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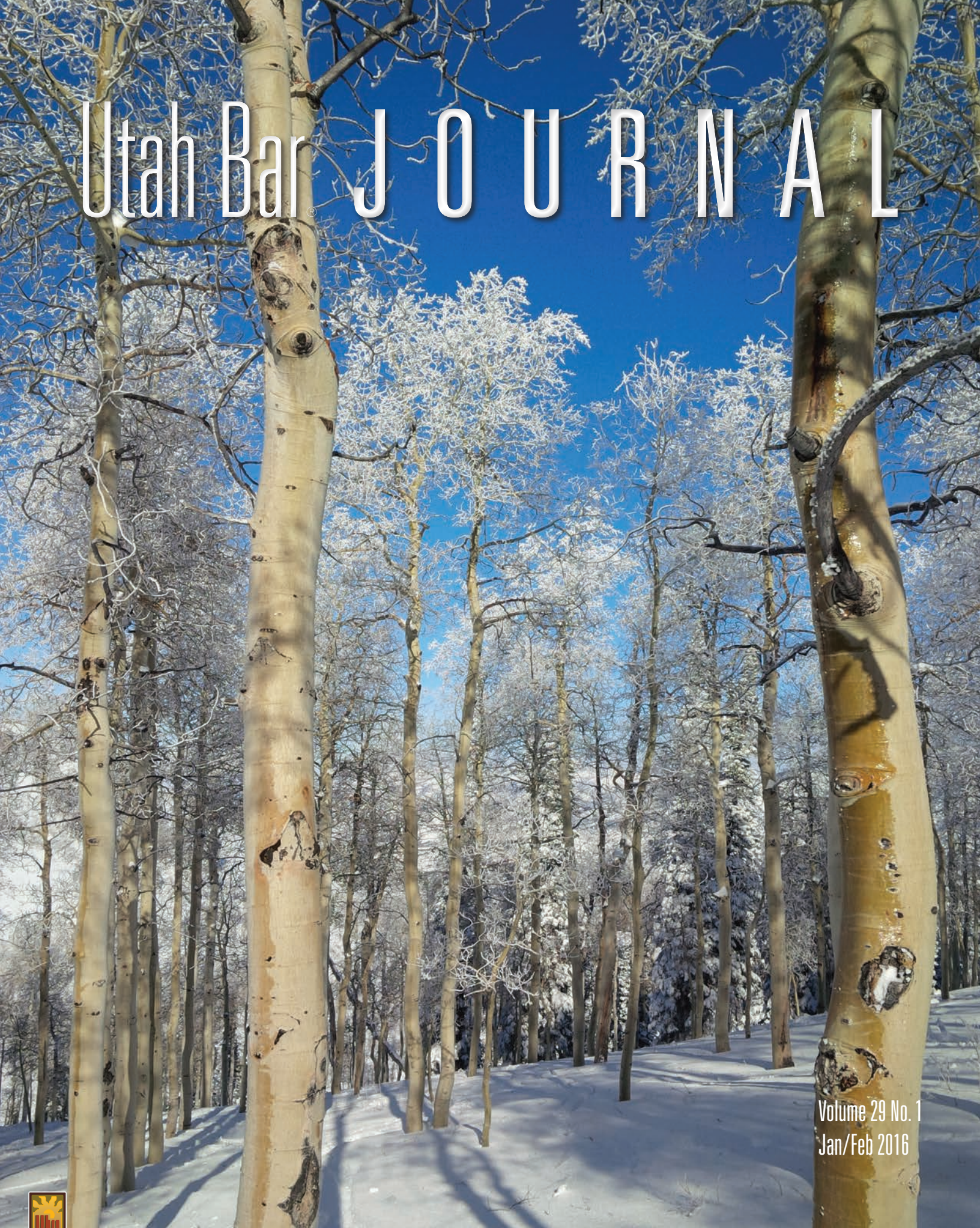

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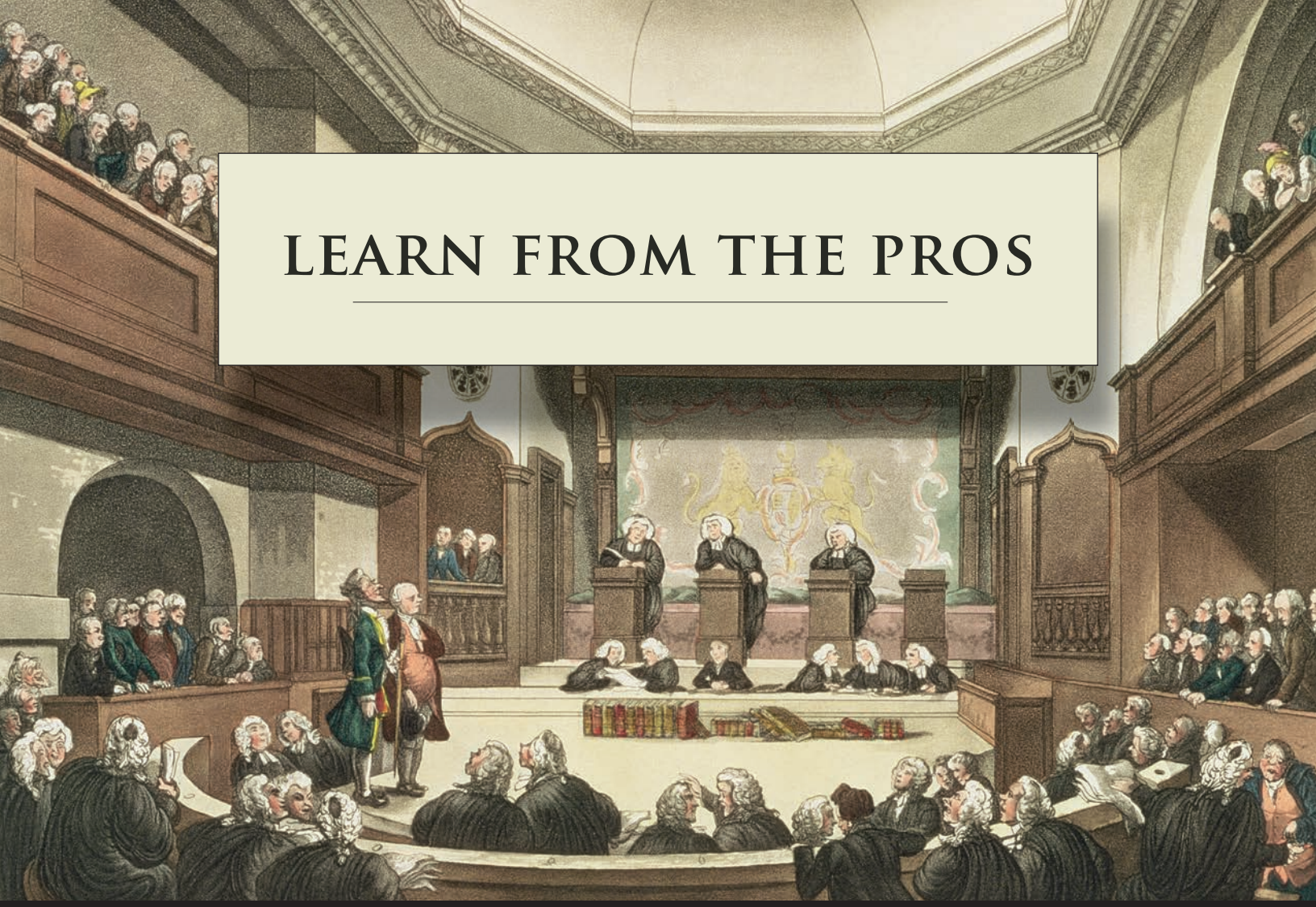

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Utah Bar JOURNAL

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Cover Photo

Frosty Forest at Powder Mountain, by Utah State Bar member Paul G. Amann.

PAUL G. AMANN graduated from the University of Utah College of Law in 1993. He worked at Amann & Wray, LLC, for five years before joining the attorney general's office in 1998 where he has served primarily as the lead prosecutor for the Internet Crimes Against Children Task Force. Paul is the coordinator for the AG's office's volunteers for the Tuesday Night Bar. He is also a Bar Examiner. Paul took this photo on Christmas Eve while tree skiing at Powder Mountain on a perfect "POW!" day with his son and daughter.

SUBMIT A COVER PHOTO

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

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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.

ARTICLE 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:
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.

ARTICLE 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.

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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.

Did You Know… You can earn Continuing Legal Education credit if an article you author is published in the *Utah Bar Journal?* For article submission guidelines, see page eight of this *Bar Journal*. For CLE requirements see Rule 14-409 of the Rules of the Utah State Board of Continuing Legal Education.

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 emailed to BarJournal@UtahBar.org or 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.

Happy New Year!

by Angelina Tsu

If you are anything like me, despite your best intentions for the new year, the reality is that by next month, gym time will be replaced with TV time, chocolate will replace the carrots (and maybe even the sandwich) in your lunch, and Candy Crush will edge out flossing as a part of your nightly routine. We are not alone: Statistics show that 45% of Americans make New Year's resolutions. Statistics also show that 88% of those who set New Year's resolutions fail. I am one of the failures. And yet, every year I feverishly draft my resolutions as if this year will somehow be different than the past thirty.

Why do so many of us fail at accomplishing our resolutions? The research on the subject is voluminous and cites issues ranging from "cultural procrastination" to "false hope syndrome." *Why People Can't Keep Their New Year's Resolutions*, Psychology Today, https://www.psychologytoday.com/blog/wired-success/201412/why-people-cant-keep-their-new-years-resolutions. Other studies indicate that the way we set our goals may be the problem. *Id*. We are taught to make goals that are specific, measurable, and time-bound. But as it turns out, those characteristics are precisely the reasons goals can backfire. *Id*.

> *"Instead of changing things that I do not like about myself, I resolve to focus on adopting the positive attributes of the lawyers I respect and admire most."*

So why do we set ourselves up for failure *every* year? Would we have a happier year if we simply did not try? I refuse to accept surrender as an alternative! What, then, can we do to join the ranks of the successful?

Some studies show that sharing one's goals with friends and colleagues can increase the likelihood of completing those goals. Those studies suggest that support from family and friends can help us to achieve our goals. Yet other studies show that keeping goals secret is critical to achieving success. This dichotomy, in my opinion, illustrates that scientists are no closer to solving this issue than we are. Personally, I believe that sharing goals helps me to achieve them because public humiliation is my motivational method of choice; hence, I'm sharing them with you. This year, I also reframed my goals. Instead of changing things that I do not like about myself, I resolve to focus on adopting the positive attributes of the lawyers I respect and admire most. Here are my resolutions for 2016 – with the reasons I want to adopt the behaviors of my role models:

1. **Be my authentic self.** We generalize about being authentic, but this concept really hit me during a conversation with Mike Spence. Being one's true self is difficult but worthwhile. People may not agree with me; some may not even like me – but nobody can truly like *me* without knowing who I really am.

2. **Never drive when I can walk.** Behind this wisdom is Judge Benson, whom you will see walking, often impeccably dressed and sometimes in the rain, all around downtown Salt Lake. My best conversations have occurred while walking. It is also technically exercise and a great way to clear the mind.

3. **Be sincere.** If you know Fran Wikstrom, you know that the room

lights up whenever he walks in. Fran can say something as simple as, "It's so nice to see you," and make my day. In 2016, I will let sincerity govern my words and deeds.

4. **Be a true friend.** Amazing people surround me, and my lunch bunch is a prime example of how having amazing friends can promote success. In 2016, I will support all of my friends the way they have supported me.

5. **Haters are going to hate (hate, hate, hate, hate). Shake it off.** I'm probably the only person in the world who hears Taylor Swift's voice when getting advice from Paul Moxley. His latest response to my very concerned inquiry about other people's opinions of me: "What other people think of you is none of your business." Fair point, Mr. Moxley. I'll spend less of 2016 obsessing about it.

6. **Be gracious.** My mother always emphasized the importance of good manners, charm, and grace. But it just seemed like a lot of hard work until I met Bill Marsden – and then it all made sense. Now it's a goal. My mother will be so proud!

7. **Ask questions first. Shoot later.** If I had to pick one person to join me for every difficult conversation through the rest of my life, it would be Charlotte Miller. She defuses situations and brings people together. I think her talent lies in asking questions first and reserving judgments for later. That assessment is a good conclusion to this piece because, quoting Nick Carraway in *The Great Gatsby*, "Reserving judgments is a matter of infinite hope." I have great hope, and resolve, for 2016. Join me, won't you?

Help Your MLM Client Avoid Legal Pitfalls When Expanding Internationally

by Rachel M. Naegeli

Transactional attorneys in Utah are increasingly tasked with assisting their Utah business clients in their efforts to expand internationally. Sometimes this process is fairly straightforward, but there is one business model that presents unique issues when introduced in foreign jurisdictions – the multi-level marketing (MLM) model. This article addresses some of the questions Utah attorneys should discuss with their MLM clients who have decided to expand abroad.

MLM in the U.S.

The MLM model has a fairly long history here in the United States, having been used in the country for nearly 100 years. Not only is it a long-established form of selling, but it is also familiar to most Americans. Many of us remember our moms using products ordered at a home party. Some of us have been to MLM home parties ourselves. The long history and familiarity of the model, coupled with the successful education of legislators that the Direct Selling Association (DSA) has undertaken over the years, has resulted in a well-developed set of laws at the federal level and in all fifty states, which largely takes into account the unique nature of the MLM model. While consumer protection laws still apply to MLM companies in the U.S., legitimate party plan MLMs are often exempted from the more stringent requirements applicable to other forms of selling that take place outside a normal place of business. Because the party plan model is built on interpersonal relationships, in contrast to the typical door-to-door sales model, most states and counties do not require home party MLM distributors to have special licenses or badges issued by the local government to demonstrate their products at a party. While a few states in the U.S. require MLMs to register with the division of consumer protection or the secretary of state as a MLM, most do not. Further, most states accept the designation of the distributor as an independent contractor for tax, workers compensation insurance, and regulatory purposes. And, although the court system does scrutinize MLMs to make sure that the company is actually seeking customers outside of its distributor base, the sometimes fuzzy distinction between distributor and customer generally does not become problematic unless the company fails to take measures to prevent inventory loading.

MLM Abroad

The cultural and legal backdrop for the home party model is different outside of the U.S. In some places, it is culturally unacceptable to sell products at a person's home; some countries view the MLM model as a pyramid scheme; even where MLM is acceptable, the regulatory requirements outside the U.S. are often stricter than in the U.S. Nevertheless, entrepreneurial, globally-minded Utah MLMs often rush to transplant their companies elsewhere, hoping to quickly plug their MLMs into profit-promising new markets where they have family, friends, or other contacts. They grant their well-connected buddies lucrative spots at the top of new international downlines and expect to sit back and watch their businesses explode. Sometimes this approach works and produces the anticipated revenues, but whether that sudden influx of additional profit also brings with it an influx of liability depends on the measures the MLM takes to protect itself during the process.

If you are a general counsel practitioner in the state of Utah, no

RACHEL M. NAEGELI is an attorney located at the Jones Waldo office in St. George, Utah. Her practice focuses on international business law, healthcare law and general counsel services.

doubt you have clients or friends who have jumped to join the exciting trend of replicating the MLM model elsewhere…and you've probably heard some interesting tales of what happened after they dove in head first. Even if you haven't had a client come to your desk asking for help getting them out of a problem somewhere on the other side of the world, you have heard of companies who were hauled into court for conducting an illegal pyramid scheme, were sued because they violated consumer rights laws, or failed to comply with government registration requirements when how they were conducting their business would have been perfectly legal in the U.S.

Utah general counsel lawyers tend to apply general international business law when assisting their clients who want to take their MLMs global, failing to recognize that the cultural, legal, and regulatory environment for MLMs can be significantly different outside the U.S. borders. The following article lists a few issues that Utah lawyers should consider when advising their clients on expanding their MLM internationally. Of course, this list is not comprehensive. Space does not allow for a deep discussion of all the issues that tend to pop up for new MLMs operating abroad, but this list should give you a good starting point for having an informed discussion with your client.

Is MLM legal in the target country?

The possible illegality of the MLM model might not even have crossed your client's mind because, as discussed above, the MLM model is common and acceptable in the United States. Admittedly, to some extent, the MLM model is an accepted form of business in most places around the world. However, not all jurisdictions have the same rules distinguishing acceptable MLMs from unacceptable pyramid schemes. The attorney must ensure that the compensation plan, policies regulating distributor communication, sales methods, and personal consumption conform to the local law in order to avoid running afoul of anti-pyramid legislation. If you didn't know that generously offering demonstrators an inventory buyback that meets the DSA Code of Ethics guidelines, Direct Selling Association, *Code of Ethics*, http://www.dsa.org/docs/default-source/ethics/shortcode.pdf?sfvrsn=2, and ensuring your client's company's policies fit the *Amway* rule won't necessarily keep your client

out of trouble on the other side of the Atlantic, you're not alone. *See In Re Amway Corp., Inc.*, 93 F.T.C. 618 (1979). Even established MLMs run into problems. For example, while the MLM model is acceptable in Belgium, a well-known U.S.-based MLM was ruled an illegal pyramid scheme in 2012 by a court in Belgium in part because the percentage of sales that were consummated by distributors, rather than retail customers, was too high. *See Test-Aankoop v. Herbalife Int'l Belgium*, available at http://pyramidschemealert.org/wordpress/wp-content/uploads/2011/12/Belgian.Court_.Decision.pdf.

