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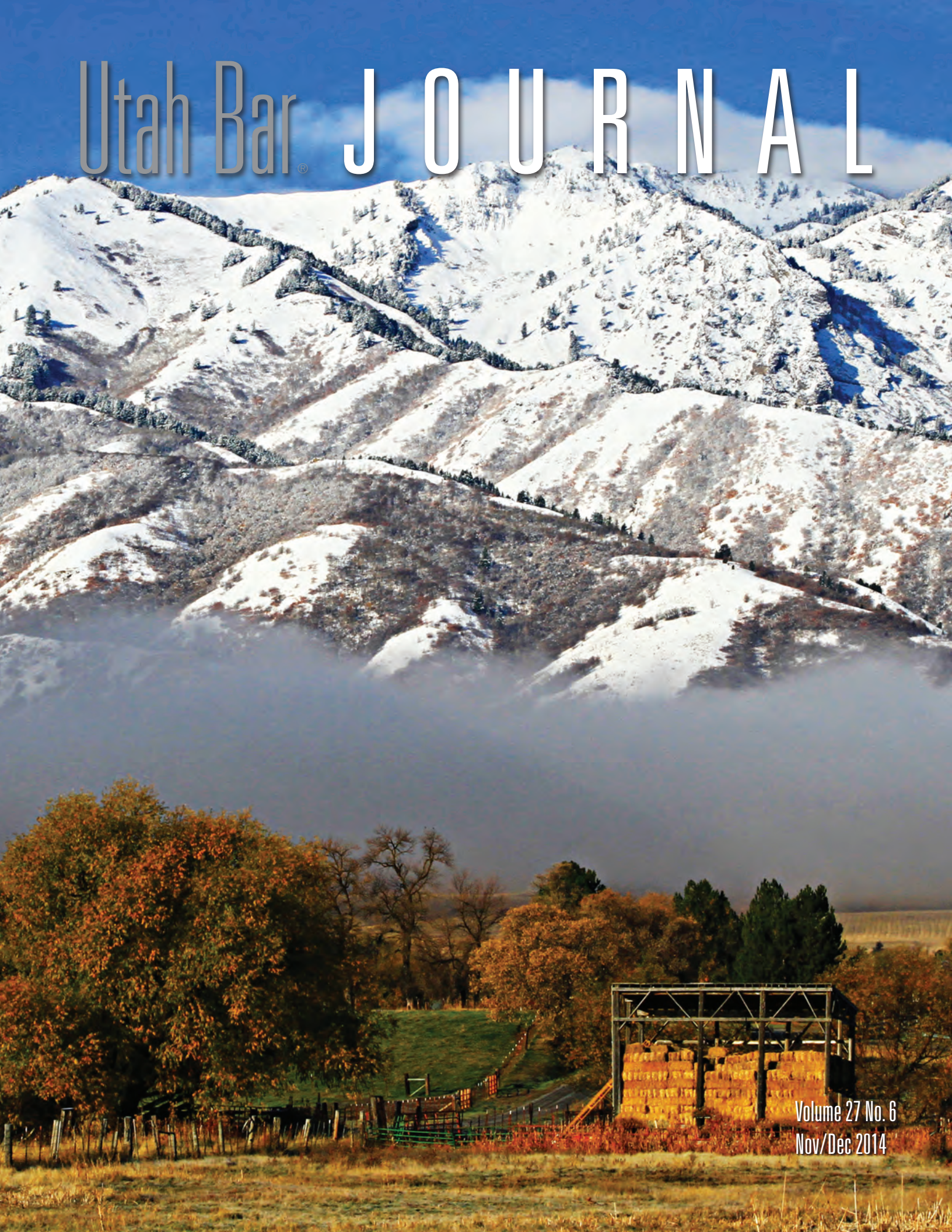

Volume 27 No. 6
Nov/Dec 2014

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Table of Contents

Letter to the Editor 8

President's Message | So What's Happening at the Bar these Days? 10
by James D. Gilson

Article | Raspberries, Lightning, and New Lawyers 12
by Emily A. Sorensen

Article | How Websites Can Reduce Their Copyright Infringement Liability for What Users Post 14
by Sarah E. Jelsema

Book Review | Bad Judges 18
by Judge Cathy Roberts

Book Review | Beyond the First Draft 20
Reviewed by Nicholas C. Mills

Utah Law Developments | Civil Procedure Committee Announces New Pilot Program 24
by Jonathan O. Hafen

Utah Appellate Law Update | Should the Supreme Court Retain Your Appeal? 26
by Noella A. Sudbury

Utah Law Developments | Appellate Highlights 30
by Rodney R. Parker & Julianne P. Blanch

Article | The Dispute Resolution Section: Celebrating 15 Years 35
by Stephen D. Kelson

Focus on Ethics & Civility | What About the Other "R"? 38
by Keith A. Call

Article | Does a Landlord have a Fiduciary Duty to a Tenant in the Build-out Scenario? 40
by Collin R. Simonsen

Article | ABA Task Force Recommends Licensing Limited Legal Technicians 43
by Peter Strand

Article | Settling Boundary Disputes Using Utah's Boundary by Acquiescence Doctrine 46
by Elliot R. Lawrence

State Bar News 51

Paralegal Division | What's Good for the Goose May Be Good for the Gander: 66
Why Your Paralegal Should Be a Member of the Utah State Bar Paralegal Division
by Heather J. Allen

CLE Calendar 68

Classified Ads 69

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Cover Photo

The Wellsvilles, taken by Jack H. Molgard in Wellsville, Utah near Logan.

JACK H. MOLGARD has been a member of the Utah State Bar and practiced law in Brigham City since 1969. He is the founding member of Molgard Law Offices. About the cover photo, Jack says, "My practice often takes me all around Northern and sometimes Central Utah. In my travels I am always looking for an opportunity to take pictures of the beautiful scenery that Utah has to offer. I enjoy photography, spending time with family, USU athletics, and my dog, Amigo. I was on my way to Logan when I took this picture. This picture of the Wellsville area is a good example of how weather can enhance the scenic drive between Brigham City and Logan. I could not resist stopping to get the picture."

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 Utah Bar Journal

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Parsons Behle & Latimer is pleased to announce that attorney Francis M. Wikstrom has been named the 65th President of the American College of Trial Lawyers.

Francis M. Wikstrom, a senior litigation shareholder with Parsons Behle & Latimer, has been elected President of the American College of Trial Lawyers, widely considered to be the premier professional organization of trial lawyers in North America. Fran was installed as President of the College at its Annual Meeting in London, England. He has the unique distinction of being the first Utah lawyer to serve as President of the College. Past Presidents of the College include former Justice Lewis F. Powell, Jr. and former Attorney General Griffin B. Bell.

Founded in 1950, the American College of Trial Lawyers is an invitation-only organization that recognizes the very best of the trial bars of the United States and Canada. Membership is limited to lawyers whose trial skills, ethics, and collegiality are recognized as exemplary by judges and lawyers alike.

The College is dedicated to maintaining and improving the standards of trial practice, the administration of justice, and the ethics of the profession. Because its members come from all branches of the courtroom bar, the College is able to speak with a balanced voice on important issues affecting the legal profession and the administration of justice.

Interested in writing an article for the Utah Bar Journal?

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

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

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

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

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

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

Letter to the Editor

Editor:

In September, our friend and colleague Francis M. Wikstrom was installed as President of the American College of Trial Lawyers in a ceremony at the College's annual meeting in London. He will be the first of the College's 62 presidents from Utah. For those who admire Fran for his skill, intelligence, generosity, and wit, the College's choice is a natural. Fran will fill the shoes of such eminent past presidents as Lewis F. Powell, Jr., Griffin B. Bell, Whitney North Seymour, Simon H. Rifkind, and Leon Jaworski.

Fran will lead the College's 5,700 fellows. Representing the best of the trial bar of the United States and Canada, fellows are chosen by invitation and after rigorous investigation. Fran is the perfect representative of the fellows because he's a tenacious advocate and a good human being. A competent and compelling advocate, his word is always his bond.

Since 1982 Fran has been a shareholder at Parsons Behle & Latimer, where he has distinguished himself with a mix of high stakes criminal, patent, and commercial cases.

If you have ever hiked, biked, or skied with Fran, you'll remember the experience. He has a competitive nature. He is a certified ski instructor and is the past President of the Professional Ski Instructors of America – Intermountain Division. He is a two-time gold medalist in cross-country skiing in the Utah Winter Games and a two-time Utah gold medalist in bicycle racing. It's been hard for the rest of us to keep up.

In the coming year, Fran and his wife, Linda Jones, will bring the College's message to conferences throughout the United States and Canada. Fran is the right person to promote the College's message.

Please join me in congratulating Fran and Linda on this great occasion. It is an honor to know both of them.

Alan Sullivan

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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So What's Happening at the Bar these Days?

by James D. Gilson

Frequently I'm asked, "What's happening at the Bar these days?" After clarifying that they are asking about the Utah State Bar, and not some local drinking establishment, I try to give an appropriate answer.

Like any self-respecting lawyer, I generally don't give out more information than is necessary. Most people, especially my non-lawyer friends (I have a few) ask that question just to make conversation. I could tell them almost anything, and they just smile and nod politely.

But, when a fellow Bar member asks me what the Bar is doing lately, I need to be much more careful how I answer. After all, I could be subjected to rigorous cross-examination by a fellow card-carrying, dues-paying member. To lawyers, I have many answers, long and short. This article is written so that when someone wants a longer answer, and I don't have time to give one, I can simply refer him or her to it.

I'll get to the point. A lot of good things are happening at the Bar these days. If you don't believe me, check out the Bar's website: www.utahbar.org. The Bar's website contains a lot of information about everything associated with the Bar, plus helpful links to many resources, including attorney directories, court rules, upcoming conventions, CLE programs, job postings, ethics opinions, and group benefits. The Bar's 2013–14 Annual Report of Operations can be found under the Bar Operations tab on the home page. Bar staff is working on making the website even more user-friendly and navigable.

Two specific Bar benefits deserve and need highlighting: the Blomquist Hale Lawyer Assistance Program and Casemaker legal research. Both benefits are very helpful and completely free to Bar members, yet both are underutilized.

Blomquist Hale Counseling Services

As a member of the Bar, you *and your eligible dependent family members* have immediate access to trained counselors at Blomquist Hale for face-to-face, confidential counseling without any fee, insurance forms, or other documentation to worry about. There are no co-pays or deductibles. The Bar pays a set fee each month to cover the cost of all services. The Bar provides this benefit because dealing effectively with personal problems is one of the best ways to prevent ethical violations, reduce disciplinary actions, and protect the public. Counselors are available to assist with family problems, stress, depression, anxiety, personal cash management difficulties, elder care challenges, assessment of drug/alcohol dependence, and any other issues impairing your work or personal life. You may access the services by calling 1-800-926-9619 or online at www.blomquisthale.com.

Casemaker

Casemaker is a legal research tool (like Westlaw or LexisNexis), but it is free to Bar members. Casemaker can be accessed through the Bar's website. Here's a testimonial about this Bar benefit from Ogden attorney Kenyon Dove, who also serves as Bar Commissioner for the Second Division:

> Casemaker is an amazing benefit that is provided to us by the Bar free of charge! Casemaker is very dynamic and provides a full range of the services provided by other online legal research services that many of us pay for, in addition to some services unique to Casemaker. You have normal online access as well as mobile access. You have a deep and broad range of case materials, statutes, and other resources to draw from in your research, and all of those sources are current. You can even upload

your brief to Casemaker to have it check all of your citations, for updates to your cases and citations, and it provides feedback and updated citations within minutes. Casemaker provides free training on various aspects of its service as well. Using Casemaker saves our firm thousands of dollars per month without any reduction in accuracy or quality. This benefit alone is worth every penny I pay in annual licensing fees!

Bar Demographics

Currently there are 8,933 active members of the Utah State Bar, and 2,760 inactive members, for a total of 11,693. These numbers include the 228 members sworn in at the October 16 admissions ceremony. Our numbers increase about 3.5% per year. There is roughly one lawyer to every 257 Utah residents, which is the same ratio as the national ratio of lawyers to non-lawyers.

Utah lawyers are on average 42 years of age, have been practicing law for 14 years, work as solo practitioners or in law firms of less than 10 lawyers, earn under $100,000 annually, and bill $200 per hour for their services.

Seventy-six percent of Utah lawyers are male; 24% are female. The average lawyer works between 40 and 59 hours per week.

Bar Commission Priorities for 2014–15

Each year the Bar Commission sets goals or a list of priorities to especially focus on during the coming year. The Bar Commission priorities for 2014–15 include the following:

1. **Improving** access to justice: building on the Pro Bono Commission and Modest Means Lawyer Referral programs. Our top priority remains facilitating access to the courts for the many Utahns who need an attorney but can't afford one.

2 **Advocating** for an independent and strong judiciary.

3. **Reviewing** Bar operations, specifically the Office of Professional Conduct, the New Lawyer Training Program, our Summer Convention, and finding ways to better manage the Bar's $5.9M budget.

4. **Planning** for the future of the profession. A "Futures Commission" is being established by the Bar to gather input and to study and consider ways current and future lawyers can provide legal and law-related services to the public, especially to individuals and small businesses.

5. **Celebrating** Magna Carta/Rule of Law. June 15, 2015 is the 800th anniversary of when King John agreed to Magna Carta at Runnymede, England. Our Bar has been fortunate to be selected to host an exhibit about Magna Carta and the development of the rule of law, which exhibit was created by the ABA and the Library of Congress. Plans are in the works to have that exhibit displayed in Logan, Ogden, Salt Lake City, Provo, and St. George in April 2015. Get excited! We're grateful to have attorney Doug Haymore chair the Magna Carta project.

6. **Supporting Diversity.** In December 2011, the Bar issued its Statement on Diversity and Inclusion. We want to find more ways to put that Statement into action.

These good things – and a lot more – are happening at the Utah State Bar. As always, if you have any questions or suggestions as to how you and the Bar can better serve the public and our profession, please feel free to contact me or other Bar Commissioners.

Raspberries, Lightning, and New Lawyers

by Emily A. Sorensen

A decade ago, I was living in Italy. I had been living in the country for nearly a year and had a pretty good grasp of the language. One day my friend – a native Italian – and I were walking down the street when I made a joke about lightning striking us. In my overconfidence, I had substituted the word for lightning (*fulmone*) with the word for raspberries (*lampone*). The latter certainly sounded appropriate: lightning – lamp – lampone. I didn't realize my mistake until my Italian friend had fallen to the ground in a fit of laughter. The visual in her mind – raspberries falling from the sky – was vastly different than the one I intended. Despite my advanced ability to speak Italian, I had still not mastered it.

As competent as new lawyers are when they graduate from law school, there is still much that they must learn about the culture of being a lawyer and of being a lawyer in Utah. There are rules of professionalism and ethics and skills in civility that are many times not fully understood within the closed context of academia. Much like what was revealed through my faux pas in Italy, new lawyers need guidance in the nuanced and cultural aspects of lawyering, not just in knowing the law, no matter how well trained they are prior to becoming licensed. Within the New Lawyer Training Program (NLTP), new lawyers are given a set of suggested activities to accomplish. But it is more than a checklist of tasks. It is a modifiable plan intended to give the new lawyer control over where the lawyer wants his or her career – or at least the first year of practice – to go.

In a recent issue of the journal put out by the General Practice and Solo section of the American Bar Association, Benjamin K. Sanchez related the following from a lawyer he heard speak:

> [L]awyers are in the business of selling knowledge, not time or activity. The three types of knowledge that lawyers sell are substantive, procedural, and judgment.... [W]hat separates lawyers from non-lawyers in the realm of legal services is judgment. Online websites, articles, and forms all can sell substantive and procedural knowledge to clients just as well as any lawyer. What these websites, articles, and forms can't do, however, is sell judgment, the judgment that comes from experience and from the substantive and procedural knowledge you have learned.

Benjamin K. Sanchez, *RONIN REPORTS: Be a Better Entrepreneur*, 31 GPSOLO 76–77 (May/June 2014).

To develop proper judgment takes time, and it certainly takes experience. Mr. Sanchez concludes his article saying, "[H]onestly sell what makes us unique – *ourselves* – rather than what makes us the same...." *Id.* Though the profession is experiencing change, lawyers are still uniquely qualified to offer the judgment that Mr. Sanchez discusses. New lawyers are entering into the field bringing new perspective and different ideas of what it means to be a lawyer. The NLTP strives to embrace the differences between individual lawyers and generations of lawyers while, at the same time, building a strong network of lawyers to support the profession as it serves the community in which they practice.

Five years ago, the first group of newly admitted Utah lawyers participated in the New Lawyer Training Program. The program was born from a discussion among the Utah State Supreme Court and the Utah State Bar regarding a paper written by Justice Antonin Scalia of the Supreme Court; Deanell R. Tacha, former Chief Judge for the Tenth Circuit Court of Appeals; and Alan Sullivan, an attorney for the Salt Lake City-based firm Snell

EMILY A. SORENSEN is the coordinator for the New Lawyer Training Program. She is licensed in Utah and was a solo practitioner prior to taking this position with the Bar.

and Wilmer. That paper compared the training of lawyers in the United States against those in the United Kingdom and concluded that there was a lack of practically skilled new lawyers in the profession. It further recognized that mentoring has largely been an unregulated field occurring ad hoc or only when a firm or other entity wanted to implement it. The Utah Supreme Court urged the Bar Commission to adopt a mentoring program for new lawyers in Utah. Thus, the NLTP was created.

Since its inception in 2009, 1,485 new lawyers have completed or are in the process of completing the training program. The newest group will enroll in the program starting in January 2015. There are currently 930 Utah-licensed attorneys who have been approved as mentors in the program, and that number is increasing every year. At the 2014 Fall Forum, the Outstanding Mentor award will again be given to a deserving mentor. Nominations have come in from new lawyers who have completed the program and the praise they give their mentors is indicative of the success of the program:

> I believe the formal mentoring plan gives the mentor and the person being mentored a place to start – a way to break the ice – but its true purpose is to foster an informal mentoring relationship that will benefit new attorneys throughout their careers.
>
> [My mentor] taught me some of the most important things about the legal profession: skills, ethics, networking, and conflict resolution, using the actual circumstances around us instead of just checking off a to-do list.
>
> Lawyers like [my mentor] make our profession a better one, mentors like [mine] make lawyers like me want to carry on that same type of professional application.
>
> [T]here is a group of able, young attorneys in Utah right now who owe their success in large part to [my mentor's] unselfish guiding influence and example.

The New Lawyer Training Program has become a smooth functioning arm of the Utah State Bar and continues to provide a place where new lawyers can learn how to be not just effective advocates but also a valuable part of a profession. As the new coordinator of the program, I look forward to being a part of the continued training of the newest lawyers in Utah. The continued success of the program, however, can only come through the help of experienced attorneys acting as mentors and through new lawyers' determination to create a unique space of their own among an established profession.

