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Volume 30 No. 1
Jan/Feb 2017



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*June 2015-June 2016

Table of Contents

President's Message Honoring Our Oath by Robert O. Rice	8
Article Removal to Federal Court: Utah Considerations and Recent Developments by Tyler V. Snow	12
Article Utah Dispute Resolution: Celebrating 25 Years by William W. Downes, Jr. and Stephen D. Kelson	18
Article Hold Me Close: Lawyers Beware, the Closely Held Company by Eric Maxfield and Darren Reid	22
The Utah Bar Commission A Brief Overview of the Utah Bar's Governing Board by Kristen Olsen and Kate Conyers	28
Article Happy New (Legislative) Year! by Senator Todd Weiler, Steve Foxley, Frank Pignanelli, and Douglas Foxley	36
Focus on Ethics & Civility Enrich Your Life in 2017: Easy Pro Bono by Keith A. Call	38
Utah Law Developments Appellate Highlights by Rodney R. Parker, Dani N. Cepernich, Nathanael J. Mitchell, Adam M. Pace, and Scott Elder	40
Article Helping Utah's Lower Income Seniors by Eric Olsen	43
State Bar News	45
Young Lawyers Division All Rise and Other Modest Health Tips for the Practicing Lawyer by Jordan Call	58
Paralegal Division Utilizing Paralegal Skills in Community Service by Cheryl Jeffs and Laura Summers	60
CLE Calendar	62
Classified Ads	63



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Published by the Utah State Bar

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

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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.

Cover Photo

Grizzly Gulch, Little Cottonwood Canyon, by Utah State Bar member Stewart B. Harman.

STEWART B. HARMAN is a shareholder at Plant, Christensen & Kanell. He took this picture while skinning the up-track in search of untouched powder turns on a cold, clear powder day in the backcountry of Little Cottonwood Canyon.



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Interested in writing an article or book review for the Utah Bar Journal?

The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea, a particular topic that interests you, or if you would like to review one of the books we have received for review in the *Bar Journal*, please contact us by calling 801-297-7022 or by e-mail at barjournal@utahbar.org.

Guidelines for Submission of Articles to the Utah Bar Journal

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

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 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.

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

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



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Honoring Our Oath

by Robert O. Rice

This year's elections are behind us, and a presidential inauguration is before us, just a few days away. Perhaps these circumstances, and any uncertainty Utah lawyers may observe about the future, warrant a discussion about the rule of law. In this regard, I take comfort in the fact that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803).

Consider this controlling legal authority in light of the oath that each of us took when we entered this profession: "I do solemnly swear that I will support, obey and defend the Constitution of the United States and the Constitution of Utah; that I will discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty, fidelity, professionalism, and civility. . . ." Utah R. Prof'l. Conduct, Preamble: A Lawyer's Responsibilities, [1].

My experience among Utah lawyers is that nearly all of us take this oath seriously, especially from 9:00 to 5:00 when we are traditionally engaged in the practice of law. But there is no off-switch on that oath when we clock out of the office. In fact, "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." *Id.*, [5]. Jeez! We can't shake this thing about upholding the Constitution, can we?

So what as Utah lawyers are we to do in our personal lives to honor the oath we took to uphold the Constitution, protect the rule of law and ensure that our nation's government remains "a government of laws, and not of men"? See *Marbury*, 5 U.S. at 163.

Well, you could protest, like so many have already done. See Christopher Mele & Annie Correal, "Not Our President": Protests Spread After Donald Trump's Election, N.Y. TIMES (Nov. 9, 2016), www.nytimes.com/2016/11/10/us/trump-election-protests.html?r=0

("Thousands of people across the country marched, shut down highways, burned effigies and shouted angry slogans on Wednesday night to protest the election of Donald J. Trump as President."). If that kind of protesting is not your style, keep in mind that in Utah we have a kinder, gentler take on political protests. Compare Lee Davidson & Mariah Noble, *Salt Lake City Protests Strike Peaceful Tone*, SALT LAKE TRIBUNE (Nov. 18, 2016, 7:57 PM), www.sltrib.com/news/4576587-155/anti-trump-protests-continue-in-salt-lake ("Salt Lake City rallies against Donald Trump on Saturday detoured from the crude chants and sometimes-obscene posters of other recent protests into more of an old-fashioned love-in.").

You could also run for office. This year's elections have apparently inspired an increase in those willing to throw their hat in the ring. See, e.g., Nicole Gaudiano, *Women Disappointed in 2016 Election Results Get "Ready to Run"*, USA TODAY (Nov. 20, 2016, 7:39 PM), www.usatoday.com/story/news/politics/2016/11/20/women-disappointed-2016-election-results-get-ready-run/94088424/ ("The non-partisan 'Ready to Run' program at Rutgers typically gets only a handful of registrations, at most, this time of year. But in the week after the election, 35 paid registrations poured in for the March session along with at least 10 requests for partial scholarships or information, according to organizers.").

But if marching in demonstrations or running for Congress isn't your cup of tea, there are other ways you can fulfill your duty to protect the rule of law. You can, for example, become more engaged in the Utah State Bar. Our Rules of Professional Conduct provide ample guidance on how, in your personal life, you can advance the legal profession and its embrace of the rule of law:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal



profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.

Utah R. Prof'l. Conduct, Preamble: A Lawyer's Responsibilities, [6].

So what does the Bar do to advance the goals our Rules of Professional Conduct so succinctly state we must strive to meet? Take our Government Relations Committee, for example. It consists of dedicated lawyers who, during the legislative session, review scores of bills to ensure your Bar has the opportunity to comment on legislation that impacts the administration of justice. What better way is there to improve the administration of justice, as we are required to do, than by constructively working with the legislature on laws that affect how our judiciary does the business of dispensing justice to the citizens of Utah?

Additionally, our Pro Bono Commission and Modest Means programs offer opportunities for you to participate in our efforts to improve access to our legal system. These programs

make giant strides toward the lawyer's duty to:

be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance and therefore, all lawyers should devote professional time and resources and use civic influence in their behalf to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.

Id.

The Bar's Ethics and Discipline Committee is made up of volunteer lawyers and non-lawyers who undertake the thankless task of hearing discipline matters to protect the quality of legal services we render as lawyers. Our ability – and responsibility – to self-regulate in this way places lawyers in a unique position of stewardship over our profession that is so integrally involved in maintaining the rule of law in our country.



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Mr. Lahti's practice focuses on litigation for a wide range of clients in matters such as patent, trade secret, contract, and securities.

Mr. Lahti enjoys an active nationwide litigation practice in both federal and state courts.

He received his Juris Doctorate from University of California Berkeley School of Law.

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If you are not a mentor in the Bar's New Lawyer Training Program (NLTP), you should be. It's an excellent way to fulfill your obligation to strengthen legal education. Your job as a mentor is to teach new lawyers how to practice law in the everyday world of a practitioner, sharing your experiences on everything from e-filing to avoiding conflicts to persuasive brief writing. The bonus is that it's a great deal of fun and rewarding to pass along your experiences to NLTP participants who, I have found, are anxious to learn from a veteran.

The Bar can assist you in your obligation to cultivate knowledge of the law to not just your clients, but the public as well. The Bar's Civics Education Committee reached hundreds of Utah students in September 2016 during its fifth annual Constitution Day Celebration, teaching school kids about our constitutional form of government. In addition, the Utah Center for Legal Inclusion, a non-profit organization launched by the Utah Minority Bar Association, is poised to start a program to encourage diverse school children from throughout our community to consider law school and then careers in law and ultimately in our judiciary.

What you do for the Bar advances the rule of law in meaningful

ways. While an elusive notion, surely the rule of law contemplates a system of governance that survives the transition of power that occurs in presidential elections. After all, to Justice Marshall our nation is comprised of a government of laws not men, with a constitution drafted to sustain itself regardless of who is in power. What we do in our law practices and in our private lives to promote justice, to improve the administration of our courts, to educate the public about the law, to engage our legislators on the administration of justice, make great contributions to advancing the rule of law in our nation.


I know scores of lawyers who have given generously of their time to serve our Bar, to our profession, and to our community. One recent example includes lawyers Brad Parker and Jim McConkie, who have formed Refugee Justice League of Utah, a group formed to protect the civil rights of all Utahns. *See* Lee Davidson, *Utah Lawyers Step Up to Protect Muslim Refugees from Discrimination, Threats*, SALT LAKE TRIBUNE (Nov. 29, 2016, 11:10 PM), www.sltrib.com/home/4650074-155/utah-lawyers-step-up-to-protect. Mr. McConkie told the *Salt Lake Tribune* he was "amazed" at the number of Utah lawyers who have contacted him to join in this endeavor. *Id.*

Kudos to Messrs. Parker and McConkie and those who have joined them for their contributions to protecting the rule of law. Their efforts are exactly what is expected of us as lawyers under our Rules of Professional Conduct: "[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." Utah R. Prof'l. Conduct, Preamble: A Lawyer's Responsibilities, [6].

Think about this for a moment: it's our job to "further the public's understanding of and confidence in the rule of law and the justice system." *See id.* At this unique moment in history, now is the time to take this obligation with utmost seriousness. There may be those in our community who lack confidence in the rule of law and our system of justice. It is our responsibility, as lawyers, to instill that confidence in our own communities. And you can fulfill that responsibility in many ways, from joining forces with the Refugee Justice League, to donating your time to the Pro Bono Commission, to contributing your talents to the many Bar committees and programs that need your skills and enthusiasm. In small ways and large, there is much you can do to ensure we remain a strong and vibrant country founded on the principle that our nation's government is one of laws, not men.

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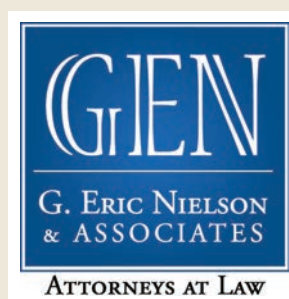
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Removal to Federal Court: Utah Considerations and Recent Developments

by Tyler V. Snow

INTRODUCTION

When I first began attending the annual Utah Bar Convention, I recall rather enjoying the “Opening General Session and Business Reports” that opened the convention. In particular, the presentation of the state and federal judiciary reports from then-Utah Supreme Court Chief Justice Christine Durham and U.S. District Judge Dee Benson were always entertaining. The repartee between the two jurists was often humorous, and underlying the humor was a good-natured competition about which court system was better (or busier, or less-funded, or what have you).

Given that I appear in both federal and state courts in Utah, I will wisely leave that debate to the judges. There are differences between each court system, however, of which every civil litigator should be aware, particularly for defendants who are deciding whether to remove to federal court. This article discusses when a case is eligible for removal based on diversity of citizenship and considerations in deciding whether to remove.