Some countries have laws that would outright prohibit certain forms of MLMs, and there are some countries that are simply unfriendly to the MLM model altogether. China continues to be a good example. Many Utah-based MLMs are itching to break into the China market, hoping to tap into the potential demand (and distribution channels) that they see in China's emerging middle class. However, as a general rule, the MLM model is not an acceptable form of selling in China. China's law entitled, "Regulation of Direct Sales and Regulation on Prohibition of Chuanxiao" (2005), allows for some forms of direct selling but prohibits any business compensation structure that pays out on more than one level of commission. In effect, the MLM model as we know it here in Utah is banned in China.

> *"[I]f the client hasn't taken the necessary steps to comply with the local direct selling rules and other local laws, it has now opened up the U.S. company to liability in a foreign jurisdiction."*

Is MLM culturally acceptable in the target country?

While cultural acceptability might sound like it is outside the scope of what a lawyer might be asked to discuss, this is a prudent question for a lawyer nonetheless. Countries where the MLM model is looked down upon in the culture tend to be hotbeds for lawsuits. Some countries with longstanding prohibitions against MLM have more recently passed laws amending their prohibition against pyramid schemes to carve out very narrow "exceptions" for MLMs. This posture lends to a perception that while MLMs are like predatory schemes and while technically legal, your client should be prepared for challenges not just in convincing potential distributors and customers of the legitimacy of its business but also from increased government scrutiny and legal challenges brought by disgruntled distributors and customers. One step your client can take to find out more about the cultural and legal environment in the target country is to contact the local DSA. As mentioned above, the U.S. DSA has been instrumental in shaping legislation in the U.S. that protects consumers while not disadvantaging legitimate MLMs. The DSA has advocates and resources available to member companies here in the U.S. Advise your client to check the local DSA in its target country to see how well established that local DSA is and the extent to which it would assist your client in gaining legitimacy and navigating the legal, cultural, and regulatory issues unique to the local environment. Information for most local DSAs can be found by visiting World Federation of Direct Selling Association's website at http://www.wfdsa.org/.

Can the not-for-resale (NFR) model be used to test the target market?

Testing the market by means of NFR is a common strategy among Utah MLMs. However, like so many legal questions, the answer to whether NFR can be used to test the target market is "yes and no." Yes, NFR can be used to gain a sense of whether the product itself appeals to potential buyers. No, it cannot be used to test the business model, distribute products, or set up initial distributorships. Businesses want to take advantage of the import/export tax forgiveness available for personal consumption and hope to avoid licensing requirements. However, the problem for the attorney is this: most of the time, your client wants to use NFR to distribute its products and/or to ship starter kits to new recruits, both of which fall outside the scope of what the NFR rule is designed to permit.

For example, let's say your client is an MLM that sells eye makeup and wants to expand into the Japan market. Your client mentions to you that she is shipping product into the country but doesn't have to pay duty or get a license to do so because it's NFR. Is she correct? In Japan, the NFR importation of cosmetics into Japan is limited to twenty-four pieces of normal sizes per item per month. The only permitted use is personal use or consumption, not resale. *See* Japan Customs, *1806 Private importation of drugs,*

cosmetics, etc., http://www.customs.go.jp/english/c-answer_e/imtsukan/1806_e.htm. The *Pharmaceutical Affairs Law* provides that the importation of drugs, quasi-drugs, cosmetics, or medical equipment for the purpose of business activities is only granted for those persons who have the business license for importation and sale of those goods issued by the Minister of Health, Labour, and Welfare. Thus, if your client ships more than the allotted amount or is found to be distributing its products for resale, he or she will be in danger of being determined to have been selling cosmetics without the required license, resulting in fines and possible forced withdrawal from the market. Your client will reassure you that he or she will refrain from shipping more than twenty-four samples to any given household, so he or she doesn't need a license.

Can your client at least sell starter kits to generate interest without running afoul of the rules and having to pay duty? To avoid payment of duty on shipments to Japan of NFR cosmetics, total customs value should be 5,000 yen or less and should be clearly labeled with the words "not for resale" on the commercial invoice. This applies to samples as well. Goods that are used as and that qualify as samples are eligible for duty-free entry. In order to qualify, the total customs value should be 5,000 yen or less and the words "sample, not for resale" should be written on the commercial invoice. The goods should be marked or mutilated so that they can only be used as samples and not be sold. The 5,000 yen limit effectively prohibits the import of most MLM starter kits and severely restricts the amount of product that can be shipped to any household because at the current exchange rate 5,000 yen is equivalent to about $40 USD, well below the value of most MLM starter kits.

Can the U.S. MLM operate its U.S. business overseas?

An unfortunate pitfall that can trap unwary U.S.-based MLMs is allowing the NFR model to slowly develop into MLM in the target market without first taking the steps to protect the U.S. company. As demand for the product and the business opportunity grows, it is tempting to allow this to occur on a small scale just to test the market. However, it only takes one lawsuit for the company to wake up to the reality that its agreements, which probably still specify U.S. law and assign jurisdiction to Utah courts, are not going to be honored by a court halfway around the globe. The company did not take the basic steps necessary to be qualified to do business in the jurisdiction and didn't set up a selling entity there. Thus, it likely lacks standing to enforce its own agreements. In addition, if the client hasn't taken the necessary steps to comply with the local direct selling rules and other local laws, it has now opened up the U.S. company to liability in a foreign jurisdiction.

When should I advise my client to set up a local entity?

MLMs desiring to break into a new market generally proceed along one of two paths. Either the company allows for a limited number of potential distributors to purchase products directly from the company on a not-for-resale basis, taking advantage of the import and tax laws that permit a limited amount of product to be mailed into the country for personal use, or it does market research on the ground in the form of focus groups, demographic polling, and the like before deciding whether to make the investment of going "active" in that market. Either way, as soon as the company decides to allow the resale of its products, starts selling business opportunities, or begins recruiting, it is time to set up a local subsidiary.

Can my client get away with using something other than a taxable business entity?

Many U.S. companies, eager to fly beneath the radar and avoid paying taxes outside of the U.S., hope that simply setting up a representative office or contracting with an individual or company with its own established distribution channels would be a lower cost means of entering the market than setting up a subsidiary. Unfortunately, the representative office is limited as to the scope of the activities in which it can engage on behalf of the U.S. company in the country. Those rules are usually clearly set forth online and quickly dissuade clients from heading down that path.

The second possibility, using an existing entity on the ground to establish the logistics and the sales network, is more widely used. However, this path is full of pitfalls that can at the least open up the U.S. company to hideous tax consequences. The U.S. has entered into tax treaties with many nations around the world that assist U.S. companies in avoiding double taxation. A list of these tax treaties and links to the text of the treaties themselves is available online at http://www.irs.gov/Businesses/International-Businesses/United-States-Income-Tax-Treaties---A-to-Z. According to most double-tax treaties, a representative of the company cannot carry out any for-profit activities in the contracting state and is strictly limited in terms of what is allowable. The representative is not permitted to act as a direct agent of the company, and it is not permitted to sign contracts or transact business on behalf of the U.S. company. Should these rules be violated, your client may be determined to have created a "Permanent Establishment" in the country, thereby subjecting the U.S. company to taxation under the laws of the foreign state, which often means the country will tax the company on its worldwide income.

Your client needs to be warned that once an individual or entity does more than simply handle logistics and quality control type issues for the company, it may be crossing the line into the permanent establishment danger zone. You will likely find that while some U.S. companies are initially attracted to the idea of using an entity that already has established distribution channels to develop the market for its products, the lure loses its appeal once the client realizes that the distributor cannot act as a direct agent of the company.

You will probably have a client or two who decide to employ the do-it-yourself method of expanding into a foreign market; that is, they will simply fly over there themselves or send some of their key people over to get things started and to stimulate demand. Unfortunately, many clients are unaware that most double-tax treaties follow what is known as the 183-day rule. Simply put, once your company has employees or agents on the ground in the country for 183 days, it will be considered to have set up a permanent establishment. The 183-day timeframe might sound generous to your client until you clarify that it is cumulative, adding all of the days of all of the agents, employees, and executives together, that the days need not be consecutive, and that the timeline spans any twelve month timeframe. Suddenly those two-week trips your five key people took to the target market a few times last year have terrible new significance!

What kind of business vehicle should be used?

Once you have determined that your client needs to establish a separate entity to run its business in the new country, what kind of business entity is best? This question is, of course, dependent upon your client and its needs. Generally speaking, however, most countries offer a rough equivalent of a limited liability company, which is a good option. Examples include the société à responsabilité limitée (SARL) in France, the Gesellschaft mit beschränkter Haftung (GmbH) in Germany, the Limited and Pty Limited companies in Great Britain, Australia, South Africa, and New Zealand, and the Godo Kaisha in Japan. These LLC-type entities are relatively inexpensive to set up and maintain. The key question for most clients is the tax treatment of the entity. The U.S. company can elect to have the IRS treat the foreign subsidiary as a foreign disregarded entity for U.S. tax purposes if it selects the correct entity type. For a list of acceptable entity types by country, visit http://www.irs.gov/irm/part4/irm_04-061-005.html. Whether and how to set up profit and loss pooling arrangements and whether to use blocking companies are specialized questions that you and an international tax advisor should help your client consider.

Do my client's products comply with local standards?

Some products are deemed "regulated products" by other countries, and their import is restricted or banned. While most products sold through Utah-based MLMs are unlikely to be found on these lists, many popular MLM products fall within the quasi-pharmaceutical realm, which often face different standards abroad than they do in the U.S. While many of these

products, including nutraceuticals, supplements, and cosmetics, are not heavily regulated in the U.S., other countries impose stricter standards and control over the same. Continuing with our eye makeup hypothetical above, if your client intends to sell cosmetics through MLM channels in Japan, you must either become familiar with the Japanese Pharmaceutical Affairs Law or obtain assistance from local counsel. The Japanese Pharmaceutical Affairs Law specifies that the cosmetics must have a mild effect on the human body and must be safe to use over the long term. Cosmetics to be imported must conform to the "Standards for Cosmetics" set forth by the Ministry of Health, Labour, and Welfare. This is likely to be a low hurdle for an eye makeup product that is safe for sale in the U.S., but the issue becomes thornier with supplements or other health related products. The Japanese Pharmaceutical Affairs Law distinguishes cosmetics from quasi-drugs and has different standards for the latter. The regulatory process is more complicated for quasi-drugs and must be undertaken prior to introducing the products into the Japanese market.

If your client wishes to sell the eye makeup product within the European Union, it must comply with the new EU Regulation on cosmetic products. The EU Regulation simplified the process of putting cosmetics on the market in the EU because it harmonized the standards among the EU member states. For example, instead of consulting the French Public Health Code along with the prior EU Directive, the company simply needs to comply with the EU Regulation. The EU Regulation 1223/2009 (Cosmetics Regulation), which was entered into force in July 2013, sets forth safety standards for cosmetics; lists banned, restricted, and approved substances; and states labeling information that must be provided to consumers. *See* Regulation (EC) No. 1223/2009 of the Eur. Parl. and of the Council on Cosmetic Products (Nov. 30, 2009), http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02009R1223-20150416&from=EN. Some of the standards that your client should be prepared to meet include the EU ban on products with a final formula that was tested on animals. Another feature of the EU Regulation that would likely be unfamiliar to a Utah client is the requirement that a manufacturer designate a responsible person in the European Community for every product placed in the common market. That person would be responsible for the product's compliance with EU law and record keeping for inspection, which must include complete supply chain and testing information.

Is my client's product packaging in compliance with local standards?

Each foreign market has different standards for the packaging of products. Some packaging materials that are used in the U.S. are unacceptable elsewhere. Further, the packaging of the product and the shipping materials must be labeled with the correct labels and comply with local recycling rules. For example, companies selling products in Germany must comply with the German Packaging Ordinance, including amendments enacted through 2014 (the Verpackungsverordnung), which contains requirements for the recovery and recycling of all types of packaging. In South Korea, the material labeling of packaging is mandatory. The South Korean system uses material-specific logos with a separate disposal message. In Japan, various labeling standards apply depending on the composition of the packaging and its likelihood of future reuse. If a label is required to be affixed to the packaging, the label must appear as specified by the Ministry of Economy, Trade and Industry, with the vertical size of the label of 6mm or more. *See* Ministry of Economy, Trade and Industry, *Identification is Requested by Law on Plastics Containers and Packaging, and on Paper Containers, and Packaging*, http://www.meti.go.jp/policy/recycle/main/english/pamphlets/pdf/mark_Indication_e.pdf.

Will my client's distributor agreements and other documents be acceptable in the foreign market?

Assuming that by this point you have convinced your client to set up a local subsidiary and that the distributors will be signing their agreements with the foreign entity (NOT the U.S. company), your client might hope that its U.S. distributor agreement can be quickly amended for use by the foreign entity. Unfortunately for your client, simply changing the company name and the choice of law will not be sufficient to meet the local requirements for MLM distributorship agreements. Many foreign countries have specific language that must appear in the distributor agreement and in the policies. For example, the United Kingdom has legislation that specifically addresses MLMs. *See* The Trading Schemes Regulation, 1997, no. 30, http://www.legislation.gov.uk/uksi/1997/30/body/made. In the UK, there is £200 limit on new recruit spending (including on the starter kit) during the first seven days after entering into a distributorship agreement, which must appear in the distributor agreement. Further, UK distributors must be informed, and thus, the company is obligated to give at least sixty days advance notice of any changes to

distributors' financial obligations. In addition, distributors should be notified that in the event the company provides any training for the distributor at the cost of the distributor, the distributor may require the company to refund such cost (less the cost of any subsistence) within fourteen days of the training if the distributor is dissatisfied with the training. These details and others must be included in the distributor agreements and reflected in the company's policies and procedures.

Can my client use the same sales forms and policies abroad as in the U.S.?

The consumer protection laws that apply to home party sales in the U.S. are different than those that apply elsewhere. Thus, invitations, order forms, sales receipts, and other documents provided to the customer will be different as well. In Japan, most of what occurs between the distributor and potential customer is regulated by the Act on Specified Commercial Transactions (Act No. 57 of June 4, 1976), as amended by Act No. 44 of 2003 (ASCT) and regulations passed at the ministry level. Under the ASCT, door-to-door sales are defined as sales of goods at any location other than a place of business. *See* Act on Specified Commercial Transactions, Act No. 57 of June 4, 1976, art. 2(1)(i), http://www.cas.go.jp/jp/seisaku/hourei/data/ASC.pdf. Thus, most MLM activities are regulated as door-to-door selling. Under the door-to-door sales rules, prior to any solicitation, the distributor must clearly indicate to the target customer the name of the seller, the fact that his or her purpose is to solicit a sales contract, and the type of goods pertaining to the solicitation. In fact, distributors are prohibited from soliciting a sales contract at a place other than a publicly accessed place from a person the seller has induced by calling or otherwise requesting she stop by a place that is not the seller's regular place of business without first informing the customer that the purpose is to solicit a sales contract pertaining to door-to-door sales. In the EU, home party and other off-premises sales are governed by the Consumer Rights Directive (CRD), which officially came into force in June 2014. *See* Directive 2011/83/EU of the Eur. Parl. And on the Council on Consumer Rights, (October 25, 2011), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1. The CRD sets forth the mandatory pre-contractual information, rights of withdrawal notice requirement, the cooling-off periods, the burden of costs, and other details of the transaction. Your client should be advised that in the EU under Chapter III of the CRD, the cooling off period is fourteen days from the date of the delivery of the goods. Also, in some circumstances in France, the distributor is prohibited from accepting payment for a period of seven days after the customer places an order. The CRD provides the legal basis for most of the documents your client's company provides for use between its distributors and customers. More information on this legislation is available at http://ec.europa.eu/consumers/consumer_rights/rights-contracts/directive/index_en.htm.

Is there anything else my client needs to know?

Yes. Here are a few more issues to discuss. You will need to explain to your client that his or her distributors may need to apply for a specific license to sell products as a MLM distributor. The data protection laws are different abroad, which means that website privacy policies and disclosures cannot merely conform to U.S. law. Your client should be advised that foreign jurisdictions might require different filings for the protection of intellectual property. Some countries would view the distributorship agreement as an employment contract and require your client to pay into the state's social security system, provide social insurance and pay post-employment compensation on termination. There is also a trend toward treating distributors as consumers under consumer protection laws, which means that the same stringent consumer protection standards that have swept much of Europe and Asia will now apply to your sales relationship with your distributors. This list could go on, but as mentioned above, space simply does not allow for a comprehensive list.

