that "[e]ven where a lawyer's unprofessionalism or incivility does not warrant sanctions, it often will nevertheless diminish his or her effectiveness," *Peters v. Pine Meadow Ranch Home Ass'n*, 2007 UT 2, ¶ 20, 151 P.3d 962, and in extreme cases can result in the assessment of fees against the offending lawyer or even striking of substantive arguments to the client's detriment, *see id.* ¶ 9.

2008 UT App 225, ¶ 12.

A most important aspect of the move toward civility in the legal profession has been the inclusion of a civility requirement in the attorney oath. In 2003, the South Carolina Bar amended its lawyer's oath to include the following: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications." S.C. App. Ct. R. 402(k)(3) (2013). In Utah, the attorney's oath was modified to include promises to "discharge the duties of attorney…with honesty, fidelity, professionalism, and civility" and to "faithfully observe…the Standards of Professionalism and Civility." Utah R. Prof'l Conduct, *Preamble: A Lawyer's Responsibilities*, [1]. Several other states have also recently amended their attorney oaths to incorporate similar language, recognizing the need for civility in all aspects of the practice of law. These include New Mexico, *see* N.M. Rules Gov. Admiss. Bar R. 15-304 (2010) ("I will maintain civility at all times"), as well as Florida, Louisiana, and Arkansas, which all follow the South Carolina model, "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communication," *available at* www.scourts.org/courtOrders/displayOrder.Cfm?orderNo=2003-10-22-03. The American Board of Trial Advocates members actively participated in bringing about these results.

Efforts by the ABA have also contributed. *See ABA Recommends Creeds for Bar Associations*, ABA J., Jan. 1989, at 58 (providing a discussion of the model lawyer creeds proposed by the ABA's Young Lawyers Division and the ABA's TIPS section). Other states with civility components in their oaths include Arizona and Ohio. Although Arizona does not specifically refer to civility in its oath, it does reference adherence to the state bar's "Lawyers Creed," providing, "I will advise my client that civility and courtesy are not to be equated with weakness," and "I will be courteous and civil, both in oral and in written communications," *available at* www.azbar.org/membership/admissions/lawyer'screedofprofessionalism (last visited Oct. 7, 2013). Ohio Rule 1 section 8 requires an attorney to "conduct myself with dignity and civility and show respect toward judges, court staff, clients, fellow professionals, and all other persons." Ohio Gov. Bar R. I, § 8(A). Likewise, Hawaii recognizes the need for civility in the practice of law, albeit with a slightly less broad scope. *See* Haw. Sup. Ct. R. 1.5(a)(3)(c) ("I will conduct myself with dignity and civility towards judicial officers, court staff and my fellow professionals."). In all, nine states have now modified their attorney oaths to specifically include reference to the requirement of civility in the practice of law.

In addition to the specific references to civility in the attorney oaths, several other states have included references to other definitional analogs to civility, such as courtesy and respect. *See* Alaska Bar R. 5, § 3 ("I will be candid, fair and courteous before the court and other attorneys. . . ."); Colo. Oath of Admission ("I will treat all persons…with fairness, courtesy, respect and honesty"); Minn. Stat. § 358.07(a) (providing that attorneys shall conduct themselves "in an upright and courteous manner"); Del. Supr. Ct. R. 54 (requiring attorneys to behave "with all good fidelity as well to the court as to the client"), and Va. Attorney Oath (requiring attorneys to swear to "courteously demean [themselves] in the practice of law"). Alaska, Colorado, Minnesota, Delaware, and Virginia all include specific references to being courteous, which any dictionary will confirm is the touchstone of civility. *See* Merriam-Webster (defining "civility" as (2)(a) "civilized conduct; *especially* : COURTESY, POLITENESS"), *available at* http://www.merriam-webster.com/dictionary/civility (last visited June 25, 2013); Black's Law Dictionary (9th ed.

2009) (defining "legal etiquette" as "professional courtesy that lawyers have traditionally observed in their professional conduct, shown through civility and a strong sense of honor"). Thus, in addition to the nine states directly referencing civility in their oaths, these five analogous "oath states" make certain the modern trend of law is moving swiftly toward a standard of civility that is made clear to attorneys from the moment they take the oath of their respective jurisdictions.

Michigan is a state that does not include civility in its oath. However, it enforces civility through its rules of professional conduct. *See Grievance Adm'r v. Fieger*, 719 N.W.2d 123 (Mich. 2006) (disciplining an attorney who violated the Michigan Rules of Professional Conduct (MRPC) prohibiting undignified or discourteous conduct toward tribunal subject to professional discipline under the Michigan Court Rules). The Michigan Supreme Court further upheld a constitutional challenge involving MRPC 6.5(a), which provides that "[a] lawyer shall treat with courtesy and respect all persons involved in the legal process." *Id.* at 162 (citation and internal quotation marks omitted).

As case law develops in this area, the inclusion of the requirement of civility in attorney oaths has also resulted in court-imposed sanctions for violations. *See generally*, Judith D. Fischer, *Incivility in Lawyers Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L. J. 365 (2011) (detailing case law regarding incivility in written legal documents). In the case *In re Abbott*, 925 A.2d 482 (Del 2007) (per curiam), the Delaware Supreme Court refers to the attorney oath wherein all attorneys swear to practice "'with all good fidelity as well to the Court as to the client,'" *id.* at 484–85 (quoting Del. Supr. Ct. R. 54), as a basis for publicly reprimanding a lawyer who, among other things, accused fellow counsel of fabrication. *Id.* As a leader in the charge to add civility to its oath, so too are South Carolina courts pushing hard against attorneys who violate their oath. *See* ABA J., Jan. 2013, at 32–40.

In 2011 alone, three South Carolina Supreme Court cases dealt with sanctions imposed against attorneys for uncivil actions in violation of the South Carolina Rules of Professional Conduct and its lawyer oath. *See In re White III*, 707 S.E.2d 411 (S.C. 2011) (sanctioning an attorney for written correspondence suggesting opposing counsel had "no brains" and questioning if "he has a soul," among other derogatory remarks); *In re Anonymous Member of S. Carolina Bar*, 709 S.E.2d 633 (S.C. 2011) (sanctioning an attorney for derogatory remarks regarding opposing counsel's family unrelated to the matter at hand); *In re Lovelace*, 716 S.E.2d 919 (S.C. 2011) (sanctioning an attorney for threatening and then slapping defendant during a deposition). These cases dealt with various instances of attorney incivility in both oral

and written forms, but all indicate the South Carolina Court's intent to enforce sanctions for violations of the oath and the standards of civility attorneys have sworn to uphold.

In re Anonymous Member of South Carolina Bar provides a good example of this direct approach. For the benefit of the bar, the court took this opportunity to address the increasing complaints of incivility. 709 S.E. 2d at 635. In upholding the disciplinary panel's decision regarding sanctions, the court noted, "Respondent took the lawyer's oath which includes the following clause, 'To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in written and oral communications. . . .'" *Id*. at 637. It commented, "An e-mail such as the one sent by Respondent can only inflame the passions of everyone involved, make litigation more intense, and undermine a lawyer's ability to objectively represent his or her client." *Id*.

The court went on to hold:

> In this case, there is no question that even a casual reading of the attorney's oath would put a person on notice that the type of language used in Respondent's "Drug Dealer" e-mail violates the civility clause. Casting aspersions on an opposing counsel's offspring and questioning the manner in which an opposing attorney was rearing his or her own children does not even near the margins of the civility clause. . . . Moreover, a person of common intelligence does not have to guess at the meaning of the civility oath.

Id. In overruling due process and First Amendment challenges, the court stated,

> The interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other in the manner in which Respondent attacked [opposing counsel]. Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client.

Id. at 638.

