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Sep/Oct 2014

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Table of Contents

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Cover Photo

Armstrong Trail, Park City by Kristine Wimmer Berg.

KRISTINE WIMMER BERG is a member of the Utah State Bar Paralegal Division. She currently works as a Paralegal at the firm of Dart Adamson & Donovan and is a full-time mom to two children. Kristine resides in Salt Lake City and enjoys all the adventures that Utah has to offer. She likes good food, good company, being outdoors, taking pictures, and spending time with her family. She took this picture while hiking the Armstrong Trail and felt the moment was magical.

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 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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Letter to the Editor

In "Statement from the Professionalism Counseling Board," which ran in the July/August 2014 issue of the *Utah Bar Journal*, Gayle McKeachnie wrote:

> Complaints to the Board commonly and surprisingly involved accusatory, course, vulgar, or threatening language and emails, letters, memoranda, and even court filings.
>
> *****
>
> Some of the eyebrow raising written words used to address or describe opposing counsel or parties include 'bit--, f--ing lawyer, dishonest, deceitful, fraudulently described fabricating stories, full of crap, or bull---.'

One would be hard-pressed to conceive of a situation in the course of practicing law in which it would be factually accurate to call opposing parties or counsel a bit--, a f--ing lawyer, or full of sh-- (and while I do not use this language in my own correspondence with my fellow attorneys and the courts, I would nonetheless argue that principles of free speech must trump rules to limit such public or private expressions, but I digress). Yet if one is dealing with a lawyer who is in fact deceitful, dishonest, and/or fraudulently fabricating stories, to bite one's tongue for fear of giving offense would not be merely "inappropriate," it could be tantamount to malpractice and/or a violation of a lawyer's oath and the rules of professional conduct (and even the Standards of Professionalism and Civility).

Mr. McKeachnie's sentiments do not appear aberrant for the Board; indeed, they reflect what I submit is an unmistakable – and unmistakably cynical – Orwellian policy: define "unprofessional" and "uncivil" as anything disparaging, even critical, of the profession or anyone in the profession, then no one can say anything disparaging or critical, and thus it will appear – falsely and deceptively – there is virtually nothing disparaged or critiqued in the profession, or that can be.

When expressing truth is deemed unprofessional and/or uncivil, question your principles.

Eric K. Johnson

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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From Magna Carta and Beyond

by James D. Gilson

It's no exaggeration to say that, as lawyers, we are part of a critical – and very old – profession. Remembering our roots, and the importance of the rule of law in our society, will guide us as we face the challenges of the legal profession today.

This coming year marks the 800th anniversary of Magna Carta. On June 15, 1215, King John agreed to rebel barons in a grassy meadow at Runnymede, England, that the law was to be the real king. That Great Charter provides, in part:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

Copies of Magna Carta were sent out to sheriffs, clergy, and other officials throughout England. Although Magna Carta failed to resolve the conflict between King John and his barons, it was a significant step in a process of guaranteeing individual rights that continues 800 years later. Four of the original copies of the Magna Carta documents have survived; the one from the Lincoln Cathedral will be on display at the U.S. Library of Congress between November 2014 and January 19, 2015.

American colonists embedded principals from Magna Carta into state laws and later into the Constitution. The Fifth Amendment provision that "no person shall…be deprived of life, liberty, or property, without due process of law" descends from Magna Carta. Our independence was declared from England, and the Revolutionary War was fought, to sever ties with another tyrannical king and government and to preserve inalienable rights of "life, liberty, and the pursuit of happiness."

The American Bar Association and the Library of Congress have developed an exhibit about Magna Carta. The Utah State Bar has been fortunate to be selected to host this traveling exhibit for three weeks in April 2015. Although the exhibit will not include one of the original copies of Magna Carta, it will provide Utah lawyers with a great opportunity to learn more about, discuss, and celebrate the rule of law in society and to educate the public about how lawyers help preserve basic rights that many take for granted. The Magna Carta exhibit will provide a platform for us to discuss the positive things that lawyers do. Too often we only hear about the negative.

Lawyers drafted the Declaration of Independence and the Constitution. Lawyers are one of the most common professions of our Presidents, of members of Congress, and of our state legislature. On a micro level, we know that lawyers are problem solvers. We help resolve disputes between family members, neighbors, business partners, and companies. We draft agreements for clients that "the law" will enforce. We

represent the parties to those contracts when there has been a breach or a perceived breach. Lawyers prosecute, defend, and judge those who have been accused of crimes. Lawyers are often board members of corporations, civic organizations, and charitable groups. We are the oil in the machine of society. Without us, our economy would seize up, and anarchy would ensue.

The Supreme Court has noted,

> Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights…. That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride.[1]

We stand on the shoulders of those who have gone before us. As members of the Utah State Bar, we have the opportunity to strengthen the legal profession, and in turn our society. It's in our DNA as lawyers to be involved in public service.

A mentor of mine, Judge Tom Greene, was a great example of what lawyers should be about. He was a zealous, ethical advocate, and he also shared much of his time in public service. He also had a good sense of humor. He wrote,

> We look to lawyers to continue to champion the cause of justice, and in spite of often misplaced and unwarranted criticism, we look to lawyers to further the noble aspects of the legal profession.… When you encounter a grave marker in the cemetery which is inscribed: 'Here lies an honest man and lawyer,' you will know that there really is only one person in the grave.[2]

The license that we have to represent clients comes with a duty to also represent those who cannot afford to hire a lawyer. The rights to due process and to access the courts to redress grievances are hollow to those who cannot afford an attorney. Too many Utah residents are without adequate resources to hire counsel and are fumbling through the judicial system *pro se*, or worse, are avoiding the system altogether.

Being a mentor, handling a *pro bono* case, or serving on a civic board will improve our profession and, as a bonus, it will also increase your job satisfaction.

The Bar's *Pro Bono* Commission and Modest Means Lawyer Referral are core programs that help each of us fulfill our duty to use our legal training and law license to help the public good. The Board of Bar Commissioners is committed to strengthening these and other public service law-related programs in financially prudent ways. We are also committed to strengthening the New Lawyer Training Program and helping attorneys to practice law with civility and professionalism amidst a difficult economy. More will be said in the months ahead on these topics.

It's indeed a privilege to be a Utah lawyer, to be part of a time-honored profession whose mission is to preserve the rule of law and to safeguard fundamental rights. I'm looking forward to this next year. If you have any specific suggestions as to how you and the Bar can better serve the public and our profession, please feel free to share them with me or other Bar Commissioners.

1. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642–43 (1985).
2. Judge J. Thomas Greene, *Humor and Zealous Advocacy in our Adversary System*, 184 F.R.D. 433, 440 (1998).

Can Your Practice Survive a Disaster?

by Scott Blackmer

Maintaining and growing a law practice is enough to keep most of us fully occupied. We only reluctantly give thought to planning for a disaster that could disrupt our practice and put our clients at risk. But lawyers are professionally obliged to think ahead. We may hope for the best, but we regularly plan for the worst. Isn't that why people pay us to write wills, contracts, regulations, and criminal codes?

Worst Case Scenarios

History suggests that it would be prudent to find some answers in advance to the kinds of questions that you will likely face during and after a disaster: Where will you work? Will you lose all your client files? How will you communicate? What do you do if your colleagues and staff are unable to work? Where will your court cases go, and can you follow them? How will you support yourself if your main clients are suddenly out of business or dramatically reduce their budgets while recovering from a disaster? How can you help your clients and community prepare for emergencies and recover from a disaster?

We can learn from the experience of lawyers who lived through California earthquakes, Midwestern tornadoes, the 9/11 attacks, and Hurricanes Sandy and Katrina. In some cases, the lawyers themselves came through fine, thankfully, but their clients suffered and their practices have never fully recovered. We'll take a look at some of the business survival techniques that worked for those who succeeded in bouncing back quickly.

In Utah, we are particularly sensitive to the risks posed by the Wasatch Fault, ice storms, summer wildfires, spring flooding, and zombies. Well, maybe not all of us outside Hollywood worry about zombies, but you get the point: bad things can happen that interrupt business as usual, even here.

And here is something else to consider: Many of the tips summarized in this article for dealing with the disruptive effects of natural disasters would serve as well to protect your practice – and your clients – against the effects of a more local disaster. This might come in the form of an office fire or break-in, a computer crash, a malicious hacker, an auto accident, or a heart attack.

Insurance helps in all these events, but it's not the entire answer to disaster-proofing your legal practice and meeting your professional obligations to clients.

Priorities in a Disaster

Let's be clear: your first priority in a disaster is your physical safety and that of your family, co-workers, and neighbors. In any disaster, the first question is whether you "shelter in place" or evacuate to a safer location – "Should I stay, or should I go?" as The Clash put it.

For information to help you make that choice, tune into KSL radio or TV, which serves as the emergency station in most of Utah, or, if you have an Internet connection, go to an authoritative website. The Disaster Center Utah Page (http://disastercenter.com/utah/utah.htm) has links to federal, state, county, and city emergency management websites. Check your phone, if it's working, for reverse 911 texts (several Utah cities already use this procedure to get the word out quickly on fires and other local emergencies to residents who register their cell phone numbers) and tweets from city and county public communications officers. Call your spouse and your kids' school if you can. But everyone else will be trying to do the same things, so expect some dropped calls, delays, and frustration.

If you have to leave your home or workplace, grab your meds

SCOTT BLACKMER is a founding partner of California-based InfoLawGroup LLP and a member of the Utah State Bar Disaster Legal Response Committee.

and your phone, tablet, or laptop (with their power chargers) if you can do so safely. The electronic devices will help you stay in touch and put your life, and your practice, back together. Files? It's too late for that. We'll talk later about making sure your files are stored or backed-up somewhere safe. In the moment, it's more important to set up a safe shelter where you are or to flee any immediate danger, preferably with a pair of good shoes on your feet, a jacket, a water bottle, and a 72-hour kit.

Your next priorities are probably to locate your family and to help others within the building, the neighborhood, or the nearest Red Cross evacuation center, which is typically set up in an undamaged high school or college gym or an events center.

You will probably be preoccupied with physical safety and survival for a few days. Then (unless the disaster involves nuclear war, pandemic, asteroids, or zombies) the dust settles, help arrives, and you start dealing with the recovery phase, where you can resume lawyerly activities.

Recovering from Disaster

The recovery phase is when you need answers to the questions listed above.

Where will you work?

If you can't use your office, you may be able to work from home or a hotel so long as there is phone service, an Internet connection, and access to your files stored online. Some of us already work from home at least part of the time, and most of us are accustomed to working while traveling. We simply go to the nearest hotel, coffee shop, library, or bookstore with working WiFi access, and we're back in business. Mostly.

Of course, it might be more comfortable and secure to set up shop temporarily in another office. After the Hurricane Katrina disaster, several law firms in Baton Rouge invited displaced colleagues from New Orleans to operate from their offices for weeks or months. New Orleans judges also relocated temporarily to Baton Rouge to hear cases in the courtrooms there. Lawyers in private practice should consider establishing a friendly relationship with a law firm in another part of the state or in a neighboring state, with mutual arrangements to share some office space, a conference room, and communications, for when they have client work in the area – or after a disaster. In-house company lawyers and government lawyers can usually shift to an undamaged corporate or government facility.

How will you preserve and access your files?
If all your files are in a single location, it wouldn't take a 7.0 earthquake to jeopardize your clients and your practice; a simple fire or burglary could be enough to put you out of business. For most of us, our files are already largely digital. These can easily be stored or backed up on a server hosted at an offsite location or in the cloud with a commercial service provider. Use an encrypted, password-controlled service to preserve confidentiality, and take a careful look at the cloud services agreement, which should include some warranties, a service level agreement, and a security annex. You will pay more for these features, but it is hard to justify storing important or privileged information with an "as is" cloud service. Make sure your data is stored or backed up on servers outside your geographic area, so it will not be lost in the same disaster that affects your office. To the extent that you have to deal with paper records, scan them and store the digital copies offsite. Make sure that you can access your digital files from anywhere with an Internet connection.

How will you communicate?
Few of us have satellite phones or ham radios available to talk to our clients and others. Both landline and mobile phone services are quickly overloaded in a disaster, even if the facilities themselves are undamaged. They are simply not designed for peak periods when nearly every subscriber is trying to call at the same time. Texts, tweets, and social media messages are often preferable during the disaster and early in the recovery phase, with the advantage that the messages you leave will be delivered over phone and Internet connections as they become available. In the recovery phase, if power and telecommunications are not promptly restored in your area, you may have to travel to a suitable location where such services are available. In addition to the Katrina example mentioned above, we have seen lawyers affected by recent storms on Long Island and the Jersey Shore move inland to rent or share office facilities where communications were unaffected or more promptly restored.

"How would you support yourself if your principal clients suddenly went out of business or cut their budgets for legal services?"

Who will help you work?
In a disaster, your colleagues and staff may be incapacitated or unable to come to work. For those in private practice, this is another reason to cultivate good relations with a law firm outside your geographic area but not too far away to visit or temporarily relocate. A Salt Lake firm would do well to have friends in St. George, Las Vegas, or Denver, for example. Client referrals and association as counsel on relevant matters may help establish valuable connections for a time of need. Most solo practitioners have had to designate a backup lawyer on their malpractice insurance applications; it would be wise to stay in contact with that person and be able to call upon him or her as needed following a disaster. Other sources of temporary assistance include contract lawyers and paralegals (check in advance for individuals or temp agencies in your area) as well as law students. If you have an existing relationship with a temp agency or local law school, you may be able to get to the head of the queue as demand suddenly rises for contract services.

Where will court cases be heard?
In recent disasters, cases have been delayed, evidence lost, and dockets transferred.

After the 9/11 attack on the World Trade Center, most courts in Manhattan and Brooklyn were closed for three business days, while some civil litigation was transferred outside the affected area. On the whole, the disruption of the legal system was minimized, although some court personnel were injured and evidence reportedly disappeared from unsecured buildings.

Hurricane Katrina affected a wider area for a longer time. More than 1.2 million people were evacuated from their homes, and twenty-five courthouses were inaccessible for months. Many state dockets moved to Baton Rouge or other Louisiana cities, and federal cases (along with criminal defendants in detention) moved to other federal courthouses, often as far away as Houston. Because of constitutional rights to a speedy trial, many criminal cases had to be relocated quickly, and defense counsel were obliged to travel, hand off cases, or engage co-counsel in other cities. More than 5,000 criminal defendants were locked up but held in limbo, in various stages of criminal proceedings, without sufficient public defenders despite an influx of law student volunteers from other parts of the country. Many of these defendants waited more than a year before they could speak to a lawyer.

When Grand Forks, North Dakota was flooded in 1997, the trial courts moved to small facilities thirty miles away. Some prisoners awaiting trial had to be housed as far as 200 miles distant.

In the 1989 Loma Prieta earthquake, there was serious damage to the federal courthouse in San Francisco. It took two years for the Ninth Circuit Court of Appeals to find sufficient temporary space for courtrooms, chambers, and records, and seven years before the court could return to the federal courthouse.

In several of these instances, court security was compromised, prisoners were shuttled to a series of temporary facilities, and court records and evidence were lost.

For the private practitioner, the lesson is to keep digital copies of files in another location or in the cloud, stay in contact with the relevant courts and incarcerated clients as much as possible after a disaster, and cultivate relationships with firms in other cities where the clients' dockets might be relocated. A trial lawyer or litigator should also be prepared to quickly contact opposing counsel and file motions for a continuance or enlargement of time, not only for hearings but to avoid missing deadlines for pleadings and discovery. And lawyers generally should be aware that there may be a need for expanded pro bono assistance to criminal defendants as well as low-income individuals and small businesses with disaster-related claims.

How can I keep my business alive?

Thousands of employees in lower Manhattan were laid off or placed on indefinite leave of absence after the 9/11 attacks. Some, including lawyers working for corporate legal departments in office buildings surrounding Ground Zero (some of which were inaccessible for months), were given early retirement or simply terminated. Outside counsel were inevitably affected by their clients' cutbacks.

The impact of Hurricane Katrina was even greater, as thousands of businesses closed for weeks (many never to reopen) and thousands of employees had no job to return to when the waters receded. Some of the smaller New Orleans law firms and solo practices never reopened, while larger ones shed personnel or froze hiring.

How would you support yourself if your principal clients suddenly went out of business or cut their budgets for legal services? A major earthquake on the Wasatch Front would send economic aftershocks through the region. It could take years to rebuild the local economy. The measures described above, such as keeping digital files outside your region and making friends in law offices in other cities, can help you complete your current work. But they will not ensure that clients keep coming to you for new business.

One lesson learned from Katrina and other disasters is the value of diversifying a legal practice. A firm that gets 60% of its revenue from a single client is obviously vulnerable if disaster strikes that client. Diversification means multiple clients, ideally in multiple cities, and the ability to shift practice emphasis as demand fluctuates. Several New Orleans firms that had corporate law practices before Katrina, for example, found it prudent to develop expertise in bankruptcy, insurance, and environmental law following the disaster. (Of course, even apart from disasters, it may make sense to diversify somewhat, given the economic unpredictability of business and legal markets.)

Finally, don't neglect relevant insurance coverage. In addition to standard all-risk or "named perils" property and casualty insurance policies that cover fire and theft, consider adding earthquake and flood riders, as these risks are otherwise normally excluded. General liability policies can cover you for injuries sustained by

non-employees on your premises. Many small businesses, including law firms, should look into business interruption insurance, which typically pay 80% of lost income for a period, plus reimbursement for certain expenses. Cyberinsurance policies can cover at least part of the losses and liabilities resulting from lost or compromised data.

What do my clients need to know?

As a lawyer, you are a trusted advisor and should be looking for ways to help clients avoid problems, as well as react to them. What can you do to help clients prepare for, and recover from, a disaster?

It would be prudent to ask regular business clients about their risk management and business continuity plans and insurance. Make sure they use effective force majeure clauses in contracts. Guide them in taking precautions against information security breaches that could expose them to liabilities, especially with respect to credit card data, health records, Social Security numbers, trade secrets of business partners, and government contracts. Following a disaster, help your clients document their losses and activities, handle layoffs and closures lawfully, and terminate or revise contracts as needed.

"Your firm or office, no matter the size, should have document management and security policies to protect client information…."

Ethical Issues

Utah's Rules of Professional Conduct include several provisions that are relevant for lawyers in their own preparation for emergencies and in their representation of clients after a disaster.

Rule 1.1, Competence. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Utah R. Prof'l Conduct 1.1. In a disaster or other emergency situation, however, a lawyer may be called upon to assist in matters outside the scope of his or her normal practice, and Comment 3 addresses this possibility:

> In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

Id. R. 1.1, cmt. [3].