It is exciting and rewarding to assist your client as his or her company takes the big step of expanding internationally. Attorneys have the ability and responsibility to ensure that this process takes place in a manner that diminishes risk, tax liability, and damage to its potential customer base by ensuring its entity set-up, governmental approvals, distributor agreements and accompanying policies, and consumer documents are accomplished in accordance with local law. It is a complicated process, and local counsel may need to be brought in from time-to-time, but the list of questions above should tip you off to some of the major traps you can help your client avoid and provide you with a useful starting point as you and your client begin the process of establishing a Utah MLM company abroad.

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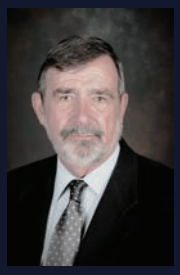

The EGC False Claims Practice is led by Robert D. Sherlock, of Counsel to Eisenberg, Gilchrist & Cutt. A 1976 graduate of the University of Utah College of Law, he also holds a Masters Degree in Public Administration specializing in health care administration. He spent over 18 years in a wide range of health care administrative positions, including Director of Compliance for a major health care system, and as General Counsel, CFO, and Chief Operating Officer for hospitals and health care entities. Mr. Sherlock's experience uniquely qualifies him as an expert in False Claims litigation, and his legal practice is exclusively dedicated to the prosecution of these claims.

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What Utah Trial Judges Have to Say About Trust and Estate Litigation – Survey Results

by John A. Adams

INTRODUCTION

Many trust and estate lawsuits carry on far too long because clients either have difficulty objectively viewing the facts of their case or they do not understand the law that will govern the outcome. In addition, many clients start with unrealistic expectations of what they think they should recover from an estate or trust. Clients often set their expectations based on their own perspective of what they think is fair and how they think assets should be divided. What many tend to forget is that the assets are not theirs. The assets belong to someone else – a parent, grandparent, sibling, or other family member. The person who sets up the trust (the trustor) or the person whose will it is (the testator) decides who gets what. It is that simple: the person whose money it is gets to decide. The distribution decisions do not have to be fair, logical, or consistent with the person's prior oral statements. The court's role is to give effect to a validly executed will or trust agreement.

Recurring advice voiced by multiple Utah district court judges in a recent survey on the topic of trust and estate litigation is to talk frankly to clients and help them set realistic expectations of likely outcomes in contested will or trust disputes. Trust and estate assets can be – no, almost certainly will be – greatly diminished in protracted litigation. When that happens, clients are deeply upset and disappointed. They are upset with other family members, perhaps upset with the benefactor who created the trust or will, and disappointed with the lawyers and our legal system.

This past summer, all current Utah district court judges and many retired district court judges were invited to participate in a survey on trust and estate litigation. Twenty-five judges responded – twelve sitting judges and thirteen retired judges. Two of the retired judges either only handled a criminal calendar or had no recollection of having handled any trust or estate cases. Therefore, the responses of those two judges were not included in the analyzed data. The twenty-three surveys analyzed included responses from at least one judge from six of the seven judicial districts in the state (nine from the Third District, six from the Second District, five from the Fourth District, and one each from the First District, Fifth District, and Seventh District). For the most part, the survey questions focused on disputed trust and estate cases that either went to trial or were decided on summary judgment, rather than on the uncontested run-of-the-mill cases that begin on the law and motion probate calendar, guardianships, or conservatorships. A primary goal of the survey was to get a better read on how frequently oft-asserted claims in contested will or trust cases actually prevail.

A challenge to collecting the desired data was that neither district judges nor their clerks track rulings on specific issues in trust and estate cases. As a result, judges' responses were based on their best recollection and estimates. More specifically, the survey asked (1) how many trust and probate estate trials the judges had presided over and (2) the number of trust and probate estate cases they had decided on summary judgment. A number of responses contained an estimate with a range of the number of cases tried or decided on summary judgment. The net result is that even though it is difficult to state precisely an accurate percentage of how frequently certain rulings were

JOHN A. ADAMS is an experienced litigator at Ray, Quinney & Nebeker who practices in the fields of trust and estate disputes, complex business matters, and alternative dispute resolution.

made, the combined data for all judges yield percentages that do not vary by more than one percentage point between the high and low estimates in each category.

The eleven retired judges had a combined 191 years of service on the bench – an average of 17.4 years per judge. Together the retired judges estimated they had presided over eighty-one to eighty-three trials involving contested estate or trust matters. They also had decided from sixty-nine to seventy-nine such cases on summary judgment. Interestingly, the twelve sitting judges had a combined 183 years of service – an average of 15.25 years per judge. This group of sitting judges estimated they had presided over eighty-three to ninety trials involving contested estate or trust matters. In addition, they had decided ninety-six other such cases on summary judgment. For the percentages used in this article, the total number of cases that went to trial or were decided on summary judgment were aggregated for both the retired and sitting judges and used as the divisor for the specific number of occurrences reported (the dividend) to come up with the quotient that was then translated into a percentage, rounding up or down.

The survey questions included how often judges (1) found the existence of undue influence, (2) determined that a testator or trustor was incompetent, (3) concluded a no-contest provision was valid and enforceable, (4) imposed a constructive trust, (5) declined to approve or appoint the nominated personal representative, or (6) found a breach of fiduciary duty that warranted discharge of the fiduciary. The short answer is that these types of claims succeed occasionally and some only rarely.

The survey also included more general questions about what percentage of cases are being resolved through the alternative dispute resolution (ADR) process, the range of the hourly rate approved for individuals serving as a non-professional trustee or personal representative, any guide used as to the maximum amount of attorney fees to be awarded in relation to the size of the trust/probate estate, evidentiary issues that tend to trip up lawyers trying trust or probate estate cases, common mistakes made by probate lawyers, and recommendations on how to help resolve disputes.

LIKELIHOOD OF SUCCESS ON COMMON CLAIMS

Undue influence is routinely alleged and seldom established. One experienced judge observed that undue influence seems to be alleged in almost all contested cases. The survey results show that undue influence is seldom found. Based on the data gathered, a contestant has a 15 to 16% chance of prevailing on an undue influence claim.

In Utah, a court will invalidate a will or trust that is the product of undue influence rather than the volition of the testator or trustor. Utah Code Ann. §§ 75-3-407, 75-7-406. To prove undue influence, a will contestant must establish, by a preponderance of the evidence, *In re Estate of Kesler*, 702 P.2d 86, 88 (Utah 1985),

> "an overpowering of the testator's volition at the time the will was made, to the extent he is impelled to do that which he would not have done had he been free from such controlling influence, so that the will represents the desire of the person exercising

the influence rather than that of the testator."

In re Estate of Ioupe, 878 P.2d 1168, 1174 (Utah Ct. App. 1994) (*quoting In re LaVelle's Estate*, 248 P.2d 372, 375-76 (1952)).

Undue influence is typically proven through circumstantial evidence, rather than direct evidence, e.g., eyewitness accounts of someone exerting pressure on the testator. Factors typically considered are the opportunity to influence the testator; what interest the undue influencer receives in the estate; whether the testator was in a weakened physical, emotional, or mental condition at the time the will was signed; and whether a confidential relationship existed between the testator and the undue influencer.

One judge pointed out that claims of undue influence are often asserted by family members who live far away from the testator and who have not regularly assisted the testator or provided care to her. The claims can ring hollow, especially when other heirs or beneficiaries have been present for long periods of time and rendered substantial care or service to the testator. The testimony and descriptive detail of those who provided the service can be very powerful in undercutting claims of undue influence.

Proving incompetence requires overcoming the presumption of testamentary capacity.

The survey results show that in very few cases does a will or trust contestant succeed in proving the incompetence of a testator or trustor. Again, these cases do not include guardianships and conservatorships. Based on the data gathered, the likelihood of success is only 5–6%. Under Utah law, a testator "is presumed competent to make a will, and the burden of proof of testamentary incapacity is on the contestant of a will." *Id.* at 1172 (citation and quotation marks omitted). Thus, to prevail, the contestant has the burden to "show by a preponderance of the evidence that [the testator] was incompetent to make the contested will and trust." *Kesler*, 702 P.2d at 88; *see also* Utah Code Ann. § 75-3-407(1) (explaining that contestants of a will have burden of establishing lack of testamentary capacity).

Under Utah law, a three-part test determines testamentary capacity: "one must be able to (1) identify the natural objects of one's bounty and recognize one's relationship to them, (2) recall the nature and extent of one's property, and (3) dispose of one's property understandingly, according to a plan formed in one's mind." *Ioupe*, 878 P.2d at 1173 (citation and quotation marks omitted). "[T]he law does not require that a person be particularly alert, nor need he have any special acumen in order to execute a will." *Id.* (citations and quotation marks omitted).

No-contest provisions are sometimes enforceable.

The term "no-contest clause" is used here interchangeably with *in terrorem* or penalty clauses in the narrow sense that it signifies a prohibition against contesting a will or trust. There seems to be a widespread belief among Utah estate planners that no-contest clauses are unenforceable. That perception likely exists because most estate planning lawyers have never participated in a proceeding where a no-contest provision has been upheld. However, such cases exist. While two judges in the survey reported having enforced no-contest provisions, the likelihood of prevailing on a no-contest clause claim at trial or on summary judgment based on the data gathered is less than 1% – in fact, it is a meager 0.6%.

The two cases that involved enforcement of a no-contest clause

had to comply with Utah statutory law the language of which is derived from the Uniform Probate Code. Utah Code sections 75-2-515 and 75-3-905 contain nearly identical language and state: "A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." Utah Code Ann. § 75-3-905; *see also id.* § 75-2-515 (providing same language but substituting "any interested person" for "an interested person"). The statute does not define probable cause in this context. However, Black's Law Dictionary defines probable cause in a civil or tort context to mean: "A reasonable belief in the existence of facts on which a claim is based and in the legal validity of the claim itself. In this sense, probable cause is usu[ally] assessed as of the time when the claimant brings the claim (as by filing suit)." Black's Law Dictionary pg 1395 (10th ed. 2014).

There is an understandable reluctance to enforce such provisions when harsh consequences of either disinheriting or otherwise penalizing a will or trust contestant could occur. Nevertheless, the purpose of a will and trust is to determine the testator's or trustor's intent and give effect to it. So long as the testator was competent, it matters little whether others agree with the testator's decisions or think the distribution is fair. One judge observed that a no-contest provision is more likely to be enforced if it is a custom-drafted provision containing details or specific concerns rather than a standard boiler-plate provision. In other words, if the testator or trustor has reason to foresee the real likelihood of a groundless challenge being asserted by a disgruntled heir or beneficiary and explains those reasons in the document, then a judge is more likely to give full effect to the provision. The same judge stated that the testator or trustor might even go so far as to identify the heir(s) or beneficiary(ies) who are the cause for concern.

Constructive trusts are rarely imposed.

In Utah, undue influence is presumed where a confidential relationship exists between the testator and the beneficiary of the will. *In re Estate of Jones*, 759 P.2d 345, 347 (Utah Ct. App. 1988), *rev'd on other grounds*, 858 P.2d 983 (Utah 1993). "A confidential relationship arises when one party, after having gained the trust and confidence of another, exercises

extraordinary influence over the other party." *Id*. However, the presumption of undue influence in a confidential relationship is rebuttable. *In re Swan's Estate*, 4 Utah 2d 277, 293 P.2d 682, 689 (Utah 1956). In the data collected, the responding judges had only imposed a constructive trust on summary judgment nineteen to twenty-one times – only 6% of the cases.

Judges seldom decline to appoint nominated fiduciaries.

It is not uncommon for a will or trust contestant to challenge the appointment of the person nominated as personal representative of a will or as successor trustee of a trust. There is some prospect of succeeding in efforts to block such an appointment, but the odds are not high. The data collected showed that in 53 to 55 instances, judges declined to appoint the nominated personal representative or trustee. That translates into a 16% chance of success.

Technical breaches of fiduciary duty don't carry the day.

Judges understand that non-professional personal representatives or trustees are usually unfamiliar with probate and trust code requirements and will often make technical mistakes. Sometimes adversaries will try to make much of the fact that certain formalities were overlooked or that technical violations occurred. What catches most judges' attention and raises their ire is when persons who have fiduciary obligations knowingly and repeatedly refuse to comply with their responsibilities. Examples include self-dealing, failure to keep heirs or beneficiaries informed of the fiduciary's actions, or blatant violation of ethical rules or fiduciary duties. The data collected showed that in thirty-nine to forty-two cases (12% of the time), the judges found a breach of fiduciary duty that was determined to be sufficiently serious that the court discharged the personal representative or trustee.

OTHER GOOD THINGS TO KNOW

Number of estate/trust cases being resolved through ADR

The general sense among the responding judges was that the use of ADR in estate and trust cases results in a large number of cases being resolved. Responses to the number of cases resolved by the use of ADR included: "approximately half," "greater than half," "a lot," "a high percentage," "most," "the vast majority," "80%," and "90%." Interestingly, there were a handful of judges whose experience was at the other end of the spectrum. Those responses were "zero," "a few," "at most 5%," "20%–25%," and "one of three."

Currently, only the Third District has adopted an ADR rule specific to its probate cases. This rule requires parties to either engage in ADR or opt out after the client has watched a video about the process and affirmatively elects to opt out. However, the general mandatory mediation rule that applies in all districts also applies to probate cases. *See* Utah Code Jud. Admin. R. 4-510.05 and R. 4-510.06.

Some data was provided by the Third Judicial District Court's Team Manager Clerk who oversees the probate calendar. As of July of 2015, of the 126 cases referred to mediation in 2014, forty-one cases (33%) went directly to the assigned civil judge, nothing had been done in twenty-nine cases (23%), nineteen cases (15%) settled without mediation, fourteen cases (11%) had been dismissed, ten cases (8%) settled as a result of mediation, six cases (5%) were mediated with no agreement reached, in five cases (4%) the objecting parties withdrew their objections, and there were miscellaneous outcomes in the other two cases. These numbers suggest that in the Third District, a significant percentage of cases either bypass ADR or fail to resolve in ADR, and therefore proceed with the assigned civil judge.

Non-professional trustee rates

The hourly rate allowed by courts for services provided by professionals – e.g., trust officers, attorneys or CPAs – serving in the fiduciary roles of trustee or personal representative tend not to be too controversial because they charge established rates, and information about prevailing rates for such services in the community is usually readily available. That is not the case with non-professional trustees or professional representatives. At times those serving in such roles can be professionals in their own right, *e.g.*, a doctor, engineer, or business executive, who spend valuable time at some expense to fulfill fiduciary duties. The survey asked judges what the range is on the hourly rate they have approved for individuals serving as a non-professional trustee or personal representative. The responses provided no uniform scale. Two judges said $20 per hour. Others answered $25 to $30 per hour, under $50 per hour, $50 to $60 per hour, $30 to $75 per hour, and $75 per hour. One former judge believed he allowed up to one-half of an attorney's hourly rate.

Attorney fee awards depend on circumstances of case. Lawyers may at times wonder whether there is an unspoken rule or "smell test" about a limit on the award of attorney fees in hotly contested trust and estate litigation. When asked in the survey whether the judges had a "rule of thumb" or other guide as to the maximum amount of attorney fees they would award in relation to the size of the trust/probate estate, the overwhelming response (sixteen out of twenty-five responses) was no. Most of the judges said they look at the circumstances of each case and decide what is appropriate. *See* Utah R. Civ. P. 73(b). However, one judge observed that he "would be troubled by any case where fees exceed 20%." Another judge answered if attorney fees were greater than one-half the size of the estate, "it seemed excessive."

SOME WORDS OF ADVICE FROM THE JUDGES

Evidentiary issues

In response to the question as to what are the evidentiary issues they see that sometimes trip up lawyers trying trust or probate estate cases, six judges cited hearsay and five mentioned foundation/authentication issues. Other responses included "financial expert qualification," "capacity," "parol evidence," "accounting proof," and "forgery without experts."

One judge with significant experience presiding over probate cases concisely identified four potential problem areas: "First, inability to understand and meet clear and convincing standards when applicable. Second, hearsay issues. Third, great difficulty tying evidence of incompetence or duress/undue influence to the critical time period. Fourth, difficulty documenting financial transactions with any precision."

Common mistakes

Another survey question was, "What are some of the most common mistakes you see made by probate lawyers?" An initial observation from one judge was that "[i]t is usually people who aren't probate lawyers who make the mistakes." Common mistakes identified were "late inventory/accounting," "not producing original testamentary or trust documents," "not getting notice to all parties," not obtaining complete lists of "interested parties," "not arranging for representation of

incapacitated individuals," and "failing to include property descriptions in a court order obviously intended for recording." One judge identified as a common mistake the decision of a probate lawyer to take on contested litigation if he or she lacks the requisite trial experience: "Estate planning lawyers rarely have the litigation skills needed to try a difficult probate case. At a minimum they should associate a litigator with business litigation skills." Another mistake noted was "[g]oing to trial based on interested parties' perceptions but without supporting third-party or documentary evidence in support."

Know the rules and know how to present the evidence in contested cases.