Hopefully, as the program and its participants grow, there will be less metaphorical raspberries falling from the sky and more unique and masterful approaches to serving our community, our profession, and ourselves.

How Websites Can Reduce Their Copyright Infringement Liability for What Users Post

by Sarah E. Jelsema

Many popular websites, like YouTube, Pinterest, and Facebook, rely on content that users contribute. Delegating content development to the masses can be an excellent business model. However, by permitting users to upload photographs, videos, text, and other content, website owners can find themselves defendants in lawsuits for copyright infringement.

U.S. copyright law automatically protects works like photographs, videos, and text as soon as the photograph is taken, the video is recorded, or the text is written. A few exceptions exist for works like data compilations, but even a kindergartner's crayon scribbles count. Copyright law places restrictions on what people can do with works that are protected by copyright. If a website displays a photograph or poem without the copyright owner's permission, copyright infringement has likely occurred.

A copyright owner suing an alleged infringer has two options for seeking damages: (1) the owner can seek actual damages and the infringer's profits, or (2) the owner can seek statutory damages of $750 to $30,000 per infringed work if the work was registered with the U.S. Copyright Office, and up to $150,000 per registered work if the owner alleges that the infringement was willful. These statutory damages provide content-producers such as photographers and authors with a great incentive to register their works.

Both website owners and users may be liable for copyright infringement when users post copyrighted material to a website. The experience of companies like YouTube, Pinterest, and Facebook demonstrates that even when a website's Terms of Service agreement prohibits users from posting infringing materials, users regularly do so. How do these sites survive if their users are constantly subjecting them to thousands of dollars of copyright infringement liability?

Following the Digital Millennium Copyright Act Requirements Can Reduce a Website's Liability for User-Generated Content

The Digital Millennium Copyright Act (the DMCA) creates a safe harbor from copyright infringement liability for websites that allow subscribers to add content. The sections of the DMCA discussed in this article were enacted in 1998 and are found at 17 U.S.C. § 512. By following the DMCA requirements, these sites can avoid – or at least greatly reduce – liability for copyright infringement resulting from the acts of their users.

Websites like YouTube follow the DCMA's safe harbor provisions to the letter. Unfortunately, many smaller companies with websites allowing users to add content only become aware of the DMCA and its requirements when they contact a copyright attorney after being accused of copyright infringement. At that time, it is too late.

For a company providing online services or network access to fall into the safe harbor, the DMCA explains that the company should take the following steps:

- Designate an agent with the Copyright Office to receive copyright infringement notifications on behalf of the company. For the form, filing fee amounts, and a directory of all currently designated agents, *see* http://www.copyright.gov/onlinesp/;
- Display the agent's name, address, phone number, and email address on the company's website in a publicly accessible location;

SARAH E. JELSEMA is an associate at Workman Nydegger, an intellectual property firm.

- If the company receives a copyright infringement notification meeting certain requirements, expeditiously remove or disable access to the allegedly infringing material; and
- Adopt, reasonably implement, and inform users of a policy that excludes repeat infringers from using the online service.

After removing or disabling access to allegedly infringing material posted by a subscriber, the owner of a website should take reasonable steps to notify the subscriber that the material was removed or that access to it was disabled.

If the subscriber who posted the material provides a counter-notification that meets certain requirements, the website owner should immediately give a copy to the person who submitted the copyright infringement notification. The website owner should also tell this person that the site intends to replace or restore access to the material in ten business days unless the site's agent receives notice that a lawsuit has been filed seeking a court order restraining the website from infringing. If the site does not receive notice of such a suit in ten business days, the website is to replace or restore access to the material in "not less than ten, nor more than fourteen, business days" from receiving the counter-notification.

Under the statute, even following these requirements may not eliminate copyright infringement liability if a plaintiff can show the website owner had "actual knowledge that the material or an activity using the material on the system or network is infringing" or that "facts or circumstances from which infringing activity is apparent" existed.

Additionally, the safe harbor does not apply if the website both receives "a financial benefit directly attributable to the infringing activity" and "has the right and ability to control such activity." Operators of websites with commercial aspects need to be careful about how active they are in approving or monitoring the content users can post if they want to fall within the DMCA's safe harbor.

Websites allowing users to post content should follow as many of the DMCA requirements as possible. While meeting the requirements does not guarantee that a website owner will avoid copyright infringement liability, it does provide a strong defense

against infringement allegations. If website owners have met the DMCA requirements, they may have a stronger negotiating position if they are accused of copyright infringement, and they may be able to more easily settle such claims as a result.

Further, DMCA compliance may help companies avoid lawsuits altogether. First, following the DMCA requirements may ensure that content owners have a way to remove content from a website without needing to file a lawsuit. Second, some content owners eager to extract rents for copyright infringement appear to target companies that do not follow the DMCA. It is easy to determine whether a company follows certain DMCA requirements regarding registering a designated agent and displaying the agent's contact information. Unfortunately, even website owners that are clearly aware of the DMCA and are attempting to fall under its safe harbor often do not fulfill all the statutory requirements.

Websites Allowing Users to Generate Content Probably Cannot Avoid All Copyright Infringement Liability

Following the DMCA is important because copyright infringement occurs constantly and is difficult to avoid. One reason copyright infringement is prevalent is because many people are uninformed about what constitutes copyright infringement. For example, a surprising number believe they avoid infringement by posting a link to where they found the content. This strategy only works if a copyright owner expressly licenses a work on the condition of attribution, and the attribution required is just the webpage of origin, which is extremely unusual. Others believe that any photograph found on the Internet without a watermark is free for use or that as long as they modify a photograph in some way, using it will not infringe.

"Because so much copyright infringement occurs online, content owners send millions of DMCA takedown notices every week."

In theory, anyone can post content online if the content is in the public domain, if the use of the material constitutes fair use, or if the person has permission to post the work, such as a license. In practice, these strategies for avoiding copyright infringement often fail, unless the person following them completely understands them. Certainly, many people posting content to websites do not understand copyright law and even those that do often lack motivation to follow it.

The public domain consists of publicly available content not protected by copyright. People can post copies of public domain works online and create works derived from public domain works without permission from anyone. Unfortunately, it is difficult for the average person to determine what is in the public domain. Except for government works not covered by copyright law, most works only enter the public domain after their copyright term has expired.

Determining when a copyright term has expired is complicated, depending on factors such as when an author dies, when the work was created, and whether the work was published. Many people think the Bible must be in the public domain, because it is so old, but most modern translations of the Bible remain under copyright. And content owners are loath to admit that something is in the public domain. For example, photographs of Renaissance paintings are probably not subject to copyright, at least when they are "slavish copies." However, many museums still require people to obtain permission to use the photographs of artwork available on their websites, no matter how old the artwork is.

Uses considered "fair use" also require no permission, but knowing whether a use is fair is often difficult. To determine whether a particular use is fair use, courts employ a four-factor test involving the purpose of the use, the nature of the copyrighted work, the amount of the work used, and the effect of the use on the value of the work. Even if a use seems to pass the four-factor test, a content owner may disagree.

Chapter 7 in Lawrence Lessig's book *Free Culture: The Nature and Future of Creativity*, which is available free online, tells a story demonstrating how fair use is a weak defense to copyright infringement. Lessig describes a documentary filmmaker who wanted to use an excerpt from *The Simpsons* in a film. *The Simpsons* happened to be playing in the background for four-and-a-half seconds during real-life footage of people playing checkers.

Lessig explains that although this use was "clearly a fair use of *The Simpsons*," the filmmaker decided he needed to edit out the excerpt. The filmmaker explained to Lessig that he needed insurance for the film before networks would broadcast it and that insurers were wary about claims of "fair use." The filmmaker could not distribute the film independently without insurance

because he could not afford the expense of defending a lawsuit for copyright infringement, particularly against a content owner with deep pockets. The filmmaker sought permission to license the excerpt, but the licensing fee of $10,000 was beyond his budget as a documentary filmmaker. As this example illustrates, even a strong fair use defense does not mean that people can rely on fair use to avoid all costs and liability associated with using copyrighted material.

Finally, relying on licensed content also involves risk. Obviously, "sketchy" sites offering "free photographs" with no strings attached do not always have the right to do so: established sites like Getty Images are much safer. Content providers have a variety of licensing schemes that may limit, for example, how a work may be used or the time it may be used. Use outside the scope of the license is infringement for which the licensor may seek damages. Even when a licensee follows the license terms, third parties can still allege copyright infringement. On Getty's iStockphoto.com, licensees accused of copyright infringement by third parties receive coverage for only up to $10,000 in damages and expenses.

Sites like Flikr fall somewhere between "sketchy" and "established." On Flikr, people probably can trust that the person who uploaded a photograph and who claims to have the right to license it really does have that right. However, sometimes people who upload photographs can change the license they use for their photographs. For example, a photographer might initially offer a photograph for licensing under a Creative Commons license that requires only certain types of attribution. Later, the photographer may change his or her mind, and offer the photograph under a more restrictive license. Anyone licensing a photograph from a site like Flikr should maintain a record, such as a screen capture or printout, of the specific license covering any photograph licensed from that site on the date it is licensed.

Until Congress Changes the Rules, Companies Allowing User-Generated Content Should Follow the DMCA to Limit Liability

Because so much copyright infringement occurs online, content owners send millions of DMCA takedown notices every week. For example, Google alone receives requests for about five to seven million URLs to be removed from its search results per week. This Google data is available at https://www.google.com/transparencyreport/removals/copyright/. After one website removes content that is popular among Internet users, often another site or several other sites begin to offer it. Content owners complain they are essentially playing a "whack-a-mole" game with infringers. On the other end, many website operators also devote significant time and resources to complying with the DMCA.

Since so much dissatisfaction with the DMCA exists, Congress may amend it within the next few years. However, for as long as these requirements are the law, any website that allows users to post content should try to follow them.

Bad Judges

Reviewed by Judge Cathy Roberts

While this book will not be everyone's cup of Twinings, it may be the perfect gift for an eccentric, Anglophilic attorney, judge, or paralegal. It is a slender volume and the cost of shipping it from England will far exceed the cost of the book itself, but that just contributes to its weirdness.

An American may need a dictionary to translate British-isms such as "silk," "QC," and "set," but here are nutshell definitions: A "set" of chambers houses a group of barristers; a barrister who "takes silk" has been appointed by the Queen as her counsel ("QC"), and therefore wears silk robes. Taking silk is possible for the most experienced members of the bar, and, if the British television shows "Silk" and "Escape Artist" are to be believed, a very political matter.

A Short Book of Bad Judges

by Graeme Williams

Published by
Wildy, Simmonds and Hill (2013)

Hardcover

The author, an English barrister, calls out three types of judges: the first includes those who have been convicted of a serious criminal offense. The second includes those whose misconduct occurred in court because of dislike of the advocates before them, because of dislike of the way the case is being conducted, or because of impatience or sheer boredom. The third includes messed up subordinate judicial appointments.

Bad English judges prefer being "boorish and rude to counsel," to having fistfights with public defenders in the hall, as a bad American judge has done. They have an "infelicitous lack of judgment." They rebuke counsel, call parties "fools" and "blockheads," and take over the questioning of witnesses before counsel on either side have a chance to conduct the case themselves. (I probably have been guilty as charged with the latter, although I don't remember calling anyone a blockhead.) Patient and attentive judges, by contrast, are like a "well-tuned cymbal," quoting Francis Bacon. As the cymbal is not usually played until the very end of a symphony, and usually for emphasis or dramatic effect, I suspect this author prefers judges who say little during the proceedings but bring everything to a rousing close.

However, when the cymbal is not well tuned, a Bad Judge may have the opposite effect. The author of *Bad Judges* describes a judge's reaction to a young barrister's final argument:

"The Judge thereupon places his robed forearms on top of each other on the bench in front of him, and then his bewigged head on his forearms, and emits a loud groan, followed very audibly by the words: 'Oh God!' addressed to nobody in particular, if not the Deity.'"

He has one woman judge among his bad ones, and, unfortunately for the author, his complaints about her have a whiff of sexism: he was also a judge when she was, and equally unqualified, as he tells it, but he faults her for lacking professional detachment,

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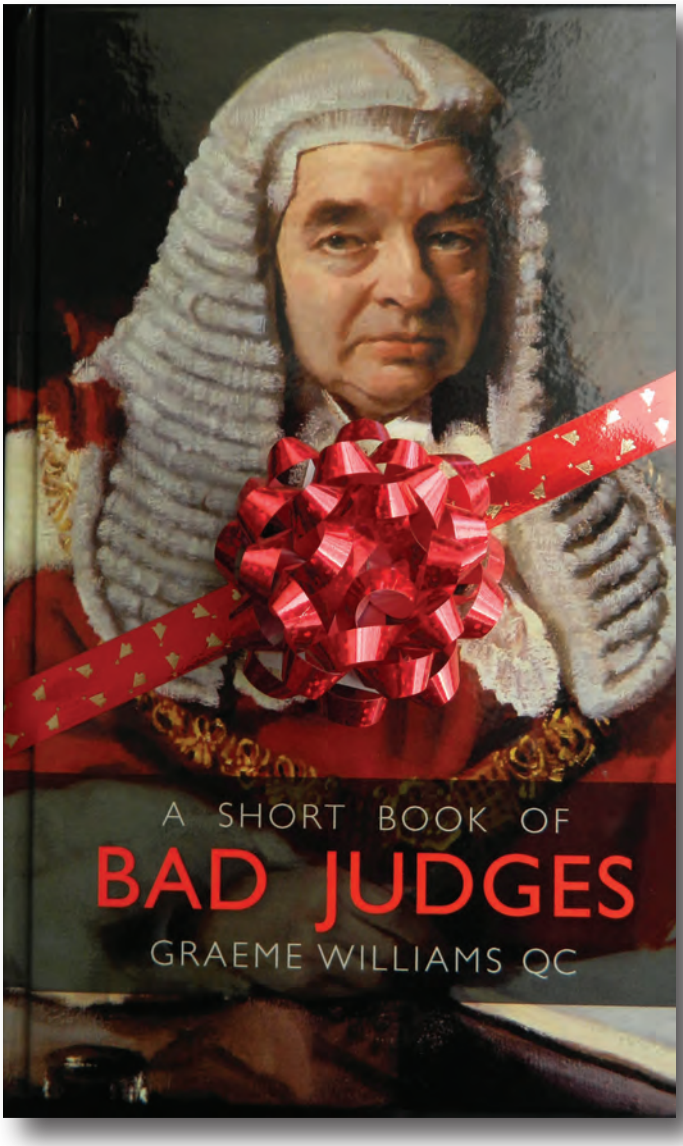
shedding tears of distress when dealing with family disputes involving children, and thinks she would have made a better artist than judge.

His point in writing the book is well taken: "The quality of the judiciary and the degree of public confidence in it, must be amongst the most crucial features of a modern democracy."



Trying to find a Utah connection to this little weird book, I looked at results of a detailed survey about the courts conducted by an outside consulting group in 2012, which showed that "Utah State Courts enjoy a very positive profile in a state that has unusual confidence in its institutions." https://www.utcourts.gov/courtools/related/PublicTrust/PublicTrustSurvey.

Predictably, the survey of 800 Utahns found that positive legal outcomes did not affect attitudes nearly as much as negative outcomes, that cost is the biggest barrier to court access, and that "[t]he most positive views of the Courts are held by those with historically the best access: white, better-educated males." The survey recommended "[a]dditional outreach on the Court's track record [to] give particular focus to people in society that have less positive views – Hispanics and other people of color, and citizens regardless of ethnicity who happen to be below the median in household income and educational attainment."

To this end, there is a Utah State Courts Standing Committee on Judicial Outreach, and Utah Justice Court Judges have created their own Trust and Confidence Committee. These committees share the task of increasing faith in the judiciary by doing more than just not being bad, but by speaking at public meetings, educating new lawyers, and helping teach schoolchildren about the Constitution and other legal matters.

As someone who came late to the judiciary, after a late start in law school, and nine years as a public defender, I believe the issue runs deeper. Some of the people in our courtrooms, especially in justice court, lack trust for the judiciary because they do not see us as human beings. Sometimes we behave as if they are "the other," as well. My sometimes compassionate approach runs afoul of egotism and self-importance.

This little book, with its very British descriptions of judicial bad behavior, underscores one of my favorite quotes (variously attributed to St. Thomas Aquinas or Victor Hugo): "Being good is easy; what is difficult is being just." Bad judges find it difficult to be good, and impossible to be just.

Beyond the First Draft

Reviewed by Nicholas C. Mills

Beyond the First Draft is a gem. That's not to say it's a diamond, but it is a small and valuable find. It fills an important and underserved niche. The book is designed to help a legal writer take his or her paper from the first draft to a finished product. The book's thesis is that the editing process is vitally important to making and winning legal arguments. The author makes an interesting point: lawyers have been taught to think like lawyers, but we are not necessarily taught to write like writers. The author, Megan McAlpin says, "Knowing the ins and outs of the rule against perpetuities won't do you much good if you can't then write about that rule in a coherent, vigorous, clear, and polished way." Megan McAlpin, Beyond the First Draft, 4 (2014).

Beyond the First Draft: Editing Strategies for Powerful Legal Writing

by Megan McAlpin

Published by Carolina Academic Press (2014)

Paperback

The book is designed for both law students and practicing lawyers. But the book's textbook form indicates its focus is more likely on students. With that said, the book was a worthwhile read, and I will add it to my library. The book is only 140 pages. It has a solid index, two interesting appendices, and a glossary of grammatical terms. But the best part of the book is undoubtedly the editing checklist. If followed, the checklist will improve any pleading substantially.

The Good

This is a really useful book. It is written in a simple, practical manner, and it was helpful in several ways.

First, the book gives really good definitions of grammatical terms and explanations for their use. A significant percentage of lawyers are not English majors, so sometimes books that are filled with grammatical terms can be difficult to wade through. The suggestions in *Beyond the First Draft* start at a very basic level and build to complex theories. This progression is natural and makes some complex writing issues very approachable. Because of the breadth of topics covered, the book would be useful to any writer, regardless of his or her skill and familiarity with usage rules.

Second, as I mentioned earlier, the book is written in a very practical manner. This is particularly useful when so many legal books are written with a heavy theoretical emphasis. Several times throughout the book McAlpin acknowledged that the rules conflicted. For example, while discussing nominalizations – verbs functioning as nouns – McAlpin wrote, "You just need to be sure that you can identify the nominalization and then justify using it." *Id.* at 47. This is solid advice that balances respect for the writer's intelligence and personal style with the need to conform to standards of usage. In many other editing books I have read and used, the authors issue their edicts as though they stood atop Sinai. But language usage is not that clear cut. Another very practical aspect is several editing techniques. For

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example, McAlpin advised scanning your brief for sentences that are longer than two lines. If those sentences have more than twenty-five words, the writer should "consider editing the sentence." *Id*. at 48. It is sometimes hard to look through an entire brief for a very small grammatical issue, and these types of suggestions are very useful. One final piece of practical advice that I really appreciated was that in legal writing, "clarity is the principal goal. It is…more important than style." Advice like this helped me understand that a truly talented legal writer might not always be able to produce a Grisham novel. But he or she must be able to communicate ideas clearly. *Id*. at 79. McAlpin's point is that you should be aware of the rules and apply them with sound discretion.

