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Cover Art

Cascade Springs Waterfall, by Mark Wilkey of Alpine, Utah.

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

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The *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.

In Memory of Joyce N. Seeley

1933–2014

In appreciation of her dedicated service to the Bar 1989–2010.

The Utah Bar Journal

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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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1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.

2. No one person shall have more than one letter to the editor published every six months.

3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.

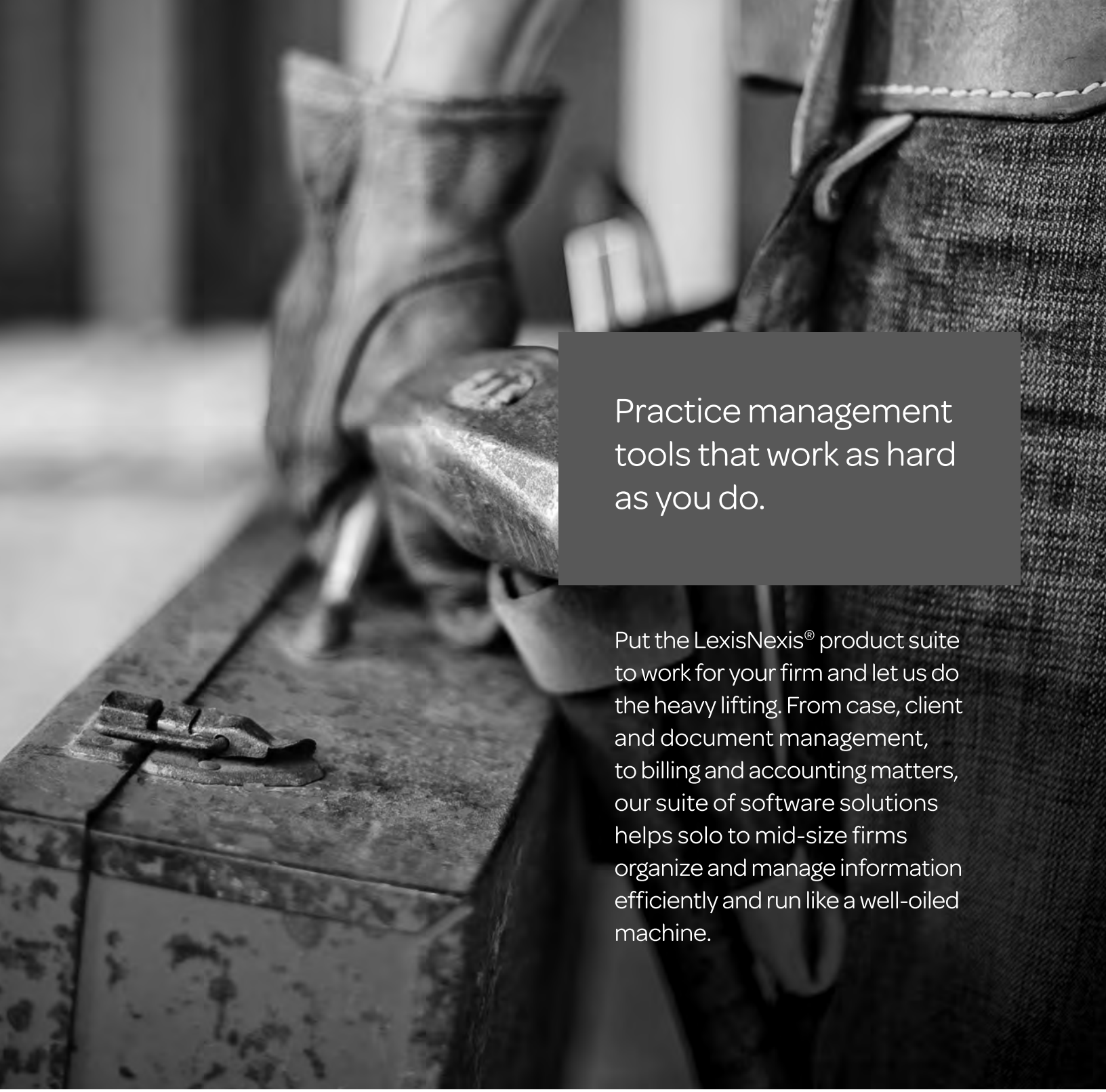
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.

8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.



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*Being a Leader in the Law: Reflections on Meeting the Responsibilities of the Legal Profession**

by Curtis M Jensen & Gregory H. Gunn

AUTHOR'S NOTE: *Mr. Jensen would like to acknowledge and thank John Baldwin, Justice Matthew B. Durrant, Justice Christine M. Durham, Judge David Nuffer, Toby Brown, Former Chief Justice Michael D. Zimmerman, James Rasband, Robert Adler, Jim Gilson, John Lund, and Frederic Ury, for their contribution, comments, and feedback.*

The practice of law has changed and, in the words of Yogi Berra, "[t]he future ain't what it used to be." Not too long ago, attorneys were the sole source from which nonattorneys could access legal information and services. With a strong economy and a demand for legal services, legal practices were growing. All indicators seemed to point to the continuation of a strong legal market. However, the practice of law has evolved due to the blurring of lines between professions, changes in the economy, and technological advances that provide greater public access to legal information. Public perception of the legal profession has continued to decline, with many individuals (including small business owners and the middle class) now unable to afford the legal services attorneys provide. The story does not end there. There is also a growing number of attorneys (mostly new graduates) that are either underemployed or unemployed. The combination of these changes has affected the current legal market, and there is disagreement on how to move through this transitional period. While there is a true challenge facing the profession, there seem to be many voices and many perspectives on how to respond.

The law schools seem to think it is about changing the law schools; the bar associations think it is about new programs; nonlawyers, and perhaps even some lawmakers, think that market forces will be the answer. Regardless of your voice and perspective, we remain firm that attorneys of the Utah State Bar can work together with others to provide a solution for the future of the practice of law within the state of Utah.

CHANGES IN THE PRACTICE OF LAW

The practice of law is changing, and we must recognize this change, both as individuals and as a legal community. If we think like leaders, these changes need not be negative. Rather than remain passive, we should be prepared to take whatever steps are necessary to lead our communities forward. This article summarizes the sources of the changes in the legal market, their potential effect on us as a legal community, and steps we can take to move forward in a way that benefits us as well as our clients.

Sources of Change in the Legal Market

In today's legal market, attorneys no longer serve as the sole source of legal information. Both technology and globalization allow individuals easy access to legal information – information that at one time was only available through attorneys.[1] These two developments, along with a dramatic shift in the economy, have turned the legal market into a buyer's market.

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Technology now allows individuals to complete legal documents on their own, obtain answers to their legal questions, and quickly decide where and how to get their legal advice. The presence of online legal service alternatives such as LegalZoom and DirectLaw may be a contributing factor to this change,[2] or it could be caused by a shift in legal consumers' expectations for online resources,[3] leaving "offline" attorneys out of the competition for new customers and expansion of their practice. What is clear is that individuals are going online for legal information – information that is abundantly available on almost any subject or issue – and accessing that information without any specialized legal skills.

The recession of 2008 left its stamp upon many aspects of the economy, and the legal profession (like many others) is still feeling the effects.[4] Now, attorneys face competition for clients, not just among attorneys within the same geographic area but also with online service providers and "do-it-yourself" software programs.[5] Without leaving the comforts of home, consumers have access to legal information that is not only easily accessible and inexpensive but also instantaneous.

Meanwhile, law firms are learning they can no longer continue to do business as they had in the past and are attempting to make changes. In order to remain competitive through the recession, attorneys had to be more efficient at providing the services clients requested while at the same time allowing clients to pay a pre-determined rate or giving clients the opportunity to redline the billing statements. The post-recession consumer of legal services now imposes timeline and price expectations for the delivery of services. Clients now have the real alternative of simply taking their business to someone (online or in person) willing to perform the services at the client's desired price and within the client's desired timeframe. Corporate clients are more cognizant of legal costs, making them cautious before hiring outside work.[6]

The economic changes that began in 2008 have turned the legal market into a buyer's market.[7] During this time, the number of lawyers was growing while the market was shrinking and becoming more demanding. Globalization has also played a critical role in reshaping the traditional model of providing legal services. One can simply email his or her legal request to an online legal service provider and receive a final document that is ready for submission to a client or filing with the court. Businesses and

attorneys now realize they can tap into a whole new market of outsourced legal services provided at considerable cost savings.[8] In the end, clients who once paid top dollar now know the majority of their work can be accomplished not only more efficiently but also at a much lower cost.[9]

The Effect of These Forces on the Legal Market

Although technology, globalization, and a dramatic shift in the economy have affected how attorneys find and retain clients, these factors have not changed the public's perception of attorneys. A recent study asked participants to identify the contribution that attorneys made to society. One-third of those surveyed said attorneys contributed "nothing" or "not very much" to society and placed attorneys at the bottom of the ten professions on the survey.[10] These results are similar to the survey's 2009 results.[11]

The time when students went to law school, graduated, and found a job that provided a large income may be over – with many possible law school applicants choosing to not even apply.[12] The current reality is that there are more students than there are available jobs,[13] and students are finding that they cannot secure a job through traditional methods.[14]

There is another side to the current legal market. The legal system is not functioning as intended, leaving a gap between those trained to provide legal services and those needing legal services.[15] Simply put, there are many people in need of legal services who simply cannot afford them.[16] Many of these individuals have limited access to legal services because of demographics as well as time constraints. People just do not have the resources and/or the time to expend on quality services, protracted litigation, or other constraints traditionally associated with the practice of law. This gap affects not only individuals without funds for legal services who would be served pro bono but also middle class individuals who are unable to pay the going price for the services they need.[17] This causes many to make the choice to forego legal services altogether.

This "access to justice paradox"[18] asks "[h]ow is it that we have people badly in need of a lawyer with no one to turn to and, at the same time, find that thousands of young lawyers are unemployed and underemployed?"[19] The problem is much more than just mere economics or supply and demand – "[t]he access to justice paradox seems to defy the most basic principles of supply and demand."[20]

RADICAL CHANGES MAY NOT BE NEGATIVE IF WE THINK LIKE LEADERS IN THE LAW

With "[t]he *status quo*…coming unstuck"[21] and a realization that the past is just that – the past, the legal profession will have to face changes, but such changes do not have to negatively impact our practice of law. As a profession, we can face the task of recognizing the change in the legal market and make adjustments in our practices, allowing us to provide necessary legal services to our communities.[22] As law students, when we entered law school, many of our professors told us that law school would "teach us to think like a lawyer." Expanding on this common phrase, we should not just think like a lawyer, but also think like a leader in the law. As attorneys, we have received three years of formal training and possess a unique skill set. Law school taught us to see, think, and read critically. It also trained us to keep an eye towards identifying potential problems, exploring options, developing and analyzing thoughtful solutions, and advocating for the implementation of those solutions. With this refined skill set and training, we often find ourselves being the key decision maker, the counselor and advisor, the advocator of change – the one everyone in the room is looking to for the answer.

There are times to be bold and times to be understanding and compassionate. We have learned to be articulate and skillful with our communication, to be good listeners, and to identify things others may miss. Therefore, we must have courage to lead and speak out where voices are not heard, where rights need to be defended, and where remedies and protections need to be asserted. We become leaders in our communities, we become leaders in the boardroom, we become advocates for those who have no voice – regardless of their economics, demographics, and physical limitations or circumstances. We need to think and act as leaders in the law and that will allow our profession to meet the challenges it now faces.

The preamble to the Utah Rules of Professional Conduct

discusses this concept of being a leader in the law:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.…A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance and therefore, all lawyers should devote professional time and resources and use civic influence in their behalf to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.[23]

The responsibility of being an attorney has not changed as a result of the economy or the level of online access individuals have to legal information. Although there is some unrest concerning the current state of the legal profession, if we in the legal profession would reflect upon the essential values contained in the preamble and live up to the aspirations of our profession, the answer becomes much clearer – lawyers can be the solution.

MOVING FORWARD

This is a complex problem. There are no easy solutions. Solving this problem will take changes in practices and attitudes among many different people and groups. But, as members of the Utah Bar, there are things we can all do now to address it. First, supporting existing programs such as pro bono and Modest Means; second, using technology to build relationships; third, finding opportunities to add value to a client's business; and finally, being open and cognizant of further opportunities.

Support the Current Existing Programs

Over the past several years, the Utah State Bar, in association with the Utah State Courts, has implemented two programs in hopes of addressing, in part, this access to justice paradox. Chief Justice Matthew B. Durrant's recognition of the Bar's

access to justice programs in his State of the Judiciary Address to the legislature acknowledges the progress of these programs:

> There are of course situations when self-help resources aren't enough, when only a lawyer will do, and the State Bar has stepped up with two important programs. The first is the Pro Bono program, in which lawyers accept cases without any compensation, and the second is the recently developed Modest Means program, in which litigants pay on a sliding fee schedule, based on their ability to pay. Both of these efforts require willing lawyers, as well as coordination to get the willing lawyers together with clients in need. The Bar is providing both, and they deserve our thanks for making legal representation more accessible.[24]

In addition to these two programs, we have several local bar associations and sections that continuously volunteer their time in meeting and providing legal services to the underserved members of our public. There are other ways in which the Bar has tried to assist the legal market with additional opportunities to serve the community and to allow attorneys to develop practical skills, such as, the Mentoring Program and Lawyer Referral Directory. In addition, many sections and committee organizations are available within the Bar and noted on the Bar's website.[25]

"All attorneys…can build a positive professional reputation by volunteering with various legal and community groups, attending bar association events, and assisting with pro bono legal clinics."

Pro bono work, as well as Modest Means work, has many tangible benefits for the attorney providing this service. This work may allow for the learning of a new practice area; refining skills in a current practice area; strengthening client relationship skills by serving a greater number of clients; raising reputation through increased standing among judges and peers; and connecting with various service providers that may be able to serve a paying clients' needs.[26] Modest Means may also help build a book of business and develop your reputation within your legal community.

Using Technology To Build and Develop Relationships

Today's legal market is an "increasingly difficult and challenging environment…that calls for clear thinking, strategic focus, and flexibility in addressing rapidly changing realities."[27] Technology should not be viewed as a hindrance to our ability to practice law but as a new opportunity. Technological advancements within our profession have enabled us to make substantial cost savings in law office operations and delivery of legal services. As an example, as much as I enjoy listening to the bands of the 1970s, I must admit it is more enjoyable hearing the rich harmonics, bone-jarring base beats, organ runs, and sound quality with today's technology than the 8-track stereos of yesterday. Today we do not need to have shelves of books to do our research, but instead we may simply press a button to turn on a computer and begin typing the issue we need to research. We no longer need to assemble bound documents and boxes for mailing and delivery; we may simply drop those documents into a folder and easily press "send," and they are delivered and accessible instantaneously.

However, even with the influx of technology into the legal profession, attorneys need to remember they have a distinctive advantage over web-based legal services – and that is personal service. At the 2012 American Bar Association's Tech Show, speakers urged the implementation of technology to establish personal relationships with customers and increase communication.[28] There simply is no replacement for the face-to-face meeting to solve problems and provide solutions. Even if we continue to advance down the road of greater technology and if alternative legal services find some way of advancing their product by incorporating an artificial intelligence quotient, it will never approach the personal and emotional empathy that we provide and personally offer to our clients. We should remain ever vigilant in helping our clients avoid problems before they arise. We should let them know we have a genuine concern for them and their business. We do not have to wait for their call to show our concern or assistance but can simply send an email, forward an online article, or pick up the phone and have a meaningful discussion.

Adding Value to a Client's Business

In today's market, and as we establish sacred attorney-client bonds, we should always be looking for ways to assist our

clients, peers, and colleagues to avoid problems before they arise. To distinguish us as attorneys – especially from the alternative legal service providers – we should let clients witness that we do possess a genuine concern for them and their business. We need to be actively engaged in providing service that is personal, valued, and specific to the client. Our clients should always feel that we are doing our best to address their concerns and problems, that we are effectively communicating with them, and that we in return value our relationship with them and the opportunity to provide them with pertinent legal services.

For many years, an attorney's ability to know where to find the answer to a client's legal question was a feature that made attorneys indispensable. Now, a Google search can find the same answer to that client's legal question in less time and for less money. Although clients may not fully understand how to search the internet for the correct answer or properly use nontraditional legal services, it is still a resource they are willing to seek out and try as an alternative. But, just knowing where to find the answer does not develop trust. We develop a "trusting relationship… [by] investing…time to understand [the] client's business and doing a better job seeing the world through their eyes."[29] We need to put ourselves in the client's shoes and ask, if we were this client, is this the type of legal service we would expect to receive? "This gives us the best opportunity to use our legal expertise to solve their problems in a way that makes [attorneys] indispensable. Thus, as our clients grow, we have the opportunity to grow with them."[30] This growth enriches both attorneys and clients economically as well as personally over time.

Build Your Professional Reputation by Getting Involved in Your Local and State Bar and Your Community

Attorneys typically only receive referrals from individuals who know and respect them. Reputation is most likely the best tool to develop business. It may take many years to build a positive reputation and just one negative incident to destroy it. All attorneys – and especially those new to the Bar – can build a positive professional reputation by volunteering with various legal and community groups, attending bar association events, and assisting with pro bono legal clinics. These experiences will not only provide attorneys with a greater network and the opportunity to build a positive professional reputation, but they will also allow

for opportunities to provide more legal services to the community through pro bono or the Modest Means Program.

At all times, we must always remember to make it a priority to adhere to civility and ethics in our practice and in the manner we conduct our daily lives. We become professional by acting professional. We have a great opportunity – because of who we are and what we are – to provide services within the communities we live in. We can serve our communities, our neighbors, and friends by volunteering and serving on local boards and councils. As we simply get involved, we have the good fortune to meet new people in our community and forge new relationships and associations with them and they in return get to know us as individuals who – when needed – can provide them with the legal services they require.

Radical Changes vs. Rethinking the Paradigm

It could be argued that the simple thoughts and solutions outlined above are grossly insufficient to cope with the ever-evolving changes facing our profession as a result of advancements in technology and globalization. Perhaps more significant changes do need to take place among several sectors of our society. First, is it time to take a closer look at law schools and the legal education format they are utilizing as some have advocated? Should the model in the law schools be reviewed and revised? Should greater emphasis be placed on graduating law students that are fundamentally equipped to meet the rigors of the legal environment with better technical, management, and interpersonal skills?