Note that a new Comment 8 to Rule 1.1, which appears in the August 2012 amendments to the ABA Model Rules of Professional Conduct (not yet adopted in Utah but likely to affect interpretations of the Rules), says that "a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology.**" ABA Model R. Prof'l Conduct 1.1, cmt. [8], *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited July 31, 2014) (emphasis added). This suggests that lawyers have an obligation to be aware of the risks and alternatives for maintaining client files and communications, so that they are not lost or compromised in a disaster or by failing to store or duplicate them at an offsite location.

Rule 1.6, Confidentiality of Information. "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…." Utah R. Prof'l Conduct 1.6(a). When privileged information is revealed inadvertently, the attorney may still be held accountable for not taking reasonable precautions. Hence, the 2012 amendments to the ABA Model Rules (again, not yet adopted in Utah but likely to be influential) add a new subsection: "(c) A lawyer shall make reasonable efforts to prevent the **inadvertent or unauthorized disclosure** of, or unauthorized access to, information relating to the representation of a client." ABA Model R. Prof'l Conduct 1.6(c) (emphasis added). This would suggest that lawyers should have security measures in place for digital as well as paper files and communications, including password protection and encryption, where appropriate, so that client confidences are not exposed even in the case of hacking, theft, or disaster. Your firm or office, no matter the size, should have document management and security policies to protect client information, including incident response procedures in the event of a security breach.

Rules 5.1, 5.2, 5.3, Responsibilities of law firms and associations. Remember that these provisions extend the

attorney's responsibility to the **supervision** of lawyers and nonlawyers who work with the attorney, to ensure that their actions do not result in a violation of the Rules. A managing partner or solo practitioner does not need to become a security or information technology expert, but he or she does have to become sufficiently informed to hire and supervise employees or contractors who look after those functions for the practice.

How can I help the community recover?

In addition to helping your regular clients, consider using your professional skills to help the community deal with the aftermath of a disaster. In the incidents mentioned above, there was an immediate need for pro bono legal volunteers, especially to help individuals and small businesses with issues such as insurance and government benefits claims, understanding responsibilities toward landlords, tenants, or employees, guardianship arrangements for children separated from parents, and damage assessments for tax and insurance purposes. Some lawyers also donated time to assist local governments and nonprofits in the aftermath of a disaster.

The Utah State Bar **Disaster Legal Response Committee** was organized to develop a plan for addressing the increased need for pro bono legal services among low-income individuals and small businesses following a disaster. In developing the Plan, Committee members are working with other Utah State Bar sections and committees as well as with the courts, legal service providers, state emergency planning officers, and nonprofit organizations. The Committee is also in contact with the Disaster Legal Services Program, a joint effort of FEMA and the ABA Young Lawyers Division, which has responded in 103 declared disasters since 2007. The object is to organize and train volunteer lawyers and law students to provide pro bono service in the recovery phase of a local or state-wide disaster.

Conclusion

Find answers now to the seven questions you will face when you are ready to go back to work: Where will you work? How will you recover your client files? How will you communicate? Who will help you? Where will your court cases go? How will you cover your financial losses and keep business coming in? And how can you help your clients prepare for emergencies and then recover from a disaster?

An emergency doesn't have to be a disaster. And most disasters are survivable, both physically and financially. A little advance planning can help you keep your practice alive and make you a valuable asset to your clients and community in the event of a disaster.

You're Invited!

The Disaster Legal Response Committee

meets on the third Friday of the month, noon to 1 p.m., lunch provided
Utah Law and Justice Center, 645 South 200 East, Salt Lake City
(telephone call-in available for committee members outside the Salt Lake area)

If you would like to help with the development and implementation of Utah's post-disaster legal response plan, please contact: Brooke Ashton (bashton@toolaw.com) or Andrea Valenti Arthur (andreaa@utcourts.gov).

(Specialized positions available for those with volunteer management or web design experience)

Tribute to a Friend

by Judge Bruce S. Jenkins

EDITOR'S NOTE: *The relationship between a judge and his or her law clerks is a very unique, often special one. Occasionally a clerk will serve his or her term and then venture out into the world, rarely to be heard from by the judge again. More typically, a bond is formed that remains for life. In Utah, the epitome of a close, life-long bond between law clerk and judge is the one that Judge Jenkins shared with his law clerk, Russ Kearl. It should never happen – but occasionally does – that a judge outlives his law clerk. Several of our readers, who attended the memorial service for Russ held in Salt Lake City on June 2, called our attention to the fine tribute paid by Judge Jenkins to his longtime clerk and friend. They encouraged us to reprint his remarks, which we are privileged to do, with the permission of Judge Jenkins.*

Louise asked me to say a few words about Russell. No one, not I, not anyone can say just a few words about Russell Kearl. He was unique, one of a kind, multi-talented, brilliant, selfless, loyal to the court and loyal to the law.

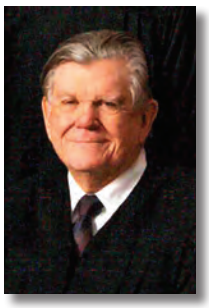
Two or three years after I was appointed a U.S. district judge, Russell, newly-minted from law school and new bar member, applied for a clerkship. A good friend of mine at the law school had told me to take a hard look at this guy. When he arrived for an interview I think I remember red suspenders holding up surplus army pants and a beard down to his belt line. Now, while he worked with me he always disputed the length of his beard at that time.

Even last Tuesday, May 27, Peggy and I had flown in from Seattle, and by the time we arrived he had been transferred home from the hospital after a weekend stay and new MRIs, and a pessimistic prognosis. Early that evening my daughter Carol and I went to visit him at his home. He was in bed, a hospice bed, in his living room. The first thing he said was, "How was the music?" He knew we had been near Seattle to hear the west coast performance of a symphonic piece composed by a grandchild, which premiered originally with the St. Louis Symphony. We told him it went well, and he raised his hands above his head and clapped. I kidded him about his beard, with the usual denial. We talked. He was lucid. Squeezed my hand, told me he was a stubborn son of a bitch and wasn't going to let this get to him. I told him I agreed he was a stubborn son of a bitch and hoped he was right.

He had been diagnosed in December and, along with his back operation and a kidney removal, had undergone ten weeks of chemotherapy for cancer. Just two weeks to go – and then a new evaluation. He had hoped for success, and wanted his condition to remain quiet until the chemotherapy was done. He was full of optimism and wanted to be back to work full time. He told me that some damn fool at the hospital put a bracelet on his wrist that said, "Don't Resuscitate." He saw it, made him mad, and he cut it off, and he laughed and squeezed my hand again and said he wanted to get back to work. I told him I needed him. When he slept that night, he slept through Wednesday, and then about 6:21 a.m., Thursday, he died. Louise called me a few minutes later to tell me.

Russ worked with me twice. Once from January 1981 to about May of 1984. He left to practice law, which he did successfully with the Callister, Duncan, Nebeker firm for about eight years. He called me and asked to go to lunch. He had heard I was going to have an opening on staff, and asked if he could come back and work for me as a possible career clerk. I was delighted with the possibility. We had worked well together. He had added experience of many years of practice. In short, no learning

JUDGE BRUCE S. JENKINS is a U.S. Senior District Judge for the District of Utah. He was appointed by President Jimmy Carter in 1978.



curve needed and, quite frankly, I could avoid interviewing a long list of interested candidates. I said yes, and he started in January of 1993, and remained with the court for the rest of his distinguished career. Altogether, we worked together for twenty-four plus years.

During that time, as daughter Carol told him when we talked on the 27th, he was family, which indeed he was. She also pointed out that I spent more time with Russ because we worked together than I did with my four children, who were of the same generation. Which was true.

Over the years Russ was an immense help to me. His basic work on numerous challenging cases; from fallout to Burr Trail – from Joseph Paul Franklin to Bonneville Pacific and to Angel Arch, as well as hundreds of others. All were improved in process and product because of his talents and unusual work ethic.

When we issue opinions from chambers, all drafts see more than one set of eyes. Our written opinions are a work of many minds and hearts. The newspapers and *Time* magazine, and now others, often give credit to those who contribute to a story, although there is a single name at the top of a column. In judging, although a judge issues an order or an opinion and has the ultimate responsibility under the Constitution, often, because of the quantity of work which needs doing, much of the work is done in-house by others, including law clerks. Russ was exemplary in doing that and, frankly, on many matters of importance, his name should be there along with mine. The same is true for other clerks who served with me, but the system dictates otherwise.

Russ was a very good editor. His red pen picked up changes which needed to be made and he was always ready to make suggestions for improvement, which we invariably adopted. After Russ returned to the court, he mentored new clerks who joined our staff. He was a source to them of institutional memory, and preferred practice in our chambers. Before computers, and after, he was our in-house spell checker, citation checker, and fact checker as well.

I mentioned that he was very bright – brilliant, which he was. One of the needs a judge has is to have someone close and knowledgeable with whom he can discuss a case; to test ideas, legal propositions, and possible outcomes; to spot inconsistencies and redundances. For me those kinds of discussions with Russ were invariably helpful. We had fun in conversation examining a problem or an idea on almost any subject and in depth. I will miss that. I will miss that very much. The give and take of such conversation is the path to clarification. And clarification is the path to decision.

I mentioned that he was selfless, which he was. From birthday remembrances – some unusual – to pushing a car out of a snowbank, examples abound. But my favorite one is his donating his accumulated leave time – he seldom took a vacation – to those court family members who were ill, often

donating hundreds of hours to assist in their recovery.

He was a pack rat. His office accumulation was something out of a Dickens novel. His love of books was evident – all kinds of books – from Winnie the Pooh to Einstein. All varieties of books, stacked up and spilled out everywhere. He often bought three at the same time. One to use and mark, one as a back up, and one to loan or give away.

He and Mike Weiler, our long time courtroom deputy, had an ongoing game of chess. Each moved a chess piece every other day. The board was located on top of a file case in Russ's office. Mike, in order to move his bishop or knight, had to be something of a contortionist to get through the books to the chessboard. Russ would call to Mike, "Herr Doctor Viler – it's your move." They enjoyed their clash of chess, but more, their joy of friendship.

Russell C. Kearl
1955–2014

He liked to eat! Early in his career with me we went to Denver where I was sitting with the Court of Appeals, 10th Circuit. An old friend of mine, who then lived in Denver, Dan Dix, took us to a place for dinner called the "Boston Sea Party." You paid a fee as you went in. You could then enjoy the variety of food. With his usual curiosity, Russ tried almost everything, and tried everything again and again and again. We were the last to leave. Three days later Boston Sea Party filed for bankruptcy. I told Russ it was all his fault. Friend Dan Dix was sure of it.

A few years ago, I was given a special assignment of a case in New Mexico. All of the judges had recused themselves. It involved an action relating to the aquifer under the city of Albuquerque. There were fifty attorneys involved representing a multitude of parties. We went there fourteen different times.

Now, in retrospect, I don't know whether we needed to go that many times, but I have my suspicions. Russ and Mike, who traveled with me, had found a restaurant called "The Cooperage," which had key lime pie which was out of this world. When we finished the case we all regretted that we had not gone more times than we had. You probably didn't know that Russ was a student of food, a kind of a gourmet cook, or, more accurately, a gourmet consumer.

Russ and I love books. We loved recommending books to each other. We each were afflicted with the same compulsion. We buy books. We collect books. My collection was better organized, at least at home. At holiday time in December, Louise, Peggy, Russ, and I would get together, have dinner, go to our home and exchange gifts. It was a fun holiday ritual. On occasion, but it happened more than once, Russ and I gave each other the very same book – the identical book with identical wrappings, often from the same store – which caused Peggy and Louise to laugh out loud.

John Boyle who worked with us for a number of years before returning home to practice in New York, flew in to say goodbye to Russ and to see Louise. He had remained close to all of us. He was lucky to have had a phone conversation with Russ on May 27th, the day Russ returned home from the hospital. John told Russ that he, Russ, had a very positive attitude. And Russ with his understated pragmatic humor said, "Under the circumstances, I have no other choice."

Russ leaves us all with a legacy of good memories. Perhaps good memories and enduring love for one another are the truest form of immortality. We remember with awe his vigorous and wide-ranging mind. We remember with laughter his subtle and sometimes biting sense of humor. We remember with joy his acts of kindness. He exemplified the best in selfless conduct – a form of religion all of his own, with a bow to Buddha.

A gathering such as this is needed by those of us who live. It is time for good memories. It is our time to say "thank you Russ," for a life well-lived, and for what you have meant to each of us, our culture, our court, and our nation. To Louise, his mother and father, and to all of his extended family we say thank you for Russell and the time he spent with us. That time we treasure. The memory of Russ and his good works – professional and personal – we treasure even more. We are all better for his life and our association with him.

Peace, dear friend, peace forever.

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One Angry Man

by Just Learned Ham

The invitation in the big envelope started out decently enough: "Dear Prospective Juror: It is my pleasure to welcome you to our courts for jury service." The attached summons, however, drops all pretense of subtlety: "If you do not come to court and report for jury service, you are violating state law."

I've never done this before. Jury duty, I mean, not violation of state law (after all, who hasn't?). My first reaction was, of course, panic. I'm an in-house lawyer, and we're instinctively afraid of courtrooms. When the wave of nausea passed, though, I started to feel intrigued about the whole thing. This might be fun.

The summons came with a helpful Q&A:

"How do I get to the courthouse?"

By happy coincidence this was going to be my first question. I was expecting the answer to be "Most people drive themselves, but some are brought in manacled and cursing. And those are just the lawyers." I'm an in-house lawyer. Did I mention that? I have no idea where the courthouse is. I have not been in a courtroom since one memorable day, decades ago, when a judge looked at me and said: "Counsel, I have neither the time nor the inclination to read your brief." I sensed a future in transactional practice. I would mention his name, but I don't doubt his power, like *stare decisis* itself, to rule from the grave and hold me in contempt (like the final scene of *Carrie*, where Sue visits Carrie's grave and then the hand sprouts out of the ground – in the 1976 original, not the 2013 remake, which I didn't see because, to be honest, even the original wasn't very good). Anyway, conveniently, the Q&A included a map, with thoughtful suggestions about where I might find free parking.

"Are there any items I should not bring to court?"

It turns out that jurors are discouraged from bringing televisions to court. It would not have seemed necessary to me to include televisions in the list, but I guess maybe they had a bad experience with *Game of Thrones* fans. (Who hasn't? Especially during Season 4. Speaking of which, how about that *Laws of Gods and Men* episode where Stannis and Davos travel to Braavos to beg for a loan from Iron Bank? Nothing gets the blood moving quite like a commercial loan application.)

"What if the weather is bad?"

This is generally not a problem, as most of the courtrooms are actually indoors. If the storm is wet enough, the bailiff closes the windows.

"What should I do if I have children?"

Get used to Miley Cyrus's *Bangerz* as the new soundtrack of your life, and accept the fact that retirement is no longer an option.

There's a questionnaire to be completed by the prospective juror, too.

INDICATE (X) IF ANY OF THE FOLLOWING APPLY TO YOU OR ANY MEMBER OF YOUR FAMILY OR HOUSEHOLD:

(A) RELATED TO AN ATTORNEY AT LAW

We'll skip (B) through (D) – prior "connections" with law enforcement, election to public office, and other embarrassments.

I confidently mark (A) with an (X), after all, this would be true of every member of my family. I puzzle for a moment over whether it would be true of me, too. I can't think of any relatives who are lawyers. My relatives all have real jobs. Then I start to wonder if I am related to myself, but this makes me want to lie on a couch and talk about my parents, so I give up on that whole idea. Then I wonder if it's a trick question in my case. I think I might have mentioned that I'm an in-house lawyer. Am I really an *attorney at law* anymore? Does "at law" mean I argue cases in court? If so, I'm not. Is "at law" just one of those linguistic vestiges of a bygone era that no longer means squat? Like my appendix, but linguistic (unlike my appendix, which is gone in any event). Did

it ever mean squat? ("at law" – not my appendix.) I suppose I could look it up in *Black's Law Dictionary*, but I'm busy, and this isn't a law review anyway. Am I even a plain vanilla attorney? Or like Colonel Kurtz in *Apocalypse Now*, have I so completely gone over to the other side (or to my own side…I'm prompted to think of my missing appendix again), that it's just plain wrong to call me an attorney? The horror…the horror.…

It is truly an honor, though, to be called to jury service. At least, that's what the pamphlet says, variously promising that my service will be "convenient and rewarding" as well as "pleasant, interesting and meaningful."

It's a curious system, really, based on the belief that truth will somehow emerge from a process of plucking a random collection of folks from the street – who have nothing in common with each other, besides a complete ignorance of what really happened – and then telling them two implausibly biased versions of the same story.

Goldilocks: There I was, kidnapped and held hostage by these three ursine terrorists. And they made me eat…porridge! (The witness bursts into tears and is unable to continue.)

Bear: Well, we came home from another day volunteering at the soup kitchen, like we always do, and we find our house trashed by this Patty Hearst wannabe.

I'm flattered that the system has so much confidence in my judgment that I would be trusted with figuring out the truth, but the first truth that comes to mind is that my judgment isn't that good.

For example, I never wear sandals without a pair of socks. Sane people think I'm crazy. They think it looks stupid. But I can't imagine that anyone wants to see my feet. My feet are probably my least attractive feature, and I've been told the competition for that honor is actually quite fierce. I really don't understand this aversion the rest of you have to socks. They're comfortable, considerate of others, and in my apparently questionable judgment, they look nice, too. Don't get me started on you folks who wear loafers without socks. That's just cretin.

I'll give you another example of poor judgment. We have one of those basketball hoops in the driveway that you can adjust to

different heights. A neighbor kid tosses me the ball and says: "Dunk it!" The rim has been adjusted to something well below ten feet. Being a dumb, middle-aged man (redundant, I know), I figure I can do it. As soon as I leap, I feel a screaming pain in my side (no, not the appendix this time). I now have a strained oblique muscle. And, at my age (every conversation with my doctor now starts with "Well, at your age …"), that will take six to twelve months to heal and will probably leave both the oblique and me a little crankier than usual for the rest of my life.

Or how about the good old days when I was a bank lawyer? Once again, decades ago. We had a non-performing commercial loan. Part of our collateral was a piece of equipment in the hands of a not-for-profit hospital in Kentucky. The hospital was not our borrower, but there was a difference of opinion about who was or wasn't a bona fide purchaser for value (as I recall). Suing the hospital to get our equipment seemed like the thing to do at the time. I remember a hearing in Paducah, Kentucky, where the judge looked at us and said, "Let me get this straight. . . ." Let me just pause here to observe that when the first words out of the judge's mouth are, "Let me get this straight," odds are you are not going to be happy with the rest of the words. "Let me get this straight, y'all are suing the nuns to repossess some life-savin' machine?"