A number of judges commented that too many lawyers take on probate and trust matters without having sufficient knowledge and experience with the trust and probate laws. There are both procedural rules and substantive law issues relating to estate and trust practice that one must understand to competently practice in those areas. For example, parties alleging undue influence and incompetency carry the burden of proof and also must deal with certain presumptions. To meet that burden and prevail, a contestant must come forward with evidence that bears on the critical issues of whether the testator or trustor was competent or unduly influenced at the time of execution of the document in question. The further in time the evidence is from the time of actual execution, the less relevant and material the evidence is. The requirement that the undue influence or incompetence be in effect *at the time of execution* is often overlooked, causing an unnecessary expenditure of time and resources on those claims. As one judge aptly stated: "Suspicion that money or property has gone missing from the estate is not a substitute for proof."

Recommendations on helping resolve disputes

The final survey question asked of the judges whether, given the challenging family dynamics and extraneous factors that often come into play in trust and probate estate disputes, they had recommendations for practitioners as to how practitioners might be more effective in helping resolve such disputes. Three judges identified the importance of lawyers telling their clients frankly about likely outcomes. Their statements were: (1) "Create realistic expectations about outcomes"; (2) "Be really honest with clients about likely outcomes. Identify disputes not worth fighting over"; and (3) "Be honest with clients about what is real."

One judge offered this thoughtful insight about the advantages of a voluntary resolution the parties reach themselves over a court's ruling:

> Spend as much time in efforts to settle the case as in litigation. A case settled through attorneys' efforts or through mediation will bring more peace to the family than a judge's decision. I may make a rational, well-thought-out decision that makes no one happy, while the parties' own compromised settlement will let every family member believe that they were, at least, somewhat victorious and were fairly treated.

CONCLUSION

What conclusions can fairly be drawn from the collected data? First, not many contested cases are decided on summary judgment or make it to trial. That is good news for all concerned. Voluntary resolutions conserve judicial resources and provide the best opportunity to preserve what have likely become strained family relationships. Judges, by and large, strongly prefer and encourage litigants in estate and trust cases to work out their differences themselves, if possible. Second, those litigants who are unwilling or unable to reach resolution on their own and carry the burden of proof to establish their claims face low probabilities of succeeding – none greater than 16%. Third, the burdens to prove undue influence, incompetence, lack of qualification or fitness to serve as a fiduciary, or breach of fiduciary duty rest upon the party asserting the claim.

Concrete evidence, both testimonial and documentary, from the critical time period (usually the date of execution of the will or trust) and from both disinterested and knowledgeable sources with first-hand information is needed to prevail. The final take-away is that good lawyers make sure their clients – from the outset – understand the likelihood of success, the law that will govern, the costs that will be incurred and the emotional strain that is inevitable in protracted litigation. Good lawyers help their clients see the whole picture and set realistic expectations – and then give them the best representation they can on whatever path the client chooses.

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How a Trusteed IRA Can Improve Your Retirement Plan

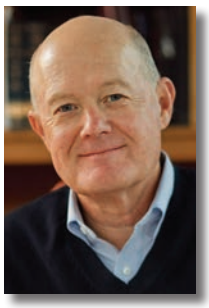
by Leland Stanford McCullough II, Lee S. McCullough III, L. Stanford McCullough IV

If your goal is to ensure that your retirement plan is available to provide income, tax-deferred growth, and long-term security for your family, then you should consider the benefits of a Trusteed IRA. Most people name their spouse as the primary beneficiary and their children as the secondary beneficiaries of their retirement plan. This typical beneficiary designation results in three potential risks: (1) your spouse may leave your retirement plan to his or her new spouse after you die, (2) your children may ignore the deferral option, cash out the retirement plan as soon as they inherit it, and blow through the money like a tornado in a trailer park, or (3) your IRA may be lost to creditors if your children get into financial problems of their own. A Trusteed IRA is an easy, simple, and inexpensive way to avoid all of these risks.

What is a Trusteed IRA?

A Trusteed IRA is typically provided by a financial institution, and it has the same tax rules and benefits of a traditional IRA. With a traditional IRA, your named beneficiary assumes full control of the account after you die. This means that the beneficiary can drain the account as fast as he or she wants and can change the beneficiaries as he or she wishes. A Trusteed IRA allows you to control the timing and amount of future distributions and the class of potential future beneficiaries.

For example, your Trusteed IRA could be designed as follows: (1) during your life, the trustee will pay you the required minimum distributions and as much of the principal as you request; (2) during your spouse's life, the trustee will pay your spouse the required minimum distributions and as much of the principal as your spouse needs (after other resources are utilized) to maintain his or her health, support, and maintenance in accordance with the accustomed manner of living (without the option for your spouse to name someone other than your children as the beneficiary); (3) after the death of your spouse, the IRA will be divided into separate IRA accounts for your children; (4) your children will then receive



LELAND STANFORD McCULLOUGH II is a member of American College of Trust and Estate Counsel, past president of the Estate Planning Section of the Utah State Bar, and is Chairman of the Board of the law firm of Callister Nebeker and McCullough.

LEE S. McCULLOUGH III is a private practice attorney, an adjunct professor at The J. Reuben Clark Law School at Brigham Young University, and a member of the American College of Trust and Estate Counsel.

L. STANFORD McCULLOUGH IV is a student at Brigham Young University and an employee at Knox Capital Group.

the required minimum distributions based on their own life expectancies. Other available options to you in a Trusteed IRA are to give your children access to the principal at such times and in such amounts as you designate (and this could be different for each child), and you could choose to limit the potential beneficiaries to whom your children can give the IRA after their death.

Why Don't I Name My Family Trust as the Beneficiary?

If you name your family trust as the beneficiary of your IRA, chances are that the trust will not qualify for the favorable minimum distribution rules that apply to individual beneficiaries. This means that your heirs may be required to take the money out of the IRA within a short time period, resulting in much higher income taxes and no more opportunity for long-term tax deferral. Therefore, it is not wise to include a family trust as the beneficiary of a retirement plan. You could hire an attorney to create a conduit trust or accumulation trust, which would provide similar benefits to a Trusteed IRA, but this will be more expensive and complicated than a Trusteed IRA.

Why Don't I Name My Children Individually as Beneficiaries?

Studies show that most inheritances are completely spent within seventeen months.[1] Most inherited IRAs are cashed out immediately despite the option for the heirs to defer distributions over their life expectancy. By naming individual beneficiaries, you risk the possibility that your heirs will spend the money immediately instead of taking advantage of the opportunity it gives them for tax-free growth and greater retirement security.

Another disadvantage of naming individual beneficiaries is that the inherited IRA could be lost to their creditors. The United States Supreme Court recently ruled that an inherited IRA is not eligible for the same protection from creditors as an IRA that is owned by the person who has funded the IRA.[2] The best solution to avoid these disadvantages is a Trusteed IRA.

Other Benefits of a Trusteed IRA

In addition to the benefits listed above, a Trusteed IRA can also provide the following benefits: (1) a Trusteed IRA is very simple and inexpensive to establish; (2) it is easy to convert a traditional IRA to a Trusteed IRA; (3) a Trusteed IRA provides continuity of management and integrity of purpose over many years or multiple generations; (4) a Trusteed IRA is especially applicable to a second-marriage situation where each spouse wants to be sure the original plan is not altered by a surviving spouse; (5) a Trusteed IRA is very well protected from creditors, bankruptcies, and divorces; (6) a Trusteed IRA allows you to give a spouse or other beneficiaries a limited power to make changes within the scope that you allow (such as a power to change future beneficiaries among your descendants but not allowing changes outside of the family); and (7) it is easy to make amendments or restatements to a Trusteed IRA during your lifetime.

How a Trusteed IRA Would Work

Craig worked and scrimped and saved for many years to build up a substantial 401(k) retirement plan. Craig loved his wife and children, but he knew that they were not good about saving, investing, or managing money. One of his children had a rocky marriage, one had financial problems, and one had a spouse that was likely to spend anything the child ever received. Craig sought advice about how to preserve his assets for the long-term security of his family. Craig's financial advisor told him about a Trusteed IRA. Craig and his wife elected to roll his 401(k) into a Trusteed IRA that would pay the required minimum distributions to them for life, and then to their children for life, with no one having power to change the beneficiaries. Each of their children would then have the power to set the terms for the next generation. Craig was glad to know he could change this at any time, but for the time being, it gave him great peace of mind. He was also happy to find that the Trusteed IRA was inexpensive, and the entire set-up process took less than an hour.

> *"[A Trusteed IRA] may give you peace of mind, knowing that your hard earned money will not be blown or diverted to spouses, creditors, or anyone else outside of your family."*

Craig died unexpectedly at the age of seventy. His wife remarried, and her new husband moved into her home so he could sell his home and invest all he had in his dream business. The dream business turned into a nightmare that drained the remainder of the couple's savings. Craig's wife tried to take the principal from the Trusteed IRA to help with the dream business, but the Trusteed IRA prohibited distributions of principal for such a purpose. Her new husband went bankrupt, but she still had the Trusteed IRA to provide income to her for life.

Craig's wife did not want to leave her new husband destitute so she added his name as a joint tenant on the family home. She attempted to name him as a beneficiary on the Trusteed IRA; however, the Trusteed IRA did not allow her to change the beneficiary. When she died, the new husband got the home and left it to his children from a prior marriage.

After the death of Craig's wife, Craig's children and their spouses were furious that they could not liquidate their share of the Trusteed IRA. Even though they were angry at first, they did enjoy the monthly income it gave them for the next thirty years. They appreciated this even more when they realized that this was the only asset that survived all those years and that most of their other assets had been spent or lost to divorce or other financial problems. They also marveled at the tax-free compounded growth that had occurred over the many years since Craig had died. After witnessing the blessing this Trusteed IRA had been in their own lives, Craig's children chose to leave it for their own children under similar terms and conditions.

Conclusion

If your goal is to ensure your retirement plan is able to provide income, tax-deferred growth, and long term security for your family, a Trusteed IRA may be a good option for you. It may give you peace of mind, knowing that your hard earned money will not be blown or diverted to spouses, creditors, or anyone else outside of your family.

1. Texas A&M Foundation, *Secure Your Heirs' Inheritance with Thoughtful Estate Planning*, (July 8, 2015).
2. *Clark v. Rameker*, 134 S. Ct. 2242 (2014).

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Getting the Big Picture on the New eDiscovery Amendments to the Federal Rules of Civil Procedure

by Philip J. Favro

The long wait for additional changes to the discovery provisions in the Federal Rules of Civil Procedure (Rules) is now over. On December 1, 2015, the latest eDiscovery amendments to the Rules were enacted, bringing to a close a process that lasted more than five years. While the debate in some circles over the necessity, substance, and form of the new amendments will likely continue, lawyers must now turn their attention to understanding the changes so they can litigate effectively under the new Rules regime.

The amendments are generally designed to streamline the federal discovery process by encouraging cooperative advocacy among litigants and spotlighting the importance of proportionality standards. In addition, the changes aim to reduce gamesmanship in discovery while calling for greater judicial involvement in case management. Last but not least, the modifications to Rule 37(e) create a national standard for discovery sanctions stemming from failures to preserve electronically stored information (ESI). This article discusses the specifics of these changes and the impact they are designed to have in discovery practice.

Cooperation, Proportionality, and Case Management

The overall purpose of the amendments is to facilitate the tripartite aims of Rule 1 in the discovery process. To carry out Rule 1's lofty yet important mandate of securing "the just, speedy, and inexpensive determination" of litigation, several amendments have been implemented to advance the notions of cooperation and proportionality. Other changes focus on promoting "more active judicial case management." *See* Judicial Conference Comm. on Rules of Practice & Procedure, Report of the Judicial Conference Committee on Rules of Practice and Procedure 13–14, App. B-11 to B-12 (Sept. 2014) (Report), *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014. The amendments that advance these three concepts are each considered in turn.

Cooperation – Rule 1

To better emphasize the need for cooperative advocacy in discovery, Rule 1 was amended to specify that clients share the responsibility with the court for achieving the Rule's objectives. The revisions to Rule 1 (in italics with deletions in strikethrough) read in pertinent part as follows: "[These rules] should be construed, ~~and~~ administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding."

Even though this concept was already set forth in the advisory committee note to Rule 1, *see* Fed. R. Civ. P. 1 advisory committee's notes 1993 amendments, an express reference in the Rule itself was made to prompt litigants and their lawyers to engage in more cooperative conduct. Report, at App. B–13. Perhaps more importantly, this mandate also should enable judges to encourage better adversarial cooperation. Indeed, such a reference, when coupled with the "stop and think" certification requirement from Rule 26(g), should give jurists more than enough procedural basis to remind counsel and clients of their duty to conduct discovery in a cooperative and cost-effective manner. *See Bottoms v. Liberty Life Assurance Co. of Boston*, No. 11-cv-01606-PAB-CBS, 2011 WL 6181423, at **4–6 (D. Colo. Dec. 13, 2011).

PHILIP J. FAVRO is an independent discovery advisor based in Alpine, Utah. He is an industry thought leader, a global enterprise consultant, and a legal scholar on issues such as eDiscovery, data protection, and information governance.

Proportionality – Rule 26 and Rule 34

The logical corollary to cooperation in discovery is proportionality. Proportionality standards, which require that the benefits of discovery be commensurate with its burdens, have been extant in the Rules since 1983. Nevertheless, they have been invoked too infrequently over the past thirty-plus years to address the problems of over-discovery and gamesmanship that permeate the discovery process. *See* Philip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 Mich. St. L. Rev. 933, 966. In an effort to spotlight these key standards, numerous changes have been made to the framework of the current Rules. The most significant changes are found in Rules 26(b)(1) and 34(b).

Rule 26(b)(1) – Tightening the Scope of Permissible Discovery

The permissible scope of discovery under Rule 26(b)(1) has been modified to spotlight the limitations that proportionality imposes on discovery. Those limitations were previously found in Rule 26(b)(2)(C) and were not readily apparent to many lawyers or judges. Similar to Utah Rule of Civil Procedure 26, the amendments (in italics) address this problem by making clear that discovery must satisfy notions of proportionality:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*

Fed. R. Civ. P. 26(b)(1). With the scope of discovery now expressly conditioned on proportionality standards, counsel and the courts should gain a better understanding of the restraints that this concept places on discovery.

Rule 26(b)(1) has also been modified to strengthen the notion that discovery is confined to those matters that are relevant to the claims or defenses at issue in a particular case. Even though discovery has been limited in this regard for many years, this limitation was being "swallow[ed]" by the "'reasonably calculated'" provision in Rule 26(b)(1). *Id.* R. 26(b)(1) advisory committee note (2015 amendments). That provision provided for the discovery of relevant evidence that was inadmissible so long as it was "reasonably calculated to lead to the discovery of admissible evidence." *Id.* R. 26(b)(1). Despite the narrow purpose of that provision, many judges and lawyers unwittingly extrapolated the "reasonably calculated" wording to broaden discovery beyond the benchmark of relevance. Report at App. B–10. To disabuse courts and counsel of this practice, the "reasonably calculated" phrase was removed and replaced with the following sentence: "Information within this scope of discovery need not be admissible in evidence to be discoverable." *Id.*

Similarly, the provision in Rule 26(b)(1) that allowed the court – on a showing of good cause – to order discovery on any issues relevant to the subject matter of the case has been eliminated. Report at App. B–9. The advisory committee observes that this change is designed to focus litigants on the proper scope of discovery: "Proportional discovery relevant to any party's claim or defense suffices." Fed. R. Civ. P. 26(b)(1) advisory committee note (2015 amendments).

Rule 34(b) – Reducing Gamesmanship with Document Productions

Three changes were made to Rule 34 to help reduce some of the gamesmanship associated with written discovery responses and document productions. The first change is a requirement in Rule 34(b)(2)(B) that any objection made in response to a document request must be stated with specificity. *See* Fed. R. Civ. P. 34(b)(2)(B). This recommended change is supposed to do away with the assertion of general objections. While such "boilerplate" objections have almost universally been rejected in federal discovery practice, they rather remarkably still appear in Rule 34 responses. *See, e.g., Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008). By including an explicit requirement for specific objections and coupling it with the threat of sanctions for noncompliance under Rule 26(g), perhaps this frivolous practice may finally be eradicated from discovery.

The second change addresses another longstanding discovery dodge: making a party's response "subject to" a particular set of objections. *See* Report at App. B–11. Whether such objections are specific or general, such a conditional response leaves the party who requested the materials unsure as to whether anything was withheld and if so, on what grounds. To remedy this practice, the following provision was added to Rule 34(b)(2)(C): "An objection must state whether any responsive materials are being withheld on the basis of that objection." Fed. R. Civ. P. 34(b)(2)(C). If enforced, such a requirement could make Rule 34 responses more straightforward and less evasive.

The third change clarifies the uncertainty surrounding the responding party's timeframe for producing documents. In the past, Rule 34 did not expressly mandate when the responding party had to complete its production of documents. *See* Report at App. B–11. That omission led to delayed and open-ended productions, which often lengthened the discovery process and increased litigation expenses. To correct this oversight, the Rule was changed to require the responding party to complete its production "no later than the time for inspection stated in the request or [at] a later reasonable time stated in the response." Fed. R. Civ. P. 34(b)(2)(B). For so-called rolling productions, the responding party "should specify the beginning and end dates of the production." Fed. R. Civ. P. 34, advisory committee note (2015 amendments). This provision should provide greater clarity surrounding the timeframe for productions of ESI.