Others would advance that we, as attorneys, need to be more open as a legal profession to innovations, new ideas, and alternatives to the current model and traditional practices in our profession. They advance ideas such as finding ways to let in alternative legal service providers and opening up limited practices to technicians, paralegals, and others who do not necessarily want to engage in the traditional practice of law. They suggest that the legal profession should allow some of these unmet legal services to be serviced by outsiders with specific training, and we, as attorneys, should assist in developing and refining those providers with the proper skills and settings to provide such services; that bar associations should be more forward thinking and look for ways of complementing our practice and unmet needs with technology and globalization that is available to the profession today; or that the legal profession should adopt a "one-stop" shopping model where clients can tap into the expertise and assistance of several professionals under one roof. Perhaps those other professions are just as suited to providing such services – we see it happening more each day with title companies, accountants, insurance agencies, engineers, business executives, and entrepreneurs. Should we be so resistant in limiting such outside professionals, or should we be more conscientious in constructively coordinating our services with these other professions to further meet the needs of the adapting legal consumer? Finally, should we be more proactive in improving our traditional model and breaking down the barriers that limit our efficiency and effectiveness – such as looking to expertise in better management of operations, capital infusion of law practices, different paradigms, utilization of bridge programs such as incubators for new lawyers or service clinics for underemployed lawyers to further train and refine their professional skills and thereby providing service at a greater reduced cost? Has the time come for serious consideration of such changes, or will such changes be considered extreme and radical by some within our profession, or as the beginning of the demise of our great profession?

CONCLUSION

It is clear the legal profession is going through a change, but the nobility and honor of our profession remains a constant. As leaders in the law, we have the opportunity before us to create a market that still requires our unique skills, ideas, and commitment in solving today's problems. We should not fear the changes coming to our profession but seek out and look for ways to benefit our practice and profession by providing valuable services more efficiently and economically. We should continuously look for opportunities to serve, to create better access to ourselves and our services, and to always approach our profession honorably by acting at all times within our practice with civility, diligence, and integrity. As we refocus our efforts and embrace the changes before us, we can uphold the principles of our profession and provide greater access to legal services. But are attorneys, law firms, and bar associations prepared to confront and meet these ever-evolving changes brought on by technology, globalization, and consumer demands? This is the real question and are we not the ones who possess the unique skills and training to be problem solvers and provide solutions?

** This article is part of a longer piece that is forthcoming in the Utah Law Review OnLaw edition and originated from a Symposium/CLE held last September that addressed the Twin Crises in the Law.*

1. *See* Mark Curriden, *Future of Law Panel: Change With the Times or Find Another Line of Business*, A.B.A. (Feb. 12, 2011, 7:30 PM), http://www.abajournal.com/mobile/article/future_of_law_panel_change_with_the_times_or_find_another_line_of_business/.
2. *See* Rachel M. Zahorsky, *The Future of Law: Old-Fashioned Client Relationships and Warnings for Solos*, A.B.A. (Mar. 29, 2012, 10:00 AM), http://www.abajournal.com/news/article/the_future_of_law_old-fashioned_client_relationships_and_warnings_for_solos/; *see also* Dan Pinnington, *The Future of Law: The Challenges and Opportunities of Practising Law in a Global Village*, Law Pro Magazine, Sept. 2013, at 27 *available at* http://www.practicepro.ca/LAWPROMag/Pinnington-Future-of-Law.pdf (describing LegalZoom and RocketLawyer as "major legal service players").
3. *See* Zahorsky, supra note 2. ("[Ninety-seven] percent of consumers expect companies to have a robust Web presence, and many look to videos on YouTube and Vimeo as ways to get to know lawyers and make hiring decisions.").
4. *See* Georgetown Univ. Law Ctr., 2013 Report on the State of the Legal Market 2–4 (James W. Jones et al. eds., 2013) *available at* http://scholarship.law.georgetown.edu/cslp_papers/4 [hereinafter Georgetown] (discussing the "financial doldrums" in the legal markets around the world and lawyer productivity as being "essentially flat").
5. *See* Katy Murphy, *Law Schools at a Crossroads: Weak Job Prospects, High Tuition Causing Fewer to Apply*, Mercury News (Oct. 2, 2013, 8:06 AM), http://www.mercurynews.com/ci_24192739/law-schools-at-crossroads-weak-job-prospects-high.
6. *See* Pinnington, *supra* note 2, at 26.
7. *See* Richard Susskind, *Richard Susskind: Disaster Ahead for Lawyers Unwilling to Change*, A.B.A. (Oct. 14, 2009, 9:00 AM), http://www.abajournal.com/legalrebels/article/richard_susskind/.
8. *See* Rachel Zahorsky & William D. Henderson, *Who's Eating Law Firms' Lunch?* A.B.A. (Oct. 1, 2013, 4:30 AM), http://www.abajournal.com/magazine/articles/whos_eating_law_firms_lunch.
9. *See* Mike Ayotte, *Transparency is BigLaw's Kryptonite*, The Law Honest Lawyer Blog (Sept. 16, 2013), http://lasthonestlawyer.org/2013/09/16/transparency-is-biglaws-kryptonite/.
10. *See* Kevin O'Keefe, *Sad: Lawyers Contribute the Least to Society – Pew Survey*, Real Lawyers Have Blogs (July 14, 2013), http://kevin.lexblog.com/2013/07/14/sad-lawyers-contribute-the-least-to-society-pew-survey/.
11. *Id*.
12. *See* Ryan Calo, *Why Now is a Good Time to Apply to Law School*, Forbes (Nov. 24, 2013, 1:43 AM), http://www.forbes.com/sites/ryancalo/2013/11/24/why-now-is-a-good-time-to-apply-to-law-school/.
13. "[T]he National Association for Law Placement released the results of its annual survey, showing 49.5 percent of law school graduates in 2011 had obtained jobs in law firms – a figure that compared with 50.9 percent for the class of 2010 and 55.9 percent for the class of 2009." Georgetown, *supra* note 4, at 8–9.
14. *See* Wendy L. Werner, *Career Advice for Law Students and New Lawyers: A Roundtable Discussion*, Law Practice Today, (Mar. 2011), http://www.americanbar.org/publications/law_practice_today_home/law_practice_today_archive/march11/career_advice_for_law_students_and_new_lawyers.html.
15. *See* Pinnington, *supra* note 2, at 25–26.
16. *Id*.
17. *Id*.; *see also* Debra Cassens Weiss, *Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid*, A.B.A. (July 22, 2010, 7:36 AM), http://www.abajournal.com/news/article/middle-class_dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid (stating the expense of legal services is "out of reach for most people" because their income precludes them from legal aid but still does not allow them to afford legal services).
18. James R. Silkenat, *Trouble in Paradox: Our Nation's Unmet Legal Needs and Unemployed Young Lawyers*, N.Y. State Bar Ass'n J., Sept. 2013, at 55 *available at* http://www.nysba.org/workarea/DownloadAsset.aspx?id=42868.
19. *Id*. at 55–56.
20. *Id*. at 56.
21. Pinnington, *supra* note 2, at 31.
22. *See* Georgetown, *supra* note 4, at 1.
23. Utah R. Prof'l Conduct, Preamble.
24. Matthew B. Durrant, Chief Justice, Utah Supreme Court, 2014 State of the Judiciary Address 5 (Jan. 27, 2014).
25. *See* http://www.utahbar.org.
26. *See* Nelson Miller, *Build Your Business With Pro Bono*, A.B.A., http://www.americanbar.org/newsletter/publications/youraba/201303article01.html#top (last visited Mar. 14, 2014).
27. Georgetown, *supra* note 4, at 1.
28. *See* Zahorsky, *supra* note 2.
29. William Henderson, Commentary, *Why Are We Afraid of the Future of Law?*, The National Jurist, (Sept. 2012) at 8.
30. *Id*.

Implementing Noncompete Agreements in Utah: Protecting Business Trade Secrets, Goodwill, and Investment in Employees

by William R. Knowlton

Introduction

Some of a company's most valuable assets are its trade secrets, customer relationships, and investments made in training and educating its workforce. As a way of safeguarding against trade secrets being misappropriated by departing employees – many of whom become direct competitors – Utah companies turn to noncompete agreements.

According to a study released in February 2013, noncompete clauses were included in 78.7% of 1,000 chief-executive employment contracts nationwide in 2010, compared with 72.5% in 2000. *See* N. Bishara, K. Martin, and R. Thomas, *When Do CEOs Have Covenants Not to Compete in Their Employment Contracts?*, Vanderbilt Law and Economics Research Paper No. 12-33(Oct. 18, 2012).

Misconceptions abound in the business community about noncompete agreements. "Utah is a 'right-to-work' state, so noncompete agreements are not valid," many employees are likely to say. Business owners may privately believe "noncompete agreements are not enforceable in Utah, but we should have them in place just to keep the honest people honest."

In Utah, a properly negotiated and structured noncompete agreement is enforceable and can serve the dual purpose of providing departing employees clear expectations upon leaving the company, while simultaneously protecting an employer's trade secrets and goodwill. The Utah Supreme Court has stated that to be enforceable, noncompete agreements must be: (1) supported by consideration, (2) negotiated in good faith, (3) necessary to protect a company's goodwill, and (4) reasonably limited in time and geographic area. *TruGreen Cos., LLC v. Mower Bros., Inc.*, 199 P.3d 929, 932 (Utah 2008) (*citing Allen v. Rose Park Pharmacy*, 237 P.2d 823, 828 (Utah 1951)); *see also System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425–26 (Utah 1983) (same).

Good Faith Negotiations: Consideration to the Employee

As with all contract negotiations, noncompete agreements must be negotiated in good faith. *TruGreen Cos.*, 199 P.3d at 932. Utah courts are not likely to enforce noncompete agreements if the employer used bad faith negotiation tactics with the employee (such as deception, intimidation, or any manner of coercion) prior to executing the contract. For example, if an employer deliberately induces an individual to enter into a noncompete agreement with the company, only to immediately thereafter terminate the employee, the noncompete agreement would be void because of the employer's bad faith. *See, e.g., Rose Park Pharmacy*, 237 P.2d at 826.

Regarding consideration, my 1L contracts professor was fond of saying, "[I]t is the bargained for exchange." As with all contracts, noncompete agreements must be supported by valid consideration. *Id.* In negotiating a noncompete agreement in Utah, the adequacy of consideration necessary to support the contract is, for the most part, minimal. *Dixon*, 669 P.2d at 426 (holding that an "offer of continued employment" is adequate consideration to the employee).

It is advisable to draft language that specifically states that continued employment is consideration for entering the noncompete agreement. However, in an abundance of caution towards existing employees, it would be prudent for the company to offer some sort of additional consideration to support the contract – perhaps in the form of a bonus, raise, or an additional employment benefit.

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Protecting Trade Secrets and Goodwill

In much of today's highly technical employment market, many companies are required to invest significant time, energy, and money into specialized training of their employees. These employees are often the direct beneficiaries of specialized (and often unique) training and skill sets, which they would not have otherwise had but for their employment education. This training often necessitates that the company share confidential trade secrets with its employees.

Protecting a company's trade secrets and goodwill are considered legitimate business purposes, and Utah courts are apt to uphold noncompete agreements in this context. *See, e.g., Rose Park Pharmacy*, 237 P.2d at 827 (holding that a restrictive "covenant is valid which protects goodwill as well as trade secrets" (*citing Valley Mortuary v. Fairbanks*, 225 P.2d 739, 740–41 (Utah 1951)). *But see Robbins v. Finlay*, 645 P.2d 623, 627 (Utah 1982) (holding that "[c]ovenants not to compete which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable").

In 1989, the Utah Legislature adopted the Uniform Trade Secrets Act (the UTSA), which was codified in Utah Code Ann. 13-24-2 *et seq*. The UTSA defines a "trade secret" as information that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertained by proper means" and "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Utah Code Ann. § 13-24-2(4). In addition to standard business procedures and controls to limit access to confidential company trade secrets, a noncompete agreement should clearly dictate how an employee is expected to handle such information upon departing from the company.

Next, Utah courts have defined a company's goodwill as "'the advantage…acquired by an establishment, beyond the mere value of the capital, stocks, funds or property employed therein, in consequence of the general patronage…it received from… habitual customers on account of its location, or local position or reputation for quality, skill, integrity or punctuality.'" *Peterson v. Jackson*, 2011 UT App 113, ¶ 35, 253 P.3d 1096 (*quoting Jackson v. Caldwell*, 415 P.2d 667, 670 (Utah 1966)).

As to protecting the goodwill of a company via a noncompete agreement, the Utah Supreme Court has held "a covenant not to compete is necessary for the protection of the goodwill of the business when it is shown that although the employee learns no trade secrets, he may likely draw away customers from his

former employer, if he were permitted to compete nearby." *Allen v. Rose Park Pharmacy*, 237 P.2d 823, 827 (Utah 1951). *But see Robbins*, 645 P.2d at 628 (stating that "general knowledge or expertise acquired through employment in a common calling cannot be appropriated as a trade secret").

Keep in mind, however, that if a company seeks to enjoin a departed employee from breaching a noncompete agreement (or from continuing to breach the agreement) using a temporary restraining order, Utah courts must also take into account whether "the services rendered by the employee were special, unique or extraordinary." *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 426 (Utah 1983) (*citing Robbins*, 645 P.2d at 627–28). The argument of "protecting goodwill" from a departing, non-specialized employee, by itself, is likely not sufficient to justify enforcement of a noncompete agreement via injunctive relief.

Reasonableness of Limitations

The last inquiry is whether the noncompete clause is reasonable in its restrictive covenants as to time and geographic scope. "The reasonableness of the restraints in a restrictive covenant is determined on a case-by-case basis, taking into account the particular facts and circumstances surrounding the case and the subject covenant." *Id*. at 427.

In determining whether a restrictive covenant on geographic scope is reasonable, facts of primary importance "are the location and nature of the employer's clientele." *Id*. While unlimited territorial restrictions will most likely be held unreasonable, Utah courts must also consider whether a company's clientele is truly local in nature, or larger in scope, given the ever-expanding breadth of globalization and Utah companies having customer bases on multiple continents.

In considering limitations on time, Utah courts have upheld restrictive covenants ranging in duration from one year to twenty-five years. *See Robbins v. Finlay*, 645 P.2d 623, 624 (Utah 1982) (upholding noncompete agreement with one-year restriction); *see also Valley Mortuary v. Fairbanks*, 225 P.2d 739, 741 (Utah 1951) (upholding a noncompete agreement with a twenty-five-year restriction). As such, there is no black-letter legal precedent to rely upon while drafting time restrictions in noncompete agreements. Like the courts, drafters of noncompete agreements should examine each client's needs on a "case-by-case basis." Generally speaking, time limitations ranging from six months to two years will likely be enforceable. But, again, there is no hard-and-fast rule in this regard – and what is "reasonable" has eluded many conscientious drafters.

Public Policy Considerations

A recent article published in the *Wall Street Journal* stated that the "number of published U.S. court decisions involving noncompete agreements rose 61% since 2002, to 760 cases last year." Ruth Simon and Angus Loten, *Litigation Over Noncompete Clauses Is Rising*, Wall St. J., Aug. 14, 2013. The public policy, for some, is that noncompete agreements are having a "chilling effect" on innovation and entrepreneurship in the United States. The argument to support this theory rests on the premise that noncompete agreements result in slower economic growth, fewer startup companies, and a "brain drain" of human capital fleeing to jurisdictions with more relaxed enforcement precedent.

Indeed, to combat the perceived stifling impact on local economies, some elected officials are advocating for new laws to reign in noncompete provisions, ranging from restrictions on how they are implemented to an outright ban on their enforceability. For example, on July 14, 2012, New Hampshire enacted House Bill 2070, which "requires an employer to disclose non-compete and non-piracy agreements to an employee or potential employee *prior to making an offer of employment* or an offer of change in job classification." N.H. Rev. Stat. Ann. § 275:70 (emphasis added).

Also, last fall, Governor Deval Patrick of Massachusetts voiced his support for an "outright elimination of enforceability" of noncompete agreements. *See* Scott Kirshner, *Big Shift: Governor Patrick Now Supports Making Noncompete Agreements Unenforceable in Massachusetts*, Boston Globe, Sept. 10, 2013. As of the date of this writing, the Massachusetts Legislature has introduced House Bill 27, which would adopt the Uniform Trade Secrets Act as a first step toward altering the state's legal landscape for various start-ups that are hindered by noncompete provisions. Mass. Leg. H. 27 (2014).

Nevertheless, these public policy considerations must be balanced against a company's legal right to protect its trade secrets from being misappropriated by departing employees – many of whom are being poached by direct competitors.

Conclusion

A properly negotiated and structured noncompete is an invaluable legal tool for Utah businesses to use as a deterrent to the theft and exploitation of their trade secrets and goodwill. As long as the noncompete is negotiated in good faith, supported by consideration, being used to legitimately protect the business's goodwill, and reasonably limited in time and geographic scope – it will be enforced by Utah courts.

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To Snoop or Not to Snoop? Legal Considerations Under Utah's Internet Employment Privacy Act

by Christopher B. Snow

In this fast-paced economy (well, it's picking up anyway!), clients need instant (right) answers to assist in navigating complex workplace scenarios that involve monitoring, reviewing, and accessing employees' electronic communications. In other words, employers sometimes demand the legal right to snoop. Let's consider a few increasingly common scenarios that may involve a client's legitimate business interests to snoop on employee electronic communications.

Trade Secret Theft

Your client calls your firm in a panic and informs you that they just learned a key employee has emailed hundreds of proprietary documents to his personal Gmail account and the company believes that the employee is intending to resign to work for a direct competitor. Your client asks whether they can demand that the employee turnover his Gmail account password so the IT department can take immediate measures to ensure the information is not electronically transmitted to third party competitors or elsewhere. What do you tell them?

Facebook Defamation

As a legal practitioner, your clients (or your own firm) will inevitably encounter the situation where an employee has posted negative, inflammatory, and slanderous statements on facebook about the company's upper level management. Does the law permit employers to demand employees' social media passwords to access and review the potentially defamatory and untrue statements?

Harassment

Sexual harassment, which increasingly involves the use of illicit text messages, photo shares, and emails on both company and personal electronic communication devices, continues to be a common workplace issue. Your clients might call you for guidance on conducting an internal sexual harassment investigation that purportedly involves salacious text messages sent from the harasser's phone and emails sent from the harasser's email account. Is your client permitted to require the harasser or the victim to turn over their devices or the passwords to the devices to cooperate in the investigation? What if they refuse? Can employers demand access to the text messages, or inappropriate emails?

Utah's Internet Employment Privacy Act

To advise clients in handling the above scenarios, practitioners must have an understanding of the scope and limits of the Internet Employment Privacy Act (IEPA or the Act). Approximately one year ago, Governor Herbert signed into law the IEPA. Utah Code Ann. §§ 34-48-101–301 (LexisNexis 2013). Utah is one of twelve states that passed legislation governing an employers right to request personal Internet account passwords from job applicants or employees and an employers right to review applicants' and employees' electronic communications. Utah's legislature enacted this statute in the wake of several high profile stories relating to employers demanding job applicants' social media passwords in a pre-hire background check scenario.

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Applies to All Utah Employers

The IEPA applies to all private and public employers that have "one or more workers or operators employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written." *Id.* § 34-48-102(2). While not explicit, the enacted language appears broad enough to apply to employees and independent contractors alike.

