UTAH BAR JOURNAL

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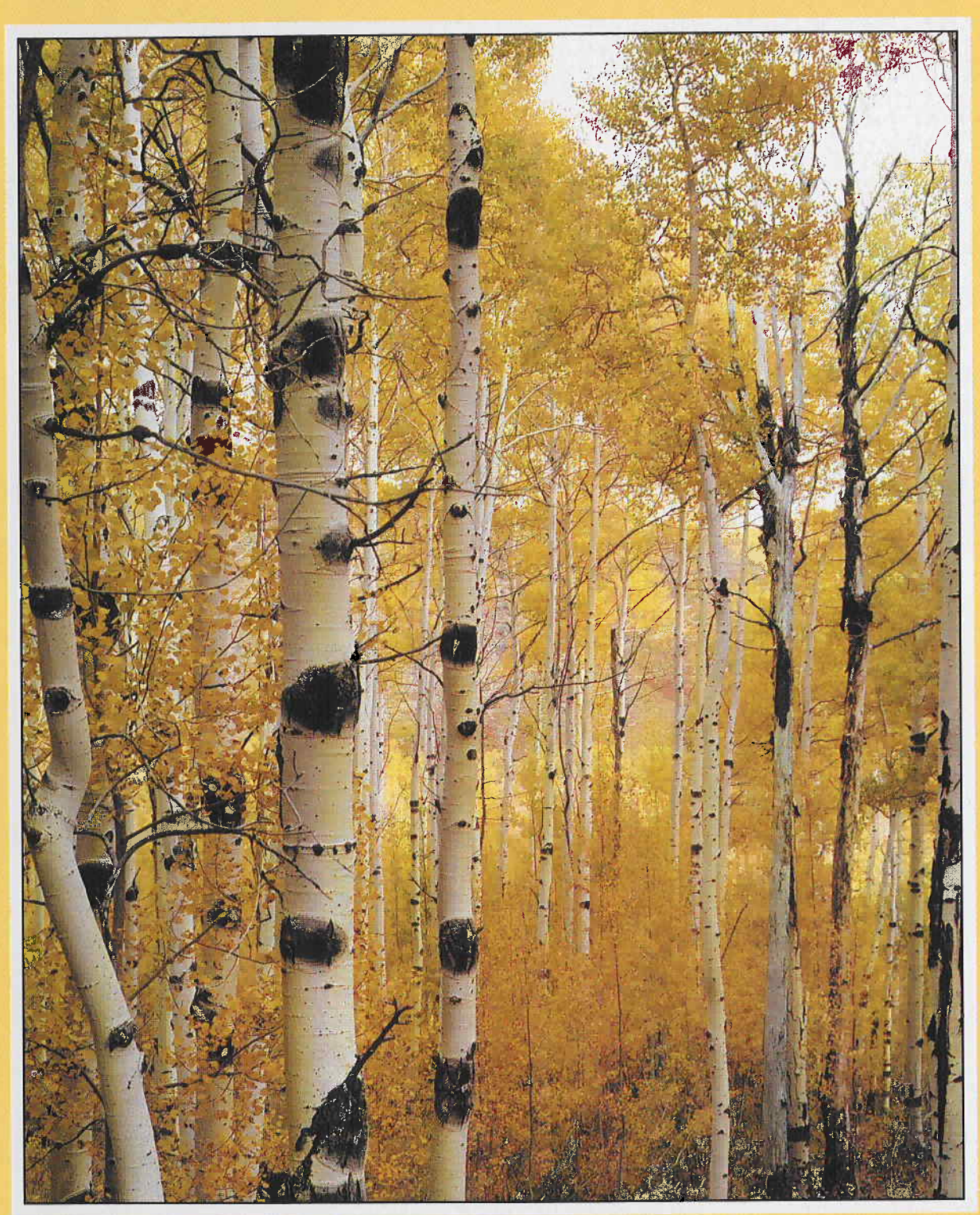

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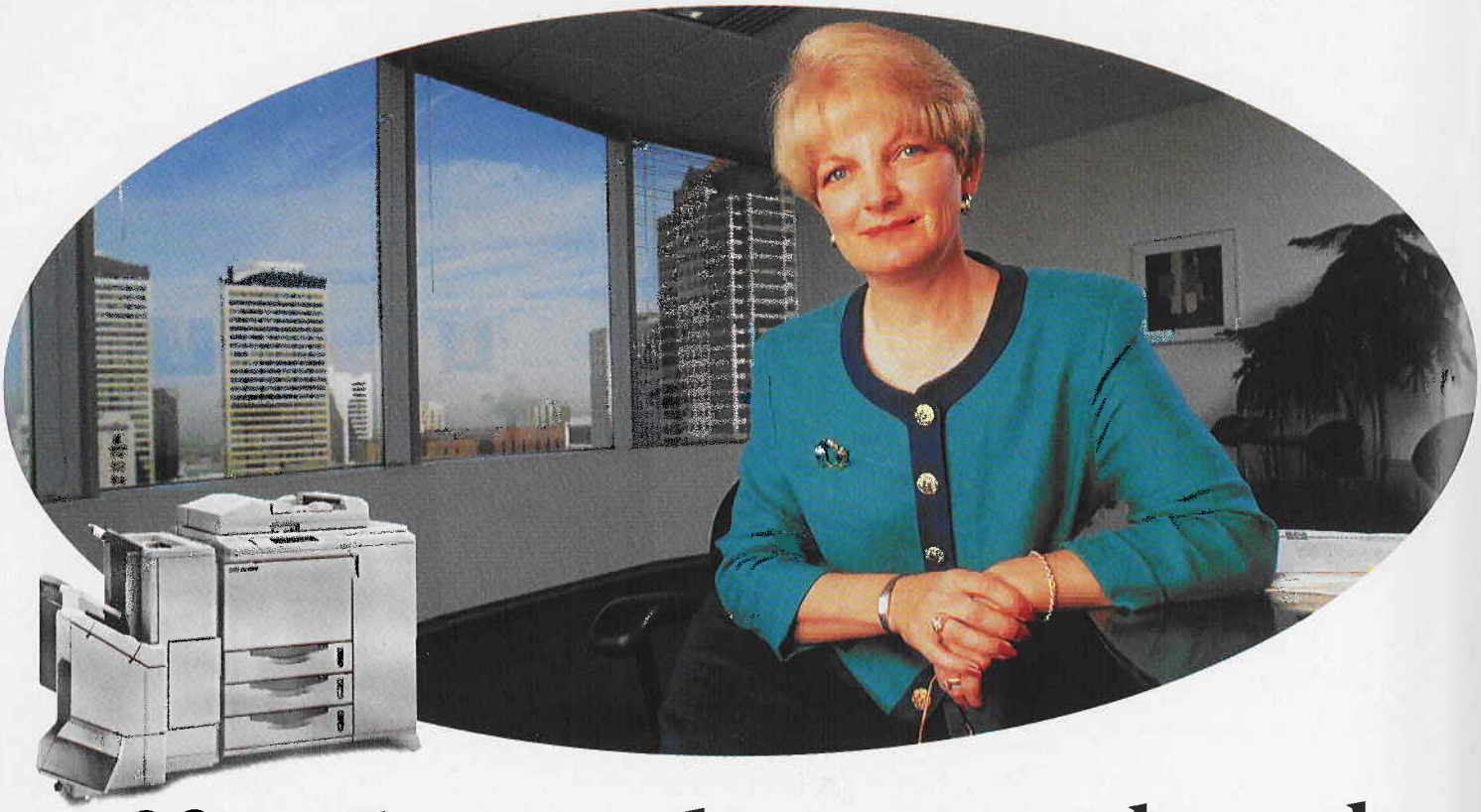

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COVER: Quaking Aspens in Snyderville, Utah, taken by John Preston Creer, Esq. of Salt Lake City.

Members of the Utah Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, Utah, 84111, 532-5200. Send both the slide, transparency or print of each photograph you want to be considered.

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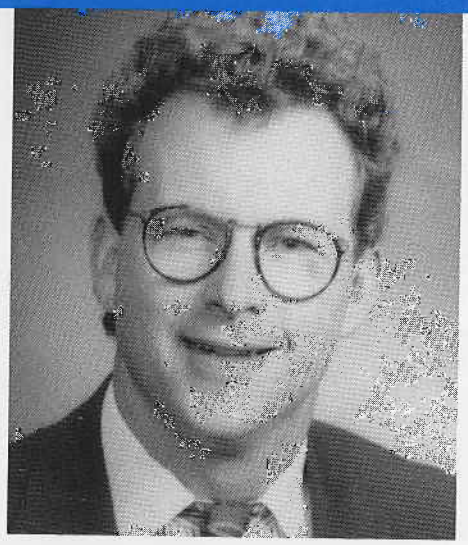

The Court, The Law School, or The Bar
Just Who Is Responsible for Lawyer Competency!

By Paul T. Moxley

Last fall I attended an ABA Standing Committee Conference on Lawyer Competence in Jackson Hole, Wyoming. Others attending included the chief justices, law school deans, bar presidents and other leaders from Hawaii, Idaho, Montana, North & South Dakota, Utah, and Wyoming. The purpose of the conference was to explore how we can work together to ensure competency in the legal profession.

While each state faces different challenges and opportunities, all present agreed that we need to open and institutionalize the lines of communication between the court, law school, and bar in order to build understanding and trust, and work toward the common goal of bettering our profession and serving the public.

Provocative questions of debate included:

When should individuals with bad moral character or fitness be screened out (at the law school or bar admission stage)?

Should law schools be preparing students to pass the bar exam or practice law?

When should practice management skills be taught?

What function does the bar examination serve (does it truly measure competence; is it more a rite of passage; is it just a way to limit the number entering into the profession)?

How can we ensure that lawyers remain competent in the areas of substantive law, practice management and emotional well-being?

We learned about successful programs in other states such as New Mexico's law student/attorney mentor program that exposes students to the real world of practice; Virginia's mandatory professionalism course for new admittees to the bar; and Arizona's diversion program in which genuine attempts are made to rehabilitate disciplinary offenders for the good of the individual attorney, profession, and public.

We tried to define what it means to deliver "quality" legal service, and determined that, like all other businesses, quality is defined by client satisfaction.

While we have traditionally viewed lawyer competence in terms of some minimum threshold of substantive legal knowledge, the vast majority of disciplinary complaints and malpractice suits have more to do with client satisfaction (e.g. not answering telephone calls, minor neglect, fees disputes), which in turn defines the quality of legal services rendered. This being the case, the attorneys would do well to sharpen their practice management and client relations skills.

Following the conference several states that participated in the ABA Conference have concluded similar conferences focusing on the same questions, and good results were announced at the Annual Meeting of the ABA in New Orleans in August, 1994. In a polite sort of way, the ABA wants states to adopt a quality control committee which will study these issues and guide us towards developing greater competence.

Most lawyers would agree that what they learned in law school contributed little to their ability to practice law. When being a lawyer was more of being a professional as opposed to a generator of billable hours and receipts, etc., experienced lawyers took more of an interest in developing young lawyers, whether they had an office relationship or not. When I started practicing law in 1973 in Salt Lake City, it was not uncommon for other

lawyers to lend a hand to a new lawyer. More mentoring took place then, I think, than presently. There are a lot of reasons for this, one significant one being the tremendous increase in lawyers in Utah which makes it more difficult as a practical matter and other demands upon the profession. Previously, much less time was spent in practice development, office management and maybe clients, partners and courts were less demanding as well.

We presently have excellent lines of communication with our law school deans inasmuch as they are ex-officio members of our Board and have contributed to our Bar for some time, and we enjoy good relationships with our Supreme Court with an open dialogue about various Bar issues. Together, we will be addressing this question of lawyer competency and we invite your comments on it. My own view is that our lawyers would resist any notion of a committee on lawyer competence or quality control, and it is a very unwieldy topic in any event. Quality may be like obsenity, no one can define it well but we always recognize it when we see it. I can remember discussing quality with my father, a lawyer, when I was a kid and his response was — anyone who ever watched Willie Mays catch a baseball understood quality, he made an impossible catch look easy!

Non-Lawyer Legal Technicians

By David Nuffer

The Arizona Bar has recently proposed rules under which it would affiliate, certify and regulate *non-lawyer legal technicians* who could provide legal services independent of a lawyer. The Arizona proposals are the most far-reaching in the nation. They were motivated by the lapse of Arizona's statutes prohibiting the unauthorized practice of law and the perceived need for regulation of document preparers and lay advocates. The Bar did not feel that the legislature would pass a statute prohibiting unauthorized practice of law if the Bar protected its turf in the face of consumer demand for non-lawyer services.

These "legal technicians" already operate in the Arizona market. They typically assist in preparation of divorce papers, simple wills, bankruptcy documents, eviction papers and collection matters. These transactions are overwhelmingly complicated to a lay person but their repetitive, standardized, and narrow nature enables a legal technician to acquire an expertise without a formal legal education. Not surprisingly, these non-lawyer legal service providers have emerged most strongly in the sunbelt states of Arizona and Florida, with large senior populations.

In a way, the modern legal technician is comparable to the lay providers of legal services in the 1800's, such as a lawyer without formal training, a notary public or a justice of the peace. Through self-education, those individuals were a community resource to those unfamiliar with the law. Similarly, the non-lawyer technician is usually self educated, through experience, in a fairly routine area of the law-related activity.

No one is surprised at the controversy provoked by the Arizona proposal. The issue is hotly debated within the Arizona Bar, and has been debated at the ABA convention in New Orleans. As the issue gains nationwide prominence, it will be debated in Utah as well. The concept of non-lawyer legal technicians is revolutionary because these individuals will practice without lawyer supervision.

LEGAL ASSISTANTS

The Arizona Bar did not take any action to define the role of legal assistants who work under the supervision of a lawyer. The "legal assistant" category is probably more familiar to most Utah lawyers. Several states already affiliate legal assistants with the state-wide lawyers association. Legal assistants cannot render services to the public independent of a lawyer, but their expertise is recognized. The concept of a legal assistant arose when the first secretary did more than type. Gradually, as secretaries "climbed over the typewriter" they assumed a mid-level role capable of delegation of tasks and supervised legal work.

In 1986 the American Bar Association (ABA) defined the concept of a legal assistant as follows:

> A legal assistant is a person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

The ABA definition recognizes the substantive nature of the legal work performed by the legal assistant, requiring a knowledge of legal concepts, while at the same time recognizing that the work must be done under supervision of an attorney. The ABA has not taken any role in the certification or licensing of legal assistants.

The ABA has adopted model guide-

lines for the utilization of legal assistant services which state:

(1) a lawyer is responsible for the actions of the legal assistant;

(2) a lawyer may delegate any task to a legal assistant except those forbidden by statute, or rule, or regulation to one who is unlicensed;

(3) a legal assistant may not establish the attorney/client relationship, the fee to be charged, or render a legal opinion;

(4) reasonable steps should be taken to ensure that the legal assistant is identified as a non-lawyer;

(5) legal assistants may be identified by name and title on letterhead and business cards;

(6) legal assistants must preserve client confidences;

(7) legal assistants with multiple employment must avoid conflicts of interest;

(8) legal charges may be made for legal assistant services;

(9) legal assistants may not receive referral, contingent or split fees;

(10) legal assistants should participate in pro bono and continuing education activities.

INTERMEDIATE STEPS

Instead of taking the single dramatic leap of licensing and regulating non-lawyer legal technicians, the Arizona Bar could have taken intermediate steps. More gradual action would have allowed for refinement of the practical difficulties of a new Bar venture.

A. The Bar might first affiliate legal assistants with the State Bar organization. Affiliation would not include certification or regulation. Legal assistants would not be permitted to provide direct services to the public.

B. Then, after knowing "who is out there," the Bar could move to certify and regulate legal assistants. This is a complex step in itself as few formal universal standards exist.

C. Finally, certification and regulation of legal technicians who can provide services directly to the public would come as a last step, after careful evaluation of the impact on the public and standards for such activities.

The need for legal services, the nature of much narrow, repetitive work that can be performed by those without a formal three-year legal education, the high demand for that work and its complexity to the average person, and the inability of lawyers to provide those services at rates affordable by the majority of the public, all demand alternative methods of providing legal services. In the best interests of the public, serious consideration will be required for the role of legal assistants and legal technicians in Utah.

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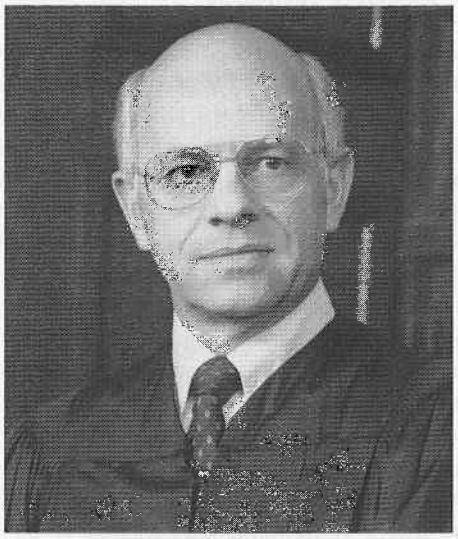
Utah Standards of Appellate Review

By Judge Norman H. Jackson



NORMAN H. JACKSON was appointed to the Utah Court of Appeals in 1987 by Gov. Norman H. Bangerter. He graduated from the University of Utah School of Law and was a practicing attorney for twenty-five years. He has Masters and Bachelors Degrees in Economics from BYU.

Formerly he served on the Utah State Bar Commission, Utah Legal Services Board, Board of Visitors J. Reuben Clark School of Law, Utah Air Travel Commission, as President of American Inn of Court I, and as President of the Utah Bar Foundation. Presently he serves on the Board of Appellate Judges, the Utah Information Technology Commission, and as chair of the Judicial Council's Standing Committee on Information, Automation, and Records.

FOREWORD

Your success as an appellate advocate will depend in large measure upon your grasp of standards of appellate review. However, as I discovered early in my appellate practice, there is no ready reference where the standard of review for a particular issue can be located. Accordingly, one of my first acts as an appellate judge was to ask my law clerk, Annina Mitchell,[1] to begin compiling a summary of standards of review. That summary, occasionally revised, has been in circulation to court of appeals personnel for several years. Although the unpublished summary bears only my initials, it was recently cited as legal authority in an appellant's brief. Accordingly, I have decided to publish a revised, expanded, and updated version of the summary in the *Bar Journal* as an aid to members of the Bar. I appreciate the editor's willingness to assist me in this effort.

I remember that attorney Bill Fowler's primer on bankruptcy, published by the state bar, was of great worth to me as I ventured into that field of law. My hope is that this publication will be of similar value to those who venture into appellate advocacy. Hopefully, it will guide the advocate in the right direction as he or she wrestles with these thorny standards. The document can have long-term usefulness simply by "shepardizing" the legal citations set forth. View it as a ready reference providing the means to answer your standard of review questions, rather than as an article to be digested during a single reading.

OUTLINE OF CONTENTS

UTAH LEGAL SERVICES, INC. PRESENTS MONDAY BROWN BAG SEMINARS

Utah Legal Services, Inc. announces that each Monday it will conduct free brown bag seminars on various legal topics. These topics will be published each month in the *Utah Bar Journal*. The seminars will begin promptly at noon and end at 1:00 p.m. The Utah State Bar has donated the space in the Utah Law and Justice Center (645 South 200 East) so seating is limited. All those who desire to attend must contact Gerre Ron at 328-8891 ext. 311 or 1-800-662-4245 one week in advance. One hour CLE credit for attendance, three hours as a speaker. (Topics are subject to change without notice.)

The topics for October and November are:

OCTOBER

October 3 – Application of Attorney Fees on V.A. Cases/ New Court of Veteran's Appeals
October 10 – Holiday – Columbus Day
October 17 – Juvenile Court Parental Rights Termination Case
October 24 – Common Law Marriage and Other Legal Aspects of Non-Marital Cohabitation/Separation
October 31 – Child Custody

NOVEMBER

November 7 – Small Claims Court
November 14 – Medical Bills: Whose Fault to Pay? Is it the Medical Provider, Medical Carrier, Debt Collector, or the Patient?
November 21 – Child Support
November 28 – Personal Injury Claims for Low Income Clients

INTRODUCTION

Standards of review are central to the decision making of appellate courts. They set the power of the lens through which appellate judges examine each issue. For a quick overview, please study the illustration "Standards of Appellate Review at a Glance." I have diagrammed three lenses of varying power demonstrating that the appellate process is reduced to three types of review:

1. Review of factual findings, paying great deference to the trial court or administrative agency;

2. Review of the exercise of discretion, paying some degree of deference; and

3. Review of conclusions of law, paying no deference.

See Ruggero J. Aldisert, *Opinion Writing* 53-54 (1990) [hereinafter Aldisert]; Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 Syracuse L. Rev. 635, 646 (1971).

Judge Aldisert observes, "[a] clear understanding of the scope of review for each point in a brief should be a minimum requirement for meeting the proposed standard of advocacy competence." Aldisert at 53. Since 1990, Rule 24(a)(5) of the Utah Rules of Appellate Procedure has required attorneys to include in briefs the standard of appellate review for each issue with supporting authority. *See also* Utah R. App. P., Form 8, Checklist for Briefs, Content Requirement 5. This standard of review requirement should not be ignored. Its purpose is to focus the briefs, thus promoting more accuracy and efficiency in processing appeals. *Christensen v. Munns*, 812 P.2d 69, 73 (Utah App. 1991); *see State v. Price*, 827 P.2d 247, 250 (Utah App. 1992).

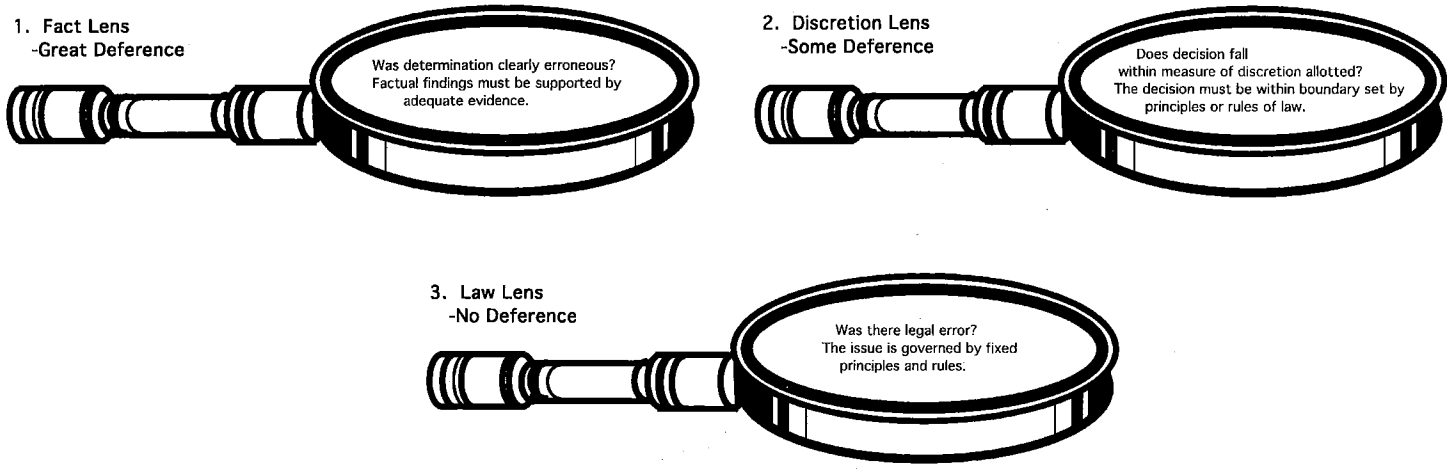
For the serious appellate advocate, I recommend careful study of the following Utah appellate opinions: *State v. Pena*, 869 P.2d 932 (Utah 1994); *State v. Thurman*, 846 P.2d 1256 (Utah 1993); *State v. Ramirez*, 817 P.2d 774 (Utah 1991); *State v. Sykes*, 840 P.2d 825 (Utah App. 1992); *State v. Vigil*, 815 P.2d 1296 (Utah App. 1991). These cases reveal how Utah standard of review "law" is developing. Further, they discuss the concerns and policy considerations in maintaining a proper balance between trial court discretion and appellate court deference.

One item of utmost importance to the appellate advocate is the requirement that issues be preserved for appeal. As a general rule, appellate courts will not consider an issue raised for the first time on appeal. *Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 455 (Utah 1993); *State v. Brown*, 853 P.2d 851, 854 n.1 (Utah 1992); *Espinal v. Salt Lake City Bd. of Educ.*, 797 P.2d 412, 413 (Utah 1990); *State v. Gibbons*, 740 P.2d 1309, 1311 (Utah 1987); *York v. Shulsen*, 875 P.2d 590, 593 (Utah App. 1994); *Wade v. Stangl*, 869 P.2d 9, 11 (Utah App. 1994); *Ashcroft v. Industrial Comm'n*, 855 P.2d 267, 268 (Utah App.), *cert. denied*, 868 P.2d 95 (Utah 1993); *Sukin v. Sukin*, 842 P.2d 922, 926 (Utah App. 1992). If appellants have failed to properly preserve an issue for appeal, they have waived that issue. *State v. Brown*, 856 P.2d 358, 359 n.1 (Utah App. 1993) (Rule 12(d) of the Utah Rules of Criminal Procedure provides that "[f]ailure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof"); *Ashcroft*, 855 P.2d at 268 (defendant waived the issues of sufficiency of evidence and adequacy of findings because he failed to properly preserve them for appeal).

Appellants are required to present all issues to the trial court or administrative agency through appropriate filings, or they must properly present objections to asserted errors during trial proceedings in order to provide an opportunity for correction at that time. *See Brown*, 856 P.2d at 359; *Broberg v. Hess*, 782 P.2d 198, 201 (Utah App. 1989). The trial court is considered "'the proper forum in which to commence thoughtful and probing analysis'" of issues. *Brown*, 856 P.2d at 360 (quoting *State v. Bobo*, 803 P.2d 1268, 1273 (Utah App. 1990)). By not arguing an issue or presenting pertinent evidence before the trial court, the appellant denies the trial court the opportunity to make findings of fact and conclusions of law relevant to the issues raised or objections to

Standards of Appellate Review at a Glance

(The power of the lens through which an appellate court may examine an issue)



evidence. *Id.* (citing *LeBaron & Assocs., Inc. v. Rebel Enters., Inc.*, 823 P.2d 479, 483 n.6 (Utah App. 1991)); *accord State v. Rangel*, 866 P.2d 607, 611 (Utah App. 1993) (trial court should be allowed first opportunity to address claim that it has erred); *Ashcroft*, 855 P.2d at 268 (by raising issue at administrative level, either administrative law judge or commission could have adjudicated issue).

Effective July 1, 1994, Rule 24(a)(5) of the Utah Rules of Appellate Procedure requires appellants to include citations to the record showing that each issue was preserved in the trial court or provide a statement of the grounds for seeking review of issues not preserved below.

Issues are preserved for appeal if properly raised and litigated before the trial court or administrative body, or if appellants make specific and timely objections to the trial court or administrative agencies.[2] *In re Estate of Russell*, 852 P.2d 997, 1000 (Utah 1993) (jury instructions must be properly objected to in order to be considered on appeal); *State v. Whittle*, 780 P.2d 819, 820-21 (Utah 1989) (specific, timely objections must be made to preserve issues for appeal); *State v. Mitchell*, 779 P.2d 1116, 1119 n.4 (Utah 1989) (Rule 103(a) of the Utah Rules of Evidence requires a timely, specific objection to preserve evidentiary errors for appeal); *York*, 875 P.2d at 593 (issue is preserved for appeal when party timely brings issue to attention of trial court); *Wade*, 869 P.2d at 11 (issues of bias or prejudice by trial court must be raised by affidavit before trial judge to preserve them for appeal); *Jenkins v. Weis*, 868 P.2d 1374, 1379 (Utah App. 1994) (failure to properly object to jury instructions bars appellant from raising issue on appeal); *Rangel*, 866 P.2d at 611 (contemporaneous objection or some form of specific preservation of claims of error must be made part of trial court record before appellate court will review such claim on appeal); *Brown*, 856 P.2d at 360 (to ensure that trial court has proper opportunity to consider issue, there must be "'contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record'") (quoting *State v. Tillman*, 750 P.2d 546, 551 (Utah 1987)); *State v. Mickelson*, 848 P.2d 677, 677 (Utah App. 1992) (issue was waived because it was not adequately framed in pleadings or raised in motion for summary judgment); *see also* Utah R. Civ. P. 51 (all objections to jury instructions must be made before written instructions are given to jury and opposing party must state distinctly matter objected to and grounds for objection).

If a trial court addresses a new issue post-trial, rather than dismissing it on the basis of waiver, an appellate court may then consider that issue. *State v. Seale*, 853 P.2d 862, 870 (Utah) (addressing issue while considering motion for new trial resuscitated defendant's right to assert issue on appeal), *cert. denied*, 114 S. Ct. 186 (1993); *State v. Johnson*, 821 P.2d 1150, 1161 (Utah 1991); *State v. Matsamas*, 808 P.2d 1048, 1053 (Utah 1991).

"A clear understanding of the scope of review for each point in a brief should be a minimum reqirement for meeting the proposed standard of advocacy competence."

Further, issues raised for the first time on appeal will be addressed if the trial court proceedings demonstrated "plain error." *State v. Olsen*, 860 P.2d 332, 333 (Utah 1993); *Brown*, 853 P.2d at 853-54 (plain error will be found if error should have been obvious to trial court and error was harmful in that it affected substantial rights of the accused); *Whittle*, 780 P.2d at 821 (error is plain if it is obvious and harmful); *State v. Eldredge*, 773 P.2d 29, 36 (Utah), *cert. denied*, 493 U.S. 814 (1989); *State v. Piling*, 875 P.2d 604, 606 (Utah App. 1994) (issue considered first time on appeal if trial court committed plain error); *Rangel*, 866 P.2d at 611 (in order for error to be "plain," appellate court must find that it should have been obvious to trial court that it was committing error); *State v. Archambeau*, 820 P.2d 920, 926 (Utah App. 1991); *see also Utah R. Evid.* 103(d).