Besides including civility in its lawyer's oath, South Carolina took a step further and, in 2004, amended Rule 7 of the Rules for Lawyer Disciplinary Enforcement to include violation of the lawyer's oath as grounds for discipline. *See* http://www.sccourts.org/courtOrder/displayOrder.cfm?orderNo=2004-09—22-01. Other states, like Kansas, although lacking a provision requiring civility in their oaths, do also include a provision that violating the oath is grounds for discipline under rules of professional conduct. *See* http://www.ksd.uscourts.gov/rule-83-6-1-professional-responsibility/. Such a provision is not necessarily a disciplinary requirement for acts of incivility. As noted above, the Delaware Supreme Court has enforced the lawyer's oath without such a rule. *See In re Abbott*, 925 A.2d 482 (Del. 2007). And other courts have also disciplined attorneys for violation of their oath, without such a provision in the rules of professional conduct. *See, e.g., State ex rel. Counsel for Discipline v. Sipple*, 660 N.W.2d 502 (Neb. 2003) (finding an attorney subject to discipline under both the rules of professional conduct and for violation of attorney's oath).

These cases in South Carolina, Delaware, Utah, and elsewhere continue to indicate the sea change taking place within our profession where civility in the practice of law is no longer tempered by notions of "zealous" or "aggressive" representation. By moving the civility requirement into the attorney oath, lawyers are now on notice that representation must be accomplished within the context of civility.

In June 2013, the Florida Supreme Court adopted procedures for, among other things, enforcing principles of civility as set forth in the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism*, and *The Florida Bar Ideals and Goals of Professionalism*. In so doing, the Florida Supreme Court rejected the prior passive academic approach to civility problems, stating further and more concrete actions are now required. Entitled a *Code for Resolving Professionalism Complaints*, any person may initiate a complaint either telephonically or by written request. *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280 (Fla. 2013) (mem.). Depending on the severity of the complaint, resolution can be pursuant to a local professionalism panel or through the Florida Bar offices. Such a resolution may be informal or include diversion, admonition and even disciplinary action.

In closing, Utah should continue as a leader to set an example of civility in all phases of our profession. Programs such as the Utah Supreme Court's professionalism counseling for members of the Utah Bar may also help enforce the expectations of civility to which we all must aspire. *See* Utah Supreme Court Standing Order No. 7, issued January 9, 2008, effective April 1, 2008, *available at* http://www.utcourts.gov/resources/rules/urap/Supctso.htm#7. Members of the Utah Supreme Court Committee on Professionalism will be urging that Utah directly adopt the South Carolina and Florida approaches.

Symposium and Gala Cap Off S.J. Quinney College of Law's Centennial Celebration

by Barry Scholl

Introduction

In 1926, barely more than a decade after the first class of eight students graduated from the University of Utah School of Law (later renamed the College of Law), Dean William H. Leary reported in the U's yearbook, the *Utonian*: "The Law School of the University of Utah is a product of the best methods and principles embodied in the old law schools of the country, together with the stimulus and zeal of a pioneer institution of higher learning." In 2013, as the College anticipated a move into its innovative new home, it also celebrated its first century of accomplishments while looking forward to its next 100 years of innovative education, service and scholarship.

Two capstone events of the 2013 Centennial, both held on September 20, celebrated the College's first 100 years. The first was a lunchtime symposium, *Improving the Law, Past, Present and Future: A Century and Counting of Engaged Scholarship*. The second, held that evening at the Natural History Museum of Utah, was the College's Centennial Gala. That event brought together 450 alumni, friends, and supporters for a "once-in-a-century" celebration of the College's past and future.

Recognizing Faculty Accomplishments

Michael W. McConnell, a former Professor at the College of Law and U.S. Court of Appeals Judge, and currently the Richard and Frances Mallery Professor at Stanford Law School, provided the keynote address at the noon symposium. In a series of wide-ranging remarks that reflected his distinguished career as a practitioner and scholar, he discussed the myriad ways scholarship "influences the way we govern and guide our society" (in the words of Interim Dean Bob Adler).

Drawing on historical anecdotes and colorful hypotheticals, McConnell discussed the formative influences that shaped the College of Law, crediting past giants including Leary, Kimball, Fordham, Ritter, and Flynn for their efforts; offered thoughtful suggestions about how legal education might adapt to the changes wrought by the 2008 economic meltdown; and offered cautious prognostications about what might lie ahead, quipping at one point that "I predict about a lot of things, but not about the future." He also emphasized the role flagship state schools like the U play in highlighting local and regional issues:

> It's not an accident that the Wallace Stegner Center situated here at the University of Utah is one of the premier institutions considering environmental and natural resources law…Why? All you have to do is drive around the state of Utah and realize that for aesthetic, economic and other reasons, that's where we live. You would expect a place like the S.J. Quinney College of Law to…provide especially important scholarship with respect to questions that involve this state.

Fittingly, McConnell wrapped up his remarks with a quote from Dean Leary that he suggested might be emblazoned in the College's new building: "'I would like to see a freer discussion of philosophical questions; a broader, more tolerant attitude; a deep respect for others; and a truly strong intellectual atmosphere.'"

"So, here we are on the 100th anniversary, I think we've done a pretty good job with all of that, here and at other law schools across the country, but let's see if we can do better," McConnell concluded.

BARRY SCHOLL, a 2005 graduate of the University of Utah S.J. Quinney College of Law, is the College's Director of External Relations.

After McConnell's address, current faculty presented on their own, and their colleagues', ongoing scholarly contributions to important issues facing the state, the nation, and the world.

Teneille Brown discussed Bioethics/Law & Medicine; Jeff Schwartz discussed Business & Commercial Law; Paul Cassell discussed Criminal Law; Laura Kessler discussed Family Law & Gender Studies; Tony Anghie discussed International Law; Amelia Rinehart discussed Property and Intellectual Property; Michael Teter discussed Public Law; and Robin Craig discussed Environmental and Natural Resources Law.

A Once-in-a-Century Celebration

Later that evening, a sold-out audience of approximately 450 gathered in the spacious Natural History Museum of Utah for the opportunity to catch up with one another and enjoy a variety of dinner entrees while celebrating the College's history and future. Audience members were also presented with the opportunity to contribute to that future by signing a steel beam that will be incorporated into the College of Law's new building. Attendees included alumni, University administrators, College faculty and staff, and members of the judiciary, among others.

Vicki Baldwin, a 1999 graduate and the current president of the College of Law's Board of Trustees, thanked attendees for joining in the celebration.

Next, Interim Dean Bob Adler thanked audience members for their support and offered a centennial birthday toast. In his remarks, he touched on several subjects, including the College's commitment to service. "Our faculty continues to address pivotal issues of law and policy from global justice to the global climate, from the rights of crime victims to the rights of the innocent, and from the legal needs of the middle class to the legal challenges of biotechnology."

Adler also focused on the many accomplishments of the school's graduates. "Our alumni continue to be leaders in law, business, government and public service," he said. "When you look at the Utah Bar's efforts to provide pro bono service and to serve the middle class through the Modest Means Program, alums like Robert Rice, Rick Davis, and John Lund are prominent."

Appropriately enough, Adler also invited those in attendance to help shape the College's next 100 years. "We're committed to continuing and improving [our] traditions, and as we focus our sights on our second century, we invite your engagement – your ideas and your participation in our programs and our service. Our doors are open to work more closely with all of you in our second century."

Adler then introduced a short video highlighting the College's history and recollections of alumni from the past fifty years. The video was followed by remarks from Kate Tipple, Class of 2014, who thanked members of past classes for their many contributions to the College. "For 100 years the [College of Law] has created a distinctive community of leaders, innovators, pioneers. I feel that energy every day I walk past your portraits in the school's hallway on the way to class. It is motivating," she said.

Turning her attention to the future and the new building, which is scheduled for completion in 2015, Tipple continued, "The new space is thoughtfully laid out to allow for greater experiential learning and scholarly collaboration. It will cater to our abilities to form spirited and intellectual connections with each other."

Finally, University of Utah President David Pershing offered a recognition of supporters. "On June 4, we broke ground on a new home for our College of Law. This incredible new building will be gateway to the campus reflecting the importance of the College," he said.

Pershing proceeded to highlight the building's features, including the tools necessary for continued interdisciplinary collaboration, expanded student spaces, high-tech teaching facilities and "the community outreach opportunities we are so proud of."