General Employer Snooping Prohibitions

Under the IEPA, employers may not "request an employee or an applicant for employment to disclose a username and password, or a password that allows access to the employee's or applicant's personal Internet account." *Id.* § 34-48-201(1). The IEPA expressly prohibits employers from taking adverse action, i.e., failing to hire, terminating, discriminating, disciplining, or in any way penalizing, against applicants or employees for refusing to disclose personal Internet account passwords or access. *Id.* § 34-48-201(2). The Act defines "personal Internet account" as an "online account that is used by an employee or applicant *exclusively* for personal communications unrelated to any business purpose of the employer." *Id.* § 34-48-102(4)(a) (emphasis added). The Act further clarifies that a personal Internet account "does not include an account created, maintained, used, or accessed by an employee or applicant for business related communications or for a business purpose of the employer." *Id.* § 34-48-102(4)(b). The plain language of the IEPA (and that is all we have at this point since there is not a single judicial decision interpreting or discussing the intent of the statute) only prohibits employers from accessing an applicant's or employee's personal Internet accounts, i.e., email, voicemail, text messages, and social media accounts, that are used exclusively for personal communications and that do not concern the business of the company.

IEPA Application to Job Candidates

In a pre-hire applicant scenario, the IEPA provides substantially more protection to the applicant's personal electronic communications because the applicant is not likely to have any material business information or communications residing on his or her personal Internet accounts. In other words, an applicant's personal Internet accounts are exclusively used for personal communications before hire because the employee has not yet had the opportunity to use those accounts for the potential employer. Employers will have a difficult time justifying a request for a password to intrude into an applicant's personal electronic data stored or residing online when the applicant has not yet even worked for the company.

IEPA Application to Existing Employees

Current and existing employees however, will likely have personal Internet accounts and electronic communications devices that frequently mingle both business and personal communications. Employers have a legitimate business interest in company information and data that is mixed with employees' personal electronic communications. While this commonplace factual scenario does not provide companies free range to demand usernames and passwords of its employees' personal Internet accounts, the IEPA does identify specific instances where an employer is not prohibited from requiring disclosure of passwords or content or from taking adverse action against an employee who has engaged in misconduct involving use of a personal Internet account. *Id.* § 34-48-202.

"The [IEPA] defines 'personal Internet account' as an 'online account that is used by an employee or applicant exclusively for personal communications unrelated to any business purpose of the employer.'"

IEPA Legally Permissible Snooping for Employers

Specifically, employers are not prohibited from:

- Requiring an employee to disclose a username or password to gain access to an electronic communications device supplied by or paid for in whole or in part by the employer or to gain access to an account or service provided by the employer and used for business purposes. Utah Code Ann. § 34-48-202(1)(a)(i)(ii) (LexisNexis 2013).

- Disciplining or discharging an employee for transferring the employer's confidential information to an employee's personal Internet account without the employer's authorization. *Id.* § 34-48-202(1)(b).

- Requiring an employee to cooperate in an investigation based on specific information about activity on the employee's personal Internet account that involves workplace misconduct (theft of trade secrets, harassment, etc.) or legal compliance issues. The statute does not appear to allow the employer to demand passwords from employees' personal Internet accounts but only to require the disclosure of the actual content that is of concern. *Id.* § 34-48-202(1)(c), (2).

- Monitoring, reviewing, accessing, or blocking electronic data stored on an electronic communications device supplied by, or paid for in whole or in part by, the employer, or stored on an employer's network, in accordance with state and federal law. *Id.* § 34-48-202(1)(e).

- Viewing, accessing, or using information about an employee or applicant that can be obtained that is available in the public domain. *Id.* § 34-48-202(3).

Penalties

The IEPA provides a private right of action for employees aggrieved by violations of the Act, but recovery is limited to not more than $500.00. Utah Code Ann. § 34-48-301 (LexisNexis 2013). There may be additional non-statutory claims, such as common law invasion of privacy claims or claims under the state or federal

Stored Communications Act, that could exact real damage against the company. 18 U.S.C. § 2701. In addition, any evidence obtained in violation of the IEPA may be excludable from trial or an injunction hearing.

Consideration of Client Scenarios Under the IEPA

Let's consider the factual scenarios at the beginning of this article under the IEPA.

Trade Secret Theft

In the first scenario, the employee emailed hundreds of proprietary documents to his personal Gmail account. The IEPA expressly permits discipline and termination for this type of misconduct (and employers certainly could terminate for this misconduct without the IEPA authority). Utah Code Ann. § 34-48-202(1)(b). But can the employer demand the employee provide passwords and access to his personal Gmail account? The employer could argue that the employee has effectively converted his personal Internet account to a mixed business and personal account by transferring sensitive business information. The IEPA defines "personal Internet account" as an "online account that is used by an employee or applicant *exclusively* for personal communications unrelated to any business purpose of the employer." *Id.* § 34-48-102(4)(a) (emphasis added). The argument follows that the Gmail account appears to be no longer *exclusively* personal under the IEPA definitions, but business related. A court could then rule that emailing proprietary documents to a personal email account removes that account from the protections of the IEPA. The counter argument that may be offered by the employee is that the employee emailed the proprietary documents for personal and not business reasons on behalf of the employer. Without the benefit of prior judicial interpretations defining the IEPA, requiring password access under these facts may violate the IEPA. An amendment may be in order to allow employers to request passwords of employees where the employer has a reasonable belief that the employee transmitted proprietary information to a personal email or Internet account.

We receive more clarity in the IEPA's declaration of permitted employer behaviors. The employer may demand cooperation in an investigation involving the theft or potential theft of trade secrets. The statute requires the employee to share the specific content in question with the employer. *Id.* § 34-48-202(1)(c). If the employee refuses to provide the content, the employer may discharge the employee. The company will then have to use the court system to obtain expedited discovery and protect the proprietary information from further dissemination and to determine where the proprietary information now resides.

Facebook Defamation

In the second potential client scenario, the company learned an employee made defamatory posts about certain co-employees or supervisors on her Facebook wall. The company does not have access or permission to review her Facebook account but wants to know the nature of the defamatory statements. The statute in this scenario again does not expressly permit employers to request the employee's Facebook password because the Facebook account is a personal Internet account (assuming she was not using the Facebook account for business purposes on behalf of the business). This is true even though she may have used a company-issued computer or phone to access her Facebook account to post the defamatory content because the Facebook account is not actually "stored on an electronic communications device" or "stored on an employer's network."

The employer may demand the employee cooperate in an investigation and share the Facebook content that is defamatory. *Id.* § 34-48-202(1)(c), (2). And, the employer may also discipline (including terminate) the employee for not cooperating in the investigation or sharing the specific content at issue.

Sexual Harassment

In this scenario, the employee used the company's email server to send numerous inappropriate and unwelcomed email messages to a subordinate. But the employee also uses his work email account for personal use and has sensitive personal information and communications residing on his work email. In addition, the employee used his personal cell phone that was paid for in part by the company to send explicit text messages to this employee. The company provides a $50 per month stipend to be used towards employee's cell phones. The company has initiated an investigation and wants to review the employee's email account and text messages. With respect to the email messages sent on the company network, the IEPA expressly states that an employee's personal Internet account "does not include an account created, maintained, used, or accessed by an employee or applicant for business related communications or for a business purpose of the employer." Utah Code Ann. § 34-48-102 (4)(b) (LexisNexis 2013). An employer does not therefore violate the IEPA by accessing an employee's email account that is being used for business purposes, even though the employee has used his work email for personal communications. To be sure, the IEPA expressly states that it is not intended to prohibit employers from "reviewing" or "accessing" information or "data stored… on an employer's network." *Id.* § 34-48-202 (1)(e). Similarly, the company may require the employee to disclose the password to his cell phone that was paid for in part by the company. *Id.* § 34-48-202 (1)(a)(i). The employer may also access and review "data stored on an electronic communications device supplied by, or paid for in whole or in part by, the employer." *Id.* § 34-48-202 (1)(e).

Other Legal Considerations

The IEPA is only one of many laws that govern employers' rights to monitor, access, and review the electronic communications of their employees. Courts have found employers liable under the Stored Communications Act, 18 U.S.C.A. § 2701(a) for snooping on former employees' personal Internet email account inadvertently left accessible to the employer post-employment. *See Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F.Supp.2d 548, 555 (S.D.N.Y. 2008). Employees have successfully asserted common law invasion of privacy claims against employers that unlawfully access electronically stored personal communications.

Employers should have in place legally compliant electronic communications policies that communicate both to the employer and employee the privacy expectations in the workplace and that are IEPA compliant.

In summary, the IEPA sets forth the Utah legal standards employers must follow when the desire or need for snooping arises in the workplace. Utah's legislature enacted the IEPA to protect employees and applicants from unnecessary company intrusion into personal electronic communications. But the IEPA also provides for permissible legal snooping into employees' electronic communications that are not strictly personal and that concern the legitimate business interests of the employer. Practitioners should ensure that their clients' employee handbooks and policies and procedures comply with the IEPA and that they consult counsel when snooping may be legally necessary.

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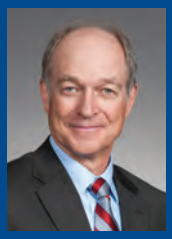

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A Few Tips for Using eFiling

by Judge Kate A. Toomey

Have you been notified, or seen in the docket of your case, that a proposed order you filed is "unsigned," or that the court "declined to sign" it, and wondered what it meant? This article is intended to help you understand the various potential actions the court might take on a proposed order and to offer a few tips for filing documents electronically.

Judges have several options for disposing of proposed orders and other documents in their electronic signing queues: Signed; Unsigned; Declined to Sign; Signed and Complete. In an effort to promote uniformity in using these options, the Board of District Court Judges recently adopted and distributed protocols for employing them.

Signed

Judges select this option to sign the document but also to make a note about it either to a case manager or judicial assistant, or to CORIS. A judge might do this because she wants to explain that she modified or edited a document filed by one of the parties. By default, a note in this box is recorded to CORIS and can be seen by all CORIS users. It is public in other words. On the other hand, she can use the note as a vehicle for communicating only with her staff, in which case, the note is not available to the public.

Unsigned

A judge would use this option after considering competing proposed orders and deciding to sign the other one, when some document necessary to his consideration has yet to be filed, or for some other situation that is not a decision on the merits. He can make a note explaining why he decided not to sign the document or insert text from one of the options available as a predefined note. Some judges have developed their own boilerplate language to insert here. The note will be available to all CORIS users unless the judge determines otherwise.

Declined to Sign

A judge uses this option when she has made a decision on the merits that is explained either in a Minute Entry made directly in CORIS or in a separate Memorandum Decision uploaded to CORIS.

Signed and Complete

A judge who wants to sign a proposed order as is and doesn't want to make a note simply selects Signed and Complete.

I hope this helps clarify our intent in taking one action or another with respect to proposed orders. Judges are also able to defer considering a proposed order, and they sometimes use this tool to hold onto an order for future consideration. If you do not notice prompt action on a proposed order you've submitted, it may be that the judge has deferred considering it.

As we continue to learn how to navigate this new system, I've noticed a few things attorneys could do that would make everyone's job a little easier and promote greater clarity in the record. Here are some suggestions.

First, you may have noticed that the judge's electronic signature and the date of signing appear on the front page of the order or other document, in the upper right corner. Because we're all so accustomed to seeing signatures at the end of documents, this makes the last page look a little goofy, and attorneys sometimes ask whether the signature line ought to be omitted. But how is a reader to determine whether it's actually the end of a document, or whether the last page of the document has been inadvertently

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omitted or deleted? My suggestion is to use words, in bold capital letters, to the effect of **END OF ORDER** or **SIGNATURE ABOVE** at the conclusion of the substantive text. That way, the end is clear. There is no need to put a signature line in the top right corner of the first page of the document; the computer system automatically places the signature where it belongs on page one.

Second, to the extent you can reasonably and in good faith do this, check the appropriate box on the proposed order making a determination concerning a defaulting party's military status. In the vast majority of these cases, the attorney knows and can demonstrate that the defendant is not on active duty in the military, and it is appropriate simply to check the box indicating as much. It's a small thing, but it saves the judge the steps of editing the order to check the appropriate box, saving the edits, clicking on the signature option, making a note to CORIS indicating that the proposed order has been modified by checking the box, then pushing another button to have the whole thing processed and recorded. In other words, it's a small thing for you with substantial cumulative savings for the judge.

Third, make sure you, or the person working under your direction, files the document you intend to file. I'm told that the most common error associated with e-filing involves filing the wrong document, and this gives rise to a couple of problems. For one thing, you may be jeopardizing your client's position by failing to file the correct document, such as a Notice of Appeal. For another, you can't substitute one document for another, so even if you discover the error right away, the only thing you can do is file the thing you meant to file in the first place. Unfortunately, this clutters dockets and can create confusion, especially, for example, if the document you intended to file is a more recent draft of the document you did file. My point is just that it would be a good idea to double check before you push the Send button. And on a related note, file a document just once!

Fourth, select the correct designation of the document type. Doing this helps create a clear and readable docket, reduces confusion, and may avoid technical delays. So, for example, you can select "Motion" and then add the entire document title. Unless the type of document you're filing isn't among the options, do not designate it as "Other." A docket populated with "Other" isn't as useful as it could be when people are trying to locate particular filings. Moreover, designating the document as "Other" will route it to the wrong queue, and the judge's team will not know that it has been filed, which can result in delay in taking an action the filer is requesting.

Fifth, make sure you use the correct formatting on RTFs. If you do not, when the document is accepted into the system, the formatting will not convert correctly, and the document will not display, open, or print with the correct formatting. For example, text may be replaced with miscellaneous symbols, the spacing will change, blank spaces and even blank pages may appear, and paragraph numbers will not be displayed. Look for "efiling friendly" templates and formatting instructions at www.utcourts.gov/efiling under "General Efiling Information." These will show you what to do in Word and in WordPerfect. We anticipate adding some new system validation checks to prevent incorrectly formatted documents from being filed, but ask that in the meantime, you do what you can to make sure that they're properly done.

Sixth, for those of you who practice criminal law, be aware that beginning March 31, 2014, all documents other than the Information must be electronically filed in District Court cases. Informations must be electronically filed beginning January 1, 2015. If you are an attorney employed full time by a government entity, the court provides a free eFiling portal which you are eligible to use. Send an email to efiling@utcourts.gov to receive a login; training is available on the website.

Seventh, for those of you who practice civil law, although Rule 7 permits you to file a proposed order with your initial memorandum, I suggest that you refrain from doing this now that efiling is here. These proposed orders are sometimes prematurely routed to a judge's signing queue and are inadvertently signed, creating a headache for everyone.

Finally, there are a number of good ways to get help if you need it. If you have court-related questions, you can contact an eFiling Specialist in the district in which you are filing. The most current list of specialists is available on the court's public website. Also, the Utah Courts On-Line Training Program is a terrific tool for learning how to effectively use the system. Additional items are frequently added to the site, so I suggest that even if you've watched some of the videos and read some of the materials, you periodically check to see what's new.

This is a new era for the courts and for practitioners, and I hope your experiences have been positive, even as we work together to resolve the glitches.

Appeals From Interlocutory Orders in the Utah Appellate Courts

by Julie J. Nelson

Rule 3 of the Utah Rules of Appellate Procedure recognizes that a party has "an appeal as of right" from all final orders and judgments. Rule 5, in contrast, governs appeals from interlocutory orders and provides: "An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order."

As the language of Rule 5 indicates, an appeal from an interlocutory order may be taken only with the appellate court's permission. To obtain that permission, a party must petition the court for it. The rule also describes the criteria the appellate court will apply in considering a petition: discretionary review "may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice." *Id.* R. 5(f). Whether the petition should be directed to the Utah Supreme Court or the Utah Court of Appeals depends on the jurisdiction of each court, as described by sections 78A-3-102(3) and 78A-4-103(2) of the Utah Code.

Figures 1 and 2 in this article show how often the Utah Supreme Court and Utah Court of Appeals, respectively, have agreed to review an interlocutory order in the last five calendar years. These charts also show how often the appellate courts ultimately granted the relief sought. These charts show that the appellate courts frequently decline to review interlocutory orders but also indicate that *if* the court grants review, the chances of the petitioner being successful are relatively high.

To prepare an effective petition, it is important to understand the difference between a persuasive petition for permission to appeal from an interlocutory order and a persuasive appellate brief on the merits. Although the audience is the same, the court has a different objective in considering the petition, and the documents should therefore differ. This article describes some of those differences and offers practical tips for drafting and responding to petitions for permission to appeal from an interlocutory order.

When To File a Petition for Permission To Appeal from an Interlocutory Order

Permission to appeal a district court's interlocutory order is typically sought when the order is effectively dispositive of some important aspect of the case. For example, parties frequently seek permission to appeal from orders adjudicating rulings on motions to suppress dispositive evidence, motions to dismiss, and motions for summary judgment because those rulings typically decide key issues.

In state court,[1] a petition for permission to appeal must be filed within twenty days of the entry of the order sought to be appealed. If no timely petition is filed, the party loses the right to seek review under Rule 5, but typically does not lose the right to appeal the issue after final judgment. There are exceptions, however. If a district court has denied a motion for summary judgment on the ground that disputed issues of material fact exist, the denial of that motion cannot be reviewed after final judgment. *Normandeau v. Hanson Equip., Inc.*, 2009 UT 44, ¶ 7, 215 P.3d 152. Therefore, review of such an order is possible only through a petition under Rule 5. *Hone v. Advanced Shoring & Underpinning, Inc.*, 2012 UT App 327, ¶ 9 n.6, 291 P.3d 832 (citing *Normandeau*, 2009 UT 44, ¶ 15).

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Persuading the Court to Review the Interlocutory Order

As noted above, Rule 5(f) provides that review of an interlocutory order is appropriate only if the order "involves substantial rights and may materially affect the final decision" or if review of the order "before final judgment will better serve the administration and interests of justice." Utah R. App. P. 5(f).

The first goal of the petition should be to explain why review is necessary at this point in the proceedings rather than after the final order or judgment. Consider, for example, a criminal case in which defense counsel believes that admission of certain evidence will almost certainly result in a conviction. If defense counsel files a pretrial motion to suppress the evidence and the district court denies the motion, it may be deemed the better strategic choice to petition for a review of that interlocutory order rather than challenging the admission of the evidence after conviction. In the petition for permission to appeal, defense counsel should explain that the defendant's substantial right of freedom is at issue, that the admission of the evidence will materially affect the final decision, and that review of the interlocutory order is appropriate at this earlier stage so that the resources needed for an entire trial are not wasted. The defendant might also argue that the issue should be addressed sooner rather than later so as not to taint the trial or prejudice the defendant.

Another example: counsel may wish to appeal a district court's denial of a motion to dismiss for lack of jurisdiction. If the key question truly is jurisdiction, it may well be more efficient for the appellate court to review the interlocutory order than to require the parties and district court to expend the resources on an entire trial when the district court may lack jurisdiction to hear the case.

An instructive list of interlocutory orders that may be ripe for review are those orders that Section 1292 of Title 28 of the United States Code allows to be appealed as a matter of right and those orders that may be appealed as collateral orders in federal court. *See generally Cohen v. Beneficial Industr. Loan Corp.*, 337 U.S. 541, 545–46 (1949).

