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Volume 27 No. 1
Jan/Feb 2014

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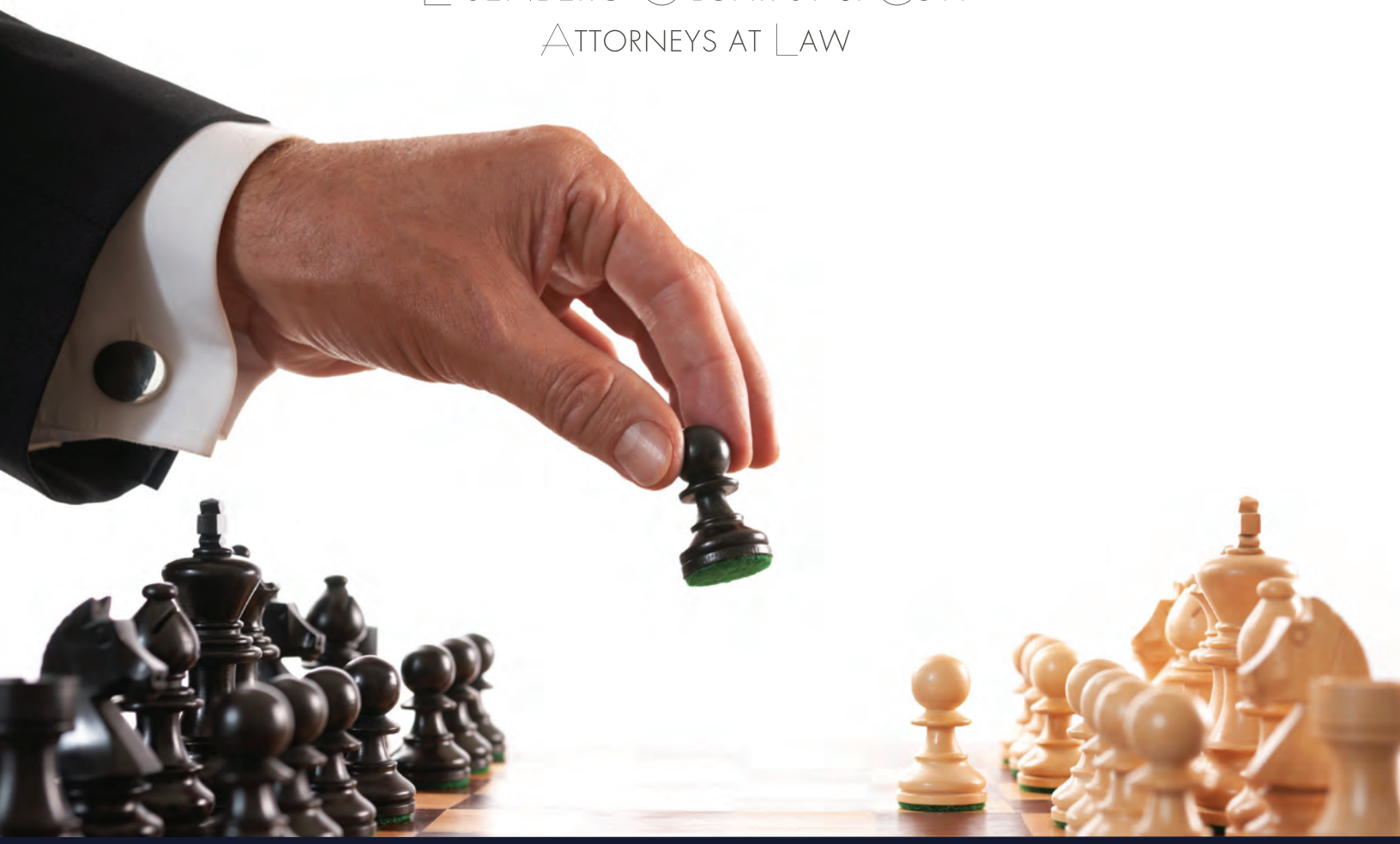

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Utah Bar JOURNAL

Volume 27 No. 1
Jan/Feb 2014

## Cover Art

*Zion's Winter,* taken in Zion National Park by Jack H. Molgard of Brigham City, Utah.

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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.

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

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

## Guidelines for Submission of Articles to the Utah Bar Journal

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

**Length:** The *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.

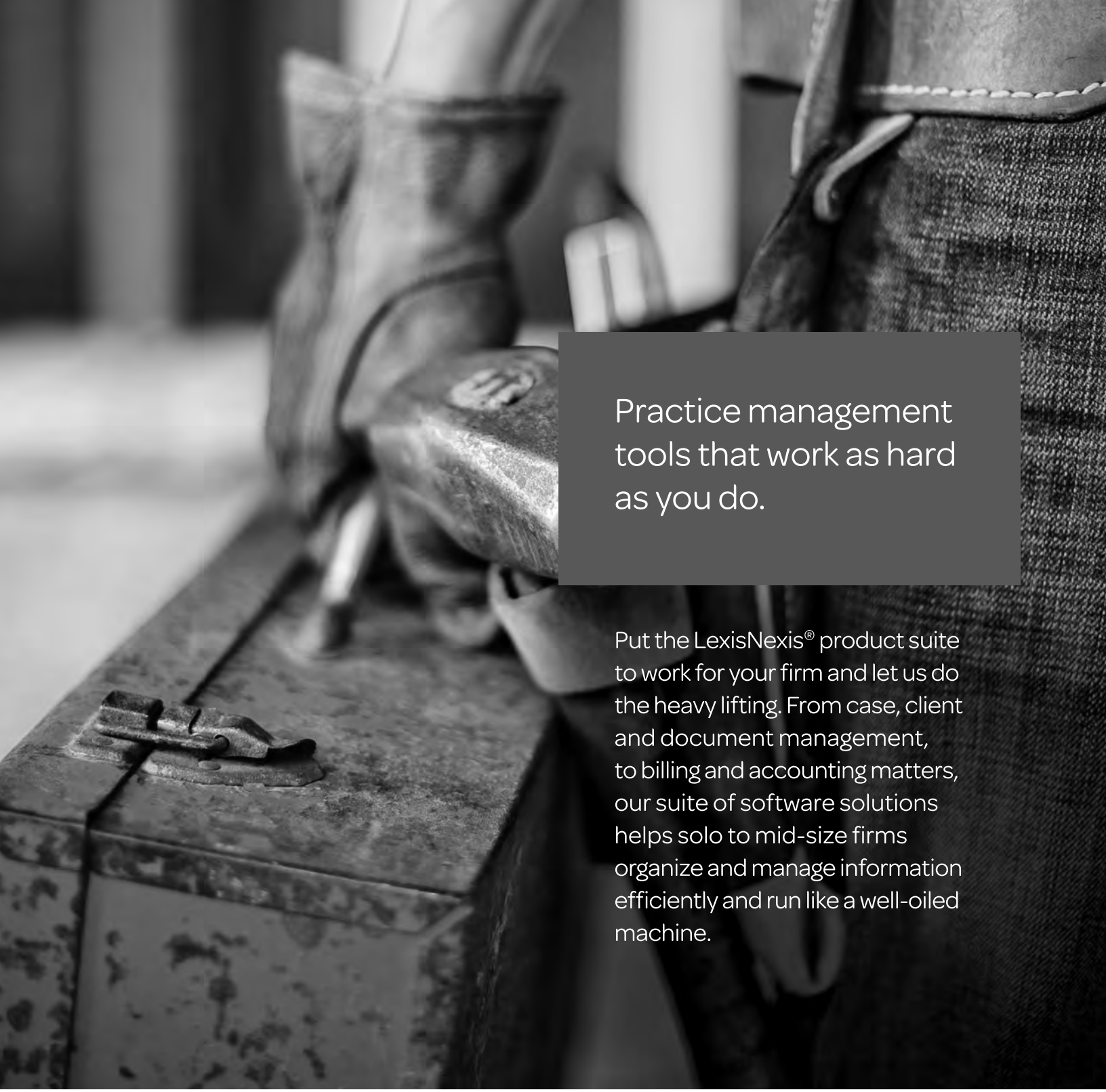
**No Footnotes:** Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial 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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***MISSION & VISION OF THE BAR:***
*The lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity.*
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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.

# Judge Anthony B. Quinn

## 1953–2013

I have known Judge Quinn from our first day of law school when Dean Rex Lee announced that, included in our entering class, were several well known celebrities, among them a Richard Chamberlain and one Anthony Quinn. I imagine Tony did not enjoy the idea of already being on the Dean's radar on the first day of law school, even in such a light hearted way. He was not one attracted to the limelight.

My recollection then as now, was that Tony was one of those individuals who is always calm in a storm, as he could envision a conclusion to an issue and the process necessary to get there. On the Third District bench we benefitted from his ability to not get caught up in the swirl of the argument and bring to bear a careful and deliberative analysis of procedural and process issues and how we would face them as a bench. As issues arose and gained the momentum that they often do of becoming storms, Tony exercised that same thoughtful and deliberative process that drew us to appropriate conclusions without the flash and thunder of a storm. Besides our emotional loss of a dear friend, our bench has lost someone who knew how to help us get to the end of the row.

**Judge Randall N. Skanchy, Third Judicial District Court**

Judge Quinn was appointed to the 3rd District Court five weeks before I was. We literally grew up as judges together. Our early calendars were an eclectic mix of the old West Valley Department of the Court, Tooele County misdemeanors and small claims, the Domestic Violence specialty court in Matheson, and the Involuntary Commitment hearings on the 5th floor of the University Hospital. He called it our "training wheels" calendar. We lived parallel lives outside of court, as well. We were the same age, our spouses are attorneys, and our kids seemed to always be at the same stages. Whether he was pedaling around Reno in search of flowers to perk up a dreary dorm at the Judicial college, flipping burgers poolside for his West Valley clerks, or officiating at a wedding with his originally scripted bicycle-built-for-two metaphor, it was clear he loved the people he worked with as much as the work he did.

Conversely, our legal practices before appointment were as dissimilar as our early judicial calendars were similar. When either of us faced unfamiliar territory in a pending hearing, it was a pretty good bet the other had some level of competence. I envied how efficiently and effectively he could instruct parties about how a given hearing would proceed. They would respond with the information he needed for his ruling and still stay within the procedural and time constraints he had imposed. I appreciated those many discussions in our beginning years. I cherish them even more, now that he is gone. He left us far too early, but the foot prints he left are indelible. I am honored to have known him as colleague and friend.

**Judge Ann Boyden, Third Judicial District Court**

Judge Tony Quinn was an extraordinary person and judge. He was a valued friend and professional colleague.

The Third District Court was often assigned challenging cases with multiple parties and complex causes of action. Judge Quinn was called upon to adjudicate more than his share of those cases. He did so with order and decorum, in the tradition of Rule 1 of the Utah Rules of Civil Procedure. Attorneys who appeared in his court were uniformly impressed with the way he managed his courtroom. Lawyers remarked: "He was first rate in every respect." "Judge Quinn treats everyone with respect and dignity." "He was simply an outstanding judge."

Judge Quinn served with distinction on the Board of District Court Judges and the Advisory Committee for the Rules of Civil Procedure. He was the longstanding chair of our Court's allocation committee. He had the leadership skills to build a consensus and distribute case assignments on a fair and equitable basis.

His skills as a biker were legendary. Tony was seriously injured in the LOTOJA bicycle race. Judge Quinn held no ill will toward other riders who were responsible for the accident. He was out of surgery, back into the courtroom and on his bike in record time.

Judge Quinn and his talented spouse, Judge Drew Quinn, have three children, two of whom are lawyers. In court you can see how their children have incorporated the values and skills of their parents. Judge Quinn left an important legacy for all of us. His skills and talents were dedicated to the service of his family, the judiciary and our community. We are fortunate to have been the beneficiaries of his good life.

**Presiding Judge Royal Hansen, Third Judicial District Court**

Judge Quinn was a superb jurist. He was brilliant, thoughtful, and fair. His work was of such high quality that I once devoted a substantial part of a presentation at an Annual Judicial Conference to one of his decisions, a lengthy decision in a highly complex case. I used it as an example of how a decision should be written.

Judge Quinn was an outstanding judge and person, whose service to the people of Utah over the past 16 years has touched countless lives. Our entire court family mourns his loss.

**Chief Justice Matthew Durrant, Utah Supreme Court**

# *Finally, a Bar Group Benefit Package for the Whole Family*

*by Curtis M Jensen*

I am pleased to introduce lawyers in Utah to what is for the Bar a revolutionary way of offering a new group benefit program designed to permit lawyers and their families greater access to a wider array of consumer products and professional services than the Bar has been able to provide in the past.

As you may know, the group benefits historically provided by the Bar have traditionally included a few high-quality discount programs usually focused on practice helps and seldom involving access to much diversity or many of the typical consumer goods which a group of over 10,000 could enjoy.

And the Bar Commission has been trying to do this better for a long time. Several months ago former Bar President Rob Jeffs was charged to see how that could happen. He learned about the program being offered by the Texas State Bar and their relationship with an online marketing group called *Beneplace*. He studied what *Beneplace* had to offer and how they interacted with the lawyers of Texas. He proposed that the Utah Bar do what the Texas Bar had done and his recommendation was adopted by the Utah Bar Commission.

So the Bar is pleased to introduce this new program of online access to group discounts at no cost to you and your families and which will provide discounts for potentially hundreds of local stores and national brands programs and services. Access to these discounts is available through the Bar's web site, www.utahbar.org. Our new home page looks like this:


Click on "NEW! Group Benefits Program" on the lower left under "Site Highlights" and you'll find this:


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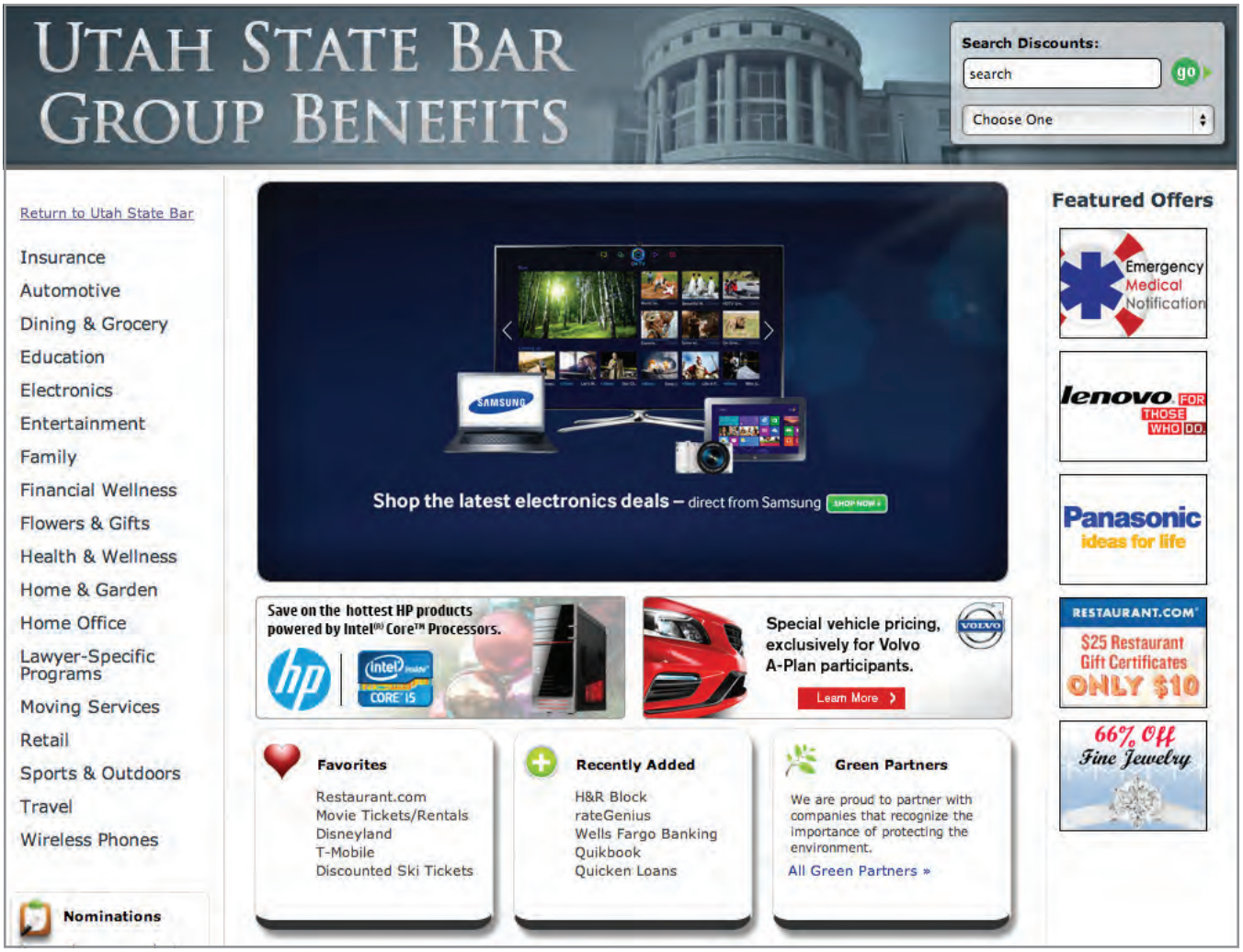


Then take a look at all the new and different offerings for consumer products and office goods. The program still provides traditional Bar services like access to free professional counseling with the Blomquist Hale Lawyers Assistance Program; free access to online legal research through Casemaker and information for Tybera e-filing. You can also access more office supplies; vacation discounts for places like the Disney Resorts, Seaworld, and Universal Studios; brand name rental cars, and even local restaurants; new electronics, phones, computers, and televisions.

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# *Innocence Lost: Fraudulent Transfer Actions Against Innocent Investors of a Ponzi Scheme*

*by Jared N. Parrish*

The term "innocent" does not necessarily mean "free from liability." This is particularly true when discussing the liability of an innocent investor in the aftermath of a Ponzi scheme, who may be subject to disgorgement of investment profits to an equity receiver.

The market crash and subsequent Great Recession of the last decade brought to light a number of massive financial fraud operations masquerading as legitimate business opportunities, exposing them as Ponzi schemes. Whether cloaked by the veil of a real estate opportunity or a proprietary investment algorithm, many of these schemes collapsed when infusions of new investment capital dried up.

After the collapse of a large Ponzi scheme, federal regulatory agencies often seek appointment of an equity receiver to take control of the company and cease ongoing fraudulent activity. A receivership is a court-established custodial proceeding in which the court oversees and directs a receiver in the administration of an estate created principally for the benefit of creditors. An equity receivership is established when a regulatory agency files a civil enforcement action against a company, and its principals, suspected of fraud or other wrongdoing. As part of the enforcement action, the agency files for an ex-parte temporary restraining order and appointment of a receiver. If the court grants the motion, a receiver is appointed and given powers and duties defined in the order. The receiver's authority flows from, and is governed by, the appointment order.

