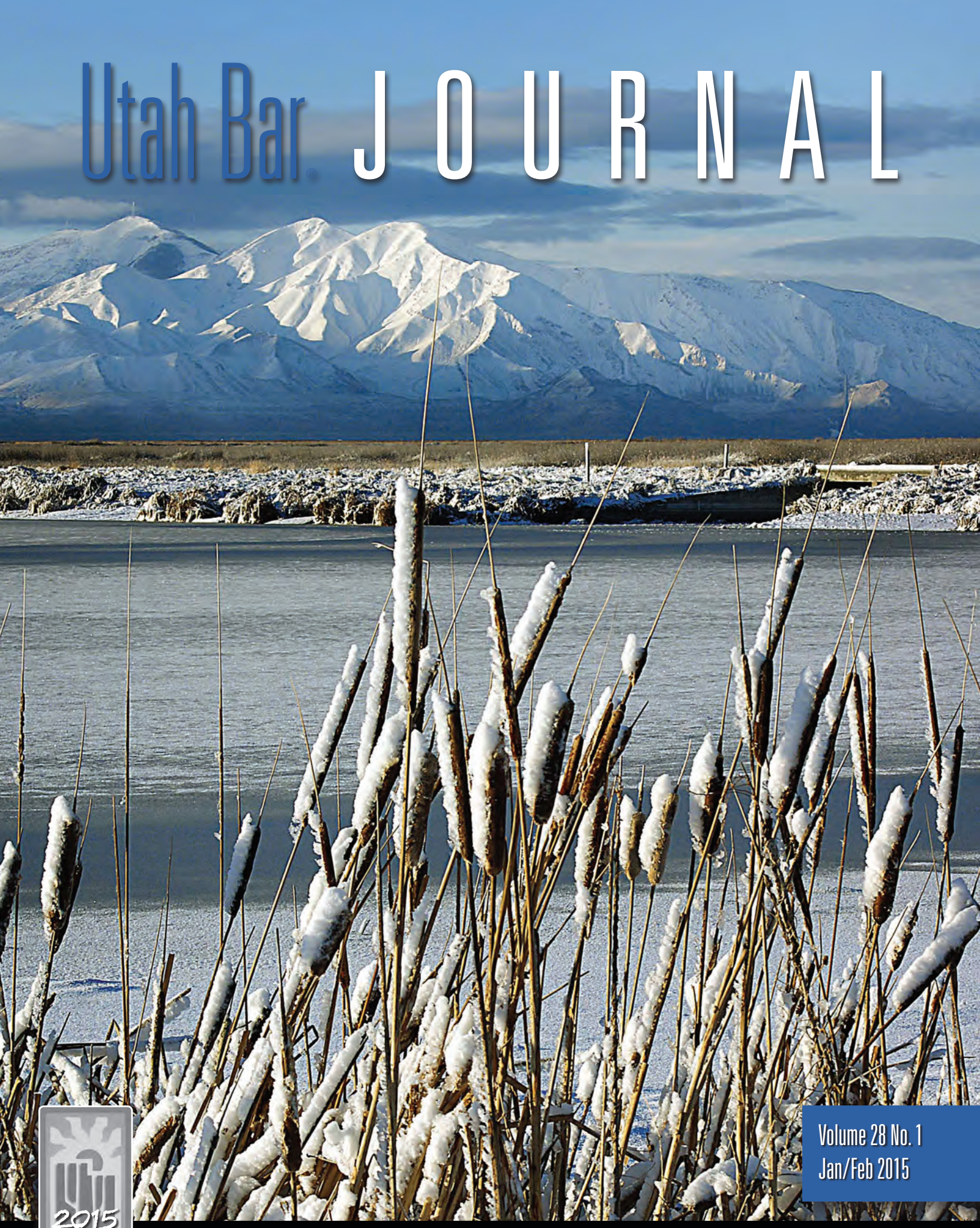
Utah Bar JOURNAL



Volume 28 No. 1
Jan/Feb 2015

2015

Spring Convention Registration Inside

EISENBERG GILCHRIST & CUTT

ATTORNEYS AT LAW

LET US LEND A HAND

Some of our successes in 2013 included:

- $5,000,000 for auto/semi collision case
- $1,250,000 for whistle blower case
- $1,449,150 jury verdict for road rage case
- $950,000 for premises liability case
- $725,000 for sexual abuse case
- $545,000 for fiduciary investor case

More than 400 lawyers have referred injured clients to Eisenberg Gilchrist & Cutt because they know we get top results. We approach every case as a serious piece of litigation, whether it is worth $100,000 or $10 million.

Call us if you have a new injury case or want to bring experience to a pending case. We tailor fee arrangements to suit your clients' needs, and we help fund litigation costs.

Let our experience add value to your case.

INNOVATIVE SOLUTIONS TO YOUR COMPLEX INJURY AND COMMERCIAL CASES.

900 PARKSIDE TOWER • 215 SOUTH STATE STREET • SALT LAKE CITY, UTAH 84111 • TEL: 801-366-9100 TOLL-FREE: 877-850-3030
FOUNDING PARTNERS ARE JEFFREY D. EISENBERG, ROBERT G. GILCHRIST AND DAVID A. CUTT
www.egclegal.com

Table of Contents

The *Utah Bar Journal* is published bimonthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar dues. Subscription price to others: $30; single copies, $5. For information on advertising rates and space reservations visit www.utahbarjournal.com or contact Laniece Roberts at utahbarjournal@gmail.com or 801-910-0085. For classified advertising rates and information please call Christine Critchley at 801-297-7022.

Utah Bar® JOURNAL

Volume 28 No. 1
Jan/Feb 2015

Cover Photo

Winter Tails, taken at Farmington Bay, by Dan Anderson.

DAN ANDERSON is a member of the Utah State Bar and serves as Associate General Counsel at Amedica Corp in Salt Lake City. Dan lives in Kaysville and frequents the Farmington Bay Waterfowl Management area during the winter months, particularly in February, when bald eagles can be found migrating through the area. The cover photo, featuring the Oquirrh Mountains in the background, was taken at the bird refuge on one of those visits.

Submit a Cover Photo

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

The Utah Bar Journal

Published by the Utah State Bar

645 South 200 East • Salt Lake City, Utah 84111 • Telephone (801) 531-9077 • www.utahbar.org

Utah's appellate law firm

www.zjbappeals.com

ZJB Zimmerman Jones Booher LLC
Appellate Lawyers

Whether it's drafting the brief or petition or presenting oral argument, we bring experience and insight.

What we do:

- Process the appeal from start to finish
- Assist with post-trial filings
- Consult at any stage of the trial or appellate process

801-924-0200

e-mail: zjb@zjbappeals.com

Kearns Building, Suite 721
136 South Main Street
Salt Lake City, UT 84101

Interested in writing an article for the Utah Bar Journal?

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

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

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

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

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

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

Are you running your practice, or running in place?

Know your law firm as well as you know the law.

LexisNexis Firm Manager® online practice management can help you run your practice more efficiently, giving you more time to practice law.

It was built just for you, with easy-to-use features that empower you to take charge of your day and your law practice.

- Manage Your Practice from Anywhere.
- Make More Money with Less Work.
- Share Even Your Most Sensitive Documents.
- Get Control of Your Calendar.
- Simplify Billing.

Take a no-hassle guided tour of the new Firm Manager®, and see how easy cloud-based practice management can be.

http://Tour.FirmManager.com | 888-918-9345

UTAH STATE BAR ORGANIZED 1931

LexisNexis Firm Manager®

Letter Submission Guidelines

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

MISSION & VISION OF THE BAR:

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

Ray Richards Christensen

1922 ~ 2014

Ray Richards Christensen died peacefully on Friday, October 24, 2014. He left this life as he had lived it with integrity, dignity, and stoicism.

Ray was born on July 7, 1922 to Carrie Richards and E. Ray Christensen in Salt Lake City. As a young boy, Ray and his brother Ned spent their summers in Chester, Utah with their father's relatives. They looked forward to these visits and learned a great deal about hard work while performing their chores on the farm.

Ray was raised during the Depression and whatever else was lacking, there was never a lack of love. Ray knew his parents would, and did, do everything they could for their sons. They supported them in all their activities and instilled in them strong moral values and a good work ethic.

Ray's father was an attorney and his mother was a teacher and they impressed on their children the importance of a good education. Ray graduated from South High School and was class valedictorian. He attended the University of Utah where he was a member of Phi Eta Sigma and Phi Kappa Phi and earned his Bachelor of Laws degree in 1944.

Ray served in the United States Army during World War II in France and Germany.

When he returned from the war, he clerked for Justice James H. Wolfe of the Utah Supreme Court and then established the law firm of Moreton, Christensen & Christensen which ultimately became Christensen & Jensen and remains to this day a prominent Salt Lake firm bearing his name.

After establishing his legal career, Ray met Carolyn Crawford and following a courtship marked by a series of extended coffee breaks in the Judge Building, they were married on July 9, 1954. They spent the next 32 years together building a beautiful home, traveling, entertaining, and raising four children. Carolyn passed away in 1986 and in 1989, Ray married Jeanne Forrest Pyke. Together, they enjoyed their blended family, wide circle of friends, and numerous international travel adventures.

Throughout his long and distinguished career, Ray earned numerous professional awards and recognition. He was elected to serve as the president of the Utah State Bar Commission and the Western States Bar Association and as a State Delegate to the American Bar Association's House of Delegates. He was inducted as a Fellow in the American College of Trial Lawyers and the International Academy of Trial Lawyers. He received the Lawyer of the Year Award and Lifetime Service Award from the Utah State Bar, the Utah Trial Lawyer of the Year from American Board of Trial Advocates, and the Distinguished Service Award from the Federal Bar Association.

As proud as he was of these professional achievements, his family was the most important part of his life and he loved traveling, playing tennis, or watching baseball and football games with them. His three grandchildren were a continual source of joy and pleasure.

Ray was a devoted golfer and spent many happy weekends at the Salt Lake Country Club constantly trying to improve his game but never really succeeding. He served as president of the Country Club in 1978 and president of the Alta Club in 1988 where he was a dedicated participant at the "Round Table."

Ray is survived by his wife Jeanne, his brother Edward R. (Ned) Christensen; his children Carlie Christensen (Herman Post), Paul Christensen (Pat), Joan Christensen (Daniel Girdano), and Eric Christensen, his three grandchildren Michael Ray Christensen (Rachel), Sarah Ann Jenkins (Wes), and Daniel James Christensen. He is also survived by stepchildren Diane Sartain (William), Gayle Griffiths (Donn), Robert Pyke and Scott Pyke.

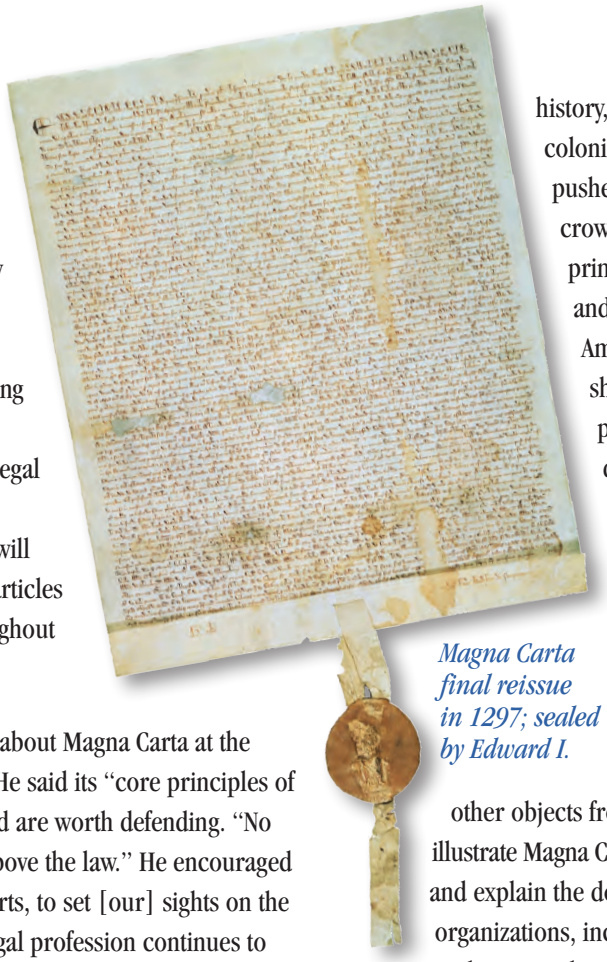
Special thanks to the caregivers and nursing staff at Silverado Senior Living Center for their compassionate care of Ray.

Magna Carta: Enduring Legacy 1215–2015

The Utah State Bar's Plans to Celebrate the Great Charter with an ABA/Library of Congress Traveling Exhibit & High School Competitions

by James D. Gilson

In April 2015, the Utah State Bar will be hosting the traveling exhibit *Magna Carta: Enduring Legacy 1215–2015* throughout Utah. This 800th-year anniversary of Magna Carta gives us a unique opportunity to generate positive publicity and increased understanding about the rule of law and the important contributions that the legal profession makes to a civilized society. The Magna Carta exhibit will be a catalyst for beneficial news articles and educational gatherings throughout the state.



Magna Carta final reissue in 1297; sealed by Edward I.

Chief Justice John Roberts spoke about Magna Carta at the ABA convention in August 2014. He said its "core principles of justice" remain relevant today and are worth defending. "No person, no matter how high, is above the law." He encouraged all lawyers "as officers of the courts, to set [our] sights on the far horizon, to ensure that our legal profession continues to advance that ideal."

Chief Justice Roberts said that Magna Carta, which is Latin for "Great Charter," was meant to resolve squabbling between King John and land-owning barons in feudal England, but it touched on "fundamental freedoms" such as due process rights, separation of powers, and the rule of law, which have reverberated through the centuries. It also warned of the dangers of "concentrated authority," he said. Magna Carta marked the start of a "major undertaking in human history…it laid the foundation for the ascent of liberty."

Of course Magna Carta's significance extends to American history, as revolutionaries in Boston and other colonial cities frequently invoked it as they pushed for independence from the English crown. American colonists embedded principles from Magna Carta into state laws and later into the Constitution. The Fifth Amendment provision that "no person shall…be deprived of life, liberty, or property, without due process of law" descends from Magna Carta.

Please see the article on Magna Carta on page 54 of this *Bar Journal* for more historical information about the Great Charter.

The Magna Carta exhibition includes images of documents, books, and other objects from Library of Congress collections that illustrate Magna Carta's influence throughout the centuries and explain the document's long history. Regional Bar organizations, including the Southern Utah Bar, Central Utah Bar, Cache County Bar, and the Weber County Bar, will be hosting the exhibit in their local communities.

To help educate and inspire young people about the importance of the world's most enduring symbol of the rule of law, the Bar is also sponsoring video and essay writing competitions in high schools. There will be scholarship award ceremonies in conjunction with the exhibit's showing in local communities, culminating in a gala celebration in Salt Lake City on April 14.

Law firms, individual attorneys,

businesses, and other citizens who are interested in contributing toward the exhibit costs and scholarship awards and hosting competition winners at the gala celebration, please contact the Bar's Communications Director, Sean Toomey, at Sean.Toomey@utahbar.org. We've already had some law firms and attorneys pledge their names and resources toward this worthwhile project.

We're grateful to attorney Doug Haymore for his help in chairing the Utah State Bar's Magna Carta committee. Other committee members include Hugh Cawthorne and Bar Commissioners Dickson Burton, Kenyon Dove, Judge Michael F. Leavitt, Herm Olsen, Tom Seiler, Larry Stevens, and Angelina Tsu. Also, thanks to exhibit co-sponsors Utah Law Related Education, the Utah Department of Education, and the Utah Commission on Civil and Character Education. If you have suggestions or are interested in helping with the Magna Carta project, please contact me or any of the other committee members.

The ABA also has planned a Magna Carta CLE program in London, England on June 11–14, with opportunities to visit the ABA's memorial to Magna Carta at Runnymede. *See* www.ambar.org/magnacarta to register.

The exhibit was developed by the American Bar Association and the Library of Congress, the nation's oldest federal cultural institution and the largest library in the world, which includes the Law Library of Congress.

Exhibit schedule

See http://lawday.utahbar.org/ for details about locations and local celebrations:

Friday, April 3:
Utah State Bar, kick-off event

Saturday, April 4:
Salt Lake City Main Public Library

Monday–Tuesday, April 6–7:
St. George, Washington County Courthouse

Wednesday–Thursday, April 8–9:
Provo, Utah Valley University Library
Lakeview Room

Friday–Saturday, April 10–11:
Logan, Utah State University Library

Monday–Tuesday, April 13–14:
Ogden, Weber State University
Shepherd Union Building

Tuesday, April 14:
Gala at "The Tower" at Rice Eccles Stadium

Wednesday–Friday, April 15–17:
Matheson State Courthouse

Saturday–Sunday, April 18–19:
Salt Lake City Main Public Library

A Judge's View of Procedural Fairness

by David Roth

I became a trial judge in 1974 and retired in 1992. From 1992 until 2010, I worked as a Senior Judge, an arbitrator, and a mediator. In thirty-six years of working in dispute resolution, I never once heard or read the words "Procedural Fairness."

Judicial education was aimed at teaching judges how to make correct rulings. We were taught how to find the facts, apply the law, and make the right decision. We took courses and attended seminars on evidence, civil procedure, criminal procedure, search and seizure, contracts, constitutional law, family law, and more. I don't recall a single seminar entitled "Procedural Fairness."

> *"People who perceive they have been treated in procedurally fair ways demonstrate significantly higher levels of compliance with court orders."*

I think most of us to some degree knew what Procedural Fairness was. We just didn't have a name for it and didn't talk about it. Most of us knew that we were hired to make correct decisions, but we also knew that the system worked best if people felt they were treated fairly in the process. Most of us learned that it was not enough to be neutral; we also had to demonstrate neutrality. It was not enough to listen. We had to convince people that they had a voice and that we were hearing them. It was not enough to have respect for people; we had to show respect for people. We knew that if we did these things, litigants were far more likely to accept and abide by the orders and judgments of the court even if they disagreed with them.

Let me illustrate with a case study. Assume a simple lawsuit where the plaintiff is suing the defendant for a money judgment for the sale of goods. The defendant claims that delivery of the goods was late and the quality was substandard.

Assume the trial is before Judge X. Judge X is intelligent and conscientious and usually makes correct decisions. The trial begins, and although Judge X listens to the evidence, to those in the courtroom, it doesn't show. He doesn't make eye contact. He doesn't ask any questions. He appears impatient. He sorts through a stack of files on the bench during testimony. At one point during the trial, he refers to the plaintiff's lawyer by his first name and asks him a personal question. He rushes the attorneys through closing arguments.

At the conclusion of the case, he rules from the bench in a short statement filled with legal terminology. He finds against the defendant and orders him to pay a money judgment. The entire trial takes two hours. Before the parties have a chance to get up from counsel table, Judge X calls the next case.

The defendant is shocked and angry. He wonders if the judge had his mind made up before the trial even started. He is not convinced that the judge heard anything he or his attorney said. He feels embarrassed and disrespected. He tells his attorney he wants to appeal and that he will never pay the judgment.

DAVID ROTH is a retired Second District Court Judge and currently serves as a Commissioner on the Judicial Performance Evaluation Commission.

The plaintiff is happy that he won the case, but he worries about the cost of an appeal and fears he will never collect the judgment.

Now assume the same case is tried before Judge Y. Judge Y is intelligent and conscientious and usually makes correct decisions. The trial begins. Judge Y listens to the evidence, and it's obvious that he's listening. He makes eye contact. He asks questions. He sometimes repeats testimony to confirm that he's heard correctly. In one instance, he summarizes a point made by the defendant's attorney to make sure he fully understood it. He treats both parties with equal respect. His body language suggests he is fully engaged.

At the conclusion of the trial, Judge Y also rules against the defendant and orders him to pay a money judgment. However, he states his decision in easily understood language. He explains his factual findings and describes how he applied the law to the facts. He outlines the elements of each party's case and specifies where the defendant fell short. The entire trial takes two hours and fifteen minutes.

The defendant is still not happy that he lost, but he feels that the judge was neutral, that he had a fair chance to present his case, and that he was respected. He decides to pay the judgment and move on with his life.

