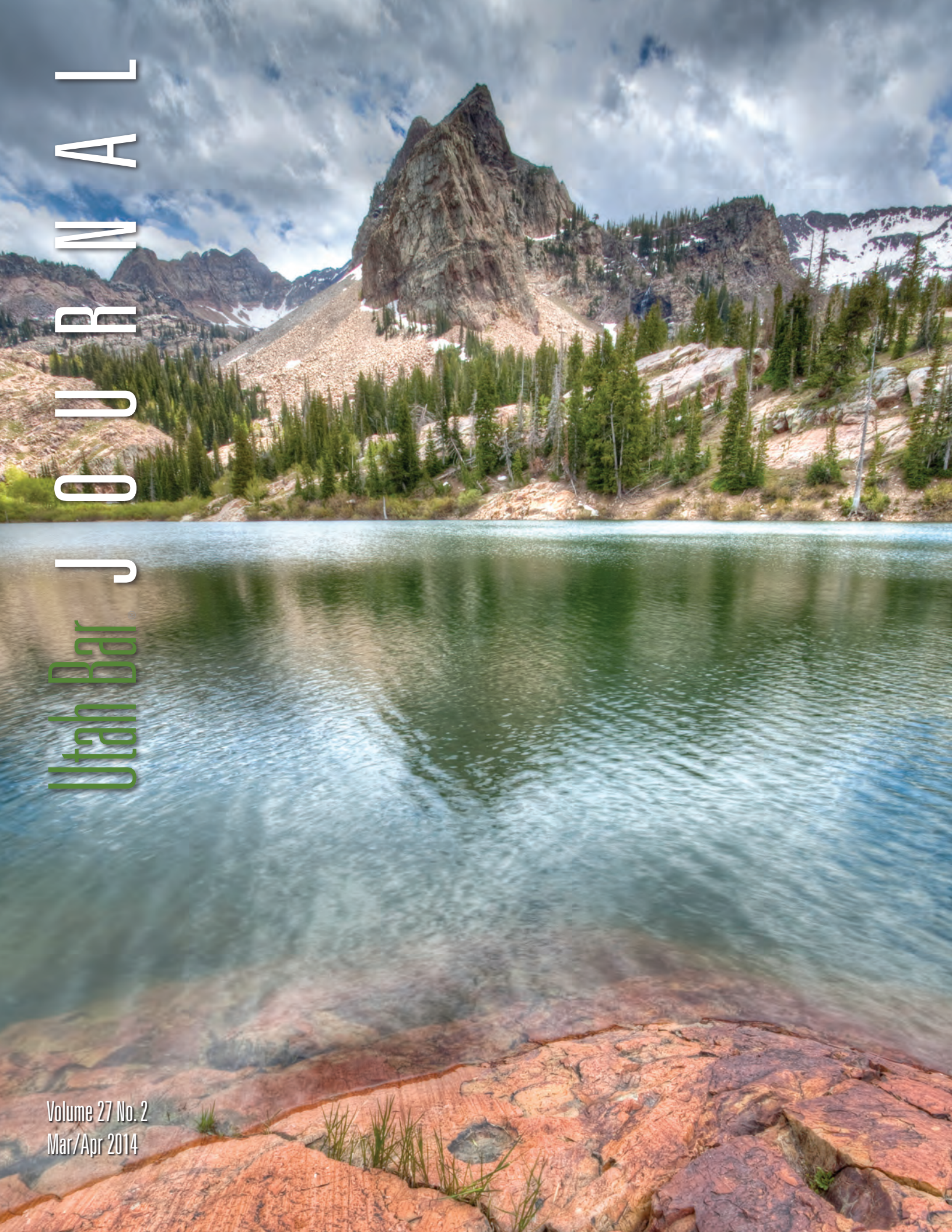

Utah Bar JOURNAL

Volume 27 No. 2
Mar/Apr 2014

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Cover Art

Lake Blanche, under Sundial Peak, Big Cottonwood Canyon, taken by Jeremy J. Stewart of Salt Lake City, Utah.

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

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.

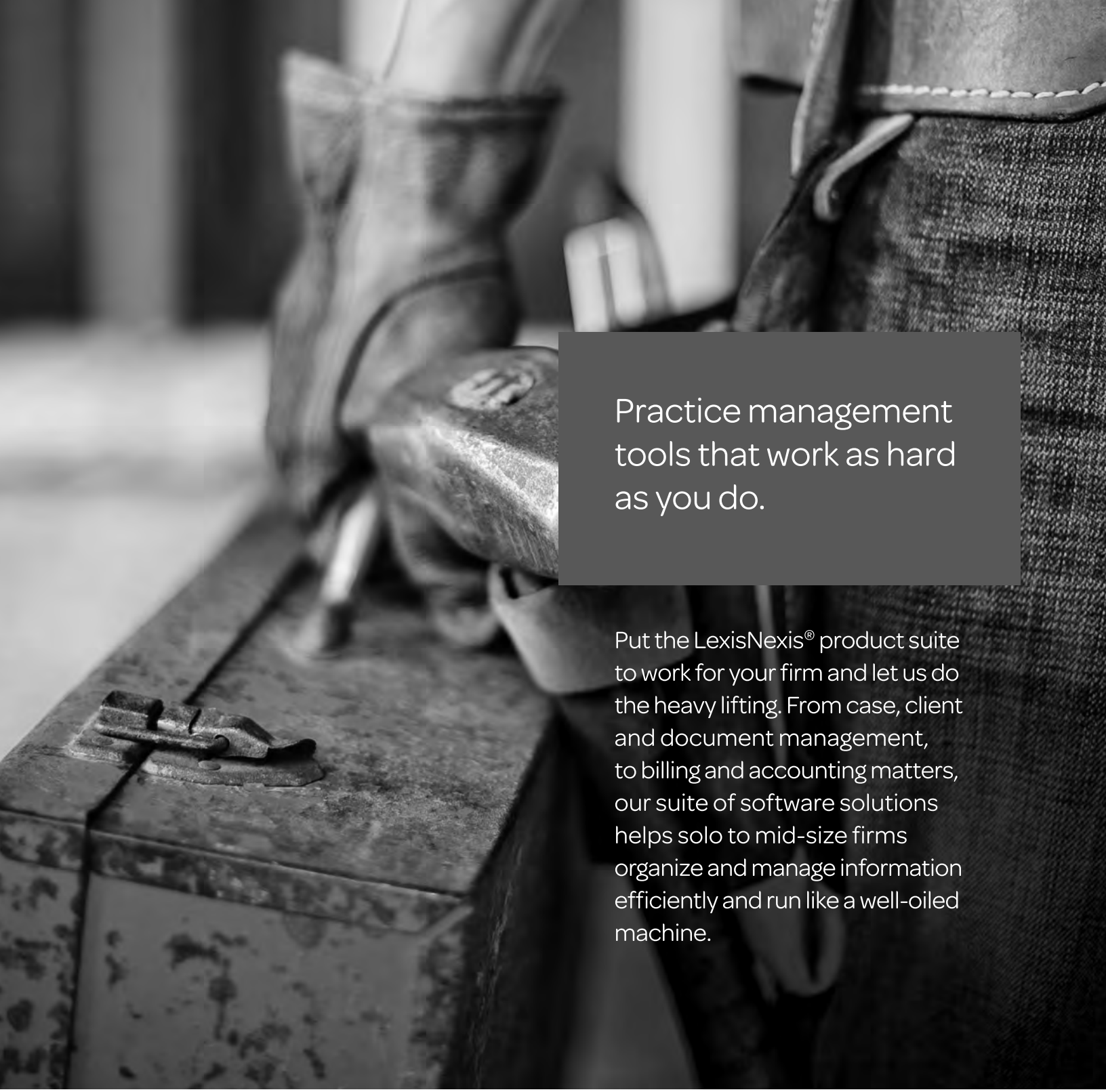
No Footnotes: Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial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

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President-Elect & Bar Commission Candidates

Candidates for President-Elect

TOM SEILER

I am running for President-Elect of the Utah State Bar. Since 2009, I have worked hard serving Utah lawyers as a Utah Bar Commissioner. During that time, we have been moving into new areas to better serve you. We have rolled out a new group benefits program for you, created a Modest Means project, been recognized nationally for our New Lawyer Mentoring Program, which improves the quality of the practice, developed a new website making access to the Bar easier for you, and implemented a public relations program.

I want to strengthen these and other services. We must also encourage our long tradition of ethical practice, fair dealing and superior legal work. Achieving these goals together will make us better, happier and more effective lawyers.

Strengthening these Bar programs, while embracing our goals, will require experienced leadership. I have been the leader of the Central Utah Bar Association, American Inn of Court I, Fourth District Judicial Nominating Commission, the Utah Association for Justice and the Utah County Public Defenders Association. As Bar President, I will serve you, delivering services to help you in your practice and elevating the profession throughout Utah.

I am honored to serve and ask for your vote.

ANGELINA TSU

Like many of you, I came to Utah to attend law school and loved it so much that I decided to build my practice here. I have served as a judicial clerk at the Federal District Court, as a litigator with Ray Quinney & Nebeker, and now as in-house counsel for Zions Bancorp. My experience includes serving on the boards of the Young Lawyers Division, the Utah Minority Bar Association, the S.J. Quinney College of Law Young Alumni Association, the Association of Corporate Counsel, Women Lawyers of Utah and the Utah Bar Commission.

The legal landscape has changed dramatically in the new technology era. Lawyers today face a different future than lawyers of the past. National commentators paint this future as bleak, but I think it can be bright if we make use of innovations in technology to build our community and develop our profession.

If elected, I will use technology to infuse new ideas into existing programs to enhance efficiency and cost-effectiveness, thus freeing up resources for new programs and member services. I will also work to preserve the sense of community and professionalism that we all share.

Together we can build a brighter future. I hope you will join me in this effort.

Notice of Electronic Balloting

Utah State Bar elections have moved from the traditional paper ballots to electronic balloting. Online voting reduces the time and expense associated with printing, mailing, and tallying paper ballots and provides a simplified and secure election process. A link to the online election will be supplied in an email sent to your email address of record. You may update your email address information by using your Utah State Bar login at http://www.myutahbar.org. (If you do not have your login information please contact onlineservices@utahbar.org and our staff will respond to your request.) Online balloting will begin April 1 and conclude April 15, 2014. Upon request, the Bar will provide a traditional paper ballot by contacting Christy Abad at adminasst@utahbar.org.

First Division Candidate

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

HERM OLSEN

I was admitted to the Utah State Bar in 1976 and the Navajo Nation Trial Bar in 1977. My education includes: B.S., Utah State University, magna cum laude; J.D. from the University of Utah. I have been a member of the District of Columbia Bar, Navajo Nation Bar, and the American Association for Justice. I serve on the Board of Directors for the Navajo Legal Aid Services, 1993–present. I was President of the Cache Chamber of Commerce, 2005–2006. My practice areas are personal injury, municipal law, and criminal defense. Prior to returning to Utah in 1980, I worked for the U.S. House of Representatives, Appropriations Committee, and served as Congressman Gunn McKay's legislative counsel.

I have appreciated the opportunity of serving as the Bar Commissioner representing the First Division. As a practicing attorney for nearly 40 years, I hope to bring to the Bar a sense of awareness for small firm practice. Bar leadership has done an excellent job of keeping members informed and providing meaningful input to legislative initiatives. We must remain vigilant in protecting Utah citizens' rights of and ensuring access to the legal system from increasing attacks by special interest groups. I appreciate your support.

Third Division Candidates

H. DICKSON BURTON

Dear Colleagues,

I am grateful to have served as a member of the Bar Commission for the past three years and I ask for the opportunity to serve one more term. I will continue to do my best to help the Bar provide necessary services in a fiscally conservative way. I also look forward to helping us all face the serious challenges of a changing profession and changing economy while at the same time preserving core principles of professionalism and integrity.

To introduce myself to those who don't know me, I have been a member of the Utah Bar for 30 years. I am the senior litigator at TraskBritt, where I am also a member of the firm's Board of Directors. In addition to litigating Intellectual Property disputes in Utah and in courts around the country, I often serve as a mediator, arbitrator and expert witness in various patent, trademark and trade secret disputes. You can see more of my biographical information at my firm's website: http://www.traskbritt.com/Professionals/h-dickson-burton.html.

Please feel to reach out to me at any time. And thank you for your vote on April 1.

STEVEN K. BURTON

Dear Colleagues:

According to the last member survey, 43% of attorneys in Utah worked in firms with less than 10 attorneys, 42% of us had been practicing under 10 years, and most of us billed less than $300 per hour. These statistics put me in good company.

After briefly working as a city prosecutor, I started a small practice in 2010. Since then, I have spent countless hours doing my own accounting, marketing, payroll, scheduling, and IT – all while trying to represent clients the best I could.

My vision of the Bar is that it should follow the small government model – providing support and resources where necessary while adding as few hindrances as possible. I fear the organizational tendency to address concerns by adding more rules and regulations, and I feel small firms and moderately-priced attorneys are disproportionately affected by additional requirements placed upon us.

Although I think the Bar does a relatively good job balancing the needs of its members, I believe an additional perspective from a small firm lawyer will be beneficial in determining the Bar's role in each of our lives. Please support me for Bar Commissioner.

Sincerely,
Steven K. Burton

HEATHER ORME FARNSWORTH

Please consider me to represent you as a Third Division Bar Commissioner. For the past two years, I have been honored to serve as an ex-officio Bar Commissioner. I offer a fresh perspective, shaped by my leadership experience as President of the Women Lawyers of Utah and as a Board Member of Real Women Run and the SLCC Women's Business Institute. I also bring law practice management experience as the co-owner of a high-volume small firm and unique legal experience by representing disabled individuals at administrative and federal court hearings for over eleven years.

I understand the practice of law is both a profession and a business. Our bar dues should be used to meet the needs of practitioners in both of these areas. If elected, I will strengthen the profession by expanding upon and promoting the Bar's pro-bono and modest means program, new lawyer mentoring, and programs to enhance the image of Utah attorneys. I will work with the Bar to heighten the success of your legal business by providing high quality CLEs, support services, and group benefit services. I commit to diligently represent your needs within the Bar and within the community. Thank you for considering my candidacy.

ROBERT O. RICE

I'm honored to have been elected to the Utah State Bar Commission in 2011 and equally privileged to have participated in the meaningful work of the Bar over the last three years. I now ask for your consideration to serve another term.

As a Bar Commissioner, I served as a founding member of the Utah Pro Bono Commission, an innovative program that matches needy clients with volunteer lawyers. Through the hard work of many, Utah is now a national leader in supplying free legal services to needy Utahns with the assistance of more than 1,200 volunteer lawyers.

As a Ray Quinney and Nebeker lawyer for 21 years, I understand the business of running a law practice. Consequently, I opposed revising the Bar's lawyer advertising rule, which I viewed as unnecessary and burdensome. I also deeply respect diversity in the law. To that end, I voted for adopting the Bar's Statement on Diversity and Inclusion.

If elected, I will continue to advocate for access to justice, for diversity in the Bar and for ways to strengthen your law practices. I respectfully ask for your support. For more information about my candidacy, please visit http://robriceutahbarcommission.wordpress.com.

GABRIEL K. WHITE

Dear Colleague,

My name is Gabe White and I would appreciate your vote in the upcoming bar commission election. I am a proud graduate of the University of Utah S.J. Quinney College of Law and a long term resident of Salt Lake City. I work at the law firm of Christensen & Jensen where my practice focuses on personal injury, construction and commercial litigation.

We are lucky to live and work in a legal community where professionalism and courtesy are still the norm. I am grateful for the opportunity to work with so many amazing lawyers, both in the courtroom and in the community. Having served as president of the young lawyers division and as an ex-officio member of the bar commission, I have seen incredible support from lawyers in the third division. The service of third division lawyers is inspiring. It is a privilege to be associated with you.

I would be honored to represent you on the bar commission. Please do not hesitate to contact me if you have any questions or concerns. I can be reached at gabriel.white@chrisjen.com, or on my cell phone at (801) 915-6152.

Sincerely,
Gabe White

D. J. WILLIAMS

I appreciate being part of the legal profession and that I practice in a place where collegiality and professionalism are common. I am excited to run for the position of Bar Commissioner in the Third Division. I believe I have the experience to represent the Third Division's members and I am committed to working with you to ensure that Utah remains a great place to practice law.

I have practiced in the litigation/trial group at Stoel Rives for 11-years and have handled a variety of cases. I am the Salt Lake City Office's Pro Bono Coordinator and I currently sit on the board of the Rocky Mountain Innocence Center and on the Third District Pro Bono Committee.

As your Bar Commissioner, I will continue to promote pro bono services and access to justice. I also will work to further advance Utah's strong legacy of professionalism and civility and the values that make Utah such a great place to practice law. These issues (among many others) not only strengthen the bar as a whole but make us individually better able to provide excellent client service.

I ask for your vote and the privilege of serving as your Bar Commissioner.

Tort Reform in Utah: Disclosure and Apology

by Greg Bell

In late September 2011, Governor Gary R. Herbert staged his first health summit, "Utah Solutions for a Healthy Economy and Community." The Summit – produced by the Utah Department of Health – brought together more than 100 of Utah's best and brightest healthcare stakeholders to initiate work on finding solutions. In the Summit, the Governor organized work groups around four priority issues: (1) public and private payment reform; (2) cost containment through healthy lifestyles; (3) strengthening the healthcare workforce; and (4) better use of health information for providers and consumers. These work groups have continued to meet and work on their final reports.

After the Summit, the Governor decided it was also important to pursue tort reform as the fifth principal topic. He asked me to convene a group of key community stakeholders to review the tort reform landscape in Utah to determine what, if anything, should be done. When talking of tort reform in the healthcare context, it is widely assumed that two major drivers of health care costs are related to malpractice claims: (1) the practice of "defensive medicine" and (2) the high cost of malpractice insurance for doctors, hospitals, and other health professionals. The work group consisted of legislators and their counsel, defense and plaintiffs' counsel, representatives of the hospitals and medical community, and a citizen's representative.

Our work group[1] met over the next year and reviewed Utah's tort reform history, national and state trends, current real and perceived problems, current law and legal procedures, and whether changes to the system were warranted. Our objectives were:

- To assist patients in receiving the highest quality health care.
- To make sure those injured by medical errors have appropriate recourse in the courts.
- To deal fairly with medical providers whose reputations and livelihoods can be seriously impaired or lost through medical malpractice claims.

Our group asked these questions:

1. How do our laws and procedures compare with those of other states?
2. Are doctors ordering medically unnecessary tests to protect themselves from lawsuits?
3. Do these costs drive up the cost of medical insurance?
4. Are patients receiving open and honest communication from their doctors when medical errors occur?
5. Are medical errors being reported and shared with patients?
6. Are compassion, condolences, and/or apologies offered when warranted?
7. How does an allegation of medical error affect patients' follow-up medical care?
8. Do medical providers feel free to discuss with the patient and their family follow-up care needed to address medical error?

Current laws and procedures surrounding medical malpractice in Utah.