"Should any of us feel comfortable with our futures in the hands of a jury of our peers? Many of whom may have axes to grind…with former spouses, banks, and assorted others who might look a lot like us?"

It's not just me, though. I think everybody's judgment is a little suspect.

A while back (more decades…), I used to teach seminars for the American Institute of Banking. (Now I've got you wondering about their judgment.) I used to teach one called *Mysteries of the Checking Account Explained*. The brochure (I still have a copy) promised that participants will "understand presentment and transfer warranties, final payment, and will no longer think that the midnight deadline has something to do with newspaper publishing, trains, or soul music." I'm sorry you missed it.

In the seminar we used to discuss a case called *Cambridge Trust Company v. Carney*, 333 A.2d 442 (N.H. 1975). The plaintiff, a bank, sued Ann and Gerard Carney (separated) to recover an overdraft on a joint checking account. As noted by the court, the facts of the case were "somewhat complex." *Id*. at 443. In short, for some reason, after their separation, it appears that Ms. Carney was persuaded (perhaps by Mr. Carney, although that is not entirely clear to me from the opinion) that in order to ensure that Mr. Carney would fulfill his support obligations, she should become a co-signatory on what had previously been his separate checking account. They went to the bank and converted Mr. Carney's account to a joint account. A few months later, the bank sued Mr. and Ms. Carney to recover a $5,902.88 overdraft. Mr. Carney could not be located (a fact that never seemed to surprise any of the seminar participants), and the action proceeded against Ms. Carney alone.

The case actually presents fascinating legal questions, at least for those with a soft spot in their hearts (or heads) for the Uniform Commercial Code (UCC). The argument for Ms. Carney, based on the applicable version of the UCC and case law, is that she neither created the overdraft nor benefited from it, and should therefore not be liable for it. The argument for the bank is that the pertinent provisions of the UCC may be varied by contract, and Ms. Carney signed two documents – a signature card and a separate letter addressed to the bank – in both of which she specifically agreed to indemnify the bank and hold it harmless for paying checks signed either by herself or Mr. Carney.

At this point in the seminar – before telling the class how the court actually ruled – I would ask for a vote. Invariably, the women in the class came down strongly in favor of the UCC and Ms. Carney. The men would all raise their hands for sanctity of contract and the bank. Once, I got the bright idea to change the facts when describing the case, and switch the roles of Mr. and Ms. Carney. When it came time to vote, the men all lined up behind the UCC and poor Mr. Carney; and the women became staunch defenders of contract rights and the bank. So much for unbiased judgment by a jury of one's peers.

In the actual case, Ms. Carney prevailed at the trial court level, and the bank appealed. The Supreme Court of New Hampshire ruled in favor of Ms. Carney, on the basis that she neither created

the overdraft nor benefited from it. The court was not persuaded by the indemnification language of the signature card and letter because while the applicable version of the UCC permitted variation of its terms by agreement, it also provided that "no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care." *Id.* at 445. Under the facts of the case, which included evidence of multiple prior overdrafts created by Mr. Carney, the court concluded that "the jury could have found that the bank did not exercise ordinary care in permitting Mr. Carney to create yet another overdraft." *Id.*

My point (and I admit it took a long time to get around to it) is not the legal analysis, which is thrown in gratuitously for the obvious scholarly value, but the curious voting pattern of the seminar participants. Should any of us feel comfortable with our futures in the hands of a jury of our peers? Many of whom may have axes to grind (consciously and subconsciously) with former spouses, banks, and assorted others who might look a lot like us?

Now you're really sorry you missed that seminar, aren't you? Oh well, T-shirt sales were disappointing and the program was eventually canceled.

Where were we?

I was excited and eager to perform my civic duty. Like Henry Fonda in *12 Angry Men*.

> I feel sorry for you. What it must feel like to want to pull the switch! Ever since you walked into this room, you've been acting like a self-appointed public avenger. You want to see this boy die because you personally want it, not because of the facts! You're a sadist!

I know, I know…it's going to be hard to find the right moment to say that during deliberations on a shoplifting case, but I intend to try. Dammit. At my age, however, the Henry Fonda impression will probably be more evocative of his performance in *On Golden Pond*. "Listen to me, mister. You're my knight in shining armor. Don't forget it. You're going to get back on that horse and I'm going to be right behind you, holding on tight and away we're going to go, go, go!" I know, I know…that was Katharine Hepburn's line, but her lines were better than Henry's. You think not? OK, here are a couple of Henry's best: "Black bears, grizzlies. One of 'em came along here and ate an old lesbian just last month." "Look at the Goddamned Orioles! Baltimore's always been a sneaky town!" Those are not going to inspire anybody in the middle of a hot, muggy deliberation marathon. Not that I won't try 'em out if things get tense, though.

The night before my scheduled jury service, I called the court for final instructions, as directed in the summons.

"All jurors summoned for Thursday, June 26 are canceled. They have fulfilled their current jury obligation."

Cancelled. Not our service as jurors, mind you, but we jurors ourselves. Cancelled. Like common postage stamps, and checks, and *Dragnet*, and other obsolete but formerly useful things (not to mention the class assembly during my senior year in high school, after Mr. Bullard read the script). And I was so looking forward to this. Words fail.

They also serve who only stand and wait.[1]

1. Milton, John: Sonnet 16 (On His Blindness). I wanted an endnote.

Matters of the Heart and Household Surveillance: Use of Private Investigators in a Domestic Case

by Kristina B. Otterstrom

Introduction

Few relationships possess the special privileges, privacies, and immunities afforded to married couples. Nevertheless, no commercial litigation case of mine has ever matched the scrutiny and detailed accountings of mundane daily life as that of a divorce case. While the marital privilege prohibiting the disclosure of private communications that took place during the marriage continues long past death or divorce, in domestic litigation, it oftentimes feels as though anything else is up for grabs.

In a memorable case, I represented a client on the receiving end on a stalking injunction filing. It was one of several similar filings in a hotly-contested divorce case. The issue raised by counsel was an interesting one: does hiring a private investigator in a divorce case constitute "stalking" under the statute? Although opposing counsel missed a critical piece of the statute providing a specific exemption for private investigators, it made me consider what kind of responsibilities we have as attorneys to protect our clients when a private investigator's actions cross the line.

What Constitutes Stalking

A person is guilty of stalking if he or she personally or through a third party, commits any of the following acts:

> (A) approaches or confronts a person;
>
> (B) appears at the person's workplace or contacts the person's employer or coworkers;
>
> (C) appears at a person's residence or contacts a person's neighbors, or enters property owned, leased, or occupied by a person;
>
> (D) sends material by any means to the person or for the purpose of obtaining or disseminating information about or communicating with the person to a member of the person's family or household, employer, coworker, friend, or associate of the person;
>
> (E) places an object on or delivers an object to property owned, leased, or occupied by a person, or to the person's place of employment, with the intent that the object be delivered to the person; or
>
> (F) uses a computer, the Internet, text messaging, or any other electronic means to commit an act that is part of the course of conduct.

Utah Code Ann. § 76-5-106.5(ii)(A)–(F) (LexisNexis 2012).

Many of the above acts fall within the job description undertaken by less careful private investigators, so where is the line drawn? While Utah Code section 77-3a-101(1) states that stalking injunctions "may not be obtained against law enforcement officers, governmental investigators, or licensed private investigators, acting in their official capacity," Utah Code Ann. § 77-3a-101(1) (LexisNexis 2012), you and your client are not necessarily insulated from illegal acts committed by a private investigator.

KRISTINA B. OTTERSTROM is a senior associate attorney at Shumway Van & Hansen where she has led the firm's Utah Family Law Practice Group. Her practice focuses on commercial litigation and family law.

Moreover, not all private investigators are licensed, as demonstrated by a 2011 bust of several unlicensed private investigators in Salt Lake. A careful private investigator will be licensed and know the law well enough not to cross certain lines and can obtain a plethora of helpful information in a case without surreptitiously surveilling a residence or appearing at a person's home.

Use of Hidden Surveillance in the Home

A North Carolina case involved a man who sued his estranged wife and the private investigator she had hired to install a concealed video camera in the husband's bedroom on grounds of invasion of privacy, intentional infliction of emotional distress, trespass, and damage to real property. *Miller v. Brooks*, 472 S.E.2d 350, 352–53 (N.C. App. 1996). While the lower court granted summary judgment to the wife and the private investigator, the appellate court unanimously reversed the decision finding that the wife and private investigator had violated the tort for intrusion on seclusion in an area where the husband had a "reasonable expectation of privacy." *Id*. at 355; *see also* Restatement (Second) of Torts § 652B (1977). Had the case occurred in Utah, the outcome would have likely been the same due to Utah's direct prohibition on the use of video cameras in private places without express permission. *See* Utah Code Ann. §§ 76-9-402, -403, –201.

Intercepting Phone Calls

Nevertheless, in a federal district Utah case, *Oliverson v. West Valley City*, 875 F. Supp. 1465, 1482 (D. Utah 1994), the court concluded that adultery was not a protected privacy right and upheld Utah's statute criminalizing adulterous conduct. In custody cases, specific exception has been made for recording or wiretapping a spouse or ex-spouse's phone calls with minor children. *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993). In *Thompson*, the wife taped calls between her children and an ex-husband as part of an ongoing custody case, claiming she did so to protect the best interests of her children. *Id*. She further claims that she had vicariously consented to the taping on the children's behalf. *Id*. at 1543. The court set forth that "as long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children," such vicarious consent is permissible. *Id*. at 1544.

While a federal case, the court discussed the possibility that the wife's actions nevertheless fall within Utah Code section 76-9-403(1)(a), setting forth the crime of communication abuse. *Id*. at 1545. Specifically, the statute criminalizes acts of surveillance where one "'intercepts, without the consent of the sender or receiver, a message by telephone.'" *Id*. (quoting Utah Code Ann. § 76-9-403(1)(a)(1953)). Ultimately, the wife's purpose in recording and/or intercepting the phone calls freed her from criminal liability. *Id*. Yet, the holding of the case was limited and it is unclear whether the case would have turned out similarly had the custody of children not been at issue.

Protecting Your Client

In its full context, Utah's stalking injunction law requires the victim to have suffered emotional distress. Utah Code Ann. § 76-5-106.5 (LexisNexis 2012). *White v. Blackburn*, 787 P.2d 1315 (Utah Ct. App. 1990), set forth that for a finding of emotional distress, the actions causing the distress must be extreme and outrageous. *Id*. at 1317–18. The *White* case was referenced in the dissent of *Bailey v. Bayles*, 2001 UT App 34, ¶ 27, 18 P.3d 1129. Notably, a stalking injunction was upheld in *Bailey* because an ex-husband had driven by a restaurant, the home, and a few other public places where he knew his former wife would be present. *Id*. ¶ 15.

Ultimately, these cases paint a murky picture of where to draw the line with a private investigator. Yet, what is clear is that any attempts your client may want to make to survey or observe his or her estranged spouse should be outsourced to a private investigator. Nevertheless, common sense should prevail, and a private investigator's attempts to install hidden cameras or even tracking devices put your client in perilous territory. Children may provide more justification for some forms of surveillance than in cases involving childless couples. Follow the laws and make sure your private investigator is doing the same, for no cases hit closer to home and the heart than domestic ones.

Staying Enforcement of a Judgment During Post-Trial and Appellate Proceedings

by Julie J. Nelson & Clemens A. Landau

Imagine that you are about to start a trial or a hearing on a dispositive motion. No matter how sure you are of prevailing, you and your client should devote serious thought to how you will respond if the proceeding culminates in the entry of an adverse judgment that will be enforced against your client. You first should consider whether you will want to challenge the adverse judgment through post-trial motions or an appeal. If so, you will need to consider whether – and how – to stay enforcement of the judgment pending resolution of post-trial and appellate proceedings.

While the typical circumstance in which a stay is needed concerns the enforcement of a money judgment, it is worth noting that your client may need a stay in other circumstances as well. To provide just one example, if the only remedy your client seeks is specific performance and after the entry of judgment the opposing party transfers the property to a bona fide purchaser, any further proceedings may be moot. *Richards v. Baum*, 914 P.2d 719, 722 (Utah 1996).

This article describes the procedures for staying the enforcement of a judgment under rule 62 of the Utah Rules of Civil Procedure and addresses the main issues you should consider when devising a strategy to stay enforcement of a judgment.

Timing of the Requirement for a Supersedeas Bond

Once the district court enters a judgment, rule 62(a) automatically stays enforcement for fourteen days. Utah R. Civ. P. 62(a). That fourteen-day period is often too short to obtain a commercial bond or other alternative security, let alone to secure the court's approval and have it enter the stay.

If you have not begun the process before the entry of judgment, you should ask the creditor to stipulate to a temporary stay of enforcement beyond the fourteen-day period. If the creditor is unwilling to stipulate, you can ask the district court to enter a stay for the period of time you will reasonably need to secure the bond, e.g., thirty days. But because any stay beyond the fourteen-day period without posting security is not guaranteed, the best practice is to complete the groundwork necessary for obtaining the bond or other security well before the entry of judgment.

When a Stay Is Not Obtained During the Fourteen-Day Stay

If the court has not stayed execution of the judgment before the fourteen-day stay expires, the judgment creditor may initiate enforcement proceedings as soon as the fourteen-day period expires. And once enforcement proceedings have begun, the effect of a subsequently entered stay on those enforcement

JULIE J. NELSON is an appellate attorney at Zimmerman Jones Booher LLC.

CLEMENS A. LANDAU is an appellate attorney at Zimmerman Jones Booher LLC.

proceedings is far from clear.

If you request a stay within a reasonable amount of time after the expiration of the fourteen-day stay, most courts will stay ongoing enforcement attempts in the interest of "preserv[ing] the status quo." *C.G. Marck & Assocs. v. Peng*, No. 3:05-CV-7391, 2008 WL 918435, at *1 (N.D. Ohio Apr. 1, 2008) (staying enforcement proceedings initiated prior to the posting of the bond); *see also United States v. York*, 909 F. Supp. 4, 9–10 (D.D.C. 1995) (same); *Sheldon v. Munford, Inc.*, 128 F.R.D. 663, 666 (N.D. Ind. 1989) (same); *Ascher v. Gutierrez*, 66 F.R.D. 548, 549–50 (D.D.C. 1975) (same). *But see Secure Eng'g Servs., Ltd. v. International Tech. Corp.*, 727 F. Supp. 261, 263 (E.D. Va. 1989) (refusing to stay enforcement attempts initiated prior to the posting of bond even when bond was filed within reasonable time after entry of judgment).

But if you delay unreasonably before requesting a stay, courts are less willing to stay enforcement attempts already underway. *Johns v. Rozet*, 826 F. Supp. 565 (D.D.C. 1993) (refusing to stay enforcement because the judgment debtor failed to post a bond for an entire year); *Larry Santos Prods. v. Joss Org., Inc.*, 682 F. Supp. 905, 906 (E.D. Mich. 1988) (refusing to stay enforcement attempts because the judgment debtor failed to post for several months after final judgment was entered).

The relatively unsettled nature of the case law, coupled with the fact that a commercial bond typically takes more than fourteen days to procure, can place an unprepared judgment debtor in a bind. If you cannot secure a temporary stay beyond the fourteen-day stay period, then you have little choice but to work as diligently as possible to obtain an adequate bond or other security and hope that the court will exercise its discretion to stay any enforcement attempts initiated in the meantime.

The procedures for execution are described in rule 64 and are beyond the scope of this article. But it is important to note that if the judgment creditor acts on his or her funds before a bond

is posted, the funds will be frozen and inaccessible unless further action is taken. No rule expressly prohibits the judgment debtor from withdrawing funds in between entry of judgment and execution. But "[i]f the court finds that the judgment debtor has violated an order or has otherwise dissipated assets, the court may set the bond" without regard to the limits set by rule 62. Utah R. Civ. P. 62(j)(4).

Stays Pending Post-Trial Proceedings

Rule 62(b) governs stays pending post-trial proceedings. *Id.* R. 62(b). The rule provides district courts considerable discretion. Unlike the subsection governing stays pending appeal, rule 62(b) does not set the presumptive amount of the bond required for a stay. Rather, the rule provides only that "[i]n its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending [the resolution of motions made under rules 50, 52(b), 59, or 60]." *Id.*

Wide discretion is warranted because "a stay pending disposition of a motion for judgment n.o.v. and/or new trial will generally be resolved in far less time than the lengthy process of briefing, argument and disposition which an appeal entails." *International Wood Processors v. Power Dry, Inc.*, 102 F.R.D. 212, 215 (D.S.C. 1984). For this reason, "the risk of an adverse change in the status quo is less when comparing adequate security pending post-trial motions with adequate security pending appeal." *Id.*; *see also In re Apollo Grp. Inc. Secs. Lit.*, No. CV-04-2147-PHX-JAT, 2008 WL 410625, at *1 (D. Ariz. Feb. 13, 2008) (recognizing that "the standard governing the court's discretion in the rule 62(b) context should be less restrictive" than rule 62(d)).

Stays Pending Appeal

Rule 62(d) governs stays pending appeal. Utah R. Civ. P. 62(d). Although rule 62(d) provides for automatic stays upon the posting of a supersedeas bond, district courts retain discretion to permit "other security to be given in lieu of giving a supersedeas bond." *Id.* R.62(i)(2) & cmt. (emphasizing that courts "should be given broad discretion to permit [other] forms of security as the facts may require"). And although rule 62 sets a presumptive amount of any security, district courts retain discretion to lower the amount or waive the requirement if the judgment debtor demonstrates the judgment creditor is

"adequately protect[ed]…against loss or damage occasioned by the appeal and [is] assure[d] payment in the event the judgment is affirmed." *Id.* R. 62(j)(1) & (2); *United States v. Melot*, No. CV-09-0752-JH/WPL, 2012 WL 2914224, at *1 (D.N.M. May 23, 2012) (noting that "a court may employ its discretion to waive or reduce the bond or other security requirement" under both rules 62(b) and 62(d)).

In determining whether it is appropriate to depart from the presumptive amount, courts can consider "any relevant factor," including the judgment debtor's ability to pay the judgment, the existence and value of security, the judgment debtor's opportunity to dissipate assets, the judgment debtor's likelihood of success on appeal, and the respective harm to the parties from setting a higher or lower amount. Utah R. Civ. P. 62(j)(1). These factors are substantially similar to the so-called *Dillon* factors used under the analogous federal rule. *Dillon v. City of Chicago*, 866 F.2d 902, 904–05 (7th Cir. 1988).