Also, issues first raised on appeal will be addressed if the case involves "exceptional circumstances." *Olsen*, 860 P.2d at 333 n.1; *State v. Dunn*, 850 P.2d 1201, 1209 n.3 (Utah 1993) (exceptional circumstances exception is "ill-defined" and applies primarily to "rare procedural anomalies"); *Gibbons*, 740 P.2d at 1311; *York*, 875 P.2d at 594; *Archambeau*, 820 P.2d at 922-23.

I. Appeals from Trial Court

A. Challenging Findings of Fact

1. Introduction

Historically, appellate advocates have faced some difficulty in distinguishing factual issues from legal issues. Simple factual questions seem to provide little trouble. However, when factual issues are part of subsidiary or underlying facts that lead to legal conclusions, confusion has prevailed. Utah appellate courts have created some of this confusion. *State v. Pena*, 869 P.2d 932, 935 (Utah 1994) ("this court and the court of appeals have created some confusion with regard to standards of review"). For example, the supreme court in *State v. Mendoza*, 748 P.2d 181, 183 (Utah 1987), treated a reasonable suspicion determination under a clearly erroneous standard, usually reserved for questions of fact. Many appellate decisions followed this approach. *See e.g., State v. Leonard*, 825 P.2d 664, 667-68 (Utah App. 1991), *cert. denied*, 843 P.2d 1042 (Utah 1992); *State v. Robinson*, 797 P.2d 431, 435 (Utah App. 1990); *State v. Talbot*, 792 P.2d 489, 493 (Utah App. 1990). However, the supreme court in *Pena* clarified the matter by determining that whether a given set of facts gives rise to reasonable suspicion is a determination of law, reviewed nondeferentially for correction, as opposed to being a fact determination reviewable for clear error. *Pena*, 869 P.2d at 939.

Appellate counsel also accounts for a portion of this confusion by attempting to characterize issues as factual, when they are actually issues of law or issues of discretion. *Pena*, 869 P.2d at 936.[3] Whether appellants are challenging a solitary finding of fact, an underlying fact, or a subsidiary fact, whatever the label, they must be able to distinguish factual questions and select the applicable standard of review.

The supreme court provided the following definition of factual issues: "Factual questions are generally regarded as entailing the empirical, such as things, events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as state of mind." *Pena*, 869 P.2d at 935 (citing Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74

Marq. L. Rev. 231, 236 (1991)). Each section below includes examples of factual questions that should prove helpful in determining whether an issue is indeed factual. Each section also includes cases outlining the corresponding standards of review.

2. Marshaling Requirement[4]

A caveat to appellate counsel is that when challenging a finding of fact made by a trial court or administrative body, appellate courts will not address the challenge unless the appellant has properly "marshaled the evidence." *Robb v. Anderton*, 863 P.2d 1322, 1328 (Utah App. 1993). The marshaling requirement "'serves the important function of reminding the litigants and appellate courts of the broad deference owed to the fact finder at trial.'" *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991) (quoting *State v. Moore*, 802 P.2d 732, 739 (Utah App. 1990)). Further, marshaling "provides the appellate court the basis from which to conduct a meaningful and expedient review of facts challenged on appeal." *Robb*, 863 P.2d at 1328. "Our insistence on compliance with the marshaling requirement is not a case of exalting hypertechnical adherence to form over substance." *State v. Larsen*, 828 P.2d 487, 491 (Utah App.), *cert. granted*, 836 P.2d 1383 (Utah 1993). "'A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.'" *Id.* (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)).

Many appellants, in apparent attempts to marshal the evidence, merely present carefully selected facts and excerpts of trial testimony in support of *their own* position, conveniently omitting negative facts. *E.g., Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 457 (Utah 1993); *Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc.*, 872 P.2d 1051, 1053 (Utah App. 1994); *Robb*, 863 P.2d at 1328; *Intermountain Health Care, Inc. v. Board of Review*, 839 P.2d 841, 844 (Utah App. 1992); *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah App. 1992). Others incorrectly state marshaled "facts" in order to improve their position. *E.g., State v. Piling*, 875 P.2d 604, 608 (Utah App. 1994) (instead of properly marshaling facts, defendant provides "facts" contrary to record); *Johnson v. Board of Review*, 842 P.2d 910, 912 (Utah App. 1992) (on appeal, appellant claimed he had missed no work days and thus suffered no incapacity in worker's compensation case, even though evidence in record showed he missed at least nine days of work). Still other appellants incorrectly reargue the same case made before the trial court without any reference to the record. *E.g., State v. Gray*, 851 P.2d 1217, 1225 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993). One appellant suggested that because the evidence in support of the jury verdict was "so light," he need not marshal the evidence. *Brown v. Richards*, 840 P.2d 143, 149 n.2 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993). A few appellants, even one who filed an overlength brief, suggested that the page limitation on appellate briefs prevented them from marshaling the evidence. *Id.*; *Larsen*, 828 P.2d at 491. These tactics do not begin to meet the marshaling burden. *See Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991).

"[A]ppellate courts will not address the challenge [to findings of fact] unless the appellate has properly 'marshaled the evidence'."

Marshaling the evidence first entails marshaling, or listing, all the evidence *supporting* the finding that is challenged. *Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282, 1286 (Utah 1993); *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991); *State v. Moosman*, 794 P.2d 474, 475-76 (Utah 1990); *Grayson Roper Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989); *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899-900 (Utah 1989); *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989); *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985); *In re Estate of Hamilton*, 869 P.2d 971, 977 (Utah App. 1994); *Willey v. Willey*, 866 P.2d 547, 551 n.2 (Utah App. 1993); *Baker v. Baker*, 866 P.2d 540, 543 (Utah App. 1993); *Robb*, 863 P.2d at 1327; *Commercial Union Assoc. v. Clayton*, 863 P.2d 29, 36 (Utah App. 1993); *State v. Hayes*, 860 P.2d 968, 972 (Utah App. 1993); *Gray*, 851 P.2d at 1225; *King v. Industrial Comm'n*, 850 P.2d 1281, 1285 (Utah App. 1993); *Johnson v. Board of Review*, 842 P.2d 910, 912 (Utah App. 1992); *State v. Peterson*, 841 P.2d 21, 25 (Utah App. 1992); *State v. Hurst*, 821 P.2d 467, 471 (Utah App. 1991).[5]

Once the evidence is listed or marshaled with appropriate citation to the record,[6] the appellant must then demonstrate that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision.[7] *Stewart v. Board of Review*, 831 P.2d 134, 138 (Utah App. 1992) (after coming "close" to marshaling evidence, appellant fails to "draw this court's attention to any flaw in the evidence upon which the [administrative law judge] relied"); *McPherson v. Belnap*, 830 P.2d 302, 305 (Utah App. 1992) (appellant failed to demonstrate, after marshaling evidence, that trial court's findings were clearly erroneous).

In summary:

> The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991); *accord Oneida/SLIC*, 872 P.2d at 1053.

If an appellant fails to properly marshal the evidence, appellate courts must assume the findings are correct. *Alta Indus.*, 846 P.2d at 1287; *Robb*, 863 P.2d at 1328; *Gray*, 851 P.2d at 1225; *Crockett*, 836 P.2d at 820 (if appellant fails to marshal evidence, the appellate court assumes record supports findings and proceeds to review accuracy of trial court's conclusions of law and application of that law).

Appellate courts have shown no reluctance in affirming the factual findings of the trial court or administrative body if appellant does not properly marshal the evidence. *See Ong Int'l*, 850 P.2d at 457; *Oneida/SLIC*, 872 P.2d at 1052-53; *Hamilton*, 869 P.2d at 975; *Robb*, 863 P.2d at 1328; *Johnson*, 842 P.2d at 912; *Smallwood v. Board of Review*, 841 P.2d 716, 719 (Utah App. 1992); *Brown*, 840 P.2d at 149; *State v. Burk*, 839 P.2d 880, 886 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993); *West Valley City*, 818 P.2d at 1313.

As shown in the outline, each section of this article includes a string citation of corresponding cases addressing the marshaling requirement.

3. Civil Bench Trial

a. Clearly Erroneous Standard

A trial court's findings of fact are reviewed under a clearly erroneous standard. *Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282, 1286 (Utah 1993); *Sorenson v. Kennecott-Utah Copper Corp.*, 873 P.2d 1141, 1147 (Utah App. 1994); *Mostrong v. Jackson*, 866 P.2d 573, 577 (Utah App. 1993), *cert. denied*, –P.2d– (Utah 1994). This clearly erroneous standard of review is derived from Rule 52(a) of the Utah Rules of Civil Procedure, which provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

A trial court's findings of fact are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence. *Doelle v. Bradley*, 784 P.2d 1176, 1178 (Utah 1989); *Sorenson*, 873 P.2d at 1147 (findings are clearly erroneous if they are against clear weight of evidence or if appellate court reaches definite and firm conviction that mistake has been made); *Edwards & Daniels Architects, Inc. v. Farmers' Properties, Inc.*, 865 P.2d 1382, 1385 (Utah App. 1993). If, viewing the evidence in the light most favorable to the trial court's determination, a factual finding is based on sufficient evidence, the finding is not clearly erroneous. *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994) (factual findings are clearly erroneous if they are "'not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination'") (quoting *Wessel v. Erickson Landscaping Co.*, 711 P.2d 250, 252 (Utah 1985)); *Greenwood v. City of North Salt Lake*, 817 P.2d 816, 819 (Utah 1991); *Clair W. Gladys Judd Family Ltd. v. Hutchings*, 797 P.2d 1088, 1090 (Utah 1990) (even though record contained conflicting evidence, trial court's finding was supported by sufficient evidence); *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377 (Utah 1987) (trial court's factual findings were supported by sufficient evidence); *Wade v. Stangl*, 869 P.2d 9, 12 (Utah App. 1994); *Slattery v. Covey & Co.*, 857 P.2d 243, 249 (Utah App. 1993) (sufficient evidence existed to support trial court's findings regarding errors, but evidence to substantiate value of trial court's award was so lacking as to be against clear weight of evidence); *Reinbold v. Utah Fun Shares*, 850 P.2d 487, 489 (Utah App. 1993) (record contained sufficient evidence to support trial court's finding even though record contained conflicting testimony).

"The clearly erroneous standard is highly deferential to the trial court's decisions because the witnesses and parties appear before the trial court and the evidence is presented there."

The clearly erroneous standard is highly deferential to the trial court's decisions because the witnesses and parties appear before the trial court and the evidence is presented there. *Pena*, 869 P.2d at 936. Thus, the trial judge is "considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record." *Id.* (citing *In re J. Children*, 664 P.2d 1158, 1161 (Utah 1983)).

b. Marshaling Cases

The following are cases involving appeals from civil bench trials in which appellate courts have addressed the marshaling requirement. *Wade v. Stangl*, 869 P.2d 9, 12 (Utah App. 1994) (in order to successfully challenge trial court's finding of fact, appellant must marshal evidence in support of findings and then demonstrate that despite this evidence, trial court's findings are so lacking in support as to be against clear weight of evidence, thus making them clearly erroneous); *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1313 (Utah App. 1991) (appellate court cannot determine whether findings are clearly erroneous unless appellant properly marshals evidence, which entails citing "every scrap of competent evidence introduced at trial" that supports trial court's findings); *see also, Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282, 1286 (Utah 1993) (appellant frequently omitted crucial incriminating evidence, clearly demonstrating that he failed to properly marshal); *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991) (because appellants failed to marshal evidence in support of challenged findings, findings were upheld); *Grayson Roper Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989) (appellant failed to marshal evidence regarding mutual use of land in contention); *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989) (appellant did not even attempt to marshal evidence, and all evidence presented was in best light to appellant's case); *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989) (evidence was properly marshaled and could not be proven to be against clear weight of evidence); *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985) (appellant failed to marshal facts for either side, and appellate court declined to consider attack on factual findings); *Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc.*, 872 P.2d 1051, 1053 (Utah App. 1994) (appellant merely presented carefully selected facts favorable to its position rather than properly marshaling evidence); *Robb v. Anderton*, 863 P.2d 1322, 1328 (Utah App. 1993) (appellant failed to marshal evidence, but rather argued selected evidence favorable to his position without presenting evidence supporting trial court's finding); *Commercial Union Assocs. v. Clayton*, 863 P.2d 29, 36 n.5 (Utah App. 1993) (appellant merely selected facts and excerpts of testimony from trial that supported appellant's position); *Slattery v. Covey & Co.*, 857 P.2d 243, 246 (Utah App. 1993) (marshaled evidence was shown to substantiate trial court's findings); *Reinbold v. Utah Fun*

Shares, 850 P.2d 487, 489 (Utah App. 1993) (marshaling effort was incomplete because appellant failed to include parts of key witnesses' testimony).

c. Examples of Fact Questions

The following cases contain examples of factual issues requiring a clearly erroneous standard of review.

(1) Whether a doctor in a medical malpractice case checked for and removed air bubbles from an IV line prior to insertion. *Robb v. Anderton*, 863 P.2d 1322, 1327 (Utah App. 1993).

(2) Whether a defendant was receiving kickbacks for inducing his employer to buy steel from a certain company. *Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282, 1285-86 (Utah 1993).

(3) Whether a writing has been adopted as a final and complete expression of an agreement. *Hall v. Process Instruments & Control, Inc.*, 866 P.2d 604, 606 (Utah App. 1993).

(4) Whether a party had the requisite contractual intent. *Fitzgerald v. Corbett*, 793 P.2d 356, 358 (Utah 1990).

(5) Whether an agreement existed between parties as to how to pay a debt. *Mountain States Tel. & Tel. v. Sohm*, 755 P.2d 155, 158-59 (Utah 1988).

(6) Whether an animal was "vicious" or "fierce." *Greenwood v. City of North Salt Lake*, 817 P.2d 816, 818-19 (Utah 1991).

(7) Whether there was intent to injure. *State Farm Fire & Casualty Co. v. Geary*, 869 P.2d 952, 955-56 (Utah App. 1994).

(8) Whether the predecessors-in-interest actually used the front and rear parking areas to reach the land in question in a prescriptive easement case. *Homer v. Smith*, 866 P.2d 622, 626 (Utah App. 1993), *cert. denied*, –P.2d– (Utah 1994).

(9) Whether liquidated damages were a reasonable forecast of actual damages. *Reliance Ins. Co. v. Utah Dep't of Transp.*, 858 P.2d 1363, 1367 (Utah 1993).

(10) Whether the parties intended to allocate property taxes between them when the agreement was made. *Wade v. Stangl*, 869 P.2d 9, 12-13 (Utah App. 1994).

(11) Whether a debt owed on a trust deed was extinguished. *Reinbold v. Utah Fun Shares*, 850 P.2d 487, 489 (Utah App. 1993).

(12) The point at which a person reasonably should know that he or she has suffered a legal injury. *Andreini v. Hultgren*, 860 P.2d 916, 919 (Utah 1993).

(13) Whether an attorney reviewed the record of bankruptcy proceedings to determine if there were outstanding court orders that needed attention. *Harline v. Barker*, 854 P.2d 595, 600 (Utah App.), *cert. denied*, 862 P.2d 1356 (Utah 1993).

d. Adequacy of Trial Court's Factual Findings

Rule 52(a) of the Utah Rules of Civil Procedure provides that "the [trial] court shall find the facts specially and state separately its conclusions of law thereon." Utah appellate courts consistently stress the importance of adequate findings of fact. *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991); *State v. Vigil*, 815 P.2d 1296, 1300 (Utah App. 1991). As stated above, to successfully challenge findings of fact, an appellant must prove they are clearly erroneous, i.e., against the clear weight of the evidence. Therefore, if appellate courts are to determine whether the evidence presented before the trial court supports the trial court's findings, the findings must embody sufficient detail and include enough facts to show the evidence upon which they are grounded. *Woodward*, 823 P.2d at 477. The findings must contain enough detail to reveal the trial court's reasoning process. *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989). In other words, the findings must be articulated with sufficient detail so that the basis of the ultimate conclusion can be understood. *Id.*; *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987) (findings must show that court's judgment or decree follows logically from and is supported by evidence); *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979) (findings should be sufficiently detailed and include enough material to disclose steps by which ultimate conclusion on each factual issue was reached); *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah App. 1993) ("ultimate test of the adequacy of the trial court's findings is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision") (quoting 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1579 (1971)); *see Woodward*, 823 P.2d at 478 (trial court's findings of fact were inadequate because they failed to provide account of actual facts supporting trial court's ultimate conclusions; rather, findings were conclusory, akin to conclusions of law); *Reid*, 776 P.2d at 899-900 (although findings were not "a model of clarity," findings of fact were sufficiently detailed to reveal trial court's reasoning process).

Unless the record clearly and uncontrovertedly supports the trial court's decision, the absence of adequate findings of fact generally requires remand for more detailed findings by the trial court.[8] *Woodward*, 823 P.2d at 478 (absent adequate findings of fact, meaningful review of a decision's evidentiary basis is virtually impossible). Otherwise, appellate courts would be in the awkward position of speculating what the trial court actually determined the facts to be, without the benefit of the guidance that adequate factual findings provide. *Id.* at 478 n.7.

4. Civil Jury Trial Verdict

a. Substantial Evidence Standard

Because an appellate court owes broad deference to the fact finder, its power to review a jury verdict challenged on grounds of insufficient evidence is limited. In reviewing a challenge to a civil jury verdict, the appellate court views all evidence in the light most favorable to the verdict. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991); *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985). The appellate court must assume the jury believed the evidence and inferences that support the verdict. *Canyon Country Store v. Bracey*, 781 P.2d 414, 417 (Utah 1989) (when conflicting evidence was introduced at trial, appellate courts assume jury believed those facts that support its verdict); *Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1082 (Utah 1985).

However, in some unusual circumstances, a reviewing court may reassess witness credibility if the testimony is inherently improbable. *State v. Workman*, 852 P.2d 981, 984 (Utah 1993) (to warrant review, there must exist either physical impossibility of evidence being true, or its falsity must be apparent, without any resort to inferences or deductions) (citing *Curtis v. DeAtley*, 663 P.2d 1089, 1092 (Idaho 1983)).

The verdict will be reversed if there is no substantial evidence to support it. *Crookston*, 817 P.2d at 799; *Canyon Country*, 781 P.2d at 417 (substantial evidence existed to justify jury's findings); *Von Hake*, 705 P.2d at 769 (evidence did not support jury's finding of constructive fraud); *In re Estate of Kesler*, 702 P.2d 86, 88-89 (Utah 1985) (doctor's testimony,

tests, and previous court trials and determinations were "substantial evidence" to enforce jury finding that will of elderly woman was not valid because it was made when mentally incompetent); *Ames v. Maas*, 846 P.2d 468, 475 (Utah App. 1993) (evidence was sufficient to justify jury's finding that defendant did not cross center of road as result of unreasonable conduct under circumstances); *Onyeabor v. Pro Roofing, Inc.*, 787 P.2d 525, 529 (Utah App. 1990) (no substantial evidence existed to show plaintiff was negligent because all evidence showed plaintiff was traveling in his own lane of traffic at or near speed limit before accident).

The evidence is insufficient if it so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case. *Ames*, 846 P.2d at 475.

b. Marshaling Cases

The following are cases involving appeals from civil jury trials in which appellate courts have addressed the marshaling requirement. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799-800 (Utah 1991) (rather than marshaling evidence in favor of jury verdict of fraud, appellant merely selected evidence favorable to its position); *Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 156 (Utah 1991) (appellant must set out all evidence that supports jury verdict, including all valid inferences, and demonstrate that reasonable persons would not conclude that evidence supports the verdict); *Cambelt Int'l Corp. v. Dalton*, 745 P.2d 1239, 1242 (Utah 1987) (appellant must marshal all evidence supporting jury verdict and then demonstrate that, even viewing evidence in light most favorable to that verdict, evidence is insufficient to support it); *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985) (appellant properly marshaled evidence and showed that confidential relationship did not exist between parties); *Morgan v. Quailbrook Condominium Co.*, 704 P.2d 573, 577 n.3 (Utah 1985) (appellants' misperception concerning how to properly challenge factual findings was evidenced by their failure to marshal evidence in support of jury findings); *Ames v. Maas*, 846 P.2d 468, 475 (Utah App. 1993) (appellant must marshal all evidence supporting verdict and then show that evidence cannot support verdict); *Shoreline Dev., Inc. v. Utah County*, 835 P.2d 207, 210 (Utah App. 1992) (county failed to satisfy its burden of marshaling evidence in support of jury's holding that it received a benefit worth $94,000); *Evans v. Doty*, 824 P.2d 460, 469 (Utah App. 1991) (appellant failed to marshal evidence in favor of the jury's finding that party was not negligent), *cert. denied*, 836 P.2d 1383 (Utah 1992); *Onyeabor v. Pro Roofing, Inc.*, 787 P.2d 525, 529 (Utah App. 1990) (plaintiff properly marshaled evidence and showed that verdict was not supported by substantial evidence).

c. Examples of Jury Fact Questions

The following cases contain examples of factual issues requiring a substantial evidence standard of review.

(1) Whether the plaintiff had knowledge of the one-year statute of limitations contained in the insurance policy. *Canyon Country Store v. Bracey*, 781 P.2d 414, 417 (Utah 1989).

"Because an appellate court owes broad deference to the fact finder, its power to review a jury verdict challenged on grounds of insufficient evidence is limited."

(2) Whether the testator was mentally incompetent when the will was executed. *In re Estate of Kesler*, 702 P.2d 86, 88 (Utah 1985).

(3) Whether the plaintiff crossed the center of the road as a result of unreasonable conduct. *Ames v. Maas*, 846 P.2d 468, 475 (Utah App. 1993).

(4) Whether the plaintiff was driving faster than was reasonable and prudent. *Onyeabor v. Pro Roofing, Inc.*, 787 P.2d 525, 529 (Utah 1990).

(5) Whether the plaintiff reasonably relied on the misrepresentations. *Brown v. Richards*, 840 P.2d 143, 148-49 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993).

5. Criminal Bench Trial

a. Clearly Erroneous Standard

The trial court has primary responsibility for making determinations of fact. *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). A trial court's findings of fact in a criminal bench trial are reviewed under a clearly erroneous standard. *See State v. Goodman*, 763 P.2d 786, 787 n.2 (Utah 1988); *City of Orem v. Lee*, 846 P.2d 450, 452 (Utah App.), *cert. denied*, 857 P.2d 948 (Utah 1993); *State v. Pedersen*, 802 P.2d 1328, 1330 (Utah App. 1990), *cert. denied*, 815 P.2d 241 (Utah 1991). This standard of review is derived from Rule 52(a) of the Utah Rules of Civil Procedure, which provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

A trial court's finding is clearly erroneous when it is against the clear weight of the evidence or, although there is evidence to support it, the court reviewing all the record evidence is left with a definite and firm conviction that a mistake has been made. *Pena*, 869 P.2d at 935-36 (reviewing court must find clear error if factual findings are not adequately supported by record, resolving all disputes in evidence in light most favorable to trial court's determination); *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992); *State v. Featherson*, 781 P.2d 424, 431-32 (Utah 1989); *Goodman*, 763 P.2d at 786; *State v. Ashe*, 745 P.2d 1255, 1258 (Utah 1987); *State v. Walker*, 743 P.2d 191, 192 (Utah 1987); *State v. Lovegren*, 798 P.2d 767, 770 (Utah App. 1990).

This clearly erroneous standard is highly deferential to the trial court's decisions because the witnesses and parties appear before the trial court and the evidence is presented there. *Pena*, 869 P.2d at 936. Thus, the trial judge is "considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record." *Id.* (citing *In re J. Children*, 664 P.2d 1158, 1161 (Utah 1983)).

b. Marshaling Cases

The following are cases involving appeals from criminal bench trials in which appellate courts have addressed the marshaling requirement. *State v. Gray*, 851 P.2d 1217, 1225 (Utah App.) (not only did defendant fail to marshal evidence in support of her motion to dismiss, she did not marshal evidence in opposition; instead she simply reargued her motion without any reference to record), *cert. denied*, 860 P.2d 943 (Utah 1993); *State v. Gentlewind*, 844 P.2d 372, 376 n.3

(Utah App. 1992) (defendant failed to marshal evidence supporting trial court's findings that he did not meet statutory qualifications for probation); *State v. Peterson*, 841 P.2d 21, 25 (Utah App. 1992) (defendant failed to marshal evidence supporting court's findings regarding transfer and distribution of cocaine, however, defendant adequately marshaled evidence concerning trial court's finding that she arranged for distribution of cocaine); *State v. Chavez*, 840 P.2d 846, 848 (Utah App. 1992) (because defendant failed to marshal evidence in support of trial court's findings, court of appeals accepted findings), *cert. denied*, 857 P.2d 948 (Utah 1993); *State v. Burk*, 839 P.2d 880, 886 (Utah App. 1992) (because defendant did not marshal evidence supporting trial court's findings concerning improper contact between jurors and witnesses, court of appeals assumed findings were supported by evidence), *cert. denied*, 853 P.2d 897 (Utah 1993); *State v. Larsen*, 828 P.2d at 490-91 (because defendant failed to marshal evidence in support of trial court's findings and show how findings were clearly erroneous, court of appeals affirmed factual findings); *State v. Hurst*, 821 P.2d 467, 471 (Utah App. 1991) (rather than marshaling evidence supporting challenged finding that defendant had ability to attend court proceedings, defendant merely restated evidence favorable to her position).

c. Examples of Fact Questions[9]

The following cases contain examples of factual issues requiring a clearly erroneous standard of review.

(1) Whether defendant knew of his right to counsel and intentionally relinquished it. *State v. Wood*, 868 P.2d 70, 87 (Utah 1993).[10]

(2) Whether officers intimidated, coerced, or deceived the defendant in the process of extracting a statement. *State v. Archuleta*, 850 P.2d 1232, 1238-40 (Utah), *cert. denied*, 114 S. Ct. 476 (1993); *State v. James*, 858 P.2d 1012, 1015-17 (Utah App. 1993).

(3) Whether defendant initiated contact and was read his Miranda warnings before giving a statement. *Archuleta*, 850 P.2d at 1238-40.

(4) How long defendant was in custody and whether Miranda warnings were given prior to consent to search. *State v. Thurman*, 846 P.2d 1256, 1273 (Utah 1993).

(5) Whether officers' concern for safety influenced their decision to make a forcible entry into a residence. *Id.* at 1273-74.

(6) Whether the defendant was informed of his constitutional right not to have a search made without a search warrant and of his right to refuse such a search. *Id.* at 1274.

(7) Whether a juror answered a material question honestly on voir dire. *State v. Thomas*, 830 P.2d 243, 245 (Utah 1992).

(8) Whether a victim's testimony was perjured. *State v. Lancaster*, 765 P.2d 872, 873 (Utah 1988).

(9) Whether the criminal defendant was mentally ill. *State v. Lafferty*, 749 P.2d 1239, 1244-47 (Utah 1988); *State v. DePlonty*, 749 P.2d 621, 624-28 (Utah 1987); *State v. Montoya*, 825 P.2d 676, 680-81 (Utah App. 1991).

(10) Whether an officer was in "hot pursuit" when he entered an apartment without a search warrant. *State v. Beavers*, 859 P.2d 9, 13-17 (Utah App. 1993).

(11) Whether the personal relationship between defendant and an undercover drug agent influenced defendant's drug purchase. *State v. Keitz*, 856 P.2d 685, 689-90 (Utah App. 1993).

"Appellate courts persistently stress the requirement and importance of adequate findings of fact."

(12) Whether the officer observed defendant place drugs on a shelf in an adjacent room. *Id.* at 690-91.

(13) Whether the defendant cooperated with officers when they asked if he had any drug paraphernalia. *Id.* at 691.

(14) Whether the defendant had an adequate command of the English language to understand the court proceedings and probationary requirements. *State v. Ruesga*, 851 P.2d 1229, 1233 (Utah App. 1993).

(15) Whether an intoxicated motorist was in control of vehicle. *State v. Barnhart*, 850 P.2d 473, 479-80 (Utah App. 1993).

(16) Whether an attorney instructed his client to disobey a court order. *State v. Long*, 844 P.2d 381, 384-86 (Utah App. 1992).

(17) Whether an attorney kept his client reasonably informed, supervised his nonlawyer assistant, and ensured that proper information flowed from his law office to the client. *Id.* at 385.

(18) Whether there was contact between witnesses and jurors. *State v. Burk*, 839 P.2d 880, 886 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993).

d. Adequacy of Trial Court's Factual Findings

Appellate courts persistently stress the requirement and importance of adequate findings of fact.[11] *State v. Ramirez*, 817 P.2d 774, 783-89 (Utah 1991); *State v. Vigil*, 815 P.2d 1296, 1300 (Utah App. 1991). As stated above, to successfully challenge findings of fact, an appellant must prove they are clearly erroneous, i.e., that the findings are against the clear weight of evidence. Deference to the trial court findings can only be extended when the trial court's factual findings adequately reveal the steps by which the ultimate conclusion is reached. *State v. Genovesi*, 871 P.2d 547, 549-51 (Utah App. 1994) (trial court failed to make adequate factual findings because it failed to address one challenged search and made irrelevant factual findings as to the other); *State v. Hodson*, 866 P.2d 556, 564 (Utah App. 1993) (trial court failed to set forth factual findings in sufficient detail for court of appeals to review validity of warrantless body search and seizure of defendant), *cert. granted*, –P.2d– (Utah 1994); *State v. Gray*, 851 P.2d 1217, 1220-22 (Utah App.) (trial court's findings of fact were adequate to support conclusion that search was a valid inventory search), *cert. denied*, 860 P.2d 943 (Utah 1993); *Vigil*, 815 P.2d at 1300 (because trial court failed to make any factual findings concerning question of consent, but merely concluded there was consent without any explanation, case was remanded for trial court to make adequate findings); *State v. Lovegren*, 798 P.2d 767, 770 (Utah App. 1990) (trial court's findings were inadequate to support conclusion that officer had reasonable suspicion of criminal activity).