Utah has adopted most of the popular tort reform measures spoken of nationally over the past couple of decades. We have a very conservative legal environment in this context. The measures Utah has adopted in this area include:

GREG BELL is currently the President and CEO of the Utah Hospital Association. He served as Utah's Lt. Governor from 2009 to 2013, during which time he led the tort reform work group.

- Utah's statute of limitations was shortened to two years. *See* Utah Code Ann. § 78B-3-404(1) (LexisNexis 2012).

- Utah requires medical malpractice claimants to give advance notice of a claim. *See id*. § 78B-3-404(5)(a).

- Before a lawsuit can be filed, each claimant must go before a pre-litigation panel of three people, one chosen by the plaintiff, one by the defendant, and one by the other two panelists to receive a designation of the claim(s) as meritorious or non-meritorious. The claimant may proceed to suit with a non-meritorious finding, and many do.

- At the pre-litigation hearing, the plaintiff must provide an affidavit from an expert stating malpractice has occurred. *See id*. § 78B-3-416(3)(d)(ii)(B)(b)(i)–(iii) (LexisNexis 2012). Requiring a showing of an expert's opinion at this stage of the proceedings excludes some non-meritorious claims.

- A statutory ceiling of $450,000 for pain and suffering. Formerly, this cap was automatically adjusted yearly for inflation and reached $488,000, but the inflator clause was revoked a few years ago. *See id*.

- Specialists treating individuals other than their own patients in the emergency room can be held liable for malpractice based only on clear and convincing evidence (compared to the much lower standard of preponderance of the evidence which typically applies to malpractice cases). *See* Utah Code Ann. § 78B-3-410(1)(d) (LexisNexis 2012).

- One-half of punitive damages (in excess of $50,000) relating to a personal injury recovery must be paid to the State. *See* Utah Code Ann. § 78B-5-817 (LexisNexis 2012).

- "I'm Sorry" laws have been enacted, referred to below.

Lawyers from both the plaintiff and defense bars in our workgroup agreed that Utah has adopted most measures used around the nation to limit non-meritorious cases and "lottery" type recoveries. Our entire group reached the same conclusion. There seemed to be almost nothing of a legal nature that we could have recommended to ameliorate in a significant way illegitimate malpractice claims. Importantly, we also concluded that doctors and other medical providers seem to have an enlarged sense of their risk of incurring a liability claim, a sense apparently derived from popular culture rather than the data.

Are doctors ordering medically unnecessary tests to protect themselves from lawsuits? Do these costs drive up the cost of medical insurance? National research shows this to be the case. Although we were unaware of Utah data in this respect, it was the group's consensus that Utah physicians sometimes order tests and procedures with at least the partial motivation of protecting themselves from claims. Moreover, there is much anecdotal evidence that patients are pushing physicians for procedures such as an MRI instead of a simple X-ray, or an angiogram instead of a much cheaper EKG. Combine the demands

of patients with the doctors' desire to insulate themselves from liability, and there is little doubt that defensive medicine is alive and well in Utah. Shannon Brownlee, who recently spoke in Salt Lake City, wrote in her 2007 book *Overtreated* that a third of every healthcare dollar goes toward procedures, tests, treatments, and surgeries of dubious medical necessity. *See* Shannon Brownlee, *Overtreated: Why Too Much Medicine is Making Us Sicker and Poorer* (Bloomsbury USA 2007).

Are patients receiving open and honest communication from their doctors when medical errors occur? Are medical errors being reported and shared with patients? Are compassion, condolences, and/or apologies offered when warranted? Do medical providers feel free to discuss with the patient and their family follow-up care needed to address medical error?

Utah adopted what is called "I'm Sorry" legislation in the last decade. Moreover, in 2010 and 2011, the Legislature also changed Rule 409 of the Utah Rules of Evidence to reflect the statutory intent "to encourage expressions of apology, empathy, and condolence and the disclosure of facts and circumstances related to unanticipated outcomes in the provision of health care in an effort to facilitate the timely and satisfactory resolution of patient concerns arising from unanticipated outcomes in the provision of health care." H.J.R. Res. 38, 59th Leg., Gen. Sess. (Utah 2011); *see also* Utah R. Evid. 409. Even the fact that a provider had paid or offered to pay a plaintiff's medical expenses was made inadmissible under Rule 409. Notwithstanding the Legislature's work, it was our group's consensus that this legislation and the rule change had not really changed the culture of how Utah physicians and hospitals address medical liability claims.

As we reviewed data on the small number of tort claims filed in the state of Utah (far less than 1% of all cases filed in Utah courts in recent years), and having a general knowledge of medical liability payouts during the last few years, our group concluded that Utah has relatively few claims, suits, and payouts, and that payouts seem to be reasonable. We do not suffer from the "runaway jury" syndrome some states have had to contend with. Nonetheless, we found that doctors' perception of their risk of incurring a malpractice claim is much higher than the reality.

Breakthrough

Even though the actual number of suits and settlements in Utah is small and the payouts are not exorbitant, merely receiving notice of a claim is a very serious and stressful matter for medical practitioners. After receiving a claim, a doctor must spend a great deal of time and energy in meeting with counsel, making a claim on errors and omissions insurance, gathering records, appearing for hearings and depositions, and ultimately preparing for and going to trial. All of this can bring great stress to the doctor. A malpractice claim can seriously affect a physician's relationship with patients. Research has shown a high incidence of suicide among physicians who had recently received a malpractice claim.

The breakthrough moment for the group came when Michelle McOmber, Executive Vice President and CEO of the Utah Medical Association, clearly communicated to the attorneys in the room that much, if not most, of the damage and trauma doctors incur in today's climate derives from the mere receipt of notice of a malpractice claim. A claim brings the doctor great stress, angst about his or her status in the profession, and worries about his or her ongoing ability to practice, to hold his or her head up in professional circles, and to make a living. From the moment he or she receives the first notice of claim, the doctor must report that claim on every credentialing application and renewal and on every subsequent application for and renewal of malpractice insurance, even though the claim may ultimately be dismissed as non-meritorious. Usually, the physician's malpractice insurance premiums will increase as a result of the claim. It is like a scarlet letter that will not fade. Every professional dreads such claims, but doctors seem especially vulnerable to mental trauma and stress because their life's very work is to aid their patients' health and well-being in an atmosphere of trust and reliance.

"[M]uch, if not most, of the damage and trauma doctors incur in today's climate derives from the mere receipt of notice of a malpractice claim.... It is like a scarlet letter that will not fade."

Insurance companies and self-insured medical institutions have traditionally responded to malpractice claims with a "deny, delay, and defend" strategy. The attorneys in our group who practice in this area explained that plaintiffs' counsel must name every medical professional whom they can determine had

any role in the matter, though it was ever so minor or tangential. Until a suit is filed and counsel can subpoena all the medical records, plaintiffs' counsel does not know what actions various doctors and nurses took. Thus, they name everyone they are aware of in the case as a possible defendant. Consequently, many claims are later dismissed against practitioners who had nothing to do with the claimed injury or damage, but the onus of the claim persisted as explained.

Out of this "Ah ha!" moment, the plaintiffs' and defense counsel from our group began meeting to explore ways of avoiding the negative impact of a mere claim. In light of our group's recommendation that counsel be given early access to medical records, as explained below, their ingenious solution was to develop a proposed rule of civil procedure that would require both parties to name prior to trial all the parties they intend to name as a party to the lawsuit. *See* H.B. 135S01, 60th Leg., Gen. Sess. (Utah 2013). Thus, hospitals who intend to claim against a physician must name that physician at the commencement of the suit, instead of relying on plaintiffs' counsel to do that for them. Hospitals have a hard time claiming against doctors who practice with them. It is hoped that this novel approach will lead to having only those parties involved in the case who were involved in the claimed malpractice.

Other Initiatives

Some of us had heard of emerging initiatives around the country that focus on a collaborative and non-legal approach to the resolution of medical errors. We reviewed a program developed by COPIC, a malpractice insurance company in Colorado. This is an early disclosure and resolution model employed to seek a negotiated settlement between plaintiff and defendant outside of litigation. COPIC is a voluntary program that empowers doctors to recognize unanticipated events, and then to quickly respond and resolve any related issues.

We also found that the Utah Medical Insurance Association, a doctor-owned insurance company that insures most Utah physicians, has been using "No-fault Coverage" which provides up to $5,000 for minor unintended outcomes and requires no litigation.

University of Michigan Early Resolution and Disclosure System

We became aware of a program the University of Michigan Health System (UMHS) had developed and employed for many years. The "Early Disclosure and Resolution" (EDR) program was developed by Richard C. Boothman, UMHS's Chief Risk Officer. Mr. Boothman had defended malpractice claims in private practice before joining the in-house legal staff at UMHS. As he worked more closely with patients and health professionals on malpractice claims, he realized that a patient who has suffered an unanticipated adverse surgical or medical outcome had never had greater need of communication with their doctor. Unfortunately, he found that the first casualty in a malpractice case is the physician–patient relationship. Under the "deny, delay, and defend" mentality, risk managers were now interposed between patient and doctor, and the risk managers would now deal with the patient and the family and other representatives. Instead of focusing on the patient's medical, psychological, and financial needs, liability concerns shoved patient care and welfare aside.

With the consent of hospital management, Mr. Boothman decided to try a new approach (which became EDR) by openly disclosing the adverse event and the related facts to the patient and his or her representatives and to seek an early resolution to the patient's valid concerns and interests. Under EDR, the hospital trained its doctors and caregivers to approach patients and their families in a manner that addresses the patient's needs above all else and keeps legal issues in the background. When a medically adverse event occurs, the doctor(s) and a hospital representative reach out to the patient and the family and disclose what they know about the event, how it occurred, what treatments or surgeries will be required to address it, whether they have established that there was hospital or doctor error, or that the adverse outcome is simply an unhoped for but not preventable condition. The hospital offers the patient and their representatives, including lawyers, complete and immediate access to all medical records and other relevant information. As appropriate, they discuss the patient's immediate financial needs arising out of the adverse event. UMHS uses each event as a quality improvement opportunity by gathering all involved in the incident to assess candidly any error or patient frustration and to improve the hospital's systems to avoid or lessen the risk of such errors occurring in the future. Under EDR, the hospital and the doctors seek no waiver of liability and no legal settlement as pre-conditions to discuss the error, and they give access to records or the terms of any settlement. It is an "open book" experience. Significantly, the doctor and hospital continue to focus on helping the patient get well and on maintaining a cooperative rather than an adversarial attitude.

Studies show that UMHS's EDR system has reduced the size of payouts and has made them more rational. Generally, in the prevailing tort litigation system, most injured patients make no claim, lose their claim, or get paltry payouts, while a few fortunate plaintiffs get lottery-sized settlements or judgments. There is no way to reconcile such payouts when they are granted one at a time by hundreds of different courts and juries. UMHS's rationalized payout system considers many factors in addition to the health care providers' liability, such as the extent of discomfort, suffering and disability, the patient's age, the patient's earning capacity, the need for extended care, any limitations of the patient returning to full employment, the patient's career, etc. Every claimant is treated fairly and equitably compared to all other UMHS system claimants. This one outcome of the EDR program alone justifies the program, in my mind.

In my personal conversation with Mr. Boothman, he indicated the UMHS and its related doctors are very pleased with the system. Plaintiffs' counsels have embraced the program, in part, because it is simpler now for them to reach settlement for their clients. They have early and complete access to relevant records and evidence. The hospital and doctors want to reach an accord that fairly addresses the patient's needs arising out of the adverse outcome. In such a system, a wise plaintiffs' lawyer will become part of a team that focuses on the patients' immediate and long-term medical, psychological, and financial needs.

Another distinct advantage of EDR is that it preserves the paramount relationship of doctor–patient, rather than letting a risk management adversarial mentality set the tone and course of doctor and hospital interaction with the patient. Because the system is voluntary to all participants, everyone works toward resolution rather than protecting themselves from risk. It reaches a human rather than a legal solution to what are really human problems. In the process, however, the legal issues are attended to as well.

Research has also shown that under the traditional "deny, delay, and defend" philosophy, many patients sue simply out frustration at one or more factors: being barred from obtaining medical information about the medical error, being denied a chance to discuss the events with their doctors, and failing to receive appropriate information about what went wrong and whether human error caused it. Moreover, it has been shown that a patient who feels

the doctor has shown compassion and perhaps even apologized, is far less likely to sue for adverse outcomes. EDR takes much of the angst and frustration out of the equation, and the patient is therefore much more likely to reach a reasonable settlement with the medical providers or perhaps not seek one at all. Patients are also gratified when they learn the adverse outcome in their case will be studied and used as a learning experience to address flaws in hospital systems and procedures, so that other patients may profit in the future from their experience.

We also learned of the work of Dr. Thomas Gallagher of the University of Washington Medical School, who has been developing an EDR system throughout the State of Washington. Dr. Gallagher spoke to the Governor's Health Summit in 2012. He indicated that getting all the stakeholders to the table in Washington had been very difficult, but they were on the cusp of rolling out a statewide EDR system.

Treasure in Our Own Backyard

Through pure serendipity, we stumbled on treasure in our own backyard. Dr. Elizabeth Guenther, a wonderful doctor, was then a practicing emergency room pediatrician at Primary Children's Medical Center (PCMC) and a researcher at the University of Utah Medical Center. She has done extensive research and worked with her colleagues in Utah and in other states researching and promoting an early disclosure and resolution of medical errors system. Dr. Guenther joined our group and became an important contributor. Dr. Guenther did much of her research under a grant through the U.S. Department of Health, Agency for Healthcare and Research Quality (AHRQ), which expired. I was able to initiate a grant application to AHRQ. We received this grant for $1 million to help expedite the effort toward finding innovations in Utah's health care systems. Dr. Guenther has since moved out of state, and Dr. Victoria Wilkins will use the grant to continue research in the area of early disclosure and resolution.

In addition to bringing the benefit of her own research and expertise in this area to our group, Dr. Guenther also made us aware of the early disclosure and resolution system at PCMC in Salt Lake City, Utah. Over the past decade, Dr. Edward Clark, Chair of the Department of Pediatrics at the University of Utah and Chief Medical Officer at PCMC, has led out in instituting an EDR program at PCMC similar to the Boothman model. At PCMC, they have found it to be well received by patients and professionals and economically advantageous to the hospital as well.

We have presented this model to other local hospital systems and are hopeful they will embrace it, too. Early signs are most encouraging.

Conclusion

Early disclosure, apology, and resolution of medical injuries exemplifies what I think will be a major trend. It elevates human relationships, specifically that of doctor–patient, above legal and institutional considerations and all the complexity they bring. EDR is an organic collaborative process looking for positive outcomes for all participants, but especially the patient. An additional highly important outcome is that medical professionals who work in an EDR environment will be able to practice with much more confidence that any human errors are much less likely to be met with threats, legal claims, and potential loss of reputation, professional standing, and even their very livelihood.

1. The membership of our work group was: Lt. Governor Greg Bell; David Gessel, VP Government Relations and Legal Affairs, Utah Hospitals and Health Systems Association; Charles H. Thronson, Senior Litigator, Parsons Behle & Latimer; Michelle McOmber, EVkP and CEO of Utah Medical Association; Rep. Kay L. McIff; Edward B. Havas, President Dewsnup, King, and Olsen; Bill Crim, Sr. Vice President, Community Impact & Public Policy, United Way; Elliott Williams, Williams & Hunt; Rep. Francis Gibson; Dr. Brian Shiozawa; Cathy Dupont, Office of Legislative Research and General Counsel for the Utah State Legislature; and Patti Peavey, staff. I am particularly indebted to Ms. Peavey, whose intelligence, can-do attitude, and outreach helped us find best practices around the country as well as allies and collaborators for our work.

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.*

***Oliver v. Labor Comm'n*,**
2013 UT App 301 (December 27, 2013)

The Utah Court of Appeals determined the Labor Commission Board of Appeals had applied the wrong legal standard in evaluating the employee's claim for permanent total disability benefits. The Board interpreted the standard for permanent total disability benefits set forth in *United Park City Mines Co. v. Prescott*, 393 P.2d 800 (Utah 1964), to mean that because the employee was able to return to work after her original injury, she was forever barred from bringing permanent total disability claims based on that accident. The court held that return to the workforce does not preclude claiming permanent total disability based on an original compensable injury. Rather, the question of additional compensation hinges on whether the subsequent injury was a natural result of the original compensable injury.

***Diversey v. Schmidly*,**
2013 WL 6727517 (December 23, 2013)

The Tenth Circuit rejected the minority interpretation of 17 U.S.C. § 507(b)'s limitation period for copyright infringement claims, which adopts a "continuing wrong" exception. Nothing in the language of § 507(b) supports a special limitation for continuing wrongs. The court further reasoned that the majority accrual rule and tolling principles adequately protect copyright owners' rights in such situations because under the majority approach, the limitation period does not begin to run until the plaintiff knows or has reason to know of the infringement. Accordingly, the "continuing wrong" doctrine is unnecessary in the copyright infringement context.

***Kerr v. City of Salt Lake*, 2013 UT 75 (December 17, 2013)**

The Utah Supreme Court held, with Justice Lee dissenting from this portion of the decision, that an appellate court may not review an order granting a new trial where a jury did not enter a verdict in the first trial. Following the first trial on the city's alleged failure to repair a sidewalk, the trial court granted a directed verdict to the city, but thereafter granted the sidewalk patron's motion for new trial. A second trial occurred, after which a jury returned a verdict against the city. The court held that for the same reasons it declines to review denials of summary judgments granted on evidentiary grounds, it declined to review the grant of a new trial because the jury did not enter a verdict after the first trial. Thus, there was no danger that the trial court granted a new trial in order to negate a result it simply disagreed with in derogation of the litigants' rights to a trial by jury. Instead, the grant of a new trial in these circumstances was akin to a reconsideration of the trial court's prior directed verdict ruling, placing the litigants in the same procedural position as if the prior aborted trial had never occurred. Because the litigants had a full and fair opportunity to litigate the facts in the second

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trial, the court held that it need not evaluate the sufficiency of the evidence at the truncated first trial.

In re McGough, 737 F.3d 1268 (December 16, 2013)

The Tenth Circuit addressed the operation of a "safe harbor" provision exempting from the trustee's power of avoidance, certain transfers to religious organizations. Under § 548 of the bankruptcy code, the trustee may avoid transfers of property in the two years preceding a bankruptcy filing where the debtor "received less than a reasonably equivalent value in exchange" or where the debtor was insolvent or made insolvent by the transfer. An exemption exists for donations to religious or charitable organizations, so long as the contribution does not exceed 15% of the debtor's gross adjusted income (GAI). The narrow issue before the court was whether the trustee could "recover the entire amount of a charitable contribution if it exceed[ed] 15% of GAI or only the amount in excess of 15%." *Id*. at 1272. The court determined "the only reasonable reading of the statute is that the amount of the transfer to be avoided is the entire amount. Nothing in the plain language of the statute indicates that, if the transfer exceeds 15% of GAI, only the portion exceeding 15% is avoidable." *Id*. at 1274.