Waiver or reduction is particularly appropriate in two circumstances. The first is "where the defendant's ability to pay the judgment is so plain that the cost of the bond would be a waste of money." *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir. 1986). The second is "where the requirement would put the defendant's other creditors in undue jeopardy." *Id.* The second circumstance arises where the judgment debtor is insolvent, so providing the judgment creditor access to a bond to satisfy the debt it is owed will deplete the remaining assets for other creditors.

If you are unable to convince the district court to depart from the presumptive amount, then the bond amount will be set using the formula established in rule 62(j)(2). This "presumptive" amount includes (i) the amount of compensatory damages, (ii) costs set by the court, (iii) attorney fees if awarded by the court, and (iv) three years' interest. Utah R. Civ. P. 62(j)(2)(A). Interest should be calculated using the post-judgment interest rate set each year by the court. The interest rate is available at http://www.utcourts.gov/resources/intrates/interestrates.htm. For 2014, the interest rate is 2.13%. Even though the bond is for three years of interest, the rate in force at the time the judgment was entered should be used to calculate the interest for all three years. Interest should be calculated on the costs and attorneys fees in addition to the compensatory damages. Interest should not be compounded.

The bond amount is typically easy to calculate, but it is worth noting several exceptions to the rule. First, a bond for compensatory damages in a class action case shall not exceed $25 million. Utah R. Civ. P. 62(j)(2)(B). Second, a bond is not required to stay enforcement of a punitive damages award. *Id.* R. 62(j)(2)(C). Third, if you are seeking to stay an injunction as opposed to a judgment for compensatory damages, rule 62(c) offers the district court more discretion. *Id.* R. 62(c) ("[T]he court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.").

Obtaining a Bond or Other Security

The "form" of the bond or other security is described in rule 62(i). Clients have four options: (i) a supersedeas bond in the form of a commercial bond, (ii) a supersedeas bond in the form of a personal bond, (iii) "other security," such as depositing funds

into court or a letter of credit, or (iv) reaching an agreement with the opposing party. Each of these options is discussed below.

First, your client can obtain a commercial bond from a surety company. *Id.* R. 62(i)(1). Unless your client has liquid assets in multiples of the amount of the adverse judgment, the process of obtaining a bond may be arduous. Bonds are typically obtained through an insurance company or broker, although not all insurance companies offer supersedeas bonds. Your client should begin searching for a surety by contacting the insurance companies with which it conducts business or by contacting an insurance broker that deals in surety bonds. A commercial bond can be obtained only from a company authorized by the Utah Department of Insurance. *Id.* A list of certified companies prepared by the U.S. Treasury Department is available at http://www.fms.treas.gov/c570/C570-certified-comp-04-16-14.pdf.

In preparing your client for the costs of obtaining a bond, a rule of thumb is that the fee for the bond will likely be 2–3% of the total amount and that fee will be due each year the bond is in place. The commercial surety is also likely to require collateral in the form of cash or a letter of credit. Each surety sets its own terms, but requiring 100% collateral is not uncommon. Further, commercial sureties are often unwilling to write bonds in amounts less than $100,000 or bonds in family law cases or other cases in which all of the parties' assets are at issue. Because commercial sureties vary greatly, it is worthwhile to use a broker that can obtain a number of quotes.

"Nothing is more uncomfortable than finding yourself unprepared when the court enters an adverse judgment and your client is suddenly faced with the prospect of putting up security for a large bond on short notice."

Second, the client can obtain a personal bond from an individual. *Id.* This process requires "one or more sureties who are residents of Utah having a collective net worth of at least twice the amount of the bond, exclusive of property exempt from execution." *Id.* (It is worth noting that a corporation that resides in Utah may qualify under the rule.) Any individual willing to serve as a surety on a personal bond must file an affidavit explaining their assets and liabilities. *Id.* The adequacy of this security can be tested by the judgment creditor in the district court, so anyone willing to serve as a surety should be advised of this fact before his or her name is submitted to the court.

Third, the court might allow a deposit of money or "other security" in court. *Id.* R. 62(i)(2). The court is allowed to permit this type of security "upon motion and good cause shown." *Id.* The "other security" is typically a letter of credit from a bank. A letter of credit should offer the same information as a supersedeas bond, i.e., the amount being pledged – including costs, attorneys fees, and interest – and include a statement that the amount will be pledged for the time necessary to resolve the appeal (which the rule presumes will be three years). Letters of credit are often used because they are cheaper and easier to obtain than commercial bonds. But they also are more risky, as district courts have discretion to refuse to accept a letter of credit and force a debtor to navigate the difficulties of obtaining a bond.

Finally, rule 62(i) contemplates proceeding by agreement of the parties. "The parties may by written stipulation waive the requirement of giving a supersedeas bond…or agree to an alternate form of security." *Id.* R. 62(i). For example, the parties may agree to open an escrow account that both parties can access. Reaching such an agreement with opposing counsel is highly beneficial as it will spare the parties several rounds of briefing during post-trial and appellate proceedings. And the best time to reach such an agreement is before – not after – a final judgment has been entered.

Few things are more uncomfortable than finding yourself unprepared when the court enters an adverse judgment and your client is suddenly faced with the prospect of putting up security for a large bond on short notice. To avoid being squeezed between a reluctant client and an aggressive creditor, it is best to prepare for the worst and have a strategy in place for staying a judgment long before it is entered in its final form.

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Appellate Highlights

by Rodney R. Parker & Julianne P. Blanch

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

United States v. Hoyle
751 F.3d 1167 (10th Cir. May 13, 2014)

The Tenth Circuit rejected the defendant's argument that the sentencing guidelines' use of the term "imprisonment for a term exceeding one year" impermissibly deviated from 18 U.S.C. § 921(a)(20)'s definition of "crime punishable by imprisonment for a term exceeding one year." The latter expressly excludes convictions that have been expunged, or set aside, or for which the defendant has had his civil rights restored; whereas the former includes such convictions. The Tenth Circuit held that the sentencing guidelines' definition and the statutory definition have different purposes and need not be consistent.

United States v. Hartshorn
751 F.3d 1194 (10th Cir. June 2, 2014)

The defendant appealed the district court's issuance of an injunction against him, arguing that the court erred in concluding he promoted an abusive tax shelter through his Church of Compassionate Service. The court addressed, as a matter of first impression, the test used to determine whether a minister is acting as an agent of the church such that his earnings are tax-exempt. The court adopted a flexible approach under which courts may consider various factors pertinent to the relationships between the religious order and the minister, between the minister and the third-party employer, and between the employer and the order. In doing so, it rejected the requirement imposed by some courts, of a contractual relationship between the secular employer and the religious order. The court additionally rejected the defendant's argument that the injunction was improper because he did not believe that his representations were false or fraudulent. The test for injunctive relief under § 7408 is satisfied if the defendant had reason to know his statements were false or fraudulent, regardless of what he actually knew or believed.

United States v. Medina-Copete
— F.3d —, 2014 WL 2958593 (10th Cir. July 2, 2014)

The Tenth Circuit addressed an issue of first impression in this circuit: whether an expert witness may offer expert opinion testimony under rule 702 of the Federal Rules of Evidence about the connection between so-called "narco saint" iconography and drug trafficking. The district court had allowed a government expert to offer opinion testimony about the connection between veneration of Santa Muerte and drug trafficking. The Tenth Circuit held that the district court abused its discretion in allowing this testimony. First, the district court failed to consider whether a prayer constitutes a "tool of the trade," as the Tenth Circuit has used that phrase. Second, it allowed the expert to testify based on his experience without considering the relevance and breadth of that experience, thereby ignoring the "facts or data" requirements of rule 702. Finally, the district court failed to consider the manner in which the expert's techniques and methodology led to his opinions, instead relying on other courts' treatment of similar testimony

RODNEY R. PARKER is a member of the Appellate Practice Group at Snow, Christensen & Martineau.

JULIANNE P. BLANCH is a member of the Appellate Practice Group at Snow, Christensen & Martineau.

in different contexts. Given the significance of the expert's opinions to the government's case, the Tenth Circuit held that the erroneous admission of the expert's opinion testimony regarding Santa Muerte was not harmless.

Energy Claims Ltd. v. Catalyst Investment Group Ltd. 2014 UT 13 (May 9, 2014)

A foreign corporation filed suit in Utah asserting the rights of a defunct Utah company (as its assignee) against the company's former directors, all of whom reside outside of Utah. The district court dismissed the case on the bases of forum non conveniens and improper venue, and the court of appeals affirmed. The court reversed and remanded, concluding that the district court should have given deference to the foreign corporation's choice of forum in the forum non conveniens analysis because it was asserting a Utah company's rights in Utah. The Utah Supreme Court also adopted the minority position from other jurisdictions and held, as a matter of first impression, that a plaintiff's claim that a contract was entered into fraudulently is sufficient to render a forum selection clause in the contract unenforceable. The court instructed the district court on remand to first determine whether the forum selection clause in a contract with one of the defendants is enforceable, and then to perform a forum non conveniens analysis under the correct standard.

State v. Lucero 2014 UT 15 (May 13, 2014)

Adopting the majority rule with respect to the admission of conditionally relevant evidence, the Utah Supreme Court upheld the admission of prior child abuse evidence. The defendant was charged with the murder of her son "after his back was bent backwards." The State sought to introduce evidence of a prior similar injury, which the court admitted over objections that it did not satisfy rule 404(b), that it was irrelevant, and that the probative value was substantially outweighed by the danger of unfair prejudice. The court clarified that to admit evidence of prior bad acts for the purpose of identity under rule 404(b) there must be "'(1) a very high degree of similarity between the charged and uncharged acts, and (2) a unique or singular methodology.'" *Id.* ¶ 15 (footnote citation omitted). Finding these criteria satisfied, the court then addressed whether the evidence was relevant, noting that it had not been definitively established that the defendant committed the prior abuse. On this point, the court acknowledged that under rule 104(b), the admissibility of prior abuse was conditional on whether the defendant committed the abuse, i.e., conditional relevance. The court explained that under rule 104(b), "it is the duty of the court to decide whether there is sufficient evidence upon which the jury could make such a determination" that the "condition of fact" is satisfied. Adopting the majority rule, the court held "that a preponderance of the evidence is required to admit evidence of prior bad acts." *Id.* ¶ 2. Next, the court held that

the prior evidence of abuse was not substantially outweighed by the danger of unfair prejudice given the similarity of injuries, short length of time between each injury, and the importance of the issue to the case.

State v. Trotter
2014 UT 17 (May 20, 2014)

The defendant, who had pled guilty to unlawful sexual contact with a minor, appealed the denial of his motion to set aside his guilty plea. He had argued that his plea was not knowing and voluntary or that he received ineffective assistance of counsel because neither the court nor his lawyer had informed him of the sex offender registration requirement associated with his plea. The Utah Supreme Court rejected the defendant's argument that the United States Supreme Court's opinion in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), abolished the distinction between direct and collateral consequences in contexts outside of deportation. The court then held that the sex offender registration requirement is a collateral, not direct, consequence of the defendant's plea. Therefore, neither the court nor the defendant's lawyer was required to advise the defendant of the registration requirement.

In re Discipline of Reneer
2014 UT 18, 325 P.3d 104 (May 23, 2014)

The Utah Supreme Court's Ethics and Discipline Committee's private admonishment of an attorney for failing to obtain informed consent for third-party payment of legal fees under rule 1.8(f) of the Utah Rules of Professional Conduct was reversed as unsupported by substantial evidence. While the court acknowledged substantial evidence would support a finding that no written consent was obtained, it held that "informed consent" may be oral. Because the Office of Professional Conduct bore the burden of showing noncompliance, its failure to inquire as to whether oral consent was obtained warranted reversal.

Wisan v. City of Hildale
2014 UT 20 (June 17, 2014)

This appeal from a default judgment was dismissed on procedural grounds, and the default judgment was allowed to stand because the appellants chose the incorrect vehicle for relief. The controversy arose when the United Effort Plan Trust (UEPT) sued Hildale and a co-defendant (collectively, Hildale) seeking a writ of mandamus to compel subdivision of UEPT property within city limits. Hildale did not respond, and a default judgment was entered. Hildale then filed a rule 60(b) motion to set aside the default judgment and, while that motion was pending, filed a direct appeal of the default judgment. The district court denied the rule 60(b) motion, and Hildale did not appeal that denial. The court dismissed the direct appeal of the default judgment because Hildale relied exclusively on rule 60(b) in the appeal. The Utah Supreme Court explained that its review on a direct appeal of the default judgment was necessarily limited to whether the prerequisites for entry of default were satisfied. Hildale should have appealed the district court's denial of the rule 60(b) motion.

Johnson v. Johnson
2014 UT 21 (June 20, 2014)

On certiorari, the Utah Supreme Court considered whether a panel majority of the Utah Court of Appeals erred in applying the "marital foundation" approach to determine the amount of a military pension that constitutes marital property. The Utah Supreme Court addressed, as a matter of first impression, how to determine the employee spouse's monthly benefit subject to equitable distribution. The court considered the two approaches at the ends of the spectrum: the bright line approach and the marital foundation approach. Under the bright line approach, post-divorce increases in pension benefits are treated as post-divorce earnings and categorized as separate property. The marital foundation approach, on the other hand, treats all post-divorce increases in marital pension benefits as marital property. Given the district court's role of making an equitable distribution of property, the court refused to adopt either approach, instead adopting a context-specific approach. Under this approach, district courts should evaluate all relevant factors and circumstances in making a determination as to the most equitable distribution of pension benefits.

Colvin v. Giguere
2014 UT 23 (June 20, 2014)

In this negligence action, the surviving family of a man killed in a car accident sued the man's co-worker who was driving the vehicle. The accident occurred outside of normal work hours, when the man and his co-worker were travelling from one work site to another in a company vehicle. The co-worker's employment contract also stated that he would not be paid for such travel. Despite these facts and the general rule that travel to and from work is not considered to be within the scope and course of one's employment, the district court found that the "special errand" exception applied and therefore dismissed the suit

under the Workers' Compensation Act's (WCA) exclusive remedy provision. The Utah Supreme Court affirmed, explaining that although an employment contract is relevant in defining the parameters of the employer–employee relationship, it is not determinative of whether a particular task arises out of or is performed in the course of a worker's employment for the purpose of determining the existence of coverage under the WCA. Instead, the actual facts and circumstances surrounding the task must be examined. The trip met the requirements of the special errand exception to the going-and-coming rule (therefore barring plaintiffs' claims under the exclusive remedy provision) because of the unusual, onerous, and sudden nature of the travel.

Living Rivers v. United States Oil Sands, Inc.
2014 UT 25 (June 24, 2014)

The Utah Supreme Court held that a petition for review of an administrative determination of the Utah Board of Water Quality (BWQ) was untimely, even though filed within thirty days of a 2011 decision, because in substance it was a collateral attack of an earlier 2008 decision. In 2008, the Utah Division of Water Quality (DWQ) granted a discharge permit to U.S. Oil Sands, which was not challenged within thirty days. In 2011, U.S. Oil Sands informed DWQ of proposed changes, which DWQ determined did not affect the original permit. Living River then intervened and sought a timely review of that decision from an administrative law judge (ALJ), which focused on the basis of the 2008 decision. The ALJ recommended that both permit decisions stand, and BWQ approved. On appeal, the court held that it lacked jurisdiction because the substance of the petition was a collateral attack on the 2008 permit, rather than an attack on the 2011 reaffirmance of the permit, which would have been permissible.

Mallory v. Brigham Young University
2014 UT 27 (July 8, 2004)

The Utah Supreme Court held that a BYU traffic cadet was an "employee" of Provo City, thus barring the plaintiff's claims under the Governmental Immunity Act of Utah. The plaintiff was injured when his motorcycle collided with another vehicle after a BYU football scrimmage. He alleged a BYU traffic cadet under the supervision of a BYU peace officer was negligent. The trial court determined that the traffic cadet was an agent of Provo City and thus an employee under the Act. This meant that the plaintiff was required to file a notice of claim within one-year after the accident. Because he did not do so, the court dismissed his claim. The Utah Court of Appeals reversed, concluding that an agent will only be considered an employee under the Act if the governmental entity "exercises control" over the purported employee. The Utah Supreme Court reversed the Utah Court of Appeals, holding that while an agent is not necessarily encompassed within the Act's definition of "employee," the Act does not impose a requirement that an individual must be "under the control of the governmental entity." *Id.* ¶ 12. Nonetheless, the supreme court

determined that if a "right to control," even without an exercise of that control, is present, an individual will qualify as an employee. With that determination, the supreme court held that the BYU traffic cadet was under the control of Provo City and thus an employee. It reasoned that sufficient control existed because the Provo City Code "strictly regulate[d]" how BYU could perform traffic control, permitted the City to discharge BYU at will, and because the city council could rescind or amend the statute from which BYU derived its authority at any time. A dissent suggested that the court's holding could open the door for a number of private actors to be entitled to governmental immunity.

Wood v. World Wide Association of Specialty Programs & Schools
2014 UT App 106, 326 P.3d 685 (May 8, 2014)

In this per curiam opinion, the Utah Court of Appeals dismissed the appeal for lack of jurisdiction because rule 4(c) of the Utah Rules of Appellate Procedure applies only to an order that, once entered, will become final and appealable. The rule does not apply to perfect a notice of appeal filed prior to the district court's entry of a written order in which it certified the order for interlocutory appeal. Although in its oral ruling, the district court expressed its intention that the order dismissing some, but not all, of the plaintiff's claims would be appealable, this did not satisfy the requirements of rule 54 for certifying an order for interlocutory appeal.

State v. Stewart
2014 UT App 112 (May 22, 2014)

A man with a knack for "obtaining" vehicles without paying for them was convicted of aggravated robbery and theft by receiving stolen property in connection with two vehicles in his collection. The first was a car he obtained from a rental company in Florida in 2007, which he used as his personal car for several years until he had put approximately 100,000 miles on it. The second was a BMW that he obtained after a test drive with a salesman from the dealership, when he dropped the salesman off on the side of the freeway after showing him his gun. The Utah Court of Appeals affirmed the aggravated robbery conviction but remanded the theft conviction for a new trial because the State supported that charge with hearsay from the rental company's manager and from the National Crime Information Center database.

BMS Ltd. 1999 v. Department of Workforce Services
2014 UT App 111 (May 22, 2014)

In this administrative appeal, the Utah Court of Appeals declined to disturb the decision of the Workforce Appeals Board that a man working for a delivery business was an employee, and not an independent contractor, and was therefore eligible for unemployment benefits under Utah's Employment Security Act. The company hired the man under an independent contractor agreement that stated that he would function as an independent contractor. The Board concluded, however, that under the totality of the circumstances, the man was an employee because he was not independently established in the delivery business before starting work with the company.

