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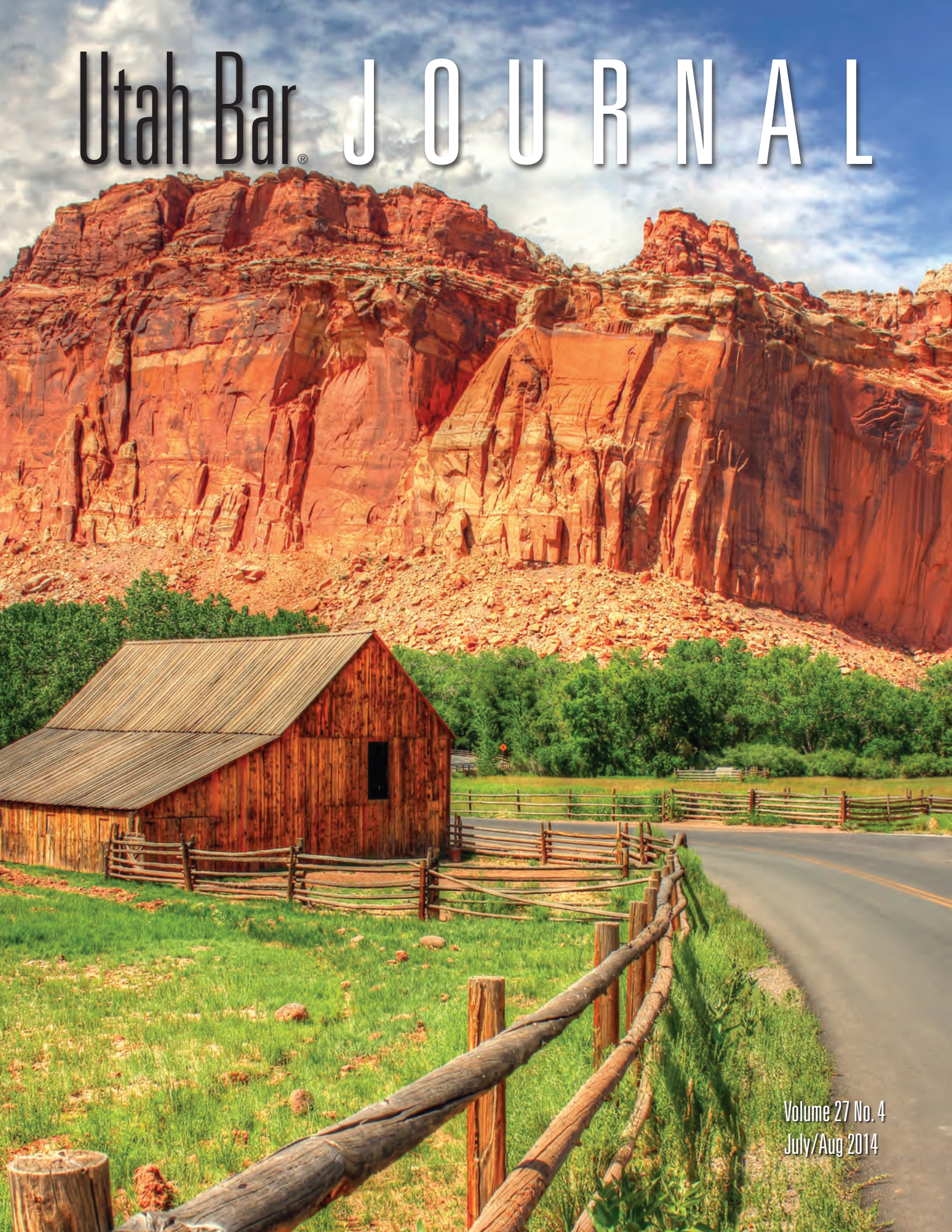

Volume 27 No. 4
July/Aug 2014

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Utah Bar JOURNAL

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Cover Photo

Gifford Homestead Barn at Capitol Reef National Park by Burke Nazer.

BURKE NAZER is a member of the Utah State Bar. He resides in South Jordan and works for the Third District Court. In his spare time, Mr. Nazer enjoys landscape photography. He took this photograph while on vacation with his family in Capitol Reef National Park.

Submit a Cover Photo

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 lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity.
We envision a just legal system that is understood, valued, and accessible to all.

Letter Submission Guidelines

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

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

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

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

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

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

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

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

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Interested in writing an article for the Utah Bar Journal?

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

Length: The *Utah Bar Journal* prefers articles of 5,000 words or less. Longer articles may be considered for publication, but if accepted such articles may may be divided into parts and published in successive issues.

Submission Format: All articles must be submitted via e-mail to barjournal@utahbar.org, with the article attached in Microsoft Word or WordPerfect. The subject line of the e-mail must include the title of the submission and the author's last name.

Citation Format: All citations must follow *The Bluebook* format, and must be included in the body of the article.

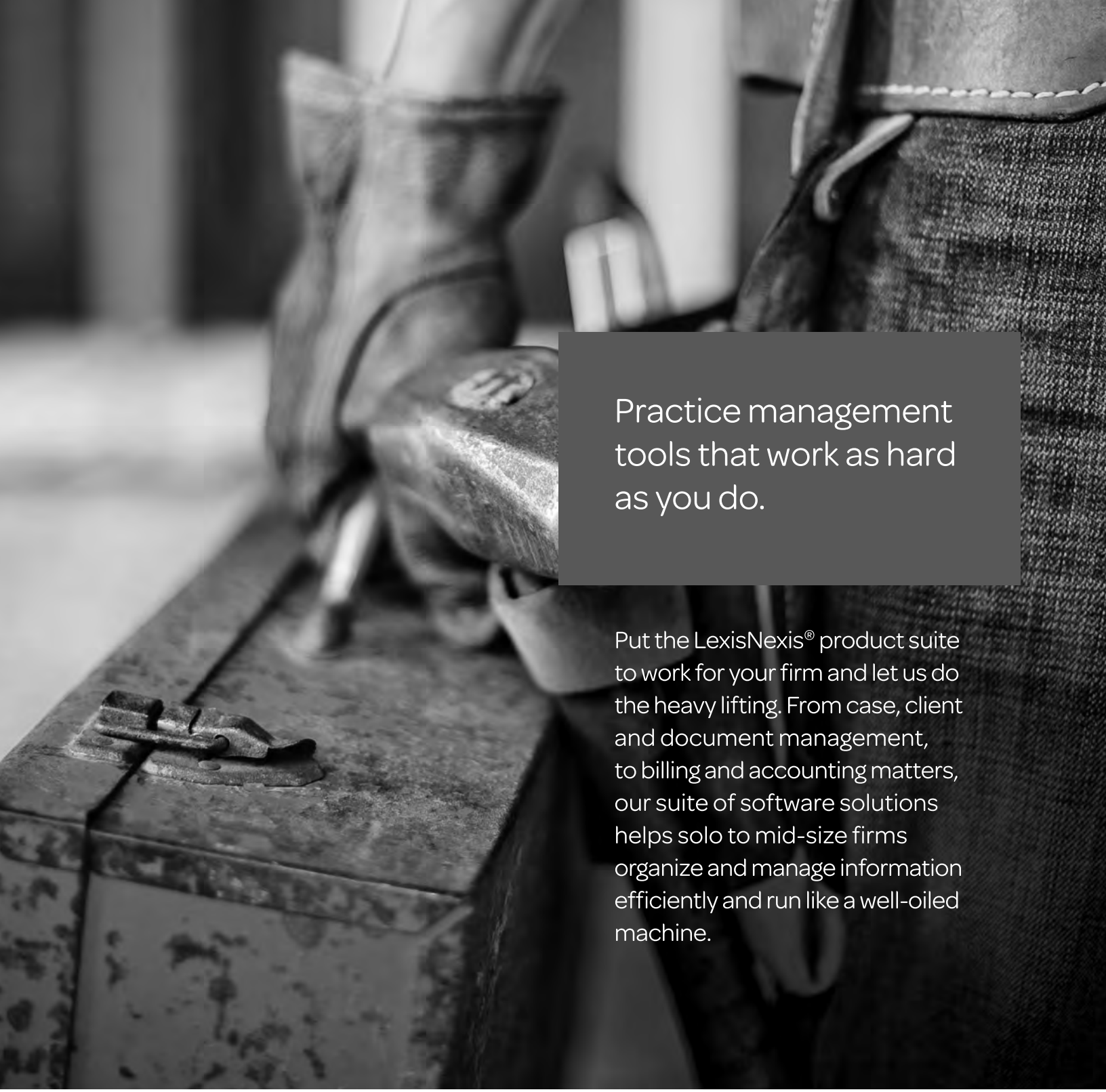
No Footnotes: Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial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

Content: Articles should address the *Utah Bar Journal* audience – primarily licensed members of the Utah Bar. Submissions of broad appeal and application are favored. Nevertheless, the editorial board sometimes considers timely articles on narrower topics. If an author is in doubt about the suitability of an article they are invited to submit it for consideration.

Editing: Any article submitted to the *Utah Bar Journal* may be edited for citation style, length, grammar, and punctuation. While content is the author's responsibility, the editorial board reserves the right to make minor substantive edits to promote clarity, conciseness, and readability. If substantive edits are necessary, the editorial board will strive to consult the author to ensure the integrity of the author's message.

Authors: Authors must include with all submissions a sentence identifying their place of employment. Authors are encouraged to submit a head shot to be printed next to their bio. These photographs must be sent via e-mail, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

Publication: Authors will be required to sign a standard publication agreement prior to, and as a condition of, publication of any submission.



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A Final Report and a Farewell

by Curtis M Jensen

Lawyers: Telling Our Story

At this time last year, the Salt Lake airwaves were filled with the cry to "kill all the lawyers," followed by Lori Nelson describing the ways lawyers benefit society – and why Shakespeare's ruffians needed lawyers out of the way – problem solving, building businesses, conflict resolution, advocacy, pro bono representation, and volunteering.

This year, billboards throughout the State caution people about do-it-yourself law and advise them to "call a lawyer first." Anyone responding to the website learned about the pitfalls of DIY law and was referred to a recent Utah Business interview of Jim Gilson, Tom Seiler, and me on this issue. Responders were also directed to the Modest Means Lawyer Referral registration page, with the anticipation that many would meet the program criteria.

Both of these campaigns are part of the Bar's efforts to meet the Utah Supreme Court's mandate to "educate the public about the rule of law and their responsibilities under the law." Utah R. Judicial Admin. Rule 14-202.

The Bar's public education and communications efforts fall into four categories:

1. General knowledge about how the legal system was created and operates:
   a. Law Day
   b. Constitution Day
   c. Various story ideas submitted to the media
2. Core functions of lawyers:
   a. Problem solving
   b. Conflict resolution
   c. Advocacy
   d. Creating businesses and opportunities
3. Lawyers giving back:
   a. Pro bono work
   b. Mentoring
   c. Serving on nonprofit and planning and zoning boards, government committees, community councils, etc.
   d. Community awards
   e. Volunteering in the community
   f. Volunteering at the Bar
4. Bar activities:
   a. Discipline
   b. Bar exam
   c. CLE, including conventions
   d. Bar awards

Our communications strategies include countering misconceptions that people may have about attorneys. This can be accomplished in two ways. First, directly confront the negative: killing all the attorneys was not something Shakespeare advocated! Second, emphasize the positive: get legal help at discounted rates with a Modest Means Lawyer Referral.

The Bar also looks for cost-effective ways of communicating. This spring, there were six quarter-page ads in *The Salt Lake Tribune* and *Deseret News* featuring Janise Macanas as the winner of he Raymond S. Uno award. Because this was a promotional ad for MediaOne's thirty-six-page Law Day special edition, there was no cost to the Bar.

In early 2013, the Bar hired a communications director, Sean Toomey, to create the advertising campaigns (radio, print, and billboards), negotiate media partnerships and supply editorial content, write news releases, and be our media representative. (He also has other duties, such as internal communications, which are beyond the scope of this article.)

One of his first communications recommendations was to include the word "lawyers" in the Bar's brand. Because many in the general public don't understand what the Bar is, any efforts to publicize its good works may fail to connect them to the lawyers involved.

Utah State Bar
Lawyers working for justice.
www.utahbar.org

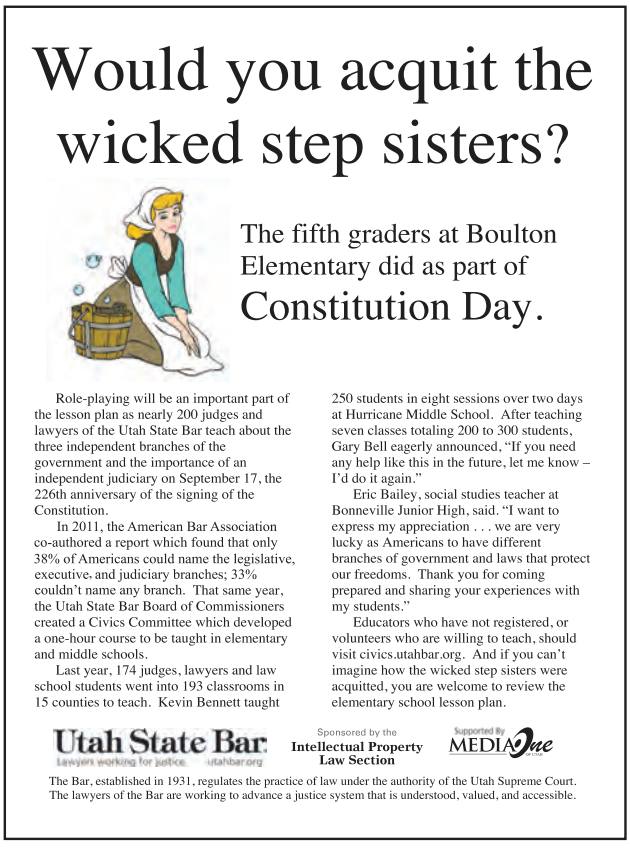
We continued this approach when we updated our vision and mission statements:

Mission: Lawyers serving the public and legal profession with excellence, civility, and integrity.

Vision: A just legal system that is understood, valued, and accessible to all.

As Sean explains it, the key to advertising is to distill your message and present it in a way that the people you want to influence will relate to it, and then to repeat the message as often as possible. For our Modest Means Lawyer Referral campaign, we determined that the best place to reach potential clients was in the courthouses throughout the state, so we partnered with the Utah State Court to reach the target audience. The campaign included posters, brochure holders, brochures, applications, and business cards with the Bar's website and street address, and training for the court staff.

For our Constitution Day promotion, we partnered with MediaOne



and the Intellectual Property Law Section to increase the number of ads. Incoming President Jim Gilson wants to expand this co-op advertising approach in 2014–15 by partnering with law firms on public relations advertising campaigns to double the reach of our efforts. If you think of messages or media that would reach the right audience, please contact Jim.

The Bar encountered an unanticipated communications challenge recently with the controversy about attorney discipline. This required educating the media on the process, coordinating a joint op-ed piece in *The Salt Lake Tribune* with Terrie McIntosh from the Ethics and Discipline Committee, and crafting public statements; all within the limitations of the Utah Supreme Court's confidentiality rules.

As you can see, the Bar is making a concerted effort to get its story in front of people. To be most effective we need the support of the entire membership. Let's continue to consider the public impact of our actions and statements, and let's be creative on how we can help the public better understand our profession and our people.

Please let me know if you have suggestions on how we can improve our efforts, and I know that our upcoming presidents, Jim Gilson and Angelina Tsu, will also value your suggestions for new initiatives and comments on our current campaigns.

"Practicing law is a privilege. We must safeguard our reputations, which can be lost in a vanishing moment should we fail to live up to the high professional standards imposed upon us…"

A Farewell

It has been my great privilege to serve this past year as your Bar President. I recall reading the remarks of Chief Justice Warren K. Winkler, which he shared many years ago, about what it meant to be a lawyer, and his remarks still resonate with me today.

Being a lawyer is significant. It means that today, and every day hereafter, we are known as, and hopefully deserving to be called, a lawyer. This designation is permanent. It does not end when we stop practicing or retire.

Practicing law is a privilege. We must safeguard our reputations, which can be lost in a vanishing moment should we fail to live up to the high professional standards imposed upon us by virtue of our entering into the community of lawyers.

Lawyers have a duty to serve the public ethically, diligently, and competently. Otherwise a lawyer will experience an empty practice, work will become tedious and unfulfilling, pressures will mount, and little satisfaction will be garnered from services rendered.

The demands of our practices sometimes require toughness and strength of spirit, not only with opposing parties and counsel, but also with our own clients. We need the wisdom and courage to refuse to act for a client when to do so would be a breach of ethics or civility.

We should embrace the very basic tenets of civility in our profession: to be polite, courteous, and respectful towards other lawyers, judges, and clients; to be honest in every aspect of our lives; to maintain humility and realize our place on the grander scale of life; to revere the law and the judicial systems; and to remember we are lawyers.

We have all committed to the solemn undertaking to act in accordance with our distinguished office and to act professionally. Aristotle believed that "we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts." So, too, as lawyers, we become professional when professionalism becomes a habit.

Our environment has become increasingly commercial and competitive. We are pressured to find and keep clients. The drive to the bottom line is sometimes difficult to resist. But law is a profession first, a business second. We need to heed the distinction between profession and business, or we will almost certainly lose our way.

As lawyers, we are the leaders in our communities, the advocates for those who have no voice, and the enforcers and protectors of our great constitutional rights and freedoms. I'm proud to be part of this noble and honorable profession.

It has been my honor to serve you. I extend to all of you my highest regards and well wishes for much success in your future endeavors and your individual journeys.

Utah's First Female Judge for the United States Court of Appeals for the Tenth Circuit: Judge Carolyn B. McHugh

by Andrea Valenti Arthur and Nicole Griffin Farrell

EDITOR'S NOTE: *The authors are both on the editorial board of the Utah Bar Journal and both formerly clerked for Judge McHugh when she served on the Utah Court of Appeals. In preparation for writing this article, they sat down with Judge McHugh and interviewed her about her recent appointment to the Tenth Circuit Court of Appeals.*

Growing up in a family with eight children, five of whom are female, newly appointed Tenth Circuit Court of Appeals Judge Carolyn B. McHugh wasn't used to women being a minority. When she arrived at law school in the fall of 1979, however, she discovered that she was entering a profession that was only beginning to attract women to its ranks. As a consequence, Judge McHugh recalls, the female law students gravitated towards one another. She eventually formed a study group with four other women, all of whom are thriving attorneys more than thirty years later. But even today, the practice of law in Utah continues to be a heavily male profession, and, on occasion, Judge McHugh still finds herself as one of the only women in the (court)room.

Confirmation to the United States Court of Appeals for the Tenth Circuit

This spring, Judge McHugh became the first woman from the state of Utah to be confirmed to the United States Court of Appeals for the Tenth Circuit. She joins a twenty-judge bench, composed of nine senior and eleven active judges. The bench currently has only one other active female judge – Chief Judge Mary Beck Briscoe, appointed in 1995 – although Judge Stephanie K. Seymour, appointed in 1979, still serves as a senior judge, and Justice Nancy Moritz of the Kansas Supreme Court has recently been confirmed and is awaiting her presidential commission. Heather Draper, *10th Circuit Court of Appeals is fully staffed with Moritz confirmation*, Denver Business Journal, May 5, 2014, available at http://www.bizjournals.com/denver/blog/finance_etc/2014/05/10th-circuit-court-of-appeals-isfully-staffed-with.html.

Judge McHugh's keen intellect, combined with her breadth of experience in civil, criminal, juvenile, and appellate law, yielded her the American Bar Association's highest rating for judicial candidates – unanimously well qualified. She has thrived in her thirty-two years of practice, epitomizing the traits of a high-quality attorney: passion for the work, compassion for the parties, and respect for superiors, colleagues, support staff, judges, and opposing

ANDREA VALENTI ARTHUR is an Attorney–Law Clerk for the Utah Court of Appeals. She clerked for Judge McHugh from 2008 to 2010. One of Andrea's favorite things about working with Judge McHugh was that she always listens to her clerks' perspective of the law or facts and is open to being convinced, even though she has much more experience than they do. Her chambers is very collaborative; she has photographs professionally taken of each of her clerks as a visual tribute to the contributions they have made.

NICOLE GRIFFIN FARRELL is a shareholder at the law firm of Parsons Behle & Latimer, where she practices in the areas of commercial litigation and employment law. Nicole was Judge McHugh's first law clerk at the Utah Court of Appeals. Nicole's favorite memory of clerking is when Judge McHugh had a "Littlest Law Clerk" T-shirt made for her daughter, Brooke, for her first birthday. (See photo on next page.)

counsel alike. She is also personable, never taking herself too seriously but always recognizing the seriousness of the work.