Framing the Issues

A petition for review should focus on legal issues. The more clearly the petition presents the issue as a straightforward legal issue that disposes of the case, the more likely it is that the petition will be granted. And the petition should be limited to issues that are fairly presented by the order for which review is sought.

While the petition should describe the legal issue presented, and suggest that the lower court erred, the petition is not a dress rehearsal of a merits brief. The petition should focus primarily on why it is important for the appellate court to consider the issue *now*. In the words of Rule 5(c)(1), the petition should state "why an immediate interlocutory appeal should be permitted" and "why the appeal may materially advance the termination of the litigation." Utah R. App. P. 5(c)(1).

Responding to a Petition for Permission To Appeal From an Interlocutory Order

Under the current rule, the party who did not file the petition for the interlocutory review may object to the granting of the petition. In that case, the responsive papers should attempt to persuade the court that review is inappropriate at this juncture, and if review is not granted now, later review may be unnecessary altogether. In addition, a response may point out that the petition is in fact an attempt to delay the case, rather than advance it. Or a response might demonstrate that the district court's decision is correct and there is no need to review it now.

UTAH SUPREME COURT						
FIGURE 1	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Petitions for Interlocutory Review Filed	21	22	13	21	20	19
Petitions Granted	13	13	4	8	11	12
Percent Granted	65%	59%	30%	38%	55%	63%
Relief Granted in Cases Reviewed	8	6	3	4	NONE YET DECIDED	NONE YET DECIDED
Percent Relief Granted in Cases Reviewed	61%	46%	75%	50%	—	—
Percent Relief Granted of Total Petitions Filed	38%	27%	23%	19%	—	—

UTAH COURT OF APPEALS						
FIGURE 2	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Petitions for Interlocutory Review Filed	99	96	89	93	85	109
Petitions Granted	11	13	17	12	6	8
Percent Granted	11%	14%	19%	13%	7%	7%
Relief Granted in Cases Reviewed	3[2]	6	9	3	2 to date[3]	0 to date[4]
Percent Relief Granted in Cases Reviewed	27%	46%	53%	25%	33% to date	—
Percent Relief Granted of Total Petitions Filed	3%	6%	10%	3%	2% to date	0 to date

Alternatively, the response might agree that review is appropriate at this time. In that case, the party can concur in the petition and add further suggestions as to why review now will advance disposition of the case. Recognizing this possibility, the current rule allows the response to add a cross-petition for interlocutory review.

Other Filings

A petition for review of an interlocutory order may prompt various other filings. For example, the petitioner may file a motion to stay the proceedings in the district court pending disposition of the petition or appeal of the interlocutory order. Rule 5(g) of the Utah Rules of Appellate Procedure governs this process in the appellate court.

Parties should also consider whether an amicus filing would be beneficial. If the district court's decision will have a significant impact on a particular group or industry, an amicus brief might help persuade the court to grant or deny the interlocutory petition.

1. Importantly, these rules apply only to appeals of interlocutory orders in Utah state courts. Petitions for permission to appeal interlocutory orders of a federal district court are governed by Rule 5 of the Federal Rules of Appellate Procedure and Section 1292 of Title 28 of the United States Code.
2. Two other cases were affirmed but subsequently reversed by the supreme court.
3. Some of these cases remain under advisement.
4. Several of these cases were settled or voluntarily dismissed; some remain under advisement.

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Appellate Highlights

by Rodney R. Parker & 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.*

***Baird v. Baird*, 2014 UT 08 (March 7, 2014)**

The court held that under Utah's stalking statute, Utah Code section 76-5-106.5(2), the issue of whether conduct would cause emotional distress must be determined by an individualized objective standard. This requires a finder of fact to determine whether the conduct would cause a reasonable person in the victim's circumstances to suffer emotional distress. The court also held that the statute's extensive definition of emotional distress supersedes the common law definition applied in *Salt Lake City v. Lopez*, 935 P.2d 1259 (Utah Ct. App. 1997).

United States v. Porter
___ F.3d ___, 2014 WL 868791 (10th Cir. March 6, 2014)

The Tenth Circuit held that a signature is a form of a name and thus qualifies as a "means of identification" under the aggravated identity theft statute, 18 U.S.C. § 1028A.

Castellanos v. Tommy John, LLC
2014 UT App 48 (February 27, 2014)

The Utah Court of Appeals affirmed summary judgment in favor of a bar and restaurant that was sued for the intentional torts of assault, battery, and false imprisonment allegedly committed by security guards in ejecting plaintiff from the establishment. The bar argued that it was not vicariously liable for the security guards' actions because they were employees of an independent contractor and because the bar did not retain control over the manner of their performance. The Utah Court of Appeals held that the general rule of nonliability for physical harm to others for one who employs an independent contractor was applicable because there was no evidence that the bar controlled the injury-causing actions of the security guards. The court also rejected the plaintiff's argument that Restatement (Second) of Torts § 427, regarding inherently dangerous activities, should be adopted as an exception to the general rule of nonliability because the provision of security services is not inherently dangerous work.

Kramer v. Wasatch County Sheriff's Office
743 F.3d 726, 2014 U.S. App. Lexis 3468
(10th Cir. February 25, 2014)

This sexual harassment case is significant for applying the standards set forth in *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), concerning whether an employee is a "supervisor." The Court in *Vance* held that an employee is a supervisor for Title VII purposes "when the employer has empowered that employee to…effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Id.* at 2443 (citation omitted). The Court in *Vance* also instructed that "supervisor" does not include those who lack the power to hire,

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fire, etc., but who "nevertheless have the ability to direct a co-worker's labor to some ill-defined degree." *Id*. In *Kramer*, plaintiff worked as a jailor and later as a bailiff for the County. She alleged she was sexually harassed and sexually assaulted by Sergeant Benson, who could not hire, fire, demote, etc., but who wrote her performance evaluations; could make a recommendation to the Sheriff about demoting, promoting, or firing plaintiff; and controlled whether she could obtain the road experience she wanted. Applying *Vance* and other cases, the Tenth Circuit held that "if Sergeant Benson had or appeared to have the power to take or substantially influence tangible employment actions and used the threat of such actions to subject [plaintiff] to a hostile work environment," the County would be "vicariously liable for his severe or pervasive sexual harassment." *Kramer* 2014 U.S. App. at [26]. The case was remanded for trial on the issue of whether Sergeant Benson was a "supervisor."

R.P. v. K.S.W. 2014 UT App 38 (February 21, 2014)

This case arose from a district court's dismissal of an alleged biological father's petition to establish paternity under the Utah Uniform Parentage Act (UUPA). During a marriage, the wife had an affair, which resulted in a child with the other man (father). The wife and father entered into an agreement and stipulation filed with the district court regarding visitation and child support and admitting the father was the biological father of the child. That agreement and stipulation was apparently never approved by the district court. About a year after the child's birth, the father sought a petition to increase parent-time. In response, the wife challenged the validity of their prior agreement. The district court dismissed the father's petition for lack of standing under the UUPA, which provides a presumption of paternity to the husband of a married woman. On appeal, the court concluded that the UUPA "preempted the common law on the issue of who has standing to challenge a presumed father's paternity," *id*. ¶7 and that unless a married couple seeks a divorce, only a husband and wife have standing to challenge paternity. While the court recognized its decision might have constitutional implications where the father has an established relationship with the child, the father did not raise those issues, and, therefore, the court did not address them.

Lawrence v. MountainStar Healthcare 2014 UT App 40 (February 21, 2014)

The Utah Court of Appeals addressed two important evidentiary issues when it affirmed the jury verdict in favor of the defendant Hospital in this medical malpractice action. First, the court interpreted Utah's apology statute, Utah Code section 78B-3-422, and concluded that the statute does not exclude statements of fault. Thus, the court found that it was error for the trial court to exclude statements from the Hospital to the plaintiff admitting that "[w]e messed up." However, the court found that the plaintiff was not prejudiced by the exclusion of this evidence because the Hospital had already stipulated that it breached the

standard of care, and therefore the evidence would have been cumulative of that stipulation. Second, the court affirmed the trial court's admission of evidence of when the plaintiff first contacted her attorney, which the Hospital's expert relied on in formulating his opinion on causation and damages. The court reasoned that although some jurisdictions exclude this evidence for policy reasons, the trial court was within its discretion to admit the evidence because it formed the basis of the expert's opinion.

Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n
2014 UT 3 (January 31, 2014)

As a matter of first impression, the Utah Supreme Court addressed whether the multi-employer worksite doctrine adopted by Federal OSHA regulations applied under Utah's OSHA statute. Under the doctrine, a general contractor is "responsible for the occupational safety of all workers on a worksite – even those who are not the contractor's employees." *Id*. ¶1. The Utah Occupational Safety and Health Division relied on the doctrine to issue a citation and penalty to a general contractor related to "improper use and erection of scaffolding in connection with masonry work" performed by a subcontractor. *Id*. ¶3. The Utah Supreme Court rejected the doctrine because, in contrast to the federal statute, under Utah's OSHA statute, the duty to provide a safe workplace runs only to employers under a traditional employment relationship. Because the general contractor only had "general supervisory authority over the worksite," *id*. ¶4, but had "no employment relationship in connection with the safety violation," *id*. ¶16, it could not be subject to sanctions under Utah's OSHA statute.

Bonnet v. Ute Indian Tribe
No. 12-4068 (10th Cir. January 28, 2014)

The Tenth Circuit addressed whether a subpoena served on a non-party tribe in a civil case in federal court is a "suit" triggering tribal sovereign immunity in the absence of congressional authorization or tribal waiver. Based on precedent establishing that tribes are immune from "suit," that suit includes "judicial process," and that a subpoena duces tecum is a form of judicial process, the court concluded that a

subpoena duces tecum served directly on a tribe is a "suit" against the tribe. Accordingly, tribal sovereign immunity applies. The court did not reach the question of whether a tribal official is also immune from federal discovery requests, but it suggested that a different result would apply.

***MacGregor v. Walker*, 2014 UT 2 (January 28, 2014)**

The Utah Supreme Court addressed whether, under Restatement (Second) of Torts § 323, the Church of Jesus Christ of Latter-day Saints and its leadership voluntarily assumed a duty to aid abuse victims by creating and operating a help line. The help line provides Church leaders who become aware of abusive situations with information about legal duties and counseling options. Applying the two-prong test of § 323, the court held that the plaintiff had not satisfied the second prong – failure to exercise reasonable care in administering the help line, thereby either increasing the plaintiff's risk of harm or causing her harm through her reliance on the help line. Because the plaintiff did not claim that she relied on the help line, the court analyzed only whether the Church's creation of the help line increased her risk of harm. It concluded that it did not because the plaintiff was in no worse position than she would have been in had the help line not existed. The court further rejected the plaintiff's claim that public policy supports imposing a duty on the Church. First, doing so would discourage organizations from creating beneficial internal policies, procedures, training and resources designed to reduce the risk of abuse and assist victims. Second, the court acknowledged that it must be even more sensitive when assessing a religious organization's internal policies.

***Q-2, LLC v. Hughes*, 2014 UT App 19 (January 24, 2014)**

The Court of Appeals held that legal title based on a claim of boundary by acquiescence transfers by operation of law as soon as the elements of that doctrine are satisfied. Thus, "a judicial determination of a boundary by acquiescence and quieting of title merely recognizes what has already occurred." *Id.* ¶11. Judge Orme concurred but questioned whether the decision would lead to uncertainty in real estate transactions, and he encouraged the Utah Supreme Court to consider the issue.

Porter v. Farmington City Corp. 2014 UT App 12 318 P.3d 1198 (January 16, 2014)

This premises liability lawsuit arose after the plaintiff fell into a concealed hole on the grounds of the City's cemetery. The hole was created by water escaping from a damaged sprinkler, and it was covered by grass so that it could not have been detected by visual inspection. The district court granted the City's motion for summary judgment, finding that the City did not have actual or constructive notice of the hole until after plaintiff fell in it. The court of appeals affirmed, rejecting the plaintiff's argument that notice should be imputed to the City because the City's sprinkler system had created the hole. The court concluded that notice could not be imputed to the City as a matter of law because the City was responsible for the hole only in the context of maintenance, and not for its existence in the first place.

State v. Thompson, 2014 UT App 14, 318 P.3d 1221 (January 16, 2014)

The defendant appealed his conviction on two counts of forcible sodomy on the ground that he received ineffective assistance of counsel. The Utah Court of Appeals agreed that trial counsel's performance was defective in several respects, including failing to object to several instances of prosecutorial misconduct. First, the prosecutor impermissibly had vouched for the State's expert in closing argument, stating, "I think he was credible" and that "I think [he] came across as a very reliable witness." *Id.* ¶57. Second, the prosecutor impermissibly commented on a defense witness's credibility in closing argument, stating, "I don't think [he] was being credible. I think he was being dishonest with you." *Id.* ¶58 (alternation in original). Third, the prosecutor impermissibly offered unchecked expert opinion and argued matters not in evidence during closing argument when he stated his opinion on how to use the defendant's body language as a lie detection method. There had been no evidence or testimony regarding body language as a measure of truthfulness. Finally, the prosecutor impermissibly appealed to the jurors' passions and prejudices during closing argument by asking the jury to send a message to the defendant "that what he did was wrong" and that "the people of Utah won't stand for that kind of crime." *Id.* ¶68. The court concluded that the cumulative effect of trial counsel's deficiencies undermined the court's confidence in the verdict, such that the conviction must be reversed. This was particularly true given that the case turned on whether the jury believed the victim's or the defendant's version of the events.

State v. Labrum, 2014 UT App 5, 318 P.3d 1151 (January 9, 2014)

The defendant, convicted of assault resulting in serious bodily injury, appealed his conviction, challenging the introduction of evidence of other uncharged acts under Utah Rule of Evidence 404(b). The Utah Court of Appeals first concluded that the other acts evidence was introduced for, and relevant to, the proper purposes of establishing the victim's state of mind and rebutting the defendant's claim of self defense. It then turned to whether the prior incidents of domestic violence were admissible under Rule 403. In doing so, it addressed the effect the Utah Supreme Court's decision in *State v. Verde*, 2012 UT 60, 296 P.3d 673, had on the factors used to balance the probative value of 'other acts evidence' announced in *State v. Shickles*, 760 P.3d 291 (Utah 1988). The court concluded that where the context involves a "doctrine of chances" analysis, *Verde* displaced the *Shickles* factors and established four foundational requirements for admission: materiality, similarity, independence, and frequency. Where the context does not involve a doctrine of chances analysis, the court concluded the *Shickles* factors remain relevant to the extent they are useful. However, *Verde* instructs that trial courts need not rigidly apply or limit their analysis to the *Shickles* factors. Instead, trial courts "should carefully weigh the tendency toward proper and improper inferences from the other acts evidence in the context of the particular case and consider whatever factors are relevant to that analysis."

State v. Lee, 2014 UT App 4, 318 P.3d 1164 (January 9, 2014)

In reviewing the defendant's conviction of murder, the court clarified under what circumstances an error in an imperfect self-defense jury instruction warrants reversal. At trial, the jury was instructed on both self-defense and imperfect self-defense. On appeal, the defendant argued trial counsel was ineffective for failing to object to murder and manslaughter jury instructions that "did not include as an element of the offense that the prosecution had the burden to prove that [the defendant] did not act in self-defense." *Id.* ¶23. The court agreed that the imperfect self-defense instruction on manslaughter was erroneous because it placed a burden upon the defendant "to prove his affirmative defense beyond a reasonable doubt rather than correctly placing the burden on the State to disprove the defense beyond a reasonable doubt." *Id.* ¶27. While the court determined counsel's failure to object was deficient, it determined

there was no prejudice because there was no evidence to support the theory of imperfect self-defense. The court explained that while trial courts are required to instruct the jury on both imperfect and perfect self-defense at the request of a party "once evidence is introduced by either party that the defendant reasonably believed that he was justified in using force," *id.* ¶32, this does not mean that "the complete evidentiary picture before the jury would *necessarily* support a conviction for imperfect self-defense manslaughter." *Id.* In concurrence, Judge Voros further expounded upon when perfect and imperfect self-defense instructions are warranted, explaining that "imperfect self-defense applies when a defendant makes a reasonable mistake of law," *id.* 41 (emphasis omitted), and that perfect self-defense applies when a defendant makes a reasonable mistake of fact.

Velasquez v. Harman-Mont & Theda, Inc.
2014 UT App 6 (January 9, 2014)

This wrongful death lawsuit arose after several KFC employees shared a ride to a company training event and were seriously injured and/or killed in a collision with a train. KFC raised the Travel Reduction Act, Utah Code section 72-12-106, as a defense for the first time in a motion for summary judgment after the close of fact discovery. The district court granted plaintiffs' motion to strike the motion for summary judgment because KFC failed to plead the Act as an affirmative defense, but also discussed how the court might view the defense if the defendant filed a motion to amend. The Utah Court of Appeals granted interlocutory appeal but then viewed the request for review of the district court's hypothetical discussion as a request for an advisory opinion on the applicability of the Travel Reduction Act to the case. The court declined to review the issue until it was properly raised in the lower court.

For questions and comments regarding the appellate summaries, contact Rodney R. Parker at (801) 322-7134 or rrp@scmlaw.com.

Judith D. Wolferts, Adam M. Pace, Danica N. Cepernich, and Robert T. Denny also contributed to this article.

WINGS: Improving Service Delivery to Protected Persons and Their Guardians

by Timothy M. Shea

This article and the two that follow are products of the Working Interdisciplinary Network of Guardianship Stakeholders (WINGS). A bit cumbersome, perhaps, but an accurate description. WINGS is a multidisciplinary body, focusing on guardianship issues from different perspectives. Forming WINGS is one of many recommendations of the *Third National Guardianship Summit: Standards of Excellence* held at the S.J. Quinney College of Law at the University of Utah in 2011. (The 2011 summit followed the Wingspread Conference in 1988 and the Wingspan Conference in 2001.)

The Judicial Council, the Utah District Courts, and the Administrative Office of the Court (AOC) have been pursuing efforts to improve the law and process of guardianships for many years. A volunteer court visitor program designed to provide judges with neutral information from which to make difficult decisions about incapacity has expanded to include fourteen counties. Volunteer visitors throughout the state help the district court enforce the guardians' annual reporting requirement and help judges review the reports that are filed. The AOC has prepared a bench book on guardianship for judges and a training manual for clerks. The AOC has published on its website information and forms to assist in the appointment of guardians and has published a wealth of information for the benefit of guardians and putative guardians. The judiciary's latest effort is WINGS.

In 2013, the Judicial Council received a small grant from the State Justice Institute and the Borchard Foundation Center on Law & Aging, administered through the National Guardianship Network, with which to form a Utah WINGS, one of seven in the country. (New York, Oregon and Texas also received grants to form WINGS. Ohio and Missouri have existing WINGS programs, and Indiana has a statewide task force with similar characteristics.) The judiciary thanks those organizations for making our efforts possible. And the judiciary thanks all of the members of the WINGS steering committee, especially those from outside the courts, for their participation and contributions. The Utah WINGS conducted a guardianship summit on November 6, 2013, attended by almost sixty people from around the state. For most of the day, the summit participants formed into three workgroups, which focused on one of three topics:

- agency cooperation and coordination;
- medical and functional evidence of incapacity; and
- person-centered planning and supported decision making.