Winkler v. Lemieux
2014 UT App 141 (June 19, 2014)

The plaintiff in this negligence action was injured in a head-on car collision while driving through a Utah Department of Transportation (UDOT) work zone that was limited to one lane of traffic. A UDOT worker controlling access to the lane had signaled the plaintiff to enter, and she was struck by a driver travelling in the opposite direction who had also been signaled to enter by the UDOT worker on the other end of the lane. The district court dismissed the case, finding that UDOT was exempt from liability under the the licensing exception to the waiver of governmental immunity found in Utah Code section 63G-7-301(5)(c), which provides that immunity is not waived for injuries resulting from "the issuance, denial, suspension or revocation of…any permit, license, certificate, approval, order, or similar authorization." Utah Code Ann. § 63G-7-301(5)(c) (LexisNexis 2011). The Utah Court of Appeals reversed and remanded for further proceedings, holding that UDOT had failed to demonstrate that the employee's signal to the plaintiff possessed the level of formality necessary to trigger the licensing exception.

Anderson v. Fautin
2014 UT App 151 (June 26, 2014)

This appeal addressed whether a claimant in a boundary by acquiescence case must show active use on both sides of the disputed boundary in order to satisfy the occupation element of the doctrine. The doctrine of boundary by acquiescence allows a landowner to establish a property line that differs from the legal description of her property by satisfying four elements: (1) occupation up to a visible line marked by monuments, fences, or buildings; (2) mutual acquiescence in the line as a boundary; (3) for a long period of time; (4) by adjoining landowners. The Utah Court of Appeals held that a claimant satisfies the occupation

element when her use of land up to a visible line would put a reasonable party on notice that the given line was being treated as a boundary between the properties.

Simmons Media Group, LLC v. Waykar, LLC
2014 UT App 145 (June 26, 2014)

After affirming the district court's judgments in the plaintiff's favor in all respects, the Utah Court of Appeals considered the plaintiff's request for reasonable attorney fees under rule 24 of the Utah Rules of Appellate Procedure. The court awarded fees to the plaintiff, holding that the defendants' appellate brief failed in several respects to meet rule 24's requirement that briefs be "presented with accuracy" and "free from burdensome. . .matters." *Id.* ¶ 48 (citation and internal quotation marks omitted). These violations "placed a tremendous burden of factual and legal research" on the plaintiff, entitling it to reasonable attorney fees. *Id.* (citation and internal quotation marks omitted).

Judge v. Saltz Plastic Surgery, PC
2014 UT App 144 (June 26, 2014)

A woman sued her plastic surgeon after he gave before and after photos of her to a television news reporter and the photos were broadcasted on television and the Internet. The district court granted summary judgment to the plastic surgeon, based partly on the conclusion that the photographs did not reveal private facts about the woman because they showed portions of her body that she had previously disclosed while wearing a bikini in public. This was based on an extension of the Restatements (Second) of Torts, which states that "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye." *Id.* ¶ 26 (citation and internal quotation marks omitted). The Utah Court of Appeals reversed, holding that the district court stretched the Restatement too far. Although the woman may have been willing to make a public fact of what she looked like in a certain bikini on a certain day in a certain context, by doing so she did not lose her ability to argue that whatever parts of her body that bikini revealed were private facts on different days in different contexts. The court reversed summary judgment and remanded for further proceedings.

State v. Johnson
2014 UT App 161 (July 3, 2014)

In a divided opinion, the Utah Court of Appeals reversed a conviction for murder on an issue that was not preserved for appeal based on "exceptional circumstances." On appeal, the court asked the parties for supplemental briefing to address for the first time whether a jury instruction "misstated the mens rea element of the lesser included offense" of homicide by assault, effectively removing this offense from the jury's consideration. *Id.* ¶ 12. The court determined that while that issue could not be considered under the doctrine of ineffective assistance of counsel and was likely barred by invited error, it could nonetheless address the issue because the jury instruction presented an "astonishingly erroneous but undetected ruling" and it allowed the parties to provide supplemental briefing on the issue. *Id.* (citation and internal quotation marks omitted). On the merits, the court concluded that "[b]y defining homicide by assault as requiring the same mens rea as criminal homicide, [the instruction] essentially removed from the jury the ability to meaningfully consider the lesser included offense." *Id.* ¶ 22. The court concluded the error was harmful "[g]iven how close the causation evidence is," and that a conviction of the greater offense did not indicate the error pertaining to the lesser offense was harmless. *Id.* ¶ 27. Accordingly, the court reversed the conviction. A concurrence defended the majority's consideration of the issue based on exceptional circumstances. In a dissent, Judge Bench, sitting as a senior judge, argued that any error in the instruction was invited and the other members of the panel "abandoned their adjudicative responsibilities and improperly bec[a]me advocates for a party." *Id.* ¶ 41 (Bench, J., dissenting).

Contributing Authors: Rodney R. Parker, Julianne P. Blanch, Dani N. Cepernich, Robert T. Denny, and Adam M. Pace.

Referral Fees

by Keith A. Call

A lawyer friend in California recently referred a nice piece of work to me. I know referral fees are prohibited, so I thought I would just say "thank you" with a movie gift card. It's a good thing I started my research for this article before I did that! To my surprise, it turns out the Utah Ethics Advisory Opinion Committee (EAOC) has opined in no uncertain terms, "[M]oney or gift cards are 'things of value' and, unless covered by an exception, cannot be given in exchange for a legal referral." Utah State Bar, Ethics Advisory Opinion Committee, Op. 13-02, ¶ 11 (2013).

The prohibitions and limitations on referral fees are found primarily in rules 1.5 and 7.2 of the Utah Rules of Professional Conduct. Rule 1.5(e) prohibits fee sharing among lawyers who are not in the same firm unless (1) "the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation"; (2) "the client agrees to the arrangement…in writing"; and (3) "the total fee is reasonable." Utah R. Prof'l Conduct 1.5(e). "Joint responsibility" means that each lawyer individually assumes financial and ethical responsibility for the representation. *Id*. R. 1.5, cmt. [7]. Thus, you would only want to enter into a fee-sharing arrangement with someone you really trust.

Rule 7.2(b) provides, "A lawyer shall not give *anything of value* to a person for recommending the lawyer's services…." *Id*. R. 7.2(b) (emphasis added.) The rule states four narrow exceptions: (1) "reasonable costs of advertisements"; (2) "the usual charges of a legal service plan or a lawyer referral service"; (3) purchase of a law practice; and (4) division of fees as permitted by rule 1.5(e). *Id*. The broad phrase "anything of value" is what prompted the EAOC to conclude I cannot give my referring friend a movie gift card.

Some of you lawyers out there have gotten pretty creative with these rules. One article goes so far as to describe the referral fee ban as a "subterranean competence test: if you can't see a way round it, you're not much of a lawyer." Richard Moorhead, *After referral fees – Ethical personal injury practice?* Lawyer Watch, March 21, 2014, *available at* http://lawyerwatch.wordpress.com/2014/03/21/after-referral-fees-ethical-personal-injury-practice/. For example, in about 2000, a lawyer-referral service tried to get around the referral fee ban by charging a referral fee to the clients, and then recommending that the lawyer discount his fee until the client's referral fee was reimbursed. Unfortunately for the lawyer referral service (and its referral-receiving lawyers), the EAOC concluded this attempt fails the subterranean competence test. Utah State Bar, Ethics Advisory Opinion Committee, Op. 01-02, ¶ 9 (2001).

The scope of the referral fee ban is surprisingly broad. To help Utah lawyers avoid unpleasant surprises, the accompanying charts spell out some of the specific bans in place as well as conduct that has been ostensibly approved, in EAOC opinions. Of course, the list is not comprehensive, so please read the rules and EAOC opinions and seek individualized help and advice with your own creative ways to avoid the ban.

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

PROHIBITED (OR PROBABLY PROHIBITED) CONDUCT	SOURCE
Paying referral fees to another lawyer (unless the standards of rule 1.5(e) are met)	EAOC Op. 121 (1993); EAOC 13-02
Payment of referral fee by client and having lawyer then discount fees until referral fee is reimbursed to client	EAOC Op. 01-02
Discounting fees to participants in a fund raising event for a charitable organization	EAOC Op. 01-02
Discounting a contingency fee charged to a personal injury client referred by accounting firm when client simultaneously enters into contingent fee agreement with referring accounting firm for provision of accounting services based on fee equal to the lawyer's discount	EAOC Op. 01-02
Discounting fees to clients referred by third party while at the same time promoting third party's practice	EAOC Op. 01-02
An arrangement by which a lawyer purchases the exclusive right to receive referrals from a referral organization; to be permissible, lawyer referral service must provide referrals to multiple lawyers and law firms	EAOC Op. 07-01
Giving non-lawyer employees a $50 bonus for referring cases to the firm	EAOC Op. 13-02
Giving gift certificates or gift cards in exchange for referrals	EAOC Op. 13-02
Indirect or non-monetary compensation for referrals	EAOC Op. 13-02
Providing free legal services in exchange for referrals	EAOC Op. 13-02
Paying a hired marketer a fee or commission each time the marketer brings in a new client	EAOC Op. 13-02
Paying a marketer a fixed salary to contact insurance agents, tow truck drivers, body shop owners, or employees and health care providers to request referrals to the attorney	EACO Op. 13-02
Paying a hired marketer with gift cards each time the marketer brings in a new case	EAOC Op. 13-02
Non-exclusive, announced reciprocal referral agreements, including such agreements with lawyers or non-lawyers	EAOC Op. 13-02
Lawyer's payment of joint advertisements with non-attorney with expectation of future referrals by non-attorney	EAOC Op. 13-02
Paying a non-lawyer marketer based on a percentage of fees paid to the law firm by clients referred by the marketer	EAOC Op. 14-02

PERMITTED CONDUCT	SOURCE
Lawyers divide tasks and allocate fees in proportion to task division and meet requirements of rule 1.5(e)	EAOC Op. 121 (1993)
Lawyers assume "joint responsibility" for the work (fee need not be proportional to lawyers' actual work) and meet requirements of rule 1.5(e)	EAOC Op. 121 (1993)
Paying a fee to a referral organization so long as the fee is not calculated on a per-referral basis. ("If the referral organization consists entirely of lawyers, the payment of the referral fee must comply with the limitations imposed by rule 1.5(e).")	EAOC Op. 01-02
Payment of costs for print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising	EAOC Op. 13-02
Paying others to generate client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, the payment is consistent with rules 1.5 and 5.4, and the lead generator's communications are consistent with rule 7.1	EAOC Op. 13-02
Paying a marketer/paralegal for clerical and case preparation work such as gathering police reports, medical records, etc., under certain conditions	EAOC Op. 13-02
Accepting referrals from employees, so long as the lawyer does not give anything of value for the referral	EAOC Op. 13-02
Compensating employees, agents, and vendors for providing marketing or client-development related services, provided compensation is not based on referrals that come from the services	EAOC Op. 13-02

Of Students, Clients, and Volunteer Attorneys

by Jill O. Jasperson

This article is based on empirical data collected from the Free Legal Clinic (the Clinic) conducted at Utah Valley University (UVU) on October 22, 2013. The 5th Annual Free Legal Clinic was hosted at UVU's Library from 7–9 p.m. The Clinic was sponsored by the Woodbury School of Business, UVU Legal Studies Department, Utah Bar Association, Central Utah Bar Association, the A. Sherman Christensen Inn of Court, and Utah Community Credit Union.

STUDENTS

Ninety-three undergraduate legal studies students participated in the Clinic, and duties were varied: from observing attorneys to placing posters for the event. There were fifty-five students who responded to our questionnaire; 58% of students agreed that the Clinic builds their resume, and 83% did the extracurricular activity to have interaction with lawyers. More than half found it a good way to network for future job opportunities, and 52% were aware of the affiliation with ABA's Celebrate Pro Bono Celebration. Approximately 97% of the students recognized that the clients seemed very grateful for the volunteer attorney help they received. And 74% of the students planned to continue with their legal studies careers. Of those participants, 65% said they would like to help with the next Pro Bono Celebration, 69% viewed the experience as strengthening their view in pursuing a law career, and 63% felt that their value in the legal system increased.

These numbers show the great impact the Utah Bar lawyers can have on undergraduate students in a volunteer legal clinic.

CLIENTS

Eighty-nine clients were served that night, and of those served, fifty-five responded to the questionnaire. There was an even mix of males (twenty-three) and females (twenty-eight) with four unknown. Ages spanned from eighteen to sixty-five. The breakdown of ages were as follows: 7% from 18–24; 35% from 19–34; 31% from 35–44; 11% from 45–54; 9% from 55–64; and 2% were 65 and up. Therefore, the majority of clients ranged from ages eighteen to fifty-four.

> *"Ninety-two percent of the attorneys felt they had really helped. Clients seemed to agree with that assessment as well."*

The Clinic served 64% whites, 24% Hispanic/Latinos, 2% Native Americans, 4% Asian/Pacific Islanders, and 7% unknown. The majority of clients, approximately 53%, had household incomes of less than $25,000. Ninety-six percent of the clients stated that the attorney they met with was knowledgeable about the law. Ninety-four percent agreed that the information they received helped them know what their legal options were. Ninety-eight percent said they would come back, overall, 94% felt that coming to the clinic would be beneficial in guiding them to solve their legal issue.

ATTORNEYS

Twenty-seven attorneys participated in the clinic, and twenty-four of them were willing to fill out a questionnaire: the

JILL O. JASPERSON is an Associate Professor of Legal Studies at UVU, and is the founder/organizer of the UVU Free Legal Clinic.

clinic featured 58% males, and 38% females, with one abstention. Out of the twenty-four individuals who answered the questionnaire, there were various fields of practice. The most prevalent practices included family law, civil litigation, business, employment law, estate planning, and criminal law. There were fewer attorneys practicing in areas of personal injury, immigration, bankruptcy, landlord/tenant, consumer protection, administrative, and fiduciary litigation. The more prevalent practices also coincided with the areas of law that clients needed.

Attorneys from various age ranges participated. It was a pleasant mix from the 25–34 range at 17%, 35–44 at 29%, 45–54 at 25%, 55–64 at 21%, and even 65 plus at 8%.

Legal experience was another question: A good portion of advice came from experienced and wise attorneys. There was one attorney with experience less than a year, six had 1–5 years' experience, two had 6–10 years, eight had 11–20 years, and seven had 20 plus years' experience. Approximately 62% of attorneys participating had between 11–20 plus years of experience. Two questions indicated the attorney's experience and knowledge: "The clients I saw had legal issues I wasn't experienced with." Seventy-five percent disagreed or strongly disagreed with that statement. "The clients I saw had complex issues." Only 29% agreed with that statement, while the other 71% disagreed, strongly disagreed, or were neutral.

Fifty-one percent of the attorneys agreed or strongly agreed with the statement: "The clients I saw seemed lost in the legal system." Another question was "The clients I saw had issues that seemed emotionally and/or financially overwhelming to them." Sixty-seven percent of the attorneys agreed or strongly agreed with this statement.

The attorneys were very positive when asked about their experience with the Clinic. Seventy-nine percent strongly agreed with the statement, "I do the Free Legal Clinic because it is gratifying to help others." Fifty-eight percent strongly agreed with the statement, "I do the Free Legal Clinic because public service interests me." Eighty-seven percent agreed or strongly agreed with the statement, "As a whole, my experiences at the Free Legal Clinic have been positive." Seventy-one percent agreed or strongly agreed with "I plan on helping next year with the event."

The most telling question was "The clients I saw walked away with a plan to take action." Ninety-two percent of the attorneys felt they had really helped. Clients seemed to agree with that assessment as well: 94% agreed that the information they received helped them know their legal options. The night was considered a resounding success, and the Clinic in cooperation with ABA's Pro Bono Celebration will continue in future years.

The 6th Annual 2014
UVU Free Legal Clinic
will be held at the UVU Library
on Tuesday, October 21, 2014,
from 7–9 p.m.

Please contact:
Prof. Jill O. Jasperson
at jillj@uvu.edu
for information or to volunteer.

The Divide, American Injustice in the Age of the Wealth Gap

Reviewed by Andrea Garland

Two groups of people should read Matt Taibbi's *The Divide, American Injustice in the Age of the Wealth Gap*: those interested in criminal justice and those interested in retiring someday. Mr. Taibbi, journalist and *Rolling Stone* contributing editor, has written an engaging, outraging, and sagacious book. Its subject: the criminal justice system's disparate treatment of financial crimes committed by Wall Street, "the industry surrounded by the legal equivalent of tinted windows," *The Divide*, p. 142, and relatively harmless, victimless, "quality-of-life" crimes committed (or perhaps not committed) by people in America's lower-income neighborhoods. Mr. Taibbi asks and answers his own question:

> What deserves a bigger punishment – someone with a college education who knowingly helps a gangster or a terrorist open a bank account? Or a high school dropout who falls asleep on the F train?
>
> The new America says it's the latter. It's come around to that point of view at the end of a long evolutionary process, in which the rule of law has slowly been replaced by giant idiosyncratic bureaucracies that are designed to criminalize failure, poverty, and weakness on the one hand and to immunize strength, wealth, and success on the other.

Id. at p. xxii.

Mr. Taibbi describes why, while valid policy arguments may support dragnet policing in poor neighborhoods, mass incarceration of poor criminals, and, in contrast, light-handed treatment of rich criminal institutions, the juxtaposition erodes respect for the rule of law while simultaneously jeopardizing investments.

According to Mr. Taibbi, Wall Street's largest corporations in the twenty-first century have been getting away with fraud, tax fraud, bank robbery, money laundering, embezzlement, libel, grand-scale Ponzi schemes, perjury, and other financial chicanery with perhaps not the blessing of the U.S. government, but without much interference. Mr. Taibbi sets forth that Wall Street's financial meltdown of 2007–2008 resulted not from accidental market mishaps but from deliberate systemic fraud that prosecutors chose to not prosecute.

The Divide, American Injustice in the Age of the Wealth Gap

by Matt Taibbi
Molly Crabapple, Illustrator

Published by Spiegel & Grau (2014)

Available in Hardcover, Paperback, Audible Book, and E-book formats

For example, Washington Mutual acquired "one of the most corrupt companies on earth," *id*. at 357, a California subprime mortgage lender who lent "to anything that moved, falsifying income statements, faking credit scores, doing anything to get people approved." *Id*. A Senate investigation revealed "WaMu" knew the loans were fraudulent. The bank's response? They intentionally concealed information and sold the worthless loans to investors. When in 2008 home defaults began accumulating, WaMu's depositors and investors began

ANDREA GARLAND is a trial attorney at Salt Lake Legal Defender Association.

demanding their money back.