As an example of the conscientiousness she applies to her legal product, Judge McHugh adheres to the principle that there is no such thing as good writing; there is only good rewriting. Indeed, when asked what she found fascinating in her legal career, she responded that she could start with little knowledge of the case, and by the time she had met with the clients, the witnesses, and the experts and read the pertinent law, she knew more about the subject than she ever thought possible. That level of commitment to thoroughly understanding the applicable facts and law served the people of Utah well during her eight-and-a-half years as a judge for the Utah Court of Appeals and will be invaluable to the citizens of the Tenth Circuit as she transitions to the federal court of appeals.

Although she recognizes the significance of being the first Utah woman to ascend to the Tenth Circuit, Judge McHugh focuses primarily on the task before her: to adjudicate the cases assigned to her with the utmost commitment to professionalism and quality work. Judge McHugh says she would love to see the process of judicial appointment evolve to the point where the gender of the appointee is no more remarkable than his or her having "brown hair" or "blue eyes." In her view, making the transition from state appellate judge to federal appellate judge as seamlessly as possible furthers that goal.

On Mentoring and Being Mentored

Judge McHugh credits much of her own success to mentors she has had throughout her career, and she believes mentoring is critical in the legal profession. Those mentors – both men and women – offered generous amounts of time to teaching her and were always available as resources. To express her gratitude for that support, Judge McHugh has paid it forward in her own career: she encouraged a legal secretary at her firm to attend law school, she guided new associates while a partner, she is a mentor and advocate for her law clerks as they emerge from law school and embark upon the task of being a lawyer, and she is a champion for making the practice of law more accessible for young attorneys with families and those juggling two careers.

Judge McHugh with her "Littlest Law Clerk."

From early on in her practice, Judge McHugh has recognized that attorneys, especially women, face unique challenges in the practice of law when it comes to balancing work and family. A particular challenge relates to what she refers to as "the issue of 'issue.'" Judge McHugh played an instrumental role in the development of a maternity policy at her firm shortly before the birth of her first son. That maternity policy has now expanded to include paternity leave as well as a flex-time program available to both male and female attorneys.

Judge McHugh also recognizes that she has benefitted from the efforts of the attorneys who have come before her. When asked what it means to be the first Utah woman to be appointed to the Tenth Circuit bench, Judge McHugh remarked that she was "well aware that she was not the first qualified female who has shown an interest in this position." In fact, she noted that the opportunity became available to her in part because of the number of "competent women [who had applied] before and simultaneously [were applying]" for a seat on the bench. She is extremely grateful for all of those contributions and strives to perform her new responsibilities consistently with their professional examples.

Judge McHugh's Judicial Philosophy

Having been a practitioner for many years, Judge McHugh respects the judicial process, and she strives to treat each case before her with the attention it is due. She understands the time and the money it takes to get to the appellate level and how invested parties become in their cases, not just financially but emotionally. She also appreciates that being in the trenches practicing law can be very demanding, and she hopes that she never loses that perspective while serving as a judge.

As for her philosophy in approaching appellate judging, Judge McHugh says the way to make good decisions is to "roll up your sleeves, do the work, and find out where the facts and law lead you." She also believes in doing the most demanding work on the case at the front end, which allows a judge to be as prepared as possible for oral argument. That way, the judge can pick at the weakest parts of both sides' arguments. "You can follow the argument and understand the nuances better if you have read everything," she says.

With regard to issuing opinions, she understands that she is writing for multiple audiences: the parties involved in the case, who need a clear understanding of why they won or lost; the trial court judges, who need to know how to evaluate analogous issues as they arise in the future; and "her bosses" – formerly the Utah Supreme Court and now the U.S. Supreme Court, who are reviewing cases to determine if anything warrants reversal. She also appreciates that each court has a unique role in the process, along with special challenges that come as advocates refine a case during its journey from the first stages in the trial court all the way up through what can be several levels of appeal. Judge McHugh jokes that trial court judges are like "medics on the battlefield," the court of appeals is like "the MASH Unit," and the supreme court is like "the Mayo Clinic," each dealing in a different environment with arguments that have evolved and improved in the process.

Advice for Appellate Practitioners

Judge McHugh says that she has read many excellent appellate briefs and seen many well-prepared and persuasive advocates in the courtroom. When asked for advice to those who have a case she is hearing, she suggests that attorneys look at a case through the prism of the standard of review and incorporate that standard into the argument. "Too many attorneys treat it as a do-over," she says, "which is not the case." She encourages practitioners to incorporate the standard of review into every argument on appeal and tell the court why their clients should prevail under that standard.

In addition, she states that attorneys who have worked on a case for the time it takes to reach the appellate level often become too wedded to their view – and their view only – of the case. This is a pitfall because it leaves the attorney unprepared for difficult questions at oral argument. Attorneys should strive to fulfill their primary obligation of advocacy without becoming blinded to the weaknesses of their facts or the application of the law to their facts. "Good advocates convince themselves first, but great advocates convince themselves while still seeing the weaknesses in their own cases," she says. Attorneys should also write their briefs so as to make them as succinct and to the point as possible. Judge McHugh recognizes that this task is not always easy with the many time demands on attorneys: "I always say that if I had more time, I'd make it shorter," referring to her own written opinions.

Judge McHugh's appointment to the Tenth Circuit Court of Appeals represents a historic occasion. She looks forward to learning how to serve effectively on the Tenth Circuit bench and then applying that knowledge for many years to come.

Judge McHugh addresses friends, family, and colleagues at her investiture as a Circuit Judge for the Tenth Circuit Court of Appeals on May 28, 2014.

Judge Carolyn B. McHugh's Life in the Law

- Judge Carolyn B. McHugh graduated with honors from the University of Utah College of Law in 1982. She served as an editor of the Utah Law Review and was a member of the Order of the Coif.
- She clerked for Judge Bruce S. Jenkins, United States District Court, District of Utah, from 1982–1983.
- Judge McHugh practiced with the Salt Lake firm Parr Brown Gee & Loveless from 1983 until 2005.
- She joined the Utah Court of Appeals in 2005, serving as its presiding judge from January 1, 2012, to December 31, 2013.
- Judge McHugh was unanimously confirmed to the Tenth Circuit Court of Appeals by a vote of 98-0 on March 12, 2014. She was officially sworn in as a Circuit Court Judge on March 17, 2014.
- She has been honored with the Dorathy Merrill Brothers Award for the Advancement of Women in the Profession, the Christine M. Durham Utah Woman Lawyer of the Year Award (2001), and the University of Utah Young Alumna of the Year Award (1997).
- Judge McHugh enjoys spending time with her two sons Kevin and Bradley, her family, and her extensive network of friends.

eDiscovery: It's Time to Drop the 'e'

by Stephanie Wilkins Pugsley

Much of our time as attorneys is spent wading through information seeking the proverbial needle in the haystack, whether it be the one email that will prove our case or the single spreadsheet that shows financial viability. Litigators live in the world of discovery; transactional attorneys are often mired in due diligence. Getting our arms around relevant information is becoming an increasingly dubious and expensive task with the exponential growth of electronically stored information (ESI). The days of simply photocopying and reviewing the contents of a file cabinet have passed.

Managing ESI Is Not Just for Litigators Anymore

Why then do attorneys hesitate at the concept of eDiscovery? The Sedona Conference defines eDiscovery as "[t]he process of identifying, preserving, collecting, preparing, reviewing, and producing electronically stored information…in the context of the legal process," encompassing both litigators and transactional attorneys alike. The Sedona Conference® Glossary: *E-Discovery & Digital Information Management* (3d ed.), 18. Many lawyers claim not to "do" it. However, the basic information needed to do our jobs was born in an electronic format. Like it or not, attorneys are "doing eDiscovery." To ignore this fact is to "do it" wrong.

Why Discovery Is Scary in the Digital Age

Current trends underscore many attorneys' fears in dealing with ESI. The volume of available information is increasing exponentially. It is estimated that 89 billion business emails are sent daily. *See* The Radicati Group, *Email Statistics Report, 2012-2016 – Executive Summary*, 3 (Apr. 2012), available at http://www.radicati.com/wp/wp-content/uploads/2012/04/Email-Statistics-Report-2012-2016-Executive-Summary.pdf. Information is now discussed in gigabytes of data rather than document page counts. Typically, it is estimated that 1 GB of data contains approximately 3,000–30,000 documents, with a page count of 20,000–120,000. And the larger the volume of data, the greater the costs associated with getting the data produced to opposing counsel in a defensible manner. It is no wonder that attorneys and clients are not enthusiastic about eDiscovery. It can be unpredictably expensive.

eDiscovery Trends

Current trends in eDiscovery are being driven by judicial opinions, civil procedure, and ethics rules, as well as case management decisions. Several common denominators are: (1) a recognition that dealing with ESI is an increasing, not decreasing, field; (2) the acceptable technology is changing at a rapid pace; and (3) an emphasis on controlling costs.

Judicial opinions regarding eDiscovery, including litigation hold requirements, spoliation of evidence, sanctions, and the acceptability of new technology in the eDiscovery arena are being issued at a rate almost as high as the overall increase in data. Courts apply the controlling principles of reasonableness and proportionality to the facts of each case, coming up with a wealth of case law. Citing controlling principles to your trier of fact is essential.

The American Bar Association, in response to these trends, formed the ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies in 2009. The group studied the impact of technologies on the legal profession, including eDiscovery. Among other recommendations, the group recommended amended ABA Model Rule 1.1 extending a lawyer's duty of competence to the technology relevant to advising and representing clients. American Bar Association, Model Rule 1.1 & comment, *available at* http://www.americanbar.org/

STEPHANIE WILKINS PUGSLEY is Associate Corporate Counsel at TPUSA, Inc. She has an expertise in electronic discovery and information governance acquired when working in house for Orange Legal Technologies and as a litigator at Kirton McConkie.

groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html (last visited March 30, 2014). Utah's rule has not been amended, but many other states' rules have. State and federal Rules of Civil Procedure and Evidence, as well as some local court rules, now include provisions specific to ESI and electronic discovery. The rules' text and comment sections provide insight as to how specific jurisdictions expect attorneys to apply the reasonable and proportional standards when dealing with ESI. Just as with practitioners, judges' understanding of technology varies widely. It is wise to become familiar with your judge's rulings in the ESI arena.

As technology develops and courts' requirements have shifted, legal teams have necessarily reacted with changing case management decisions. Litigation budgets often require lengthy discussions over the costs and pain associated with eDiscovery. Clients demand certainty in cost, requiring attorneys to decide how to "do eDiscovery" in order to avoid sanctions. Rarely is a case driven purely by strategy any more, but the pressures of the costs affect moving a case forward. Moreover, the total cost of eDiscovery is commonly associated with collection and processing of data (often by a vendor) and delegated to litigation support to attempt to shop around for the best price. Unfortunately, pricing comparisons are often skewed if attempting to compare outside vendors because they typically offer such different services, and levels of quality in a single per GB price. Unless you are an industry expert, these nuances can be frustrating to counsel and aggravating to the client paying the bill. It is not surprising that some attorneys simply do not want to "do" eDiscovery.

With the Changing Landscape, Strategies for Managing eDiscovery Costs

There is no one size fits all for managing costs; however, some general principles have emerged to help reduce eDiscovery costs.

Earlier tends to be better.

When assessing your litigation profile (who are the custodians, where is the ESI, is a forensic collection required, what search terms should be applied to narrow the focus of the collection, what are the costs/benefits of self-collect v. vendor-assisted collect, etc.), the earlier you inquire into the relevant ESI, the more able you are to control the costs. Late or rushed

eDiscovery tends to drive up costs on all fronts, including the risk of overcollecting, overproducing, producing data without sufficient time to review, or having to throw additional resources at review prior to production.

Understand the source of eDiscovery costs.
In the RAND Institute for Civil Justice's *Where The Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, at 19–20 & Fig. 2.2, the RAND Institute estimated that at least 70% of an eDiscovery budget was dedicated to attorney review for relevance, responsiveness, and privilege and concluded that "review costs would have to be reduced by about three-quarters in order to make those costs comparable to processing, the next most costly component of production." Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, 41 & Fig. 4.1 (emphasis omitted), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf. It will take an intentional shift in thinking to reduce the costs associated with attorney review.

"The greatest way to reduce the cost of eDiscovery is to reduce the cost of attorney time reviewing it. . . . Outsourced attorney review has become one viable option to reduce costs."

Manage costs by managing the source of the costs.
Simply put, attorneys must find ways to reduce the amount of time spent reviewing discovery, while balancing the interests in a defensible production and the need to explore fully the information governing the matter at hand. The surest way for a party not to incur costs associated with review or production of ESI at any level is not to collect it in the first instance. There are several ways to reduce the data collected.

First, inquire whether your client has a written document retention and destruction policy that it follows. Clients with policies are protected from producing deleted data by the safe harbor provision in the rules of civil procedure. Second, be precise and collect only that data that may be relevant and responsive. Increasing precision at the data collection phase reduces the data that will ultimately need to be processed and reviewed. Third, occasionally, custodian self-collection may reduce costs in narrow circumstances allowing quick identification, review, and production of relevant documents. However, self-collection may encourage clients/employees, without proper guidance and supervision, to be biased or to conceal information that may be personally damaging or embarrassing. Moreover, clients rarely have the legal or technical expertise needed to identify and/or acquire relevant ESI for purposes of litigation. If a client's self-collection is challenged by the opposing party, attorneys need to be able to show chain of custody of the ESI, as well as identify a witness to testify as to the defensibility of the collection. The legal standards by which a party's discovery responses, including collection, are measured are reasonableness and proportionality. However, determining whether the efforts a custodian or party used were reasonable or proportional is not easy. Courts are imposing the duty to determine reasonableness and proportionality upon counsel. Failure to do so often results in spoliation sanctions for clients and monetary sanctions against individual attorneys and law firms. Courts are holding that when an employee has a personal stake in a dispute, it is unreasonable for a party to rely on that employee to collect or determine relevance. If you decide self-collection is appropriate for your client, it requires clear direction and supervision by counsel, and it should be carefully documented.

Use technology.
Lawyers are finally realizing the fallacy that it is best and most accurate to have a lawyer's eyes on every document prior to production. Humans are fallible. Statistics from cases with large data sets show that using some hybrid form of technology and eyes-on attorney review reduces the risk of error. In very large data cases, predictive coding and other computer-assisted review technologies have the potential to identify at least as many documents of interest as traditional eyes-on attorney review with about the same level of inconsistency. Use technology as a means to cull larger data sets to a more manageable size. The technology in the eDiscovery space is constantly evolving and becoming more inexpensive. Lawyers who are unfamiliar with current technology should consider doing due diligence prior to the onset of a matter. EDiscovery professionals are happy to explain their processes and certifications and to introduce their teams. For those attorneys who lack time to become an expert in the field, consider designating an attorney in your firm as the eDiscovery guru and provide him or her with the time and resources to become an expert. By so doing, as new matters

begin, case management strategies can be discussed with the client, inside and outside counsel, IT personnel, and a vendor (where necessary).

Do not be afraid to hire an expert.
Attorneys are comfortable bringing in expert witnesses in almost all kinds of cases. EDiscovery is no different. However, just as with hiring a forensic accountant or a doctor to opine on causation, picking the right vendor-expert can be critical to your case. The trends of looking at a vendor as a partner and leaning on his or her experience and advice rather than as a simple outsourced cost will also help reduce costs associated with your data.

Use traditional litigation tools.
Although the shadow of eDiscovery looms over every matter, preventive client counseling regarding document retention and management, litigation hold notices and procedures, and defensible collections provide safety under the Rules of Civil Procedure. Utilizing the Rules of Civil Procedure that specifically apply to ESI to implement or defend case management decisions also help control costs. *See, e.g.*, Fed. R. Civ. P. 26(b)(2)(C) (proportionality); *id.* R. 26(g) (reasonable inquiry). At the outset of a case, consider adding specific eDiscovery provisions to a Case Management Order or during a meet and confer to help rein in the amount of data that could become at issue later on in the matter. If you understand your ESI, who controls it, and what may be at issue, you can put parameters around the data to limit it prior to your first collection – by identifying search terms, date ranges, custodians, locations where the ESI may reside, and type of production. Additionally, if parties can agree to the addition of a provision requiring the parties to use an eDiscovery special master or mediator in the event a dispute arises, parties can select an expert and not have to spend resources educating the trier of fact.

Outsource first pass attorney review.
The greatest way to reduce the cost of eDiscovery is to reduce the cost of attorney time reviewing it. Once all other strategies have been employed to reduce the amount of data through collection and agreement, finally, the trend over the past five years has been to outsource first pass relevance and privilege review to contract-based attorneys, leaving a much smaller data set for counsel of record's eyes. Outsourced attorney review has become one viable option to reduce costs. "Choosing a 75-percent reduction in review expenditures as the desired target is an admittedly arbitrary decision, but more-modest cost savings are not likely to end criticisms from some quarters that the advent of eDiscovery has caused an unacceptable increase in the costs of resolving large scale disputes." RAND Institute, *supra*, at xvi. Regardless of whether attorney review is done in house or outsourced, document the review process, document the quality controls you put in place, and document your review structure (batches/completion/attorney assignment/ issues), in order to maintain the integrity of your process as defensible when challenged. When outsourcing, document your procedure for quality controlling and checking the work when it is returned to you. All successful discovery projects are the result of a defensible and repeatable process. Therefore, do whatever it takes to document and streamline your attorney review processes in order to build on successes and learn from mistakes. Undoubtedly, another ESI or discovery project is likely to arise.

Electronic discovery is here to stay. Those attorneys and firms willing to understand the trends and requirements are finding ways to help successfully manage the associated costs and risks. Perhaps it is time to finally drop the 'e' and recognize that managing our client's ESI is simply discovery.

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.*

State v. Manatau
2014 UT 7, 322 P.3d 739 (March 7, 2014)

The Utah Supreme Court reversed a defendant's conviction for various charges on double jeopardy grounds because the legal necessity for a mistrial was not established on the record. During the first trial, the defendant's wife brought him a suit jacket that contained a pocket knife, and the trial court excluded her from trial as a result. After the jury was sworn, defense counsel requested that the defendant's wife be allowed to reenter the courtroom, to which the State objected. The trial court allowed the wife to return. After taking a recess, the judge explained that the knife incident "was affecting her more than she had previously thought," *id.* ¶ 5, and she declared a mistrial, despite objections from the State and the defense. At a second trial, the defendant moved to dismiss the case on double-jeopardy grounds, but the court rejected this claim, and he was convicted. On appeal, the Utah Supreme Court reversed, holding that after a mistrial a second trial may only proceed without violating the Utah Constitution if "(1) the defendant consents to the mistrial or (2) there is 'legal necessity' for the mistrial." *Id.* ¶ 10 (citation omitted).Where the defendant does not consent, "legal necessity is established only if a mistrial is the 'only reasonable alternative to insure justice under the circumstances.'" A mistrial is considered the only reasonable alternative only if (1) upon a careful evaluation the trial judge considers alternatives to mistrial and concludes no alternative exists, and (2) the trial court establishes a factual record for its determination of legal necessity. Because the trial court did not consider alternatives to a mistrial and did not create a record to establish there was no reasonable alternative, the Utah Supreme Court could not decide whether the mistrial was legally necessary. Accordingly, the court held that the first trial served as an acquittal and the second trial violated double jeopardy.

State v. Nielsen
2014 UT 10 (April 29, 2014) (corrected April 30, 2014 and May 2, 2014)

In a significant departure from prior case law, the Utah Supreme Court explained that the marshaling requirement for challenging a factual finding is no longer grounds for a procedural default on appeal but is rather "a natural extension of an appellant's burden of persuasion." *Id.* ¶ 1. The court emphasized the continuing importance of marshaling, explaining that a "party who fails to identify and deal with supportive evidence will never persuade an appellate court to reverse under the deferential standard of review that applies to such issues." *Id.* ¶ 40. However, the Court explained that appellants are not required to play "'devil's advocate'" and present "'every scrap of competent evidence' in a 'comprehensive and fastidious order.'" *Id.* ¶ 43 (citation omitted). Rather, appellants and the courts should focus "on the merits, not on some arguable deficiency in the appellant's duty of marshaling." *Id.* ¶ 42. On this basis, the court rejected the state's argument in a criminal appeal from charges of kidnapping that the defendant's failure to marshal in itself warranted a rejection of the appeal. Nonetheless, the court

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ruled that sufficient evidence was presented to convict the defendant, even though the state's evidence was entirely circumstantial.

State v. Gutierrez-Perez
2014 UT 11 (April 29, 2014)

The court affirmed the district court's denial of a motion to suppress, based on its determination that the language in Utah's eWarrant application system satisfies the Utah and U.S. constitutional requirements that a warrant be supported by an "oath or affirmation."