American Nat'l. Prop. & Cas. Co. v. Sorensen, 2013 UT App 295 (December 12, 2013)

The Utah Court of Appeals addressed whether the common area of a planned unit development could be considered an "insured location" under a homeowners insurance policy. An individual was injured when the ATV he was riding tipped over and landed on his leg. The individual sued the ATV's owner, who made a claim against her homeowner's insurance policy. The insurance company denied coverage on the ground that the ATV accident and resulting injuries were subject to the policy's motor vehicle exclusion. The trial court disagreed, concluding that the motor vehicle exclusion only applied to ATV's operated "while off an insured location." *Id*. ¶ 4. Because the accident occurred in a common area of the planned unit development, the trial court reasoned this was "on" an insured location, thus precluding application of the exclusion. The court of appeals agreed. Relying on authority from other states, the court found the insured's ownership interest in the common area determinative. Moreover, it concluded the definition of "insured location," which included "'any premises used…in connection with' the residence premises," *id*. ¶ 16, was susceptible to several interpretations. Because that definition was contained in exclusion, the court strictly construed it against the insurer and liberally construed the policy in favor of the insured. The court concluded "the common area [was] an insured location," thus triggering coverage. *Id*. ¶ 24.

Krejci v. City of Saratoga Springs, 2013 UT 74 (December 10, 2013)

The Utah Supreme Court addressed the constitutional question of whether site-specific rezoning is administrative or legislative action, and consequently whether a site-specific rezoning decision is subject to a citizen petition to place the issue on the ballot for referendum. The citizens of Saratoga Springs sought to place the city's rezoning decision on the ballot after the city granted a landowner's request to rezone its property to allow for development of the land into mansion-style town homes. The landowner sued and obtained an injunction from the district court against the city. The Utah Supreme Court granted a petition for extraordinary writ from the citizens and directed the

city to place the referendum on the ballot. In doing so, the court overruled its prior precedent and held that specific rezoning decisions are legislative action, subject to referendum. The court explained that specific rezoning decisions are legislative actions because they create new law that calls for the broad weighing of all relevant public policy considerations. They do not involve the application of existing law to a new set of facts such as granting a variance or conditional use permit, which are recognized administrative actions.

State v. Bedell, 2013 UT 73 (December 3, 2013)

The Utah Supreme Court reaffirmed the "wide latitude to trial counsel to make tactical decisions" in representing a criminal defendant when it reversed a decision by the Utah Court of Appeals. *Id.* ¶ 23. The Utah Court of Appeals had reversed the conviction of a doctor on a lesser-included misdemeanor charge of sexual battery against a patient on the ground of ineffective assistance of counsel. The Utah Court of Appeals determined that defense counsel should not have allowed evidence of similar charges by other patients against the doctor to come in because the trial judge had ruled before trial that the evidence was inadmissible unless defense counsel opened the door. Describing the trial proceedings in some detail, the Utah Supreme Court observed that defense counsel had not only opened the door to this evidence, defense counsel consciously made this evidence part of a legitimate, and ultimately effective, strategic decision to undermine the veracity of the victim's accusations against the doctor. Specifically, defense counsel raised the other instances in opening statement by saying that the victim brought her allegation only after learning from a fellow inmate that other patients were accusing the doctor of inappropriate touching. Defense counsel then cross examined the detective who interviewed the victim after she brought her allegation, suggesting that he readily accepted her accusations without any scrutiny because "you had those other allegations and you had done all that work of investigation." *Id.* ¶ 10. Defense counsel continued this theme in closing argument, contending the case came down to "whether or not someone that knew of Dr. Bedell's plight would use that to their own advantage when nothing happened to them." *Id.* ¶ 14. The Utah Supreme Court concluded that defense counsel chose to use this evidence and did not render ineffective assistance by not objecting to the State's use of that evidence. Because the jury acquitted the doctor of two charged felonies but convicted him on the misdemeanor charge, the court surmised, defense counsel's strategy was not only legitimate, but likely advantageous to the client.

State v. Machan, 2013 UT 72 (December 3, 2013)

The Utah Supreme Court addressed for the first time the conditions under which an estranged spouse may burglarize the family home in the absence of a court order excluding him/her. A spouse had been removed from the home by police and was prohibited from returning under a protective order. Several weeks after the protective order expired, the spouse returned to the home and was found by his 16-year-old son and wife, brandishing a rifle. The court held that the proper focus of the inquiry was not on who held title to the home, but was whether the spouse/cotenant had voluntarily surrendered his possessory rights to the family home prior to his entry, creating an implied-in-fact contract relinquishing possession. Relying in part on the language of Utah Code section 30-2-10, the court held that such a relinquishment could only be achieved through mutual consent, and a spouse/cotenant cannot unilaterally revoke the other spouse/cotenant's possessory right to the home. The court affirmed the consideration of several conditions in determining whether such an implied-in-fact contract exists from the totality of the circumstances, including whether the spouse/cotenant: voluntarily moved out and established a separate residence; removed his personal belongings; willingly relinquished keys; and entered through surreptitious or violent means, supporting an inference that the spouse/cotenant understood he had relinquished possession. The court upheld the magistrate's determination that the State had presented insufficient evidence at a preliminary hearing to support any such relinquishment in this case because there was no evidence that the spouse voluntarily moved out of the home, and the fact that the removed spouse did not try to reestablish residence in the home for three weeks after expiration of the restraining order was insufficient by itself to support an inference of mutual agreement to relinquish possession. The court concluded that affirmative acts are more indicative of an implied agreement as opposed to failures to act.

Lilley v. JP Morgan Chase, 2013 UT App 285 (November 29, 2013)

Plaintiffs defaulted on their home construction loan. They sued the appraiser who provided an appraisal to the bank to support their loan for breach of contract under a third party beneficiary

theory. Plaintiffs alleged that the appraisal was over-inflated, which led them to borrow too much for the construction, which led to their default. The court affirmed the dismissal of the complaint, finding that plaintiffs were not third party beneficiaries of the appraisal as a matter of law. The court explained that the appraisal between the bank and the appraiser did not indicate a direct intent to benefit the plaintiffs – to the contrary, it clearly stated that it was "intended for use [] only by [Lender] for loan purposes only and *is not intended for use by any other party or for any other purpose*." *Id.* ¶ 7 (alterations in original). The court found that the appraiser's knowledge that the appraisal was going to be used to support plaintiffs' home construction loan was insufficient to confer third party beneficiary status on them.

State v. Younge, 2013 UT 71 (November 22, 2013)

In 2000, four years after an unsolved sexual assault case, state prosecutors filed information identifying the unknown attacker by his DNA profile only. Two years later, the attacker's DNA sample was matched with an individual incarcerated in Illinois. Shortly thereafter, the State filed amended information adding that individual's name. In February 2009, charges pending in Illinois against the defendant were dropped. Utah requested extradition, and he was booked into Salt Lake County jail in March 2009. He was convicted at a jury trial nine months later. On appeal, the defendant challenged his conviction on statute of limitations and speedy trial grounds. First, the Utah Supreme Court determined it did not need to address the statute of limitations issue because the information filed in 2000 was valid and filed within the applicable statute of limitations. The court reasoned that even though the defendant was not identified by name in the initial information, identification by DNA profile was sufficient. Moreover, the court determined the defendant's due process right to notice was not violated because a statute of limitations is "not a source of constitutional liberties," *id.* ¶ 15, and notice is not required before a prosecution is commenced. Second, the court determined the defendant's right to a speedy trial was not violated. It weighed four factors set forth by the

U.S. Supreme Court: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* ¶ 17 (alteration in original) (citation and internal quotation marks omitted). It concluded that his right to a speedy trial was not violated because even though the length of delay between the filing of the information and trial was "extraordinary," the remaining factors weighed in the State's favor.

Delta Canal Co. v. Frank Vincent Family Ranch LC, 2013 UT 69 (November 19, 2013)

The Utah Supreme Court addressed whether partial abandonment and partial forfeiture of water rights were available prior to 2002. In 2002, the Legislature amended Utah Code section 73-1-4 to clarify that partial forfeiture was an available remedy by providing "the water right or *the unused portion of that water right*" could be forfeited. *Id.* ¶ 8 (citation and internal quotation marks omitted). After a review of case law, the court concluded that it had recognized and applied the doctrine of partial forfeiture long before 2002. It then concluded that, although the pre-2002 forfeiture statute was ambiguous, it did provide for partial forfeiture. To reach this conclusion, the court turned to Utah's common law and statutory requirement that all water be put to "beneficial use," which requires a beneficial purpose and reasonable amount. The defendant's position – that a water right could be maintained in full through partial use – would be inconsistent with the beneficial use requirement. Accordingly, the court held that under pre-2002 versions of the forfeiture statute, a water right may be forfeited either in whole or in part. Partial forfeiture occurs when, during the statutory period, the appropriator fails to use material amounts of available water without securing an extension of time from the state engineer.

State v. Perea, 2013 UT 68 (November 15, 2013)

The defendant was convicted on two counts of aggravated murder and two counts of attempted murder and sentenced to life without parole. On appeal, the Utah Supreme Court determined that the trial court erred in refusing to allow a defense expert to testify about false confessions. The defendant sought to introduce such testimony arguing that juries "do not understand the prevalence of false confessions, the aggressive and persuasive techniques employed by police to elicit confessions from suspects, or other factors that contribute to false confessions." *Id.* ¶ 59. The court agreed with the defendant explaining that the value of cautionary jury instructions on such issues is limited and that "research has shown that the potential infirmities of confessions are largely unknown to jurors." *Id.* ¶ 69. Accordingly, it concluded expert testimony on false confessions "should be admitted so long as it meets the standards set out in rule 702 of the Utah Rules of Evidence and it is relevant to the facts of the specific case." *Id.* ¶ 72. Next, the court decided that the trial court did not err in denying the defendant's request to suppress his confession due to alleged *Miranda* violations. Defendant argued that he anticipatorily invoked his right to counsel two days before he was arrested and that his confession post-arrest without the presence of counsel could not be used against him. The court disagreed, explaining that even if defendants could anticipatorily invoke their right to counsel prior to custodial interrogations, such right was subject to waiver, and that defendant did in fact waive his *Miranda* rights once in custody. The court also decided that Utah's life without parole statute was constitutional and left for another day whether all station-house confessions should be recorded. The court determined any errors were harmless and affirmed the conviction.

Republic of Ecuador v Hinchee, 735 F.3d 1179 (10th Cir., November 13, 2013)

The Tenth Circuit discussed whether the work-product doctrine contained in Rule 26(b)(3)(A) extends to a party's expert witness. It concluded that neither the plain language of Rule 26(b)(3)(A) nor traditional understandings of the work-product doctrine supported the respondent's assertion that expert materials are protected under Rule 26(b)(3). The court then rejected the contention that the 2010 amendments to Rule 26(a)(2) and (b)(4) restored broad protection to expert materials. Rule 26(b)(3) does not provide protection for documents provided to an expert by a party. Rather, Rule 26(a) requires disclosure of "any material considered by the expert, from whatever source, that contains factual ingredients." *Id.* 1187 (internal quotation marks and citation omitted). The only exceptions to disclosure are those expressly set forth in Rule 26(b)(4) – draft reports and attorney – expert communications.

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

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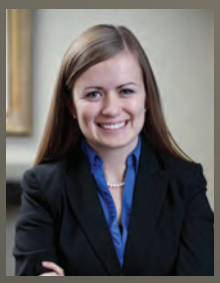

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Liening on Clients Part II – The Client's File

by Keith A. Call

In the last issue of the *Utah Bar Journal*, we discussed a broad array of issues relating to attorney's liens and how they can impact the attorney–client relationship. But what about the client's file? Is the lawyer obligated to give the entire file to the client upon termination of the attorney–client relationship, even if the client has not paid the bill?

Short Answer

Regardless of fee payment status or other reasons for termination of the attorney–client relationship, the lawyer is required to give the "client's file" to the client. The devil is in defining the "client's file."

> *"Utah lawyers must give the client's file to the client upon request. Period. Lawyers have been disciplined for violating this rule."*

Longer Answer

The question is governed by Rule 1.16 of the Rules of Professional Conduct. Utah's version of the Rule differs from the ABA Model Rule. The relevant part of ABA Model Rule 1.16(d) states: The lawyer may retain papers relating to the client to the extent permitted by other law.

In contrast, the relevant part of Utah's Rule 1.16(d) states: The lawyer must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer's expense. Utah R. Prof'l Conduct 1.16(d).

Comment 9 to Utah's Rule 1.16 elaborates: "The Utah rule differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses owing to the lawyer." *Id.* R. 1.16 , cmt. [9]. Thus, Utah lawyers must give the client's file to the client upon request. Period. Lawyers have been disciplined for violating this rule. *See, e.g., In the Matter of Discipline of Brussow*, 2012 UT 53, 286 P.3d 1246.

Utah amended its version of the Rule after the Utah Supreme Court criticized the practice of asserting a lien on the client's file pending payment. *See Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1375–76 (Utah 1996). Notably, the law firm in that case had complied with a Utah State Bar Ethics Advisory Opinion, which applied a prior version of the Rule and opined that an attorney could ethically assert a lien on papers and documents belonging to the client. *See* Utah State Bar, Ethics Advisory Opinion Committee, Op. 91 (1989). In light of amendments to Utah's Rule 1.16(d), Opinion No. 91 is no longer valid.

An important question remains: What is the "client's file" that must be returned? Comment 9 to Rule 1.16 partially answers this question:

> It is impossible to set forth one all encompassing definition of what constitutes the client file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation materials such as

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pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings.

An ethics opinion has elaborated, stating that "an unexecuted legal instrument such as a trust or will, or an unfiled pleading, such as an extraordinary writ, is not part of the 'client's file' within the meaning of Rule 1.16(d)."

Utah State Bar, Ethics Advisory Opinion Committee, Op. 06–02 (2006).

Finally, practitioners in criminal law will want to know that they may delay or withhold transmission of certain information in the client's file in the exceptional circumstance where harm to the client would likely result, or where the client may use the information to commit fraudulent or criminal conduct. Utah State Bar, Ethics Advisory Opinion Committee, Op. 06–04 (2006).

So be aware that Utah's rule for retaining liens on the client's file has changed over time and now differs from the ABA Model Rule. Most of your file probably belongs to the client and must be returned upon request. Follow Comment 9 to Rule 1.16 to determine which parts of the file you must return and which parts you may keep regardless of fee payment status.

The Utah Fraudulent Transfer Act: Choosing Whom to Sue

by Kristen C. Kiburtz

The Utah Fraudulent Transfer Act (the Act) provides a remedy for creditors when debtors conceal their assets by transferring them to another individual or entity. Utah Code Ann. §§ 25-6-1 to -14 (LexisNexis 2013). Under the Act, a creditor may obtain "avoidance of the transfer or obligation," "an attachment," or "other provisional remedy against the asset transferred or other property of the transferee." *Id.* § 25-6-8(1)(a)–(b).

The Act allows a creditor to sue the transferee and other qualifying individuals directly. Thus, for instance, if a debtor gives all his assets to a friend or sells his assets to the friend for $1 to avoid a judgment that has been entered against him, the Act permits the creditor to collect against the friend. Additionally, if the friend then transfers the assets to another individual who is not a good faith transferee, a creditor may collect from the subsequent transferee as well. Specifically, Utah Code section 25-6-9(2) provides,

> [T]o the extent a transfer is voidable in an action by a creditor under Subsection 25-6-8(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under Subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:
>
> > (a) the first transferee of the asset or the person for whose benefit the transfer was made; or
> >
> > (b) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

Id. § 25-6-9(2).

The Act identifies three categories of individuals or entities against whom a creditor can recover: (1) "the first transferee of the asset," (2) or "the person for whose benefit the transfer was made," (3) or "any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee." *Id.*

Utah courts have not defined the contours of these three classifications. However, Utah's Act is derived from the Uniform Fraudulent Transfer Act, much of which is also incorporated into the avoidance provisions of the Bankruptcy Code. Consequently, a number of federal courts have construed the same or similar language. The first appellate court to do so was the Seventh Circuit, in an opinion authored by Judge Posner in *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890 (7th Cir. 1988). *Bonded* provides a comprehensive framework for determining whom a trustee can recover against under 11 U.S.C. § 550 of the Bankruptcy Code, and has become the seminal case in interpreting that section. *Id.* at 895–97 The categories identified in section 550 essentially mirror those found in the Act:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –

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> (1) *the initial transferee* of such transfer or *the entity for whose benefit such transfer was made*; or
>
> (2) any *immediate or mediate transferee of such initial* transferee.

11 U.S.C. § 550(a) (Westlaw through P.L. 113-72 (excluding P.L. 113-66 and 113-67) approved Dec. 26, 2013) (emphasis added).

Given the overlap between § 550 of the Bankruptcy Code and the Act, *Bonded* provides a useful framework for understanding whom a creditor can recover from under Utah's Act.

The Facts of *Bonded Financial Services v. European American Bank*

Bonded involved business owner Michael Ryan, who controlled a number of currency exchanges, including Bonded Financial Services (Bonded). Ryan also owned a business called Shamrock Hill Farm. To finance the farm, Ryan obtained a loan from European American Bank (Bank) in the amount of $655,000. *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 891 (7th Cir. 1988)

Bonded was under financial strain. Shortly before declaring bankruptcy, Bonded transferred $200,000 to Ryan. To accomplish this, Bonded sent a $200,000 check payable to European American Bank's order with directions to deposit the check in Ryan's account. After the Bank deposited the money into this account, Ryan directed the Bank to debit his account by $200,000 to pay off his loan. Bonded's creditors sought to recover against Ryan, but he became insolvent as well. The creditors therefore looked to the Bank. The question in *Bonded* was whether the Bank was an initial transferee, a person for whose benefit the transfer occurred, or a subsequent transferee. *Id.*

An Initial Transferee

The court first considered whether the Bank qualified as an initial transferee. Like the Act, the Bankruptcy Code does not define the term "transferee." The court, however, concluded that under the Bankruptcy Code a transferee must be something more than someone who merely touches the money as a "'possessor' or 'holder' or 'agent.'" *Id.* at 894. Rather, "the

minimum requirement of status as 'transferee' is dominion over the money or other asset, the right to put the money to one's own purposes." *Id*. at 893.

Using this definition, the court concluded that the Bank could not be an initial transferee. Although the $200,000 check it received from Bonded was made payable to the Bank, the Bank did not have "dominion over the money." *Id*. at 893–94. The Bank could not do as it willed with the money. The only thing that the Bank could do was deposit it in Ryan's account. Instead, Ryan was the initial transferee – he was the person who actually had control over the money. The Bank was merely Ryan's agent.

For Whose Benefit the Transfer Was Made

The court then turned to the bankruptcy trustee's second argument: "If the Bank is not the 'initial transferee,'…it is at least the 'entity for whose benefit such transfer was made.' The Bank ultimately was paid and therefore, …it got the 'benefit' of the transfer.…" *Id*. at 895.

The court disagreed. After musing about the relevance (if any) of a recipient's intent, the court rejected the trustee's argument based on the statutory wording alone and concluded that the trustee's argument confused the difference between a subsequent transferee and the person for whose benefit a transfer is made, which are mutually exclusive.