The government's response? Mass felony fraud prosecutions? RICO prosecutions against top executives? Pleas in abeyance demanding restitution and structural changes in business practices? Not exactly. In order to prevent bank failure in which the FDIC would have had to compensate consumers, Timothy Geithner, then-president of the Federal Reserve Bank of New York, and Hank Paulson, then Treasury Secretary, arranged for JPMorgan Chase to purchase WaMu and its $307 billion in assets for $1.9 billion, just a few weeks before the government gave Chase $25 billion in bailouts. In the same way, they assisted Chase to purchase Bear Stearns, in trouble for the same behavior, even assisting with a federal loan. These sales "allowed the state to conceal massive criminal conspiracies from the public and markets by burying the toxic, fraudulently generated assets of these corrupt companies in the billowing skirts of a stable, 'reputable,' too-big-to-fail company." *Id*. at p. 360.

In similar fire-sale fashion, Barclays acquired Lehman Brothers, this time facilitated by Lehman Brothers' bankruptcy, in which Lehman executives tasked with valuing Lehman's assets obtained large bonuses from Barclays for their work undervaluing Lehman's assets. The deal was represented to the bankruptcy judge as "a wash," although Barclays made more than $5 billion profit. Meanwhile, lawyers for Lehman's unsecured investor creditors: a wine workers' union, firefighters, Australian Boys' clubs, missionaries in Africa, the city of Long Beach, California, and various other funds, were excluded from negotiations. Creditors pursued long and expensive civil proceedings because federal prosecutors had no interest in the swindle.

> Wall Street crime, in part, is a confidence game in which the criminal justice system itself is the mark. Much like common street grifters, who bank on the victim's feelings of shame and guilt preventing him from going to the police, Wall Street criminals bank on the terminal intellectual insecurity of their regulators. They dare prosecutors to call what they've done crimes, knowing they'll be hesitant to disagree with the hotshot defense lawyers from New York and Washington who make forty or fifty times what they do.
>
> So a foreign bank steals billions of dollars from dozens of American towns like Long Beach, but when the bank's lawyers call the transaction not theft but "clarification," American law enforcement is mesmerized by the semantics. It then declares the issue a civil matter and kicks the problem to the civil courts, where the best hope for the victims now is not for justice but for mere remuneration.

Id. at pgs. 176–77.

Mr. Taibbi overstates this point. Yet, once the true value of Lehman's assets came to light in bankruptcy court the judge punted on grounds that even the fraudulently lopsided deal likely saved jobs, albeit perhaps not those of Lehman's creditors.

Saving jobs, in United States Attorney General Eric Holder's "Collateral Consequences" memo, is one reason the Department of Justice fails to prosecute large corporations' crimes. Holder advised federal prosecutors contemplating criminal charges against large corporations (but not smaller, per Mr. Taibbi), to consider possible collateral consequences to the corporation's officers, directors, employees, and shareholders. According to Mr. Taibbi, the memo, plus some embarrassing unsuccessful previous prosecutions (Arthur Andersen, Senator Ted Stevens), usually causes the Justice Department to pause and reject filing charges. In lieu of criminal charges, the Justice Department often enters into "deferred prosecution agreements," in which the corporation, not any named individual, agrees to a fine. Chase, found to have manipulated bids on municipal bond offerings and defrauded active-duty soldiers, paid fines in deferred prosecution agreements; no one went to jail, and Chase even retained its right to bid on bonds. The giant Swiss bank USB, having previously been caught evading taxes, colluded with nine to sixteen of the world's other largest banks in thousands of transactions bribing officials to manipulate global interest rates. This crime "had consequences for nearly every person in the world who has money or buys or sells anything." *Id*. at p. 65. British and American officials investigated, found their evidence, identified the criminals, and asked the bank to pay a fine with no admission of wrongdoing. Assistant Attorney General for the Criminal Division Lanny Breuer said "the goal [was] not to destroy a major financial institution," *id*. at p. 66, not that arresting individuals necessarily destroys a major financial institution.

Personally, I would rather see someone try to sell me crack than lose home equity or money from my retirement savings due to market manipulation. But according to Mr. Taibbi, it's the raggedy guy with gypsum in his pocket who gets arrested. In contrast to policing Wall Street, police departments unconcerned with collateral consequences to individuals instituted programs "like

the infamous CompStat system and other lesser-known outgrowths of the celebrated 'broken windows' urban policing strategies whose effectiveness depended upon massive numbers of low-level arrests for minor violations." *Id*. at p. 50. In the late 1990s, crime rates dropped all over the country, yet incarceration increased. In 2011, New York City police stopped and frisked for firearms 684,724 people, 88% of whom were black or hispanic, finding guns in fewer than 0.02% of the stops. *Id*. at p. 57. Mr. Taibbi recounts numerous accounts of persons arrested, especially in New York's outer boroughs, on low-level or specious accusations in which "there's almost always a strip search." *Id*. at p. 103. Mr. Taibbi observes the criminal justice system doesn't easily admit error, subjecting arrestees to onerous and protracted proceedings. He describes crumbling, crowded courtrooms with hours-long calendars and dangerous jails where low-income defendants await resolution of their cases. "The punishment is the process." *Id*. at p. 116. While many of the low-level arrests Mr. Taibbi recounts affected persons who were in fact guilty, he nevertheless points out that police disproportionately investigate and arrest poor, black, and hispanic people for the same crimes the white middle classes commit – *e.g.*, riding a bike on the sidewalk, standing in front of a doorway, drinking beer in public, failing to disperse quickly after a legal order to disperse – without attracting law enforcement attention. Then, as a result of arrests for misdemeanor or low-level drug crimes, less well-off employees lose jobs, education opportunities, and professional licenses, while the truly impoverished lose cars and housing.

"[P]olice disproportionately investigate and arrest poor, black, and hispanic people for the same crimes the white middle classes commit… without attracting law enforcement attention."

Mr. Taibbi describes a two-tiered set of criminal justice outcomes that only Ayn Rand could admire. Did you launder money for Middle Eastern terrorists, Chechen extremists, Mexican and Columbian drug cartels, Russian mobsters, tax fraudsters, and the sanctioned state of Iran, as did the Hong Kong and Shanghai Banking Corporation, the largest bank in Europe? Careful, you might be "held accountable" in a deferred prosecution agreement with the U.S. Department of Justice and have to pay a fine that approximates five weeks of your revenue. Did you carry in your backpack a pink highlighter in an area where someone of your race recently graffitied in black ink? Police might handcuff you in full view of your neighbors, drive you around in a windowless van for hours while they arrest others like you, and take you to their precinct for a strip search. Mr. Taibbi describes case after case of "a government-sponsored sorting of the entire population into arrestable and nonarrestable classes." *Id*. at p. 51. He describes the contrast as encouraging disdain for law and order. White collar criminals whose companies pay fines in deferred prosecution agreements experience no deterrent consequences and their victims receive no restitution. Individuals subject to repeated illegitimate stops and arrests tend to acquire a skeptical view of law enforcement and criminal justice.

I found little to criticize in *The Divide*. I wish it included an index. Some sentences are long and confusing. The *International New York Times* said, "[t]he argument isn't laid out in a particularly or rigorous manner," which is a fair observation. Timothy Noah, *The Justice Gap, 'The Divide,' by Matt Taibbi*, International New York Times, April 10, 2014. Mr. Taibbi does tend to wander down tangents. Although unrigorous, his thesis still possesses predictive capability. For example, if tomorrow I ask a prosecutor to consider collateral consequences of a drug conviction on my indigent legal resident client and her American children, I will likely hear that the D.A.'s relevant consideration is whether a crime has been committed. In contrast, this week the Department of Justice considered collateral consequences and entered into a deferred prosecution agreement with Lloyds Bank where the bank, accused of intentionally manipulating interbank interest rates, agreed to pay over $380 million in fines. For the bank's "highly reprehensible conduct," no individuals were arrested, searched, charged, convicted, deported, forced to pay fines with personal funds, forced to spend time in jail or court, or lost professional licenses. Chad Bray, *Lloyds Bank to Pay Over $380 Million to Resolve Manipulation Inquiries*, dealbook.nytimes.com, July 28, 2014. For those inclined to view *The Divide* as a leftist attack on the top economic 1%, Mr. Taibbi lays blame for governmental leniency towards large corporations and contrasting harassment of poor people squarely at the feet of the current and past Democratic presidents' administrations.

"Ultimately this all comes down to discretion. If they want, the police can arrest you for just about anything," *The Divide*, p. 132, but if you run a major corporation they probably won't. The divide between the economic classes' experiences of criminal justice is unjust and probably unsustainable. *The Divide* presents an excellent argument against unreviewable prosecutorial discretion.

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eschmutz@djplaw.com

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Evan has tried over 30 cases to jury verdict and conducted over 100 bench trials, some lasting more than two months, in state and federal courts. He has successfully defended business clients where the claims exceeded more than $100 million. He has experience in a wide variety of civil litigation fields including contracts and business torts, bank litigation, Direct Sale Marketing and FTC litigation, insurance coverage disputes, construction, defense of workplace discrimination claims, trade secret, intellectual property, car dealership and charter school litigation, business valuation claims related to business dissolutions and securities fraud claims.

Rebecca G. Van Tassell
Associate
Salt Lake City
rvantassell@djplaw.com

A 2013 BYU graduate, Rebecca joins D|J|P after serving as a law clerk for Justice Lee at the Utah Supreme Court. She will practice in the firm's commercial litigation section.

Christopher D. Wade
Associate
Salt Lake City
cwade@djplaw.com

Chris is a 2014 graduate of Brigham Young University. He will practice in the firm's commercial litigation section after passing the Utah State Bar exam.

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Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the June 13, 2014 Commission Meeting held at the Utah State Bar Law & Justice Center.

1. The Commission deferred approval of the Bar budget until the next Commission meeting on July 16th.
2. The Commission voted to defer selecting the Lawyer of the Year Award until June 24th.
3. The Commission voted to defer selecting the Judge of the Year Award until June 24th.
4. The Commission voted to defer selecting the Committee of the Year Award until June 24th.
5. The Commission voted to select Intellectual Property the Section of the Year Award.
6. The Commission voted to select the Young Lawyers Division for the Distinguished Service Award.
7. The Commission declined to approve Utah Dispute Resolution's request for $20,000.
8. The Commission voted to approve a $7,500 increase to total a $56,000 contribution to the Young Lawyers Division for 2014–2015.
9. The Commission voted to approve the Court's Advisory Committee proposed modifications to the Rules of Professional Conduct advertising rules.
10. The Commission voted to approve the ABA's Magna Carta's traveling exhibition project.
11. The Commission voted to approve Tanner and Company as the new Bar auditors.
12. The Commission voted to approve Blake Miller's appointment to the Judicial Council's Technology Committee.
13. The Commission approved their Committee and Section Liaison assignments.

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the July 16, 2014 Commission Meeting held at the Summer Convention in Snowmass, Colorado.

1. The Commission voted to set aside $75,000 for pro bono database.
2. The Commission voted to approve 2014–2015 budget.
3. The Commission voted to approve committee chair appointments.
4. The Commission voted to approve ex-officio members.
5. The Commission voted to approve 2014–2015 Executive Committee members.
6. The Commission voted to adopt resolution on bank signatures.
7. Commissioners agreed to contact section chairs to follow up on issues raised at leadership meeting.

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

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
4. Outstanding Mentor Award

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

Attendees at Utah State Bar Past-President Dinner Utah Governor's Mansion – 1984

Shortly before he left office in 1984, Governor Scott M. Matheson and his wife, Norma Matheson, hosted a dinner at the Governor's Mansion for the current and past Presidents of the Utah State Bar and their spouses. Governor Matheson had been Bar President in 1968–69. Twenty-one past Presidents, then-current President Stephen Anderson and then-current President-Elect Brian Florence, were in attendance. James Lee recently shared this photo taken at the event with the *Bar Journal*. We thought our readers might enjoy it.

Front Row:
Brian R. Florence 1984–85
Governor Scott M. Matheson 1968–69 (deceased)
Tenth Circuit Court of Appeals Judge Stephen H. Anderson 1983–84

Second Row:
Judge A. Sherman Christensen 1951–52 (deceased)
A. Thorpe Waddingham 2002–03 (deceased)
James B. Lee 1977–78
Carvel Mattsson 1948–49 (deceased)
Former Attorney General A. Pratt Kesler 1959–60 (deceased)
Judge Burton H. Harris 1971–72 (deceased)
Elder James E. Faust 1962–63 (deceased)
O. Wood Moyle, III 1982–83 (deceased)
Duane A. Frandsen 1981–82 (deceased)
LaVar E. (Bud) Stark 1973–74 (deceased)

Third Row:
Cullen Y. Christensen 1966–67 (deceased)
Davis S. Kunz 1967–68
Carman E. Kipp 1980–81 (deceased)
Harold G. Christensen 1975–76 (deceased)
Ray R. Christensen 1965–66

Fourth Row:
Judge J. Thomas Greene 1970–71 (deceased)
W. Eugene (Gene) Hansen 1979–80
Judge Sterling R. Bossard 1969–70 (deceased)
Joseph (Joe) Novak 1974–75
John C. Beaslin 1978–79

2014 Summer Convention Awards

The Utah State Bar presented the following awards at its Summer Convention in Snowmass Village, Colorado:

JUDGE OF THE YEAR

Judge James L. Shumate

LAWYER OF THE YEAR

Charlotte L. Miller

SECTION OF THE YEAR

Intellectual Property Section

Steven P. Shurtz, Chair 2014–15

Perry S. Clegg, Chair 2014–15

Paul N Taylor, Vice Chair 2014–15

Brent P. Lorimer, Secretary 2014–15

COMMITTEE OF THE YEAR

Civics Education Committee

Angelina Tsu

Benson L. Hathaway, Jr.

Co-Chairs

THANK YOU TO OUR CONVENTION SPONSORS:

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Christensen & Jensen
Clyde Snow & Sessions
Cohne, Rappaport & Segal
Durham, Jones & Pinegar
Fabian Law
Holland & Hart
Jones, Waldo, Holbrook & McDonough
Kaufman, Nichols, Olds & Kaufman
Kirton | McConkie
Manning Curtis Bradshaw & Bednar
Parr Brown Gee & Loveless
Parsons Behle & Latimer
Prince, Yeates & Geldzahler
Randy S. Kester
Ray, Quinney & Nebeker
Richards Brandt Miller & Nelson
Snell & Wilmer
Snow Christensen & Martineau
Snow Jensen & Reece
Stoel Rives
Strong & Hanni
Thorpe North & Western
TraskBritt
Van Cott, Bagley, Cornwall & McCarthy
Williams & Hunt
Workman/Nydegger

Notice of Verified Petition for Reinstatement by David Christopher VanCampen

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of Respondent's Petition/Motion to To Terminate Probation and Return Bar Status to Good Standing (Petition) filed by David Christopher VanCampen in *In the Matter of the Discipline of David VanCampen*, Third Judicial District Court, Civil No. 080924407. 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.

Notice of Petition for Reinstatement to the Utah State Bar by Jerry D. Reynolds

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 to Practice Law (Petition) filed by Jerry D. Reynolds, in *In the Matter of the Discipline of Jerry D. Reynolds*, Fourth Judicial District Court, Civil No. 120100211. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Bar Thank You

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

Ryan Andrus
J.D. Ashby
Ken Ashton
P. Bruce Badger
Bart Bailey
Allyson Barker
Kimberly Barnes
J. Ray Barrios
Hon. Brent Bartholomew
Jon Bauer
James Bergstedt
John Bowen
Elizabeth Butler
Sarah Campbell
Jared Casper
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Amy Jonkhart
Derek Kearl
Alyssa Lambert
Derek Langton
Greg Lindley
Kelley Marsden
Elisabeth McOmber
Tony Mejia
Angela Micklos
Branden Miles
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Tanya Peters
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Summer Shelton
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James Sorenson
J. Kelly Walker
Ben Whisenant
Jason Wilcox
Colleen Witt
Brent Wride
Kelsy Young
John Zidow

Notice of Legislative Rebate

Bar policies provide that lawyers may receive a rebate of the proportion or their annual Bar license fee which has been expended during the fiscal year for lobbying and any legislative-related expense by notifying the Executive Director, John C. Baldwin, 645 South 200 East, Salt Lake City, Utah 84111 or at jbaldwin@utahbar.org.