The plaintiff is delighted. He won the case and will likely collect his judgment.

Both judges weighed the evidence correctly, applied the law correctly, and made the right decision. Judge Y understands and practices Procedural Fairness. Judge X is in the wrong job.

Extensive research confirms that how people are treated in court affects not only attitudes about the court experience but also their willingness to comply with court orders. People who perceive they have been treated in procedurally fair ways demonstrate significantly higher levels of compliance with court orders. To be effective, judges not only have to be fair, they have to be seen as being fair. *See* Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 The Yale Law Journal Forum 525, 526–28 (2014).

The importance of Procedural Fairness is gradually gaining recognition and acceptance, both nationally and here at home. In his 2014 State of the Judiciary address, Chief Justice Matthew B. Durrant noted, "[W]e have taken the research in this area to heart. We have educated our judges and helped them hone these skills." *See* 2014 State of the Judiciary Address, *available at* www.utcourts.gov/resources/reports/statejudiciary/2014-StateOfTheJudiciary.pdf at 3. The Judicial Performance Evaluation Commission has also recognized the importance of fair procedures. Utah is now the first state in the nation with a judicial performance evaluation program that directly evaluates Procedural Fairness, both in its survey work and in its courtroom observation program. For the first time, Utah judges are getting candid feedback about how they make people feel.

Maya Angelou once wisely observed:

People will forget what you said
People will forget what you did
But people will never forget how you made them feel.

Anyone in a position of authority – whether a judge, a parent, a supervisor, a law partner – would do well to remember these words and to treat those subject to their decisions accordingly.

The Evolution of Estate Planning

by James S. Judd

Overview

The American Taxpayer Relief Act of 2012 (ATRA), enacted January 2, 2013, drastically changed the landscape of estate planning. Under the federal estate and gift tax provisions of ATRA, the federal estate tax exemption of $5 million was made permanent and indexed for inflation ($5.43 million for 2015). ATRA also solidified the "portability" of a deceased spouse's unused federal estate tax exemption. These changes now allow married couples to shelter $10.86 million from federal estate tax in 2015 by merely leaving everything to a surviving spouse with a simple will. As a result, according to the Center for Tax Policy, approximately 99.8% of Americans will not be subject to any federal estate tax.

Although ATRA lessened the impact of the federal estate tax, it significantly increased the impact of the federal income tax on individuals, estates, and trusts by raising the maximum tax bracket from 35% to 39.6% and raising the capital gains tax on the highest income tax bracket from 15% to 20%. Although not a part of ATRA, the new Medicare tax of 3.8% on "net investment income" also increases the sting of federal income tax.

Income Tax Planning for Estates

Prior to ATRA, estate planning focused primarily on avoiding federal estate tax by using the federal estate tax exemption as early as possible during a taxpayer's life and avoiding the inclusion of assets in a taxpayer's estate. Federal income tax considerations were less important because of lower federal income tax rates and broader federal estate tax application. ATRA has changed the focus for a majority of taxpayers, from federal estate tax avoidance to federal income tax avoidance. Consequently, estate planners now have an increased motivation to structure estate plans that maximize the inclusion of assets in a taxpayer's estate because assets included in a taxpayer's estate will receive a basis step-up and eliminate or substantially reduce federal income tax on a subsequent sale of the assets. This type of tax basis management, now more than ever, will become a critical part of estate planning.

As estate planning evolves from federal estate tax avoidance to federal income tax avoidance, estate planners will implement more creative and aggressive strategies to avoid the increased sting of the federal income tax. "Reverse estate planning" is a strategy that may become progressively more popular due to the effects of ATRA. Using reverse estate planning, an estate planner may seek to use the federal estate tax exemption that is available to a client's modest-income parent in order to obtain a basis step-up in the client's property. For example, a reverse estate planning strategy may consist of having a client transfer low-basis stock to an elderly parent and when the elderly parent dies, having the stock transferred back to the client. When the stock is transferred back to the client at the parent's death, the client will obtain a full basis step-up in the stock and can immediately sell the stock without any federal income tax implications.

Section 1014(e) of the Internal Revenue Code

When an estate planner engages in reverse estate planning, caution must be taken to avoid the pitfalls of 26 U.S.C. § 1014(e) of the Internal Revenue Code. If § 1014(e) applies, the taxpayer will not receive a basis step-up at the death of the parent but will

JAMES S. JUDD is an attorney at Snow, Christensen & Martineau. His practice focuses on estate planning, but he also practices in the areas of business formation, business planning, tax planning, and tax litigation. He has an LL.M. in tax from Georgetown, a J.D. from Creighton, and an M.S. in accounting from Southern Utah.

receive a basis equal to the parent's basis in the property immediately prior to the parent's death.

Although § 1014(e) was enacted in 1981, there is a lack of authority providing interpretation and application of the section. The IRS has not issued any Treasury Regulations providing guidance on § 1014(e) and announced in 1986 that it closed its project to construct interpretive regulations. For a more complete explanation and understanding of § 1014(e), see Jeff Scroggin, *Understanding Section 1014(e) and Tax Basis Planning*, LEIMBERG EST. PL. EMAIL NEWSLETTER #2192 (Feb. 6, 2014). The lack of interpretation of § 1014(e) makes it difficult to understand how the IRS will enforce it as estate planners increasingly seek to assist clients in avoiding the sting of the federal income tax. According to the provisions of § 1014(e), it will apply if the three following circumstances are present: (1) there is a gift of an appreciated asset; (2) the gift occurred within one year of the donee's death; and (3) the gifted asset is reacquired by the donor. 26 U.S.C. § 1014(e).

With federal income tax avoidance becoming paramount to estate planning, an estate planner's client may insist on implementing an estate plan that uses the imminent death of a terminally ill parent in order to get a basis step-up in the client's assets. Since the terminally ill parent is likely to die within one year of the transaction, § 1014(e) would apply and disallow a basis step-up. However, an estate planner may possibly avoid the application of § 1014(e) by structuring a transaction with the following four steps:

(1) the client makes a gift of cash to the client's grantor trust;

(2) the client gives a testamentary power of appointment over the trust to the client's parent;

(3) appreciated assets are sold to the trust in

exchange for the previously gifted cash; and

(4) the parent exercises the power of appointment in favor of the client.

This transaction should escape the reach of § 1014(e) if the terminally ill parent dies within one year of the gift because the initial gift of cash was not a gift of appreciated assets. The appreciated assets were purchased by the trust and not gifted by the client. Moreover, the purchase of the appreciated assets by the grantor trust will not trigger a taxable gain since grantor trusts are disregarded for federal income tax purposes. This strategy has been attributed to prominent trust and estates lawyer Jonathan Blattmachr.

It is possible that the IRS will challenge such transactions under the "step transaction doctrine" or "substance over form doctrine." Using these two doctrines, the IRS may assert that the initial gift of cash and subsequent purchase of appreciated assets with the gifted cash was a "constructive gift" of appreciated assets. It is also possible that the IRS will try to expand the reach of § 1014(e) to disallow a basis step-up in these types of transactions.

"With ATRA making portability permanent, it is no longer necessary to use AB Trusts to allow a married couple to use a deceased spouse's federal estate tax exemption."

As a result of ATRA, there will be a substantially higher number of estate plans that focus on federal income tax avoidance instead of federal estate tax avoidance. As estate planners use aggressive strategies to avoid the increased sting of the federal income tax, the IRS will likely seek to broaden the reach of § 1014(e), and likely other sections, in order to limit the ability to avoid federal income tax.

Relevance of AB Trusts

Prior to ATRA, couples could pass two times the federal estate tax exemption only by implementing "AB Trusts." AB Trusts were commonplace and used in virtually all estate plans. The B Trust, i.e., the credit shelter trust, was funded with the first deceased spouse's assets up to the amount of the deceased's spouse's federal estate tax exemption, while the A Trust, i.e., the marital trust, was funded with any amount exceeding the deceased spouse's federal estate tax exemption. With ATRA making portability permanent, it is no longer necessary to use AB Trusts to allow a married couple to use a deceased spouse's federal estate tax exemption. Does this render AB Trusts irrelevant?

Now that portability allows a couple to pass twice the federal estate tax exemption without the use of AB Trusts, the disadvantages of using AB Trusts may outweigh any remaining benefits. Three major issues must be considered when using AB Trusts in the wake of portability. First, at the death of the surviving spouse, the B Trust becomes irrevocable. Thus, the surviving spouse is required to strictly adhere to the exact terms of the B Trust. This significantly limits estate plan modifications after the death of a spouse since a significant part of the estate assets may be subject to the irrevocable terms of the B Trust.

The second issue with AB Trusts is that B Trust assets do not receive a basis step-up at the death of the surviving spouse. Although the assets funded in the B Trust receive a basis step-up at the death of the first deceased spouse, the basis of the B Trust assets remains unchanged at the death of the surviving spouse. Thus, if the surviving spouse outlives the deceased spouse by ten years, there will be ten years of appreciation subject to federal income tax. The federal income tax on such appreciation could have been avoided with an estate plan that "bypassed" the use of AB Trusts.

The third issue with AB Trusts is that the B Trust results in high administrative costs. At the death of the first deceased spouse, there will be administrative costs associated with the division of assets and additional costs for administering the separate trusts over the surviving spouse's lifetime. Furthermore, there must be separate income tax returns/K-1s prepared for the beneficiaries of the B Trust. Thus, the AB Trust

structure results in significantly higher administration expenses than if a couple merely relied on the portability of a deceased spouse's federal estate tax exemption.

With the passage of ATRA, the disadvantages of AB Trusts likely outweigh any advantages. However, since federal tax law is constantly changing, a taxpayer may insist on the existence of an AB Trust structure to act as a safety precaution in the event that portability is later revoked by Congress. An effective solution to avoid the potential pitfalls of the AB Trust structure is a disclaimer provision. A properly drafted disclaimer provision will direct that the B Trust will only be funded with the assets that are "disclaimed," i.e., rejected, by the surviving spouse. This allows the surviving spouse to determine whether it makes sense to fund the B Trust at a spouse's death. The surviving spouse does not have to make the decision to disclaim immediately after a spouse's death but will have nine months after the spouse's death to determine whether to disclaim any assets. The disclaimer provision will effectively prevent a surviving spouse from being forced to adhere to the irrevocable terms of the B Trust in the event that the surviving spouse desires greater flexibility in avoiding the AB Trust structure entirely.

Conclusion

Although ATRA has lessened the impact of the federal estate tax, it has significantly increased the sting of the federal income tax. As a result, a majority of individuals will need estate plans that seek income tax avoidance through proper tax basis management. ATRA has also significantly lessened the need for AB Trusts. Thus, estate planners will want to consider revising AB Trust estate plans by implementing a disclaimer provision, which will allow a taxpayer the ability to avoid the possible disadvantages of an AB Trust structure.

Mediation 101 – "Help Me Help You" Musings of a Mediator and an Attorney

by Kent B. Scott and Cody W. Wilson

Introduction

A construction dispute, which began after a cave-in of a large resort roof causing $5,000,000 in damages, eventually resulted in a lawsuit naming fifteen parties. The case was in litigation for several years and generated significant legal fees, due in large part to the taking of ninety fact and expert witness depositions. Another twenty depositions remained to be taken. The court had failed to bring the parties to an agreeable resolution in two settlement conferences. A trial date had still not been scheduled. The parties then agreed to try private mediation and were able to schedule a mediation conference the same month. The parties agreed on an attorney with significant construction litigation experience to serve as the mediator. The case settled for a six-figure sum after three days of mediation. The mediation fee was $7,100. The parties were all satisfied with the outcome. And of critical importance in the construction industry, their relationships remained intact.

Mediation can serve a range of purposes, including giving parties a chance to define and clarify issues, understanding each side's perspective, exploring solutions, and ultimately arriving at a mutual agreement. The advantages of mediation can include speed, privacy, choice of the mediator, expertise of the mediator, informality, and cost. On the other hand, litigation is often lengthy and expensive. Construction disputes can be highly varied. They can involve defects in workmanship, delay in completion, cost overruns, terminations, environmental harm, and injury to workers among other things. Despite these challenges, the construction industry has long been a leader in the use of alternative dispute resolution to successfully and cost effectively resolve the industry's disputes.

This article focuses on the critical issues that must be faced and addressed for a successful mediation. In order for a mediation to have its best chance to succeed, both the mediator and the participating parties need to work together in "helping" each other achieve a resolution that is better than litigation. An awareness of how to "help" one another throughout the mediation process is fundamental in building a foundation for a successful mediation.

Is There a Recipe for a Successful Mediation?

Mediator Scott: The success of a particular mediation is mainly determined by the parties. It is their process. They are in control of the ultimate result. However, there are some common elements that make the mediation more likely to succeed.

- Work with your client to discuss objectives and interests. Let him or her know what the process and procedure will be like.
- Discuss with your client options that may be pursued if the mediation is not successful and the resources required to pursue those options.

KENT B. SCOTT is a shareholder in the law firm of Babcock Scott & Babcock in Salt Lake City whose practice focuses on the prevention and resolution of commercial disputes through mediation.

CODY W. WILSON is a partner in the law firm of Babcock Scott & Babcock, concentrating his practice in the area of construction law.

- Select a mediator with the skills, knowledge, and style that fits the dispute and personalities involved in the mediation.
- Bring the people with knowledge of the dispute and the authority to settle.
- Counsel should exchange enough information that would allow each to understand the positions and the perspectives of the other.

Attorney Wilson: The mediator, attorney, and client should work together to create a recipe that will increase the likelihood that mediation will be successfully resolved.

- Pre-mediation preparation with the mediator will go a long way to give you your best chance for resolution.
- Discuss your client's objectives and interests with the mediator.
- Be committed to making the mediation work. Get your client committed. Don't give up on the process too early. Explore all available avenues and options.

How Do We Get Started?

Mediator Scott: The attorney's role in preparing the client for mediation is essential. Design a process that will best help the parties to be comfortable, feel safe, and be assured that their concerns and confidences will be respected.

Selecting the correct mediator for the issue: Attorneys, talk to your clients about what to expect and how to act. Discuss options for settlement. Also talk about what the alternatives would be if the matter is not settled, including the requisite resources to resolve the matter through the traditional litigation process.

Attorney Wilson: Determine how much information should be presented in your mediation position statement. What kind of an opening session do you want: Opening statements followed by a question and answer exchange? PowerPoint presentation? "Meet and Greet" followed by recessing into caucus groups? Moving directly into caucus? The attorney should be searching for his client's concerns, needs, and objectives, taking into consideration the money, time, and emotions the client will be spending should the mediation not succeed.

The Pre-mediation Conference

Mediator Scott: Hold a brief pre-mediation conference to discuss the time, place, and "ground rules" for the mediation. The mediator will ask the attorneys to submit position statements. Should this statement be confidential or should it be exchanged with opposing counsel? If the statements are exchanged, should separate confidential statements be submitted? Carefully consider what essential facts, law, and points will best assist the mediator in advancing the client's interests. If the case is in litigation, consider furnishing the mediator with the key pleadings and other filings.

Attorney Wilson: Treat items such as client objectives, range of offers, and a discussion of strengths and weaknesses confidentially. Hybrid statements are often used where the facts, law, and points of argument are shared by counsel, and other more confidential and sensitive matters are provided for the mediator's eyes only.

Confidential Pre-mediation Conferences

Mediator Scott: Most mediators consider it helpful to be informed of any potential hurdles or difficulties. Discuss with the mediator what has kept the parties from settling the case thus far. Inform the mediator of any personality characteristics of the parties that would assist the mediator in working with them at the mediation. The quality and character of the relationship that opposing counsel have with one another is also important for the mediator to know. Think outside the box. Give some thought to providing the mediator with your preferred version of the settlement agreement.

Mediation Preparation

Mediator Scott: Who should come to the mediation? More is not better. Plan on bringing the people who know the facts and have the authority to get the dispute resolved. It is imperative to bring the decision maker. If the decision maker is not able to attend in person, have him or her available by phone, or have the entity send a representative. In any event, the attorneys and the decision maker should work hand in hand in preparing for the mediation and in establishing mediation objectives and strategies.

Attorney Wilson: A word of caution: Oftentimes company employees most involved in the dispute focus on protecting their personal turf. Counsel and the decision maker for the client will need to address how to work with an employee who has an interest or an "agenda" that doesn't fit in with the client's objectives for resolution.

Mediator Scott: Should you bring experts? Generally, clients and their attorneys should ask experts to help in the preparation efforts. On occasion, experts may use the mediation process as a means of advancing their own positions, which can complicate and add an additional level of advocacy to the mediation process. If an expert is going to come to the mediation, discuss what role the expert will play throughout the process.

Attorney Wilson: Work with everyone who plans on attending the mediation and establish what each person's role will be. Remember to remain flexible and avoid "drawing a line in the sand." Trust and work with the mediator to consider all possible options. The mediator will have the best sense as to what it will take to achieve closure. The mediator is the only person who has been to all of the caucuses. Ask questions as to the mediator's impressions and do a little "reality testing" of your own with the mediator while in your private caucus session(s).

Mediator Scott: Bring all documents that were provided to the mediator or exchanged with the other side. Also consider preparing summaries, graphs, and charts that illustrate key points. These items are useful in the opening statement or in private meetings with the mediator. Finally, bring any specific information requested by the mediator.

The Mediation

Mediator Scott: Every mediation is different and unique. Seek a format that is best suited for the particular dispute. Generally, the mediation is conducted in four stages: Opening, Private Caucuses, Breaking through Impasse, and Disposition (Settlement, Suspension, or Termination).

Attorney Wilson: I recommend a short "Meet and Greet" session, followed by private caucus. All information should be exchanged by this point. If not, we attorneys have not done our job.

Mediator Scott: I also prefer the "Meet and Greet" format. I encourage an open exchange of information with counsel including an exchange of mediation statements. Any confidential or private matters can be discussed with or presented to me prior to the mediation.

Attorney Wilson: The private caucuses have three functions: information gathering, negotiation, and consensus building. It is important to the success of the mediation process to have a direct dialogue with the mediator about the strengths and weaknesses of a case.

Mediator Scott: The mediation process eventually shifts from information gathering to negotiation. Every client undoubtedly wants to know who makes the first move in mediation. Again, the mediator is the only person who has been in all of the caucuses with all of the parties. Work with the mediator to come up with a "negotiation strategy."

Attorney Wilson: Impasse is inevitable. Discuss impasse strategies with your client and the mediator in preparing for the mediation and during the caucus sessions. The mediator may decide to bring the parties or counsel together for direct negotiation. Always trust the mediator.

Mediator Scott: The mediator may ask legal counsel for permission to speak with the clients out of the presence of their counsel. This is a risky proposition, and I have only permitted it when I have had a sophisticated client.

Where an impasse is evident, I discuss what is likely to happen if a settlement is not achieved. I want everyone to always be aware of their alternatives if the mediation fails and to weigh those alternatives in view of what they have thus far achieved. At this point, we make an effort to "brainstorm" and create new ideas, or even add a new twist to old information that would assist in overcoming an impasse. Sometimes, however, the circumstances call for a suspension, recess, or termination of the mediation process.

Settlement

Attorney Wilson: When the parties reach a settlement, no one leaves until the settlement is memorialized in writing. I often bring with me a thumb drive with a blank generic mediation agreement. Without a written memorandum setting out the material terms of the resolution, the courts have no means of enforcing the settlement. *Reese v. Tingey Constr.*, 2008 UT 7, ¶¶ 12–14, 177 P.3d 605.

Mediator Scott: I orally summarize the main terms of the resolution to counsel and their clients. I ask the attorneys to prepare a draft summary of the settlement covering all material

points, *which the parties and attorneys sign*. I prefer a detailed settlement agreement, as this document is legally binding and enforceable in court.

Attorney Wilson: Settlement agreements often contain a dispute resolution mechanism, such as arbitration or mediation. I like to include terms appointing the mediator or a named third party to handle any disputes over the interpretation of the mediation settlement agreement.

Suspension and Termination – The Mediator's Proposal

Mediator Scott: If the parties do not agree to a settlement, I review the progress the parties made during the mediation and advise them of their options, such as providing one another with additional information, meeting again later for further mediation, going to arbitration, or going to court. I always follow up with counsel a couple of weeks after the mediation to determine if there would be any merit in further discussing settlement. I sometimes ask the parties if they would consider me giving them a "Mediator's Proposal" that would address all the areas of the dispute. All post-mediation discussions or proposals remain part of the mediation process and are therefore confidential.