He also reported on the continued progress of the building campaign, noting that the campaign had raised $33 million to date toward its $63 million budget. Near the end of his remarks, he reminded those in attendance, "Tonight is mainly a celebration of 100 years of excellence and not a fundraising event. But I do need to ask you to help us shape the future."

Alumni Pay Tribute

After the event, alumni from classes reaching back more than fifty years offered their own tributes, including personal recollections about their time at the College of Law.

Senior U.S. District Court Judge Bruce S. Jenkins, class of 1952, congratulated all who contributed to the College of Law's "stellar first 100 years" and fondly recalled his favorite mentors and teachers who included Willis Ritter, Dean William H. Leary, Dr.

A. Ladru Jensen, Judge Herbert M. Schiller, and many others. "I remember as well Brigham Roberts and Ed Clyde, extraordinary lawyers who came up from downtown to teach. I have known and admired each new Dean since William H. Leary, and congratulate each for his contribution in making a great school better."

Judge Jenkins concluded with a poetic description of his experiences. "We were edified, enlightened and inspired. May the next 100 years flourish."

Herb Livsey, a 1969 graduate, placed his remembrance in historical context:

> I attended the College of Law during the era of the Civil Rights movement, but before the use of personal computers, and when the Internal Revenue Code was only about one-fifth of its size today. Since then, the practice of law has continued to change and I am continually impressed at how the College of Law keeps pace with rapid developments in legal education. My congratulations not only for 100 years of growth but also for the academic stature achieved by the S. J. Quinney College of Law.

Rod Snow, a 1971 graduate, said,

> As past Bar president, we have been pleased with the focus of the law school on pro bono work and community service. We know the move to an exciting new facility will only enhance the reputation of the College, facilitate and improve the superb education of the students, benefit the bar and advance the many outreach programs which service so many in need.

Denise Dragoo, another '70s graduate, said,

> As the College of Law marks its centennial, I would like to personally thank the professors, administrators and my colleagues from the Class of 1976. Professor Owen Olpin sparked my interest in natural resources law, Professor John Flynn and his wife Sheila counseled me to pursue an LL.M. at Washington University and then welcomed me to St. Louis during his term as a visiting professor. When I returned to Utah, law school provided the skills needed for law firm practice and many long-lasting friendships, including my husband, Craig Anderson. Thanks to you all and congratulations on 100 years of excellence!

Conclusion

In 1923, a time when the College of Law was experiencing dramatic growth in enrollment and expansion of its curriculum, Dean Leary made a bold prediction. In that year's *Utonian*, he wrote, "Utah will be a better place to live in because of her law school."

Today, 90 years after those words were published and a century after the College's first commencement, the University of Utah S.J. Quinney College of Law has improved the quality of life not just in Utah, but also nationally and internationally.

And as the College prepares to move into a new home, Adler emphasizes that the building's primary function will be to extend those traditions by supporting the College's educational mission. "As the College enters its second century, we're firmly committed to using the new building to prepare our students in new and better ways to master the full range of skills necessary to become leaders, as well as excellent lawyers," he concluded.

Business and Commercial Litigation in Federal Courts, Third Edition

Reviewed by Michael D. Zimmerman

In 2008, I reviewed the Second Edition of an excellent treatise titled Business and Commercial Litigation in Federal Courts. I recommended the series because I found it to be extremely helpful in its handling of both substantive and practical issues. It is the only series of its kind, addressing exclusively commercial litigation in the federal courts. It is also unique in that it emphasizes the interplay between the substantive law and rules of procedure. As a result, it offers outstanding guidance to new and experienced litigators alike. Any litigator, no matter how many years of practice were under his or her belt, could turn to this treatise for advice in navigating the logistics of federal practice through every stage of the process.

Business and Commercial Litigation in Federal Courts, Third Edition

Edited by Robert L. Haig

Published by West/Thomson Reuters (2011)

Hardcover

The editors of the series have recently released a Third Edition, in every way equal or superior to the Second Edition. The Third Edition updates the Second Edition and adds thirty-four new chapters on subjects affecting commercial litigators today. The authors are notably neutral in their presentation, of equal value to both plaintiff and defendant. The authors share their insights garnered from years of practice, the result of which is both a research tool and an idea source.

The treatise is truly a "how-to" guide for the development of a federal commercial or business case. The first half of the series begins with chapters on fundamental legal concepts like jurisdiction and venue, and then moves to the practicalities involved at every stage of litigation. It includes chapters on the investigation of a case, case evaluation, preparation of pleadings, removal, all aspects of discovery, motion practice, pretrial, jury selection, all aspects of trial, jury instructions, remedies and damages, post-trial motions, attorney fees, sanctions, appeals, and enforcement of judgments. New chapters have been added on internal investigations, comparison with state courts, coordination of litigation in state and federal court, and international arbitration. For any new litigator, the treatise is a gold mine for the practicalities of maneuvering through a case. For an experienced litigator, the treatise offers insight and advice on the nuances of handling any case within a particular subject area, as well as strategic tips.

The treatise aspires to be a multifaceted tool, useful in a variety of circumstances. Its accessible format means it could be used for a quick reference – on the phone, during a break in a deposition, or read more slowly and thoughtfully.

To add to its utility, some of the chapters contain research references to West's Key Number Digest, the A.L.R. Library, legal encyclopedias such as Am. Jur 2d and C.J.S., other treatises, compilations of forms, and numerous law reviews. It also includes a CD-ROM that contains all of the jury instructions, forms, and checklists that are included in the printed volumes.

Litigators at any level of experience will also find helpful the chapters on day-to-day management, including chapters on litigation avoidance and prevention, techniques for expediting and streamlining litigation, litigation technology, litigation

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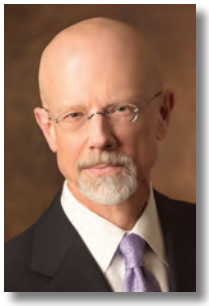

management by law firms, litigation management by corporations, civility, and ethical issues in commercial cases. New chapters have been added addressing crisis management and pro bono – issues that are increasingly pertinent to today's litigators.

The remaining chapters – another half of the treatise – address discrete areas of substantive law, but always with an eye to the practicalities of how cases in these areas may be shaped and presented. Among the areas addressed are antitrust, securities, officer and director liability, mergers and acquisitions, professional liability, banking, communications, patents, trademarks, copyright, labor law, employment discrimination, ERISA, products liability, theft of business opportunities, competitive torts, commercial defamation and disparagement, governmental entity litigation, energy, environmental claims, and e-commerce. The bulk of the new chapters have been added to this part of the treatise. The new chapters include regulatory litigation with the SEC, derivatives, commodities and futures, medical malpractice, reinsurance, consumer protection, licensing, occupational safety and health claims, immigration, executive compensation, food and drug, privacy and security, prior restraint on speech, federal claims based on land use regulation, white collar crime, interplay between commercial litigation and criminal proceedings, money laundering, the Foreign Corrupt Practices Act, export controls, the Alien Tort Statute and Torture Victim Protection Act, the False Claims Act, administrative agencies, government contracts, tax, project finance and infrastructure, sports, entertainment, and information technology.

This list of new chapters demonstrates the breadth of the topics covered in this treatise. I was also impressed by the depth of treatment. I found several discussions directly relevant to cases currently faced by attorneys in our office. Whether the question is practical or substantive, these books provide insight and guidance. Of particular note is that each of these chapters includes a discussion of practice aids, checklists, sample forms, sample complaints, sample jury instructions, or other tools to aid the practitioner.

One timely addition to the series is the chapter on pro bono representation. The chapter notes that pro bono representation has long been a part of the general tradition of the bar, but is an increasingly important consideration for members of the commercial bar. The chapter explains the similarities and

differences between pro bono representation and fee-based representation, and it points out which related chapters will continue to be relevant in a pro bono case. It addresses some of the peculiar considerations that a lawyer should remember when accepting a pro bono case, including assessing a client's need, and offers guidance on how to "vet" a case or client before accepting the representation. The chapter includes a pro bono checklist with a series of particular questions for the lawyers to ask themselves. It also includes various form engagement letters, a disengagement letter, etc.