"Specific, detailed findings not only ease the burden of appellate review by communicating the steps by which the ultimate legal conclusions are reached, . . . they also enable appellate counsel to properly frame issues on appeal . . . and to comply with our rigid requirement of marshaling evidence in support of subsidiary

facts when challenging a trial court's findings." *Vigil*, 815 P.2d at 1300-01 (citations omitted).

If the trial court's factual findings do not address the appropriate issues, appellate courts will remand the case to the trial court for proper findings unless the undisputed facts in the record compel but one conclusion. *Id.* at 1301; *Lovegren*, 798 P.2d at 771 & n.10; *accord Ramirez*, 817 P.2d at 787 n.6 (even though appellate courts can infer findings of fact not actually made, it is inappropriate to do so if testimony is irreconcilably contradictory).

6. Criminal Jury Trial Verdict

a. Sufficiently Inconclusive or Inherently Improbable Standard

Because an appellate court owes broad deference to the fact finder, its power to review a jury verdict challenged on the ground of insufficient evidence is limited. *State v. James*, 819 P.2d 781, 784 (Utah 1991); *State v. Souza*, 846 P.2d 1313, 1322 (Utah App. 1993). In reviewing a jury verdict, the appellate court views the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict and assumes the jury believed the evidence and inferences that support the verdict. *State v. Wood*, 868 P.2d 70, 87 (Utah 1993); *State v. Seale*, 853 P.2d 862, 865 (Utah), *cert. denied*, 114 S. Ct. 186 (1993); *State v. Hamilton*, 827 P.2d 232, 233 (Utah 1992); *State v. Gardner*, 789 P.2d 273, 285 (Utah 1989), *cert. denied*, 494 U.S. 1090 (1990); *State v. McClain*, 706 P.2d 603, 605 (Utah 1985); *State v. Morgan*, 865 P.2d 1377, 1379 (Utah App. 1993); *State v. Barlow*, 851 P.2d 1191, 1193 (Utah App.), *cert. denied*, 859 P.2d 585 (Utah 1993); *State v. Pedersen*, 802 P.2d 1328, 1330 (Utah App. 1990), *cert. denied*, 815 P.2d 241 (Utah 1992); *State v. Moore*, 802 P.2d 732, 738 (Utah App. 1990); *State v. Ortiz*, 782 P.2d 959, 962 (Utah App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990).

Appellate courts will not weigh conflicting evidence, nor will they substitute their own judgment of the credibility of the witnesses for that of a jury. *State v. Workman*, 852 P.2d 981, 984 (Utah 1993); *State v. Howell*, 649 P.2d 91, 97 (Utah 1982); *State v. Diaz*, 859 P.2d 19, 22 (Utah App. 1993), *cert. denied*, –P.2d– (Utah 1994); *State v. Sherard*, 818 P.2d 554, 557 (Utah App. 1991), *cert. denied*, 843 P.2d 516 (Utah 1992). Moreover, the existence of contradictory evidence or conflicting inferences does not warrant disturbing the jury's verdict. *Howell*, 649 P.2d at 97; *Diaz*, 859 P.2d at 23.

In some unusual circumstances, however, a reviewing court may reassess witness credibility if the testimony is inherently improbable. *Workman*, 852 P.2d at 984. To warrant such a review, there must exist either a physical impossibility of evidence being true, or its falsity must be apparent, without any resort to inferences or deductions. *Id.* (citing *Curtis v. DeAtley*, 663 P.2d 1089, 1092 (Idaho 1983)).

Appellate courts will reverse a jury verdict only if the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted. *Workman*, 852 P.2d at 985 (even when viewed in light most favorable to jury's verdict, State's evidence did not support reasonable inference that defendant had mental state required by statute for lawful conviction); *State v. Dunn*, 850 P.2d 1201, 1212 (Utah 1993) (challenged testimony was sufficient to support conviction); *State v. Johnson*, 821 P.2d 1150, 1156 (Utah 1991); *State v. Span*, 819 P.2d 329, 332 (Utah 1991); *Diaz*, 859 P.2d at 22 (in reviewing evidence and reasonable inferences therefrom, court was unable to say that reasonable minds must have entertained reasonable doubt as to defendant's guilt); *Barlow*, 851 P.2d at 1193; *Souza*, 846 P.2d at 1322 (although evidence that defendant furnished alcohol to minors was not extensive and appeared mildly contradictory, it was not so inconclusive or inherently improbable that jury must have entertained doubt as to whether defendant furnished or supplied alcohol to minors).[12]

Stated in other words, appellate courts will affirm the jury verdict if "there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made." *Wood*, 868 P.2d at 87-88 (based on evidence, jury could reasonably conclude that defendant participated in beating and assault that led to victim's death); *accord State v. Booker*, 709 P.2d 342, 345 (Utah 1985).

b. Marshaling Cases

Following are cases discussing the marshaling requirement for factual issues underlying criminal jury trial verdicts. *State v. Gallegos*, 851 P.2d 1185, 1190 (Utah App. 1993) (court of appeals reviewed issues for which defendant properly marshaled evidence, but refused to review issues for which defendant failed to marshal); *State v. Lemons*, 844 P.2d 378, 381 (Utah App. 1992) (defendant failed to marshal evidence which indicated that he intended to shoot the victim), *cert. denied*, 857 P.2d 948 (Utah 1993); *State v. Mincy*, 838 P.2d 648, 652 n.1 (Utah App.) (appellate court refused to address a sufficiency of evidence claim because defendant failed to marshal evidence), *cert. denied*, 843 P.2d 1042 (Utah 1992); *State v. Scheel*, 823 P.2d 470, 473 (Utah App. 1991) (defendant marshaled version of facts most favorable to his position, ignoring testimony supporting jury's verdict); *State v. Day*, 815 P.2d 1345, 1351 (Utah App. 1991) (defendant neither marshaled evidence submitted at trial which supported jury verdict, nor did he argue why such evidence was insufficient); *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990) (court of appeals adopted requirement that appellants must marshal evidence in support of jury verdict where sufficiency of the evidence is at issue).

c. Examples of Jury Fact Questions

The following cases contain examples of factual issues requiring a sufficiently inconclusive or inherently improbable standard.

(1) Whether the defendant participated in and aided in the beating and assault that ultimately led to the victim's death. *State v. Wood*, 868 P.2d 70, 87-88 (Utah 1993).

(2) Whether the defendant touched children in an inappropriate sexual manner. *State v. Seale*, 853 P.2d 862, 876 (Utah), *cert. denied*, 114 S. Ct. 186 (1993).

(3) Whether the defendant raised a wrench and threatened to harm the victim. *State v. Brown*, 853 P.2d 851, 860 (Utah 1992).

(4) Whether the defendants knew that the photographs would be used for sexual purposes. *State v. Workman*, 852 P.2d 981, 985-86 (Utah 1993).

(5) Whether the defendants had the statutory mental state for sexual exploitation. *Id.* at 987.

(6) Whether the defendant's stabbing caused the victim's death. *State v. Stewart*, 729 P.2d 610, 611-12 (Utah 1986).

(7) Whether the defendant's physical abuse caused baby's death. *State v. Morgan*, 865 P.2d 1377, 1380-81 (Utah App. 1993).

(8) Whether the victim's death was the result of the defendant shooting him in the chest. *State v. Diaz*, 859 P.2d 19, 22 (Utah App. 1993), *cert. denied*, –P.2d– (Utah 1994).

(9) Whether the drug agent had a personal relationship with the defendant. *State v. LeVasseur*, 854 P.2d 1022, 1025 (Utah App.), *cert. denied*, 862 P.2d 1356 (Utah 1993); *State v. Martinez*, 848 P.2d 702, 707 (Utah App. 1993).

(10) Whether the defendant was out of work during the time in which he failed to pay child support. *State v. Barlow*, 851 P.2d 1191, 1194 (Utah App. 1993), *cert. denied*, 859 P.2d 585 (Utah 1993).

(11) Whether the defendant furnished or supplied alcohol to minors. *State v. Souza*, 846 P.2d 1313, 1322 (Utah App. 1993); *State v. Vigil*, 840 P.2d 788, 794 (Utah App. 1992), *cert. denied*, 857 P.2d 948 (Utah 1993).

(12) Whether the defendant attempted to cause a witness to withhold testimony concerning vandalism committed by defendant. *State v. Burk*, 839 P.2d 880, 884-85 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993).

(13) Whether the defendant was given proper authority to sign and cash a check in another's name. *State v. Gonzalez*, 822 P.2d 1214, 1216 (Utah App. 1991).

B. Challenging Discretionary Rulings

1. Introduction

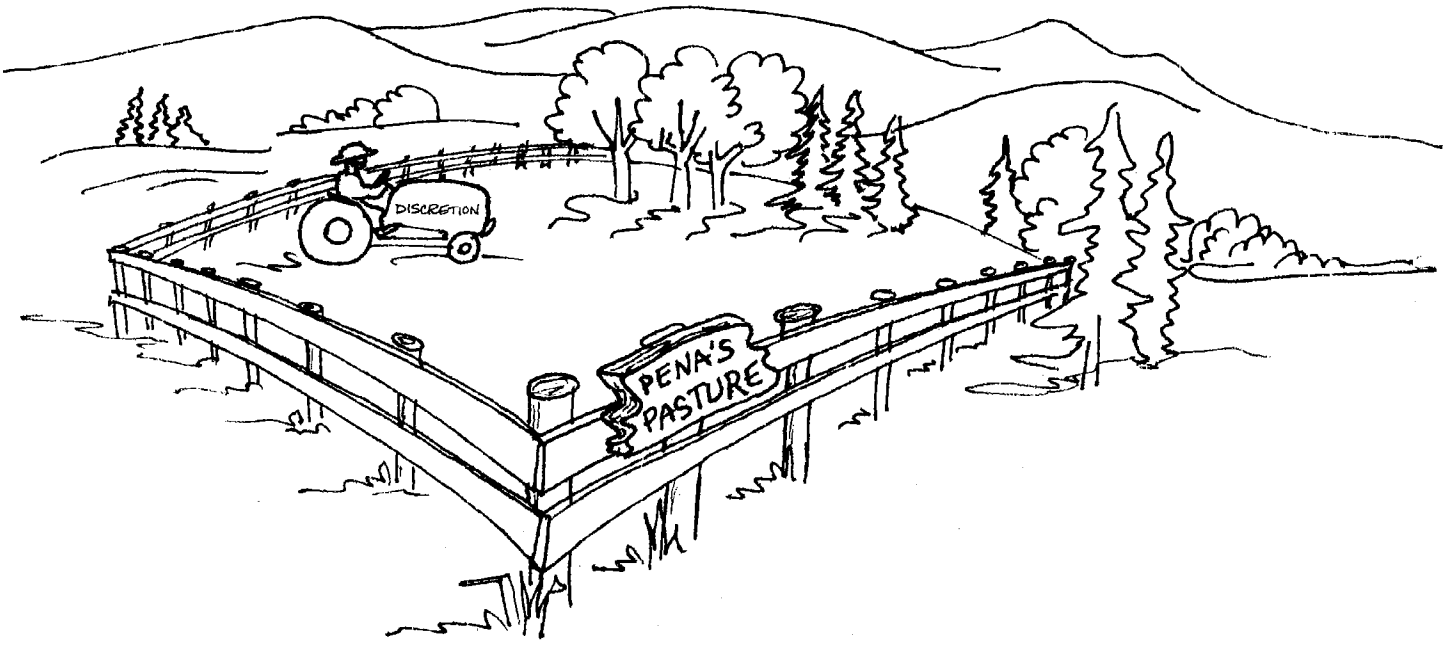
As discussed in the Introduction to the Challenging Findings of Fact section above, appellants often characterize issues as "findings of fact" when they are actually issues challenging discretionary rulings made by the trial court. The traditional "abuse of discretion" standard of review was recently discussed at length in *State v. Pena*, 869 P.2d 932, 936-39 (Utah 1994). Here the supreme court provided a discussion of the "measure of discretion" given to the trial courts. When a legal rule[13] is to be applied to a given set of facts, or, in other words, when the trial court must determine "whether a given set of facts comes within the reach of a given rule of law," the trial court is given a de facto grant of discretion. *Id.* at 937.

In *Pena*, the supreme court relied on a pasture metaphor to explain the degrees of discretion granted to the trial court.[14] Applying this pasture metaphor, appellate courts may give trial courts little room to roam in applying a legal rule to facts because the appellate courts closely and regularly redetermine the legal effect of specific facts. *Id.* In such cases, the standard of review approximates a "de novo" review by the appellate courts. *Id.* On the other hand, appellate courts may give trial courts considerable freedom to roam about the pasture, either by not creating new fences or by expanding the size of the pasture, *see Sotor's, Inc. v. Deseret Fed. Sav. & Loan*, 857 P.2d 935, 942 (Utah 1993) (waiver case), thus giving the trial court broad discretion. *Pena*, 869 P.2d at 937-38. Only when the trial judge crosses an existing fence or when appellate courts decide to more closely define the law by "fencing off part of the pasture previously available does the trial judge's decision exceed the broad discretion granted." *Id.* at 938.

Discretion issues can be placed at various points along a spectrum of discretion. *Id.* Some of the examples in the next section reflect stated degrees of discretion. However, several situations involving a review of trial court discretion have not yet been defined under the test enunciated in *Pena*. The examples in the next section are limited to cases that explicitly identify issues where the trial court acts with some discretion. Prudent appellate counsel will closely study *Pena* and its progeny before mechanically classifying an issue as one of fact, law, or discretion.

2. Challenging Discretionary Rulings in Civil Cases

Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and make that determination. *State v. Pena*, 869 P.2d 932, 939-40 n.5 (Utah 1994). A trial court abuses its discretion if there is "no reasonable basis for the decision." *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993). A trial judge's determination will be



reversed if the ruling is so unreasonable that it can be classified as arbitrary and capricious or a clear abuse of discretion. *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah App. 1993); *Ames v. Maas*, 846 P.2d 468, 476 (Utah App. 1993).

a. Examples of Pretrial Discretion

(1) Whether the trial court appropriately determined that venue was proper. *Prows v. Pinpoint Retail Sys.*, 868 P.2d 809, 810 (Utah 1993).

(2) Whether the trial court properly granted a temporary restraining order. *Birch Creek Irrigation v. Prothero*, 858 P.2d 990, 994 (Utah 1993).

(3) Whether the trial court properly denied a motion to amend a pleading. *Girard v. Appleby*, 660 P.2d 245, 248 (Utah 1983); *Kleinert v. Kimball Elevator Co.*, 854 P.2d 1025, 1028 (Utah App. 1993); *Mountain Am. Credit Union v. McClellan*, 854 P.2d 590, 592 (Utah App.), *cert. denied*, 862 P.2d 1356 (Utah 1993); *HCA Health Servs. of Utah, Inc. v. St. Mark's Charities*, 846 P.d 476, 480 (Utah App. 1993).

(4) Whether the trial court properly conducted voir dire. *Barrett v. Peterson*, 868 P.2d 96, 98 (Utah App. 1993); *accord Redd v. Negley*, 785 P.2d 1098, 1100-02 (Utah 1989); *Evans v. Doty*, 824 P.2d 460, 462 (Utah App. 1991), *cert. denied*, 836 P.2d 1383 (Utah 1992); *Doe v. Hafen*, 772 P.2d 456, 457-58 (Utah App. 1989), *cert. denied*, 800 P.2d 1105 (Utah 1990).

(5) Whether the trial court should grant declaratory relief. *Boyle v. National Union Fire Ins. Co.*, 866 P.2d 595, 598 (Utah App. 1993).

(6) Whether the trial court properly denied a motion for continuance of trial. *Radcliffe v. Akhavan*, 875 P.2d 608, 610 (Utah App. 1994); *Hill v. Dickerson*, 839 P.2d 309, 311 (Utah App. 1992).

(7) Whether the trial court should summarily enforce a settlement agreement. *Goodmansen v. Liberty Vending Sys. Inc.*, 866 P.2d 581, 584 (Utah App. 1993).

b. Examples of Discretion Exercised During Trial[15]

(1) Whether the trial court properly allowed an amendment of a complaint during trial. *Slattery v. Covey & Co.*, 857 P.2d 243, 248 (Utah App. 1993).

(2) Whether the trial court determined the proper amount for a punitive damage award. *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950, 967 (Utah App. 1989); *see Lake Philgas Serv. v. Valley Bank & Trust Co.*, 845 P.2d 951, 959-60 (Utah App. 1993).

(3) Whether the trial court properly excluded witnesses from the courtroom. *Terry's Sales, Inc. v. Vander Veur*, 618 P.2d 29, 32 (Utah 1980).

c. Examples of Post-Trial Discretion

(1) Whether the trial court properly denied a motion for a new trial. *Pena*, 869 P.2d at 938 ("[a]t the extreme end of the discretion spectrum would be a decision by the trial court to grant or deny a new trial based on insufficiency of the evidence") (citing *Hansen v. Stewart*, 761 P.2d 14, 17 (Utah 1988)); *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993).[16]

"Prudent appellate counsel will closely study Pena *and its progeny before mechanically classifying an issue of one of fact, law, or discretion."*

(2) Whether a trial court should grant a motion for relief from a judgment. *Gillmor v. Wright*, 850 P.2d 431, 434-36 (Utah 1993); *Mascaro v. Davis*, 741 P.2d 938, 942 n.11 (Utah 1987); *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304, 1306 (Utah 1982).

(3) Whether the amount of attorney fees awarded was proper. *Baldwin v. Burton*, 850 P.2d 1188, 1198 (Utah 1993); *Dixie State Bank v. Bracken*, 764 P.2d 985, 988-89 (Utah 1988); *Equitable Life & Casualty Ins. Co. v. Ross*, 849 P.2d 1187, 1194 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993).

3. Challenging Discretionary Rulings in Criminal Cases

Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and make that determination. *State v. Pena*, 869 P.2d 932, 939-40 n.5 (Utah 1994). A trial court abuses it discretion if its decision is beyond the limits of reasonableness. *State v. Olsen*, 860 P.2d 332, 334 (Utah 1993); *State v. Dunn*, 850 P.2d 1201, 1221 (Utah 1993); *State v. Hamilton*, 827 P.2d 232, 239-40 (Utah 1992). Discretion is also abused if the actions of the judge are inherently unfair. *State v. Ramirez*, 817 P.2d 774, 781-82 n.3 (Utah 1991); *State v. Russell*, 791 P.2d 188, 192-93 (Utah 1990); *State v. Nuttall*, 861 P.2d 454, 456 (Utah App. 1993); *State v. Gentlewind*, 844 P.2d 372, 375 (Utah App. 1992). The exercise of discretion necessarily reflects the personal judgment of the trial judge, and the appellate court can properly find abuse only if no reasonable person would take the view adopted by the trial court. *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978); *Nuttall*, 861 P.2d at 456.

a. Examples of Pretrial Discretion

(1) Whether the trial court properly denied a motion to remove a juror for cause. *State v. Wood*, 868 P.2d 70, 76 (Utah 1993); *State v. Archuleta*, 850 P.2d 1232, 1240-41 (Utah), *cert. denied*, 114 S. Ct. 476 (1993); *State v. Morgan*, 865 P.2d 1377, 1381 (Utah App. 1993); *State v. Boyatt*, 854 P.2d 550, 553 (Utah App.), *cert. denied*, 862 P.2d 1356 (Utah 1993); *State v. Gray*, 851 P.2d 1217, 1223 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993).

(2) Whether the trial court should grant or deny a motion to join offenses. *State v. Germonto*, 868 P.2d 50, 59 (Utah 1993).

(3) Whether a trial court should allow the press to inspect and copy actual exhibits admitted during a preliminary hearing. *Archuleta*, 857 P.2d at 242.

(4) Whether security measures were necessary to ensure a safe and orderly proceeding. *State v. Lemons*, 844 P.2d 378, 379 (Utah App. 1992), *cert. denied*, 857 P.2d 948 (Utah 1993).

(5) Whether a trial judge abused its discretion in deciding to restrain the accused during trial. *State v. Mitchell*, 824 P.2d 469, 474 (Utah App. 1991).

(6) Whether a trial court should deny or grant motion for change of venue. *State v. Cayer*, 814 P.2d 604, 608 (Utah App. 1991).

(7) Whether the trial court properly applied the law to the facts in a consent-to-search motion to suppress. *State v. Pena*, 869 P.2d 932, 938 (Utah 1994) (trial court's discretion in applying law to facts in consent-to-search case is narrowed considerably for policy reasons).

(8) Whether the trial court appropriately applied the law to the facts in a reasonable suspicion motion to suppress. *Id.* at 939 (reasonable suspicion standard conveys a "measure of discretion" to trial

judge when applying that standard to given set of facts; "[p]recisely how much discretion we cannot say, but we would not anticipate a close, de novo review").

(9) Whether the trial court abused its discretion in granting or denying a continuance. *State v. Horton*, 848 P.2d 708, 714 (Utah App.), *cert. denied*, 857 P.2d 948 (Utah 1993).

b. Examples of Discretion Exercised During Trial[17]

(1) Whether the trial court should allow jurors to view a crime scene. *State v. Cabututan*, 861 P.2d 408, 412-13 (Utah 1993); *State v. Cayer*, 814 P.2d 604, 613 (Utah App. 1991).

(2) Whether a victim should be excluded from the courtroom after a trial has begun. *State v. Rangel*, 866 P.2d 607, 613 (Utah App. 1993).

(3) Whether a trial court should disqualify a prosecutor. *State v. Gray*, 851 P.2d 1217, 1228 (Utah App. 1993), *cert. denied*, 860 P.2d 943 (Utah 1993).

(4) Whether the trial court should deny a motion for special verdict with interrogatories. *Id.* at 1226.

c. Examples of Post-Trial Discretion

(1) Whether the trial court properly denied a motion for a new trial. *State v. Pena*, 869 P.2d 932, 938 (Utah 1994) (in reviewing whether to grant a new trial, "we give the trial court a great deal of pasture" or discretion); *State v. Wetzel*, 868 P.2d 64, 70 (Utah 1993).[18]

(2) Whether the trial court properly denied a motion for a mistrial. *State v. Hay*, 859 P.2d 1, 6 (Utah 1993) (motion for mistrial based on prosecutorial misconduct); *State v. Morgan*, 865 P.2d 1377, 1381 (Utah App. 1993) (motion for mistrial based on juror misconduct); *State v. Swain*, 835 P.2d 1009, 1010 (Utah App. 1992) (motion for mistrial based on inappropriate contact between juror and victim).

(3) Whether a sentence imposed by the trial court was proper. *State v. Strunk*, 846 P.2d 1297, 1302 (Utah 1993); *State v. Brown*, 853 P.2d 851, 861 (Utah 1992); *State v. McCovey*, 803 P.2d 1234, 1235 (Utah 1990); *State v. Russell*, 791 P.2d 188, 192-93 (Utah 1990); *State v. Gibbons*, 779 P.2d 1133, 1135 (Utah 1989); *State v. Nutall*, 861 P.2d 454, 458 (Utah App. 1993).

(4) Whether the trial court should grant, deny, or revoke probation. *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990); *State v. Peterson*, 869 P.2d 989, 991 (Utah App. 1994); *State v. Ruesga*, 851 P.2d 1229, 1233 (Utah App. 1993).

(5) Whether the trial court abused its discretion in denying a motion to set aside a guilty plea. *State v. Blair*, 868 P.2d 802, 805 (Utah 1993); *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992); *State v. Stilling*, 856 P.2d 666, 670 (Utah App. 1993); *State v. Thorup*, 841 P.2d 746, 747 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993).

"[C]ounsel should carefully examine an issue and ferret out all possible standards of review, rather than assuming only one standard applies."

C. Challenging Conclusions of Law

1. Introduction

Legal determinations[19] are defined as "those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances." *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). "[A]ppellate review of a trial court's determination of the law is usually characterized by the term 'correctness.'" *Id.* at 936. Utah case law teaches that "correctness" means "the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *Id.*; *State v. Deli*, 861 P.2d 431, 433 (Utah 1993). Thus, the broadest scope of judicial review extends to questions of law. "This is because appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction." *Pena*, 869 P.2d at 936 (citing Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 779 (1957)); *see State v. Thurman*, 846 P.2d 1256, 1266 (Utah 1993).

It is important for the appellate advocate to be able to properly identify issues as legal rather than factual or discretionary in order to apply the appropriate standard of review. Often, trial courts will label an issue as a factual finding when it is actually a legal conclusion. The appellate courts will use the standard of review that is in accord with the substance of the issue and not the title given it by the trial court. *Gillmor v. Wright*, 850 P.2d 431, 433 (Utah 1993) (appellate courts disregard labels attached to factual findings and legal conclusions and look to substance); *Fernandez v. Cook*, 870 P.2d 870, 874-75 (Utah 1993) (when reviewing a lower court's findings and conclusions, appellate courts disregard labels attached to them and examine substance of issue).

Further, appellate advocates should also be aware of recent court opinions recognizing that a determination is often the sum of several rulings, each of which may be reviewed under a separate standard of review. *Fernandez*, 870 P.2d at 874; *State v. Mabe*, 864 P.2d 890, 892 (Utah 1993); *State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993); *State v. Simmons*, 866 P.2d 614, 617 (Utah App. 1993); *Cal Wadsworth Constr. v. City of St. George*, 865 P.2d 1373, 1375 (Utah App. 1993) (whether contract exists may embody several subsidiary rulings), *cert. granted*, –P.2d– (Utah 1994); *Provo River Water Users' Ass'n v. Morgan*, 857 P.2d 927, 931 (Utah 1993); *Hansen v. Heath*, 852 P.2d 977, 978-79 & n.4 (Utah 1993); *State v. Horton*, 848 P.2d 708, 713 (Utah App. 1993); *see Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 939-40 (Utah 1993) (while review of denial of motion for new trial is made under abuse of discretion standard, if trial court made determination of law that provides premise for denial of new trial, such legal decision is reviewed under correctness standard).

Thus, counsel should carefully examine an issue and ferret out all possible standards of review, rather than assuming only one standard applies. If counsel properly characterizes issues as legal, factual, or discretionary and in turn selects the proper standards of review, his or her brief and oral argument will be more effective, resulting in better judicial decisions.

2. Areas of Application

Appellate courts typically apply the correction of error standard of review to the following general categories:

(a) Challenges to the interpretation of the United States and Utah constitutions:

The supreme court possesses the ulti-

mate state authority to make legal determinations in its analysis of the United States Constitution, and it affords no particular deference to the lower courts' interpretation of the Utah Constitution. *See, e.g., State v. Humphrey*, 823 P.2d 464, 465-66 (Utah 1991). Appellate courts have the ultimate power to conduct an independent review of federal constitutional claims. *City of St. George v. Turner*, 860 P.2d 929, 932 (Utah 1993) (citing *Miller v. California*, 413 U.S. 15, 25, 93 S. Ct. 2607, 2615, 37 L.Ed.2d 419 (1973)). *See also State v. Thurman*, 846 P.2d 1256, 1266 (Utah 1993); *State v. Strickling*, 844 P.2d 979, 981 (Utah App. 1992).

(b) Challenges to the constitutionality of statutes and ordinances:

A trial court's conclusion that a statute or ordinance is constitutional presents a question of law reviewed under a correction of error standard. *State v. James*, 819 P.2d 781, 796 (Utah 1991); *Provo City Corp. v. Willden*, 768 P.2d 455, 456 (Utah 1989); *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 887 (Utah 1988); *Currier v. Holden*, 862 P.2d 1357, 1362 (Utah App. 1993), *cert. denied*, 870 P.2d 957 (Utah 1994); *West Valley City v. Streeter*, 849 P.2d 613, 614 (Utah App. 1993).

(c) Challenges to the constitutionality of rules:

A trial court's ruling on the constitutionality of a rule is reviewed for correctness. *City of Monticello v. Christensen*, 788 P.2d 513, 516 (Utah), *cert. denied*, 498 U.S. 841 (1990) (defendant's claim that Utah R. Crim. P. 26(13)(a) is unconstitutional is reviewed for correctness).

(d) Challenges to the trial court's interpretation of statutes, rules, and ordinances:

The trial court's interpretation of statutes, rules and ordinances is a question of law reviewed for correctness. *See, e.g., State v. Larsen*, 865 P.2d 1355, 1357 (Utah 1993) (whether trial court correctly interprets statute is question of law to be reviewed for correctness); *Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 455 (Utah 1993); *Bennion v. Graham Resources, Inc.*, 849 P.2d 569, 570 (Utah 1993); *State v. Vigil*, 842 P.2d 843, 844 (Utah 1992); *Jacobsen Inv. Co. v. State Tax Comm'n*, 839 P.2d 789, 790 (Utah 1992); *State v. James*, 819 P.2d 781, 796 (Utah 1991); *State v. Petersen*, 810 P.2d 421, 424 (Utah 1991); *Ward v. Richfield City*, 798 P.2d 757, 759 (Utah 1990); *State v. Shipler*, 869 P.2d 968, 969 (Utah App. 1994); *State v. Simmons*, 866 P.2d 614, 616 (Utah App. 1993); *State v. Garcia*, 866 P.2d 5, 6 (Utah App. 1993); *Salt Lake City v. Emerson*, 861 P.2d 443, 445 (Utah App. 1993); *State v. Phathammavong*, 860 P.2d 1001, 1002 (Utah App. 1993); *State v. Paul*, 860 P.2d 992, 993 (Utah App. 1993); *Town of Alta v. Ben Hame Corp.*, 836 P.2d 797, 800 (Utah App. 1992) (correction of error standard applied for interpretation of ordinance).

A question of legislative intent associated with statutory interpretation is a matter of law, not of fact. *State v. Mitchell*, 824 P.2d 469, 471-72 (Utah App. 1991). Whether a statute applies to a particular set of facts is a question of law. *State v. Waite*, 803 P.2d 1279, 1282 (Utah App. 1990); *see also State v. Gardner*, 870 P.2d 900, 901 (Utah 1993); *State v. Burgess*, 870 P.2d 276, 279 (Utah App. 1994) (which statute governs defendant's placement is question of law reviewed for correctness).