Finally, McAlpin's writing style was very approachable. The book is not a heavy tome. It's a handbook. It is a book that you could read in a day, gather most of the information, and revisit when you need to bone up on a topic. The easy approachable language really helped to make editing – a normally difficult process – doable. McAlpin's simple and straightforward advice and suggestions were very useful. The way that she wrote that advice made applying her principles simple.

The Bad and the Ugly

I stand by my representation that the book is a gem, but every gem has a few blemishes and imperfections. Two aspects of the book stood out as weak spots to me.

First, I thought the way the book's suggestions were structured was slightly confusing. Each chapter is divided into several general numbered themes. For example, chapter five is divided into the following themes:

1. Check Your Grammar
2. Check Your Spelling
3. Check Your Punctuation
4. Polishing and Perfection

Each chapter is simultaneously divided into "editing strategies." Chapter five has the following editing strategies:

- Editing Strategy 5.1 Check for Sentence Fragments
- Editing Strategy 5.2 Check for Parallel Structure
- Editing Strategy 5.3 Check Verb Tense
- Editing Strategy 5.4 Check for Tricky Homophones
- Editing Strategy 5.5 Just Check
- Editing Strategy 5.6 Check Commas
- Editing Strategy 5.7 Check Semicolons
- Editing Strategy 5.8 Check Colons
- Editing Strategy 5.9 Check Quotation Marks
- Editing Strategy 5.10 Check Apostrophes

But the numbering of the strategies does not differentiate between the chapter's themes. In chapter three, I read for ten pages before coming to the second theme, "Write Uncluttered Sentences." At that point, it was difficult to determine if McAlpin was launching into a second phase of an editing strategy or starting a new topic. Further, this lack of consistency in subdividing the chapter makes the editing checklist – which I found super useful – less effective than it could have been. It's a simple fix, and one that I hope the author will make in her next edition. Until then, I made my own version of McAlpin's checklist. I just took the editing strategies and added McAlpin's subdivisions. This helps me remember what I am attempting to accomplish by employing the editing strategy.

My second complaint is the sometimes sophomoric analogies and examples McAlpin employs. The worst example is her analogy of putting a roadmap and a GPS into your writing. The roadmap is a useful tried-and-true analogy. As students, we were all taught that our legal writing should contain roadmaps to help foreshadow our argument for the reader. That is fine. A roadmap is a simple, easy-to-understand analogy. But McAlpin piles analogy upon analogy: Most drivers (your document's readers) would find it odd if upon entering your car (the document you prepared) you insisted that they use both a roadmap and a GPS to get to their destination. In fact, using both a map and GPS makes the destination seem more difficult to find. Further, unlike an in-car GPS, a writer cannot – and, in my opinion, should not – break up the flow of the paper by constantly giving the judge updates on where the judge's decision should go, i.e., "In 100 feet merge right onto Interstate 15." Instead, the document should contain a roadmap near the beginning that is clear enough that the reader should be familiar with and recognize where the argument is going.

The analogy as presented comes off as trying too hard and, frankly, just silly. I think McAlpin was trying to say that all of your writing should direct the reader to where you want the reader to go. But she erred when she tried to shoehorn the GPS analogy into the roadmap advice. This analogy ignored one of the most pervasive writing tips from *Beyond the First Draft*: write simply. Because the GPS analogy is one of McAlpin's first analogies it taints the rest of her analogies. This is especially unfortunate because after finishing the book, I realized that some of her other writing analogies were really well thought out.

Conclusion

If you, like me, often feel lost attempting to edit your work, this book is for you. McAlpin's writing is clear, concise, and practical. The book is full of answers to the questions you sometimes feel sheepish asking a colleague. The editing checklist is extremely useful in looking for areas of your document that can be improved upon. I don't buy many books, but I am going to buy *Beyond the First Draft*. The book is pretty cheap for a legal book – $27.00 – and is available at http://www.cap-press.com/books/isbn/9781594609985/Beyond-the-First-Draft. It is also available at the University of Utah's Law Library.[1] The next time you have an important brief, check out *Beyond the First Draft*. It will help you take your brief from a mere draft to a polished product. And maybe some client or judge will even think your writing is a gem.[2]

1. In case you didn't know, every member of the Utah State Bar has access to the University of Utah S.J. Quinney College of Law Library. Just take your bar card into the library, and the helpful staff will set you up with a free library account.
2. The author wishes to thank Wendy Brown for her editing help and Ashley, Samantha, Brooklyn, and McKenzie for their unwavering support.

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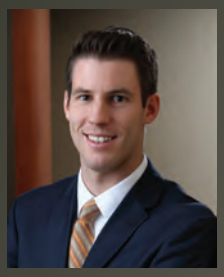
Kirton McConkie is pleased to welcome 9 new attorneys



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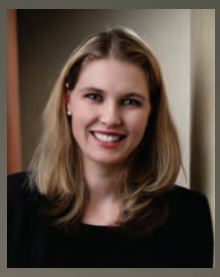

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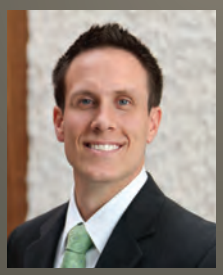

Chase Nielsen
Associate,
Real Estate

Kyle Peterson
Associate,
International

Cameron Daw has also joined the firm as a staff attorney.

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Civil Procedure Committee Announces New Pilot Program

by Jonathan O. Hafen

In 2011, the Utah Supreme Court approved changes to the Rules of Civil Procedure intended to better achieve the long-standing objectives of URCP 1 – "the just, speedy and inexpensive determination of every action." In a word, the court sought to make discovery "proportional" to what was at stake in the litigation.

Since 2011, other states have followed Utah's lead, and in August 2013, the federal counterpart to Utah's Advisory Committee on the Rules of Civil Procedure submitted a package of proposed amendments to the Federal Rules of Civil Procedure, the centerpiece of which was to adopt "proportionality" requirements similar to those adopted in Utah. The relevant federal committees voted unanimously in favor of the changes earlier this year, and the amendments are currently awaiting approval by the United States Supreme Court. If the Supreme Court approves the proposed amendments, they will then go to Congress; if Congress takes no action, the amendments will take effect on December 1, 2015.

With proportionality as the new governing standard, Utah's Rules Committee continues to consider ways to improve the Rules. For example, some Utah lawyers have expressed concern that revised Rule 26 does not fit well with larger, complex cases. Such concerns have led the Committee to explore other options to achieve better outcomes in such cases.

Several national organizations are watching and studying efforts by Utah and other states to improve the discovery process. Data gathered thus far strongly suggest that early and active judicial case management is key to efficient litigation, particularly in complex cases. With this in mind, the Committee proposed, and the supreme court approved, a new pilot program for Tier Three cases in the Second, Third, and Fourth Judicial Districts.

Starting on January 1, 2015, all Tier Three cases randomly assigned to certain Judges in those districts will be part of the program. As soon as possible after the parties are known, the clerk will notify the parties that their case is part of the pilot program, that the default discovery limits apply, but that the judge will schedule a Rule 16 conference for purposes of entering a case management order, including discovery limits.

This Rule 16 conference will be held approximately twenty-eight days after the defendant's initial disclosures are due. Lead counsel will be required to attend the Rule 16 conference, with telephonic participation available in exceptional circumstances.

Prior to the conference, counsel are to file a detailed statement of the case, including the factual claims and legal theories. The pilot program will have a website containing a case statement template. The case statement is limited to ten pages and is not intended to persuade the judge with respect to the merits of the case but instead to educate the judge on the complexities of the cases for purposes of establishing proportional discovery limits.

One central purpose of this conference is for the court and the parties to discuss ways in which factual and legal issues can be narrowed at the outset of the case and to discuss how the case can most efficiently be prepared for trial.

As part of the Rule 16 conference, the court will set limits on the various discovery methods, which may be the same, less, or

JONATHAN O. HAFEN, of Parr Brown Gee & Loveless, is Chair of the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure.

more than the existing Tier Three default limits. It is expected that this process will reduce or eliminate the need for extraordinary discovery. The court also will set a cutoff date for dispositive motions. Deadlines set as part of the Rule 16 conference will not change absent extraordinary circumstances, and the court's rulings will be memorialized in a case management order.

After the initial Rule 16 conference, the court will hold periodic status conferences, including one or more during fact discovery and one at the close of fact discovery. Pilot program judges are expected to raise settlement prospects during these conferences and may order mediation.

Discovery disputes will be handled using Utah Rule of Judicial Procedure 4-502's expedited statement of discovery issues, which soon will become part of Utah Rule of Civil Procedure 37. The pilot program judges may also advise the lawyers at the Rule 16 conference to simply arrange a meeting, perhaps by telephone, to discuss and resolve the discovery dispute without the need for written statements.

At the close of discovery, a status conference will be held to set a trial date and otherwise prepare for trial.

Cases within the pilot program will be measured against other Tier Three cases. Counsel, parties, and judges will be surveyed as part of this pilot program. One premise to be tested is that early and active judicial case management will result in decreased time to disposition and reduced litigation costs. If litigation becomes more efficient and less costly, while still achieving just outcomes, the hope is that litigants, judges, and counsel will have greater satisfaction with our judicial process.

The full details of the pilot program will be found on the pilot program website.

The Rules Committee welcomes your comments on this pilot program. The pilot program website will have a comments feature. You also can send feedback to jhafen@parrbrown.com and tims@utcourts.gov.

Should the Supreme Court Retain Your Appeal?

by Noella A. Sudbury

The final order is entered. The notice of appeal is filed. The case is within the original jurisdiction of the supreme court. You are thinking about asking the supreme court to hear your client's appeal in the first instance rather than transfer it to the court of appeals. But is this really a good idea? And if so, how do you convince the Utah Supreme Court to keep the appeal on its calendar?

Not all appeals are good candidates for retention. If the law is straightforward and the district court simply made an error in applying it, the court of appeals can correct that error and the supreme court is unlikely to be interested in deciding the issue. So what type of cases is the supreme court interested in? And what is the court looking for in a retention letter? This article will address how retention letters differ from petitions for certiorari and explain how, why, and when to submit a retention letter.

RETENTION LETTERS V. PETITIONS FOR A WRIT OF CERTIORARI

A petition for certiorari and a letter requesting retention are similar. For both, the audience is the supreme court, and the primary purpose of the filing is to present the court with an opportunity to clarify the law. So how are they different?

One important difference is that a petition for a writ of certiorari asks the supreme court to review a decision of the court of appeals, while a request for retention asks the supreme court to keep an appeal that it would otherwise transfer to the court of appeals. In other words, a retention letter asks the supreme court to review directly the decision of the district court.

Another difference between a petition for a writ of certiorari and letters requesting retention is that, unlike with petitions, no appellate rules govern the preparation and submission of retention letters. While requests for retention are mentioned in Utah Rule of Appellate Procedure 9 – the rule governing docketing statements – the form and content of a retention letter is governed by an order the supreme court mails to counsel sometime after the appellant files a notice of appeal.

THE CHANCES

Perhaps one of the most notable differences between a petition for a writ of certiorari and a request for retention is that the supreme court grants requests for retention more frequently. In fact, recent statistics indicate that the supreme court votes to retain cases about 59% of the time. This is much more promising than the 19% success rate of petitions for a writ of certiorari. Below are the retention letter statistics by year:

	2011	2012	2013	2014 (so far)
Filed	72	61	67	57
Granted	42	40	42	28
Denied	30	20	24	25
Percentage Granted	58%	66%	63%	49%[1]

What explains the numbers? One reason the supreme court may be more likely to grant a request for retention (as opposed to a petition for a writ of certiorari) is that a party petitioning for a writ of certiorari has already had the benefit of one level of appellate review. Thus, to convince the court to grant the petition, a party has two hurdles to clear instead of one – the petitioner must demonstrate both that the court of appeals erred in resolving the issues and that a "special and important" reason merits additional review. For that reason, if a case involves a conflict between different panels of the court of appeals, unfavorable court of appeals case law that should be overruled,

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or an unsettled issue of law – common reasons to seek certiorari or request retention – you may consider asking the supreme court to keep your client's appeal in the first instance.

THE NUTS AND BOLTS

When to File

Utah Rule of Appellate Procedure 9 provides that if either party seeks to have the case retained, a retention letter must be filed within ten days of service of the docketing statement. While this is the general rule, the opportunity to file a retention letter may also be triggered by a transfer order generated by the Utah Supreme Court and mailed to counsel. This order typically states that the court will transfer the case to the court of appeals "unless a timely request for retention is received." Once this order arrives, counsel has only ten days from the date of the order to draft and submit a retention letter to the supreme court.

What to File

A retention letter should take the form of a letter (rather than a pleading) and must contain the following information:

- The name of the case and the appellate case number;
- the name of all parties involved in the case and the attorneys and firms representing all parties;
- a concise statement of the issues presented on appeal; and
- a brief explanation of the reasons supporting retention.

So how do you write the letter? How many issues should you include? And what type of information increases the chances that the court will retain your appeal? While there is no exact science to writing a retention letter, the following five tips may make it more likely that the Utah Supreme Court will retain the appeal:

1 Limit the issues presented. When drafting the issues presented, counsel should identify the two or three most critical issues on appeal. This is important for at least two reasons. First, the retention letter is limited to a total of five pages and you want to be sure to save space for an explanation of why the supreme court should retain the appeal – the most important part of the letter. Second, including a lengthy list of issues on

appeal is likely not to be attractive to the supreme court. When faced with such a list, the supreme court is likely to kick the case to the court of appeals in order to narrow and filter the issues in the first instance.

2 Focus on the list of "considerations" contained in rule 9. When identifying the issues presented and explaining to the court why it should keep the appeal, counsel should focus on the list of considerations contained in Utah Rule of Appellate Procedure 9(c). That rule provides three examples of reasons why retention may be appropriate: (i) the appeal involves a novel constitutional issue, (ii) it presents an important issue of first impression, or (iii) the court of appeals has issued conflicting decisions in a particular area of the law. Each of these points merits further discussion:

The appeal involves a novel constitutional issue. When it comes to retention letters at least, counsel is lucky if the appeal happens to involve a novel constitutional issue. Few cases do. If a constitutional question is truly novel, and the letter is framed in the right way, chances are, the supreme court will want to weigh in on the issue and will vote to retain the appeal.

The appeal involves an important issue of first impression. Telling the supreme court that it has never heard *this dispute between these parties before* is not what the court means by an issue of first impression. And simply asserting that the appeal involves an issue of first impression is not enough. Instead, the retention letter should clearly identify an unresolved statutory, common law, or constitutional question and describe how a decision in the case will set helpful precedent. One example is where Utah courts have no governing common law rule and other jurisdictions are split on how to deal with the issue. Another example is where the court has not had the opportunity to explain how a statute interacts with a pre-existing body of the common law. Whatever the issue, counsel should succinctly explain the problem and emphasize the positive effects the opinion will have in clarifying the law for citizens, lawyers, and Utah courts.

There exists a conflict in court of appeals decisions. When there is a conflict between different panels of the court of appeals, the law is uncertain because it is unclear which opinion controls. However, the court of appeals cannot resolve this conflict effectively because, under the doctrine of horizontal stare decisis, it is bound by its own precedent, which is in conflict. A retention letter should highlight the conflict between the court of appeals' panels and ask the supreme court to retain the case to clarify the law.

3 Identify and discuss any "other persuasive reasons why the Supreme Court should resolve the issue." Utah Rule of Appellate Procedure 9(c) also provides that counsel should include any other persuasive reasons why the supreme court should resolve the issue instead of transferring the case to the court of appeals. While this standard is vague, it allows parties to be creative. Does the case involve tension between old supreme court precedent and a new national trend? If so, maybe it is time for the supreme court to revisit the old case law. Perhaps a statute was passed in response to an appellate opinion, creating ambiguity in the law going forward. If so, maybe the supreme court should address the issue. And if the substantive law is clear, consider focusing on the process instead, i.e., whether the process of interpreting statutes or constitutional provisions is in flux and is producing inconsistent results.

4 It is never compelling to argue that your case is contentious and will end up in the supreme court anyway. First of all, a contentious case with litigious parties is not exactly an attractive proposition, and it is certainly not one that will persuade the supreme court to retain the appeal. Second, this statement is most often untrue. If the supreme court decides to transfer your case to the court of appeals and that court issues an opinion, a party must file a petition for certiorari and it will be up to the supreme court whether it would like to hear the appeal at that point. And in an article published earlier this year, we reported that counsel has only a 19% chance of convincing the court to take the case.[2]

5 Keep it brief and straightforward. A shorter brief takes much longer to write than a longer one. Although writing concisely is hard, it pays off. The retention letter should be easy to understand, make the issues sound interesting and manageable, and provide a straightforward explanation as to why the supreme court should keep the appeal.

Securing a spot on the supreme court's calendar is not easy and may not be the best move in every case. However, if your case involves an issue of first impression, a conflict in the court of appeals' case law, a novel constitutional issue, or it is unique for another reason, consider filing a retention letter. Odds are, it will be granted and may save your client time and money in the long run.

1. Three retention requests are currently pending.
2. Beth E. Kennedy, *Petitioning the Utah Supreme Court for A Writ of Certiorari*, 27 Utah B.J. 30. (Jan/Feb 2014).

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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.*

Al-Turki v. Robinson
762 F.3d 1188 (10th Cir. 2014)

The Tenth Circuit affirmed the denial of qualified immunity to prison officials in this Eighth Amendment case brought pursuant to 42 U.S.C. § 1983, where a prisoner with kidney stones alleged that he was not given prompt medical treatment and that his requests for medical attention were ignored. The court held that the prisoner's several hours of untreated severe pain satisfied the objective element of the "deliberate indifference" test. It further held that the law was clearly established that a deliberate indifference claim arises when medical professionals deny care even though they are presented with recognizable symptoms that potentially create a medical emergency.

Doe v. Jones
762 F.3d 1174 (10th Cir. 2014)

As a matter of first impression, the Tenth Circuit held that the stay and abeyance of a federal habeas petition, as approved in *Rhines v. Weber*, 544 U.S. 269 (2005), applies to mixed as well as unmixed petitions. However, because the petitioner's claim of actual innocence would be a basis for equitable tolling of the federal limitations period, he was unable to establish the "good cause" required under *Rhines*. The court accordingly affirmed the district court's denial of the stay and its dismissal of the petitioner's habeas petition.

Fisher v. Raemisch
762 F.3d 1030 (10th Cir. 2014)

The Tenth Circuit held that the one-year statute of limitations for habeas petitions was tolled during the pendency of the petitioner's state court application for post-conviction relief, even though it took the state court over eight years to resolve the petition. The fact that the petition could have been, but was not, dismissed on the ground of abandonment did not mean that the matter was not still pending for tolling purposes.