The Sixth Circuit explained,

> The receiver's role, and the district court's purpose in the appointment, is to safeguard the disputed assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary. As an officer of the court, the receiver's powers are coextensive with his order of appointment.

*Liberte Capital Grp., LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006).

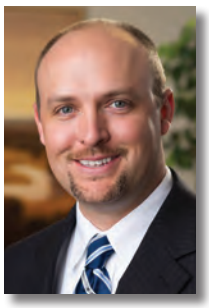
Receivership orders typically direct a receiver to conduct an investigation into the affairs of the company subject to the order and to marshal the company's assets. This task generally includes filing lawsuits to recover fraudulent transfers.

Many receivers file lawsuits against insiders and those who helped perpetuate the scheme, such as sales agents, as well as investors who received more money from the scheme than they invested. A fraudulent transfer action against innocent "winning" investors, commonly referred to as a "claw-back" action, is the most well-defined claim a receiver possesses. It is also, for some, the most troubling. Lawsuits against the winning investors put an equity receiver in an awkward position at times, suing some of the defrauded investors while marshaling assets for the benefit of others.

## A Receiver's Standing to Sue

An equity receiver has standing to file lawsuits to recover assets that have been fraudulently transferred by the principal of a company that was operated as a Ponzi scheme. *Wing v. Dockstader*, 482 Fed.Appx. 361, 362–63 (10th Cir. 2012). Much of the modern receivership law defining a receiver's standing finds its

*JARED N. PARRISH is a shareholder of Prince Yeates & Geldzahler. His practice is dedicated to commercial litigation, securities fraud, regulatory actions and equity receiverships.*



roots in the Seventh Circuit's opinion, *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), authored by Judge Posner. Under the Seventh Circuit's reasoning, the appointment of an equity receiver displaces the wrongdoer from control of the company being used to perpetrate a fraud. Once the receiver is appointed, the company is no longer the Ponzi operator's "evil zombie." *Id.* at 754. "Freed from his spell [the companies] become entitled to the return of the moneys – for the benefit not of [the perpetrator] but of innocent investors – that [the perpetrator] had made the corporations divert to unauthorized purposes." *Id.* The Ponzi perpetrator injures the companies by fraudulently transferring assets through their accounts. The receiver steps into the shoes of the company as a creditor of the wrongdoing debtor and has standing to sue recipients of the assets transferred by the wrongdoer.

Lawsuits filed by federal equity receivers are considered to be ancillary to the receivership action itself and should be assigned to the judge presiding over the receivership. The receivership court sits in equity throughout the administration of a receivership, including the ancillary lawsuits, and has broad discretion in fashioning relief. *SEC v. VesCor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010).

## The Ponzi Presumption

An equity receiver's fraudulent transfer action is a creature of both state and federal law. It relies, in the first instance, on the Uniform Fraudulent Transfer Act "UFTA", but its interpretation and application in an equity receivership is a matter of federal common law.

Under the UFTA,

> a transfer made…by a debtor is fraudulent as to a creditor…if the debtor made the transfer…with actual intent to hinder, delay, or defraud any creditor of the debtor; or without receiving a reasonably equivalent value in exchange for the transfer [at a time the transferor is or becomes insolvent].

Utah Code Ann. § 25-6-5(1)(a)–(b)(LexisNexis 2013).

Generally, a creditor who files a fraudulent transfer action must look to the factors enumerated in the Uniform Fraudulent Transfer Act to demonstrate that a transfer was made with actual intent to hinder, delay, or defraud a creditor. An equity receiver is not required to undertake this "badges of fraud" analysis, however, and is entitled to a presumption of actual intent if the receiver proves that the companies under his or her control operated as a Ponzi scheme.

"The mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud." *Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008). In fact, a receiver's summary judgment burden is conclusively established by proving the entities under the receiver's control were operated as a Ponzi scheme. *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) (citing *Scholes*, 56 F.3d at 757). This principle is often referred to as the "Ponzi Presumption." *Wing v. Dockstader*, 482 Fed. Appx. 361, 363 (10th Cir. 2012).

## Innocent Winning Investors

If a receiver demonstrates that he or she is entitled to the Ponzi presumption, or otherwise meets the burden under the UFTA, the burden shifts to the defendant to demonstrate that he or she took in good faith and for reasonably equivalent value. *Id.; see also* Utah Code Ann. § 25-6-9(1). This affirmative defense is conjunctive, such that if a fraudulent transfer defendant cannot establish both that he or she exchanged reasonably equivalent value and took in good faith, the defense will not defeat the receiver's claim.

The fraudulent transfer analysis in circumstances where an equity receiver files suit against an innocent investor of a Ponzi scheme is well-defined. Numerous courts have recognized that an innocent Ponzi scheme investor who receives money from the scheme in excess of his or her initial investment has received two types of payments – (1) a full return of the principal investment and (2) amounts in excess of the initial investment, i.e., "fictitious profits." Receivership courts have uniformly held that an innocent investor does not exchange reasonably equivalent value for any payments received that represent false profits. *See Dockstader*, 482 Fed.Appx. at 365; *Donell*, 533 F.3d at 772–74; *Byron*, 436 F.3d at 560; *Scholes*, 56 F.3d at 757–58; *Eby v. Ashley*, 1 F.2d 971, 973 (4th Cir. 1924). Because reasonably equivalent value is not exchanged for fictitious profits, innocent investors cannot establish an affirmative defense to the fraudulent transfer action and must return the "winnings" to the receivership.

The general rule, then, is that innocent investors of a Ponzi scheme (those who do not have notice of the fraud or insolvency of the company) are deemed to have provided reasonably equivalent value in exchange for the principal

amounts they invest, but must return the amounts they received which exceeded their original investment as "fictitious profits."

There are several reasons for this rule. In a Ponzi scheme, the money used to fund returns to investors comes from a shuffling of new investor money, not from the operating profits of a legitimate business venture. These payments "deplete the assets of the scheme operator for the purpose of creating the appearance of a profitable business venture." *Donell*, 533 F.3d at 777. Because the payments are not legitimate returns, the excess must be returned to the receivership estate for distribution to the investors whose money funded those fictitious returns. This process is meant to equalize the impact of the fraud on all investors as much as possible. Receivership courts are courts of equity, and in Ponzi scheme receiverships, "equality is equity." *Cunningham v. Brown (In re Ponzi)*, 265 U.S. 1, 13 (1924).

As Judge Posner said,

> It is no answer that some or for that matter all of [an investor's] profit may have come from 'legitimate' trades made by the corporations. They were not legitimate. The money used for the trades came from investors gulled by fraudulent representations. . . . [An investor] should not be permitted to benefit from a fraud at their expense merely because he was not himself to blame for the fraud.

*Scholes*, 56 F.3d at 757.

Courts have uniformly held the principle that winning investors must return their fictitious profits is the most equitable way to balance the pain after the collapse of a Ponzi scheme.

Despite the multitude of duties an equity receiver may owe to different creditors of a receivership estate, legal and equitable principles of receiverships demand a receiver recover fraudulently transferred assets for the benefit of defrauded investors whose money was used to perpetrate a Ponzi scheme. This charge includes filing lawsuits against winning investors to return that money to losing investors whose money funded the fictitious returns.

# *Liening on Clients*

*by Keith A. Call*

Attorney's liens are fraught with potential problems. An attorney's lien has the potential to give the lawyer too much leverage in an already-unequal attorney–client relationship. It can make it difficult for the client to fire the lawyer and can give the lawyer too great an interest in the representation. Yet, Utah is actually a lawyer-friendly state when it comes to liens.

## The Rules

Utah Rule of Professional Conduct 1.8(a) prohibits a lawyer from entering into a business transaction with a client or acquiring a security interest adverse to the client, unless (1) the transaction is fair and fully disclosed in writing; (2) the client is advised in writing to seek independent legal counsel; and (3) the client gives informed consent, again in writing. Utah R. Prof'l Conduct 1.8(a) (2013).

> *"As a profession, if we cannot properly regulate ourselves, then we should expect others to seek to impose more stringent regulations upon us."*

Rule 1.8(i) specifically provides that a lawyer shall not acquire an interest in the cause of action or subject matter of the litigation, except that the lawyer may (1) "acquire a lien authorized by law to secure [his] fee," and (2) enter into a reasonable contingent fee arrangement in civil cases. *Id.* R. 1.8(i).

## The Statutory Attorney's Lien

A "lien authorized by law" as described in Rule 1.8(i)(1) includes the statutory attorney's lien found in Utah Code section 38-2-7. By statute, a lawyer automatically receives a lien on any money or property that is the "subject of or connected with the work performed." Utah Code Ann. § 38-2-7(2) (LexisNexis 2010). This includes real or personal property, funds held by the attorney, and any settlement, judgment, and proceeds thereof. *Id.* The statute includes limitations on pending criminal and domestic relations matters. *Id.* § 38-2-7(9).

The statutory attorney's lien is not a "business transaction" with the client and is therefore exempt from the requirements of Rule 1.8(a). *See* Utah State Bar, Ethics Advisory Op. Comm., Op. 01-01 (2001). The Ethics Advisory Opinion Committee has further opined that, given a lack of clarity in the extent of an attorney's statutory lien rights, lawyers should not be subject to discipline for asserting lien rights according to a good faith interpretation of the statute. *See id.*

The statutory "attorney's lien commences at the time of employment." Utah Code Ann. § 38-2-7(3). Notice of the lien can be given by filing a notice of lien in a pending legal action in which the attorney performed services or, in the case of real property, by filing a notice of lien with the county recorder. *Id.* § 38-2-7(5).

To enforce the statutory lien, a lawyer must first demand payment from the client. If the client fails to pay within thirty days, the lawyer can move to intervene in the case in which the attorney performed services or the lawyer may file a separate legal action to enforce the lien. *Id.* § 38-2-7(4)–(5).

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

### Contractual Liens

A "lien authorized by law" also includes contractual liens that may be negotiated with your client. *See* Utah Rule Prof'l Conduct 1.8 cmt. [16]. This seems to presume that the lawyer and client may negotiate liens on money or property that is *not* the "subject of or connected with the work performed." Utah Code Ann. § 38-2-7(2).

Because of the grave risk of overreaching by the lawyer, contractual liens are subject to the requirements of Rule 1.8(a). *Id*. Thus, all contractual liens with clients must be fair and reasonable, fully disclosed in writing and consented to in writing, and the client must be advised to seek independent counsel.

### Common Law Liens

Another form of "lien authorized by law" is a common law lien. *See* Utah R. Prof'l Conduct 1.8 cmt [16]. The most common form of such lien is the lien on the client's files and papers. These liens warrant separate treatment, so watch for further discussion in a future edition of "Focus on Ethics and Civility."

### So What About Protections for the Client?

Utah's lien laws give lawyers significant leverage. Are there any protections for clients? The answer lies in several other places in the Utah Rules of Professional Conduct and the common law.

For example, the lawyer's fee must always be reasonable. *Id*. R. 1.5(a). Liberal lien rights do not allow the lawyer to charge an excessive fee. A lawyer always has a fiduciary duty of loyalty to the client and must zealously represent his or her interests. This includes the general prohibition against conflicting interests, including a "personal interest of the lawyer." *Id*. R. 1.7(a)(2). Lawyers should avoid dealings with clients that are – or even appear to be – overreaching or unfair.

Lawyers should also invoke a strong measure of self-restraint when it comes to attorney's liens. As a profession, if we cannot properly regulate ourselves, then we should expect others to seek to impose more stringent regulations upon us. This certainly applies to the field of attorney's liens.

# *Reflections of a New Judge*

*by Carolyn E. Howard*

As a new sitting justice court judge, I have pondered the question of what makes a good judge. I am honored to serve as judge of the Saratoga Springs Justice Court. I was sworn in on January 28, 2013, by my father, the Honorable Fred D. Howard of the Fourth District Court. Given the importance of this special assignment, I have worked diligently during the past months to gather insight from other judges and lawyers through observation of court calendars and trials, in order to better understand the character and qualities of a good judge. Now with almost a year behind me, and as one of the youngest judges in the state (age 36), I have come to appreciate that the rules we learned in kindergarten, namely being nice to others, being kind and minding your manners, are the same relevant rules we are to live by in the practice of law.

*The Honorable Fred D. Howard of the Fourth District Court swearing in his daughter Carolyn as Justice Court Judge of the Saratoga Springs Court. Both courts are in Utah County.*

In April 2013, I attended the Annual Justice Court Training in St. George, Utah, which included discussion of how the public views judges. Anonymous comments from the public included expectations of judges to listen to litigants, to maintain order in the courtroom, to treat everyone with respect, and to avoid talking down to lawyers and litigants. Win or lose, parties expected to be able to tell their story and have their day in court.

While there are perhaps many characteristics that suggest a positive judicial demeanor, I noted an article written by Justice Steven Wallace of the Orderville Justice Court in the Spring 2013 Newsletter for Justice Court Judges. Judge Wallace commented that judges must know the law, be able to separate the relevant from the irrelevant, maintain a good listening ear, and hold one's tongue. Such are the primary characteristics of good judicial demeanor.

Additionally, one of the public comments from the conference included the observation that a respectful judge is one who maintains direct eye contact with attorneys and litigants throughout legal proceedings.

The comments suggested that judges who are writing from the bench often make an attorney or litigant believe the judge is not listening or being attentive to the case. While the taking of notes can be of vital assistance to one's memory, this exercise should not eclipse direct eye contact with the attorney or litigant in order to assure him or her that the judge is following along and listening to the arguments at hand.

In July 2012, in response to criticism about the accountability of justice courts, these courts implemented audio recordings of their proceedings. I believe this is a very positive change which will not only increase the public's confidence in justice court judges but will also ensure protection for the judges, particularly where an accusation is made concerning the judge's conduct during a hearing. The recordings also create a positive

*HON. CAROLYN E. HOWARD is the daughter of Judge Fred Howard and a practicing attorney in the areas of family law. Carolyn was sworn in as a new Justice Court Judge in Saratoga Springs, Utah, on January 28, 2013, and is one of the youngest judges in the State of Utah, at the age of 36. Carolyn is a tenured Professor at Utah Valley University where she teaches business law, family law and criminal law.*

reminder to all judges, attorneys, and litigants that the statements made in the court are subject to review by a third party.

The change of viewpoint from a practicing attorney to sitting as a judge on the other side of the bench has increased my appreciation that a judge must demonstrate respect and restraint. Often the less said from the bench, the better. In court, emotions run high and the court should not be caught up in the fray. The judge must remain in control of the court at all times and not allow his or her personal opinions to become the basis for ruling. Certainly the courts must make appropriate orders and explain the reasoning for such orders, but rendering a personal opinion about a case is unnecessary.

A judge must remain impartial, which requires that personal opinions be set aside. As a practicing attorney, I appreciated arguing in a courtroom where I knew the judge would not impose his or her personal opinions about the case. As a new judge, I recalled the former experiences in my law practice when a judge unnecessarily interrupted a hearing by issuing personal opinions about the case. Those past experiences have reminded me to make an effort to listen more and speak less when presiding in the courtroom.

Judge Wallace quoted the following advice: "I have often regretted my speech, but never my silence. So bite your tongue and you will be better for it." My father, the Honorable Fred D. Howard, has been a sitting district court judge in the Fourth District Court since 1995 and has been a source of inspiration for me. Since taking the bench, I have sought his advice numerous times as to how to conduct myself in a fair manner as a judge. Throughout my law practice, I have heard it said more than once by attorneys who practice before my father that he administers justice with a velvet gavel, attesting to the fair, impartial, and even-handedness with which he administers his courtroom. It is my aspiration to be described as a judge who is fair and impartial.

By the nature of their office, judges are empowered, and by reason of such empowerment, a judge's authority should be reserved and never abused. In speaking to my father regarding the issue of temperament, he offered me sound advice:

> [A]s a trial judge, it would be patently unfair and unjust to rule in favor of a litigant's case only where they shared my personal values, or I liked them. I must set aside my personal bias and preferences and consider a litigant's claims dispassionately. This may sound easy, but it is not easy for most of us; I can tell you that it can become very challenging for judges. One of the reasons it is difficult is because judges are empowered by the nature of their position. A judge sits in a position of authority over those before him and by reason of such power, can enforce his orders. He can come down hard against someone he dislikes. He can place someone in jail for rudeness and insolence. Restraint in the proper use of the judge's powers is the true test of his wisdom. And there is no room for abuse of such authority.

During my interviews for the Saratoga Springs judgeship, I was asked whether I believed the same respect should be afforded defendants who appear in the justice courts, as those defendants who appear in the district courts. Without hesitation, I answered in the affirmative. A good portion of my case load is concerned with misdemeanor offenses, including speeding violations, failure to register a vehicle, and driving without insurance or a license. Many of the defendants who appear in justice courts are individuals who are unlikely to ever appear in a district court on a more serious offense. The few minutes the individual experiences in my courtroom may be the only experience he or she has in the court of law or with the judicial system. The public's view of the courts is often created during a single encounter with a small town justice court. This is all the more reason for justice courts to create a transparent, open, fair, and respectful process for all those that appear in court.

# *Professionalism Re-examined or The Unexamined Life Might Actually be Better*

*by Learned Ham*

Have you ever done something you couldn't explain? Like sleepwalking, wearing a yellow necktie, ordering ceviche on purpose, majoring in economics, or watching professional bowling on TV? I just took the Multistate Professional Responsibility Exam ("MPRE"). I don't remember taking it before. I passed the bar exam in Utah in 1984, and I probably took a lot of things back then that I don't remember now. Maybe the MPRE was one of them.

I took it now because for some reason I want a license to practice law in Connecticut. I live in Connecticut now. It's a pretty, great state. If you don't mind Lyme disease. I've been working here as in-house counsel. I have a certificate to prove it. My certificate is valid as long as I remain in good standing with the Utah State Bar, which – and this will come as a mild surprise to some – hasn't been a problem so far. I don't need a Connecticut license. I don't even want one. But I decided it would be a good thing to do to keep my options open. That's the same reason I went to law school, which probably should have made me stop and think. But if you stop and think about everything, nothing ever gets done. Stop and think about that. If we had stopped and thought about it, would Afghanistan be the vibrant pluralist, democratic society that it is today? My point exactly.

So I recently took the MPRE. And maybe thirty years ago, too. Or maybe not. I paid for an online review course. I read the study guide. Well worth it. It was full of valuable insights like "don't steal client funds," "don't lie to judges," and "don't go into business with accountants." I kept wanting to add knowledge and materiality qualifiers. There was a sample test, too.