This article reports on the first topic and the succeeding articles report on the other two. The judiciary also thanks the Editorial Board of the *Utah Bar Journal* for reserving space for these articles in the issue for May, which is National Elder Law Month.

The Need for Agency Coordination and Cooperation

Utah has the largest increase in the number of people with Alzheimer's disease – not all occurring with the elderly – of any state. *See* Utah's State Plan for Alzheimer's Disease and Related Dementias: Action Plan 2012-2017 (2011). Improvements in medical care help those with developmental disabilities and

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traumatic brain injuries live much longer. Individuals with severe and persistent mental illness often need assistance with making decisions to meet their basic needs. All this has changed the complexion of guardianship.

Nothing could have more keenly brought home the message of the need for agencies – not just government agencies, but for-profit and non-profit private providers as well – to improve the delivery of services to guardians and protected persons than a panel of five non-professional guardians. For over an hour, the panelists described for an audience of almost sixty judges, lawyers, healthcare providers, peace officers, administrators, and others the hardships faced by a caregiver for a person under guardianship: the difficulty in getting information; the misinformation from professionals who should have the right answers; the bureaucratic barriers; the delay; and the daily challenge of putting fine legal concepts into practice.

When a judge decrees that an adult is incapacitated, that person becomes, in the eyes of the law, a minor once more. *See* Utah Code Ann. § 75-5-312(2) (LexisNexis 2013). The protected person's guardian assumes ultimate authority for making the protected person's decisions. These guardians act in incredibly trying circumstances.

Making decisions for and with a person under guardianship because of a mental illness, a developmental disability, a traumatic brain injury, or cognitive decline is difficult under the best of circumstances. All of the panelists described the added frustration of working through a confusing patchwork of local, state and federal programs, and non-government services. Organizations used to working directly with a principal struggle when working with an agent. An organization's representative may not accurately understand his or her own organization, let alone the services provided by some other.

All of the panelists described a strong, committed relationship to the person in their charge. All described the burnout caused by stress; burnout that can lead to giving up, to mistakes, to neglect – or worse. The panelists displayed incredible courage and strength in sharing with sixty strangers very private and personal stories.

The panelists also described moments of success. An effort that turned out not to be a dead end. A person who helped deliver a service or who explained how to take the next step. A webpage with current information. These moments, they concluded, show that the systems can work.

The panelists might have said that the "system" can work, but anyone with any experience knows that ours is not an integrated system. We all remain separate: federal; state; local; public; private; courts; law enforcement; healthcare; residence; transportation; behavioral health; disability; aging; and legal. We all try to do our best, but these are human institutions with human failures. Some days are better than others, and some people are better at it than others. From the panelists' perspectives, whether one gets a good person on a good day was entirely the luck of the draw.

Summit Recommendations

The workgroup that focused on agency cooperation and coordination identified two issues it said need to be addressed:

- Guardians sometimes misunderstand their role; what they must do, can do, and cannot do. The guardianship laws and

the process for being appointed as guardian are complex. There needs to be more education for protected persons, for their guardians, for their family and friends, and for the organizations that serve them.

- The organizations that serve protected persons are fragmented. Protected persons and their guardians benefit when organizations know about what services a person might need, what services are available in the community, and how to obtain them.

And the workgroup summarized two recommendations for addressing those needs:

- Inventory and coordinate webpages that explain the procedures for getting a guardianship, the authority and limitations of guardians, alternatives to guardianship, and resources for guardians and other information.

- Integrate the Aging and Disability Resource Connection model of options counseling to help people understand and access alternatives and services. Ensure that the counseling is culturally accessible to the client.

The workgroup identified a third issue – the cost of appointing a guardian and the cost of services – but that topic will have to wait for another day.

Coordinating Information About Guardianship

Websites

The AOC has published several webpages (http://www.utcourts.gov/howto/family/gc/) that describe alternatives to guardianship, nominating someone to serve as guardian, authority and responsibilities of a guardian, and procedures and forms for appointing a guardian. The AOC also has published several pages of information about serving as a guardian; resources to help guardians; decisions about healthcare, residence, and financial management; information about banking, budgeting, and record keeping; and other topics.

Even a simple list of topics is long and shows the complexity of making decisions for another adult. Simplicity cannot be imposed on a process and on a relationship that is necessarily complex, so education about those complexities is the next best thing.

At meetings subsequent to the summit, other WINGS members have described their commitment to include on their websites a brief description of guardianships with a link to the court's site for a fuller description. The AOC encourages any organization, public or private, that wants to include in its information a section on guardianship to simply link to the court's website. The information and forms are public and free, and the AOC will work to keep them current. The information necessarily focuses on guardianships – because that is the business of the courts – but much of the information and resources will benefit any caregiver, regardless of circumstances.

The AOC website also links to sites of several federal, state, and local agencies, describing briefly the information, programs, and services that those agencies offer. Again, while focusing on guardianships, the information can also be helpful to a wider population. Some examples:

- Benefits Checkup, a free service of the National Council on Aging. Answer questions to find benefit programs that can help pay for medications, health care, food, utilities, and more.

- Caregiver Support Program, published by Division of Aging and Adult Services.

- Caring for Your Parents: The Complete Family Guide, published by AARP.

- Dictionary of Legal and Medical Terms, published by the Administrative Office of the Courts.

- Eldercare Locator, published by the Department of Health and Human Services.

- Financial Steps for Caregivers, published by Women's Institute for a Secure Retirement.

- Help for Families – When Loved Ones Have Substance Abuse Problems, published by Division of Substance Abuse and Mental Health.

- Legal Guide for the Seriously Ill, published by the American Bar Association.

- Managing Someone Else's Money guides, published by the Consumer Protection Financial Bureau.

- Prepare to Care: A Planning Guide for Families, published by AARP.
- Senior Centers, published by Utah Division of Aging and Adult Services.
- Senior Resource Directory, published by Salt Lake County Aging Services.
- Ucare, published by the Department of Human Services. Find support and services for yourself as a caregiver and for people receiving care.
- Utah Coalition for Caregiver Support. A diverse group of caregiver advocates provides information about caregiving issues, coordinates a support network for caregivers, and facilitates access to caregiver resources.

Ultimately, a webpage is not education but an education opportunity. It relies on a guardian or other caregiver having enough motivation to read and understand the information provided. Live classes would be the best method of educating guardians about their responsibilities and the process of being appointed, but the costs are high, and the geographic reach is wide. The panel participants uniformly expressed a preference for video information, rather than text, and video may be a cost-effective compromise between text and live classes.

Listserv

WINGS has initiated a listserv on guardianship topics. Those who participated in the summit have already been included. Any who would like to subscribe can do so by sending an email to karolinaa@utcourts.gov with "subscribe to wings" in the subject line or text. Some of the information sent around that you may have missed:

- University of Utah College of Social Work free Lecture Series on Aging: Music & Memory: How Many Memories Does an iPod Hold?
- 2014 World Congress on Adult Guardianship features the Utah Volunteer Court Visitor Program.

- 12th Annual Rocky Mountain Geriatrics Conference: Unlocking Doors across the Long Term Services and Support Spectrum.
- University of Utah – Center on Aging Newsletter: Katherine Supiano, PhD, LCSW, FT received funding from the Alzheimer's Association for her studies on grief experiences of caregivers for patients who had dementia.
- The Veterans Health Administration Office of Rural Health has developed an education series designed to aid caregivers who are helping a loved one suffering from dementia, including home safety, legal matters, dealing with problem behaviors and learning relaxation techniques.

Although not yet published as of the deadline for this article, WINGS will publish a Facebook page for the public with the hope of connecting people to the organizations and services that they need.

There is a surprising amount of information that can help lawyers and other professionals help their clients. Stay connected. Subscribe.

"There is a surprising amount of information that can help lawyers and other professionals help their clients. Stay connected."

The Aging and Disability Resource Connection (ADRC) (www.utadrc.org/)

The ADRC operates in nineteen counties, but it is a largely unknown organization in Utah. That needs to change because the ADRC can be a significant resource to guardians, other caregivers, the public generally, and the organizations that serve them.

The ADRC centers provide information and assistance to individuals needing public or private resources, professionals seeking assistance on behalf of their clients, and individuals planning for their future long-term care needs.

Perhaps the ADRC's most significant service is options counseling, in which a counselor will interview an individual and:

- help that client identify his or her needs and goals;
- identify options for meeting those needs and goals;
- help the client to obtain services from the organizations that offer them; and
- follow up over time to ensure that the client is achieving his or her desired goals and obtaining desired services.

The ADRC does not evaluate incapacity; it does not investigate abuse of vulnerable adults; it does not have residential facilities or prepare tax returns. Rather, the ADRC counselor helps a client develop a plan specific for that individual, and the ADRC counselor helps the client connect with the organizations that provide these and other services.

Suppose, for example, that Ms. Garcia is seventy-five years old and generally in good health. However, she has developed severe arthritis in her right knee. She lives in a two-story home and has difficulty getting from one level to another. She needs help with meal preparation and taking medications. Is a guardianship in order? Or perhaps Ms. Garcia's needs can be met by physical therapy and periodic assistance with transportation, food purchasing and preparation, and medication. Is there a family member who can help? An ADRC counselor can help Ms. Garcia or her caregiver identify and contact local services.

We have all been left with a toll-free telephone number or a link to a website and the expectation that "just click on it" is going to meet our needs. An ADRC counselor is more. The ADRC counselor is something of a navigator, piloting a client through the network of aging and disability organizations, programs and services, allowing the organizations to continue to specialize in whatever program or service they may happen to offer. Although guardianship is the topic that ties our WINGS effort together, the population served by the ADRC is much more varied. For the ADRC counselors and the people they serve, guardianship may be just one option among many.

Options counseling is available at seven ADRC sites, including three of the six Utah Centers for Independent Living – private, nonprofit agencies providing services and advocacy with persons with disabilities of all ages that are a part of the Utah Office of Rehabilitation – and four of the twelve Area Agencies on Aging (the aging network). Currently, five Utah ADRC sites

are participating on a project with the Veterans Affairs Office of Rural Health, "Connecting Rural Veterans to Aging and Disability Resource Centers for Options Counseling." The ADRC hopes to expand to other Area Agencies on Aging and Centers for Independent Living to provide statewide coverage.

The cooperation of ADRC personnel and other WINGS members will soon produce a resource guide designed to enable personnel of any organization, public or private, to help a client find the organization that can best provide the information or service that is needed. Assuming the client needs information about guardianship but contacts the Division of Services to Persons with Disabilities (DSPD), the resource guide will direct the DSPD support coordinator – and his or her client – to the Utah State Courts' Self-Help Center. Does that client need an attorney? The Self-Help Center knows to direct the client to the Bar's referral program, including pro bono and modest means. WINGS hopes that the resource guide will be available on the websites of several organizations for their counselors and the public to use.

Summary

WINGS is a hub of professionals and others from a variety of networks collaborating to improve services to those in need of protection and their guardians. We hope that WINGS' efforts, built on the seed money provided through the National Guardianship Network, can grow, assisted by other grants and by contributions from the agencies involved.

WINGS is committed to pursuing the action steps identified at the Utah summit. Education about guardianships was a theme common to all three of the workgroups, and so education will be a high priority: education for the public, for guardians, and for the organizations that serve them. A listserv helps professionals stay connected with the efforts of others in the guardianship network. Websites with information and forms help. Classes, either live or recorded, are needed.

WINGS is also committed to cooperation among organizations to better provide the services needed by vulnerable adults and stressed caregivers. The ARDC, which counsels on the needs of an individual client, is the best model for the delivery of services. WINGS can help educate the counselors so the client receives accurate information and the correct referrals.

WINGS: The Challenges of Submitting Competent Medical Evidence of Incapacity in Guardianship Proceedings

by Robert Denton

Guardianship is one of many methods available to help ensure that the needs of an individual with limited mental capacity are met. Other than possibly civil commitment, it is the most drastic one. A finding of incapacity by a court and the appointment of a guardian results in the loss of freedom to direct one's life and make basic choices. Because of the significant impact it can have on one's life, it is crucial that competent, persuasive evidence is presented to the judge regarding the individual's incapacity.

Capacity is about decision-making. Many disorders can impair one's capacity to make decisions. Dementia or Alzheimer's disease, mental illness, intellectual disability, traumatic brain injuries, and strokes are some of the most common causes of a decreased ability to make adequate decisions for oneself. With some of these impairments, the individual's capacity is likely declining. With others, it will be static. It is possible that the functional decision-making skills of an individual with an intellectual disability or traumatic brain injury may improve, even though their medical/cognitive abilities remain static. Medical evidence for each of those conditions may come from a different type of health care practitioner using different examinations and test results. With advances in medicine many individuals with these conditions live longer. More individuals need a substitute decision-maker, and our medical knowledge is far more sophisticated. The former places a greater burden on the medical community as it is asked to provide more expert opinions about an individual's capacity, and our advanced knowledge makes the question of the extent of one's capacity, and its duration, more complicated.

Before a guardian can be appointed for an individual, a court must find that the person is incapacitated. "Incapacitated" or "incapacity"

> is measured by functional limitations and means a judicial determination after proof by clear and convincing evidence that an adult's ability to do the following is impaired to the extent that the individual lacks the ability, even with appropriate technological assistance, to meet the essential requirements for financial protection or physical health, safety, or self-care: (a) receive and evaluate information; (b) make and communicate decisions; or (c) provide for necessities such as food, shelter, clothing, health care, or safety.

Utah Code Ann. § 75-1-201(22) (LexisNexis 2013). Until 2013, a finding of incapacity required that the individual have a "mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause" for their inability to "make or communicate responsible decisions." Utah Code Ann. § 75-1-201(22) (LexisNexis 2012). Now there is no statutory requirement to prove a physical or mental cause for incapacity. The focus is solely upon the individual's functioning. However, evidence of a physical or mental basis for the alleged incapacitated person's functional limitations should be available to the judge. Since incapacity must be proven by clear and convincing evidence, a judge may be less willing to find incapacity when there is no identified cause for the limited functional abilities. The strongest case of incapacity will include proof of a physical

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or mental impairment, functional limitations that arise specifically from those impairments, and how those functional limitations directly render the individual unable to receive and evaluate information, make and communicate different types of decisions, or provide for necessities such as food, shelter, and clothing.

The medical evaluation of incapacity should be detailed, setting forth the health care professional's testing process and observations that led to his or her conclusion. There should be sufficient evidence to demonstrate in what areas of life the individual needs a substitute decision-maker. The law prefers a limited guardianship. Utah Code Ann. § 75-5-304 (LexisNexis 2013). A petitioner must be able to identify the specific deficits the individual has because of the individual's limited capacity. Areas of decision-making authority could include medical, financial, residential, and prevocational habilitation. The medical and functional evidence should prove decision-making deficits in each of the areas the petitioner wants to be included in the guardianship.

The medical and functional evidence workgroup at the November 6, 2013 guardianship summit identified three issues that are most critical and problematic in relation to the guardianship court process: (1) the minimal information necessary for the court to make a decision on the issue of capacity; (2) cost as a barrier to obtaining competent medical evidence; and (3) identifying critical decision points and the resources available from when the need for a guardian is first identified by the court to appoint a guardian. This final issue is particularly important when events or circumstances arise that place the alleged incapacitated person at greater risk of harm.

Minimum Information Needed by the Court

Providing the best medical evidence of incapacity is not simple. The health care professionals are not necessarily clear about the type of information that is most useful to the judge. There is nothing specific in the law about the type of information a health care professional should provide to the court. Practitioners often do not know when this information is presented or what form it should take. Attorneys often do not know which type of health care professional is the best source of medical information of incapacity and how the health care professional will be reimbursed for the cost of preparing the necessary information.

At the summit, health care professionals talked about various difficulties they have in writing an evaluation of an individual's decision-making capacity. They do not always understand the legal terminology involved in guardianship proceedings. There can be inconsistencies between the legal terminology and the medical terminology they use on a daily basis. On the other hand, attorneys representing the parties may not be as familiar with the medical terminology relevant to conditions that might render an individual incapacitated. The two professionals need to work together to make sure there is a clear understanding of the medical–legal relationships. This is particularly true when the health care professional has not treated the alleged incapacitated person but is asked by the parties or the judge for an evaluation. Some guidelines in blending the medical and legal for both the health care professionals and the attorneys would be helpful, perhaps with a well-crafted evaluation form.

Often the alleged incapacitated person's condition is declining. This presents greater challenges to both attorneys and health care professionals evaluating the individual. Given the strong preference for limited guardianship, the focus must be on what the alleged incapacitated person can currently do or will likely be able to do in the near future. Trying to structure a guardianship to anticipate the inevitable decline while at the same time maintaining the individual's fundamental right to make decisions about important parts of their lives is tricky. Health care professionals can assist with this by projecting, to the extent possible, a timeline for the decline. With this, changes to the guardianship can be a relatively simple matter. At the same time, prognosing this timeline cannot be speculative.

At least one health care professional was unclear on his role when conducting the evaluation. Are they supposed to be advocates for the alleged incapacitated person or are they supposed to provide an objective, neutral opinion? One way for the health care professional to meet her need to be an advocate would be to include in her evaluation a consideration of resources that could be available to the individual that would lessen the need for a guardian or reduce the scope of the guardianship needed. A list of resources typically available to individuals with different types of mental impairments would help the evaluator in some cases.

One part of the discussion was surprising. The workgroup panelists assumed that there is a need not to burden health care providers by asking for too much information about the alleged incapacitated person's medical condition and to avoid submitting too much information to judges. The responses of the health care professionals and judges at the symposium was unexpected – some of the health care providers feel that they cannot adequately address an individual's capacity in less than a ten-to-twelve-page report. The judges feel that too much information is better than too little.

Payment for Professional Evaluations

Many alleged incapacitated persons do not have the income or estate to pay for thorough and competent evaluations of incapacity. Unfortunately, payors such as private insurance, Medicare, and Medicaid only pay for the costs of medical treatment. They will not pay for evaluations for other purposes, such as guardianship proceedings. This problem is exacerbated when the individual has received little, or no, medical treatment in the past. Under these circumstances, more testing and assessments may be necessary since there are no records the evaluator can refer to.

Identifying Critical Decision Points and Available Resources

This generated the liveliest discussion in the breakout sessions. Representatives of law enforcement at the sessions described their frustration when they come upon a person in need of protection who clearly is not capable of making decisions necessary to keep out of harm's way. Too often the individual does not have a guardian, and there is no other alternative available to make sure that decisions can be made to meet the individual's needs. Sometimes, depending upon the individual's disability, it is difficult to determine where to *bring* people when they are in need of protection. At crisis points, such individuals usually do not require acute medical or psychiatric hospitalization and are discharged back into the community with little change in condition or available supports. What works for someone with a mental illness may not work if the person had a traumatic brain injury or an intellectual disability. Someone with Alzheimer's disease or dementia may benefit from a different type of temporary placement.