Attorney Wilson: After a suspended or terminated mediation, the parties retain their right to settle, resume mediation, arbitrate, or litigate. Oftentimes, the parties decide to take a break from mediation and then reach a settlement on their own or resume mediation later. Otherwise, we proceed to litigation.

Client Follow-up

Attorney Wilson: Where a resolution is reached at the mediation, I follow up with the client. The day after mediation, some parties experience "settlement remorse." The client has invested so much into advancing the dispute and may feel unfamiliar with his or her new found condition. I remind the client of the reason he or she decided upon resolution. I point out that the client is now free to use his or her time to attend to the affairs of the business. After all, the client is better at making money operating its own business than spending time preparing for or attending court or arbitration.

Enforcing the Settlement

Mediator Scott: No party is bound by anything said or done at the mediation unless a written settlement is reached and signed by all necessary parties. *Reese v. Tingey Constr.*, 2008 UT 7, ¶¶ 12–14, 177 P.3d 605. A signed agreement reached during mediation is enforceable in court just like any other settlement agreement. Because a court will look to the face of the document, it is important to spend quality time and effort in drafting the mediation settlement agreement. The court cannot take testimony from the parties, counsel, or the mediator as to the interpretation of the settlement agreement. There are statutory exceptions "where the interests of justice outweigh the parties' need for confidentiality." *Id.* ¶ 9. Courts often require a high threshold of proof to overcome the confidentiality protection afforded by mediation.[1]

Conclusion

"Help me help you." Mediation is an effective process that helps parties settle disputes. Mediation is appropriate for most commercial business disputes. It has the advantage of allowing the parties to choose and control the process and the outcome of their dispute rather than have it determined for them by a judge, jury, or arbitrator.

"Help me help you." Attorneys and their clients can work together to design the mediation process they plan on using. The parties can select the mediator they want to assist them in resolving their dispute and discuss with that mediator the means and methods by which the mediation is to be conducted.

The mediator may not have much in the way of authority to impose a resolution upon the parties; however, a cooperative work effort among the mediator, counsel, and parties is the recipe for creating resolution. Happy mediating to all!

AUTHORS' NOTE: *The authors would like to acknowledge the assistance of Andrew Berne in the editing of this article. Mr. Berne is a third-year student at the J. Reuben Clark College of Law and is currently a clerk for the law firm of Babcock Scott & Babcock.*

1. *Reese v. Tingey Constr.*, 2008 UT 7, ¶ 12, 177 P.3d 605; *Lyons v. Booker*, 1999 UT App 172, ¶¶ 10–11, 982 P.2d 1442, *see also Lake Utopia Paper Ltd. v. Connelly Containers*, Inc., 608 F.2d 928, 930 (2d Cir. 1979); *Ryan v. Garcia*, 33 Cal. Rptr. 2d 158, 161 (Cal. Ct. App. 1994); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Price*, 78 P.3d 1138, 1141–42 (Colo. Ct. App. 2003); *Wilmington Hospitality, LLC v. New Castle County*, 788 A.2d 536, 541–42 (Del. Ch. 2001); *Gordon v. Royal Caribbean Cruises Ltd.*, 641 So. 2d 515, 517 (Fla. Dist. Ct. App. 1994); *Cohen v. Cohen*, 609 So. 2d 785, 786 (Fla. Dist. Ct. App. 1992); *Hudson v. Hudson*, 600 So. 2d 7, 8–9 (Fla. Dist. Ct. App. 1992); *Vernon v. Acton*, 732 N.E. 2d 805, 808–09 (Ind. 2000); *Spencer v. Spencer*, 752 N.E.2d 661, 664 (Ind. Ct. App. 2001).

PRIVATE PLACEMENT OFFERING?

With its Am Law 50 background and narrow focus on securities law, Capital Fund Law Group provides expertise at an unparalleled level of sophistication.

We have years of experience structuring Regulation D offerings in every major industry sector, including: investment funds, real estate, oil and gas, technology, lending and finance, healthcare, manufacturing, entertainment, and others.

WE DO THEM EVERY DAY

CAPITAL FUND LAW GROUP

- Regulation D Offerings
- Angel Investing
- New Venture Financing
- Hedge Funds
- Private Equity
- Real Estate Funds

UTAH'S SECURITIES LAW BOUTIQUE

DOWNLOAD OUR PRIVATE PLACEMENT EBOOK AT CAPITALFUNDLAW.COM

222 S. Main Street Suite 500 Salt Lake City, Utah 84101 • (801) 456-3620
capitalfundlaw.com

Retiring: Justice Ronald E. Nehring

by Julie J. Nelson and Noella A. Sudbury

EDITOR'S NOTE: *In preparation for writing this article, the authors sat down with Justice Nehring and interviewed him about his legal career and his time on the court.*

In February, Justice Ronald E. Nehring will retire after twenty years as a Utah judge. His time on the bench is marked by great changes in Utah law, witty comments from the bench and in judicial opinions, and a large fan base of colleagues, attorneys, secretaries, and clerks.

Personal Background

Justice Nehring was born in Fond du Lac, Wisconsin, and grew up in Kalamazoo, Michigan. When he was only one year old, his father died. He was raised by his mother and remained very close to her throughout her life. When Justice Nehring became a lawyer, his mother was able to attend his swearing-in ceremony. Justice Nehring remembers thinking on that day how grateful he was for all she had done to make it possible for him to be there.

Justice Nehring attended Cornell University as an undergraduate and went to law school at the University of Utah College of Law. In 1974, he married Kristina Hindert, who is a child psychiatrist in Salt Lake City. The Nehrings have three children, Lincoln, Jessie, and Kyle, and are avid dog and horse lovers.

Justice Nehring has been an incredible athlete all his life. In his pre-law years, he won the high school state championship in cross country, played football at Cornell, ran cross country for the Chicago Track Club, ran the half-mile race for the United States, and narrowly missed making the U.S. team for the Munich Olympics. Justice Nehring has participated in the Boston Marathon several times and took second place in a national ride-and-tie championship (a competition involving two runners and a horse). More recently, he has become an avid cross-country skier and bicyclist. A few years ago, he completed the "Death Ride," a bicycle tour of the California Alps, and made a 2,400 mile trip from St. Petersburg to Venice. His wife attributes his athletic success to "grim determination" and "mental stamina," and says that he had no experience with horse-back riding, swimming, cross-country skiing, or yoga but simply learned and practiced them until he excelled.

Mentors in the Law

Justice Nehring said he has had many mentors throughout his legal career but named three who stick out in his mind. First, he said that he learned a tremendous amount from his law partner, John Ashton. He and John worked on many cases together, and Justice Nehring said that watching John helped him to become a better lawyer. The second person Justice Nehring mentioned was former judge, Tim Hanson. Justice Nehring explained that after he joined the bench, Judge Hanson taught him the importance of proper judicial temperament. Third, Justice Nehring mentioned

JULIE J. NELSON is an appellate attorney at Zimmerman Jones Booher LLC. She was a clerk for Justice Nehring from 2003–2005 and 2011–2012.

NOELLA A. SUDBURY an appellate attorney at Zimmerman Jones Booher LLC. She was a clerk for Justice Nehring from 2009–2011.

his long-time friend and mentor Fran Wikstrom, who, in addition to being a fantastic lawyer, is a talented skier. Justice Nehring commented that he "always aspired to ski as well as Fran but was never able to do it."

Most Memorable Moments

When asked to reflect on his twenty years on the bench, Justice Nehring stated that the moment that most stands out in his mind was the time he signed a death warrant as a trial judge. "That is an event that truly grabs your attention," he said.

When asked about the opinions he has written, he stated that he most remembers his opinion in *Campbell v. State Farm Mutual Automobile Insurance Co.*, 2004 UT 34, 98 P.3d 409. Justice Nehring authored that opinion on its return trip from the United States Supreme Court, not long after Justice Nehring had joined the Utah Supreme Court. The Utah Supreme Court had originally upheld a $1 million compensatory damages award and a $145 million punitive damages award. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, ¶¶ 1, 69, 65 P.3d 1134. In a landmark case, the United States Supreme Court reversed and remanded, holding the decision violated due process and setting a veritable "single-digit" ratio limit. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). On remand, Justice Nehring set the Campbells' punitive damage award at nine times their compensatory damages. *Campbell*, 2004 UT 34, ¶ 1.

Law Clerks

Justice Nehring says that although he will miss many things about the supreme court, he will probably most miss the interaction he has with his law clerks. His clerks will remember him in kind. As one former clerk said, "My clerkship was the start of my true legal education and one of the more memorable years of my life."

In Justice Nehring's chambers, all law clerks participated in preparing for oral argument. He required his law clerks to read all the briefs for the monthly calendar and then he held a meeting to discuss the cases the Friday before oral argument. Justice Nehring would provide pastries; law clerks would provide a forum for fleshing out ideas. All viewpoints were welcome, although sometimes the conversation would end with,

Justice Nehring's Life in the Law

- **1978:** Graduated from the University of Utah College of Law
- **1978:** Worked at Utah Legal Services and later became the managing attorney of the organization
- **1981:** Joined the law firm of Prince Yeates & Geldzahler where he practiced civil litigation and became a shareholder
- **1995:** Appointed to the Third District Court and later served as Presiding Judge
- **2003:** Appointed to the Utah Supreme Court
- **2013:** Became Associate Chief Justice of the Utah Supreme Court

"Well, Justice [law clerk's last name], when you have a vote on this court, you're free to write that opinion."

Wit

Many lawyers know Justice Nehring as the writer behind the Justice Tongue articles that appeared in the *Salt Lake County Bar & Bench Bulletin*. He stopped writing those articles when he became a supreme court justice, but his way with words did not disappear. He has earned a reputation for searing zingers in both his opinions and in comments from the bench. Here are some of his clerks' favorites:

> Under the majority's interpretation of 'minor child,' woe to the pregnant woman who abandons her husband and thereby must surrender her fetus and, presumably, adjacent anatomical structures to the custody of her husband.

Carranza v. United States, 2011 UT 80, ¶ 43, 267 P.3d 912 (Nehring, J., dissenting).

> While it would not be appropriate to place great reliance on the *New York Times*' usage of 'minor child' or 'minor children,' given the press's influence on dictionary definitions, it merits noting that since 1851, the term 'minor child' has appeared in the pages of the *Times* 2,886 times without ever referring to a fetus.

Id. ¶ 35 (Nehring, J., dissenting).

> The troopers were after drugs. They had received word that the bounty of the California marijuana harvest was coming this way and decided to do something about it. During the interdiction exercise, 95–99 percent of all the cars stopped, and all twenty-three of the cars stopped by the trooper in question, were from out of state. Whatever else might be said about the troopers' motives, it is safe to say they were not responding to an epidemic of motorists crossing the fog line.

State v. Chettero, 2013 UT 9, ¶ 33, 297 P.3d 582 (Nehring, J., concurring and dissenting in part) (citation omitted).

> False light invasion of privacy entered English common law by an aggrieved Lord Byron. Protective of his reputation as a poet – his reputation for his nonpoetic behavior was controversial and, to many, beyond redemption – Byron successfully appealed to the British courts to stay publication of a "spurious and inferior poem attributed to him."

Jensen v. Sawyers, 2005 UT 81, ¶ 45, 130 P.3d 325 (citation omitted).

> While the statute bans women from dancing in public, it does not forbid men to impersonate women in dances, promenades, or other exhibitions. I make no claim to any historical knowledge about drag entertainment in Utah at the time of statehood. If it existed, it is safe to assume it was not encouraged. Whether entertainers in drag performed in Utah is not the point. It is rather that by criminalizing female dancing the legislature may not have intended to target content, but had in mind the preservation of the nineteenth century's gender-based morality.

American Bush v. City of S. Salt Lake, 2006 UT 40, ¶ 188, 140 P.3d 1235 (Nehring, J., dissenting).

Wisdom

Consistent with his own experience, Justice Nehring advises young practitioners to model their work after someone they trust and admire. He also advises practitioners to give themselves a philosophical check when presented with a new case: "Stop and ask yourself, 'What is really going on here?'" He says attorneys often attempt to solve only the superficial problem but will find that scratching below the surface may yield a deeper problem with a deeper, possibly even profound, answer.

He also advises managing the stresses of life and the law with humor. He says we should all laugh, hard, more often, and that laughter will make the intolerable seem bearable. He also says that lawyers should not take themselves too seriously: "[W]hatever it is, it isn't as much about you as you think."

Reflection on the Rule of Law in Iraq

by Raymond B. Rounds

I am aware that this submission is out of the ordinary for the *Utah Bar Journal*, but I am reminded every Veterans Day of Utah lawyers serving in the military. My suggestion of relevance is that almost all lawyers in Utah have seen information and news on Operation Iraqi Freedom as it unfolded from 2003 to 2011, and we now have daily breaking news regarding ISIS/ISIL in Iraq and the surrounding region. Additionally, I have personal knowledge of five Utah lawyers, who, while deployed to Iraq and Afghanistan, were involved in trying to create a basis for an unbiased, non-sectarian, and evidence-driven judicial system in places of brutal conflict and militaristic chaos. I know there are more. On the international scene, Utah lawyers were, and are, on the front lines, exposing themselves at great personal risk to try and make things better. As I watch the news today, I suppose I wonder about what good we did in Iraq.

> *"U.S. military members gave, and are giving, their lives and their limbs all over the world to help establish the rule of law that we all take for granted."*

Utah lawyers probably have been going to and returning from war-torn countries since the Utah Bar was founded. I recently attended a CLE at Parsons Behle and Latimer, where it was revealed that Utah lawyers participated in the WWII Nuremberg trials, worked on cases in the military before Judge Advocates did all legal cases, and were deployed to Iraq as late as 2011. There are other attorneys who must have been involved in Korea, Vietnam, and the Cold War. These sacrifices are undoubtedly not widely known.

In Iraq in 2006, the insurgency reached its zenith until ISIS/ISIL came along. An Army task force of Judge Advocates had been developed a couple of years before to try and establish a judiciary in a country where death and torture were commonplace everywhere. The void was filled with tribal leaders, sectarian clergy, Al Qaeda operatives, ethnic groups, and just plain armed sadistic thugs dispensing justice through the barrel of an AK-47, with the edge of a sword blade through a neck, or at the point of an electric drill into a body. Military Judge Advocates from all over the nation were deployed over the years from all branches of military service to take on the work. Other Utah lawyers and I were included.

In 2006, all persons detained by the U.S. and coalition forces were brought to Abu Ghraib Forward Operating Base. Many of these detainees were accused of horrendous acts of violence against Iraqi people and coalition members. The killing of dozens of civilians by bombing buses, market places, and religious shrines was a frequent occurrence. Attacks on coalition forces with Improvised Explosive Devises (IEDs), Rocket Propelled Grenades (RPGs), and small arms happened multiple times daily in all parts of the country. Some of the perpetrators were fanatics who came from outside Iraq. Men, women, and children were involved.

Despite the indescribable horror of these acts, my fellow lawyers and I were tasked with seeing to it that rudimentary due process was established. After sifting through the evidence available

RAYMOND B. ROUNDS is a sole practitioner in Ogden where he maintains a general law practice. He served on active duty and in the Reserves in the Judge Advocate General's Corps. of the United States Air Force until his military retirement in 2011. He volunteered to be deployed to Abu Ghraib FOB, Iraq, in 2006.

(much of which cannot be adequately illustrated here or would make most Americans sick to the stomach to see), Judge Advocates formulated into words what violations of Iraqi criminal law had been conducted. Several multiple murder accusations flowed through almost daily. Great pains were taken to translate the accusations into Arabic and have the document personally served on the detainee so he or she could read exactly why he or she was being held. Detainees were given an opportunity to rebut the accusations through written statements, but this opportunity often required translators to write for the detainees because several were illiterate. Iraqi defense lawyers would not come to Abu Ghraib for fear of their lives, even though they were allowed to do so. Lawyers recommended detention or release based on evidence. All of this occurred in the middle of a war.

Coalition forces found that there needed to be a mechanism established to review cases periodically for release. The American judicial system does not support pre-trial confinement for lengthy periods without concern. Bail was not an option under the war conditions of Iraq. The goal became to review all charges every six months. A board was created with Iraqi participation to look at the cases and release people who were innocent or who were charged with lesser offenses and did not appear to be a further threat to Iraqi society. Judge Advocates reviewed thousands of cases daily to make recommendations to this board and see to it that no one slipped through the cracks.

More serious offenses were referred to a court set up by the coalition and Iraq called the Central Criminal Court of Iraq. The war-torn building where it was housed was not in the "Green Zone" but "outside the wire" in what was called the "Red Zone." Lawyers wore helmets and battle armor going to and coming from the structure for their own safety. The building was exposed to mortars, rockets, and gunfire but was secured on the ground by the Army. Iraqi judges dedicated to sound legal principles, and whose very lives were threatened for cooperating with the Americans, were recruited. A juvenile division was established for those under eighteen years of age. American military lawyers, including Utah lawyers, worked with Iraqi lawyers in developing evidence and presenting cases to this Iraqi tribunal. At great personal risk to U.S. Army personnel, all detainees were brought personally to appear at the court, face the accusations, and present a defense. Although not entirely successful, the U.S. lawyers worked hard to establish guilt or innocence based on the facts and evidence alone. The desire was to create a judicial system based on fairness, due process, and the law. Sectarianism, tribal ties, and authoritative friendships were sought to be eliminated. These notions, so dear to Americans, were being demonstrated to Iraqi prisoners by American lawyers devoted to their profession.

U.S. military members gave, and are giving, their lives and their limbs all over the world to help establish the rule of law that we all take for granted. Lawyers in general, and Utah lawyers specifically, are deployed overseas, under fire and in living conditions which most Americans would find objectionable, to make the rule of law happen.

Although some would say our endeavors to create a judicial system in Iraq were a failure, as I see what is happening now, I can safely say we saved many lives, at least while we were there. Even the worst detainees had written notice of the reason for detention. Even the most violent could state to a lawyer why the accusations might be factually in error. Reviews were conducted to release those who deserved it under the facts known. Juveniles were separated because of their unique status. Persons who had killed or wanted to kill were removed from Iraqi society so they could not continue their reign of terror. Detainees under coalition control were not executed summarily because of their religious sect, tribal affiliation, or lack of money or by the word of Saddam Hussein, his sons, or other Ba'athist authorities as had been done before 2003. An Iraqi court was created with judges and evidence before sentences were imposed.

I do not suggest that things always worked perfectly in Iraq, because they did not. Being in the middle of a war does not make things easy. I do not know how the judicial system functions now in areas controlled by the Iraqi government. I do know that ISIS/ISIL-controlled areas have returned to law meted out summarily by a few persons' whims, with little or no due process, or based on punishment because of Western nationality, Western cooperation, sectarianism, and tribal alliances.

Utah lawyers have always brought their knowledge, expertise, and ethical standards to places and at times that can only be described as anarchy. Justice prevailed innumerable times because of their work. Of that we can be proud.

Our best may not have been good enough, but it was always our best.

De Minimis

by Judge Gregory K. Orme

Back in the day – and that was a phrase we never used, back in the day – I wrote a column for the *Salt Lake County Bar & Bench Bulletin* called "De Minimis," borrowed from the well-worn (but debatable) maxim, "De minimis non curat lex," i.e., "The law does not concern itself with trifles." I would spend just a paragraph or five on things that had crossed my mind. I reprised the column in these pages fifteen years ago. *See* Gregory K. Orme, *Just a Few Little Things*, 13 UTAH B.J. 27 (Aug./Sept. 2000). And I thought it might be about time to do it again.

* * *

Complex Civil Litigation

Every civil litigator's bio, vitae, resume, or ad that I see touts the lawyer's practice area as "complex civil litigation." Who, may I ask, is doing the simple, straightforward litigation? Nobody, I guess. But aren't there such cases? Lots of motions for summary judgment and to dismiss are filed, many of those are granted, and at least a few of those are affirmed on appeal. The whole idea behind such motions – and others – is that the case is simple and straightforward. And it's a very economical way for cases to be resolved. Clients like that. Somebody, it seems to me, ought to lay claim to an expertise in "simple civil litigation."