Question 6: Should retainer agreements be in writing?

a. Only if the client is illiterate.

b. Not if opposing counsel is of legal age.

c. Yes, if you're an orthodontist.

d. Sure, why not?

The questions on the actual test were a little less straightforward.

Question 437: Attorney Alpha represents Client, the seller in a lawsuit resulting from an aborted real estate transaction involving property that was previously the subject of an abandoned eminent domain proceeding handled by Alpha's current partner, Attorney Beta, while she was a staff lawyer for the municipality. The buyer is represented by Attorney Zeta, who is the illegitimate son of Beta and Judge Gamma, to whom the lawsuit has now been assigned. Client confides to Alpha that he perjured himself in Gamma's court in a prior criminal case involving the alleged theft by Alpha of funds belonging to Client's previous lawyer, Theta, from a drawer in which Theta's personal funds were commingled with client funds received by Theta from Zeta in connection with the settlement of a disputed securities fraud case. If Alpha and Beta sell their practice to Epsilon before the case is tried, may Epsilon move to disqualify Gamma on the basis of Gamma's notorious alcoholism?

a. No, unless Epsilon reasonably believes that Alpha was competent, and the agreement to purchase the practice was written and signed, but not notarized, at any location within the jurisdiction.

b. It depends on whether Judge Gamma is standing for re-election.

c. Yes, provided Zeta's business cards do not contain any inaccurate or seriously misleading statements.

d. Only if conclusive evidence is adduced that the nature of Judge Gamma's relationship with Client's parole officer is purely Platonic.

The toughest part of the MPRE was having to sit there for two-and-a-half hours without a bathroom break. I don't recall this being a problem thirty years ago. But then, I don't

remember. I think I might have mentioned that. Actually, bathroom breaks are permitted, but one of the proctors has to accompany you. And I thought I had a bad job.

The thorny questions aren't all on the MPRE. The application for admission to the Connecticut Bar has some head-scratchers, too: *Do you have any conditions that affect your ability to practice law in a competent and professional manner?* Where does one start?

Very, very occasionally, I respond to stress by tossing things gently around the office. This undoubtedly affects my ability to practice law in a competent and professional way, but I like to think the effect is a positive one. Am I obligated to disclose this?

Maybe I should illustrate the point. It was a bad day. We were in the middle of a debt-for-equity exchange and getting a little tired of explaining to vendors that liquidity wasn't a problem and there was no reason to put us on cash payment terms. I think the phrase is "harmless puffery." Although counsel for various counterparties had other words for it. I'm at my desk. The phone rings once too often. I whirl around in my chair and hurl a pen at the phone as hard as I can. It hits the phone and explodes, flinging an arc of blue ink like the rings of Saturn around my office.

A dripping trail of navy blue climbs up the front of my shirt, leaps to the bookcase behind me, and crawls halfway across the ceiling above my head. I recognize this as a sub-optimal situation. I can't let anyone see this. I sneak down the hall and grab some cleaning supplies from a closet. I lock my door and start scrubbing before things dry. I realize that the acoustic ceiling tiles are the most vulnerable. The ink will soak in quickly, deeply, and hopelessly. I have to act fast.

I have a table in the corner of my office. It's a round pedestal table, supported by a single column in the middle, like the trunk of very small oak tree, or a very large mushroom. I probably don't need to tell you what happens next. I, of course, climb up onto the table and start scouring the ceiling tiles – as any reasonable person would do. But I stand too close to the edge of the table, with not enough weight balanced on that central pedestal. The tabletop snaps away from the column. I plunge to the floor and am met on my way down by the opposite edge of the table on its way up. It whacks my forehead and I come to rest – dazed, bleeding, and relaxing in a pile of kindling in the corner of my office. I look up in time for a drop of blue ink to splotch on my cheek, like a drop of warm summer rain.

I do not throw pens any more. Nor do I buy negligently designed tables. And I suggest you don't, either. As a reformed pen-flinger, I also don't think I'm obligated to describe this as a condition affecting my ability to practice in a professional manner. They didn't leave enough space on the form anyway.

By the way, against all odds, I did pass the MPRE. So please don't shunt me off to voicemail again when I call about that letter of recommendation. Character and fitness? Competent and professional? Let he or she who is without fault cast the first pen.

# What the American Taxpayer Relief Act of 2012 and Portability Mean to Utah Estate Planners

*by John S. Treu*

## The American Taxpayer Relief Act of 2012

After several weeks of politicking, posturing, threats, endless meetings, and failed compromises, on January 1, 2013, Congress finally passed legislation to avert the so-called fiscal cliff. The American Taxpayer Relief Act of 2012 ("ATRA") was signed into law from Hawaii with President Obama's magic electronic vacation pen on January 3, 2013. So what does the latest bill mean to the attorney who does occasional estate planning work or generally smaller estates? Well, it actually means quite a bit. While ATRA makes changes to the rates and the exclusion amounts that would have otherwise taken effect in 2013, from a functional perspective, the deepest impact for estate planners under ATRA is that the short-term experiment of portability has now been made a permanent fixture of estate planning.

## The Estate & Gift Tax Exclusion

Prior to the enactment of ATRA, the estate, generation-skipping tax ("GST"), and gift tax exclusions were set to return to pre-Bush-era tax cut levels meaning the exclusion amount would be only $1M with a maximum tax rate of 55% and no portability. Fortunately for the millions of taxpayers with estates with less than $5M and more than $1M in assets, ATRA permanently extended the 2010 tax act provisions that applied to estates of decedents who passed away during 2011 and 2012. These provisions include a $5M exclusion, adjusted for inflation after 2010, and a maximum tax rate of 40%. *See* the American Taxpayer Relief Act of 2012, § 101. More importantly, ATRA increases the gift tax and GST exclusion amounts to this same $5M level to reintroduce a true unified credit. This represents a significant increase in the gift tax and GST exclusion amount over the applicable amount for 2011 and 2012.

## Portability

Also included in this provision is what is commonly referred to as the concept of portability. *See* 26 U.S.C. § 2010(c) (2013).

Prior to the introduction of portability in 2011, in order for a surviving spouse to utilize the unused exclusion of the deceased spouse, the assets of the deceased spouse had to be placed in an inter-vivos credit shelter trust (also referred to as an A-B Trust or a marital credit shelter trust) for the benefit of the surviving spouse and the subsequent beneficiaries prior to the death of the first spouse. Absent such a trust when a spouse died and the assets went to the surviving spouse, it would generally do so under the unlimited marital exclusion and the lifetime exclusion of the first deceased spouse would simply expire with the decedent.

The theory of a credit shelter trust is that if the first spouse placed the assets up to the amount of that spouse's exemption in trust for the benefit of both the surviving spouse (subject to certain minor required limitations such as distributions being made based on an ascertainable standard) and then the trust subsequently distributed the assets to the children, then the first deceased spouse's exemption would shelter those assets from being included in the subsequent spouse's estate. This is the case even when the assets passed on to the children many years later at the death of the surviving spouse.[1] Any assets held in excess of the first spouse's exemption amount would pass to the surviving spouse's share of the trust under the unlimited marital exemption. So placing these assets in a credit-shelter trust allowed the lifetime exemptions of both spouses to essentially be stacked to avoid being subject to estate tax when the

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surviving spouse died and the assets were transferred to the subsequent beneficiaries. Notwithstanding the fairly limited restrictions on the surviving spouse's use of the assets based on an ascertainable standard during life, the credit shelter trust does have to become irrevocable upon the death of the first spouse to die in order to have the desired effect, which introduces significantly greater restrictions at such time.

The concept of portability eliminates the need to have this complex credit-shelter trust structure for purposes of stacking the estate tax exemptions because it automatically grants such treatment to a surviving spouse. *See Estates, Gifts and Trusts Portfolios: Estate Tax, 844-3rd, Estate Tax Credits and Computations* (BNA, 2013). In fact, the code now defines the applicable exclusion amount as the sum of the basic exclusion amount for the decedent of the estate (or $5M adjusted upward for inflation and rounded to the nearest $10,000), and, in the case of a surviving spouse, the deceased spouse's unused exclusion amount. *See* I.R.C. § 2010(c)(2) (2013). This provides a great deal of flexibility and potentially brings many individuals who will fail to do their estate planning before the death of the first spouse into the credit shelter tent, but there are still some important limitations to be aware of. The portability calculation is not entirely automatic as the executor of the deceased spouse 's estate, which is often the surviving spouse, must file a tax return in order for the surviving spouse's executor to calculate the amount that is portable to the surviving spouse and any unused exclusion amount must be calculated by the executor of the surviving spouse's estate. So a key take away is that with portability, it has now become essential to file estate tax returns in all cases to ensure the exclusion is preserved, even if no estate tax is due. This issue will become moot over time as estates are now required to file estate tax returns for all estates, regardless of the amount of assets in the gross estate, for all decedents who died in 2013,[2] but if you have clients who died in 2011 or 2012 and were not required to file an estate tax return, it may very well be beneficial to file one now in order to benefit from portability. One issue to note is that the IRS may audit the deceased spouse's estate tax return even though the relevant statute of limitations has passed, but such review can

be performed solely for the purpose of ensuring that the initial calculation of the deceased spouse's unused exemption was completed correctly. *See id.* § 2010(c)(5).

Portability essentially allows everyday taxpayers to receive many of the benefits previously enjoyed only by individuals utilizing credit-shelter trust estate plans. While this would normally be considered a win for the little guy, the fact that an estate has to exceed $5M for this to even provide any benefit means that it is more of a safety net for individuals who could afford to put an effective estate plan in place but chose not to. There are also broader benefits since portability does provide for much more flexible estate planning because the exemptions can be stacked without using an irrevocable credit shelter trust or tying up significant assets in a trust that makes distributions only based on an ascertainable standard. There is also less risk that a credit shelter will be disallowed based on intermingling of funds between trusts which means there will be less unnecessary leg work in terms of funding the credit shelter trust with assets formerly belonging to the deceased spouse.

### Is Portability the Death of the Credit Shelter Trust?

Notwithstanding these characteristics of portability, there are some tax aspects of the credit shelter trust that are still preferable to relying on portability, most importantly, the value of appreciation that is excluded on the assets in the credit shelter trust between the death of the first and the second spouse. There are two issues with this approach that should give planners pause before using this factor to carry on business as usual. First, this strategy only works to the extent that the assets will appreciate at a faster rate than the inflation adjustment built into the lifetime exclusion amount. If the assets fail to appreciate in real dollars, meaning their appreciation fails to exceed inflation, then this alone would make the use of a credit shelter trust disadvantageous to the taxpayers. Second, assuming we take for granted that the taxpayer's assets will appreciate faster than inflation, then the credit shelter trust will lock in a lower stepped up basis in real dollars for purposes of capital gains taxes when the asset is subsequently sold by the beneficiaries. Ultimately, the issue of whether a credit shelter trust makes sense for the client will, therefore, depend on several factors including: (i) the nature of the assets (whether the assets tend to appreciate or depreciate), (ii) the extent of any gains in the assets (whether the assets have low vs. high basis which affects the value of the step-up in basis) (iii) the life expectancy of the clients, particularly if there are factors that might suggest there will likely be significant time between the deaths of the first and second spouse to die, (iv) the likelihood of having a taxable estate and the extent thereof, and (v) the likelihood of the heirs retaining the appreciated assets following the second spouse's death.

### What Now for Utah Estate Planners?

Over the last two years when portability was first introduced, estate planners were reluctant to modify A-B trusts that had become temporarily obsolete because the estate tax laws were set to expire beginning in 2013 and the credit-shelter provisions were still potentially very important,[3] particularly if the exemption dropped back down to a mere $1M with a 55% tax on all funds above that amount. Another source of angst among estate planners and their clients was the overall lack of clarity in terms of where the law was going and so many clients were taking a "wait and see" approach to updating their estate plans.[4] But now that the concept of portability has not only been extended into future years but made permanent, any credit shelter trusts that are still revocable are potentially due for important updates. This is significant as credit shelter trusts have long been a staple of estate planning and may constitute the majority of *inter-vivos* trusts prepared prior to 2011. While credit shelter trusts still have significant relevance as discussed above, and also may be particularly important for decedents with assets in states with independent estate tax regimes, in Utah we may have come to the death of an era as the permanent extension of portability eliminates some of the important factors supporting the use of the credit shelter trust structure in many cases.

Given the increased complexity in determining whether a credit shelter trust is right in a given situation, this is a good time to reach out to your married clients with trusts set up before 2011 for a review and a potential update.

1. For more information about the now partially obsolete credit shelter trust structure, *see* Ray D. Madoff, Practical Guide to Estate Planning, §§ 6.04 & 6.05 (Commerce Clearing House 2013).
2. *See e.g.,* Instructions for Form 706 at 2, Internal Revenue Service (August 2013) *available at* http://www.irs.gov/pub/irs-pdf/i706.pdf (last visited Dec. 12, 2013).
3. *See* Ray D. Madoff, Practical Guide to Estate Planning, §5.02[D].
4. If the first spouse died in 2011 or 2012 with a credit shelter trust in place, the industry's appropriately slow reaction to the uncertainty in the law may have the unfortunate byproduct of creating a number of irrevocable trusts unnecessarily.

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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.*

### *Olsen v. Park City Municipal Corporation*, 2013 UT App 262 (November 7, 2013)

The Utah Court of Appeals held that a challenge to a municipal land use ordinance is timely when filed within thirty days after the ordinance becomes effective. The Municipal Land Use, Development, and Management Act provides that a challenge to an ordinance must be filed no later than "thirty days after the enactment." Utah Code Ann. § 10-9a-801(5) (LexisNexis 2012). The court rejected a city's argument that "enactment" meant passage by the city council, concluding that the term means "all necessary steps to give an ordinance the validity of law." *Olsen*, 2013 UT App 262, ¶ 13.

### *Garza v. Burnett*, 2013 UT 66 (November 1, 2013)

In answering a certified question from the Tenth Circuit, the Utah Supreme Court held that when an intervening change in law "extinguishes a previously timely cause of action," the doctrine of equitable tolling will "afford the plaintiff a reasonable period of time after the change in law to bring his claim." *Garza*, 2013 UT 66, ¶¶ 14–15. Previously, the court only applied equitable tolling in cases where the "discovery rule" was implicated. *Id*. ¶¶ 10–11. The court explained that this was not because equitable tolling was limited to such cases, but because there is a high bar that litigants must meet in order to obtain such "extraordinary relief." *Id*. ¶ 10. In this § 1983 case, the court held that failure to apply equitable tolling "would be manifestly unjust because [the plaintiff] would lose his cause of action due to circumstances beyond his control and through no fault of his own." *Id*. ¶ 12.

### *America First Credit Union v. Kier Construction Corporation*, 2013 UT App 256 (October 24, 2013)

The Utah Court of Appeals held that a general contractor could not turn to its stone veneer subcontractor's commercial general liability policy for coverage in a lawsuit brought against the general contractor by the owner for the subcontractor's allegedly defective work. *America First*, 2013 UT App 256, ¶¶ 17–19. The ruling hinged upon the policy's definition of "your." *Id*. ¶¶ 9–10. The policy limited the definition of "your" to the "Named Insured." *Id*. ¶¶ 10, 18–19. The subcontractor was the only named insured in the policy; the general contractor had been added to the policy as an "Additional Insured." *Id*. Therefore, the exclusions for "your work" and "your product" were exclusions for the subcontractor's work, and the exclusions applied to bar coverage. *Id*. As to the general contractor's argument that the subcontractor was required by its contract with the general contractor to provide insurance coverage for its defective work, the general contractor's remedy would be to bring a claim for breach of contract against the subcontractor. *Id*. ¶ 19.

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### *Weber County v. Ogden Trece*, 2013 UT 62 (October 18, 2013)

The Utah Supreme Court vacated an injunction against a street gang because the County's service by publication was insufficient. *Ogden Trece*, 2013 UT 62, ¶ 64. Under a public nuisance theory, the County sought an injunction prohibiting the gang from engaging in certain acts. *Id*. ¶ 2. After the complaint was filed, the County personally served five members. *Id*. ¶ 8. As an additional precaution, the County sought and was authorized to serve the gang by publication, which it did. *Id*. ¶ 9. The trial court then granted a preliminary and permanent injunction. *Id*. ¶¶ 11, 16. On appeal, the court first held that it lacked appellate jurisdiction because the individual members of the gang raising the appeal were not parties to the trial court action – only the street gang was. *Id*. ¶ 28. Nonetheless, several individual members filed a petition for extraordinary writ, which the court concluded was the proper means for the nonparties to challenge the district court's order. *Id*. ¶ 29. Next, the court concluded that the street gang was amenable to suit as an unincorporated association, even though it was a criminal organization, because it transacted business under a common name. *Id*. ¶ 33. The court then held that in order to properly serve the gang, the County needed to serve its "officers or managing or general agents or their functional equivalent" or "establish a sufficient factual basis for service by publication." *Id*. ¶ 60. Because a proper officer of the street gang was not served, and the County did not show it "exercised reasonable diligence in attempting to identify" the appropriate agent "before requesting alternative service," the trial court lacked jurisdiction to issue the injunction. *Id*. ¶ 64.

### *Bell v. Bell*, 2013 UT App 248 (October 18, 2013)

The Utah Court of Appeals reversed the trial court's award of joint custody because the court had not required the parties to file the parenting plan required by Utah Code section 30-3-10.2(1). *Bell*, 2013 UT App 248, ¶ 34. Even though the issue was not properly preserved in the trial court, the court refused to "disregard controlling authority" and held the award of joint custody to have been an abuse of discretion. *Id*. ¶ 15. The court also held that the assumptions behind the trial court's imputation of income to wife were flawed, were inadequately explained, and failed to take into account wife's status as caregiver for a severely disabled child. *Id*. ¶ 19. The property division was reversed because of inadequate findings concerning valuations or exceptional circumstances supporting an unequal property division. *Id*. ¶ 23. The attorney fee award was also inadequately explained in the trial court's findings, and was reversed despite apparent failure to preserve the issue in the lower court. *Id*. ¶ 24. (Wife was a pro se litigant.)

### *Sewell v. Xpress Lube*, 2013 UT 61 (October 18, 2013)

In this personal injury case, the plaintiff secured a default judgment against an oil and lube business owned by a sole proprietor approximately one month after it served the complaint and summons on an employee of the business. *Sewell*, 2013 UT 61, ¶ 8. The district court denied the business's motion to have the default judgment set aside and awarded the plaintiff the full $600,000 he requested for medical bills, lost wages, and pain and suffering without holding an evidentiary hearing. *Id*. ¶ 9. The Utah Supreme Court vacated the default judgment on three independent and alternative grounds. *Id*. ¶ 41. First, the court held that the default judgment was void for lack of proper service under rule 4(d)(1)(A) of the Utah Rules of Civil Procedure because the plaintiff served the complaint and summons on an employee rather than on the sole proprietor himself. *Id*. Second, the court held that the district court abused

its discretion in failing to grant the business's rule 60(b)(1) motion to have the default judgment set aside after the business had shown that its failure to answer the complaint was the result of mistake, inadvertence, or excusable neglect. *Id*. And finally, the court held that the district court abused its discretion by awarding damages without holding a hearing because rule 55(b)(2) requires a damages hearing when damages are unliquidated, regardless of the allegations in the complaint. *Id*.