CAN I REMOVE?

The United States Court of Appeals for the Tenth Circuit has stated that “there is a presumption against removal jurisdiction.” *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (citation omitted). In light of that presumption, “[a]s the parties invoking the federal court’s jurisdiction . . . , [the removing] defendants bear the burden of establishing that the requirements for the exercise of diversity jurisdiction are present.” *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 (10th Cir. 2001) (citation omitted). In determining whether the defendant can meet the burden of establishing jurisdiction through removal, the defendant must assess four principal factors: (A) timing; (B) amount in controversy; (C) diversity of the parties; and (D) the forum defendant rule.

TIMING

According to the U.S. Code, generally “[t]he notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading.” 28 U.S.C. § 1446(b)(1).

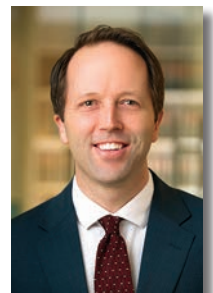
Alternatively, the notice of removal should be filed “within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.” *Id.*

Even if your case does not appear to be removable when you first review the complaint, remain vigilant because it may become removable later through dismissal of a co-defendant or otherwise.

[I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” *Id.* § 1446(b)(3). However, if more than one year has passed since the commencement of the action, generally the case “may not be removed.

Id. § 1446(c)(1).

TYLER V. SNOW is an attorney at Christensen & Jensen, P.C., where he handles commercial litigation, insurance defense, and personal injury matters.



AMOUNT IN CONTROVERSY

To remove a case to federal court based on diversity jurisdiction, the amount in controversy requirement must be satisfied. The U.S. Code provides that “[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.” 28 U.S.C. § 1332(a).

Where a Utah state court case is filed as a Tier 3 case under Utah Rules of Civil Procedure 8(a) and 26(c)(3), in which the plaintiff must allege that it is “claiming \$300,000 or more in damages,” Utah practitioners may assume that this factor is easily met. However, in certain circumstances, showing something more than the tier designation may be required.

In *Young Electric Sign Co. v. Hartford Casualty Insurance Co.*, No. 2:13-CV-120-DN, 2013 U.S. Dist. LEXIS 74022 (D. Utah May 24, 2013), the complaint requested “damages in the amount of \$33,659.08,” plus attorney fees, punitive damages, and interest. However, the complaint also stated that “[t]his is a ‘Tier 3’ case for purposes of discovery pursuant to Utah Rule of Civil Procedure 26(c)(3).” *Id.* at *2. Based in part on the over-\$75,000 damages request that inhered in the Tier 3 designation, the defendant attempted to remove the case to federal court.

In remanding the case to state court, the district court noted that the removing defendant “must affirmatively establish

jurisdiction by providing judicial facts beyond a preponderance of the evidence that made it possible that \$75,000 was in play.” *Id.* at *4. The court ruled that “[r]egardless of [the plaintiff’s] claim to a state discovery system or whether that classification is properly claimed under the rules of the State of Utah, [the plaintiff] has plead damages that fall short of the amount in controversy required by 28 U.S.C. § 1332(a).” *Id.* at *6. Thus, the Tier 3 designation alone was not sufficient to meet the amount in controversy requirement.

More recently, in *H.A. Folsom & Associates v. Capel*, No. 2:16-cv-00160-DN, 2016 U.S. Dist. LEXIS 111040 (D. Utah Aug. 19, 2016), a plaintiff that sought to amend its complaint after removal was not allowed to rely on its state court Tier 3 designation to meet the amount in controversy requirement. Rather, to establish diversity jurisdiction, the plaintiff was required to “refile a motion to amend its Complaint,” and to include in the new complaint, “a specific amount in controversy” in excess of \$75,000. *See id.* at *5, *27.

DIVERSITY

Diversity jurisdiction also requires, as its name implies, that the parties be “citizens of different states.” 28 U.S.C. § 1332(a)(1). Common issues confronting Utah practitioners include determining the citizenship of (1) an individual, (2) a corporation, and (3) an LLC or other non-corporation. Once allegations of diversity have been challenged, the party invoking federal

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jurisdiction must prove citizenship by a preponderance of the evidence. *Mid-Continent Pipe Line Co. v. Whiteley*, 116 F.2d 871, 873 (10th Cir. 1940).

Citizenship of an individual

For purposes of diversity jurisdiction, a person is considered a citizen of the state in which he or she is domiciled. *Crowley v. Glaze*, 710 F.2d 676, 678 (10th Cir. 1983). Domicile is established by (1) physical presence in a place accompanied by (2) an intent to remain there. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989). The place where a person lives is assumed to be his or her domicile unless the evidence establishes the contrary. *District of Columbia v. Murphy*, 314 U.S. 441, 455 (1941). The Tenth Circuit has stated,

In order to acquire a domicile of choice, one must have a present intention of permanent or indefinite living in a given place or country, not for mere temporary and special purposes, but with a present intention of making it his home unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home. If a person has actually removed from one place to another with an intention of remaining in the latter for an indefinite time and as a place of fixed present domicile, such latter place will be deemed his place of domicile, notwithstanding he may entertain a floating intention to return to his previous domicile at some future time. However, an intention to return on the occurrence of some event which may reasonably be anticipated is not such an indeterminate or floating intention.

Gates v. Commissioner, 199 F.2d 291, 294 (10th Cir. 1952).

The citizenship of a Utah resident who has lived in Utah for his or her whole life is determined fairly easily. For Utah residents who may be here only temporarily, such as college students or members of the military from out of state, the intent to remain factor is key. For example, a student domiciled in Virginia who resides in Utah while attending one of our fine universities is still a Virginia domiciliary if the student intends to return to Virginia after completing his or her education. Likewise, a Florida native who joins the military and is stationed at Utah's Hill Air Force Base remains a Florida domiciliary unless he or she decides to remain in Utah.

In some situations, a person may be said to have multiple residences. "Where it appears that a party may have more than one residence, the court should use a 'totality of evidence' approach to ascertain the party's intended domicile." *Wilson v. IHC Health Servs.*, No. 2:12-cv-835, 2013 U.S. Dist. LEXIS 49007, at **6–7 (D. Utah Apr. 2, 2013) (citation and internal quotation marks omitted). Courts consider a variety of factors in determining the domicile of an individual with two or more residences, including the following:

- (1) whether or not an individual votes where he claims domicile;
- (2) where an individual is employed;
- (3) where the party maintains automobile registration and his driver's license;
- (4) where a party maintains bank accounts;
- (5) the manner in which an individual lives, taken in connection with station in life;
- (6) whether the individual's family and dependents have moved to the new residence;
- (7) whether an individual's belongings have been moved to the new residence;
- (8) one's relationship with churches, clubs, and investments in the new residence;
- (9) whether or not a place of abode is retained in the old state of residence;
- (10) whether or not investments in local property or enterprise attach one to the former residence;
- (11) whether one retains affiliations with professional and fraternal life of the former community; and
- (12) where the individual pays taxes.

Id. (citations omitted).

Citizenship of a corporation

Determining citizenship of the parties can become murkier when a corporation is involved. The U.S. Code provides that, generally, "a corporation shall be deemed to be a citizen [1] of every State and foreign state by which it has been incorporated and [2] of the State or foreign state where it has its principal place of business." 28 U.S.C. § 1332(c)(1). For a long time, there was a debate in the courts about whether a multi-state corporation's "principal place of business" was where the company's headquarters were situated (the "nerve center" test) or where its place of activity was centered (the "place of activity" test).

The United States Supreme Court finally and unanimously resolved the question in 2010, in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010). In that case, the Supreme Court adopted the

nerve center test, stating that “‘principal place of business’ is best read as referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities.” *Id.* at 78. “In practice it should normally be the place where the corporation maintains its headquarters – provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the ‘nerve center,’ and not simply an office where the corporation holds its board meetings.” *Id.* (citation omitted).

Citizenship of an LLC and other non-corporation entities

The allegations establishing diversity jurisdiction must be in the complaint or on the face of the notice of removal. *See Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995). For removal purposes, this requirement becomes particularly important when one of the parties is an LLC or other non-corporation entity.

“‘[W]hile the rule regarding the treatment of corporations as ‘citizens’ has been firmly established, [the Supreme Court has] just as firmly resisted extending that treatment to other entities.’” *Penteco Corp. Ltd. Partnership-1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1522–23 (10th Cir. 1991) (quoting *Carden v. Arkoma Assoc.*, 494 U.S. 185, 189 (1990)). Thus, “for entities other than corporations (and sometimes trusts), diversity jurisdiction in a suit by or against [an] entity depends on the citizenship of all the members, . . . the several persons composing such association, . . . each of its members.” *Penteco Corp.*, 929 F.2d at 1523 (quoting *Carden*, 494 U.S. at 195–96) (internal quotation marks omitted).

With respect to LLCs in particular, the Tenth Circuit has stated that the citizenship of an LLC is the citizenship of all of its members. *Siloam Springs Hotel, LLC v. Century Sur. Co.*, 781 F.3d 1233, 1234 (10th Cir. 2015) (“Like every other circuit to consider this question, this court concludes an LLC, as an unincorporated association, takes the citizenship of all its members” (citations omitted)). Thus, the district court must be provided with “a list of the LLC’s members and their citizenship” in order for the court to “determine whether it has diversity jurisdiction.” *Grimsey v. Loewen*, No. 2:13-CV-173-TC, 2013 U.S. Dist. LEXIS 65695, at *5 (D. Utah May 7, 2013).

Moreover, “where an LLC has, as one of its members, another LLC, the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be to determine the citizenship of the LLC.” *Wood v.*



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Kinder Morgan Altamont, LLC, No. 2:16-cv-415, 2016 U.S. Dist. LEXIS 116845, at *2 (D. Utah Aug. 30, 2016) (citation and internal quotation marks omitted).

In other words, if a member of the LLC is another LLC, the removing party needs to keep digging as to the identity of the other members of the LLC until arriving at the names of individuals or corporations. This search can be accomplished via the Utah Division of Corporations website. See <http://corporations.utah.gov>.

FORUM DEFENDANT RULE

The U.S. Code provides that “[a] civil action otherwise removable solely on the basis of [diversity] jurisdiction . . . may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. §1441(b)(1). In other words, even if the parties are diverse, you may not be able to remove to federal court in Utah if one of the parties that has been properly joined and served is a Utah citizen. This rule is commonly known as the forum defendant rule.

The Tenth Circuit has stated that the forum defendant rule is not jurisdictional. See *Brazell v. Waite*, 525 F. App’x 878, 884 (10th Cir. 2013). In other words, if a citizen of Utah is later added to a case without destroying diversity, the forum defendant rule will not operate to defeat diversity. What matters is whether the district court “would have had original jurisdiction over the case as it was filed and at the time it was removed.” *Schubert v. Genzyme Corp.*, No. 2:12CV587DAK, 2012 U.S. Dist. LEXIS 113233, at *6 (D. Utah Aug. 10, 2012).