Case Management – Rules 4, 16, 26, 34

To better ensure that the Rules' objectives regarding cooperation and proportionality are achieved, several changes were made to increase the level of judicial involvement in case management. Most of these changes are designed to improve the effectiveness of the Rule 26(f) discovery conference, to encourage courts to provide input on key discovery issues at the outset of a case, and to expedite the commencement of discovery.

Rules 26 and 34 – Improving the Effectiveness of the Rule 26(f) Discovery Conference

One way that the amended Rules can enable greater judicial involvement in case management is to have the parties conduct a more meaningful Rule 26(f) discovery conference. Such a step is significant since courts generally believe that a successful conference is the lynchpin for conducting discovery in a proportional manner. *See, e.g.*, 7th Cir. Elec. Discovery Comm., Principles Relating to the Discovery of Electronically Stored Information 2.05-2.06 (Aug. 1, 2010).

To enhance the usefulness of the conference, Rule 26(f) has been amended to specifically require the parties to discuss any pertinent issues surrounding the preservation of ESI. *See* Fed. R. Civ. P. 26(f)(3)(C). This provision should get parties thinking proactively about preservation problems that could arise later in discovery. It is also designed to work in conjunction with the amendments to Rule 16(b)(3) and Rule 37(e). Changes to the former expressly empower the court to issue a scheduling order addressing ESI preservation issues. *See* Fed. R. Civ. P. 16(b)(3)(B)(iii). Under the latter, the extent to which preservation issues were addressed at a discovery conference or in a scheduling order could very well affect any subsequent motion for sanctions for failure to preserve relevant ESI. *See* Fed. R. Civ. P. 37 advisory committee note (2015 amendments).

Amended Rule 26(f) also requires parties to discuss the need for orders under Federal Rule of Evidence 502. *See* Fed. R. Civ. P. 26(f)(3)(D). Though underused, Rule 502(d) orders generally reduce the expense and hassle of litigating issues surrounding the inadvertent disclosure of ESI protected by the attorney–client privilege. To ensure this overlooked provision receives attention from litigants, amended Rule 16(b)(3) now enables the court to weigh in on issues related to Rule 502 in a scheduling order. *See* Fed. R. Civ. P. 16(b)(3)(B)(iv).

Additional modifications calculated to enhance the effectiveness of the Rule 26(f) conference are found in amended Rule 26(d) and Rule 34(b)(2), which now allow parties to propound Rule 34 document requests *prior* to that conference. These "early" requests, which are not deemed served until the conference, are "designed to facilitate focused discussion during the Rule 26(f) conference." Fed. R. Civ. P. 26, advisory committee note (2015 amendments). This should enable parties to subsequently prepare Rule 34 requests that are more targeted and proportional to the issues in play.

Rule 16 – Greater Judicial Input on Key Discovery Issues

As mentioned above, modifications have been made to Rule 16(b)(3) that track those in Rule 26(f) so as to provide the opportunity for greater judicial input on certain electronic discovery issues at the outset of a case. In addition to those changes, amended Rule 16(b)(3) now allows a court to require that parties caucus with the court before filing a discovery-related motion. The purpose of this provision is to encourage judges to informally resolve discovery disputes before the parties incur the expense of fully engaging in motion practice. Various courts have used similar arrangements under their local rules, which have proved "very effective in resolving discovery disputes quickly and inexpensively." Report at App. B–12.

Rules 4 and 16 – Expediting the Commencement of Discovery

The commencement of discovery has also been expedited with two other Rule changes. Rule 4(m) has been revised to shorten time to serve the summons and complaint from 120 days to ninety days. In addition, amended Rule 16(b)(2) has reduced by thirty days the time in which a court must issue a scheduling order.

Preservation and Sanctions under a Revised Federal Rule 37(e)

The over-preservation of ESI and the appropriate standard of culpability required to impose sanctions for any failures to preserve relevant ESI were the subject of considerable debate during the amendment process. The byproduct of that process as reflected in a completely overhauled Rule 37(e) is a straightforward framework for the issuance of any sanctions stemming from failures to preserve relevant ESI. Rule 37(e) also encourages courts to draw on a wide range of factors to fashion sanctions awards that cure prejudice caused by less harmful forms of ESI spoliation. Finally, Rule 37(e) now establishes "a uniform standard in federal court" for the imposition of severe remedial measures resulting from ESI preservation failures. Fed. R. Civ. P. 37 advisory committee note (2015 amendments).

The New Sanctions Framework

Rule 37(e) has established a set of requirements that must be satisfied before a court can impose sanctions on a litigant for failing to preserve ESI. The reason for doing so is to ensure that sanctions for preservation failures are based on the designated criteria and not the potentially arbitrary use of a court's inherent powers: "New Rule 37(e) … authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine whether measures should be used." Report at App. B–58 (emphasis added).

The prerequisites that a party must satisfy when moving for sanctions under amended Rule 37(e) are as follows:

1. Relevant ESI "should have been preserved in the anticipation or conduct of litigation";
2. Relevant ESI was "lost";
3. The party charged with safeguarding the lost ESI "failed to take reasonable steps to preserve the information"; and
4. The lost ESI "cannot be restored or replaced through additional discovery."

While the first two steps essentially reflect existing common law requirements, the third step includes the key notion that preservation efforts must be analyzed through the lens of reasonableness. This is a significant step because it obligates courts to examine preservation issues with a broader perspective and not focus exclusively on whether and when the party modified aspects of its electronic information systems. Moreover, it directs preservation questions away from the kaleidoscope of perfection that has unwittingly crept into electronic discovery jurisprudence over the past several years. Instead of punishing parties that somehow fail to preserve every last email that could conceivably be relevant, the rule requires a common-sense determination of the issues based on a benchmark – reasonableness – with which courts and counsel are familiar. Fed. R. Civ. P. 37 advisory committee note (2015 amendments).

The fourth and final provision is significant because it prevents the imposition of sanctions where there is essentially no harm to the moving party given the availability of replacement evidence.

Severe Sanctions vs. Curative Measures

To obtain the most severe sanctions under Rule 37(e)(2), the moving party must additionally demonstrate that the alleged spoliator "acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2). This specific intent requirement is designed to create a national standard by ensuring that severe sanctions are imposed only for the most flagrant violations of ESI preservation duties. These violations appear to include bad-faith destructions of ESI that occurs in connection with the instant lawsuit. They do not, however, include negligent or grossly negligent conduct. The advisory committee note makes clear that the Rule 37(e) amendments "reject[] cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence." Fed. R. Civ. P. 37 advisory committee note (2015 amendments).

The severe sanctions that a court may issue under Rule 37(e)(2) are limited to dismissing the case, entering default judgment, or "instruct[ing] the jury that it may or must presume the information was unfavorable to the party." Fed. R. Civ. P. 37(e)(2). Alternatively, a court can presume that the lost ESI was unfavorable to the alleged spoliator. Nevertheless, a court is under no obligation to order any of these measures even if the specific intent requirement is satisfied. As the committee note cautions, "[t]he remedy should fit the wrong, and the severe measures authorized…should not be used when the information lost was relatively unimportant or lesser measures…would be sufficient to redress the loss." Fed. R. Civ. P. 37 advisory committee note (2015 amendments).

If the moving party cannot satisfy the specific "intent to deprive" requirement, the court may then resort to curative measures under Rule 37(e)(1) to address prejudice resulting from the loss of the ESI. The sanctions that a court may order pursuant to that provision should be "no greater than necessary to cure the prejudice" to the aggrieved party. Fed. R. Civ. P. 37(e)(1). That wording was drafted broadly to ensure that jurists would have sufficient discretion to craft remedies that could ameliorate the prejudice. Fed. R. Civ. P. 37 advisory committee note (2015 amendments). While the precise range of these remedies is not delineated in the rule, the advisory committee note and a separate committee report suggest the remedies could include the following:

- "forbidding the party that failed to preserve information from putting on certain evidence";
- "permitting the parties to present evidence and argument to the jury regarding the loss of information";
- "giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies"; or
- "exclud[ing] a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence."

Id.

Thus, a moving party could very well obtain weighty penalties against an alleged spoliator even if it is unable to establish the specific "intent to deprive." Nevertheless, the advisory committee note makes clear that any such sanctions must be tailored so they do not equal or exceed the severe measures of Rule 37(e)(2). *Id.*

Need for Change in Discovery Culture

The changes to the Rules are significant. In theory, they should make discovery more efficient and cost effective, thereby allowing matters to be litigated on the merits instead of in costly satellite litigation. All parties to the discovery process should be aware of the impact that these changes could have both in litigation and on pre-litigation information governance programs.

And yet, despite these great expectations, it would be Pollyannaish to suggest the Rules changes will cure the present ills afflicting the discovery process. Without a corresponding change in discovery culture by courts, counsel, and clients alike, the new amendments will likely have little to no effect on the manner in which discovery is conducted today. In a planned follow-up to this article, I expect to discuss some of the changes that must take place in litigation practice and information governance programs for a shift in discovery culture to occur.

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Balancing the Scales: The Growth and Development of Civility Standards for Judges

by Donald J. Winder

AUTHOR'S NOTE: *The author wishes to thank Jerald V. Hale, an Administrative Law Judge for the Arizona Department of Transportation, for his assistance in preparing this article. Thanks also to Kent B. Scott for his research in gathering and examining the current judicial civility rules around the country as part of his service on the Utah Supreme Court's Advisory Committee on Professionalism, Subcommittee on Proposed Standards of Judicial Civility and Professionalism.*

> *"As the world changes and becomes less civil, there is a stark need for the legal profession to become more civil."*

In the practice of law, the twenty-first century has been witness to a sea change in how those in the legal profession are expected to conduct themselves. As civility has decreased in society at large over time, incivility on the part of attorneys seemed to become distilled to a pure form as a desirable trait in the practice of law by young and old lawyers alike. However, slow but steady progress has been made in replacing this "ideal" with recognizing and embracing civility in the practice of law. Following the establishment of civility guidelines and standards for attorneys, many states now have similar civility guidelines for members of the judiciary.

The American Board of Trial Advocates (ABOTA) has long been at the forefront of promoting civility in the legal profession. The ABOTA Principles of Civility provided the benchmark for establishing a framework for civility in all aspects of the legal profession. As a result of ABOTA's efforts and similar efforts in state and local bar associations and courts throughout the country, civility standards for lawyers are now the norm, rather than the exception.

The ABOTA Principles of Civility, Integrity and Professionalism outline the conduct expected of judges. Specifically, judges are requested to observe the following Principles:

1. Be courteous and respectful to lawyers, parties, witnesses, and court personnel.

2. Control courtroom decorum and proceedings so as to ensure that all litigation is conducted in a civil and efficient manner.

3. Abstain from hostile, demeaning, or humiliating language in written opinions or oral communications with lawyers, parties, or witnesses.

4. Be punctual in convening all hearings and conferences, and, if unavoidably delayed, notify counsel if possible.

5. Be considerate of time schedules of lawyers, parties, and witnesses in setting dates for hearings, meetings, and conferences. When possible, avoid scheduling matters for a

DON WINDER is managing partner in the firm Winder & Counsel, P.C., in Salt Lake City, Utah. Mr. Winder has been practicing for more than forty years and has a varied trial and transactional practice focusing on business, commercial, and real estate law.

time that conflicts with counsel's required appearance before another judge.

6. Make all reasonable efforts to promptly decide matters under submission.

7. Give issues in controversy deliberate, impartial, and studied analysis before rendering a decision.

8. Be considerate of the time constraints and pressures imposed on lawyers by the demands of litigation practice, while endeavoring to resolve disputes efficiently.

9. Be mindful that a lawyer has a right and duty to present a case fully, make a complete record, and argue the facts and law vigorously.

10. Never impugn the integrity or professionalism of a lawyer based solely on the clients or causes he represents.

11. Require court personnel to be respectful and courteous towards lawyers, parties, and witnesses.

12. Abstain from adopting procedures that needlessly increase litigation time or expense.

13. Promptly bring to counsel's attention uncivil conduct on the part of clients, witnesses, or counsel.

Following ABOTA's lead in this area, sixteen states currently have judicial standards of civility and professionalism. Of those, Delaware, Hawaii, Idaho, Louisiana, Maryland, Minnesota, New Mexico, and Oklahoma are directly based on the ABOTA standards. Another four jurisdictions, District of Columbia, New York, Pennsylvania, and West Virginia, have developed standards loosely based on the ABOTA standards. Three additional states, New Jersey, Ohio, and Wisconsin, have created standards outside the guiding framework of the ABOTA standards. Regardless of the specific language or pedigree, all of these jurisdictions are united in their commitment to civility in all aspects of the legal profession, including the judiciary.

As with developing formal civility standards for attorneys, Utah has been part of the early vanguard of jurisdictions working to put into place similar standards for judges. The Utah Supreme Court Committee on Professionalism, which was an integral part of the development of civility standards for lawyers, the establishment of a program of professionalism counseling for members of the Utah State Bar, and the placement of civility in the oath for admission, established a Subcommittee on Proposed Standards of Judicial Civility and Professionalism to propose judicial civility standards. The Subcommittee consisted of me,

Judge John Baxter, Kent B. Scott, and John Sundloff.

In developing the proposed standards for the Utah judiciary, members of the Subcommittee examined the judicial standards of civility and professionalism currently existing throughout the country. Using these various models, the Subcommittee created draft standards for judges. These standards were distilled from the ABOTA standards, and from creative and meaningful modifications and additions found in the standards of other jurisdictions. The Subcommittee's efforts resulted in principles for judges, approved by the Utah Supreme Court, as well as the Judicial Conduct Commission, as part of the Utah Standards of Judicial Professionalism and Civility. As noted in the Preamble to the Utah Standards, they are voluntary and aspirational.

The Utah Standards state:

1. Judges will refrain from manifesting or acting upon racial, gender, or other improper bias or prejudice toward any participant in the legal process.

2. Judges will not use language in oral or written communications, orders, or opinions that is profane or that gratuitously demeans or humiliates an attorney, litigant, witness, or other judge, recognizing, however, that judges are sometimes expected to stand up to obstinacy or insubordination with sharpness and even severity, and that the difficult legal or factual determinations they make might produce a demeaning or humiliating effect on a participant in the judicial process.

3. Judges will not disparage the integrity, motives, intelligence, morals, ethics, or personal behavior of an attorney, litigant, witness or another judge except in circumstances where such matters are in furtherance of a judge's responsibilities or are otherwise relevant under the governing law or rules of procedure. Judges will not impugn the integrity or professionalism of any lawyer on the basis of the client or cause which the lawyer represents.

4. Judges will avoid impermissible ex parte communications.

5. Judges will not adopt procedures aimed at delaying the resolution of proceedings before them or at compounding litigation expenses unnecessarily.

6. Judges will endeavor to begin judicial proceedings on time and to provide reasonable notice if necessary to apprise the parties, recognizing that circumstances beyond the judge's control may impact the goal of punctuality.

7. Judges will give issues of controversy thoughtful and impartial analysis and consideration, recognizing the corresponding prerogative and responsibility to promote their just, speedy, and inexpensive resolution.

8. Judges will recognize that a party has a right to a fair and impartial hearing and a right to present its cause within the limits established by law. Judges will allow lawyers or parties, with reasonable time limits, to present proper arguments and to make a complete and accurate record.

9. In all legal proceedings, judges will direct parties, attorneys, and other participants to refrain from uncivil conduct. Judges who observe uncivil conduct or receive a reliable report of uncivil conduct will take corrective action as the judge deems appropriate.

10. Judges will cooperate with other judges to ensure the successful management of the court as a system as well as the judge's individual docket.

Rule 11-301, Utah Standards of Judicial Professionalism and Civility, *available at* http://www.utcourts.gov/resources/rules/ucja/ch11/11-301.htm.

As the world changes and becomes less civil, there is a stark need for the legal profession to become more civil. Attorneys and educators have been working for many years to bring civility to our profession, with the expansion of civility rules across the country, as well as in Canada. *See* Canadian Bar Association Code of Conduct, Appendix: Principles of Civility for Advocates, *available at* www.cba.org/cba/activities/pdf/codeof conduct.pdf. The Utah State Bar continues to champion this cause and welcomes the efforts to develop and implement similar civility rules for the judiciary as a necessary and complementary step for the continued recognition and respect of the legal profession.

Abe had it right:

"He who represents himself has a fool for a client."

Well, maybe not a fool, but there are better uses of your time.
Being a lawyer is stressful, especially if:

- Your conduct is being scrutinized
- You are accused of malpractice
- A client goes to the Bar
- A judge has blindsided you in a case
- You want outside help with a fee dispute
- The IRS or DOL comes knocking

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The Standards of Professionalism and Civility Grow Teeth. Let's Eat.

by Keith A. Call

In the May/June 2014 issue of this column, I wrote that the Utah Standards of Professionalism and Civility (Civility Standards) are not a basis for disciplinary action.