### *Hill v. Superior Property Management Services, Inc.*, 2013 UT 60 (October 11, 2013)

The Utah Supreme Court affirmed summary judgment in favor of a property maintenance company, finding that the company owed no duty towards a condominium resident who tripped on tree root offshoots concealed in the grassy common area of her complex. *Hill*, 2013 UT 60, ¶ 9. The court rejected all three of plaintiff's theories for imposing tort liability on the company. *Id*. First, the court concluded that the company's maintenance contract with the complex did not create a duty towards plaintiff because it did not say anything specifically about trimming tree roots. *Id*. ¶ 15. Second, the court found that the company did not "possess" the land, for the purposes of imposing premises liability, because it had no right to exclude persons from the property, and had only limited authority to perform authorized repair and maintenance services, while other services were contracted out to other companies. *Id*. ¶¶ 19–20. Finally, the court held that the company had not voluntarily undertaken maintenance of the tree root hazard, even though it had mowed over them on occasion, because it did voluntarily do anything meaningfully aimed at remedying the tree roots. *Id*. ¶¶ 40–41.

### *SEC v. Thompson*, 732 F.3d 1151 (10th Cir. Oct. 4, 2013)

The Tenth Circuit clarified that whether a "note" is a "security" in a civil case should be determined as a matter of law, except in "rare instances." *Thompson*, 732 F.3d at 1161. The court reasoned that where the Supreme Court had set forth a rebuttable presumption that a note is a security, prescribed a "comparison of the subject instrument to a judicially crafted list of non-security instruments, and [prescribed] an inquiry into the existence and adequacy of alternate regulatory schemes," this strongly suggested that the issue was one of law. *Id*. The court recognized that the determination included "factual and legal components," and the court also implied a different application might be warranted in the criminal context. *Id*. (citation and internal quotation marks omitted).

### *Westmont Maintenance Corporation v. Vance*, 2013 UT App 236 (October 3, 2013)

In an action where an attorney was sued for defamation based on letters he wrote to plaintiffs and their counsel before formal proceedings were instituted, the Utah Court of Appeals soundly affirmed the applicability of the judicial proceedings privilege and awarded sanctions. *Westmont Maintenance*, 2013 UT App 236, ¶ 22. Although the attorney wrote several letters asserting fraud, extortion, and forgery before any action was filed, because these letters were "preliminary to a proposed judicial proceeding," and "broadly" related to the underlying dispute between the litigants, the judicial proceedings privilege applied, barring the defamation action. *Id*. ¶¶ 15–17. Moreover, even though the accused attorney was acting pro se and Utah law precludes prevailing-party attorney fees in such instances, the court affirmed an award of attorney fees based on the trial court's inherent ability to sanction. *Id*. ¶ 20.

### *Wolferts v. Wolferts*, 2013 UT App 235 (October 3, 2013)

The Utah Court of Appeals rejected a mother's appeal from contempt sanctions because she had not preserved the issue for appeal, and the court refused to consider arguments of plain error and exceptional circumstance doctrine that the mother raised for the first time in her reply brief. *Wolferts*, 2013 UT App 235, ¶¶ 20, 24. The court similarly rejected the mother's claim that the trial court denied her due process by not allowing her to testify or present witnesses at a hearing to determine the children's best interests because she had not raised the constitutional issue before the trial court. *Id*. ¶ 22. Although the mother had filed a motion with the trial court seeking permission to testify and call witnesses, she did not assert she had a constitutional right to do so, nor did she argue she would be prejudiced if her participation was limited to cross-examining witnesses. *Id*. Therefore, the court refused to consider her constitutional argument. *Id*.

### *Jenkins v. Jordan Valley Water Conservancy District*, 2013 UT 59 (October 1, 2013)

Avoiding the issue of whether portions of the Utah Governmental Immunity Act violate the open courts clause of the Utah Constitution, the Utah Supreme Court reversed and vacated the Utah Court of Appeals' opinion, 2012 UT App 204, 283 P.3d 1009, which held it did, on the ground that expert testimony was necessary to establish the relevant standard of care. 2013 UT 59, ¶ 22. The Utah Court of Appeals had determined that

"[t]he all-inclusive definition of governmental function" in the Act abrogated a preexisting remedy, did not offer a reasonable alternative remedy, and was not narrowly tailored, thus violating the open courts clause. 2012 UT App 204, ¶ 117. Prior to reaching this issue, it had determined that expert testimony was not needed to establish the relevant standard of care because "[t]he issue of whether three years was a reasonable time to delay replacing" a water pipe after the Water Conservancy District identified it for replacement was "not beyond the knowledge and analytical ability of the average juror." *Id.* ¶ 41. The Utah Supreme Court reversed on this issue of expert testimony and vacated the remainder of the court of appeal's opinion. *See* 2013 UT 59, ¶ 22. It reasoned that an internal decision by the District to replace the water pipe did "not establish a tort law duty to do so." *Id.* ¶ 14. Specifically, the court concluded that without expert testimony, "jurors would be forced to speculate about how a reasonable water conservancy district would act, and about whether the District failed to conform to that standard by failing to replace the [water pipe] earlier." *Id.* ¶ 21.

### *Stone v. M&M Welding & Construction, Inc.*, 2013 UT App 233 (September 26, 2013)

In this wrongful discharge case, an employee sued his employer for "pretaliatory" discharge, claiming that his employer fired him after he stated his intention to file a workers' compensation claim, but before he actually filed the claim. *Stone*, 2013 UT App 233, ¶ 1. The district court granted summary judgment in favor of the employer dismissing the claim, finding that the employee's termination could not have been in retaliation for filing a workers' compensation claim because he was fired eight months before he filed the claim. *Id.* ¶ 5. The Utah Court of Appeals reversed, finding that an employee did not have to have actually filed a workers' compensation claim to be protected from retaliatory termination. *Id.* ¶¶ 11–12. The court explained that to find otherwise would "create a perverse incentive for an employer to discharge an injured employee as soon as the employer learns of the employee's intention to file a claim." *Id.* ¶ 11.

### *State v. Binkerd*, 2013 UT App 216, 310 P.3d 755 (September 6, 2013)

The Utah Court of Appeals determined there was no error in convicting an individual of manslaughter, a general intent crime, even though the lead actor was convicted of aggravated murder, a specific intent crime. *Binkerd*, 2013 UT App 216, ¶ 29. The court recognized that under Utah precedent, an accomplice to a crime need not have the same intent as the principal. *Id.* Specifically, it relied on a quote from *State v. Jeffs*, stating that "'accomplice liability adheres only when the accused acts with the mens rea to commit the principal offense.'" *Id.* ¶ 26 (quoting *State v. Jeffs*, 2010 UT 49, ¶ 44, 243 P.3d 1250). The court explained that its understanding of the term "'principal offense' [meant] the offense of which the defendant is convicted under a theory of accomplice liability." *Id.* Because defendant "was found guilty of acting as an accomplice to manslaughter, not murder…it is manslaughter, not murder, which is the 'principal offense.'" *Id.* Accordingly, because the defendant acted with the mental state necessary for a conviction of manslaughter, i.e., his intentional acts and statements "disregarded the distinct possibility that [the lead actor] would interpret them to be a directive to murder the victim," there was no error. *Id.* ¶ 28.

### *Howick v. Salt Lake City Corporation*, 2013 UT App 218, 310 P.3d 1220 (September 6, 2013), *cert. filed* Nov. 7, 2013

The Utah Court of Appeals held that a City employee can contract away the right to be treated as a merit employee. *Howick*, 2013 UT App 218, ¶ 46. Howick was hired by the City as a lawyer in 1992. *Id.* ¶ 2. In 1998, the City created a new position in response to some lawyers' dissatisfaction with salaries. *Id.* The new position came with a significant salary increase, but applicants were required to sign a disclaimer stating their employment was at-will even though under Utah Code section 10-3-1105 they would otherwise have been merit employees. *Id.* After her termination, Howick argued that she continued to be a merit employee under section 10-3-1105 and that permitting cities to contract around that statute's merit protection violated public policy. *Id.* ¶ 30. Using the analysis in *Ockey v. Lehmer*, 2008 UT 37, 189 P.3d 51, the court concluded that public policy did not prevent such a waiver. *Id.* ¶¶ 34–43. Addressing the two Ockey factors, the court stated: (1) the statute contains no "express anti-waiver provision," and (2) although the 2012 amendment to section 10-3-1105, which allows employees to waive merit protection in writing, could not be applied retroactively it could be considered "as a reflection of current legislative views on public policy." *Id.* ¶¶ 35, 42.

### *State v. Campos*, 2013 UT App 213, 309 P.3d 1160 (August 29, 2013)

The appellant was convicted of attempted murder and aggravated assault after he and an unofficial neighborhood watch volunteer each armed with semi-automatic pistols "squared off near midnight in their Bluffdale neighborhood." *Campos*, 2013 UT App 213, ¶ 1. The Utah Court of Appeals overturned the attempted murder conviction on the basis of ineffective assistance of counsel due to the cumulative effect of three errors. *Id.* ¶¶ 92–93. First, the court determined that the verdict form improperly shifted the burden of proof on imperfect self-defense to the defendant. *Id.* ¶ 45. Second, the court determined that the prosecutor's statements had "prompted the jury to put themselves in the shoes of the victim and to consider matters outside the evidence," and so constituted prosecutorial misconduct. *Id.* ¶¶ 49–53. Third, the court determined the prosecutor's statements during closing arguments "crossed the line from permissible argument of the evidence to an impermissible attack on defense counsel's character." *Id.* ¶ 57. Specifically, the court noted that "[a]rguing that the evidence does not support the defense theory and that the theory is thus a distraction from the ultimate issue is fundamentally different from arguing that defense counsel is intentionally trying to distract and mislead the jury." *Id.* Because defense counsel did not object on these three issues, the court determined that the cumulative effect of the errors undermined its confidence in the verdict. *Id.* ¶ 72.

### *In re Hannifin's Estate*, 2013 UT 46, 311 P.3d 1016 (August 2, 2013)

A 3-to-2 majority held that the doctrine of equitable adoption, which it recognized in *In re Williams' Estates*, 348 P.2d 683 (Utah 1960), has been preempted by "the detailed provisions of Utah's Probate Code." *In re Hannifin's Estate*, 2013 UT 46, ¶ 2. In a lengthy discussion of preemption, equitable adoption, definitions of "child" and "parent" in the Probate Code, the majority concluded that it is "impossible to comply with both the Probate Code and with the principles of equitable adoption." *Id.* ¶ 21. In particular, the majority found that the doctrine of equitable adoption undermines the Code's "detailed intestate succession scheme" by "introducing uncertainty, complexity, and inefficiency – the very evils the Probate Code was designed to avoid." *Id.* ¶ 29.

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# *Petitioning the Utah Supreme Court for a Writ of Certiorari*

*by Beth E. Kennedy*

The raw statistics indicate that the chances are relatively slim that the Utah Supreme Court will grant a petition for a writ of certiorari. Since 2008, the Utah Supreme Court has granted only 19% of the petitions that have been filed. Figure 1 shows the percentages by year.

| FIGURE 1 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 to date |
|---|---|---|---|---|---|---|
| **Petitions Filed** | 122 | 116 | 102 | 108 | 113 | 114 |
| **Petitions Granted** | 27 | 22 | 27 | 11 | 18 | 21 |
| **% Granted** | 22% | 19% | 26% | 10% | 16% | 18% |

And even if a petitioner persuades the Utah Supreme Court to grant the petition, there is no guarantee that the petitioner ultimately will persuade the Utah Supreme Court to reverse the Utah Court of Appeals' opinion. The Utah Supreme Court has not issued opinions in all of the cases for which it granted certiorari review since 2008. But of those cases it has decided, it granted relief to the petitioners on the merits only 43% of the time. Figure 2 shows the percentages by year.

While these numbers seem daunting, they are not prohibitive. A petitioner who keeps in mind the purpose and function of a petition can increase the chances that the Utah Supreme Court will grant the petition and review the Utah Court of Appeals' opinion.

To prepare an effective petition, it is important to understand the ways in which drafting a petition for a writ of certiorari differs from drafting an appellate brief. Although the audience is an appellate court for both a petition and a brief, the court has a different objective in reviewing each document. This article describes some of those differences and offers practical tips for drafting and responding to petitions.

## Reasons Why the Utah Supreme Court Will Grant a Petition

To understand how to draft a petition for a writ of certiorari, it is important to understand its purpose. On the most fundamental level, a petition provides the Utah Supreme Court an opportunity to review an opinion issued by the Utah Court of Appeals. But this review is "not a matter of right," and the Utah Supreme Court will not grant a petition simply because the Utah Court of Appeals erred. Utah R. App. P. 46(a). Instead, a petitioner must convince the Utah Supreme Court that there are "special and important reasons" that require the Utah Supreme Court to exercise its discretion to review the Utah Court of Appeals' opinion. *Id.*

Rule 46(a) lists four of these reasons. They suggest that the supreme

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| FIGURE 2 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 to date |
|---|---|---|---|---|---|---|
| % Relief Granted | 63% | 57% | 46% | 18% | 33% | None yet decided |

court's primary focus in deciding whether to grant a petition is whether the appeal presents an opportunity to clarify Utah law. The four listed reasons are "neither controlling nor wholly measuring the Supreme Court's discretion," but they "indicate the character of the reasons that will be considered." *Id.*

The first listed reason the Utah Supreme Court will grant a petition is that the Utah Court of Appeals' opinion conflicts with a prior Utah Court of Appeals' opinion. *Id.* R. 46(a)(1). When such a conflict arises, the law becomes uncertain because it is unclear which opinion controls. A federal court of appeals can resolve such a conflict with an en banc opinion, eliminating the need for the United States Supreme Court to resolve the conflict. But our state system has no en banc mechanism, and a future panel of the Utah Court of Appeals cannot satisfactorily resolve the conflict because it is bound by horizontal stare decisis. So in Utah, only the Utah Supreme Court can resolve the conflict.

The second listed reason the Utah Supreme Court will grant a petition is if the Utah Court of Appeals' opinion conflicts with an opinion of the Utah Supreme Court. For a district court, a conflict between an opinion of the Utah Supreme Court and a subsequent opinion of the Utah Court of Appeals is no more comforting than a conflict between two opinions by the Utah Court of Appeals. While the Utah Supreme Court's view of the law governs, the question of whether the Utah Supreme Court's opinion is narrow and therefore distinguishable from the Utah Court of Appeals' opinion can be answered definitively only by the Utah Supreme Court. When the Utah Supreme Court considers a petition where such a conflict exists – or arguably exists – the Utah Supreme Court is not concerned primarily with correcting an error, but with resolving the uncertainty created by the Utah Court of Appeals' opinion.

The remaining two listed reasons the Utah Supreme Court will grant a petition also highlight the Utah Supreme Court's purpose of clarifying the law. They arise when the Utah Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings…as to call for an exercise of the Supreme Court's power of supervision," or when the Utah Court of Appeals has decided an important issue of law "which has not been, but should be, settled by the Supreme Court." *Id.* R. 46(a)(3)–(4). In the former circumstance, it is important for the Utah Supreme Court to exercise its supervisory authority to ensure the orderly and predictable course of judicial proceedings. In the latter circumstance, while district courts will be bound by the Utah Court of Appeals' opinion, litigants may not consider the important issue settled until the Utah Supreme Court has spoken. The uncertainty will remain until the Utah Supreme Court decides the issue, even if it ultimately agrees with the Utah Court of Appeals.

### Identifying and Framing the Questions

The first step in drafting a petition is to identify the questions of law to ask the Utah Supreme Court to review. As explained above, each question should invite the Utah Supreme Court to clarify confusion or a conflict in the law, not merely to correct an error in the Utah Court of Appeals' opinion. An error that does not create uncertainty in the law for future cases – because it is tied to the facts of your case, for example – is unlikely to entice the Utah Supreme Court.

The questions should be simple and objective. They "should be short and concise and should not be argumentative or repetitious." Utah R. App. P. 49(a)(4). And just like choosing issues to include in an appellate brief, it is important to narrow the questions presented to one or two questions – three at most. Presenting more than three questions detracts from the importance of any one question.

Narrowing the issues makes it more likely that the Utah Supreme Court will grant the petition, but it comes with risk. If the petition is granted, the questions you can address in the opening brief will be limited to those questions the Utah Supreme Court agreed to review in granting the petition and those "fairly included within." *Id.*; *DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995). This means that drafting the petition can require a substantial amount of research to ensure that the few questions presented in the petition are the ones that will provide the best chance to prevail on the merits.

> *"Making a misrepresentation, whether on the law or the facts, invites the respondent to imply that any uncertainty in the law is a product of your misreading of the law or misrepresentation of the facts."*

### Persuading the Court

Once the questions have been identified and framed, the next step is to explain why the Utah Supreme Court should grant the petition. Because there will not be an opportunity to present oral argument, the contents of the petition are especially important. *See* Utah R. App. P. 51(a).

The primary focus of the petition is to explain how the Utah Supreme Court can settle an important issue of Utah law – in other words, how each question fits within one of the four considerations listed in rule 46(a). *Id.* R. 49(a)(9). The petition should explain the uncertainty that results from the Utah Court of Appeals' opinion and how that uncertainty will impact future cases. After describing the uncertainty, the petition must convince the Utah Supreme Court that the facts and posture of your case will provide an adequate vehicle for resolving the uncertainty.

Remember that the point of the petition is to convince the Utah Supreme Court to review the merits of your case, so at this stage the primary focus should not be how you will prevail on the merits. Even if you convince the Utah Supreme Court that there is an uncertainty in the law, the Utah Supreme Court might grant the petition and resolve the uncertainty in a way that affirms the Utah Court of Appeals' opinion. What is certain, however, is that you cannot change the result absent the Utah Supreme Court's granting the petition. If your petition is granted, you will have the opportunity to convince the Utah Supreme Court on the ultimate merits in the briefing.

Finally, the petition must be accurate. Making a misrepresentation, whether on the law or the facts, invites the respondent to imply that any uncertainty in the law is a product of your misreading of the law or misrepresentation of the facts. The rule explains, "The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." *Id.* R. 49(e).

### Responding to the Petition

The same principles explain how to respond to a petition. A response should persuade the Utah Supreme Court that the issues presented in the petition are not worth the Utah Supreme Court's time and attention. Simply put, the respondent must undo the petitioner's work.