The chapters addressing substantive topics provide guidance for practitioners regarding individual topics. This would be particularly helpful for a practitioner wading into a new area of law.

The chapter on Tax, for instance, explains that its focus is to address the technical and practical considerations implicated in challenging in court a federal tax liability arising in a business context. It states that a secondary goal is to identify strategic options regarding selection of the judicial forum and presentation of a tax case so that a nonspecialist can understand it. The chapter includes a pre litigation checklist and guidance on which tax issues should be handled by a lawyer and which by other professionals. The chapter also offers information on the choice of court – tax court, district court, or the court of federal claims. To assist the practitioner, the chapter concludes with a checklist and sample motions and pleadings for the various tax courts.

The chapter on Administrative Agencies begins with the premise that, as Congress cedes ever more power to administrative agencies, it is imperative for lawyers to become more adept at litigating within them. The chapter explains the special deference afforded to some agency actions, the rule making process, and the internal adjudication process. It notes that many agency actions can be made either through adjudication or rule-making, and offers insight into which path a practitioner should choose to bring about the needed result. The chapter also, consistent with the treatise's usual practice, provides guidance as to the practical aspects of agency adjudication and how to prepare for an administrative hearing.

The chapters are written by 251 experienced practitioners, including 22 federal judges. Those judges include United States Circuit Judges Timothy B. Dyk, Susan P. Graber, Boyce F. Martin, Jr., David W. McKeague, M. Margaret McKeown, Jane R. Roth, and Richard C. Wesley, and United States District Judges Harold Baer, Jr., Michael M. Baylson, Brian M. Cogan, Paul A. Crotty, Paul S. Diamond, William S. Duffey, Jr., Warren W. Eginton, David Hittner, Robert S. Lasnik, William C. Lee, Barbara M.G. Lynn, Jeffrey T. Miller, Solomon Oliver, Shira A. Scheindlin, and Petrese B. Tucker.

This treatise provides helpful information to any litigator. It is designed for the federal court practitioner but much of its guidance would apply to the state court practitioner as well. It is remarkable in both the breadth and depth of its treatment of procedural rules, substantive issues, and practice guides.

As an additional note, the royalties from any purchases of the treatise or its pocket parts are donated to the ABA Section of Litigation.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the September 27, 2013 Commission Meeting held at the Law and Justice Center in Salt Lake City, Utah.

1. The Bar Commission presented the American Bar Association's Gambrell Professionalism Award Plaque to Elizabeth Wright, New Lawyer Training Program Director.

2. Commissioners discussed the final arrangements for the Special Election to fill the vacant Commission seat representing the 3rd Division.

3. Commissioners discussed the Constitution Day events, and the success of the Civics Education Outreach. Volunteer attorneys filled 185 teaching opportunities, which included classrooms, assemblies, and community youth councils in twelve Counties statewide.

4. The Bar Commission had a rigorous discussion on the future of law practice in Utah and also discussed law practice exit strategies.

5. The Commission selected William S. Britt for the 2013 Professionalism Award.

6. The Commission selected Robert Austin of the Utah State Office of Education as the 2013 Community Member of the Year.

7. The Commission selected Brent H. Bartholomew and Hugh Cawthorne as 2013 Outstanding Mentor Award recipients.

8. Commissioners finalized plans for the Bar Leadership Luncheon on October 17th.

9. Commissioners heard reports from the Pro Bono Commission, Bar Communications Director Sean Toomey, and the Group Benefits Project Committee.

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

Supreme Court Seeks Attorneys to Serve on Advisory Committee on Professionalism and Civility

The Utah Supreme Court is seeking applicants to fill two vacancies on its Advisory Committee on Professionalism and Civility. Appointments are for a four year term. No lawyer may serve more than two consecutive terms as a member of the Committee. Any interested attorney should submit a resume and a letter addressing qualifications to Diane Abegglen, Appellate Court Administrator, Utah Supreme Court, P. O. Box 140210, Salt Lake City, UT 84114-0210 or to the e-mail address dianea@utcourts.gov. Applications must be received no later than November 29, 2013.

Notice of Petition for Reinstatement to the Utah State Bar by Bradley N. Roylance

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement ("Petition") filed by Bradley N. Roylance, in *In the Matter of the Discipline of Bradley N. Roylance*, Second Judicial District Court, Civil No. 100700553. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Lawyers Helping Lawyers Seeks Volunteers

Utah Lawyers Helping Lawyers is currently seeking applications for volunteer positions on their Board of Trustees and various committees within the lawyers assistance program. Applicants may be active or retired attorneys and should be able to give a few hours each month to support the work of the program. To learn more about these volunteer opportunities, please contact Utah Lawyers Helping Lawyers at 801-579-0404 or admin@lawyershelpinglawyers.org. For more information about the Lawyers Helping Lawyers program, visit our website at: lawyershelpinglawyers.org.

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2014 "Spring Convention in St. George" Accommodations

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

Hotel	Rate (Does not include 11.45% tax)	Block Size	Release Date	Miles from Dixie Center to Hotel
Ambassador Inn (435) 673-7900 / ambassadorinn.net	$100 Including Tax!	10–Q	2/15/14	0.4
Best Western Abbey Inn (435) 652-1234 / bwabbeyinn.com	$119	20	2/13/14	1
Clarion Suites (fka Comfort Suites) (435) 673-7000 / stgeorgeclarionsuites.com	$100	10	2/13/14	1
Comfort Inn (435) 628-8544 / comfortinn.com/	$111	20	3/13/14	0.4
Courtyard by Marriott (435) 986-0555 / marriott.com/courtyard/travel.mi	$139	8–Q 7–K	2/15/14	4
Crystal Inn Hotel & Suites (fka Hilton) (435) 688-7477 / crystalinns.com	$97 +$10 for poolside room	12–Q	2/13/14	1
Fairfield Inn (435) 673-6066 / marriott.com	$95	15–DBL 15–K	2/15/14	0.2
Green Valley Spa & Resort (435) 628-8060 / greenvalleyspa.com	$99–$220.50* *10% discount for a 2 night minimum stay Tax:18%	7 1–3 bdrm condos Cleaning deposit: $45–65	1/13/14 (30 days prior to cancel–refund)	5
Hilton Garden Inn (435) 634-4100 / stgeorge.hgi.com	$132–K $142–2Q's	20	02/13/14	0.1
LaQuinta Inns & Suites (435) 674-2664 / lq.com	$99	7–K	2/13/14	3
Lexington Hotel & Conference Center (fka Holiday Inn) (435) 628-4235 / lexingtonhotels.com/property.cfm?idp=22049	$95	10	2/13/14	3
Ramada Inn (800) 713-9435 / ramadainn.net	$99	20	2/13/14	3
St. George Inn & Suites (fka Budget Inn & Suites) (435) 673-6661 / www.stgeorgeinnhotel.com	$99 $84	5–DQ 5–Single Q	2/13/14	1