Kerr v. Hickenlooper
744 F.3d 1156 (10th Cir. Mar. 7, 2014), *reh'g en banc denied*, 759 F.3d 1186 (10th Cir. July 22, 2014)

"[M]embers of a state legislature may have standing to sue in order to vindicate the 'plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Id.* at 1163 (citation omitted). The Tenth Circuit Court of Appeals held that legislator–plaintiffs have Article III standing to bring suit to enjoin enforcement of an act that could violate the Guarantee Clause of the United States Constitution, withstanding the political question doctrine and challenges to prudential standing. Colorado's Taxpayer's Bill of Rights (TABOR) requires referendum approval of most tax increases. State legislators challenged the constitutionality of TABOR. The court only considered the issues of standing and the political question doctrine, avoiding the merits of the case. Article III standing requires that the plaintiff demonstrate (1) a concrete injury, (2) causation, and (3) redressability. The court found that "nullifying a legislator's vote or depriving a legislator of an opportunity to vote is an injury in fact," *id.* at 1166 (citation omitted), that the enforcement of the act is

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sufficient causation, and that barring enforcement is sufficient redressability. The court distinguished TABOR from situations where a legislator might have been "[s]eeking to obtain a result in a courtroom which he failed to gain in the halls of the legislature." *Id.* at 1167 (citation omitted).

Ralphs v. McClellan
2014 UT 36 (Aug. 29, 2014)

The petitioner sought to challenge a previous justice court lewdness conviction when that conviction led to subsequent lewdness charges being charged as felonies. The petitioner argued that he had been deprived of his right to appeal the original justice court decision under the standards set forth in *Manning v. State*, 2005 UT 61, 122 P.3d 628, and Utah Rule of Appellate Procedure 4(f). On a petition for extraordinary relief, the Utah Supreme Court held that the procedures set forth in *Manning* and confirmed in Rule 4(f) extend to *de novo* appeal of a justice court decision. The court disagreed with the district court's conclusion that the petitioner had waived his right to assert the denial of his right to appeal by waiting too long. Because neither *Manning* nor Rule 4(f) contains a time limitation on a motion to reinstate an appeal, the petitioner could not be deemed to have forfeited his right to file such a motion by his delay in filing it. The court flagged the lack of time limitation as a concern for consideration by the advisory committee on the rules of appellate procedure, suggesting the committee could amend the rule to add a time limitation going forward.

State v. Smith
2014 UT 33 (Aug. 26, 2014)

The Utah Supreme Court held that while it is error for a district court to accept a guilty plea without holding a preliminary hearing or obtaining an express waiver from the defendant of the right to a preliminary hearing, that error does not deprive the court of subject matter jurisdiction. The defendant, who entered a guilty plea without a preliminary hearing or having waived a preliminary hearing, argued that the failure of a district court to bind over a defendant following a preliminary hearing or express waiver of the right to a preliminary hearing is jurisdictional. The court rejected this argument for two reasons. First, the case on which the defendant relied was decided under a prior jurisdictional framework, and intervening large-scale

structural changes to Utah's district court system rendered it inapplicable. In July 1996, the legislature merged the former circuit court into the district court and gave the district court jurisdiction over all matters previously filed in the circuit court. Under the current framework, in criminal cases, the information is now always filed directly with the district court. Second, district courts have broad subject matter jurisdiction over criminal cases, and neither the Utah Constitution nor the Utah Code makes that jurisdiction contingent upon a preliminary hearing, its waiver, or a bindover order.

Keith v. Mountain Resorts Development
2014 UT 32 (Aug. 8, 2014)

The parties initially had a joint development agreement to develop three parcels in which they each owned partial interests. The parties could not agree on how to develop the property, so they settled their differences by having one party take Parcel A and the other party take Parcels B and C. With approval from the county, the owner of parcels B and C proceeded to develop its properties under a development plan that was previously approved for all three parcels. The owner of Parcel A (which by itself did not meet the requirements of the originally-approved plan) sued for breach of contract and other tort claims, claiming that she was entitled to her proportional share of the development rights because they were vested rights acquired through her deed for Parcel A. The Utah Supreme Court affirmed summary judgment dismissing the owner of Parcel A's claims, holding that the conditional development rights granted by the county were not included in the deed's general terms of conveyance giving a grantee the "rights and privileges" belonging to a piece of real property.

Oseguera v. State
2014 UT 31, 332 P.3d 963 (July 29, 2014)

A legal immigrant to the U.S. faced deportation proceedings after pleading guilty to theft charges. He sought to avoid deportation by withdrawing his guilty plea through a petition under the Utah Post-Conviction Remedies Act (UPRA), or alternatively, through an extraordinary writ. The Utah Supreme Court denied the UPRA petition, founded on alleged ineffective assistance of counsel in making affirmative misstatements about the immigration consequences of the plea agreement because the man failed to preserve the argument for appeal by raising it in the district court. The court also affirmed denial of the extraordinary writ, holding that the Writ of Coram Nobis, used to correct fundamental errors in criminal proceedings, was not available because the UPRA provided an adequate remedy of which the petitioner had already availed himself.

Glaittli v. State
2014 UT 30, 332 P. 3d 953 (July 15, 2014)

The Utah Supreme Court held that a reservoir is not a "natural condition" within the meaning of Utah's Governmental Immunity Act, Utah Code section 63G-7-301(5)(k). It reversed the Utah Court of Appeals' decision because the court of appeals had erred in interpreting "natural condition" too broadly. Because the Jordanelle Reservoir was designed and created by human activity, it is not "natural" and does not fall within the natural condition exception to the waiver of immunity. Justice Lee concurred in the decision, explaining that he would interpret "natural condition" as used in the Governmental Immunity Act based on its premises liability counterpart, in which a "natural condition" is a "condition of land [that] has not been changed by any act of a human being." *Id.* ¶ 36 (internal citation omitted) (J. Lee concurring).

Martin v. Rasmussen
2014 UT App 200 (Aug. 21, 2014)

The defendant in this real-estate dispute made an offer of judgment under Utah Rule of Civil Procedure 68 to resolve the matter by transferring four feet of a disputed five-foot strip of land to the plaintiff. The defendant attempted to revoke the offer three days before the the deadline stated in the offer, but the plaintiff accepted the offer on the last day. The court affirmed the district court's order compelling the defendant to transfer the four feet of land, holding that the Rule 68 offer was enforceable and irrevocable.

Salt Lake City Corp. v. Haik
2014 UT App 193 (Aug. 14, 2014)

The Utah Court of Appeals held that strict compliance with the notice provisions of GRAMA is not required to put a requester on notice of the basis for which a government entity denies access to certain records. The plaintiff made a request to Salt Lake City for records of the city's private counsel retained to advise upon matters related to water exchange agreements. The city denied the request asserting attorney–client privilege, but it cited the incorrect statute in its denial. The plaintiff appealed to the Salt Lake City Record Appeals Board, which determined that the plaintiff was entitled to the records because they were not protected under the cited provisions. The city appealed to the district court, which overturned the board, finding that the denial citing to the incorrect statute was sufficient to put the plaintiff

on notice of the basis for the denial. The court of appeals affirmed, finding that while the statute says the denial "shall contain" citations to the appropriate GRAMA provisions, "the result will nevertheless effectuate the policy behind the statute." *Id.* ¶¶ 22–23 (internal quotation marks and citation omitted).

State v. Doutre

2014 UT App 192 (Aug. 14, 2014)

The Utah Court of Appeals reversed the defendant's conviction for attempted kidnapping based on trial counsel's ineffective assistance of counsel in failing to object to the expert testimony of a detective. Although the court identified three ways in which trial counsel was ineffective, the most notable was the failure to object to the detective offering expert testimony on the same day that he had served as the escort and narrator for the jury's view of the crime scene. The court explained that trial counsel "should have been sensitive to the impression this unusual situation might have made on the jury." *Id.* ¶ 16. The dual role of the detective was an impermissible irregularity that might tend to influence the trier of fact. This was particularly true given that the judge told the jury that none of the witnesses would be at the jury view; the detective was the only witness privileged to be there; and the detective was able to answer the State's questions during trial by referencing how things appeared earlier that day during the jury view, even though as the court-appointed guide for the jury view, he was supposed to point out landmarks impartially.

Rutherford ex rel. Rutherford v. Talisker Finance Co., LLC,

2014 UT App 190, 333 P.3d 1266

"The [Inherent Risks of Skiing] Act prohibits pre-injury releases of liability for negligence entirely, regardless of the age of the skier that signed the release or whether the release was signed by a parent on behalf of a child." *Id.* ¶ 30. A ten-year-old boy was practicing skiing as a member of a racing club affiliated with the U.S. Ski and Snowboard Association (USSA). While skiing very fast, he hit a patch of artificial snow that was of a wetter consistency and fell, sustaining injuries. His parents filed a complaint on his behalf. At issue were (1) whether Utah's Inherent Risks of Skiing Act (Act) contemplated the man-made snow that caused the boy's crash and (2) whether his father could effectively waive liability for negligence on the boy's

behalf. The Act was a compromise tool to bring insurance premiums down for resorts and incentivize resorts to carry insurance. The court placed the "inherent" hazards the Act precludes from liability into two categories: (1) the type of hazards which skiers endeavor to encounter (powder, moguls, steep grades) and (2) the fact that those skiers do not want to encounter but cannot be alleviated by ordinary care (sudden changes in weather). Whether the artificial snow was within the second category was an issue of fact, and the test is whether the plaintiffs could prove the accident could have been prevented through the use of ordinary care. The liability waiver had two sub-issues: (1) whether the choice of law provision selecting Colorado law as governing was enforceable and (2) whether the Act allowed for a pre-injury waiver on behalf of a minor. The court found that the Restatement's (Second) of Conflicts of Laws § 188(2) several factors governed this determination and that Utah has a clear interest in the case. Next, the court held that the policy behind the Act did not allow for a parent to waive a child's pre-injury claim.

Hansen v. Harper Excavating
2014 UT App 180, 323 P.3d 969

The plaintiff appealed the district court's order granting summary judgment in favor of the defendant on the basis that the plaintiff's claims required expert medical testimony. The Utah Court of Appeals affirmed, holding that the plaintiff was required to provide expert testimony from which the jury could find, without speculation, that he would have avoided the injuries he complained of if he had received the recommended treatment. The court additionally rejected the plaintiff's argument that even if expert testimony were required, he could show causation through the physicians he designated as fact witnesses. Although a treating physician does not fall within the category of "retained or specially employed" expert witness and therefore does not need to comply with the expert report requirements of former Utah Rule of Civil Procedure 26(a)(3)(B) (2010), treating physicians must still be disclosed as expert witnesses under subsection (a)(3)(A) if they will provide opinion testimony based on their experience or training.

United Fire Group v. Staker and Parsons Companies
2014 UT App 170 (July 25, 2014)

Plaintiffs were traveling on a stretch of highway that was under heavy construction. The construction resulted in lane closures and temporarily redirecting traffic. Plaintiffs' vehicle drove off an unfinished embankment, and plaintiffs sustained injuries. There was a dispute as to whether the construction hazards were marked with signs at all. Following the close of discovery, the defense moved for summary judgment on the basis that the plaintiffs had not designated an expert to speak on some 1,000 pages worth of UDOT traffic control guidelines, and so could not establish for the fact-finder what the ordinary standard of care was for its negligence claim. The court of appeals held that an expert would not be required to determine that the ordinary standard of care was breached if there was a complete absence of signs, as was the plaintiffs' position but that if there were signs, the plaintiffs would need an expert to establish an ordinary standard of care. The court reversed the summary judgment and remanded for further proceedings.

Town & Country Bank v. Stevens
2014 UT App 172, 332 P.3d 387

As a matter of first impression, the Utah Court of Appeals adopted the Fifth Circuit's rule that the discharge of a debtor in a reorganization proceeding does not affect a guarantor's liability. The defendant – guarantors of a promissory note to the plaintiff bank – appealed the district court's grant of partial summary judgment in favor of the bank. The guarantors argued that there were material facts in dispute regarding whether the guarantees were altered when the borrower created and commenced performance under a bankruptcy reorganization plan. Adopting the Fifth Circuit's rule, the court rejected the guarantors' argument that an existing dispute of fact precluded summary judgment because the issue was resolved as a matter of law.

Dyck-O'Neal, Inc. v. Wilson
2014 UT App 173, 332 P.3d 380

The Utah Court of Appeals reversed and remanded a summary judgment that was improperly granted to a creditor seeking a deficiency judgment on a debt secured by a deed of trust. The creditor sued for breach of contract but failed to present facts to establish that its claim was not barred by the one-action rule. The court held that the creditor was not entitled to pursue a breach of contract claim for a debt secured by a deed of trust unless it first established that it was an unsecured junior creditor having lost its security interest when a senior creditor foreclosed on the property.

Dani Cepernich, Taymour Semnani, and Adam Pace also contributed to this article.

The Dispute Resolution Section: Celebrating 15 Years

by Stephen D. Kelson

Many well-seasoned practitioners can recall a time when trials were the norm and anything more than direct negotiations between parties and counsel was considered taboo or supposedly showed weakness. The practice of law has changed significantly, and well-informed counsel and clients recognize the benefit of other methods to resolve conflicts and disputes. This year marks the fifteenth anniversary of the Dispute Resolution Section of the Utah State Bar (DR Section).

For the few, if any, who don't recognize the term, "alternative dispute resolution" (ADR) refers to informal dispute resolution processes where the parties meet with a professional third party, who assists resolution of disputes in a way that is less formal and often more consensual than litigation. While the most commonly utilized forms of ADR are mediation and arbitration, there are many other forms, including judicial settlement conferences, facilitation, early neutral evaluation, ombudsmen, special masters, etc. Though generally voluntary, ADR is mandatory in Utah divorce proceedings, and it may be ordered by the court prior to trial in other cases.

The Beginning

The use of ADR has increased rapidly in America since the 1960s. Its application started to become mainstream in the Utah legal practice in the late 1980s and early 1990s. In 1998, Karin Hobbs, Kent Scott, and Nathan Alder formed a committee that participated in the Utah State Bar's Governmental Relations Committee to observe ADR legislation and subsequently moved forward with the prospect of creating a Bar section for dispute resolution. In May 1999, the DR Section was founded with the four-fold purpose of (1) providing high quality continuing education opportunities for the Bar, state and federal judiciary, and others involved with alternative systems and forums for dispute resolution; (2) providing opportunities and forums to network and exchange ideas regarding dispute resolution; (3) monitoring legal and political issues relevant to alternative dispute resolution and making recommendations to the Bar; and (4) undertaking other services to benefit the section members, the legal profession and the public.

DR Section Leadership

This past October, at the DR Section's annual meeting, its members had the opportunity to elect leadership for the section. For the 2013–2014 year, the DR Section's leadership consists of Felicia B. Canfield (Chair), Carolynn Camp, (Vice-Chair), Ben W. Lieberman (Secretary), and Russell D. Gray (Treasurer). Each brings experience and perspectives that assist the section in fulfilling its purposes as ADR matures in Utah.

Felicia B. Canfield is a founding member of Action Law LLC and has litigated title insurance, banking, and commercial disputes for eleven years. She seeks resolution where possible, recognizing the significant financial, business, and emotional toll such disputes often create, and states that "dispute resolution is a powerful tool for parties who wish to manage the outcomes of their disputes rather than relying upon an inherent risky, unpredictable litigation process that does not favor flexibility."

STEPHEN D. KELSON is a litigation attorney and mediator at the law firm of Christensen & Jensen, P.C. in Salt Lake City, Utah, where his practice focuses on civil and commercial litigation.

Carolynn Camp is an attorney–mediator practicing in the area of divorce and family mediation. She also directs and serves as an instructor for the Conflict Resolution Graduate Certificate Program at the University of Utah.

> I believe that attorneys are, first and foremost, problem solvers. Attorneys should help their clients resolve their conflicts in ways that not only provide the best outcomes, but are also the least costly, taking into account not just the financial cost but also the emotional toll, damage to ongoing relationships, and other concerns of the client.

She believes litigation to be a single tool at the attorney's disposal and attorneys should be very savvy in using other methods and processes to provide good outcomes for their clients.

Ben W. Lieberman is a trial litigator and mediator at the Lieberman Law Firm. He has been a civil trial attorney for eleven years and a mediator for six years. He has litigated and mediated disputes regarding commercial, real estate, personal injury, and domestic matters. His interest in mediation and dispute resolution stems from a passion for solving problems in ways that reduce risk for parties and are more efficient than litigation.

"The strength of the DR Section comes from the diversity of its members' practice areas and experience...."

Russell D. Gray is a solo practitioner who also works for Orange Legal. He also serves as a Salt Lake County hearing officer for county tax appeals. "I went to law school because I enjoy helping people and I enjoy solving problems. After practicing several years, I realized that a lot of what happens in a litigated case neither helps nor solves problems." Russell became fascinated by the different methods of dispute resolution that allow people to find their own solutions to legal problems.

DR Section Events

The DR Section is vibrant with activity. Each year, the DR Section offers multiple opportunities for its members to expand and share their knowledge of dispute resolution and its application through the annual ADR Academy, Ethics and Professionalism Seminar, presentations at the Spring Convention, Summer Convention and Fall Forum, co-sponsorship of the Utah Council on Conflict Resolution's yearly Symposium, monthly CLE Brown Bag lunches, and co-sponsorship of relevant CLE events with other sections of the Utah State Bar. Over the past year, the DR Section Brown Bag lunches have provided training for both attorneys and non-attorneys seeking to expand their knowledge of ADR. Brown Bags have included a wide range of ADR topics and presenters, including, but not limited to:

- "Rethinking the Spectrum of Dispute Resolution," presented by Joshua F. King;
- "The Iceberg Effect in Mediation: What is Hidden from View?" presented by Michelle M. Oldroyd;
- "Some Commercial Mediation Insights: Things I Have Learned from Eight Years in the Trenches," presented by Judge William B. Bohling (Ret.);
- "Construction Mediation Minefields: Building Resolution," presented by Kent B. Scott;
- "Persuasion in Mediation," presented by Stephen D. Kelson;
- "Escaping the Charging Gorilla: Diversifying Your Toolbox to Account for Culture and Negotiate More Effectively," presented by Benjamin Cook; and
- "Deconstructing a Construction Mediation," presented by Adam T. Mow.

At the 2014 Spring Bar Convention in St. George, Carolynn Camp presented a break-out session entitled "You've Got the Wrong Mediator: The Case for Varying Mediator Styles and Techniques." Her presentation discussed different mediator styles and techniques to inform and encourage Utah attorneys to recognize them and to consider both in light of the given case intended to be mediated and the benefit of broadening pools of mediators to meet the special needs of individual cases.