Dillon v. Southern Management Corporate Retirement Trust
2014 UT 12 (Originally filed May 2, 2014; Amended May 13, 2014)

The court affirmed summary judgment for the plaintiffs on their claims that the trust deed encumbering their property was invalid, that the defendant had slandered their title, and that the defendant was liable for damages under Utah Code section 57-1-38(3) and the trust deed. The court clarified that in order to satisfy the malice element of a slander of title claim, the plaintiff must prove that the defendant had actual knowledge that the statements at issue were false. The court then considered whether the district court erred in trebling the attorney fee award under section 57-1-38(3)(a), which provides for "treble actual damages incurred…including all expenses incurred in completing a quite title action." Utah Code Ann. § 57-1-38(3)(a) (LexisNexis 2010). The court rejected the plaintiffs' argument that "all expenses incurred" includes attorney fees. Such an interpretation would render subsection (3)(b), which provides for attorney fees, superfluous. Finally, as a matter of first impression, the court held that the plaintiffs were entitled to attorney fees even though a non-party title insurance company had paid all of the fees. To hold otherwise would give the nonprevailing party an undeserved windfall.

BMBT, LLC v. Miller
2014 UT App 64, 322 P.3d 1172 (March 20, 2014)

In this quiet title action, the district court granted defendant's Rule 12(b)(6) motion to dismiss after considering a deed and note that plaintiff had failed to attach to the complaint. The court affirmed, explaining that the district court's consideration

of the deed and note did not require the motion to be converted into one for summary judgment because those documents were referred to in the complaint and were central to plaintiff's claim.

Zelig v. Uintah County
2014 UT App 69 (March 27, 2014)

The Utah Court of Appeals clarified that if an expert witness is appointed by a juvenile court, the juvenile court is the proper forum to decide the reasonableness of the expert's fees and which party is responsible for paying such fees. Specifically, in a termination of parental rights proceeding, the juvenile court appointed an expert custody evaluator and ordered Uintah County to pay the expert's fees. The county did not object at the time but after trial challenged the reasonableness of the expert's fees in the juvenile court. The expert later filed suit against the county in the district court to recover his fees. The county argued that the proceeding should be heard in the juvenile court, but the district court disagreed and ordered the county to pay the expert's fees. On appeal, the court of appeals sided with the county, holding that "the court that heard the underlying case and appointed the expert in the first place [] was the appropriate court to determine the reasonableness of the work." *Id.* ¶ 7.

Thomas v. Thomas
2014 UT App 72 (March 27, 2014)

In a per curiam opinion, the court of appeals affirmed the district court's denial of a Rule 60(b)(1) motion. The respondent had asserted that the district court's underlying order was based on a mistake of law. The court of appeals held that the proper avenue to raise such a challenge is an appeal or a motion for a new trial. Mistakes of law are excluded from the narrow realm of "mistakes" recognized in Rule 60(b)(1), so the motion did not toll the time for appealing the underlying order.

CCAM Enterprises v. Department of Commerce
2014 UT App 79 (April 10, 2014)

In this dispute over $110,000 of cabinetry work, the court interpreted the statutory scheme establishing the Residence Lien Recovery Fund and determined that claims for recovery against the fund are assignable.

Northgate Village Development, LC v. Orem City
2014 UT App 86 (April 17, 2014)

The trial court granted summary judgment to Orem City on various claims related to a land sale contract. The court of appeals held that material issues of fact existed on the contract issue and that the contract contained ambiguities. The court of appeals also held that while a party is free to alternatively plead equitable and contract claims at the pleading stage, if the trial court eventually determines that a contract covers the issues subject to the equitable claims, the equitable claims are precluded. Thus, while the trial court arguably erred in dismissing claims for unjust enrichment and restitution on a motion to dismiss, the error was harmless where the issue was covered by a valid contract.

White v. Jeppson
2014 UT App 90 (April 24, 2014)

Several investors sued their financial advisors for breach of fiduciary duty and violations of state securities laws. The district court granted the financial advisors' motion and dismissed the claim for failure to join other financial advisors who were also involved, concluding that they were necessary and indispensable parties under Rule 19 of the Utah Rules of Civil Procedure. The court reversed, explaining that joint tortfeasors are not necessary or indispensable parties, and that it is not necessary to name them all in a single lawsuit if the plaintiff has not asserted claims against the unjoined parties.

Wright v. PK Transport
2014 UT App 93 (April 24, 2014)

The plaintiff amended his complaint to name additional defendants in this negligence action a year-and-a-half after the statute of limitations expired. He argued that his new claims related back to the date of the original complaint under Rule 15(c) of the Utah Rules of Civil Procedure because one of the original defendants was an agent of the new defendants, and therefore, his knowledge of the claim should be imputed to establish the actual notice and identity of interest. The Utah Court of Appeals affirmed summary judgment for the defendants dismissing the claims, noting that although the original defendant was the agent of the new defendants at the time of the underlying accident, there was no evidence that he was an agent at the time the complaint was filed.

Salt Lake City v. Almansor
2014 UT App 88 (April 24, 2014)

In his second of three challenges to his conviction, the defendant argued the trial court erred in proceeding to trial after one of his defense witnesses failed to appear. The Utah Court of Appeals held that the defendant had failed to preserve this claim. The defendant failed to request a continuance or otherwise ask the court to procure the witness's appearance. The trial court's

statement that "we'll just go on with the trial, it is what it is…, [it] happens" was insufficient to establish that such motions would have been futile. *Id.* ¶ 10. This statement was in response to defense counsel's statement that he was "in a bit of a quandary" about what to do, not in response to a motion or a request to continue. *Id.*

Zions Gate R.V. Resort, LLC v. Oliphant
2014 UT App 98 (May 1, 2014)

Clarifying the doctrine of apparent authority in the context of LLCs, the Utah Court of Appeals determined that regardless of whether an individual has actual knowledge of an LLC manager's authority to bind the LLC, notice is presumed if limitations on a manager's authority are contained in the LLC's articles of organization on file with the State. As applied, one manager of an LLC purported to enter into a long-term lease with a tenant, but the other manager did not sign the lease. The LLC's articles of organization required the approval of both managers to bind the LLC, thus limiting the authority of a manager to act unilaterally. The LLC later sought to invalidate the lease because it was only signed by one manager. At trial, the tenant moved for summary judgment on the grounds of apparent authority, or alternatively, ratification. The trial court agreed with the tenant. The court of appeals reversed. The court noted that, pursuant to Utah Code section 48-2c-121(1), articles of organization filed with the state "constitute notice to third persons…of all statements set forth in the articles of organization." *Id.* ¶ 12 (alteration in original). Thus, regardless of whether the tenant actually knew of the limitations on the manager's authority, such knowledge was presumed by statute, and there could be no apparent authority. Moreover, because material issues of fact existed on the issue of ratification, the court reversed the grant of summary judgment.

United States v. Tucker
745 F.3d 1054 (10th Cir., March 11, 2014)

The Tenth Circuit dismissed the defendants' interlocutory appeal for lack of jurisdiction. Defendants appealed the district court's denial of their motion to dismiss the indictment and suppress grand jury testimony, which was based on the Fifth Amendment right to be indicted by a grand jury, the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment right to effective assistance of counsel. The Tenth Circuit held that the collateral order exception to the final judgment requirement was inapplicable to the district court's order. Only the third *Cohen* factor – whether the order would be effectively unreviewable on an appeal from final judgment – was at issue. The district court's order did not fall within the three categories of criminal cases in which the Supreme Court has applied the collateral order exception: appeals from (1) motions to reduce bail; (2) motions to dismiss based on double jeopardy grounds; and (3) motions to assert immunity under the Speech or Debate Clause of the Constitution. Nor did the order otherwise satisfy *Cohen*'s "effectively unreviewable" requirement. The defendants' Fifth Amendment challenges would be reviewable on direct appeal, and their Sixth Amendment challenge could be brought in a habeas petition for postconviction relief under 28 U.S.C. § 2255.

Calhoun v. Colorado Attorney General
745 F.3d 1070 (10th Cir., March 18, 2014)

The Tenth Circuit had previously granted the pro se petitioner a certificate of appealability on the question of whether the petitioner's ongoing registration obligations under Colorado's Sex Offender Registration Act satisfy the custody requirement of 28 U.S.C. § 2254. The court, as a matter of first impression, held that Colorado's sex offender registration requirements are collateral consequences of the petitioner's conviction and not restraints on his liberty. In doing so, the Tenth Circuit joined

other circuits that have held sex registration requirements do not satisfy the custody requirement of § 2254.

Christoffersen v. United Parcel Service, Inc.
747 F.3d 1223 (10th Cir., April 2, 2014)

In the context of underinsured motorist (UIM) coverage, the Tenth Circuit held that UPS was not a self-insurer under Utah law, despite the fact that UPS maintained a "fronting" insurance policy where its deductible equaled its policy limits, essentially limiting the insurer's obligation to pay any claim unless UPS was insolvent. The heirs of a deceased UPS driver argued that this type of policy constituted self-insurance because they could not gain UIM coverage from UPS if UPS was self-insured. The court first held that the issue of whether a company is self-insured is an issue of law, not fact, an issue both parties missed. Next, the court held that even though UPS's deductible equaled its policy limits, it still qualified as an insured under Utah law. In reaching this conclusion, the court looked to the definition of insurance under Utah Code section 31A-1-301(82) and concluded that because the agreement between UPS and its insurer involved "an arrangement for the distribution of a risk," *id*. at 1232, it qualified as insurance. Accordingly, because status "as an 'insured' and 'self-insurer' are mutually exclusive," UPS could not be considered a self-insurer because it was an insured under its "fronting" policy. *Id*.

United States v. Romero
2014 WL 1424529 (10th Cir., April 15, 2014)

Affirming the denial of a motion to suppress, the Tenth Circuit held that the presumption regarding a parent's authority to consent to a search on his or her child's behalf applies equally to a stepparent.

Utah ex rel. Utah Department of Environmental Quality v. EPA
—F.3d—, 2014 WL 1778143 (10th Cir. May 6, 2014)

The Tenth Circuit dismissed the petition for review of the EPA's rejection of a revised Clean Air Act plan for lack of jurisdiction. The petitioners failed to file within sixty days of the date the EPA's action appeared in the Federal Register, as required by statute. This failure was the result of the EPA's initial failure to alert the parties to the sixty-day deadlines, as is its usual practice, which led the EPA to, more than a month later, inform the parties that they would have sixty days from that date to file a petition for review. Relying on this statement, the parties filed their petition within the extended sixty-day period, but after the true sixty-day period had run. The Tenth Circuit rejected the parties' (including the EPA's) argument that the EPA had, through its statement, implicitly changed the date of its decision. Under its regulations, the EPA's action is considered the date of publication unless the Administrator otherwise explicitly provides in a promulgation, approval, or action. There was no such explicit change in this case. Although recognizing the inequity to the petitioners created by the application of the jurisdictional bar, the Tenth Circuit held that it cannot expand its jurisdiction to avoid hardships even when they are inequitable.

Rockwood Select Asset Fund XI (6)-1, LLC v. Devine, Millimet & Branch
2014 WL 1778048 (10th Cir., May 6, 2014)

In this personal jurisdiction case, a Utah lender obtained an opinion letter from a New Hampshire law firm. The lender later sued the law firm in Utah federal court. Relying in part on *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the Tenth Circuit held that jurisdiction cannot be based solely on interaction with a "plaintiff known to bear a strong connection to the forum state." *Id*. at *2. Sending an opinion letter to a Utah address and participating in telephone communications with a Utah resident were also insufficient.

United States v. Davis
—F.3d—, 2014 WL 1797834 (10th Cir., May 7, 2014)

Defendant appealed a denial of a motion to suppress evidence after a GPS device was placed on an accomplice's car and resulted in the seizure of evidence from that car. The Tenth Circuit determined that he did not have standing to challenge the validity of the search because he did not own or use the car regularly and did not have a reasonable expectation of privacy in the car.

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Send in the B Team: Insurance Coverage for Personal and Advertising Injury

by Mark W. Dykes

Introduction

Most lawyers are aware that the standard commercial general liability (CGL) policy provides defense and indemnity coverage (subject to policy terms) for bodily injury and property damage. Thus, if the insured (with a CGL policy, almost always a corporate entity) injures another party or damages property of another, the insurer will defend the insured against the subsequent lawsuit and indemnify the insured against a judgment, assuming that all policy requirements for coverage are met and no exclusions apply.

The bodily injury/property damage coverage is sometimes referred to as the "A" coverage for the subheading under which it appears in "Section I: Coverages" of the standard ISO (Insurance Services Office) CGL form. "A" of course implies that there is at least a "B," and indeed there is: coverage for "personal and advertising injury."[1]

The B coverage is arguably less well known than the A coverage and inarguably far more complicated, given the many definitions, "predicate offenses," and exclusions applicable to the coverage, and ever-new and evolving fact patterns involving the internet and cybersecurity. (As discussed below, by the time this article is published there will be a new set of endorsements in place excluding coverage from the CGL policy for cybersecurity claims.)

Nomenclature is confusing here as well because "personal injury" sounds like a synonym for "bodily injury," particularly given the normal use of the term "personal injury" in the legal trade. (Concerning this issue, be very careful in drafting or reviewing insurance requirements that the phrase "personal injury" is not really meant to be "bodily injury.") Under the CGL form, "'[b]odily injury' means bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time." Although, as noted below, "personal and advertising injury" has a bodily injury component, the coverage otherwise has nothing to do with bodily injury. The "personal injury" referred to is instead infringement of certain "personal" rights, such as the right to privacy.

It is impossible in a short article to do justice to the B coverage or even a subset of the B coverage. We will hit only some high points, with an emphasis on advertising injury.

Predicate Offenses

Coverage for advertising injury by itself was originally available only via an endorsement. In 1986, this coverage was folded into the standard ISO policy. That policy defined "advertising injury" and "personal injury" separately. In 1998, the ISO form adopted the combined term "personal and advertising injury." The current ISO form defines the combined term as "injury, including consequential 'bodily injury,'" arising out of a series of listed "offenses," including false arrest/detention/imprisonment; malicious prosecution; wrongful eviction/entry; slander of person/disparagement (trade libel) of a person's or organization's goods or services; violation of privacy; and "the use of another's advertising idea" in the insured's "'advertisement'" or "infringing upon another's copyright, trade dress or slogan in the insured's 'advertisement.'"

Although both "property damage" and "bodily injury" under the A coverage are defined terms, "injury" is not defined under the B coverage, save for the inclusion of the defined term "bodily injury" in "consequential bodily injury." Instead, the underlying substantive law must be consulted to determine if there has been an "injury" cognizable under the law. Given that "personal and advertising injury" includes "consequential" bodily injury,"

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we can be sure that the B coverage applies to more than just bodily injury.

Concerning coverage for consequential bodily injury under the B coverage, exclusion 2.o of the A coverage provides, "This insurance does not apply to…'Bodily injury' arising out of 'personal and advertising injury.'" The thing to keep in mind is that "[t]his insurance" here means the A coverage, not the B coverage. When the ISO drafters added coverage (in 1998) for consequential bodily injury arising from personal and advertising injury, they felt compelled to add an exclusion to the A coverage to ensure that bodily injury arising from the B coverage would not be covered twice and thus entitled to application of two limits rather than one. (A standard example of consequential bodily injury under the B coverage is the claimant who suffers a heart attack from being falsely arrested or imprisoned.)

As to the duty to defend, the Tenth Circuit refers to each of the enumerated offenses in the personal and advertising definition as a "predicate offense," the existence of at least one of which must be shown by the underlying complaint against the insured before any further inquiry into coverage is required. *Novell, Inc. v. Federal Ins. Co.*, 141 F.3d 983, 986 (10th Cir. 1998).

"Advertising injury" requires an advertisement. Definitions are contained in Section V of the standard ISO form. Thereunder,

> "[a]dvertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
>
> a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
>
> b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

Although the phrase "specific market segments" gives at least running room to the notion that coverage can apply if the advertisement is distributed to an extremely narrow group (perhaps even a single individual), the phrase "broadcast or published" in the definition is usually interpreted as importing a requirement of wide distribution of the advertisement for coverage

to attach and thus is a back-door requirement that the segment at issue be of appreciable size. *See Rombe Corp. v. Allied Ins. Co.*, 128 Cal.App.4th 482, 492 (Ct. App. 2005) (holding that small breakfast meeting of insured's competitors did not constitute a market segment – "The term 'specific market segments' does not relieve an insured of the burden of demonstrating that it was engaged in relatively wide dissemination of its advertisements even if the distribution was focused on recipients with particular characteristics or interests."); *see also Santa's Best Craft, LLC v. Zurich Am. Ins. Co.*, 941 N.E.2d 291, 303 (Ill. App. 2010).

The insuring agreement for the B coverage is almost identical to that for the A coverage. Thus, the carrier will "pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury'" to which the insurance applies and has the "right and duty" to defend the insured against a suit asserting personal or advertising injury. Defense payments do not erode the limits for coverage available. Section II, "Who is an insured," applies to the B coverage, as does Section IV, "Commercial General Liability Conditions."

"'[A]dvertising injury' does not cover 'false advertising' if that term is meant to refer to claims that a manufacturer lied in advertisements about how its property would perform."

The same rules governing the duty to defend under the A coverage apply to the B coverage:

> A duty to defend arises "when the insurer ascertains facts giving rise to potential liability under the insurance policy." *Sharon Steel Corp. v. Aetna Cas. & Sur.*, 931 P.2d 127, 133 (Utah 1997). When the allegations, if proven, show "there is no potential liability [under the policy], then there is no duty to defend." *Deseret Fed. Sav. v. U.S. Fid. & Guar.*, 714 P.2d 1143, 1147 (Utah 1986). Under Utah law, the court must interpret the insurance policy as it would any written contract, under general contract interpretation principles. *Benjamin v. Amica Mut. Ins. Co.*, 140 P.3d 1210, 1213 (Utah 2006). If one claim or allegation triggers the duty to defend, the insurer must defend all claims (that is, covered and noncovered claims), at least until the suit is limited to the non-covered claims. *Id.* at 1216. Finally, and perhaps most important: "'When in doubt, defend.'" *Id.* at 1215 (*quoting* Appleman on Ins. Law & Practice § 136.2[C] (2d ed.2006)).

Ohio Cas. Ins. Co. v. Cloud Nine, LLC, 464 F. Supp. 2d 1161, 1166 (D. Utah 2006) (trademark/trade practices case), *rev'd by Ohio Cas. Ins. Co. v. Unigard Ins. Co.*, 458 F. App'x 705 (10th Cir. 2012). However, as noted below concerning the Utah Supreme Court's recent *Basic Research* decision, the duty to defend is not limitless. *Basic Research, LLC v. Admiral Ins. Co.*, 2013 UT 6, ¶ 7, 297 P.3d 578.

The A coverage applies only if, *inter alia*, the bodily injury or property damage is caused by an "'occurrence,'" defined as "'an accident, including continuous or repeated exposure to substantially the same general or harmful conditions.'" "Occurrence" has no application to the B coverage under the ISO form. It is in fact very difficult to conceptualize the torts of malicious prosecution or false arrest and so forth as "accidental." Although, as noted below, personal and advertising injury arising from a "knowing violation of another's rights" is excluded from coverage, the courts have set a very high bar for this exclusion when it comes to carrier arguments that the exclusion relieves them of the duty to defend:

> As other courts have concluded, this exclusion must be understood as applying only to the intentional and knowing infliction of injury, and not to injury resulting from reckless or negligent behavior. Here, [the underlying plaintiff's] allegations concerning Cleary fall well within the range of reckless misconduct. Because [plaintiff's] allegations leave it possible for Cleary to be found liable based on something less than intentional and knowing infliction of injury upon Towers, the exclusion does not negate Norfolk's duty to defend Cleary.

Norfolk & Dedham Mut. Fire Ins. Co. v. Cleary Consultants, Inc., 958 N.E.2d 853, 863 (Mass. App. 2011) (explaining lawsuit asserting that superior at work "made sexually explicit, inappropriate, and unwelcome comments" to plaintiff notwithstanding her protests);[2] *see also, e.g., CGS Indus., Inc. v. Charter Oak Fire Ins. Co.*, 720 F.3d 71, 83 (2d Cir. 2013) ("Despite the boilerplate allegation of willful misconduct, Five Four's Lanham Act section 43(a) claim did not require it to prove that CGS intended to infringe on its trademark ....");

Fuisz v. Selective Ins. Co. of Am., 61 F.3d 238, 245 (4th Cir. 1995) (holding that insurer had duty to defend defamation claim that asserted both recklessness and actual malice).

Exclusions

As is normal for insurance policies, the B coverage is granted subject to a number of exclusions. As the use of the internet has expanded, so have the exclusions. Although there are others, some of the more important exclusions in the current CGL form are for personal and advertising injury arising from:

- a knowing violation of another's rights;
- an agreement under which the insured has assumed another's liability;[3]
- the failure of goods, products, or services to conform with statements of quality, price, or description made in the insured's advertisement;
- the infringement of copyright, patent, trademark, trade secret, or other intellectual property rights, provided, however, that the exclusion does not apply to infringement in the insured's advertisement of copyright, trade dress, or slogan;
- conduct by an insured that is in the advertising business, including designing internet content for others and acting as a search, content, or service provider (to fill this enormous gap in coverage for such entities, specialized errors and omissions coverage is available for advertisers and other media entities);
- statements made in electronic chat rooms or bulletin boards hosted, owned, or controlled by the insured;
- the unauthorized use of another's name or product in the insured's email address, domain name, or similar tactics to mislead another's potential customers; and
- the distribution of material in violation of the Telephone Consumer Protection Act (prohibits certain marketing conduct via telephone phone or fax), the CAN-SPAM Act of 2003 (applies to unsolicited e-mails) or any law or regulation that prohibits or limits the distribution of information.