* * *

Hand Shaking

Every flu season, one or more TV doctors will suggest it makes more sense to greet a friend by bowing from a safe distance, like they do in Japan, rather than by seizing and shaking your friend's virus-infested hand. The idea makes sense, but it doesn't seem to ever catch on. We're hardwired to shake hands in this society.

I have a very modest proposal. Let's continue to shake hands when we pass on the street or see each other at a Bar meeting or a Jazz game. But when someone is eating their lunch[1] – especially their hand-held lunch – let's bow or nod or wave, and not extend a hand and expect our friend to set down their club sandwich to shake our who-knows-where-that's-been hand, following which they'll then have to pick up that same sandwich and continue eating it, along with a few million of our germs. How about the Mealtime Exception to the handshaking custom? Any chance that might catch on?

Speaking of handshaking, I do like the post-game custom of most athletic competitions, where at the end of the game or match the opponents exchange handshakes. Or hugs. Or even shirts. But beyond youth league level, not so with the national pastime. Professional baseball teams don't shake hands with each other; they shake hands with themselves. Be it the Orem Owlz vs. the Grand Junction Rockies or the Pittsburgh Pirates vs. the Philadelphia Phillies, when the game is over the losers slink off the field and into their locker room. Meanwhile, members of the winning team form up in two lines and shake hands with their own teammates, who they see every day and presumably get along with well. It doesn't really seem to be a meaningful display of sportsmanship. Baseball is otherwise a great game, but this variation on post-game civility is very weird.

* * *

JUDGE GREGORY K. ORME has served on the Utah Court of Appeals since 1987. He is the Utah Bar Journal's *Judicial Advisor.*

Softball

I was delighted to see in our last issue the little piece about the championship game of the Salt Lake Lawyers Softball League. *See* State Bar News, *Durham Jones Defeats Clyde Snow in Championship Softball Game*, 27 Utah B.J. 27 (Nov./Dec. 2014). I'm not sure I realized they were still in business. (The league; not the firms.) And I surely didn't realize that they had relocated their games from downtown public school yards to the greener pastures of the University of Utah. I am a proud veteran of that league and have a "seriously compromised" ACL to show for my trouble. Back in the 80s, all of our games were played on the fields of nearby elementary schools – at Riley and Parkview and one other field. Emerson, maybe? The idea, I'm sure, was that these fields were close to where lawyers worked, minimizing the loss of billable hours in making a 6:00 starting time. Several games were played each weeknight in May and June, and it was impossible to get into the La Frontera on Fourth South on those nights after play finished at around 8:00. The only good thing about forfeiting a game (more on that later) was that you got a jump on the La Fron crowd.

It was sometimes challenging to take possession of our reserved and paid-for field, even with a copy of our duly issued permit in hand. When we showed up a few minutes before 6:00, the fields were typically empty and at our disposal. ("Field" is a very apt term. Mowing schoolyards was not a high summer priority of the Salt Lake City School District.) But occasionally, the fields were in use. Youth teams with competent adult supervision would typically yield with little more than sighs and sad faces. Sometimes, a group of twenty-something locals would be in the midst of a robust pick-up game, and a conversation like this would unfold:

Me (I was my teams's coach)**:** I'm sorry, are you guys about to wrap up? We have the field reserved at 6:00.

Local: That's bullshit.

Me: Actually, it isn't. Here's a copy of our permit, issued by the School District.

Local: We were here first.

Me: Yes; yes you were. But we have a league, of sorts, and so we have to be able to schedule games with some reliability. So we rent this field four nights a week, and this is one of those nights, as you can see here (pointing to schedule, attached to permit).

Local: That's bullshit. This is a public park. The school don't own it.

Me: The school do – er, does – actually. See the sign right there? SLCSD stands for Salt Lake City School District.

Local: Well, school's off for summer, so I think SLCSD stands for [unprintable].

Me: Good one. So how about if you guys leave now and we give you a six-pack of Bud?

Local: Twelve pack, and you've got a deal.

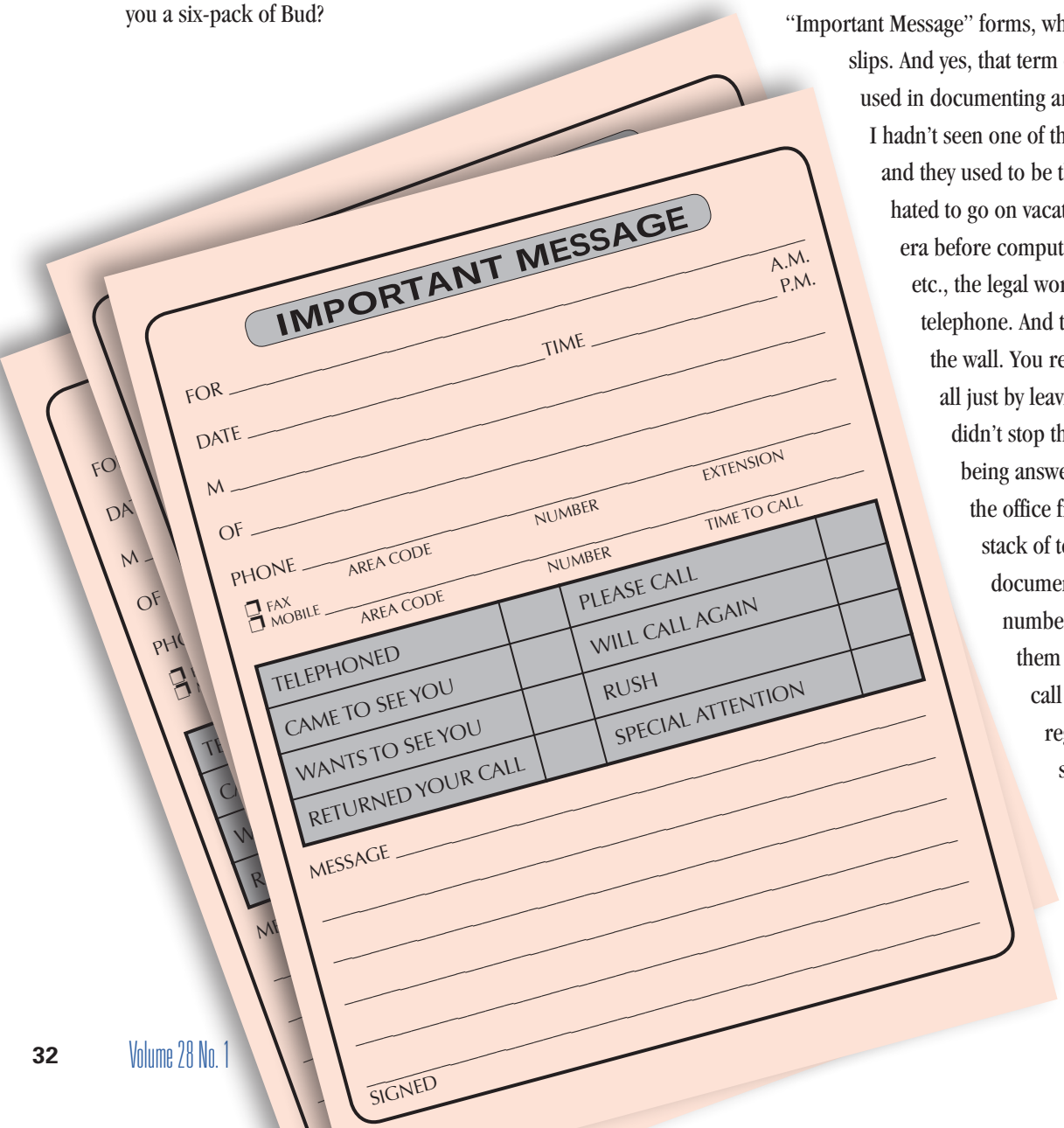
Me: Alrighty then.

And the field was ours – having nothing to do with the sum paid to the School District at the first of the season or our holding a bona fide permit "entitling" us to the use of the field from 6:00 til 8:00. Fortunately, the need to come up with twelve cans of America's leading pale lager was not an occasion for additional delay in taking the field. SLCSD's rule against alcohol on the premises was definitely honored in the breach by most of the teams, mine included.

* * *

Pink Slips

We just threw out – sorry; recyled – a huge box of these "Important Message" forms, which we always called pink slips. And yes, that term can also refer to the form used in documenting an employee's termination. I hadn't seen one of these pink slips in years, and they used to be the main reason lawyers hated to go on vacation. Or to lunch. In the era before computers, iPads, smart phones, etc., the legal world revolved around the telephone. And telephones were wired to the wall. You really could get away from it all just by leaving your office. But it didn't stop the phone from ringing. Or being answered. Upon your return to the office from lunch, you'd find a stack of ten or fifteen pink slips, documenting who called, their number, whether you should call them or whether they would call back, what the call was regarding, etc. There was a spot for the receptionist's or secretary's initials, in case you had questions. (Is that a 3 or an 8? Did he seem really pissed? What's the area code for Nebraska?)



There was a box that could be checked if the message was urgent. It was always checked. If you took a day off, you would have a stack of fifty pink slips on your return. If you took a ten-day vacation, when you got back into the office you could not see the top of your desk for all the pink slips.

When did we quit using these? I don't remember getting one in the last five years. I wonder what was on the last one I got. I wish I had it, for the souvenir value. That failing, I snagged a packet of unused pink slips destined for the landfill/recycling facility – for the souvenir value. We don't need them any more, because nobody calls any more. They email or text. I go weeks between phone calls. The other day the phone rang and, startled, I jumped out of my chair. I'm no longer used to that sound. If my land-line phone rings, it is either my mother or a recorded message reminding me of my daughter's dental appointment. Nobody else calls anymore.

* * *

Technology

I confess to being something of a Luddite. I was the last judge on the court of appeals to surrender his or her typewriter for a computer. I was still using my typewriter to do memos that I would then personally deliver while everyone else was using email. An assertive law clerk (thank you, Lauren!) finally brought me around: "This is silly. You are the youngest judge at the court, and you seem to be of better-than-average intelligence. The world is moving from typewriters and books to computers and more computers. And you need to get with the program!" So we blocked a day, and I became tech-savvy. Sorta.

But there are some things about computers that baffle me. The "prompts" seem all wrong. If I go to log off, a little box appears: "Are you sure you want to log off?" What's the big deal? If I really don't want to, it is honestly no great trouble to log back on. I could use more helpful prompts: "Are you sure you don't want to save your changes? You just spent three hours on this document and if you don't save your changes your 22-page document will shrink to five pages." About once every three years, I have a mental lapse when I am done with a document and go to close it. When asked, "Do you want to save your changes?," I click "No" when I mean "Yes." (This typically happens late at night, when I'm drowsy, and I think I'm subconsciously answering the question, "Are you sure you want to log off?") And then all that work is gone forever. Unlike wasting two minutes to log back on after erroneously logging off, wasting hours because you erroneously didn't save your changes is a huge deal. That's where I could really use a prompt, and where a prompt would do me some good. And also this one: "Are you sure you mean 'Reply All?' Your snippy little comment will go to over 2,000 people."

A skewed sense of priority in the world of "prompts" is not limited to computer stuff. If I leave my keys in the car, an annoying series of bells will ring until I remove them. Okay fine. So I don't want to leave my keys in the car. If I don't put my seat belt on, a different set of bells will ring at periodic intervals until I do put it on. Fair enough. I should just be in the habit of putting it on when I get in the car. And when I exit the car, a siren-like sound is emitted if I leave the headlights on. Fine idea. A dead battery is a real nuisance. But get this: If there is no oil in the engine, meaning the engine will be destroyed in under a minute, an unobtrusive little genielamp quietly appears on the dashboard screen, lost among the veritable light show that is standard on modern vehicles. Honestly Ford and GM and

Toyota!?! Now THAT'S where I could really use sirens, bells, whistles, and flashing lights.

As someone who in the past had a bit of a penchant for running out of gas (sorry, Alex!), I do like this feature of my "new" car. It tells me how many miles I can go until I will be out of gas, and I have the impression this isn't some imprecise guesstimate but a computer-calculated number you can count on. When it's down to fifty miles, a chime sounds and a notice appears: "Fuel level low." Ditto at twenty-five. At ten, the chime sounds three times and the "Fuel level low" notification starts flashing. I've resisted the temptation to see what happens below ten, but I'm guessing that with every new digit, the chime threepeats. Maybe all the dashboard lights start flashing. Anyway, with that wonderful use of technology, I can't imagine ever running out of gas again.

And is it just me, or are the "innovations" in restrooms and break rooms counterproductive? Some institutions think they are saving lots of money with hand driers instead of paper towels in the restroom. But have you ever tried to clean up a spilled beverage or the ill-effects of a bloody nose or a youngster's errant effort to land urine (or worse) in the toilet bowl with a wall-mounted hand drier? Restrooms thus equipped are invariably a mess. Even countertops wet with routine sink water and soap suds stay wet until evaporation runs its course. With access to paper towels, I'll clean up my share of that mess – and sometimes the whole countertop. But I won't do it with my shirttail.

I have a similar complaint about those stupid motion-activated paper towel dispensers. You know the kind. You wave your hand in front of a little red light and a 10" x 10" square of very thin paper towel appears. Once the square is removed, and a brief interval has passed, the light will come back on and you can repeat the process, extracting another little square of paper towel. This is wonderful technology if you have tiny hands or never spill anything more than a thimble's worth of gravy from your microwaved Lean Cuisine. But if you have normal adult hands, you will need at least three of those squares to dry your hands. And if in the break room you knock over an opened liter of soda or spill your coffee, you will spend the better part of the afternoon extracting enough of those squares to have any hope of cleaning up the mess. If a roll of paper towels were at hand, you'd have the mess cleaned up and be on with your life in mere moments.

I often say, in reference to some wonderful innovation – like Velcro, or satellite radio, or cans that come with a self-contained means of being opened, or step-in ski bindings, or coffee pots that can turn themselves on at 6:00 a.m. – that I hope the inventor made a fortune on the idea. This will sound less than charitable of me, but I hope the inventor of the red-light paper towel dispenser achieved no notoriety during his or her lifetime. And died penniless and alone.

* * *

Lawyers League Revisited

I had two different stints as team coach in the Lawyers League. The first was when I was with Van Cott Bagley. In that era, we didn't have neutral umpires. The team at bat furnished an ump. This created a conflict-of-interest of the type lawyers try to avoid, and lawyers tend to be competitive and want to win. The format led to considerable rancor and the occasional fist fight. (True story!) So the League decided to hire umpires, drawn from the ranks of the Salt Lake County rec program. I think this ran us $10 per game. It was money well spent – there were no more fist fights – even though the quality of the officiating validated the adage, "You get what you pay for."

The first year I came to the court, I took the lead in organizing a courts team. Our roster – made up of a few judges, some court clerks, other court staff, and a law clerk (and, typical of the League, a former brother-in-law and a clerk's roommate, both of whom were really good) – was quite stable for five years or so. That first season, we never won a game. But we were proud of the facts that we never forfeited and we were never shut out. (And we provided the opportunity for the law clerk and a member of the courts' administrative staff to meet, fall in love, and later marry!) The fifth season or so, we actually made the playoffs. The team disbanded a season or two later.

When I was at Van Cott, I was regularly embarrassed that we forfeited games. Van Cott was then the largest firm in the state, and this seemed unforgivable. As it happened, I was also the editor of the *Van Cott News*. This was a strictly internal publication, given to wedding and baby announcements, stories on the softball "team" and new hires and retirements, and a fair amount of nonsense, given who the editor was. Annoyed

after two straight forfeited games, in announcing the day, time, and field of the next game in that week's issue of the *Van Cott News*, I casually mentioned that Leonard and Lois Ann were expected to be in attendance. Leonard Lewis was the firm president. Stepping in to his well-appointed corner office was like walking into a wing of the Smithsonian. It was very important to be on his good side. Lois Ann was his wife. I'm not sure he even knew we had a softball team, and I was confident he was not one of my devoted readers. But I had the idea that mentioning the mere possibility of his presence would have a positive impact on participation. So, with no basis in fact or even rumor, I included the reference to the possibility of the Lewises coming out for an evening with the softball team.

My guess about human behavior proved to be very astute. The turn-out was excellent! We were three deep at every position. There was a veritable traffic jam approaching the school where we were playing that game. Of course, the Lewises were not in attendance, but nobody ever said, "Where's Leonard? That's the only reason I'm here."

We won the game. And everybody seemed to have a good time enjoying complimentary beverages and snacks, the pleasant summer evening, one another's company, and a little good-old-fashioned recreation. I was privately smug in my assessment of human nature and the kind of thing that motivates people, and I was confident that with this very positive experience under our collective belt, we had turned the corner in terms of participation.

We forfeited the next game.

1. I realize this flip-flopping from third person singular to third person plural is ungrammatical. And I wouldn't do it in formal writing. (For that matter, I wouldn't use contractions in formal writing.) But in conversation and in informal writing, I'm warming up to this device as a means to avoid the "he or she" usage. *See generally* Mark Nichol, *Is "They" Acceptable as a Singular Pronoun?*, Daily Writing Tips, http://www.dailywritingtips.com/is-%E2%80%9Cthey%E2%80%9D-acceptable-as-a-singular-pronoun/ (last visited December 14, 2014); *"He or she" versus "they,"* Oxford Dictionaries, http://www.oxforddictionaries.com/words/he-or-she-versus-they (last visited December 14, 2014).

Supervising Staff

by Keith A. Call

For many of us, good non-lawyer assistants are crucial to our success. I would personally be lost in my practice without outstanding secretaries, paralegals, clerks, and other non-lawyer professionals.

Other than penalties associated with the unauthorized practice of law, non-lawyers may not be bound by many of the codes and rules that govern lawyers. *See* Utah Code Ann. § 78A-9-103 (LexisNexis Supp. 2012) (practicing law without a license prohibited); Utah R. Prof'l Conduct 5.3, cmt. 1 (training of non-lawyers should take into account that non-lawyers are not subject to professional discipline); Utah R. Jud. Admin. R. 14-111. While non-lawyer staff may not be bound by the ethics rules, the warning bell for lawyers is that *the lawyer may be responsible for ethical breaches by their staff.* This article summarizes some of the ethical responsibilities Utah lawyers have for the conduct of their non-lawyer staff.

Responsibilities of Law Firm Partners and Managers

Any lawyer with management responsibility in a firm has a personal ethical duty to take reasonable steps to assure that the conduct of the firm's non-lawyer staff is compatible with a lawyer's professional obligations. This rule extends to anyone who is a firm partner or its equivalent. *See* Utah R. Prof'l Conduct 5.3(a). Any firm partner or lawyer with comparable management authority can be personally responsible for a non-lawyer staff member's violation of the rules if the lawyer knows of the conduct at a time when its consequences could be avoided or mitigated. *See id.* R. 5.3(c)(2).

If you are a partner or hold a management position at your firm, consider whether your firm needs to do more to make sure your non-lawyer staff is complying with the rules. And if you become aware of a violation by a non-lawyer in your firm, move quickly to take remedial action if that is possible.

Supervisory Responsibilities

If you directly supervise any non-lawyer staff, you are obliged to take reasonable measures to assure that the conduct of those you supervise is compatible with your own professional obligations. *Id.* R. 5.3(b). A lawyer is personally responsible for his or her staff's violations of the rules if the lawyer directed the conduct or if the lawyer knowingly ratified the conduct. *Id.* R. 5.3(c)(1).

Particular Areas of Concern

Utah opinions and commentary have identified several areas of special concern. Here are just a few to consider.

Client Confidences

People talk. People also tweet, post, and blog. It is easy for anyone to forget the importance of protecting client confidences, especially in casual communications with trusted friends and relatives. Staff who lack extensive legal training may not even understand the full scope of a lawyer's obligations of confidentiality. For example, staff may be unaware that some client information can be part of the public record but still off limits for restaurant chat. Even the fact that a client is represented can be confidential. Lawyers should consistently train and remind non-lawyer staff to keep client secrets secret. *See id.* R. 5.3, cmt. 1 ("A lawyer must give [non-lawyer] assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding

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

the obligation not to disclose information relating to representation of the client….").