The response should show that the law does not need clarification because the Utah Court of Appeals' opinion is

consistent with existing law. In essence, the response should trivialize the questions presented, attempting to remove any temptation the Utah Supreme Court might have to weigh in on the issues. And if there is uncertainty that requires resolution, the response should focus on why this case does not present an adequate vehicle for resolving that uncertainty. The case may not provide an adequate vehicle because, for example, it is fact-specific, the issue presented was not preserved in the trial court, or the petition advances a position contrary to the position the petitioner advanced in the Utah Court of Appeals. The response should focus on any reason this case may not allow the Utah Supreme Court to address the merits of the question presented.

### Other Filings

Although the petitioner may file a reply, the Utah Supreme Court will not wait to receive it. As soon as the respondent files its opposition, the clerk will distribute the petition and opposition for consideration. Utah R. App. P. 50(d). This means that a petitioner who wishes to file a reply should do so quickly – otherwise, some justices may already have made up their mind by the time your reply is distributed.

The respondent must also decide whether to file a cross-petition. Determining whether to file a cross-petition can be difficult. On the one hand, if the Utah Supreme Court grants the petition and the respondent did not file a cross-petition, the respondent's issues will not be before the court. On the other hand, filing a cross-petition might persuade the Utah Supreme Court that the case warrants review, increasing the chances that the petition will be granted. Having just obtained a partial victory in the Utah Court of Appeals, increasing the risk that the petition will be granted by filing a cross-petition may not be worth it.

Finally, the petitioner should consider whether an amicus brief will be helpful. If the Utah Court of Appeals' opinion will have important consequences on a particular group or industry, a brief from a representative of that group or industry might help to persuade the Utah Supreme Court that it should address the questions presented. *Id.* R. 50(f).

# *Reading Law: The Interpretation of Legal Texts*

*Reviewed by Ryan Tenney*

*Reading Law* is one thing, but reviewing it is another. After all, this is a book about textual interpretation, co-written by two authors who clearly know a thing or two about legal texts and how to interpret them.[1] Moreover, it has already been publicly reviewed by many others – perhaps most notably by Judge Richard Posner of the Seventh Circuit, whose well-publicized (and highly critical) review prompted well-publicized defenses from both authors.[2]

Rather than wading into those waters, I'll stick with the basics: namely, what is this book, and why should the typical Utah lawyer read it?

***Reading Law:***
***The Interpretation of Legal Texts***
**by Hon. Antonin Scalia and Bryan A. Garner**
**Published by Thomson/West (2012)**
**Hardcover**

*Reading Law* really has two distinct parts: one theoretical and one practical. The theoretical part of the book focuses on the proper approach to interpreting legal texts. It begins with the assertion that "[o]ur legal system must regain a mooring that it has lost: a generally agreed-on approach to the interpretation of legal texts."[3] It then proposes "fair-reading textualism" as the proper approach.[4] Under this approach, analysis of a legal text "begins and ends with what the text says and fairly implies" – i.e., that, within their "full context," the words in a legal text should be interpreted to "mean what they conveyed to reasonable people at the time they were written – with the understanding that general terms may embrace later technological innovations."[5]

Notably, *Reading Law's* fair-reading textualism differs somewhat from at least some conventional notions about what a "textualist" does or does not believe. For example, the book distinguishes its approach from "strict constructionism" – which it derides as a "hyperliteral brand of textualism" that should not "be taken seriously."[6] Instead, it suggests that "what is needed is reasonableness, not strictness, of interpretation."[7]

*Reading Law* directs its more pointed criticism, however, at interpretive approaches that would allow a court to consider things that are outside the text itself. For example, the book attacks "consequentialist" notions of textual interpretation – i.e., those that would allow a court to consider which interpretation might produce the most "sensible [or] desirable results."[8] It argues that such outcome-based approaches are a "distortion of our system of democratic government," insofar as they improperly allow non-elected judges to insert their "own policy views" into the law without accountability through the democratic process.[9]

The book also criticizes what it refers to as "purposivist" interpretive approaches – i.e., those that would allow consideration of a legislative body's perceived intent or purpose.[10] *Reading Law* squarely rejects the notion that "legislative intent" should be considered, instead insisting that it is a "pure fantasy" to "assume" that a multi-member legislative body would have developed a unified "view on the matter at issue" in a particular case.[11] As a corollary, the book argues that legislative history should not be used either, contending that its use is an ahistorical, thoroughly modern practice that "provides great potential for manipulation

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and distortion."[12] Thus, *Reading Law* insists that the interpretive question should not be what "the legislature meant" by a statute; rather, it proposes that the question should be limited to what the statute's words fairly mean.[13]

Of course, many disagree with this approach. Indeed, the Utah Supreme Court disagrees on at least some levels. It has often stated that its "primary purpose" when interpreting a statute is to "give effect to the legislature's intent."[14] Under the Utah Supreme Court's approach, the "best evidence of the legislature's intent is the plain language of the statute," but "legislative history and other interpretive tools" may be used if a statute's "plain meaning cannot be discerned from its text."[15]

Given this, one could wonder whether *Reading Law* has any practical value for a practicing Utah lawyer. The answer is yes, and this is where the book's second part comes in. There, the authors separately describe and illustrate fifty-seven canons of statutory construction as part of their effort to set the terms for future textual debates.[16]

Most of us have likely heard about the "canons of construction," but often in a vague or piecemeal way. Here, however, is an organized, detailed look at what these canons actually are and how they can be used. For each canon, the book begins with a concise statement of the overarching rule, follows with a short discussion of the canon's meaning and proper scope, and then concludes with an illustrative discussion of how a few noteworthy cases have applied it.

Many of the canons are familiar. For example, *Reading Law* discusses such well-known rules of interpretation as the "Whole-Text Canon" ("The text must be construed as a whole.");[17] the "Harmonious-Reading Canon" ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.");[18] and the "Ordinary Meaning Canon" ("Words are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense.").[19] But though these may be familiar, the book's discussion of them still has practical value – both by providing historical context, as well as additional authority to illustrate their proper application.

This is particularly true with respect to a few of the canons that receive more extensive treatment. *Ejusdem generis*, for example, is a canon that is commonly invoked, though often incorrectly.[20] *Reading Law* discusses its historical pedigree at length, and also offers a detailed explanation of how to properly use it.[21]

The book also discusses many lesser-known – but still potentially useful – canons. Perhaps you have used the "Nearest-Reasonable-Referent Canon," the "Prefatory-Materials Canon," or the "Repeal-of-Repealer Canon" in your practice. Or perhaps not. Either way, *Reading Law* defines and illustrates these and other canons that might prove helpful in a given case.

To be clear, *Reading Law* does not claim that its list of canons is exhaustive, nor does it claim that their use will solve all interpretive problems. To the contrary, most of the canons come with express qualifiers. For example, after discussing the "Presumption of Consistent Usage Canon" ("[A] word or phrase is presumed to bear the same meaning throughout a text."), the book notes that this canon is "often disregarded" by courts and is "particularly defeasible by context."[22] Similarly, the book notes that the "Surplusage Canon" ("[I]f possible, every word and every provision is to be given effect.") "cannot always be dispositive" because legislatures "sometimes…do repeat themselves and do include words that add nothing of substance," often "out of a flawed sense of style."[23] Similar examples

abound. For example, the book describes five separate limitations on *ejusdem generis*,[24] notes "two limiting conditions" for the absurdity doctrine,[25] and openly recognizes that the "Prefatory-Materials Canon" is subject to "two serious limitations."[26]

But rather than shying away from the resultant uncertainty, *Reading Law* instead candidly acknowledges it. Thus, the book makes it clear that it is not trying to offer a mechanical algorithm that would solve all problems; rather, it instead offers a preferred "*approach* to the interpretation of legal texts," as well as a list of canons that, depending on the case, may be helpful as tools for interpreting them.[27]

In a very real sense, *Reading Law* therefore operates on two different levels. The first is the 1,000-foot level, wherein the book seeks to definitively settle the question of what should – and should not – matter when interpreting a legal text. But the second level is more grounded. Even if the authors cannot persuade us all to agree with their particular version of textualism, the authors nevertheless hope that we will use their proffered set of interpretive tools when engaging in our own interpretive endeavors. Thus, even if the book does not definitively win the big-picture debate, it still seeks partial victory by at least framing its underlying terms.

In short, if you are looking for an explanation of the fair-reading textualist approach, *Reading Law* is clearly for you. But even if you are not – indeed, even if you whole-heartedly disagree with it – there is still a lot of practical value in the book. By gathering, organizing, and then defining the canons of interpretation, *Reading Law* ultimately acts as a how-to guide for textual interpretation. In this sense, it will be a valuable resource for anyone who works with legal texts.

1. One of the authors is, of course, the senior sitting justice of the United States Supreme Court, while the other is the editor-in-chief of *Black's Law Dictionary*.
2. Judge Posner's initial review can be found at: http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism (Aug. 24, 2012).

   Bryan Garner's response can be found at: http://www.lawprose.org/blog/?p=570 (Sept. 5, 2012).

   Justice Scalia responded in an interview, which was reported at: http://www.reuters.com/article/2012/09/18/us-usa-court-scalia-idUSBRE88H06X20120918 (Sept. 17, 2012).

   Judge Posner later responded to the responses. That response, as well as other commentaries on the book, may be found through a simple internet search.
3. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* xxvii (Thomson/West 2012).
4. *Id*. at 39; *see also id*. at 15–28, 33–41 (describing the approach in detail).
5. *Id*. at 16; *see also id*. at 33 ("The interpretive approach we endorse is that of the 'fair reading': determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.").
6. *Id*. at 39, 356.
7. *Id*. at 355.
8. *Id*. at 22.
9. *Id*. at xxviii, 22. The authors do not comment on whether this would be less objectionable in states in which the judges are elected on partisan ballots.
10. *Id*. at 18.
11. *Id*. at 376.
12. *Id*. at 376; *see also id*. at 369–90 (detailing the authors' objections to use of legislative history).
13. *Id*. at 291; *see also id*. at 394 ("We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said." (citation and internal quotation marks omitted)).
14. *Jaques v. Midway Auto Plaza, Inc*., 2010 UT 54, ¶ 14, 240 P.3d 769 (citation and internal quotation marks omitted); *see also Delta Canal Co. v. Frank Vincent Family Ranch, LC*, 2013 UT 54, ¶ 16 ("Our primary objective when interpreting statutes is to give effect to the legislature's intent." (citation and internal quotation marks omitted)).
15. *Reynolds v. Bickel*, 2013 UT 32, ¶ 10, 307 P.3d 570 (citation and internal quotation marks omitted); *see also Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 15, 267 P.3d 863 ("[W]hen statutory language is ambiguous – in that its terms remain susceptible to two or more reasonable interpretations after we have conducted a plain language analysis – we generally resort to other modes of statutory construction and 'seek guidance from legislative history' and other accepted sources." (citation omitted)).
16. The book's enumerated list includes seventy. But the last thirteen are not labeled as "canons," nor do they function as such. Rather, they are a response to what the authors perceive as thirteen "falsities" about the proper approach to textual construction. In essence, the last thirteen are an extension of the book's earlier discussion about the proper interpretive approach, rather than separate rules of interpretation.
17. Scalia & Garner, supra note 3, at 167–69.
18. *Id*. at 180–82.
19. *Id*. at 69–77.
20. *See id*. at 205–11 for examples; *see generally Turner v. Staker & Parson Cos*., 2012 UT 30, ¶¶ 14–16, 284 P.3d 600.
21. *See* Scalia & Garner, supra note 3, at 199–213.
22. *Id*. at 170–71.
23. *Id*. at 174–79.
24. *Id*. at 206–11.
25. *Id*. at 237–38.
26. *Id*. at 219–20.
27. *Id*. at xxvii (emphasis added), 7–9. Indeed, one of the first canons discussed in the book is the "Principle of Interrelating Canons," which posits that "no canon of interpretation is absolute," and that each canon "may be overcome by the strength of differing principles that point in other directions." *Id*. at 59.

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# *Securities Finders – More Confusing Than Ever Before*

*by Brad R. Jacobsen and Fred Peña*

About eight years ago, the Task Force on Private Placement Broker-Dealers issued a report recommending the use of a "simple" registration form and process (1010-EZ) for Private Placement Broker Dealers (PPBDs), or more commonly referred to as Finders. *Report and Recommendations of the Task Force on Private Placement Broker-Dealers*, Securities & Exch. Comm'n, June 20, 2005, *available at* http://www.sec.gov/comments/rr/offer-and-sale/offerandsale-16.pdf. This report prompted the article "Finding a Solution to the Problem with Finders in Utah" (the "Original Article"), because it was a sign of potential progress in the long struggle to settle registration concerns for Finders. *See* Brad R. Jacobsen & Olympia Z. Fay, *Finding a Solution to the Problem with Finders in Utah*, 19 Utah Bar Journal 38 (Mar/Apr 2006), *available at* http://webster.utahbar.org/barjournal/2006/04/finding_a_solution_to_the_prob.html. To understand this article more fully and the discussion below, the authors recommend that you review the Original Article.

Statements made by David Blass, Chief Counsel for the United States Securities and Exchange Commission's (SEC) Division of Trading and Markets, are another mark of potential progress along that path to settle the issue of registration for Finders. David W. Blass, *A Few Observations in the Private Fund Space*, Securities & Exch. Comm'n, (Apr. 5, 2013), *available at* http://www.sec.gov/news/speech/2013/spch040513dwg.htm. Accordingly, Blass's statements have prompted this follow-up to the Original Article.

Blass commented that the Division of Trading and Markets staff (the Staff) has been considering options, from exempting Finders from registration, *see* Letter sent from the ABA Private Placement Broker Task Force to the SEC, *available at* http://www.sec.gov/comments/265-27/26527-26.pdf (last visited September 27, 2013), to providing simplified FINRA registration, Blass, *A Few Observations in the Private Fund Space*. Blass believes the Staff has made great strides in relation to the simplified registration option due to the SEC's responsibilities under the JOBS Act to provide for simplified funding portal regulations. *Id.*; *see also Jumpstart Our Business Startups Act*, Pub. L. No. 112-106, 126 Stat. 306 (codified as amended in scattered sections of title 15 of the United States Code), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf.

Unfortunately, for Finders and the issuers who use them, Blass's statements are merely a dream of possible future resolution. Reality is that standards for when a Finder must register as a broker are uncertain because of conflict between the SEC and courts who have heard Finder cases. For an attorney, counseling a client who either is or wants to use a Finder has become more difficult. The risk associated with providing counsel comes from the fact that the SEC has no official stance on registration for Finders and there is discord between Staff comments, No-Action letters, and court rulings. If we advise clients to follow the latest Staff comments or No-Action letters, there is little to no room

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for Finders at all. If we advise clients to follow the most recent court proceedings, we could open the client up to SEC action, which is undesirable even if our client obtains a favorable outcome in any proceeding.

Furthermore, like with any securities issue, there are two levels of analysis: what is happening at the federal level and what is happening at the state level. This article provides an in-depth look at the main events that have changed the Finder landscape at the federal level and provides a brief follow-up to Finder registration in the State of Utah.

In brief, the SEC spurned the *Anka* No-Action letter and has taken a stance for a more limited role for Finders. *See* Brumberg, Mackey & Wall, PLC., SEC No-Action Letter, 2010 WL 1976174 (May 17, 2010), *available at* http://www.sec.gov/divisions/marketreg/mr-noaction/2010/brumbergmackey051710.pdf. The courts have decisively pushed back against the SEC's limited-role stance in favor of a multi-faceted test to determine the need to register. *See, e.g., SEC. v. Kramer*, 778 F.Supp.2d 1320 (M.D. Fla. 2011). The State of Utah has made no comment on the debate and still prominently posts the *Anka* No-Action letter on its site library page as the role model to determine if a Finder's activities should require licensure.

## THE SEC MOVES AWAY FROM *ANKA*

Good advice requires good knowledge. A thorough knowledge of the SEC and its choices can help attorneys understand which situations are more likely to bring SEC action, which leads to giving better advice to clients. The SEC's and its Staff's stance on Finders is clear from statements made during the 27th Annual SEC Government-Business Forum on Small Business Capital Formation in April 2013 (the Forum), U.S. Securities and Exchange Commission Twenty-Seventh Annual SEC Government-Business Forum on Small Business Capital Formation Program Record of Proceedings, 154–60 (Nov. 20, 2008) (hereinafter, "Forum"), http://www.sec.gov/info/smallbus/sbforumtrans-112008.pdf, and in a No-Action letter written to the Brumberg, Mackey & Wall law firm (Brumberg), *Brumberg*, 2010 WL 1976174, at *1–2.

### Statements by Staff

It is unclear why the Staff spoke out against Anka; whether it was because the Staff is trying to distance itself from the *Anka* No-Action letter, because the Staff was tired of Finders incorrectly applying and relying on the *Anka* No-Action letter, or because of some other reason is irrelevant. What matters is that it happened: Special Counsel Fausti spoke out against Anka, *see* Forum, at 156–57, and now the funding universe is aware that the Staff does not fully follow the *Anka* No-Action letter and that relying on it could be detrimental for issuers and Finders.

A complete grasp of the Staff's view cannot be obtained by Fausti's statements alone, but they serve as a foundation and partial piece of the Staff's stance. Fausti, while discussing the concept of making introductions, said, "We have concerns about sales abuses that could happen and that's why we want you under the umbrella of broker-dealer regulation." *Id*. at 158. So in order to prevent sales abuses, the Staff wants to incorporate as many people under the broker-dealer regulation as possible. This would explain why the Staff's interpretation of the statute is broad.

When discussing the definition of a broker under (a)(4)(A) of the Exchange Act, Fausti identifies two steps in the analysis for registration: (1) is someone "engaged in the business" of (2) "[e]ffecting transactions" in securities (for the account of others)? *Id*. at 154; *see also* 15 U.S.C. § 78c(a)(4)(A) (2012). According to Fausti, persons are "engaged in the business" when they are receiving compensation because compensation encourages them to get involved. Forum, at 155, 158. At first, she just mentions transaction-based compensation but then later includes flat fees as causing engagement because in reality "people are out there to make money and to be in the business." *Id*. Another way of being considered engaged in the business is based on the regularity of involvement. *Id*. at 155.

As for "[e]ffecting transactions," Fausti describes someone effecting transactions as someone who is involved in "anything along the chain, all the way from initial solicitation of an investor to the completion of a transaction." *Id*. She includes making introductions as part of initial solicitations because by making the introduction a finder is implicitly recommending the investment and issuer to the investor. *Id*. at 157.