There is a split of authority among the federal courts on the issue of whether one defendant from outside the forum can remove where the forum defendant has not been served (i.e., where the Utah defendant has not been properly joined and served, as required by statute). See *Lone Mt. Ranch, LLC v. Santa Fe Gold Corp.*, 988 F. Supp. 2d 1263, 1266 (D.N.M. 2013) (listing cases and then agreeing with the authorities stating that even if the forum defendant remains unserved, the served defendants cannot remove). The Tenth Circuit has not decided the issue.

SHOULD I REMOVE?

There are many factors to consider when deciding whether to remove a diversity-eligible case to federal court. Two Utah-specific factors are addressed here: differences in expert discovery and the jury rules.

Expert discovery distinctions

First, there are significant differences in how expert discovery is handled as between state and federal courts, primarily as a result of the 2011 changes to the Utah Rules of Civil Procedure. In federal court, the parties typically develop their own discovery plan and establish discovery deadlines (including expert discovery) at the outset of the case, as approved by the court. See Fed. R. Civ. P. 26(f). The parties have the ability to stagger deadlines and indicate clearly which side’s designations are due as of a certain date.

In Utah state courts, expert discovery deadlines are set automatically by operation of Utah Rule of Civil Procedure 26(a)(4)(C). The deadlines are staggered during expert discovery in state court as well but, unlike in federal court, in state court the deadlines are staggered not along party lines but rather depending on which party bears the burden of proof on a particular issue. Moreover, the non-burden-of-proof expert designation deadline for a particular issue is tied to when the burden-of-proof expert submitted his or her report or provided a deposition.

For example, if the burden-of-proof party designates four experts and those experts are deposed on four different days, the non-burden-of-proof party will have a seven-day disclosure deadline running from the date of each deposition – i.e., four deadlines to keep track of. In complex situations like this, the issue can be remedied by stipulation or by seeking a court order, but this issue is generally avoided altogether in federal court.

Differences in jury systems

In civil cases in federal court, “[u]nless the parties stipulate otherwise, the verdict must be unanimous.” Fed. R. Civ. P. 48(b).

In civil cases in Utah state courts, the jury verdict need not be unanimous. Rather, the Utah Constitution provides that “[i]n civil cases three-fourths of the jurors may find a verdict.” Utah Const. art. 1, § 10; see also Utah R. Civ. P. 47(r).

CONCLUSION

As discussed above, there are some Utah-specific issues civil litigators should be aware of as they consider whether they can and should remove to federal court. By keeping abreast of these issues, attorneys will be better prepared to counsel with their clients about whether to try to remove, or to seek to defeat, removal.

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Utah Dispute Resolution: Celebrating 25 Years

by William W. Downes, Jr. and Stephen D. Kelson

Many well-seasoned practitioners can recall a time when trials were the norm, and anything more than direct negotiations between parties and counsel was considered taboo or supposedly showed weakness. The practice of law has significantly changed over the past twenty years, and well-informed counsel and clients recognize the benefit of alternative methods to obtain outcomes to disputes. For twenty-five years Utah Dispute Resolution (UDR) has assisted in providing access to justice to thousands of Utah's low and moderate income residents through mediation.

For the very few, if any, in the Utah legal community who do not understand the term, mediation is a voluntary, collaborative approach to dispute resolution using the assistance of an impartial, third party. Mediators for UDR help people in conflict to understand and express their needs and interests. The process offers an opportunity for the parties to voice their viewpoints and hear other viewpoints in a safe, supportive environment that promotes understanding. It is an alternative to litigation, avoidance, destructive confrontation, or violence. In mediation, the disputing parties retain control over the outcome, while the mediator manages the process and helps parties overcome barriers that often stymie the discussion. Mediation is designed to preserve interests and maintain relationships where possible. With the purpose and goals of mediation, UDR has assisted thousands of Utah's citizens retain control of the outcome of their disputes and resolve their conflicts. The courts have also benefitted through resolution of these cases, which would otherwise fill the courts' dockets.

WILLIAM W. DOWNES, JR. has mediated family law conflicts in Utah since 1990. He is an instructor in basic mediation skills and family mediation skills. He is listed in Best Lawyers in America for Family Law Mediation.



From a Humble Beginning: The concept of UDR began in 1988 when Dr. Marlene W. Lehtinen, Assistant Professor of Sociology at the University of Utah, submitted a grant request, on behalf of the Utah State Bar, to the federally funded State Justice Institute in Alexandria, Virginia. The purpose of the proposal was to create and operate a neighborhood dispute resolution program that could provide mediation services to members of the community free of charge. Although such programs were in existence in other states, no such program existed in Utah at that time.

After several revisions and submission of the proposal, a two-year grant was awarded to the Utah State Bar in 1991 for the purpose of establishing the UDR program. The primary purpose of creating UDR in Utah was the belief on the part of its founders and staff that mediation, in many circumstances, is a better means of resolving conflicts than other approaches to dispute resolution. UDR began under the auspices of the Utah State Bar in conjunction with the development of the Bar's Law and Justice Center. By the end of 1991, UDR established an office at the Law and Justice Center, recruited eighteen trained mediators, and set to work. The original grant kept UDR in operation through 1993.

UDR remained a part of the Utah State Bar until the summer of 1996. The Utah Bar asked its Alternative Dispute Resolution Committee Chair, Hardin Whitney, to lead a group that would form UDR as a separate and independent entity from the Utah Bar. Mr. Whitney and a Board of Trustees, including William (Bill) Downes, Jr., Phyllis Geldzahler, John Greene, Diane

STEPHEN D. KELSON is a shareholder at Christensen & Jensen, P.C., where his practice includes general commercial litigation, professional liability defense, and mediation.



Hamilton, Jane Semmel, Constance White, and Cherie Shanteau filed articles of incorporation with the state of Utah, and UDR received 501(c)(3) non-profit corporation status with the IRS in 1997.

A History and Legacy of Leadership: From 1996 through 1997, the work of UDR was overseen by Dr. Lehtinen and its Board of Trustees. In 1997, the Board of Trustees hired UDR's first full-time executive director, Susan Bradshaw. Under her leadership, UDR was able to increase its staff members and significantly expand the number of its volunteer mediators, and coordinated UDR's move into newly constructed offices in the Law and Justice Center.

Bill Downes replaced Susan Bradshaw as executive director in 1999. Over the next five years, UDR expanded its services and gained a highly regarded reputation for its mediation services and dispute resolution training programs, including UDR's small claims and family mediation programs, and UDR's youth mediation program at Horizonte School, which has helped to change the way at-risk youth address conflict in their lives.

In November 2004, Nancy McGahey replaced Bill Downes as executive director. Since that time, UDR has expanded its mission of providing mediation services statewide. The organization now coordinates mediation small claims appeals programs in Salt Lake City and Farmington, as well as in the justice courts in Salt Lake City, Salt Lake County, Taylorsville, West Valley City, Ogden, and Logan. As one of the few providers of court-approved mediation training in Utah, UDR has access to mediators throughout Utah who are willing to assist disputants in conflict.

The Significance of UDR and Access to Justice: For twenty-five years, UDR has assisted parties who otherwise would not have the means to hire counsel and would otherwise have difficulty navigating the legal process. Since 2004 alone, UDR as a non-profit organization, through its staff and volunteers, has provided more than 12,000 mediations to the Utah community. This amazing service to the public and the court system has been accomplished through UDR's five general programs, including Community Mediation, Family Mediation, Court Mediation, Youth Mediation, and Mediation and Conflict Management Training.

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Community Mediation Program

UDR receives numerous requests for assistance involving a wide range of disputes and contexts. Community mediations at UDR include conflicts between neighbors, landlords and tenants, consumers and merchants, parties to a contract, employers and employees, parties to an accident, students and administrators or teachers, groups within an organization, etc. In addition, UDR provides facilitation services to help groups and organizations manage meetings or community disputes.

Family Mediation Program

The Family Mediation Program at UDR provides mediation services to low-income clients who need assistance with divorce, separation, paternity, parenting, and family issues, and often are unable to afford legal counsel. UDR collaborates closely with Utah Legal Services and Legal Aid Society to accommodate clients who would not be able to afford mediation services elsewhere. UDR relies primarily on qualified volunteers to conduct family mediations and maintains a limited roster of mediators who have considerable experience and advanced training in family mediation. These family mediators work on a pro bono basis for many of these mediations.

Court Mediation Program

UDR coordinates mediation programs at various small claims court venues throughout the state, and small claims appeals in the Second and Third Judicial Districts. UDR's small claims mediation program works in collaboration with justice courts in Salt Lake City, Salt Lake County, Taylorsville, West Valley City, Ogden, and Logan to offer mediation to disputants prior to their scheduled trial. In this program, many newly trained mediators gain experience by volunteering their time to mediate these cases.

UDR's small claims appellate program works collaboratively with the Second and Third Judicial District Courts. When a disputant appeals a small claims judgment in these districts, the case is automatically referred by court order to mediation. Unless the parties attempted to resolve the matter in mediation prior to their initial hearing, they are required to mediate before the case can be scheduled for an appeal trial de novo. UDR coordinates, schedules, sends notices of mediation dates to the disputants, provides trained pro bono volunteer mediators for these cases, and reports the outcome back to the courts.

Youth Mediation Program

Since 1997, UDR has been training approximately 450 students per year at Horizonte Instruction and Training Center (Horizonte)

in conflict resolution and mediation skills. Horizonte is Salt Lake City's multicultural training center and alternative high school with programs that offer standard high school curriculum, English as a second language, applied technology, and life skills for young parents. The school serves students from fourteen to eighty years of age who come from over sixty countries of origin. UDR's Youth Mediation Program provides an eight-week program to help students build skills to bridge their differences, gain understanding of other perspectives, and resolve conflicts collaboratively. Interested students who complete mediation training become youth mediators and help their peers address and resolve disagreements.

ADR and Conflict Resolution Training

In addition to its direct mediation services, UDR offers training in alternative dispute resolution for individuals, organizations, and businesses. Workshops include: Basic Mediation Training, Interest Based Negotiation, Advanced Mediation, Conflict Resolution in the Workplace, and Domestic Mediation Training. Many mediators in Utah have received training through UDR. In 2007, UDR introduced a Domestic Mediation Mentorship program which satisfies the new court Rule 4-510 of the Utah Code of Judicial Administration to qualify mediators for the domestic mediation court roster, and includes practicum in domestic violence screening as well as mediation experience. Since 1999, UDR has trained hundreds of individuals, including attorneys, judges, teachers, business leaders, and citizens in alternative dispute resolution, for the betterment and benefit of our community.