Avoidance of Conflicts

In the case of hiring an attorney laterally, the concept of creating screens or "Chinese walls" is well-known and accepted. *See, e.g.*, Utah R. Prof'l Conduct 1.10(c)(1). Do you follow the same procedures when you hire a paralegal, secretary, or other non-lawyer assistant? There is good authority that says you should. *See* Utah State Bar Ethics Advisory Opinion Committee, Op. 145 (1994).

Competence

Non-lawyer assistants can do a lot to help a lawyer. For example, a paralegal may be allowed to represent clients in evidentiary hearings before a government agency that authorizes non-lawyer representation. *See* Utah State Bar Ethics Advisory Opinion Committee, Op. 03-03 (2003). However, the partner, managerial lawyer, and supervisory lawyer must take reasonable measures to ensure that the non-lawyer's services are compatible with the lawyer's professional obligations, which include competence. *See* Utah R. Prof'l Conduct 1.1. Do not ask your paralegal or other assistant to perform legal services he or she is not competent to provide.

Employing Disbarred or Suspended Lawyers

Some lawyers have employed disbarred or suspended lawyers to work as legal assistants. Their training and experience could be valuable in such a role. In such situations, a supervising lawyer must be extra careful to provide appropriate supervision. "Because such an individual has had significant legal training and experience, there may be a tendency for him to engage in conduct that is not properly supervised and, therefore, constitutes the unauthorized practice of law." Utah State Bar Ethics Advisory Opinion Committee, Op. 99-02 (1999). The managerial or supervisory lawyer could then be responsible for assisting another in the unauthorized practice of law. *See* Utah R. Prof'l Conduct 5.5(a). Because the line separating what *is* and what *isn't* the practice of law is very fuzzy, this could be a potentially dangerous area for the employing lawyer.

Dealing with Adverse Non-Lawyer Staff

When communicating with opposing counsel's non-lawyer staff about substantive matters, a lawyer may safely presume the non-lawyer is supervised within the requirements of rule 5.3. That presumption can be overcome, however, if the lawyer becomes aware of circumstances indicating that adequate supervision is lacking. In such a case, continued communication with opposing counsel's non-lawyer staff could be considered assisting in the unauthorized practice of law in violation of rule 5.5(a). *See* Utah State Bar Ethics Advisory Opinion Committee, Op. 99-02 (1999).

Conclusion

The "big picture" message here is that a lawyer can be personally responsible for violations of any of the Rules of Professional Conduct by her non-lawyer staff. It therefore behooves the lawyer to train and re-train his or her staff on all standards of ethical conduct, especially those applicable to her particular practice.

If you are one of the new generation lawyers who manage to practice law with nothing more than a laptop and a cell phone, then you have one less thing to worry about. For all of the rest of us, carefully consider what you can do to better assure your non-lawyer assistants are fully compliant with your professional obligations.

Appellate Highlights

by Rodney R. Parker and Julianne P. Blanch

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

United States v. Titley, 770 F.3d 1357 (10th Cir. 2014)

The defendant brought an equal protection challenge to the provision of the Armed and Career Criminal Act that defines a "serious drug offense" to include a state crime for "manufacturing, distributing, or possessing with intent to distribute, a controlled substance for which a maximum term of imprisonment of ten years or more is prescribed by law." *United States v. Title*, 770 F.3d 1357, 1358 (10th Cir. 2014) (citation and internal quotation marks omitted). **Applying rational basis review, the Tenth Circuit held that 18 U.S.C. § 924(3)(2)(A), defining "serious drug offense," does not violate equal protection, even if criminal conduct may qualify as a "serious drug offense" in one state but not another.**

Headwaters Resources, Inc. v. Illinois Union Insurance Co., 770 F.3d 885 (10th Cir. 2014)

The plaintiffs carried commercial general liability coverage through the defendant, and the policy included a broad exclusion for liability associated with pollution, "a ubiquitous feature of insurance litigation" since the 1970s. *Headwaters Res., Inc. v. Illinois Union Ins. Co.*, 770 F.3d 885, 889 (10th Cir. 2014). Two schools of thought have emerged in resolving such litigation. Some courts enforce the pollution exclusions, and others find the exclusions too ambiguous to enforce because of how broadly they are written. Utah has not taken a position on the issue. The Tenth Circuit affirmed the district court's summary judgment that **the broad language of the pollution exclusions, although possibly ambiguous, applied because the complaints alleged traditional environmental pollution that broad exclusions contemplate.**

United States v. Heineman, 767 F.3d 970 (10th Cir. 2014)

The defendant was convicted of one count of sending an interstate threat in violation of 18 U.S.C. § 875(c) when he a sent racist death threat by email to a professor at the University of Utah. The district court declined to give the defendant's requested instruction that the government must prove that the defendant intended the communication to be received as a threat, and it also denied the defendant's motion to dismiss the charges over the government's failure to establish that element. The Tenth Circuit reversed and remanded for a new trial, holding that **the district court was required to find that the defendant intended his email to be threatening before it could convict him of sending an interstate threat in violation of 18 U.S.C. § 875(c).**

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

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

***Bolden v. Doe (In re Adoption of J.S.)*,**
2014 UT 51 (Nov. 4, 2014)

In this adoption matter, the district court denied an unwed father's motion to intervene and object to the adoption of his child because he failed to preserve his legal rights as a father by filing a paternity affidavit within the time prescribed by the Utah Adoption Act. Utah Code Ann. § 78B-6-121(3) (LexisNexis Supp 2014). The affidavit is required to include a statement under oath establishing paternity, as well as a statement that the father is able and willing to provide for the child. On appeal, the father challenged the constitutionality of the affidavit requirement, arguing that it violates both due process and equal protection. **A majority of the Utah Supreme Court upheld the constitutionality of the paternity affidavit requirement and affirmed the district court's denial of the father's motion to intervene**. Two of the five justices dissented, agreeing with the father that the paternity affidavit requirement violates equal protection because the different treatment of unwed mothers and fathers is discriminatory on the basis of gender and it is not justified under the intermediate scrutiny standard.

***State v. Brown*,**
2014 UT 48, 772 Utah Adv. Rep. 16 (Oct. 24, 2014)

A victim attempted to intervene in this criminal matter to assert a claim for restitution of travel expenses and lost wages incurred in attending hearings in the criminal proceedings. The district court denied the motion to intervene, concluding that the victim lacked standing to assert the restitution claim and that the amounts sought were not recoverable in restitution. The Utah Supreme Court reversed on the standing issue, **holding that crime victims possess the status of a limited-purpose party with the right to file a request for restitution.** However, the court affirmed the district court's determination that the lost wages and travel expense were not recoverable as restitution because they were litigation expenses, not pecuniary damages.

***America West Bank Members, L.C. v. State*,**
2014 UT 49, 772 Utah Adv. Rep. 9 (Oct. 24, 2014)

The Utah Department of Financial Institutions (UDFI) seized the plaintiff's bank, then appointed the FDIC to be receiver of the bank. The plaintiff filed an action against the head of the UDFI for breach of contract and the covenant of good faith and fair dealing, unconstitutional taking, and violations of procedural and substantive due process for failing to hold a pre-seizure hearing. The defendant moved to dismiss for failure to state a claim, and the court granted the motion with prejudice. The supreme court upheld dismissal for failure to state a claim because it found the plaintiff failed to meet even the liberal standard of a short and plain statement for a breach of contract claim, that the claim for breach of the covenant of good faith and fair dealing was a derivative of the dismissed contract claim, that there was no constitutional right to a pre-seizure hearing for banking entities, and that the plaintiff's rights could be sufficiently protected by a post-seizure hearing. **The court clarified what is required for a short and plain statement for relief for a breach of contract claim under the Utah Rules of Civil Procedure: allegations regarding (1) the date when the contract was formed, (2) the essential terms of the contract, and (3) the nature of the breach.** The Utah Supreme Court ordered the dismissal to be without prejudice, however, to protect the plaintiff's right to a post-seizure hearing.

***Allred v. Saunders*,**
2014 UT 43, 772 Utah Adv. Rep. 5 (Oct. 21, 2014)

In this interlocutory appeal from discovery orders, the Utah Supreme Court held that **Rule 26(b)(1) of the Utah Rules of Civil Procedure, as amended in 2012, creates an evidentiary privilege for peer-review and care-review documents that shields those documents from discovery.** The court rejected the district court's reasoning that only the Utah Rules of Evidence can create an evidentiary privilege. Rule 501 of the Utah Rules of Evidence itself recognizes privileges contained in "[o]ther Rules adopted by the Utah Supreme Court," which includes the Rules of Civil Procedure. Utah R. Evid. 501(d). The court then provided guidance on the appropriate use of in camera review: parties seeking to withhold arguably privileged material must create a privilege log identifying each document or item withheld and providing sufficient foundational information to allow the opposing party and the court to evaluate the validity of the claimed privilege. The district court may then, in its sound discretion, undertake in camera review of any questionably withheld material.

***State v. Sessions*,**
2014 UT 44, 772 Utah Adv. Rep. 44 (Oct. 21, 2014)

During jury selection, the defendant's lawyer used all five of his peremptory challenges on female members of the jury pool but failed to give nondiscriminatory explanations for two of the strikes when asked to do so by the court in response to a *Batson* objection from the State. The State suggested that the court should reinstate the two female jurors. Defense counsel did not object or ask the court to restore the two peremptory challenges he had lost. The female jurors were reinstated and ultimately sat on the jury, which convicted the defendant of aggravated sexual assault and domestic violence in the presence of a child. On appeal, the court rejected the defendant's ineffective assistance of counsel arguments and affirmed his conviction, **holding that the loss of two peremptory challenges in and of itself did not establish a presumption of prejudice** and that the defendant had failed to demonstrate actual prejudice – in other words, that an actually biased juror sat on the jury that convicted him.

***Garver v. Rosenberg*,**
2014 UT 42, 771 Utah Adv. Rep. 48 (Oct. 10, 2014)

The court dismissed this untimely appeal and clarified the circumstances under which an appeal will divest the district court of its jurisdiction to enter orders in the underlying matter. The district court referred claims brought by two medical malpractice plaintiffs to arbitration and stayed proceedings pending the outcome. The plaintiffs filed an appeal of the district court's order referring the matter to arbitration (the First Appeal) after the arbitration panel issued its decision but before the district court confirmed the arbitration ruling. While the First Appeal was pending, the district court entered an order confirming the arbitration ruling (the Final Order), from which the plaintiffs did not appeal. The plaintiffs' First Appeal was then dismissed as premature because it was not taken from a final order and did not properly seek interlocutory relief. The plaintiffs then filed a Rule 60(b) motion asserting that the district court lacked jurisdiction to enter the Final Order on the ground that the First Appeal had divested the district court of jurisdiction. The district court erroneously agreed with this argument and purported to reissue the Final Order, from which the plaintiffs timely appealed (the Second Appeal). The court dismissed the Second Appeal as untimely, explaining that **only a timely notice of appeal from a final order will divest the district court of jurisdiction.**

***Butler v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints*,**
2014 UT 41, 337 P.3d 280

The Utah Supreme Court held **(1) an interlocutory order is subject to the implementing order requirements of Rule 7(f)(2) of the Utah Rules of Civil Procedure and (2) a Rule 54(b) certification can serve as the Rule 7(f)(2) implementing order as long as the requirements of both rules are strictly complied with.** The single Certification Order in this case did not strictly comply with Rule 7(f)(2) and therefore could not serve as a Rule 54(b) certification and Rule 7(f)(2) implementing order. The Certification Order was not submitted with the underlying motion for summary judgment, so it could not satisfy the first Rule 7(f)(2) option; it did not satisfy the second option because the plaintiff had not served it on the defendant within fifteen days of the ruling on the motion for summary judgment; and because the summary judgment ruling did not specifically direct that no further order was required, the third option was not satisfied.

***Menzies v. State*,**
2014 UT 40, 771 Utah Adv. Rep. 4 (Sept. 23, 2014)

The Utah Supreme Court considered and rejected numerous post-conviction claims from a man who was sentenced to die for murder over twenty years ago. The court rejected constitutional challenges to the Utah Post-Conviction Remedies Act, **concluding that neither the Utah nor the United States Constitution provides a right to funded post-conviction counsel.** The court rejected procedural challenges to the underlying decisions of the Post-Conviction Court (PCC), concluding that the State could properly file a motion for summary judgment instead of answering the petition for post-conviction relief under Utah Rule of Civil Procedure 65(c) and that the PCC did not abuse its discretion by denying a Rule 56(f) continuance and the petitioner's request for an evidentiary hearing. Finally, the court rejected the petitioner's ineffective assistance of counsel argument, concluding that he could not demonstrate that his counsel's performance was deficient and prejudiced his case under the *Strickland v. Washington*, 466 U.S. 668 (1984) standard.

Hansen v. Department of Workforce Services, 2014 UT App 231, 336 P.3d 1087

The petitioner applied for and received unemployment benefits after losing his job and was granted a training exemption under Utah Code section 35A-4-403(2)(b)(i), that allowed him to collect benefits while attending school without the need to look for work. The petitioner got a part-time job while he was attending school, but he later quit that job. After he quit, the Department of Workforce Services determined that the petitioner was no longer entitled to the training exemption and that he was required to repay three months of the benefits he had received to the department. On appeal, the Utah Court of Appeals set aside the department's determination, **concluding that quitting a job he was not required to have in the first place did not make the petitioner ineligible for unemployment benefits under the training exemption for which he was previously approved.** The court based its reasoning on public policy as well as interpretation of the statute that creates the training exemption.

State v. Terrazas, 2014 UT App 229, 336 P.3d 594

As a matter of first impression, the Utah Court of Appeals held that **a cooperation agreement between a criminal defendant and the State is more akin to a plea agreement than a probation agreement.** In determining whether a criminal defendant violated a cooperation agreement, courts need not follow the process specified in the probation statute or apply a standard of willfulness. The defendant is, however, entitled to due process – notice and an opportunity to be heard.

Monarrez v. Utah Department of Transportation, 2014 UT App 219, 334 P.3d 913

The plaintiff was riding his motorcycle in a construction zone. He was forced to come to a sudden stop in a slick section of road in a construction zone. He filed a claim with UDOT that UDOT failed to post signage warning of the dangers. UDOT did not respond to his claim. Not responding for sixty days is deemed to be a denial, and this denial triggered a one-year statute of limitations to file a complaint under the Governmental Immunity Act of Utah (GIAU). After the sixty-day period, though, UDOT sent an affirmative denial. The plaintiff filed a complaint within one year of the affirmative denial but after the one-year statute had passed counting from the original sixty-day period. The defendant moved to dismiss, and the district court granted the defendant's motion. The court of appeals affirmed the dismissal for failure to comply with the GIAU, holding that **the presumption of a denial controlled the date of the statute running, regardless of whether an affirmative denial was later sent.**

Christensen v. Rolfe, 2014 UT App 223, 336 P.3d 40

The court of appeals reversed the district court's order setting aside the Utah Driver License Division's suspension of two driver licenses. **The district court had erred in reviewing the administrative proceedings on the record rather than conducting trials de novo as required by the Administrative Procedures Act.**

State v. Lewis, 2014 UT App 241, 337 P.3d 1053

The defendant was accused of sexually abusing a thirteen-year-old girl; the two offering differing accounts. At trial, the court gave an instruction regarding the defendant taking "indecent liberties" without defining the term. The jury subsequently found the defendant guilty of abusing the girl. The defendant appealed on the ground of ineffective assistance of counsel for failing object to the use of the term "indecent liberties," arguing that the ordinary definition without the clarification of the MUJI definition unduly prejudiced the defendant. The court of appeals agreed with the defendant, finding that **MUJI's definition of "indecent liberties" is much narrower than the layperson's definition and that failing to clarify the term stripped the jury of its duty to make a credibility determination between the accounts of the defendant and the child.** The court reversed and remanded for a new trial.

Callister v. Snowbird, 2014 UT App 243, 337 P.3d 1044

The plaintiff skied past a roped-off area under the tram and stopped to remove his goggles. He was then hit in the back of the head by either the tram itself or something hanging from it. He suffered serious head injuries causing vision and breathing problems, but he was aware enough to ski down and go to a hospital with the assistance of a friend. He filed a complaint alleging negligence and gross negligence. He failed to designate an expert on the standard of care, and the court dismissed the case with prejudice on the defendant's motion for summary judgment. The court of appeals affirmed, holding that **expert testimony was required to establish the standard of care because issues such as aerial tram standards and proper placement of signs are not within the common sense of the jury.**

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

Ignite Referrals with ARAG®

The legal industry is changing. How you compete and grow your practice requires understanding the mindset of consumers and how they access legal services. Strengthen your position in the market – participate in the ARAG Attorney Network and capture the large segment of consumers accessing their services through legal plans.

How Attorneys Benefit

- ✔ Gain referrals easily and at no cost
- ✔ Receive payment directly from ARAG
- ✔ Appear on a free listing as a preferred attorney provider, visible to more than 1 million potential referrals nationally

Learn more: ARAGgroup.com/Attorneys or call 866-272-4529, ext. 3

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the October 10, 2014 Commission Meeting held at S.J. Quinney College of Law on the University of Utah Campus, Salt Lake City.

1. Bar Commissioners approved the 2014–2015 Commission Priorities.

    - Improving Access to Justice: *Pro Bono* Commission & Modest Means Lawyer Referral
    - Advocating for the Judiciary
    - Reviewing Bar Operations: OPC, CLE, NLTP, Budget
    - Planning for the Future of the Profession
    - Celebrating Magna Carta/Rule of Law
    - Supporting Diversity

    Members of the Performance Review Committees were assigned and encouraged to meet before the December 5, 2014 Commission Meeting and to add helpful, additional members.

OPC:
Larry Stevens
Margaret Plane
Herm Olsen
Tom Seiler
Susanne Gustin
Steve Burt
Tim Shea

Summer Convention:
Dickson Burton
Angelina Tsu
Heather Farnsworth
Jim Gilson
Curtis Jensen
Aida Neimarlija

NLTP:
Kenyon Dove
Jessie Nix
Nate Alder
Kat Judd

Budget:
Mary Kay Griffin
Jim Gilson
Angelina Tsu
Janise Macanas
Heather Allen
Tim Shea

2. Bar Commissioners voted to have the Summer Convention in Sun Valley in July 2017.

3. Bar Commissioners approved the 2013–2014 fiscal year audit report.

4. Bar Commissioners voted to give Lifetime Service Awards to Judge Raymond Uno, Rod Snow, Felshaw King, Lyle Hillyard, and Judge James Davis. The Professionalism Award was given to Laura Scott. Steve Burt was selected for the Community Member Award. The Outstanding Mentor Awards were given to Tim Larsen, Debra Nelson, and Tupakk Renteria. And, the Heart and Hands Award was given to Jenifer Tomchak.

5. Bar Commissioners will review final recommendation for the 2016 Summer Convention location at the December 2014 meeting.

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

MCLE Reminder Odd Year Reporting Cycle

July 1, 2013 – June 30, 2015

Active Status Lawyers complying in 2015 are required to complete a minimum of 24 hours of Utah approved CLE, which shall include a minimum of three hours of accredited ethics. One of the ethics hours shall be in the area of professionalism and civility. A minimum of twelve hours must be live in-person CLE. Please remember that your MCLE hours must be completed by June 30 and your report must be filed by July 31. For more information and to obtain a Certificate of Compliance, please visit our website at www.utahbar.org/mcle.

If you have any questions, please contact Sydnie Kuhre, MCLE Director at sydnie.kuhre@utahbar.org or (801) 297-7035 or Ryan Rapier, MCLE Assistant at ryan.rapier@utahbar.org or (801) 297-7034.

Notice of Bar Commission Election

Third, Fourth, and Fifth Divisions

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

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

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

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

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

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

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

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

2015 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2015 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, January 16, 2015. You may also fax a nomination to (801) 531-0660 or email to adminasst@utahbar.org.

1. **Dorathy Merrill Brothers Award** – For the Advancement of Women in the Legal Profession.

2. **Raymond S. Uno Award** – For the Advancement of Minorities in the Legal Profession.