Pro Bono Honor Roll

Alig, Michelle – Tuesday Night Bar

Amann, Paul – Tuesday Night Bar

Anderson, Doug – Tuesday Night Bar

Anderson, Skyler – Immigration Clinic

Askar, Jamie – Tuesday Night Bar

Backman, Jim – Tuesday Night Bar

Baker, Jim – Senior Center Legal Clinic

Barnett, Dan – Tuesday Night Bar

Barrick, Kyle – Senior Center Legal Clinic

Beck, Sarah – Debtor's Clinic

Bertelsen, Sharon – Senior Center Legal Clinic

Black, Mike – Tuesday Night Bar

Bogart, Jennifer – Street Law Clinic

Burton , Mona – Tuesday Night Bar

Buswell, Tyler – Tuesday Night Bar

Chandler , Josh – Tuesday Night Bar

Clark, Melanie – Senior Center Legal Clinic

Combe, Steve – Tuesday Night Bar

Conley, Elizabeth – Senior Center Legal Clinic

Crismon, Sue – Family Law Clinic

Daggs, Lena – Tuesday Night Bar

Denny, Blakely – Tuesday Night Bar

DePaulis, Megan – Tuesday Night Bar

Durrant, Marie – Tuesday Night Bar

Farley, KT – Rainbow Law Clinic

Ferguson, Phillip – Senior Center Legal Clinic

Frame, Craig – Tuesday Night Bar

Frandsen, Nick – Tuesday Night Bar

Gittins, Jeffry – Street Law Clinic

Gonzalez, Marlene – Immigration Clinic

Hart, Laurie – Senior Center Legal Clinic

Hashimoto, Michael – Tuesday Night Legal Clinic

Hawkes, Dani – Street Law Clinic

Hogle, Chris – Tuesday Night Bar

Hollingsworth, April – Street Law Clinic

Jardine, David – Tuesday Night Bar

Jensen, Michael – Senior Center Legal Clinic

Johansen, Bryan – Tuesday Night Bar

Jones, Casey – Tuesday Night Bar

Judd, Kat – Tuesday Night Bar

Kaas, Adam – Tuesday Night Bar

Kesselring, Christian – Rainbow Law Clinic

Kessler, Jay – Senior Center Legal Clinic

Knauer, Louise – Family Law Clinic

Kuhn, Timothy J. – Tuesday Night Bar

Latimer, Kelly – Tuesday Night Bar

Lee, Terrell – Senior Center Legal Clinic

Lisonbee, Elizabeth – Layton Family Law Clinic

Love, Jon – Tuesday Night Bar

Mares, Robert – Family Law Clinic

Marx, Shane – Rainbow Law Clinic

Maughan, Joyce – Senior Center Legal Clinic

McCoy II, Harry – Senior Center Legal Clinic

McKelvey, Adrienne – Tuesday Night Bar

Miller, Nathan – Senior Center Legal Clinic

Miya, Stephanie – Employment Law Clinic, Medical-Legal Clinic

Montoya, Sara – Tuesday Night Bar

Morrow, Carolyn – Family Law Clinic

Nalder, Brian – Tuesday Night Bar

Otto, Rachel – Street Law Clinic

Peterson, Jessica – Tuesday Night Bar

Pettey, Bryce – Tuesday Night Bar

Ralphs, Stewart – Family Law Clinic

Riter, Austin – Tuesday Night Bar

Roberts, Kathie – Senior Center Legal Clinic

Ryon, Rebecca – Tuesday Night Bar

Scholnick, Lauren – Street Law Clinic

Semmel, Jane – Senior Center Legal Clinic

Shakespear, Paul W. – Tuesday Night Bar

Shaw, LaShel – Tuesday Night Bar

Sinclair, Cory – Tuesday Night Bar

Smith, Linda – Family Law Clinic

Stewart, Jeremy – Tuesday Night Bar

Stewart, Steve – Street Law Clinic

Thomas, Michael – Tuesday Night Bar

Thorne, Matt – Tuesday Night Bar

Thorpe, Scott – Senior Center Legal Clinic

Timothy, Jeannine – Tuesday Night Bar

Trease, Jory – Debtor's Clinic

Turner, Jenette – Tuesday Night Bar

Walkenhorst, Steve – Tuesday Night Bar

Wardel, Adam – Tuesday Night Bar

Weber, Thomas – Tuesday Night Bar

Weinacker, Adam – Tuesday Night Bar

Wheeler, Lindsey – Tuesday Night Bar

Wilkins, Brinton M. – Tuesday Night Bar

Williams, Timothy – Senior Center Legal Clinic

Wilson, Analise – Tuesday Night Bar

Winzeler, Zack – Tuesday Night Bar

Wycoff, Bruce – Tuesday Night Bar

Yauney, Russell – Family Law Clinic

Young, Steve – Tuesday Night Bar

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 the months of August–September of 2013. To volunteer call Michelle V. Harvey (801) 297-7027 or C. Sue Crismon at (801) 924-3376 or go to https://www.surveymonkey.com/s/2013ProBonoVolunteer to fill out a volunteer survey.

Twenty-Fourth Annual

Lawyers & Court Personnel Food & Winter Clothing Drive

for the Less Fortunate

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

Selected Shelters

The Rescue Mission

Women & Children in Jeopardy Program

Jennie Dudley's Eagle Ranch Ministry
(She serves the homeless under the freeway on Sundays and Holidays and has for many years)

Drop Date

December 20, 2013 • 7:30 a.m. to 6:00 p.m.

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

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

Volunteers Needed

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

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

Sponsored by the Utah State Bar

Thank You!

What is Needed?

All Types of Food

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

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

New & Used Winter & Other Clothing

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

New or Used Misc. for Children

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

Personal Care Kits

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

Utah State Bar Takes the Constitution to the Classroom

The Utah State Bar thanks the nearly 200 Utah judges and lawyers who, along with Utah law students, marked the 226th anniversary of the signing of the Constitution by visiting classrooms across the state where they taught about the three independent branches of the government and the importance of an independent judiciary.

Aaron M. Pacini
Adam Beckstrom
Adelaide Maudsley
Adrianna Davis
Alison Adams-Perlac
Alyssa L. Lambert
Amber Cushman
Amy Fiene
Analise Wilson
Angelina Tsu
Ben King
Ben Pollock
Benjamin A Sims
Bilinda K. Townsend
Blake Hamilton
Blake Nakamura
Brandon Crowther
Brent Haslam
Brent Johnson
Brett M Peterson
Brian Frees
Brian Greene
Carolyn Pence-Smith
Cass C Butler
Catherine Hoskins
Celeste C. Canning
Chad W. Hutchings
Charles L. Perschon
Charles R. Ahlstrom
Charles Stewart
Christopher Scharman
Christopher Wharton
Clark McClellan
Clint Drake
Daisy Bennett
Dallas Rosevear
Daniel Harper
Daphne Oberg
David C. Dahlquist
David E. Ross II
Deb Badger
Derek Onysko
Donald R. Savage
Doug Monson
Drew Quinn
Dwayne A Vance
Elizabeth Wilson Ferrin
Elizabeth Wright
Esther Chelsea-McCarty
Gabrielle Lee Caruso
Garrett Handy
Geneva Barrett
Gregory J Wilder
Heather S. White
Jaque Ramos
Jeannine P. Timothy
Jed Burton
Jeff Ross
Jennifer C. Mitchell
Jennifer Lange
Jennifer Mitchell
Jessica Tyler
Jim Gilson
Joann Shields
Jodi Borgeson
Joe McAllister
John Tillotson
John Ynchausti
Jon Stearmer
Jonathan Bachison
Judge Augustus Chin
Judge Elizabeth Lindsley
Judge Joe Bean
Judge Julie Lund
Judge Kim Hornak
Judge Marsha Thomas
Judge Randy Skanchy
Judge Ronald Wolthuis
Judge Samuel McVey
Judge Su Chon
Justin Keys
Kate Conyers
Katherine Judd
Kathy Nester
Kelly Ryan
Kelsy Young
Kelvin Green
Kenyon D Dove
Kevin Grange
Kirsten S. Griswold
Laina Arras
Lance Thaxton
Landon Ipson
Langdon T Owen
Laura Thompson
Loren Anderson
Loren M. Lambert
Lori Nelson
Lorraine Brown
Mark Andrus
Mark Brown
Mark Dahl
Mark Woodbury
Matthew Jeffs
Maybell Romero
Michael D Stanger
Michael Kwan
Michael Smith
Michelle Quist
Milda Shibonis
Nathan Buttars
Nicholas Dudoich
Olga Siggins
Patrick Burt
Paul Farr
Peter Strand
Phillip S. Ferguson
Reha Kamas
Richard C. Terry
Richard Petersen
Ricky Nelson
Robert F. Babcock
Robert Thorup
Rod Andreason
Rodney G. Snow
Rodrigo Sagebin
Roger Tsai
Rusty Andrade
Ryan B. Frazier
Ryan J. Schooley
Samuel D. McVey
Sara F. Lucas
Sara L. Cadwell
Sarah Campbell
Shannon Zollinger
Stephen Whiting
Steven J. Johnson
Steven M. Jensen
Susan Denhardt
T. Richard Davis
Ted Paulsen
Thad LeVar
Thomas Scribner
Tiffany Blanchard
Tiffany Smith
Todd Turnblom
Travis B. Alkire
Vernon F. (Rick) Romney
Wendy Woodfield Porter

Heidi Leithead Selected as the 2013 Woman Lawyer of the Year

Women Lawyers of Utah chose Heidi E.C. Leithead as the 2013 recipient of the *Christine M. Durham Woman Lawyer of the Year Award*. Each year this award is given to an outstanding member of the Utah State Bar who exemplifies professional excellence and integrity and has demonstrated a long-term commitment to further opportunities for women in the law.