The exclusion for infringement of copyright, patent, trademark, trade secret, or other intellectual property rights slammed the door on a tremendous amount of litigation over whether claims of trademark infringement were covered. *See Ohio Cas. Ins. Co.*, 464 F. Supp.2d at 1167 ("Courts also find that where there is no exclusion specific to trademark (as is the case in Ohio Casualty's Policy), the phrase 'advertising idea' is a broad enough term to include and provide coverage for trademark infringement.").[4] Although the cases were rarer, some pre-exclusion decisions "held that where an advertising technique itself is patented, its infringement may constitute advertising injury." *Dish Network*

Corp. v. Arch Specialty Ins. Co., 659 F.3d 1010, 1018 (10th Cir. 2011). *Cf. Auto Sox USA Inc. v. Zurich N. Am.*, 88 P.3d 1008, 1011 (Wash. Ct. App. 2004) ("If the insured took an idea for soliciting business or an idea about advertising, then the claim is covered. But if the allegation is that the insured wrongfully took a patented product and tried to sell that product, then coverage is not triggered." (citation omitted)).

The Issue of a Causal Connection and the *Basic Research* Decision

Basic Research, LLC v. Admiral Insurance Co., 2013 UT 6, 297 P.3d 578, addressed a vexing question that has arisen scores of times in cases under the B coverage: to trigger coverage for advertising injury, what must the relationship be between the advertisement and the injury? Does it suffice that an advertisement was somehow factually involved in the chain of events leading to the claim? "No," answered the Utah Supreme Court. *Id.* ¶¶ 10–11.

In *Basic Research*, Basic Research marketed a weight-loss product, which it promoted with the slogans "'Eat All You Want And Still Lose Weight'" and "And we couldn't say it in print if it wasn't true!'" *Id.* ¶ 2. Basic Research did not come up with the slogans, but instead licensed them from another entity. *Id.* ¶ 2 n.1.

When buyers remained corpulent notwithstanding their use of the product, they sued Basic Research for false advertising, product defect, and failure of the product to perform. *Id.* ¶ 2. Basic Research sought a defense from its insurer, Admiral, asserting that the complaint alleged advertising injury. Admiral declined to defend. *Id.* ¶ 3. Basic sued Admiral for a declaration that Admiral was obligated to defend.[5] *Id.* ¶ 4. The trial court granted Admiral's motion for summary judgment. The Utah Supreme Court affirmed. *Id.* ¶ 17.

In support of coverage, Basic Research offered a very simple, literalistic argument: the B coverage applies to claims for injury arising out of the insured's use of another's advertising idea in the insured's advertisement. *Id.* ¶ 10. Basic Research's advertisements used another's advertising idea. *Id.* The plaintiffs alleged that because of the advertising, they bought the product, which failed to perform. *Id.* "Accordingly, Basic Research asks the court to require indemnification[6] against claims of 'personal and advertising injury' where the claim has some factual connection with Basic Research's 'use of another's advertising idea' in its advertisement." *Id.*

Basic Research does not address the meaning of "advertising idea," which the policy leaves as an undefined term. Courts have defined the term as "an 'idea for calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage.'" *Ohio Cas. Inc. Co. v. Cloud Nine, LLC*, 464 F. Supp. 2d 1161, 1166 (D. Utah 2006) (citation omitted).

The Utah Supreme Court explained when it was proper to deny a defense:

> In Utah, an insurer has a duty to defend "when the insurer ascertains facts giving rise to potential liability under the insurance policy." Where the allegations, if proved, show "there is no potential liability [under the policy], there is no duty to defend." The question of whether there is potential liability under the policy "is determined by comparing the language of the insurance policy with the allegations of the complaint." "The question is whether the allegations, if proved, could result in liability under the policy." "If the language found within the collective 'eight corners' of these documents clearly and unambiguously indicates that a duty to defend does or does not exist, the analysis is complete."

Basic Research, LLC v. Admiral Ins. Co., 2013 UT 6, ¶ 7, 297 P.3d 578.

The court found an insufficient causal relationship between the underlying injuries alleged and the use of another's slogans in Basic Research's advertisement. *Id.* ¶ 7. To trigger coverage, the injury must directly arise from the fact that the advertising idea belonged to another party:

> [I]n order to trigger Admiral's duty to defend, the underlying claims must allege "personal and advertising injury" that occurred *as a result of* the "use of another's advertising idea." That connection is lacking in the present case. Although the underlying claims asserted that Basic Research used the slogans "Eat All You Want And Still Lose Weight" and "And we couldn't say it in print if it wasn't true!," the underlying causes of actions were in no way dependent on the source or ownership of those slogans. In fact, if the underlying claims were to go to trial, the plaintiffs would never be required to prove the original source of the slogans. They would need to prove only that

> Basic Research used the slogans to market a defective product.

Id. ¶ 11; *see also id.* ¶ 12 ("Where the alleged damages do not legally 'aris[e] out of' the policyholder's 'use of another's advertising idea,' the underlying claims do not obligate the insurer to indemnify.").

Of course, if Basic Research had itself come up with the slogans, its coverage argument would have evaporated:

> If we were to interpret the coverage terms as Basic Research requests, parties insured under this type of language would be able to indemnify themselves from all defective product liability by simply limiting their advertising, however false or deceptive, to the use of slogans and materials owned by other entities.

Id. ¶ 14.

Put another way, "advertising injury" does not cover "false advertising" if that term is meant to refer to claims that a manufacturer lied in advertisements about how its property would perform. *Id.* ¶ 15 ("[T]he underlying claims do not depend on whether Basic Research owned or was otherwise entitled to use the slogans, but on whether the slogans constitute false advertising. The underlying claims do not 'aris[e] out of' Basic Research's 'use of another's advertising idea' in the sense required for coverage under the Policy."). Although the policy form independently excludes claims grounded in a product's failure to perform as advertised, *Basic Research* suggests that even without that exclusion, the definition of "advertising injury" does not include the claims before it. *Id.*

For coverage to attach, even a competitor of the insured must assert a causal link between the advertisement and the injury. Thus, in *Novell, Inc. v. Federal Insurance Co.*, 141 F.3d 983 (10th Cir. 1998), the Tenth Circuit rejected Novell's claim that it was entitled to a defense under the B coverage when the insured was sued for breach of contract not to develop a competing product. *Id.* at 988. Although Novell advertised the competing product, that advertisement was not the cause of the injury: "Ross was injured when Novell/WordPerfect created and sold a competing product in direct contravention of oral and written statements to him. The fact it may have advertised the competing product to consumers simply did not cause Ross' injuries." *Id.*

Privacy; Cybersecurity; New Endorsements

The insurance industry's normal approach when it sees allegedly unforeseen coverage theories gain traction is to put in an exclusion in new and renewal policies and develop a new policy form (with new premiums) covering the now excluded event.

In 2013, ISO introduced an endorsement, "Amendment of Personal and Advertising Injury Definition," which stated that "Paragraph 14.e of the Definitions section" did not apply to the B coverage. Paragraph 14.e. identifies "[o]ral or written publication, in any manner, of material that violates a person's right to privacy[,]" as one of the offenses which could give rise to personal and advertising injury. This amendment, if the carrier uses it, is a large, substantive reduction in coverage, not simply a definitional tweak.

Assuming the policy at issue does not exclude claims for violations of privacy, "the term 'privacy' can be interpreted in multiple ways and be used to mean either secrecy or seclusion." *Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading, PA*, 442 F.3d 1239, 1248 (10th Cir. 2006). In Park University, a (pre-exclusion) Telephone Consumer Protection Act case, the carrier argued that coverage for violation of privacy applied only to the right of secrecy, not seclusion, given the policy requirement that there be a "publication" and that the unwanted receipt of faxes did not implicate secrecy rights because there was no publication. *Id*. at 1242. The Tenth Circuit held that for a layman, from whose eyes the policy must be read, the requirement of "publication" was met because by a mass fax the insured "made information known[,]" even if the insured did not publish information to a third party and even if the "legal" definition demanded publication to a third party. *Id*. at 1250.

For there to be a violation of a person's right to privacy, there first must be a right to privacy. The substantive law must be consulted to determine if such a right exists. *See A & B Ingredients, Inc. v. Hartford Fire Ins. Co*., 2010 WL 5094419 (D. N.J. 2010) (holding that because governing law did not recognize a common law right of privacy, carrier had no duty to defend allegations that the right was violated by the insured).

The privacy coverage has been used by insureds to argue that coverage should apply when computer data are disclosed. One issue is: disclosed by whom? As of this writing, a decision burning up the blogosphere is *Zurich American Insurance Co. v. Sony Corp. of Am*erica, Index No. 651982/2011 (N.Y. Sup. Ct., N.Y. Cnty.), an oral ruling issued by a New York trial court concerning whether Zurich and other carriers had a duty to defend Sony in the massive PlayStation breach, where hackers infiltrated the system and stole users' personal information. Sony relied on the "violation of privacy" prong of the B coverage. The court agreed with the insurers that this coverage applied only to violations committed by the insured, not violations by third parties. Criticism of this decision has been fierce, given that the privacy coverage does not refer to publication of private information by the insured, but publication "in any manner that violates a person's right of privacy."

2014 Exclusions for Cybersecurity

For renewals and new policies issued on or about May 1, 2014, and thereafter, the battle over CGL coverage for privacy violations arising from data breaches and other cybersecurity problems will be over before it begins, for that is nominally the effective date of new ISO endorsements,[7] which are intended to close off CGL coverage for these claims and steer insureds towards purchasing new policies specifically intended for cybersecurity issues.

Policies issued on the standard form prior to the effective date of these endorsements will not be affected. Under the Insuring Agreement for the B coverage, that coverage applies "only if the offense was committed…during the policy period." (By comparison, the Insuring Agreement for the A coverage applies only if the "'bodily injury' or 'property damage' occurs during the policy period.") Thus, if a cybersecurity claim is filed against the insured arising from an offense which occurred when a pre-exclusion policy was in effect, the 2014 endorsements will have no effect, although the insured will still have to convince the court that the claim is otherwise covered.

Concerning the B coverage, the 2014 exclusion is as follows:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> **Access Or Disclosure Of Confidential Or Personal Information**
>
> "Personal and advertising injury" arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type

of nonpublic information.

> This exclusion applies even if damages are claimed for notification costs, credit monitoring expenses, forensic expenses, public relations expenses or any other loss, cost or expense incurred by you or others arising out of any access to or disclosure of any person's or organization's confidential or personal information.

There are also new, similar exclusions for the A coverage. Endorsements are also available that provide a "limited bodily injury" exception to the exclusion.

In a memorandum filed with state insurance commissioners, ISO asserted that each exclusionary endorsement was simply a "reinforcement of coverage intent" because the CGL policy was never intended to cover damages from data breaches. Instead, "such coverage may be more appropriately covered under certain stand-alone policies including, for instance, an information security protection policy or a cyber liability policy."

Conclusion

It is easy to tell, usually, when bodily injury or property damage is afoot such that your client (or you and your client together) should consult the carrier. It is not so easy to tell when personal or advertising injury is lurking, given the extraordinary complexities of this coverage and the insurance industry's continuous efforts to draft around prior coverage decisions. If your client is sued, or hears noises about a potential suit, for anything that sounds like one of the predicate offenses for the B coverage, look into coverage immediately.

1. There is also a "Coverage C" for enumerated medical expenses, payable on a no-fault basis, arising from bodily injury caused by an accident on the insured's premises arising from the insured's operations.
2. However, if included with the policy an endorsement entitled "Employment-related practices exclusion" will exclude all such claims, in which case coverage must be obtained under an employment practices liability policy.
3. There is a trap for the unwary in this exclusion, which is 2.e. of the B coverage. Under the A coverage, if via contract or agreement (an "insured contract") the insured assumes the tort liability of another party to pay damages to a third party arising from bodily injury or property damage, the carrier will reimburse the insurer for those indemnity costs. Such indemnity provisions are extremely common in a multitude of contracts.

   However, Exclusion 2.e. of the B coverage excludes personal and advertising injury "for which the insured has assumed liability in a contract or agreement." There is no carve-out for an insured contract. Thus, if the insured has agreed to indemnify another party for damages caused by injury resulting from the other party's advertising injury, the insured's policy will not reimburse the insured for the indemnity costs. *See Santa's Best Craft, LLC v. Zurich Am. Ins. Co.*, 941 N.E.2d 291, 298 (Ill. App. 2010) (stating that although license agreement had indemnity clause, B coverage "specifically excluded coverage for personal and advertising injuries 'for which the insured has assumed liability in a contract or agreement[]'" with no insured contract exception). The lesson: be wary of signing agreements indemnifying others for claims which could give rise to personal or advertising injury. And again: be very careful in the use of "personal injury" in indemnity agreements.
4. Note that the exception to the "intellectual property exclusion" brings coverage for use of another's trade dress in an advertisement, but not trademark, back into the fold. They are not the same thing. "Trade dress" is "'the total image of a good as defined by its overall composition and design, including size, shape, color, texture, and graphics.'" *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 115 (2nd Cir. 2006) (citation omitted). "Trademark" is "'any word, name, symbol, or device, or any combination thereof'" used by a person "'to identify and distinguish his or her goods…from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.'" *Id.* at 116 (*quoting* 15 U.S.C. § 1127, part of the Lanham Act).
5. Normally, to avoid claims of bad faith, the carrier defends under a reservation of rights and then files the declaratory judgment action. The insurer's failure to do so here suggests that the carrier believed its position was very solid.
6. Basic Research was not seeking indemnification, which refers to payment of a judgment, but instead was seeking a defense.
7. Copies of these endorsements and ISO's explanatory memoranda may be found at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=0CFMQFjAH&url=http%3A%2F%2Fwww.insurance.state.pa.us%2Fserff_filings%2FISOF-129157456.pdf&ei=sDIzU-jKNYOEogS9lYHIBQ&usg=AFQjCNFusdJxZxINTWFYFfy9UT2z0qKZtQ&sig2=B5iqibV7p04EU7b-xVwnJw&bvm=bv.63808443,d.cGU.

Trial Ethics: ABA Issues New Decision on #juryresearch

by Keith A. Call

Who hasn't researched a potential client, witness, or juror on social media? If you haven't done this, you are missing out on a great research tool. A few years ago, I used this forum to confess my practice of secretly sleuthing my children on Facebook. *See* Keith A. Call, *Confessions of a Facebook Sleuth*, 24 Utah B. J. 18 (May/June 2011).

The ABA Standing Committee on Ethics recently issued an important opinion on the ethics of using social media to research jurors and potential jurors. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 466 (Apr. 24, 2014). The opinion includes some helpful "green lights," at least one "red light," and some unexpected and potentially dangerous twists.

Passive Review of Juror's Internet Presence Is Okay

The ABA's opinion begins with Model Rule 3.5, which, in general, prohibits *ex parte* communications with jurors and prospective jurors. According to the ABA, a lawyer's passive review of a juror's public presence on the Internet is not a communication with the juror and therefore does not violate Rule 3.5. This includes passive review of a juror's social media websites, blogs, and any other publicly viewable Internet sites. In a sweeping, privacy-eroding analogy, the ABA likened reviews of such websites to "driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions." *Id.* at 4.

Some social media websites, such as LinkedIn, have settings that can allow a user to see who has viewed his or her social media profile. The ABA opinion concludes that a social media platform that notifies the juror that the lawyer may be reviewing the juror's Internet presence is not a "communication" within the meaning of Rule 3.5. Thus, according to the ABA, it is ethical to review a juror's social media profile even if the social media platform notifies the juror that the lawyer is doing the review. This opinion is not universal. *See, e.g., id.* at 5 (citing contrary ethics opinions from other jurisdictions). In any event, lawyers should consider the potential impact on a juror when the juror learns a lawyer is sleuthing them!

Seeking to "Connect" Is Not Okay

Some social media platforms allow subscribers to restrict access to information they post on the Internet. Such information can be restricted to certain identified "friends," "links," "followers," or other specified and approved groups.

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Other Internet users can request access to the subscriber's restricted information.

The ABA opinion concludes it is an unethical communication to make such an access request to any juror or potential juror. Thus, do not send requests to "friend," link, or follow any juror. And what you cannot do directly, you cannot do through someone else. Citing Model Rule 8.4(a), the ABA opinion reminds us that "[a] lawyer may not do through the acts of another what the lawyer is prohibited from doing directly." *Id.* at 4. (My sixth grader thinks it is silly we need a written rule to tell us this!)

Discovering Juror Misconduct and Other Dangerous Twists

The ABA opinion includes some interesting language that may surprise some and should serve as a warning to all.

First, we are reminded that our ethical obligation of "competence" requires lawyers to keep current on modern technology. Comment 8 to Model Rule 1.1 specifically requires lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." The ABA opinion even goes so far as to advise lawyers to do what is otherwise nearly unthinkable: actually *read and understand* the terms and conditions, including privacy features, of social media providers before using those platforms to conduct jury research. *Id.* at 5–6.

The opinion also provides a warning against taking any actions, including Internet research, "that have no substantial purpose other than to embarrass, delay, or burden a third person." *Id.* at 6 (citing Model Rule 4.4(a)). Do not conduct your Internet research in a way that could embarrass a juror.

Finally, the opinion addresses the possibility that a lawyer's Internet research may uncover juror misconduct. For example, what should you do if you discover a juror is tweeting or posting about the trial before the trial concludes? Citing Model Rule 3.3, the opinion warns that a lawyer is obligated to report juror misconduct if the misconduct is "criminal" or "fraudulent." The opinion makes reference to obtuse criminal theories such as criminal contempt. *Id.* at 8. The opinion suggests that "innocuous postings about…the quality of food served at [a juror] lunch" may not be reportable, but it provides very little guidance on exactly what *is* reportable. I wish you luck in discerning the difference!

Differences in Appellate Practice in Utah's Appellate Courts and the Tenth Circuit: Finality, Appeals of Right, and Discretionary Appeals

by Clemens A. Landau

Although the rules of appellate procedure in Utah and the Tenth Circuit are similar in many respects, they also differ in several important ways. Understanding those differences will help lawyers avoid common jurisdictional pitfalls.

APPEALS OF RIGHT

Both Utah and federal appellate courts have jurisdiction over appeals from final judgments and orders. Utah R. App. P. 3(a); 28 U.S.C. § 1291. In both state and federal courts, the final judgment rule preserves judicial resources and prevents piecemeal appellate review. *Powell v. Cannon*, 2008 UT 19, ¶ 12, 179 P.3d 799; *Western Energy Alliance v. Salazar*, 709 F.3d 1040, 1047 (10th Cir. 2013). But when a judgment or order in a civil case is "final" differs in the two jurisdictions.

Finality in Utah

In Utah, an order must satisfy two requirements to be final – one substantive and one procedural. To meet the substantive requirement, the order "must dispose of the case as *to all the parties*, and finally dispose of the subject-matter of the litigation on the merits of the case." *Bradbury v. Valencia*, 2000 UT 50, ¶ 9, 5 P.3d 649 (internal quotation marks and citation omitted). In other words, the order "must end the controversy between the litigants." *Loffredo v. Holt*, 2001 UT 97, ¶ 12, 37 P.3d 1070. Under Utah law, pending claims for attorney fees preclude finality because they are considered to affect the merits of a case, but pending claims for costs and other clerical matters do not. *Compare ProMax Dev. Corp. v. Raile*, 2000 UT 4, ¶ 15, 998 P.2d 254, *with Beddoes v. Giffin*, 2007 UT 35, ¶ 12, 158 P.3d 1102.

To meet the procedural requirement, the order must be issued in compliance with rule 7(f)(2) of the Utah Rules of Civil Procedure. *Central Utah Water Conservancy Dist. v. King*, 2013 UT 13, ¶¶ 9–10, 297 P.3d 619.[1] This requirement may be satisfied in one of three ways: (1) the order "explicitly directs that no additional order is required"; (2) the "district court approves the proposed order submitted with a party's initial memorandum"; or (3) the order was entered after it was circulated by the parties pursuant to procedures set forth in Rule 7(f)(2). *Id.* ¶ 10. Failure to comply with Rule 7(f)(2) will also have the effect of indefinitely extending the appeal rights of the nonprevailing party. *Id.* ¶ 26.[2] And any appeal taken from a non-Rule 7(f)(2)-compliant order will likely be summarily dismissed for lack of jurisdiction.

Once the order or judgment is final, a notice of appeal must be filed within thirty days. Utah R. App. P. 4(a).