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

Fall Forum Award Recipients

Congratulations to the following who were honored with awards at the 2014 Fall Forum:

TIMOTHY J. LARSEN
Outstanding Mentor

DEBRA M. NELSON
Outstanding Mentor

JUDGE TUPAKK RENTERIA
Outstanding Mentor

STEVEN R. BURT
Community Member of the Year

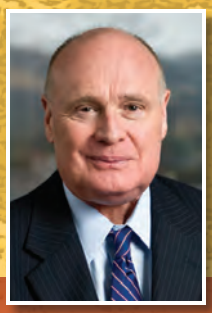
CHAD B. McKAY
Pro Bono Attorney of the Year

LAURA S. SCOTT
Professionalism

JUDGE JAMES Z. DAVIS
Lifetime Service Award

LYLE W. HILLYARD
Lifetime Service Award

FELSHAW KING
Lifetime Service Award

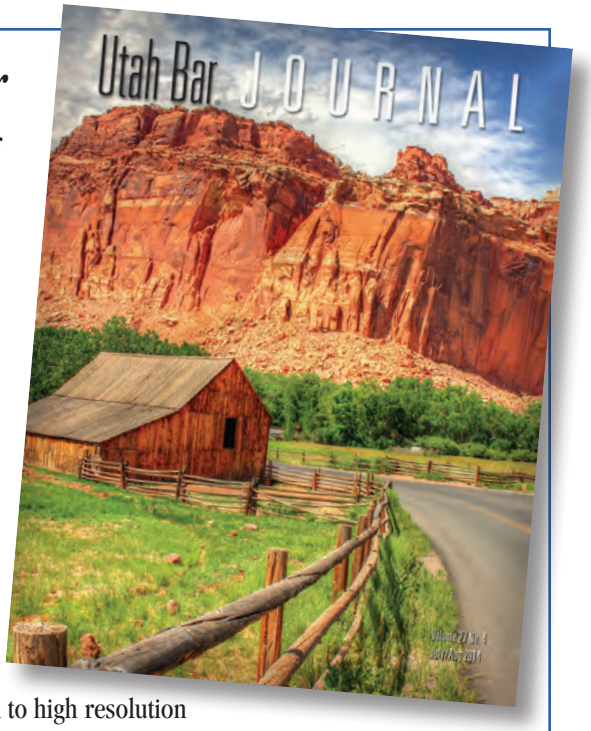


RODNEY G. SNOW
Lifetime Service Award

JUDGE RAYMOND UNO
Lifetime Service Award

2014 Utah Bar Journal *Cover of the Year*

The winner of the *Utah Bar Journal* Cover of the Year award for 2014 is *Gifford Homestead Barn at Capitol Reef National Park* by Burke Nazer, who took the winning photograph while on a family vacation. Burke's photo appeared on the cover of the July/August 2014 issue.



Congratulations to Burke, and thanks to the more than 100 contributors who have provided photographs for the *Bar Journal* covers over the past twenty-six years.

The *Bar Journal* editors encourage members of the Utah State Bar or Paralegal Division, who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal*, to submit their photographs for consideration. For details and instructions, please see page 4 of this issue. (**A tip for prospective photographers:** preference is given to high resolution portrait (tall) rather than landscape (wide) photographs. We are currently in particular need of fall and winter scenes.)

Food and Clothing Drive Participants and Volunteers

We would like to thank all participants and volunteers for their assistance and support in this year's Food and Clothing Drive. Tons of food, clothing, and toiletries were collected and delivered for immediate distribution, in addition to the many generous cash donations to specific shelters and organizations that we have supported over the years.

Thanks also goes to all of the individual contacts that we made this year. We look forward to working with you again next year. Thank you all for your kindness and generosity.

Women Lawyers of Utah 2014 Retreat

by Ashley A. Peck, Women Lawyers of Utah Board

Women Lawyers of Utah (WLU) hosted its Annual Fall Retreat on October 25th and 26th at the St. Regis Resort in Deer Valley. Attendees enjoyed dynamic and inspirational speakers, the fantastic company of colleagues, and great food and drink – all in the luxurious surroundings of the St. Regis.

"We had a record turnout this year – more than 200 ladies and several men attended," said WLU President Susan Motschiedler. "We do our best to provide a couple days for our members to relax and take a step back from their busy practices to reflect and recharge, and we also use the event to honor some amazing ladies."

WLU presented three awards to exceptionally deserving recipients this year. Annette W. Jarvis was honored as the recipient of the 2014 WLU Mentoring Award. Ms. Jarvis is the Partner-in-Charge of Transactions at the law firm of Dorsey & Whitney and the Managing Partner of the firm's Salt Lake City office. Ms. Jarvis has championed flex time, remote office, and maternity leave policies in law firms across the country. Her success as an attorney and a mother are proof that these policies work for women lawyers and make economic sense for law firms. She has served as a mentor to countless women lawyers. Among them is WLU Board Member and Utah State Bar President-Elect Angelina Tsu, who shared her own personal experience in presenting the award to Ms. Jarvis.

Adrienne Bossi and Jessica Rancie at the WLU Retreat.

The 2014 Women's Law Caucus Reva Beck Bosone Scholarship was awarded to Veronica Davis. Ms. Davis is a second-year law student at the University of Utah S.J. Quinney College of Law. Born in Colombia, she surmounted obstacles that many could not begin to imagine. She describes herself as coming from a "line of strong Latina women who survived abuse, single-motherhood, poverty, fear, and despair." Ms. Davis found her passion through education, first studying engineering in Colombia and then later obtaining a B.S. degree in legal studies from Utah Valley State University after moving to the United States with her husband in 2006. Ms. Davis has served as a judicial extern for Third District Judge Paul B. Parker, and she hopes to become a prosecutor after graduation. She describes her career goal as using the justice system to help those who live in fear, confusion, and shame, like she once did. Ms. Davis is also the mother of twins.

The Women in the Law's Cora Snow Carleton Scholarship was awarded to Sully Bryan. Ms. Bryan is a third-year law student at Brigham Young University J. Reuben Clark Law School. She grew up in Los Angeles with her mother and grandmother, both of whom were immigrants. Early on, Ms. Bryan struggled in school because she did not speak English, but she ultimately became the first person in her family to attend college. She graduated with honors from Whittier College, where she mentored at-risk teenage girls and organized other college students to serve as mentors to local high school students. Ms. Bryan serves on the board of the Minority Law Student Association and the Latin American Law Student Association. She hopes to continue her volunteer work in promoting education and helping women and students in general develop confidence and strength in themselves to accomplish their dreams. Ms. Bryan is also the mother of two.

The WLU awards presentation was followed by a presentation by Carol Frolinger titled "Her Place at the Table: Negotiating for Conditions of Career Success." Ms. Frolinger is the founder of

University of Utah law student attendees: Melissa Moeinvaziri, Dominica Dela Cruz, Desire' Allen, Caitlin McKelvie, Blake Van Zile, Elizabeth Rudolf, Amy Pauli, Victoria Luman, Aenon Johnson, Nina Kim, and Veronica Davis.

Negotiating Women, Inc., an advisory firm committed to helping organizations advance talented women into leadership positions. For more than fifteen years, she has designed, developed, and delivered highly customized negotiation and leadership programs for executive women. Ms. Frolinger's presentation focused on practical strategies women can employ to be more effective in negotiations and in the practice of law generally. The Keynote Speaker was sponsored exclusively by Holland & Hart LLP.

The following morning, attendees enjoyed a presentation by Ida Abbott titled "Aspire to Success: What Do You Want and How Will You Get It?" Ms. Abbott is a consultant who has been helping law firms develop, manage, and retain legal talent since 1995. She also serves as a personal coach to various professionals. Ms. Abbott has long been recognized as a leader in the fields of mentoring, leadership development, and professional development, and she has been at the forefront of efforts to promote women in the legal profession. Ms. Abbott's presentation focused on defining career goals and charting a path to achieve them. The morning session was jointly sponsored by Stoel Rives and Dorsey & Whitney.

On Friday night, attendees also enjoyed a Social Hour sponsored by Parsons Behle & Latimer, complete with chair massages and a networking activity sponsored by Kirton McConkie. Early risers on Saturday morning were treated to a yoga session sponsored by Durham Jones & Pinegar.

"The WLU Retreat is always a fantastic event, and this year was no exception," said attendee Jennifer Horne of Holland & Hart LLP. "It's an absolute treat to spend time with so many great women – from federal and state court judges, to seasoned firm practitioners, to law students just entering the profession – and the speakers were very relevant to me and my practice."

WLU would like to thank the following additional sponsors of the event:

Orange Legal

Alpine Court Reporting

Zimmerman Jones Booher LLC

Ballard Spahr, LLP

Larry H. Miller Lexus

Parr Brown Gee & Loveless

Ray Quinney & Nebeker

Snow Christensen Martineau

Workman Nydegger

Clyde Snow

Fabian Law

Jones Waldo

Lone Peak Valuation

Maschoff Brennan

Snell & Wilmer LLP

Trask Britt

Match & Farnsworth

Richards Brandt Miller Nelson

The Utah State House of Representatives

Patrice Arent (D) – District 36 (Elected to House: 2010. Prior service in Utah House & Senate: 1/1997–12/2006)

Education: B.S., University of Utah; J.D., Cornell University

Committee Assignments: Appropriations – Executive. Standing – Executive Appropriations; Business, Economic Development & Labor; Public Utilities & Technology; Government Operations; Ethics (Co-Chair).

Practice Areas: Adjunct Professor, S.J. Quinney College of Law – University of Utah. Past experience: Division Chief – Utah Attorney General's Office, Associate General Counsel to the Utah Legislature, and private practice.

F. LaVar Christensen (R) – District 32 (Elected to House: 2002)

Education: B.A., Brigham Young University; J.D., University of the Pacific, McGeorge School of Law

Committee Assignments: Appropriations – Public Education. Standing – Education; Judiciary; Administrative Rules.

Practice Areas: Mediator and Dispute Resolution, Real Estate Development and Construction, Civil Litigation, Appeals, Family Law, General Business, and Contracts.

Brian Greene (R) – District 57 (Elected to House: 2012)

Education: B.A., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Natural Resources, Agriculture & Environmental Quality. Standing – Judiciary; Revenue & Taxation.

Practice Areas: Administrative Law, Government Affairs & Public Policy, and Commercial Real Estate Transactions.

Craig Hall (R) – District 33 (Elected to House: 2012)

Education: B.A., Utah State University; J.D., Baylor University

Committee Assignments: Appropriations – Infrastructure & General Government. Standing – Health & Human Services; Judiciary.

Practice Areas: Litigation and Intellectual Property.

Kenneth R. Ivory (R) – District 47 (Elected to House: 2010)

Education: B.A., Brigham Young University; J.D., California Western School of Law

Committee Assignments: Appropriations – Natural Resources, Agriculture & Environmental Quality. Standing – Public Utilities & Technology; Revenue & Taxation.

Practice Areas: Mediation, General Business, Commercial Litigation, and Estate Planning.

Mike Kennedy (R) – District 27 (Elected to House: 2012)

Education: B.S., Brigham Young University; M.D., Michigan State University; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Public Education. Standing – Health & Human Services; Political Subdivisions.

Practice Areas: "Of Counsel," Bennett Tueller Johnson & Deere

Brian King (D) – District 28 (Elected to House: 2008)

Education: B.S., University of Utah; J.D., University of Utah S.J. Quinney College of Law

Committee Assignments: Appropriations – Executive; Executive Offices & Criminal Justice. Standing – Judiciary; Revenue & Taxation.

Practice Areas: Representing claimants with life, health, and disability claims; class actions; ERISA.

Daniel McCay (R) – District 41 (Appointed to House: 2012, Re-Elected 2012)

Education: Bachelors and Masters, Utah State University; J.D., Willamette University

Committee Assignments: Standing – Higher Education; Education; Revenue & Taxation.

Practice Areas: Real Estate Transactions, Land Use, and Civil Litigation.

Kay L. McIff (R) – District 70 (Elected to House: 2006)

Education: B.S., Utah State University; J.D., University of Utah S.J. Quinney College of Law

Committee Assignments: Standing – Higher Education; Health & Human Services; Law Enforcement & Criminal Justice.

Practice Areas: Former presiding judge for the Sixth District Court, 1994–2005. Before his appointment, he had a successful law practice for many years, most recently as a partner in the McIff Firm.

Mike McKell (R) – District 66 (Elected to House: 2012)

Education: B.A., Southern Utah University; J.D., University of Idaho

Committee Assignments: Appropriations – Natural Resources, Agriculture & Environmental Quality (Chair). Standing – Natural Resources, Agriculture, & Environment; Revenue & Taxation Ethics.

Practice Areas: Personal Injury, Insurance Disputes, and Real Estate.

Merrill Nelson (R) – District 68 (Elected to House: 2012)

Education: B.S., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Executive Offices, & Criminal Justice; Retirement. Standing – Judiciary (Vice Chair); Government Operations.

Practice Areas: Kirton McConkie – Appellate and Constitution, Risk Management, Child Protection, Adoption, Health Care, and Education.

Kraig J. Powell (R) – District 54 (Elected to House: 2008)

Education: B.A., Willamette University; M.A., University of Virginia; J.D., University of Virginia School of Law; Ph.D., University of Virginia Woodrow Wilson School of Government

Committee Assignments: Appropriations – Public Education. Standing – Natural Resources, Agriculture, & Environment; Political Subdivisions; Retirement & Independent Entities.

Practice Areas: Powell Potter & Poulsen, PLLC; Municipal and Governmental Entity Representation; and Zoning and Land Use.

Lowry Snow (R) – District 74 (Appointed to House: 2012; Re-Elected 2012)

Education: B.S., Brigham Young University; J.D., Gonzaga University School of Law

Committee Assignments: Standing – Executive Offices & Criminal Justice; Education; Judiciary.

Practice Areas: Snow Jensen & Reece – Real Estate, Civil Litigation, Business, and Land Use Planning.

Keven J. Stratton (R) – District 48 (Appointed to House: 2012, Re-Elected 2012)

Education: B.S., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Executive Offices & Criminal Justice. Standing – Public Utilities & Technology; Judiciary.

Practice Areas: Stratton Law Group PLLC – Business, Real Estate, and Estate Planning.

Earl Tanner (R) – District 43 (Elected to House: 2012)

Education: B.S., University of Utah; J.D., University of Utah S.J. Quinney College of Law

Committee Assignments: Appropriations – Social Services. Standing – Public Utilities & Technology; Law Enforcement & Criminal Justice.

Practice Areas: Tanner & Tanner, P.C.: Trusts and Estates, Real Estate, Tax, Corporate, and Litigation.

The Utah State Senate

Lyle W. Hillyard (R) – District 25 (Elected to House: 1980; Elected to Senate: 1984)

Education: B.S., Utah State University; J.D., University of Utah S.J. Quinney College of Law

Committee Assignments: Appropriations – Executive (Co-Chair); Public Education; Infrastructure and General Government. Standing – Government Operations and Political Subdivisions; Judiciary, Law Enforcement, and Criminal Justice.

Practice Areas: Family Law, Personal Injury, and Criminal Defense.

Mark B. Madsen (R) – District 13 (Elected to Senate: 2004)

Education: B.A., George Mason University, Fairfax, VA; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Social Services. Standing – Education; Judiciary, Law Enforcement, and Criminal Justice; Senate Rules.

Practice Area: Eagle Mountain Properties of Utah, LLC.

Stephen H. Urquhart (R) – District 29 (Elected to House: 2000; Elected to Senate: 2008)

Education: B.S., Williams College; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Public Education; Higher Education. Standing – Education; Judiciary, Law Enforcement, and Criminal Justice; Senate Rules.

Todd Weiler (R) – District 23 (Appointed to Senate: 2012; Re-Elected: 2012)

Education: Business Degree, Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Social Services; Retirement and Independent Entities (Chair). Standing – Business & Labor; Judiciary, Law Enforcement, and Criminal Justice; Retirement and Independent Entities (Chair); Senate Rules.

Practice Areas: Civil Litigation and Business Law.

Magna Carta: The Most Enduring Symbol of the Rule of Law

This iconic document was not intended to be a lasting declaration of legal principle. It was a practical solution to a political crisis of the highest ranks of feudal society, but it included the first reference to what became known as due process of law, and so was the first significant step in a process of guaranteeing constitutional freedoms that continues 800 years later. Sir Edward Coke interpreted it as a declaration of individual liberty in the conflict between The House of Commons and King Charles I, and it has resonant echoes in the U.S. Constitution and Bill of Rights.

P. Vanderbanck after E. Lutterell. Portrait of King John, from the Compleat History of England, 1697. Engraving, 1680–1687. Prints and Photographs Division, Library of Congress.

Origins

In a grassy meadow at Runnymede, England, rebellious barons presented a list of remedies of long-held grievances to King John (based on King Henry's Coronation Charter of 1100). King John had recently failed to reclaim the French lands he had inherited and lost and had attempted to rebuild his coffers by demanding more scutage (a fee paid in lieu of military service which he levied often during his reign). The barons – who had just received the support of London – would only allow King John to remain on the throne if he acceded to their demands. Lincolnshire's Cardinal Stephen Langton, Archbishop of Canterbury, who supported the non-violent means of the barons and who had recently returned from King John's exile, was present as one of the king's commissioners and helped write the final accord, the Charter of Runnymede.

Lincoln Cathedral's manuscript of King John's Magna Carta is one of four surviving exemplifications of Magna Carta dating to 1215. Courtesy of Lincoln Cathedral.

The formal charter was written in Latin by scribes working in the royal chancery and was sent out to bishops, sheriffs, and other officials throughout the country. Four of those original documents survive; the one from the Lincoln Cathedral is pictured here. Clauses 39 and 40 still resonate today:

> 39. No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.
>
> 40. We will not sell, or deny, or delay right or justice to anyone.

Ten weeks later, at King John's request, Pope Innocent III nullified the agreement. King John then cut a swath through Lincolnshire in a civil war to save his throne. Illness – some legends say food poisoning – ended his life in Newark Castle, a residence of the bishops of Lincoln. Fighting continued, until the climax was reached in a battle in Lincoln – where Stephen Langton studied as a young cleric. The barons were defeated assuring the succession of John's son Henry III to the English throne.

Reissues were granted in 1216 and 1217, when the charter was divided into the Charter of the Forest – the smaller of the two – and the Great Charter – Magna Carta. Henry III reissued a version of Magna Carta in 1225, which was the first to enter English law.

The final reissue in 1297 by Edward I was very similar to the 1225 version, in which the original clauses 39 and 40 were combined into a new clause 29:

> 29. No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice.

The 1297 version remains in statute today, but beginning in 1829, clauses were repealed and replaced by other statutes. Clause 29 is one of the three remaining, and it can be found in The National Archive's database of current legislation.

A 1354 statute by Edward III repeats the guarantees laid out in clause 29, with some slight but important differences. Instead of protecting only free men – which meant landowners of a particular level of wealth and townspeople – this statute protects "Man of what Estate or Condition that he be." And instead of guaranteeing protections according to "the law of the land," this statute substitutes the phrase "due process of the law," the very first instance of this phrase in legal literature. This statute, including a scan of the original Latin version, can also be seen in the legislation database.

Clause 29 received its classic form at the hands of the celebrated jurist Sir Edward Coke in his *Second Part of the Institutes of the Laws of England*, which was published after his death in 1634. At the heart of Coke's interpretation of Magna Carta is the idea that the Great Charter was fundamental law, a law that no King can ever repeal. While this was merely interpretation, not law, it was Coke's perspective that influenced the colonies of British America.

Magna Carta was the first of a series of instruments in England that have a special constitutional status, including the Petition of Right (1628), the Habeas Corpus Act (1679), and the Bill of Rights (1689). (There is no defining document that can be termed the "Constitution" in England because the political system evolved over time, rather than being changed suddenly in an event such as a revolution.) The first petition presented by the commons to the monarch at each new parliament is a request that the Magna Carta be retained. The British Library has an extensive website on Magna Carta.

Inspiration for Americans

During the American Revolution, Magna Carta served to inspire and justify action in liberty's defense. The colonists believed they were entitled to the same rights as Englishmen, rights guaranteed in Magna Carta.

Images, photographs, and captions in this article are from the traveling exhibit, Magna Carta: Enduring Legacy 1215–2015, courtesy of the American Bar Association and the Library of Congress, except for the Lincoln Cathedral manuscript. All rights reserved.