> *"Recovery…can prove challenging when the transfer involves multiple parties. In these circumstances, correctly identifying the potential sources for recovery is important."*

> These questions need not be answered, because a subsequent transferee cannot be the "entity for whose benefit" the initial transfer was made. The structure of the statute separates initial transferees and beneficiaries, on the one hand, from "immediate or mediate transferee[s]," on the other. The implication is that the "entity for whose benefit" is different from a transferee, "immediate" or otherwise.

Id. (alteration in original).

The court went on to define who qualifies as the entity for whose benefit the transfer was made – "The paradigm 'entity for whose benefit such transfer was made' is a guarantor or debtor – someone who receives the benefit but not the money." *Id*. at 895. Citing *In re Universal Clearing House Co*., 62 B.R. 118, 128–29 (D. Utah 1986), and other authority, Judge Posner wrote:

> Section 550(a)(1) [U.C.A. § 25-6-9(2)(a)] recognizes that debtors often pay money to A for the benefit of B; that B may indeed have arranged for the payment (likely so if B is an insider of the payor); that but for the payment B may have had to make good on the guarantee or pay off his own debt; and accordingly that B should be treated the same way initial recipients are treated.… Someone who receives the money later on is not an "entity for whose benefit such transfer was made"; only a person who receives a benefit from the initial transfer is within this language.

Bonded Fin. Servs., Inc. v. European Am. Bank, 838 F.2d 890, 896 (7th Cir. 1988)

Judge Posner's interpretation – that only someone whose liability was reduced by a transfer is a person for whose benefit the transfer was made – has been widely followed. *See, e.g., Rupp v. Markgraf*, 95 F.3d 936, 941–43 (10th Cir. 1996) (concluding that primary shareholder of debtor corporation was "the entity for whose benefit" transfer was made because transfer extinguished the shareholder's debt to transferee); *In re Universal Clearing House Co.,* 62 B.R. at 127 (holding that person whose debt for attorney fees was reduced by initial transfer qualified as person for whose benefit the transfer was made); *see also, e.g., In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 130 F.3d 52, 57 (2d Cir. 1997) (explaining that the phrase "'entit[ies] for whose benefit such transfer was made'" "references entities that benefit as guarantors of the debtor, or otherwise, without ever holding the funds" (alteration in original)(citation omitted)); *In re Chase & Sanborn Corp*., 904 F.2d 588, 600 (11th Cir. 1990) (concluding that transfer was for the benefit of a person when the transfer paid off the person's debt); *In re Columbia Data Prods., Inc*., 892 F.2d 26, 29 (4th Cir. 1989) ("[T]he entity for whose benefit the transfer is made 'is a guarantor or debtor – someone who receives the benefit but not the money.'" (citation omitted)); *In re Red Dot Scenic, Inc*., 293 B.R. 116, 121–22 (S.D.N.Y. 2003) (transfer

was for the benefit of a person when money transferred to pay personal creditor); *In re Innovative Commc'n Corp*., Bankr. No. 07-30012, 2011 Bankr. LEXIS 3040, *157 n.104 (Bankr. D.V.I. Aug. 5, 2011) ("For example, where New ICC transferred funds directly to American Express (the initial transferee) for charges made by the Adult Prosser Children (debtors of the initial transferee), the Adult Prosser Children directly benefitted from the payment of their creditor."); *In re Day Telecomm., Inc*., 70 B.R. 904, 909 (Bankr. E.D.N.C. 1987) (holding that a person received a benefit from transfer when that person's obligation to pay back debt was reduced by the initial transfer).

A Subsequent Transferee

The *Bonded* court also considered whether the Bank qualified as a subsequent transferee. Like an initial transferee, a subsequent transferee has "dominion and control" over the asset. But a subsequent transferee is not the first individual in the line of transfers. Therefore, there must have been a predecessor transferee who meets the requirements of an initial transferee (*i.e*., dominion and control) for an individual to qualify as a subsequent transferee.

The court had already determined that Ryan was the initial transferee when the Bank received the $200,000 payable to Ryan's account. The court therefore had to determine whether there was a subsequent transfer that gave the Bank dominion and control over the money. The court concluded that there was a subsequent transfer – when Ryan paid the Bank to reduce his loan. At this point, the Bank obtained dominion and control of the money and became a subsequent transferee. *Bonded Fin. Servs., Inc.*, 838 F.2d at 895–96.

Agent or Mere Conduit

Finally, the court addressed those whom recovery could not be obtained from under the Bankruptcy Code – mere conduits or agents. Had Ryan not paid the Bank to reduce his loan, the Bank would not have fallen within any of the three categories. When the Bank initially received the money to deposit in Ryan's account, it was neither a transferee (initial or subsequent) nor an entity for whose benefit the transfer was made. The Bank received no direct benefit from the transfer. Rather, the Bank was contractually obligated to follow the instructions on the check (*i.e.*, deposit the check in Ryan's account). As the court explained, "[w]hen A gives a check to B as agent for C, then C is the 'initial transferee;' the agent may be disregarded." *Id*. at 893. Under this analysis, recovery is not available against someone just because he or she has the ability to control the transferred asset – the person must have a legal right to put the money to his or her own purpose.

Why We Care

Recovery for fraudulent transfers can be an important source of recovery when a debtor's assets are insufficient to satisfy a creditor's claims. Recovery, however, can prove challenging when the transfer involves multiple parties. In these circumstances, correctly identifying the potential sources for recovery is important. Also important are the duties of the parties. The initial transferee is in the best position to monitor whether the transfer from the debtor is fraudulent. Subsequent transferees do not have a duty to monitor preceding transfers. The closer the transfer is to the original transaction involving the debtor, the higher the probability for recovery.

In summary, under the Act, a creditor can recover for fraudulent transfers from three basic categories of individuals. Correctly identifying these individuals is important to ensuring a quick and effective recovery for clients. Although there is a dearth of Utah authority interpreting these relevant categories, federal bankruptcy case law provides a useful framework.

The Top Ten Things to Remember When Arguing in Front of an Appellate Court

by Michelle Mumford

Instead of nightmares featuring public spaces and differing degrees of nakedness, lawyers' nightmares involve something like this real life oral argument exchange from *Shalala, Secretary of Health & Human Services v. Whitecotton*, 514 U.S. 268 (1995). Note that the "Unknown Speakers" are justices of the United States Supreme Court.

> Unknown Speaker: [Counselor for Petitioner], we've been questioning you several times about findings of aggravation.
>
> You answered me just a moment ago that the special master made no finding.
>
> Now Justice Ginsburg points out that he made a very express finding.
>
> How can you stand up there at the rostrum and give these totally inconsistent answers?
>
> [Counselor for Petitioner]: – I'm sorry, Your Honor.
>
> I don't mean–
>
> Unknown Speaker: Well, you should be.
>
> [Counselor for Petitioner]: – I don't mean to confuse the Court.
>
> Unknown Speaker: Well, you... perhaps you haven't confused us so much as just made us gravely wonder, you know, how well-prepared you are for this argument.
>
> [Counselor for Petitioner]: Your Honor, it is our assertion that the onset of a residual seizure disorder in table time is a significant–
>
> Unknown Speaker: Your time has expired.

Shala, Secretary Of Health & Human Services v. Whitecotton, The Oyez Project at IIT Chicago-Kent College of Law, http://www.oyez.org/cases/1990-1999/1994/1994_94_372 (last visited February 2, 2014).

Lest this happen to you, I've prepared the Top Ten Things to Remember When Arguing in Front of an Appellate Court. This article is meant as a help for practitioners who have not been in front of an appellate panel since their moot court competition in law school. Obviously, these are my observations, and I am not a judge. I was, however, an appellate law clerk, and as such was able to glean the following helpful hints:

10. Don't waste the court's time when $2,000–$3,000 is at stake, even when you think the issue or principle on point is worth it. It's not. It's a waste for everyone involved.

9. Know your jurisdictional arguments – if any are credible, they'll come up first. Does the court have subject matter jurisdiction? Judges love it when they don't.

8. Be mindful of the terminology you use – judges are legal scholars. The term "held" refers to a matter of law, while "found" is a matter of evidence. Also don't respond to questions with slang. "Yeah," is not an appropriate response to a question regarding Rule 32. Further, many

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appellate courts do not refer to the district court as the "lower court" out of respect. On the other end of the spectrum, don't speak to the panel as if you're addressing preschoolers. And honestly, the top of your head will never have the answers, so don't act as if it might ("Well, off the top of my head.…").

7. Watch your time. Save time for rebuttal. And if the court granted the other side additional time during questioning, make sure you respectfully request the same amount of additional time. Most judges, though, won't need the reminder – they are very cognizant of equal time.

6. Know your cases. Enough said.

5. Don't address the judges individually – even when one of them asks you a question. I know it may seem respectful to address a judge by name – "Well Justice Hamilton, the answer to your question is simple." – don't do it. You are addressing the entire panel, even when one judge asks a question. "Your Honors" includes the entire bench in the discussion. You are not up there to have a private conversation with one member of the court. If you just refuse to take this piece of advice and insist on following your moot court guidelines of addressing a judge individually, DO NOT miss the fact that a judge is the Chief.

4. Similarly, don't refer to an individual judge's prior scholarship or authored opinions. As to scholarship, whether it is a law review article or the text of a speech, the judge knows what he or she has written or said in the past. By singling out that particular judge, your attempt to pigeonhole him or her into a previous position can backfire. You can sound as if you're challenging the judge to disagree with himself or herself. Most people like to accept challenges. As to prior authored opinions, again, you are addressing an entire court, and not just an individual judge. Refer to the opinion generally – the panel is well aware that one of their own authored the opinion. Also, don't refer to a judge who is not sitting on the panel – the judges are not in competition with each other. It is not necessary to state where Judge Posner is on the particular issue.

3. Don't start with a long recitation of the facts – I wouldn't even start with a short recitation of the facts. The judges just spent fifteen to sixty minutes reviewing each case with their clerks prior to walking onto the bench. Unless a fact is specifically at issue, don't waste your time talking about it. I would immediately start with an explanation of the legal issue, and start right into my argument. In other words, get to the point quickly. As one judge said, "Don't waste your time telling us what you're going to say, just do it."

2. Relax. Oral argument will be a stressful experience, but remember it will be mercifully short. Cases are more typically won or lost in briefing – not in fifteen or twenty minutes at the podium. So don't put undue pressure on yourself. The best way to avoid stress and perhaps even enjoy the oral argument experience is to be prepared.

1. Which leads me to the most important tip: Prepare, Prepare, and Prepare. What is your best case to persuade the court? Use it. What is your best evidence? Focus on it. Have talking points ready – not a script. A script will limit your ability to engage the panel and participate in essentially the conversation they are having with themselves about how they should decide the case. Make sure your passion is equaled by analysis.

Regarding the Standards of Professionalism and Civility and the Use of Disparaging Language as a Tactical Decision During a Criminal Trial

by Ted Weckel

I write this article in response to Mr. Donald J. Winder's article entitled: *Civility Revisited*, which appeared in the November/December 2013 edition of the *Utah Bar Journal*. Donald J. Winder, *Civility Revisited*, 26 Utah B. J. 45 (Nov./Dec. 2013). I agree with much of what Mr. Winder had to say about the need for civility and laud his presentation of a variety of recent cases from a few states that pertain to the civility issue. Nevertheless, I believe that a further explanation is warranted in regard to whether Utah's Standards of Professionalism and Civility, as Mr. Winder has portrayed them, strictly apply to the practice of law during a criminal trial. For that reason, I would like to elaborate on the parameters of Article 3, Rule 14-301(3) of the Standards of Professionalism and Civility.

Much of Mr. Winder's article pertains to issues of civility that have arisen between opposing counsel's communications outside of the courtroom. Undoubtedly, there is no need for uncivil communication between lawyers as they respectively prosecute their cases. Indeed, the case of *In re Anonymous Member of S. Carolina Bar*, 709 S.E.2d 633 (S.C. 2011), is a good example of how an attorney's communication to opposing counsel was impermissibly offensive and why it merited the issuance of a private letter of caution. In that case, an attorney's email to opposing counsel made a racial slur against the latter and also suggested that his daughter had purchased illegal drugs.

However, I believe that Mr. Winder makes another point which needs clarification. He states that there is a "sea change" occurring in the practice of law today throughout the country to the effect that notions of "'zealous[ness]'" or "'aggressive'" representation no longer temper the practice of law. Winder, *supra*, at 48. Mr. Winder only cites to a handful of state decisions to support this contention – one of which was the above South Carolina case.

However, Mr. Winder's statement, respectfully, appears to misstate the Utah and American common law regarding zealous representation generally and in the criminal law context specifically. Indeed, zealous advocacy is required by Rule 1.3, Comment 1 of the Utah Rules of Professional Conduct. Utah R. Prof'l Conduct 1.3, cmt. [9]. Zealous advocacy does not mean, of course, that counsel may disobey court orders or the professional rules. *State v. Clark*, 2005 UT 75, ¶¶ 35–36, 124 P.3d 235. However, Rule 14-301(3) of the Standards of Professionalism and Civility allows a lawyer with an adequate factual basis to attribute to counsel an improper motive, purpose, or conduct, or to disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary if such matters are directly relevant under controlling substantive law. Utah Standards of Professionalism & Civility 14-301(3). While acknowledging whole heartedly that counsel should attempt to act with decorum in all communications with the court and in written and oral representations to both the court or opposing counsel generally, the issue remains as to when it is proper to disparage opposing counsel, the other party, or a witness under Utah's Standards of Professionalism and Civility and its common law.

To begin with, I think it is important to remember that an advocate in the courtroom has the burden of persuasion. Counsel must either persuade a judge or a jury of laymen of the rightness of

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his or her client's position or lose. Juries for the most part have had no training in court rules, procedure, or the proper application of the law. Indeed, counsel is a partner with the judge in the effective presentation of evidence as an officer of the court. *See ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-1.2 (3d ed. 1993); *see also Strickland v. Washington*, 466 U.S. 668 (1984).

The stakes are frequently high when parties decide to have a trial. Presumably that is why persuasive, albeit strong language, has been frequently allowed during closing argument at a criminal trial as part and parcel of zealous advocacy. As stated, if a party fails to persuade the trier of fact by the standard of proof of his client's position, counsel will lose his or her case, and the party may suffer greatly – financially, emotionally, or otherwise. If that happens, a child, for example, may be returned to a mother who is an alcoholic. A guilty defendant who suborned perjury to obtain an acquittal may walk free. An attorney who performed his or her duties in a grossly negligent fashion may deny a defendant the effective assistance of counsel in a criminal prosecution, which may result in unnecessary imprisonment, the payment of fines, or even death. And persons who state an embarrassing truth about another to a third party might be liable for damages in a defamation action.

Indeed, the American common law supports the notion that it is appropriate to disparage opposing counsel, his client, or the arguments presented by one's opponent when there is an adequate factual basis to do so. This seems particularly true in the context of criminal law, where defense counsel has a constitutional duty of zealous advocacy. *State v. Martinez*, 2013 UT App 39, 297 P.3d 653; ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 5.1(B)(1)(b) (2003); *see also Strickland*, 466 U.S. at 689. Indeed, it can even be said that defense counsel is under an affirmative duty to disparage the prosecution's case during counsel's presentation under the defendant's right to the effective assistance of counsel and based upon the reasonable inferences to be drawn from the evidence. *See, e.g., Schauer v. McKee*, 662 F.Supp.2d 864, 881 (E.D.Mich. 2009), *rev'd*, 401 Fed. App'x 97 (6th Cir. 2010).

Indeed, this notion of allowing counsel latitude during closing argument is probably the most apparent in the criminal law context. For example, although disparagement of a defendant or defense counsel can rise to the level of denying a defendant the right to a fair trial, frequently a court gives the prosecution a great degree of latitude in attacking a defendant's closing argument, evidence, witnesses, counsel, or even the defendant himself. *See, e.g., Mason v. Mitchell*, 95 F.Supp.2d 744, 781 (N.D. Ohio 2000) (citing to a variety of cases where the prosecutors' characterizations of either the defendant, his lawyer, or his lawyer's arguments were not considered to be prosecutorial misconduct when the prosecutor used such terms as "ridiculous," "unbelievable," stupid, "trash," "a fairy tale," "hogwash," "garbage," lying, or a con-job in describing defense counsel's or the defendant's statements or positions (citations and internal quotation marks omitted)); *see also, United States v. Robinson*, No. 10-20071-03-KHV, 2011 WL 3704229, at *7 (D. Kan. August 23, 2011) (citing *United States v. Graham*, 314 Fed. App'x 114, 118 (10th Cir. 2008) and *United States v. Brewer*, 630 F.2d 795, 803 (10th Cir. 1980), to explain that the prosecution's argument that the defendant's position was no more than a magic show was an attempt to focus the jury on the evidence)).

Indeed, in Utah, claims of prosecutorial misconduct can pertain to disparaging remarks made by a prosecutor about a defendant. *See, e.g., State v. Davis*, 2013 UT App. 228, ¶¶ 57–62, 311 P.3d 538. However, unless such remarks are unduly disparaging

or untruthful, they will generally be tolerated as a means to argue the prosecution's position, and are not considered as a violation of a defendant's right to a fair trial. *Id*. Such disparaging language may also be viewed as improper but not prejudicial in light of the prosecution's evidence and the defendant's due process claim. *State v. Johnson*, 2007 UT App 184, ¶¶ 45–46, 163 P.3d 697. Thus, it follows that in the context of criminal law, Rule 14-301(3) seems to have a far weaker application when it comes to statements made by either party during closing argument. Indeed, from a historical perspective, disparagement based upon the evidence has been the rule rather than the exception in the American common law when it comes to criminal law.

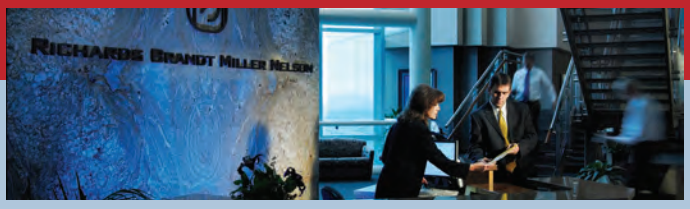
Perhaps that is why American courts have historically allowed zealous advocacy to include the use of strong language before a jury, as well as the use of strong language in chastising counsel for their deficient performances. Therefore, one could argue, for example, that: (1) calling an opponent's position "stupid" during a closing argument would be the most effective way to get one's point across to a jury made up of blue collar workers, where the use of such language was commonplace in every day conversation; and (2) that barring the use of "strong" language, although respectful, would water down the passion, persuasiveness, and effectiveness associated with a party's closing argument. For that reason, denial of the use of strong language before a jury might even constitute a denial of due process. Of course the need for such strong language is greatly reduced when advocating one's position before a judge or when argument is made by way of written documents. *See e.g., Advanced Restoration, LLC v. Priskos*, 2005 UT App 505, ¶ 37 n.13, 126 P.3d 786.