Check that.

Rule Change (or Clarification)

Effective as of November 1, 2015, the Utah Supreme Court added a new comment to Utah Rule of Professional Conduct 8.4(d). Rule 8.4(d) states, "It is professional misconduct for a lawyer to…engage in conduct that is prejudicial to the administration of justice." The new comment 3a states: "The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d)."

"Utah lawyers are now on notice that the Office of Professional Conduct can prosecute violations of the Civility Standards. I applaud this…important step toward encouraging professionalism and civility among lawyers and society."

Utah lawyers are now on notice that the Office of Professional Conduct can prosecute violations of the Civility Standards. I applaud this notice as an important step toward encouraging professionalism and civility among lawyers and society.

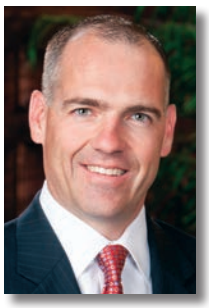
These newly discovered teeth are only baby teeth, however. To warrant discipline, the violation must be "egregious" or there must be a "pattern of repeated violations." Given the core challenge in walking the "zealous vs. civil" line, prosecuting violations of the Civility Standards under Rule 8(d) will be difficult, and likely rare. The most effective enforcement tool will remain self-policing.

Let's Eat

A friend and colleague recently related a time when her opposing counsel's primary goal seemed to be making her life miserable. Rather than reciprocating, she picked up the phone and invited the lawyer to lunch. Her opponent accepted. At lunch, they focused their discussion on outside interests and ended up becoming friends. After lunch, they were able to work more productively toward resolving the case. *See* Heather Thuet, *Message from the Chair*, Newsletter of the Litigation Section of the Utah State Bar, Nov. 2015, *available at* http://litigation.utahbar.org/advocate/2015_november_advocate.html.

What a courageous response to conduct that felt uncivil!

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.



Let's Play

Collegiality, professionalism, and civility will also increase when we play and socialize together. My partner and I recently concluded a particularly difficult case, hard fought on both sides. While I went back to work on the next case, my partner enjoyed playing golf with our former adversary. That's another great example I admire.

My friend and Chair of the Litigation Section of the Bar, Heather Thuet, has recently launched an initiative aimed at increasing collegial relationships among the Bar. Dubbed *Healthy Lifestyles for Litigators and Developing Collegial Relationships*, the program will include "Tuesdays @ 2" yoga and fun hosted at the Zimmerman Jones Booher law firm; a Zen in Zion retreat; a Rafting, Reception, and Bike event in Moab; a Bike and CLE event in Cache County; a Ski and CLE event; a Wine, Shakespeare, and CLE event in Cedar City; and continuing Golf and CLE events.

I commend these and many other efforts by the Litigation Section and other members of the Bar to build collegiality. Practicing law is not just about computers, paper, and swordsmanship. It is about humans. Our clients are humans. Our adversaries and their clients are humans. We are working to solve human problems. And all of us are imperfect. We should all seek to treat and judge others according to their best character traits and actions, not their worst.

Take some time to make friends and build relationships with other lawyers. Get to know their "best" selves. You will be happier, the rigorous practice of law will become more fulfilling, and you will be a better lawyer.

Things I Have Learned About Representing a Client in a Family Law Case

by Ted Weckel

Recently, I decided to attend conferences sponsored by the Association of Family and Conciliation Courts (AFCC), the American Academy of Matrimonial Lawyers (AAML), and the National Association of Counsel for Children (NACC). I would like to share with my family law colleagues some of the things I learned by attending these conferences. These comments are made from the notes I took while attending the conferences and are accurate to the extent of my note-taking ability and recollection.

Some of the subject areas presented at the conference that I will not address below involved: (1) How to Try a Family Law Case Without Destroying the Family; (2) Shared Legal Custody: Should There Be a Presumption?; (3) How the U.S. Supreme Court's Recent Decision on Gay Marriage, i.e., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Impacts Child Custody Cases; (4) How to Derail the Imbalance of Power and Control in Domestic Violence Divorce and Custody Cases; and, (5) Practical Tools for Promoting a More Civil Approach to Law.

Borderline Personality and Narcissistic Clients

One of the most intriguing presentations was made by a licensed clinical social worker and attorney by the name of Bill Eddy. The topic of his presentation was personality disordered parents and alienated children. Perhaps like you, I have wondered over the years why so many of my clients have been so bitterly upset with each other. Indeed, the term "custody battle" seems aptly named. Mr. Eddy provided an answer. He suggested that many if not most divorcing parents reach an amicable settlement without going to court because that is the most reasonable alternative and they are capable of seeing that. He then spoke about divorcing parents who suffer from borderline personality disorder and narcissistic personality disorder and who have skewed thinking, which creates the drama that many of us experience. He suggested that cases that don't settle frequently involve such clients. He suggested that the communication problems between such divorcing parents are systemic (making mediation challenging, if not impossible) and that without gaining insight into their issues, continued fighting will most likely be the ongoing result during the entire course of the litigation. He suggested that such clients generally do not gain insight from our constructive feedback. I also discovered that there are several programs for such highly conflicted parties, which help them learn to problem-solve rather than to spar endlessly. Mr. Eddy also suggested that court orders should be well-defined in black and white terms for such parties because the acrimonious tone of the litigation was likely to continue and if future behavior is not clearly spelled out, further conflict will ensue.

The second thing that dawned on me was that the family law bar's primary focus on zealous advocacy misses the boat when it comes to effectively trying to resolve domestic cases. That is, clients with personality disorders need our help as advisors even more than they need our help as zealous advocates. I now understand the value of being a problem-solving advisor from the get-go in a high conflict case. Professional Rule 2.1 allows attorneys to provide broad advice (outside of legal advice) about virtually any subject that touches on our clients' cases. When you think about it, it seems that identifying whether we have a client with a personality disorder is pivotal not only to helping that client resolve not only his or her case but to learning life skills, which will help him or her generally in the future.

Indeed, in the divorce context, is there ever a clear winner when we have to resort to using the zealous advocate approach?

TED WECKEL practices in the areas of criminal defense, death penalty habeas appeals, family law, tax controversies, and civil litigation.

It seems that the real losers are the kids who get caught in the cross-fire of their parents' fighting and who suffer psychological damage as a result. Therefore, shouldn't we as family law practitioners be initially inclined to serve as advisors before heading headlong into the fray of zealous advocacy, clueless (as I was) about what is driving the parties' dispute in the first place? I agree that to be a zealous and skilled advocate is a necessary evil in the family law context when there is no other alternative but to have a court decide the issues for our clients. However, it would seem that our advocacy skills should take second fiddle to the advisor role for the reasons stated. I recommend Mr. Eddy's book entitled, *Splitting*, for a more detailed discussion of the personality disorder issue and his suggestions of how to effectively represent such persons.

Parental Alienation

I had a client come into my office the other day and ask me if I had ever heard of parental alienation before. I told him that I had and mentioned that the term is frequently raised by divorcing parents and thrown around willy-nilly by practitioners. But I must admit that I had no clear understanding of what the term meant. Both conferences provided additional information on this popular term. Mr. Eddy reported that parental alienation is not a so-called syndrome and is not listed in the DSM-V. He suggested that parents may exhibit alienating behavior but that real parental alienation is a rare occurrence.

At the NACC conference, two speakers addressed the issue as well. What I gleaned there was that a child becomes alienated when he or she becomes hell-bent on resolving the dispute between the parents because the parents will not do it themselves. The speakers cited to an article authored by Joan Kelly and Janet Johnston entitled, *The Alienated Child: A Reformation of Parental Alienation Syndrome*. Both the article and the speakers suggested that kids develop various coping strategies (sometimes pathological) to get through the divorce and are not necessarily alienated from either parent. The speakers suggested that if one parent becomes a gatekeeper (could be the primary caregiver or sole custodian), that parent gets the upper hand, as it were, in the custody battle and can influence the child in developing effective, but perhaps pathological, coping strategies. For example, one coping strategy could be to speak of the non-custodial parent in negative terms only in the gatekeeping parent's presence because the child realizes that the custodial/gatekeeping parent despises the other parent. The speakers suggest that this is not alienation behavior but coping behavior. The speakers also suggested that less than 3% of children of divorcing parents are actually alienated.

The speakers went on to suggest that if a child is taken to a therapist who is not sophisticated and the child reports coping mechanism behavior to the therapist that is corroborated by the gatekeeping parent and that is not in fact truly alienating behavior, an erroneous record by the therapist or custody evaluator may be created for the judge. Then if the judge has little experience in this subject area, an erroneous custody decision may ensure.

A book that was recommended on this subject is entitled, *Children Who Resist Postseparation Parental Contact*, by Barbara Fidler, Nicholas Bala, and Michael A. Saini. I bought the book and have skimmed its table of contents. The book appears to be a very thorough treatise on parental alienation with some of the chapters focusing on the following issues: (1) risk factors and indicators involved in alienation; (2) assessment and measurement tools for alienation; (3) prevention; (4) interventions, educational and therapeutic; (5) hearing the voices of children in alienation cases; and, (6) recommendations for practice, policy, and research. Although it is helpful to use an expert witness to review (and challenge if necessary) the findings of a custody evaluator, it is undoubtedly helpful for practitioners to have some understanding of this subject when reviewing or discussing the findings of the evaluator in a pre-Rule 4-903 or Rule 4-903 conference or in cross-examining the evaluator at a deposition or at trial.

The Use of Parental Coordinators

In chatting with one of the attorneys who attended the conference, I learned that he never used a parental coordinator unless the coordinator has been trained by the AFCC. I had always assumed that a parental coordinator was qualified simply because he or she had been educated in child psychology. However, in reviewing the AFCC's website, I learned that there are several guidelines associated with being qualified to serve as a parental coordinator as well as many other guidelines that govern ethical conduct for parental coordinators. I suggest reviewing these standards because they may apply in any given case to challenge the recommendations by a parental coordinator. In Utah, there is no statute that defines what qualifications are necessary to serve as a parental coordinator or that governs ethical duties for parental coordinators. Perhaps this is an area where future legislative action can improve the law.

Interviewing Children

Some of us serve as private guardians ad litem. One of the psychologist speakers at the AFCC conference presented on the subject of skills useful in effectively interviewing children. She said the major issues that attorney-interviewers should focus on are: (1) being aware of our own assumptions/biases; (2) avoiding confirmatory bias, i.e., assuming that what a parent has reported is correct; (3) establishing rapport with the child; (4) inviting narrative answers; (5) preventing pressure on the child; and, (6) listening for themes in a child's response. Some basic pointers are to only speak the truth to children and to never interrupt a child's narrative.

The presenter said of initial importance is to build trust and rapport with the child so that the child will open up to us and tell us what we need to find out to make an effective representation to the court. The presenter said that this can be accomplished by, among other things, letting kids do what they feel comfortable doing during the interview, e.g., playing on the floor, swirling their chair around, etc. She said the best information is volunteered by the child and that we should go to the interview without any expectation of what the child might say. She said that a good ice breaker question is: "How do you feel today?" She said you can suggest to a child to talk about a particular person, topic, or event, e.g., "What is your favorite subject in school?" She said it is important to use precise language with kids, e.g., the word "few" could have a different meaning to a child, depending upon his or her age or culture. If you make a child guess, you will get unreliable information.

Regarding questions for children, if anger of a parent is an issue, you could ask the child: "How does your mom get mad?" You could also use a sentence completion technique, e.g., "If I had a magic wand, and could change anything about your dad, it would be that…." Or, "If I were giving your mom a report card, what would you give her an 'A' in?" "A 'C' in?" etc. Other questions could be: "Is there something you would like to talk about?" "Is there anything anybody told you to tell me?" "Is there anything you would like to tell me?"

Cross-Examining the Mental Health Professional

A book suggested by the presenters was *How to Examine Mental Health Experts* by John A. Zervopoulos. Another book recommended at a local CLE I attended a few years ago was *How to Examine Psychological Experts in Divorce* by Marc J. Ackerman and Andrew W. Kane. The presenters recommended having one's client write down what the custody evaluator asked during the interview and presenting this information to his or her attorney for review and consideration. One good examination question for the evaluator is: "Did you just assume what the other party said was correct, i.e., an indication of confirmatory bias?" If the evaluator admits that fact, then the interview of the second parent may have been biased. The evaluator's methodology may also have been flawed for other reasons and that is why hiring your own expert witness to review the evaluator's findings may be helpful in reviewing the findings of the evaluator.

There are both AFCC Model Standards and standards promulgated by the American Psychological Association for custody evaluations. The AFCC's standards are posted on its website. Among other things, those standards cover the subject areas of (1) training, education, and competency issues; (2) record keeping and release of information; (3) communication with litigants, attorneys, and courts; (4) data gathering; (5) role conflict; (6) interviewing children; (7) use of collateral source information; and, (8) presentation and interpretation of data. If the evaluator is deposed before trial and your client does not have the funds to pay for an expert to review the evaluator's findings, these standards can be an excellent source for cross-examination during the deposition as well as at trial. The presenters also recommended reading all published articles by the evaluator. They also mentioned the concepts of primacy and recency. That means that the trier of fact usually focuses on the first and last five minutes of what the evaluator will testify about and pays less attention to the middle of the testimony. That is why jumping immediately to cross-examination questions that will expose the weakness of the evaluator's findings is a better approach than going over a highly qualified expert's curriculum vitae initially.

Conclusions

I have practiced in the family law area for close to fifteen years in Utah. I thought that I had a fairly good understanding of this subject area before attending these conferences. However, I was amazed at how much I didn't understand about the complexity of family relationships. I also sympathize with new judges who may not have practiced in this subject area and who are expected to make accurate rulings on this complex area of law. It has been my experience that new judges must (and do) rely heavily upon counsel's understanding of the law in modification of child custody and divorce cases. Therefore, it seems that the more we as practitioners can educate ourselves in this rapidly evolving subject area, the greater opportunity we will have to assist our clients in resolving their conflicts without going to trial and the better positioned we will be to help the judiciary render sound decisions. If you have time and money, I highly suggest attending one of the CLEs sponsored by these organizations.

Appellate Highlights

by Rodney R. Parker, Dani N. Cepernich, Nathanael J. Mitchell, Adam M. Pace, and Taymour B. Semnani

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. Rodella*,**
No. 15-2023, 2015 U.S. App. LEXIS 19275 (10th Cir. Nov. 4, 2015)

Former county sheriff appealed criminal conviction for violating victim's constitutional rights. On appeal, the Tenth Circuit considered whether the sheriff used unreasonable force or conducted a lawful arrest when the sheriff, who was not in uniform, chased the victim in an unmarked vehicle, brandished a firearm, pulled the victim from his vehicle, threw him to the ground, and slammed a badge into the victim's cheek. As a matter of first impression, the Tenth Circuit held that the sheriff lacked probable cause for the stop, notwithstanding the victim's flight and ensuing traffic violations, where the sheriff not only provoked the flight but also placed the victim in reasonable fear of harm. The Tenth Circuit went on to clarify that language in prior cases requiring more than a *de minimis* injury to establish excessive force applied narrowly to handcuffing claims.

***Grynberg v. Kinder Morgan Energy Partners, L.P.*,**
No. 14-1465, 2015 U.S. App. LEXIS 19132 (10th Cir. Nov. 2, 2015)

The Tenth Circuit affirmed the dismissal of the lawsuit for lack of diversity jurisdiction, holding as a matter of first impression that a master limited partnership's citizenship is the citizenship of all of its unit holders, and not its state of incorporation or principal place of business.

***United States v. Burns*,**
800 F.3d 1258, 1261 (10th Cir. Sept. 10, 2015)

The court held, as a matter of first impression, that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed. 2d 435 (2000), does not require the jury to make factual determination underlying a restitution order beyond a reasonable doubt.

***Osguthorpe v. ASC Utah, Inc.*,**
2015 UT 89 (Oct. 13, 2015)

This appeal arose out of a longstanding dispute between the Osguthorpe family and ASC Utah, Inc., which operated the Canyons ski resort on land adjacent to that owned by the Osguthorpes. The court held that it lacked jurisdiction to consider several of the Osguthorpes' arguments relating to the jury trial in the underlying matter – including the argument that additional claims should have been allowed to go to the jury and objections to jury instructions that were given. The court explained that the jury verdict was certified as a final judgment under Utah Rule of Civil Procedure 54(b), which also rendered final and appealable all interlocutory decisions that led up to that judgment. The Osguthorpes' failure to file a notice of appeal within thirty days of the Rule 54(b) certification deprived the court of jurisdiction to consider those claims on appeal.