Lastly, Fausti states in passing that under this current view of broker-dealers, she does not think the Staff would issue the *Anka* No-Action letter again. *Id*. This is important to note because, according to the Staff view she describes, we do not see any support for rejecting Anka. Under this current approach, Anka would not have effected a transaction because he never made an introduction, thus never implicitly recommending the investment nor the issuer, and thus never making a solicitation. According to the fee perspective, Anka would have been engaged but not in

a way that could cause fear of sales abuses. Regardless, without effecting the transaction through solicitation or any other way, Anka should be granted relief again – that is, unless there is something else the Staff is focusing on.

This other *thing* becomes clear two years later, in 2010, when the Staff issues the *Brumberg* No-Action letter.

### The Brumberg No-Action letter

The *Brumberg* No-Action letter is the nail in Anka's coffin according to the SEC. Brumberg, Mackey & Wall, PLC., SEC No-Action Letter, 2010 WL 1976174 (May 17, 2010), *available at* http://www.sec.gov/divisions/marketreg/mr-noaction/2010/brumbergmackey051710.pdf. Here are the main facts in the Brumberg situation:

1. Brumberg, a law firm, would assist Electronic Magnetic Power Solutions, Inc. (EMPS) "in the acquisition of funding" and "would be compensated upon the closing of the financing based upon a percentage of the amounts raised."

2. The fee arrangement between the two entities was agreed to before commencement of the relationship.

3. The level of assistance Brumberg would provide to EMPS would be limited at introducing "EMPS to a limited number of its contacts who may have an interest in providing funds for financing."

4. Brumberg would not be involved in negotiations.

5. Brumberg would not provide information about EMPS that could be used in negotiations to any of its connections.

6. Brumberg would not have responsibility for any terms, conditions, or provisions of any agreement between EMPS's and Brumberg's contacts.

7. Brumberg would not make any recommendations concerning the terms, conditions, or provisions of any agreement between EMPS's and Brumberg's contacts.

8. Brumberg will not provide assistance in any financing transaction between EMPS and the contacts.

*Id*. at *3. By comparing this set of facts to those present in the *Anka* No-Action letter, the only apparent difference is that in *Anka*, Anka made no contact with the connections about the offering, and in *Brumberg*, the law firm made the introductions.

Unfortunately for Brumberg, the Staff responds to this situation in accordance with Fausti's description of the Staff's opinion. Unfortunately for the industry, the Staff is not clear in its reasoning for rejecting the request for a No-Action ruling. The confusion comes from the fact that the Staff gives two distinct and incompatible reasons for rejecting the request – the first statement providing the *something else* missing from Fausti's previous comments.

First, after defining the term "broker" and identifying the requirement for registration, the Staff made an assertion that receiving "transaction-based compensation in connection with these activities," (the activities causing need for registration), "is a hallmark of broker-dealer activity." *Id*. at *1. Then the Staff made an assertion that because of the definition of a broker, the requirements to register, and the hallmark nature of transaction-based compensation, "any person receiving transaction-based compensation in connection with another person's purchase or sale of securities typically must register as a broker-dealer or be an associated person of a registered broker-dealer." *Id*. Aha! Now the reason for rejecting *Anka* becomes more clear. The Staff appears to take the position that the receipt of transaction-based compensation is evidence of *both* being engaged in the business and effecting transactions.

And this is how many have interpreted the *Brumberg* No-Action letter – the presence of transaction-based compensation alone would trigger registration requirements. *See* Ernest E. Badway & Daniel A. Schnapp, *Is the Tide Turning Against the SEC in Favor of Finders?*, Securities Litigation Section, American Bar Ass'n (Nov. 17, 2011), *available at* http://apps.americanbar.org/litigation/committees/securities/email/fall2011/fall2011-tide-turning-against-sec-favor-finders.html. This may in fact be what the Staff intended to convey, that receiving transaction-based compensation satisfies the "engaged in" prong because of the incentive to sell, and its presence would also satisfy the "effecting transactions" prong because transaction-based compensation makes someone a salesman, who presumably, by definition, is effecting the transaction. The problem with the *Brumberg* No-Action letter is that it does not stop there.

The second reason the Staff gives for denying relief begins with the Staff's summary of the scenario:

> [Brumberg] would introduce to EMPS individuals

> and entities who 'may have an interest'[1] in providing financing to EMPS through investments in equity or debt instruments of EMPS. In return, EMPS would pay [Brumberg] an amount equal to a percentage of the gross amount EMPS raised as a result of [Brumberg's] introductions.

*Brumberg*, at *2.

The Staff assumes that by saying they will introduce people who "'may have an interest'" in investing, Brumberg expects to pre-screen and pre-sell the investors. This pre-screening and pre-selling satisfies, in the mind of the Staff, the "effecting transactions" prong. True to form, the Staff believes the receipt of transaction-based compensation satisfies the "engaged in" prong. Interestingly, the Staff gives a reason, aside from being a hallmark of a salesman, that transaction-based compensation leads to being engaged in the business. The Staff states that by having an interest in the outcome of the issuance, the finder obtains a "'salesman's stake'" in the issuance that creates a "heightened incentive for [the Finder] to engage in sales efforts." *Id*.

These two reasons create confusion because one implicates the use of a one-prong test and the other a two-prong test – a two-prong test consistent with Fausti's description. Relying on Fausti's statements and the *Brumberg* No-Action letter could require the opinion that all Finder activity is illegal, or that transaction-based compensation must be avoided, or that a Finder should avoid making introductions or speaking with the potential investor.

## THE COURTS INSIST ON A MULTI-FACTOR TEST

### *SEC v. Kramer*

Just a little under a year after the *Brumberg* No-Action letter, the SEC brought suit against Kenneth Kramer, a person who the SEC insisted was a broker, but who claimed to be a finder. *SEC. v. Kramer*, 778 F.Supp.2d 1320, 1337–38 (M.D. Fla. 2011). The charges against Kramer are in relation to his relationship with a single issuer over a period of a couple of years. Kramer found out about the Skyway company through a business associate, Mr. Baker. Baker and Kramer's relationship consisted of an agreement to share investment opportunities with each other and to share revenue from those opportunities. *Id*. at 1330.

Kramer received compensation from both Skyway and Baker while introducing others to Skyway and the investment opportunity. *Id*. at 1330–31. Initially, Kramer introduced Nick Talib, a broker, to the president of Skyway, Kovar. *Id*. at 1331. Kramer's involvement consisted of picking up Talib at the airport in Florida and driving him to a restaurant to meet with Baker and Kovar. *Id*. Kramer was not a party to the negotiations that took place but instead took a tour of the Skyway facility. *Id*. Kramer eventually received up to $200,000 from Skyway because of the introduction he made. *Id*. This compensation was paid based on an understanding that Skyway had with Kramer to pay him if someone he introduced to Skyway eventually made an investment in the company. *Id*.

Kramer also received compensation from Baker based on a separate agreement not involving Skyway directly. *Id*. at 1332. This agreement was with Baker and consisted of Kramer pointing people to Skyway. *Id*. at 1332–33. Those individuals would purchase shares of Skyway through a broker, if they were interested, and then Kramer would report the investment to Baker. *Id*. at 1333. Baker would then pay Kramer, and others making introductions, with his own shares of Skyway. *Id*. The court found that as part of this agreement Kramer had told people that Skyway was a good company and a good investment and told them to check out Skyway's website. *Id*. at 1332.

> *"Counsel should be very careful in advising clients as to the types of activities that are permitted in connection with an offering of securities."*

In analyzing whether Kramer was a broker in either of these situations, the court notes that the SEC bears the burden to prove he was a broker, and needed to register, by a preponderance of the evidence. *Id*. at 1333. The court took the position that because the statutes do not define either "effecting transactions," or "engaged in the business," there are "an array of factors [that] determine[] whether a person qualifies as a broker under Section 15(a)." *Id*. at 1334 (internal quotation marks omitted) The court enumerates a six-factor test from *SEC v. Hansen*, 1984 U.S. Dist. LEXIS 17835, 1984 WL 2413, 10 (S.D.N.Y. 1984), four more factors from *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, 2006 U.S. Dist. LEXIS 68959, 2006 WL 2620985, 6 (D.Neb. 2006), and "the most important factor" of regularity from *SEC v. Bravata*, 2009 U.S. Dist. LEXIS 64609, 2009 WL 2245649, *2 (E.D.Mich. 2009). *Kramer*, 778 F.Supp.2d at 1334–36.

The six-factor test from *Hansen* consists of whether th[e] person[:]

> 1) Is an employee of the issuer; 2) received a commission as opposed to a salary; 3) is selling, or previously sold, the securities of other issuers; 4) is involved in negotiations between the issuer and the investor; 5) makes valuations as to the merit of the investment or gives advice; and 6) is an active rather than passive finder of investors.

1984 U.S. Dist. LEXIS 17835, 1984 WL 2413, at *10.

The four-factors that indicate broker activity in *Cornhusker* are whether a person: (1) analyzes the financial needs of an issuer, (2) recommends or designs the financing method (the deal structure), (3) discusses details of securities transactions, and (4) recommends an investment. 2006 U.S. Dist. LEXIS 68959, 2006 WL 2620985, at *6. The court in *Bravata* considers the "most important factor in determining whether an individual or entity is a broker" is the "regularity of participation in securities transactions at key points in the chain of distribution." 2009 U.S. Dist. LEXIS 64609, 2009 WL 2245649, at *2.

Other cases that the *Kramer* court looks to include *SEC v Corporate Relations Group*, 2003 WL 25570113 (M.D. Fla. 2003), in which a company, not its employees, were held to have acted as unregistered brokers and *SEC v. M&A West*, 2005 WL 1514101 (N.D. Cal 2005), where an individual drafted documents, orchestrated transactions, identified potential merger targets, and got paid a transaction-based fee in cash and securities, and was held not to have acted as an unregistered broker because each of those activities were normally performed by other professionals, who have never been required to register as a broker. *See SEC. v. Kramer*, 778 F.Supp.2d 1320, 1335–36 (M.D. Fla. 2011).

The court cites to a "series of cases" that came after *M&A West* that help to carve out the finder's exception. *Id*. at 1336. These cases stand for the proposition that "'[m]erely bringing together the parties to transactions, even those involving the purchase and sale of securities, is not enough to warrant broker registration under Section 15(a)." *Id*. (citation and internal quotation marks

omitted). Instead, there must be evidence that demonstrates "involvement at 'key points in the chain of distribution,' such as participating in the negotiation, analyzing the issuer's financial needs, discussing the details of the transaction, and recommending an investment." *Id.* (quoting *Cornhusker*, 2006 U.S. Dist. LEXIS 68959, 2006 WL 2620985, at *6. The court maintains this position even if the finder receives transaction-based compensation stating that the SEC should be fine with it also according to a string of No-Action letters issued by the Staff. *Id.*

The court then describes the stance of each party, the SEC trying to define Kramer's actions in terms of the factors and Kramer trying to define his actions as different from or distinct to the factors. *Id.* at 1337.

The SEC argues that Kramer:

> (1) received transaction-based compensation, (2) actively solicited investors (by distributing promotional material and directing people to Skyway's web site), (3) advised investors about Skyway (by telling people that Skyway was a good company and suggesting that people read Skyway's press releases), (4) used a "network" of associates to promote Skyway, (5) demonstrated a regularity of participation (through the money that Kramer earned and the two years over which the conduct occurred), (6) promoted the shares of other issuers, and (7) earned commissions rather than a salary as a Skyway employee.

*Id.*

Kramer argues that he:

> (1) never sold a share of stock, (2) never "engaged in the business of effecting securities transactions for the accounts of others," (3) talked about investments in the manner that people talk about sports or politics, (4) talked to only some of Kramer's relatives and close friends about Skyway, (5) acted as a finder by introducing Talib to Skyway, and (6) reported purchases of Skyway shares to Baker because Baker requested the information and because Baker agreed to pay Kramer (with Baker's Skyway shares) for collecting the information.

*Id.* at 1337–38.

In terms of Kramer's involvement with Talib's introduction to Skyway, the court followed the chain of cases that indicated an introduction is not enough without involvement in key moments of the transaction. *Id.* at 1339. Since Kramer took a tour while everyone else was negotiating the deal and Kramer only brought the parties together, the court does not find that he acted as an unregistered broker for having received transaction-based compensation. *Id.*

In terms of Kramer's involvement with his friends and family, the court compared his situation to the individuals in Corporate Relations Group (CRG), where the company was held to have acted as an unregistered broker, but not the employees of the firm. *Id.* at 1339–40. Because Kramer was working for Baker, received commissions from Baker, and did not contact or encourage a broker to sell shares, nor field investor inquires, nor counsel an investor to purchase shares the court refused to treat him differently than the individuals in CRG. *Id.* at 1340.The court indicates that it holds this way since the SEC failed to provide sufficient "evidence from which to conclude that Kramer's conduct in this instance is somehow materially different from a BRE in Corporate Relations Group." *Id.*

### *Maiden Lane Partners, LLC v. Perseus Realty Partners, G.P. II, LLC*

In this case, Maiden Lane found and introduced potential investors to Perseus. *Maiden Lane Partners, LLC v. Perseus Realty Partners, G.P. II, LLC*, 2011 WL 2342734, *1 (Mass. Super. 2011). Perseus did not pay Maiden Lane the agreed

upon transaction-based fee for these services because Perseus argued that Maiden Lane was an unregistered broker and filed for summary judgment. *Id*. at *2–3. The court reiterated that introducing parties was not enough and that involvement in "key points in the chain of distribution," including participating in the negotiations, analyzing the issuer's needs, discussing details of the transaction, and recommending an investment, was necessary. *Id*. at *4 (citation and internal quotation marks omitted).The court also reiterated that this finding of involvement is necessary even when the fee is a transaction-based fee. *Id*. at *5. Maiden Lane asked another individual to frequently communicate with a potential investor until that investor eventually did invest. *Id*. The record did not show enough to support that Maiden Lane had acted as an unregistered broker to permit summary judgment in Perseus's favor. *Id*. at **5–6.

The important points of fact from these cases are that transaction-based compensation is not enough to merit broker registration and that evidence of participation in "key points in the chain of distribution" are necessary to require broker registration.

## THE SEC MAKES NO MOVE

The SEC appealed the *Kramer* decision and, later in 2011, received an okay from the court to proceed with the appeal, but according to documents and history records on PACER, *SEC v. Skyway* (the main case involving all parties mentioned in *SEC v. Kramer*) was dismissed for lack of jurisdiction in the 11th Circuit. Since *Kramer*, there has been little action in clarifying the stance the SEC will take against potential violators.

Blass's comments about Finders unfortunately fail to resolve the conflict between the SEC and the courts but instead provide insight indicating that the SEC may have realized it went too far with *Brumberg* and that it may have accepted, at least in part, the decision of the court in *Kramer*. However, without any official or unofficial statement from the SEC or Staff, attorneys must expect the SEC to follow *Brumberg* and the courts to follow *Kramer* at the national level.

## UTAH LAW REGARDING FINDERS

The Utah Division of Securities commented for a prior article, that it would follow *Anka* even though it did not like the letter. *See* Brad R. Jacobsen & Olympia Z. Fay, *Finding a Solution to the Problem with Finders in Utah*, 19 Utah Bar Journal 38 (Mar/Apr 2006), *available at* http://webster.utahbar.org/barjournal/2006/04/finding_a_solution_to_the_prob.html. The Division did not make any comment for this article about changes with *Brumberg* and *Kramer*, but the Anka No-Action letter continues to be the only federal No-Action letter displayed in "Other Industry Letters" on the Division's website. *Securities Library, Open Letters & White Papers*, Utah Div. of Secs., http://www.securities.utah.gov/industry/library_openletters.html (last visited December 11, 2013). Extra caution in following the rules correctly in Utah should be emphasized as the use of an unlicensed broker-dealer in Utah to raise funds (that doesn't qualify under the correct Finder exception) provides investors a right of rescission for up to five years following issuance. Utah Code Ann. § 61-1-22 (LexisNexis Supp. 2013).

## CONCLUSION

The following general principles may be inferred from the analysis above:

### Still Room For Finders

The SEC's very limited position on Finders is not being enforced carte blanche by the judiciary. There still appears to be limited activities that Finders may engage in to receive compensation.

### More Action to Come

The SEC will likely continue to push for a more limited approach for Finders. While courts are pushing back on the SEC's limited position, the SEC will likely take enforcement action against those seeking to fall within the nebulous exemptions of a Finder. Win or lose on the merits, SEC enforcement actions are onerous and expensive.

### Facts and circumstances

The determination of whether or not a party is involved in activities that require registration as broker will always be made on the particular facts and circumstances of the situation. Counsel should be very careful in advising clients as to the types of activities that are permitted in connection with an offering of securities.

1. The authors believe that this phrase could have another meaning different from the SEC's interpretation. It could be the Finder's way of disclaiming that everyone introduced would eventually buy. For the SEC's interpretation to be accurate, Brumberg would have needed to say that they would introduce people that they believed to be interested. The SEC's interpretation is evidence of reaching. It interprets it in a way favorable to its goals even if it is not the most logical interpretation.


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## *Commission Highlights*

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the December 6, 2013 Commission Meeting held at the Law & Justice Center in Salt Lake City.

1. The Bar Commission approved the Bar Database Committee's Report and Recommendations to contract with Euclid Technologies Solution for the general AMS system; New Dawn for the disciplinary system, and Box Networks (Synergy) for the admissions system and agreed that implementation should be coupled with an evaluation of the possible reduction of staff.

2. The Commission designated C. Markley Arrington as the Bar's representative to the Children's Justice Center Board. Mr. Arrington will serve a four-year term on the Board, replacing Robert Steele.

3. The Commission approved the expenditure of $60,000 from the Public Education budget for new billboard project as presented by Sean Toomey. The Bar will be placing billboards throughout the state this spring highlighting the advantages of talking to a Utah lawyer about specific legal issues. More and more people are completing forms on the Internet without the counsel of an attorney, and the resulting wills, powers of attorney, and divorce papers are often not customized to the unique circumstances of each individual. Others are falling victim to scams when facing legal challenges such as foreclosures. With the Bar's new Modest Means Lawyer Referral program, everyone is able to afford an attorney, even if just for a short coaching session. Fifteen percent of the billboards will promote the lawyer referral program.

4. The Commission approved the Minutes of October 25, 2013 Commission Meeting via the Consent Agenda.

5. The Commission formalized the current CLE Department policy on co-sponsorships, revenue sharing criteria, and the use of e-mail addresses via the Consent Agenda. Third parties may co-sponsor educational events with the CLE Department in areas not currently being met by the CLE Department. Revenue will be shared on a 50/50 basis. Events not co-sponsored by the Bar may be listed on the Bar CLE online calendar. Outside providers who are not co-sponsoring with the Bar may otherwise purchase advertising in the Utah Bar Journal. Events not co-sponsored by the Bar will not be advertised via the Bar e-mail system according to the Bar's policy on privacy of e-mail accounts.