Ms. Leithead grew up on a farm in McCammon, Idaho. After graduating from high school, she worked in West Yellowstone, where she met her future husband, Steven. She moved to Boise, Idaho, to attend Boise State University.

After working as a legal secretary in Salt Lake City, Ms. Leithead returned to college to complete her education. She received her Bachelor of Arts degree from the University of Utah in 1982. In 1987, she graduated Order of the Coif from the University of Utah College of Law and served as a staff member and on the Board of Editors of the Utah Law Review. Ms. Leithead is currently a shareholder and past-President of the law firm Parr Brown Gee & Loveless. Over the past 25-plus years, she has built a highly respected employment law practice and specializes in employment litigation defense, including unlawful discrimination and harassment and wrongful termination, and counsels employers on various employment-related issues.

Ms. Leithead is also deeply committed to public service. She teaches as an adjunct professor at Brigham Young University and is an active mentor to the women in her law firm. She served as the president of the Aldon J. Anderson Inn of Court for the 2012–2013 year. She was recently appointed by Governor Herbert to serve on the Board of Directors for the Workers Compensation Fund. She also serves as a member of the Ethics & Discipline Committee of the Utah State Bar.

People who know Ms. Leithead describe her as smart, humble, kind, professional, and committed to excellence. She is also known to love Pepsi, sewing, and collecting antique farm tools. She and her husband have a daughter named Lindsay. The members of the Utah State Bar have greatly benefitted from her vast public service and dedication to professionalism.

Past *Utah Woman Lawyer of the Year* Recipients:

1986	Justice Christine M. Durham	1995	Judge Leslie Lewis	2004	Judge Judith Atherton
1987	Jan Graham	1996	Lisa-Michele Church	2005	Terrie MacIntosh
1988	Magistrate Brooke Wells	1997	Denise Dragoo	2006	Jane Conard
1989	Jane Marquardt	1998	Ellen Maycock	2007	Judge Tena Campbell
1990	Judge Judith M. Billings	1999	Judge Sandra Peuler	2008	Judge Kathleen Switzer
1991	Anne Milne	2000	Judge Kimberly Hornak	2009	Barbara Bearnson
1992	Patricia Christensen	2001	Judge Carolyn B. McHugh	2010	Christine Soltis
1993	Judge Pamela T. Greenwood	2002	Patrice Arent	2011	Carlie Christensen
1994	Kate Lahey	2003	Louise T. Knauer	2012	Judge Vernice Trease

For more information about Women Lawyers of Utah, or to become a member, visit utahwomenlawyers.org or email at womenlawyersofutah@gmail.com.

Notice of Bar Commission Election First and Third Divisions

Nominations to the office of Bar Commissioner are hereby solicited for three members from the Third Division, one member from the First Division, each to serve a three-year term. Terms will begin in July 2014. To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar. Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Nominating petitions are available at http://www.utahbar.org/elections/commission_elections.html. Completed petitions must be submitted to John Baldwin, Executive Director, no later than February 3, 2014, by 5:00 p.m.

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

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

1. space for up to a 200-word campaign message plus a color photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions and two photographs no later than February 1st;

2. space for up to a 500-word campaign message plus a photograph on the Utah Bar Website due February 1st;

3. a set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division who are eligible to vote; and

4. a one-time email campaign message to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate.

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

Notice of Bar Election President-Elect

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

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1, 2014 with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15, 2014.

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

1. space for up to a 200-word campaign message plus a color photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions and two photographs no later than February 1st;

2. space for up to a 500-word campaign message plus a photograph on the Utah Bar Website due February 1st;

3. a set of mailing labels for candidates who wish to send a personalized letter to Utah lawyers who are eligible to vote;

4. a one-time email campaign message to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate; and

5. candidates will be given speaking time at the Spring Convention; (1) 5 minutes to address the Southern Utah Bar Association luncheon attendees and, (2) 5 minutes to address Spring Convention attendees at Saturday's General Session.

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

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/office-of-professional-conduct-ethics-hotline/. Information about the formal Ethics Advisory Opinion process can be found at www.utahbar.org/opc/bar-committee-ethics-advisory-opinions/eaoc-rules-of-governance/.

PUBLIC REPRIMAND

On July 2, 2013, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Nathan W. Drage for violation of Rules 1.3 (Diligence) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Drage was hired to defend a client who was being sued by a creditor and made his appearance on behalf of the client after the Answer was filed. The Court set a pretrial conference in the matter; at which time, Mr. Drage failed to appear on behalf of his client. At the pretrial conference, the creditor's attorney moved the Court to strike the Answer and enter a default judgment against Mr. Drage's client, and the motion was granted by the Court. A default judgment was signed by the Court. Mr. Drage failed to promptly file an action to set aside the default once he learned the default had been entered. Mr. Drage acted negligently and his client suffered injury because the default judgment was not set aside, forcing the client to file for bankruptcy.

Mitigating factors:

No dishonest or selfish motive; acceptance of responsibility; attempt to take corrective action; and remorse.

Aggravating factors:

Prior record of discipline; and substantial experience in the practice of law.

DISBARMENT

On June 25, 2013, the Honorable Robert Faust, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Disbarment against Victor Lawrence for violation of Rules 3.1 (Meritorious Claims and Contentions), 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Lawrence attempted to remove a case to federal court even though there was no basis in law or fact to do so and by filing an assault case against another party when he had no basis in law or fact to do so. Mr. Lawrence intentionally engaged in a conspiracy to assist others to defraud a car dealership and by converting one of the vehicles. In addition, Mr. Lawrence committed a criminal act when he assaulted the owner of the dealership. These criminal acts all reflect adversely on Mr. Lawrence's honesty, trustworthiness, and fitness as a lawyer. Mr. Lawrence's conduct was dishonest and deceitful when he engaged in the conspiracy to commit fraud and when he converted the vehicle. Mr. Lawrence engaged in further dishonest conduct when he made misrepresentations about his earnings and exhibited a lack of candor in his dealings with the courts. The conspiracy Mr. Lawrence was involved in to commit fraud and the fraud itself involved the expenditure of hours and court time and significant judicial resources. The unnecessary removal action and the filing of an assault case when no assault had taken place also caused the expenditure of court time and judicial resources. Furthermore, Mr. Lawrence used his knowledge as a lawyer to pursue litigation when there was no purpose except to delay and harass others and therefore his actions were prejudicial to the administration of justice.

Aggravating factors:

Prior record of discipline; dishonest or selfish motive; multiple offenses; refusal to acknowledge the wrongful nature of the misconduct; lack of good effort to make restitution or to rectify the consequences of the misconduct involved; and substantial experience in the practice of law.

Young Lawyer of the Year

Each year the Young Lawyers Division of the Utah State Bar selects a Young Lawyer of the Year. The award is given to a young lawyer who exhibits outstanding professional excellence, service to the profession and the Bar, service to the community, and for the advancement of legal ethics and professional responsibility. All of these things describe this year's recipient, R. Blake Hamilton.

Blake practices at Stirba, P.C., where he is currently the Vice President of the firm. He also serves as the City Attorney for the City of Hilldale. Blake has been listed by the 2010 and 2012 Mountain States Super Lawyers Magazine as a Rising Star and has been listed by the 2013 *Utah Business Magazine* as a Legal Elite.