UDR's Strength and Future: UDR's ability to provide mediation services to the thousands of members of the Utah community comes from its countless supporters and volunteers, including the Utah State Bar and members of the legal community. Without financial contributions from the Utah legal community, including many law firms and individuals, UDR would not be able to continue to fulfill its purposes. UDR welcomes additional financial support from the Utah legal community to continue its work providing needed access to justice.

UDR thanks the Utah State Bar and the legal community for its initial foresight, development and support of UDR through the past twenty-five years. UDR looks forward to assisting the Utah community far into the future, and invites all members of the Utah State Bar to utilize its many services in alternative dispute resolution.

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Hold Me Close: Lawyers Beware, the Closely Held Company

by Eric Maxfield and Darren Reid

Utah's standard for forming an *implied* attorney-client relationship is nebulous from a loss prevention perspective, creating potential problems for even the most careful practitioner who clearly defines who the client is and the scope of such representation. *See Roderick v. Ricks*, 2002 UT 84, ¶ 40, 54 P.3d 1119 (“An attorney-client relationship exists when a person reasonably believes that the attorney represents the person’s legal interests. In order for a person to ‘reasonably believe’ that an attorney represents the person, (1) the person must subjectively believe the attorney represents him or her and (2) this subjective belief must be reasonable under the circumstances.” (internal citation and quotation marks omitted)). Though a person’s belief must be reasonable under the circumstances of a particular case, this standard provides a pathway for malpractice claims against lawyers representing only a corporate client. This can be particularly tricky for transactional lawyers helping corporate clients navigate the varied interests of multiple shareholders. It is not uncommon for an officer, director, or shareholder of a company to later argue, “Hey, I thought you were my lawyer, too!”

ARGUMENTS SUPPORTING AN IMPLIED ATTORNEY-CLIENT RELATIONSHIP

The problem intensifies when lawyers represent closely held companies with relatively few shareholders or members. As most transactional lawyers are aware, the line between legal advice to the corporate client and legal advice to the person

running the company can sometimes get blurry. Consequently, lawyers must be careful not to unwittingly expand the client relationship or the scope of representation beyond what was originally intended.

In recent legal malpractice cases, plaintiffs have argued that when a lawyer represents a closely held business, Utah courts should automatically impute an attorney-client relationship between the lawyer and the founder or majority shareholder of that closely held company regardless of what the engagement letter or other signed documents provide. The argument suggests that because the company is “virtually indistinguishable” from its founder or shareholder, the lawyer represents both the company and the founder/shareholder individually as a matter of law. *See, e.g., In re Brownstein*, 602 P.2d 655, 657 (Or. 1979) (“Where a small, closely held corporation is involved . . . the attorney in such a situation represents the corporate owners in their individual capacities as well as the corporation unless other arrangements are clearly made.”); *In re Banks*, 584 P.2d 284, 290–91 (Or. 1978); *see also Detter v. Schreiber*, 610 N.W.2d 13, 17 (Neb. 2000) (holding that lawyer assisting closely held corporation acted on behalf of the corporation and both shareholders); *Matter of Nulle*, 620 P.2d 214, 217 (Ariz. 1980) (holding that attorney represented two principal owners of closely held company in their individual capacities while also serving as attorney for the company).

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In support of implying attorney-client relationships between company lawyers and the founders/shareholders of closely held companies, litigants have pointed to two Oregon cases, *Brownstein* and *Banks*, and suggested the Utah Supreme Court implicitly adopted this approach in *Margulies v. Upchurch*, 696 P.2d 1195 (Utah 1985). In *Margulies*, the court dropped a footnote citing *Banks*, noting “where the Oregon Supreme Court found that an attorney who was representing a closely held corporation was in fact representing both the corporation and its dominant shareholder because the interests of both were at stake.” *Id.* at 1201 n.2.

We do not believe *Margulies* or current Utah law supports an argument that lawyers for closely held companies *per se* represent the company’s founder or majority shareholder. Indeed, adopting such a *per se* standard would turn the legal representation of companies on its head and irrevocably change transactional practice in Utah.

Such a standard is contrary to the well-established rule that “[a] corporation exists apart from its shareholders, even where the corporation has but one shareholder.” *Fassibi v. Sommers, Schwartz, Silver, Schwarts & Tyler, P.C.*, 309 N.W.2d 645, 648 (Mich. Ct. App. 1981). Even in a closely held company “the attorney’s client is the corporation and not the shareholders.” *Id.*; see also *Johnson v. Superior Court*, 45 Cal. Rptr. 2d 312, 321–22 (Cal. Ct. App. 1995) (holding that the lawyer for LLC owed no ethical duty to limited partners); ABA Formal Op. 91-361 (1991) (“Generally, a lawyer representing a partnership represents the entity rather than the individual partners.”); *Margulies*, 696 P.2d at 1200 (reaffirming the well-established general rule “an attorney representing a corporation or similar entity owes allegiances to the entity rather than to its shareholders”).

Utah law should recognize the corporate form and an attorney’s fiduciary duties, when engaged by the company, should inure to the company only. See Utah R. Prof’l Conduct 1.13(a) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”). Indeed, the corporate form is generally enforced to shield shareholders from company obligations, liabilities, taxes, penalties, and judgments. It should likewise operate to ensure directors, officers, and shareholders do not conflate the role of counsel hired to represent the company’s interests.

In our view, *Margulies* does *not* hold that shareholders or members in a closely held or emerging business automatically have an attorney-client relationship with company counsel any time their individual interests may be directly involved in a transaction.

Margulies, 696 P.2d at 1198. The court in *Margulies* was careful to limit its holding to the specific facts of the case before it:

It should be noted that we do not find that an attorney automatically becomes counsel for limited partners when he or she undertakes representation of a limited partnership. Ethical Consideration 5-18 of the Utah Code of Professional Responsibility (1977) states that an attorney representing a corporation or similar entity owes allegiance to the entity rather than to its shareholders.... [T]herefore representation of a limited partnership does not of itself require allegiance to the interests of the limited partners.

Id. at 1200 (internal citation and quotation marks omitted).

Since *Margulies*, the Utah Supreme Court clarified that “direct involvement” with the individual interests of the partners or principals in an organization “is not a separate test, but only one factor to consider in determining whether the specific circumstances of the case demonstrate the individual [] partner’s belief concerning representation is reasonable.” *Kilpatrick v. Wiley*, 2001 UT 107, ¶ 49, 37 P.3d 1130. Thus, the standard for

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forming an implied attorney-client relationship, as defined in *Roderick v. Ricks*, is necessarily a case-by-case inquiry.

Relying on the decades-old *Brownstein* and *Banks* decisions is misplaced for two other reasons. First, courts have rejected arguments asserting an automatic representation rule in the context of closely held corporations, distinguishing *Brownstein* and *Banks* as “extreme” outliers. See, e.g., *First Republic Bank v. Brand*, 2001 WL 1112972 at *4 n. 9 (51 Pa. D. & C.4th 2001) (characterizing *Brownstein* as an “extreme example” that “has been limited in focus in subsequent decisions”; “most courts . . . have analyzed the attorney-client relationship in closely held corporations based on the facts of the particular case”); *Agster v. Barmada*, 43 Pa. D.&C.4th 353, 369 (C.P. Allegheny 1999) (stating that there is “no legal justification” for an “absolute rule that in closely held corporations corporate counsel represents all shareholders”); *McCarthy v. John T. Henderson, Inc.*, 587 A.2d 280, 283 (N.J. Super. 1991) (dismissing the *Brownstein* and *Banks* decisions as the “only two instances in which a court has disregarded the corporate form and determined that the principles of the corporation were indistinguishable from the corporation itself”); *In re Conduct of Kinsey*, 660 P.2d 660, 670 (Or. 1983) (distinguishing and narrowing *Brownstein*).

Second, closely held companies often are nothing like the exclusive, founder-dominated, family-run businesses described in *Banks* and *Brownstein*. In many instances, closely held or emerging businesses will have multiple investor, boards of directors, officers, and/or managers operating running the business, reinforcing a clear distinction between the corporate client and its authorized constituents.

We urge courts and practitioners to reject a proposed *per se* standard, which to date has neither been adopted nor clarified by Utah courts. When a company is solely owned or dominated by one person, we believe that adopting a *per se* rule imputing an attorney-client relationship between the lawyer and the sole owner would be troubling policy from a loss prevention perspective, especially when the lawyer and the sole owner have agreed upon an engagement where the company is the only client. A careful lawyer would be required to second-guess – or disclaim – too many interactions with his or her client’s authorized constituent, rather than focusing on providing appropriate legal advice for the company in unfettered communication with the sole owner. We acknowledge there may be instances where an implied attorney-client relationship could (and even should) be formed, but such a relationship should be reasonable under the circumstances of a given case, instead of an initial presumption or automatic conclusion.

BEST PRACTICES WITH CLOSELY HELD COMPANIES AND THEIR CONSTITUENTS

Lawyers can and should protect themselves to avoid confusion with an authorized constituent of a closely held company, which may include founders, directors, officers, shareholders, members, or employees. This is true not just for transactional lawyers, but all lawyers who represent closely held companies. We believe the following practices will significantly reduce malpractice exposure and the likelihood that a founder or shareholder later claims that an implied attorney-client relationship also existed between the lawyer and the individual.

Avoiding “Stale” Engagement Letters

Consistent with Rule 1.5 of the Utah Rules of Professional Conduct, most lawyers formalize an engagement with a letter that specifies the corporate client and scope of representation. Problems arise when engagement letters gather dust in the file and the scope of representation evolves over time. For example, many initial engagement letters for corporate work identify the corporate client and set forth a broad scope of representation, such as “to provide general corporate advice” or “to assist in forming the company and related organizational documents,” etc. Later, when a lawyer assists the corporate client in purchasing real estate or obtaining investment funds, such a generalized engagement letter may not adequately reflect the current scope of representation. When a new or significant client transaction is on the horizon, it is the perfect time to refresh the engagement letter, define the new scope of representation consistent with Rules 1.4 and 1.5, and, critically, remind all authorized company constituents – including founders or majority shareholders – that the representation is expressly limited to the company only.

Writing “I’m Not Your Lawyer” Letters/Emails

When a corporate transaction might touch on the personal interests of a founder or shareholder, a lawyer should remind the company’s authorized constituents, in writing, that the lawyer represents the company only and not the owners, shareholders, members, directors, and/or officers. Many careful and well-intentioned practitioners may believe that a client’s oral confirmation as to the lawyer’s representation should suffice. But consider whether lay jurors, who often believe lawyers uniformly “document” all their dealings with clients, will accept the lawyer’s testimony that the scope of the representation was discussed orally but never written down. Even a short email will be powerful evidence in a subsequent dispute regarding whom the lawyer actually represented in a transaction. It may also generate a contemporaneous

conversation with the authorized constituents to dispel any confusion about the lawyer's role and duties.