(e) Challenges to the trial court's interpretation of common law:

Questions of common law interpretation are questions of law which the appellate court is well suited to address, and thus affords no deference to the lower court. *See Trujillo v. Jenkins*, 840 P.2d 777, 778-79 (Utah 1992); *McMahan v. Dees*, 873 P.2d 1172, 1175 (Utah App. 1994); *Wade v. Stangl*, 869 P.2d 9, 12 (Utah App. 1994); *Allstate Ins. Co. v. Liberty Mut. Ins. Group*, 868 P.2d 110, 112 (Utah App. 1994); *State v. Richardson*, 843 P.2d 517, 518 (Utah App. 1992) ("[w]e consider the trial court's interpretation of binding case law as presenting a question of law and review the trial court's interpretation of that law for correctness").

3. Challenging Conclusions of Law in Civil Cases

a. Correction of Error Standard

A trial court's conclusions of law in civil cases are reviewed for correctness. *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 885 (Utah 1993); *Society of Separationists, Inc. v. Taggart*, 862 P.2d 1339, 1341 (Utah 1993); *Kasco Servs. Corp. v. Benson*, 831 P.2d 86, 89 (Utah 1992); *McMahan v. Dees*, 873 P.2d 1172, 1175 (Utah App. 1994); *Wade v. Stangl*, 869 P.2d 9, 12 (Utah App. 1994); *Allstate Ins. Co. v. Liberty Mut. Ins. Group*, 868 P.2d 110, 112 (Utah App. 1994); *Hall v. Process*, 866 P.2d 604, 606 (Utah App. 1993); *Anesthesiologists Assocs. v. St. Benedict's Hosp.*, 852 P.2d 1030, 1035 (Utah App.), *cert. granted*, 860 P.2d 943 (Utah 1993); *LMV Leasing, Inc. v. Conlin*, 805 P.2d 189, 192 (Utah App. 1991).

This standard of review has also been referred to as a "correction of error standard." *Jacobsen Inv. Co. v. State Tax Comm'n*, 839 P.2d 789, 790 (Utah 1992); *Sanders v. Ovard*, 838 P.2d 1134, 1135 (Utah 1992); *Commercial Union Assocs. v. Clayton*, 863 P.2d 29, 36 (Utah App. 1993). As used by Utah's appellate courts, "correctness" means that no particular deference is given to the trial court's ruling on questions of law. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994); *Provo River Water Users' Ass'n v. Morgan*, 857 P.2d 927, 931 (Utah 1993); *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993); *Klinger v. Kightly*, 791 P.2d 868, 870 (Utah 1990); *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985); *Sevy v. Security Title Co.*, 857 P.2d 958, 961 (Utah App. 1993), *cert. granted*, 870 P.2d 957 (Utah 1994).

b. Examples of Conclusions of Law[20]

(1) Whether the terms of a contract are ambiguous. *Alf v. State Farm Fire & Casualty Co.*, 850 P.2d 1272, 1274 (Utah 1993); *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) (whether ambiguity exists is question of law); *Wade v. Stangl*, 869 P.2d 9, 12 (Utah App. 1994); *Hall v. Process*, 866 P.2d 604, 606 (Utah App. 1993); *Anesthesiologists Assocs. v. St. Benedict's Hosp.*, 852 P.2d 1030, 1035 (Utah App.), *cert. granted*, 860 P.2d 943 (Utah 1993); *Equitable Life & Casualty Ins. Co. v. Ross*, 849 P.2d 1187, 1192 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993).

(2) Whether the trial court properly interpreted an unambiguous contract. *Saunders v. Sharp*, 806 P.2d 198, 199-200 (Utah 1991); *Allstate Ins. Co. v. Liberty Mut. Ins. Group*, 868 P.2d 110, 112 (Utah App. 1994); *Edwards & Daniels Architects, Inc. v. Farmers' Properties, Inc.*, 865 P.2d 1382, 1385 (Utah App. 1993); *LMV Leasing, Inc. v. Conlin*, 805 P.2d 189, 192 (Utah App. 1991).

(3) Whether a contract exists. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985); *Herm Hughes & Sons, Inc. v. Quintek, Inc.*, 834 P.2d 582, 583 (Utah App.

1992); *Bailey v. Call*, 767 P.2d 138, 139 (Utah App.), *cert. denied*, 773 P.2d 45 (Utah 1989).

(4) Whether the trial court properly interpreted an insurance policy where there was no reliance on extrinsic evidence. *Nielsen v. O'Reilly*, 848 P.2d 664, 665 (Utah 1992); *LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 858 (Utah 1988); *Buehner Block Co. v. UWC Assocs.*, 752 P.2d 892, 895 (Utah 1988); *Christiansen v. Holiday Rent-A-Car*, 845 P.2d 1316, 1319 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993).

(5) Whether a privilege exists in a defamation action. *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992).

(6) Whether a person is properly served with process. *In re Schwenke*, 865 P.2d 1350, 1354 (Utah 1993).

(7) Whether an eminent domain taking was necessary. *Cornish Town v. Koller*, 817 P.2d 305, 309-10 (Utah 1991).

(8) Whether a defendant in a negligence action owes a duty of care. *C.T. v. Martinez*, 845 P.2d 246, 247 (Utah 1992); *Ferree v. State*, 784 P.2d 149, 151 (Utah 1989).

(9) Whether a landowner owes a duty of care to another. *Trujillo v. Jenkins*, 840 P.2d 777, 778-79 (Utah 1992); *Weber v. Springville City*, 725 P.2d 1360, 1363 (Utah 1986).

(10) Whether an order is "final" and thus, eligible for certification under Rule 54(b) of the Utah Rules of Civil Procedure. *Kennecott Corp. v. State Tax Comm'n*, 814 P.2d 1099, 1100 (Utah 1991).

(11) Whether the discovery rule applies to toll a statute of limitations. *Klinger v. Kightly*, 791 P.2d 868, 870 (Utah 1990); *Sevy v. Security Title Co.*, 857 P.2d 958, 961 (Utah App. 1993), *cert. granted*, 870 P.2d 957 (Utah 1994).

(12) Whether a dismissal pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure is proper. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991); *Hansen v. Department of Fin. Insts.*, 858 P.2d 184, 186 (Utah App. 1993) *DeBry v. Valley Mortgage Co.*, 835 P.2d 1000, 1001 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993).

(13) Whether a party has failed to prove a prima facie case. *Sorenson v. Kennecott-Utah Copper Corp.*, 873 P.2d 1141, 1144 (Utah App. 1994); *Handy v. Union Pac. R.R.*, 841 P.2d 1210, 1215 (Utah App. 1992).

(14) Whether a denial of a motion to dismiss based on governmental immunity was proper. *Petersen v. Board of Educ.*, 855 P.2d 241, 242 (Utah 1993).

(15) Whether a party has failed to comply with the requirements of a statute and the rules of civil procedure sufficient to justify involuntary dismissal. *Avila v. Winn*, 794 P.2d 20, 22 (Utah 1990).

(16) Whether a party is entitled to summary judgment. *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993); *State Farm Fire & Casualty Co. v. Geary*, 869 P.2d 952, 954 (Utah App. 1994).

(17) Whether a plaintiff has standing to sue. *Provo City Corp. v. Willden*, 768 P.2d 455, 456 (Utah 1989); *West Valley City Fraternal Order of Police v. Nordfelt*, 869 P.2d 948, 950 (Utah App. 1993).

(18) Whether a statute of limitations has expired. *Gramlich v. Munsey*, 838 P.2d 1131, 1132 (Utah 1992); *Hansen*, 858 P.2d at 186.

(19) Whether the trial court's refusal to give a jury instruction is proper. *Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 452 (Utah 1993).

(20) Whether a plaintiff is entitled to prejudgment interest. *Andreason v. Aetna Casualty & Sur. Co.*, 848 P.2d 171, 177 (Utah App. 1993); *Hermes Assocs. v. Park's Sportsman*, 813 P.2d 1221, 1223 (Utah App. 1991).

(21) Whether a defense is without merit. *Broadwater v. Old Republic Sur.*, 854 P.2d 527, 534 n.3 (Utah 1993); *Jeschke v. Willis*, 811 P.2d 202, 203 (Utah App. 1991).

(22) Whether the trial court correctly determined that Nevada rather than Utah law applied. *Shaw v. Layton Constr. Co.*, 872 P.2d 1059, 1061 (Utah App. 1994).

4. Challenging Conclusions of Law in Criminal Cases

a. Correction of Error Standard

A trial court's conclusions of law in criminal cases are reviewed for correctness.[21] *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993); *State v. Ramirez*, 817 P.2d 774, 781-82 & n.3 (Utah 1991); *State v. Hayes*, 860 P.2d 968, 971 (Utah App. 1993); *State v. Beavers*, 859 P.2d 9, 12 (Utah App. 1993); *State v. Gurule*, 856 P.2d 377, 379 (Utah App. 1993); *State v. Gray*, 851 P.2d 1217, 1220 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993); *State v. Gallegos*, 851 P.2d 1185, 1188 (Utah App. 1993); *State v. Brooks*, 849 P.2d 640, 643 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993); *State v. Strickling*, 844 P.2d 979, 981 (Utah App. 1992); *State v. Bagshaw*, 836 P.2d 1384, 1385 (Utah App. 1992); *State v. Godina-Luna*, 826 P.2d 652, 654 (Utah App. 1992); *State v. Vigil*, 815 P.2d 1296, 1299-1300 (Utah App. 1991); *State v. Duncan*, 812 P.2d 60, 62 (Utah App.), *cert. denied*, 826 P.2d 651 (Utah 1991); *accord State v. Christensen*, 866 P.2d 533, 535 (Utah 1993) (when reviewing questions of law, supreme court accords no particular deference to conclusions of law made by court of appeals).

"Controlling Utah case law teaches that 'correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *State v. Pena*, 869 P.2d 932, 936 (Utah 1994); *see State v. Deli*, 861 P.2d 431, 433 (Utah 1993).

b. Examples of Conclusions of Law[22]

(1) Whether a defendant validly waived his or her Miranda rights. *State v. Pena*, 869 P.2d 932, 940-41 (Utah 1994); *State v. Sampson*, 808 P.2d 1100, 1103-04 (Utah 1990), *cert. denied*, 112 S. Ct. 1282 (1991).

(2) Whether the trial court has substantially complied with the constitutional and procedural requirements for entry of a guilty plea. *State v. Hoff*, 814 P.2d 1119, 1124-25 (Utah 1991); *State v. Stilling*, 856 P.2d 666, 670 (Utah App. 1993).

(3) Whether an officer had reasonable suspicion. *State v. Pena*, 869 P.2d 932, 939 (Utah 1994); *State v. Bello*, 871 P.2d 584, 586 (Utah App. 1994); *State v. Potter*, 863 P.2d 40, 41 (Utah App. 1993); *State v. Hubbard*, 861 P.2d 1053, 1054 (Utah App. 1993); *State v. Carter*, 812 P.2d 460, 466 & n.6 (Utah App. 1991).

(4) Whether an officer had probable cause to continue searching a vehicle after defendants withdrew consent. *State v. Poole*, 871 P.2d 531, 533 (Utah 1994) ("we review the underlying factual finding of the trial court for clear error . . . and the legal conclusion of 'probable cause' for correctness, and in so doing, we afford a 'measure of discretion' . . . to the trial court's legal determination of whether the officers had probable cause to search").

(5) Whether the Rules of Professional Conduct apply to a particular set of facts. *State v. Johnson*, 823 P.2d 484, 489 (Utah App. 1991).

(6) Whether service of process is proper. *State v. D.M.Z.*, 830 P.2d 314, 316 (Utah App. 1992).

(7) Whether a trial court has jurisdiction to quash bindover orders. *State v. Humphrey*, 823 P.2d 464, 465-66 (Utah 1991).

(8) Whether res judicata applies. *State v. V.G.P.*, 845 P.2d 944, 946 (Utah App. 1992).

(9) Whether consent to a search is voluntary. *State v. Thurman*, 846 P.2d 1256, 1270-71 & n.11 (Utah 1993); *State v. Genovesi*, 871 P.2d 547, 551 (Utah App. 1994); *State v. Delaney*, 869 P.2d 4, 8 (Utah App. 1994); *State v. Keitz*, 856 P.2d 685, 691 (Utah App. 1993); *State v. Vigil*, 815 P.2d 1296, 1299-1300 (Utah App. 1991).

(10) Whether a trial court may impose separate sentences for related crimes. *State v. Stettina*, 868 P.2d 108, 109 (Utah App. 1994).

(11) Whether a defendant is "in custody" during a police interview. *State v. Wood*, 868 P.2d 70, 83 (Utah 1993).

(12) Whether a jury instruction correctly states the law. *State v. Archuleta*, 850 P.2d 1232, 1244 (Utah), *cert. denied*, 114 S. Ct. 476 (1993); *State v. Lucero*, 866 P.2d 1, 3 (Utah App. 1993); *State v. Tinoco*, 860 P.2d 988, 989-90 (Utah App. 1993); *State v. Brooks*, 833 P.2d 362, 363-64 (Utah App. 1992); *State v. Gonzales*, 822 P.2d 1214, 1217 (Utah App. 1991).

(13) Whether the trial court properly refuses to give requested instructions to a jury. *State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992); *State v. James*, 819 P.2d 781, 798 (Utah 1991); *State v. Diaz*, 859 P.2d 19, 24 (Utah App. 1993), *cert. denied*, –P.2d– (Utah 1994); *State v. Tennyson*, 850 P.2d 461, 470 (Utah App. 1993); *State v. Gallegos*, 849 P.2d 586, 588 (Utah App. 1993); *State v. Pharris*, 846 P.2d 454, 467 (Utah App. 1993), *cert. denied*, 857 P.2d 948 (Utah 1993).

(14) Whether an attorney's decision not to contact prospective witnesses is reasonable. *State v. Templin*, 805 P.2d 182, 187 (Utah 1990).

(15) Whether a trial court properly declined to exercise jurisdiction. *State v. Humphrey*, 794 P.2d 496, 497 (Utah App. 1990), *rev'd on other grounds*, 823 P.2d 464 (Utah 1990).

(16) Whether police action implicates a fundamental violation of a defendant's rights. *State v. Simmons*, 866 P.2d 614, 618 (Utah App. 1993).

(17) Whether the legal standard applicable to the defense of involuntary intoxication is incorporated within the statutory mental illness defense. *State v. Gardner*, 870 P.2d 900, 901 (Utah 1993).

(18) Whether one's spouse may consent to the search of jointly owned property. *State v. Genovesi*, 871 P.2d 547, 551 (Utah App. 1994).

(19) As an ultimate legal determination, whether a confession is voluntary. *State v. Mabe*, 864 P.2d 890, 892 (Utah 1993); *State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993); *State v. Miller*, 829 P.2d 132, 134 (Utah App. 1992), *cert. denied*, 836 P.2d 1383 (Utah 1992); *State v. Singer*, 815 P.2d 1303, 1309 (Utah App. 1991).

"'Correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law."

(20) Whether a restitution order abates when a defendant dies during the pendency of appeal. *State v. Christensen*, 866 P.2d 533, 534-35 (Utah 1993).

(21) Whether a defendant has a legitimate expectation of privacy in a searched package. *State v. Kolster*, 869 P.2d 993, 995 (Utah App. 1994).

(22) Whether a conclusion to suppress evidence is proper. *State v. Brown*, 853 P.2d 851, 854-55 (Utah 1992); *State v. Potter*, 860 P.2d 952, 955 (Utah App. 1993); *State v. Naisbitt*, 827 P.2d 969, 971 (Utah App. 1992).

(23) Whether a defendant may avail himself of the defense of entrapment. *State v. Gallegos*, 849 P.2d 586, 589 (Utah App. 1993); *State v. Richardson*, 843 P.2d 517, 518 (Utah App. 1992).

(24) Whether a trial court has exceeded its scope of discretion. *State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993).

(25) Whether a prima facia case of race discrimination in a jury selection has been established. *Pharris*, 846 P.2d at 459.

D. Challenges in Divorce Cases

1. Challenging Findings of Fact

a. Clearly Erroneous Standard

Appellate courts give great deference to the trial court's findings of fact in divorce cases and do not overturn them unless they are clearly erroneous. *Barnes v. Barnes*, 857 P.2d 257, 259 (Utah App. 1993) (citing *Riche v. Riche*, 784 P.2d 465, 467 (Utah App. 1989)); *see also Elmer v. Elmer*, 776 P.2d 599, 602 (Utah 1989); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1277 (Utah 1987); *Bingham v. Bingham*, 872 P.2d 1065, 1067 (Utah App. 1994); *Godfrey v. Godfrey*, 854 P.2d 585, 587 (Utah App. 1993); *Peterson v. Peterson*, 818 P.2d 1305, 1307-08 (Utah App. 1991) (due regard shall be given to opportunity of trial court to judge credibility of witnesses); *Crouse v. Crouse*, 817 P.2d 836, 838 (Utah App. 1991); *Hinckley v. Hinckley*, 815 P.2d 1352, 1353 (Utah App. 1991); *Hagan v. Hagan*, 810 P.2d 478, 481 (Utah App. 1991); *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah App.), *cert. denied*, 817 P.2d 325 (Utah 1991); *Rothe v. Rothe*, 787 P.2d 534, 535-36 (Utah App. 1990); *Jense v. Jense*, 784 P.2d 1249, 1251 (Utah App. 1989).

A finding of fact will be adjudged clearly erroneous if it violates the standards set by the appellate court, is against the clear weight of the evidence, or, the reviewing court is "left with a definite and firm conviction that a mistake has been committed" even though there is evidence to support the finding. *Cummings v. Cummings*, 821 P.2d 472, 476 (Utah App. 1991) (citing *State v. Walker*, 743 P.2d 191, 193 (Utah 1987); *Peterson v. Peterson*, 818 P.2d 1305, 1307-08 (Utah App. 1991); *Dunn v. Dunn*, 802 P.2d 1314, 1317 (Utah App. 1990); *Rothe v. Rothe*, 787 P.2d 534, 535-36 (Utah App. 1990); *Weston v. Weston*, 773 P.2d 408, 410 (Utah App. 1989).

b. Marshaling Cases

The following are cases involving divorce proceedings in which appellate courts have addressed the marshaling requirement. *Schaumberg v. Schaumberg*, 875 P.2d 598, 603 (Utah App. 1994) (husband who has merely reargued evidence supporting his position has not marshaled evidence); *Shepherd v. Shepherd*, 876 P.2d 429, 431 (Utah App. 1994) ("'if the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case'")

(quoting *Saunders v. Sharpe*, 806 P.2d 198, 199 (Utah 1991)); *Baker v. Baker*, 866 P.2d 540, 543 (Utah App. 1993) (party has not successfully completed marshaling requirement if, although she has marshaled evidence to support trial court's finding, she has not shown that finding is "so lacking in support as to be against the clear weight of the evidence"); *Watson v. Watson*, 837 P.2d 1, 6-7 (Utah App. 1992) (appellant who claims that his testimony before trial court was "uncontroverted," ignoring his ex-wife's contradictory testimony, has not properly marshaled evidence); *Crouse v. Crouse*, 817 P.2d 836, 838 (Utah App. 1991) (husband who cites only evidence which supports outcome he desires has not marshaled evidence); *Hagan v. Hagan*, 810 P.2d 478, 481 (Utah App. 1991) (party seeking to overturn trial court's factual findings has burden of marshaling evidence which supports findings and then demonstrating that, despite such evidence, findings are nevertheless so lacking in support as to be against clear weight of evidence); *Riche v. Riche*, 784 P.2d 465, 468 (Utah App. 1989) (party who only refers appellate court to evidence conflicting with trial court's findings has not properly marshaled evidence).

c. Examples of Fact Questions

(1) Whether a person has been served with process. *Carnes v. Carnes*, 668 P.2d 555, 557 (Utah 1983).[23]

(2) Whether an ex-wife may set aside a conveyance of property from ex-husband based on fraud and mutual mistake. *Despain v. Despain*, 855 P.2d 254, 256-57 (Utah App. 1993).

(3) Whether a spouse has waived his or her right to reduce alimony payments. *Hinckley v. Hinckley*, 815 P.2d 1352, 1354 (Utah App. 1991); *Barnes v. Wood*, 750 P.2d 1226, 1230 (Utah App. 1988).

(4) Whether a deed to property has been "delivered." *Horton v. Horton*, 695 P.2d 102, 106 (Utah 1984).

(5) Whether a defendant is voluntarily underemployed. *Hill v. Hill*, 869 P.2d 963, 965 (Utah App. 1994).

(6) Whether a spouse who is responsible for paying child support has inappropriately delayed trial proceedings. *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah App. 1992).

d. Adequacy of Trial Court's Factual Findings

To ensure that the trial court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions. *Martinez v. Martinez*, 728 P.2d 994, 995 (Utah 1986); *Barnes v. Barnes*, 857 P.2d 257, 260-62 (Utah App. 1993); *Sukin v. Sukin*, 842 P.2d 922, 924 (Utah App. 1992); *Roberts v. Roberts*, 835 P.2d 193, 195-96 (Utah App. 1992) (stressing particular importance of specificity of findings in custody determinations); *Howell v. Howell*, 806 P.2d 1209, 1213 (Utah App.) (trial court must make findings on all material issues), *cert. denied*, 817 P.2d 325 (Utah 1991); *Dunn v. Dunn*, 802 P.2d 1314, 1317 (Utah App. 1990) (to permit appellate review of property distribution, distribution must be based on adequate factual findings); *Allred v. Allred*, 797 P.2d 1108, 1111 (Utah App. 1990) ("findings are adequate only if they are 'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached'") (quoting *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987)); *Haumont v. Haumont*, 793 P.2d 421, 424 (Utah App. 1990); *Painter v. Painter*, 752 P.2d 907, 909 (Utah App. 1988).

"The trial court must make sufficiently detailed findings on each factor to enable a reviewing court to ensure that the trial court's discretionary determination was rationally based upon the applicable factors."

The trial court must make sufficiently detailed findings on each factor to enable a reviewing court to ensure that the trial court's discretionary determination was rationally based upon the applicable factors.[24] *Willey v. Willey*, 866 P.2d 547, 550 (Utah App. 1993); *Bell v. Bell*, 810 P.2d 489, 492 (Utah App. 1991) ("if sufficient findings are not made, we must reverse unless the record is clear and uncontroverted such as to allow us to apply the . . . factors as a matter of law on appeal"); *see Hill v. Hill*, 869 P.2d 963, 966 (Utah App. 1994) (failure to make findings on all factors necessary to make alimony award constitutes abuse of discretion).

The making of formal findings of fact materially assists the parties in determining whether there may be a basis for appeal, and if the appeal is taken, significantly assists the appellate court in its review. *Christensen v. Christensen*, 628 P.2d 1297, 1301 (Utah 1981). Furthermore, if the findings are legally inadequate the exercise of marshaling the evidence in support of the findings becomes futile and appellant is under no obligation to marshal. *Barnes v. Barnes*, 857 P.2d 257, 259 (Utah App. 1993). For example, if the trial court's findings of fact are conclusory in nature, that is, they do not contain enough detail to clearly show the evidence upon which they are grounded, attempts to marshal will prove largely ineffectual. *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991) (appellants need not marshal evidence when findings are so inadequate that they cannot be meaningfully challenged as factual determinations; rather, appellant can simply argue legal insufficiency of court's findings as framed).

2. Challenging Discretionary Rulings

a. Abuse of Discretion Standard

"Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence." *Whitehead v. Whitehead*, 836 P.2d 814, 816 (Utah App. 1992); *see Bingham v. Bingham*, 872 P.2d 1065, 1067 (Utah App. 1994) ("property and alimony awards 'will be upheld unless a clear and prejudicial abuse of discretion is demonstrated'") (quoting *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah App.), *cert. denied*, 817 P.2d 325 (Utah 1991)); *Crockett v. Crockett*, 836 P.2d 818, 819 (Utah App. 1992) (trial courts may exercise broad discretion in adjusting financial interests of parties to divorce and modification proceedings). "Where a trial court may exercise broad discretion, we presume the correctness of the court's decision absent 'manifest injustice or inequity that indicates a clear abuse of . . . discretion.'" *Crockett*, 836 P.2d at 819-820 (quoting *Turner v. Turner*, 649 P.2d 6, 8 (Utah 1982)). However, "[w]hile trial courts have broad discretion . . . that discretion

must be exercised within legal parameters set by appellate courts." *Cummings v. Cummings*, 821 P.2d 472, 474-75 (Utah App. 1991). Furthermore, "'to ensure the court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions.'" *Barnes v. Barnes*, 857 P.2d 257, 259 (Utah App. 1993) (quoting *Painter v. Painter*, 752 P.2d 907, 909 (Utah App. 1988)).

b. Examples of Questions Within the Trial Court's Discretion

(1) Whether property has been equitably divided. *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1277 (Utah 1987) (in making orders concerning division of marital estate, trial court is permitted broad latitude and its judgment is not to be lightly disturbed); *Bingham v. Bingham*, 872 P.2d 1065, 1067 (Utah App. 1994); *Baker v. Baker*, 866 P.2d 540, 542 (Utah App. 1993); *Morgan v. Morgan*, 854 P.2d 559, 564 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993); *Watson v. Watson*, 837 P.2d 1, 5 (Utah App. 1992); *Dunn v. Dunn*, 802 P.2d 1314, 1317 (Utah App. 1990); *Weston v. Weston*, 773 P.2d 408, 410 (Utah App. 1989) (when considering testimony regarding property value, the trial court is entitled to give conflicting opinions whatever weight it deems appropriate); *Sorensen v. Sorensen*, 769 P.2d 820, 823 (Utah App. 1989); *Naranjo v. Naranjo*, 751 P.2d 1144, 1146 (Utah App. 1988) (trial court has considerable latitude in adjusting financial interests and is given presumption of validity); *Talley v. Talley*, 739 P.2d 83, 84 (Utah App. 1987).

(2) Whether spousal support is sufficient. *Paffel v. Paffel*, 732 P.2d 96, 100 (Utah 1986); *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985); *Bingham v. Bingham*, 872 P.2d 1065, 1067 (Utah App. 1994); *Hill v. Hill*, 869 P.2d 963, 966 (Utah App. 1994); *Willey v. Willey*, 866 P.2d 547, 550 (Utah App. 1993) (trial court's alimony ruling will not be overturned as long as court supports its ruling with adequate findings and exercises its discretion according to established standards); *Johnson v. Johnson*, 855 P.2d 250, 251-52 (Utah App. 1993); *Chambers v. Chambers*, 840 P.2d 841, 843 (Utah App. 1992); *Bell v. Bell*, 810 P.2d 489, 491-92 (Utah App. 1991) (failure to consider established guidelines in fashioning alimony award constitutes abuse of discretion); *Thronson v. Thronson*, 810 P.2d 428, 435 (Utah App.), *cert. denied*, 826 P.2d 651 (Utah 1991); *Haumont v. Haumont*, 793 P.2d 421, 423 (Utah App. 1990); *Naranjo v. Naranjo*, 751 P.2d 1144, 1147 (Utah App. 1988), *cert. denied*, 826 P.2d 651 (Utah 1991).

(3) Whether the award of child custody and support is proper. *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985); *Barnes v. Barnes*, 857 P.2d 257, 259 (Utah App. 1993); *Sukin v. Sukin*, 842 P.2d 922, 923 (Utah App. 1992); *Roberts v. Roberts*, 835 P.2d 193, 195-96 (Utah App. 1992); *Maughan v. Maughan*, 770 P.2d 156, 159 (Utah App. 1989).

(4) Whether a divorce decree should be modified. *Moore v. Moore*, 872 P.2d 1054, 1055 (Utah App. 1994); *Wells v. Wells*, 871 P.2d 1036, 1038 (Utah App. 1994) (trial court's ruling of no substantial change of circumstances such as to warrant modification of divorce decree to be reviewed for abuse of discretion); *Hinckley v. Hinckley*, 815 P.2d 1352, 1353 (Utah App. 1991); *Myers v. Myers*, 768 P.2d 979, 984 (Utah App. 1989).

(5) Whether the trial court properly determined visitation rights. *Watson v. Watson*, 837 P.2d 1, 4 (Utah App. 1992); *Ebbert v. Ebbert*, 744 P.2d 1019, 1022 (Utah App. 1987), *cert. denied,* 765 P.2d 1278 (Utah 1988); *see also Moon v. Moon*, 790 P.2d 52, 54-55 (Utah App. 1990).

(6) Whether the trial court accurately determined and assigned values to marital property. *Shepherd v. Shepherd*, 876 P.2d 429, 433 (Utah App. 1994) (although marital estate is generally valued at time of trial, trial court has broad discretion to use a different date, such as date of separation); *Morgan*, 854 P.2d at 563; *Dunn v. Dunn*, 802 P.2d 1314, 1317 (Utah App. 1990); *Sorensen v. Sorensen*, 769 P.2d 820, 823 (Utah App. 1989); *Talley v. Talley*, 739 P.2d 83, 84 (Utah App. 1987).

(7) Whether the trial court properly allocated marital debts. *Hill v. Hill*, 869 P.2d 963, 966 (Utah App. 1994); *Willey v. Willey*, 866 P.2d 547, 555 (Utah App. 1993).

(8) Whether the trial court properly awarded a parent the right to claim children as income tax dependents. *Hill v. Hill*, 869 P.2d 963, 967 (Utah App. 1994).

(9) Whether the trial court should award attorney's fees. *Wells v. Wells*, 871 P.2d 1036, 1038 (Utah App. 1994); *Hill v. Hill*, 869 P.2d 963, 967 (Utah App. 1994); *Crockett v. Crockett*, 836 P.2d 818, 821 (Utah App. 1992); *Lyngle v. Lyngle*, 831 P.2d 1027, 1031 (Utah App. 1992); *Crouse v. Crouse*, 817 P.2d 836, 840 (Utah App. 1991) (both decision to award attorney fees and amount of such fees are within sound discretion of trial court); *Rudman v. Rudman*, 812 P.2d 73, 76 (Utah App. 1991).

(10) Whether premarital equity in the marital home has lost its separate character as premarital property. *Willey v. Willey*, 866 P.2d 547, 555 (Utah App. 1993).