Finality in the Tenth Circuit

The Tenth Circuit also has jurisdiction over appeals from "final decisions." 28 U.S.C. § 1291. Under federal law, a "final decision" does not exist "until there has been a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

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McClendon v. City of Albuquerque, 630 F.3d 1288, 1292 (10th Cir. 2011) (citation and internal quotation marks omitted). But federal law differs from Utah law in that "an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final." *Ray Haluch Gravel Co. v. Cent. Pension Fund of the Int'l Union of Operating Eng'rs*, 134 S. Ct. 773, 778 (2014).[3] Consequently, if a notice of appeal is timely only as to the district court's later resolution of an attorney fees claim, the Tenth Circuit will not have jurisdiction to consider the merits of the underlying case. *See, e.g., Farnsworth v. Kennard*, 190 F. App'x 594, 596 (10th Cir. 2006).

Further, there is no federal counterpart to Utah rule 7(f)(2) regarding the form of the final order. To the contrary, "[i]n considering whether the judgment constitutes a final decision under § 1291, the label used to describe the judicial demand is not controlling." *Albright v. UNUM Life Ins. Co.*, 59 F.3d 1089, 1092 (10th Cir. 1995) (citation and internal quotation marks omitted). Rather, federal law directs appellate courts to "analyze the substance of the district court's decision, not its label or form" in determining finality. *Id.* For example, the Tenth Circuit has jurisdiction over an appeal even if the district court fails to set out a judgment in a separate document pursuant to rule 58 of the Federal Rules of Civil Procedure "if no question exists as to the finality of the district court's decision." *Koch v. City of Del City*, 660 F.3d 1228, 1237 n.2 (10th Cir. 2011) (citation and internal quotation marks omitted). And unlike Utah appellate courts, the Tenth Circuit will not summarily dismiss an appeal for the sole purpose of allowing the district court to enter an additional piece of paper on its docket.

Once the order or judgment is final, an appellant must file a notice of appeal within thirty days (or within sixty days after the order if one of the parties is the United States, U.S. agency or U.S. officer or employee). Fed. R. App. P. 4(a)(1). Even if the judgment lacks finality because a separate document has not been entered on the docket pursuant to rule 58, the notice of appeal must nevertheless be filed within 150 days. Fed. R. Civ. P. 58(c)(2). The federal rule thereby prevents the appeal period from remaining open indefinitely in the event of a procedural irregularity at the district court level. *Id.*; *Cent. Utah Water Conservancy Dist. v. King*, 2013 UT 13, ¶ 26, 297 P.3d 619.

Statutory Rights to Appeal from Non-Final Orders

Several Utah and federal statutes carve out limited exceptions to the final judgment rule. Parties should therefore check the statutes governing their disputes to determine whether the statutes authorize appeals of right prior to final judgment. Examples in Utah include the Utah Arbitration Act and the statutes governing derivative proceedings. *See* Utah Code Ann. § 78B-11-129 (LexisNexis 2012) (Arbitration Act provision authorizing appeals from denials of motions to compel

arbitration, as well as certain other interlocutory orders); Utah Code Ann. § 16-6a-612(4)(g) (LexisNexis 2013) (Non-Profit Corporation Act provision authorizing appeals from denials or grants of motions to dismiss in derivative suits); Utah Code Ann. § 16-10a-740(4)(g) (Business Corporation Act provision authorizing same).

Several examples of such exceptions under federal law are found in the United States Code section governing interlocutory appeals. 28 U.S.C. § 1292(a). Specifically, section 1292 allows appeals of right from three categories of interlocutory orders: (1) orders granting or denying injunctive relief, (2) certain orders related to receiverships, and (3) orders that determine the rights and obligations of parties in admiralty cases. *Id.* § 1292(a). Other federal laws also authorize certain appeals prior to final judgment. *See, e.g.*, 9 U.S.C. § 16 (Federal Arbitration Act provision authorizing appeals from certain interlocutory orders).

> *"Because district courts are sometimes prone to grant rule 54(b) certification 'rather freely,' parties should carefully analyze whether a particular judgment is eligible for certification...."*

Collateral Order Doctrine (Federal Law only)

In addition to the statutory exceptions to the final judgment rule, the Tenth Circuit allows appeals of right from "collateral orders." *See, e.g., Miller v. Basic Research, LLC*, 2014 WL 1778046, at *3 (10th Cir. May 6, 2014). To qualify as a collateral order, the order at issue must: (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. *Id.* The Supreme Court has emphasized that "the class of cases capable of satisfying this stringent test should be understood as small, modest, and narrow." *United States v. Wampler*, 624 F.3d 1330, 1334 (10th Cir. 2010) (citation and internal quotation marks omitted).

Most commonly, the collateral order doctrine is used to appeal orders denying a party some form of immunity from suit. *See, e.g., Estate of Booker v. Gomez*, 745 F.3d 405, 409 (10th Cir. 2014) (denials of qualified immunity); *Bonnet v. Harvest Holdings, Inc.*, 741 F.3d 1155, 1157 (10th Cir. 2014) (denials of tribal immunity); *Pettigrew v. Oklahoma*, 722 F.3d 1209, 1212 (10th Cir. 2013) (denials of Eleventh Amendment immunity). But even in those cases, appellate review is limited to "abstract legal questions" and does not extend to "whether or not the pretrial record sets forth a genuine issue of fact for trial." *Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1267 (10th Cir. 2013) (citation and internal quotation marks omitted). In the criminal context, the doctrine applies where a defendant asserts the right "not to be tried" on double jeopardy grounds or under the Speech or Debate Clause of the United States Constitution, or in cases where the defendant is attempting to vindicate a right that must be preserved before trial – such as the right to reasonable bail under the Eighth Amendment. *United States v. Tucker*, 745 F.3d 1054, 1063–64 (10th Cir. 2014).[4]

Orders Certified as Final under Rule 54(b)

Orders that do not meet the requirements of the final judgment rule and are not within any statutory exception can nevertheless sometimes be certified as final under both the Utah and federal versions of rule 54(b). Utah R. Civ. P. 54(b); Fed. R. Civ. P. 54(b). Both versions of rule 54(b) set forth "three prerequisites for appeal of a separate final judgment on fewer than all claims in a lawsuit: (1) multiple claims; (2) a final decision on at least one claim; and (3) a determination by the district court that there is no just reason for delay." *Jordan v. Pugh*, 425 F.3d 820, 826 (10th Cir. 2005); *Kennecott Corp. v. Utah State Tax Com'n*, 814 P.2d 1099, 1101 (Utah 1991) (same). If all three of these prerequisites are not met, the appeal will be dismissed by the appellate court as improperly certified under rule 54(b). *Jordan*, 425 F.3d at 826; *Kennecott*, 814 P.2d at 1101.

Disputes over rule 54(b) certifications generally involve the second factor: whether a judgment is final as to at least one claim. Although the definition of "claim" for rule 54(b) purposes varies by jurisdiction, both Utah and the Tenth Circuit focus on whether there is "factual overlap between the ostensibly separate claims." *Kennecott*, 814 P.2d at 1105; *see also Jordan*, 425 F.3d at 827. Under this approach, the test is

> whether the claim that is contended to be separate so overlaps the claim or claims that have been retained for trial that if the latter were to give rise to a separate appeal at the end of the case the court would have to go over the same ground that it had covered in the first appeal.

Jordan, 425 F.3d at 827 (citation and internal quotation marks omitted).

For example, under this interpretation of rule 54(b), a district court could not properly certify a negligence claim as final if it also retained for trial a breach of fiduciary duty claim based on the same facts. Because district courts are sometimes prone to grant rule 54(b) certification "rather freely," parties should carefully analyze whether a particular judgment is eligible for certification before filing a motion under rule 54(b). *Kennecott*, 814 P.2d at 1104. Following this practice will minimize the risk of having the ensuing appeal dismissed for lack of jurisdiction.

DISCRETIONARY APPEALS

Both Utah and federal law also vest their appellate courts with discretionary jurisdiction over appeals from interlocutory orders that do not fit within any of the exceptions to the final judgment rule described above. Under Utah law, discretionary appellate review of interlocutory orders is governed by rule 5 of the Utah Rules of Appellate Procedure. *Gunn Hill Dairy Props., LLC v. Los Angeles Dept. of Water & Power*, 2012 UT App 20, ¶ 20, 269 P.3d 980. Utah appellate courts will exercise this discretionary jurisdiction only where "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." Utah R. App. P. 5(f).[5]

To obtain permission to appeal from an interlocutory order, a party must file a petition with the Utah appellate courts within twenty days of the order. Utah R. App. P. 5(a). Importantly, the twenty-day clock is only triggered once a rule 7(f)(2) compliant order is entered by the district court. *Houghton v. Dept. of*

Health, 2008 UT 86, ¶ 11, 206 P.3d 287. As a practical matter, parties often will have more than twenty days to consider whether to file a petition to appeal while the proposed implementing order is being circulated pursuant to rule 7(f)(2).[6]

United States Code section 1292 similarly grants federal appellate courts discretionary appellate jurisdiction over interlocutory orders, but this discretionary jurisdiction exists only if "the district court first enters an order granting permission to [appeal]." Fed. R. App. P. 5(3).[7] In making this determination, section 1292 directs district courts to grant requests if three conditions are satisfied: (1) the "order involves a controlling question of law"; (2) there is a "substantial ground for difference of opinion" as to the correctness of the decision; and (3) an "immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). There is no statutory requirement as to the time for filing the petition *in the district court. Id*. Nevertheless, case law supports that a petition generally "must be filed in the district court within a reasonable time after the order sought to be appealed." *See, e.g., Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000). Once a district court grants permission to appeal, the appellant must file a petition with the court of appeals within ten days after the entry of the district court's order. 28 U.S.C. § 1292(b).

1. Although parties often circulate proposed judgments in a manner consistent with rule 7(f)(2), judgments – unlike orders – are final upon entry. *See Houghton v. Dept. of Health*, 2008 UT 86, ¶ 11, 206 P.3d 287.
2. In *Cent. Utah Water Conservancy Dist. v. King*, 2013 UT 13, 297 P.3d 619, the court noted that this aspect of the current rule was "contrary to notions of judicial efficiency and finality," and asked the advisory committee to review the rule and address this problem. *Id*. ¶ 27.
3. It is worth noting that this rule only applies to claims for fees incurred in the "litigation at hand." *McKissick v. Yuen*, 618 F.3d 1177, 1197 (10th Cir. 2010). A pending claim for attorney fees incurred in a prior litigation would suffice to defeat finality under Tenth Circuit case law. *Id*.
4. This article does not discuss the somewhat analogous "practical finality" exception to the final judgment rule which can be invoked to obtain immediate appellate review of administrative remand orders. *See, e.g., W. Energy Alliance v. Salazar*, 709 F.3d 1040, 1049 (10th Cir. 2013).
5. For a comprehensive discussion of interlocutory appeals under Utah law, see Julie J. Nelson, *Appeals From Interlocutory Orders in the Utah Appellate Courts*, 27 Utah B. J. 3, 28 (May/June 2014).
6. If the parties neglect to comply with Rule 7(f)(2) after the district court announces its interlocutory ruling, the period for filing a petition may remain open indefinitely under the current version of the rule. *Cf. Central Utah Water*, 2013 UT 13, ¶ 27.
7. By rule, the district court requirement does not apply to appeals from orders granting or denying class-action certification. Fed. R. Civ. P. 23(f).

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What Every Lawyer Should Know About Bitcoins

by Brad Jacobsen and Fred Peña

For those who think Bitcoins and other virtual currencies are a passing fad, remember that many people thought the same thing about the Internet. Given the globalization of economies and the ease of transferring value via "virtual currencies," we believe that Bitcoins (as well as other virtual currencies) are only going to become more ingrained in our everyday lives.

So what do you need to know now? Below are a few FAQs that we have put together to help you understand some of the basics of Bitcoins and other virtual currencies.

Q: What is a Bitcoin?

A: Bitcoins (like physical commodities) are intrinsically valued based on supply and demand. They are valued at the price someone will pay in order for someone else to sell. Supply, laws, regulations, public perception, utility and a host of other variables contribute to the valuation of virtual currencies.

A Bitcoin is a virtual asset that does not exist in the physical world, consisting of an entry on a public ledger known as a "Blockchain," and is owned by the possessor of a secret number, or "private key." The private key has a mathematical relationship with the public number in the ledger entry. The public ledger contains a chronological record of all of the prior ownership changes of the Bitcoin. This is similar to the Stanley Cup that has indicated on the Cup the team, players, and coaches that won the championship. Like the Cup, you can see in the Bitcoin (the ledger entry) itself the identity of the most recent owner. The Bitcoin is transferred to the next owner when the next owner gives a public key and the previous owner uses his private key to publish a record into the public ledger announcing the ownership has changed to the new public key.

Sending Bitcoins from one user to another is done using Bitcoin software. Each prospective Bitcoin user uses the software to create a Bitcoin wallet, which is simply a file containing randomly generated numbers that are treated as the public-private key pairs for future Bitcoin transactions. The public key is much like an e-mail address; it is an endpoint for a transaction. Much like an e-mail address is given out to a sender in anticipation of receiving a message, a Bitcoin address is given out in anticipation of receiving a payment. Bitcoins sent to a Bitcoin address are owned by the person who has knowledge of the private key associated with the address.

The "Bitcoin Network" is a system that creates and tracks the transfer of ownership of each Bitcoin and acts as a distributed ledger combined with a timestamp server, creating a single unretractable public record of all transactions in chronological order, thus ensuring correct current ownership. The Bitcoin Network is not operated by any single organization, but rather,

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is a decentralized system consisting of all of the users of the Bitcoin software worldwide.

Q: Are there other virtual currencies?

A: As Bitcoins have gained in popularity, the number of other virtual currencies available have increased significantly. This article focuses on Bitcoins due to their popularity and "industry standard" status. There are, however, currently more virtual currencies then there are "real" currencies in the world. The world has approximately 180 recognized government-issued currencies. As of early March 2014, it is estimated that there were approximately 200 virtual currencies being traded on the Internet. This is very similar to the early automobile industry where there were several hundred automobile manufactures in the early part of the Twentieth Century. Will only a few of these virtual currencies survive as well? Time will tell.

Q: What is Bitcoin mining?

A: Bitcoin mining is how new Bitcoins are added to the pool of Bitcoins available to the general public. To begin mining, a user can download and run Bitcoin Network mining software, which turns the user's computer into a "node" on the Bitcoin Network that validates transactions on the network. All Bitcoin transactions are recorded in groups of transactions known as blocks, and each block is appended to the end of the previous block creating a "Blockchain." To add blocks to the Blockchain, a miner must map an input data set (i.e., the Blockchain, plus a block of the most recent Bitcoin Network transactions and an arbitrary number called a "nonce") to a desired output data set of predetermined length (the "hash value") using a specific mathematical algorithm. To "solve" or "calculate" a block, a miner must repeat this computation with a different nonce until the miner generates a hash of a block's header that has a value less than or equal to the current target set by the Bitcoin Network. Each unique block can only be solved and added to the Blockchain by one miner; therefore, all individual miners and mining pools on the Bitcoin Network are engaged in a competitive process and constantly increase their computing power to improve their likelihood of solving for new blocks. Mining is essentially a race to solve the next block. Therefore, "hashing" is akin to a mathematical lottery, and miners that have devices with greater processing power are more likely to be successful miners. As more miners join the Bitcoin Network and its processing power increases, the Bitcoin Network adjusts

the complexity of the block-solving equation to ensure that one newly-created block is added to the Blockchain approximately every ten minutes.

Q: Are Bitcoins and other virtual currencies regulated?

A: Like so many legal questions, the answer to this is "it depends." In this case, it depends on a person's role in utilizing the Bitcoins. In March 2013 the Department of the Treasury Financial Crimes Enforcement Network (FinCEN) released guidance regarding the use of virtual currencies under the Bank Secrecy Act (BSA) for persons creating, obtaining, distributing, exchanging, accepting, or transmitting virtual currencies. Whether such person is a Money Service Business (MSB) subject to the reporting requirements of FinCEN under the BSA (and likely state requirements as well) depends on the category of the person's use.

In the FinCEN release, FinCEN stated that "[a] user of virtual currency is not an MSB under FinCEN's regulations and therefore is not subject to MSB registration."[1] However, a user of virtual currencies that is deemed to be an "administrator or exchanger is an MSB under FinCEN's regulations, specifically, a money transmitter,"[2] and will be required to comply with the reporting and recordkeeping regulations of the BSA pursuant to FinCEN's regulations. These rules essentially require a person that exchanges/transmits Bitcoins (or other virtual currencies) from one medium to another (for example, paying cash for Bitcoins or providing Bitcoins for cash), to report any such transactions to FinCEN in excess of $10,000. Additional recordkeeping and reporting requirements apply as well.[3]

Compliance on the federal level is relatively straightforward.The person registers online with FinCEN and reports transactions as required. Complicated compliance issues arise at the state level. States like Virginia, Texas, New York, and California have issued subpoenas to Bitcoin businesses and/or threatened jail time for their failure to properly license in each applicable state as an MSB/money transmitter. Compliance with various state "money transmitter" licenses often requires the posting of a bond and evidence of minimum capital ($1 million, for example). Though not all states require licensure (Utah, for example, does not currently require registration for a money transmitter in virtual currencies), many states are looking into this area and will likely follow FinCEN's lead.

Q: How are Bitcoins taxed?

A: On March 25, 2014, the IRS issued a "Virtual Currency Guidance" relating to Bitcoins and other virtual currencies. For federal tax purposes, virtual currencies such as Bitcoins will be treated as property. General tax principles applicable to property transactions apply to transactions using virtual currency. Because Bitcoins are defined as property, gains from buying and selling will be treated like any other capital gains. Depending on the holding period, capital gains will generate vastly different tax treatment. Bitcoins held for more than one year qualify for long-term capital gains. Bitcoins held for less than one year are treated as ordinary income.

People who receive Bitcoins as compensation for services should treat the receipt of Bitcoins as income, and the Bitcoin should be valued at the market price in U.S. Dollars at the time a payment is received. For those who have acquired Bitcoins and use them to purchase assets or services, the IRS treats such purchase as a taxable event, requiring the payor to determine his or her capital gain on the Bitcoins used to make the purchase. If the purchase acquired a particular Bitcoin for $5.00 and then

purchased goods or services with that Bitcoin when the value was $500.00, the person would need to declare $495 in capital gains (long or short term depending on holding period). Losses would be treated in a similar fashion.

Q: Are Bitcoins securities?

A: No. In and of themselves, Bitcoins are not securities, they are essentially currencies – things of value. Selling Bitcoins is not selling a security but is regulated in the manner described above. Investments in Bitcoins and other virtual currencies, however, could be deemed a security depending on the structure. For example, if a person sells computer capacities for mining purposes and contracts with purchasers to handle the mining and upkeep of the networks, such a contract could easily be deemed an investment contract and subject to securities laws.[4] Additionally, selling interests in an entity that invests in Bitcoins would clearly be the sale of a security.

Q: Can lawyers accept Bitcoins for payment of services?

A: Yes. Accepting payment in Bitcoins is no different than accepting any other form of compensation for services. Utah Rule of Professional Conduct 1.5 requires that an attorney's fees be reasonable. So as long as accepting Bitcoins as part or all of an attorney's fees are reasonable and he or she reports them properly for tax purposes, an attorney should feel comfortable accepting Bitcoins.

If you do not want to assume the volatility risk associated with Bitcoins, a number of service providers, such as BitPay and CoinBase, will convert Bitcoins to cash as the payment is tendered by your client. For a small administrative fee, often less than those charged by credit card companies, these entities will accept the Bitcoins from your clients and tender the cash payment directly to your account.

Q: Where can I learn more?

A: If you are interested in learning more about Bitcoins, below are additional materials and resources that you may find of interest:

1) Join the Bitcoin Reddit feed for current information: http://www.reddit.com/r/Bitcoin/

2) The IRS guidline on taxation of virtual currencies: http://www.irs.gov/pub/irs-drop/n-14-21.pdf

3) The FinCEN guidance on virtual currencies: http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf

4) The Winklevoss Bitcoin Trust Form S-1 filing with the SEC: http://www.sec.gov/Archives/edgar/data/1579346/000119312513279830/d562329ds1.htm

The law and regulation of virtual currencies are currently in a state of flux worldwide. The fact that laws are being put into place demonstrates the validity and impact of virtual currencies. The best advice we can give is to be aware and knowledgeable about virtual currencies and realize they are likely here to stay.

1. FIN-2013-G001 (Issued: March 18, 2013), Subject: Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies
2. *Id.*
3. 31 CFR § 1010.100(ff)(5)(i)(A).
4. *Bitcoin Mining Rig Shares Subject to Securities Regulations?*, Fred Peña and Brad Jacobsen, Bitcoin Magazine Issue 19, March 2014.

Big Client Savings: Tax-Efficient Settlements

by Meagan Carpio and Jason Rogers

Every day lawyers negotiate settlements. Often, the parties are simply happy to get an unfortunate situation behind them and only focus on the dollar amount. Frequently, tax planning is neglected by the parties.