Pro Bono Honor Roll

Adams, Stanley – Adoption/Termination of Parental Rights Case

Allred, Clark – Family Law Case

Allred, Parker – Tuesday Night Bar

Amann, Paul – Tuesday Night Bar

Anderson, Doug – Family Law Clinic

Anderson, Michael S. – Tuesday Night Bar

Anderson, Skyler – Immigration Clinic

Andreasen, Dean C. – Tuesday Night Bar

Andrus, Mark – Debtor's Legal Clinic

Angelides, Nick – Estate Planning Cases

Archibald, Nathan – Tuesday Night Bar

Arnold, Brian – ORS Calendar, Second District

Arrington, Mark – Probate Case

Backlund, Erika – Family Law Case

Ballow, Gordon Andrew – Family Law Case

Barclay, Linda – TLC Document Clinic

Barnett, Dan – Tuesday Night Bar

Barrick, Kyle – Senior Center Legal Clinic

Barton, Carl – Tuesday Night Bar

Bawden, Eric – Tuesday Night Bar

Benson, Jonny – Immigration Clinic

Bernard, Blaine – Post-Conviction Case

Bertelsen, Sharon – Senior Center Legal Clinic

Billings, David – Debt Collection Calendar

Black, Michael D. – Tuesday Night Bar

Blanchard, Brad – Family Law Case

Blanton, Trudi – Expungement Case

Bsharah, Perry – Debtor's Legal Clinic

Burnett, Brian W. – Debt Collection Calendar

Burton, Mona Lyman – Tuesday Night Bar

Carlson, Joseph – TLC Family Law Clinic

Carlston, Charles – TLC Family Law Clinic

Carson, Eric – Family Law Case

Clark, Melanie – Senior Center Legal Clinic

Coil, Jill – Tuesday Night Bar

Collier, Heather – Pro Bono Case

Conley, Elizabeth – Senior Center Legal Clinic

Conyers, Kate – Tuesday Night Bar

Coombs, Brett – Street Law Clinic

Cornish, Rita – Tuesday Night Bar

Corporon, Mary – Family Law Cases

Crane, Michelle – Family Law Case

Crebs, Colin – Family Law Case

Crismon, Sue – Expungement Law Clinic

Cundick, Ted – Debtor's Legal Clinic

Cundick, Ted – Bankruptcy Case

Davis, Mikkel – TLC Family Law Clinic

Deus, Jeremy – Family Law Clinic

Deus, Jeremy – Tuesday Night Bar

Deus, Jeremy – Family Law Cases

Dez, Zal – Family Law Clinic

Drake, Aaron – Family Law Cases

Evans, Chris – Family Law Case

Evans, Russell – Rainbow Law Clinic

Falk, Jennifer – Family Law Case

Ferguson, Phillip S. – Senior Center Legal Clinic

Fillmore, W. Jeffery – Debt Collection Calendar

Floyd, Jerrid – Family Law Cases

Fox, J. Tayler – Debt Collection Calendar

Fox, Richard – Senior Center Legal Clinic

Gardner, David – Family Law Case

Gardner, Jordan – Family Law Case

Gilbert, Graham – Tuesday Night Bar

Gittins, Jeff – Street Law Clinic

Gonzalez, Marlene F. – Immigration Clinic

Gordon, Andrew Owens – Expungement Case

Hansen, Clint – Adoption Case

Harding, Sheleigh – Family Law Clinic

Hardy, Dustin – TLC Family Law Clinic

Harmon, Ben – Debt Collection Calendar

Harrison, Jane – Expungement Case

Harrison, Matt – Street Law Clinic

Hart, Laurie – Senior Center Legal Clinic

Hatch, Dave – Tuesday Night Bar

Henderson, Rand – Family Law Case

Hollingsworth, April – Street Law Clinic

Holt, Becky – Tuesday Night Bar

Hurst, John – Tuesday Night Bar

Jelsema, Sarah – Family Law Clinic, Guardian ad Litem Case

Jensen, Micheal A. – Senior Center Legal Clinic

Kearl, Derek – Tuesday Night Bar

Kennedy, Michelle – Debt Collection Calendar

Kessler, Jay – Senior Center Legal Clinic

Kotter, Jon – Tuesday Night Bar

Langeland, David J. – Debt Collection Calendar

Large, Stephanie – Family Law Case

Lattin, Peter – TLC Family Law Clinic

Lee, Terrell R. – Senior Center Legal Clinic

LeMieux, Andy – Tuesday Night Bar

Locke, Erin Edward – Family Law Case

Long, Adam – Street Law Clinic

Lund, Niel – Bankruptcy Case

Lyons, Jacob D. – Debt Collection Calendar

Machlis, Ben – Post-Conviction Case

Mares, Robert – Family Law Clinic

Marquez, Laura – Tuesday Night Bar

Marychild, Suzanne – Family Law Case

Maughan, Joyce – Senior Center Legal Clinic

McCann, Eli – Tuesday Night Bar

McCoy, Harry – Senior Center Legal Clinic

McKay, Megan – Tuesday Night Bar

McOmber, Liz – Tuesday Night Bar

Miya, Stephanie – Expungement Law Clinic

Montague, Amanda – Debt Collection Calendar

Morris, M. Covey – Debt Collection Calendar

Morrow, Carolyn – Domestic Cases

Morrow, Carolyn – Family Law Clinic

Morrow, Carolyn – Family Law Case

Morrow, Carolyn – Guardian ad Litem Case

Morton, Paul – Tuesday Night Bar

Motschiedler, Susan Baird – Tuesday Night Bar

Mouritsen, Alan – Tuesday Night Bar

Munson, Ed – Tuesday Night Bar

Navar, Allison – Family Law Case

Navarro, Carlos – Immigration Clinic

Nelson, Mark K – Probate Case

Ness, Sandi – Family Law Case

Neville, Adam – Family Law Case

Nielsen, Keri – Family Law Case

O'Neil, Shauna – Bankruptcy Hotline, Bankruptcy Case

O'Neil, Shauna – Debtor's Legal Clinic

Pack, Tim – Tuesday Night Bar

Palacios, Frances – Family Law Case

Parker, Kristie – Senior Center Legal Clinic

Parkinson, Jared – Senior Center Legal Clinics

Pernichele, Matt – Family Law Case

Petersen, Eric – Tuesday Night Bar

Peterson, Jessica – Tuesday Night Bar

Petty, Ralph – Guardianship Case

Pohl, Buddy – Family Law Case

Preston, Derae – Post-Conviction Case

Prignano, Edward – Tuesday Night Bar

Ralphs, Stewart – Family Law Clinic

Rasmussen, Kasey – Debtor's Legal Clinic

Rasmussen, Kasey – Debt Collection Calendar

Rawlins, Christopher – Family Law Case

Richards, Jeff – Tuesday Night Bar

Rinaldi, Leslie – Tuesday Night Bar

Roberts, Katie Brown – Senior Center Legal Clinic

Roche, Mike – Family Law Case

Rogers, Christopher – Bankruptcy Cases

Romney, Walter – Tuesday Night Bar

Salazar, Nicole – Tuesday Night Bar

Salcido, Spencer – TLC Family Law Clinic

Schaefermeyer, Steven – Street Law Clinic

Scholnick, Lauren – Street Law Clinic

Schultz, Lauren – ORS Calendar, Second District

Schulz, Gregory – Tuesday Night Bar

Scruggs, Elliot – Street Law Clinic

Sellers, Andy – Tuesday Night Bar

Semmel, Jane – Senior Center Legal Clinic

Shaw, Jeremy – Debt Collection Calendar

Shaw, LeShel – Tuesday Night Bar

Shibonis, Milda – Family Law Cases

Shields, Zachary T. – Debt Collection Calendar

Sims, Ben – Utah Advance Health Care Directive Clinic

Sims, Ben – Adoption Case

Sjoblom, Andrew – Post-Conviction Case

Sjoblom, Andrew – Tuesday Night Bar

Slater, Julie – Tuesday Night Bar

Smith, Aunica – Family Law Case

Smith, Craig – Street Law Clinic

Smith, Jacob – Family Law Case

Smith, Linda F. – Family Law Clinic

Smith, Shane – Street Law Clinic

So, Simon – Family Law Clinic

Sorensen, Mark – Family Law Case

Sorensen, Samuel J. – Family Law Clinic

Sparks, Ryan – Tuesday Night Bar

Sparks, Ryan – Bankruptcy Case

Stanley, Josh – Family Law Case

Stolz, Martin – Street Law Clinic

Stormont, Charles A. – Debt Collection Calendar

Stringham, Reed – Debt Collection Calendar

Sudbury, Virginia – Post-Conviction Case

Thompson, Elizabeth – Adoption Case

Thorne, Jonathan – Street Law Clinic

Thorne, Matthew – Tuesday Night Bar

Thorpe, Scott – Senior Center Legal Clinic

Timothy, Jeannine – Senior Center Legal Clinic

Trease, Jory – Debtor's Legal Clinic

Turner, Jenette – Tuesday Night Bar

Wertheimer, Rachel – Tuesday Night Bar

Wharton, Chris – Rainbow Law Clinic

Wheat, Jay – Family Law Case

Williams, Rachel – Family Law Case

Williams, Timothy G. – Senior Center Legal Clinic

Wilson, Analise – Tuesday Night Bar

Wing, Robert – Family Law Case

Winzeler, Zack – Tuesday Night Bar

Woodard, M'Leah – Family Law Case

Wycoff, Bruce – Tuesday Night Bar

Zaehringer, Robert – Family Law Cases

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 May-July 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.

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE
Call the Bar's Ethics Hotline at (801) 531-9110 Monday through Friday from 8:00 a.m. to 5:00 p.m. for fast, informal ethics advice. Leave a detailed message describing the problem and within a twenty-four-hour workday period, a lawyer from the Office of Professional Conduct will give you ethical help about small everyday matters and larger complex issues.

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

SUSPENSION

On July 10, 2014, the Honorable Judge Keith Kelly, Third Judicial District Court, entered an Order of Discipline against Mr. Dwight B. Williams, suspending Mr. Williams' license to practice law for one year for his violation of Rule 1.3 (Diligence), Rule 1.7(a)(2) (Conflict of Interest: Current Clients), Rule 1.15(a) (Safekeeping Property), Rule 1.15(d) (Safekeeping Property), and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Williams was appointed as trustee of a trust which was created by the trust grantor to serve as a supplemental needs trust. Mr. Williams also served as attorney for the trust and for the trust grantor. Mr. Williams as attorney and trustee, did not perform proper due diligence prior to investing trust funds. Mr. Williams, as attorney and trustee, failed to diligently secure loans made to persons from the trust. Mr. Williams, as attorney and trustee, failed to diligently pursue collections of loans and lost investment monies for the trust. Mr. Williams did not obtain adequate security before or simultaneously with the dispensing of trust funds for loans and investments and did not diligently pursue collection of funds from the transactions.

Mr. Williams, as attorney and trustee, made loans from the trust to friends, colleagues and former associates. Mr. Williams, as attorney and trustee, made investments based upon his own personal friendships and relationships without performing any objective due diligence. Mr. Williams used trust funds to fund transactions in which he had a personal interest with the third parties.

Mr. Williams as attorney for the trust moved trust funds from the trust account to his firm and placed the funds in the firm client trust account. He did not hold the funds separately from other client funds or from firm funds. Mr. Williams failed to keep the trust funds safe.

Mr. Williams failed to provide any information to the trust beneficiaries regarding losses of funds each year while the trust funds were under his control. Mr. Williams did not disclose to the beneficiaries that he was making loans from the trust funds to friends and colleagues without fully securing the loans for repayment. Mr. Williams failed to disclose to the beneficiaries that he was using trust funds for investments that were high risk

and not appropriately safeguarded. Mr. Williams failed to create separate trusts as required under the trust agreement, failed to promptly deliver funds to the separate trusts as required under the trust agreement and then failed to disclose this information to the beneficiaries. Mr. Williams failed to disclose to the beneficiaries any information that would allow them to make informed decisions regarding the funds.

Mr. Williams represented to the beneficiaries that he had given oral accounting to the trust grantor when he had not. Mr. Williams was asked repeatedly to account for the funds under his control and failed to provide accountings of the funds.

Mitigating factors:
Absence of prior discipline; good character and reputation; and efforts at making restitution.

SUSPENSION

On March 29, 2014, the Honorable Judge Paul Parker, Third Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Discipline: Suspension against Mr. Chad D. Noakes suspending Mr. Noakes' license to practice law for one year for his violation of Rule 8.1(b) (Bar Admission and Disciplinary Matters) and Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:
While conducting a routine traffic stop of Mr. Noakes' vehicle, a Salt Lake City police officer found a substance which tested positive as methamphetamine inside Mr. Noakes' vehicle. Mr. Noakes informed the officer he had given another male $300 for an amount of methamphetamine worth $260. Mr. Noakes was charged with Possession or Use of a Controlled Substance, a Third Degree Felony (Utah Code Ann. §58-37-8(2)(A)(I)). Mr. Noakes pled guilty to an amended charge of Attempted Possession of a Controlled Substance, a class A Misdemeanor, which was to be held in abeyance for one year and dismissed if Mr. Noakes completed the conditions of the plea deal. Mr. Noakes also violated the ethical rules when he was sent a Notice of Informal Complaint (NOIC) requiring him to respond in writing to the informal Bar complaint and Mr. Noakes failed to submit a NOIC response.

PUBLIC REPRIMAND
On May 28, 2014, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Walter T. Keane for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation and Allocation of Authority), and 1.4(a) (Communication) of the Rules of Professional Conduct.

In summary:
Mr. Keane was hired to represent two defendants in a debt collection/foreclosure matter filed against them by a law firm for unpaid attorney fees. Mr. Keane was paid a flat fee for his legal representation.

After Mr. Keane filed an appearance of counsel on behalf of his clients, a telephone conference was held by the court and Mr. Keane failed to appear. The court could not reach Mr. Keane. Mr. Keane's clients were not informed of the court date in advance of the telephone conference.

Subsequently, Mr. Keane filed a Certificate of Completion of Discovery and Request for Trial Date. The court held a telephone conference. Mr. Keane's clients were not informed of the court date in advance of the telephone conference. At the telephone conference, without his clients' consent and against his clients' instruction to litigate the issue, Mr. Keane offered to settle the matter by stipulating to an amount of damages and agreeing that a final judgment be entered against his clients. The amount of the damages and judgment that Mr. Keane agreed to was in excess of the amount of damages sought in the complaint filed against Mr. Keane's clients.

Plaintiff's counsel prepared and sent a stipulation and other documents to Mr. Keane for signature. They were never signed by Mr. Keane or his clients. As a result, the plaintiff filed a motion to enforce the settlement, which was granted by the court.

Aggravating factors:
Lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved.

Mitigating factors:
Lack of prior discipline.

SUSPENSION & PROBATION
On May 27, 2014, the Honorable Judge Robert Faust, Third Judicial District Court, entered an Order of Discipline: Suspension and Probation against Ms. April R. Morrissette for violation of Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:
Ms. Morrissette pled guilty to and was convicted in Colorado of one count of Felony Menacing – Real/Simulated a class 5 felony, C.R.S. § 18-3-206(1)(a)/(b). Ms. Morrissette also pled guilty to a related crime of one count of Child Abuse – Negligence a class 3 misdemeanor, C.R.S. §18-6-401(1), (7)(b)(II). Ms. Morrissette violated the statutes by aiming a gun at a group of people in a threatening manner while yelling obscenities, and then shooting into the ground. One of the members of the group was a three-year old child.

Ms. Morrissette's term of suspension began on April 22, 2013. Following the one-year suspension period, Ms. Morrissette will be on probation for a period of two years.

Mitigating factors:
Absence of prior discipline; and full and free disclosure to the client or the disciplinary authority prior to the discovery of any misconduct or cooperative attitude toward proceedings.

PUBLIC REPRIMAND
On June 12, 2014, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Stuwert B. Johnson for violation of Rules 1.1 (Competence) and 8.1(b) (Bar

Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
Mr. Johnson was hired to represent a client in a paternity action involving the custody and support of a minor child. Pursuant to Mr. Johnson's legal advice, his client relocated out of state with the minor child without providing sixty days notice of the relocation as required by statute. At a hearing on an Order to Show Cause, Mr. Johnson's client was held in contempt of court for moving without giving sixty days notice and for denying parent time. As a result, Mr. Johnson's client was ordered to perform community service and to pay attorney fees.

The Office of Professional Conduct sent a Notice of Informal Complaint (NOIC) to Mr. Johnson requiring him to respond in writing to the informal Bar complaint. Mr. Johnson failed to submit a NOIC response.

PUBLIC REPRIMAND

On June 5, 2014, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against J. Keith Henderson 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:
Mr. J. Keith Henderson was hired to assist with a disability claim. After Mr. Henderson was hired, his client was unable to contact him for two months. After finally getting in touch with Mr. Henderson, Mr. Henderson explained that personal circumstances had put him behind and he would send a report assessing the disability claim right away. After two more months of not hearing anything, the client again tried to contact Mr. Henderson. Mr. Henderson said he would send the report the following Monday. Mr. Henderson never sent the report.

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

ADMONITION

On June 30, 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 1.7(a) (Conflict of Interest: Current Clients) and 1.8(a) and Rule 1.8(i) (Conflict of Interest: Current Clients: Specific Rules) of the Rules of Professional Conduct.

In summary:
The attorney acted as legal counsel and advisor for an individual from whom the attorney purchased a business ownership

interest. The attorney entered into the business transaction with the client without securing the client's informed consent, in writing, to attorney's role in the transaction. The attorney also used information relating to the representation of the client to the client's disadvantage in obtaining a purchase price for the business ownership interest. Through the business transaction, the attorney acquired a proprietary interest in the subject matter of a lawsuit in which the attorney was counsel of record for most of the defendants named in the lawsuit.

Mitigating factors:
Absence of a prior record of discipline; absence of a dishonest motive; timely good faith effort to make restitution or to rectify the situation; and genuine remorse.

RESIGNATION WITH DISCIPLINE PENDING

On July 18, 2014, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Steven Kuhnhausen, for violation of Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:
On April 28, 2014, Mr. Kuhnhausen pled guilty to two counts of Unlawful Sexual Conduct with a sixteen- or seventeen-year-old, both 3rd degree felonies, in violation of Utah Code section 76-5-401.2.

SUSPENSION

On July 20, 2014, the Honorable Judge Robert Faust, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Suspension against Mr. Huy Ngoc Vu, suspending Mr. Vu's license to practice law for three years for his violations of Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a) (Fees), Rule 1.16(d) (Declining or Terminating Representation), and Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary, there are five matters:
In the first matter, Mr. Vu was hired for legal representation in a divorce matter. Mr. Vu filed several documents with the court including the Verified Complaint for Divorce and also sent and received several email correspondences in connection with his representation of the client. Subsequently, Mr. Vu stopped responding to the client's emails and phone calls. There is no evidence through invoices and/or an accounting to show that Mr. Vu earned the entire fee he collected. Mr. Vu failed to return unearned fees and return the client's papers.

In the second matter, Mr. Vu was hired for legal representation for modification of a divorce involving child custody issues. Mr. Vu had several communications with the client about the case during the month in which he was hired. Mr. Vu failed to obtain documents and coordinate visitation times as requested by the client. Despite the client's multiple attempts to communicate with Mr. Vu, Mr. Vu did not have any contact with his client following the communications which transpired during the month in which he was hired and he failed to inform the client he would no longer be representing the client.

In the third matter, Mr. Vu was hired to represent a client in divorce modification proceedings. Mr. Vu was ordered to prepare the court's order but failed to do so. Mr. Vu failed to communicate the client's upcoming travel plans with opposing counsel as requested and issues arose regarding the client's child and ex-spouse. When the client returned from the trip, Mr. Vu did not respond to the client's communications. Mr. Vu did not file or send documents for an Order to Show Cause hearing to opposing counsel. Despite repeated attempts to communicate by the client, Mr. Vu did not respond. Mr. Vu failed to give notice that he would no longer represent the client and failed to respond to requests for the client's file.

In the fourth matter, Mr. Vu was hired for legal representation in a divorce matter. During the first two months of the representation, Mr. Vu did some work on the case. Subsequently, despite numerous attempts by the client to communicate, Mr. Vu failed to communicate with the client. Mr. Vu did not send the documents filed by opposing counsel to his client and also failed to return the client's file.

In the final matter, Mr. Vu entered into a fee agreement with a client to finish a Qualified Domestic Relations Order (QDRO) from the client's divorce. During the first two months of the representation, Mr. Vu regularly communicated with the client via email and discussed the process by which he would get information necessary to complete the QDRO. Thereafter, Mr. Vu failed to communicate with the client despite the client's repeated attempts to communicate with him. Mr. Vu did not follow through with the work he agreed to perform. Mr. Vu abandoned the client and failed to give the client notice that he was no longer representing the client.

In all five matters, Mr. Vu was served with a Notice of Informal Complaint requesting information from him concerning the informal Bar complaints. Mr. Vu failed to submit responses in writing to the OPC's requests for information concerning the informal Bar complaints against him.