However, there is still another important reason why the denial of counsel's use of strong language at a criminal trial could be considered as a denial of due process. In *Strickland*, the United States Supreme Court stated that defense counsel's independent, strategic decision-making was constitutionally protected and virtually unassailable. 466 U.S. at 681, 689. The Court went on to say that: (1) defense counsel had an "overriding mission of vigorous advocacy of the defendant's cause" to ensure that the defendant received a fair trial and (2) "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id*. at 689. Therefore, it follows that if during a criminal trial, defense counsel made a tactical decision to use an "offensive" or strong word to describe the prosecution's position in front of a blue collar jury, e.g., counsel said the position was stupid, preposterous, or inane, because counsel believed that the word would be the most effective way for the jury to understand a point (and the jury would not understand the polite term of egregious, for example), then prohibiting counsel from using that word under the notion of civility could very well be considered a denial of due process and a denial of the right of the effective assistance of counsel. The same could be said in the context of a criminal case where counsel attempted to clarify or accentuate a point before a judge by saying, for example: "No judge, the prosecution's position really is preposterous, and let me tell you why.…," when the judge is not buying defense counsel's argument.

Additionally, in the context of ineffective assistance of counsel claims brought against former defense counsel (particularly in the death penalty context), disparagement of defense counsel by habeas or postconviction counsel through zealous representation is routinely considered relevant, mandatory to prove prejudice, and even a constitutional right. *Cf. Menzies v. Galetka*, 2006 UT 81, ¶¶ 95, 105, 150 P.3d 480 (concluding that postconviction counsel's representation was "grossly negligent" for, among other things, failing to investigate alleged errors by trial counsel).

Furthermore, rules 404(a), 404(b), and 608 of the Utah Rules of Evidence require counsel to impeach a witness or a party's credibility through the introduction of embarrassing evidence as a matter of standard practice. Thus, a prosecutor may introduce evidence of a defendant's bad acts to prove motive, intent, absence of mistake, identity, or a common scheme or plan, *State v. Bair*, 2012 UT App 106, ¶ 16, 275 P.3d 1050, and a defendant may introduce evidence of a victim's embarrassing and immoral behavior in his defense, *State v. Howell*, 544 P.2d 466, 469–70 (Utah 1975).

In sum, Utah's Standards of Professionalism and Civility now require counsel to act with decorum in communication with opposing counsel. These standards have brought about a welcomed and needed sea change to the practice of law in Utah. However, it should be remembered that Rule 14–301(3) permits counsel to disparage opposing counsel, the other party, or his or her evidence where such matters are directly relevant under controlling substantive law. Such disparagement of a party's position is relevant, and has occurred routinely by both parties in the criminal law context – particularly during closing argument. New practitioners should familiarize themselves with the contexts in which Rule 14-301(3) may apply to the areas of law in which they practice.



Richards Brandt Miller Nelson

is pleased to announce

Barbara Melendez has joined Richards Brandt Miller Nelson as Chair of the Immigration Practice Group, working with Rafael Seminario and Kristina Ruedas. She brings with her vast experience in the area of Immigration Law.

Stephen Mayfield has joined the Firm's Business Group focusing in Business Formations.

Steven Bergman has become a Shareholder of the Firm in Business Litigation and Products Liability.

Kallie Smith has become a Shareholder of the Firm focusing in Business and Employment Litigation.

RBMN Business Group: Back row *(l. to r.)*: Matthew Barneck, Steven Bergman, Gregory Steed. Front row: Kallie Smith, Mark McCarty (Chair), Shari Dirksen, Stephen Mayfield, Russell Fericks, Zachary Peterson.

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Sweatshops in Paradise: A True Story of Slavery in Modern America

Reviewed by Jeannine P. Timothy

There are two excellent reasons to read Virginia Sudbury's non-fiction *Sweatshops in Paradise*. The first reason is to learn of the astounding, heartbreaking, and recent practice of human slavery and servitude that occurred in American Samoa. As the author states in her Preface, "You need to know this happened," and it is alarming to see the details of servitude revealed as the author and her legal staff uncovered the reality of their clients' lives. The second reason to read the book is its Prologue. There you will come to know the author and her personal story leading up to the events of her book.

Virginia Sudbury is a delightful and energetic woman. I had the opportunity to get to know Virginia a few years ago when she represented a mother in a custody case and I represented the child as her Guardian ad Litem. When we met to discuss the case and consider our individual clients' positions, I found Virginia to be candid, engaging, and sincere. I had no idea, however, of the unique experience Virginia brought with her to that case and to her legal practice in general.

Reading the Prologue, I learned that before I met Virginia, she and her husband, Rob, lived a collective of ten years aboard Scout, a twenty-five foot, engineless, pocket cruiser sailboat. They had purchased Scout in 1987, and then worked diligently to ready it for their adventurous plans. They completely renovated Scout, and the change I found most fascinating was the new dining table Rob created. Into the butcher-block table top, he set tiny rubies in the shape of the Northern Hemisphere stars. That replica of the northern night sky traveled with Virginia and Rob through all their journeys in Scout.

Sweatshops in Paradise: A True Story of Slavery in Modern America

by Virginia Lynn Sudbury

Published by iUniverse.com (2012)

Hardcover $20.08, Paperback $13.43, Kindle $3.99 (Amazon.com)

Virginia and Rob lived six years in Scout sailing the Sea of Cortez, Baja, California. Virginia's comical yet loving description of her life on the sailboat is truly incredible. She and Rob shared all the duties of life on the boat including keeping watch, night or day, while underway on the water. Virginia describes looking into the water and experiencing the humbling feeling of floating above the "layers of life and energy" that live below. In 1995, Virginia and Rob set out to travel 5,000 miles across the Pacific from Baja, Mexico, through French Polynesia, to the harbor of Pago Pago on the island of Tutuila, American Samoa. On this territory of the United States, Virginia and Rob could legally work. There they decided to spend time living and working on the land. So begins Chapter One.

In 1996, Virginia was hired by the American Samoa Government public defender's office. The following year, she and Rob opened a small law office in Fagatogo. Virginia was the sole attorney, and Rob handled all the duties of a paralegal. From their office, they could walk down the mountain road to the High Court of American Samoa, and sometimes they made the trek several times a day. Grace, always dressed in the traditional *muumuu*, was the firm's secretary, receptionist, and translator. Petita was

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the investigator and "furniture hauler." Petita could carry anything on his back, even five-drawered filing cabinets with all their contents still inside.

Although the law office handled many types of cases, there was a large focus on family law issues. Many married women who suffered maltreatment by their husbands approached Virginia for legal help and divorces. Virginia and Rob had been awarded a grant from the Department of Justice's Violence Against Women Granting Agency (VAWA) to open U'una'i Legal Services Corporation. Those clients who qualified for this federal funding received the first free legal services ever offered in the territory. The name Virginia chose for the corporation, *U'una'i*, roughly translates to "self-sufficiency and empowerment." The name encompassed the attributes Virginia wanted to help her clients gain. As the events of the book unfold, however, Virginia shows in her actions toward her clients and coworkers that *U'una'i* is part of the vision she lives.

In mid-1999, Virginia met nine new clients who arrived at her office seeking a type of help Virginia had yet to encounter. The clients were women from Vietnam who had come to work in a garment factory in the village of Tafuna. One of the women had some knowledge of English, and so she acted as the translator for all. Haltingly she explained that forty women had arrived some months earlier to sew at the factory. Their contracts promised monthly wages, opportunity for overtime pay, free room and board, and a prosperous life in America. Each woman had already paid a hefty recruiting fee so that she could take advantage of the incredible opportunity to earn much money for herself and her family back home. As the months passed, however, the women were not paid for their work. When some of the women finally demanded their rightful salaries, the owner of the factory had retaliated. He terminated the sponsorship of those women and had them deported back to Vietnam.

After Virginia and her staff listened to the incredible situation of the nine women who now sat huddled in the law office, Virginia decided to represent the women pro bono. As the case progressed, more workers added their names to the list of plaintiffs. By the end of December 1999, Virginia and her co-counsel filed a complaint on behalf of thirty workers against the garment factory president, its owner, and others alleging nonpayment of wages, breach of contract, tort claims, and due-process violations. It would be one year before the trial would begin.

Virginia explains in vivid, heartbreaking, and yet humorous prose what she experienced during the year 2000 as the attorney for clients who were being exploited by the company and its owners. The notion of slavery in Samoa at the turn of the twenty-first century was completely foreign to Virginia, yet as she, Rob, co-counsel, and their staff dug deeper into the circumstances of the workers, they uncovered the true nature of the servitude of the Vietnamese workers. The notion of slavery was also foreign to the local community. Many of the local residents viewed Virginia as a troublemaker who was creating a tarnished image of their community, and they did not take kindly to the work she and her staff were doing. Virginia describes her feelings of frustration and anger as she encountered ridicule and scorn wherever she went in the village. She also portrays a heartbreaking picture of the life the workers were living during this time. They were frightened and mocked by many of the residents. They also received letters from home begging them to drop the legal case as it was bringing shame to their families in Vietnam. There were, however, those island residents who recognized and appreciated the full implications of the legal action against the garment factory president and owners. Some of the local families opened their homes to many of the Vietnamese factory workers. The Samoa News published regular, and often daily, newspaper reports of the events in a straightforward, yet sympathetic, manner.

Despite the hardships they encountered, Virginia and her team pushed on and continued to work the case, meet regularly with their clients, and file motions and injunctions. More than a year later, in January 2001, Virginia entered the court for the two-day trial in the matter. Two days, however, turned into weeks.

Virginia clearly describes the layout of the High Court of Samoa, the parties to the case, the spectators who filled the courtroom, and the view from the panoramic windows that opened onto the veranda. She wore the traditional muumuu to court every day. Presenting her case and enlightening the court as to the truth of the allegations made in the petition was a painstakingly slow process because almost none of the parties and witnesses in the case could speak English. Eventually five translators were needed to translate Vietnamese, Korean, Chinese, and Samoan into English and then back again. Virginia includes in her book excerpts of the transcript from her cross-examination of several witnesses, and it is easy to see how the various language barriers added an extra burden upon the attorneys and the court.

Virginia took advantage of the days when the court held hearings on its other cases to continually prepare for her next day in court. Her concern for her clients and their well-being is evident as Virginia depicts her almost constant communication with her co-counsel and their review of the boxes of evidence supporting their clients. Long before the time Virginia rested her case, she was completely exhausted. The stress and worry for her clients, however, was not over, and they would all wait many months for the decision from the High Court of Samoa. In the meantime, good news was on its way for Virginia's clients.

Joyfully Virginia describes the FBI agents who arrived in Pago Pago to announce that under the newly enacted T-visa for victims of slave trafficking and involuntary servitude, the U.S. government had granted legal access to the United States to many of the garment factory workers. Unbeknownst to Virginia and her team, the FBI had been operating its own investigation into the problems at the garment factory. Relieved and thankful that her work and her clients' hardships had been noticed by other U.S. agencies, Virginia and her team were elated for their clients who wanted to live in the States.

Three months later, in June 2001, Virginia and Rob left Tutuila island for their next home. Scout had long ago been sold, so Virginia and Rob traveled by air across the waters to land-locked Salt Lake City. Here Virginia waited over a year for the decision of the High Court of Samoa. Even though she remained in close contact with her co-counsel in the case, Virginia describes the feeling that at times the memories of the lawsuit seemed surreal. The High Court's final order, however, was very real, and the judgment awarded to the plaintiffs was more than they had requested.

Virginia's work as counsel for the garment factory workers was groundbreaking in Samoa, and it affected her personally in a profound way. Her first-hand account of the case details and her clients' issues is at times humorous and always forthright. Her narratives and descriptions bring the events of the book to life. Truly Virginia is correct when she states in the Prologue, "you need to know this happened." Additionally, it will be your delight to get to know Virginia better. It certainly was mine.

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"Citizens" or "Taxpayers"?: On "Fighting Words" and Justice Lee

by Richard Kaplan

Introduction

In a recent article appearing in these pages, Justice Thomas Lee observed that the catch phrases "judicial activism" and "judicial restraint" have become "loaded" or "fighting words" that are overused and obscure clear thinking about the proper role of judges. Justice Thomas R. Lee, *Judicial Activism, Restraint, & the Rule of Law*, 26 Utah B.J. 12, 12 (Nov/Dec 2013). Justice Lee's point is an important one, and I will come back to it and to his formulation of the proper exercise of judicial power later in this essay. First, however, I want to take his article as an invitation to talk about another catch word that has become politically-charged, and that is "Taxpayer"; and to argue that overuse of the word Taxpayer has obscured clear thinking about the concept of "Citizenship," much the same way overuse of the phrase judicial activism has interfered with cogent thinking about judicial power.

At first blush, the word Taxpayer probably sounds innocuous enough. But not all political fighting words are so blatant as, say, "death tax" or "death panel," catch phrases that were conceived to fight and for no other purpose. Even facially neutral words can become loaded when used to throw a partisan punch. The word Taxpayer has become loaded in political speech because it is often used (and often heard) to mean (and appeal to) the millions of Americans who pay federal or state income taxes and to exclude (and in so doing to demean) the millions who don't. And while the taxpayer has taken center stage in American political speech, something that is apparently more fragile has fallen off. That is the concept of Citizenship, which involves much more than paying taxes, but apparently requires nourishing to flourish in the hearts and minds of Americans, especially in tough times like these.

Part One: What happened to the word Citizen?

Set aside discussions about illegal immigration, and you will rarely find the word Citizen used these days in political speech. Politicians understand that when the subject is immigration, American citizenship is precious, and they can score points with large swaths of voters by using the word Citizen to mean "you, the people I'm talking to, the people who matter," and thus to exclude everyone else from the conversation. In this context, to be a Citizen is something to fight for, to fight about. The word Citizen in this context is thus loaded and a fighting word in the sense that Justice Lee uses that phrase.

But apart from discussion of immigration, the word Citizen seems to have essentially vanished from political speech. This seems to hold true in the White House press room, on Capitol Hill, in statehouses across the country, and in the media. President Obama tossed the word out there a few times in his second inaugural address, but to little notice so far as I can tell. Sadly, when we're not arguing about immigration policy, the word Citizen seems almost quaint, drained of power, no ounce of fight left in it.

By contrast, these days the word Taxpayer is used almost universally in political speech as a surrogate for Citizen (that is, as a referent to those of us who matter). Politicians understand what resonates these days is that "The taxpayers want this; the taxpayers deserve that. I want to save the taxpayers' money. We've already burdened the taxpayers enough." Sometimes the heated rhetoric goes so far as to suggest that the taxpayers must be the beneficial or even legal owners of government or perhaps the country. Like shareholders. After all, we are told over and over: it is "the taxpayers' money." Assuming that's true,

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it's not much of a stretch to argue that the government holds the treasury merely in trust for the taxpayers, awaiting instructions from the taxpayers' representatives. Indeed, the word Taxpayer as a referent for Americans who matter gains power through such use every day. When used that way, it divides us into those who matter and those who do not and is thus a powerful, divisive fighting word.

To be sure, it is undoubtedly a good thing for politicians to make clear that they are at least mindful of where government revenues come from and to demonstrate that they at least try to spend tax dollars carefully for precisely that reason among others. To the extent use of the word Taxpayer is used just to demonstrate such understanding and concern, I suppose the word serves a legitimate purpose.

My primary concern is that progressive substitution of Taxpayer for Citizen is divisive in a way that monetizes and cheapens what it means to be an American. In political speech, use of the word seems to confer special status on those who pay federal or state income taxes. The impact may be to cause such folks to feel a little bit better about it, but what about the rest of the populace (including non-citizen residents) who pay other kinds of federal and state taxes, including employment taxes or certainly sales taxes, but do not have sufficient income to warrant income taxation? Also, conflating Taxpayer with Citizen raises troubling questions. If you pay more federal income tax than the next person does, do you have a greater stake in the country than that person does? Does someone who pays no income tax at all have no stake at all?

It seems to me self-evident that our constitutional government is not charged, like a corporate board of directors is, with maximizing the taxpayers' return (in dollar terms) on investment. Taxpayers are not the sole constituency. Rather, our constitutional government is through its very charter directed to form and preserve a union that serves fundamental interests that all of its citizens have in common. These include the common interests set forth explicitly in the Preamble to our Constitution and throughout that document and its Amendments.

We enjoy rights as American citizens, perhaps foremost among which in a loose sense are the rights the Declaration exalts to "life, liberty and the pursuit of happiness." Our forebears understood that as a corollary, it follows that we also have a broad array of responsibilities to country. The words Citizen and Taxpayer are not interchangeable, not synonyms, and not substitutes. Paying taxes is merely one incident of citizenship, albeit an important one. It should be obvious that we want and need a common understanding of the concept of an **American citizen** that is much more robust in all contexts than that of an **American taxpayer**. Indeed, the original understanding of what it meant to be an "American citizen" didn't include paying a federal income tax. Other than to fund the war effort during Lincoln's presidency and in connection with the financial "Panic of 1893," no such tax existed in the United States until after the ratification of the Sixteenth Amendment in 1913.

Part Two: An oversimplified historical detour

It may be helpful to offer some more recent historical context for the evolution or really de-evolution from Citizen to Taxpayer. Let me preface this with a qualification. I have not done an empirical study of the relative frequency with which Presidents or other political figures have used these words over the years, and I am not positing a causal connection between what I see as the ascendancy of the word Taxpayer and the descendancy of the word Citizen. Rather, I think that to the extent I'm correct in identifying and describing these two phenomena, they both reflect the same societal reaction to challenging economic times: that is, increasing concern for self and decreasing

concern for country or, put differently, a culture where rights are increasingly exalted over responsibilities. In that light, it is entirely consistent that in the context of immigration, you don't get to join the club merely by paying taxes. Rather, in that limited context, the word Citizen is used proudly and seemingly to mean more than it does anywhere else.

In any case, I personally tend to trace this shift in our discourse toward the primacy of taxpayer to the moment in 1980 when then candidate Ronald Reagan looked into the camera and, with his abundant charm, asked us this question during a televised debate with President Carter: "Are you better off than you were four years ago?" This question obviously elicited a resounding response among Americans of "No, I'm not," and Reagan repeated it countless times in televised ads. Take a moment to reflect on Reagan's words, and to contrast them with this familiar excerpt from President Kennedy's inaugural address in 1960: "Ask not what your country can do for you; ask what you can do for your country." Regardless of your political persuasion, you may agree with me that Reagan was appealing primarily to the voter's pocketbook; Kennedy to our better angels (to borrow a phrase from the greatest of all Republican Presidents).

In fairness, Reagan offered to uplift us from the malaise that Carter's presidency had become (in Carter's own words) and to restore the "Shining City on the Hill." Thus, he appealed not just to holes in the American pocketbook but also to deeper wounds in the American psyche. Further, when Reagan asked, "Are you better off?" he was of course campaigning, and to the extent that he was offering an ode to the American wallet, he struck a chord that surely had a lot to do with his election and re-election by a landslide. By contrast, Kennedy was giving an inaugural address. If the purpose of a campaign sound bite is to obtain traction in collective consciousness, Reagan implanted his question there with super glue. If the purpose of an inaugural address is to inspire, Kennedy's surely had inspirational impact, but only for a while. Indeed, over the last fifty years, the legs under Reagan's theme have only grown sturdier: elections are reduced time and again to the catch phrase "It's the economy, stupid." By contrast, while Kennedy's words will likely ring for posterity, their impact seems to have diminished at lightning speed. Unless I'm gravely mistaken (and frankly nothing could please me more), the very notion of public service (with the notable exception of the Armed Forces) seems to have morphed steadily into little more than a historical anecdote from a bygone era of progressive liberal politics. Consistent with that, Obama's use of the word Citizen in his address fell flat, even at the height of his popularity.