Colonists, including John Dickinson, James Otis, and Benjamin Franklin, objected to England's Stamp Act's provision that those who disobeyed could be tried in admiralty courts without a jury of their peers. Coke's influence on Americans showed clearly when the Massachusetts Assembly reacted by declaring the Stamp Act "against the Magna Carta and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void."

It is no wonder that, as the colonists prepared for war and the resulting new country, they would look to Coke and Magna Carta for justification and inspiration.

Through Lord Coke, John Adams, Thomas Jefferson, and James Madison learned of the spirit of the charter and the common law – especially Coke's interpretation of them. Jefferson wrote to Madison of Coke in 1826: "a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties."

Americans embedded principles of Magna Carta into the laws of their states and later into the Constitution and the Bill of Rights. The Fifth Amendment to the Constitution, "no person shall…be deprived of life, liberty, or property, without due process of law," is a direct descendant of Magna Carta's guarantee.

King Edward I reissued Magna Carta and the Charter of the Forest in 1297 in an act known as the Confirmation of the Charters. Confirmation of the Charters as reproduced in Statutes of the Realm. London, 1810. Engraving, 1810. Law Library of Congress.

Lasting Legacy

Magna Carta is the origin of many enduring constitutional principles: the rule of law, the right to a jury trial, the right to a speedy trial, freedom from unlawful imprisonment, protection from unlawful seizure of property, the theory of representative government, the principle of "no taxation without representation," and most importantly, the concept of fundamental law – a law that not even the sovereign can alter.

Magna Carta's First Visit to the United States. On the Lincoln Magna Carta's first visit to the United States seventy-five years ago, British Ambassador Lord Lothian delivers Magna Carta to Librarian of Congress Archibald MacLeish for safekeeping during World War II.

An Evolving Document

As with Magna Carta, the U.S. Constitution is not static; it has been amended and interpreted through the years. This has allowed the Constitution to become the longest-lasting written constitution codified in a single document and a model for those penned by other nations.

Constitutional rights continue to evolve through amendments to the U.S. Constitution; the most recent is the Twenty-seventh. Amendment XXVII prohibits any law that increases or decreases the salary of members of Congress from taking effect until the start of the next set of terms of office for Representatives. It was submitted by Congress to the states for ratification on September 25, 1789, and became part of the Constitution in May 1992, a record-setting period of 202 years, seven months, and twelve days.

Constitutional rights also evolve through interpretations of our laws by judicial review, decisions that are made weekly throughout our nation.

"The democratic aspiration is no mere recent phase in human history… It was written in Magna Carta." – Franklin Delano Roosevelt, 1941 Inaugural Address

See these and other Magna Carta images at the ABA/Library of Congress traveling exhibit in April throughout Utah; details on page 11.

"Magna Carta is the origin of many enduring constitutional principles: the rule of law, the right to a jury trial, the right to a speedy trial, freedom from unlawful imprisonment, protection from unlawful seizure of property, the theory of representative government, the principle of 'no taxation without representation,' and most importantly, the concept of fundamental law – a law that not even the sovereign can alter."

Pro Bono Honor Roll

Ahlstrom, James – Tuesday Night Bar

Alig, Michelle – Tuesday Night Bar

Allen, William – Family Law Case

Amann, Paul – Tuesday Night Bar, Debt Collection Calendar

Anderson, Michael – Tuesday Night Bar

Anderson, Skyler – Immigration Clinic

Barrick, Kyle – Senior Center Legal Clinic

Bertelsen, Sharon – Senior Center Legal Clinic

Billings, David – Debt Collection Calendar

Black, Hailey – Family Law Clinic

Black, Michael – Tuesday Night Bar

Bosshardt, Jackie – Appeals Case

Brown, Marco – Tuesday Night Bar

Buchanan, Don – Family Law Case

Burns, Mark – Tuesday Night Bar, Debt Collection Calendar

Burton, Mona – Tuesday Night Bar

Cadwell, Sarah – Family Law Clinic

Carr, Ken – Family Law Clinic

Chandler, Josh – Tuesday Night Bar

Christensen, Sydnee – Family Law Case

Christiansen, J. Ed – Family Law Case

Clark, Melanie – Senior Center Legal Clinic

Cohen, Dara – Street Law Clinic, Estate Planning Case

Coil, Jill – Tuesday Night Bar

Conley, Elizabeth – Senior Center Legal Clinic

Cowdin, Jake – Second District ORS Calendar

DeGraffenried, Scott – Tuesday Night Bar

DePaulis, Megan – Tuesday Night Bar

Dez, Zal – Family Law Clinic

Eggert, Christopher – Family Law Case

Emmett, Mark – Bankruptcy Case

Erickson, Michael – Third District ORS Calendar

Evans, Russell – Rainbow Law Clinic

Farraway, Wade – Tuesday Night Bar

Ferguson, Phillip – Senior Center Legal Clinic

Fonnesbeck, Jacob – Tuesday Night Bar

Fox, Richard – Senior Center Legal Clinic

Frame, Craig – Tuesday Night Bar

Frandsen, Nicholas – Tuesday Night Bar

Galati, Rick – Tuesday Night Bar

Gardner, Jordan – Family Law Case

Garrett, Aaron – Landlord/Tenant Case

Gilmore, Grant – Debt Collection Calendar

Gonzalez, Marlene – Immigration Clinic

Green, AJ – Third District ORS Calendar

Hagen, Scott – Third District ORS Calendar

Hancock, Liisa – Family Law Case

Handley, Debra – Family Law Case

Harrison, Jane – Consumer Case

Harrison, Matt – Street Law Clinic

Hart, Laurie – Senior Center Legal Clinic

Hartley, Taylor – Post-Conviction Case

Henderson, Rand – Family Law Case

Hill, Melinda – Tuesday Night Bar

Jelsema, Sarah – Family Law Clinic

Jensen, Leah – Family Law Case

Jensen, Michael – Senior Center Legal Clinic

Johns, Brent – Family Law Case

Judd, Katherine – Tuesday Night Bar

Judd, Michael – Tuesday Night Bar

Kennedy, Michelle – Debt Collection Calendar

Kessler, Jay – Senior Center Legal Clinic

Lacombe, Christopher – Tuesday Night Bar

Lambert, Sam – Third District ORS Calendar

Larsen, Kristy – Third District ORS Calendar

Lee, Terrell – Senior Center Legal Clinic

Long, Adam – Street Law Clinic

Lund, Niel – Family Law Case

Macfarlane, John – Tuesday Night Bar

Martineau, Kigan – Tuesday Night Bar

Maughan, Joyce – Senior Center Legal Clinic

Mayfield, Michael – Third District ORS Calendar

McConkie, Bryant – Third District ORS Calendar

McCoy II, Harry – Senior Center Legal Clinic

McGarvey, James – Family Law Clinic

Meredith, Lillian – Family Law Case

Milne, Eli – Legislative Law Case

Miya, Stephanie – Expungement Law Clinic

Morrison, Jackie – Medical Legal Clinic

Morrision, William – Bankruptcy Case

Morrow, Carolyn – Family Law Clinic, Family Law Case

O'Neil, Shauna – Bankruptcy Case

Parker, Kristie – Senior Center Legal Clinic

Parkinson, Jared – Senior Center Legal Clinic

Pascual, Margaret – Immigration Clinic

Pena, Fred – Tuesday Night Bar

Peterson, Jaqualin – Street Law Clinic

Priest, Katie – Third District ORS Calendar

Pugsley, Mark – Third District ORS Calendar

Ralphs, Stewart – Rainbow Law Clinic, Family Law Clinic

Rasmussen, Kasey – Debt Collection Calendar

Rawson, Blaine – Third District ORS Calendar

Rice, Robert – Third District ORS Calendar

Roberts, Kathie – Senior Center Legal Clinic

Rose, Rick – Third District ORS Calendar

Schaefermeyer, Steve – Street Law Clinic

Schultz, Lauren – Second District ORS Calendar

Schulz, Gregory – Tuesday Night Bar

Scruggs, Elliot – Street Law Clinic

Sellers, Andrew – Tuesday Night Bar

Semmel, Jane – Senior Center Legal Clinic

Shaw, Jeremy – Debt Collection Calendar

Smith, Craig – Street Law Clinic

Smith, Linda – Family Law Clinic, Family Law Case

Smith, Shane – Street Law Clinic, American Indian Clinic

So, Simon – Family Law Clinic

Sorensen, Rick – Family Law Case

Sorensen, Samuel – Family Law Clinic

Sparks, Ryan – Tuesday Night Bar

Stormont, Charles A. – Debt Collection Calendar

Sumbot, Nathan – Tuesday Night Bar

Swinyard, Eric – Family Law Case

Thorne, Jonathan – Street Law Clinic

Thorne, Matthew – Tuesday Night Bar

Thorpe, Scott – Senior Center Legal Clinic

Throop, Sheri – Family Law Clinic

Timothy, Jeannine – Senior Center Legal Clinic

Turner, Jenette – Tuesday Night Bar

VanTassell, Rebecca – Tuesday Night Bar

Wells, Matthew – Tuesday Night Bar

Wertheimer, Rachel – Tuesday Night Bar

Whitby, Yvette – Tuesday Night Bar

Williams, Timothy – Senior Center Legal Clinic

Winzeler, Zack – Tuesday Night Bar

Zidow, John – Tuesday Night Bar

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in the MONTHS October and November 2014. To volunteer call Michelle V. Harvey (801) 297-7027 or C. Sue Crismon at (801) 924-3376 or go to https://www.surveymonkey.com/s/UtahBarProBonoVolunteer to fill out a volunteer survey.

Have No Fear – Your Trusted Advisor is Here The Utah State Bar Pro Bono Commission Needs Your Help

Jennifer Falk and Cecilia M. Romero, Third District Pro Bono Committee Members

We know we all do it – the Utah State Bar's Pro Bono Commission calls to ask if you will accept a pro bono case but because it's not in your practice area you politely decline. What you may not know is that for any case you take, the Pro Bono Bar Commission will provide you an advisor attorney that practices in the area, among other helpful resources.

The Utah State Bar's Pro Bono Commission was created in 2012 with the goal to recruit, train, retrain, and reward attorneys for their pro bono efforts. The Pro Bono Commission works to place eligible clients with pro bono attorneys for direct representation. To be eligible for pro bono help through the Check Yes! program, applicants must be below 125% of the federal poverty line; the 2014 federal poverty line for a family of four is just under $30,000. It goes without saying that the individuals that apply for pro bono services through this program and qualify are truly in need of legal help and do not have the resources to get it elsewhere. In addition to screening for financial eligibility, the Pro Bono Commission pre-screens potential cases, including attorney review, to ensure the matter is appropriate for pro bono legal help.

The most recent Pro Bono Commission campaign is the Check Yes! volunteer campaign. Through the Check Yes! campaign, the Commission matches attorneys in each of Utah's eight judicial districts who are available to take on a case involving any of the following matters: Administrative Law, Appeals, Bankruptcy, Consumer, Foreclosure, Disability, Employment, Estate Planning, Family Law, Habeas, Landlord Tenant, Immigration, Indian Law, Limited Assistance for Military Servicemen, Non-Profit Formation, Private Guardian ad Litem, Probate, Public Benefits, Small Claims, and Tax. Notwithstanding the variety of pro bono services available to eligible applicants, 85% of the cases placed by the Pro Bono Commission program are in the family law arena; most pro bono clients request help with simple divorces, child custody, or child support issues. The family law attorney bench does more than its fair share in taking pro bono family law cases. However, taking on a pro bono family law case should not be the sole obligation of family law attorneys and for those attorneys willing to take a family law pro bono case, this is an area where there are many resources available to pro bono attorneys.

In return for your availability to take on a pro bono case, each pro bono attorney is provided a variety of necessary resources to help in his or her pro bono efforts. By request, at any time during the life of a pro bono case, the Pro Bono Commission can assign an advisor or an attorney that regularly practices in a certain area as a resource – the advisor will consult with the pro bono attorney, provide general legal guidance, or sample pleadings. Other resources include free Westlaw access, forms and sample pleadings, student researcher(s), malpractice insurance, and/or CLE training. Utah attorneys are encouraged to provide pro bono representation as part of their professional responsibility to provide legal services to those unable to pay. The Utah State Bar encourages lawyers to aspire to commit to at least fifty hours of pro bono legal services per year and in particular, the Pro Bono Commission challenges each attorney to take at least one family law case a year.

In an effort to thoughtfully assign attorneys to cases in areas of law they are experienced, each attorney who responds to the Check Yes! volunteer survey can select particular areas of law for volunteer service. The Utah State Bar Pro Bono Commission is grateful for any services an attorney is willing to provide; however, we challenge you to think about the great need there is for more attorneys to take on pro bono family law cases and ask you to Check Yes! to family law or accept a pro bono family law case the next time the Commission calls regardless of your practice area, including corporate attorneys. Taking on a family law case is a great way for those attorneys who do not appear in court as regular litigators to keep their litigation skills fresh. If you decide to take a case the next time the Pro Bono Commission calls, no matter the area, the Pro Bono Commission will provide you multiple resources. A family law issue is likely to touch each of our lives at some point, whether it be our own divorce or that of a friend or family member, guardianship or custody of a grandchild or child support issues, and they greatly impact those involved. Get involved in a family law case and you could truly be lifting a life through your pro bono service.

To get additional information on the Check Yes! campaign, obtain an advisor, volunteer to be an advisor, or receive any other information about the Pro Bono Commission please contact Michelle Harvey, Director, Access to Justice Department with the Utah State Bar, 801-297-7027, Michelle.Harvey@utahbar.org.

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

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

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

PUBLIC REPRIMAND

On October 13, 2014, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Scott T. Poston for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) Fees, 1.15(c) (Safekeeping Property), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

Mr. Poston was hired to represent a client in a criminal matter and an immigration matter. Mr. Poston was paid a flat fee for his legal representation. Mr. Poston did not earn the entire flat fee and failed to place the flat fee in to his trust account.

At the time Mr. Poston was retained, the client filled out and signed the necessary forms required for Mr. Poston to enter an appearance on his behalf and to submit a Freedom of Information Act (FOIA) Request to obtain his applicable records. Mr. Poston did not file the FOIA Request until two months after the request was ready to be sent and took three months to report to his client on the information he received.

Mr. Poston failed to contact the criminal prosecutor for months after he was retained, after telling his client it would only take a few weeks to resolve. Mr. Poston failed to follow up on his conversation with the criminal prosecution and ultimately did nothing to address his client's criminal charge. The client made several attempts to speak with Mr. Poston by contacting his office. Mr. Poston did not return the client's calls. Mr. Poston failed to report to his client in a timely manner regarding the work he performed.

The OPC sent a Notice of Informal Complaint ("NOIC") to Mr. Poston requiring him to respond to the informal Bar complaint in writing within 20 days. Mr. Poston did not submit a timely NOIC response.

New Bar Department Provides Discipline-In-Progress Information

Jeannine P. Timothy, Disciplinary Process Information Office

There are few things more disconcerting for an attorney than getting a letter from the Office of Professional Conduct (OPC) notifying the attorney about a Bar complaint. The fact that last year only 2.7% of OPC cases resulted in Orders of Discipline (and almost half of those were reached by stipulation) might be reassuring to many attorneys, but most attorneys probably aren't aware of such facts and do not understand the discipline process. In an effort to assist those attorneys who find themselves the subject of a Bar complaint, complainants, and the public, the Board of Bar Commissioners has created the Disciplinary Process Information Office. I am pleased to be managing this office to help people understand the disciplinary process.

I am also the staff attorney for the Consumer Assistance Program (CAP), a role I have had since CAP's inception seventeen years ago. As the CAP attorney, I help facilitate resolution of minor conflict between consumers and attorneys. CAP functions independently from the OPC, as will the new Disciplinary Process Information Office. It is important to note I cannot give legal advice, and because I am not part of the OPC, any opinions I have are not binding on that office and should not and cannot be used as a defense in a disciplinary action. Nevertheless, because I am not part of the OPC, I can provide confidential assistance to Bar members, not as a legal advocate, but as an information source for the disciplinary process.

The first letter a respondent receives from the OPC has always provided information about how an informal complaint is handled, but the process is very complicated. I will be available to answer questions about the process, refer attorneys to the appropriate procedural rules at various points in the process, and inform them about the progress of their individual cases with the OPC.

Let's take a quick look at the attorney discipline process.

The Bar encourages anyone looking to "resolve issues with an attorney" to complete an online Request for Assistance form. The OPC reviews and investigates allegations to determine if there are grounds for discipline, which is limited to violations of the Utah Supreme Court's Rules of Professional Conduct (Ethics Rules). The OPC processes follow the Utah Supreme Court's Rules of Lawyer Discipline and Disability (Discipline Rules).

When there are no grounds for discipline:

(1) CAP attempts to help attorneys and their clients resolve minor issues, such as communication issues and getting departing clients their files. Depending on the clients' concerns, the clients can also be referred to other Bar programs, which include Fee Dispute Resolution, Tuesday Night Bar, Modest Means Lawyer Referral, Lawyers Helping Lawyers, and Fund for Client Security. In many cases, there is no action required of the attorney because the consumer's concerns are outside the scope of the attorney–client relationship. In those cases, the CAP attorney explains to consumers what they can and cannot reasonably expect from their attorneys, how the legal process works, and what other forums and resources are available to help the consumers resolve their issues. Or;

(2) The OPC declines to prosecute those issues that lack merit or fail to state a claim, or when the issue is beyond the statute of limitations, is not related to practice of law, or does not fall within the jurisdiction of the OPC.

If there are grounds for discipline, there are two potential stages in the process:

(1) Informal complaint (can be initiated by the OPC, attorneys, or non-attorneys).

(2) Formal complaint (if recommended by a Utah Supreme Court Ethics and Discipline Committee screening panel).

In the first stage – the informal complaint – the OPC continues its investigation. There are several possible outcomes for an informal complaint prior to a screening panel determination. Additionally, either party can request an abeyance if the allegations closely match those of a pending criminal or civil litigation.

(1) Non-discipline outcomes:

a. Dismissal, if the Ethics Rules have not been violated, evidence is insufficient, or the complaint is unintelligible.

b. Referral to the Court's Diversion Committee, if the issue is a first-time, minor infraction and the respondent agrees to rectify the issue.

c. Referral to the Court's Professionalism Board if the Ethics

Rules have not been violated but there is a potential violation of Standards of Professionalism & Civility.

(2) Discipline outcomes:

a. Discipline by Consent (either Private Admonition or Public Reprimand), if the respondent admits fault (Chair of the Ethics & Discipline Committee must approve).

b. Resignation with Discipline Pending, if the respondent admits fault and indicates desire to resign (Utah Supreme Court must approve this action).

The OPC also has the option of presenting an informal complaint to a screening panel. Last year, the OPC presented only 4.4% of its cases to screening panels. The panels consist of six attorney members and two public members of the Ethics and Discipline Committee (only a quorum of two attorneys and one public member is required). After a screening panel hearing, members of the panel review all facts developed by the informal complaint, the attorney's written response, the OPC's investigation, and the information revealed during the hearing. It is then the screening panel's decision to determine how the case should proceed. The possible outcomes are as follows:

(1) Dismissal.

(2) Dismissal with caution.

(3) Dismissal with diversion.

(4) Referral to the Utah Supreme Court's Professionalism Board.

(5) Private Admonition.

(6) Public Reprimand.

(7) Enter a finding of probable cause that the OPC should initiate a civil suit in district court.

As you can see from this brief overview, the disciplinary process is very complicated. Additionally, there are considerations for appeals and interim actions. The Ethics and Discipline Rules are designed to protect the public, the profession, the complainants, and the respondent attorneys. In my new position as the Disciplinary Process Information Office attorney, I will be able to provide information about the process as a whole and details of the process which pertain to an individual case. I hope to be a valuable resource to Bar members and the public.

If you have any questions about the process concerning your case, or have general questions or comments about the attorney discipline process, please contact me at 801-257-5515 or DisciplineInfo@UtahBar.org.