When a company transaction "goes bad," a malpractice plaintiff may later argue that, as a founder or significant shareholder, they were an "unrepresented person" in the transaction and that it directly involves their personal interests. Rule 4.3(a) of the Utah Rules of Professional Conduct states:

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct that misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 1.13(f) of the Utah Rules of Professional Conduct has similar language: "In dealing with an organization's directors,

officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

A scenario where a founder, shareholder, or other authorized constituent misunderstands the lawyer's role is fraught with peril. Has a lawyer breached his or her fiduciary duties when the lawyer proceeds with a corporate transaction involving a constituent's personal interests without first clarifying the lawyer's role pursuant to Rule 4.3? We do not believe these rules apply in corporate transactions. In our view, the situation to which Rules 1.13(f) and 4.3(a) most often apply is one in which corporate counsel interviews company employees as part of an internal investigation of possible corporate wrongdoing. In such cases, the concern to which these rules are directed is that corporate lawyers may accidentally mislead employees into thinking that what they told the lawyer would be kept confidential as between them and not used against the employee or contrary to the employee's wishes. Thus, Rules 1.13(f) and 4.3(a) require the



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lawyer to give employees in such cases what is informally called a “corporate *Miranda* warning.” These rules should not be enforced against a transactional lawyer representing a company when that lawyer’s role for the company is already clear to its constituents.

But regardless, if a lawyer has carefully drafted an engagement letter and directed appropriate legal advice to the company only, there should be no confusion among constituents, and Rules 1.13(f) or 4.3 should not be triggered. Given the relatively low bar for an implied attorney-client relationship, however, it is wise practice for a lawyer to reiterate prior to a transaction, in writing, that the only client is the company and the founder, shareholder, or other authorized constituent should secure counsel for their own personal interests. An “I’m Not Your Lawyer” letter or email should turn fertile ground for a claim of an implied attorney-client relationship into strong summary judgment material. Indeed, when a lawyer has communicated in writing, whether through an unambiguous engagement letter or an “I’m Not Your Lawyer” letter, whom the lawyer represents, courts should be hard pressed to allow such claims to proceed to trial.

Keeping Constituents Reasonably Informed.

Under Rule 1.4 of the Utah Rules of Professional Conduct, a lawyer shall keep his or her client “reasonably informed” and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 1.4 (a) (3), (5). While an authorized constituent is not the client when a lawyer represents the company only, the company, of course, acts through its authorized constituents and cannot make decisions unless the authorized constituent is reasonably informed. Thus, it is good practice to keep appropriate constituents apprised in the same manner described by Rule 1.4.

Ironically, plaintiffs in malpractice cases may point to routine communications between a lawyer and an authorized constituent as indicia establishing an implied attorney-client relationship between the lawyer and the constituent on a personal basis (as opposed to the company client). When the contours of the attorney-client relationship have been made abundantly clear, however, it is a difficult argument for would-be legal malpractice plaintiffs.

Likewise, lawyers must exercise careful judgment to determine under what occasions client constituents should be “in the loop” on transactional communications between the various interests participating in the transaction. Must a lawyer “copy” the constituent on every email chain with an investor’s counsel?

Or, to the contrary, has the lawyer instead fulfilled his or her duties by communicating with the authorized company constituent at regular intervals without the need for the constituent to view every single negotiated “back and forth”? While it is unnecessary – and sometimes inappropriate – to include authorized constituents in all email communications that further the legal objectives of the closely held company, a lawyer should be careful to observe the potential “optics” of leaving them off emails when they could easily be copied, or the relevant communication could be forwarded. Indeed, transactional lawyers should discuss and document with company clients their expectations for staying informed as to the progress and negotiation of a transaction, and should consciously exercise judgment under the circumstances on the level of detail to convey.

Including an “I’m Not Your Lawyer” Provision in the Deal Documents.

Many malpractice claims in the closely held business context involve a transaction and related deal documents. Along with executed engagement letters, and when appropriate, “I’m Not Your Lawyer” letters, we believe it is best practice to include an explicit provision in the executed documents that identifies the lawyer’s client in the transaction and disclaims an attorney-client relationship with any other officers, directors, shareholders, members, employees, etc. Many transactional lawyers already implement this wise practice, but in at least one recent case, a malpractice plaintiff argued that such provisions are mere boilerplate buried in the deal documents, providing little in the way of notice to unsuspecting constituents. Though we believe Utah law requires the enforcement of executed terms of a written contract, it may nevertheless be helpful to have every signatory sign or initial their names next to the “I’m Not Your Lawyer” provision. While this is a “belt and suspenders” approach to clarifying the company counsel’s role, it makes it very difficult for later complaining constituents to wiggle out of their express acknowledgement of the lawyer’s role and duties.

CONCLUSION

By carefully defining the client and scope of representation during key stages of the representation and by understanding typical arguments that constituents later use to create an implied attorney-client relationship where none was intended, lawyers can avoid serious headaches down the road. Lawyers should carefully document his or her role with authorized constituents of closely held companies, which will make it difficult for malpractice claims to form in the “negative space” of routine interactions.

Clyde Snow & Sessions congratulates Charles R. Brown as he heads into retirement



Charles R. Brown's colleagues at Clyde Snow & Sessions extend their sincere appreciation and congratulations to him as he heads into retirement. Mr. Brown's sage advice, salty personality, fierce loyalty, and warm friendship will be sorely missed.

Mr. Brown has been a true advocate and professional, providing exemplary leadership and service to the legal community and his clients for over 45 years. His contributions to the profession will be felt long after his retirement. Charles is heralded as one of the most distinguished attorneys in tax and other complex matters.

- President, Utah State Bar (1999-2000)
- Utah State Bar Delegate to ABA House of Delegates (2000-06)
- Board of Utah State Bar Commissioners (1992-93; 1994-2000)
- Distinguished Lawyer of the Year, Utah State Bar (2008)
- Practitioner of the Year, Utah State Bar Tax Section (1995-96)
- Scott Daniels Award for outstanding service in the providing of pro bono legal services to military personnel and their families (2004)
- Best Lawyers in America, Best Tax Law Lawyer of the Year (2014)
- Best Lawyers in America, Tax Law (1999-2016)
- Mountain States Super Lawyers, Tax, Business/Corporate, Real Estate
- Utah Business Magazine Legal Elite, Tax Law
- AV Rating, Martindale-Hubbell

A true gentleman and opera aficionado, Charles maintains of counsel status at Clyde Snow.



A Brief Overview of the Utah Bar's Governing Board

by Kristen Olsen and Kate Conyers

What is the Bar Commission?

The Utah State Bar Commission (Commission) is the governing board and decision-making body of the Utah State Bar. Under the state's constitution, the Utah Supreme Court regulates the practice of law. The court, in turn, has delegated responsibility for the administration of the practice of law and the regulation of lawyers to the Utah State Bar, a 501(c)(6) nonprofit corporation. The Commission, in essence, acts as a revolving board of directors for the Utah Bar.

What does the Commission do?

The primary responsibility of the Commission is to carry out all of the responsibilities delegated to the Bar. Specifically, the Commission establishes policies and rules ranging from admissions of lawyers, writing and administering the Bar Examination, and setting thresholds for the character and fitness committee process through the Utah Supreme Court.

The Commission also:

- Organizes CLEs, annual conventions (Spring, Summer, and Fall Forum), and other Bar events;
- Lobbies the legislature when bills and issues affect the administration of justice and the regulation and management of the practice;
- Creates and implements programs and services, such as the Bar's Pro Bono program, Modest Means program, and the Lawyer Referral Service Directory;

- Selects members to be considered by the Governor for the Judicial Nominating Commission and other law-related commissions;
- Arranges for services and benefits to Bar members like Beneplace Group Benefits, Blomquist Hale counseling services, and Casemaker online legal research, all found at www.utahbar.org/members; and
- Selects individuals to receive recognition and awards.

The Bar commissioners, who are elected to serve three-year terms, meet nine to ten times a year and each meeting lasts up to four hours. Individual commissioners also spend around eight to ten hours between each Commission meeting on other responsibilities, such as sitting on subcommittees, liaising to various sections and divisions of the Bar, and attending Bar conventions, events, and socials. The Commission also delegates many of its responsibilities to the Bar's Executive Director, John Baldwin, who manages a staff of thirty-eight individuals to assist in these tasks.

How does the Commission operate?

Some things can be handled by the Commission during the course of one meeting and other things – such as implementing long-term projects – can take years. The Executive Committee of the Commission – which consists of the President, President-elect, and one to three commissioners – meets quarterly with the Utah Supreme Court to update the Court and seek approval for any project that is not financially self-sustaining.

KRISTEN OLSEN is an attorney in Dorsey & Whitney's trial group where she focuses on commercial litigation, primarily in the products liability, health care, and banking industries. She serves on the executive boards of the Utah Center for Legal Inclusion and the Salt Lake County Bar Association.



KATE CONYERS is a felony attorney at Salt Lake Legal Defenders. She has served on the Bar Commission for several years and currently serves as a Commissioner for the Third Division.



The Mentoring Program, for example, was created after the Utah Supreme Court approached the Commission with a mentoring report written by local lawyers and judges. The court asked the Commission to determine whether a mentoring program should be implemented in Utah. The Commission, in turn, set up a committee to research whether the program would be valuable, necessary, important, and achievable. That committee met and researched these issues over the course of a year, regularly reporting to the Commission about its progress and requesting feedback. Once the committee determined that the mentoring program would be a good fit for the Bar, the Commission approved it and determined how the program would be funded and implemented. Then the Commission petitioned the court for final approval. Now, the Bar's mentoring program is a requirement for all new attorneys admitted to the Bar.

What are the priorities and goals of the current Commission?

This year, Bar President Rob Rice has asked the Commission to focus on several initiatives, beginning with further increasing membership services. In that regard, the Commission is studying a new look for the Bar's webpage and incorporating an online law practice management system that will assist solo- and small-firm practitioners with managing their calendaring, invoicing, research, networking, CLE, and a wide array of legal information. The Commission is also rolling out its online lawyer directory and referral service at www.licensedlawyer.org. President Rice hopes that all lawyers in the Bar will sign up and take advantage of this new service to expand their client base.