On July 17, 2014, at the Summer Bar Convention in Snowmass, Colorado, Karin Hobbs, Ed Havas, Heather Thuet, and Nathan Alder, with the assistance of others, presented a break-out session titled "What Goes on Behind Closed Doors in Mediation," which included a humorous and informative skit involving issues that frequently arise before, during, and after mediation, including lack of preparation, unrealistic expectations, unannounced guests, and settler's remorse, and a discussion about ways to address these issues and improve mediation practice.

Peter W. Billings, Sr. Award of Excellence

In honor of the memory of Peter W. Billings, Sr. (1917–1996), who pioneered and championed ADR in Utah through legislation and his personal assistance to both the Utah state and federal courts, the DR Section annually awards the Peter W. Billings, Sr. Award of Excellence to the person or organization that has done the most to promote ADR in the state of Utah. The award is not restricted to an attorney or judge, and the DR Section board actively seeks nominations from the community throughout each year from the legal and ADR communities. Kathy Elton is the recipient of the 2014 Peter W. Billings, Sr. Award of Excellence. Recent past recipients of this prestigious recognition have included LeeAnn Glade, Nathan Alder, Michele Mattsson, and Judge William B. Bohling (Ret.).

The strength of the DR Section comes from the diversity of its members' practice areas and experience, and the DR Section is committed to continuing to serve both the profession and community at large. The DR Section thanks the Bar as well as the many individuals who have supported it these past fifteen years. It looks forward to assisting the legal community for many decades to come, and invites all members of the Utah State Bar to join the section.

To join the Dispute Resolution section visit
http://utahbar.org/sections/adr/member_application.html

What About the Other "R"?

by Keith A. Call

As I write this, a headline in the *Salt Lake Tribune* reads, "Three recent flights made unscheduled landings after fights over [reclining] seats." Scott Mayerowitz, *It's No Longer Safe to Recline Your Airplane Seat*, Salt Lake Tribune, Sep. 2, 2014, available at http://www.sltrib.com/sltrib/money/58364627-79/passengers-seats-airlines-flight.html.csp. The story reports: "Three U.S. flights made unscheduled landings in the past eight days after passengers got into fights over the ability to recline their seats. Disputes over a tiny bit of personal space might seem petty, but for passengers whose knees are already banging into tray tables, every inch counts." *Id*. The news story itself is forgettable, but the underpinnings of the story warrant thought and discussion.

The story is about the exercise of "rights" – the right to recline an airline seat vs. the right to protect one's personal space. As a society, we have become quite good at exercising our "rights" muscles. There are many outstanding examples of brave Americans who have stood up for rights, from John Adams to Jackie Robinson. Our country has historically relied on lawyers to protect and promote personal and collective rights.

Today, we still rely on lawyers to be at the forefront of the battle. It's what we do. Most lawsuits are about protecting the rights of our clients. Enormous social change has been brought about by lawyers seeking to redefine and enforce individual rights. The world is a better place because of lawyer heroes like Thurgood Marshall, Clarence Darrow, and, of course, Abraham Lincoln.

But isn't there another "R" that has equal importance with "rights"? Imagine the impact in the world if our society placed the same emphasis on "Responsibility" as it does on "Rights." Responsible behavior – and its close cousin, restrained behavior – would greatly mitigate, and possibly eliminate, some of our most pressing social problems, including poverty, crime, juvenile (and adult) delinquency, and maybe even social problems involving reclining airline seats.

As leaders in society, lawyers can also be on the front lines of the battle for responsible behavior. How can lawyers be activists in "civil responsibility"? Here are a few ideas. I'm sure you will have many others.

Represent Clients Competently and Zealously.
Our judicial system is designed to seek truth through an adversarial process. The process works best when lawyers provide the best possible preparation and advocacy for their clients. Lawyers have a responsibility to work vigorously for their clients within the adversary system.

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.

Be Civil.

Civility and zealousness can and should co-exist. Lawyers have a responsibility to follow the Utah Standards of Professionalism and Civility. These standards should set a minimum bar. I previously wrote about the need for lawyers to strive to exercise good character as lawyers and in life, above and beyond minimum written standards. *See* Keith A. Call, *Don't Use Your Head*, 25 Utah B. J. 38 (Sept./Oct. 2012).

Do Pro Bono work.

Access to justice continues to be one of the biggest problems with our judicial system. As lawyers, we are stewards of the people's justice system. We have more ability to address the judicial access problem than any other segment of society. Lawyers have a responsibility to assist people who can't otherwise afford to pay for access to the legal system.

Do Good. Be Good.

Pro bono work is not the only way to alleviate access to justice problems. Lawyers can be advocates in a larger sense for breaking down barriers that limit judicial access. Lawyers can also be powerful agents for change in society at large. We have a responsibility to use our education, skills, and training to improve society. We should exercise our "responsibility" muscles every day by looking for opportunities to help and serve others.

Whether practicing law or walking down Main Street, lawyers should develop a constant mindset of making the world a better place for others. By exercising our "responsibility" and "restraint" muscles, we can take upon ourselves a little extra burden for the overall good of society. So consider taking public transportation or riding your bike instead of driving your car to work every day. Allow the car driving next to you to merge. Give a little extra to the Utah Food Bank or other charities. And if you can, don't recline your seat on airplanes even if the person in front of you does.

Does a Landlord have a Fiduciary Duty to a Tenant in the Build-out Scenario?

by Collin R. Simonsen

When a landlord leases an office space for the first time, it is not uncommon for the tenant to bear the cost of "building out" the space. In some cases, the landlord also takes upon himself the responsibility of hiring and overseeing the contractor, interior designer, architect, or others who work on the space. If the cost of building out the office space is not a "fixed" cost, or, in other words, if the tenant is responsible for the final cost no matter what it is, then the landlord may have a fiduciary duty to keep costs within reasonable bounds.

Although courts have generally "refrained from definitively listing the instances of fiduciary relationships," some will be "implied in law due to the factual situation surrounding the involved transactions and the relationship of the parties to each other." *First Sec. Bank of Utah N.A. v. Banberry Dev. Corp.*, 786 P.2d 1326, 1332 (Utah 1990).

"Whether or not a…fiduciary relationship exists depends on the facts and circumstances of each individual case." *Id.* (citation and internal quotation marks omitted).

> Whether an agency relationship exists depends upon all the facts and circumstances of the case.… Where evidence as to the alleged agent's authority and/or principal's control is disputed or reasonable inferences drawn from the evidence may differ, the question of whether an agency relationship exists is one of fact for the jury.

United States v. Welch, 327 F.3d 1081, 1102 (10th Cir. 2003) (citation and internal quotation marks omitted).

Furthermore,

> [a] fiduciary is [a person] in a position to… exercise…influence over another. A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary.

First Sec. Bank, 782 P.2d at 1333.

When a tenant is bearing the cost of building out the tenant space, but the landlord has full control over how that is accomplished, the "authority of the [tenant] is placed in the charge of the [landlord]" to such an extent that a fiduciary duty could be found. *Id.*

Although no Utah court has ruled on this issue, it is a fact pattern that is closely analogous to another situation where a fiduciary or confidential duty has been found in many jurisdictions. This situation is that of a "cost-plus" construction contract. A cost-plus contract is one where the owner of the property agrees to pay the contractor for the costs of a construction project, plus a certain percentage of the costs as profits to the contractor. In this scenario, there is no defined limit to the amount that the contractor can spend and be reimbursed. And as the cost of the project grows, the profit grows proportionally. In this situation, "the cost-plus contract places the contractor in a role that could be

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termed a 'constructive fiduciary,' i.e., when a contractor holds the owner's pocketbook, it would be inequitable to consider the contractor's duty to be less than that of an agent, a trustee, or a fiduciary." Paul J. Walstad, Sr. & Camille Williams, *Contracting on a Cost-Plus Basis: The Owner's Relationship of Trust with the Contractor*, Construction Briefings No. 2000–12 (2000).

A landlord in the build-out scenario is in the same position as a contractor in the cost-plus scenario. Knowing that he or she will have to lease out the premises to future tenants and that the current tenant will be obligated to pay the costs for building-out the premises, the landlord has an incentive to purchase the best materials and to build the fanciest amenities in the office space. The landlord has no incentive to be vigilant against cost overruns or to dispute spurious charges from the contractor, architect, or suppliers. In essence, the landlord "holds the owner's pocketbook." The landlord should therefore be considered a "constructive fiduciary."

Why does Walsted use the term "constructive fiduciary" rather than just "fiduciary" or "agent"? It is because an actual fiduciary has the power to bind the principal in such a way that the third party could sue the principal for payment *directly*. In the "cost-plus" context and in the "lease build-out" context, this is probably not the case. But when the tenant gets the bill and refuses to pay, the tenant could use the defense of breach of constructive fiduciary duty when the landlord brings suit for breach of contract.

The landlord would be an *actual* agent if he or she had the authority to bind the tenant to costs such that the contractor or supplier had a cause of action against the *tenant*. Where the landlord only binds the tenant to reimburse it for costs that landlord expends, the terms "quasi-agent" or "constructive fiduciary" are appropriate.

If a court determines that the landlord has a fiduciary or "constructive fiduciary" duty, then the landlord may not be able to pass along "unreasonable" costs to the tenant notwithstanding the contractual right to do so. This reasoning comes from the cost-plus scenario, where a contractor has "a duty to make every reasonable effort to minimize costs and thus may recover only for such material and labor which it is necessary to use to complete the job." *Metropolitan Elec. Co. v. Mel-Jac Constr. Co.*, 576 P.2d 323, 325 (Okla. App. 1978).

Further,

> [the contractor] had a duty to be aware of the ongoing or escalating costs of construction and to communicate this information to the [owner] in timely fashion. The gathering of this information was within [the contractor's] ability and expertise, not the [owner]. . . . [The contractor] failed to keep effective track of the costs and likely future costs and failed to communicate the appropriate information.

Jones v. J.H. Hiser Constr. Co., Inc., 484 A.2d 302, 304 (Md. 1984). Similarly, the landlord who hires the contractor has the ability to keep track of costs that the tenant will end up paying. He should have the duty to be aware of escalating costs of construction and should communicate that information with the tenant.

What, then, can a landlord or contractor pass along? "In the case of a cost-plus contract, it is implicit that the price charged must not be whatever the contractor sees fit to charge but rather must be whatever may be shown to be a reasonable and proper cost." Walsted, *Contracting on a Cost-Plus Basis*. Since the landlord would be the plaintiff in a breach of contract action, it would be up to him to prove that the costs are reasonable. Some states impose on the contractor the duty of itemizing "each and every expenditure to prove that efficient methods were used to procure reasonable amounts of material and labor." *Id*.

Nevertheless, Utah courts have not recognized (or denied) a fiduciary duty in the cost-plus contract scenario. And, indeed, some states have refused to find such a duty in that situation.

See e.g. Munn v. Thornton, 956 P.2d 1213, 1220 (Alaska 1998). However, a prudent attorney would advise his clients to avoid situations where a fiduciary duty may be imputed to them.

There are a number of things a landlord can do. First, the landlord should include a term in the lease agreement disclaiming any duties, including fiduciary duties, not explicitly granted.

Second, the landlord should agree to a reasonable cap on the cost of the build-out. If the build-out stays under the cap, it is unlikely that a court would find a breach (or even existence) of a fiduciary duty. If the landlord does not want to set a cap, he should at least refrain from giving estimates of cost. Such estimates could be used against him by a tenant showing unreasonably high cost overruns.

Third, the landlord could give control of the build-out to the tenant, including the power to hire and direct the contractor, architect, interior designer, and others. This would require more trust in the tenant than a landlord may want to give because the landlord could be stuck with an office space he does not like after the tenant has moved out. To address this risk, in negotiation the landlord may demand a premium if tenant seeks this power.

Fourth, if the landlord desires to maintain control over the build-out, he should give the tenant regular updates, access to the construction documents and invoices, and access to the builders, and he should allow the tenant to go on site and inspect the premises during construction. This is because

> the law will [only] imply [fiduciary responsibilities]… where one party to a relationship is unable to fully protect its interests or where one party has a high degree of control over the property or subject matter of another and the unprotected party has placed trust and confidence in the other.

Town of New Hartford v. Conn. Res. Recovery Auth., No. UWYCV040185580S(X02), 2007 WL 1977151, *46 (Conn. Super. Ct. June 19, 2007) (second alteration in original) (citation omitted). If the tenant has the power to detect and prevent cost overruns, it is less likely that a court will find that the landlord was in a fiduciary relationship with the tenant.

ABA Task Force Recommends Licensing Limited Legal Technicians

by Peter Strand

I am writing this in response to the report of the American Bar Association Task Force on the Future of Legal Education (the Task Force). The Task Force was created in 2012 and was charged with recommending to the ABA how agencies involved in the practice of law can take steps to address issues concerning the economics of legal education. I must admit I failed to take notice of the Task Force's laudable appointment as I, like so many of my colleagues, was struggling to provide the best value I could for my clients and community in an ever more fast-paced legal market. So it was nearly three months after the Task Force released its final report that I managed to find the time to peruse its recommendations.

Much of the report focuses on well-known problems within the legal education market, such as the high burden that expensive legal education places on attorneys, the scarcity of jobs paying traditional legal salaries, overly standardized education lacking in practical skills training, and other basic issues. For each issue the Task Force provides at least one recommendation to help address these concerns, such as a recommendation for legal bar associations to remove or reduce standards that inhibit experimentation in legal education. ABA Section of Legal Education and Admissions to the Bar, *Report of the Task Force on the Future of Legal Education*, 27 (Jan. 23, 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf. It is with only one of the Task Force's recommendations that I take umbrage, and in this article, I set out to provide reason for the legal bar associations to stridently refuse this recommendation.

The Recommendation

Nearly every lawyer actively engaged in the practice of law has recognized the dual dangers presented to his or her profession by the flooding of the legal market with more attorneys than it can handle and the ever increasing groups, software, and websites that invade the practice of law by providing legal forms, advice, and, in some cases, actual representation. The prevalence of new methods for receiving legal services that were previously available only from attorneys has proven itself both powerful and lasting. The Task Force even refers to the problem in its report, referring to the large number of recent law graduates and their inability to get the type of employment they anticipated when they chose to attend law school. *See id.* at 13. However, the Task Force alludes to the oversaturation of the market with attorneys seemingly only as an introduction to the idea that there are areas that have few or no attorneys. It is this latter concern that the Task Force seeks to address with its recommendation, making no further reference to the likely detrimental effect of its recommendation on the former.

The Task Force recommends that the state supreme courts, legal bar associations, and law schools create a category of non-attorneys to be educated and certified to perform limited legal services. *Id.* at 3, 13–14. It recognizes a lack of access to justice for the citizens of those areas that are not economically feasible for an attorney to make a practice in or that for other reasons have failed to attract an adequate base of legal service providers. The Task Force believes that this new class of non-JD limited legal technicians will fill that need.

Why This Recommendation Will Not Increase Access to Justice in Rural Areas

The Task Force, while recognizing there is an overabundance of attorneys in some locations, is concerned that some areas are unable to get lawyers to set up a practice because they provide poor

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financial prospects for the attorney. *Id*. at 13. The report identifies rural areas as one such category and hypothesizes that it is a lack of monetary opportunity or low interest in rural life. *Id*.

I believe it is highly unlikely that lawyers as a group are predisposed to shun the rural lifestyle. It is more likely that a young lawyer, saddled with upwards of $60,000 in education loans, is not in a position to set up a practice in rural areas where the number of potential clients is too low to provide adequate opportunities to service that debt. The Illinois State Bar Association's final report entitled The Impact of Law School Debt on the Delivery of Legal Services finds that not only does debt drive lawyers away from rural areas; it also makes them less likely to engage in pro bono work, reduces the diversity in the legal profession, and increases the likelihood of ethics violations. *See* Illinois State Bar Association, *Final Report, Findings & Recommendations on The Impact of Law School Debt on the Delivery of Legal Services*, 2 (June 22, 2013), *available at* http://www.isba.org/sites/default/files/committees/ISBA%20Law%20School%20Debt%20Report.pdf.

The purpose of this proposed new legal paradigm is to address a misdistribution of legal services that the Task Force believes may be due to the expense of hiring a properly trained Juris Doctorate attorney. *Report of the Task Force*, at 3. The Task Force believes that by allowing people to practice law who do not have a JD (hereinafter, limited legal technicians), they will provide legal services to the areas that currently do not have access to them and at a reduced cost when compared to their better educated JD-holding counterparts.

The report, however, fails to explain how, if an area provides poor prospects for a traditionally educated attorney, the new class of limited legal technicians would be more likely to set up shop in such a financially unviable zone. I see no reason to believe that these new limited legal technicians would set up in rural or economically disadvantaged areas in greater numbers than traditional attorneys. It is much more likely that they will seek to profit from their new right to practice law by setting up shop in the larger, more urban areas where profits are more assured because of increased populations or wealth.

And (Unequal) Justice for All

It is unlikely that the new order of limited legal technicians would set up shop in legally disadvantaged areas, but I am highly concerned about the results if they were to do so. Access to the law is a fundamental necessity for citizens to maintain a healthy democracy. Creating a class of less educated and more limited legal technicians to service the rural communities may create the illusion that the disparity of access between rural and urban citizens has been addressed but fail to truly do so. In that scenario, we would be left with a formalized two-tier legal system that makes available superior legal services to urban citizens while rural citizens are left with a less competent and more limited level of access to legal services. While many may argue that there is already a two-tiered system of access to justice based on wealth, we in the legal profession have not resigned ourselves to that truth. We continue to strive to ensure that the legal system remains as fair and unbiased as our great republic promises.

Attorneys, judges, and paralegals are constantly seeking new ways to provide access to justice for those who currently lack it. In one small part of Utah alone, Judge John Baxter holds a homeless court every other week near Salt Lake City's homeless shelter; Lawyers for Veterans and the Utah Legal Alliance are currently engaged in creating "virtual legal clinics" that will allow rural residents to Skype with attorneys in the urban areas; and the Young Lawyers' Division of the Utah Bar designs and tests numerous programs every year in an attempt to increase access to justice. If limited legal technicians were to suddenly flood the rural areas, it might very well create the illusion that the need has been addressed, reducing such laudable efforts to truly address it.

Death of the Local Practitioners

Even if the introduction of non-JD-holding limited legal technicians did increase the level of access to rural areas, it would not begin to offset the potential damage done to access to justice where it already exists. In the current market, the number of solo practitioners is on the rise due to a constricting legal jobs market. Solo practitioners, small firms, and even some large firms are feeling the pinch from having to compete within the new legal market. New technologies provide legal forms and access that undercut some of the more routine or contractual aspects of the law that often make up the bread and butter of small firms and solo practitioners. It is these commonplace less complex types of legal practice that help ensure small firms and solo practitioners remain in business, and it can reasonably be inferred that it is also these less complex types of legal practice that will be the areas that the bar associations will allow legal practitioners to practice. Allowing them to do so will further erode that key base. Higher initial cost and overhead will ensure that traditional lawyers will be unable to fairly compete with their non-lawyer competitors for this oft-needed work. Cut off from their bread-and-butter business, the number of small firms and solo practitioners would be greatly reduced. This may eventually result in the legal market becoming split between

medium and large firms and non-JD holding legal practitioners.