Blake was born and raised in Utah and attended college at Weber State University. He received a Juris Doctor and Masters of Business Administration from Gonzaga University. While a student at Gonzaga, he served on the Moot Court Council where he was elected President, and he also represented Gonzaga in regional moot court and other negotiations competitions where he received honors.

Blake is deeply committed to contributing to the community. While in law school, he interned at the Gonzaga University Legal Assistance Clinic, which provides legal services for elderly and low income individuals. Currently, he co-chairs YLD's Wills for Heroes committee, which provides wills and other estate planning services for emergency first responders and their families. The Utah State Bar Commission specially recognized his efforts with the Wills For Heroes project and he has been asked to give presentations and write articles about his work for the *Utah Bar Journal* and the *Utah Peace Officer Journal*. Blake has personally expanded Wills For Heroes across the state of Utah. This year alone, Blake and his committee held events in five areas outside the Wasatch Front, a first for the YLD. Blake also serves as a Board Member of the Anne Stirba Cancer Foundation, a foundation committed to raising money for breast cancer research at the Huntsman Cancer Institute. In his local community, Blake serves as a commissioner on the Roy City Planning Commission.

In addition to everything else he does, Blake is very involved with his church and he is a great husband and father to his three beautiful daughters. He always finds time to spend time with family and has volunteered as a youth soccer coach and basketball coach for his daughter's teams.

Congratulations Blake and thank you for your service and example.

Privacy & Security: A Quick Look into the Omnibus Final Rule of the HIPAA & HITECH Acts

by Heather J. Allen

On January 25, 2013, the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) promulgated the final rule under Health Information Portability Accountability Act (HIPAA) and Health Information Technology for Economic and Clinical Health Act (HITECH). Compliance with the new rule was required by September 23, 2013. The final rule can be found at 45 CFR 160-164. This rule, actually, includes four final rules:

The Final Modifications to the HIPAA Privacy, Security, and Enforcement Rules

According to HHS, the final modifications to the HIPAA Privacy, Security and Enforcement Rules were issued to (1) "Make business associates of covered entities directly liable for compliance with certain of the HIPAA Privacy and Security Rules' requirements." (2) "Strengthen the limitations on the use and disclosure of PHI for marketing and fundraising purposes, and prohibit the sale of protected health information without individual authorization." (3) "Expand individuals' rights to receive electronic copies of their health information and to restrict disclosures to a health plan concerning treatment for which the individual has paid out of pocket in full." (4) "Require modifications to, and redistribution of, a covered entity's notice of privacy practices." (5) "Modify the individual authorization and other requirements to facilitate research and disclosure of child immunization proof to schools, and to enable access to decedent information by family members or others." (6) "Adopt the additional HITECH Act enhancements to the Enforcement Rule not previously adopted." *Federal Register* Vol 78, No. 17, Friday January 25, 2013, 5566-5567 (outlining and detailing final modifications).

A covered entity is a health care provider, a health plan, or a health care clearinghouse. A business associate is an entity that receives, creates, transmits, and/or maintains protected health information (PHI) on behalf of a covered entity. (Detailed definitions can be found at 45 CFR 160.103.) Business associates are now held to a higher level and required to comply with the rules and protect the privacy and security of PHI. The rules have expanded this definition to include subcontractors of traditional business associates and other groups, such as patient safety and health information organizations. A covered entity will contract with a business associate to help carry out its health care activities and functions. The contract is known as a Business Associate Agreement (BAA) and will give the requirements of the business associate how it will protect the PHI it received. Note that, it is possible that a law firm will fall under a business associate type of relationship, depending on the work performed for the covered entity. If your law firm does business with a covered entity and accesses PHI as part of the legal work it does for that covered entity, your firm is considered a business associate and subject to the requirements under the updated rule.

The rule added restrictions on marketing communications from covered entities without a patient authorization. This is to give the patient more control over their information and how it is used. This area of the rule would also enhance the patient rights by requiring covered entities to honor patient requests that information regarding services that the patient paid for out-of-pocket not be shared with health plans.

The Final Adoption of changes to the HIPAA Enforcement Rules

This is "to incorporate the increased and tiered civil money penalty structure provided by the HITECH Act." *Id*. Both the covered entity and the business associate can be issued civil money penalties under HIPAA. The civil money penalty can

HEATHER J. ALLEN is a Paralegal and Privacy Officer at 1-800 CONTACTS, Inc. She is also the Community Service Chair and Young Lawyers Division Liaison for the Paralegal Division as well as the Chair-Elect for the Division this year.

range from $100 per violation to $500,000 per violation and is capped at $1,500,000 for identical violations during a single calendar year. The penalties given will depend on the violations that occur and the actions of the covered entity or business associate prior to the violation. For example, if the covered entity or business associate did not know, or by exercising reasonable diligence would not have known, about a violation, the penalties are $100–$50,000 each. However, if the covered entity or business association willfully neglected and did not correct the violation, the penalties are at least $50,000 for each violation. These penalties are outlined in 45 CFR 160.400-426.

There are also criminal penalties that could be found against a covered entity and/or business associate. A person who knowingly obtains or discloses individually identifiable health information in violation of the Privacy Rule (45mCFR §164 Subpart E extending from §164.500 through §164.534) may face a criminal penalty. The penalties begin at one year imprisonment with a maximum of ten years imprisonment depending on the violation. Section 13401 of the HITECH Act outlines the Security Rule (a subset of the Privacy Rule dealing with electronic PHI ("ePHI")) applies to both the covered entity and the business associate.

Breach Notification for Unsecured Protected Health Information

This "replaces the breach notification rule's 'harm' threshold with a more objective standard and supplants an interim final rule." *Federal Register*, Vol. 78, No. 17. Previously, the "harm threshold" was used for determining when a breach occurs and notification is required. Under the final rule, most "unauthorized acquisitions, accesses, uses or disclosures of protected health information" are presumed to be breaches. There are some exceptions to this definition, such as, if the covered entity or business associate can "demonstrate a low probability that the information has been compromised" using at least four specified factors. These factors are more "objective," although they still call for significant analysis and include consideration of (1) "[T]he nature and extent of the protected health information involved, including the types of identifiers and the likelihood of re-identification"; (2) "[T]he unauthorized person who used the PHI or to whom the disclosure was made"; (3) "[W]hether the PHI was actually acquired or viewed"; and (4) "[T]he extent to which the risk to the PHI has been mitigated." The "breach" section of the rule can be found 45 CFR 164.400–414.

Modify the HIPAA Privacy Rule as required by the Genetic Information Nondiscrimination Act (GINA)

The modifications to GINA "prohibit most health plans from using or disclosing genetic information for underwriting purposes." The rule restricts the use or disclosure of genetic information for underwriting to all health plans that are subject to the HIPAA Privacy Rule, rather than solely to those plans listed in GINA. The final rule explicitly excludes long-term care insurance from the prohibition on underwriting. Long-term care plans do remain subject to the Privacy Rule's other provisions.

2013–2014 Paralegal Division Board

Sitting (left to right): Heather Allen, Danielle Davis, Geneve Wanberg. Standing (left to right): Tally Ellison, Thora Searle, Julie Eriksson, Krystal Hazlett, Cheryl Jeffs, Karen McCall, Sharon Andersen, Kari Jimenez, Jodie Scartezina. Carma Harper, not pictured.

CLE Calendar

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

11/08/13 | 8:00 am – 5:00 pm

YLD Leadership Workshop. Waldorf Astoria, 2100 Frostwood Drive, Park City, UT. $25 for the first 25 to register, $50 after. Social following the event.

11/13/13 | 10:00 am – 12:45 pm **2 hrs. self-study**

Maxims, Monarchy, and Sir Thomas Moore – Webcast. Featuring Graham Thatcher. In 1535 one lawyer chose personal conscience over public loyalty and so threatened those in power that they killed him! Bar Members: $139, Legal Aid Attorneys: $119, Non-Bar Members: $169.