In addition, the Commission is focused on promoting diversity and inclusion in the law. It is supporting an expansion of unconscious bias training in the Bar's New Lawyer Training Program and giving more attention to diversity issues at CLEs and conventions. The Commission is also working with the newly formed Utah Center for Legal Inclusion, an organization dedicated to advancing diversity and inclusion initiatives in the legal profession. The Commission remains dedicated to reviewing and fulfilling the recommendations made by the Bar's Futures Commission in its recent Report and Recommendations on the Future of Legal Services in Utah.

Finally, the Commission is aiming to promote collegiality and professional growth among attorneys. In this regard, the Commission invites all lawyers to attend the Spring Convention

in St. George, the Summer Convention, which this year returns to Sun Valley, Idaho, and the Fall Forum in Salt Lake City. Visit www.utahbar.org/cle/utah-state-bar-annual-conventions/ for details on upcoming conventions.

During the 2015–16 year, the Commission focused specifically on responding better to the needs of its membership. It sought increased transparency and better communication in Bar services and operations. This resulted in a dozen individual changes in the Bar's Office of Professional Conduct, admissions department, and financial department. The Commission, at the direction of Past President Angelina Tsu, also created monthly Bar Reviews, the Breakfast of Champions mentor award event, 50-year Pins, and the 85th Anniversary Gala.

How can attorneys have a voice on the Commission?

Attorneys are encouraged to raise concerns and express ideas to the Commission in an effort to resolve issues, improve the practice of law, and better the administration of justice in Utah. While there is no formal process for submitting ideas and concerns to the Commission at large, Executive Director Baldwin encourages

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attorneys to reach out to their individual commissioners.

The ideas, suggestions, and concerns attorneys express to individual commissioners are either brought to the attention of the entire Commission at a monthly meeting or are shared with Executive Director Baldwin, the Bar President, individual commissioners, the Executive Committee of the Commission, and/or the Utah Supreme Court. For example, Mr. Baldwin explained, he often gets calls from commissioners explaining that an attorney has expressed frustration about a certain issue of which the Commission, as a whole, was unaware. Such issues, according to Mr. Baldwin, are often easily resolved or investigated once the Commission is put on notice that such a problem exists. “Sometimes it effects great change, sometimes it doesn’t,” Mr. Baldwin said, but either way, “it’s a great populist notion.”

How do I run for a seat on the Commission?

Utah Bar elections are held each April. According to the Utah Bar website, before an attorney can apply to run, “[a]pplicants 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.” See <http://www.utahbar.org/utah-state-bar-news-and-announcements/bar-news/notice-bar-commission-election/>. If you are interested in running for a commissioner position next year, you must submit a Utah State Bar Nominating Petition by 5 p.m. on February 1, 2017. For more information about the elections and about the services offered by the Bar to assist in your campaign, visit the Utah Bar website.

If you are interested in volunteering in a different capacity, visit www.utahbar.org and click on the “Volunteer!” tab.

Who serves on the Commission?

The Utah Bar Commission is generally composed of the following voting members: the current President, the President-elect (who may or may not be a standing Commissioner), and thirteen commissioners, eleven of which represent the five geographic divisions of the Bar, and two of which are non-attorney appointed “public members.” Rob Rice is the President of the Bar Commission and John R. Lund is the President-elect. Herm Olsen of Logan represents the First Division; John W. Bradley of Ogden represents the Second Division; S. Grace Acosta, H. Dickson Burton, Kate Conyers, Heather Farnsworth, Michelle Mumford,

Cara Tangaro, and Heather Thuet, all attorneys practicing in Salt Lake City, represent the Third Division; Liisa Hancock of Provo represents the Fourth Division; and Kristen “Katie” Woods of St. George represents the Fifth Division. The two non-attorney voting members are Mary Kay Griffin, a Certified Public Accountant, and Steven R. Burt, an architect. As non-attorneys, Griffin and Burt add a “public perspective that we as lawyers don’t always see because we think and act and look and talk and bill...like lawyers,” said Executive Director Baldwin.

In addition to the voting members of the Commission listed above, non-voting members attend the Commission meetings and serve the Bar in various capacities, including the immediate Past President, the Deans from the University of Utah and Brigham Young University law schools, a Utah Supreme Court liaison, and representatives from the Young Lawyers Division, Utah Minority Bar Association, Women Lawyers of Utah, LGBT & Allied Lawyers of Utah, Paralegal Division, and American Bar Associate delegates.

The voting commissioners hail from diverse professional backgrounds. Some work for large firms while others are solo practitioners. At least two work in government service, and one works as in-house counsel. Last year marked the first female majority on the Commission, according to Executive Director Baldwin, who said that the number of female commissioners has significantly grown over the past three years. The Commission is currently made up of nine voting female members and six voting male members, which is not representative of the overall Utah Bar membership consisting of approximately 80% male attorneys and only 20% female attorneys. The racial diversity of the Commission, according to Mr. Baldwin, is likely more representative of the overall Utah Bar membership, but it is difficult to determine because the Bar lacks the data to effectively track racial diversity among its members.

Executive Director Baldwin noted that there is more diversity on the Commission with regards to LGBT representation than he has noticed in the past, and he has observed an influx of young attorneys serving on the Commission. “So often the younger lawyers are more enthusiastic and have more ideas,” Mr. Baldwin explained. He believes the diverse characteristics and demographics of the commissioners add a valuable diversity of voice within the Commission, as each member brings something different to the table.

Statements from Voting Commissioners



President Rob Rice

I ran for the Bar Commission in 2011 because I like lawyers and the practice of law and wanted to take the time to be of service to both. I've enjoyed immensely my practice and my colleagues at Ray Quinney and Nebeker. I thought the least

I could do is become involved in our Bar Commission to be of service to our profession. On the lighter side, my first job was digging ditches. I worked on a large cranberry marsh as a teenager in Wisconsin. I dug ditches by hand around the perimeter of football-field-sized cranberry marshes, finishing one and moving onto another, until I had dug miles of ditches by summer's end. There's a metaphor in there somewhere about the practice of law, I'm sure. I am the Liaison for the Budget and Finance Committee and the Labor and Employment Section. You can reach me at rrice@rqn.com.



President-elect John Lund

I view serving on the Commission as a way to be an advocate for lawyers and for the legal profession. And we need some advocacy! People want to write us off as antiquated and unhelpful. Nothing could be further from the truth. My overall goal

in Bar service is to help both lawyers and the public see the real value in what lawyers do. For health, I cycle, run, and do "Yoga with Adriene." For fun, I travel, dine, fish, and dream of being the next American Idol. I am the Liaison for the Unauthorized Practice of Law Committee, the Modest Means Committee, and the Futures Commission Implementation Committee. The best way to contact me is via email at JLund@parsonsbehle.com.



First Division Commissioner Herm Olsen

I joined the Bar Commission in an effort to keep the notion alive that there is more to legal life in Utah outside Salt Lake County. I represent Cache, Box Elder, and Rich counties and have loved working

with genuinely decent, hard-working commissioners who are fully committed to improving the Bar, innovating necessary

programs, and keeping up with the rigors of practice. I can honestly say that the Bar is well-served by the Commission – which serves to protect the Bar from ill-advised initiatives from multiple quarters. I am the Liaison for the Fee Dispute Resolution Committee, the Elder Law Section, and the Solo, Small Firm and & Rural Section. Please contact me at herm@hao-law.com. I'm always happy to listen.



Second Division Commissioner John W. Bradley

I am the new commissioner for the Second Division. I joined the Commission at first because I simply enjoy serving and I like being "in the know." So far it has been a pleasurable surprise to learn just how

active and forward-thinking the Commission is. Most attorneys in my Division are solo practitioners, belong to small firms, or work for a governmental entity. My focus is bringing helpful innovation for these attorneys and to help them feel a

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connection to the Bar as a whole. I have practiced for about twenty-seven years in both private practice and for the Utah Attorney General's Office. In my other life, I am an outdoors enthusiast and a small business owner. The best way to reach me is by e-mail at Jbradley@utah.gov.



Third Division Commissioner
S. Grace Acosta

I ran for Utah State Bar Commissioner because I wanted to make difference in my community. I ran on a platform of inclusion. I believe that it is important that many points of view be considered when making decisions that affect a large group of people. I intend to work hard to be the voice of those "not at the table" whenever possible. I hope that my life experience gives me insight into different points of view. I am the Liaison for the Criminal Law Section and the Corporate Law Section. The best way to contact me is via e-mail at GAcosta@scalleyreading.net.



Third Division Commissioner H.
Dickson Burton

For me, joining the Commission was a great way to give back to the profession that has been so very good to me. Also, after spending much of my time with patent attorneys, serving on the Commission is a great opportunity to escape and interact with normal people. :-) In my spare time, I love to travel, near and far, with my wife and family. I am the Liaison for the Character and Fitness Committee, Bankruptcy Law Section, Intellectual Property Section, and International Law Section. You can reach me at hdburton@traskbritt.com.



Third Division Commissioner
Kate Conyers

I love having the opportunity to represent the Third Division on the Bar Commission. I ran as a Commissioner because it is important to me to be a voice for diversity, specifically public defenders, criminal defense lawyers, young lawyers, and women lawyers. I also believed and still believe that I can make a positive difference

on the Commission for all Bar members. I'm an avid Ute fan. I also love spending time with my twenty-plus nieces and nephews, traveling, and meeting new people while networking at legal events. I am the Liaison for the Juvenile Law Section and the Banking & Finance Committee. The best way to reach me is at kconyers@sllda.com.



Third Division Commissioner
Heather Farnsworth

Initially, I joined the Bar Commission as an ex officio representative for the Women Lawyers of Utah. Prior to my service on the Commission, I was completely unaware of the impact commissioners have. I thoroughly enjoyed the opportunity, and I became inspired to run for a voting position when my term ended. At that time women were under-represented among voting commissioners, as were small firms, and I hoped to provide a voice for both groups. During my term, the Commission has grown to be quite diverse and I have been excited to be a part of this change. In addition to serving as a commissioner and working as an attorney, I am a mother of two, an owner of many strange pets, and I run a small non-profit named "Cancer Bites," which raises funds for the Huntsman Cancer Foundation. I am the Liaison for the CyberLaw Section, Administrative Law Section, the Business Law Section, and the Securities Law Section. I can be reached at heather@matchfarnsworth.com.



Third Division Commissioner
Michelle Mumford

I joined the Commission because I saw a demographic that was missing, and thought I could add value to Bar activities while learning from seasoned attorneys and great mentors. I am working to increase the Bar's focus on innovative and quality practice, including part-time lawyering, while continuing to support underserved attorneys and client populations. I have seven awesome children and enjoy food and travel. And time to myself. When I went to Paris, I brought a dozen chocolate croissants home. They didn't make it off the plane. I am the Liaison for the Communications Law Section, Education Law Section, Estate Planning Law Section, Government Relations, and Senior Lawyers Section. The best way to contact me is via e-mail at michelle@utahappellatelaw.com.