Failing to plan for a desired tax result may result in a tax-inefficient outcome where a client receives less money on an after-tax basis than would otherwise be possible. This article addresses some of the considerations attorneys should keep in mind when drafting settlement agreements.

Settlements vs. Judgments

The Internal Revenue Code applies in the same way to both settlements and judgments. When a dispute is resolved through litigation, often there is little room for tax planning; however, in a settlement situation, attorneys may be able to obtain advantageous tax results for their clients. Since ordinary income can be taxed at a rate up to 39.6%, while long-term capital gains are taxed at no more than 20% for individuals, a favorable agreement can save a client nearly 20% of the settlement amount.

Origin and Nature of Claim Test

For federal income tax purposes, to determine whether a settlement results in ordinary income or capital gain, the origin and nature of the claim test is used. *See, e.g., Ash Grove Cement Co. v. United States*, No. 11-2546-CM, 2013 WL 451641 (D. Kan. Feb. 6, 2013).

For a payee, the test determines:

- whether the settlement amount is excludible from gross income; and
- if the settlement amount is not excludible, whether it is ordinary income or a capital gain.

For a payor, the test determines:

- whether the settlement amount is deductible as trade or business or production of income expense; and
- whether the settlement amount is deductible currently or if it must be capitalized.

Includible or Excludible from Gross Income

For a payee, the first question is whether a settlement payment needs to be included in gross income. Gross income is broadly defined to include nearly every payment. *See* 26 U.S.C. § 61. Generally, money or property that is received from a settlement is includible in gross income.

However, amounts received from the resolution of physical personal injury claims are excluded from gross income. 26 U.S.C. § 104(a)(2). This is the most favorable treatment of all, so it is in a client's best financial interest to draft a settlement agreement to show that amounts paid are attributable to physical personal injury to the greatest extent possible.

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Ordinary Income or Capital Gain

The next question for a payee is whether the payment will be characterized as ordinary income, return of capital, or capital gain. If the underlying claim is for lost profits then that recovery will be ordinary income. Rev. Rul. 55-264, 1955-1 C.B. 11.

However, if the recovery is due to a loss of goodwill or harm to other capital assets, then the amount is generally characterized as a capital gain. Rev. Rul. 74-251, 1974-1 C.B. 234. A recovery that only compensates for harm to capital assets results in capital gain or a reduction of capital loss, depending upon the taxpayer's basis in the capital asset. In some cases, recovery may be attributable to lost profits as well as harm to capital assets, depending on the source of the recovery.

Courts look at the nature of the claim that gives rise to a settlement payment. If the nature of the claim suggests that the payment arises from a loss of what would have otherwise been ordinary income, then recovery is includible in gross income as ordinary income. If the nature of the claim test reveals that the payment arises from harm to a capital asset, recovery is either a return of capital or capital gain income, depending on the taxpayer's applicable basis. *Collins v. Comm'r.*, 18 T.C.M (CCH) 756 (1959). For example, a claim for lost profits gives rise to ordinary income and can be taxed up to 39.6% at the highest tax bracket, whereas a claim that alleges harm to a capital asset is treated as a capital gain and is taxed at rates as low as 0% to 20%.

Deductible as Trade or Business or Production of Income Expense

A payor's first question is whether the payment is deductible for tax purposes. Generally, personal expenses are not deductible. However, a client who can prove the requisite business nexus can deduct settlements or judgments, including legal fees.

Damages or settlement payments must meet the following requirements in order to be deductible as a business expense:

- they must be ordinary, necessary, and reasonable expenses;
- they must be directly connected or proximately result from the taxpayer's business, income-producing activity, or investment activity;
- the expenses must be currently deductible rather than a capital expenditure;
- they must be paid or incurred during the tax year for which a deduction is sought;
- the expense must be paid by the person to whom such services are rendered; and
- the expense must not be personal in nature.

See 26 U.S.C. §§ 162, –212.

The "reasonableness" element of this requirement relates to the amount of the expenses. However, due to the adversarial nature of litigation and settlement situations, rarely is the reasonableness of a payment pursuant to a settlement or judgment questioned. The "ordinary and necessary" expense requirement is fulfilled where a businessperson would commonly incur it in the particular circumstances involved. *See Comm'r. v. Chicago Dock & Canal Co.*, 84 F. 2d 288, 290 (7th Cir. 1936).

The determination of whether a payment is directly connected or proximately results from a business comes down to the nexus between the lawsuit and the trade or business, as well as the origin of the claims. *See Taylor v. Comm'r.*, T.C.M (CCH) 1322 (1992). Attorneys should draft a settlement agreement to show the connection between the payment and the taxpayer's business.

Capital Losses v. Ordinary Losses

For a payor, the following factors govern whether a payment will be treated as a capital or ordinary loss: whether the property being disposed was used in business or for personal use, whether the property is a capital asset, and how long the asset was held.

"Taking tax treatment into account may reduce the ultimate settlement amount since proper tax planning can increase the after-tax proceeds of a payment."

Multiple Claims

Lawsuits generally seek recovery for many claims. In this situation it is necessary to allocate the recovery to one or more of those claims. A settlement that expressly allocates various claims is typically given great deference. *See Robinson v. Comm'r.*, 102 T.C. 116, 126 (1994). Clear language can help to determine the intent of the payor and payee in arranging for settlement payments. If the specific intent of the payor and payee cannot be determined from the settlement agreement, a court will look to facts and circumstances. A court could dismiss a prior allocation and determine its own allocation that may not be inclusive of the payor's true intent. *See Bagley v. Commissioner*, 105 T.C. 396, 406-407 (1995). The best way to classify a recovery is to specify treatment in the settlement documents, which is where an attorney's drafting expertise can be invaluable. *Glynn v. Comm'r.*, 76 T.C. 116, 120 (1981).

Simply drafting in an agreement's recitals that a settlement payment is due to claims that are capital in nature, such as a goodwill payment rather than lost profits, can potentially halve a client's tax payment.

Practical Advice

Settlement agreements are given deference by the IRS since they are negotiated by two arm's-length parties. An attorney drafting a settlement agreement should take care to insert language into the agreement, at least in the recitals, that protects the client's tax position.

In representing a payee:

- If applicable, tie the settlement into a physical injury.
- If possible, tie the settlement into the loss of a capital asset such as goodwill and do not state that a payment is for lost profits or employee compensation. Choose the most favorable claims and avoid others.

Of course, the facts are what they are and there may not be any possibility of capital gains.

In representing a payor:

- To maximize chances of deduction, draft a settlement agreement to show a connection between the payment and the payor's business.
- If possible, relate the payments to expenses that may be deducted in the current year rather than capital expenditures that must be amortized over a number of years.
- Since ordinary losses are generally more valuable for non-corporate taxpayers, if applicable, seek to tie the payment to lost profits, compensation or another ordinary deduction category.

Taking tax treatment into account may reduce the ultimate settlement amount since proper tax planning can increase the after-tax proceeds of a payment. Keeping this in mind while negotiating a settlement can provide big benefits to clients.

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Pro Bono Signature Project: Debt Collection Volunteer Attorney Program

by T. Richard Davis and Charles A. Stormont

Did you know that any debt collection matter filed in the Salt Lake City District Court where the amount being pursued is less than $20,000 is assigned to a rotating collections calendar? The calendar occurs once a week and is covered by two assigned judges that rotate every six months. If the case is larger, it will be assigned to an individual judge. The rotating calendar for smaller cases helps facilitate scheduling by plaintiffs who may be large debt collection firms with numerous cases that require short hearings for scheduling or arguments on relatively straight-forward motions. By setting the calendar well in advance, these entities are able to handle their cases more efficiently and avoid clogging the docket, which also helps the court.

And while the calendar is more efficient for the court and certain plaintiffs, it has also facilitated the creation of a new *pro bono* program – the Debt Collection Volunteer Attorney Program. Volunteers for the Program are drawn primarily from two organizations: the Utah Attorney General's Office and Callister Nebeker &McCullough. Not surprisingly, representatives from these organizations sit on the Third District Pro Bono Committee, which helped create the Program. Spreading the work between two organizations has made it easy to ensure the Program is adequately staffed each week and helps address conflicts on the rare occasions when they arise. As the Program has developed, we have been fortunate to have volunteers from other organizations chip in to help as well.

Volunteers arrive a few minutes before the calendar is scheduled to begin in an effort to introduce themselves to potential clients and facilitate the completion of a short-term representation agreement. Such limited-term agreements are permitted by rule 1.2(c) of the Utah Rules of Professional Conduct: "if the limitation is reasonable under the circumstances and the client gives informed consent." Further, Rule 6.5 of the Utah Rules of Professional Conduct limits the application of conflict of interest rules for a "lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter" to situations where the lawyer knows that a conflict exists. Through some simple questions, participants can ensure that the client does not have a conflict that would prevent the lawyer from assisting – and if a conflict does exist for a particular lawyer, a volunteer from another organization can usually take the case. The short-term nature of the representations also makes it easier for volunteers with unpredictable schedules to engage in *pro bono* work without risk of over-committing themselves.

So what if you are not a debt collection specialist? Rule 1.1's competency requirement cannot be ignored, but training is readily available for volunteers to ensure they are prepared to address the issues that come up. Further, many of the issues encountered are basic contractual and procedural matters that most civil

T. RICHARD DAVIS is a Shareholder at Callister, Nebeker & McCullough. He is a co-chair of the Third District Pro Bono Committee.

CHARLES A. STORMONT is an Assistant Attorney General with the State of Utah. He is a member of the Third District Pro Bono Committee.

litigators can handle. Finally, multiple volunteers are typically in attendance, so an experienced person is usually available to help new volunteers when an unusual situation arises.

Perhaps the most valuable tool for volunteers is a good ear. Meeting with a client for the first time in the middle of litigation requires an ability to get to the bottom of a dispute. Opposing counsel are typically courteous and professional, and often provide background information that can be verified with clients. In many instances, clients are simply unaware of what the litigation process involves and what options are available to them. An overwhelming majority of the cases handled by volunteers are resolved quickly – through lump sum settlements, payment arrangements, or dismissal when fatal flaws are highlighted to opposing counsel. Occasionally, volunteers will argue an issue to the court by entering a limited appearance for a particular hearing, which can provide guidance to the parties that can then lead to a settlement. When settlements cannot be worked out, volunteers counsel clients on the litigation process, negotiation strategies, and resources available to them, ranging from debt counseling to self-help resources to low cost legal assistance.

While every case is different, volunteers resoundingly walk away with numerous benefits. First, they have helped satisfy their "professional responsibility to provide legal services to those unable to pay" pursuant to Rule 6.1's aspirations. As lawyers, we all enjoy helping our clients solve the problems that weigh upon them, and the Program is no exception in that regard. It is also satisfying to know that volunteers help the legal system work a little more smoothly so that all participants in the process walk away with a sense that justice has been served. Learning about a new area of the law is valuable in today's competitive legal environment, as is the time on your feet in court, which can be hard to come by in some civil litigation practices. Since the Program began in July 2013, we have represented more than 195 clients, many of whom have called the Bar to thank them for the assistance provided. But the gratitude and rewards for engaging in *pro bono* service is a two-way street and nearly every single volunteer has returned to help the Program on multiple occasions. It is an incredible opportunity to put our legal skills and training to work for others.

If you know of another area where similar short-term representation arrangements could be put to work to assist those in need, please contact Michelle V. Harvey, Access to Justice Coordinator, at 801-297-7027.

Mandatory Online Licensing

The annual Bar licensing renewal process has started and can be done only online. Sealed cards have been mailed and include a login and password to access the renewal form and the steps to re-license online at https://services.utahbar.org. **No separate form will be sent in the mail. Licensing forms and fees are due July 1 and will be late August 1. Unless the licensing form is completed online by August 31, your license will be suspended.**

If you need to update your email address of record, please visit https://services.utahbar.org. To receive support for your online licensing transaction, please contact us either by email to onlineservices@utahbar.org or, call 801-597-7023. Additional information on licensing policies, procedures, and guidelines can be found at http://www.utahbar.org/licensing.

Upon completion of the renewal process, you should receive a Certificate of License Renewal that you can print and use as a receipt for your records. This certificate can be used as proof of licensure, allowing you to continue practicing until you receive your renewal sticker, via the U.S. Postal Service.

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.

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/.

Utah State Bar 2014 Law Day Awards

Salt Lake County Bar Association Art & the Law Project
Judges' Award: Jenna Villar & Erin Stotts
Elementary Schools: 1st place – Sophie Uchitel, 2nd place – Braydon Reimann, 3rd place – Charlie Lanchbury
Middle Schools: 1st place – Kareena Morrill, 2nd place – Rachel Slovensky, 3rd place – Angel Lopez

The winners' schools also receive a prize for their art teachers: Rowland Hall Lower School, Northwest Middle School, Eisenhower Jr. High, and Ridgecrest Elementary

Law Related Education – Mock Trial Competition
Woods Cross High School: Kaestle Charlesworth, Jack Brimhall, Annie Moscon, Jade Hall, McKay Hall, Sasha Sloan. Instructors: Brooke and Joseph Gregg, Attorney Coach: D. Matthew Mascon.

Centennial Middle School: Candace Brown, Benjamin Drewes, Will Evans, Emma Fox, Elizabeth Mitton, Catherine Nemelka, Niels Turley. Instructor – Krista Thornock, Attorney Coach – Charles F. Abbott.

Scott M. Matheson Award – Timothy B. Schade

Pro Bono Publico Awards
Law Firm: Holland & Hart
Young Lawyer Pro Bono: Kate Conyers
Law Student: Maureen Minson

Young Lawyer of the Year – Liisa Hancock

The Liberty Bell Award – JoLynn Spruance

Utah Bar Foundation Welcomes Two New Board Members

The Utah Bar Foundation is pleased to welcome two new Members on the Board of Directors.

Tracy Scholnick Gruber and Lori Nelson join the Utah Bar Foundation Board to replace outgoing and longtime members, Lois Baar and the Honorable Gus Chin.

Tracy Scholnick Gruber is the Senior Advisor for the Intergenerational Poverty Initiative for the Utah Department of Workforce Services (DWS). She is the lead researcher who is working to establish programs and policies to achieve positive outcomes from children that will make the greatest impact in their lives to help break the cycle of poverty as they become adults. Tracy has a lifelong interest in improving the lives and the community in which she resides and is motivated by the belief that all children have the capacity to achieve their dreams. Prior to joining DWS, Tracy worked at Voices for Utah Children as the Senior Policy Analyst and the American Federation of State, County and Municipal Employees (AFSCME) Council 31 in Illinois. Tracy received her JD from Kent-Chicago College of Law. In addition to her legal work, Tracy enjoys hiking and running in the Wasatch Mountains, watching her son play baseball, camping, biking and all of the great outdoor opportunities that Utah has to offer with her husband and children.

Lori Nelson is the leader of the Jones Waldo Domestic and Family Law Practice Group. She advises clients in every aspect of family law, and handles cases involving contract interpretation, the intersection of family law with: corporate law, probate law, intellectual property, real property law, water law, and partnership law. She is a trained mediator with extensive mediation experience. Lori organized the first Women's Law Caucus scholarship lecture and she is ranked among Utah's most prominent attorneys by Super Lawyers, Best Lawyers in America, Martindale-Hubbell and *Utah Business* magazine. Lori served as President of the Utah State Bar (2012-2013), is Past Chair of the Family Law Section Executive Committee, has served on the Needs of Children Committee, the Utah State Bar Commission, the Judicial Standing Committee on Children and Family Law, and has proudly served as a member of the Board of Directors for Legal Aid Society of Salt Lake. Lori received her JD from the S.J. Quinney College of Law at the University of Utah. In addition to her legal work, Lori loves cooking, photography, fishing, hiking, reading and Grand Teton and Yellowstone National Parks.

Tracy Scholnick Gruber and Lori Nelson will bring vast community knowledge and involvement to the Board of the Utah Bar Foundation. Please join us in welcoming them.

Notice of Affidavit of Completion for Reinstatement to the Utah State Bar by Daniel V. Irvin

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Affidavit of Completion for Reinstatement ("Affidavit") filed by Daniel V. Irvin, in *In the Matter of the Discipline of Daniel V. Irvin*, Third Judicial District Court, Civil No. 100917506. Any individuals wishing to oppose or concur with the Affidavit are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Notice of Petition for Reinstatement to the Utah State Bar by Paul R. Poulsen

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement ("Petition") filed by Paul R. Poulsen, in *In the Matter of the Discipline of Paul R. Poulsen*, Third Judicial District Court, Civil No. 130500033. 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.

Utah State Bar Ethics Advisory Opinion Committee Opinion Number 14-03 | Issued April 22, 2014

ISSUE: Do the Utah Rules of Professional Conduct prohibit referral agreements between two attorneys that require one of the attorneys (the "Referring Attorney") to refer to the other (the "Receiving Attorney") all clients that have a certain specified type of products liability claim?

OPINION: The Committee concludes that an agreement between two attorneys which requires the Referring Attorney to refer to the Receiving Attorney all clients that have a certain specified type of claim may likely violate various provisions of the Utah Rules of Professional Conduct (the "Rules").

FACTS: The Referring Attorney, licensed to practice in the State of Utah, and the Receiving Attorney, licensed to practice elsewhere, enter into an agreement governed by Utah law (the "Agreement") to jointly pursue certain kinds of products liability claims (the "Claims") of individuals located in the State of Utah. The Agreement provides in relevant part:

a. Referring Attorney will generate the cases by placing advertising and/or arranging for medical testing and diagnosis of prospective clients and would be entitled to reimbursement from the Receiving Attorney for the costs of doing so.

b. In return for the Receiving Attorney's agreement to pay those expenses, the Referring Attorney would be required to exclusively refer to the Receiving Attorney all clients having such Claims who contact the Referring Attorney. The Referring Attorney would not be allowed to represent such clients himself or to refer such clients to any other attorney.

c. The Referring Attorney will place advertising, accept incoming calls from potential clients, obtain medical records from potential clients, arrange for medical testing, and perform certain other related tasks, before turning the clients over to Receiving Attorney for further action.

d. The Receiving Attorney will decide in his sole discretion the venue, jurisdiction, timing, counts, and content of complaints or petitions, joinder of plaintiffs and/or defendants, and any other strategic issues relating to the Claims.

e. The Referring Attorney will ask clients to sign new fee

agreements directly with the Receiving Attorney, identifying the Receiving Attorney as the clients' attorney, will inform the clients of the division of fees between the two attorneys, and will inform the clients of any other matters deemed by either attorney to be required by the Rules of Professional Conduct.

f. The Referring Attorney will not be required to perform any services except those specified in the Agreement or required by the Utah Rules or by any other ethical rules governing the Claims or any resulting cases.

g. The Receiving Attorney will pay the Referring Attorney specified portions of the fees recovered by the Receiving Attorney for the clients on their Claims.

ANALYSIS: The fee sharing agreement between the two attorneys is governed by Rule 1.5, which provides that there may be a division of fees between lawyers in different firms, but on the following condition:

> (e)(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (e)(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (e)(3) the total fee is reasonable.

The Committee does not have enough information to fully evaluate the fee sharing arrangement between the attorneys under the Agreement. For example, it is unclear if the Referring Attorney retains any responsibility for the matter after the referral or if the Referring Attorney's share of the fee is based upon services provided. If the Referring Attorney is not compensated based upon the proportion of services performed by him or he has not retained joint responsibility for the specific matter, which it appears he has not, then the arrangement violates Rule 1.5. *See also* Va. State Bar Legal Ethics Op. 1739 (April 13, 2000).

The Agreement does not appear to comply with the provisions of Rule 7.2 – Advertising. In Utah Ethics Advisory Opinion No. 07-01, the Committee opined that an agreement which contemplates the exclusive referral of clients to one lawyer or firm, is not permitted, as it violates Rule 7.2(b). The Rule provides:

> (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services; except that a lawyer may:
>
> (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
>
> (2) pay the usual charges of a legal service plan or a lawyer referral service;
>
> (3) pay for a law practice in accordance with Rule 1.17; or
>
> (4) divide a fee with another lawyer as permitted by Rule 1.5(e).

From the proposed arrangement, it appears that the Receiving Attorney intends to pay to the Referring Attorney more than is permitted by Rule 1.5(e), as discussed above. Therefore, there is a violation of Rule 7.2.[1]

The exclusivity provision raises conflict concerns as well. Rule 1.7 – Conflict of Interest: Current Clients, prohibits a lawyer from representing a client if "[t]here is a significant risk that the representation of one or more clients will be materially limited…by a personal interest of the lawyer." The exclusivity provision of the Agreement could result in a material limitation on the Referring Attorney's judgment in making the referral. Again, it is possible that a client that falls within the exclusivity provision of the Agreement would be better served by an attorney other than the Receiving Attorney. However, because of the Agreement, the Referring Attorney cannot refer the client to the attorney who may be better suited to assist. *See also* Conn. Bar Assoc. Comm. Prof. Ethics, Informal Opinion 97-34 (1997); Ken. Bar Assoc. KBA-390; John S. Dzienkowski and Robert J. Peroni, *Conflicts of Interest in Lawyer Referral Arrangements with Nonlawyer Professionals*, 21 Geo. J. Legal Ethics 197 (Spring 2008). The obligation of competence under Rule 1.1 can require an evaluation of the specific client's needs and interests before a referral.[2] Additionally, although not directly applicable, Rule 5.4(c) provides, "[a] lawyer shall not permit a person who…pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment…." The Referring Attorney should not permit the Receiving Attorney to interfere with the judgment of the Referring Attorney, which can include referrals.