Family members often do not understand the process for obtaining a guardianship or are intimidated by or do not have the money to go through the process to obtain guardianship. It can be a long period of time between an incident indicating that a person cannot make decisions on his or her own and the day a guardianship petition is granted.

Guardianship is not always necessary to ensure that an individual's basic needs for food, shelter, clothing, and medical care are

met. There are alternatives that can be less expensive and allow the individual to retain greater freedom and independence. Advanced health care directives can identify a substitute decision-maker when an individual is unable to give informed consent to medical care. The law also recognizes a hierarchical order of relatives who can be default decision-makers for medical care. Utah Code Ann. § 75-2a-108 (LexisNexis 2013). By a durable power of attorney, an individual can grant someone else the authority to make decisions and take various actions on their behalf in financial matters. The power of attorney can remain effective after the grantor no longer has the capacity to make informed choices on his or her own. Trusts are another vehicle through which an appointed person can take care of the financial affairs of another. Of course, none of these options are available when the individual has the type of mental impairment that has prevented them from ever being competent, such as an intellectual disability. Likewise, they cannot be created by an individual after they become incapacitated. Advanced planning is required.

A court currently has the ability to grant an emergency temporary guardianship when circumstances warrant, or when a guardian is not performing the guardian's duties. *Id.* § 75-5-310. However, there is no definition of emergency. The judges attending the workgroup discussions did not feel constrained by the lack of a definition of "emergency." They did not think that the lack of a definition has led to any abuse of the provision.

There was also some discussion in the group about time-limited guardianships. Often situations arise when the alleged incapacitated person may be in need of greater support or intervention. The steps to take on his or her behalf may be short in duration. A temporary or time-limited guardianship may be sufficient to meet the individual's immediate critical need. At the same time, in the majority of these situations, the individual's incapacity will not be short lived. He or she will need a guardian long term. In these situations, the time-limited guardianship should be avoided.

The group also discussed the option of civil commitment. The standards for commitment are different. There must be a high degree of impairment before an individual can be committed. For an individual with mental illness, there must be substantial danger that the individual with mental illness will commit suicide, inflict serious bodily injury to himself or others, or will suffer serious bodily injury because he or she is unable to meet their basic needs, such as food, clothing, or shelter. *Id.* §§ 62A-15-602(14), -631(10)(b). For an individual with an intellectual disability, he or she must pose an immediate danger of physical injury to self or others, lack the capacity to provide the basic necessities of life, such as food, clothing, or shelter, or be in immediate need of habilitation, rehabilitation, care, or treatment to minimize the effects of a condition which poses a threat of serious physical or psychological injury to the individual. *Id.* § 62A-5-312(13).

Commitment will not directly protect the individual's finances. It does not reach to most medical needs. For individuals with mental illness, it reaches only one part of the overall medial need – mental health treatment. Commitment will last only as long as the risk of serious harm to self or others remains. For people with mental illness, sometimes their condition is cyclical. For others, while they are taking their medications, they may not pose the necessary risk. Commitment can be a relatively short-term answer. It can be little more than a mechanism for crisis management.

Forms

There is a Report on Clinical Evaluation form on the Utah State Courts' website. It asks for the critical information of capacity needed by a court. It may not accommodate the evaluator who feels the need to provide the court a great deal of information. The report itself would not justify payment for the evaluation by a private or public insurer. Members of the medical and functional evidence workgroup will tweak the form to meet some of the concerns raised in the summit sessions and enhance the likelihood that the evaluator will be reimbursed for their evaluation. The revised form must be submitted to the Board of District Court Judges for its approval before it can be posted on the Utah State Courts' website. A draft of the revised form will soon be posted on the WINGS website, http://www.utcourts.gov/howto/family/GC/wings/.

Outline of Resources Available

WINGS will outline the types of resources that are available to an individual with potentially limited decision-making capacity, families, health care providers, public agencies, and law enforcement at various points in time when there are threats to the individual's ability to meet his or her own needs. Those resources may help the individual when a critical need is not being met, provide alternative supports and services so that a guardianship is not needed, or be a resource for individuals as they consider filing a petition for guardianship. It will outline the process for obtaining an emergency guardianship. The outline will also be submitted to the Board of District Court Judges for its approval before it can be posted on the Utah State Courts' website.

WINGS: Person-Centered Planning and Supported Decision-Making

by Mary Jane Ciccarello & Maureen Henry

The role of decision-maker for adults with impaired decisional abilities is a challenging one, whether decision-makers are acting informally or as court-appointed guardians. How should they make decisions? Who should they involve in the process, and how should they involve them? What information and support do they need and how can they access information and support? How should they interact with those providing services to the adult?

The Utah WINGS person-centered planning and supported decision-making workgroup explored these questions as one of three workgroups established by the WINGS steering committee. Workgroup members met before, during, and after the November 6, 2013 guardianship summit. The workgroup's goal was to develop an action plan addressing the most pressing issues facing surrogate decision-makers and adults with impaired decisional abilities. The workgroup focused on educational materials and methods for delivering information that would best support the decision-making challenges people confront.

Guardianship in Utah: Brief Overview

Anyone 18 or older has the right to make decisions based on his or her values and beliefs, even if others disagree with those decisions. Decision-making can be burdensome, even stressful at times, but few of us would willingly give up the right to make our own decisions. Guardianship law is based on the presumption that an adult whose ability to make decisions is impaired may need legal protection.

Utah law, like the U.S. legal system in general, has created mechanisms that authorize others to make decisions for persons with impaired decision-making ability. The two most powerful mechanisms are guardianships and conservatorships, which remove an adult's fundamental rights to make decisions about his or her life. Guardianships and conservatorships should be a last resort, after all other, less intrusive means have been examined and attempted first.

In a guardianship action, the court may appoint a person or institution to make decisions on behalf of an adult (a "protected person" once a guardian or conservator is appointed) that the court has determined to lack the capacity to make decisions independently. Decisions made by a guardian may address residence, health care, nutrition, education, and personal care. Conservators make decisions about a protected person's estate. Courts may appoint a guardian, a conservator, or both, and the guardian and conservator may be the same person or entity, or two different people or entities. If the court does not appoint a conservator, the guardian assumes some of the conservator's responsibilities.

Utah law prefers that guardianships be limited to the authority needed to provide protection for an adult with impaired

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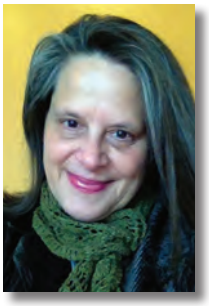

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decisional abilities. Before granting a full guardianship, Utah law requires courts to make a specific finding that, "that nothing less than a full guardianship is adequate," for instance, when the adult is unable to communicate. Utah Code Ann. § 75-5-304(2) (LexisNexis 2013). The 2009 Report by the Utah State Courts Ad Hoc Committee on Probate Law and Procedure observed,

> To be sure, there are cases in which the respondent is so clearly incapacitated that substantial medical evidence would be costly and without purpose. There are cases in which the respondent is so fully incapacitated that plenary control over that person is the most appropriate arrangement. But not in all cases. Many cases present nuances that need to be explored and capacities that need to be protected.

Utah State Courts Ad Hoc Committee on Probate Law and Procedure 2009 Report, *available at* http://www.utcourts.gov/committees/adhocprobate/Guardian.Conservator.Report.pdf#page=9.

A guardianship order enumerates the specific powers of the guardian, whether full or limited. The court can also limit the authority of a conservator. Despite the preference for limited guardianships, some courts in these actions still grant plenary authority over protected persons with little or no exploration of the person's capabilities.

Once appointed, guardians and conservators must meet demanding standards: they are responsible for fundamental decisions about another person's life, and they must act with the utmost honesty, loyalty, and fidelity toward that person. The Advance Health Care Directive Act requires guardians, as well as other surrogate decision-makers, to involve the person when making health care decisions, when possible. *See* Utah Code Ann. §§ 75-2a-101 to –125. Even when it is not possible to involve the person, guardians cannot simply do what they want; rather, they should make the same decision that the person would have made, unless that decision will cause harm. A guardian or conservator should become and remain personally involved with the person to understand his or her preferences, values, capabilities, limitations, needs, opportunities, and physical and mental health.

Resources on guardianships and conservatorships in Utah are available from the Utah State Courts online resources (http://www.utcourts.gov/howto/family/gc/); the Utah Department of Human Services, Office of Public Guardian, "A Guide to Guardian Services in Utah," (http://opg.utah.gov/pdf/guide_to_guardian_services.pdf); the Alzheimer's Association Utah Chapter (http://www.alz.org/utah/index.asp); Guardianship Associates of Utah, (http://guardianshiputah.org/); Guardian and Conservator Services, LLC (http://guardianconservatorservices.com/); and NAMI Utah, (http://www.namiut.org). Nonetheless, there are few resources available to inform stakeholders about how decisions should be made by guardians. Stakeholders, including guardians, conservators, and protected persons, as well as professionals such as health care providers and facilities, long-term care facility staff and administration, social services providers, and law enforcement, need guidance about appropriate surrogate decision-making.

Overview of Person-centered Planning and Supported Decision-making

Involving people in decisions about their care has practical implications that go beyond the legal requirements. Some people, including family members and professionals such as attorneys and physicians, assume that a person found to lack decisional capacity by a court or physician also lacks the ability to be involved in decisions. To the contrary, researchers considering this assumption have found that adults with impaired decisional abilities can be reliable informants and can consistently report preferences, goals, and values; most express the desire to be involved in the decision-making process. Moreover, individuals

with intellectual disabilities learn through the process of making decisions, and older adults with dementing illness are more likely to retain cognitive function when they use their cognitive skills. Involving adults in decisions about their lives and care also improves overall well-being, decreases distressing behaviors, and even improves both health and mental health status.

Guardianships have been criticized for being anti-therapeutic because they can unintentionally harm the adult in need of protection by not allowing the person to participate in decision-making. They have also been criticized for being overly intrusive and poorly monitored, and for violating the civil rights of the protected person.

> While countless American studies have found that guardianship protects those adults amongst us who are helpless and vulnerable, they have also uncovered evils in guardianship: removing all individual rights; denying access, connection, and voice to those lost in guardianship's gulag; and still continuing a process rooted in systemic perversities. Recent reexaminations of monitoring and public guardians acknowledge that guardianship still limits the autonomy, individuality, self-esteem, and self-determinations of AIPS [alleged incapacitated persons.]

A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 Utah L. Rev. 1541, 1542–43 (2012). *See also* Brenda K. Uekert & Richard Van Duizend, *Nat'l Ctr. For State Courts, Adult Guardianships: A "Best Guess" National Estimate and the Momentum for Reform 107 (2011), available at* http://www.guardianship.org/reports/Uekert_Van_Duizend_Adult_Guardianships.pdf.

Addressing these concerns, the United Nations Convention on the Rights of Persons with Disabilities (CRPD), asserts that people with disabilities, including disabilities that adversely affect decisional abilities, retain full legal capacity. Gen. A. Res. 61/106, U.N. Doc. A/RES/61/16, art. 12(2) (Dec. 13, 2006). The Optimal Protocol for implementing the CRPD encourages supported decision-making processes that view the adult as the decision-maker, with others in supportive roles to explain issues and interpret the individual's preferences. One hundred fifty-eight countries (including the U.S.) have signed, and 143 countries (excluding the U.S.) have ratified the CRPD. According to one commentator,

> Article 12 [of the CRPD] marks an important paradigm shift from the practice of depriving people of their rights simply on the basis of their perceived lack of capacity to the promotion of national policies and laws which comport to the goals and principles of the CRPD, including autonomy, dignity, and independence.

Kanter, Arlene S., *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People under International Law*, 25 Ga. St. U. L. Rev. 527, 560 (2008-2009).

While the CRPD represents one approach to supported decision-making, there is no one universally accepted definition or model of supported decision-making; the term is used differently in different contexts. Generally, supported decision-making describes a process wherein an adult with impaired decisional abilities is the ultimate decision-maker, receiving support from one or more individuals or entities who assist in making and communicating decisions. The term may also be used to describe a formal voluntary agreement between an adult and another individual or entity that supports the adult in making decisions. *See* Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 Penn State Law Rev. 1111 (2013). Some supported decision-making models involve court proceedings, while others remain informal or lack legal enforceability. Some models are being institutionalized in legislation, such as those in Sweden, British Columbia, and Saskatchewan. *See, e.g.*, Doug Surtees, *The Evolution of Co-Decision-Making in Saskatchewan*, 73 Sask.L.Rev. 75 (2010); NIDUS Personal Planning Resource Centre, British Columbia, Canada, *available at* http://www.nidus.ca/.

A uniform definition of "person-centered planning" is equally elusive. The U.S. Centers for Medicare and Medicaid Services offer one of many examples.

> The individual directs the process, with assistance as needed or desired from a representative of the individual's choosing. It is intended to identify the strengths, capacities, preferences, needs, and desired measurable outcomes of the individual. The process may include other persons, freely chosen by the individual, who are able to serve as important contributors to the process.

42 C.F.R. 440.167 (2011).

Under any definition, supported decision-making would be one way of achieving the goal of person-centered planning. In the U.S., efforts have been made to integrate supported decision-making and person-centered planning into existing guardianship structures. For example, the Third National Guardianship Summit in 2011 recommended that guardians "identify and advocate for the person's goals, needs, and preferences" in accordance with the following instructions:

> Goals are what are important to the person about where he or she lives, whereas preferences are specific expressions of choice. First, the guardian shall ask the person what he or she wants. Second, if the person has difficulty expressing what he or she wants, the guardian shall do everything possible to help the person express his or her goals, needs, and preferences. Third, only when the person, even with assistance, cannot express his or her goals and preferences, the guardian shall seek input from others familiar with the person to determine what the individual would have wanted. Finally, only when the person's goals and preferences cannot be ascertained, the guardian shall make a decision in the person's best interest.

Symposium, *Third National Guardianship Summit Standards and Recommendations*, 2012 Utah L. Rev. 1191, 1197 (2012), *available at* http://epubs.utah.edu/index.php/ulr/issue/view/72.

The National Guardianship Organization also provides standards and guidelines for professional guardians that can also be used by lay guardians. *See* National Guardianship Association, Inc., Guardianship Standards, *available at* http://www.guardianship.org/guardianship_standards.htm.

Questions and Responses About Decision-making

To explore the personal experience of decision-making for an adult, WINGS asked five surrogate decision-makers to illustrate the challenges they faced and the support they needed by sharing their powerful stories with summit participants. The five panelists represented a variety of experiences and backgrounds in surrogate decision-making. Panelists included family members and others who served as court-appointed guardians or informal decision-makers for an adult. The adults they served included a son, mothers, a Sudanese refugee, and members of the Ute Tribe. The adults' needs for assistance arose from mental illness, dementia, and intellectual and cognitive disabilities. Some of the adults also had physical disabilities.

A moderator asked panelists about how they became a decision-maker, about processes used in making decisions (e.g., how decisions are made, who is included in decisions, and why are they included), and about the challenges they faced. They were then asked to describe the best resources they had encountered, resources that would have helped, and effective methods for receiving additional information and education.

Responses varied, but several themes emerged. The first theme represented an evolving decision-making role. Informal decision-makers without professional experience slipped into decision-making roles gradually and through long family association or friendship. The role was not formalized until the person needed help with medical decision-making or a bureaucratic task that required the decision-maker to take legal steps (e.g., applying to the Social Security Administration to be appointed a representative payee or petitioning a court to be appointed as guardian).

A second theme was the adverse impact of bureaucratic barriers. Panelists encountered barriers in making medical decisions, gaining access to medical records, applying for government benefits, and addressing housing, education, and transportation needs. Panelists described tremendous stress caused in part by too little time to deal with bureaucracies while taking care of the person.

The third theme was the difficulty accessing information and assistance. While panelists wanted information and help, they described their struggle to locate reliable information; they did not even know what questions to ask or what information would help.

The fourth theme was the tension between the effort to involve the adult in decision-making and time available to make decisions. Participants struggled to involve the person in decision-making while providers such as health care facilities pressured them to make decisions quickly.

After hearing from the panelists and exploring a range of issues, the workgroup agreed that all stakeholders need easily accessible information about decision-making, alternatives to guardianship, guardianship, and appropriate services and resources. More specific needs identified were the ability to obtain information in a variety of ways (e.g., a centralized website), written materials available in various locations around the state, and visual materials (like videos or other virtual resources). The workgroup also identified the need for all stakeholders to understand the decision-making process and what it means to engage in person-centered planning and supported decision-making.

The workgroup recommended that Utah WINGS begin to address these needs on a statewide basis by coordinating roundtables for all stakeholders (service providers, professionals, family members, and supported persons) where participants could share information and develop specific recommendations for education and information dissemination. Proposed roundtables include:

- Decision-making for and with another person and alternatives to guardianship
- Resources: agency presentations on available resources
- Guardianship:
  - Court process
  - Court resources (Court Visitor Program, Self-Help Center, webpages)
  - Community resources

Telecommunications technology can be used to broadcast roundtables and facilitate statewide participation.

After the summit, the WINGS Steering Committee created a listserv on guardianship and related topics to make information accessible to participants. A WINGS Facebook page is also under consideration as a tool for easy dissemination of information to the public.

The workgroup concluded that there is no single right way to make decisions for and with a person with impaired decisional abilities. Good decisions can be made for and with an adult when everyone respects the adult and works to understand the adult's abilities, needs, and desires, while also addressing the practical realities and challenges that decision-makers face.

Do the Standards of Professionalism and Civility Have Teeth?

by Keith A. Call

Yesterday, I received a postcard reminding me of my upcoming dentist appointment. This happened to coincide with an upcoming deadline for submitting articles to the *Utah Bar Journal*. This led me to ponder two questions: (1) Why are there more lawyer jokes than dentist jokes? (2) Do the Standards of Professionalism and Civility have teeth?

There are a number of excellent articles on the potency of our Standards of Professionalism and Civility (Civility Standards). *See, e.g.*, Ted Weckel, *Regarding the Standards of Professionalism and Civility and the Use of Disparaging Language as a Tactical Decision During a Criminal Trial*, 27 Utah B. J. 32 (Mar./Apr. 2014); Donald J. Winder, *Civility Revisited*, 26 Utah B. J. 45 (Nov./Dec. 2013). In fact, the entire November/December 2006 issue of the *Utah Bar Journal* was dedicated to civility.

Here's a brief summary of what I believe the Civility Standards do and don't do.

The Civility Standards Are Aspirational and Are Not Binding (Yet?)

Referring to the Civility Standards, the Utah Supreme Court has stated that "these standards are not binding." *Peters v. Pine Meadow Ranch Home Ass'n*, 2007 UT 2, ¶ 22, 151 P.3d 962. The court has also described the Civility Standards as "aspirational guidelines that encourage legal professionals to act with the utmost integrity at all times." *Abrogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶ 40, 238 P.3d 1035.