6. The Commission approved the Client Security Fund recommendations via the Consent Agenda.

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

## *Food and Clothing Drive Participants and Volunteers*

We would like to thank all participants and volunteers for their assistance and support in this year's Food and Clothing Drive. 2.5 tons of food, clothing, and toiletries were collected and delivered for immediate distribution, in addition to the many generous cash donations to specific shelters and organizations that we have supported over the years.

Thanks also goes to all of the individual contacts that we made this year. We look forward to working with you again next year. Thank you all for your kindness and generosity.

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# New Utah State Bar Ethics Advisory Opinion Committee Opinions

## Opinion No. 13-03, Issued September 11, 2013

**ISSUE**

Whether a lawyer violates his or her duty to diligently represent a client who wishes to appeal a juvenile court's order but refuses to sign the Notice of Appeal (which will be dismissed without appellant's signature pursuant to statute) due to her diminished capacity.

**OPINION**

Under Rule 1.14, if the lawyer believes the client is at risk of substantial harm unless action is taken and cannot adequately act in the client's own interest, the lawyer should take reasonable steps to protect the client's interests.

The full text of this opinion can be found at: www.utahbar.org/ethics-advisory-opinions/ethics-advisory-opinion-no-13-03/.

## Opinion Number 13-04, Issued September 30, 2013

**ISSUE**

The question before the Committee concerns federal criminal law practice in the District of Utah. Although it may have general application, this Opinion is confined to that arena. The question is whether it is ethical under the Utah Rules of Professional Conduct for a criminal defense attorney (hereinafter, "the attorney") to advise a client/defendant (hereinafter, "the client") to negotiate and enter into a plea agreement whereby the client, as an integral part of his plea of guilty, waives all post-conviction claims the client may have, including claims of ineffective assistance of the attorney, except for claims of ineffective assistance of counsel based upon negotiating or entering in to the plea or waiver.

**OPINION**

The Committee concludes that it is a violation of Rule of Professional Conduct 1.7 for an attorney to counsel his client to enter into a plea agreement which requires the client to waive the attorney's prospective possible ineffective assistance at sentencing or other postconviction proceedings.

The full text of this opinion can be found at: www.utahbar.org/ethics-advisory-opinions/ethics-advisory-opinion-13-04/.

## Opinion Number 13-05, Issued September 10, 2013

**ISSUE**

To what extent may an attorney participate in an "on-site" fee/retainer funding program to obtain and finance attorney retainer or litigation funds?

**OPINION**

A lawyer may not participate in an "on-site" fee/retainer funding program, under the circumstances set forth herein, as such would violate the provisions of Rules of Professional Conduct 1.7(a) (Conflict of Interest: Current Clients), Rule 1.8(a) (Acquire a pecuniary interest adverse to the client). The lawyer may, however, obtain a waiver of the conflict by complying with the terms of Rules 1.7(b) and 1.8(a), including making full disclosure and obtaining "informed consent" confirmed in writing. Adequate measures must also be taken to safeguard the lawyer's independent judgment under Rule 5.4(c) (A third party may not direct or regulate the lawyer's professional judgment.)

The full text of this opinion can be found at: www.utahbar.org/ethics-advisory-opinions/ethics-advisory-opinion-13-05/.

# *Notice of Bar Commission Election First and Third Divisions*

Nominations to the office of Bar Commissioner are hereby solicited for three members from the Third Division and one member from the First Division, each to serve a three-year term. 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 C. Baldwin, Executive Director, no later than February 3, 2014, by 5:00 p.m.

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

## *Fall Forum Award Recipients*

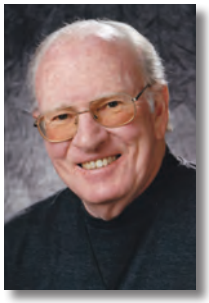
Congratulations to the following who were honored with awards at the 2013 Fall Forum:

**Robert Austin**
*Community Member of the Year*

**Brent H. Bartholomew**
*Outstanding Mentor*

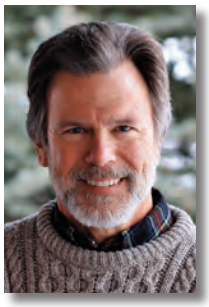
**Hugh Cawthorne**
*Outstanding Mentor*

**Elizabeth Elon Thompson**
*Pro Bono Attorney of the Year*



**William S. Britt**
*Professionalism*

## *2013* Utah Bar Journal *Cover of the Year*



The winner of the *Utah Bar Journal* Cover of the Year award for 2013 is first-time contributor, Jeff Kramer, of Salt Lake City, Utah. His photo, *Gooseneck of the Colorado River near Moab* appeared on the cover of the Mar/Apr 2013 issue.

Congratulations to Jeff, and thanks to the nearly 100 contributors over the past twenty-five plus years who have provided photographs for the covers.


The *Bar Journal* editors encourage members of the Utah State Bar or Paralegal Division, who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal*, to submit their photographs for consideration. For details and instructions, please see page 4 of this issue. (**A tip for prospective photographers:** preference is given to high resolution portrait (tall) rather than landscape (wide) photographs. We are currently in particular need of fall and winter scenes.)

## *2014 Spring Convention Awards*

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2014 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession.

Award applications must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, January 20, 2014. You may also fax a nomination to (801) 531-0660 or email to adminasst@utahbar.org.

1. **Dorathy Merrill Brothers Award** – For the Advancement of Women in the Legal Profession.

2. **Raymond S. Uno Award** – For the Advancement of Minorities in the Legal Profession.

View a list of past award recipients at: http://www.utahbar.org/bar-operations/history-of-utah-state-bar-award-recipients/.

## *MCLE Reminder – Even Year Reporting Cycle*

**July 1, 2012 – June 30, 2014**

Active Status Lawyers complying in 2014 are required to complete a minimum of 24 hours of Utah approved CLE, which shall include a minimum of three hours of accredited ethics. **One of the ethics hours shall be in the area of professionalism and civility.** A minimum of twelve hours must be live in-person CLE. Please remember that your MCLE hours must be completed by June 30th and your report must be filed by July 31st. For more information and to obtain a Certificate of Compliance, please visit our website at www.utahbar.org/mcle.

If you have any questions, please contact:

Sydnie Kuhre, MCLE Director
sydnie.kuhre@utahbar.org
(801) 297-7035

Ryan Rapier, MCLE Assistant
ryan.rapier@utahbar.org
(801) 297-7034.

# The Utah State House of Representatives

**Patrice Arent (D)** – District 36 (Elected to House: 2010. Prior service in Utah House & Senate: 1/1997–12/2006)

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

**Committee Assignments:** Appropriations – Business, Economic Development & Labor. Standing – Education; Judiciary; Ethics; Legislative Information Technology Steering.

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

**F. LaVar Christensen (R)** – District 32 (Elected to House: 2002)

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

**Committee Assignments:** Appropriations – Public Education. Standing – Judiciary; Vice Chair, Health & Human Services.

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

**Brian Greene (R)** – District 57 (Elected to House: 2012)

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

**Committee Assignments:** Appropriations – Natural Resources, Agriculture & Environmental Quality. Standing – Health & Human Services; Judiciary.

**Practice Areas:** Administrative Law, Government Affairs & Public Policy, and Commercial Real Estate Transactions.

**Craig Hall (R)** – District 33 (Elected to House: 2012)

**Education:** B.A., Utah State University; J.D., Baylor University

**Committee Assignments:** Appropriations – Executive Offices & Criminal Justice. Standing – Judiciary; Political Subdivisions.

**Practice Areas:** Litigation and Intellectual Property.

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

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

**Committee Assignments:** Appropriations – Natural Resources, Agriculture & Environmental Quality. Standing – Vice Chair, Rules; Natural Resources, Agriculture & Environment; Vice-Chair, Government Operations.

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

**Mike Kennedy (R)** – District 27 (Elected to House: 2012)

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

**Committee Assignments:** Appropriations – Public Education. Standing – Health & Human Services; Political Subdivisions.

**Practice Areas:** "Of Counsel," Bennett Tueller Johnson & Deere

**Brian King (D)** – District 28 (Elected to House: 2008)

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

**Committee Assignments:** Appropriations – Executive Offices & Criminal Justice. Standing – Ethics; Rules; Judiciary; Revenue & Taxation.

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

**Daniel McCay (R)** – District 41 (Appointed to House: 2012, Re-Elected 2012)

**Education:** Bachelors and Masters, Utah State University; J.D., Willamette University

**Committee Assignments:** Appropriations – Social Services. Standing – Education; Transportation.

**Practice Areas:** Real Estate Transactions, Land Use, and Civil Litigation.

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

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

**Committee Assignments:** Appropriations – Higher Education. Standing – Judiciary; Revenue & Taxation.

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

**Mike McKell (R)** – District 66 (Elected to House: 2012)

**Education:** B.A., Southern Utah University; J.D., University of Idaho

**Committee Assignments:** Appropriations – Natural Resources, Agriculture & Environmental Quality. Standing – Natural Resources, Agriculture & Environment; Public Utilities & Technology..

**Practice Areas:** Personal Injury, Insurance Disputes, and Real Estate.

**Merrill Nelson (R)** – District 68 (Elected to House: 2012)

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

**Committee Assignments:** Appropriations – Executive Offices & Criminal Justice; Retirement. Standing – Retirement & Independent Entities; Natural Resources, Agriculture & Environment; Economic Development & Workforce Services.

**Practice Areas:** Kirton McConkie – Appellate and Constitution, Risk Management, Child Protection, Adoption, Health Care, and Education.

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

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

**Committee Assignments:** Appropriations – Public Education; Retirement. Standing – Retirement & Independent Entities; Education; Government Operations.

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

**Lowry Snow (R)** – District 74 (Appointed to House: 2012; Re-Elected 2012)

**Education:** B.S., Brigham Young University; J.D., Gonzaga University School of Law

**Committee Assignments:** Appropriations – Business, Economic Development & Labor. Standing – Education; Judiciary.

**Practice Areas:** Snow Jensen & Reece – Real Estate, Civil Litigation, Business, and Land Use Planning.

**Keven J. Stratton (R)** – District 48 (Appointed to House: 2012, Re-Elected 2012)

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

**Committee Assignments:** Appropriations – Executive Offices & Criminal Justice. Standing – Education; Law Enforcement & Criminal Justice.

**Practice Areas:** Stratton Law Group PLLC – Business, Real Estate, and Estate Planning.

**Earl Tanner (R)** – District 43 (Elected to House: 2012)

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

**Committee Assignments:** Appropriations – Social Services. Standing – Transportation; Revenue & Taxation.

**Practice Areas:** Tanner & Tanner, P.C.: Trusts and Estates, Real Estate, Tax, Corporate, and Litigation.

# *The Utah State Senate*

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

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

**Committee Assignments:** Appropriations – Executive (Co-Chair), Public Education; Infrastructure & General Government. Standing – Government Operations & Political Subdivisions; Judiciary, Law Enforcement & Criminal Justice; Ethics.

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

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

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

**Committee Assignments:** Appropriations – Public Education; Executive Offices & Criminal Justice. Standing – Education; Judiciary, Law Enforcement & Criminal Justice; Rules.

**Practice Area:** Eagle Mountain Properties of Utah, LLC.

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

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

**Committee Assignments:** Appropriations – Public Education; Higher Education. Standing – Education; Judiciary, Law Enforcement & Criminal Justice.

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

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

**Committee Assignments:** Appropriations – Natural Resources, Agriculture & Environmental Quality; Higher Education. Standing – Business & Labor; Revenue & Taxation; Rules Chairman.

**Practice Areas:** Corporate, Estate Planning, and Tax.

**Todd Weiler (R)** – District 23 (Appointed to Senate: 2012; Re-Elected: 2012)

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

**Committee Assignments:** Appropriations – Social Services. Standing – Business & Labor; Judiciary, Law Enforcement & Criminal Justice; Retirement & Independent Entities; Rules.