Wills for Heroes: "A Rewarding Program"

by R. Blake Hamilton

Back in May of 2012, I wrote an article for the *Bar Journal* regarding one of my passions, the Wills for Heroes program. In the two years since then, I have continued my involvement with this amazing program because I find it to be one of the most rewarding parts of my legal practice. I would like to take a few moments and explain why I find this program so rewarding.

The Wills for Heroes program provides wills, living wills, and healthcare and financial powers of attorneys to first responders and their spouses or domestic partners at no cost to them. The origins of the program stem from September 11, 2001, when over four hundred first responders gave their lives to save their fellow Americans.

In 2006, Utah was the twelfth state to adopt the program. Since then, the program has provided complimentary estate planning services to approximately 5,000 first responders, with volunteer lawyers in Utah having contributed approximately 12,000 hours of pro bono legal work at events from Logan to St. George.

These events are scheduled for the third Saturday of every other month. A calendar of future events and further information about the Wills for Heroes program can be found by visiting the Utah Young Lawyers Division's informational website: http://younglawyers.utahbar.org/index.php/Wills_for_Heroes.

The Wills for Heroes program is truly a joint effort with each first responder department. The first responder department provides a contact person to disseminate information and coordinate appointments. The department also provides a classroom or a conference room with tables and chairs where the event may be held.

The first responder department's involvement makes these events special. Our most recent event was hosted by the U.S. Marshal in their offices at the new Federal Courthouse. James A. Thompson, the U.S. Marshal for the State of Utah, was our first responder contact.

After this event, Marshal Thompson wrote me a letter in which he stated,

> It was truly an honor to be able to host this event. . . .I have seen firsthand the type of emotional and financial devastation that can stem when [a] first responder and his/her family is not prepared with the proper documents. I would like to commend all the volunteers who . . .provided this invaluable service. On behalf of each person who benefitted from your services . . .I want to recognize you for the assistance to them and their families and to thank you from the bottom of my heart for the service that we hope that we will never need, but will truly appreciate if we do.

Such gratitude at Wills for Heroes events is common not only from the hosting agency but also the first responders we have an opportunity to assist. Back in April of 2013, I was contacted

R. BLAKE HAMILTON is a shareholder at Durham Jones & Pinegar where he chairs the Governmental Entity Defense Group. He also is an Executive Council Member of the Utah Bar Young Lawyer Division where he has Co-Chaired the Wills for Heroes Committee since 2009.

about a Salt Lake County bailiff who had a brain tumor. He was scheduled for major brain surgery on May 13th but our next scheduled Wills for Heroes event was on May 17th. Through this officer's wife, who is also a first responder, I was able to arrange to meet him at the Utah Bar office prior to his surgery. During our meeting, I learned that he had previously undergone several other surgeries and that his doctors had informed him that he needed to get his affairs in order. We spoke about his wife and his two young children. As a husband and parent of young children, my heart ached when he spoke about his family and his love for them and the uncertainty he felt about his upcoming surgery. As we completed and executed his estate planning documents and later as I helped him out of the building, he tearfully thanked me.

Unfortunately, this officer suffered a stroke during his May 2013 surgery and was never able to recover. This February I learned of his passing. Since then, I have had the opportunity to speak with his widow. She again expressed her gratitude for Wills for Heroes program. This experience was humbling to me, and through it, I know I have been rewarded far greater than anything I was able to do for this family. It also illustrates why I find the Wills for Heroes program so rewarding, because it allows us, as members of the Bar, to provide pro bono legal work as an expression of gratitude to those who sacrifice and put themselves in harm's way to protect their communities – in our small way "protecting those who protect us."

I want to thank all those attorneys, judges (for example, Judge Dever was a recent first-time volunteer), paralegals, and the many first responder departments around the state who have made the Wills for Heroes program a success. The Young Lawyers Division also looks forward to many years of Wills for Heroes events in the future based on the expressed interest in the program. If you haven't had an opportunity to participate in the Wills for Heroes program, please find some time to do so. I know you will be rewarded for it!

Message from the Chair

by Heather Allen

As the new chair of the Paralegal Division, I would like to introduce the 2014–2015 Board of Directors. I am excited and honored to be in this position and am looking forward to helping our Division become even better. I look forward to working with the attorneys in the various divisions of the Bar to help promote the use of paralegals and the importance of the paralegals in our community being a member of our Division.

Chair-Elect – Krystal Hazlett. Krystal is currently a paralegal in the Special Victims Unit at the Salt Lake County District Attorney's Office. She received her paralegal degree from Salt Lake Community College and also has an associate's degree in criminal justice from Salt Lake Community College. She has a bachelor of science in sociology from the University of Utah, and is currently working on her master's degree in public administration at Southern Utah University. Krystal believes so much in education that she is also an adjunct teacher at Salt Lake Community College in the Paralegal Studies Department. Prior to working at the Salt Lake County District Attorney's Office, Krystal worked at the Salt Lake City Prosecutor's Office and at Ballard Spahr. Krystal is a certified paralegal through National Association of Legal Assistants (NALA) and maintains active memberships with the Utah State Bar Paralegal Division and Utah Paralegal Association. Krystal is passionate about volunteering in her community, giving her time to programs and causes such as: the Guardian ad Litem's Office CASA (Court Appointed Special Advocate) program, the Utah State Bar Wills for Heroes, the Utah Food Bank senior food box deliveries, US Marine Corps Toys for Tots, and the Utah Arts Festival, to name a few.

Region I Director – Alaina Neumeyer. Alaina is a paralegal at Farr, Rasmussen, & Farr (FRF). She has been with FRF since December 2013 and, prior to that, she was a paralegal at Farr, Kaufman, Olds, Kaufman, Rasmussen & Nichols since 2001. Alaina currently runs the personal injury & mass tort divisions for the firm. Alaina has over fifteen years of personal injury experience. She works in all types of personal injury and product liability cases, including wrongful death, all types of accident cases, mass torts, and many more. Alaina's efforts on the Vioxx litigation resulted in millions of dollars in recovery for the firm's clients. Alaina specializes in unique insurance claims. She is currently handling the firm's mass tort cases for Transvaginal Mesh, Stryker hip devices, and Pradaxa. Alaina has developed a large network of out-of-state attorneys to assist the firm in its many product liability cases. She graduated from Stevens Henager College with her legal secretarial degree with high honors, and she has her ALS certification from the National Association of Legal Secretaries. Her greatest accomplishment has to be her fifteen-year marriage to her husband and raising her four amazing children.

Region II Director – Karen McCall, ACP. Karen has been in the legal field for fifteen years and recently achieved her Certified Paralegal (CP) and Accredited Commercial Professional (ACP) designations from NALA. She has a B.A. in communications and earned her paralegal certificate from Fullerton College in California before relocating to Utah. She is employed as a paralegal with Strong & Hanni in Salt Lake City, where her work centers on insurance defense, personal injury and construction law. Karen has been married for twenty-two years and has two children. She enjoys music, hiking, and exploring new places.

Region III Director – Christina Cope. Christina specializes in state and federal civil litigation and has eleven years' experience in appellate law, family law, business law, and estate planning. She was employed for the past four years as the lead civil litigation paralegal for Heideman & Associates in Provo. Christina is the owner of Cope Litigation Services, providing ad hoc litigation paralegal support to sole practioners and small firms. She is also the Financial and Administrative Director, and co-owner with her husband, of Ascent IRT, Inc. Ascent IRT provides foster care and therapeutic services for troubled youth. Christina graduated with a degree in paralegal studies from UVU and began her paralegal career at the Utah County Public Defender Association where she helped expand the role of legal assistants. She currently serves with Wills for Heroes and loves new volunteer opportunities. Her volunteer service includes Historic Wendover Airfield Foundation

projects on the Norden Bomb Site storage vault and projects benefitting the Enola Gay hangar restoration. For several years, she served as an independent certified radKIDS® instructor and provided training against abuse, abduction, and bullying to hundreds of children. She is excited to be part of the board so that she can help other paralegals attain their personal and career goals.

Region IV Director – Kari Jimenez. Kari Jimenez received her professional paralegal certificate from the University of Phoenix and has over twenty-two years of experience as a litigation paralegal. She has a broad spectrum of experience which includes criminal defense, criminal prosecution, civil litigation, insurance defense, medical malpractice, products liability, mortgage servicing and lending, and in-house corporate. She obtained her Real Estate license in 2005 and is currently the City Recorder and Paralegal for the municipality of Ivins City. She received her Certified Municipal Clerks (CMC) designation from the University of Utah and will be awarded her Master Municipal Clerk (MMC) designation by the end of this year. Kari served two terms as the Southern Region Director for the Utah Paralegal Association (UPA) and is currently serving as the Region IV Director for the Utah State Bar Paralegal Division. Kari enjoys road and mountain biking, hiking, camping, traveling, and nearly anything that is adventurous.

Director at Large – Sharon Anderson. Sharon has been a paralegal for over twenty-three years. She is currently employed as a litigation paralegal at the Law Offices of Eisenberg Gilchrist & Cutt, working primarily for David Cutt. Over the years, Sharon has worked as a paralegal/legal assistant in law firms, city government, and in-house legal offices of several prominent corporations. She has assisted in a variety of litigation matters involving personal injury, medical malpractice, worker's compensation, labor relations, chemical exposure, and environmental law as well as having experience in contract administration. Sharon attended BYU, married and had a family, then returned to school and graduated from the Legal Assistant Program at Westminster College in 1990. Since 2005, Sharon has served on the board of the Paralegal Division in several capacities, including serving as chair of the Division and ex officio member of the Bar Commission during 2007–2008. Sharon has six adult children and five grandchildren. She views her children and grandchildren as her greatest accomplishment and joy in life.

Director at Large – Julie Emery. Julie has twenty-five years' legal experience focused on complex litigation, trial practice, electronic discovery and document management. After working as a paralegal for approximately ten years, she started and managed a litigation support company providing paralegal and litigation support, mock trials, and trial support to firms and companies in the Intermountain West. Julie is now with the law firm Snow Christensen & Martineau, and she currently works with a busy trial and litigation practice. Julie is a past adjunct instructor for the paralegal programs at Salt Lake Community College and Westminster College, where she taught document management, ethics and practical applications for paralegals. She has served as a director on the boards of Legal Assistants Association of Utah, Center for Family Development, PTSA Legacy Council, Community Council and Eagle Aquatic Team. She enjoys promoting the usage of paralegals and educating paralegals about electronic discovery issues and technologies. Julie is an avid supporter of the Road Home in Salt Lake City; however, her greatest passion is spending time with her family.

Director at Large – Julie Eriksson. Julie has been a paralegal for twenty-three years and an active participant in the Paralegal Division since its inception. She currently serves on the Board of Directors as a Director at Large and as the current Finance Officer. She is past chair of the Paralegal Division 2008–2009 and also served as CLE Chair of the Paralegal Division from 2007–2008. She is also a member of the Utah Paralegal Association and served that association in many capacities, including several years as its president. For the past fourteen years, she has been employed at the law firm of Christensen & Jensen, P.C., where she works in civil litigation

Director at Large – Tamara Green. Tamara is the Paralegal Manager for Parsons Behle & Latimer where she has been employed for twenty-six years. Prior to that, she was employed by the State of Utah. She served as an administrative assistant to Governor Scott M. Matheson and then worked at the Division of Public Utilities as an assistant to the director. In 1988, she graduated from Westminster College with a degree in paralegal studies and obtained her certified paralegal endorsement in 1991. Tamara is a founding member of the Utah State Bar Paralegal Division and was on the *Bar Journal* Editorial Board as the Paralegal Representative. In 2006, she was a member of the ABA site evaluation team that reviewed and approved the paralegal program at Utah Valley State College for ABA accreditation. In addition to the Utah State Bar Paralegal Division, she is a current member of the ABA, the National Association of Legal Assistants and the International Paralegal Management Association. Tamara looks forward to serving on the 2014–2015 board.

Director at Large – Abby Ruesch. Abby has worked in the

legal field for over fifteen years in private practice law offices. She has experience in corporation/LLC set up, estate planning, business and civil litigation, family law, land development, and real estate contract law. She currently works for Academy Mortgage Corporation, where she assists the general counsel in handling corporate governance matters, policies and procedures as well as special projects as assigned and other general corporate matters. She has a business degree from LDS Business College, a bachelor of science degree in speech communication from the University of Utah, and a paralegal degree from Salt Lake Community College.

Director at Large – Cheryl Jeffs. Cheryl is a paralegal at Strong and Hanni, where she works in the areas of litigation and insurance defense. Cheryl has been a paralegal for twenty-two years, having received her paralegal certificate from Wasatch Career Institute in 1990. She earned her CP designation from NALA in September 2005. Cheryl has held other positions in the Paralegal Division, including UMBA liaison and Membership Task Force.

Director at Large – Diane McDermaid, CP. Diane is a paralegal who really does love being a paralegal. She earned her paralegal certificate from Phillips Junior College in the late 80s after spending many months in a S.J.Quinney law library carrel surrounded by a mountain of books. Writing and researching, pre-Internet, cemented her devotion to a profession where there is always something new to learn. Initially, she worked in domestic litigation in Ogden, and it was there she found real joy in working directly with clients. The best parts of her job are those personal relationships she is fortunate enough to gain. Her clients' success matters very much, and she works hard to win and maintain their trust. She especially loves litigation and has been fortunate to have been a member of some trial teams with remarkable lawyers at Snow, Christensen & Martineau (1997–2007) and Parsons Behle & Latimer (2008–present), vigorous advocates who refuse to lose. In the spirit of continual learning, and with no trials queued up at that time, she earned her CP designation through NALA in 2009. She is a volunteer court visitor with the district court, and, in addition, she takes every opportunity to volunteer at Wills For Heroes and Serving Our Seniors with the Utah State Bar Young Lawyer Division. She finds it humbling to do this simple act for those who serve. She is a proud and grateful two Blue Star Mother – her son went into the Army as a medic, and her daughter went into the Air Force on a rescue helicopter squadron. Each of them celebrated several birthdays in Iraq and/or Afghanistan, having made four trips between them. Those who sacrifice and serve have earned Diane's abiding admiration and respect. Diane is honored to be involved in the Bar's Paralegal Division and hopes to advance the paralegal field in some small measure.

Director at Large – Greg Wayment. Greg has over ten years of paralegal experience and is a paralegal at Magleby & Greenwood, P.C. a boutique litigation firm in Salt Lake City, specializing in trademark infringement and complex business disputes. He has been a member of the Paralegal Division, served on the board of directors, and served as the Paralegal Division liaison to the *Utah Bar Journal*. He earned a bachelor's degree from Weber State University.

Ex-Officio – Danielle Davis, CP. Danielle is a certified paralegal with Strong & Hanni. She has worked as a paralegal for twenty-two years with experience in insurance defense, personal injury, bankruptcy, construction law, adoption, collections, and family law. She received her paralegal certificate from Westminster College in 1996 and obtained her certified paralegal designation in 2005. Danielle is the immediate past chair of the Paralegal Division and served as Chair in 2005–2006 and 2011–2012 and has served as a director-at-large and an ex-officio member of the Division. She has served on the Paralegal of the Year Committee, Paralegal Day Committee, Community Service Committee, *Bar Journal* Committee, Governmental Relations Committee, and Licensing Committee and has served as an ex-officio member of the Bar Commission of the Utah State Bar. She is a former president, education chair, parliamentarian, and newsletter editor for the Legal Assistants Association of Utah (LAAU) nka Utah Paralegal Association and is a member of NALA. She is also a member of the Program Advisory Committee for the Salt Lake Community College Paralegal Studies Program.

Chair – Heather Allen. Heather is a paralegal and privacy officer at 1-800 CONTACTS, Inc. and has been there since November 2012. She previously was a paralegal at Ray Quinney & Nebeker, working with wonderful attorneys in the product liability group. She had the opportunity to work on large class action lawsuits in Florida, plaintiff personal injury, and corporate defense product liability cases. She has also been a paralegal at Snell & Wilmer in asbestos litigation and other product liability litigation. Heather has also been an adjunct professor at Utah Valley University (when it was Utah Valley State College), teaching computerized legal research. She graduated from Utah Valley University with a bachelor's degree in paralegal studies and a minor in psychology. She enjoys reading and spending time with her family.

CLE Calendar

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

September 10, 2014 | 4:00–6:00 pm — **2 hrs. CLE**

PRACTICE IN A FLASH: LITIGATION 101 SERIES – Case Investigation and Evaluation
Learn What They Didn't Teach You in Law School! This is the first in a six part series of courses. Register for all six now and get two free! Food and drink provided. Cost: $25 for YLD, $50 for all others.

October 8, 2014 | 4:00–6:00 pm — **2 hrs. CLE**

PRACTICE IN A FLASH: LITIGATION 101 SERIES – Depositions and Discovery
Learn What They Didn't Teach You in Law School! This is the second in a six part series of courses. Register for all six and get two free! Food and drink provided. Cost: $25 for YLD, $50 for all others.

October 16, 2014 | 9:00 am–12:15 pm

New Lawyer Required Ethics Program. This program is required for all new lawyers who took the two day Bar Exam and are admitted to practice in Utah. The New Lawyer Ethics Program satisfies the ethics and Prof/Civ. credits for NLTP and your first compliance term. For this program only – attendees must be in the door by 9:15 a.m. After that time your registration will be transferred to the next program. Please leave early to avoid traffic congestion. Price: $75.

November 12, 2014 | 4:00–6:00 pm — **2 hrs. CLE**

PRACTICE IN A FLASH: LITIGATION 101 SERIES – Mediation and Negotiating
Learn What They Didn't Teach You in Law School! This is the third in a six part series of courses. Register for all six and get two free! Food and drink provided. Cost: $25 for YLD, $50 for all others.

January 14, 2015 | 4:00–6:00 pm — **2 hrs. CLE**

PRACTICE IN A FLASH: LITIGATION 101 SERIES – Trial
Learn What They Didn't Teach You in Law School! This is the fourth in a six part series of courses. Register for all six and get two free! Food and drink provided. Cost: $25 for YLD, $50 for all others.

February 12, 2015 | 4:00–6:00 pm — **2 hrs. CLE**

PRACTICE IN A FLASH: LITIGATION 101 SERIES – Appeals
Learn What They Didn't Teach You in Law School! This is the fifth in a six part series of courses. Register for all six and get two free! Food and drink provided. Cost: $25 for YLD, $50 for all others.

March 11, 2014 | 4:00–6:00 pm — **2 hrs. CLE**

PRACTICE IN A FLASH: LITIGATION 101 SERIES – Ethics and Civility
Learn What They Didn't Teach You in Law School! This is the sixth in a six part series of courses. Register for all six and get two free! Food and drink provided. Cost: $25 for YLD, $50 for all others.

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

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