Getting to Know the Office of Professional Conduct – or Not

Billy L. Walker & Barbara L. Townsend

The Office of Professional Conduct (OPC) is very pleased that Jeannine Timothy will be taking on her new role as Disciplinary Process Information Officer. We look forward to her providing assistance to attorneys, complainants, and the public regarding the process of complaints against attorneys that are processed through our office.

You now have the option of talking to Jeannine Timothy if you are having difficulties navigating the attorney discipline process. As outlined in this article, there are steps you can take during or prior to becoming involved in the disciplinary process that may help you. We welcome Jeannine's new role and hope that if you have to get to know the OPC, your experience with our office will not be as bad as you anticipated.

The lawyers that comprise the staff of the OPC are members of the Bar like all other lawyers. We practice in a very specialized area of the law. This specialized area of the law is the law of attorney discipline where, as part of the Bar, we assist the Utah Supreme Court with the enforcement of the ethical rules and the regulation of the conduct of the practice of law in Utah. When attorneys and complainants have to deal with the Office of Professional Conduct, we understand that it can be intimidating.

In reality, most of our time is spent discussing frivolous claims made by complainants that are disposed of before attorneys are required to respond to the allegations. For those "unlucky few" whose complaints go beyond a frivolous disposition, we would like to offer some tips on how to make your experience with the process less onerous and maybe some of these tips will help attorneys avoid us completely.

Avoidance of the Process:

1. Call the Ethics Hotline before you decide to make a questionable choice. *See* http://www.utahbar.org/opc/office-of-professional-conduct-ethics-hotline/.

2. Attend Ethics CLE classes that are pertinent to your practice.

3. Ask for an Ethics Advisory Opinion.

4. Call Lawyers Helping Lawyers.

5. Consult with Blomquist Hale.

6. Consult with colleagues.

7. Self-report first instances of unethical behavior or illegal conduct – if you make a mistake, own up to it. Do not compound the mistake with a cover-up.

8. Return unearned fees and give files back, without asking the client for anything in return. (Failing to do these things has resulted in the violation of Rule 1.16(d) in numerous cases. *See* Utah R. Prof'l Conduct 1.16(d) (2003).).

9. If your trust account or office is a mess, ask for help and follow through by fixing these problems.

10. Change the way you do things so that you don't continue to make the same mistakes.

11. If you make a mistake, attempt to rectify the problem you caused.

12. If you have personal problems or medical or psychological issues, seek help to manage these so they don't affect your practice.

13. Clearly define for the client the beginning and end of the lawyer–client relationship.

14. Withdraw from a case when your representation has ended.

15. Don't involve yourself with non-lawyers in businesses such as trust mills and foreclosure rescue scams. The lawyer who attempts to bring legitimacy to these enterprises may be left holding the bag. (In at least one case, this kind of arrangement resulted in the disbarment of the attorney involved.)

16. Don't take money out of your trust account until it is earned. *See* Ethics Advisory Opinion No. 12-02 (2012); *see also In re Jardine*, 2012 UT 67, 289 P.3d 516.

17. Don't invest money for your clients or others. Unless you are also a financial planner with experience in these things, your clients/investors will be very angry when all of the

money is gone. ("Bad investments" by attorneys have resulted in suspensions and disbarments.)

18. Don't loan client money to friends or others and don't loan your money to clients.

19. Don't "borrow" money from your trust account.

20. Don't hold money in "escrow" in order to use the money for your own purposes.

After You Are Involved in the Process:

1. Give us mitigating materials to consider.

2. Don't contact complainants and tell them you will give them money if they withdraw their complaint against you. This could result in a separate rule violation or could be considered an aggravating factor. *See* Utah R. Prof'l Conduct 8.4(d) (2005).

3. Don't ignore mail from the OPC. (This may result in discipline without your input.)

4. Don't ignore OPC discovery requests. (This may result in a summary judgment against you.)

5. Don't move during your case without leaving forwarding address. (Default sanctions may be imposed.)

6. Don't hide from the OPC, the Bar, or process servers.

7. Don't file non-meritorious papers in your case. (This has, in some cases, resulted in a higher level of discipline because the conduct may be used as an aggravating factor.)

8. Ask about Diversion. *See* Sup. Ct. R. Prof'l Practice 14-533; Article 5 – Lawyer Discipline and Disability (2012).

9. Cooperate in answering questions and providing documents to the OPC and to the court.

Generally, in our experience, lawyers tend to make bad choices for a number of reasons, including: (1) substance abuse; (2) office management difficulties such as too little staff or too many cases; (3) personal problems; (4) financial problems; (5) depression or mental illness; and, (6) character flaws such as dishonesty.

The first five of these problems can be addressed and can significantly change the assessment of the type of misconduct that may ultimately result in discipline. In many cases, when we investigate cases, we are not given any information regarding the reason for an attorney's choice and thus our investigation may be hindered. In this respect, if the lawyer chooses not to cooperate, i.e., not to talk to us, and not to give us the documents that we need to have our investigation to tell the full story, then our investigation leads us to the worst possible scenario. The worst possible scenario is that our investigation may conclude that the lawyer was driven by pure and simple dishonesty. Hopefully these tips will be helpful not only to any experience you might have with the Attorney Discipline Process but also in your everyday practice.

(This article is intended only to provide informal guidance. Individual cases vary. The OPC's position on a particular case will be based on its investigation of the facts and its assessment of those facts in light of the appropriate Rules and case law.)

Message from the Chair

by Heather J. Allen

This time of year brings out the resolutions or goal setting in most people. I've always believed that it is good to look to the past for lessons learned and to help make the future brighter. My parents taught me to set goals and write them down whenever there was much to be accomplished, regardless of the situation, and it didn't have to be at the beginning of the year. Prior to my becoming Chair in June, I thought about what the goals for our division would be and what the plan should be to achieve those goals. I surrounded myself with excellent paralegals who care about our profession, strive to be the best that they can be, and work hard to help bring about the goals set. The Paralegal Division of the Utah State Bar set the following three goals for the 2014–2015 year: (1) Increase membership; (2) Provide valuable and applicable CLE; and (3) Educate attorneys on proper utilization of paralegals.

One of our Division's greatest accomplishments in 2014 was the ability to give the first endowment of the Heather Johnson Finch Scholarship, which is chaired by attorney Nathan D. Alder and paralegal Julie Eriksson. As many of you are aware, this scholarship was put into place after our dear friend and colleague Heather Finch was tragically killed in an airplane crash in August of 2010 on her way to Mount Everest. Heather was a model paralegal, with joie de vivre to boot. The scholarship was given to a well-deserved Paralegal Studies major at Utah Valley University. We wish her well as she continues her career path as a paralegal. The Division is committed to and continues to budget contributions to this scholarship. For more information on donating, please visit: http://www.uvu.edu/development/scholarships/criteria_pages/heather_johnson/.

Our current board was set in June at our annual meeting and CLE. In July, a few members of the board and some Division members attended the Summer Convention in Snowmass. This was a great showing for our Division, and we hope attendance will continue to grow at the various bar conventions in the coming year.

On September 25, Abby Ruesch and Julie Emery represented the Division at the Utah Minority Bar Association's Banquet honoring the 50th anniversary of the Civil Rights Act of 1964. This year the event was held at the Natural History Museum of Utah. In addition to celebrating the achievements of Utah's minority attorneys, scholarship awards were presented to law students who have a demonstrated record of academic success and service to racial and ethnic minority groups.

In October, I was honored with an invitation by the New Lawyers Training Program to participate in a training video on paralegal utilization. This video is a part of the Utah Bar's initiative to provide "on demand mentor videos" that are currently available at the Utah State Bar's YouTube web page. For more information, please visit: https://www.youtube.com/user/UtahStateBar.

The Division, along with the Utah Paralegal Association (UPA), has continued with its tradition of offering "brown bag" lunches, whereby paralegals and attorneys are invited to bring their own lunch and attend an hour of CLE. These lunches are typically offered without any cost. This fall, the Division was honored to have the Professor Sharee Laidlaw of Salt Lake Community College present for a brown bag titled, "Do Birth Fathers have Rights in Utah Adoptions?" In October, Spencer Hadley, Office Administrator of the Utah Lieutenant Governor's Office, presented

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

the second part of a series on notary training titled, "Notary Training, Part 2: Powers and Limitations." And finally, in November, Lane Perkins of Salt Lake Legal made a presentation titled "Forensic Collection/Examination, Electronic Discovery, and Document Review." We are thankful for the speakers who were willing to share their time and talents with the paralegals and encourage you to put these events on your calendars and plan on attending.

Throughout the year, one of the questions the Board has asked is how the Division can better serve the community and represent the paralegal profession in the State of Utah. This last year the Paralegal Division has actively supported the Young Lawyers Division by providing notaries and witnesses for the Wills for Heroes and Serving Our Seniors programs. For those not familiar with these programs, Wills for Heroes is a statewide program that provides police officers, firefighters, and other first responders (and their spouses/partners) with wills and other estate planning documents. Serving Our Seniors is a statewide program that provides advanced health care directives and durable powers of attorney for people aged fifty-five and older. These are valuable programs, and they are absolutely free for the recipients. If you are interested in volunteering, please email Diane McDermaid at dbm@scmlaw.com with your availability, contact information, and whether you are a notary.

We are pleased to report that the paralegal job market here in Utah looks strong. We had several firms, corporations, and government departments looking to fill qualified legal positions this last fall. The Division strives to email these notifications out to our members and also post them on our Facebook page. If you or someone you know needs a paralegal job, please regularly visit the Division's Facebook page at: https://www.facebook.com/paralegaldivisionoftheutahstatebar.

Many wonderful events and opportunities are coming up in 2015. First will be the Spring Convention held March 12–14 in St. George. We encourage all members of the Paralegal Division to attend. As part of our goals to offer valuable and applicable CLE and educating attorneys on utilization of paralegals, our Division has been actively participating in the planning for the Spring Convention. We are very excited to have received one of the keynote spots for a speaker to present on proper utilization of paralegals. We have invited Toni Marsh, J.D., from George Washington University. Ms. Marsh is the founding director of the George Washington University Paralegal Studies program. After her address, she will be sitting on a panel to continue the discussion with Greg Sanders from Kipp and Christian and two of our board members, Greg Wayment and myself.

In May, the Division will be co-hosting with UPA the annual Paralegal Day Luncheon and awarding the Paralegal of Year award. In June, the Division will hold its Annual meeting and all-day CLE where our new board will be sat. Finally, the Utah Bar's Summer Convention will be heading back to Sun Valley on July 29–Aug 1. Please make plans to attend as many of these great events as you can, the CLE and opportunities to network will be well worth the time.

Our Board continues to look for ways to meet the goals set and believes that the upcoming conventions, brown bags, and open house will help us meet those goals. I look forward to seeing you at the events in 2015.

Distinguished Paralegal of the Year Award

The Distinguished Paralegal of the Year Award is presented by the Paralegal Division of the Utah State Bar and the Utah Paralegal Association to a paralegal who has met a standard of excellence through his or her work and service in this profession.

We invite you to submit nominations of those individuals who have met this standard. Please consider taking the time to recognize an outstanding paralegal. Nominating a paralegal is the perfect way to ensure that his or her hard work is recognized, not only by a professional organization, but by the legal community. This will be an opportunity to shine! Nomination forms and additional information are available by contacting Danielle Davis at ddavis@strongandhanni.com.

The deadline for nominations is April 30, 2015. Reminders will also come via E-Bulletin as well as announcements at the Spring Convention in March in St. George. The award will be presented at the Paralegal Day Celebration held on May 21, 2015.

Ethics Key Note Speaker – Spring Convention

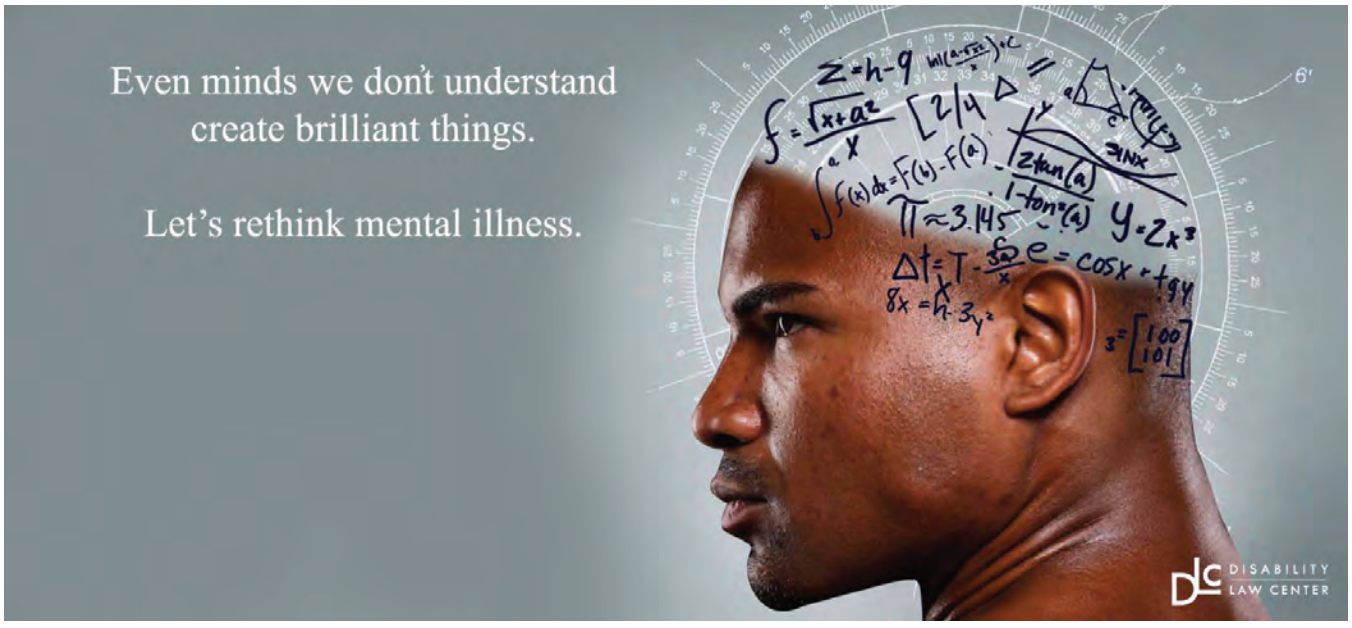
The Utah State Bar's annual Spring Convention will be held March 12–14 in St. George. The Paralegal Division is pleased to announce that Toni Marsh from George Washington University has been invited to give the Ethics Keynote speech. Ms. Marsh is the Director of the Masters of Paralegal Studies and travels around the country giving CLE's on proper utilization of paralegals and also the unauthorized practice of law. Please make plans to attend the convention! It is a great opportunity to mingle with other members of the Utah State Bar, get CLE hours, and enjoy St. George. For more information on registration, please see the insert in the *Bar Journal* or visit www.utahstatebar.org.

Ogden Area – Paralegal Open House

The Paralegal Division of the Utah State Bar would like to invite all paralegals in the Davis, Weber, Cache and Box Elder area to attend an open house.

Farr, Rasmussen, Farr, LLC
205 26th Street, Suite 24, Ogden, UT
January 22, 2015 | 5:30 – 6:30 pm.

If you are not currently a member of the Division, we would love to meet you and pass along some information on how joining the Division can benefit you.



CLE Calendar

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

January 13, 2015 | 4:00–6:00 pm — **2 hrs. CLE**

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

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

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

February 27, 2015 | 8:00 am–5:00 pm

I.P. Summit. Hilton Hotel with special guest speakers: Retired Judge Randall Radar and Patent and Trademark Commissioner Margaret A. Focarino. $280 for section members, $330 for non-section members.

February 2015 – Date TBA

CLE & Ski. Real Property and Litigation Section, Park City Mountain Resort. Stay tuned for more information.

March 11, 2015 | 4:00–6:00 pm — **2 hrs. CLE**

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

March 12–14, 2015

Spring Convention in St. George. See the enclosed brochure for more information and registration.

April 23, 2015 | 8:30 am–12:30 pm

New Lawyer Required Ethics Program. This program is required for all new lawyers who took the two day Bar Exam and are admitted to practice in Utah. The New Lawyer Ethics Program satisfies the ethics and Prof/Civ. credits for NLTP and your first compliance term. For this program only – attendees must be in the door by 9:00 a.m. After that time your registration will be transferred to the next program. Please leave early to avoid traffic congestion. Price: $75.

June 5, 2015 | 8:30 am–5:00 pm — **7.5 hrs. CLE (incl. 1 hr. Prof./Civ.)**

Personal Injury – Beyond the Basics – Part III. Topics include:

- The Basics of FTCA and GIA Malpractice Actions, presenter: Ryan M. Springer
- Litigating with Governmental Entities, presenter: Eric Olson
- Avoiding the Pitfalls of Appellate Preservation, presenter: David M. Corbet
- Changes in the Discovery Process, presenters: Francis J. Carney and Hon. Todd M. Shaughnessy
- Uses of Technology in Your Practice, presenter: Jeff M. Sbaih
- How to be Most Effective in Arbitrations and Mediations, presenter: R. Scott Williams
- Attention-Grabbing Demonstrative Evidence, presenter: David A. Cutt
- The Whys, Whens and Hows of Experts, presenters: Jordan Kendall, Esq. and Jeff Oritt

Price: TBA

Classified Ads

RATES & DEADLINES

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

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

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

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

OFFICE SPACE

Executive Office space available in professional building. We have a couple of offices available at Creekside Office Plaza, located at 4764 South 900 East, Salt Lake City. Our offices are centrally located and easy to access. Parking available. *First Month Free with 12 month lease* Full service lease options includes gas, electric, break room and mail service. If you are interested please contact Michelle at (801) 685-0552.

BEAUTIFUL DOWNTOWN, newly built-out, Executive Office: Full service and warm associations with seasoned lawyers at Terry Jessop & Bitner. Next to the courts with a stunning Main Street view. Have the feel of a well established law firm. Contact Richard at (801) 534-0909 or richard@tjblawyers.com.

Unique, best office space available in East Sandy location. Three-story suite: Ground level includes reception/lobby, work stations/conference room, bathroom, kitchen area. Second level includes three offices with windows and views. Third level includes roof garden meeting area (common to building) with view of Wasatch Front. Storage offered in attached building. Excellent advertising via signage in high traffic area to build your business. Easily accessible for clients and staff. $2,268, utilities not included. Call Jody at (801) 635-9733 or (801) 501-0100.

POSITIONS AVAILABLE

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

SERVICES

BOOKKEEPING/ACCOUNTING – Chart Bookkeeping LLC offers services to small and medium sized law firms in the Salt Lake valley. Bookkeeping, billing, and payroll services provided weekly or monthly. Contact M'Lisa Patterson at mpatterson@chartbookkeeping.com or (801) 718-1235.

CALIFORNIA PROBATE? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, North Salt Lake. (801) 837-8889 or (888) 348-3232. Licensed in Utah and California – over 35 years experience.

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

VIRTUAL OFFICE SPACE AVAILABLE: If you want to have a face-to-face with your client or want to do some office sharing or desk sharing. Creekside Office Plaza has a Virtual Office available, located at 4764 South 900 East. The Creekside Office Plaza is centrally located and easy to access. Common conference room, break room, fax/copier/scanner, wireless internet and mail service all included. Please contact Michelle Turpin at 801-685-0552 for more information.

PROLIABILITY LAWYERS PROGRAM

PROTECT what you've worked hard to build!

PROGRAM HIGHLIGHTS:

50 State Solutions

Exceptional Customer Service

Dedicated Account Managers and Agents

Easy to purchase — Apply and obtain coverage online at www.proliability.com/lawyers

PROLIABILITY LAWYERS PROGRAM

Administered by Mercer Consumer, a service of Mercer Health & Benefits Administration LLC, with more than 40 years' experience in providing law firms with the protection they need and deserve.

Endorsed by Utah State Bar

GET YOUR QUOTE TODAY!

To obtain your Professional Liability Insurance quote:

VISIT **www.proliability.com/lawyers**

CALL **(800) 906-7614 or (303) 376-5860**

AR Ins. Lic. #303439 | CA Ins. Lic. #0G39709
In CA d/b/a Mercer Health & Benefits Insurance Services LLC

MERCER

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

PRSRT STD
U.S. POSTAGE
PAID
SALT LAKE CITY, UT
PERMIT NO. 844