11/14/13 | 5:00 pm – 8:00 pm AND 11/15/13 | 8:00 am – 5:00 pm **Up to 8 hrs. (incl. 2 hrs. Ethics)**

2013 Fall Forum – Little America Hotel, 500 South Main Street, Salt Lake City. Early registration (by November 1): $235 for attorneys, $160 for active under 3-years attorneys and non-lawyer assistants. After November 1: $260 for attorneys, $185 for active under 3-years attorneys and non-lawyer assistants.

11/20/13 | 10:00 am – 1:00 pm **3 hrs. self-study**

Impeach Justice Douglas – Webcast. Featuring Graham Thatcher. His passions were protection of the environment, civil rights, freedom of speech and the right of the individual to non-conformity and dissent! Bar Members: $159, Legal Aid Attorneys: $139, Non-Bar Members: $189.

11/20/13 | 10:00 am – 12:00 pm

Mentor Training for New Mentors. This training is for those who have been approved to mentor a new lawyer in the New lawyer Training Program. For information contact Elizabeth Wright: mentoring@utahbar.org.

12/10/13 | 12:00 pm – 1:30 pm

New Lawyer Training Program Event. NLTP orientation for the January 2014 mentoring term. Presenters include: Elizabeth Wright, NLTP Coordinator; Benjamin Machlis, Holland and Hart; Sue Crismon, Utah Legal Services; and Joanne Vandestreek, Utah State Law Library. Cost: Free. Please bring your own brown bag lunch, drinks will be provided.

12/19/13 | 8: 30 am – 4:30 pm

Annual Mangrum & Benson on Utah Evidence. Annual Seminar update on Utah evidence with Hon. Dee V. Benson and Professor R. Colin Mangrum.

12/30/13 | 10:00 am – 12:30 pm **2 hrs. (including 1 Ethics and 1 Prof/Civility)**

Webcast Double Feature – Ben Franklin on Ethics & Lincoln on Professionalism. (See descriptions above.) Ben Franklin at 10:00 am (60 minutes), Lincoln at 11:15 am (75 minutes). Cost for one program: Legal Aid attorneys – $59, Bar Members – $79, others – $99. For BOTH programs: Legal Aid attorneys – $109, Bar Members – $139, others $169.

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.

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

POSITIONS AVAILABLE

OPPORTUNITIES IN EUROPE: LLM in Transnational Commercial Practice – www.legaledu.net. Visiting Professorships in Eastern Europe – www.seniorlawyers.net. Center for International Legal Studies / Salzburg, Austria / US Tel 970-460-1232 / US Fax 509-356-0077 / Email office@cils.org.

OFFICE SPACE / SHARING

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.

BEAUTIFUL MAIN STREET, Newly built-out, 12 x 16 sq. ft. Executive Downtown Office: full services & warm associations with seasoned lawyers at Terry Jessop & Bitner only $800 a month. Next to the courts with 5th floor Main Street views. Have the feel of a well established law firm. Contact Richard at (801) 534-0909 or richard@tjblawyers.com.

Law Office for Rent. Beautiful, large downtown law office with separate secretary station available within an office sharing environment. Possible firm affiliation may be considered for select applicants. Walking distance to Federal and Third District Courts. Common library, conference room, receptionist, copy machine and break room. Available immediately. Please contact Mr. Julian Jensen or Mr. John Cawley at 801-531-6600.

Professional Office Space for Lease – South Jordan. Located at 1656 West Reunion Avenue (approximately 10000 South), bordering on Redwood Road in South Jordan. Beautiful office space perfect for a small professional business. Newly remodeled with fresh paint and new carpet. The office space is located on the second floor. Unit consists of: ~980 Square ft., ample parking and easy access from Redwood Road, reception area, small break room, 3 offices, bathroom, interior & exterior access to unit, handicapped lift access. Call (801) 446-8802 or email jamie@vancelaw.us for further details.

VIRTUAL OFFICE SPACE AVAILABLE: If you want to have a face-to-face with your client or want to do some office sharing or desk sharing. Creekside Office Plaza has a Virtual Office available, located at 4764 South 900 East. The Creekside Office Plaza is centrally located and easy to access. Common conference room, break room, fax/copier/scanner, wireless internet and mail service all included. Please contact Michelle Turpin at (801) 685-0552 for more information.

Class A Office Space Available. 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.

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SERVICES

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.

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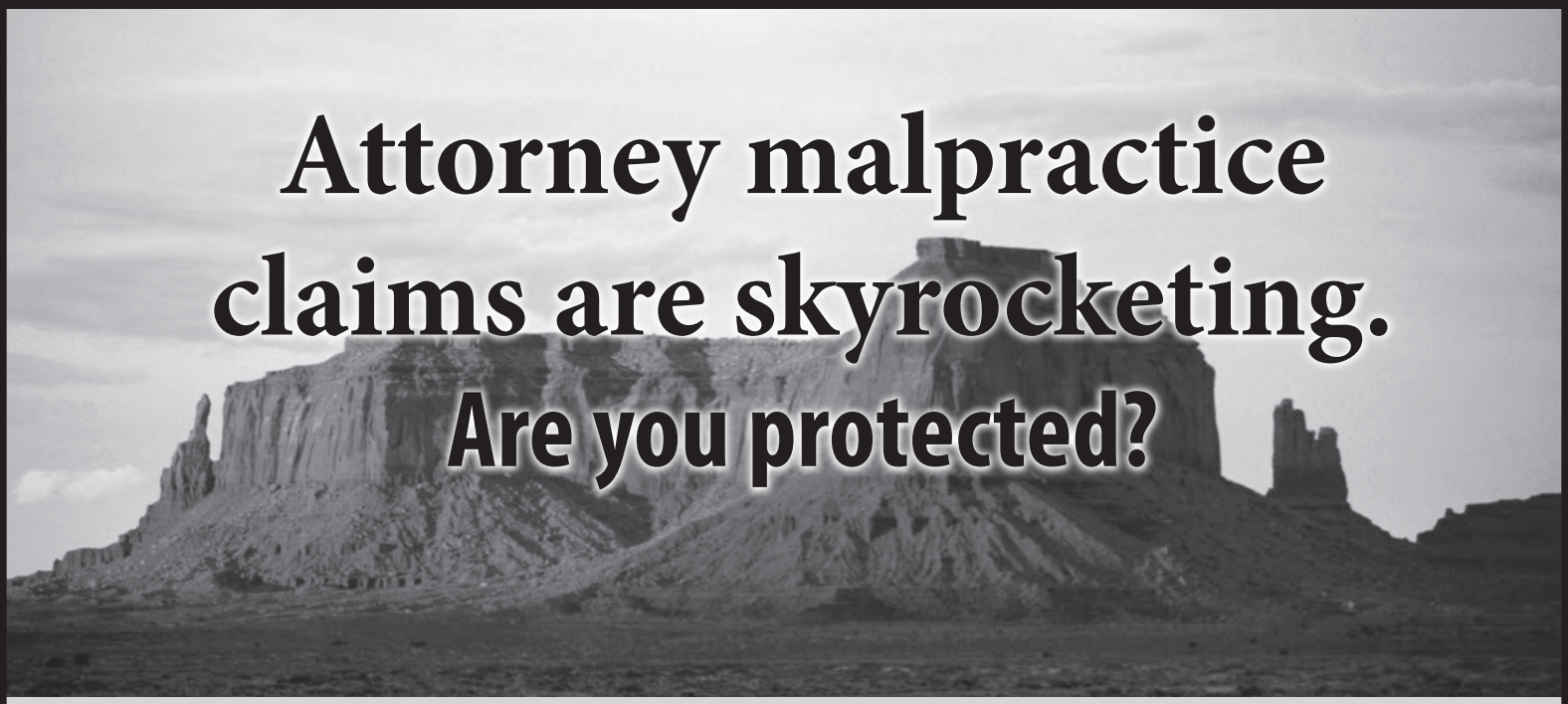

Attorney malpractice claims are skyrocketing.

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

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