(11) Whether a modified child or spousal support payment should be retroactive. *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah App. 1992).

3. Challenging Conclusions of Law

a. Correction of Error Standard

Although considerable deference is accorded to factual findings, conclusions of law arising from those findings are to be reviewed for correctness and are given no special deference on appeal. *Bingham v. Bingham*, 872 P.2d 1065, 1067 (Utah App. 1994); *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah App.), *cert. denied*, 817 P.2d 325 (Utah 1991); *Smith v. Smith*, 793 P.2d 407, 409 (Utah App. 1990).

"Controlling Utah case law teaches that 'correctness' means the appellate court decided the matter for itself and does not defer in any degree to the trial judge's determination of law." *State v. Pena*, 869 P.2d 932, 936 (Utah 1994); *see Howell*, 806 P.2d at 1211. "This is because appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction." *Pena*, 869 P.2d at 936 (citing Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 779 (1957)); *see State v. Thurman*, 846 P.2d 1256, 1266 (Utah 1993).

b. Examples of Conclusions of Law

(1) Whether a person has been properly served with process. *Reed v. Reed*, 806 P.2d 1182, 1184 n.3 (Utah 1991).[25]

(2) Whether the trial court properly denied a motion to strike an order to show cause. *Grover v. Grover*, 839 P.2d 871, 873 (Utah App. 1992).

(3) Whether a court has subject matter jurisdiction. *Rimensburger v. Rimensburger*, 841 P.2d 709, 710 (Utah App.

1992); *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1337 (Utah App. 1991).

(4) Whether a divorce decree is ambiguous. *Lyngle v. Lyngle*, 831 P.2d 1027, 1029 (Utah App. 1992); *Bettinger v. Bettinger*, 793 P.2d 389, 391-92 (Utah App. 1990); *Whitehouse v. Whitehouse*, 790 P.2d 57, 60 (Utah App. 1990).

(5) Whether a prenuptial agreement is ambiguous. *Rudman v. Rudman*, 812 P.2d 73, 78 (Utah App. 1991); *Neilson v. Neilson*, 780 P.2d 1264, 1267 (Utah App. 1989).

(6) Whether a postnuptial agreement is ambiguous. *D'Aston v. D'Aston*, 808 P.2d 111, 114 (Utah App. 1990).

(7) Whether res judicata applies. *Smith v. Smith*, 793 P.2d 407, 409 (Utah App. 1990).

(8) Whether a home fits within the definition of "usual place of abode." *Reed v. Reed*, 806 P.2d 1182, 1184 (Utah 1991).

(9) Whether a trial court correctly resolved a party's objection to the recommendation of a commissioner. *Dent v. Dent*, 870 P.2d 280, 282 (Utah App. 1994).

E. Challenges to Evidentiary Rulings

1. Introduction

In general, a trial court is granted broad discretion in its decision to admit or exclude evidence. *State v. Pena*, 869 P.2d 932, 938 (Utah 1994). In "the absence of an abuse of discretion, the trial court's ruling on the admissibility of evidence will not be disturbed." *State v. Casias*, 772 P.2d 975, 977 (Utah App. 1989). The appellate court "will presume that the discretion of the trial court was properly exercised unless the record clearly shows to the contrary." *State v. Morgan*, 813 P.2d 1207, 1210 n.4 (Utah App. 1991) (quoting *State v. Jonas*, 793 P.2d 902, 906 (Utah App. 1990), *cert. denied*, 804 P.2d 1232 (Utah 1990)). However, some clarity concerning the appropriate standard of review in evidence issues remains to be developed.

The standard of review for trial court rulings on the admissibility of evidence has been problematic. Many decisions from the court of appeals considered footnote 3 of the Utah Supreme Court's ruling in *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991), to designate a trial court's ruling on the admissibility of evidence as a question of law reviewed for correctness with a clearly erroneous standard for subsidiary factual findings. *State v. Morgan*, 865 P.2d 1377, 1380 (Utah App. 1993); *State v. Diaz*, 859 P.2d 19, 23 (Utah App. 1993), *cert. denied*, –P.2d– (Utah 1994); *State v. Gray*, 851 P.2d 1217, 1224 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993); *State v. Martinez*, 848 P.2d 702, 704 (Utah App. 1993); *State v. Mickelson*, 848 P.2d 677, 684 (Utah App. 1992); *Provo City v. Warden*, 844 P.2d 360, 365 (Utah App. 1992), *aff'd*, 875 P.2d 557 (Utah 1994); *Turner v. General Adjustment Bureau*, 832 P.2d 62, 69 (Utah App. 1992), *cert. denied*, 843 P.2d 1042 (Utah 1992); *State v. Gonzalez*, 822 P.2d 1214, 1217 (Utah App. 1991); *see also State v. O'Neil*, 848 P.2d 694, 688-89 & n.5 (Utah App.), *cert. denied*, 859 P.2d 585 (Utah 1993).

"In general, a trial court is granted broad discretion in its decision to admit or exclude evidence."

However, Utah Supreme Court decisions since *Ramirez* have continued to apply an abuse of discretion standard of review. *State v. Pena*, 869 P.2d 932, 938 (Utah 1994) ("rulings on the admission of evidence generally entail a great deal of discretion"); *State v. Wetzel*, 868 P.2d 64, 67 (Utah 1993); *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993) ("trial court has wide discretion in determining the admissibility of expert testimony and such decisions are reviewed under an abuse of discretion standard"); *Nay v. General Motors Corp.*, 850 P.2d 1260, 1262 (Utah 1993); *State v. Archuleta*, 850 P.2d 1232, 1241 (Utah), *cert. denied*, 114 S. Ct. 476 (1993); *State v. Dunn*, 850 P.2d 1201, 1221 (Utah 1993) (in reviewing trial court's ruling on admissibility of evidence under Rule 403, supreme court will not overturn court's determination unless it was abuse of discretion); *State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993) (supreme court clarifies meaning of *Ramirez* and its footnote 3, stating that *Ramirez* incorrectly portrayed standard of review for admissibility of evidence as correctness standard); *State v. Hamilton*, 827 P.2d 232, 239-40 (Utah 1992).

The most recent court of appeals decisions have followed this discretion approach. *E.g., State v. Larsen*, 876 P.2d 391, 395 (Utah App. 1994) (trial court's Rule 403 determination will not be disturbed absent abuse of discretion); *Utah Dep't of Transp. v. 6200 South Assocs.*, 872 P.2d 462, 465 (Utah App. 1994) (when rule of evidence requires trial court to balance factors, abuse of discretion is appropriate standard).

Abuse of discretion has been defined as acting beyond the bounds of reasonability. *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993); *Nay*, 850 P.2d at 1262; *Archuleta*, 850 P.2d at 1241; *Dunn*, 850 P.2d at 1221; *Hamilton*, 827 P.2d at 239-40 (abuse of discretion means that ruling is beyond limits of reasonability); *see Morgan*, 813 P.2d at 1210 n.4 ("general rule concerning abuse of discretion is that the appellate court 'will presume that the discretion of the trial court was properly exercised unless the record clearly shows to the contrary'") (quoting *Jonas*, 793 P.2d at 906).

The portions of evidentiary rulings which require a balancing of factors are reviewed under an abuse of discretion standard. *Thurman*, 846 P.2d at 1270 n.11; *State v. Horton*, 848 P.2d 708, 713 (Utah App. 1993); *State v. Morgan*, 813 P.2d 1207, 1210 n.4 (Utah App. 1991); *see also State v. Knowles*, 709 P.2d 311, 312 (Utah 1985).

However, while abuse of discretion is always the proper standard of review for evidentiary rulings which require a balancing of factors, the appellate advocate should be aware that recent court rulings have found that admissibility decisions are the sum of several rulings, each of which may be reviewed under a separate standard of review. *Hansen*, 852 P.2d at 978 n.4; *Thurman*, 846 P.2d at 1270 n.11; *Horton*, 848 P.2d at 713.

Therefore, individual legal determinations are still reviewed under a correction of error standard and not an abuse of discretion standard, even though the legal determinations may be part of the overall evidentiary ruling. *Dunn*, 850 P.2d at 1222 n.22 (when appellate court is in as good position as trial court to view photograph for gruesomeness, correctness standard of review should be applied); *Utah Dep't of Transp.*, 872 P.2d at 465 (in reviewing admissibility of evidence at trial, appellate courts apply correction of error standard to trial court's selection, interpretation, and application of particular rule of evidence

and abuse of discretion standard to balancing of specified factors); *Schreiter v. Wasatch Manor, Inc.*, 871 P.2d 570, 572 (Utah App. 1994) (trial court's interpretation of rule of evidence is conclusion of law, reviewed for correctness); *Horton*, 848 P.2d at 713 (questions of whether correct rule of evidence was selected, whether rule was correctly applied, and whether rule was correctly interpreted are legal questions requiring correction of error standard of review, while those rulings requiring balancing of factors are reviewed for abuse of discretion).

2. Specific Standards of Review

a. Challenges to the Relevancy of Evidence—Rules 401-412

Whether evidence is relevant is a decision by the trial court that requires a balancing of factors, such as the probativeness of a piece of evidence against its potential for unfair prejudice. *E.g., State v. Wetzel*, 868 P.2d 64, 67 (Utah 1993) (trial court's decision on whether evidence is relevant under Rule 401 requires balancing of factors and will only be reversed for abuse of discretion); *State v. Morgan*, 813 P.2d 1207, 1210 n.4 (Utah App. 1991). The trial court has broad discretion in determining the relevancy of proffered evidence and error will only be found if the trial court abused its discretion. *Wetzel*, 868 P.2d at 67; *Nay v. General Motors Corp.*, 850 P.2d 1260, 1262 (Utah 1993) (appellate courts "review a trial court's determination that evidence should be excluded under Rule 403 for abuse of discretion and reverse only if the ruling is beyond the bounds of reasonability"); *State v. Archuleta*, 850 P.2d 1232, 1241 (Utah) (appellate courts will not overturn trial court's Rule 403 decision unless it was abuse of discretion), *cert. denied*, 114 S. Ct. 476 (1993); *State v. Dunn*, 850 P.2d 1201, 1221 (Utah 1993) ("[i]n reviewing a trial court's ruling on the admissibility of evidence under Rule 403, we will not overturn the court's determination unless it was an "abuse of discretion"); *Barnard v. Sutliff*, 846 P.2d 1229, 1234-35 (Utah 1992) (appellate courts apply abuse of discretion standard to review trial court's balancing of interests in determining admissibility of Rule 403); *State v. Allen*, 839 P.2d 291, 301 (Utah 1992) (admitting tape under Rule 403 was not abuse of discretion); *State v. Hamilton*, 827 P.2d 232, 239-40 (Utah 1992); *State v. Harrison*, 805 P.2d 769, 780 (Utah App.) (citing Rule 402 and abuse of discretion standard), *cert. denied*, 817 P.2d 327 (Utah 1991); *State v. Morrell*, 803 P.2d 292, 296 (Utah App. 1990) (Rule 404 determination is reviewed for an abuse of discretion); *In re R.R.D.*, 791 P.2d 206, 212 (Utah App. 1990); *State v. Moore*, 788 P.2d 525, 528 (Utah App.) (trial court did not abuse its discretion by admitting tape under Rules 403 and 404), *cert. denied*, 800 P.2d 1105 (Utah 1990).

b. Challenges to Witnesses—Rules 601-615

Rules 601 to 615 of the Utah Rules of Evidence govern challenges to a witness's testimony and presence in the courtroom. The application of these rules by the trial court are typically reviewed under an abuse of discretion standard. *State v. Kallin*, 877 P.2d 138, 143 (Utah 1994) (whether trial court properly permitted leading questions on direct examination pursuant to Rule 611(c) of Utah Rules of Evidence is reviewed for abuse of discretion); *Russell v. Russell*, 852 P.2d 997, 999 (Utah 1993) (Rule 611 grants trial court broad discretion over mode and manner testimony of witnesses is offered); *State v. Wilkerson*, 612 P.2d 362, 364-65 (Utah 1980) (trial court did not abuse discretion in allowing victim to testify pursuant to statute replaced by Rule 601); *State v. Rangel*, 866 P.2d 607, 613 (Utah App. 1993) (trial court did not abuse discretion in allowing adult victim to remain in court room pursuant to Rule 615);[26] *State v. Boyatt*, 854 P.2d 550, 553 (Utah App. 1993) (trial court has prerogative under Rule 614 to ask witnesses questions necessary or desirable to clarify or explain evidence related to disputed issues); *State v. Smith*, 817 P.2d 828, 829-30 (Utah App. 1991) (appellate courts will reverse trial court's ruling under Rule 609 if trial court "so abused its discretion that there is a likelihood that injustice resulted"); *Salt Lake City v. Holtman*, 806 P.2d 235, 237 (Utah App. 1991) (appellate court will not reverse Rule 609 ruling unless trial court abused its discretion to extent that there is likelihood that injustice resulted); *State v. Morrell*, 803 P.2d 292, 294 (Utah App. 1990) (reviewing the trial court's admission of prior guilty plea under 609 of Utah Rules of Evidence for abuse of discretion); *State ex rel. L.D.S. v. Stevens*, 797 P.2d 1133, 1139 (Utah App. 1990) (trial court did not abuse its discretion in Rule 615 decision); *State v. Brown*, 771 P.2d 1093, 1094 (Utah App. 1989) (trial court's ruling that prior theft convictions were admissible to impeach testimony of witness pursuant to Rule 609(a)(2) is reviewed under abuse of discretion standard).

c. Challenges to Expert Testimony—Rules 701-706

"The trial court has wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard." *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993); *Steffensen v. Smith's Management Corp.*, 862 P.2d 1342, 1347 (Utah 1993) (court of appeals incorrectly applied "clear error standard" to exclusions of expert testimony when proper standard was abuse of discretion); *State v. Span*, 819 P.2d 329, 332 n.1 (Utah 1991) (trial court has discretion in Rule 704 and Rule 702 decisions); *Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069, 1078 (Utah 1991); *Casida v. Deland*, 866 P.2d 599, 603 (Utah App. 1993); *Robb v. Anderton*, 863 P.2d 1322, 1326 (Utah App. 1993) (Rule 702 reviewed for abuse of discretion); *State v. Tennyson*, 850 P.2d 461, 471 (Utah App. 1993) (Rule 703 determination is reviewed for abuse of discretion); *Walker v. Union Pac. R.R.*, 844 P.2d 335, 343 (Utah App. 1992) (Rule 702 determination will not be reversed "absent a clear abuse of discretion"); *State v. Larsen*, 828 P.2d 487, 492 (Utah App.), *cert. granted*, 836 P.2d 1383 (Utah 1992); *Anton v. Thomas*, 806 P.2d 744, 745 (Utah App. 1991); *Ostler v. Albina Transfer Co.*, 781 P.2d 445, 447 (Utah App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990).

d. Challenges to Hearsay Rulings—Rules 801-806

The standard of review for evidentiary rulings on hearsay has also been problematic. For example, the supreme court in *State v. Ireland*, 773 P.2d 1375, 1378 (Utah 1989), and *State v. Auble*, 754 P.2d 935, 937 (Utah 1988), apparently applies a correctness standard to a finding of admissibility under Rule 803(3), while the supreme court in *State v. Kaytso*, 684 P.2d 63, 64 (Utah 1984), held that no "abuse of prerogative" occurred when trial court admitted evidence under Rule 63(4) (now 803(3)). Further, the supreme court in *State v. Cude*, 784 P.2d 1197, 1201 (Utah 1989) applied a clear error standard to find that a statement did not fall within Rule 803(2), and the supreme court in *State v.*

Thomas, 777 P.2d 445, 449 (Utah 1989), stated that determinations of whether evidence meets requirements of Rule 803(2) is within the "sound discretion" of the trial court. These variations arise because the exceptions to Utah Rule of Evidence 803 vary the trial court's analysis between factual issues, legal issues, and a mixture of both. *Hansen v. Heath*, 852 P.2d 977, 978 & n.4 (Utah 1993).

In a recent case, the Utah Supreme Court recognized this problem and stated a trial court's determination often contains a number of rulings, each of which may require a different standard of review. *State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993) (admissibility decisions are "sum of several rulings, each of which may be reviewed under a separate standard" of review). As a result, "the appropriate standard of review of a trial court's decision admitting or excluding evidence under Rules 802 and 803 depends on the particular ruling in dispute." *Hansen v. Heath*, 852 P.2d 977, 978 (Utah 1993).

Therefore, legal questions, which are part of the evidentiary ruling, are reviewed for correctness even though the evidentiary ruling is reviewed for an abuse of discretion. *State v. Olsen*, 860 P.2d 332, 335 (Utah 1993) ("[t]o the extent that there is no pertinent factual dispute, whether a statement is offered for the truth of the matter asserted is a question of law, to be reviewed under a correction of error standard"); *State v. Horton*, 848 P.2d 708, 713 (Utah App. 1993) (applying abuse of discretion standard to Rule 804 and stating that whether correct rule of evidence was selected, whether rule was correctly applied, and whether the rule was correctly interpreted are legal questions requiring correction of error standard of review, while those rulings requiring balancing of factors are reviewed for abuse of discretion); *State v. Morgan*, 813 P.2d 1207, 1211 (Utah App. 1991) (trial court did not abuse discretion in allowing testimony that party claims was inadmissible hearsay under Rule 802); *Layton City v. Peronek*, 803 P.2d 1294, 1296 (Utah App. 1990) (report admitted under Rule 803 reviewed for abuse of discretion); *State v. Barker*, 797 P.2d 452, 455 (Utah App. 1990) (court did not abuse its discretion by placing testimony within Rule 801); *see also Hansen*, 852 P.2d at 879; *State v. Ramirez*, 817 P.2d 774, 781 n.3 (Utah 1991).

3. Additional Challenges to Evidentiary Rulings Within Trial Court's Discretion

(1) Whether the trial court's determination on a preliminary question concerning the admissibility of evidence was proper under Rule 104 of the Utah Rules of Evidence. *State v. Harrison*, 805 P.2d 769, 782 (Utah App. 1991), *cert. denied*, 817 P.2d 327 (Utah 1991).

(2) Whether the trial court abused its discretion in applying the rules of evidence pursuant to Rule 104(a). *State in re Dep't of Social Servs. v. Ruscetta*, 742 P.2d 114, 117 (Utah App. 1987).

(3) Whether the trial court properly took judicial notice of a fact under Rule 201(b) of the Utah Rules of Evidence. *Finlayson v. Finlayson*, 874 P.2d 843, 847 (Utah App. 1994); *Riche v. Riche*, 784 P.2d 465, 468 (Utah App. 1989).

(4) Whether the trial court reasonably determined a witness failed to properly authenticate the photograph pursuant to Rule 901 of the Utah Rules of Evidence. *State v. Horton*, 848 P.2d 708, 714 (Utah App. 1993).

(5) Whether the trial court's determination to allow photocopied palm prints into evidence under Rule 1003 of the Utah Rules of Evidence was proper. *State v. Casias*, 772 P.2d 975, 977 (Utah App. 1989).

(6) Whether the trial court abused its discretion in refusing to require a psychological examination of a state's witness in a criminal trial. *State v. Hubbard*, 601 P.2d 929, 931 (Utah 1979) (case decided before present rules of evidence enacted).

F. Challenges to Collateral Proceedings

1. Contempt

On review of both criminal and civil contempt proceedings, appellate courts accept the trial court's findings of fact unless they are clearly erroneous. *Von Hake v. Thomas*, 759 P.2d 1162, 1172 (Utah 1988). The trial court must make written findings of fact and conclusions of law on all substantive elements. *Id.* (judgment of contempt reversed because there were no adequate written findings); *Thomas v. Thomas,* 569 P.2d 1119, 1120-21 (Utah 1977) (written findings are necessary to support contempt judgment); *State v. Long*, 844 P.2d 381, 383 (Utah App. 1992) (appellate courts accept trial court's findings of fact unless clearly erroneous and review whether findings support legal conclusion of violation of statutory duty under correction of error standard).

2. Rule 11 Sanctions

When reviewing a trial court's sanction determination pursuant to Rule 11 of the Utah Rules of Civil Procedure, appellate courts review the trial court's findings of fact under a clearly erroneous standard, the trial court's conclusion that Rule 11 was violated under a correction of error standard,[27] and the trial court's determination of the type and amount of sanctions to be imposed under an abuse of discretion standard.[28] *Schoney v. Memorial Estates, Inc.*, 863 P.2d 59, 62 (Utah App. 1993) (noting that costs and attorney's fees are reasonable form of sanction). *See Barnard v. Sutliff*, 846 P.2d 1229, 1233-35 (Utah 1992).

II. Appeals From State Administrative Agencies

A. Pre-UAPA Challenges

Review of state agency adjudicative proceedings commenced on or before December 31, 1987, is not subject to the Utah Administrative Procedures Act (UAPA).[29] Utah Code Ann. § 63-46b-22 (1993). Guidelines for pre-UAPA standards of review are set forth in great detail in the following cases: *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 583-89 (Utah 1991); *Hurley v. Board of Review*, 767 P.2d 524, 526-27 (Utah 1988); *Utah Dep't of Admin. Servs. v. Public Serv. Comm'n*, 658 P.2d 601, 607-12 (Utah 1983).

For agency actions prior to UAPA, agencies' findings of fact are given considerable deference and will not be disturbed on appeal if supported by "evidence of any substance whatever." *SEMECO Indus., Inc. v. State Tax Comm'n*, 849 P.2d 1167, 1171 (Utah 1993) (Durham, J., dissenting); *Utah Dep't of Admin. Serv.*, 658 P.2d at 608-09 (Utah 1983); *Superior Soft Water Co. v. State Tax Comm'n*, 843 P.2d 525, 528 (Utah App. 1992). However, note that the supreme court in *Morton Int'l*, 814 P.2d at 585, stated that findings of fact in pre-UAPA cases will not be set aside on appeal if "supported by substantial evidence." *Accord Savage Indus., Inc. v. State Tax Comm'n*, 811 P.2d 664, 666 (Utah 1991); *Hurley*, 767 P.2d at 526. The courts have also stated a third approach: factual findings are only overturned if

found to be arbitrary and capricious. *Olsen v. Industrial Comm'n*, 797 P.2d 1098, 1100 (Utah 1990) (citing *Kaiser Steel Corp. v. Monfredi*, 631 P.2d 888, 890 (Utah 1981)); *Utah Dep't of Admin. Serv.*, 658 P.2d at 609 (Utah 1983); *Stouffer Foods Corp. v. Industrial Comm'n*, 801 P.2d 179, 181 (Utah App. 1990).

Legal determinations are given no deference and are reviewed under a correction-of-error standard. *Morton Int'l*, 814 P.2d at 585; *Utah Dep't of Admin. Serv.*, 658 P.2d at 608; *Superior Soft Water*, 843 P.2d at 528; *Department of Transp. v. Personnel Review Bd.*, 798 P.2d 761, 764 (Utah App. 1990).

An intermediate-deference standard of review of "reasonableness and rationality" is used for mixed questions of law and fact, questions of special law, questions of the application of law to fact, and questions of "ultimate fact." *SEMECO*, 849 P.2d at 1171 (Durham, J. dissenting); *Morton Int'l*, 814 P.2d at 586; *Hurley*, 767 P.2d at 527; *Utah Dept. of Admin. Serv.*, 658 P.2d at 609-12; *Superior Soft Water*, 843 P.2d at 528-29 (pre-UAPA intermediate standard applies to both applications of law to fact and interpretations of provisions that agencies are empowered to administer).

In practice, the choice between no deference and intermediate deference often turns on whether the agency had experience or expertise regarding the specific issue. *SEMECO*, 849 P.2d at 1171 (Durham, J. dissenting); *Morton Int'l*, 814 P.2d at 586 (it is not characterization of issue as mixed question of law and fact or general law in pre-UAPA cases that is dispositive in determining standard of review; it is "whether the agency, by virtue of its experience and expertise, is in a better position than the courts to give effect to the regulatory objective to be achieved"); *Taylor v. Utah State Training Sch.*, 775 P.2d 432, 434-35 (Utah App. 1989) ("the more likely it is that agency expertise will assist in resolving an issue, the more deference courts should give to the agency's resolution").

B. UAPA Challenges

Review of administrative decisions for cases commenced after December 31, 1987, is governed by UAPA. *Thorup Bros. Constr. Inc. v. Auditing Div.*, 860 P.2d 324, 327 (Utah 1993); *Uintah Oil Ass'n v. County Bd. of Equalization*, 853 P.2d 894, 896 (Utah 1993); *Zissi v. State Tax Comm'n*, 842 P.2d 848, 852 (Utah 1992); *Nucor Corp. v. State Tax Comm'n*, 832 P.2d 1294, 1296 (Utah 1992); *Questar Pipeline Co. v. State Tax Comm'n*, 817 P.2d 316, 317 (Utah 1991). The Utah Supreme Court provided a detailed discussion of the governing UAPA provisions in *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 583-89 (Utah 1991); *see also Uintah Oil*, 853 P.2d at 896.

As an initial note, for a reviewing court to grant relief under UAPA, it must determine that the party has been "substantially prejudiced" by the agency action in question. Utah Code Ann. 63-46b-16(4) (1993). In other words, appellate courts must be able to determine that the alleged error was not harmless. *Mountain Fuel Supply Co. v. Public Serv. Comm'n*, 861 P.2d 414, 423 (Utah 1993).

"Review of state agency adjudicative proceedings commenced on or before December 31, 1987, is not subject to the Utah Administrative Procedures Act."

Further, the principle of exhaustion of administrative remedies is embodied in the general provisions of UAPA. "A party may seek judicial review only after exhausting all administrative remedies available . . . ." Utah Code Ann. 63-46b-12(2); *Mountain Fuel*, 861 P.2d at 423; *Maverik Country Stores, Inc. v. Industrial Comm'n*, 860 P.2d 944, 947 (Utah App. 1993).

1. Review of Informal Agency Proceedings

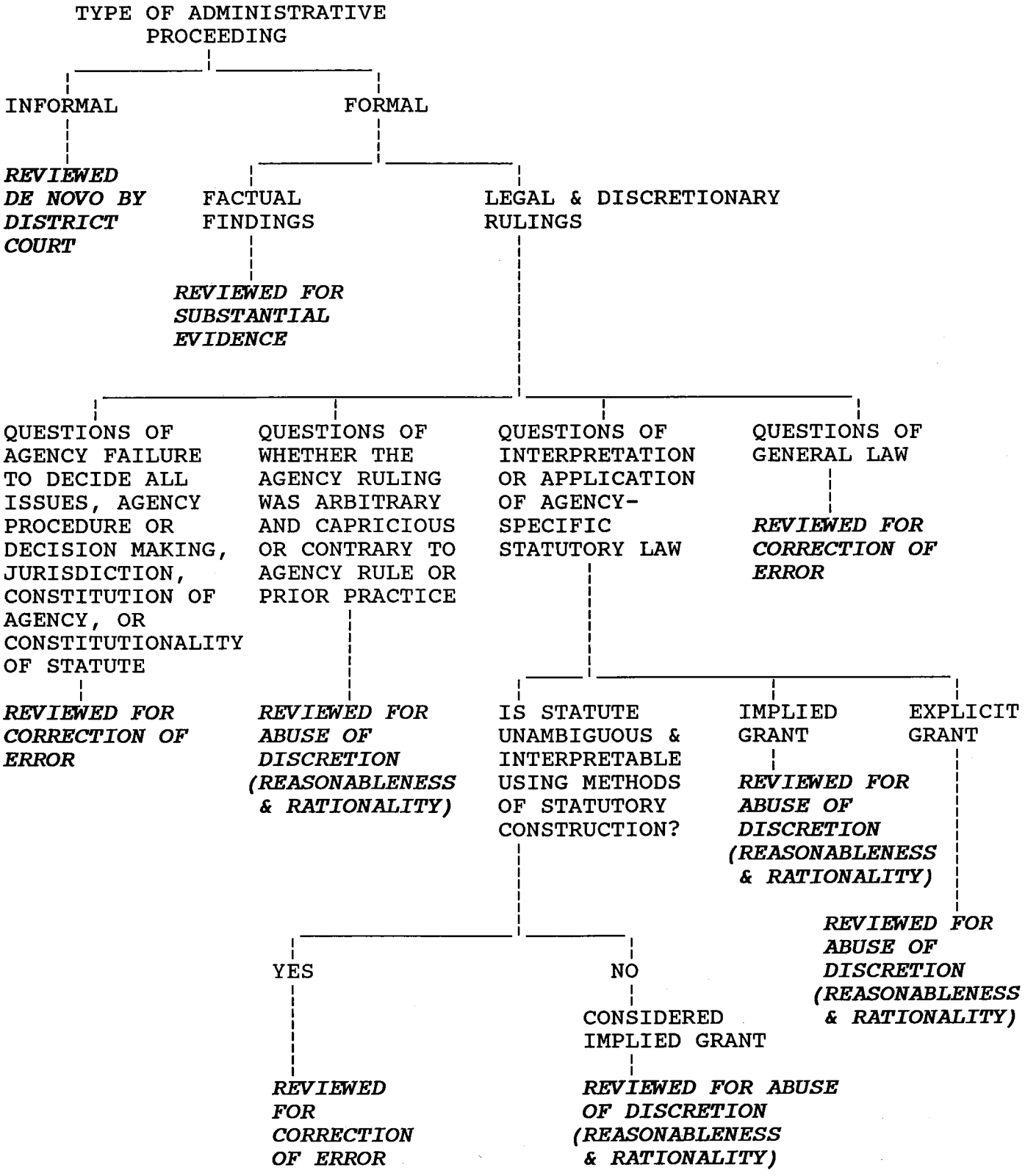
UAPA allows state agencies to promulgate rules designating that certain adjudicative proceedings be conducted informally. Utah Code Ann. § 63-46b-4(1); *Cordova v. Blackstock*, 861 P.2d 449, 451 (Utah App. 1993). Under UAPA, "the district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings." Utah Code Ann. § 63-46b-15(1)(a) (1989 & Supp. 1993); *Southern Utah Wilderness Alliance v. Board of State Lands*, 830 P.2d 233, 235 (Utah 1992) (supreme court lacked jurisdiction over informal adjudicative proceeding of agency); *see also* Utah Code Ann. §§ 78-2-2(3)(f); 78-3-4(5). Section 63-46b-15(1)(a) requires that the trial court's review of informal adjudicative proceedings be accomplished by holding a new trial, not just by reviewing an informal record. *Cordova*, 861 P.2d at 451; see *Brinkerhoff v. Schwendiman*, 790 P.2d 587, 588 (Utah App. 1990) (noting plaintiff was able to present entire case in trial de novo). The review of an informal agency proceeding by a new trial at the trial court level ensures that an adequate record will be created, which appellate courts can properly review. *Cordova*, 861 P.2d at 452.