The implications of this two-tiered system are not only bad for the small practitioners but also for the general public the Task Force's recommendation is designed to help. Limited legal technicians will not be able to provide complex legal representation because they are not authorized or trained to do so. Small firms and solo practitioners will have been largely forced out of the market and those that remain may no longer have the resources to mount strong legal cases due to the increased competition of those who did not obtain JDs. If only large firms remain in a position to provide complex legal services, then the costs of such services will rise rather than fall. Further, even if the general public does have the money to obtain a large firm's assistance, many potential claims will be effectively barred as those firms may likely already have relationships with many of the potential defendants. The net result would likely be a decrease in access to the law that is larger, by an order of magnitude, than the one this recommendation is designed to address.

Respect for Attorneys Would Be Tarnished

Of more immediate concern is the result of implementing this recommendation on the practice of the law in general. In *Sperry v. Florida*, 373 U.S. 379 (1963), the Supreme Court stated that careful restriction on who is allowed to practice law helps to protect the public from unreliable advice, preserves and strengthens the lawyer–client relationship, and maintains law as the foundation of government. In order to make sure that these restrictions are meaningful, we currently require attorneys generally to go through four years of higher education and three years of law school to make sure they are competent to provide advice and represent the public. The Task Force's report recognizes that it is the JD education that imparts the competence, which is of value to the public. ABA Section of Legal Education and Admissions to the Bar, *Report of the Task Force on the Future of Legal Education*, 6–7 (Jan. 23, 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

If a JD is required to be competent to provide legal advice, preserve the attorney–client relationship, and maintain law as the foundation of government, then the lesser educational paradigm would be entering into the legal market a new set of under-educated limited legal technicians who by the traditional standard are not competent to practice law. Worse, the general public would have little ability to distinguish these limited legal technicians from their better educated and more competent brethren. With the public unable to distinguish a traditional attorney from the newly created non-JD limited legal technician, there would be ample opportunity for these newly minted professionals to take advantage of the public by offering services they are not authorized to perform. Honest limited legal technicians would still be unable to provide the quality of representation that JD attorneys are able to provide, and the public would attribute the lower quality to the legal profession at large. Esteem for the legal profession would be hurt, not helped, by the implementation of this recommendation.

Conclusion

Implementation of this recommendation on a statewide or national level will not result in an appreciable increase in access to justice. In fact, in the long run it will likely result in a sharp decrease of access and a more permanent two-tiered legal system. The Task Force report is filled with many good recommendations and its goals are clearly laudable, but the problem of access to justice will not likely be fixed by allowing non-JD limited legal technicians to practice law. It will be fixed by increasing the support to legal pioneers like Judge Baxter and the Young Lawyers Division in their attempts to improve the quality and quantity of legal services.

Settling Boundary Disputes Using Utah's Boundary by Acquiescence Doctrine

by Elliot R. Lawrence

Not too long ago, I took a call from a property owner involved in a boundary dispute. A masonry wall had stood for several years, separating her parcel from a neighboring property. A new owner had recently purchased the neighboring property, and he discovered that the wall had been built about ten feet onto his parcel. He immediately demanded that it be removed, so he could install a swimming pool. The woman protested, but he hired a contractor, who began removing the wall and her flower bed. She was distraught, but at that point, she had no choice but to begin legal action against her neighbor. If the parties had understood the boundary by acquiescence theory, they could have settled the dispute and avoided litigation.

Boundary by Acquiescence is an equitable doctrine applied to resolve property line disputes based on recognition of long-established markers used to identify boundaries. "Its essence is that where there has been any type of a recognizable physical boundary, which has been accepted as such for a long period of time, it should be presumed that any dispute or disagreement over the boundary has been reconciled in some manner." *Baum v. Defa*, 525 P.2d 725, 726 (Utah 1974). The boundary by acquiescence principle was recognized in Utah as early as 1887. *See Switzgable v. Worseldine*, 5 Utah 315, 15 P. 144 (Utah 1887).

Boundary by acquiescence is not found in the Utah Code but was developed over many years by Utah's appellate courts. It is intended to guide property owners, prevent inequity, and help avoid litigation. The doctrine thus promotes stability in property descriptions, contributing to the "peace and good order of society." *Bahr v. Imus*, 2011 UT 19, ¶ 35, 250 P.3d 56.

The Equitable Underpinning of Boundary by Acquiescence

Boundary by acquiescence, like the similar doctrines of adverse possession or prescriptive easements, prevents inequity by recognizing long acceptance of property use or occupation.

> The very reason for being of the doctrine of boundary by acquiescence…is that in the interest of preserving the peace and good order of society the quietly resting bones of the past, which no one seems to have been troubled or complained about for a long period of years, should not be unearthed for the purpose of stirring up controversy, but should be left in their repose.

Hobson v. Panguitch Lake Corp., 530 P.2d 792, 794 (Utah 1975). Altering property ownership is not to be taken lightly but may be necessary to prevent inequity and injustice and to recognize property rights arising from reliance on long-standing use. "It is not unjust in certain cases to require disputing owners to live with what they and their predecessors have acquiesced in for a long period of time." *Staker v. Ainsworth*, 785 P.2d 417, 422 (Utah 1990) (citation and internal quotation marks omitted).

Elements of Boundary by Acquiescence

A property owner must prove the following four elements in order to successfully establish a boundary by acquiescence: "(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." *Bahr*, 2011 UT 19, ¶ 35. The person asserting a claim for boundary by acquiescence has the burden of proof. And, because application of the acquiescence doctrine alters an

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owner's interest in real property, all four elements must each be established by "clear and convincing" evidence. *Essential Botanical Farms, LC v. Kay*, 2011 UT 71, ¶ 22, 270 P.3d 430, 437. If any of the four elements are not proven, the claim fails. *Hales v. Frakes*, 600 P.2d 556, 559 (Utah 1979).

For a time, a fifth element – objective uncertainty as to the correct boundary line's location – was also required. However, in 1990, the Utah Supreme Court eliminated that requirement, holding that it made "boundary by acquiescence less practical," and that the extra element would lead to more litigation rather than less. *Staker*, 785 P.2d at 423.

Occupation Up to a Visible Line

The occupation element requires actual or constructive occupation and use of the area in question, not just a mere claim to the property. "The first element [of boundary by acquiescence] may be satisfied where land up to the visible, purported boundary line is farmed, occupied by homes or other structures, improved, irrigated, used to raise livestock, or put to similar use." *Bahr v. Imus*, 2011 UT 19, ¶ 36, 250 P.3d 56. The occupation should be consistent with "a pattern of use that is normal and appropriate for the character and location of the land." *Dean v. Park*, 2012 UT App 349, ¶ 29, 293 P.3d 388 (internal citation omitted). An encroaching owner may not claim a new boundary if access and occupancy of a parcel up to the correct boundary by the neighboring property owner is impossible. *Carter v. Hanrath*, 925 P.2d 960, 962 (Utah 1996) (holding that inability to access and occupy all of parcel is not acquiescence in a new boundary).

The purpose of the occupancy element is not the extent of the use or occupancy, but whether the owners have knowledge of conditions and activities which might alter the ownership rights in the property, so that there is opportunity to interrupt or alter those conditions or activities. *See Anderson v. Fautin*, 2014 UT App 151, ¶ 18, 330 P.3d 108, 113. "Constructive" occupation, even if intended plans are not carried out, may also satisfy the occupation requirement, if the owners have knowledge of the conditions prevailing on the property. *See Harding v. Allen*, 10 Utah 2d 370, 353 P.2d 911, 914–15 (Utah 1960).

The line claimed as the boundary "must be definite and certain, [with] physical properties such as visibility, permanence, stability, and a definite location." *Gillmor v. Cummings*, 904 P.2d 703, 707 (Utah Ct. App. 1995). The claimed boundary line "must be open to observation" and "must be definite, certain and not speculative." *Fuoco v. Williams*, 421 P.2d 944, 946 (Utah 1966). In *Fuoco*, the court found that an unused irrigation ditch was not permanent, visible, or stable enough to mark a purported boundary. *Id.* at 946–47.

Ultimately, the measure of whether the occupation requirement has been satisfied is to establish that a claimant's occupation up to, but not over, the purported boundary "would place a reasonable party on notice that the given line was treated as the boundary between the properties." *Bahr*, 2011 UT 19, ¶ 36. It follows, therefore, that occupation and use of property without regard to a fixed line would probably not be sufficient to establish a boundary by acquiescence.

Marked by Monuments, Fences, or Buildings

The purported boundary line must be clearly marked, again so that a reasonable person would realize that the line was being treated as the property boundary. "A *monument* must be some tangible landmark to indicate a boundary" *Englert v. Zane*, 848 P.2d 165, 169 (Utah Ct. App. 1993) (citation omitted). The monument, building, or fence may be replaced or even altered,

but, as long as the same visible line is treated as the boundary, an acquiescence claim may still be successful. *See Orton v. Carter*, 970 P.2d 1254, 1257–58 (Utah 1998).

The purpose of the fence, building, or monument and whether it was installed to mark a property boundary is important. A structure or other marker erected as part of the normal use of the property, may identify a boundary only if the owners treated it as such. A temporary, moveable fence used to control livestock, but not intended to delineate a boundary, would not be sufficient to support a claim for a new boundary by acquiescence. *Pitt v. Taron*, 2009 UT App 113, ¶ 2, 210 P.3d 962.

Most of the cases addressing boundary by acquiescence have concerned an artificial marker, such as a fence or building. Natural features, however, may also serve to mark a purported boundary line, as long as the affected owners acquiesce in the feature as marking the boundary. *Englert*, 848 P.2d at 170 (treating a river as property boundary). The nature of the marker is not critical. "[T]he law merely requires 'a recognizable physical boundary of *any character*, which has been acquiesced in as a boundary for a long period of time.'" *Orton*, 970 P.2d at 1257 (citations omitted).

Mutual Acquiescence in the Line as a Boundary

The "heart" of boundary by acquiescence is mutual recognition by adjoining property owners that a visible line marks the boundary between the properties. This element is satisfied "where neighboring owners recognize and treat an observable line, such as a fence, as the boundary dividing the owner's property from the adjacent landowner's property." *Bahr v. Imus*, 2011 UT 19, ¶ 37, 250 P.3d 56. Because it is based on the actions of the property owners, acquiescence is highly fact dependent. *Essential Botanical Farms, LC v. Kay*, 2011 UT 71, ¶ 26, 270 P.3d 430. What the owners intended regarding placement of the boundary is not a factor. "[A] party's subjective intent has no bearing on the existence of mutual acquiescence." *Id.* ¶ 27, 439. Since acquiescence may be implied or inferred by the owners' actions, it is not necessary to show that the owners explicitly agreed that the line was the property boundary. *Wilkinson Family Farm, LLC v. Babcock*, 1999 UT App 366, ¶ 8, 993 P.2d 229.

"Mutual acquiescence in a line as a boundary has two requirements: that both parties recognize the specific line, and that both parties acknowledge the line as the demarcation between the properties." *Id.* (citation omitted). Acquiescence thus requires more than just the existence of some identifiable line. "'[T]he mere fact that a fence happens to be put up and neither party does anything about it for a long period of time will not establish it as the true boundary.'" *Brown v. Jorgensen*, 2006 UT App 168, ¶ 16, 136 P.3d 1252, 1257 (citation omitted).

Acquiescence may be established by the direct actions of the property owners regarding the purported boundary. It may also "be tacit and inferred from evidence, i.e., the landowner's actions with respect to a particular line may evidence that the landowner impliedly consents, or acquiesces, in that line as the demarcation between the properties." *Ault v. Holden*, 2002 UT 33, ¶ 19, 44 P.3d 781. Even silence and inaction may be evidence of acquiescence. *See Anderson v. Fautin*, 2014 UT App 151, ¶ 21, 330 P.3d 108, 114.

Any person familiar with the situation could offer relevant testimony concerning whether the property owners considered a particular line as the property boundary. *See RHN Corp. v. Veibell*, 2004 UT 60, ¶ 27, 96 P.3d 935; *Martin v. Lauder*, 2010 UT App 216, ¶ 6 n.4, 239 P.3d 519.

In order for the acquiescence to be mutual, "'both parties must have knowledge of the existence of a line as [the] boundary line.'" *Wilkinson Family Farm*, 1999 UT App 366, ¶ 8 (citations omitted). Since acquiescence is determined by the owners' objective actions and not their mental state or intent, a party's actual knowledge of the correct boundary is relevant to determine acquiescence, but it is not necessarily fatal to the claim. *Id.* ¶ 13. In like manner, while a deed provides constructive notice of the correct boundaries, a deed description by itself is insufficient to negate an acquiescence claim. *RHN Corp.*, 2004 UT 60, ¶ 28. Finally, a party's subjective belief concerning the location of the boundary could also be relevant to a boundary by acquiescence action. *Id.* ¶ 26.

A claim of mutual acquiescence may be countered by actions indicating that either property owner did not recognize or treat the purported line as marking the property boundary. *Ault*, 2002 UT 33, ¶ 20. Objections to the use or occupancy of the property are sufficient. "[M]ere conversations between the parties evidencing either an ongoing dispute…or an unwillingness…to accept the line as the boundary refute any allegation that the parties have mutually acquiesced…." *Id.* ¶ 21. In addition, evidence that the boundary had already been settled in an earlier dispute may defeat a new claim for boundary by acquiescence. *See Low v. Bonacci*, 788 P.2d 512, 513 (Utah 1990).

For a Long Period of Time

Utah's courts have firmly established that twenty continuous years is the minimum period of time required for a successful boundary by acquiescence claim. *Jacobs v. Hafen*, 917 P.2d 1078, 1080-81 (Utah 1996). Any interruption in that period, however brief, "restarts the clock for determining boundary by acquiescence." *Orton v. Carter*, 970 P.2d 1254, 1258 (Utah 1998) (citing a Colorado case where a two-week period of common ownership disrupted the acquiescence period).

When a twenty-year period of mutual acquiescence is proven, the new boundary is delineated, even if actions taken after the twenty-year period would otherwise defeat a claim. "Once adjacent landowners have acquiesced in a boundary for a long period of time, the operation of the doctrine of boundary by acquiescence is not vitiated by a subsequent discovery of the true record boundary by one of the parties." *RHN Corp.*, 2004 UT 60, ¶ 31.

Finally, "once adjacent landowners have acquiesced to a visible boundary other than the recorded property line for the requisite twenty years, the encroaching landowner's possession ripens into legal title by operation of law, extinguishing the other landowner's legal title to any part of the disputed land." *Q-2, LLC v. Hughes*, 2014 UT App 19, ¶ 11, 319 P.3d 732 (citation omitted). In other words, title to the disputed property is transferred when all of the elements of boundary by acquiescence are established, even if some time has passed, and regardless of when it is confirmed that the elements have been satisfied. When all elements are satisfied, the new boundary would be established from that point and could impact subsequent events pertaining to the property. *Id.*, ¶¶ 14–18, (holding that there was sufficient evidence to establish a subsequent adverse possession claim).

By Adjoining Landowners

Although it seems a bit obvious, a new boundary may only be established when adjoining property owners mutually acquiesce in a purported boundary. *See Brown v. Milliner*, 232 P.2d 202 (Utah 1951) (noting unsuccessful cases that did not involve adjoining owners). Boundary by acquiescence may not be invoked

when one of the properties is in the public domain. *Carter v. Hanrath*, 925 P.2d 960, 962 (Utah 1996). In addition, the dispute must involve a common boundary. For example, in *Switzgable v. Worseldine*, 15 P. 144 (Utah 1887), the dispute concerned the correct placement of other property lines, but not the common boundary between the parties' parcels. *Id*. at 144–45.

The actions of previous owners may establish a boundary by acquiescence, which would bind subsequent purchasers, even if those purchasers acted in good faith and identified the correct boundary. *See Q-2*, 2014 UT App 19, ¶ 13, 319 P3d 732. Boundary by acquiescence, however, cannot derive from actions of non-owners regarding the boundary, even if they are familiar with the property and even if they have an interest in the placement of the boundary. "[A]cquiescence between [non-owners] was impossible because they could not permissibly settle their dispute by adjusting the boundary on property neither of them owned." *Argyle v. Jones*, 2005 UT App 346, ¶ 12, 118 P.3d 301.

Several boundary by acquiescence cases have involved properties owned by corporate entities rather than individuals. However, none of these cases have directly addressed the question of how a corporate entity's actions could be construed as mutual acquiescence. It stands to reason that only the actions of the individuals responsible for the corporate entity could establish that a purported line was recognized and treated as the property boundary. *See Judd Family Ltd. P'ship v. Hutchings*, 797 P.2d 1088, 1090 (Utah 1990). It is also follows that actions by individuals who are not in a position of responsibility, i.e., employees, could not establish acquiescence of a corporate entity through their actions.

Conclusion

As the old adage goes, "[g]ood fences make good neighbors." Obviously, it is better to avoid potential boundary disputes through correct measurement and placement of fences or other boundary markers. Unfortunately, most property boundaries are not reviewed on a regular basis, so mistakes can be perpetuated for several years and later cause heated disputes between neighbors. Many years ago, the Utah Supreme Court acknowledged this fact of life, with a small dose of cynicism:

> It is significant that in most cases, a physical, visible means of marking the boundary was effected at a time when it was cheaper to risk the mistake of a few feet rather than to argue about it, go to court, or indulge the luxury of a survey, pursuance of any of which motives may have proved more costly than the possible but most expedient sacrifice of a small land area. The rub comes when, after many years, land value appreciation tempts a test of the vulnerability of a claimed ancient boundary. The struggle usually involves economics. Nothing is wrong in the urge to acquire or retain. But neither is there anything wrong in the law's espousal of a doctrine that says that with the passage of a long time, accompanied by an ancient visible line marked by monuments with other pertinent and particular facts, and with a do-nothing history on the part of the parties concerned, can result in putting to rest titles to property and prevent protracted and often belligerent litigation usually attended by dusty memory, departure of witnesses, unavailability of trustworthy testimony, irritation with neighbors and the like. This idea is based on the concept that we must live together in a spirit justifying repose or fixation of titles where there has been a disposition on the part of neighbors to leave an ancient boundary as is without taking some affirmative action to assert rights inconsistent with evidence of a visible, long-standing boundary. In the vernacular, the doctrine might be paraphrased to enunciate that boundaries might be established by an "I don't give a hoot" attitude on the part of neighbors.

King v. Fronk, 14 Utah 2d 135, 378 P.2d 893, 896 (Utah 1963).