***State v. Anderson*,**
2015 UT 90 (Oct. 28, 2015)

The criminal defendant appealed the denial of a motion to suppress following conviction by a jury. The Utah Supreme Court held that the defendant was seized when the police pulled up and parked directly behind him on the side of the road with their lights activated because a reasonable person would not have felt free to leave. It then evaluated whether the seizure was justified by the community caretaking doctrine. In doing so, it abandoned the court's previous requirement that there be

Case summaries for Appellate Highlights are authored by members of the Appellate Practice Group of Snow Christensen & Martineau.

imminent danger to life or limb. The current test for application of the community caretaking doctrine requires courts to first evaluate the degree to which an officer intrudes upon a citizen's freedom of movement and privacy and then determine whether the degree of the public interest and the exigency of the situation justified the seizure for community caretaking purposes.

***State v. Bond*,**
2015 UT 88 (Sept. 30, 2015)

In this criminal appeal, the Utah Supreme Court clarified that unpreserved federal constitutional claims are not subject to heightened review but are to be reviewed under the plain error doctrine.

***Flowell Elec. Ass'n, Inc. v. Rhodes Pump, LLC*,**
2015 UT 87 (Sept. 25, 2015)

This case involves a public utility's demand for indemnification from an employer under the High Voltage Overhead Lines Act (HVOLA) for all liability the public utility incurred when an employee came into contact with an overhead power line. The court held that a three-year statute of limitations applies to HVOLA indemnity claims, which begins to run when the public utility incurs liability as a result of the contact with the line. The court also rejected the employer's argument that the HVOLA indemnity claim was barred by the exclusive remedy provision of the Workers Compensation Act (WCA). The court explained that an HVOLA indemnity claim does not implicate the WCA because it arises under a statutory obligation created by HVOLA and is not brought on account of or based on the employee's injuries.

***Ray v. Wal-Mart Stores, Inc.*,**
2015 UT 83 (Sept. 17, 2015)

This case involves claims for wrongful termination by former Wal-Mart employees who were fired for being involved in physical altercations with shoplifters. The employees filed suit in federal district court, and the court certified the question to the Utah Supreme Court of whether self-defense is a substantial public policy exception to the at-will employment doctrine, thus providing a basis for a wrongful termination action. The court answered yes – concluding that an at-will employee who is fired for exercising the right of self-defense may maintain a wrongful termination action but only if the employee faced an imminent threat of serious bodily harm in circumstances where he or she was unable to safely withdraw.

***Jones v. Jones*,**
2015 UT 84 (Sept. 16, 2015)

The Utah Supreme Court held that a grandparent visitation order under Utah Code section 30-5-2 overriding a parent's decision is subject to strict scrutiny review, requiring proof that the order is narrowly tailored to advance a compelling governmental interest. In order for the governmental interest to be compelling, there must be circumstances involving the avoidance of "substantial harm." The court did not further define what is required to establish "substantial harm," finding there was no evidence of such harm in the present case.

***Capri Sunshine, LLC v. E & C Fox Investments, LLC*,**
2015 UT App 231 (Sept. 24, 2015)

In this foreclosure action, the prior lien holder (defendant) gave the subordinate lien holder (plaintiff) an inflated calculation of the amount required to pay off the prior lien. The defendant subsequently outbid the plaintiff at the sale. The plaintiff asserted that defendant's inflation of the payoff and subsequent outbidding at its own foreclosure sale amounted to a substantive violation of Utah Code section 57-1-31 by depriving plaintiff of the opportunity to cure the default. The court of appeals declined to hold that a statutory right to redeem imposed upon defendant a duty not to inflate the payoff amount. Even if it did, no remedy is available that would set aside the valid trustee's sale, as the beneficiary is not restricted from outbidding plaintiff at the subsequent sale.

***Snyder v. Snyder*,**
2015 UT App 245 (Sept. 24, 2015)

Father moved to modify custody two months after the parties resolved a dispute over the amount of child support. Concluding the father failed to show a substantial change in circumstances in the intervening two months since it had accepted the parties' child support stipulation, the district court dismissed the petition. The Utah Court of Appeals reversed and held the lower court erred when it require it required the father to show a material change in circumstances in the preceding two months because (a) the divorce decree was entered without the court "making an independent judicial determination that the agreed-upon

custody arrangement was in the best interests of the children," (b) the stipulation entered two months earlier did not address physical custody, and (c) the only order that had addressed physical custody (the divorce decree) had occurred five years prior to the father's most recent petition. *Id.* ¶ 11.

***CFD Payson, LLC v. Christensen*,**
2015 UT App 251 (Oct. 8, 2015)

A divorce decree, which awarded wife one-half of the proceeds from a sale of land owned by an LLC, did not give wife a vested ownership in the land sufficient to support an attorney's lien, because (a) neither the defendant nor spouse had a personal ownership interest in property owned by an LLC under the Act in effect, and (b) while the land was not subject to division in the divorce decree, even though proceeds from the sale of the property could be subject to distribution.

***Siebach v. Brigham Young University*,**
2015 UT App 253 (Oct. 8, 2015)

The court of appeals held that the Uniform Prudent Management of Institutional Funds Act does not change the common law rule that charitable donors lack standing to enforce their donative intent.

***In re Estate of Strand*,**
2015 UT App 259 (Oct. 22, 2015)

The district court dismissed an individual's petition to probate a will twenty-five years after his father's death. Affirming, the Utah Court of Appeals held that the three-year limitation contained in the probate code was a statute of repose and, as a result, equitable tolling doctrines did not apply.

***Lewis v. Nelson*,**
2015 UT App 262 (Oct. 29, 2015)

The plaintiff filed tier 1 claims for contract damages, limiting him to five requests for production, five requests for admission, and no interrogatories. Utah R. Civ. P. 26(c)(5). Plaintiff served thirty requests for admissions, thirteen interrogatories, and thirteen requests for discovery. On defendant's objection, the trial court ordered vaguely that he respond. The defendant answered the first five requests for production and requests for admission. Plaintiff moved for summary judgment on the basis the remaining requests were admitted. The trial court granted summary judgment, explaining that the defendant should have asked for clarification, not merely assumed his interpretation of the rule would govern. The defendant appealed. The court of appeals held that Rule 26 puts the burden on the requesting party to demonstrate a need for extraordinary discovery, even if the requests go without objection. Therefore, a failure to answer requests that exceed the discovery tier is not an automatic admission.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the October 30, 2015 Commission Meeting held at the Alta Club in Salt Lake City.

1. Commissioners voted to donate $1,500 to the Utah Minority Bar Association scholarship fund and to purchase a table at the UMBA scholarship awards banquet. Additional seats may be purchased depending on demand.

2. Commissioners voted to renew the Double Dutch convention application for four more events.

3. Commissioners voted to approve the payment of Client Security Fund claims.

4. Commissioners voted to table the motion to commit to Sun Valley for the summer 2018 convention until after the Fall Forum financials are calculated and until we are closer to the deadline for contracting with Sun Valley for 2018.

5. Commissioners voted to approve an awards "Breakfast of Champions" to honor mentors.

6. Commissioners voted to establish a committee to explore a Bar fundraising event to provide scholarships for lawyers who cannot afford to pay for CLE classes.

7. Commissioners voted to give Tara Isaacson the Professionalism Award.

8. Commissioners voted to give Anne Burkholder the Community Member of the Year Award.

9. Commissioners voted to give Mark Tolman and Scott Hansen the Outstanding Mentor Award.

10. Commissioners voted to accept the audit report for the 2014–2015 fiscal year.

11. Commissioners formed a committee to explore CLE scholarship fundraiser and associated costs.

12. Commissioners formed a committee composed of Angelina Tsu, Mary Kay Griffin, H. Dickson Burton, Rob Rice, Liisa Hancock, Michelle Mumford, and Heather Thuet to review the accounting methods under which the Bar allocates overhead to sections.

13. Commissioners were assigned to implement AAA Task Force recommendations and submit action memos by November 20, 2015 outlining intended steps to implement their assigned Task Force recommendation.

14. Commissioners received assignments to serve as liaisons to sections, committees and local and specialty bars and were asked to contact their groups.

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

Notice of Bar Commission Election

Second and Third Divisions

Nominations to the office of Bar Commissioner are hereby solicited for two members from the Third Division, one member from the Second Division, each to serve a three-year term. Terms will begin in July 2016. 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, 2016 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.

2016 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2016 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 15, 2016. 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/

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 (Vice Chair).

Practice Areas: Civil Litigation and Business Law.

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.

Timothy D. Hawkes (R) – District 18 (Elected to House: 2014)

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

Committee Assignments: Appropriations – Natural Resources, Agriculture & Environmental Quality. Standing – Natural Resources, Agriculture & Environment; Economic Development & Workforce Services.

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: Commission for the Stewardship of Public Lands, Commission on Federalism, Federal Funds Commission, House Public Utilities and Technology Committee, House Revenue and Taxation Committee, Natural Resources, Agriculture, and Environmental Quality Appropriations Subcommittee, Public Utilities and Technology Interim Committee, Revenue and Taxation Interim Committee.

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

Michael E. 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: Appropriations – Higher Education. Standing – 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: Appropriations – Higher Education. Standing – 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: Commission for the Stewardship of Public Lands, Executive Offices and Criminal Justice Appropriations Subcommittee, House Judiciary Committee, House Public Utilities and Technology Committee, Judiciary Interim Committee, Public Utilities and Technology Interim Committee

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.

2015 Utah Bar Journal *Cover of the Year*

The winner of the *Utah Bar Journal* Cover of the Year award for 2015 is *Pumpkin Patch at Sunset* by Utah State Bar member Chad Grange. Chad's photo of a pumpkin patch in Layton, Utah appeared on the cover of the September/October 2015 issue.

Congratulations to Chad, and thank you to the more than 100 contributors who have provided photographs for the *Bar Journal* covers over the past twenty-seven years.

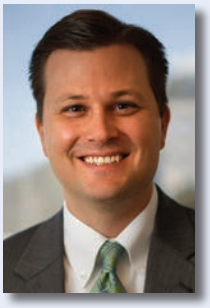
The *Bar Journal* editors encourage members of the Utah State Bar or Paralegal Division, who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal*, to submit their photographs for consideration. For details and instructions, please see page 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.)

2015 Fall Forum Award Recipients

Congratulations to the following who were honored with awards and the 2015 Fall Forum:

Anne Burkholder
Community Member of the Year

Scott D. Hansen
Outstanding Mentor



Mark Tolman
Outstanding Mentor

McKette H. Allred
Pro Bono Attorney of the Year

Disaster Legal Response
Committee of the Year

Tara L. Isaacson
Professionalism

Pro Bono Honor Roll

Appeals Case
Emily Adams
Cory Talbot

Bankruptcy Case
Clinton Brimhall
J. Ed Christiansen
KC Garner
Rand Henderson
Neil Lund
Abbott Nelson
Christopher E. Rogers
Brian Steffensen

Community Legal Clinic
Jonny Benson
Dan Black
Joshua Irvine
Jacob Kent
Chad McKay
Emily McKenzie
Brian Rothschild
Lauren Schultz
Brian Tanner
Aaron Tarin
Brent K. Wamsley
Ian Wang
Russell Yauney

Debt Collection Calendar
Paul Amann
David P. Billings
Grant Gilmore
David Langeland
JD Lyons
Covey Morris
John Rees
Zach Shields
Charles A. Stormont
Reed Stringham

Debtors Legal Clinic
Brian Rothschild
Ian Wang

Estate Planning Case
Courtney John Klekas

Expungement Clinic
Kate Conyers
Stephanie Miya
Ian Quiel
Bill Scarber

Family Law Case
Tess Davis
Sandy Dolowitz
Jonathan Felt
Lorie Fowlke
Jim Hunnicutt
Ben Larsen
Steven Lawrence
Shane Marx
Kenneth McCabe
Chad McKay
Malone Molgard
Carolyn Morrow
Valerie Paul
Ted Ririe
Mark Tanner
Roland Uresk
Jake Watterson

Family Law Clinic
Justin T. Ashworth
Steve Baedy
Tyler Needham
Stewart Ralphs
Aunica Smith
Linda F. Smith
Simon So
Sheri Throop

Landlord/Tenant Case
Sandy Dolowitz

Medical-Legal Clinic
Jeffrey Enquist
Stephanie Miya
Jacqueline Morrison
Micah Vorwaller

Military Service Case
Kenyon D. Dove

Non-Profit Case
Aaron Garrett

OSC Calendar
Michael K. Erickson
AJ Green
Kristine M. Larsen
Michael D. Mayfield
Mark W. Pugsley
Robert O. Rice
Michael W. Spence
Liesel B. Stevens
Maria E. Windham

Probate Case
Richard S. Brown
Laura Gray
Jonathan Miller
Gregory Misener
Daniel Shumway

Rainbow Law Clinic
Abby Dizon-Maughan
Russell Evans
Shane Marx
Stewart Ralphs

Senior Center Legal Clinic
Kyle Barrick
Sharon Bertelsen
Kathie Brown Roberts
Kent Collins
Elizabeth Conley
Phillip S. Ferguson
Richard Fox
Laurie Hart
Michael A. Jensen
Jay Kessler
Terrell R. Lee
Joyce Maughan
Harry McCoy II
Stanley D. Neeleman
Kristie Parker
Jane Semmel
Scott Thorpe
Jeannine Timothy
Timothy G. Williams

Street Law Clinic
Nathan Bracken
Dara Cohen
Jeff Gittins
Matt Harrison
Brett Hastings
Stephen Henriod
John Macfarlane
Clayton Preece
Elliot Scruggs
J. Craig Smith
James Stewart
Jonathan Thorne

Tuesday Night Bar
Michael Anderson
Rob Andreasen
Courtland Astill
Mike Black
Jon Bletzacker
Mona Burton
Tyler Buswell
Kate Conyers
Rita Cornish
Julie Crane
Denise Dalton
Scott Degraffenried
Megan DePaulis
Grant Foster
Michael Green
Ruth Hackford-Peer
Chris Hadley
Carlyle Harris
Michael Hoppe
Annette Jan
Brent E. Johns
Jennifer Junkin
Adam Kaas
Stewart Merrick
Natalia Peterson
Eric Peterson
Scott Pratt
Drew Quinn
Bruce Reemsnyder
Walt Romney
LaShel Shaw
Teresa Silcox
Jeremy Stewart
George Sutton
Swen Swenson
Engels Tejeda
Jeff Tuttle
Adam Weinacker
Ben Welch
Rachel Wertheimer
David Wilkins
Sam Williams
Analise Wilson
Zack Winzeler
John Zidow

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 October and November of 2015. To volunteer call Tyler Needham (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.

ACCESS TO JUSTICE MESSAGE:

2015 was a milestone year for the Utah State Bar Pro Bono Commission:

- The Utah State Bar Pro Bono Commission placed 225 full representation cases with pro bono attorneys.
- The Utah State Bar Pro Bono Commission Signature Projects (calendars and specific legal needs served by law firms and the courts) served more than 800 clients.
- The Tuesday Night Bar clinic, Debtor's Clinic, and Senior Center Legal Clinics also served more than 1,400 clients.
- In total, Utah State Bar Pro Bono Commission programs helped more than 2,400 Utahns in 2015.

Keep up the good work in 2016!

MCLE Reminder – Even Year Reporting Cycle

July 1, 2014 – June 30, 2016

Active Status Lawyers complying in 2016 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
sydnie.kuhre@utahbar.org or (801) 297-7035,

Ryan Rapier, MCLE Assistant
ryan.rapier@utahbar.org or (801)297-7034,

Hannah Roberts, MCLE Assistant
hannah.roberts@utahbar.org or (801) 297-7052.

Utah Bar New Mentoring Awards – Call for Nominations

The Utah Bar in an effort to promote and recognize crucial mentoring is sponsoring a new program to recognize and honor great mentors in our legal community outside those specifically involved in the New Lawyers Training Program. All members of the Bar are eligible. We will host the 1st Annual Breakfast of Champions (and CLE) in late February to honor EVERY nominee as well as the three recipients of the awards.

The specific mentoring awards have been named after three exceptional mentors in our community:

1. The Charlotte Miller Mentoring Award
2. The James Lee Mentoring Award
3. The Paul Moxley Mentoring Award

Members of the Utah Bar are hereby invited to submit nominations for these mentoring awards. EACH nomination will be included in a published booklet in recognition of all of our great mentors. Please submit your nomination with specific information as to why the mentor was effective, in 400 words or less, to Michelle Mumford, michlmumford@gmail.com, by January 31.

We'd like to thank Orange Legal for their sponsorship of the commemorative mentoring booklets.

Notice of Petition for Reinstatement to the Utah State Bar by Jeffrey M. Gallup

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement ("Petition") filed by Jeffrey M. Gallup, in *In the Matter of the Discipline of Jeffrey M. Gallup* Third Judicial District Court, Civil No. 150908529. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

UTAH STATE BAR

2016 Summer Convention

JULY 6–9

Loews Coronado Bay Resort

San Diego

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summerconvention.utahbar.org

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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/.

ADMONITION

On September 22, 2015, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rule 1.6(a) (Confidentiality of Information) of the Rules of Professional Conduct.