Since this piece concerns the power of fighting words to shape public consciousness, another familiar Reagan sound bite warrants mention. In his First Inaugural, Reagan offered that "the government is the problem" and those words found enduring, solid footing in our discourse. It is often argued that Reagan did not intend to condemn government with a broad brush, but rather was urging that an imbalance had developed between dependency on government and reliance on "we, the people," and that he wanted to restore the emphasis on "we, the people" that the founders extolled. If that argument is correct, it tends to reinforce the point I am making here – that we, the people, have important responsibilities, not just rights. But regardless of what President Reagan's intentions were, the meaning of his words morphed into a sweeping indictment of government as always and only the enemy. The effect of these particular fighting words has been to establish an overhang that denigrates not just government as such but also public servants and public service, to what I think has been lasting diminution of our understanding of citizenship.

Part Three: Maybe talk show bloviators are the crux of it

What perhaps irks me most about the pervasive use of the word Taxpayer is not merely that it is misleading (because virtually all of us pay taxes of some kind) or that it is divisive (because it fosters a "we/they" mentality). Rather, I maintain its most pernicious effect is to fuel the poisonous narrative advanced by some influential talk show hosts that the "they" (those who aren't taxpayers) actually want to steal what is "ours" (the taxpayers' money). "Robbing Peter to pay Paul," according to this view of things, is at the heart of any progressive approach to taxation. No longer, then, are taxes merely a necessary incident of citizenship about which one might actually be proud to have contributed one's fair share. Rather, taxes are a reason to be angry and to join up with others who are angry to stop this form of theft, this immoral outrage, from occurring.

The capacity of the word Taxpayer to mold opinion when used this way is more powerful than it might otherwise be because of the increasing fragmentation of the media, and even living and social arrangements in the United States. Americans can now isolate themselves so that they interact only with those who agree with them. They can listen only to what they want to hear, and have it reinforced, day in and day out, 365 days a year. They can choose to occupy an echo chamber of their own design. It is easy to see other Americans as the enemy in such circumstances.

Part Four: Justice Lee's Article

Against this backdrop, I was heartened to read what Justice Lee had to say in his recent article. In identifying judicial activism and restraint as loaded or fighting words, he was plainly concerned about the dulling effect abuse of such language can have on our brains and about how such words play to our passions rather than aid us in clear thinking. That is the same kind of phenomenon I'm trying to identify and caution against here. My thesis is that use of the word Taxpayer (together with underuse of the word Citizen) to mean those who matter and to exclude the rest has exactly those same harmful effects.

Justice Lee's article shows how loaded words interfere with analysis and is instructive as far as it goes. He is obviously right when he points out that a court decision striking down a law passed by a duly elected political branch of government does not necessarily reflect judicial activism (in a pejorative sense), and that a court decision upholding such a law does not necessarily reflect judicial restraint (in a positive sense). After all, as he says, ever since Marbury it has been understood that passing on the legitimacy of acts of Congress is a core function of the federal judiciary. It's their job. Most of the time it's thumbs up, but sometimes it is thumbs down. When thumbs down, that may seem arrogant to many, but invalidating a law may be a perfectly appropriate indeed constitutionally required exercise of judicial power.

> *"[W]hen is a judge legitimately performing his role as an interpreter of the law, and when is he not? And how is that function to be accomplished in those inevitable cases where values clash?"*

Similarly, Justice Lee is undoubtedly correct when he says that a court decision overruling precedent does not necessarily warrant a charge of activism. Consider the eventual fate, to take the easiest, most obvious of examples, of *Plessy v. Ferguson*. Sometimes the overwhelming majority or even a unanimous court decides that an earlier case was wrongly decided. There is nothing wrong *per se* with overruling precedent. *Stare decisis* supports stability and predictability, but every first year law student knows that that doctrine does not constitute an absolute bar to overruling precedent when a court determines that circumstances compel it. Rather, as Justice Lee implies, whether such a decision is activist in a pejorative sense is a question requiring careful consideration of the decision itself and, in the end, may be simply a matter of perspective.

Justice Lee observes that "our use of these terms [activism and restraint] ought to be informed by a careful delineation of the meaning of the nature of the judicial power." Justice Thomas R. Lee, *Judicial Activism, Restraint, & the Rule of Law*, Utah B.J. 12, 18 (Nov/Dec. 2013). And he asserts that the essential inquiry is whether the judge has performed or abdicated his or her "role of interpreter of the law and arrogated the role of injecting his own will into his decisions." *Id*. Although personally I've never thought it possible for judges to compartmentalize everything they've learned or contemplated during a lifetime of experience, it's hard to disagree that the pledge of neutrality requires them at the very least to be mindful of that problem and to bend over backwards to try not to "arrogate[] the role of injecting [their] own will into [their] decisions." *Id*.

What Justice Lee has done here is to try to move our discourse toward an alternative conversation where thoughtfulness and considered judgments trump superficial, emotionally-packed jargon. In so doing, he has made a potentially important contribution to the national discussion about the role of judges, a discussion that has been fueled if not dominated by heat-seeking language for at least the last four decades if not longer.

All of that said, the points Justice Lee makes are the relatively easy ones, and it bears mention that harder questions dominate the debate over how courts should interpret the Constitution. Let's posit that Justice Lee is right when he says the legitimate role of a judge is to interpret the law. What, then, constitutes interpretation and what does not? Put differently, when is a judge legitimately performing his role as an interpreter of the law, and when is he not? And how is that function to be accomplished in those inevitable cases where values clash?

Answering such questions is vexing because well-meaning people disagree fundamentally about how the Constitution should be interpreted and about whether the results in particular cases reflect legitimate or illegitimate exercises of judicial power. There is abundant legal scholarship on the various interpretative paradigms that compete for recognition, acceptance by courts, and a public sense of legitimacy, and identifying or discussing them is well beyond the scope and purpose of this comment. Suffice it to say that in this author's opinion, the question remains open whether the so-called

conservative United States Supreme Court Justices who embrace variations of what they call originalism are any more or less politically motivated and proactive than the liberal or progressive Justices who embrace variations of what is sometimes referred to as a living constitution.

Part Five: Modest suggestions for re-invigorating the word Citizen

As to how we can move our discourse beyond loaded or fighting words, let me first repeat and then adopt Justice Lee's suggestion: He urged that "our use of these terms [activism and restraint] ought to be informed by a careful delineation of the meaning of the nature of the judicial power." *Id*. So, too, then, our use of the terms Citizen and Taxpayer ought to be informed by a careful delineation of the meaning of the nature of citizenship in American society – what is the full range of contributions to the common good that adult members of our society must make if it is going to sustain itself? If "we, the people" have responsibilities beyond ourselves?

Thinking about it that way, perhaps those of us who pay income taxes ought to view what we're doing as a necessary requirement of citizenship for ourselves because we have the means to do it, but certainly not as sufficient to fulfill the idea much less the ideal of citizenship as it appears to have existed well into the twentieth century. That ideal includes both public and private service and the notion of self-sacrifice for the common weal. What is more, we should take care not to adopt self-serving characterizations of ourselves that imply that the less fortunate are second-class citizens, since the common good to which we are dedicated as a people includes their well-being too. You need look no further than the Preamble of the Constitution to get to the same place: the charge of our constitutional government is to create and maintain a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, etc. The ratification of the Sixteenth Amendment reflects nothing more than recognition that to address twentieth century challenges to the common good, the federal government needed a significantly larger revenue base than it had.

But paying taxes is not enough to demand of our citizenry, for the simple reasons that our government cannot achieve the lofty aims set forth in the Preamble by itself, or by resort only to treasure. "We, the people," have critical roles to play. For some, the responsibility to country is best fulfilled by public service. For others, it is fulfilled through participation in private enterprise, or as an educator, physician, or even a lawyer, and through religious or other charitable foundations or organizations. And for yet others, the call of working for the media or these days creating new media is most compelling. The spectrum of roles through which we as citizens can contribute to the common good is a broad and inclusive one. Our concept of citizen must leave room as well for criticism of government, of protest, and opposition; I would say sometimes loyal to power and sometimes not. There is a proud tradition in the United States of skepticism, suspicion, and distrust of government, which stems from the birth of this country through the present day. We believe that holding government to account at least has a tendency to make it better. Most basically, our concept of citizenship must encourage the engagement and participation of all Americans in the affairs of the country. That you become an active member of an informed electorate is the least that American citizenship requires.

Summing all this up with a suggestion for action, I would add this to my wish list for fellow citizens: Next time you hear someone abuse the word Taxpayer, or the phrases judicial activism and judicial restraint, call them on it. Ask them to explain what they mean. Let's not let loaded or fighting words obscure our ability to think through the issues for ourselves. Maybe we can eliminate the propensity to resort to inflammatory, thoughtless characterizations one thoughtful conversation at a time.

Part Six: More of the same

I had been thinking about this bugaboo I have about the word Taxpayer for quite a while before I managed to complete a draft of this essay. In the meantime, Judge Robert Shelby of the United States District Court for the District of Utah issued his opinion striking down the State's ban on gay marriage. No sooner than the proverbial ink was dry, the Governor labeled Shelby an "activist federal judge attempting to override the people of Utah" and some Utahns wrote letters to the editor calling for Judge Shelby's impeachment. I wish the Governor had stopped to read Justice Lee's comment in these pages before lobbing a heat-seeking missile into the crowd. And whether the result Judge Shelby reached is right or wrong as a constitutional matter, an honest reading of his opinion leaves no room to doubt that it was the product of thoughtful and careful analysis. In fairness to Governor Herbert, he's certainly not alone. These days politicians of every stripe toss red meat to their base at every turn. As citizens, though, we should demand better, not just from our elected leaders but most basically from ourselves.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the January 24, 2014 Commission Meeting held at the S.J. Quinney College of Law.

1. The Commission nominated Tom Seiler and Angelina Tsu as the 2014 Bar-President-elect candidates.

2. The Commission selected Terrie McIntosh for the Dorothy Merrill Brothers Award.

3. The Commission selected Janise Macanas for the Raymond Uno Award.

4. The commissioner liaison reports of Margaret Plane, Rob Rice, John Lund, Dickson Burton, Janise Macanas, and Kenyon Dove were postponed until the March meeting

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

2014 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2014 Summer Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org, no later than Thursday, May 30, 2014. The award categories include:

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The amount which was expended on lobbying and legislative-related expenses in the preceding fiscal year was .57% of the mandatory license fees. Your rebate would total: Active Status – $2.42; Active – Admitted Under 3 Years Status – $1.42; Inactive with Services Status – $1.42; and Inactive with No Services Status – $.60.

Notice of Second Verified Petition for Reinstatement by Larry A. Kirkham

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of Respondent's Second Verified Petition for Reinstatement (Petition) filed by Larry A. Kirkham in *In the Matter of the Discipline of Larry A. Kirkham*, Third Judicial District Court, Civil No. 070901366. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

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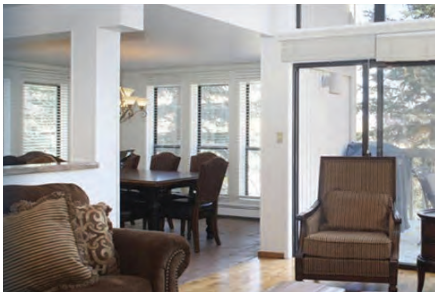

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http://summerconvention.utahbar.org

New Utah State Bar Ethics Advisory Opinion Committee Opinions

Opinion Number 14-01, Issued January 15, 2014

ISSUE

Under what conditions is it appropriate for a personal injury lawyer to "outsource the calculation, verification and resolution of alleged health insurance liens and subrogation/reimbursement claims" and pass the outsourced resolution fee to the client as a "cost." There are two questions posed to the committee. First, can the lawyer appropriately outsource the lien resolution? Second, is the treatment of the lien resolution fee appropriately treated a "cost" to the client?

OPINION

It is ethical for a personal injury lawyer to engage the services of a lien resolution company that can provide expert advice or to associate with a law firm providing this service.

If properly disclosed in the retention agreement, fee resolution services may be included as "costs" to the client provided the resolution services are professional services equivalent to accountants or appraisers.

If the services provided constitute the practice of law, the personal injury lawyer and the lien resolution company must comply with the fee-splitting requirements of Rule 1.5(c) and (d). Then, the lawyer cannot treat the lien resolution fee as a cost to the client. If the services constitute the practice of law, it may be proper for a lien resolution company to collect a contingency fee.

Opinion Number 14-02, Issued January 14, 2014

ISSUE

Is an Agreement between a non-lawyer Marketer and a Law Firm where the Marketer conducts telephone marketing to solicit and refer clients to Law Firm in violation of the Rules of Professional Conduct where the payment to the Marketer matches a percentage of the fees paid to the Law Firm by the clients referred to the Law Firm by the Marketer?

If the Agreement is in violation of the Rules of Professional Conduct, must the Attorney retained by Marketer to enforce the Agreement inform the appropriate professional authority pursuant to Rule 8.3(a)?

OPINION

The Agreement, which requires payment to the non-lawyer Marketer to be based on a percentage of the fees paid to the Law Firm by the clients referred to the Law Firm by the Marketer, violates Rule 7.2(b) and Rule 5.4 of the Rules of Professional Conduct.

The question of whether it should be apparent to the Attorney retained by Marketer to enforce the Agreement, that the Agreement violates Rule 7.2(b) and/or Rule 5.4 of the Rules of Professional Conduct, in a manner that triggers a duty to inform the appropriate professional authority under Rule 8.3(a), is a fact specific inquiry undertaken by the lawyer presented with a Rule 8.3(a) question. The Committee expresses no opinion as to whether these specific facts do in fact trigger any obligation of the Attorney under Rule 8.3(a).

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 at sydnie.kuhre@utahbar.org or (801) 297-7035 or Ryan Rapier, MCLE Assistant at ryan.rapier@utahbar.org or (801) 297-7034.

Mandatory Online Licensing

The annual Bar licensing renewal process will begin June 1, 2014, and will be done only online. Sealed cards will be mailed the last week of May to your address of record. (*Update your address information now at* http://www.myutahbar.org). The cards will include a login and password to access the renewal form and will outline the steps to re-license. Renewing your license online is simple and efficient, taking only about 5 minutes. With the online system you will be able to verify and update your unique licensure information, join sections and specialty bars, answer a few questions, and pay all fees.

No separate licensing form will be sent in the mail. You will be asked to certify that you are the licensee identified in this renewal system. Therefore, this process should only be completed by the individual licensee, not by a secretary, office manager, or other representative. Upon completion of the renewal process, you will be shown a Certificate of License Renewal that you can print and use as a receipt for your records. This certificate can be used as proof of licensure, allowing you to continue practicing until you receive your renewal sticker, via the U.S. postal service. If you do not receive your license in a timely manner, call (801) 531-9077.

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

We are increasing the use of technology to improve communications and save time and resources. Utah Supreme Court Rule 14-507 requires lawyers to provide their current e-mail address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org.

Tax Notice

Pursuant to Internal Revenue Code 6033(e)(1), no income tax deduction shall be allowed for that portion of the annual license fees allocable to lobbying or legislative-related expenditures. For the tax year 2013, that amount is .57% of the mandatory license fee.

Call for Nominations for the 2014 Pro Bono Publico Awards

The deadline for nominations is April 1, 2014.

The following Pro Bono Publico awards will be presented at the Law Day Celebration on May 1, 2014:

- **Young Lawyer of the Year**
- **Law Firm of the Year**
- **Law Student or Law School Group of the Year**

To download a nomination form and for additional information please go to:
http://lawday.utahbar.org/lawdayevents.html

If you have questions please contact the Access to Justice Coordinator, Michelle Harvey at:
probono@utahbar.org or 801-297-7027

SUPPORT LAW DAY

Be a part of the special Law Day section of *The Salt Lake Tribune* and *Deseret News*. As we approach the 50th anniversaries of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, we can help people reflect on the importance of a citizen's right to vote and the challenges we still face in ensuring that all Americans have the opportunity to participate in our democracy.

By advertising in the edition you can showcase your expertise in a targeted editorial environment read by thousands of potential clients. Contact Ken Stowe at kstowe@mediaoneutah.com or 801-204-6382.

If you have suggestions for editorial content, please write to sean.toomey@utahbar.org or call 801-297-7059.

2014

LAW DAY Luncheon

Thursday May 1, 12:00 noon

Salt Lake Marriott Downtown at City Creek
75 South West Temple
Salt Lake City

AWARDS WILL BE GIVEN HONORING:

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

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

JOELLE KESLER
(801) 521-6383 • jkesler@dadlaw.net

For other Law Day related activities visit the Bar's website: http://lawday.utahbar.org

Sponsored by the Young Lawyers Division.

Utah State Bar Request for 2014–2015 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more of 12 different committees which participate in regulating admissions and discipline and in fostering competency, public service and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name _____ Bar No. _____

Office Address _____ Telephone_____

Email Address _____ Fax No. _____

Committee Request:

1st Choice _____ 2nd Choice _____

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

_____

_____

_____

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

_____

_____

_____

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

_____

_____

_____

Please list the fields in which you practice law:

_____

_____

_____

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

_____

_____

_____

_____

_____

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

Date_____ Signature _____

Utah State Bar Committees

1. **Admissions.** Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.
2. **Bar Examiner.** Drafts, reviews, and grades questions and model answers for the Bar Examination.
3. **Character & Fitness.** Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.
4. **CLE Advisory.** Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality, and conformance.
5. **Disaster Legal Response.** The Utah State Bar Disaster legal Response Committee is responsible for organizing pro bono legal assistance to victims of disaster in Utah.
6. **Ethics Advisory Opinion.** Prepares formal written opinions concerning the ethical issues that face Utah lawyers.
7. **Fall Forum.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
8. **Fee Dispute Resolution.** Holds mediation and arbitration hearings to voluntarily resolve fee disputes between members of the Bar and clients regarding fees.
9. **Fund for Client Protection.** Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.
10. **Spring Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
11. **Summer Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
12. **Unauthorized Practice of Law.** Reviews and investigates complaints made regarding unauthorized practice of law and takes informal actions as well as recommends formal civil actions.

Detach & Mail by June 6, 2014 to:
James D. Gilson, President-Elect
645 South 200 East
Salt Lake City, UT 84111–3834

"and Justice for all"

32nd Annual Law Day 5K Run & Walk

May 17, 2014 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

"Every Step ~ Every Voice ~ Every Vote"

REGISTRATION INFO: Mail or hand deliver completed registration to address listed on form (registration forms are also available online at www.andjusticeforall.org). **Registration Fee:** before May 1 -- $25 (plus $10 for Baby Stroller Division extra t-shirt, if applicable), after May 1 -- $35. Day of race registration from 7:00 a.m. to 7:45 a.m. Questions? Call 801-924-3182.

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

DATE: Saturday, May 17, 2014 at 8:00 a.m. Check-in and day-of race registration in front of the Law School from 7:00 - 7:45 a.m.