The exclusivity provision of the Agreement can lead to the violation of other provisions of the Utah Rules. Rule 2.1 – Advisor, requires that a lawyer "shall exercise independent professional judgment and render candid advice" in representing a client, which includes referring a client to another attorney. Because of the exclusivity provision of the Agreement, the Referring Attorney may not be exercising independent judgment and give sound advice in every situation. For example, a potential plaintiff may have a unique circumstance that renders referral to the Receiving Attorney not in the client's best interest. *See* Colo. Bar. Assoc. Ethics Comm., Letter Op. 96/97-13 (regarding referrals to nonlawyers).

With the proposed arrangement, there is a potential violation of Rule 7.1 – Communications Concerning a Lawyer's Services. The Rule provides, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." The Committee does not have information on the nature or substance of the proposed advertising, but it could be deemed misleading

if the Referring Attorney suggests in the advertising that s/he will represent the client in all respects, since the Agreement specifically limits the services the Referring Attorney can perform to basic preliminary matters. *See also* Conn. Bar Assoc. Comm. Prof. Ethics, Informal Opinion 97-34 (1997); Ala. Bar. Assoc. RO-93-23. Likewise, Rule 1.4 – Communications, imposes an obligation on the attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," which could include disclosure of the limited services that the attorney can provide under the Agreement and that the client will be referred to another attorney.

It appears that the Receiving Attorney will decide in his/her sole discretion various strategic matters. It is unclear if the Receiving Attorney intends to consult with the client regarding this matter or even consult with the Referring Attorney. It is noted that Rule 1.2(a) and Rule 1.4(a)(2) require attorneys to consult with clients regarding the means by which the objectives of the representation will be achieved or fulfilled.

It is also noted that before the Referring Attorney discusses a matter subject to referral under the Agreement, the requirements of Rule 1.6 – Confidentiality of Information, must also be satisfied. Rule 1.6 states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Before the matter is disclosed to the Receiving Attorney, the Referring Attorney will probably need informed consent from the client.

1. It is noted that the Model Rules of Professional Conduct ("Model Rule"), Rule 7.2(b), prohibit exclusive referral provisions in reciprocal referral agreements. Model Rule 7.2(b) states:

   (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

   (1) pay the reasonable costs of advertisements or communications permitted by this Rule;

   (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

   (3) pay for a law practice in accordance with Rule 1.17; and

   (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

   (i) the reciprocal referral agreement is not exclusive, and

   (ii) the client is informed of the existence and nature of the agreement.

   Utah's version of Rule 7.2 (b) does not contain an anti-exclusivity provision such as the Model Rule, but, unlike the Model Rule, Utah's version of Rule 7.2(b) provides for a division of fees if in compliance with Rule 1.5(e), referenced above.

2. Emily S. Lassiter, *Liability for Referral of Attorneys*, 24 J. Legal Prof. 465 (1999/2000) ("Throughout the past few years, attorneys have been held liable under the doctrine of 'negligent referral.").

Statement from the Professionalism Counseling Board

by Gayle McKeachnie

In 2003, the Utah Supreme Court approved Rule 14, article 3 of the Utah Supreme Court Rules of Judicial Administration, entitled "Standards of Professionalism and Civility" (the Standards). The Professionalism Counseling Board was subsequently created and assigned the task of receiving complaints from lawyers and judges about unprofessional and uncivil behavior by members of the Bar. While the Board has no authority to enforce the Standards or discipline lawyers for violating the Standards, it was created to respond to inquiries by lawyers regarding their own conduct and to offer counsel to accused lawyers, who choose to receive counsel about reported unprofessional or uncivil behavior.

The Board has dealt with a sufficient number of cases that certain patterns have emerged. Complaints to the Board commonly and surprisingly involve accusatory, coarse, vulgar, or threatening language in e-mails, letters, memoranda, and even court filings.

It seems that words written in a moment of anger or frustration are of no benefit in resolving disputes. Mainly they evidence a lack of self-discipline on the part of the lawyer writing the words. They elevate the temperature between parties and lawyers when the need is to cool things down and build relationships that enable the development of solutions based on the facts and merits of the situation.

Sometimes, as a Board, we think to ourselves, "[T]hey put that in writing for the entire world to see and read?" When we talk to the lawyers who used such language, they usually agree that they shouldn't have used the words and they regret doing it. Some of the eyebrow-raising written words used to address or describe opposing counsel or parties include "bit__, f__ing lawyer, dishonest, deceitful, fraudulently fabricating stories, full of crap, or bull____."

If you must think it, don't say it. If you must write it, don't send it. Think about it for forty-eight hours before you push the button.

Pro Bono Honor Roll

Allred, Parker – Tuesday Night Bar

Amann, Paul – Tuesday Night Bar, Debt Collection Calendar

Anderson, Doug – Family Law Clinic

Andrus, Mark – Debtor's Legal Clinic, Debt Collection Calendar

Angelides, Nick – Estate Planning Cases

Archibald, Nathan – Tuesday Night Bar

Arnold, Brian – ORS Calendar

Bachison, Jonathan – Family Law Case

Barclay Mount, Linda – Document Clinic

Barrick, Kyle – Senior Center Legal Clinic

Benson, Jonny – Immigration Clinic

Bergstedt, Jim – Street Law Clinic

Bertelsen, Sharon – Senior Center Legal Clinic

Boettcher, Rachael – Tuesday Night Bar

Bogart, Jennifer – Street Law Clinic

Briggs, Jacob – Adoption/ Termination of Parental Rights Case

Brown, Mary Ellen – Family Law Case

Buck, Adam – Tuesday Night Bar

Burn, Brian – Family Law Case

Burnett, Brian W. – Debt Collection Calendar

Burns, Mark – Debt Collection Calendar

Carlston, Charles – Document Clinic

Chandler, Joshua – Tuesday Night Bar

Cheney, Scott – Tuesday Night Bar

Chipman, Brent – Family Law Case

Clark, Melanie – Senior Center Legal Clinic

Combe, Steve – Tuesday Night Bar

Conley, Elizabeth – Senior Center Legal Clinic

Conyers, Kate – Tuesday Night Bar

Coombs, Brett – Street Law Clinic

Corporon, Mary – Family Law Case

Crismon, Sue – Medical-Legal Clinic

Cundick, Ted – Street Law Clinic

Cushman, Amber – Rainbow Law Clinic

Denny, Blakely – Tuesday Night Bar

Denny, Nathan R. – Debt Collection Calendar

Dez, Zal – Family Law Clinic

Dixie Jackson – Guardian ad Litem Case

Duffin, Matthew – Contracts Case

Durrant, Marie – Tuesday Night Bar

Evans, Russell – Rainbow Law Clinic

Ferguson, Phillip S. – Senior Center Legal Clinic

Fox, J. Tayler – Debt Collection Calendar

Fox, Richard – Senior Center Legal Clinic

Frame, Craig – Tuesday Night Bar

Frandsen, Nick – Tuesday Night Bar

Glassford, Michael – Document Clinic

Gonzalez, Marlene – Immigration Clinic

Grover, Jonathan – Family Law Case

Harding, Sheleigh – Family Law Clinic

Harmon, Benjamin P. – Debt Collection Calendar

Harrison, Jane – Family Law Case

Harrison, Matt – Street Law Clinic

Hart, Laurie – Senior Center Legal Clinic

Harvey, Michelle – Debtor's Legal Clinic

Hatch, Dave – Tuesday Night Bar

Hollingsworth, April – Street Law Clinic

Holt, Rebecca – Tuesday Night Bar

Hyde, Ashton – Tuesday Night Bar

Jasperson, Jill – Document Clinic

Jelsema, Sarah – Family Law Clinic

Jenkins, Larry – Adoption/ Termination of Parental Rights Case

Jensen, Micheal A. – Senior Center Legal Clinic

Jorgensen, Sonja – Bankruptcy Case

Kaiser, Kyle – Debt Collection Calendar

Kennedy, Michelle – Tuesday Night Bar

Kern, Peter – Tuesday Night Bar

Kessler, Jay – Senior Center Legal Clinic

Kummer, Emily – Tuesday Night Bar

Lattin, Peter – Document Clinic

Lee, Timothy – Senior Center Legal Clinic

Lillywhite, Andrew – Tuesday Night Bar

Long, Adam – Street Law Clinic

Lyons, Jacob D. – Debt Collection Calendar

Macfarlane, John – Tuesday Night Bar

Mares, Robert – Family Law Clinic

Marx, Shane – Rainbow Law Clinic

Maughan, Joyce – Senior Center Legal Clinic

McCann, Eli – Tuesday Night Bar

McCoy, Harry – Senior Center Legal Clinic

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

Moffitt, Melinda – Street Law Clinic

Morrison, Jacqueline – Medical-Legal Clinic

Morrow, Carolyn – Family Law Case, Family Law Clinic

Nejad, Aria – Debtor's Legal Clinic

O'Neil, Shauna – Bankruptcy Hotline

Ostrow, Ellen – Tuesday Night Bar

Otto, Rachel – Street Law Clinic

Parker, Kristie – Senior Center Legal Clinic

Parkinson, Jared – Senior Center Legal Clinic

Pascual, Margaret – Immigration Clinic

Pearson, Rachel – Document Clinic

Peterson, Jessica – Tuesday Night Bar

Pettey, Bryce – Tuesday Night Bar

Poorman, J.D. – Guardian ad Litem Case

Pranno, Al – Family Law Clinic

Preston, DeRae – Document Clinic

Ralphs, Stewart – Family Law Clinic

Rasch, Tamara – Family Law Cases

Rasmussen, Kasey – Debt Collection Calendar

Richards, Brigham – Tuesday Night Bar

Rinaldi, Leslie – Tuesday Night Bar

Roberts, Katie Brown – Senior Center Legal Clinic

Roberts, Stacy – Family Law Clinic

Robertson, James – Family Law Case

Rogers, Callie – Street Law Clinic

Rupp, Josh – Tuesday Night Bar

Salcido, Spencer – Document Clinic

Sanchez, Jeff – Tuesday Night Bar

Sansom, Stephen – Tuesday Night Bar

Saunders, Robert – Park City Clinic

Schultz, Lauren – ORS Calendar

Semmel, Jane – Senior Center Legal Clinic

Sheffield, Richard – Non-Profit Case

Shields, Zachary T. – Debt Collection Calendar

Simcox, Jeff – Street Law Clinic

Smith, J. Craig – Street Law Clinic

Smith, James – Document Clinic

Smith, Linda F. – Family Law Clinic

Smith, Shane – Street Law Clinic

Smith, Tiffany – Tuesday Night Bar

So, Simon – Family Law Clinic

Sorensen, Samuel J. – Family Law Clinic

Stephens, Jeff – Tuesday Night Bar

Stevenson, Tammy – Tuesday Night Bar

Stormont, Charles A. – Debt Collection Calendar

Tanner, Brian – Immigration Clinic

Tarbet, Brian – Debt Collection Calendar

Thomas, Michael – Tuesday Night Bar

Thorne, Jonathan – Street Law Clinic

Thorpe, Scott – Senior Center Legal Clinic

Timothy, Jeannine – Senior Center Legal Clinic

Tingey, Steve – Debt Collection Calendar

Trease, Jory – Debtor's Legal Clinic

Trousdale, Jeffrey – Tuesday Night Bar

Trujillo, Scott – Davis County Protective Orders

Turner, Jenette – Tuesday Night Bar

Tuttle, Jeff – Tuesday Night Bar

Waldron, Paul – Document Clinic

Ward, David – Guardian Ad Litem Case

Weinacker, Adam – Tuesday Night Bar

Wheeler, Lindsey – Tuesday Night Bar

Williams, Timothy G. – Senior Center Legal Clinic

Winzeler, Zack – Tuesday Night Bar

Wolfley, Nate – Family Law Case

Wycoff, Bruce – Tuesday Night Bar

Yauney, Russell – Family Law Clinic

Zidow, John – Tuesday Night Bar

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in the months of March–May 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.

Thank you to all the sponsors of the
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Lamb's Grill
Law Day Run Committee
Mazza Restaurant
The Pie Pizzeria
The Salt Lake Bees
Salt Lake Film Society
Salt Lake Running Company
Sapa Sushi Bar
St George Marathon
Target
Wendover Resorts
Wild Grape
Visage Salon Studios

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/.

RESIGNATION WITH DISCIPLINE PENDING

On April 16, 2014, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Luc D. Nguyen, for violation of Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

On April 10, 2013, Mr. Nguyen pled guilty to a one-count felony Information of Money Laundering, admitting that during 2007 and 2008, he solicited and induced investors by making false representations regarding the nature of the investment and the risk involved. Mr. Nguyen made payments to many investors and represented that these payments were profits generated by private traders without personally verifying that any private trader existed. He also created the misleading impression that the company was able to meet all of its business obligations when he was aware that the company was actually not able to do so. Additionally, Mr. Nguyen transferred funds to his personal bank account and used the monies to pay his personal expenses without disclosing this information to investors.

ADMONITION

On April 21, 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 1.4(a) (Communication) of the Rules of Professional Conduct.

In summary:

The attorney was hired by a financial institution to represent the company in connection with multiple deficient accounts. The collections manager of the financial institution emailed the attorney and requested the balance owing on an account and requested an accurate accounting for all accounts. An attorney for the financial institution followed up on the credit manager's request via letter to the attorney.

When the credit manager again emailed the attorney regarding a discrepancy in the accounting provided by the attorney for one of the accounts, the attorney failed to respond. Subsequently the credit manager emailed the attorney. The email indicated that the attorney failed to respond to five requests for accounting information made over the prior two months.

The credit manager continued to email the attorney requesting information on the accounts that had previously been requested but the attorney failed to respond.

ADMONITION

On March 28, 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 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Over a period of several months, the attorney billed hours to a firm client for work the attorney did not perform. The client paid the bills as they were submitted by the firm. A firm audit of the client's account revealed the improperly billed hours. The firm informed the client and refunded the overpayment to the client.

Mitigating factors:

Personal or emotional problems; full and free disclosure to the disciplinary authority; cooperative attitude towards proceedings; participation in rehabilitation with continued counseling; acceptance of significant oversight in his work and billing of clients; and remorse.

DISBARMENT

On April 14, 2014, the Honorable Judge Gary D. Stott, Fifth Judicial District Court, entered an Order of Sanction Disbarment against Mr. John L. Ciardi for violation of Rule 3.5(d) (Impartiality and Decorum of the Tribunal) and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Ciardi appeared in the Fifth District Court in St. George to represent a client in a criminal matter. The client had appealed a case from the Washington County Justice Court. When the case was called neither the client nor Mr. Ciardi were present. The judge dismissed the case and remanded it back to the justice court. During the next roll call Mr. Ciardi entered the courtroom, interrupted the judge's calendar and asked the court to recall the case. The court instructed Mr. Ciardi to sit down or he would be removed from the courtroom. Mr. Ciardi did not sit down and persisted in his request to have the case recalled. The judge then ordered him out of the courtroom, which was full of attorneys and members of the public. It was necessary for a bailiff to escort Mr. Ciardi from the courtroom. Mr. Ciardi caused a disruption and swore loudly as he was leaving the courtroom, and he continued to yell loudly outside the courtroom and made disparaging remarks about the judge. Mr. Ciardi then went to the court clerk's office, which is open to the public. He continued to yell and make disparaging remarks about the judge in the clerk's office.

Mr. Ciardi became belligerent with court personnel and the clerk requested the assistance of a bailiff. A bailiff came to the clerk's office and asked Mr. Ciardi numerous times to leave the courthouse. Mr. Ciardi refused and continued to yell at the bailiff and make disparaging remarks about the judge. At one point, there were three bailiff's in the public area of the clerk's office dealing with Mr. Ciardi. The bailiffs had to leave their assignments in three different courtrooms in order to deal with him. The incident with Mr. Ciardi in the clerk's office lasted for approximately one hour.

After Mr. Ciardi was escorted from the clerk's office by two bailiffs he continued to yell at the bailiffs. While in the rotunda of the courthouse he yelled obscenities directed toward one of the bailiffs. There were members of the public in the rotunda that witnessed Mr. Ciardi's conduct. Mr. Ciardi yelled other profanities and vulgarities that were heard by the public. Mr. Ciardi was cited for Disorderly Conduct and Refusing a Lawful Order/Interfering.

As a result of Mr. Ciardi's conduct at the courthouse, a Screening Panel hearing was held before the Utah Supreme Court Ethics and Discipline Committee. At the Screening Panel hearing Mr. Ciardi made disparaging comments about the Utah judicial system, Utah Courts, Utah Judges, the Screening Panel members and the proceedings. Mr. Ciardi repeatedly interrupted witnesses who were attempting to offer testimony, and referred to witnesses as liars and idiots.

PROBATION

On April 22, 2014, the Honorable Keith C. Barnes, Fifth Judicial District Court, entered an Order of Discipline: Probation against Kerry F. Willets for violation of Rules 1.4(a) (Communication), 1.5(a) Fees, 1.16(d) (Declining or Terminating Representation), and 8.1(b) (Bar Admissions and Disciplinary Matters) of the Rules of Professional Conduct.

In summary there are four matters:

In the first matter, Mr. Willets was hired to represent a client in a Chapter 7 Bankruptcy Petition. Mr. Willets filed the Petition on behalf of the client and the court subsequently discharged the client's Petition. The court notified the client of the discharge by letter sent to the address Mr. Willets provided for the client in the bankruptcy filings; however, Mr. Willets did not directly notify the client that the Court had discharged his Petition.

In the second matter, Mr. Willets was hired to represent a client in a bankruptcy matter. The client paid Mr. Willets a fee to pursue the bankruptcy matter. Mr. Willets never filed a bankruptcy petition on behalf of the client.

Even though requests for a refund were made, Mr. Willets never provided an accounting of the fees he received from the client. Some work was performed; however, Mr. Willets never refunded any portion of the fees to the client.

The Office of Professional Conduct ("OPC") sent a Notice of Informal Complaint ("NOIC") to Mr. Willets requiring him to respond to the informal Bar complaint in writing within twenty days. Mr. Willets did not submit a timely NOIC response.

In the third matter, the OPC sent an NOIC to Mr. Willets requiring him to respond to the informal Bar complaint in writing within

twenty days. Mr. Willets did not submit a timely NOIC response.

In the final matter, Mr. Willets was retained to modify a divorce petition. Mr. Willets did not file any paperwork with the court on behalf of the client. Subsequently, the client decided to terminate the services of Mr. Willets and asked for a refund of the fees paid. Even though Mr. Willets had earned some of the fees paid, Mr. Willets never refunded any portion of the monies paid by the client.

The OPC sent an NOIC to Mr. Willets requiring him to respond to the informal Bar complaint in writing within twenty days. Mr. Willets did not submit a timely NOIC response.

Aggravating factors:
Prior record of discipline.

Mitigating factors:
Family medical problems.

PUBLIC REPRIMAND

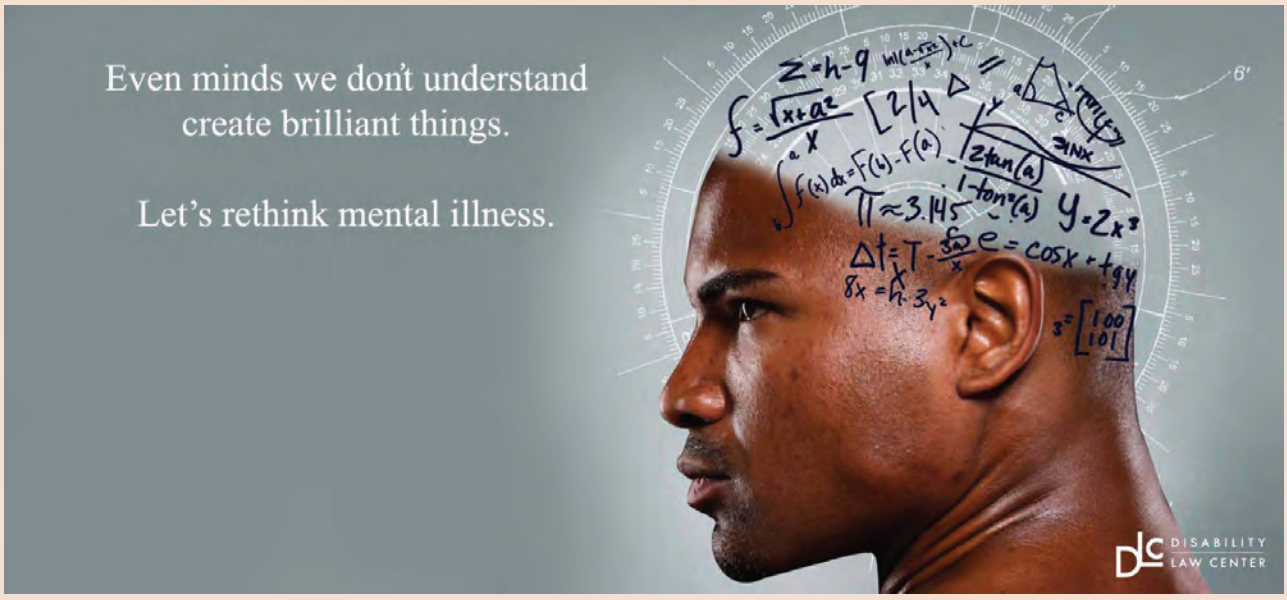
On April 21, 2014, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Roland F. Uresk for violation of Rules 1.3 (Diligence), 1.4(a) (Communication) and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
Roland F. Uresk was hired by the executors of an estate to represent the estate in a probate matter. Mr. Uresk was retained by the executors to have the primary house of the estate and other properties appraised; ready the house and other properties for sale; contact a realtor; and to identify and pay the taxes of the estate. Mr. Uresk paid the estate's taxes, but failed to accomplish any of the other tasks he was hired to perform. Mr. Uresk also failed to timely and regularly communicate with the executors of the estate and failed to respond to any of their written correspondence in writing. Mr. Uresk failed to provide the executors with an accounting of the expenses incurred and/or paid by the estate and he failed to properly advise them regarding their responsibilities as fiduciaries. Mr. Uresk also failed to assist the executors in their responsibilities as executors of the estate.