In summary:
The attorney was hired to represent a client in a domestic matter and received photographs from the client which purportedly depicted the client's domestic abuse injuries. The photographs were attached to an affidavit which was submitted to the court. The attorney subsequently learned that one of the photographs submitted to the court was not actually a photograph of the client. Before discussing the issue with the client, the attorney contacted a different attorney, who represented the same client in a different matter, and informed that attorney that the client had provided misleading evidence. The attorney did not have the client's consent to disclose the information which was provided to the other attorney.

RECIPROCAL DISCIPLINE

On September 21, 2015, the Honorable James Gardner, Third Judicial District Court, entered a Default Judgment and Order of Public Reprimand against Matthew C. Brimley for violating Rule 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law) of the Rules of Professional Conduct.

Mr. Brimley is a member of the Utah State Bar. The Supreme Court of Wyoming issued an Order of Public Censure for Mr. Brimley's conduct in violation of the Wyoming Rules of Professional Conduct. An Order was entered in Utah based upon the discipline order in Wyoming.

In summary:
Mr. Brimley is not now, nor has he ever been, licensed to practice law in Wyoming. Mr. Brimley filed an entry of appearance and a plea of not guilty on behalf of four defendants charged with motor vehicle violations in a Circuit Court of Wyoming. Mr. Brimley also filed simultaneous motions to continue on behalf of three of these defendants. Mr. Brimley subsequently filed a notice of withdrawal in all four cases but failed to submit proposed orders with the notices. At the time he entered his appearance on behalf of the four defendants, Mr. Brimley had not attempted to be admitted *pro hac vice* in any of those cases. The Supreme Court of Wyoming found the aggravating factor of substantial experience in the practice of law and mitigating factors of absence of prior disciplinary record, absence of dishonest or selfish motive and full and free disclosure to Bar Counsel and a cooperative attitude toward the proceedings.

RESIGNATION WITH DISCIPLINE PENDING

On September 30, 2015, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Brenda S. Whiteley, for violation of Rules 1.15(a) (Safekeeping Property), 1.15(d) (Safekeeping Property), and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Ms. Whiteley was retained to represent a minor child for a personal injury claim in connection with an automobile accident. The child's claim was settled by Ms. Whiteley and a conservator was appointed on behalf of the minor child. After medical expenses and Ms. Whiteley's attorney fee had been paid out of the settlement, Ms. Whiteley was to hold the child's net settlement funds in trust until the child reached the age of eighteen. Ms. Whiteley misappropriated a portion of the child's settlement funds and made only a partial payment to her client after the child's eighteenth birthday. When the child's conservator contacted Ms. Whiteley regarding the balance of the money Ms. Whiteley should have been holding in trust, Ms. Whiteley falsely represented to the conservator that the insurance company had authorized monthly payments until the remainder of the settlement had been paid.

RECIPROCAL DISCIPLINE

On October 6, 2015, the Honorable Keith Kelly, Third Judicial District Court, entered a Default Judgment and Order of Public Reprimand against Edward P. Moriarity for violating Rule 3.1 (Meritorious Claims and Contentions) of the Rules of Professional Conduct.

Mr. Moriarity is a member of the Utah State Bar and is also licensed to practice law in Wyoming, Arizona, and Montana. The Supreme Court of Wyoming issued an Order of Public Censure for Mr. Moriarity's conduct in violation of the Wyoming Rules of Professional Conduct. An Order was entered in Utah based upon the discipline order in Wyoming.

In summary:

The events giving rise to the Supreme Court of Wyoming's Order of Public Censure took place in Arizona. Mr. Moriarity represented an Arizona attorney in disbarment proceedings brought against the attorney for numerous ethical violations and also filed a lawsuit in the Superior Court of Maricopa County on behalf of the attorney. The lawsuit filed by Mr. Moriarity on behalf of his client lacked a basis in fact or law.

RECIPROCAL DISCIPLINE

On October 7, 2015, the Honorable Paul G. Maughan, Third Judicial District Court, entered an Order of Reciprocal Discipline: Public Reprimand against Nicholas Thomas Haderlie for violating Rules 8.4(b) (Misconduct) and Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct.

Mr. Haderlie is a member of the Utah State Bar and is also licensed to practice law in Wyoming. The Supreme Court of Wyoming issued an Order of Public Censure for Mr. Haderlie's conduct in violation of the Wyoming Rules of Professional Conduct. An order was entered in Utah based upon the discipline order in Wyoming.

In summary:

Mr. Haderlie was arrested and charged with violation of Wyoming Statutes sections 31-5-233 (Driving or having control of vehicle while under the influence of intoxicating liquor or controlled substances) and 6-5-204(a) (Interference with a peace officer). Mr. Haderlie ultimately pled guilty to the DWUI charge and to interference with a peace officer, both misdemeanors.

SUSPENSION

On October 14, 2015, the Honorable Joseph M. Bean, Second Judicial District Court, entered an order suspending Ronald E. Griffin from the practice of law for a period of one year for Mr. Griffin's violation of the court's prior order reinstating Mr. Griffin's license to practice law contingent on his compliance with certain conditions.

In summary:

Mr. Griffin failed to satisfy the conditions of his reinstatement by failing to clarify his involvement in a case before the Utah Court of Appeals, by failing to complete forty hours of service with an approved legal services organization and by failing to complete three hours of Continuing Legal Education.

Have you received a letter from the Office of Professional Conduct (OPC)? Do you have questions about the disciplinary process? For all your questions, contact Jeannine P. Timothy at the Discipline Process Information Office. The office opened in January 2015, and to date Jeannine has answered questions and provided information about the discipline process to 75 attorneys. All called about complaints filed against them. Jeannine is able to address concerns about each attorney's individual matter with the OPC. Call Jeannine at (801) 257-5515 or email her at DisciplineInfo@UtahBar.org.

DISCIPLINE PROCESS INFORMATION OFFICE

Jeannine P. Timothy
(801) 257-5515
DisciplineInfo@UtahBar.org

The Importance of Continuing Legal Education for Paralegals

by Christina Cope and Karen McCall

Members of the Paralegal Division are required to participate in at least ten hours of continuing legal education every year. The Paralegal Division board strongly believes this time out of the office benefits paralegals by teaching new skills, sharpening old skills, giving opportunities to network, and enhancing each member's professionalism. These are direct benefits that paralegals can take back to their places of employment.

The Amended and Restated Bylaws of the Paralegal Division state the purposes for which the Division was formed twenty years ago. These purposes reflect the professionalism and commitment each member has for the paralegal profession. Some keywords from the list of purposes are *utilization, assist, serve, enhance, provide, excellence, facilitate, communication, community, responsibility, promote,* and *education*. Strong CLE can promote each of these purposes.

No single purpose is necessarily more impactful than the others, but combined these purposes create a community of individuals who bring significant value to their workplace. Toni Marsh, Esq., Director of the George Washington University Paralegal Studies Program, uses this analogy:

> If you view the law office as a body, then the stronger and healthier each of its systems is, the stronger and healthier the whole will be. A sharp, well-educated paralegal corps with current knowledge and a robust professional network will contribute that sharpness, education, knowledge and network to the benefit of the office.

The Paralegal Division works with the Bar to provide varied CLE opportunities for paralegals. The Utah State Bar Conventions and functions are a great opportunity for timely CLE and networking, and there are more affordable attendance rates for members of the Paralegal Division. Many firms pay for and support their paralegals attendance of conferences and various CLE. Those firms are enriched with the relationships and knowledge that their paralegals gain by their attendance. We encourage our members to discuss attendance with their firms and offices, and we encourage the firms, companies, and attorneys to be willing to pay for this valuable education for their paralegals. Heather L. Thuet, with Christensen & Jensen, puts her perspective on why paralegal CLE is important.

> Could you imagine employing an assistant who didn't follow the rules? One who didn't bother to stay current on the rules or evolution of law? One who cited old statutes or bad law? Continuing education is essential to career growth and maintenance. Paralegals who are committed to continuing education not only have confidence in their abilities but also tend to have greater job satisfaction as they occasionally get to tell their attorneys that they are

CHRISTINA COPE is the Paralegal Division Region III Director, CLE Chair, and 20th Anniversary Celebration Chair. She is a contract paralegal and the owner of Cope Litigation Support.

KAREN C. McCALL, ACP is the Paralegal Division Region II Chair and is the CLE Co-Chair. Karen works as a paralegal for Strong & Hanni, P.C.

wrong (and how great is that?).

Jeffery Eisenberg, of Eisenberg Gilchrist & Cutt, also supports paralegal CLE. Mr. Eisenberg's firm hosts a four-part *Learn from the Pros* seminar that provides CLE credits. This year the firm invited to sponsor members of the Paralegal Division to attend. Mr. Eisenberg indicated the following on why CLE for paralegals is vital to his practice:

> Our paralegals are critical to our practice. A good paralegal can make the difference between getting ahead of a case and playing "catch up" with deadlines. We rely on paralegals to handle a wide variety of assignments. I feel it's extremely important to provide regular CLE to paralegals. There are so many things a paralegal needs to know, starting with the rules of the courts, the Rules of Civil Procedure, Westlaw/Nexis skills, internet research skills, using document search and organization software and trial presentation software. We conduct regular in-house training, but we also encourage our paralegals to seek out and attend outside training.

Troy Booher of Zimmerman Jones Booher stated the following regarding CLE for paralegals:

> Judges and attorneys benefit from understanding the perspective of paralegals, something each group takes in preparing CLE for that audience. More important, paralegals benefit from learning directly what judges want and how other attorneys do their job. In my view, paralegal CLE is vital to a well-functioning court system.

The Paralegal Division's CLE mission is to provide CLE that is *valuable and applicable*. We strive to tailor the CLE events to current, relevant needs based on input from our members. At the request of a presenter, we will utilize surveys for gathering relevant topic suggestions or questions for that presenter. Our members are encouraged to reach out to our CLE chair with topics that are of interest. Chances are good that someone else will benefit from the same thing.

We try to focus a CLE on the changes in technology that specifically relate to the legal profession. Technology has had a tremendous impact on the paralegal profession. Twenty, or even ten years ago, it was common practice to use an actual Bates stamp or to do legal research at the law library because that's where the books were. Today most of these tasks are performed in an electronic world, and it's important to keep informed about new software and processes.

The goal of the Paralegal Division in 2016 is to also make CLE more accessible through technology, especially for our monthly Brown Bags. The Paralegal Division and the Utah Paralegal Association team up to host the Brown Bags. These are a free, convenient, and easy way to satisfy some of the CLE requirements. Brown Bags offer a fantastic educational and networking opportunity. Brown Bags are held the second Wednesday of each month at 12:00, usually at the Law & Justice Center. We have gone paperless and provide the materials via email. Bring your lunch, and come join us!

One of the other initiatives we have also been working with the Bar is to record the presentations in case someone was unable to attend the live event. We are looking into broadcasting future Brown Bags via Skype. November's Brown Bag featured changes to Utah's appellate rules, with appellate attorney Julie Nelson and Appellate Court Clerk Lisa Collins. And, we will welcome attorney and Utah legislator Michael McKell on January 13, 2016.

Paralegal Division: 20 Year Anniversary Celebration

We are excited to announce the Paralegal Division 20th Anniversary in 2016! Mark your calendars and save the date so you can join us for an evening to celebrate this event at The Grand Hall at the Gateway, on Friday, April 22, 2016.

The evening will feature wonderful entertainment, a silent auction, and delicious food. Individual tickets and tables will be available. More ticket and sponsorship information will be coming or you can contact our 20th Anniversary Committee at 20thanniversary2016@gmail.com.

CLE Calendar

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

January 13, 2016 | 4:00 pm–6:00 pm — **2 hrs. CLE**

Litigation 101 Series – Trial Skills I, Opening Statements and Closing Arguments. Sponsored by the Young Lawyers Division. Third in a six-part series. Cost is $25 for YLD section members, $50 for all others.

January 14, 2016 | 8:30 am–1:30 pm — **4.5 hrs. CLE, incl. 3.5 Ethics, 1 Prof./Civ.**

Utah Lawyers Helping Lawyers Bi-Annual Fundraising CLE. How to Help: Recognition, Resource and Rehabilitation. Presenters will include: Kelly J. Lundberg, Ph.D., Kent B. Scott, and Judge Royal Hanson. $110 before January 1st, $130 after.

January 15, 2016 | 8:30 am–10:00 am — **1.5 hrs. CLE**

How to Start a Lean Law Practice. Cost: $35, $20 for active under three.

February 10, 2016 | 4:00 pm–6:00 pm — **2 hrs. CLE**

An Afternoon with the Utah Court of Appeals. The court will hear oral argument in a significant case at the S. J. Quinney College of Law. The arguments are free and open to the public, but this unique CLE opportunity allows participants to attend an introduction to the case before the arguments, a panel discussion featuring prominent appellate practitioners following the argument, and a social for all participants. $75, or $50 for members of the Appellate Practice Section. S.J. Quinney College of Law, Moot Courtroom.

February 11, 2016 | 4:00 pm–6:00 pm — **2 hrs. CLE**

Litigation 101 Series – Trial Skills II, Direct Examination and Cross Examination. Sponsored by the Young Lawyers Division. Fourth in a six-part series. Cost is $25 for YLD section members, $50 for all others.

February 17, 2016 | 8:30 am–12:00 pm

Utah State Bar Day at the Legislature. Utah State Office Building Auditorium.

February 26, 2016 | 8:00 am–5:00 pm — **8 hrs. CLE, incl. 1 Ethics**

2016 IP Summit. Hilton Salt Lake City Center, 255 South West Temple. $295 for IP Section Members, $340 for all others.

March 9, 2016 | 4:00 pm–6:00 pm — **2 hrs. CLE**

Litigation 101 Series – Mock Trial. Sponsored by the Young Lawyers Division. Fifth in a six-part series. Cost is $25 for YLD section members, $50 for all others.

March 10–12, 2016 — **up to 10 hrs. CLE, incl. 2 Ethics, 1 Prof./Civ.**

2016 Spring Convention in St. George. Dixie Center, 1835 S Convention Center Dr, St George, UT. See the brochure in the center of this *Bar Journal* for more information and registration.

March 16, 2016 | 9:00 am–3:45 pm — **6 hrs. CLE, incl. 5 Ethics, 1 Prof./Civ.**

OPC Ethics School. Cost: On or before March 4th – $245, after March 4th – $270.

April 13, 2016 | 4:00 pm–6:00 pm — **2 hrs. CLE**

Litigation 101 Series – Ethics & Civility. Sponsored by the Young Lawyers Division. Sixth in a six-part series. Cost is $25 for YLD section members, $50 for all others.

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READY TO RETIRE? WANT TO SELL YOUR LAW PRACTICE? Need to ensure that your clients will receive excellent care? We are interested in purchasing transactional law practices, including estate planning, business planning and/or general corporate work. Please call Ryan at 855-239-8015 or e-mail ryan@pharoslaw.com.

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Executive Legal Assistant. Brigham Young University's Office of the General Counsel is looking to hire an executive assistant to the General Counsel. The ideal candidate will have five or more years' experience in a legal office setting and excellent clerical and interpersonal skills. BYU's legal office operates within a collegial academic setting and participates in all university benefits. Apply online at yjobs.byu.edu. Call 801-422-3089 if you have any questions about the position.

"AV"/Best Lawyers rated, downtown Salt Lake City law firm is looking for an associate with up to 5 years of experience to assist in a demanding business, commercial and real estate transaction and litigation practice. Salary commensurate with experience. Send resume to arther@winderfirm.com.

Snow Jensen & Reece, St. George, Utah, seeks an associate attorney with excellent communication and writing skills, a minimum of 1–2 years' experience in litigation, an excellent academic record and the ability to work well in a fast-paced, team environment. The associate will focus primarily on litigation, but will also be responsible for working on matters in other areas of law such as real estate, commercial transactions, etc. Please submit cover letter, resume, writing sample and law school transcript via email to SJR HR Dept.: sjlaw@snowjensen.com.

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Conference and Meeting Space in Downtown SLC – Conference rooms and day offices available in a professional atmosphere at the Walker Center. Great space for depositions and client meetings. Internet, projector, whiteboard, photo/copier/scanner (per copy charge), and unlimited domestic long distance are all included. Multiple locations available along the Wasatch Front. Contact Paul Kardos at 801-590-4501 or paul.kardos@officeevolution.com.

Downtown law firm office space. Three offices available as of January 2016 on month-to-month or longer sublease. Beautiful space with access to conference rooms and kitchen/breakroom. Call Candace at 801-961-1300.

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.

PRACTICE DOWNTOWN ON MAIN STREET: Nice fifth floor Executive office in a well-established firm, now available for as low as $599 per month. Enjoy great associations with experienced lawyers. Contact Richard at (801) 534-0909 or richard@tjblawyers.com.

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Richard M. Dibblee
Assistant Executive Director
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OFFICE OF PROFESSIONAL CONDUCT
Phone: 801-531-9110
Fax: 801-531-9912
E-mail: opc@utahbar.org

Billy L. Walker
Senior Counsel
801-297-7039

Todd Wahlquist
Deputy Senior Counsel
801-297-7054

Diane Akiyama
Assistant Counsel
801-297-7038

Adam C. Bevis
Assistant Counsel
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