Third Division Commissioner

Cara Tangaro

I joined the Commission to be a voice for solo practitioners and criminal practitioners. For example, I would love to see the Bar Conventions contain more talks/speakers for criminal practitioners. A couple fun facts about me: I had three children in two years (oops); I rowed in college (crew); I lived in Florence, Italy, for a year; and I went to the Barcelona Olympics with the Dream Team (as a nanny for John Stockton). The best way to contact me is via e-mail at cara@tangarolaw.com.



Third Division Commissioner

Heather Thuet

I have enjoyed being Chair of the Litigation Section but the section has term limits! So, I joined the Commission. Ok, all kidding aside, I embrace the opportunity to serve the entire Bar as a Commissioner and look forward to making positive changes. In my spare time, I am out adventuring with my daughter. She reminds me how to perceive the world through the eyes of child and embrace new challenges. This winter we learned to ski (or more aptly, she

waited while I tried to learn to ski) and this summer we're trying bikes. I also own a boutique real estate brokerage and enjoy helping my clients buy and sell real estate. I am an avid Pilates enthusiast and teach Pilates too. I can be reached by e-mail at heather.thuet@chrisjen.com.



Fourth Division Commissioner

Liisa Hancock

I love serving the legal community. I wanted to be on the Bar Commission to work on bringing increased bar services to outlying bar divisions, small firms, and solo practitioners. I am delighted that this is a goal actively shared by those I get to work with on the Bar Commission. The Leadership Academy, Bar Review, Small Firm visits, and other upcoming services that the Bar is implementing are furthering these efforts. I am the Liaison for the Ethics Advisory Opinion Committee and Family Law Section. I feel privileged to be a part of the board for the Leadership Academy, which is just finishing its first class. When I am not being a lawyer, I enjoy traveling, learning languages, adventuring, and experiencing new cultures. I recently resurrected a part of my college life and am training as a competitive ballroom dancer. You can contact me best at lahancock@jeffslawoffice.com.

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Fifth Division Commissioner Kristin “Katie” Woods

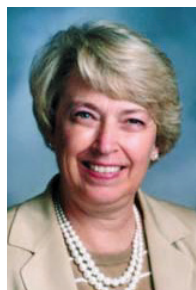
My goal as a Bar Commissioner is to represent the interests of attorneys who live and practice outside of the Wasatch Front. Our needs as rural practitioners are different than those who primarily practice in the Salt Lake City area, and I constantly strive in Bar Commission meetings to make sure our needs are not overlooked. My main goal is to make it easier for rural practitioners to access CLE programming by utilizing the technology that we have at our fingertips. I own and operate the Law Office of Kristin K. Woods, PLLC in St. George. A native of the St. George area, I enjoy being outdoors at the lake, in my Jeep, and with my dog, Boomer. I am a high school basketball coach and spend my entire winters indoors: at the office and at the basketball gym. I urge the attorneys in my Division to e-mail me at katie@woodslawyer.com if they have any questions, comments, or concerns that I can address with the Bar Commission.



Public Member Steven R. Burt, AIA

I joined the Commission a decade ago, filling the unexpired term of another non-attorney. I immediately found myself on the minority end of a 13–1 commission vote on a proposed rule change that I

opposed. Since then I’ve tried to represent the views of individuals and businesses affected by changes in the practice of your profession, often sharing perspectives I’ve gained through more than thirty years of practicing my own. Sometimes I’m still an outlier in voting. Meanwhile, beyond the Commission, I’m trying desperately to succeed as a writer of murder mysteries, keep my design-build business afloat, and make time for family. Go Utes! I am the Liaison for the Disaster Legal Response Committee and Construction Law Section. I can be reached at sburt@entelen.com.



Public Member Mary Kay Griffin, CPA

I am a Certified Public Accountant and serve as one of the Public Members of the Utah State Bar Commission. The Public Members are appointed by the Utah Supreme Court. I also serve as a member of the Bar’s Budget and Finance Committee in overseeing the financial stability of the Bar. I have enjoyed the opportunity to serve the legal profession and important work of the Utah State Bar. In my spare time I enjoy spending time with family, antigravity yoga and cheering for University of Utah sports teams. I am the Liaison for the Budget & Finance Committee, Non-Profit/Charitable Law Section, and Tax Law Section.

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Happy New (Legislative) Year!

by Senator Todd Weiler, Steve Foxley, Frank Pignanelli, and Douglas Foxley

January is thought to be named after Janus, the Roman god of beginnings and transitions. So now is as good of a time as any to “begin” to “transition” into another general session of the Utah Legislature.

Utah has one of the shortest legislative schedules in the country. This year, the forty-five-day session runs from January 23 through March 9. But much of the leg work for this session began nine months ago.

What to Expect in 2017

Since last May, legislators have been meeting monthly in interim committees to vet issues and draft legislation for this year. Many of those bills will be debated on the floor during the first week of the session.

Juvenile Justice will be a hot topic in February. All three branches of state government jointly established a Juvenile Justice Working Group in 2016. The working group met almost weekly during the summer and fall, and it has submitted a lengthy list of finding and policy recommendations. Watch for Representative Lowry Snow to sponsor major legislation designed to make it much more difficult for a court to place a juvenile in detention.

The facts show that taking a child out of the home costs more and often results in increased recidivism. In addition, there will be a push to add a juvenile court component to the indigent defense commission created last year.

The Estate Planning Section of the Bar has worked with members of the Judiciary Committee on a number of uniform

laws. As a result, you can expect new legislation regarding access to fiduciary assets, transfers of real property at death, and powers of appointment.

Last year, Representative Mike Schultz’s proposal to eliminate non-compete agreements caught most of the business

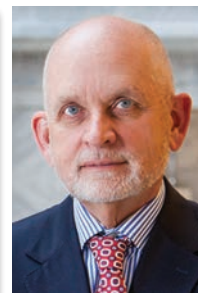
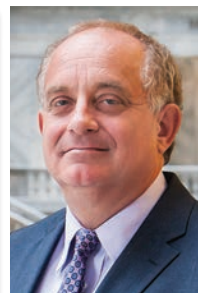
community off guard. Significant compromises were made once the bill reached the state Senate. The bill that eventually passed limits non-competes to a single year and provides for an award of attorney fees against overreaching employers. The legislature is funding a study that is collecting data on the new law. Speaker Greg Hughes has indicated that he wants another bite at the apple. Watch for House leadership to push to further scale back non-competes. Employment attorneys are expected to be on both sides of the issue.

“As a new service from the Bar, members will receive informational updates during the session regarding items of interest... These updates will also help put readers in contact with the legislators sponsoring or hearing the bills.”

TODD WEILER is a licensed Utah attorney and a member of the Utah Senate, representing District 23.



STEVE FOXLEY, FRANK PIGNANELLI, and DOUG FOXLEY are licensed attorneys and lobbyists for the Utah State Bar.



The threatened repeal of the Affordable Care Act (ACA) will likely bring new discussion regarding the state's future role in health care and Medicaid. Prior to Donald Trump's victory, the Health Reform Task Force took steps to close down Avenue H – the state's small business health insurance exchange. Look for a variety of measures to push back on the ACA and federal overreach.

How To Stay Involved

As a new service from the Bar, members will receive informational updates during the session regarding items of interest. The Bar will continue to adhere to Rule 14-106 of the Judicial Council Rules of Judicial Administration, which limits its authority to engage in legislative activities. These updates will also help put readers in contact with the legislators sponsoring or hearing the bills. The Bar wants to assist you in tracking the legislation important to your practice area.

The Bar's Government Relations committee meets on a weekly basis during the legislative session. The weekly process for reviewing legislation will remain the same. However, section representatives will receive advance notice whenever possible to solicit input on repeat issues.

The Bar will be hosting an annual breakfast for attorney-legislators. This group has consistently provided valuable feedback, guidance, and assistance to the Bar. Rather than hosting a lawyer day on the hill in 2017, the Bar will provide post-session CLE opportunities with legislative wrap-ups. These changes in format should provide greater opportunities for bar members to obtain information about key issues.

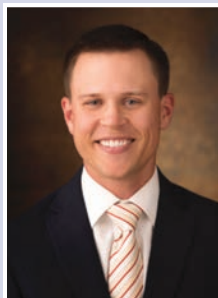
The Bar has been encouraging lawmakers to work with Bar sections to ensure their proposals have the benefit of practical expertise.

New Associates Continued Commitment to Excellence

Smith Hartvigsen is pleased to welcome our newest attorneys,
Zac D. Sparrow and Devin L. Bybee



Zac joins Smith Hartvigsen as an associate attorney. Zac graduated cum laude from the J. Reuben Clark Law School at Brigham Young University, and graduated cum laude from Utah State University with a degree in Finance and Economics. Zac practices primarily in the areas of real estate, water, and construction litigation.



Devin joins Smith Hartvigsen as an associate attorney. Devin graduated magna cum laude from the J. Reuben Clark Law School at Brigham Young University, and graduated summa cum laude from Utah Valley University with a degree in Business Management. Devin practices primarily in the areas of commercial litigation, natural resources litigation, appellate law, and local government law.



The Walker Center | 175 South Main Street, Suite 300 | Salt Lake City, UT 84111
Tel. 801.413.1600 | www.SmithHartvigsen.law

Enrich Your Life in 2017: Easy Pro Bono

by Keith A. Call

“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year.” Utah R. Prof'l Conduct 6.1.

In May 1997, I met Charlotte Martinez at a *pro bono* landlord-tenant clinic. Charlotte's landlord had just issued a three-day notice to vacate her apartment for failure to pay rent. Charlotte went to the Matheson Courthouse for a possession bond hearing. She was scared, lost, and baffled. She was particularly distressed because she believed she had a valid defense: she had timely tendered the full amount of rent due, but the landlord has refused to accept it.

My fellow associate, Adam Price, and I agreed to represent Charlotte at the bond hearing. The judge was sympathetic to our story but, somewhat tied by then-existing landlord-tenant law, required Charlotte to post a \$1,000 bond to avoid eviction. Unable to post the bond, Charlotte lost her apartment even though she did nothing wrong.

That did not sit well with Adam and me so we agreed to continue representing Charlotte. We continued to guide her through the process, filed a counterclaim for abuse of process, and proceeded to get an expedited trial setting. Adam discovered that the landlord, a business entity, was not properly registered to do business in Utah. At the trial, Adam successfully argued that the complaint should be dismissed on that basis, and the court agreed. We then proceeded to a short trial on Charlotte's counterclaim, in which we won a modest award of \$700 for Charlotte, plus attorney fees.