In a successful boundary by acquiescence action, there will be a winner and a loser. One owner will forfeit property, and another may gain a significant amount of land. *See LPM Corp. v. Smith*, 2006 UT App 258, ¶12, 139 P.3d 292 (holding that ownership of entire parcel may be transferred through boundary by acquiescence). Since the stated purpose of the boundary by acquiescence doctrine is to avoid litigation, attorneys who counsel property owners facing boundary disputes should become familiar with the doctrine, and apply it to resolve matters outside of court. While litigation may sometimes be necessary, understanding the boundary by acquiescence doctrine may lead to settlement through negotiation or through alternate dispute resolution.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the August 22–23, 2014 Commission Meeting and Retreat held at The Canyons Resort in Park City, Utah.

1. Jim Gilson announced that the Commission will do a performance review of the Office of Professional Conduct, the Continuing Legal Education Department, the New Lawyer Training Program, and the Bar budget.

2. The Commission agreed on the priorities for the coming year:

   – Improving Access to Justice: Pro Bono Commission & Modest Means Lawyer Referral

   – Advocating for the Judiciary

   – Reviewing Bar Operations: OPC, CLE, NLTP, Budget

   – Planning for the Future of the Profession

   – Celebrating Magna Carta/Rule of Law

   – Supporting Diversity

3. Commission liaisons and ex officio members of the Commission will request nominations from sections, committees and their membership groups for the Lifetime Service Award and Professionalism Award. Members should request background and qualifications because the Commission needs adequate information to properly consider nominees.

4. Commissioners were selected to prepare a recommendation for the location of the 2016 Summer Convention.

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

Notice of Bar Commission Election

Third, Fourth, and Fifth Divisions

Nominations to the office of Bar Commissioner are hereby solicited for two members from the Third Division, one member from the Fourth Division and, one member from the Fifth Division, each to serve a three-year term. Terms will begin in July 2015. To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar. Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Nominating petitions are available at http://www.utahbar.org/bar-operations/leadership/. Completed petitions must be submitted to John Baldwin, Executive Director, no later than February 2, 2015 by 5:00 p.m.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1st with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15th.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1. space for up to a 200-word campaign message plus a color photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions and two photographs no later than February 1st;

2. space for up to a 500-word campaign message plus a photograph on the Utah Bar Website due February 1st;

3. a set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division who are eligible to vote; and

4. a one-time email campaign message to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate.

If you have any questions concerning this procedure, please contact John C. Baldwin at (801) 531-9077 or at director@utahbar.org.

UTAH STATE BAR

Spring Convention in St. George

Photo courtesy of visitstgeorge.com

March 12–14

2015

DIXIE CENTER AT ST. GEORGE

1835 Convention Center Drive, St. George, Utah

APPROVED FOR UP TO **10** HRS. CLE CREDIT*

*Credit-type subject to change.

Full online Brochure/Registration will be available on January 6 and in the Jan/Feb 2015 edition of the *Utah Bar Journal*.

2015 "Spring Convention in St. George" Accommodations

Room blocks at the following hotels have been reserved.
You must indicate that you are with the Utah State Bar to receive the Bar rate.
After "release date" room blocks will revert back to the hotel general inventory.

Hotel	Rate (Does not include 11.5% tax)	Block Size	Release Date	Miles from Dixie Center to Hotel
Ambassador Inn (435) 673-7900 / ambassadorinn.net	$100 Including Tax!	10–Q	2/02/15	0.4
Best Western Abbey Inn (435) 652-1234 / bwabbeyinn.com	$129.95	16	2/02/15	1
Clarion Suites (fka Comfort Suites) (435) 673-7000 / stgeorgeclarionsuites.com	$100	10	2/02/15	1
Comfort Inn (435) 628-8544 / comfortinn.com/	$111	25	3/13/15	0.4
Courtyard by Marriott (435) 986-0555 / marriott.com/courtyard/travel.mi	$143	8–Q 7–K	2/15/15	4
Crystal Inn Hotel & Suites (fka Hilton) (435) 688-7477 / crystalinns.com	$99 +$10 for poolside room	15–Q	2/18/15	1
Fairfield Inn (435) 673-6066 / marriott.com	$99	10–DBL 10–K	2/13/15	0.2
Green Valley Spa & Resort (435) 628-8060 / greenvalleyspa.com	$102–$287* *10% discount for a 2 night minimum stay Tax:18%	7 1–3 bdrm condos Cleaning deposit: $45–65	2/01/15 (30 days prior to cancel–refund)	5
Hampton Inn (435) 652-1200 / hampton.com	$135	20–DQ	2/12/15	3
Hilton Garden Inn (435) 634-4100 / stgeorge.hgi.com	$132–K $142–2Q's	20	02/09/15	0.1
LaQuinta Inns & Suites (435) 674-2664 / lq.com	$99	7–K	2/19/15	3
Lexington Hotel & Conference Center (fka Holiday Inn) (435) 628-4235 / lexingtonhotels.com/property.cfm?idp=22049	$95	10	2/02/15	3
Ramada Inn (800) 713-9435 / ramadainn.net	$109	15–DQ 5–K	2/12/15	3
St. George Inn & Suites (fka Budget Inn & Suites) (435) 673-6661 / www.stgeorgeinnhotel.com	$95	10–DQ	2/13/15	1

"An attorney's work must be pretty cool."

Reflections of a fourth grader on Constitution Day

This fourth grader's perspective on being an attorney resulted from the Constitution Teach-in by 200 judges, lawyers, law students, and law school staff in celebration of the 225th anniversary of the U. S. Constitution. The volunteer instructors taught 300 classes throughout Utah on and around Constitution Day, September 17.

This was the third year of the teach-in sponsored by the Bar's Civics Education Committee. Co-chair Benson Hathaway said, "We are so pleased that the number of volunteers increased by one-third and that they taught half again as many classes as last year. We're looking forward to our biggest year yet in 2015, the 800th anniversary of Magna Carta – the world's most enduring symbol of the rule of law."

Volunteers used lesson plans developed by the committee, included mock trials (Cinderella vs. the Step Sisters for elementary schools) or employed their creativity (one volunteer administered the test required for citizenship).

Teachers had these comments about the classes:

"My instructor brought a replica of the constitution and played a very fun game with the students. The students were engaged the entire time and even stayed after to talk to him. I would have him come back every year."

Lt. Governor Cox congratulates Hawthorne 3rd graders for their recitation of the Preamble on Constitution Day.

"It got the students thinking about the rule of law and their personal responsibility to uphold the law."

"My class enjoyed the instructor so much they wrote an article for the school paper about how they celebrated Constitution Day."

"My students absolutely loved this! One class had a lawyer do the simulation and my other class had a lawyer do more of a lecture. Both were very enlightening for the students, and when I asked them about it during the next class they remembered a surprising amount. I will definitely use this again next year."

"Cinderella" testifies

"My students loved the mock trial. They learned so much about procedure and about the law."

"I think it is great that we are getting professionals into the classrooms; students need to meet and get to know real people who work in these fields."

"I really liked how the attorney who talked to my class gave the students great examples of how checks and balances work and about some of the responsibilities of each branch of government."

"We loved it!!!"

And the volunteers seemed to enjoy it as much as the kids:

"The students were wonderful. They were bright and eager to participate. We had a lot of fun, even when the discussion got heated. There were no disciplinary issues. I enjoyed spending time in the classroom with them."

"I look forward to this more than any other Bar-sponsored event during the year. Please keep it going."

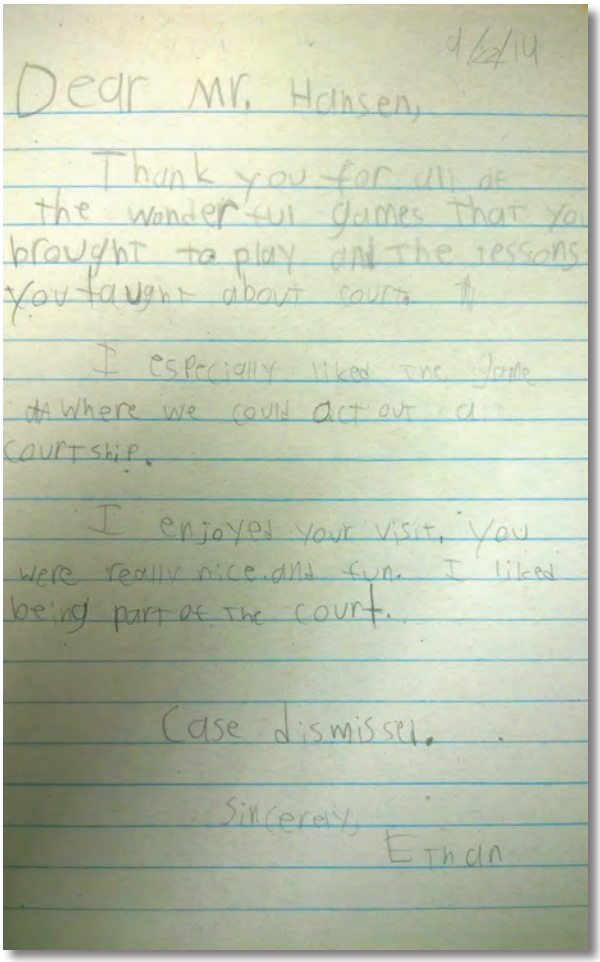
"Teaching the classes is a hoot. I have enjoyed nudging the kids with good, fun history about the Constitution and America. Great interactions. Much fun."

Case closed!

Bar President Jim Gilson said, "We plan on continuing this important dialogue about the rule of law with Utah students by sponsoring Magna Carta essay and video contests. We will present student awards at the traveling exhibit *Magna Carta: Enduring Legacy 1215–2015* as it makes stops throughout Utah." The exhibit includes images of documents, books, and other objects from Library of Congress collections that illustrate Magna Carta's influence throughout the centuries and explain the document's history. See www.utahbar.org for details.

Responding to an ABA sponsored survey that indicated that only 38% of Americans could name all three branches of our government (33% couldn't name any branch), the Bar created the Civics Education Committee to develop and promote a one-hour course to be taught in Utah schools. In 2005, Congress designated September 17 as a day to hold educational programs for students on the Constitution. Teachers or volunteers who wish to participate in the 2015 Constitution Teach-in should write to civics@utahbar.org.

Special thanks to Utah Commission on Civic & Character Education Chair Michelle Oldroyd and Utah State Office of Education K-12 Social Studies Specialist Robert Austin.



Thank you note to Kent Hansen

Notice of Bar Election

President-elect

Nominations to the office of Bar President-elect are hereby solicited. Applicants for the office of President-elect must submit their notice of candidacy to the Board of Bar Commissioners by January 1, 2015. Applicants are given time at the January Board meeting to present their views. Secret balloting for nomination by the Board to run for the office of President-elect will then commence. Any candidate receiving the Commissioners' majority votes shall be nominated to run for the office of President-elect. Balloting shall continue until two nominees are selected.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1, 2014 with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15, 2015.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1. space for up to a 200-word campaign message* plus a color photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions and two photographs no later than February 1st;
2. space for up to a 500-word campaign message* plus a photograph on the Utah Bar Website due February 1st;
3. a set of mailing labels for candidates who wish to send a personalized letter to Utah lawyers who are eligible to vote;
4. a one-time email campaign message* to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate; and
5. candidates will be given speaking time at the Spring Convention; (1) five minutes to address the Southern Utah Bar Association luncheon attendees and, (2) five minutes to address Spring Convention attendees at Saturday's General Session.

If you have any questions concerning this procedure, please contact John C. Baldwin at (801) 531-9077 or at director@utahbar.org.

* Candidates for the office of Bar President-elect may not list the names of any current voting or ex-officio members of the Commission as supporting their candidacy in any written or electronic campaign materials, including, but not limited to, any campaign materials inserted with the actual ballot; on the website; in any e-mail sent for the purposes of campaigning by the candidate or by the Bar; or in any mailings sent out by the candidate or by the Bar. Commissioners are otherwise not restricted in their rights to express opinions about President-elect candidates. This policy shall be published in the *Utah Bar Journal* and any E-bulletins announcing the election and may be referenced by the candidates.

Become a Mentor

Show a New Lawyer the Ropes

Help them build a successful career

UTAH STATE BAR
NEW LAWYER
Training Program
The first steps to success!

Search for
"Mentoring" at:
utahbar.org

Durham Jones defeats Clyde Snow in Championship Softball Game

Durham Jones & Pinegar, and Clyde Snow & Sessions battled it out for the coveted trophy during the Lawyers Softball League championship game on August 19 with Durham Jones fetching the victory. The League has been in existence for over thirty years. During the early years, the League played on downtown elementary school fields and used umpires from a local softball association, transitioning play to University of Utah softball fields, and student umpires in mid-2000.

The League has provided an opportunity for Salt Lake County law firms, the AG's office, state and federal courts, and the S.J. Quinney College of Law to come together in an environment that is intended to foster camaraderie among the profession and an opportunity for some entertaining competition. The League requires each team to field at least three women at all times and instead of only nine players on the field, ten are allowed. Players are required to provide legal services to the community, however, family members have been allowed to participate.

Mark Gaylord, attorney for Ballard Spahr, has been the League Commissioner for nineteen years, and has seen the league size vary from twenty teams, down to ten, and has watched the coveted engraved "Cup" move from office to office. Only once, were sanctions imposed for misbehavior that led to kicking a player out of the league. Well, what do you expect, for after all, it is a "lawyers" league!

Past champions include:

1996 & 98 – Suitter Axland;
1997 – Attorney General's Office;
1999 – Ray Quinney & Nebeker;
2000 & 03 – Holme Roberts & Owen;
2001, 02, 04, 05, 07, 08, & 10 – Parsons Behle & Latimer;
2006, 13 – Ballard Spahr Andrews & Ingersoll;
2009, 11, 12 – Van Cott, Bagley, Cornwall & McCarthy;
2014 – Durham Jones & Pinegar.

Notice of Petition for Reinstatement to the Utah State Bar by Bruce L. Nelson

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement ("Petition") filed by Bruce L. Nelson, in *In the Matter of the Discipline of Bruce L. Nelson*, Fourth Judicial District Court, Civil No. 100403156. 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 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.

Twenty-Fifth Annual

Lawyers & Court Personnel Food & Winter Clothing Drive

for the Less Fortunate

Look for an e-mail from us regarding where you can purchase one or more meals for families in need this holiday season.

Selected Shelters

The Rescue Mission

Women & Children in Jeopardy Program

Jennie Dudley's Eagle Ranch Ministry
(She serves the homeless under the freeway on Sundays and Holidays and has for many years)

Drop Date

December 19, 2014 • 7:30 a.m. to 6:00 p.m.

Utah Law and Justice Center – rear dock
645 South 200 East • Salt Lake City, Utah 84111

Volunteers will meet you as you drive up. If you are unable to drop your donations prior to 6:00 p.m., please leave them on the dock, near the building, as we will be checking again later in the evening and early Saturday morning.

Volunteers Needed

Volunteers are needed at each firm to coordinate the distribution of e-mails and flyers to the firm members as a reminder of the drop date and to coordinate the collection for the drop; names and telephone numbers of persons you may call if you are interested in helping are as follows:

Leonard W. Burningham, Branden T. Burningham, Bradley C. Burningham, or April Burningham . . . . . (801) 363-7411
Lincoln Mead . . . . . (801) 297-7050

Sponsored by the Utah State Bar

Thank You!

What is Needed?

All Types of Food

- oranges, apples & grapefruit
- baby food & formula
- canned juices, meats & vegetables
- crackers
- dry rice, beans & pasta
- peanut butter
- powdered milk
- tuna

Please note that all donated food must be commercially packaged and should be non-perishable.

New & Used Winter & Other Clothing

- boots
- gloves
- coats
- sweaters
- trousers
- hats
- scarves
- suits
- shirts

New or Used Misc. for Children

- bunkbeds & mattresses
- cribs, blankets & sheets
- children's videos
- books
- stuffed animals

Personal Care Kits

- toothpaste
- toothbrush
- combs
- soap
- shampoo
- conditioner
- lotion
- tissue
- barrettes
- ponytail holders
- towels
- washcloths