The Office of Professional Conduct sent a Notice of Informal Complaint ("NOIC") to Mr. Uresk requiring him to respond in writing to the informal Bar complaint. Mr. Uresk failed to submit a timely NOIC response despite admitting that he received the NOIC sent by the OPC.

NOTICE OF TRANSFER OF PHILIP J. DANIELSON TO DISABILITY STATUS

On May 2, 2014, the Honorable Judge Kate Toomey, Third Judicial District Court, entered an Order Transferring Philip J. Danielson to Disability Status.



Building Meaningful Relationships

by Katherine E. Judd

When I was young, my father would often tell me that life is as much about whom you know as it is what you know. Like all fathers' wisdom, his words were deeply profound and I would find them to be true later in life.

In order to be a successful lawyer, you have to be highly skilled in your craft. In addition, you must be able to generate business. Competence and skill comes from hard work and experience. Similarly, being able to generate business also comes from hard work and experience. You should build your book of business by developing and cultivating meaningful personal relationships with others now. The foundation for such relationships is laid through common interest, mutual trust, and respect.

Relationships May Lead To Places You Never Imagined

I went to law school thinking I would return to the business world after obtaining my law degree. I thought a law degree would be an asset and help me climb the corporate ladder. To minimize loans during law school I worked as a student co-director for the school's academic support program. My co-director worked for a federal judge and ended up introducing me to another judge, the Honorable Dee Benson, and his staff. My co-director needed to consult with Judge Benson's clerks on some matters and because she was my ride, I tagged along. Judge Benson and his clerks were gathered together when we were buzzed in. I was worried that I was crashing a meeting, but they were welcoming and we had great conversations about our families, funny stories, and interests outside of the law. I do not recall us discussing anything relating to law school or the practice of law. At the conclusion, Judge Benson encouraged me to take his evidence class. Prior to walking into those chambers, litigation-type classes had not been of interest to me and a clerkship had not been on my radar as a potential job. I took Judge Benson's evidence class and later interviewed for and accepted a clerkship with him. Now I am happily employed in a law firm defending employers against employee claims primarily in federal court and administrative agencies.

The ability to connect with people on a personal level is just as important as your resume and can lead to opportunities that you had not considered. If you are currently seeking employment, then go to places where potential employers are and make a personal connection – something that you cannot do by submitting your resume online. Technology is great, but a firm handshake and in-person conversations are better when you are looking to build meaningful relationships.

Relationships Built Through YLD Service

Young Lawyer Division activities provide young lawyers the opportunity to meet and interact with other lawyers outside the conference room or courtroom. Working with lawyers on projects to educate children, present CLEs, or provide pro bono services to first responders and the elderly will help you build meaningful relationships with others who may share your same interests or goals. Through YLD, I have found lawyers I can trust to show up for or participate in volunteer activities. If I can trust a lawyer to do a great job on a task for which he or she is not paid, then I am more inclined to refer a case or client to that attorney, as I know the attorney will zealously protect that client's best interests.

If you are a "young lawyer" (under thirty-six years old or admitted to practice for five years or less), I cannot stress enough the importance of getting involved with YLD. Service helps you expand your referral network and build meaningful relationships while also making a difference in the lives of our fellow Utahns. Through your involvement in YLD, you will find informal mentors who will guide and support you throughout your career, opportunities to network for jobs, clients and referral sources, and you will have fun. I encourage each of you to get involved today.

KATHERINE E. JUDD is an associate attorney and member of the Employment Law Group at Clyde Snow & Sessions where she focuses her practice on a broad range of labor and employment law matters. Ms. Judd has been elected 2014–15 President of the Young Lawyers Division.

Message from the Chair

by Danielle Davis

Distinguished Paralegal of the Year

J. Robyn Dotterer, CP was nominated and was awarded the 2014 Distinguished Paralegal of the Year Award at the annual Paralegal Day Luncheon on May 15, 2014.

Robyn has worked as a paralegal for over twenty-five years. She has worked for Dunn & Dunn for eleven years, during which time she achieved her Certified Paralegal in 1994. She has been employed with Strong & Hanni for fifteen years. She has an outstanding knowledge of the law, demonstrates high ethical standards, and is very dedicated, not only to Strong & Hanni, but also to the community.

Robyn was nominated by Ron Mangone, the Executive Director at Strong & Hanni, as well as several of her attorneys. Mr. Mangone had this to say about Robyn in his nomination:

> Robyn has toiled countless hours in unison with her attorneys, staff, and other paralegals to insure that clients receive the best legal representation possible. Her attorneys rely explicitly on her not only for her quantitative work but also her qualitative skills in analyzing and strategizing a case. She is a vital part of making Strong & Hanni the firm they are.

Robyn has been an active member in the Paralegal Division and the Utah Paralegal Association for many years, serving on various committees. She was a Director-at-Large, co-chair of the Community Service Committee, YLD Liaison for several years, chair of the Utilization Committee, and has continued to dedicate time and knowledge to the Division, Bar, and community. She has published several articles in the *Utah Bar Journal* on the subject of utilization of paralegals and has reported on the salary surveys which she headed-up while serving on the Paralegal Division Board of Directors. Robyn has acted as the Paralegal Division representative on the Disaster Legal Response Committee. She has been instrumental in facilitating several clothing drives and community service projects and has assisted with Wills for Heroes, where you will also find her husband, Duane, not far from her side, assisting her with her adventures throughout the community. Congratulations Robyn Dotterer!

Did you know?

When the Utah Supreme Court granted the Petition filed by the Utah State Bar for the creation of the Legal Assistant Division (now the Paralegal Division), it adopted the same definition of a Legal Assistant that was adopted by the ABA as follows:

> Definition of "Legal Assistant"
>
> A legal assistant is a person, qualified through education, training or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity, in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.
>
> The term "Legal Assistant" is synonymous with the term "Paralegal."
>
> The definition of a "Legal Assistant or Paralegal" includes paralegals on a contract or freelance basis who work under the supervision of a lawyer or who

produces work directly for a lawyer for which a lawyer is accountable.

Petition for Creation of a Legal Assistant Division of the Utah State Bar

In August of 1997, the ABA updated their definition of a paralegal/legal assistant. According to the ABA's website, the ABA's policy making body, the House of Delegates, adopted the current definition of "legal assistant/paralegal," as recommended by the Standing Committee on Legal Assistants. The current definition reads as follows: "A legal assistant or paralegal is a person, qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible."

The current definition of "legal assistant/paralegal" replaces the definition adopted by the ABA Board of Governors in 1986. It adds the term "paralegal" since the terms "legal assistant" and "paralegal" are, in practice, used interchangeably. The term that is preferred generally depends on what part of the country one is from. The current definition streamlines the 1986 definition and more accurately reflects how legal assistants are presently being utilized in the delivery of legal services. (ABA website)

There is an increasing trend with Utah law firms to give their legal secretaries the title of Legal Assistant. It is important for attorneys and law firm administrators to be aware that the definition of a Paralegal/Legal Assistant has not changed and that the terms are still synonymous and interchangeable according to the Petition granted by the Utah Supreme Court in 1996. By using the title inappropriately, it creates confusion with clients, other attorneys, administrative agencies, and with the courts. It is a misrepresentation of the job description and could result in rules violations. Further, one of the Canons of Ethics for paralegals requires paralegals/legal assistants to properly identify their status. This raises the question of how would you ever know if the legal assistant is, in fact, a legal assistant or a legal secretary with a different title?

Canons of Ethics

As a general guide intended to aid paralegals and attorneys, the Paralegal Division and the Board of Bar Commissioners of the Utah State Bar have approved the following Canons of Ethics for paralegals:

Canon 1 – A paralegal shall not perform any of the duties that attorneys only may perform nor take any actions that attorneys may not take.

Canon 2 – A paralegal shall not:

a) establish an attorney–client relationship;

b) establish the amount of a fee to be charged for legal services;

c) give legal opinions or advice;

d) represent a client before a court or agency unless so authorized by that court or agency;

e) engage in, encourage, or contribute to any act which would constitute the unauthorized practice of law; and

f) engage in any conduct or take any action, which would assist or involve the attorney in a violation of professional ethics or give the appearance of professional impropriety.

Canon 3 – A paralegal may perform any task which is properly delegated and supervised by an attorney provided the attorney maintains responsibility for the work product, maintains a direct relationship with the client, and maintains responsibility to the client.

Canon 4 – A paralegal shall take reasonable measures to ensure that his or her status as a paralegal is established at the outset of any professional relationship with a client, court or administrative agency, a member of the general public or other lawyers.

Canon 5 – A paralegal shall ensure that all client confidences are preserved.

Canon 6 – A paralegal shall take reasonable measures to prevent conflict of interest resulting from his or her employment affiliates, or outside interests.

Canon 7 – A paralegal must strive to maintain integrity and a high degree of competency through education and training with respect to professional responsibility, local rules and practice, and through continuing education in substantive areas of law to better assist the legal profession in fulfilling its duty to provide legal services.

Canon 8 – A paralegal shall abide by all court rules, agency rules and statutes, as well as the Utah State Bar's Rules of Professional Conduct.

"Yes, Virginia, there is a Santa Claus!"

by Carma J. Harper, CP

Like the article, which appeared in the *New York Sun* on September 21, 1897, I too am hoping to capture the attention of my readers with this article.

The Paralegal Division of the Utah State Bar was created by the Utah Supreme Court in April 1996. As members of the Paralegal Division of the Utah State Bar, we receive a Bar number and a Bar Card with our Bar number on it. We are required to obtain ten hours of Mandatory Continuing Legal Education (CLE) per year prior to our renewal of membership along with being held to the same Standards of Professionalism and Civility, found in Article 3 of the Rules Governing the Utah State Bar. The Rules can be located on the Bar's website at http://utahbar.org. We are a part of and an extension of the Utah State Bar and are expected to act accordingly while being held to the same ethical standards as the attorneys.

As members, we have many of the same benefits available to us as do the attorneys. I would strongly suggest going to the Bar's website and seeing what benefits are available for your use. As a note of interest, you can also access the Paralegal's website from the Bar's website by selecting sections, scrolling down the screen to locate, in bold, Utah State Bar Paralegal Division, or go to http://paralegals.utahbar.org. We also have a Facebook page where you can go and get news and updates of our Paralegal Division's current and upcoming activities.

As always, there are a variety of activities and committees the Paralegal Division is involved in throughout our communities. Projects are an ongoing process and we are always looking for volunteers. Please go to our website and let the Paralegal Division know that you want to participate on a committee or just volunteer for a specific event.

Our Continuing Legal Education Committee is hard at work coordinating outstanding CLE opportunities to help paralegals and attorneys maintain the highest standards, while providing affordable CLE seminars to all of the legal community.

In addition, the Paralegal Division as a whole is committed to assisting the Bar in furthering its purposes and mission and to assist with the Bar's goal of providing affordable and accessible legal services to the citizens of this state and our various communities. Remember to "Pay It Forward."

CLE Calendar

SEMINAR LOCATION: Utah Law & Justice Center, unless otherwise indicated.

07/10/14 | 9:00 am – 12:00 pm

Litigation Section Golf & CLE in Salt Lake County: What Every Civil Litigator Needs to Know About Criminal Law. Old Mill Golf Course, Salt Lake City. Presenters include: Hon. Deno Himonas, Third District Court; Samuel Alba, Snow Christensen & Martineau; and Rick Van Wagoner, Snow Christensen & Martineau. Litigation Section Members: $30 for just CLE or $60 for both CLE and golf. Non-section members: $90 for just CLE or $142 for both golf and CLE.

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

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

07/19/14 | 12:00 – 5:00 pm **3–8 hrs. CLE**

Annual Securities Law Workshop. Viceroy Hotel, Snowmass Colorado.
Option #1 – SUMMER CONVENTION (3 credit hours)
Receive three credit hours for attending Saturday morning Bar Convention

Noon (Shuttle to Viceroy from Westin Conference Center)

Option #2 – ANNUAL SECURITIES LAW WORKSHOP
Salon A, Viceroy Hotel

Option #3 – ATTEND BOTH

REGISTRATION:
Workshop only (5 hrs. CLE): $175 for section members, $225 non-section members.

Saturday morning 2014 Summer Convention (3 hrs. CLE): $90

Attend Both Convention and Workshop (8 hrs. CLE): $265 for section members, $315 non-section members.

For the most recent list of available CLE events visit:
http://www.utahbar.org/cle/

Classified Ads

RATES & DEADLINES

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

Classified Advertising Policy: It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For **display** advertising rates and information, please call (801) 910-0085.

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

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

WANTED

I WOULD LIKE TO PURCHASE AN ESTATE PLANNING/ BUSINESS PRACTICE. If you are retiring and would like to have an experienced Utah licensed attorney purchase your practice please call me at 800-679-6709 or email me at Ben@ConnorLegal.com.

OFFICE SPACE

Class A Office Sharing Space Available. Growing eight attorney firm is looking to lease adjacent unique and beautiful office space in Holladay. Will accommodate three attorneys. Willing to lease individual offices separately. Excellent space for office sharing for solo practitioners. Easy to access location from anywhere in the Salt Lake Valley. Beautiful views of Mt. Olympus. Large windows, work room, and private entrance with reception area; approximately 1288 square feet of total rentable space. Plenty of parking available. Must see to appreciate. Please call Jeff Skoubye of Olsen Skoubye & Nielson, LLC at 801-365-1030.

OFFICE AVAILABLE: An office in the law firm of Nelson, Snuffer, Dahle & Poulsen located at 10885 South State Street, Sandy, Utah is available. An LDS mission by a partner opens up a partner office and staff/paralegal office, both of which can be rented. Terms are flexible and can include joining the firm, independent practice, or other arrangement. Anyone interested may call 801-576-1400 and speak with Bob Dahle or Denver Snuffer.

POSITIONS AVAILABLE

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

SERVICES

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

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

SOUTHERN UTAH GUARDIAN – Owl Guardianship and Elder Care Services, LLC offers private guardianship, conservatorship, trustee, and fiduciary services in Southern Utah and Mesquite. Call (435)-215-4969 or inquire at www.owlguardianship.com for more information.

Certificate of Compliance

UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION
Utah State Bar | 645 South 200 East | Salt Lake City, Utah 84111
Phone: 801-531-9077 | Fax: 801-531-0660 | Email: mcle@utahbar.org

For July 1 _____ through June 30_____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____ Email: _____

_____

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

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

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

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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

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

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

Date: _____ Signature: _____

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

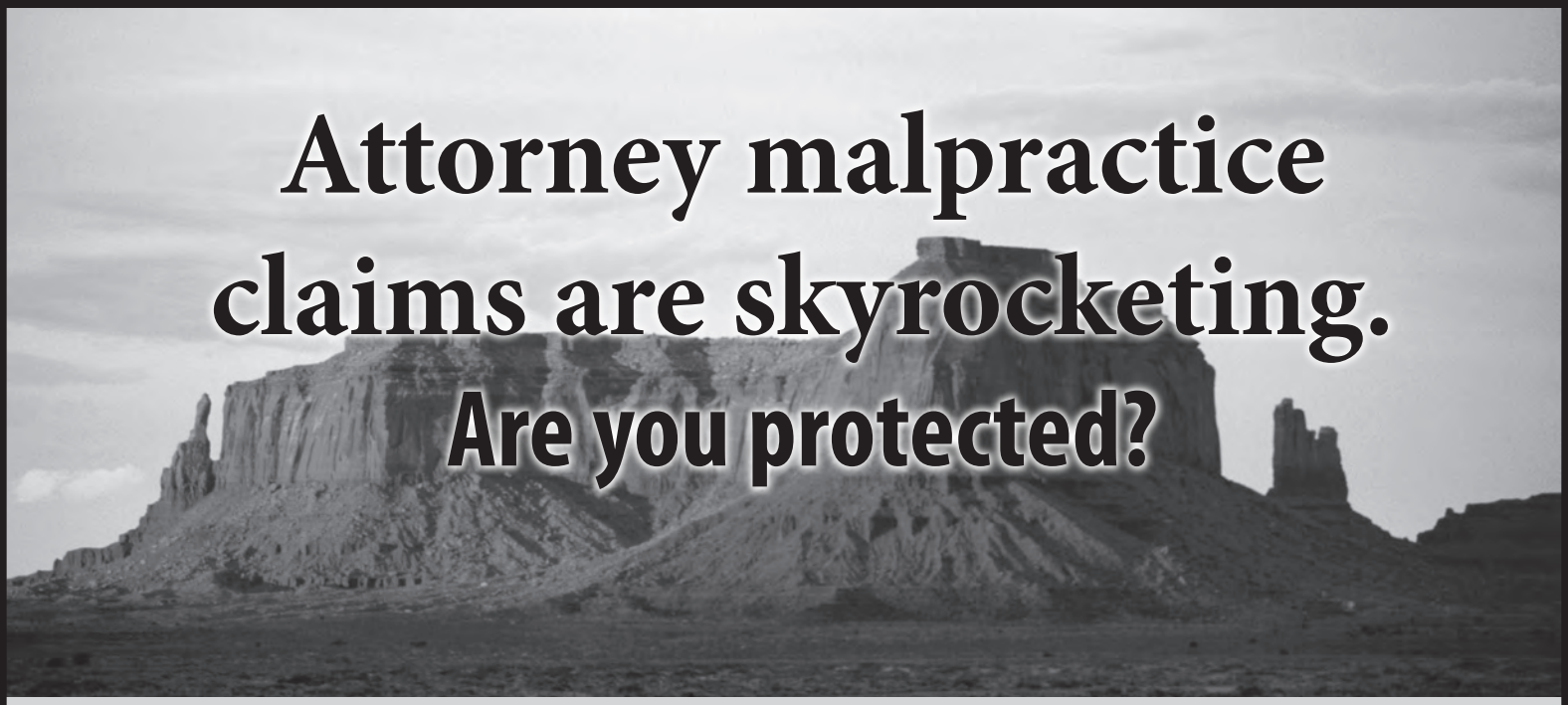
Credit Card Type: ☐ MasterCard ☐ VISA Card Expiration Date:(e.g. 01/07) _____

Account # _____ Security Code: _____

Name on Card: _____

Cardholder Signature _____

Please Note: Your credit card statement will reflect a charge from "BarAlliance"
Returned checks will be subject to a $20 charge.



Attorney malpractice claims are skyrocketing.

Are you protected?

The number of legal malpractice claims has increased by more than 50% over the last several years, according to a 2012 report from the American Bar Association.[1]

In this increasingly risky environment, **can your current professional liability coverage give you the *right* protection?**

The **Utah State Bar** endorses the **Malpractice Program from Mercer Consumer**, a service of Mercer Health & Benefits Administration LLC, when it comes to protecting Utah State Bar members. The Lawyer Malpractice Program is underwritten by Liberty Insurance Underwriters Inc. (a member company of Liberty Mutual Insurance Group).

Mercer Consumer's Lawyer Malpractice Program can help protect you against negligent acts, errors and omissions. Once you purchase insurance coverage, you have reduced your risk.

To Learn More,
Call
1-800-882-7609, ext. 52824

MERCER

DON'T WAIT
Get your no-obligation quote today.

Call **1-800-882-7609, ext. 52824**
or visit **www.proliability.com/lawyer**

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

AR Ins. Lic. #303439
CA Ins. Lic. #0G39709

In CA d/b/a Mercer Health & Benefits Insurance Services LLC

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