The trial court's final orders and decrees from review of informal adjudicative proceedings of agencies may be appealed to the appellate courts. Utah Code Ann. § 78-2-2(3)(f) (Supp. 1993); Utah Code Ann. § 78-2a-3(2)(a) (Supp. 1993).

2. Review of Formal Agency Proceedings

Section 63-46b-16(4) of UAPA outlines the circumstances under which a reviewing court may grant relief from formal agency action. Utah Code Ann. § 63-46b-16(4)(1993); *Anderson v. Public Serv. Comm'n*, 839 P.2d 822, 824 (Utah 1992). Some standards of review are explicitly set forth in section 63-46b-16(4). Others have been provided by appellate courts in interpreting the statute. *See SEMECO Indus., Inc. v. State Tax Comm'n*, 849 P.2d 1167, 1170-75 (Utah 1993) (Durham, J., dissenting) (some provisions of 63-46b-16(4) "give little guidance concerning the standard of review the court should apply"); *see also Questar Pipeline Co. v. State Tax Comm'n*, 817 P.2d 316, 317 (Utah 1991); *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 584-87 (Utah 1991). The remainder of this administrative outline discusses the standards of review for formal agency proceedings and the following diagram provides a flow chart for standards of review for formal agency proceedings.

Illustration of Standards of Review for State Administrative Agency Proceedings



a. Challenging Findings of Fact

i. Substantial Evidence Standard

Under UAPA, an agency's factual findings will be affirmed "only if they are supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1988); *accord Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1385 (Utah 1993) (appellate courts review whole record to determine whether commission's factual finding is supported by substantial evidence); *Hales Sand & Gravel, Inc. v. Audit Div.*, 842 P.2d 887, 890 (Utah 1992); *Zissi v. State Tax Comm'n*, 842 P.2d 848, 852 (Utah 1992); *Jensen v. State Tax Comm'n*, 835 P.2d 965, 970 (Utah 1992); *Tasters Ltd., Inc. v. Department of Emp. Sec.*, 863 P.2d 12, 18 (Utah App. 1993), *cert. denied*, –P.2d– (Utah 1994); *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 858 P.2d 1034, 1036 (Utah App.), *cert. denied*, 870 P.2d 957 (Utah 1993); *Willardson v. Industrial Comm'n*, 856 P.2d 371, 374 (Utah App. 1993), *cert. granted*, 870 P.2d 957 (Utah 1994); *Albertsons, Inc. v. Department of Emp. Sec.*, 854 P.2d 570, 574 (Utah App. 1993); *Johnson v. Board of Review*, 842 P.2d 910, 911 (Utah App. 1992); *Stewart v. Board of Review*, 831 P.2d 134, 137 (Utah App. 1992); *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 67 (Utah App. 1989).

Substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990); *accord Mountain Fuel Supply Co. v. Public Serv. Comm'n*, 861 P.2d 414, 428 (Utah 1993); *Tasters*, 863 P.2d at 18; *Willardson*, 856 P.2d at 374; *Johnson*, 842 P.2d at 911; *Grace Drilling*, 776 P.2d at 68 (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). Substantial evidence is more than a mere "scintilla" of evidence and something less than the weight of the evidence. *Johnson*, 842 P.2d at 911; *Johnson-Bowles Co. v. Division of Sec.*, 829 P.2d 101, 107 (Utah App. 1991), *cert. denied*, 843 P.2d 516 (Utah 1992); *Grace Drilling*, 776 P.2d at 68.

When reviewing an agency's decision under the substantial evidence test, the reviewing court "does not conduct a de novo credibility determination or reweigh the evidence." *Questar Pipeline Co. v. State Tax Comm'n*, 850 P.2d 1175, 1178 (Utah 1993); *Ashcroft v. Industrial Comm'n*, 855 P.2d 267, 269 (Utah App. 1993) (reviewing court does not weigh the evidence). An appellate court will not substitute its judgment as between two reasonably conflicting views, even though it may have come to a different conclusion had the case come before it for de novo review. *Albertsons*, 854 P.2d at 575; *Stokes v. Board of Review*, 832 P.2d 56, 60 (Utah App. 1992) (agency's findings of fact are accorded substantial deference and "will not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible") (quoting *Hurley v. Board of Review*, 767 P.2d 524, 526-27 (Utah 1988)); *Tasters*, 819 P.2d at 365 (appellate court will not substitute its judgment as between two reasonably conflicting views). "It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences." *Albertsons*, 854 P.2d at 575 (quoting *Grace Drilling*, 776 P.2d at 68).

When applying the substantial evidence test under UAPA, appellate courts are required to consider not only the evidence supporting the Board's findings, but also the evidence negating them. *Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1385 (Utah 1993) ("[w]e consider both the evidence supporting the Commission's factual findings and the evidence that detracts from those findings"); *First Nat'l Bank*, 799 P.2d at 1165; *Tasters*, 863 P.2d at 18; *Albertsons*, 854 P.2d at 574-75; *Department of Air Force v. Swider*, 824 P.2d 448, 451 (Utah App. 1991).

Because a party seeking review of an agency order must demonstrate that the agency's factual determinations are not supported by substantial evidence, the reviewing court examines the facts and all legitimate inferences drawn therefrom in the light most favorable to the agency's findings. *Hales Sand & Gravel*, 842 P.2d at 888; *Zissi*, 842 P.2d at 852.

ii. Marshaling Cases

The following are cases involving appeals from administrative agencies in which appellate courts address the marshaling requirement. *Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1385 (Utah 1993) (party challenging commission's factual findings must marshal all evidence supporting agency's findings and show that despite supporting facts and all reasonable inferences that can be drawn therefrom, findings are not supported by substantial evidence given record as whole); *Hales Sand & Gravel, Inc. v. Audit Div.*, 842 P.2d 887, 893 (Utah 1992) (petitioner failed to marshal facts to show commission's finding was not supported by substantial evidence); *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990); *Tasters Ltd., Inc. v. Department of Emp. Sec.*, 863 P.2d 12, 18 (Utah App. 1993), *cert. denied*, –P.2d– (Utah 1994); *Johnson v. Board of Review*, 842 P.2d 910, 912 (Utah App. 1992) (appellant failed to properly marshal evidence, thus, factual findings of commission were accepted); *Intermountain Health Care, Inc. v. Board of Review*, 839 P.2d 841, 844 (Utah App. 1992) (appellant catalogued only evidence in record most helpful to its position, wholly neglecting to amass evidence supporting ALJ's findings); *Bhatia v. Department of Emp. Sec.*, 834 P.2d 574, 579 (Utah App. 1992) (board's findings accepted after petitioner only marshaled evidence emphasizing his own position); *Stokes v. Board of Review*, 832 P.2d 56, 58 (Utah App. 1992); *Stewart v. Board of Review*, 831 P.2d 134, 138 (Utah App. 1992) (petitioner marshaled evidence in support of ALJ's findings but failed to show how supporting evidence was not substantial); *Johnson-Bowles Co. v. Division of Sec.*, 829 P.2d 101, 107 (Utah App. 1991), *cert. denied*, 843 P.2d 516 (Utah 1992); *Department of Air Force v. Swider*, 824 P.2d 448, 451 (Utah App. 1991); *Heineke v. Department of Commerce*, 810 P.2d 459, 464 (Utah App. 1991) (even though appellate court will consider evidence contrary to findings in applying substantial evidence test, petitioner is still required initially to marshal only evidence which supports findings); *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989).

iii. Examples of Fact Questions

The following cases contain examples of factual issues reviewed under the substantial evidence standard of review.

(1) Whether a person has been served

with process. *In re Schwenke*, 865 P.2d 1350, 1354 (Utah 1993).

(2) Whether the commission properly accepted post-test-year adjustments. *Mountain Fuel Supply Co. v. Public Serv. Comm'n*, 861 P.2d 414, 424-25 (Utah 1993).

(3) Whether it is proper to use the capitalized net revenue method in property tax calculations. *Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1385-86 (Utah 1993).

(4) Whether assessment of fair market value by income and market methods rather than by cost method is proper. *Questar Pipeline Co. v. State Tax Comm'n*, 850 P.2d 1175, 1176-79 (Utah 1993).

(5) Whether an explicit bilateral agreement existed on the subject of title transfer. *Hales Sand & Gravel, Inc. v. Audit Div.*, 842 P.2d 887, 893 (Utah 1992).

(6) Whether amphetamine tablets are drugs sold by weight or by "dosage unit." *Zissi v. State Tax Comm'n*, 842 P.2d 848, 852-53 (Utah 1992).

(7) Whether the commission properly determined the amount of a tax deficiency. *Jensen v. State Tax Comm'n*, 835 P.2d 965, 970 (Utah 1992).

(8) Whether a party established a domicile in Utah and intended to remain in Utah for an indefinite time. *O'Rourke v. State Tax Comm'n*, 830 P.2d 230, 232 (Utah 1992).

(9) Whether the amount of a nonconsent penalty was proper. *Bennion v. ANR Prod. Co.*, 819 P.2d 343, 349 (Utah 1991).

(10) Whether the amount of an expense ratio on property was proper. *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165-66 (Utah 1990).

(11) Whether a heart attack was the result of a preexisting medical condition or employment activities. *Olsen v. Industrial Comm'n*, 797 P.2d 1098, 1099 (Utah 1990). *See Stokes v. Board of Review*, 832 P.2d 56, 60 (Utah App. 1992).

iv. Adequacy of Agencies' Factual Findings

"An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review." *LaSal Oil Co. v. Department of Envtl. Quality*, 843 P.2d 1045, 1047 (Utah App. 1992) (quoting *Adams v. Board of Review*, 821 P.2d 1, 4 (Utah App. 1991)).

The failure of an agency to make adequate findings of fact in material issues renders its findings "arbitrary and capricious" unless the evidence is clear and uncontroverted and capable of only one conclusion. *Hidden Valley Coal Co. v. Utah Board of Oil*, 866 P.2d 564, 568 (Utah App. 1993) (pre-UAPA case); *Adams v. Board of Review*, 821 P.2d 1, 4-5 (Utah App. 1991); *Nyrehn v. Industrial Comm'n*, 800 P.2d 330, 335 (Utah App. 1990), *cert. denied*, 815 P.2d 241 (Utah 1991).

An agency's failure to make adequate findings is prejudicial to the appealing party. *Adams*, 821 P.2d at 4-8 (absent adequate findings, petitioner wishing to challenge agency's factual findings will not be able to marshal evidence in support of findings).

Where the findings of the agency are inadequate, the case will be remanded unless the failure to make adequate findings of facts and conclusions of law is nevertheless harmless. *LaSal Oil*, 843 P.2d at 1048 (inadequacy of findings made meaningful review impossible, thus case was remanded to formulate more adequate findings); *Adams*, 821 P.2d at 7 (inadequacy of findings caused commission's order to be remanded for adequate findings).

b. Challenging Discretionary Rulings

i. Challenging Agency's Interpretation and Application of Statutes

Utah Code Ann. § 63-46b-16(4)(h)(i) provides that an appellate court may grant relief if an agency's interpretation or application of statutes is "an abuse of discretion delegated to the agency by statute." Appellate courts give this deference to an agency's statutory interpretation and construction only "when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language." *Morton Int'l v. State Tax Comm'n*, 814 P.2d 581, 589 (Utah 1991); *accord Nucor Corp. v. State Tax Comm'n*, 832 P.2d 1294, 1296 (Utah 1992) (agency discretion may be either express or implied and, if granted, results in review of agency action for abuse of discretion under section 63-46b-16(4)(h)(i)); *Cross v. Board of Review*, 824 P.2d 1202, 1204 (Utah App. 1992).

When such a grant of discretion exists, appellate courts will not disturb the agency's ruling unless its determination "exceeds the bounds of reasonableness and rationality." *Morton Int'l*, 814 P.2d at 587-88; *accord Uintah Oil Assoc. v. County Bd. of Equalization*, 853 P.2d 894, 896 (Utah 1993); *Union Pac. R.R. Co. v. Auditing Div.*, 842 P.2d 876, 881 (Utah 1992) (to extent legislature delegated to commission discretion to interpret sales tax statute, commission's construction is reviewed under reasonableness-and-rationality standard; otherwise, statutory construction is reviewed under correction-of-error standard); *Nucor*, 832 P.2d at 1296-97; *South Davis Community Hosp. v. Department of Health*, 869 P.2d 979, 981 (Utah App. 1994); *Tasters Ltd., Inc. v. Department of Emp. Sec.*, 863 P.2d 12, 19 (Utah App. 1993), *cert. denied*, –P.2d– (Utah 1994); *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 858 P.2d 1034, 1036-37 (Utah App.), *cert. denied*, 870 P.2d 957 (Utah 1993); *Luckau v. Board of Review*, 840 P.2d 811, 813 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993); *Wagstaff v. Department of Employment Sec.*, 826 P.2d 1069, 1071-72 (Utah App. 1992) (if agency has grant of discretion, "the agency is entitled to a degree of deference such that it should be affirmed if its decision is reasonable and rational"); *Cross*, 824 P.2d at 1204; *Department of Air Force v. Swider*, 824 P.2d 448, 451 (Utah App. 1991); *see also SEMECO Indus., Inc. v. State Tax Comm'n*, 849 P.2d 1167, 1170-74 (Utah 1993) (Durham, J., dissenting).

This review for reasonableness and rationality is the same standard as the "abuse of discretion" standard mentioned in Utah Code Ann. 63-46b-16(4)(h)(i). *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 858 P.2d 1034, 1037 (Utah App.) (when legislature has either explicitly or implicitly granted discretion to agency with respect to particular question, appellate courts review agency's decision under section 63-46b-16(4)(h)(i) for abuse of discretion), *cert. denied*, 870 P.2d 957 (Utah 1993); *King v. Industrial Comm'n*, 850 P.2d 1281, 1286 (Utah App. 1993) (in applying abuse-of-discretion standard to agency decisions, appellate court "will not disturb the agency's interpretation or application of the law unless its determination exceeds the bounds of reasonableness and rationality").

(a) Explicit Discretion

An explicit grant of discretion exists when a statute specifically authorizes an agency to interpret or apply statutory lan-

guage. *King v. Industrial Comm'n*, 850 P.2d 1281, 1287 (Utah App. 1993). An explicit grant of discretion to the agency can be found from statutory language such as: "unless it is shown to the satisfaction of the commission," "'as determined by the commission,'" "if the [commission determines that the] weight of the evidence supports that finding," and "considered [by the commission] if applicable." *Tasters Ltd., Inc. v. Department of Emp. Sec.*, 819 P.2d 361, 364 (Utah App. 1991), *cert. denied*, –P.2d– (Utah 1994) (quoting *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 588 & n.41 (Utah 1991)). Another example of an explicit grant of discretion can be found in Utah Code Ann. § 35-4-5(b)(1) (Supp. 1992), which states, "discharged for just cause . . . if so found by the commission." *Albertsons Inc. v. Department of Emp. Sec.*, 854 P.2d 570, 573 (Utah App. 1993).

(b) Implied Discretion[30]

If no explicit grant of discretion is given to the agency to interpret and administer the statute, the agency may have implied discretion. An implied grant may be found from statutory language such as "equity and good conscience." *Tasters Ltd., Inc. v. Department of Emp. Sec.*, 819 P.2d 361, 364 (Utah App. 1991), *cert. denied*, –P.2d– (Utah 1994) (quoting *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 588 & n.41 (Utah 1991)). Likewise, when the operative terms of a statute are broad and generalized, these terms "bespeak a legislative intent to delegate their interpretation to the responsible agency." *Morton Int'l*, 814 P.2d at 588 (quoting *Utah Dep't of Admin. Serv. v. Public Serv. Comm'n*, 658 P.2d 601, 610 (Utah 1983)).

However, when the legislative intent is not discernible by applying traditional rules of statutory construction, the agency has an implied grant of authority and its decision is reviewed for reasonableness and rationality. *Morton Int'l*, 814 P.2d at 589 (in "absence of a discernible legislative intent concerning the specific question in issue, . . . an appellate court should not substitute its judgment for the agency's judgment concerning the wisdom of the agency's policy"); *Nucor*, 832 P.2d at 1296. "[I]n the absence of a discernible legislative intent concerning the specific question in issue, a choice among permissible interpretations of a statute is largely a policy determination. The agency that has been granted authority to administer the statute is the appropriate body to make such a determination." *Morton Int'l*, 814 P.2d at 589.[31]

However, an implied grant is not found, and an appellate court grants no deference to an agency's interpretation of a statute, "when the court is in as good a position as the agency to interpret the general statutory provision in question, or 'when a legislative intent concerning the specific question at issue can be derived through traditional methods of statutory construction.'" *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 858 P.2d 1034, 1036 (Utah App. 1993), *cert. denied*, 870 P.2d 957 (Utah 1993) (quoting *Morton*, 814 P.2d at 589); *Pickett v. Utah Dep't of Commerce*, 858 P.2d 187, 191 (Utah App. 1993) (if statutory language is unambiguous and courts can interpret and apply statutory language by traditional methods of statutory construction, agency action is reviewed for correction of error as specified in section 63-46b-16(4)(d)); *King v. Industrial Comm'n*, 850 P.2d 1281, 1291 (Utah App. 1993); *Luckau v. Board of Review*, 840 P.2d 811, 813 (Utah App. 1992) ("[b]ecause we can ascertain the Rule's meaning by applying traditional rules of statutory construction, we find no implicit grant of discretion"), *cert. denied*, 853 P.2d 897 (Utah 1993); *Nucor Corp. v. State Tax Comm'n*, 832 P.2d 1294, 1296-97 & n.5 (Utah 1992); *Ferro v. Utah Dep't of Commerce*, 828 P.2d 507, 510 (Utah App. 1992).

"An explicit grant of discretion exists when a statute specifically authorizes an agency to interpret or apply statutory language."

ii. Challenging Determinations Contrary to Agency's Rule

Under Utah Code Ann. § 63-46b-16(4)(h)(ii) (1993), the appellate court reviews whether the agency action is contrary to a rule of the agency by applying an intermediate-deference reasonableness and rationality standard of review. *Thorup Bros. Constr., Inc. v. Auditing Div.*, 860 P.2d 324, 327 (Utah 1993); *SEMECO Indus., Inc. v. State Tax Comm'n*, 849 P.2d 1167, 1174 (Utah 1993) (Durham, J., dissenting); *Union Pac. R.R. v. State Tax Comm'n*, 842 P.2d 876, 879 (Utah 1992); *Kent v. Department of Emp. Sec.*, 860 P.2d 984, 986 (Utah App. 1993) (in reviewing agency's application of its own rules, court reviews for reasonableness and rationality); *Holland v. Career Serv. Review Bd.*, 856 P.2d 678, 681 (Utah App. 1993); *Ashcroft v. Industrial Comm'n*, 855 P.2d 267, 269-70 (Utah App. 1993) (63-46b-16(4)(h)(ii) issue requires appellate courts to consider whether agency acted contrary to its own rule, and decision will not be disturbed unless it exceeds bounds of reasonableness and rationality).

iii. Challenging Rulings Contrary to Agency's Prior Practice

Under Utah Code Ann § 63-46b-16(4)(h)(iii) (1993), the appellate court reviews whether the agency action is contrary to the agency's prior practice and whether the inconsistency has a fair and rational basis. If the challenging party can prove by a preponderance of the evidence that the agency's action was contrary to prior practice, the agency's reason for the inconsistency or argument of consistency is reviewed under a reasonableness and rationality standard of review. *SEMECO Indus., Inc. v. Auditing Div.*, 849 P.2d 1167, 1174 (Utah 1993) (Durham, J., dissenting); *B.J. Titan Servs. v. State Tax Comm'n*, 842 P.2d 822, 831 (Utah 1992) (appellate courts use reasonableness and rationality standard to review actions under subsection (4)(h)(iii)); *Pickett v. Utah Dep't of Commerce*, 858 P.2d 187, 191 (Utah App. 1993) (if agency sets forth its rationale for deviation from its own precedent or explanation to demonstrate consistency, court's review of explanation will be on basis of reasonableness and rationality).

iv. Challenging Agency's "Arbitrary and Capricious" Actions

Under Utah Code Ann. § 63-46b-16(4)(h)(iv) (1993), when a claim is brought alleging that an agency action was arbitrary and capricious, the appellate court reviews the agency action for reasonableness and rationality. *Anderson v. Public Serv. Comm'n*, 839 P.2d 822, 824

(Utah 1992).

c. Challenging Conclusions of Law

If, as discussed above, an administrative agency has not been granted discretion in interpreting and administering a statute, pursuant to Utah Code Ann. § 63-46b-(4)(d) (1993), appellate courts review the agency decision interpreting statutory law under a correction of error standard. *Uintah Oil Assoc. v. County Bd. of Equalization*, 853 P.2d 894, 896 (Utah 1993) (if no express or implied grant of discretion exists, statutory interpretation or application by agency will be reviewed without deference under a correction of error standard); *Union Pac. R.R. Co. v. Auditing Div.*, 842 P.2d 876, 881 (Utah 1992); *Nucor Corp. v. State Tax Comm'n*, 832 P.2d 1294, 1296 (Utah 1992); *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 588 (Utah 1991)("absent a grant of discretion, a correction-of-error standard is used in reviewing an agency's interpretation or application of a statutory term"); *South Davis Community Hosp. v. Department of Health*, 869 P.2d 979, 981 (Utah App. 1994) (under UAPA, appellate courts review agency decision interpreting statutory law under correction of error standard, unless legislature has granted agency discretion in interpreting and administering statute); *Willardson v. Utah Indus. Comm'n*, 856 P.2d 371, 374 (Utah App. 1993), *cert. granted*, 870 P.2d 957 (Utah 1994); *Tasters Ltd., Inc. v. Department of Emp. Sec.*, 863 P.2d 12, 19 (Utah App. 1993), *cert. denied*, –P.2d– (Utah 1994); *Walls v. Industrial Comm'n of Utah*, 857 P.2d 964, 966 (Utah App. 1993); *Luckau v. Board of Review of the Indus. Comm'n*, 840 P.2d 811, 813 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1993); *Stokes v. Board of Review*, 832 P.2d 56, 58 (Utah App. 1992).

i. Interpretation of General Law

When an agency interprets or applies general law such as case law, constitutional law, or non-agency specific legislative acts, the appellate courts review the agency interpretations under a correction of error standard pursuant to Utah Code Ann. § 63-46b-16(4)(d). *Zissi v. Tax Comm'n*, 842 P.2d 848, 852-53 & n.2 (Utah 1992) (issues of law are reviewed for correctness under § 63-46b-16(4)(d)); *Questar Pipeline Co. v. State Tax Comm'n*, 817 P.2d 316, 318 (Utah 1991) (questions of general law reviewed "under a correction of error standard, giving no deference to the agency's decision"); *Savage Indus., Inc. v. Tax Comm'n*, 811 P.2d 664, 669 (Utah 1991) (finding agency's erroneous interpretation of law is grounds for relief under § 63-46b-16(4)(d)); *Maverik Country Stores, Inc. v. Industrial Comm'n*, 860 P.2d 944, 949 (Utah App. 1993) (agency's application or interpretation of "general law" is reviewed under section 63-46b-16(4)(d) for correction of error); *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 858 P.2d 1034, 1036 (Utah App.) ("we apply the least deferential correction-of-error standard when reviewing questions of general statutory interpretation"), *cert. denied*, 870 P.2d 957 (Utah 1993); *Willardson v. Industrial Comm'n*, 856 P.2d 371, 374 (Utah App. 1993) ("[w]e review Commission's interpretation of general questions of law under a correction-of-error standard, with no deference given to the expertise of the Commission"), *cert. granted*, 870 P.2d 957 (Utah 1994); *King v. Industrial Comm'n*, 850 P.2d 1281, 1285 (Utah App. 1993).

"The appellate process is a joint intellectual effort requiring teamwork between the bench and the bar."

The correction of error standard is applied not simply because the court characterizes an issue as one of general law, but because the agency has no special experience or expertise placing it in a better position than the courts to construe the law. *Morton Int'l*, 814 P.2d at 586-87; *Niederhauser*, 858 P.2d at 1036; *King*, 850 P.2d at 1285-86.

ii. Interpretation of Agency-Specific Law

If an agency has not been granted discretion, its interpretation and application of agency-specific law also falls under Utah Code Ann. § 63-46b-16(4)(d) and is reviewed for correction of error. *Nucor Corp. v. State Tax Comm'n*, 832 P.2d 1294, 1296 (Utah 1992); *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 589 (Utah 1991); *King v. Industrial Comm'n*, 850 P.2d 1281, 1285 (Utah App. 1993).

iii. Challenges to the Constitutionality of a Statute or Rule

Under Utah Code Ann. § 63-46b-16(4)(a) (1993), the appellate court reviews the constitutionality of the statute upon which an agency's action is based without deference under a correction of error standard. *Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1384 (Utah 1993) ("[w]hen reviewing the Commission's conclusions as to the legality or constitutionality of tax statutes, we afford no deference because they are conclusions of law and are therefore reviewed for correctness"); *Union Pac. R.R. Co. v. Auditing Div.*, 842 P.2d 876, 881 (Utah 1992); *Amax Magnesium Corp. v. Utah State Tax Comm'n*, 796 P.2d 1256, 1258 (Utah 1990); *Velarde v. Board of Review*, 831 P.2d 123, 125 (Utah App. 1992).[32]

iv. Challenges to an Agency's Jurisdiction

Under Utah Code Ann. § 63-46b-16(4)(b), the appellate court reviews the jurisdiction of an agency under a correction of error standard. *Bennion v. ANR Prod. Co.*, 819 P.2d 343, 349 (Utah 1991).

v. Challenges to an Agency's Failure To Decide All Necessary Issues

Under Utah Code Ann. 63-46b-16(4)(c), the appellate court reviews whether the agency has decided all of the issues requiring resolution. Questions implicating this subsection are reviewed under a correction of error standard. *SEMECO Indus., Inc. v. Auditing Div.*, 849 P.2d 1167 (Utah 1993) (Durham, J., dissenting); *see Zimmerman v. Industrial Comm'n*, 785 P.2d 1127, 1132 (Utah App. 1989) (no error in failing to make finding of tentative permanent disability).

vi. Challenges to Agency's Procedure or Decision-Making Process

Under Utah Code Ann. § 63-46b-16(4)(e), the appellate court reviews the procedures and decision-making process of an agency under a correction of error standard. *Krantz v. Utah Dep't of Commerce*, 856 P.2d 369, 370-71 (Utah App. 1993); *see SEMECO Indus., Inc. v. Auditing Div.*, 849 P.2d 1167, 1172 (Utah 1993) (Durham, J., dissenting); *King v. Indus-*

trial Comm'n, 850 P.2d 1281, 1284-92 (Utah App. 1993) (recognizing differing standards of review under various subsections of section 63-46b-16(4)).

vii. Challenges to the Constitution of the Agency

Under Utah Code Ann. § 63-46b-16(4)(f), the appellate court reviews whether "the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification." This subsection is reviewed under the correction of error standard. *SEMECO Indus., Inc. v. Auditing Div.*, 849 P.2d 1167, 1172 (Utah 1993) (Durham, J., dissenting).

d. Appeals From the State Tax Commission

The appellate advocate should be aware of Utah Ann. § 59-1-610 (Supp. 1993), which codified a separate standard of review for appeals from formal adjudicative proceedings before the state tax commission. This statute became effective on May 3, 1993, and superseded section 63-46b-16 pertaining to judicial review of formal adjudicative proceedings. *Board of Equalization v. State Tax Comm'n*, 864 P.2d 882, 884 (Utah 1993).

The standard of review for written findings of fact from formal adjudicative proceedings by the Utah State Tax Commission remains a substantial evidence standard. Utah Code Ann. §59-1-610(1) (Supp. 1993). The standard of review for conclusions of law is the correction of error standard "unless there is an explicit grant of discretion contained in a statute at issue before the appellate court." Utah Ann. § 59-1-610(1)(b) (Supp. 1993); *accord 49th Street Galleria v. State Tax Comm'n*, 860 P.2d 996,999 (Utah App. 1993). This section applies to cases filed before the effective date of the section. *See OSI Indus., Inc. v. Utah State Tax Comm'n*, 860 P.2d 381, 383 (Utah App. 1993) (applying section 59-1-610 retroactively because it is procedural, rather than substantive); *accord Board of Equalization v. State Tax Comm'n*, 864 P.2d 882, 884 (Utah 1993) (holding section 59-1-610 applies to actions commenced before its effective date).

CONCLUSION

The appellate process is a joint intellectual effort requiring teamwork between the bench and the bar. Appellate advocates are vital members of the team and their briefs and arguments are crucial to the judges' decision-making. The importance of their role and contribution should be recognized. When material for an opinion can be lifted directly from a brief, the appellate judge rejoices. For example, the phrase set forth in advocate Daniel Webster's brief: "An undaunted power to tax involves, necessarily, the power to destroy," became Chief Justice Marshall's: "The power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

The effective advocate will carefully scrutinize the standards of review applicable to issues under consideration for appeal. If the standard is ignored or misplaced, chances for success are jeopardized. If the proper standard is selected and applied, the odds for success are improved. I wish you well as you pursue excellence in the arena of appellate advocacy.