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

PARKING: Parking available in Rice Eccles Stadium (451 S. 1400 E.). Or take TRAX!

USATF CERTIFIED COURSE: The course is a scenic route through the University of Utah campus. A copy of the course map is available on the website at www.andjusticeforall.org.

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

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

RECRUITER COMPETITION: It's simple, the organization who recruits the most participants for the Run will be awarded possession of the Recruiter Trophy for one year and air transportation for two on **JetBlue Airways** for non-stop travel between Salt Lake City and New York, NY or Long Beach, CA. However, all participating recruiters are awarded a prize because success of the Law Day Run depends upon our recruiters! To become the 2014 "Team Recruiter Champion," recruit the most registrants under your organization's name. Be sure the Recruiting Organization is filled in on the registration form to get competition credit.

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

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

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

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

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

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

REGISTRATION - "and Justice for all" Law Day 5K Run & Walk
May 17 2014 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

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

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

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

- ❒ Age Division FEMALE _____ (AGE on May 17, 2014 - Must be filled in)
- ❒ Age Division MALE _____ (AGE on May 17, 2014 - Must be filled in)
- ❒ Baby Stroller Division FEMALE
- ❒ Baby Stroller Division MALE
- ❒ Wheelchair Division FEMALE
- ❒ Wheelchair Division MALE
- ❒ Chaise Lounge Spectator
- ❒ In Absentia - "I'll be there in spirit!"

SHIRT SIZE (please check one)

❒ Child XS ❒ Child S ❒ Child M ❒ Child L
❒ Adult S ❒ Adult M ❒ Adult L ❒ Adult XL ❒ Adult XXL

BABY SHIRT SIZE (baby stroller participants only)

❒12m ❒18m ❒ 24m ❒ Child XS

OPTIONAL COMPETITIONS (Registrations MUST be received by May 1, 2014 to be entered in any of these):

Recruiting Organization:	Speed Competition Team:	Speed Individual Attorney:
_____	_____	_____
(must be filled in for recruiters' competition)	(team name)	(Bar number)

Payment	
Pre-Registration (deadline 05/01/14)	$25.00
Baby Stroller (add $10 per baby)	$10.00
Late Registration Fee (after 05/01/14)	$10.00
Charitable Donation to "and Justice for all"	$_____
TOTAL PAYMENT	$_____

Payment Method

❒ Check payable to "Utah State Bar"
❒ Visa ❒ Mastercard
Name on Card _____
Address _____
No. _____ exp. _____

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

Signature (or Guardian Signature for minor) _____ Date _____ If Guardian Signature, Print Guardian Name _____

THANK YOU TO OUR MAJOR SPONSORS

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S.J. Quinney College of Law The University of Utah
Garden Restaurant
The Lion House Pantry Restaurant
Nauvoo
The Roof Restaurant

Women Lawyers of Utah to Unveil "Trailblazers" Documentary May 8th

by Aida Neimarlija

This spring, Women Lawyers of Utah (WLU) will unveil its much-anticipated "Trailblazers" documentary highlighting the lives and accomplishments of the first one hundred female lawyers admitted to practice law in the State of Utah (First One Hundred). The film includes compelling interviews with these inspiring women. WLU plans to hold an evening reception and screening event on May 8, 2014, at the Salt Lake City Library.

The Utah State Bar and WLU have long appreciated and recognized the significant role that Utah's first women attorneys have played in Utah's history. These women, through their determination, resilience, and hard work, overcame numerous challenges and paved the way for generations to come. Their dedication to the practice of law and their service in key leadership and other positions have helped women gain a greater presence in the profession where they offer a different set of perspectives, knowledge, and experiences.

Former Utah State Bar Presidents and WLU members Charlotte Miller and Debra Moore organized a special dinner honoring the First One Hundred in 1998. Building on that event, in 2010, WLU's then-President Melanie Vartabedian and the former Special Committee Chair Cathleen Gilbert initiated WLU's "Women Trailblazers in the Law Project." WLU's goal was to memorialize in film the fascinating stories by and about this group of women for the benefit of future generations of attorneys in this state. The project was co-sponsored by the Utah State Bar, the S.J. Quinney College of Law, the J. Reuben Clark Law School, and many Utah law firms. Thanks to the generosity of these sponsors, WLU was able to film hundreds of hours of interviews with almost two dozen of the First One Hundred and to incorporate those interviews into a full-length documentary.

The legal community celebrated the first phase of the project on May 26, 2011, at the Grand America Hotel, where over 350 guests had an opportunity to preview excerpts of several fascinating interviews of the first One Hundred. WLU presented each of the First One Hundred in attendance with a memento key chain engraved with the words "Utah Trailblazer." The keychain represented lawyers' roles in creating a path for women to practice law in Utah. All attendees received an updated version of a booklet the Utah State Bar published in 1998, which contained photographs, biographies, anecdotal stories, and advice from the Utah Trailblazers. The 2011 Trailblazers Booklet is available at utahwomenlawyers.org.

Since the 2011 event, WLU's Immediate Past-President Heather Farnsworth and the current Special Project Committee Chair Cortney Kochevar retained producer Ryan Gass to assist in creating a full-length documentary. Mr. Gass was chosen because of his excellent work producing the "Lend a Learned Hand" documentary for the Utah State Bar's Pro Bono Commission. WLU's Special Project Committee members Allyson Barker, Carrie Boren, Emy Cordano, Katherine Judd, Heidi Kingman, Tanner Lenart, Stacie Stewart, and Carrie Towner worked tirelessly by researching the history of women in the law, collecting photographs, film footage and various documents from the archives, and conducting additional interviews of the Trailblazers.

The sixty-minute "Trailblazers" documentary will premiere on May 8, 2014, at a special screening at the Salt Lake City Library. Additional information about this event will be available on the WLU website, utahwomenlawyers.org. For any questions, please contact WLU at womenlawyersofutah@gmail.com.

Pro Bono Honor Roll

Alig, Michelle – Tuesday Night Bar

Allebest, Jared – Family Law Case

Allred, Parker – Tuesday Night Bar

Amann, Paul – Tuesday Night Bar

Angelides, Nicholas – Senior Cases

Archibald, Nathan – Tuesday Night Bar

Armstrong, Harold – Family Law Case

Backlund, Ericka – Family Law Case

Baker, Jim – Senior Center Legal Clinics

Ball, Matt – Tuesday Night Bar

Barrick, Kyle – Senior Center Legal Clinics

Baxter, Brandon – Cache County Thursday Night Bar

Baxter, Brandon – Family Law Case

Beck, Sarah – Debtor's Clinic

Benson, Jonny – Immigration Clinic

Berceau, David – GAL Case

Bertelsen, Shaon – Senior Center Legal Clinics

Bogart, Jennifer – Street Law Legal Clinic

Bogart, Jennifer – Street Law Legal Clinic (took case)

Bosshardt, Jackie – Tuesday Night Bar

Bown, Ashley – Expungement Cases

Brown, Richard – Family Law Case

Burn, Brian – Consumer Case

Carroll, Nathan – Bankruptcy Cases

Chandler, Josh – Tuesday Night Bar

Clark, Melanie – Senior Center Legal Clinics

Coil, Jill – Tuesday Night Bar

Combs, Kenneth – Expungement Case

Conley, Elizabeth – Senior Center Legal Clinics

Conyers, Kate – Street Law Legal Clinic

Conyers, Kate – Tuesday Night Bar

Culas, Robert – Medical Legal Clinic

Cundick, Ted – Street Law Legal Clinic

Davis, Burton – Tuesday Night Bar

Davis, Tess – Cache County Thursday Night Bar

DePaulis, Megan – Tuesday Night Bar

Drake, Michael – GAL Case

Farr, Doug – Tuesday Night Bar

Ferguson, Phillip S. – Senior Center Legal Clinics

Foster, Shawn – Immigration Clinic

Fox, Richard – Senior Center Legal Clinics

Gilmore, Grant – Bankruptcy Case, Housing Case

Gittins, Jeff – Street Law Legal Clinic

Gittins, Jeff – Street Law Legal Clinic (took case)

Gonzalez, Mary – Family Law Case

Grover, Jonathan – Family Law Case

Harison, Matt – Street Law Legal Clinic

Harrison, Jane – Expungement Case

Hart, Laurie – Senior Center Legal Clinics

Harvey, Michelle – Debtor's Clinic

Held, Becky – Tuesday Night Bar

Hollingsworth, April – Street Law Legal Clinic

Holt, Rebecca – Tuesday Night Bar

Horne, Jennifer – Tuesday Night Bar

Hoskins, Kyle – Family Law Case

Houdeshel, Megan J. – Tuesday Night Bar

Jelsema, Sarah – Family Law Clinic

Jensen, Michael A. – Senior Center Legal Clinics

Johnstone, Cathy – Family Law Cases

Kearl, Derek – Tuesday Night Bar

Kennedy, Michelle – Tuesday Night Bar

Kessler, Jay – Senior Center Legal Clinics

Kulbeth, Marie – Senior Center Legal Clinics

Lee, Terrell R. – Senior Center Legal Clinics

Lillywhite, Andrew – Tuesday Night Bar

Love, Perrin – Family Law Case

Mader, Rebecca – Expungement Clinic

Marx, Shane – Rainbow Law Clinic

Marychild, Suzanne – Family Law Case, GAL Case

Maughan, Joyce – Senior Center Legal Clinics

McCoy II, Harry – Senior Center Legal Clinics

McKay, Chad – Family Law Cases

McKelvey, Adrienne – Tuesday Night Bar

McOmber, Liz – Tuesday Night Bar

Meredith, Lillian – Family Law Case

Miller, Nathan – Senior Center Legal Clinics

Mitchell, Nate – Family Law Clinic

Miya, Stephanie – Medical Legal Clinic

Molen, Michael L. – Tuesday Night Bar

Molgard, Jack – Family Law Case

Molgard, Malone – Family Law Case

Moore, Marty – Cache County Thursday Night Bar

Morrow, Carolyn – Family Law Clinic

Morrow, Carolyn – Family Law Case

Munro, Dan – Tuesday Night Bar

Naegle, Lorelei – Family Law Case

Nalder, Bryan – Tuesday Night Bar

Nejad, Aria – Family Law Cases

Nevar, Allison – Family Law

O'Neil, Shauna – Bankruptcy Hotline

Ostrow, Ellen – Tuesday Night Bar

Owen, Langdon – Property Case

Pace, David – Family Law Case

Parker, Kristie – Senior Center Legal Clinics

Parkinson, Jared – Senior Center Legal Clinics

Pettey, Bryce – Tuesday Night Bar

Poff, Samuel – Post Conviction Case

Powers, Amy – Expungement Clinic

Ralphs, Stewart – Family Law Clinic

Rammell, Steve – Expungement Case

Redman, Meisha – Family Law Case

Rippa, Anthony – Post Conviction Case, Family Law Case

Roberts, Kathie Brown – Senior Center Legal Clinics

Roberts, Stacy – Family Law Clinic

Robinson, Dan – Bankruptcy Case

Roman, Francisco – Immigration Clinic

Ronnow, Bill – Street Law Legal Clinic

Ronnow, Bill – Street Law Legal Clinic (took case)

Ryon, Rebecca – Tuesday Night Bar

Schow, Jason – Family Law Case

Schulz, Gregory – Tuesday Night Bar

Scruggs, Elliot – Street Law Legal Clinic

Sellers, Andrew – Tuesday Night Bar

Semmel, Jane – Senior Center Legal Clinics

Smith, Linda – Family Law Clinic

Smith, Shane – Street Law Legal Clinic

So, Simon – Family Law Clinic

Starr, Steven – Family Law Case

Stewart, Jeremy – Tuesday Night Bar

Tanner, Brian – Immigration Clinic

Thomas, Michael – Tuesday Night Bar

Thorne, Jonathan – Street Law Legal Clinic

Thorpe, Scott – Senior Center Legal Clinics

Thorpe, Sherry – Family Law Case

Throop, Sheri – Immigration Clinic

Timothy, Jeaninne – Senior Center Legal Clinics

Trease, Jory – Debtor's Clinic

Trousdale, Jeff – Tuesday Night Bar

Tsai, Roger – Immigration Case

Tsai, Roger – Tuesday Night Bar

Velez, Jason – Estate Planning Case, Probate Case

Waldron, Paul – GAL Case

Wharton, Chris – Rainbow Law Clinic

Wheeler, Lindsey – Tuesday Night Bar

Williams, Timothy G. – Senior Center Legal Clinics

Winder, Craig – Cache County Thursday Night Bar

Yauney, Russell – Family Law Clinic

Young, Summer – Family Law Cases

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 December–January of 2013 and 2014. 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.

Utah Bar Foundation

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

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

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

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

Nomination forms must be received in the Foundation office no later than 5pm on Wednesday, May 7, 2014, to be placed on the ballot.

The Utah Bar Foundation will be holding the Annual Meeting of the Foundation on Saturday, July 19, 2014, at 9:00 am in Snowmass Village, Colorado. This meeting will be held in conjunction with the Utah State Bar's Annual Meeting.

For additional information on the Utah Bar Foundation, please visit our website at www.utahbarfoundation.org.

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/.

ADMONITION

On January 13, 2014, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence) and 1.4(a) (Communication) of the Rules of Professional Conduct.

In summary:

The attorney represented a Plaintiff who did not meet the threshold requirements for maintaining a personal injury action. The attorney nonetheless filed the Complaint but failed to have the Defendant served. The court held a hearing on an Order to Show Cause. The attorney did not appear at the hearing and the case was dismissed without prejudice. The attorney re-filed the Complaint on behalf of the Plaintiff. Over three years after the re-filing of the Plaintiff's lawsuit, the court issued an Order to Show Cause for failure to prosecute. Both parties failed to appear at the hearing and the court dismissed the case with prejudice. The attorney did not know the case had been dismissed and failed to keep the client informed of the status of the case, which the client believed was still ongoing, twelve years after first hiring the attorney. There was little or no injury to the client.

PUBLIC REPRIMAND

On December 20, 2013, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against James A. Valdez for violation of Rules 1.15(b) (Safekeeping Property), 1.15(c) (Safekeeping Property), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct

In summary:

Several Notices of Insufficient Funds (NSF) were generated from the bank where Mr. Valdez had his IOLTA client trust account. The Office of Professional Conduct (OPC) received these NSFs and in various letters asked Mr. Valdez to explain the circumstances surrounding the NSFs. Mr. Valdez received the request letters from the OPC. Mr. Valdez did not respond to any of the letters.

Subsequently, the OPC served Mr. Valdez with a Notice of Informal Complaint (NOIC) for the NSFs, requiring him to respond in writing to the NSFs as OPC Bar complaints. Mr. Valdez received the NOIC from the OPC. Mr. Valdez failed to respond to the OPC's NOIC.

Mr. Valdez did not have proper accounting procedures in place. In this respect, Mr. Valdez tracked client funds mentally and did not have a formal tracking system.

ADMONITION

On December 5, 2013, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

The attorney represented a client in a divorce case. This representation resulted in the client filing a Bar complaint against the attorney. The Office of Professional Conduct sent the attorney a Notice of Informal Complaint requiring the attorney to respond in writing to the Bar complaint. The attorney failed to respond to the Notice of Informal Complaint.

PUBLIC REPRIMAND

On December 5, 2013, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Amy L. Butters for violation of Rule 1.1 (Competence) and Rule 1.4(a) (Communication) of the Rules of Professional Conduct

In summary:

Ms. Butters represented a client in a bankruptcy proceeding. The client's first bankruptcy filing was dismissed and then subsequently re-filed. At the time the client's bankruptcy was re-filed, the client's checking account had a greater balance than the balance reflected in the filing. Ms. Butters failed to adequately inform the client regarding how to report the balance of their checking account and did not take adequate steps to ensure she knew the balance of the client's account on the day the bankruptcy was re-filed.

The Bankruptcy Trustee wanted payment into the bankruptcy for the total amount of the discrepancy. Ms. Butters's client wanted part of the discrepancy amount to be kept for bills. Ms. Butters wrote a letter to the Trustee offering to pay back the total amount of the discrepancy and requesting that it be paid back in installments. Ms. Butters failed to keep her client reasonably informed regarding her communications with the Bankruptcy Trustee and failed to consult with her client before making an offer of repayment to the Trustee. Ms. Butters did not adequately explain to her client how the money in the checking account would be treated. The client's checking account funds that were taken by the Bankruptcy Trustee may have been able to be used for exempt expenses had the client been reasonably informed.

Ms. Butters' client wanted student loan debt to be discharged as part of the bankruptcy. Ms. Butters advised her client that they could make a motion to have the student loans discharged based on the client's disability and hardship, and that the decision would be up to the judge. Ms. Butters did not have the requisite knowledge to properly advise her client regarding the dischargeability of the student loans. Ms. Butters failed to timely respond to the client's requests for information regarding the dischargeability of the student loan debt.

PUBLIC REPRIMAND

On December 5, 2013, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Amy L. Butters for violation of Rule 1.4(a) (Communication), 1.5(a) (Fees), 1.15(d) (Safekeeping Property), 1.16(a) (Declining or Terminating Representation), 1.16(d) (Declining or Terminating Representation), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct

In summary:
Ms. Butters was retained to represent a client in a divorce proceeding. The client paid Ms. Butters a retainer. About 2 ½ weeks after she was retained, for five days, Ms. Butters failed to respond to the client's telephone calls and text messages. At the end of the five-day period, the client emailed Ms. Butters and terminated her representation. The client also called Ms. Butters's assistant on the same day to reiterate that the client was terminating the relationship. A week after she was terminated, Ms. Butters prepared and filed an Answer on behalf of the client.

The client requested an accounting of fees from Ms. Butters. Ms. Butters did not provide the client with an accounting and characterized the fee she received as a flat fee. The hours Ms. Butters spent on the client's case prior to the termination of her representation were billed at an hourly rate that did not justify the fee she received. Ms. Butters did not return the unearned fees to the client.

After the client filed a Bar complaint against Ms. Butters, the Office of Professional Conduct sent Ms. Butters a Notice of Informal Complaint requiring her to respond in writing to the Bar complaint. Ms. Butters did not provide a written response to the Notice of Informal Complaint.

An Expert for All Seasons: Expert Testimony Usually Required, and Unusually Specific

by Tanner Lenart

Expert witnesses are pervasive throughout all areas of the legal system. However, with apologies to Sir Thomas More, an expert for all seasons does not exist. With the most recent iteration of the discovery rules mandating the disclosure of experts prior to any demand, the tendency has fostered the attitude of Franz Kafka that it is better to have and not need than need and not have. However, attorneys should beware of such an approach, because in the case of expert witnesses, the quality of on-point experience and/or education is often better than a quantity of degrees on a resume. Before designating an expert, make sure he or she is an expert in the field you need – and not a well-known "expert" in some tangentially related endeavor. Without the right expert, your jury could be left to speculate, which is never a good idea.

"Before designating an expert, make sure he or she is an expert in the field you need – and not a well-known 'expert' in some tangentially related endeavor."