However, in his recent article, Mr. Winder argues there is a "sea change" in Utah and elsewhere, and that there is a "growing recognition that the concept of civility is no longer merely aspirational." Winder, *supra*, at 45, 48. Perhaps he is right, and the Civility Standards are growing adult teeth.

The Civility Standards Are Not a Basis for Disciplinary Action

Rule 14-509 of the Utah Supreme Court Rules Governing the Utah State Bar states the "Grounds for [attorney] discipline." Utah S. Ct. R. 14-509. "It shall be a ground for discipline for a lawyer to…violate the Rules of Professional Conduct." *Id.* R. 14-509(a). Rule 14-509 has no similar provision relating directly to the Civility Standards. In my research and experience, I am not aware of any case in which the Office of Professional Conduct has prosecuted a case based solely on an alleged violation of the Civility Standards. The Utah Supreme Court has stated that violation of the Civility Standards may result in disciplinary consequences "if [the] conduct also runs afoul of the Utah Rules of Professional Conduct." *Abrogast*, ¶ 43.

It appears we are not quite there in terms of using the Civility Standards as an independent basis for attorney discipline.

The Civility Standards Can Be Used to Impose Sanctions

Several reported cases in Utah have cited the Civility Standards as a basis – at least partially – for imposing civil sanctions. For example, in *Peters v. Pine Meadow Ranch Home Association*, 2007 UT 2, 151 P.3d 962, the Utah Supreme Court cited Civility Standard violations in support of its decision to strike the

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

appellant's brief, impose attorney fees, and affirm the lower court's decision, all without even addressing the merits of the appeal. *Peters*, 2007 UT 2, ¶¶ 11, 16, 22, 23. By this decision, the court undoubtedly meant to send a message to Utah lawyers that a violation of the Civility Standards is a punishable offense.

Notably, however, the *primary* basis for the court's decision appears to have been a violation of Utah Appellate Procedure Rule 24(k), which refers to "scandalous matters" in briefs, Utah R. App. P. 24(k). *Id.* ¶ 23. I have searched in vain for a reported decision in which a violation of the Civility Standards was a stand-alone basis for imposition of sanctions. Perhaps that is because egregious violations of the Civility Standards are usually coupled with violations of other procedural or ethical rules. I suspect courts would encourage civil behavior by more frequently imposing less severe sanctions for less severe civility violations than were present in the *Peters* case.

Violation of Civility Standards Can Result in Lost Credibility and Embarrassment

Judges agree that uncivil tactics are ineffective. The Utah Supreme Court has stated, for example, that although uncivil advocacy "may occasionally lead to some short-term tactical advantages, …it is usually highly counterproductive…and erodes the credibility of the advocate." *Peters*, 2007 UT 2, ¶ 21. Once lost, credibility and trust are usually difficult to regain. It is also highly embarrassing to be called out by a court or others for uncivil behavior, publicly or in private.

There Is Tension Between the Civility Standards and the Duty of Zealous Representation

There will probably always be tension between the duel obligations to be civil and zealous. Mr. Weckel makes a great case for this in his article about the tension between certain Civility Standards and criminal defense work. *See generally* Weckel, *supra*, at 32–34. This is part of what makes the fine art of law a "practice." In lawyering and in life, we learn to balance these sorts of tensions through practice and experience.

Civility Standards Have Strong Moral Force

Utah's Attorney's Oath states, in part, "I will faithfully observe… the Standards of Professionalism and Civility.…" Utah R. Prof'l Conduct, Preamble, [1] (internal quotation marks omitted). Every lawyer should be firmly committed to living by the Civility Standards because it is the right thing to do.

Like the Civility Standards, one might say that flossing your teeth and visiting the dentist regularly are merely aspirational. But it is undisputed that flossing every day and visiting the dentist every six months results in a lot less pain and a lot more smiling.

President-Elect and Bar Commission Election Results

Congratulations to **Angelina Tsu** on her election as President-elect of the Bar. She will serve as President-elect for the 2014–2015 year and then become President for 2015–2016. Congratulations also go to **Herm Olsen** who ran unopposed in the First Division. In the Third Division **H. Dickson Burton, Heather Farnsworth,** and **Rob Rice** were elected from a group of very qualified commission candidates. Sincere appreciation goes to Steve Burton, Gabe White, and DJ Williams for their great campaigns and thoughtful involvement in the Bar and the profession.

Angelina Tsu, President-Elect

Herm Olsen
First Division

H. Dickson Burton
Third Division

Heather Orme Farnsworth
Third Division

Robert O. Rice
Third Division

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 2014, and ends June 30, 2015. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its June 13, 2014 meeting.

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

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

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

2014 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2014 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org by Friday, September 12, 2014. The award categories include:

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

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

Pro Bono Signature Projects

The Utah State Bar Pro Bono Commission began working to provide greater access to justice in the spring of 2012. The program involves the Commission placing full pro bono cases with attorneys and also providing opportunities for attorneys to provide pro bono services in a limited scope situation. The Pro Bono Commission, in conjunction with the eight District Pro Bono Committees, has worked to develop signature projects in areas of great public need. These signature projects allow attorneys to receive training in a very specific area of the law and to provide limited or full representation in that area of law to a pro bono client.

Some of the signature projects are designed for specific firms or organizations and others are open to all members of the Bar for participation. Here are some of our ongoing projects and some that are currently in development:

The Litigation Section of the Bar has taken on a project to help support the Guardian ad Litem Office. The Litigation Section helps recruit attorneys to participate as private guardians ad litem, they establish training events that go beyond the initial training attorneys must complete in order to participate, and they educate attorneys as to why guardians ad litem are so vital in certain family law cases. This program is open to all attorneys statewide. In order to participate as a guardian ad litem an attorney must complete the online training courses and forms.

Two firms located in Salt Lake City have taken on a signature project specifically designed for them. Volunteer attorneys from the Attorney General's Office and Callister Nebeker & McCullough cover the Debt Collection Law and Motion Calendar at the Matheson Courthouse in Salt Lake City. As part of this program the attorneys are trained in what issues regularly come up in a debt collection matter and what defenses are available to a respondent in one of these cases. The attorneys arrive thirty minutes before the calendar is scheduled to begin and speak with those appearing for their hearing. The attorneys then provide brief legal advice, answering any questions the client may have and representing them in court if necessary. This program began in July 2013 and has assisted over 137 clients. This is an example of a project that your firm or organization may create to give an opportunity for your attorneys to provide pro bono services in a limited scope manner. The attorneys learn a specific area of law in which they may not currently practice and know exactly how much time they are being asked to give.

Another statewide opportunity is the Adoption and Termination of Parental Rights signature project. This project was created at the request of the courts to develop a program where parents adopting or having their parental rights terminated in the district courts would be able to be represented by pro bono counsel. The project is led by a board made up of attorneys from Kirton & McConkie, MacArthur Heder & Metler, and The Law Offices of Jason F. Barnes, who focus on adoptions. Attorneys participating in this project handle cases referred to the Pro Bono Commission through Utah Legal Services, the Self-Help Center, or directly from judges.

A program designed to help judges to find representation for protected persons in guardianship and conservatorship cases is currently in the process of being developed. Hopefully rosters will be provided to the district courts throughout the state starting in the summer or fall of 2014. Those in the work group have gone to great lengths to create guidelines for the program in order to help protect respondents in these types of cases. All attorneys statewide may sign up to be part of this project and may receive training on how to fulfill the role of the attorney for the protected person through CLE programs offered throughout the year.

Office of Recovery Services Contempt Hearing Calendar is a project that the judiciary would like to see happen throughout the state. In the Second Judicial District, the law firm of Arnold and Wadsworth has begun to cover this calendar. This is a project in which attorneys are asked to represent those who are facing possible jail time due to nonpayment of child support. In order to help make sure that due process is being fulfilled and that there is no question of deficient representation, the courts would like to have attorneys volunteer to cover these calendars statewide.

If you or your firm would like to participate in one of the statewide signature projects or would like to develop a signature project of your own please contact the Utah State Bar Access to Justice Coordinator, Michelle V. Harvey, at michelle.harvey@utahbar.org or (801) 297-7027 to get more information. Also sign up to participate in any of the programs by going to http://www.utahbar.org/public-services/pro-bono-commission/.

The Quinn Essential Ride

Thanks to everyone who participated in the Quinn Essential Ride, a bicycle ride in honor of Judge Anthony Quinn. Proceeds from the ride will be donated to "and Justice for all," and to publicizing the dangers of distracted driving and bicycle safety.

Interested in writing an article for the *Utah Bar Journal*?
See the submission guidelines on page 4 of this issue.

Elder Law Month

May is National Elder Law Month. In commemoration, we celebrate the 12-year anniversary of the Senior Center Legal Clinics, a program of the Elder Law Section and the Utah State Bar Access to Justice Program. In Senior Center Legal Clinics, volunteer attorneys meet with senior citizens at senior citizen centers. The advice is general in nature. An attorney-client relationship is not established. Clinics are conducted once a month. The volunteer attorney meets one-on-one with up to six different senior citizens for 20-minute consultations.

The goal is not to provide in-depth legal advice, but to determine whether the senior citizen has a legal problem and then to identify potential legal services to address the problem. It is not necessary for the volunteering attorney to have specialized knowledge of the specific legal problem. Time commitment and the number of clinics to attend is controlled by each volunteer.

The program welcomes new attorney volunteers. For information on volunteering for the Senior Center Legal Clinics, please contact Joyce Maughan, Elder Law Section Pro Bono Committee Chair maughanlaw@xmission.com, (801) 359-5900; or Michelle Harvey, Access to Justice Program of the Utah State Bar, probono@utahbar.org.

Ethics Advisory Opinion Committee Seeks Applications

The Utah State Bar is currently accepting applications to fill vacancies on the 14-member Ethics Advisory Opinion Committee. Lawyers who have an interest in the Bar's ongoing efforts to resolve ethical issues are encouraged to apply. The charge of the Committee is to prepare and issue formal written opinions concerning the ethical issues that face Utah lawyers. Because the written opinions of the Committee have major and enduring significance to members of the Bar and the general public, the Bar solicits the participation of lawyers who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in résumé or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.) and substantive areas of practice, and
- A brief description of your interest in the Committee, including relevant experience, ability and commitment to contribute to well-written, well-researched opinions.

Appointments will be made to maintain a Committee that:

- Is dedicated to carrying out its responsibility to consider ethical questions in a timely manner and issue well-reasoned and articulate opinions, and
- includes lawyers with diverse views, experience and background.

If you want to contribute to this important function of the Bar, please submit a letter and résumé indicating your interest by June 11, 2014 to John A. Snow, Chair at jsnow@vancott.com.

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 five minutes. With the online system you will be able to verify and update your unique licensure information, join sections and specialty bars, answer a few questions, and pay all fees.

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

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

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

Notice of Verified Petition for Reinstatement by Ronald E. Griffin

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 Verified Petition for Reinstatement ("Petition") filed by Ronald E. Griffin in *In the Matter of the Discipline of Ronald E. Griffin*, Second Judicial District Court, Civil No. 110903418. 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.

Bar Thank You

Many attorneys volunteered their time to grade essay answers from the February 2014 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Ryan Andrus
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J.D. Ashby
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J. Ray Barrios
Jon Bauer
Allison Behjani
Jordan Bennett
Wayne Bennett
Mike Boehm
Sara Bouley
David Broadbent
Heidi Buchi
Elizabeth Butler
Sarah Campbell
Ken Cannon
Brent Clayton
Tim Considine
Victor Copeland
Bob Coursey
Jake Crockett
Daniel Dansie
Lynn Davies
Michelle Diamond
L. Mark Ferre
Michael Ford
Amy Fowler
Michael Garrett
Stephen Geary
Mark Hales
Clark Harms
Melinda Hill
Justin Hitt
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David Jeffs
Amanda Jex
Craig Johnson
Randy Johnson
Matthew Jube
Hon. Mark Kouris
Karen Kreeck
Clemens Landau
Catherine Larson
Susan Lawrence
Greg Lindley
Michael Lowe
Elisabeth McOmber
Tony Mejia
Angela Micklos
Branden Miles
Doug Monson
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Jonathon Parry
Rachel Peirce
Tanya Peters
RobRoy Platt
Callie Rogers
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Joshua Rupp
Melanie Serassio
Nate Skeen
James Sorenson
Ryan Stack
Charles Stormont
Steve Strong
W. Kevin Tanner
Engels Tejeda
Steve Tingey
J. Kelly Walker
David Walsh
Ben Whisenant
Jason Wilcox
Colleen Witt
James Wood
John Zidow

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.

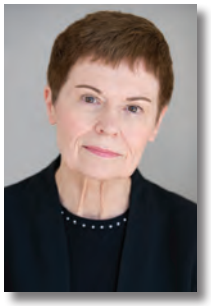
Pro Bono Honor Roll

Ahlstrom, James
Alig, Michelle
Allred, Clark
Amann, Paul
Amann, Paul
Anderson, Doug
Anderson, Nicholas
Andrews, Cortland P.
Angelides, Nick
Babb, Lenora
Backlund, Erika
Baer, Mark
Barlow, Craig
Barrick, Kyle
Beck, Sarah
Beckstrom, Britt
Benson, Jonny
Berger, John
Bertelsen, Sharon
Black, Hailey
Black, Julie
Black, Mike
Boettcher, Rachael L
Bogart, Jennifer
Bondy, Adam
Brahshaw, Justin
Brinton, Jed
Bsharah, Perry
Burnett, Brian W.
Burns, Mark
Buswell, Tyler L.
Cannan, Clark
Carlston, Charles
Christensen, Michelle
Clark, Melanie
Coebergh, Colleen
Coil, Jill
Combe, Steve
Combs, Kenneth
Conley, Elizabeth
Conners, Kate
Coombs, Brett
Culas, Robert
Cundick, Ted
Cushman, Amber
Davis, T. Richard
Denny, Nathan R.
Dez, Zal
Dixie Jackson
Evans, Russell
Ferguson, Phillip S.
Fox, J. Tayler
Fox, Richard
Gardner, Jamis
Gilson, James
Gittons, Jeff
Gordon, Ben
Goucher, Suzette
Hamilton, Mckail
Harmon, Benjamin P.
Harrison, Jane
Harrison, Matt
Hart, Laurie
Harvey, Michelle
Heinhold, David K.
Hill, Melinda
Hollingsworth, April
Holt, Becky
Hurst, John
Hyde, Ashton J.
Jackman, Rick
Jelsema, Sarah
Jensen, Leah
Jensen, Michael A.
Johansen, Bryan
Jones, Casey
Jones, Jenny
Kennedy, Michelle
Kessler, Jay
Koehler, Court
Larsen, Mandy
LeBaron, Shirl
Lee, Terrell R.
Lillywhite, Andrew
Long, Adam
Love, Jonathan
Lund, Topher
Lyons, J.D.
Madow, Rebecca
Marelius, Suzanne
Mark Robinson
Marx, Shane
Maughan, Joyce
McCoy, Harry II
Mitchell, Russ
Miya, Stephanie
Miya, Stephanie
Moffitt, Melinda
Molgard, Malone
Montague, Amanda
Montgomery, Carolyn
Morrison, Jacqueline
Morrow, Carolyn
Mortimer, Jeffrey
Munson, Ed
Naegle, Lorelei
Nalder, Bryan
Navarro, Carlos
Nevar, Allison
O'Neil, Shauna
Ochoa, Barbara
Ostrow, Ellen
Otto, Rachell
Parker, Kristie
Parkinson, Jared
Pascual, Margaret
Paul Waldron
Pearson, Alex
Peterson, Jessica G.
Peterson, Kelly
Peterson, Sam
Peterson, Susan
Plimpton, John
Powers, Amy
Ralphs, Stewart
Rasmussen, Kasey
Reber, S. Lauren
Rees, John H.
Richards, Brigham T.
Roberts, Kathie Brown
Roberts, Stacy
Roche, Michael
Rodier, Yvette
Rogers, Callie
Roman, Francisco
Romano, Bridget
Sagers, Julie
Schulz, Gregory
Scruggs, Elliot
Sellers, Andrew
Semmel, Jane
Shaw, Jeremy
Shelton, Richard Eric
Shields, Zachary T.
Simcox, Jeff
Skinner, Dayne
Smith, J. Craig
Smith, Linda
Smith, Shane
Snelson, Clark
So, Simon
Sorensen, Rick
Sorenson, Sam
Starr, Steven
Stormont, Charles A.
Stout, Mike
Stringham, Reed III
Swenson, Swen
Tanner, Brian
Telfer, Diana L.
Thomas, Michael J.
Thorne, Jonathan
Thorpe, Scott
Throop, Sheri
Timothy, Jeannine
Tingey, Steven
Tobler, Dan
Topham, W. Spencer
Trease, Jory
Trousdale, Jeff
Turman, Marc L.
Turner, Jenette
Velez, Jason
Waldron, Paul
Wentz, Jonathan
Wertheimer, Rachel Lassig
Wheeler, Lindsey
Williams, Timothy G.
Winward, LaMar
Winzeler, Zack
Woods, Katie
Wycoff, Bruce
Yauney, Russell
Young, Summer

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 February–March 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 State Bar 2014 Spring Convention Award Winners

During the Utah State Bar's 2014 Spring Convention in St. George the following awards were presented:



TERRIE McINTOSH
Dorathy Merrill Brothers Award
For the Advancement of Women
in the Legal Profession

JANISE K. MACANAS
Raymond S. Uno Award
For the Advancement of Minorities
in the Legal Profession

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2. Complete a short survey
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For more information: www.myutahbar.org
https://www.surveymonkey.com/s/2013ProBonoVolunteer

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/.

SUSPENSION

On January 6, 2014, the Honorable Judge Ryan Harris, Third Judicial District Court, entered an Order of Discipline: Suspension for six months and one day and probation for 18 months, for Mr. McKay Marsden's violation of Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct. The Suspension Order is effective as of the date of an Interim Suspension Order entered on November 12, 2013.

In summary:
On November 4, 2011, Mr. Marsden was charged with Driving Under the Influence of Alcohol and/or Drugs ("DUI"), Open Container in a Vehicle, Failure to stay in One Lane and Failure to Yield to Emergency Vehicle; a third degree felony because of two prior DUI's within the prior ten year period and due to a pending DUI in another court. On August 14, 2012, Mr. Marsden pled guilty to and was convicted of Driving Under the Influence of Alcohol or Drugs, a third degree felony.

ADMONITION

On March 6, 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 Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
The Office of Professional Conduct served the attorney with a Notice of Informal Complaint. The attorney failed to respond to the Notice of Informal Complaint as required by the Rules of Lawyer Discipline and Disability.

Mitigating factors:
Remorse and absence of a prior record of discipline.

ADMONITION

On March 12, 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 1.5(a) (Fees) and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary, there are two matters:

In the first matter, the attorney was retained to represent a client in connection with an immigration matter. The client paid the attorney an initial retainer. After taking the client's payment, the attorney's office informed the client that the next available appointment to meet with the attorney was not for several weeks. The client terminated the attorney's representation and requested a refund of the retainer. The attorney initially refused to refund the client's retainer on the basis that the retainer was a non-refundable fee.