[1]Annina M. Mitchell, Deputy Solicitor General; Chair, Appellate Practice Section, Utah State Bar, J.D., 1975. The first "summary" consisted of a three page handout for the Court of Appeals Symposium, University of Utah College of Law, November 5, 1987, which expanded substantially during Ms. Mitchell's tenure at the court. Thereafter, Sharon Kishner, Claralyn Hill, and David Fonda contributed to the document. Further, my present law clerk, Lisa Broderick Thornton has been responsible for the final draft, assisted by B.Y.U. externs Loyal Hulme, Chad King, James MacKinlay and Christopher Williams.

[2]Although Rule 24(a)(5) does not specifically mention administrative proceedings, appellants seeking review of issues on appeal from administrative determinations must also properly preserve those issues. *See Ashcroft*, 855 P.2d at 268; *USX Corp. v. Industrial Comm'n*, 781 P.2d 883, 887 (Utah App. 1989).

[3]For a more complete discussion of discretion issues, see section I(B)(1), an Introduction to Challenging Discretionary Rulings.

[4]Although this marshaling discussion falls under the "Appeals From Trial Courts" heading, appellants challenging factual findings made by administrative agencies must also properly marshal the evidence. Thus, administrative cases discussing the marshaling requirement are included here, as well as in the administrative agency section of this article.

[5]Occasions exist when marshaling would prove ineffectual. In such situations, appellants are advised to marshal the evidence to the degree possible and then explain the reason for any deficiency. Appellants should not merely ignore the marshaling requirement. For example, situations arise when there may be no evidence in the record supporting the factual findings. *Krauss v. Utah State Dep't of Transp.*, 852 P.2d 1014, 1022 (Utah App. 1993) (record contained no evidence to support jury's verdict), *cert. denied*, 862 P.2d 1356 (Utah 1993); *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1339 n.7 (Utah App. 1991) (no evidence existed in record to support finding).

Similarly, if the factual findings are legally inadequate, the exercise of marshaling the evidence in support of the findings is futile. *Barnes v. Barnes*, 857 P.2d 257, 259 (Utah App. 1993) (if factual findings are inadequate, marshaling exercise is futile and appellant is under no obligation to marshal); *Adams v. Board of Review*, 821 P.2d 1, 8 (Utah App. 1991) (absent adequate findings, petitioner wishing to challenge administrative agency's factual findings will not be able to marshal evidence in support of findings).

For example, if the trial court's findings of fact are con-

clusory in nature, that is, they do not contain enough detail to clearly show the evidence upon which they are grounded, attempts to marshal will prove largely ineffectual. *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991) (appellants need not marshal evidence when findings are so inadequate that they cannot be meaningfully challenged as factual determinations; rather, appellant can simply argue legal insufficiency of court's findings as framed). Sections of this article entitled "Adequacy of Trial Court's Factual Findings" and "Adequacy of Agency's Factual Findings" provide a more complete discussion on inadequacy of findings of fact made by a trial court or administrative agency.

[6]Utah Rule of Appellate Procedure 24(e).

[7]Sections I(A)(3)(a), (4)(a), (5)(a), and (6)(a) of this article provide a more complete discussion of this requirement.

[8]For example, if a trial court errs in interpreting a statute, the factual findings are often inadequate in light of the incorrect interpretation. Accordingly, the case must be remanded for adequate findings. *See Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282, 1288 (Utah 1993).

[9]Several of these examples arise in criminal jury trials but deal with motions made to the trial judge concerning fact-dependent issues, such as motions to suppress evidence. Factual determinations by the judge, whether in a bench trial or in a jury trial, are reviewable under the clearly erroneous standard.

[10]This, along with several other examples below, are underlying or subsidiary factual questions leading to a legal conclusion. The legal conclusion in this case is whether the defendant voluntarily waived his right to counsel.

[11]For example, Rule 12(c) of the Utah Rules of Criminal Procedure requires the trial court to specify its findings on the record when resolution of factual issues is necessary to the disposition of a motion. *See State v. Genovesi*, 871 P.2d 547, 548 (Utah App. 1994); *State v. James*, 858 P.2d 1012, 1014-15 (Utah App. 1993).

[12]This standard remains even when much of the evidence is circumstantial. *Span*, 819 P.2d at 332; *Barlow*, 851 P.2d at 1193.

[13]The legal rules are determined without deference to the trial courts. *Pena*, 869 P.2d at 937.

[14]Areas of discretion surrounded by boundaries have also been described as "fields of inquiry," *State v. Harmon*, 854 P.2d 1037, 1040 n.2 (Utah App.), *cert. granted*, 868 P.2d 95 (Utah 1993); *State v. Rochell*, 850 P.2d 480, 485 n.3 (Utah App. 1993) (Bench, J., concurring); *State v. Barnhart*, 850 P.2d 473, 475 (Utah App. 1993); *State v. Richardson*, 843 P.2d 517, 525 (Utah App. 1992) (J. Bench, concurring), "holes in doughnuts," Ronald Dworkin, *Taking Rights Seriously* 31 (1977), and "uncharted minefields." Rugerro J. Aldisert, *Opinion Writing* 63, 65 (1990).

[15]Most examples of challenges to discretion exercised during trial arise in the evidence context, covered later in this article.

[16]However, "if the trial court has made a determination of law that provides a premise for its denial of a new trial, such legal decision is reviewed under a correctness standard." *Crookston*, 860 P.2d at 938; see *State v. Thurman*, 846 P.2d 1256, 1279 n.11 (Utah 1993); *State v. Ramirez*, 817 P.2d 774, 781 n.3 (Utah 1991); *State v. Petersen*, 810 P.2d 421, 425 (Utah 1991).

[17]Most examples of challenges to discretion exercised during trial arise in the evidence context, covered later in this article.

[18]However, "if the trial court has made a determination of law that provides a premise for its denial of a new trial, such legal decision is reviewed under a correctness standard." *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993); *see State v. Thurman*, 846 P.2d 1256, 1279 n.11 (Utah 1993); *State v. Ramirez*, 817 P.2d 774, 781 n.3 (Utah 1991); *State v. Petersen*, 810 P.2d 421, 425 (Utah 1991).

[19]Although appellate courts usually refer to legal determinations as "questions of law," *Dubois v. Grand Central*, 872 P.2d 1073, 1076 (Utah App. 1994), or "legal conclusions," *Shaw v. Layton Constr. Co.*, 872 P.2d 1059, 1061 (Utah App. 1994); *Brown v. Weis*, 871 P.2d 552, 558 (Utah App. 1994), they have also been labeled as "ultimate facts," *State v. Harmon*, 854 P.2d 1307, 1340 (Utah App. 1993); *State v. Rochelle*, 850 P.2d 480, 485 (Utah App. 1993), and "ultimate determinations," *State v. Bean*, 869 P.2d 984, 985 (Utah App. 1994); *State v. Genovesi*, 871 P.2d 547, 551 (Utah App. 1994).

[20]Several of these examples necessarily include underlying or subsidiary factual questions leading to the ultimate legal question.

[21]Additionally, appellate courts will review the *sufficiency* of the trial court's findings of fact for correctness. *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991); *State v. Pharris*, 846 P.2d 454, 459 (Utah App.), *cert. denied*, 857 P.2d 948 (Utah 1993).

[22]Several of these examples necessarily include underlying or subsidiary factual questions leading to the ultimate legal question.

[23]Whether a person has been *properly* served, however, is a question of law. *Reed v. Reed*, 806 P.2d 1182, 1184 n.3 (Utah 1991).

[24]*But cf. Hall v. Hall*, 858 P.2d 1018, 1025 (Utah App. 1993) ("unstated findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made"); *accord State v. Ramirez*, 817 P.2d 774, 787-88 n.6 (Utah 1991).

[25]However, whether a person has been served with process is a question of fact. *Carnes v. Carnes*, 668 P.2d 555, 557 (Utah 1983).

[26]However, note *Rangel*, 866 P.2d at 613 n.7, which suggests that Rule 615 takes away the trial court's discretion to exclude a witness, who is also the victim, during the testimony of other witnesses, in apparent conflict with Utah Code Ann. § 78-7-4 (1992).

[27]Whether specific conduct amounts to a violation of Rule 11 is a question of law. *Rimensburger v. Rimensburger*, 841 P.2d 709, 711 (Utah App. 1992); *Jeschke v. Willis*, 811 P.2d 202, 204 (Utah App. 1991); *Taylor v. Estate of Taylor*, 770 P.2d 163, 171 (Utah App. 1989). Therefore, an appellate court reviews the trial court's determination that a violation has occurred for correctness. *Rimensburger*, 841 P.2d at 711; *Jeschke*, 811 P.2d at 204.

[28]"If a Rule 11 violation is shown, an appropriate sanction is mandated, and we will affirm the particular sanction imposed by the trial court, including the reasonableness of any fee award, absent an abuse of discretion." *Taylor*, 770 P.2d at 171. "We are mindful that Rule 11 gives trial courts great leeway to tailor the sanction to fit the requirements of the particular case." *Id.*

[29]UAPA is codified at Utah Code Ann. § 63-46b-0.5 to -16 (1993).

[30]Whether an agency has been granted implied discretion to interpret or apply a statute, and thus, whether the courts should apply the reasonableness standard of review, has been the subject of much debate. I refer the reader to the following cases for assistance: *SEMECO Indus., Inc. v. State Tax Comm'n*, 849 P.2d 1167, 1170-75 (Utah 1993) (Durham, J., dissenting); *Morton*, 814 P.2d at 583-589; *Employers' Reinsurance Fund v. Industrial Comm'n*, 856 P.2d 648, 650-51 (Utah App. 1993); *King v. Industrial Comm'n*, 850 P.2d 1281, 1284-92 (Utah App. 1993).

[31]While some agency interpretations and applications of statutory law receive discretion, "no agency enjoys the discretion to exceed the authority vested in it by the Legislature" and such will be reviewed for legal error, without deference. *Tasters*, 863 P.2d at 19; *see* Utah Code Ann. § 63-46b-16(4)(d) (1993); *LaSal Oil Co. v. Department of Envtl. Quality*, 843 P.2d 1045, 1047 (Utah App. 1992); *Adams v. Board of Review*, 821 P.2d 1, 4 (Utah App. 1991).

[32]However, interpretations of the state and federal constitutions are questions of law, reviewed for correctness under Utah Code Ann. § 63-46b-16(4)(d). *Questar Pipeline Co. v. State Tax Comm'n*, 817 P.2d 316, 317-18 (Utah 1991).

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Thomas D. Morgan — Oppenheim Professor of Antitrust and Trade Regulation Law, George Washington University National Law Center. Topic: ***"Rights of the Individual Attorney in Balance with Duties to Clients, the Court, and the Profession"***

Bruce C. Hafen — Provost, Brigham Young University; former Dean, J. Reuben Clark Law School. Topic: ***"Individual Autonomy and Children's Rights: Are There Limits?"***

John T. Kesler — President and co-founder, Woodbury & Kesler; President, Resolution Management Group; Founder and president, The Civil Society (social and political reform organization); with **Larry Spears** — Executive Director, North Dakota Consensus Council, Inc.. Topic: ***"Toward the Common Good: Public Policy Concensus and the Northern Dakota Concensus Counsel Experience"***

James D. Gordon III — Professor of Law, J. Reuben Clark Law School; writer, humorous and legal topics. Topic: ***"Academic Freedom at Religious Universities: Rights and Duties"***

Commission Highlights

During its regularly scheduled meeting of May 26, 1994, held in Vernal, Utah, the Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the April 28, 1994 meeting.
2. The Board voted to approve holding a special election to fill a vacated position on the Bar Commission as soon as possible in the Third Division for a three-year term and to modify the Rules to allow for special elections.
3. J. Michael Hansen reported on the Judicial Nominating Commission Procedures Manual. Hansen indicated that the rules have been adopted by the Judicial Council on an emergency basis and are subject to a public comment period and depending on the comments, the rules will then be finalized and published.
4. The Board discussed the recusal policy in the Judicial Nominating Commission Procedures Manual. The Board voted that should a recusal result in a vacancy on a nominating commission the vacancy should be filled in the same manner as originally filled and that the Bar should send a letter recommending this amendment to the rules.
5. Jim Clegg, a member of the Appellate Management Task Force, reviewed the issues discussed by the Task Force at its last meeting.
6. The Board voted to endorse the Collection Task Force proposed Recommendations Nos. 1-10 with amended language and not to endorse 6 and 8.
7. The Board voted to recommend amending the Code of Judicial Administration and to ask the Court to require that collection agency lawyers certify that they are not fee splitting.
8. Gary Sackett, Chair of the Ethics Advisory Opinion Committee, appeared to comment on Opinion #111.
9. Carol Clawson, Assistant Attorney General, and Karl L. Hendrickson, Deputy County Attorney appeared to present the position of their offices with regard to Ethics Advisory Opinion No. 115R.
10. The Board voted to nominate members of the newly constituted trial court judicial nominating commission for submission to the governor.
11. Keith A. Kelly, Delivery of Legal Services Committee Chair, appeared to report on the Committee's pro bono program proposals.
12. The Board voted to propose a rule to allow inactive lawyers to engage in pro bono work but to make participation conditional that lawyers come under the organization's umbrella professional liability insurance program and that participants meet minimal CLE requirements as established by the Mandatory Continuing Legal Education Board.
13. The Board voted to endorse the concept of the Delivery of Legal Services Committee proposal and directed the Executive Director to look at how the proposal would affect Bar operations and report on the estimated impact at a future meeting.
14. Paul Moxley reported on the recent Long-Range Planning Committee meeting.
15. Budget & Finance Committee Chair, Ray Westergaard, reviewed the April financials.
16. The Board voted to approve the recommendations of the Client Security Fund Committee to pay $5,150 out of the Fund.

During its Annual Meeting of June 29, 1994, held in Sun Valley, Idaho, the Bar Commission received the following reports and took the actions indicated.

1. Jim Clegg welcomed incoming commissioners, Fran Wikstrom, representing the Third Division; David Nuffer, representing the Fifth Division; and new Ex Officio member, Mary Ellen Sloan, representing the Women Lawyers.
2. Timothy M. Shea, Administrative Office of the Courts, and James B. Lee appeared to review the preliminary Utah Family Court Task Force Report.
3. The Board voted to adopt Ethics Advisory Opinion No. 111 with a language change and allow publication in the *Bar Journal* for a sixty-day comment period.
4. The Board voted to appoint the following as ex officio members of the Bar Commission for the upcoming year. The Dean of the University of Utah School of Law; The Dean of the Brigham Young University College of Law; The Bar Commission's Representative to the ABA House of Delegates; The Utah ABA delegations Delegate to the ABA House of Delegates; The Young Lawyers Division President; The Immediate Past President of the Bar; A Representative of the Minority Bar Association; A Representative of the Women Lawyers of Utah.
5. The Board voted to appoint Mike Hansen to a one-year term as the Bar Commission representative on the Judicial Council and to be an ex officio member of the Bar Commission.
6. Mike Hansen appeared to report on the Judicial Council meeting currently in session.
7. The Board voted to approve a list of student applicants to take the July 1994 Bar Examination and to provisionally approve a list of attorney applicants pending a favorable recommendation of the Character & Fitness Committee after they receive investigative reports from the National Conference of Bar Examiners.
8. Suzanne Verhaal and Mary Lou Peterson of the Legal Assistants Association of Utah presented a proposal for creation of a Legal Assistant Division of the Bar.
9. The Board voted to approve the 1994-95 final budget and decided to discuss approval of any discretionary items for specific programs at the July meeting.
10. The Board voted to renew the Executive Director's contract for another year.
11. The Board voted to oppose the proposed in-house counsel licensing rule.
12. The Board voted to ask the Unauthorized Practice of Law Committee to formulate a plan for enforcement of UPL rules against in-house counsel who might not be licensed.
13. The President-Elect and new Commissioners were seated.

A full text of the minutes of these and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

Bar Commission Accepts Recommendations of Collection Task Force

In late October of 1993 Jim Clegg, then President of the Bar, appointed a task force to study collection practices after receiving a letter of concern from Judge Michael K. Burton, Chairman of the Circuit Court Board of Judges. The Task Force members[1] consisted of representatives from the Judiciary, the Collection Section of the Bar, collection attorneys not presently members of the Section, a representative from Legal Aid whose practice concentrated in fair debt collection practice litigation, a retired Utah Supreme Court Justice, disciplinary counsel, a representative from the Utah Attorney General's Consumer Protection Division, representatives of the Young Lawyers Division Consumer Credit Counseling Committee, a collection agency owner, and a legislative counsel.

Each member of the Task Force expressed the abuses, system failures and inadequacies that they had observed or become aware of, each of which involved acts or omissions by some 1) members of the Bar, 2) the Judiciary, and 3) collection agencies.

The Task Force has studied each problem, invited and received many comments from collection agencies, debtors, and collection attorneys. As a result, the Task Force has submitted recommendations, guidelines, ethics opinions revisions and proposals to the Bar Commission,[2] the Circuit Court Board of Judges, the Young Lawyers Division (which is presently engaged in drafting legislation for the licensing of collection agencies) as well as the Judicial Council.

A Preliminary Report of the Task Force was circulated to interested parties on January 26, 1994 and an open forum was held on February 28, 1994 where representatives of numerous collection agencies commented on the ten Recommendations of the Task Force.

The Bar Commission, considered this Preliminary Report on March 10, 1994 at the mid-year meeting and on May 26, 1994 at the Vernal meeting and after considering the comments from interested parties and the policy reasons behind the proposed recommendations, approved eight of the ten recommendations.[3]

Accordingly, the following Recommendations have been approved.[4] Following each Recommendation are questions frequently asked by members of the Bar and Collection Community. Answers have been provided by the Task Force after due consideration.

Recommendation 1: Attorneys for creditors and attorneys for collection agencies must maintain, in their possession, the physical files related to each collection case.

Question: As an attorney, representing collection agency, exactly what constitutes the "file" which I must physically have in my possession?

Answer: The original underlying document(s) evidencing the debt, such as the consumer contract, check, etc., together with all pleadings and correspondence between the debtor and your client the collection agency. Of course the agency-client may maintain a copy of the file.

Question: Why?

Answer: Debtors are frustrated and a sham is perpetrated on the Court when a debtor calls an attorney's office regarding a summons, complaint, default, etc. only to have the caller referred to the agency since the "attorney knows nothing about the case." Each attorney who files a lawsuit must be conversant with the facts of the complaint (Rule 11, Utah Rules of Civil Procedure) to intelligently respond to an inquiry from the defendant and the Court. For the attorney to reply only on computer notes generated by the agency is insufficient since the best evidence of what is in correspondence or a relevant document is that document itself. Further, attorneys must have physical possession of the file to control the litigation. This requirement is consistent with Rule 5.4, Professional Independence of a Lawyer, Rules of Professional Conduct (RPC).

Recommendation 2: Non lawyers employed by collection agencies or creditors may not prepare pleadings.

Question: Why can't non lawyers employed by collection agencies use a "standardized" summons and complaint which the attorney has drafted and merely fill in the debtors name, address and amount owed if reviewed and signed by the lawyer before serving and filing?

Answer: Because the legislature, apparently noting the potential for "rubber stamping" by attorneys when handed a stack of summons and complaints has prohibited such conduct as reflected in U.C.A. §12-1-8.[5]

Question: May non lawyers employed by collection agencies or creditors send demand letters using lawyer letterhead?

Answer: No. Non lawyers may only act under the direct supervision and control of a lawyer as specified in Rule 5.3, RPC. If the non lawyer, presumably a paralegal, is employed by an attorney, in the attorney's office and under the attorney's control demand letters may be signed by the non lawyer if the signature clearly indicates that it is on behalf of the lawyer. For example: "Cyndi Snow, Paralegal for Stephen Collector, Attorney at Law."

Recommendation 3: All legal fees awarded in collection cases belong to the

attorney and shall not be shared with agencies or clients as collection fees, administrative costs, paralegal support, clerical costs, equipment rental, etc.

Question: Didn't Ethics Opinion No. 100, issued by the Ethics Advisory Committee and approved by the Bar Commission on July 27, 1990 allow for sharing or "gifting" of fees to collection agencies.

Answer: Utah Ethics Opinion No. 100 referred to the case of *National Treasury Employees' Union v. U.S. Dept of Treasury*, 656 F.2d 848 (D.C. Cir 1981) where "the court refused to award the union more than the actual cost of legal services" citing Rule 5.4 RPC. However the ethics opinion then went on to cite dicta in the Court's opinion allowing a lawyer to "donate some or all of their fees to charity or even their employer" *Id.* at 852-853. The Utah Bar Commission has stricken this dicta from Ethics Opinion No. 100 to prohibit the "gifting" of fees which the Commission believes could be used to circumvent Rule 5.4, RPC.

Question: Can attorneys rent computer or other equipment from their collection agency clients?

Answer: Yes. However the burden will be on the attorney to prove that the rental rate does not exceed fair market value and is therefore not another attempt at circumventing Rule 5.4, RPC.

Question: May attorneys share, lease or employ part time employees, officers, directors or owners of their collection agency client?

Answer: No. The inherent problems of assuring confidentiality, control and conflicts requires a prohibition.

Question: Can attorneys office in the same building as their collection agency clients?

Answer: Yes, but their offices and in particular their files must be accessible only to the lawyer and his staff in order to assure control and confidentiality.

Question: Can attorneys office in the same office suite as a collection agency client?

Answer: Yes, but a separate and distinct office that can be secured and is only accessible by the attorney must be utilized to assure confidentiality and control.

Recommendation 4: Non lawyers employed by attorneys, agencies or creditors may not examine witnesses at any judicial proceeding and any lawyer acquiescing in this proscribed activity is aiding the unauthorized practice of law in violation of Rule 5.5(b), RPC.

Question: Can attorneys take their paralegal or other support staff to court and have them do purely administrative tasks such as collecting money from debtors who acknowledge their debt and merely want to pay it off?

Answer: Yes; provided that there is no intimidation, verbal abuse or other discourse regarding the validity of the underlying debt between the paralegal and the defendant. Additionally there can be no discussion regarding compromising attorney fees.

Question: Can an attorney use anyone other than his/her own employee at post judgment proceedings?

Answer: No, the attorney must maintain control through supervision of *their employees* and be responsible for their conduct via the RPC.

Recommendation 5: Lawyers may

own a proprietary interest in collection agencies but may not concurrently represent the agency in civil litigation of creditor assignments.

Question: Doesn't Ethics Advisory Opinion No. 111, approved by the Bar Commission on July 29, 1992, reverse Ethics Advisory Opinion No. 45 and allow a lawyer to have a financial interest in a collection agency *and* represent the agency in assigned accounts?

Answer: It was the opinion of the Utah Ethics Advisory Committee that the U.S. Supreme Court's opinions beginning with *Bates v. Arizona*[6] and in particular *Shapero v. Kentucky Bar Association*[7] made the reasoning of Opinion No. 45 (1978) inapplicable today. However, that Committee properly referred to U.C.A. § 78-51-27(1) (1953)[8] which prohibits a lawyer from suing on an assigned debt but offered no *legal* opinion. However, the Bar Commission has considered §78-51-27 and has modified Opinion 111 "to the extent that it is inconsistent with U.C.A. §78-51-27(1) (1953)." Thus lawyers are prohibited from agency ownership *and* legal representation of the agency by statute. A lawyer engaging in such conduct violates Rule 21(a) of the Rules of Integration which states "It is a duty of an attorney and counselor: to support the Constitution and the laws of the United States and of this state." It is therefore the opinion of the Office of Attorney Discipline that a violation of Rule 21(a) noted above would also be a violation of Rule 8.4(d) of the RPC which states "It is professional misconduct for a lawyer to (d) engage in conduct that is prejudicial to the administration of justice."

Recommendation 6: Lawyers are prohibited from acting as "in house counsel" or "corporate counsel" for a collection agency when that position entails the sale of legal services to a third party such as a creditor.

Question: Can an independent lawyer be retained by a collection agency to collect on an assigned debt?

Answer: Yes; they simply cannot be employed as in-house counsel for an agency and as part of the agency's services to creditors provide legal services in the form of collecting debts by filing lawsuits.

Recommendation 7: Judges should preside over all judicial proceedings, including supplemental proceedings.

Recommendation 8: Judges should assure that only licensed attorneys are engaged in the practice of law in their court with respect to their cases.

The Task Force has formally requested the Judicial Council to consider certain proposed amendments to C.J.A. 4-505.1. The proposed changes would require an attorney to file an affidavit with each case stating that the attorney is not sharing, rebating or in any other way splitting the attorney fees awarded in the case with any other party.

Insofar as these recommendations will be enforced by allegations of violations of the RPC referred to the Office of Attorney Discipline, and the unauthorized practice of law provision enforced by the Bar Commission through its statutory authority, the Task Force has recommended that no enforcement action be commenced for violations occurring prior to December 1,

1994 to enable members of the Bar and the collection industry an opportunity to revise their business and professional practices to comply with these Recommendations.

The Task Force welcomes additional comments and suggestions to improve collection practices. Comments may be made by writing to the Collection Task Force, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111.

[1]The COLLECTION TASK FORCE includes The Honorable K. Roger Bean, Jan M. Bergeson, Richard J. Carling, Chairman, David G. Challed, Kirk A. Cullimore, Paul R. Ince, Steven M. Kaufman, Stephen G. Knight, The Honorable Roger Livingston, Patricia Owen, Sheila Page, Stephen A. Trost, M. Richard Walker, and D. Frank Wilkins.

[2]The Bar Commission is acting by the authority granted by the legislature to prohibit the unauthorized practice of law (U.C.A. 78-51-25), and by Paragraph 12 (Conduct of Attorneys), and Paragraph 20 (Practicing without a License) of the Rules of Integration and Management of the Utah State Bar, adopted by the Supreme Court of Utah, July 1, 1981 as amended in September of 1985.

[3]The Commission did not approve Recommendation No. 6 which required specificity in every precipe when a debtor's property was to be seized nor Recommendation No. 8 concerning legislation proposed by the Young Lawyers Division since the final version was not available.

[4]Comments to each rule were provided to the Commission but not included here.

[5]Any collector having complied with the provisions of this act may receive accounts, bills or other indebtedness, take assignments thereof for the purpose of collections, and at the direction of the assignor bring suit thereon as assignee, provided however, that such accounts shall be within the statute of limitations as provided by law, and that *in case of suit all legal processes and pleadings and court representations shall be prepared and conducted by a duly licensed attorney*, and a copy of summons and complaint, in all cases, shall be served on defendants, by a duly qualified process server of the court in which such suit is filed. (emphasis added)

[6]433 U.S. 350 (1977) – allowing lawyer advertising.

[7]486 U.S. 466 (1988) – allowing targeted mail solicitation but prohibiting in person solicitation.

[8]An attorney or counselor shall not (1) directly or indirectly buy, or in any manner be interested in buying or having assigned to him, for the purpose of collection, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon. (UCA 78-51-27(1) (1953)

U.S. Bankruptcy Court for the District of Utah — Study of Chapter 7 Filing Fee Waiving

On October 27, 1993, the Congress enacted legislation requiring the Judicial Conference of the United States to study the effect of waiving the filing fee in Chapter 7 bankruptcy cases for debtors who are unable to pay the fee in installments. The District of Utah was selected as one of the six federal judicial districts to participate in the study. The other participating districts are the Southern District of Illinois, the District of Montana, the Eastern District of New York, the Western District of Tennessee, and the Eastern District of Pennsylvania.

The program will commence October 1, 1994 and run for a period of three years. During this time, individuals who are unable to pay the Chapter 7 filing fee either in full when filing the petition or in installments may apply to the court for waiver of the fee. The court will review the application using a general indigency standard similar to that used by the district courts in determining *in forma pauperis* eligibility. If the court approves the application, the debtor will be allowed to proceed without paying the fee. If the court denies the application, the debtor must pay the fee in full or in installments.

Soon after the completion of the three-year program, a report will be submitted to the Congress describing the costs and benefits of the program. This information will allow the Congress to consider whether the program should be implemented nationwide.

Additional information about the fee waiver program is available from:

William Stillgebauer, Clerk of Court
350 South Main Street, Room 301
Salt Lake City, Utah 84101

MEMORANDUM

In accordance with Rule 25 of the Rules of Lawyer Discipline and Disability it is requested that the following Notice be published in the Utah Bar Journal as soon as possible.

NOTICE OF PETITION FOR REINSTATEMENT

Richard J. Culbertson has filed a Petition for Reinstatement to Practice Law with the Second Judicial District Court, Civil No. 940900260. Mr. Culbertson was suspended from the practice of law for one (1) year by the Utah Supreme Court effective November 15, 1993, for violating Rules 1.13(b), Safekeeping of Property, and Rule 8.4(b)(c), Misconduct, arising from misappropriation of client funds. In accordance with Rules 25 of the Rules of Lawyer Discipline and Disability individuals desiring to support or oppose this Petition may do so within 30 days of the date of the publication of this edition of the Bar Journal by filing a Notice of Support or Opposition with the Second Judicial District Court. It is also requested that a copy by sent to the Office of Attorney Discipline 645 South 200 East, Salt Lake City, UT 84111.

Supreme Court Seeks Attorneys To Serve on Appellate Advisory Committee

The Utah Supreme Court is seeking applicants to serve four year terms on the Advisory Committee on the Rules of Appellate Procedure. Interested attorneys should submit a letter indicating their interest and qualification to: Supreme Court Advisory Committee on the Rules of Appellate Procedure, c/o Administrative Office of the Courts, 230 South 500 East #300, Salt Lake City, Utah 84102. Letters of interest must be received no later than October 25, 1994. Questions regarding this committee may be directed to Brent M. Johnson at (801) 578-3800.

Thank You

I would like to thank all the members of the Bar Examiners Committee, Bar Examiners Review Committee and Character and Fitness Committee for a successful July Bar Examination that was given July 26th and 27th. Your voluntary time for the bar examination was very much appreciated.