Whether or not an expert may testify at trial or present evidence to a jury is up to the court. Utah law has adopted the federal interpretation of Utah Rule of Evidence 702, which "assigns to trial judges a 'gatekeeper' responsibility to screen out unreliable expert testimony." *Gunn Hill Dairy Props., LLC v. L. A. Dept. of Water & Power*, 2012 UT App 20, ¶ 28, 269 P.3d 980 (internal quotation omitted). To fulfill this "gatekeeper" duty, "the court must first consider whether expert testimony would be helpful in assisting the trier of fact and whether the proposed expert has the necessary knowledge, skill, experience, training, or education to provide such assistance to the trier of fact." *Id.* ¶ 30. Accordingly, this "knowledge, skill, experience, training, or education" must be in the same topic and/or field as the issue to which the expert is testifying for the benefit of the jury. For example, in a case where a tourist engages a ski instructor for lessons and allegedly is injured due to the ski instructor's negligence, you may be tempted to hire Lindsay Vonn as your expert, because Ms. Vonn is, without a doubt, an expert skier. Her expertise, however, is limited to skiing and not its instruction, and she may not be allowed to opine on the standard of care for ski instructors. C.J.S. *Evidence* § 704 provides:

> The competency of an expert is relative to the topic about which the witness is asked to testify. While a witness may be an expert in one field, he or she may not necessarily be an expert in another field, even though that field is closely related, and it is impermissible for an expert to render an opinion which requires special expertise in a discipline other than that in which he or she is shown qualified.

In Utah, this delineation is seen in *Butler, Crockett & Walsh Development Corp. v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225 (Utah 1995), where a dispute over property boundaries and water rights resulted in an expert witness testifying at trial

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> Without waiting for a discovery request, a party shall disclose a person who may be used at trial to present evidence under Rule 702 or 703 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. The party shall give: (i) the expert's name and qualifications, including a list of all publications authored within the preceding ten years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years; (ii) a brief summary of the opinions to which the witness is expected to testify; (iii) all data and other information that will be relied upon by the witness in forming those opinions; and (iv) the compensation to be paid for the witness's study and testimony. Regardless of the tier of the case, further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. An expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report. *See* Utah R. Civ. P. 26(a)(4).

regarding quiet title matters. While the trial court found that this witness was an abstractor and an "honest individual," the court also held that it did not find that "his expertise met the qualifications which he was called to testify on." *Id*. at 233. Simply put: An expert in one field cannot testify in another, even though the fields may be related.

In another case, *Turner v. University of Utah Hospitals*, 2011 UT App 431, 271 P.3d 156, *rev'd on other grounds*, 2013 UT 52, 310 P.3d 1212, a physician-expert testified outside of the limits of his specialty when he offered expert testimony regarding a patient's thoracic spine even though his area of expertise was the cervical spine. While the court did not find that the trial court abused its discretion in allowing this testimony due to the manner in which courts are allowed to conduct their trials, the appellate court admonished that "as a designated expert, [his] testimony should have been limited to his fields of expertise." *Id*. ¶ 26. *See also Construction Servs. Workers' Comp. Grp. Self Ins. Trust v. Stevens*, 8 A.3d 688 (Me. 2010) (An expert witness's opinion may be excluded if the court finds that it is not within the expert's specialized knowledge); *State v. Norton*, 712 S.E.2d 387 (N.C. Ct. App. 2011) (The test for the admissibility of expert testimony requires, inter alia, that the witness be qualified as an expert within the area of testimony). "One may qualify as an expert only in his or her own particular field and is limited to testifying as an expert only in that special sphere." 32 C.J.S. *Evidence* § 704.

It is not only testifying in the wrong field that can get your expert thrown out but also the way in which your expert conducts trial preparations. In the recent case of *Paget v. UDOT*, 2013 UT App 161, — P.3d —, handed down on June 27, 2013, the expert, who through experience, education, and training appeared to meet the requisite requirements for presenting pertinent expert testimony under the Rules of Evidence, failed to meet with the court's approval due to his questionable methodological practices. In *Paget*, a car crossed I-80 into oncoming traffic, resulting in a fatality and injuries. UDOT sought summary judgment. Paget opposed, proffering expert testimony stating that UDOT should have erected a median barrier. The trial court found that Paget's expert relied on inadmissible evidence, failed to visit the scene of the accident, and relied on incorrect measurements made by another person; therefore, he was not qualified to testify. Although the summary judgment was not upheld for other reasons, the appellate court did uphold the trial court's striking of Paget's expert witness testimony because his "opinion is based on evaluations that contain incorrect measurements . . .and they have failed to provide any other indicia that his proposed testimony is reliable." *Id*. ¶ 15.

Paget shows that your responsibility as an attorney is to determine not just whether your expert will pass muster

regarding his or her qualifications, but also the sufficiency of your expert's testimony and methods. While there is a tendency to just let the experts just do their jobs, *Paget* portends a cautionary tale which challenges all lawyers to review and question the basis of their experts' testimonies before it is released into the wildlands of litigation.

In cases involving duties owed by a particular profession, the standard of care owed by that profession must ordinarily be established by expert testimony. *Wycalis v. Guardian Title of Utah*, 780 P.2d 821, 826 n.8 (Utah Ct. App. 1989). "Where the average person has little understanding of the duties owed by particular trades or professions, expert testimony must ordinarily be presented to establish the standard of care." *Spafford v. Granite Credit Union*, 2011 UT App 401, ¶ 31, 266 P.3d 866. *Wycalis* cites a wide variety of cases that required expert testimony regarding specific professions: *Chadwick v. Nielsen*, 763 P.2d 817, 821 (Utah Ct. App. 1988) (medical doctors); *Nauman v. Harold K. Beecher & Assocs*., 467 P.2d 610, 615 (Utah 1970) (architects); *Nat'l Housing Indust., Inc. v. E.L. Jones Dev. Co*., 576 P.2d 1374, 1377 (Ariz. Ct. App. 1978) (engineers); cf. *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co*., 682 P.2d 388, 403 (Ariz. 1984) (establishing insurance brokers' standard of care "may require expert testimony"); *Estate of Beach*, 542 P.2d 994, 1001 (Cal. 1975) (professional estate executors).

Utah courts have long held that "[w]here the subject of inquiry is a field beyond the knowledge generally possessed by a layman, one properly qualified therein maybe permitted to testify to his opinion as an expert." *Edwards v. Didericksen*, 597 P.2d 1328, 1330 (Utah 1979) (citation omitted). In point of fact, Utah Rule of Evidence 702(a) supports this position stating that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Utah R. Evid. 702(a). Through expert testimony, "the jury is directly informed of what the basic facts and intermediate inferences add up to. The jury is not required to speculate in an area in which it is not as knowledgeable as the expert.…Accurate fact finding is enhanced…and improper jury speculation is avoided." *Edwards,* 597 P.2d at 1330.

It is well established in Utah that juries may not speculate. The Utah Court of Appeals held that summary judgment is appropriate "when the plaintiff cannot show that a jury could conclude, without speculation, that the injury would not have occurred but for the defendant's breach." *Triesault v. Greater Salt Lake Bus. Dist*., 2005 Utah App 489, ¶ 14, 126 P.3d 781. The jury also may not speculate as to causation. In order to avoid this type of guesswork, "proximate cause issues can be decided as a matter of law… when the proximate cause of an injury is left to speculation." *Thurston v. Workers Comp. Fund*, 2003 UT App 438, ¶¶ 12–16, 83 P.3d 391; *see also Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996). A trial court's decision to grant summary judgment will be upheld where "the jurors would have had to engage in rank speculation to reach a verdict" regarding causation. *Clark v. Farmers Ins. Exch.*, 893 P.2d 598, 600 (Utah Ct. App 1995) (internal quotation marks and citation omitted). To hold otherwise would "undermine the policies of Rule 56:"

> To hold that the [the rules of evidence] prevent[ ] a court from granting summary judgment against a party who relies solely on an expert's opinion that has no more basis in or out of the record than [the plaintiff's expert's] theoretical speculations would seriously undermine the policies of Rule 56.... The position that an expert's opinion that lacks any credible support creates an issue of "fact" is clearly untenable.

Butterfield v. Okubo, 831 P.2d 97, 103 (Utah 1992) (emphasis in original) (alterations in original).

While an expert must adhere to the "general rule" regarding his or her opinion – that "the expert may not give an opinion which represents a mere guess, speculation, or conjecture," *Thurston*, ¶ 20 – it nonetheless remains the burden of the plaintiff to prove his or her prima facie case. In *Thurston*, the court of appeals affirmed summary judgment because the plaintiff did not "present sufficient evidence that would allow a jury to conclude that such breach was a proximate cause" of the alleged injury, as there was "no expert testimony or lay opinion that addresses proximate cause." *Id*. ¶ 12. These cases illustrate that while it is often true that it is better to have and not need, *ad hoc* expert testimony can prove toxic to a case if the expert and his or her methodology is not adequately vetted prior to entering the courtroom. Without an expert – the *right* expert – juries speculate, and that simply will not do.

Message from the Chair

by Danielle S. Davis

The Paralegal Division Board of Directors has been contacted by the Board of the Utah Newborn Safe Haven program about working with them to spread the word about the program and increase their opportunities for fundraising efforts. We are pleased to assist this program and have some information from them as follows:

In an ideal world, all pregnancies would be planned and wanted. Newborns would be welcomed into the home and raised by loving parents. But, sometimes, a pregnancy is not planned nor wanted. When this happens, a newborn baby's life may be at risk.

For some women, their pregnancies are not welcomed. The woman may not want to admit she is pregnant. She may not receive prenatal care or counseling, nor does she consider traditional adoption. Instead, she may hide her pregnancy, deliver on her own with no medical care and leave her newborn in an unsafe place.

"[I]n 2001, the statewide Utah Newborn Safe Haven law went into effect allowing birth parents to anonymously give up custody of their newborn baby without facing any legal consequences."

That is why in 2001, the statewide Utah Newborn Safe Haven law went into effect allowing birth parents to anonymously give up custody of their newborn baby without facing any legal consequences. The law is designed to prevent tragic situations we have all heard about when a newborn was left in a dumpster, airport bathroom or other unsafe place that jeopardized the life of the infant or actually led to a newborn baby's death.

The law states that *anyone* can drop off a newborn baby at any Utah hospital that is open 24/7 – with no questions asked.

The Utah Newborn Safe Haven Committee has developed an outreach initiative to inform Utah residents about the Safe Relinquishment Law. The committee has created materials to promote general awareness, including a website, educational posters, TV and radio public service announcements, and access to a toll-free information hotline staffed by emergency professionals at the Utah Department of Health. The website provides information on Utah's Safe Relinquishment Law, including Commonly Asked Questions, Utah Hospital Locations, and Helpful Links and Resources.

With questions about the Utah Newborn Safe Haven program, please visit the website www.utahsafehaven.org or call the hotline at 1-866-458-0058.

All of these activities and materials are costly to create and implement. Tax-deductible donations for this valued project are appreciated. Checks can be addressed to "Safe Haven" and mailed to Julia Robertson, Utah Newborn Safe Haven, 44 North Medical Drive, Salt Lake City, Utah 84114.

The program would like to garner support from the legal community. If this program interests you or you if you feel you can assist with fundraising, please contact them for more information. If you know of someone that may benefit from this information, please pass it along.

Distinguished Paralegal of the Year Award

The Distinguished Paralegal of the Year Award is presented by the Paralegal Division of the Utah State Bar and the Utah Paralegal Association to a paralegal who has met a standard of excellence through his or her work and service in this profession.

We invite you to submit nominations of those individuals who have met this standard. Please consider taking the time to recognize an outstanding paralegal. Nominating a paralegal is the perfect way to ensure that his or her hard work is recognized, not only by a professional organization, but by the legal community. This will be an opportunity to shine. Nomination forms and additional information are available by contacting Danielle Davis at ddavis@strongandhanni.com or on the Paralegal Division website at www.utahbar.org/sections/paralegals.

The deadline for nominations is April 30, 2014. Reminders will also come via E-bulletin as well as announcements at the Mid-Year Meeting in March in St. George. The award will be presented at the Paralegal Day Celebration held on May 15, 2014.

Heather Johnson Finch Memorial Endowed Scholarship

The Paralegal Division of the Utah State Bar is proud to announce that the Heather Johnson Finch Memorial Endowed Scholarship has now reached the $30,000 benchmark needed to fund scholarship opportunities. Heather Finch was the consummate professional and model of what a paralegal should be. Heather tragically died in an airplane crash in August of 2010. It was the goal of the Division and the legal community to honor Heather's legacy and dedication by providing scholarship opportunities for dedicated, aspiring, service-oriented students majoring in Paralegal Studies at Utah Valley University (UVU). By pursuing the best paralegal education, the legal community will benefit when these students enter the workforce. Interested students should follow the guidelines established by UVU. We anticipate the first recipient will be announced at the Paralegal Day Celebration luncheon on May 15, 2014. Please donate to this continuing, growing scholarship. For more information contact: Nancy Smith, UVU Office of Institutional Advancement (801) 863-8896. Students may apply, as listed on UVU's scholarship financial aid website: http://www.uvu.edu/financialaid/scholarships/.

CLE Calendar

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

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.
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 and 5 Ethics)**

Ethics School: What they Didn't Teach you in Law School. $245 early registration $270 after March 10.

03/28/14 | 9:00 am – 12:15 pm **3 hrs.**

U-visas, T-visas, and VAWA: A Crash Course. Applying for U-visas and VAWA with Mark Carter Williams, Peretta Law Office. Applying for T-visas with Alex McBean, Utah Legal Services. $45 for AILA members and attorneys active under three years in practice, $90 for all others.

06/03/14 | 8:00 – 11:30 am **3 hrs. CLE (including 2 hrs. Ethics)**

Ethics in Social Media Legal Extravaganza. "Hot Tweets, Hot Water: Ethical Issues When Lawyers do Social Media" with Randy Dryer, Parsons Behle & Latimer. "Social Media in the Workplace: Legal Issues" with Christina Jepson, Parsons Behle & Latimer. "The Admissibility of Social Media Evidence" with Michael Young, Parsons Behle & Latimer.

07/16–07/19/14 | All Day **TBA**

2014 Summer Convention in Snowmass Village, Colorado

For more information visit: http://summerconvention.utahbar.org

For the most up to date CLE listings,
or to register for an upcoming CLE, please visit:
www.utahbar.org/cle/cle-events/

Classified Ads

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

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

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

POSITIONS AVAILABLE

Two-lawyer AV-rated Sandy law firm seeks highly-skilled, experienced commercial litigator(s). Form of association flexible, dependent on size and quality of applicant's practice and experience. Other practice areas may be considered. Space exists for up to 4 additional lawyers. Firm merger may be considered. (801) 858-3402, dws@psplawyers.com.

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Long established Salt Lake City firm seeking patent procurement lawyer with substantial portable book of business to augment the firm's intellectual property practice. Salary and distributions commensurate with experience and performance. Excellent benefits and collegial working environment. Please send resume and writing sample to Confidential Box #2, Attn: Christine Critchley, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111 or email barjournal@utahbar.org.

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Certificate of Compliance

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For July 1 _____ through June 30_____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____ Email: _____

_____

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

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

2. **New Lawyer CLE requirement –** Lawyers newly admitted under the Bar's full exam need to complete the following requirements during their first reporting period:
   - Complete the NLTP Program during their first year of admission to the Bar, unless NLTP exemption applies.
   - Attend one New Lawyer Ethics program during their first year of admission to the Bar. This requirement can be waived if the lawyer resides out-of-state.
   - Complete 12 hours of Utah accredited CLE.

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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

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

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

Date: _____ Signature: _____

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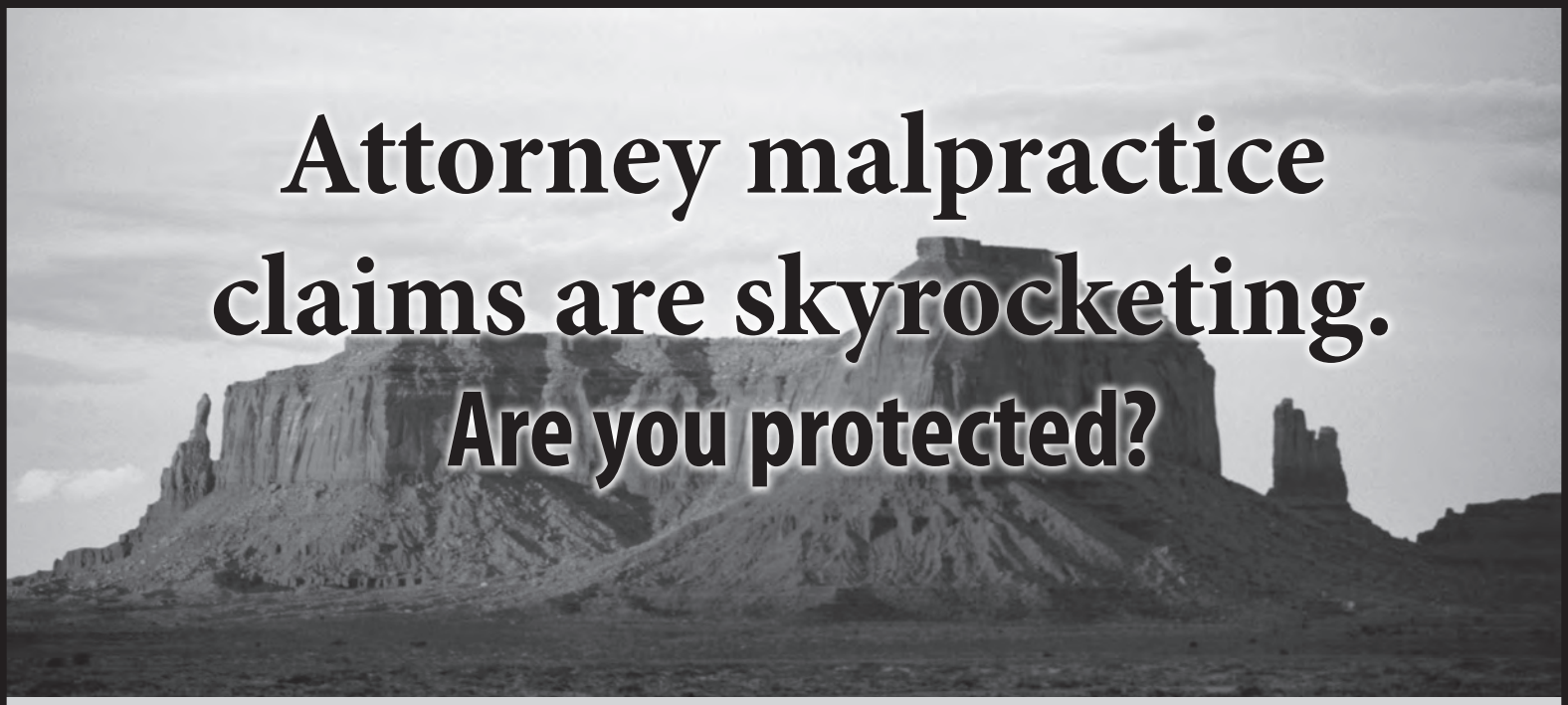

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[1] *"Profile of Legal Malpractice Claims: 2008–2011," American Bar Association, September 2012.*

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