Pro Bono Honor Roll

Adamson, Jeremy – Tuesday Night Bar

Ahlstrom, Charles – Family Law Case

Ahlstrom, James – Tuesday Night Bar

Allred, Parker – Tuesday Night Bar

Amann, Paul – Debt Collection Calendar

Anderson, Skyler – Immigration Clinic

Andrews, Christina – Social Security Disability, Family Law Cases

Andrus, Mark – Debtor's Legal Clinic

Angelides, Nick – Estate Planning Cases

Bainum, Craig – PGAL

Ball, Matt – Tuesday Night Bar

Barclay-Mount, Linda – TLC Document Clinic

Barrett, Douglas – Bankruptcy case

Barrick, Kyle – Senior Center Legal Clinic

Bean, Melissa – Tuesday Night Bar

Becker, Heath – Immigration Clinic

Beckstrom, Ryan – Tuesday Night Bar

Beins, Christopher – Family Law Case

Benson, Jonny – Immigration Clinic

Bertelsen, Sharon – Senior Center Legal Clinic

Billings, David – Debt Collection Calendar

Blaisdell, David – Family Law Case

Bogart, Jennifer – Street Law Clinic

Bradley, Erin – Family Law Case

Bsharah, Perry – Debtor's Legal Clinic

Buhler, Kim – TLC Document Clinic

Burgin, Chad – Tuesday Night Bar

Burns, Mark – Debt Collection Calendar

Buswell, Tyler – Tuesday Night Bar

Carlston, Charles – TLC Family Justice Clinic

Carr, Ken – Debtor's Legal Clinic

Carroll, Nathan – Family Law Case, Bankruptcy Case

Chipman, Brent – Family Law Case, Tuesday Night Bar

Clark, Melanie – Senior Center Legal Clinic

Coil, Jill – Tuesday Night Bar

Conley, Elizabeth – Senior Center Legal Clinic

Conrad, Katie – Family Law Case

Conyers, Katherine – Tuesday Night Bar

Cope, Cameron – Bankruptcy Case

Couser, Jessica – Rainbow Law Clinic

Cowdin, Jake – Second District ORS Calendar

Crebs, Colin – PGAL

Crismon, Sue – Street Law Clinic

Cundick, Ted – Bankruptcy Case

Daw, Cameron – Tuesday Night Bar

Deeds, John – Tuesday Night Bar

Deus, Jeremy – Family Law Clinic, Tuesday Night Bar

Dez, Zal – Family Law Clinic

Doctorman, Gary – Family Law Clinic

Donovan, Sharon – Family Law Case

Evans, Chris – Family Law Case

Evans, Russell – Rainbow Law Clinic

Evans, Taryn – Tuesday Night Bar

Ferguson, Phillip – Senior Center Legal Clinic

Figueira, Joshua – Tuesday Night Bar

Ford, Michael – Probate Case

Fowlke, Lori – Family Law Case

Fox, Richard – Senior Center Legal Clinic

Francis, Leslie – Medical Legal Clinic

Gaither, Randall – Family Law Case

Galati, Rick – Tuesday Night Bar

Gibb, J. Mark – Probate Case

Gilmore, Grant – Debt Collection Calendar

Gittins, Jeff – Street Law Clinic

Gonzalez, Rafael – Rainbow Law Clinic

Gray-Milliken, Lauren – Probate Case

Griffiths-Handley, Debra – Family Law Case

Hansen, Clint – Adoption Case

Hardy, Dustin – TLC Family Justice Clinic

Hardy, Kenny – Consumer Law

Harrington, Mike – Family Law Case

Harrison, Jane – Expungement Case

Harrison, Matt – Street Law Clinic

Hart, Laurie – Senior Center Legal Clinic

Harvey, Michelle – Debtor's Legal Clinic

Heckel, Maria – Third District ORS Calendar

Hendrix, Rori – Family Law Case

Howe, Jeffrey – Family Law Case

Jelsema, Sarah – Family law Clinic

Jensen, Michael – Senior Center Legal Clinic

Jones, Steve – Tuesday Night Bar

Kaas, Adam – Tuesday Night Bar

Kennedy, Michelle – Debt Collection Calendar

Kessler, Jay – Senior Center Legal Clinic

Kuhn, Timothy – Tuesday Night Bar

Kummer, Emily Tuesday Night Bar

Latimer, Kelly – Tuesday Night Bar

Lattin, Peter – TLC Family Justice Clinic

Lawrence, Benjamin – Tuesday Night Bar

LeBaron, Shirl – Family Law Case

Lee, Terrell – Senior Center Legal Clinic

Manderino, Chase – Tuesday Night Bar

Marker, Travis – PGAL

Maughan, Joyce – Senior Center Legal Clinic

McCoy II, Harry – Senior Center Legal Clinic

McKay, Chad – Family Law Case

Merrick, Stewart, Tuesday Night Bar

Mitchell, Russell – Estate Planning Case

Miya, Stephanie – Expungement Law Clinic

Molen, Michael – Tuesday Night Bar

Morrison, Jackie – Medical Legal Clinic

Morrow, Carolyn – Family Law Case

Nelson, Mark – Probate Case

Ness, Sandi – Post- Conviction Case

O'Neil, Shauna – Bankruptcy Hotline, Bankruptcy Case

Olsen, Tracy – Tuesday Night Bar

Parker, Kristie – Senior Center Legal Clinic

Parkinson, Jared – Senior Center Legal Clinic

Pearson, Rachel – TLC Document Clinic

Pena, Fred – Tuesday Night Bar

Pohl, William – Family Law Case

Pranno, Al – Family Law Clinic

Preston, Derae – TLC Document Clinic

Priest, Katherine – Third District ORS Calendar

Ralphs, Stewart – Family Law Clinic

Rasmussen, Kasey – Debt Collection Calendar

Reber, S. Lauren – Tuesday Night Bar

Reemsnyder, Bruce – Tuesday Night Bar

Rice, Robert – Third District ORS Calendar

Riffo-Jenson, Lorena – Tuesday Night Bar

Rinaldi, Leslie – Tuesday Night Bar

Roberts, Kathie – Senior Center Legal Clinics

Roberts, Stacy – Family Law Clinic

Roman, Francisco – Immigration Clinic

Schultz, Lauren – Second District ORS Calendar

Schultz, Gregory – Tuesday Night Bar

Scruggs, Elliot – Street Law Clinic

Semmel, Jane – Senior Center Legal Clinic

Shaw, Jeremy – Debt Collection Calendar

Shaw, LaShel – Tuesday Night Bar

Sims, Ben – Utah Advance Health Care Directive Clinic

Smith, Jacob – Family Law Case

Smith, Linda – Family Law Clinic

Smith, Shane – Street Law Clinic

So, Simon – Family Law Clinic

Sonnenburg, Babata – TLC Family Law Justice Clinic

Spencer, Daniel – Adoption Case

Stapley, Wes – TLC Document Clinic

Stevens, Liesel – Third District ORS Calendar

Stormont, Charles – Debt Collection Calendar

Sutton, George – Tuesday Night Bar

Swinward, Eric – Family Law Clinic

Telfer, Diana – Family Law Case

Thorne, Jonathan – Street Law Clinic

Thorne, Matthew – Tuesday Night Bar

Thornton, Lisa – Probate Case

Thorpe, Scott – Senior Center Legal Clinic

Throop, Sheri – Family Law Clinic

Timothy, Jeanine – Senior Center Legal Clinic

Torrey, Teresa – Tuesday Night Bar

Trousdale, Jeff – Tuesday Night Bar

Tuttle, Jeffrey – Tuesday Night Bar

Wharton, Chris – Rainbow Law Clinic

Williams, Camille – Family Law Case

Williams, Timothy – Senior Center Legal Clinic

Winzeler, Zack – Tuesday Night Bar

Wycoff, Bruce – Tuesday Night Bar

Young, Michael – Post- Conviction Case

Zollinger, Shannon – Tuesday Night Bar, Probate Case

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 August–September. 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/UtahBarProBonoVolunteer to fill out a volunteer survey.

We're going back to Sun Valley!

UTAH STATE BAR.

July 29 - August 1

Save the Date

Sun Valley, 2015

summerconvention.utahbar.org

Attorney Discipline

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

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

RESIGNATION WITH DISCIPLINE PENDING

On August 1, 2014, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning James F. Nichols, for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 3.1 (Meritorious Claims and Contentions), 3.3(a) (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.4 (Respect for Rights of Third Persons), 5.3(c) (Responsibilities Regarding Nonlawyer Assistants), 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary, there are five matters:
In the first matter, Mr. Nichols hired an associate attorney to work at his firm. The attorney transferred trust funds for one of her clients into Mr. Nichols' IOLTA account when she started working for Mr. Nichols and over the next three months, added to the amount held in Mr. Nichols' trust account.

Subsequently, the attorney left Mr. Nichols' employment and many of the clients chose to go with her. After she joined a new firm, she contacted Mr. Nichols requesting that all of her clients' funds be turned over so that she could put the funds in her trust account.

The attorney requested an accounting from Mr. Nichols of all of the funds in his trust account. Mr. Nichols refused to provide an accounting or to give any of the funds to the attorney. In response to the attorney's request for the clients' funds, Mr. Nichols stated that there were no funds in his trust account and claimed that he either transferred the funds to his operating account or retained the funds for himself even though he had not done

work on the cases to earn the fees. Mr. Nichols also falsely claimed that his receptionist failed to put the money in trust.

One client who stayed with Mr. Nichols was in the middle of settlement negotiations when the associate attorney left. Opposing counsel, in the case, drafted settlement papers and sent them to Mr. Nichols so that the client could sign. The client attempted to contact Mr. Nichols but he had closed his office and vanished resulting in a significant delay in settling the case.

In the second matter, Mr. Nichols was hired by a client to represent her during her production of an event at the Sundance Film Festival. During the festival, Mr. Nichols' client hosted an event and sub-let portions of a building to vendors. One of the vendors signed a contract with the client and paid for use of the space for one week.

At the conclusion of the week, Mr. Nichols removed the vendor's equipment from the building and told the vendor that he would return the equipment only if he received additional money. Mr. Nichols filed a Writ of Replevin in another County requesting that he be given a Writ to take the property even though he had already taken the property and placed it in a storage unit. In support of the Writ, Mr. Nichols made misrepresentations to the Court. Based upon Mr. Nichols misrepresentations to the Court, the Court signed the Writ.

The vendor had to hire counsel to have the Writ quashed based upon the fact that Mr. Nichols had inappropriately obtained the Writ. Mr. Nichols was ordered to return all of the property to the vendor. When the vendor retrieved the equipment from Mr. Nichols, some of the equipment was missing.

Both Mr. Nichols and his client were charged with Theft, a Second Degree Felony. As a result of Mr. Nichols' actions, his client was arrested and spent 30 days in jail before she was able to have the charges against her dismissed.

Mr. Nichols eventually pled guilty to a reduced charge of Attempted Wrongful Appropriation, a Class A Misdemeanor, but the vendor never received the missing equipment which had significant irreplaceable value. Mr. Nichols was ordered to pay restitution, serve 60 days in jail and was placed on supervised probation for 24 months.

In the third matter, Mr. Nichols was hired to represent a client in matters relating to child support issues. An Order to Show Cause hearing was held in the matter and the court later issued a ruling affecting the client's rights. Mr. Nichols never sent his client a copy or explained the ruling. The client emailed Mr. Nichols inquiring about what he needed to do pursuant to the ruling. Mr. Nichols notified the client that his mailing address had changed but did not respond to his client's questions.

The client made numerous subsequent attempts to contact Mr. Nichols to find out what he needed to do pursuant to the ruling, but he either received no response from Mr. Nichols or a response without any substantive information. Mr. Nichols' phone numbers were later disconnected or not in service.

The client never received a copy of his file, and despite the client's multiple requests for statements, Mr. Nichols never sent him any statements regarding his fees or a refund. The client was forced to hire a second attorney to represent him in the matter.

In the fourth matter, Mr. Nichols was retained to represent a client in a custody matter in Idaho. Mr. Nichols advised the client regarding the case and told the client he would assist her in modifying the order even though he was not licensed in Idaho. When the client's children moved to Washington, Mr. Nichols

continued with the representation even though he is not licensed to practice in Washington. As part of the retainer agreement, the client granted Mr. Nichols a lien on her automobiles.

Mr. Nichols sent an email to his client providing advice regarding a California Order and the litigation in Washington. Subsequently, the client sent numerous emails requesting information about the case and informing Mr. Nichols that she needed to appear in court in ten days.

Mr. Nichols sent the client an email informing her that the documents related to the Washington case were available to be picked up at his office. When the client went to Mr. Nichols' office, it was empty and her papers were found in a drawer.

When the client received an order in Utah stating that there was an urgent matter that needed to be addressed, she made numerous attempts to reach Mr. Nichols, but received no further response. Mr. Nichols never released the liens on the client's automobiles, paid a refund or gave the client a complete copy of her file.

In the final matter, Mr. Nichols was retained to represent a client in a divorce case. The client paid Mr. Nichols a flat fee to draft, file and serve a Complaint and to file the decree, findings of fact and necessary supporting documents in his divorce. Mr. Nichols prepared a draft of the Summons and Complaint and met with the client who requested that several changes be made.

After the meeting, the client made numerous attempts to reach Mr. Nichols by telephone and by email, but never received a response. Ultimately, Mr. Nichols' telephone numbers were disconnected and Mr. Nichols could not be found. The client went to Mr. Nichols' office and found it to be vacant. The client had to hire a second attorney to represent him in the matter. The client did not receive his file or a refund from Mr. Nichols.

FEDERAL COURT PUBLIC REPRIMAND AND PROBATION

On September 24, 2014, the Chair of the Attorney Discipline Panel of the United States District Court for the District of Utah, entered an Order of Discipline publically reprimanding Hunt W. Garner for violation of Rule 4.2(a) (Communications with Persons Represented by Counsel) of the Rules of Professional Conduct. The Attorney Discipline Panel also imposed a one year probationary period during which Mr. Garner is restricted in his ability to appear in the United States District Court for the District of Utah. The restrictions are as follows: Mr. Garner may only appear in the United States District Court for the District of Utah if he is associated in the case with a member in good standing of the bar of that Court, who will serve as co-counsel and as a mentor for Mr. Garner's representation. The mentor must be identified and approved by the Chair of the Attorney Discipline Panel of the United States District Court for the District of Utah prior to the filing of an action of the entry of an appearance by Mr. Garner and must maintain co-representation throughout the period of probation or the period of representation, whichever ends first.

In summary:
Mr. Garner represented a client in a criminal matter. On four occasions in a single month, Mr. Garner visited a co-defendant of his client, who was represented by counsel, at the Cache Valley County Jail without permission from the co-defendant's attorney and the criminal case was discussed to the extent of whether Mr. Garner would represent the co-defendant. Mr. Garner knew that the co-defendant was represented by counsel and made no effort to speak with the co-defendant's attorney to authorize Mr. Garner's contact with the client.

Aggravating circumstances:
Multiple offenses and refusal to acknowledge the wrongful nature of the misconduct involved.

What's Good for the Goose May Be Good for the Gander: Why Your Paralegal Should Be a Member of the Utah State Bar Paralegal Division

by Heather J. Allen

Most attorneys are not aware that there is a division of the Utah State Bar that is specifically put into place for their paralegals. The Paralegal Division was created in April 1996 by the Utah Supreme Court and has been a source of great continuing legal education, networking opportunities, and community involvement for paralegals. Paralegals who are not members of this division and, perhaps some who are, don't always know the benefit of membership.

Why did I become a member of this organization? I was encouraged to join by an attorney when I was in my first year working as a paralegal. My attorney told me that it was a great way to network with other paralegals in town. He made my joining the organization one of my goals for the year. You may wonder why that was such a big deal – I know at the time I wondered just that. So here is one reason why it is a big deal: IT MAKES YOUR LIFE EASIER! That's right, paralegals who have the opportunity to network with other paralegals, whether it be at CLE, annual meetings, or community service events, will be able to build rapport with those they work opposite. In high-stress cases, it's important to have a paralegal who can get along with the other side. What better way to develop rapport than by being a member of an organization and getting to know other paralegals in a different setting other than a contentious lawsuit. I know for myself that having these relationships has worked in my favor going into a case. When the opposing paralegal and I know one another, we have common respect and we are able to be more efficient when dealing with the issues for our clients. As a result, membership in the Paralegal Division could be a great cost saver for clients. My attorney understood that value.

As with attorneys, the Paralegal Division collects dues every year to allow our members the same benefits that are afforded to the attorneys through the Bar. The cost is small, and the benefits are boundless.

I want to highlight a few of our great benefits that you, the attorney or current member of the Paralegal Division, can use in encouraging your paralegal or fellow paralegal to be part of our Division.

Continuing Legal Education

As you are aware, CLE is an opportunity to keep current on legal topics and practices you use every day and an excellent opportunity to see what others are doing in different areas of law. Paralegals work in a diverse range of settings, from in-house corporate environments to government and criminal law offices, to the traditional big law firms. Even the range of activities one might do as a paralegal in a small firm as opposed to a big firm can be quite varied. By attending continuing legal education classes or CLEs, your paralegal will have an opportunity to broaden his or her perspective and keep skills sharp. The Paralegal Division hosts free monthly Brown Bag CLEs at the Utah Law & Justice Center. We co-host with the Utah Paralegal Association the Paralegal Day Luncheon, which is a celebration of paralegals and includes a great ethics CLE. Finally, we host an all-day CLE in June, which also includes our annual meeting.

Networking

As I mentioned before, this is priceless. Giving your paralegal the opportunity to get out of your office and meet other paralegals

HEATHER J. ALLEN is a paralegal and privacy officer at 1-800 CONTACTS, Inc.

here in Utah is a great way to help your paralegal feel value. Most paralegals are cool under pressure and seem to know a vast amount of information. Many times it is because of networking with other paralegals that they have that knowledge. Some paralegals who work at small firms, for example, may not have readily available peers to get help on best practices or a perspective that will change how they view a task. Oftentimes, your paralegal will gain long-term friendships based on mutual respect are made.

Blomquist Hale

This is a full-service, confidential, outside counseling service available to all members of the Utah State Bar and their immediate households. They provide counseling for issues such as stress, depression, anxiety, family problems, personal finance issues, elder care challenges, and assessment of drug/alcohol dependence. There are no co-pays and no deductibles. http://www.utahbar.org/members/lhl-blomquist-hale/.

Community-Wide Discounts with Beneplace

This is a new service available through the Utah State Bar's website, for all members, which offers community-wide discounts on everything from insurance, automotive services, and car-buying. http://www.utahbar.org/members/

Job Announcements

Frequently the Paralegal Division send emails to active members notifying them of job openings. The Paralegal Division also strives to make the community aware of these opportunities by also posting them on the Division's Facebook page. https://www.facebook.com/paralegaldivisionoftheutahstatebar?ref=hl.

Community Service Opportunities

The Paralegal Division looks for opportunities to provide service to the community. In the past, the Paralegal Division has been involved in community outreach programs such as Wills for Heroes, Serving Our Seniors, Christmas food and clothing drives, and legal aid clinics. Members of the Division are encouraged to get involved.

Discounted Registration to Bar Events

As you know, the Utah State Bar holds conventions throughout the year. All or almost all Bar functions are available to members of the Paralegal Division at a discounted rate (from what attorneys pay). This includes the popular event of the Summer Convention, which has traditionally been held in Sun Valley, Idaho, and most recently, in Snowmass, Colorado; also the Spring Convention held in St. George; and the Fall Forum held in Salt Lake.

Salary Survey

Beginning in 2008 and following up in 2012, the Paralegal Division, with the help of the Utah State Bar, sought and published findings from the Utah paralegal community about salaries, benefits, and the environments in which paralegals are being utilized in Utah. The surveys have helped set the standard for what kinds of salaries and benefits students and professionals should expect. We anticipate conducting another salary survey in the near future.

Community Recognition

The Paralegal Division provides opportunities for you to recognize the good work and outstanding qualities of your paralegals or peers. Every year, the Paralegal Division recognizes an individual as the "Distinguished Paralegal of the Year." Past honorees have been paralegals who have not only shown a high level of professionalism and skill but also given back to the community.

Promoting the Profession

Ultimately, being a member of the Paralegal Division gives your paralegal or colleague an opportunity to help promote the profession! The goals of the Paralegal Division specifically are: To assist the Utah State Bar with its mission to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of the law and to assist the Bar in increasing access to justice through affordable legal services by better utilization of paralegals by the Bar.

For more information on how to become a member, please visit http://paralegals.utahbar.org or contact any of the board of directors.

The Paralegal Division of the Utah State Bar would like to invite all paralegals in the State of Utah to submit articles for publication in the Bar Journal. Please submit all articles to Greg Wayment via email to wayment@mgpclaw.com.

CLE Calendar

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

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.

November 20 & 21, 2014 — **up to 8 hrs. CLE. including up to 2 hrs. Ethics and up to 2 hrs. Prof/Civ**

Thursday Evening Event – 5:00 – 9:00 pm | 1 hr. Prof/Civ. Credit

Ethics Forum from 5:00 – 6:00 pm

Meet Your Judges Mixer from 6:00 – 9:00 pm

Friday Events – 8:00 am – 5:15 pm | up to 7 hrs. CLE Credit

Topics include: Trial Tips, Technology Updates, Practice Pointers, Networking, Ethics & Civility, Time Management, Clients Relations, and more.

All events will be held at the Little America Hotel in Salt Lake City.

Register online with your login and password at: https://services.utahbar.org.

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/

Classified Ads

RATES & DEADLINES

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

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

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

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

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Lateral Attorney – Fillmore Spencer, Provo is looking for a transactional attorney with at least 3 or 4 years experience with a large or mid-size law firm. In addition to substantial experience with commercial contracts generally, expertise in securities, mergers and acquisitions, technology licensing and/or internet law would be advantageous. Please forward resumes to Bill Fillmore at wfillmore@fslaw.com.

SERVICES

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