The Office of Professional Conduct served a Notice of Informal Complaint upon the attorney, requiring the attorney to respond in writing to the client's informal Bar complaint. The attorney failed to respond to the Notice of Informal Complaint.

In the second matter, the attorney was retained to represent a husband and wife in their efforts to obtain U Visas as victims of a crime. The clients paid the attorney for both representations. The attorney submitted paperwork to the Department of Homeland Security on behalf of the clients which incorrectly cited a non-qualifying criminal offense as the basis for the clients' requests for U Visa status. The Department of Homeland Security sent the clients a Request for Evidence, requiring them to demonstrate how the non-qualifying offense was similar to a crime that would qualify the clients for U Visa status. The attorney requested additional fees from the clients to respond to the Request for Information and provide corrected information.

Mitigating factors:

Timely good faith effort to make restitution or to rectify the consequences of the misconduct involved.

SUSPENSION

On January 30, 2014, the Honorable Judge Ryan Harris, Third Judicial District Court, entered an Order of Discipline: Suspension against Mr. Paul R. Poulsen for violation of Rule 8.4(b) (Misconduct) and 8.4(c) (Misconduct) of the Rules of Professional Conduct. Mr. Poulsen was suspended for one year. The effective date of the suspension is the date of an Order of Interim Suspension against Mr. Poulsen dated May 7, 2013.

In summary:
On October 1, 2012, Mr. Poulsen pled guilty and was convicted of one count of wrongful appropriation, a Class A misdemeanor. Mr. Poulsen pled guilty to the facts as described in the Amended Information filed against him, admitting that from approximately January 2006 through June 2012, while employed by a law firm, he billed for legal services to at least four closed files for work that he did not perform.

SUSPENSION

On January 27, 2014, the Honorable W. Brent West, Second Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Discipline suspending Ronald E. Griffin from the practice of law for a period of eight months with four months stayed and one year of probation, for Mr. Griffin's violation of Rules 3.4(c) (Fairness to Opposing Party and Counsel), Rule 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law), Rule 8.1(b) (Bar Admission and Disciplinary Matters), and Rule 8.2(a) (Judicial Officials) of the Rules of Professional Conduct.

In summary:
Mr. Griffin was involved in a civil case where pursuant to the settlement of the case, his clients were entitled to an award of their costs and attorney's fees. Opposing counsel made requests for Mr. Griffin's billings records showing the attorney's fees he was claiming in the case. Mr. Griffin did not produce his billing records in response to the requests from opposing counsel. Mr. Griffin was directed by the judge presiding over the case to submit evidence of his attorney's fees. Mr. Griffin did not submit his billing records for attorney's fees as the court directed.

While Mr. Griffin's attorney membership was on inactive status, Mr. Griffin filed papers with the court as an attorney; made appearances on behalf of clients in a case at status conference hearings before the court and at a mediation. During the time Mr. Griffin's license was on inactive status, he charged attorney's fees in billings for work he performed for his clients and negotiated and signed a settlement agreement on behalf of the parties to a civil action as their attorney in the case.

Mr. Griffin filed a Rule 54(b) motion for reassessment and revision of a prior ruling, judgment and Court order, along with a supporting memorandum. In his memorandum, Mr. Griffin made statements asserting that the judge's ruling and judgment raised the specter of judicial paternalism or bias and favoritism. Mr. Griffin did not include facts to support his statements.

The Office of Professional Conduct served Mr. Griffin with a Notice of Informal Complaint requesting his written response to an informal Bar complaint within 20 days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Griffin did not respond in writing to the Notice of Informal Complaint within 20 days.

Aggravating and mitigating circumstances:
The Court found some aggravating and some mitigating circumstances. Based on the mitigating circumstances, the court shortened and stayed some of the suspension time in this matter.

INTERIM SUSPENSION

On October 28, 2013, the Honorable James L. Shumate, Fifth Judicial District Court, entered an Order of Interim Suspension pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability granting the OPC's Motion for Interim Suspension against John E. Hummel.

In summary:
Mr. Hummel took money and other things from indigent clients as payment of his legal fees, even though he was already receiving compensation for the same legal services from the County. As a result, he was found guilty of three counts of felony theft by extortion; one count of felony theft by deception; and one count of felony attempted theft by extortion.

Remembering Judge Anthony B. Quinn: Three Lessons for Young Lawyers

by Ashley M. Gregson

I recently had the opportunity to meet three legal professionals who worked with the late Judge Anthony B. Quinn in various capacities: an experienced litigator, a judicial law clerk, and a judicial assistant/soon-to-be law student. I asked each of them what they learned from interacting with Judge Quinn through their particular role in the justice system. Each had a different perspective of the Judge, but all three had the utmost respect and admiration for his exemplary contribution to our profession.

For those of us who did not have the privilege of knowing or practicing before Judge Quinn, especially young lawyers like me who are always looking for ways to improve their practice, we can still learn a great deal from Judge Quinn's actions. In this way, the lessons Judge Quinn (knowingly or unknowingly) taught those around him still impact the legal profession, including its rising generation of lawyers, as an ongoing legacy. Below are just a few of the lessons that can be taken from the experiences that were shared with me.

Welcome a Challenge

Nicole Hanna, judicial law clerk at the Third District Court of Salt Lake County, recalled her job interview with Judge Quinn. "The first words [he] ever spoke to me were these: 'What exactly did you hope to accomplish by handing this to me?'" He was referring to a draft opinion Ms. Hanna had written while interning for then-Chief Justice Christine Durham, which she had submitted as her writing sample. "I looked down and noticed for the first time that the Judge we had reversed was none other than the one sitting before me," Ms. Hanna said. Ms. Hanna "took a deep breath, squared [her] shoulders, stuck out [her] hand," and prepared herself for an interview she hadn't expected.

Judge Quinn spent the next twenty minutes of the interview explaining his thought process in making the decision and why it was the appropriate ruling at the time, Ms. Hanna remembered. Eventually, as the interview drew to a close, Ms. Hanna said, "I appreciate your consideration, even if it means that there is no chance of being offered this position," and prepared to leave.

"Judge Quinn looked at me in surprise," Ms. Hanna said. "'Oh, I'm sorry,' he said, 'I didn't mean to give you that impression at all. It's very well-written and besides, what's the use in having a law clerk that just agrees with you all the time?'"

As young lawyers, we enter the Bar with freshly honed skills, knowing how to spot, research, and analyze issues to craft the most persuasive argument in support of our conclusion. In fact, often we become so good at this process that we convince ourselves that our position is golden. Of course, there is nothing wrong with this type of zealous advocacy; it is an inherent part of the adversarial process. Yet we can gain so much more when we consider opposing perspectives and opinions. As we all hopefully learned in law school, considering and addressing the counterargument will only make our own argument stronger.

Certainly Judge Quinn felt he had made the appropriate ruling. However, he also knew, and demonstrated to Ms. Hanna, that his own convictions were not enough to do his job; he needed someone who might sometimes disagree with him, because the most correct and just results come from considering more than one perspective – from opposition, not agreement. So, too, should young lawyers look to the challenges they face (whether they be counterarguments, thorny issues, or simply a difficult job market) as opportunities to refine and improve.

ASHLEY M. GREGSON is an attorney at Stirba, P.C. practicing in the areas of government defense, civil rights defense, and general civil litigation.

Be Prepared, Efficient, and Practical

Judge Quinn was well known for always being thoroughly prepared for proceedings in his courtroom. "In four years I never saw him come to court unprepared," Ms. Hanna said. "In every case we worked on together, he spent hours carefully considering the legal arguments and case law and was prepared to discuss them with counsel."

Elaina Maragakis, attorney at Ray Quinney & Nebeker, recalled one oral argument where the Judge, unprompted, referenced a footnote in one of many fairly lengthy exhibits to the parties' filings. "At that moment we all thought, 'Wow, he's even reading the footnotes in the exhibits.'" Ms. Maragakis felt that Judge Quinn prepared for oral arguments as thoroughly as a civil litigator planning to argue his own motion: he came in having a clear understanding of the case and all the materials. "Sometimes he even came up with approaches that we hadn't considered before," Ms. Maragakis said.

In fact, Judge Quinn had often prepared so well that he would begin an oral argument hearing by announcing his tentative ruling to the attorneys. "The lesson that young lawyers can take from this practice is: listen to the Judge," Ms. Maragakis explained. You couldn't go to a hearing before Judge Quinn intending to merely summarize what you had said in your briefs. Instead you listened to his tentative ruling and determined what particular information you could provide to convince him that his inclinations were either correct or incorrect.

"It was efficient," Jennifer Leo, Judge Quinn's judicial assistant explained. Ms. Leo recalled that Judge Quinn managed his own calendar, and his own painstaking preparation allowed him to cut to the chase in oral argument and only focus on getting the information he needed to make his final ruling. It would sometimes fluster attorneys who were not familiar with Judge Quinn's style when he would ask them to "move on" to another argument, Ms. Leo said, but it also saved time that may have been spent on a subject that the Judge, having thoroughly prepared ahead of time, already understood.

Ms. Maragakis also recalled that Judge Quinn, being characteristically well prepared to discuss an issue, would often refer to the practical implications or effects of a particularly technical or abstract argument. Not only did Judge Quinn's preparation make for a more efficient courtroom, it also allowed him and the attorneys to step back and consider what their arguments would mean for the parties and in terms of setting precedent. This is particularly instructive because, as young attorneys, it is often tempting to stake out an argument that is technically correct and latch onto that idea for the win without considering whether the argument makes sense in the real world.

I included this lesson from Judge Quinn not just because preparation, efficiency, and practicality are important traits for any professional. These qualities in a servant of the justice system reminded me of something I heard one of my professors say in law school. When the lawyers and the judge are all on the same page – prepared, informed, and smart – petty bickering can be eliminated to focus on the real legal issues, and our jobs as lawyers can actually be fun. I would add to this statement that when you have well prepared judges and attorneys, who think about the practical effect of their actions, the system thrives and the right result is more often reached.

Respect the System

Ms. Hanna, Judge Quinn's judicial law clerk, remembered another statement Judge Quinn made during her interview. "I truly believe in the judicial system and what it stands for – I know it's not perfect, but I think it's the best we have." She added, "he believed that the highest calling of the law was, in his words, 'to do justice,'" and that "he took pride in his duty to serve, to uphold the law."

Certainly these sentiments are not lost on any member of the Bar – they capture at least one of the reasons many of us decided to become lawyers in the first place. Ms. Leo, his judicial assistant, also recognized Judge Quinn's faith in the justice system, and she, too, has decided to become a lawyer. Ms. Leo recently submitted applications to several law schools and intends to start school in the fall. "I'm definitely going in with my eyes open," she said when I asked her how her experience as a judicial assistant impacted her decision to go to law school. She saw first-hand how much hard work is required but also recognized the care and respect Judge Quinn had for the work he did.

Judge Quinn will continue to be sorely missed throughout Utah's legal community. Yet, the lessons he taught through his superb example will remain as lawyers apply those principles to their own practices. In this way, Judge Quinn has left us all an enduring legacy in the law.

CLE Calendar

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

05/07/14 | 8:30 am – 1:00 pm — **3.5 hrs. CLE (including 1 hr. Ethics)**

Annual Collection Law Section Seminar. Topics include: "Trends and Defenses in FDCPA Matters" with Joe Lico-Current; "Creditor's Guide to Bankruptcy" with Jory Trease; "Legislative Update" with Spencer Lithgoe; "Ethics and Professional Responsibility." Lunch and business meeting to follow. $25 for current section members, $105 for all others.

05/08/14 | 7:45 am – 4:30 pm — **6 hrs. CLE (including up to 2 hrs. Ethics)**

First Annual ALJ & Government Law Conference. Topics include: "The Theoretical and Policy Underpinnings of Agencies & Administrative Laws" with Aaron Nielson of BYU Law School; "Best Practices: Civility, Professionalism and Self-Represented Litigants" with Judge Marsha Thomas; and "Issues Unique to Informat Hearings" a panel discussion. Afternoon break-out sessions. $15 for current section members, $35 for ALJs and Hearing Officers, $180 for all others.

05/09/14 | 8:00 am – 4:30 pm — **7 hrs. CLE (including 1 hr. Ethics)**

Annual Family Law Seminar. University Guest House, University of Utah, 110 Fort Douglas Blvd, Salt Lake City. Topics include: "Legislative Rules and Case Law Update" with Bart Johnsen, Parsons Behle & Latimer and Lorie Fowlke, Scribner McCandless & Fowlke; "Alimony National Trends and Utah Law" with special guest Gaetano "Guy" Ferro, a nationally renowned family law practitioner, author, and speaker; "Zen and the Practice of Family Law" with Michael Zimmerman, Zimmerman Jones & Booher; "Ethical Issues and the Internet" with Lincoln Mead, Utah State Bar Webmaster; "A Dialogue on Best Practices" a judges panel with Judge Brian Cannell, Judge Deno Himonas, Judge Katherine Bernards-Goodman, Judge Ryan M. Harris, Judge Ryan M. Harris, Judge G. Michael Westfall, and Louise Knauer as moderator. $175 for section members, $250 others, $130 Paralegal Division members.

05/13/14 | 12:00 pm – 1:00 pm — **1 hr. CLE, self-study**

What Lawyers Need to know to Work with PDFs in the Law Practice – Webinar. The basics of PDFs, including creating, editing, combining, securing, and sharing PDF documents, as well as tasks especially useful for legal professionals. Presenter: Adriana Linares, Law Tech Partners. $40.

05/14/14 | 8:00 am – 12:00 pm — **3 hrs. CLE (including 1hr. Prof/Civ)**

Annual Real Property Seminar and Golf. Eaglewood Golf Course. Special Guest Stuart Teicher will present "2014, a MySpace Odyssey, Ethical Concerns When Using Social Media." Event includes CLE, lunch, and golf. Agenda pending.

05/15–05/17/14 — **9 hrs. CLE (including 1 hr. Ethics and 1 hr. Prov/Civ)**

Federal Bar Symposium. St. George, Utah.

05/20/14 | 12:00 – 1:30 pm — **1.5 hrs. Prof/Civ**

Diversity in the Legal Profession

05/21/14 | 12:00 – 1:15 pm — **1 hr. Prof/Civ**

Professionalism and Civility: From the Bench

05/22/14 | 9:00 am – 2:00 pm — **4 hrs. CLE (pending)**

Annual Elder Law Seminar

06/03/14 | 8:00 – 11:30 am — **up to 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. $90 for 3 hrs., $60 for 2 hrs. and $40 for one hour.

06/17/14 | 12:00 pm — **1 hr. CLE, self-study**

Outlook for Legal Professionals – Webinar. Learn how to better organize emails, contacts, calendars, and tasks to work more effectively, improve client service, and avoid malpractice claims. Presenter: Adriana Linares, Law Tech Partners. $20.

07/16–07/19/14 | All Day — **13 hrs. (Including up to 1 hr. Prof/Civ, up to 2 hrs. Ethics)**

2014 Summer Convention in Snowmass Village, Colorado

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

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For July 1 _____ through June 30_____

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

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

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

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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

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

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

Date: _____ Signature: _____

Make checks payable to: **Utah State Board of CLE** in the amount of ***$15*** or complete credit card information below.

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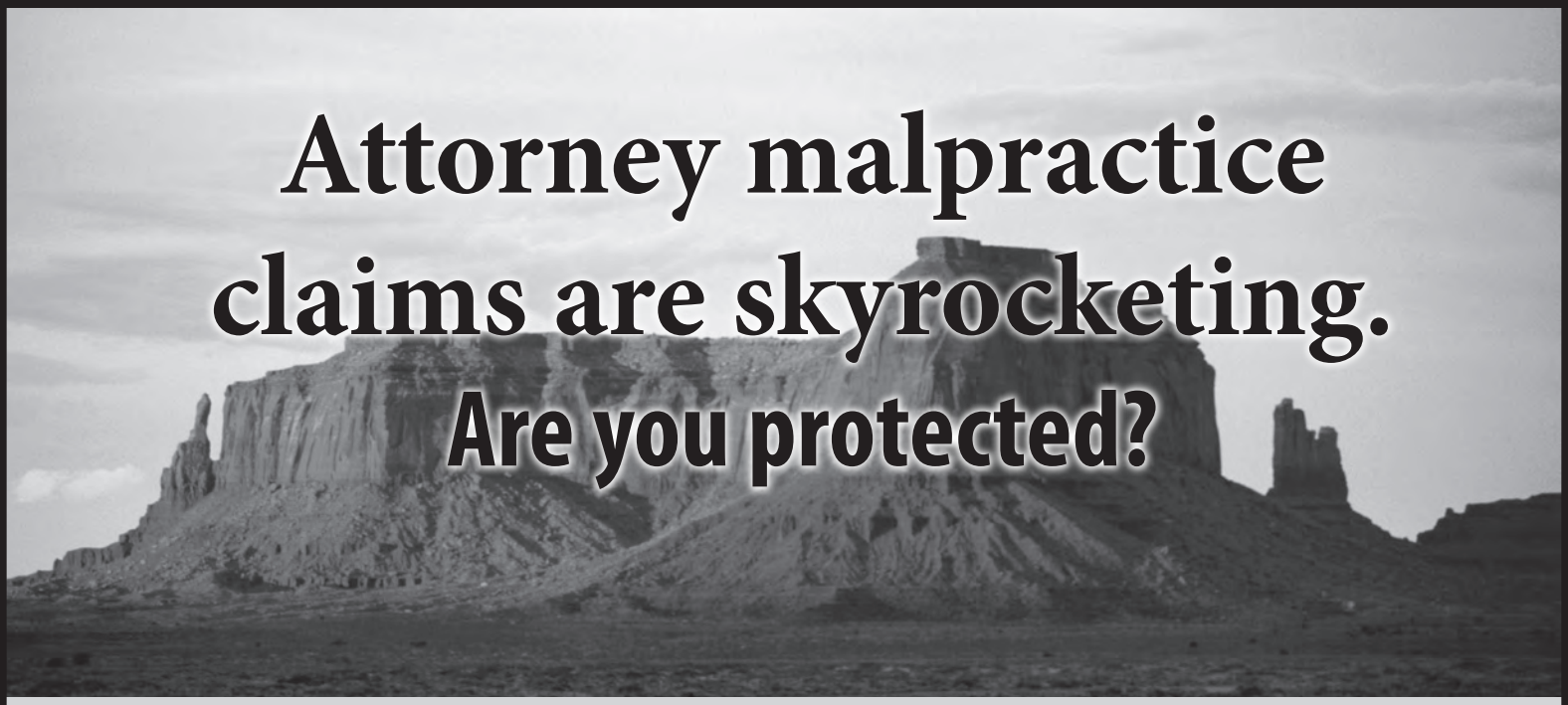

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[1] *"Profile of Legal Malpractice Claims: 2008–2011," American Bar Association, September 2012.*

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