Thank you again,
Darla C. Murphy
Admissions Administrator

Rocky Mountain Mineral Law Foundation Seminars

The Rocky Mountain Mineral Law Foundation is sponsoring three short courses in the fall of 1994. These programs are:

- International Oil & Gas Law
  September 26–October 1, 1994,
  Dallas, Texas
- Management of Hazardous Substances
  October 10–20, 1994,
  Breckenridge, Colorado
- Oil and Gas Law
  October 17–21, 1994,
  Breckenridge, Colorado

Ethics Advisory Opinion No. 146
Approved July 29, 1994

This opinion addresses three related issues arising from a lawyer's employment as a life insurance agent and by a financial planning company.

Issue No. 1: May a lawyer who is also a life insurance agent, in the course of selling life insurance products, suggest the need for estate planning and then perform legal services for the customer, if requested, where the customer initially did not contact the insurance agent for legal advice?

Opinion (a): A lawyer who is employed for an insurance firm or who works as an insurance agent is restricted from soliciting legal services from insurance customers under Rule 7.3.

(b): A lawyer may sell insurance products to existing legal clients after fulfilling the disclosure and consent requirements of Rule 1.8(a).

Issue No. 2: May an attorney be employed as an agent of a financial planner to coordinate legal services for the planner's clients?

Opinion: A lawyer employed as an agent of a financial planner may not perform legal services for the planner's clients unless those clients are also the lawyer's clients, and the services are provided directly by the lawyer to the clients.

Issue No. 3: May a lawyer, who is also an insurance agent, take referrals from other insurance agents to do legal work for those agents' customers under the circumstance where every agent has his own territory and the lawyer/insurance agent would be only doing the legal work referred to him and representing those clients on a consent basis between the client and the attorney?

Opinion: A lawyer is permitted to accept referrals from any source and enter into an attorney-client relationship with the referred individual.

The Board of Bar Commissioners has adopted a policy whereby ethics opinions will be approved, pursuant to the recommendations of the Ethics Advisory Opinion Committee, pending a 60-day comment period following publication in the Bar Journal.

Attorneys Needed to Assist the Elderly

Needs of the Elderly Committee
Senior Center Legal Clinics

Attorneys are needed to contribute two hours during the next 12 months to assist elderly persons in a legal clinic setting. The clinics provide elderly persons with the opportunity to ask questions about their legal and quasi-legal problems in the familiar and easily accessible surroundings of a Senior Center. Attorneys direct the person to appropriate legal or other services.

The Needs of the Elderly Committee supports the participating attorneys, by among other things, providing information on the various legal and other services available to the elderly. Since the attorney serves primarily a referral function, the attorney need not have a background in elder law. Participating attorneys are not expected to provide continuing legal representation to the elderly persons with whom they meet and are being asked to provide only two hours of time during the next 12 months.

The Needs of the Elderly committee instituted the Senior Center Legal Clinics program to address the elderly's acute need for attorney help in locating available resources for resolving their legal or quasi-legal problems. Without this assistance, the elderly often unnecessarily endure confusion and anxiety over problems which an attorney could quickly address by simply directing the elderly person to the proper governmental agency or pro bono/ low cost provider of legal services. Attorneys participating in the clinics are able to provide substantial comfort to the elderly, with only a two hour time commitment.

The Committee has conducted a number of these legal clinics during the last several months. Through these clinics, the Committee has obtained the experience to support participating attorneys in helping the elderly. Attorneys participating in these clinics have not needed specialized knowledge in elder law to provide real assistance.

To make these clinics a permanent service of the Bar, participation from individual Bar members is essential. Anyone attorney interested in participating in this rewarding, yet truly worthwhile, program are encouraged to contact: John J. Borsos or Lisa Christensen, 370 East South Temple, Suite 500, Salt Lake City, Utah, 84111, (801) 533-8883; or Joseph T. Dunbeck, Jr., Parsons, Davies, Kinghorn & Peters, 310 South Main Street, Suite 1100, Salt Lake City, Utah 84101, (801) 363-4300.

Members Needed to Serve . . . Bar Examiner's Committee Expanding

The Bar Examiner's Committee is expanding its membership. Several positions are now open on the Committee. Members are needed to draft questions in various content areas and grade the Utah essay portion of the Bar Examination, as well as, the Multistate Essay Examination. The positions are three-year terms and require a minimum of five years of practicing law and the commitment to spend one day in March and one day in August grading the Bar Examination at the Utah Law & Justice Center. If you are interested in serving on the Bar Examiners Committee or would like further information, please contact Darla Murphy, Admissions Administrator, at 531-9077.

DO REPORTERS HATE LAWYERS? DO LAWYERS HATE REPORTERS?

ATTORNEY/NEWS MEDIA RELATIONS SEMINAR

Three Hours C.E. Credit (1 1/2 Hrs. Ethics Credit)

Thursday, October 27, 1994
1:00 p.m. – 4:00 p.m.
Check-in 12:30

Utah Law & Justice Center
645 South 2nd East
Salt Lake City, Utah

Learn to communicate with the news media ethically and painlessly.

Co-sponsored by Utah Legal Services and the Utah Chapter of the Society of Professional Journalists.

Five Salt Lake reporters from various media will discuss and answer questions on how attorneys should deal with the news media. Journalist and legal experts will discuss the ethical aspects of attorneys dealing with the news media

No cost. Advance registration required.
To register call Bev Jackson, Utah Legal Services 328-8891 ext. 337

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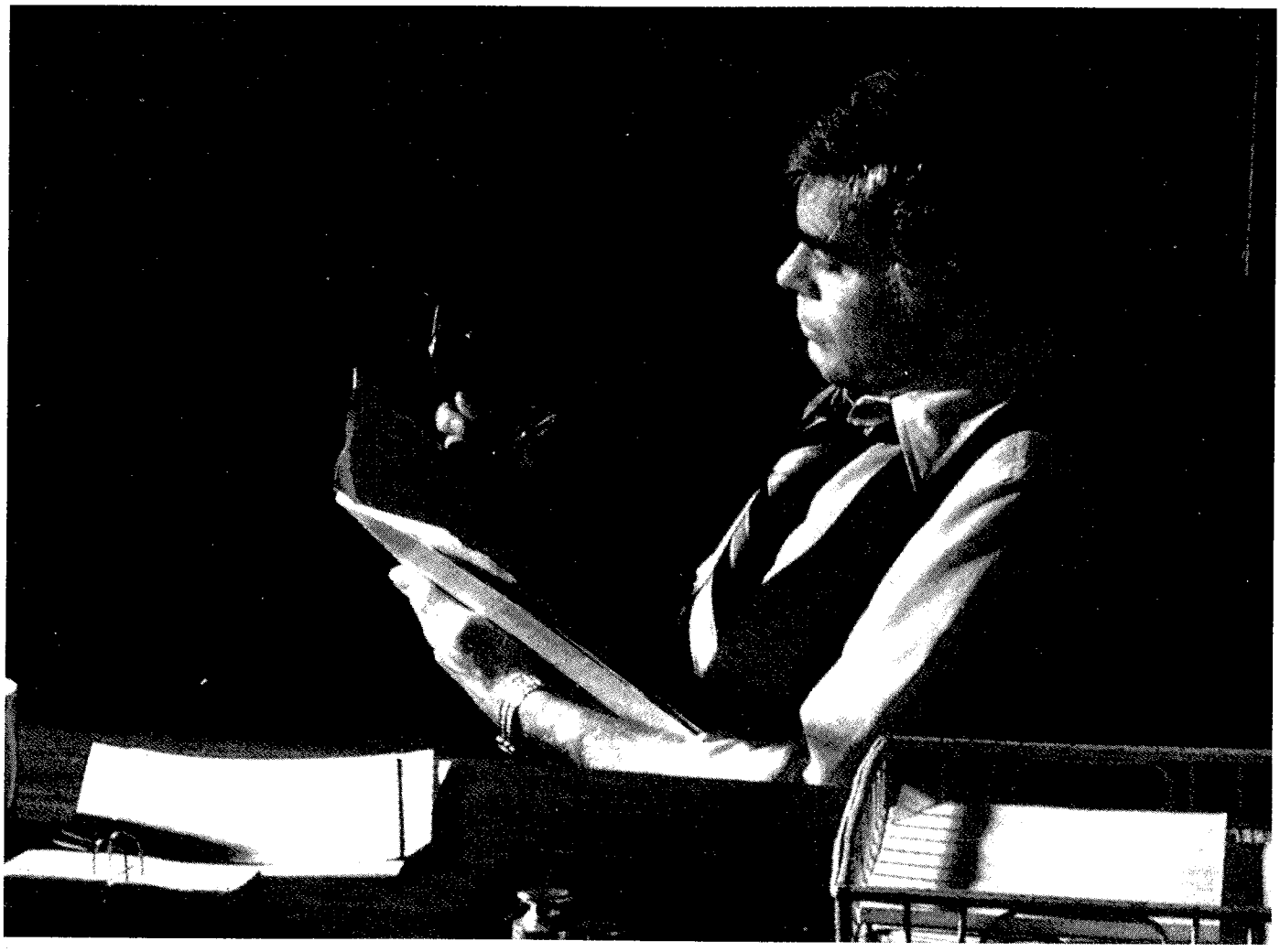

When your client names First Security's Trust Division, they invest in the strength and stability of the First Security Corporation. Their trust is in the hands of experienced administrators, backed by First Security's resources and experience in serving customers throughout the Intermountain West.

We offer a complete range of trust services including personal, corporate, and testamentary trustee, custodian or agent and personal representative. For professional trust services of the largest trust department in Utah, we're right where you want us to be.

First Security Trust Division

We're right where you want us to be

Salt Lake Trust Department	Provo Trust Department	Ogden Trust Department	St. George Trust Department
David Halladay	Jeff Kahn	Gary Peterson	Gary Cutler
246-5859	342-2105	626-9557	628-2831

Utah Bar Foundation Elects Officers and Two Trustees

James B. Lee, President

Stephen B. Nebeker, Vice President

Jane A. Marquardt, Secretary/Treasurer

Carman E. Kipp, Trustee

Hon. Pamela T. Greenwood, Trustee

Salt Lake City attorney James B. Lee, a shareholder in the law firm of Parsons Behle & Latimer, has been elected President of the Utah Bar Foundation. The Honorable Pamela T. Greenwood, Judge in the Utah Court of Appeals, was elected to a three-year term on the Foundation Board and Carman E. Kipp, partner in the Salt Lake City law firm Kipp & Christian, was reelected to a second term.

Mr. Lee, a former President of the Utah State Bar, said the Board is fortunate to have such highly skilled trustees. "As the first woman president of the Utah State Bar, Judge Greenwood served during a very demanding period. She handled the job with a steady hand, with the Bar moving into a financially stable position under her leadership," Mr. Lee said.

He added: "Carman Kipp, also a former Bar President, is Chair of the Finance Committee and brings to the Foundation a wealth of knowledge, experience and financial acumen. We are pleased he has been elected to a second term."

The Foundation elected Stephen B. Nebeker, a partner with the Salt Lake City law firm Ray, Quinney & Nebeker, Vice-President. Jane A. Marquardt, a partner with the Ogden law firm Marquardt, Hasenyager & Custen, was elected Secretary/Treasurer. Other Foundation trustees are Stewart M. Hanson, Jr. and Joanne C. Slotnik.

Mr. Lee said the primary goal of the Board this year is to attract more attorneys to join the Foundation and participate in the IOLTA program. "The Foundation has been able to provide desperately needed financial support to many organizations, and our ability to serve more will be enhanced with more participation by Utah attorneys and firms," he said.

The non-profit organization of Utah lawyers has contributed more than $1.45 million to projects and causes which provide free or low-cost legal aid, legal education or other law-related services. Mr. Lee said the Foundation endeavors to provide funding to organizations which provide access to the legal system to low-income and disadvantaged people.

Ellen Maycock Completes Year as President of the Utah Bar Foundation Retires from Board

When Ellen Maycock was elected to the Board of the Utah Bar Foundation in 1987, she was the first woman to become a trustee. It was another example of her many "firsts," so it wasn't surprising she would also become the first woman president of the Bar Foundation. She completed her term in July.

Ellen is also one of the first women lawyers in Utah to become a "name partner" in a major law firm, the Salt Lake City firm of Kruse, Landa & Maycock. In the 18 years since she entered practice, she has had extensive courtroom experience in both state and federal courts. And in recent years she has expanded the family law portion of her practice.

The Bar Foundation is among a long list of organizations which have benefitted from Ellen's devotion to the profession. She currently serves as chair of the Family Law Section of the Utah State Bar and as chair of the Supreme Court's Advisory Committee on the Rules of Evidence. She formerly chaired the CLE Advisory Committee and is past chair of a Disciplinary Screening Panel. In 1988, the Bar recognized her with the Distinguished Lawyer Award for Service to the Bar.

In 1993, Ellen became a Fellow of the American Academy of Matrimonial Lawyers, an honor accorded to only a few Utah family law practitioners.

Ellen received her Juris Doctor from the University of Utah College of Law where she was Editor-in-Chief of the Utah Law Review and a member of the Order of the Coif.

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Guaranteed Locate of Subject or *NO FEE!

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If your desire is that a more in-depth search is not warranted in your case, then your maximum financial liability is the $75.00 file maintenance fee, no matter how much time has been spent by our agency in attempting to locate your subject. *No further fees will be billed under this search request unless authorized.*

Over the past 14 years, we have compiled a 83% success record for our clients. Some investigations, though, are more complex and may need advance procedures to uncover details which lead to the person who intentionally conceals their whereabouts. **Limited Nation-wide Skip Trace Service Only*

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Specialists are assigned to uncover banking and savings accounts on your subject anywhere in the United States.

A $75.00 expense advance/file maintenance fee begins our search. When productive a $375.00 discovery fee is billed for our services, in which your $75.00 expense fee will be credited. If unproductive, your total liability is the $75.00 expense advance. No further fee will be imposed.

SAFETY DEPOSIT BOXES

We will attempt to located hidden assets and safety deposit boxes *anywhere* in the United States on your subject.

$125.00-$750.00 depending upon difficulty

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Our team of experts will provide the most up to date financial analysis on your subject ***anywhere*** in the United States.

- ❑ **Real Estate Holdings**
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$47.50 Per Hour
(4 Hour Minimum Required)
- Banking and Credit Report Information Not Included In This Fee -

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Our specialists are trained to uncover facts on your subjects' behavior through surveillance and background investigations for use in court cases.

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- ❑ **Workman's Compensation**
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(Including Jets & Commercial Airplanes)

We specialize in the location and recovery of property on a national level.

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Our staff is capable of obtaining credit information on your subject and providing you with a complete analysis of your subject's spending habits, net worth, or other indebtedness.

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When expert service is required by professionals in the most delicate family law matters.

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- **Child Support Matters**
- **Unfit Environment**

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General: $275.00	**Habits**	**Financial Information**	**Loyalty**	General: $375.00
Extensive: $350.00 Minimum	Fees are determined by the nature, scope & complexity of the investigation. For in-depth assignments, call our offices for free consultation			Extensive: $500.00 Minimum

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Dallas, Texas 75240

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(800) 460-6900 Toll Free/North America
(214) 503-8509 Fax Line

Post Office Box 802006
Dallas, Texas 75380

CLE CALENDAR

PRACTICING BEFORE UTAH'S REGULATORY AGENCIES

This seminar is being sponsored by the Administrative Practice Section of the Utah State Bar and the Utah State Bar CLE. Please watch for information in your mail regarding time and registration fees. The seminar will be held at the Utah Law & Justice Center on **October 6, 1994** in conjunction with the Adminstrative Practice Section's annual business meeting.

THE COMMON SENSE RULES OF TRIAL ADVOCACY — FEATURING KEITH EVANS

Date: Friday, October 14, 1994
Place: Utah Law & Justice Center
Time: 9:00 a.m. – 4:30 p.m.
Registration at 8:30 a.m.
Fee: $165.00 pre-registration
$180.00 after September 30, 1994
CLE Credit: 6 hours CLE

NLCLE ALL-DAY MANDATORY SEMINAR

Date: Wednesday, October 19, 1994
Place: Utah Law & Justice Center
Time: 8:30 a.m. – 3:30 p.m.
Fee: $30.00 (please pay at the door)
CLE Credit: This seminar is **mandatory** for all new lawyers who have been admitted in May 1994 or October 1994 and are active members of the Bar. If you have questions regarding this program, please contact Monica Jergensen, CLE Coordinator, at (801) 531-9095.

NLCLE WORKSHOP: EMPLOYMENT LAW PART II — WORKERS COMPENSATION, UNEMPLOYMENT COMPENSATION AND SOCIAL SECURITY

Date: Thursday, October 20, 1994
Place: Utah Law & Justice Center
Time: 5:30 p.m. – 8:30 p.m.
Fee: $20.00 for Young Lawyer Division members
$30.00 for all others
CLE Credit: 3 hours CLE

DEPOSITIONS: TECHNIQUE, STRATEGY AND CONTROL — FEATURING PAUL LISNEK

Date: Friday, October 28, 1994
Place: Utah Law & Justice Center
Time: 9:00 a.m. – 4:30 p.m.
Registration at 8:30 a.m.
Fee: $150.00 pre-registration
$175.00 after October 14, 1994
CLE Credit: 7 hours CLE

NLCLE WORKSHOP: NEGOTIATION AND EVALUATION SKILLS

Date: Thursday, November 17, 1994
Place: Utah Law & Justice Center
Time: 5:30 p.m. 8:30 p.m.
Fee: $20.00 for Young Lawyer Division members
$30.00 for all others
CLE Credit: 3 hours CLE

SIMPLE PROBATE PRACTICE AND PROCEDURE

Date: Friday, November 18, 1994
Place: Utah Law & Justice Center
Time: 9:00 a.m. to 12:00 noon
Fee: To be determined
CLE Credit: 3 hours CLE
Presented by the Needs of the Elderly Committee of the Utah State Bar and Utah Legal Services.

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____

2. _____ _____

_____ Total Due

Make all checks payable to the Utah State Bar/CLE

Name _____ Phone

Address _____ City, State, ZIP

Bar Number _____ American Express/MasterCard/VISA _____ Exp. Date

Signature

Please send in your registration with payment to: **Utah State Bar, CLE Dept., 645 S. 200 E., S.L.C., Utah 84111.** The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars. Please watch for brochure mailings on these.

Registration and Cancellation Policies: Please register in advance as registrations are taken on a space available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day. If you cannot attend a seminar for which you have registered, please contact the Bar as far in advance as possible. No refunds will be made for live programs unless notification of cancellation is received at lease 48 hours in advance. Returned checks will be charged a $15.00 service charge

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

CLASSIFIED ADS

For information regarding classified advertising, please contact (801) 531-9077. Rates for advertising are as follows: 1-50 words — $10.00; 51-100 words — $20.00; confidential box numbers for positions available $10.00 in addition to advertisement.

CAVEAT — The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for 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.

INFORMATION WANTED

There is presently pending in the Second Judicial District Court a guardianship proceeding concerning **Kamiah Marchant**, age 5, (DOB: 05/31/89), being Case No. 943700176 (Davis County) and Case No. 943900196 (Weber County). At issue is whether or not the parents, both deceased, left individual and or joint wills, designating a Guardian. The parents, Misty Jo (Scamihorn) Marchant (DOB: 09/7/64) and Kenneth "Kenny" D. Marchant (DOB: 11/11/64), both passed away on July 3, 1994. Their address at the time of death was 1120 North 3200 West, West Point, Davis County, Utah 84015. These wills it is believed would probably have been drafted sometime in a late 1990 or early 1991 time frame. Anyone knowing the whereabouts of will(s) or having information in this regards is requested to contact: Mark E. Kleinfield, Attorney At Law, 1133 North Main, Suite 226, Layton, Utah 84041, (801) 544-5934.

BOOKS FOR SALE

USED LAW BOOKS FOR SALE – Pacific Reporters, Pacific 2nd, including Digests; CJS; ALR 2nd through 5th; Proof of Facts 2nd and Third. All are complete sets up to date. Please call Jolene at (801) 637-1245.

For Sale: complete hardbound set of Utah Code Annotated. Set includes new 1994 index volumes, pocket parts, and court rules volume. Expired 1993 volumes and pocket parts also included. $600.00 Please contact Nathan in the evenings at (801) 451-2109.

OFFICE SPACE/SHARING

CHOICE OFFICE sharing space available for 1 attorney with established law firm. Downtown location near courthouse with free parking. Complete facilities, including conference room, reception room, library, kitchen, telephone, fax, copier, etc. Secretarial services and word processing are available, or space for your own secretary. Please call, (801) 355-2886.

Small Salt Lake business law firm seeks full or part-time attorney with domestic relations practice. Complete facilities including conference room, fax, copier and secretarial services. May develop into partnership opportunity. Respond to Randle, Deamer, Zarr & Lee, P.C., 139 E. South Temple, #330, Salt Lake City, UT 84111.

Excellent OGDEN office sharing space available for one attorney with four other attorneys. Close proximity to state and bankruptcy courts. Features include: receptionist, covered parking, telephone, fax, copier and potential for Estate Planning Referrals. Please call Cindy at: (801) 627-3846.

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Quality Law Offices available: 1,2 +/or 3 unfurnished/ $450, $550, or $650/ monthly. One furnished $550. Share large reception area, conference room, and parking lot. Add YOUR name to high visibility (50,000 cars per day) Overflow cases possible. See at 3587 West 4700 South: (801) 964-6100.

UTAH COUNTY. Deluxe office sharing space in Provo Jamestown Square complex available for one attorney with established law firm. Complete facilities including large private office, large reception area, conference rooms, support, fax telephones, copier. Excellent opportunity. Call (801) 342-6387.

Large office available with four attorney firm. Great location within walking distance of state and federal courts. Convenient covered parking. Access to facsimile, copier, phone and conference room. Secretarial and receptionist support available. Contact Rhoda at (801) 364-4040.

OFFICE SPACE FOR LEASE, 3896 Sq. Ft. Rentable Area (Gross Leased Area); 2nd Floor, Hermes Building, 455 East 500 South; 2 blocks to Metropolitan Hall of Justice, 3 blocks to City/County Building, 1 block to Trolley Square; Abundant covered parking; excellent freeway and surface street access; 40-month term; $15.00/Sq. Ft./Yr. + CAM charges. Contact Gary Nielsen, Gump & Ayers, (801) 466-8704.

Large corner office with a lovely view available at 310 South Main Street, Suite 1330, with 8 other attorneys. Office has secretarial space for your own secretary, receptionist, reception area, copier, telephone, fax machine, library and conference rooms available. Contact Sharon at Dart Adamson & Donovan (801) 521-6383.

Spacious office, all amenities, close to courts, very reasonable. Call (801) 322-5556.

POSITIONS AVAILABLE

Insurance defense. Associate wanted. Minimum of 2 years experience. Reply care of Utah State Bar Journal, Box 6: 645 South 200 East, Salt Lake City, Utah 84111.

LITIGATION SUPPORT PARALEGAL position available with firm located in St. George, Utah. Experience Preferred. Please Reply to 90 East 200 North, St. George, Utah 84770.

ASSOCIATE ATTORNEY position available with firm located in St. George, Utah. Experience Preferred. Licensed in Utah required. Please Reply to 90 East 200 North, St. George, Utah 84770.

Salt Lake Legal Defender Association is currently accepting applications for several trial and appellate conflict of interest contracts to be awarded for the fiscal year 1995. To qualify each application must consist of two or more individuals. Should you and your associate have extensive experience in criminal law and wish to submit an application, please contact F. John Hill, Director of Salt Lake Legal Defender Association, (801) 532-5444.

Salt Lake Legal Defender Association is currently accepting resumes to update its trial and appellate attorney roster. Interested attorneys should submit their application to F. John Hill, Director, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111. (801) 532-5444.

Associate Attorney Position: Medium size law firm seeking attorney with two to four years litigation experience. Employment law background helpful. Strong academic credentials and writing skills preferred. (Also should be helpful, truthful, trustworthy, loyal, kind . . .) Send Resume to P.O. Box 11008, Salt Lake City, Utah 84147-0008.

POSITIONS SOUGHT

Experienced personal injury trial attorney available to handle all appearances including trial depositions, motions, Etc. 14 years experience in Personal Injury Plaintiff and Insurance Defense Litigation, as well as Workers Compensation Subrogation. Reasonable Rates. Contact: William R. Rawlings, 4001 South 700 East, Suite 500. Salt Lake City, Utah/ Tel. (801) 264-6606 / Fax. 264-6601.

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CERTIFIED PERSONAL PROPERTY APPRAISALS — Estate work, Fine furniture, Divorce, Antiques, Expert Witness National Instructor for the Certified Appraisers Guild of America. 16 years experience. Immediate service available, Robert Olson C.A.G.A. (801) 580-0418

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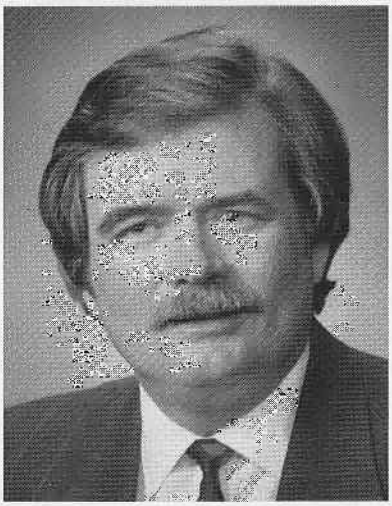
Thank You!

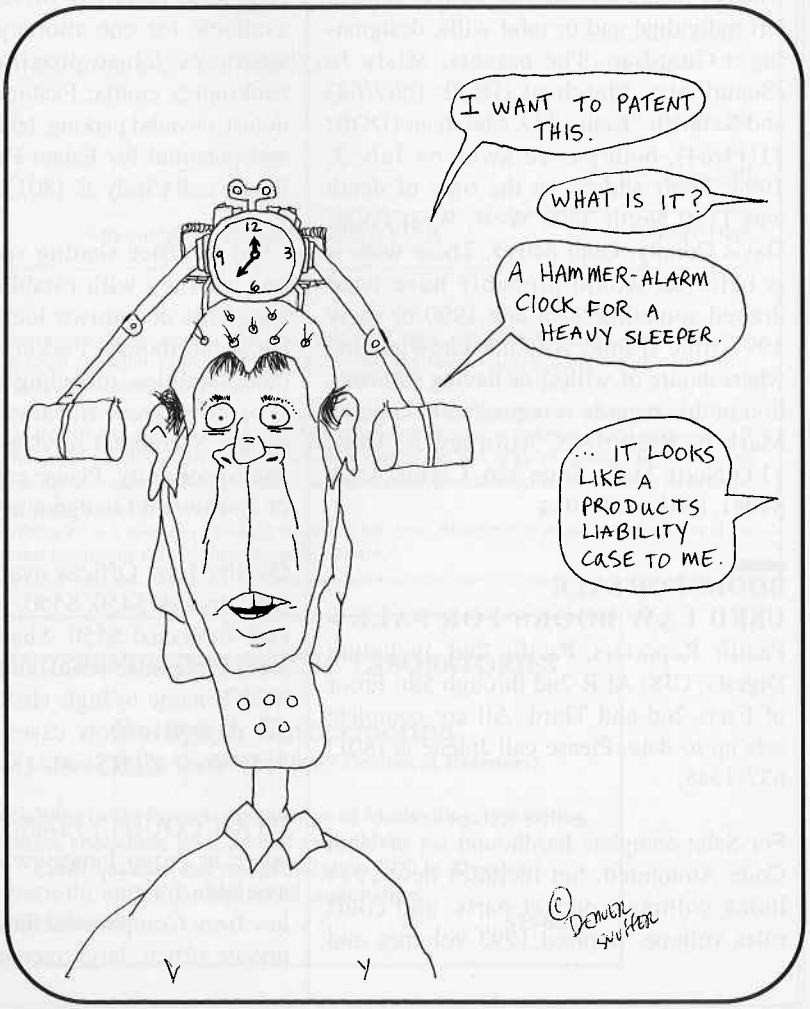


J. Michael Hansen has left us as a bar commissioner after five years of splendid service.

He demonstrated in the many special tasks he performed as a commissioner, including membership on the Executive Committee for the Commission, his espousal of the Wellesley College's motto "not to be served, but to serve."

He is a rare soul who excels and continues to grow. Thank you, Michael. Thank you very much.

D. Frank Wilkins



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Utah Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX 9801) 531-0660

CERTIFICATE OF COMPLIANCE
For Years 19 _____ and 19 _____

NAME: _____ UTAH STATE BAR NO. _____

ADDRESS: _____ TELEPHONE: _____

Professional Responsibility and Ethics* **(Required: 3 hours)**

1. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

2. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

3. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

Continuing Legal Education* **(Required 24 hours) (See Reverse)**

1. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

2. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

3. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

4. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

* Attach additional sheets if needed.

** (A) audio/video tapes; (B) writing and publishing an article; (C) lecturing; (D) law school faculty teaching or lecturing outside your school at an approved CLE program; (E) CLE program – list each course, workshop or seminar separately. NOTE: No credit is allowed for self-study programs.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Regulation 5-103 (1) and the other information set forth on the reverse.

Date: _____ _____
(signature)

Regulation 5-103(1) Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. This proof shall be retained by the attorney for a period of four years from the end of the period for which the statement of compliance is filed, and shall be submitted to the board upon written request.

EXPLANATION OF TYPE OF ACTIVITY

A. Audio/Video Tapes. No more than one-half of the credit hour requirement may be obtained through study with audio and video tapes. See Regulation 4(d)-101(a)

B. Writing and Publishing an Article. Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least sixty days prior to reporting the activity for credit. No more than one-half of the credit hour requirement may be obtained through the writing and publication of an article or articles. See Regulation 4(d)-101(b)

C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive 3 hours of credit for each hour spent in lecturing or teaching. No more than one-half of the credit hour requirement may be obtained through lecturing and part-time teaching. No lecturing or teaching credit is available for participation in a panel discussion. See Regulation 4(d)-101(c)

D. CLE Program. There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at an accredited legal education program. However, a minimum of one-third of the credit hour requirement must be obtained through attendance at live continuing legal education programs.

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Regulation 8-101 — Each attorney required to file a statement of compliance pursuant to these regulations shall pay a filing fee of $5 at the time of filing the statement with the Board.

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