**Practice Areas:** Civil Litigation and Business Law.

# *Pro Bono Honor Roll*

Ahlstrom, Charles – GAL Case

Alig, Michelle – Tuesday Night Bar

Allred, Clark – Consumer Case

Amann, Paul – Tuesday Night Bar

Anderson, Doug – Family Law Clinic

Anderson, Michael – Tuesday Night Bar

Andrade, Rusty – Domestic Case

Angelides, Nicholas – Senior Cases

Archibald, Nathan – Tuesday Night Bar

Atwood, Jeremy – Consumer Case

Backman, James – Domestic Case

Bagley, John – Bankruptcy Case

Bailey, Rhonda – Domestic Case

Ball, Matt – Tuesday Night Bar

Ball, Ron – Housing Case

Barnett, Dan – Tuesday Night Bar

Baron, Bryan – Domestic Cases

Barrett, Genny – Domestic Case

Batty, Jaise – Domestic Cases, SMAV Case

Beckstrom, Britt – St. George TTAL Clinic

Bennett, Daisy – Domestic Case

Benson, Jonny – Immigration Clinic

Bergstedt, Jim – Street Law Legal Clinic

Beringer, Maria Nicolle – Bankrupty Hotline

Black, Michael – Tuesday Night Bar

Black, Mike – Domestic Case

Blotter, Scott – Debtor's Clinic, Bankruptcy Case

Bogart, Jennifer – Street Law Clinic

Bradley, Erin – Domestic Case

Brindley, Brent – St. George TTAL Clinic

Buck, Adam – Tuesday Night Bar

Burgin, Chad – Tuesday Night Bar

Burn, Brian – Consumer Cases

Buswell, Tyler – Tuesday Night Bar

Cadwell, Sara – Domestic Case

Cannon, Andrew – Domestic Case

Carlile, Craig – Expungement

Chambers, Steve – Rainbow Law Clinic

Chandler, Josh – Tuesday Night Bar

Chipman, Brent – Domestic Cases

Christensen, Zachary – Rainbow Law Clinic

Clyde, Jon – Tuesday Night Bar

Coil, Jill – TUesday Night Bar

Colton, Kim – SMAV Case

Conyers, Kate – Street Law Clinic, Tuesday Night Bar

Cook, David – Bankruptcy Case

Couser, Jess – Family Law Clinic

Crimson, Sue – Expungement Clinic, Medical Legal Clinic

Culas, Robert – Debtor's Clinic, Domestic Case

Cushman, Amber – Street Law Legal Clinic

Dez, Zal – Family Law Clinic

Dickinson, Anita – Domestic Case

Dolowitz, Sandy – Domestic Case

Drake, Michael – GAL Case

Eastmond, Dirk – Domestic Case

Emmett, Mark – Bankruptcy Case

Evans, Russell – Rainbow Law Clinic

Falk, Jennifer – Domestic Case

Field, Mark – Domestic Case

Francisco, Roman – Immigration Clinic

Frandsen, Nicholas – Tuesday Night Bar

Freeman, Joshua – Consumer Case

Fuller, Jason – Domestic Case

Gartside, Chloe – Domestic Case

Gilson, James – Post Conviction Case

Gittins, Jeff – Street Law Legal Clinic

Gladstone, Chad – Domestic Case

Gordon, Benjamin – St. George TTAL Clinic

Gunter, Jacob – Bankruptcy Case

Ha, Jennifer – Bankruptcy Case

Hadley, Greg – Domestic Case

Handy, Garrett – Domestic Cases

Hansen, Clint – Tuesday Night Bar

Harding, Sheleigh – Domestic Case

Harmon, Benjamin – SMAV

Harrison, Jane – Domestic Cases, Expungement Case

Harrison, Jane – American Indian Legal Clinic

Harrison, Matt – Street Law Clinic

Harstad, Kass – Street Law Clinic

Hawkes, Dani – Street Law Clinic

Hawkins, Tyler – Expungement Case

Helgesen, Craig – Domestic Case

Hendrix, Rori – Domestic Case

Hollingsworth, April – Street Law Clinic

Hoopes, Chad – Tuesday Night Bar

Hoskins, Catherine – Domestic Case

Jackson, Jennifer – Domestic Case

Jang, Edwin – Domestic Case

Jelsema, Sarah – Family Law Clinic

Jensen, Curtis – Consumer Cases

Jensen, Leah – St. George TTAL Clinic

Jensen, Mary – Public Benefits Case

Johansen, Bryan – Tuesday Night Bar

Johnson, Stuwert – Domestic Case

Jones, Jenny – St. George TTAL Clinic

Jorgensen, Sonja – Bankruptcy Case

Keith, Penrod – Bankruptcy Case

Keller, Bryant – Tuesday Night Bar

Kelley, Asa – Domestic Case

Kent, David – Domestic Case

Kesselring, Christian – Domestic Case, Rainbow Law Clinic

Kimball, Chase – Domestic Case

Kivisto, Katia – Domestic Case

Koehler, Courtney – Domestic Case

Kuhlmann, Gary – Domestic Case

Kuhn, Timothy J. – Tuesday Night Bar

Kummer, Emily – Tuesday Night Bar

Lambson, Rebecca – Domestic Case

Langton, Derek – Domestic Case

Latimer, Kelly – Tuesday Night Bar
Limb, Allison – Domestic Case
Lund, Christopher – St. George TTAL Clinic
Lund, Niel – Domestic Case
Mader, Rebecca – Expungement Clinic
Mangum, David G. – SMAV Case
Mares, Robert – Family Law Clinic
Martens-Sheinberg, Traci – Domestic Case
Marx, Shane – Rainbow Law
McKay, Chad – Domestic Case
McNeill, Shaunda – Domestic Case
Micken, Christina – Domestic Case
Miller, Brian – Domestic Case
Miller, Jon – Domestic Case
Mitchell, Nate – Family Law Clinic
Miya, Stephanie – Medical Legal Clinic, American Indian Legal Clinic
Morrison, William – Bankruptcy Case
Morrow, Carolyn – Domestic Case, Family Law Clinic
Morrow, Carolyn – Family Law Clinic, Medical Legal Clinic
Morse, Andrew – Probate Case
Mortimer, Jeffrey – Bankruptcy Case
Munson, Edward – Tuesday Night Bar
Nalder, Bryan – Tuesday Night Bar
Neeley, Jennifer – Domestic Case
Nelson, Sarah – Domestic Case
O'Neil, Shauna – Bankruptcy Hotline, Domestic Case
Otto, Rachael – Street Law Legal Clinic
Patterson, Bradley – Expungement Case
Pedrazas, David – Domestic Case
Poff, Samuel – Post Conviction Cases
Powers, Amy – Expungement Clinic
Ralphs, Stewart – Rainbow Law Clinic, Family Law Clinic
Randall, Bret – Domestic Case
Ratelle, Brittany – Domestic Case
Reber, Lauren – Tuesday Night Bar
Richards, Jason – Bankruptcy Case
Riffo-Jenson, Lorena – Domestic Case
Rinaldi, Leslie – Tuesday Night Bar
Roberts, Stacy – Family Law Clinic
Rodier, Yvette – Tuesday Night Bar
Romney, Spencer – Tuesday Night Bar
Ronnow, Bill – Street Law Clinic
Rupp, Joshua – Tuesday Night Bar
Ryon, Rebecca – TUesday Night Bar
Saunders, Robert – Park City Clinic
Schofield, Tom – Tuesday Night Bar
Scholnick, Lauren – Street Law Legal Clinic
Schwendiman, Steve – St. George TTAL Clinic
Scruggs, Elliot – Domestic Case
Seletos, Tamara – Domestic Cases
Sellers, Andrew – Tuesday Night Bar
Shaw, Lauren – Domestic Case
Shell, Phillip – Bankruptcy Cases
Shibonis, Milda – Domestic Case
Shumway, Dan – Domestic Case
Simcox, Jeff – Street Law Clinic
Sims, Ben – SMAV Case
Smith, Anneli – Expungement Case
Smith, Craig – Street Law Clinic
Smith, Linda – Family Law Clinic
Smith, Shane – Street Law Clinic
So, Simon – Family Law Clinic
Sorensen, Sam – Family Law Clinic
Stephens, Jeff – Tuesday Night Bar
Stephenson, Clay – Domestic Case
Stewart, Steve – Street Law Legal Clinic
Stolz, Martin – Domestic Case
Sullivan, Kevin – Domestic Case
Sullivan, Landon – Tuesday Night Bar
Swensen, Michael – Domestic Case
Tanner, Brian – Immigration Clinic, Family Law Clinic
Telfer, Diana – Domestic Case
Terry, Rachel – SMAV Case
Thomas, Michael – Tuesday Night Bar
Thompson, Elizabeth – Domestic Case
Thorne, Jonathan – Street Law Clinic
Thorne, Matthew J. – Tuesday Night Bar
Throop, Sheri – Domestic Case
Tobler, Daniel – St. George TTAL Clinic
Tolley, Ann – Domestic Case
Trease, Jory – Bankruptcy Cases
Trujillo, Scott – Protective Orders, Domestic Case
Turner, Jenette – Tuesday Night Bar
Turney, Kevin – Tuesday Night Bar
Tuttle, Jeff – Tuesday Night Bar
Waldron, Paul – Domestic Case, GAL Case
Warr, Bethany – Family Law Clinic
Wertheimer, Rachel – Tuesday Night Bar
Wheeler, Lindsey – Tuesday Night Bar
Wiethorn, John – Street Law Clinic
Wilkins, David – Tuesday Night Bar
Williams, Camille – Domestic Case
Williams, D.J. – Domestic Case
Williams, Derek – GAL Case
Wing, Robert – Domestic Case
Winward, LaMar J. – Domestic Case
Wolfley, Nathan – Domestic Case
Woodbury, Mark – Domestic Case
Wycoff, Bruce – Tuesday Night Bar
Yauney, Russell – GAL Case
Yauney, Russell – Family Law Clinic
Zidow, John – 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 October–November of 2013. To volunteer call Michelle V. Harvey (801) 297-7027 or C. Sue Crismon at (801) 924-3376 or go to https://www.surveymonkey.com/s/2013ProBonoVolunteer to fill out a volunteer survey.

# 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 October 29, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Gale E. Laser for violation of Rules 4.4 (Respect for Rights of Third Persons), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*

Ms. Laser used her employee, who had access to another law firm's computer, to access information and obtain evidence about a former client of the firm that violated the rights of the former client, who was now an opposing party in litigation. Ms. Laser acted negligently and caused harm to the legal system and the parties by necessitating the use of court resources to address the issue.

*Mitigating factors:*

Ms. Laser took steps to correct system access issues and her behavior.


## PUBLIC REPRIMAND

On November 1, 2013, the Honorable Todd M. Shaughnessy, Third Judicial District Court, entered an Order of Public Reprimand against Joseph Wrona for violation of Rule 4.3(a) (Dealing with Unrepresented Person) of the Rules of Professional Conduct

*In summary:*

Mr. Wrona was hired to secure a judgment against an individual who he had previously represented on an unrelated legal matter. Mr. Wrona subsequently secured a judgment against his former client on behalf of the client he was presently representing. The former client then contacted Mr. Wrona regarding the unrelated legal matter. Mr. Wrona provided his former client with legal advice while the former client was adverse to his present client. Mr. Wrona's mental state was negligent. There was no injury caused by his misconduct.

*Aggravating factors:*

Substantial experience in the practice of law.

## PUBLIC REPRIMAND

On October 30, 2013, the Honorable Todd M. Shaughnessy, Third Judicial District Court, entered an Order of Discipline: Public Reprimand against James H. Deans for violation of Rule

1.15(a) (Safekeeping Property), Rule 1.15(b) (Safekeeping Property), Rule 1.15(c) (Safekeeping Property), and Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

*In summary:*
Mr. Deans deposited monies into his attorney trust account. Mr. Deans wrote two checks to be paid from his trust account before the deposit was available and there were insufficient funds in the account to cover the checks, causing his account to be overdrawn.

The Office of Professional Conduct ("OPC") received two notices of insufficient funds ("NSF") from Bank of Utah regarding Mr. Deans' attorney trust account. The Office of Professional Conduct sent Mr. Deans a request for a written response and documentation supporting his explanation of the NSFs. Mr. Deans did not respond to the OPC's request for written response.

The OPC served Mr. Deans with a Notice of Informal Complaint for each NSF, requiring him to respond in writing to the Complaints within twenty days pursuant to Rule 14-510(a)(5) of the Rules of Lawyer Discipline & Disability. Mr. Deans did not respond to the Notices of Informal Complaints.

Mr. Deans did not have proper accounting procedures in place. Mr. Deans failed to respond to the OPC's lawful demands for information.

## RECIPROCAL DISCIPLINE

On October 11, 2013, the Honorable Kate A. Toomey, Third Judicial District Court, entered an Order of Discipline: Public Reprimand against Laura J. Edwards for violating Rule 1.15(a) (Safekeeping Property) of the Rule of Professional Conduct.

Ms. Edwards is a member of the Utah State Bar and is also licensed to practice law in Arizona. The Supreme Court of Arizona issued a Final Judgment and Order reprimanding Ms. Edwards for her conduct in violation of the Arizona Rules of Professional Conduct. An Order was entered in Utah based upon the discipline order in Arizona.

*In summary:*
Ms. Edwards did not have proper accounting procedures in place and wrote a check on her client trust account without sufficient funds in the account to cover the check. The check was returned by the bank and an insufficient funds notice was sent to the Arizona State Bar. No client funds were used to rectify the shortages and she took efforts to account for the errors, correct the errors and implement procedures to ensure that the errors will not recur.

# 10 Thoughts for New Lawyers from Two Graduating Young Lawyers

*by Scott Powers and Patrick Burt*

The Young Lawyers Division is one of the most active and populous sections of the Utah State Bar. Lawyers admitted to practice in Utah are automatically members of the Young Lawyers Division until they have more than five years of experience or they turn thirty-six, whichever is later. For most young lawyers, the first several years of practice are critical because they set the stage for a lawyer's entire career. Now that we are aging out of the Young Lawyers Division, we would like to share some lessons, observations, and recommendations culled from our combined nearly two decades as young lawyers.

### 1. Know the law.

Few things frustrate practicing attorneys more than young lawyers who are ignorant of the law in their particular field. Not only does this frustrate your peers, it costs your client money. A young lawyer's relative ignorance in the law can be changed into a strength, however, due to the ever-changing nature of legal precedent. Indeed, we have prevailed on several motions where the opposing counsel relied on an outdated, and inaccurate, version of the statute. Similarly, know the rules. Look at the Rules of Civil Procedure before approaching others with questions and expect the first response to any such question to be "What do the Rules say?" You will be surprised how much is covered by existing rules and statutes.

### 2. Do not take cases personally.

As an attorney you are required to zealously represent, and advocate for your client. However, taking your client's issues personally can lead to incivility when dealing with opposing counsel and stress in your personal life. Like a boxer, you need to "leave the fight in the ring." If you learn to compartmentalize your zeal, you will be able to sleep easier and maintain beneficial relationships with your fellow attorneys.

### 3. Your reputation is precious.

Utah is a relatively small bar. Judges talk to each other; lawyers talk to each other; and, clients talk to each other. Treat every business or social interaction with care so as not to offend or burn bridges. A reputation for honesty, professionalism, and proficiency will lead to smoother dealings with opposing counsel, more referrals from fellow attorneys and clients, and more respect from the bench.

### 4. Do not get discouraged.

Being a young lawyer has many challenges, from finding a job, learning the law, and juggling debt incurred from law school to building a practice and trying to make partner. As with all things in life, there will be disappointments. Nevertheless, having an upbeat attitude will help you weather the storm. In fact, studies show that your subjective attitude, and confidence, plays a vital role in your overall success. As stated by Morrissey, "just do your best and don't worry."

### 5. Own your mistakes.

Carman Kipp, the founding member of Kipp and Christian, P.C., was famous for saying "If you are going to eat crow, eat it while it's fresh."

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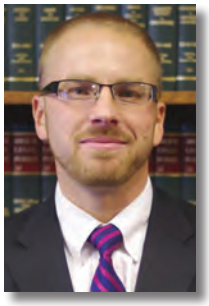
*PATRICK BURT is an attorney at Kipp and Christian practicing in the areas of professional malpractice defense, insurance law, and general civil litigation.*



You will make mistakes; there's nothing to prevent it. Tell someone above you immediately so you can fix the mistake. Do not try to avoid it or fix it on your own; it will only make things worse.

### 6. Make connections.

Make friends among the other lawyers. Be involved in your community. Making lasting connections within your profession and within the general community will help you develop your practice and make it more fulfilling and enjoyable.

### 7. Perform service.

Getting involved in the community and helping others is extremely rewarding. As an attorney, you have a unique skill set that the public prizes and sorely needs. Be generous with your time and provide service, including pro bono service. Not only will this help the community, it feels good and may even help you build your practice in the future.

### 8. Enjoy being a lawyer.

Some may say that you are "too nice" or "easy going" to be a lawyer. This is a good sign. Being a lawyer is your profession; it is not your life. If you are like us, you got into law because you found joy in the challenge. Do not lose sight of that.

### 9. Think before you hit "send."

We live in a fast-paced, technology driven world. It is too easy to send an email, write a letter, or make a heated comment that, in hindsight, should not be sent, written or uttered. Before you know it, your words are in the hands of a supervising partner, circulated among the bar, posted in break rooms, used in civility presentations, and/or placed in front of a judge as an exhibit. See No. 3 above.

### 10. Get involved in the Young Lawyers Division.

This is an amazing group of people. Comprised of attorneys from many of the most influential firms and organizations in the state, the Young Lawyers Division provides attorneys with an opportunity to network with their peers to a degree not possible in any other setting.

As young lawyers, you are embarking on a career that can be as rewarding, or as miserable, as any you can imagine. Although the ten suggestions above are not a failsafe roadmap to professional happiness, they are a good step in the right direction. Good luck and welcome to the Bar.

# CLE Calendar

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

**01/23/14 | 5:15 pm – 10:30 pm** — **2 hrs. Prof/Civ – 1 for the play, 1 for panel discussion**

**Can You Handle the Truth? Pioneer Theater Company *A Few Good Men*.**

5:30–5:45 pm Registration

5:45–6:45 pm Pre-Show Program/CLE.
Panel Moderator: James Holbrook with panelists: Lyn Creswell, South Salt Lake City Attorney; George M. Haley, Holland and Hart; Linda Smith, S.J. Quinney College of Law, Clinical Program.

6:45–7:15 pm Light Buffet Reception at the S.J. Quinney College of Law, University of Utah

7:30 pm *A Few Good Men*, Simmons Pioneer Memorial Theatre

PLATINUM Sponsorship –$1,300. Pre-Show CLE, buffet, and tickets to *A Few Good Men* for 20 people. 2 CLE Credits Offered.

GOLD Sponsorship –$675. Pre-Show CLE, buffet, and tickets to *A Few Good Men* for 10 people. 2 CLE Credits Offered.

SILVER Sponsorship –$350. Pre-Show CLE, buffet, and tickets to *A Few Good Men* for 5 people. 2 CLE Credits Offered.

Sponsorship registration deadline: January 13, 2014. Individual registration deadline: January 20, 2014.

Individual Registration with *A Few Good Men* – $80. Includes buffet and 2 CLE credit hours. Individual Registration without *A Few Good Men* – $60. Includes buffet and 1 CLE credit hour.

For those who might want to bring guests just to the play, we will again offer, Theatre ticket only (no pre-show CLE) for $40.
FREE PARKING AT RICE ECCLES STADIUM

**01/29/14 | 9:00 am – 11:00 am** — **2 hrs.**

**The *Debra Brown v. State of Utah* and the Law of Exoneration** (previously scheduled for Dec. 3).
Featuring panel discussions on the nuts and bolts of innocence investigation and litigation, emerging and unresolved issues in the field, and specific lessons from the Utah Supreme Court's decision in *Brown v. State*. $125 in advance / $150 at the door.

**01/31/14 | 12:30 pm – 9:00 pm**

**Utah Litigation Section Networking and CLE Event.** Ski Day at Brighton Resort, Brighton Utah. CLE Presentation and Dinner: "It's all Downhill from Here: Common Ethical Dilemmas for Utah Lawyers" (an interactive presentation). CLE and dinner at 4:30 pm. Just dinner and CLE: $35 for section members, $50 for others. Skiing/riding and CLE: $85 for section members; $100 for others.

**02/06/14 | 4:30 pm – 7:45 pm** — **3 hrs.**

**Worker's Compensation Basic Training.** Halston T. Davis, Davis & Sanchez. $90 for active under three, $105 for all others.

**02/06/14 | 8:00 am – 12:00 pm** — **3–3.5 hrs. TBD**

**Social Media CLE.** Proceeds benefit Law Related Education. Speaker: Randy Dryer, Parsons Behle & Latimer. Pricing TBD.

**02/28/14** — **8 hrs. (including 1 Ethics hr.)**

**Annual IP Summit.** Hilton Hotel, Salt Lake City. $275 registration fee, discount skiing tickets at Snowbird $74 for Saturday March 1st. Topics include: Post Grant Contested Proceedings and the Duty of Candor; Post Grant Review Patent Eligibility; Unitary Patents; Recent CACF Cases; Patent Damages; China; The America Invents Act: Update; Judges Panel.

**03/13/13 – 03/15/13 | All Day** — **10 hrs.**

**2014 Spring Convention in St. George.** Dixie Convention Center, 1835 South Convention Center Drive, St. George, UT. Please see the insert in this issue of the *Bar Journal* or visit: http://springconvention.utahbar.org for more information.

**03/19/14 | 9:00 am – 4:00 pm** — **6 hrs. CLE (including 1 hr. Prof/Civ)**

**Ethics School: What they Didn't Teach you in Law School.** $210 early registration $250 after March 10.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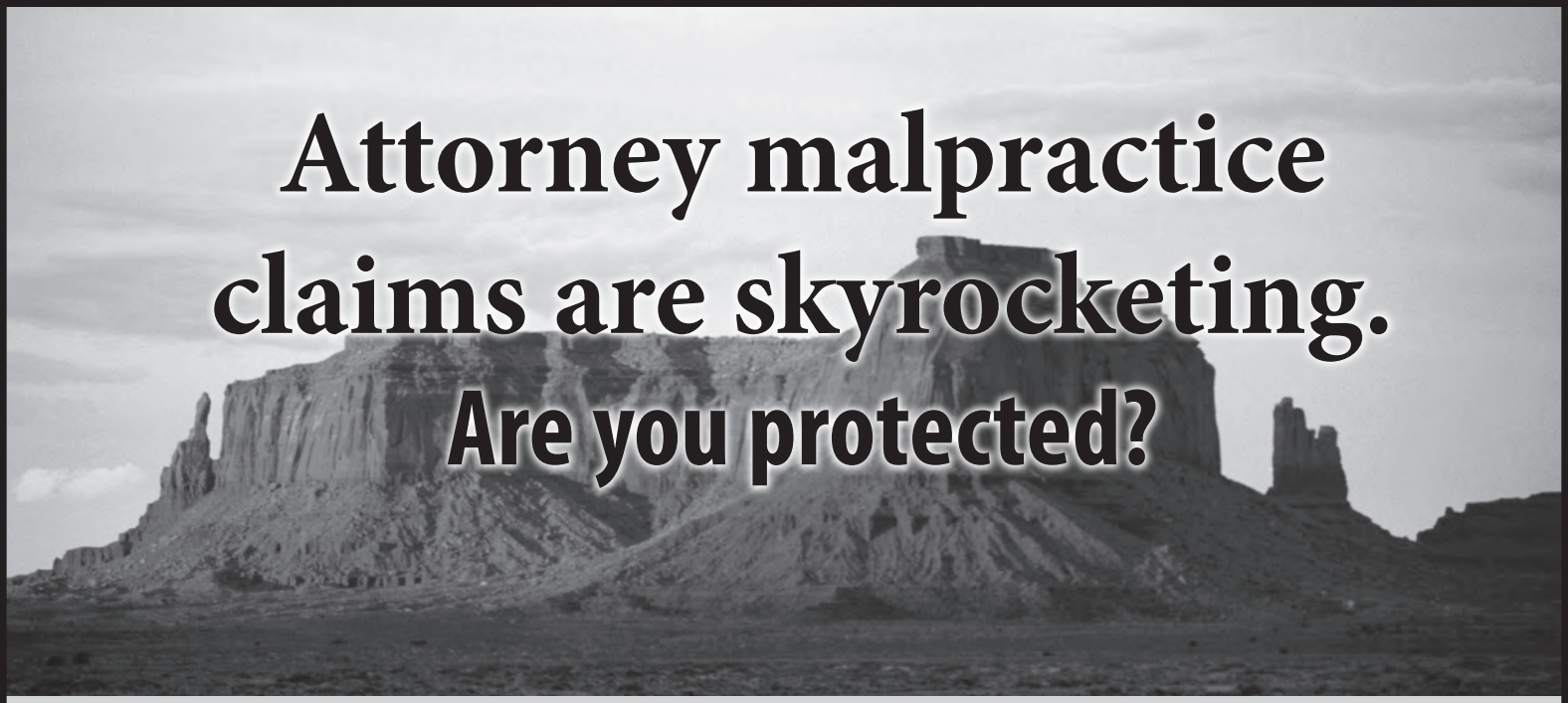

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[1] *"Profile of Legal Malpractice Claims: 2008–2011," American Bar Association, September 2012.*

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