That experience, nearly twenty years ago, truly remains “one of the most rewarding experiences in [my] life [as] a lawyer.” Utah R. Prof'l Conduct 6.1, cmt. [1]. It is equaled only by other similar experiences helping disadvantaged people who were in high distress because of a legal issue.

Limited scope representation at *pro bono* legal clinics is an easy and a rewarding way for lawyers to fulfill their *pro bono* obligations. In most such cases, the lawyer's representation will typically last for a few minutes or, at most, a few hours. In these few minutes, the lawyer can often help another human being through what may be

one of the most difficult and stressful moments of his or her lifetime.

Relaxed Conflict Rules

The Utah Supreme Court has also made participation in such clinics easier by relaxing the conflict of interest rules. Rule 6.5 provides:

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

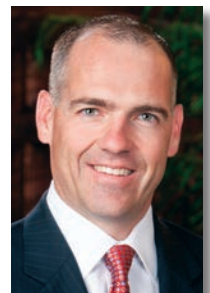
(a)(1) is subject to Rule 1.7 [conflicts of interest-current clients] and 1.9(a) [duties to former clients] *only if the lawyer knows that the representation of the client involves a conflict of interest*; and

(a)(2) is subject to Rule 1.10 [imputation of conflicts] *only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified* by Rule 1.7 or 1.9(a) with respect to the matter.

Utah R. Prof'l Conduct 6.5(a) (emphasis added).

In other words, when you participate in qualified *pro bono* legal clinics, you don't have to worry about conducting a regular check for conflicts of interest. You only have to apply what you know at the time of the limited representation. You simply need to identify the client and the adverse party, and then search your mind for actual knowledge of a conflict, including any conflict

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.



you know exists in your firm. If you don't know of any conflict at that moment, you are permitted to proceed with the limited scope representation. Be careful, of course, to fully inform the client of the limited scope and nature of your representation.

Dozens of *Pro Bono* Clinics Exist

These limited scope *pro bono* clinics are about the easiest way I know to provide meaningful *pro bono* service. For those who live or practice in Utah's most populous areas, such legal clinics abound. They include the following:

Matheson Courthouse Debt Collection Calendar

Wednesdays, 1 p.m. To sign up, please contact Charles Stormont at cstormont@fabianvancott.com.

Matheson Courthouse Landlord-tenant Calendar:

Wednesdays, 1:30 p.m. This clinic will soon be operating in conjunction with the debt collection calendar; contact Tyler.Needham@utahbar.org for more information.

West Jordan Landlord-tenant and Debt Collection Calendars:

Tuesdays, 8:30 a.m. To sign up, please visit <https://goo.gl/forms/QlIDRkKqn8rIAIpE2> or contact Tyler.Needham@utahbar.org.

Bountiful Courthouse Debt Collection Calendar:

Thursdays, 8:00 a.m. This clinic will be operating soon; contact Tyler.Needham@utahbar.org for more information.

Family Law Clinic at Matheson Courthouse:

Schedule varies. Contact Virginia Sudbury at virginia@lovs.biz for more information.

Family Law Clinic at West Jordan Courthouse:

Second and Third Wednesdays at 1:30 p.m. Contact Virginia Sudbury at virginia@lovs.biz for more information.

In researching this article, I learned that there are literally dozens of free legal clinics throughout the state that serve Utah's citizens on a wide variety of issues. Make 2017 the best year of your professional life by donating even a small amount of time to one of these great causes. For a list of additional opportunities, go to <https://www.utcourts.gov/howto/legalclinics/>.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.

PRINCE•YEATES

Prince Yeates is pleased to announce the addition of six attorneys to the firm.



T. Richard Davis | Lynda Cook | Jeanene F. Patterson
Paul H. Shaphren | John B. Lindsay | R. Jesse Davis

Appellate Highlights

by Rodney R. Parker, Dani N. Cepernich, Nathanael J. Mitchell, Adam M. Pace, and Scott Elder

Editor's Note: The following appellate cases of interest were recently decided by the Utah Supreme Court, Utah Court of Appeals, and United States Tenth Circuit Court of Appeals.

Sierra Club v. Dep't of Environ. Quality

2016 UT 49 (Oct. 26, 2016)

The Executive Director of the Utah Department of Environmental Quality dismissed a request for agency action. Rather than addressing alleged deficiencies in the Executive Director's final order in their opening brief, the petitioners instead challenged underlying steps in the agency process. The court struck the portions of the petitioners' reply brief in which they, for the first time, addressed the Executive Director's final order. **The petitioners' failure to challenge the appropriate decision in their principal brief led the court to dismiss the appeal on the basis that the petitioners had not met their burden of persuasion.**

Bagley v. Bagley

2016 UT 48 (Oct. 26, 2016)

An individual, acting as personal representative and sole heir of her deceased husband, brought an action against herself for negligently causing her husband's death. The Utah Supreme Court held that **the wrongful death and survival action statutes unambiguously allow a person acting in the legal capacity of an heir or personal representative to sue him or herself in an individual capacity for negligently causing a decedent's death or injury.**

Mackin v. State

2016 UT 47 (Oct. 21, 2016)

After taking his ex-girlfriend's purse, the defendant fled the scene. His ex-girlfriend dove into his vehicle's passenger window and climbed in while the defendant continued to drive. The defendant was subsequently convicted of aggravated

robbery based upon the use of the car as a deadly weapon. On appeal, the Utah Supreme Court held that **a defendant may be convicted of aggravated robbery for using an object in a manner capable of causing serious bodily injury or death**, even if the object is not ordinarily considered a weapon.

Brierley v. Layton

2016 UT 47 (Oct. 21, 2016)

The district court granted a motion to suppress evidence obtained while a warrant application remained pending. The Utah Court of Appeals reversed based upon the inevitable discovery doctrine and a four-factor test articulated by the Tenth Circuit. Reversing the Utah Court of Appeals, the Utah Supreme Court held that **the city failed to carry its burden of showing, by a preponderance of the evidence, that evidence would have been inevitably discovered in the absence of a warrant.** In doing so, the supreme court declined to apply the Tenth Circuit's four-factor test.

Little Cottonwood Tanner Ditch Co. v. Sandy City

2016 UT 45 (Oct. 20, 2016)

This appeal involved a post-judgment motion to modify the 1910 Morse Decree, the final decree that adjudicated the right to use the waters of Little Cottonwood Creek. The district court denied the post-judgment motion to modify, holding it did not have authority to reopen the hundred-year-old case to modify the final judgment. The Utah Supreme Court affirmed, holding that **the district court did not have common law authority to modify the Morse Decree through a post-judgment motion and the Morse Decree itself did not authorize the motion.**

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

Washington Townhomes, LLC v. Washington County Water Conservancy District

2016 UT 43 (Oct. 3, 2016)

The Utah Supreme Court reaffirmed that to qualify for certification under Rule 54(b), a decision must constitute a “judgment as to one or more but fewer than all of the claims or parties” at issue in the case. *Id.* ¶ 4. **Because the district court’s order granting partial summary judgment in favor of the defendant did not finally dispose of any claim and did not finally adjudicate the interests of a party, the court held that Rule 54(b) certification was improper.** It accordingly dismissed the appeal for lack of jurisdiction.

Holmes v. Cannon

2016 UT 42 (Sept. 8, 2016)

The court overruled *Panos v. Smith’s Food & Drug Centers, Inc.*, 913 P.2d 363 (Utah Ct. App. 1996), and held that a **dismissal for failure to prosecute under Utah R. Civ. P. 41(b) is with prejudice unless the judge specifies otherwise in the order.**

Bresee v. Barton

2016 UT App 220 (Nov. 11, 2016)

In a dispute over water and boundaries, the Utah Court of Appeals upheld an award of attorney fees as a sanction for bad faith in instigating the litigation without an honest belief in its merits. The court held that **a prevailing party, under the bad faith litigation statute, is able to recover its fees incurred at the appellate level to defend its award of fees in the district court, as well as fees incurred in defense of the original claim.**

Carson v. Barnes

2016 UT App 214 (Oct. 27, 2016)

Appealing the grant of a civil stalking injunction, the defendant argued that the district court erred in considering an incident involving the defendant brandishing a gun against a non-party with connections to the plaintiff. Affirming, the Utah Court of Appeals held that **the statutory grounds for issuing a civil stalking injunction may include a threat against a business associate, even if the victim was not physically present at the time of the incident.**

Mota v. Mota

2016 UT App 201, 382 P. 3d 1080 (Sept. 22, 2016)

In this appeal from the denial of an ex-husband’s motion to dismiss a protective order that his ex-wife had obtained against him, the Utah Court of Appeals considered whether the ex-husband had properly preserved his arguments for appeal. The ex-husband had failed to object to the commissioner’s recommendation that the protective order remain in place. The court agreed with the ex-husband that **the procedure for filing an objection to a commissioner’s order outlined in Utah R. Civ. P. 108 is optional. The husband accordingly was not required to file an objection in order to preserve his right to appeal.** But, the failure to file an objection limited the ex-husband’s ability to challenge the factual basis of the commissioner’s decision on appeal.

Kirton McConkie v. ASC Utah

2016 UT App 200 (Sept. 22, 2016)

This suit involved a dispute over an assignment of the right to receive rental payments. Wolf Mountain, as payment for attorney fees, had assigned its rights to receive rent from a property in

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Summit County to Kirton McConkie. The property was being leased by ASC Utah. In a separate suit, ASC Utah obtained a \$60 million judgment against Wolf Mountain, which ASC Utah then used to set off its rent payments under the lease. The Utah Court of Appeals held that **even though Kirton McConkie's interest was assigned prior to the setoff, the assignment did not sever the right to receive rent from the other obligations under the lease, so Kirton McConkie's assignment was subject to ASC Utah's right to set off the rent.**

Olsen v. State

2016 UT App 194, 382 P.3d 679 (Sept. 15, 2016)

The court concluded that **the claims procedure provided in the Unclaimed Property Act, Utah Code §§ 67-4a-101 *et seq.*, is the exclusive method for a judgment creditor to obtain a judgment debtor's unclaimed property that is held by the State.**

Diné Citizens v. Jewell

839 F.3d 1276 (10th Cir. Oct. 27, 2016)

Prior to this case, a party could receive a preliminary injunction by showing that the case presents a serious and important question, if a strong showing is made that the other elements of the preliminary injunction test are met. In response to a supreme court decision, **the court held that a showing of likelihood of success is always required and the relaxed "serious question" test is no longer permissible.**

Vehicle Market Research v. Mitchell International — F.3d —, 2016 WL 6211806 (10th Cir. Oct. 25, 2016)

The Tenth Circuit held that **the testimony of a Rule 30(b)(6) witness is merely an evidentiary admission, rather than a judicial admission.** The plaintiff challenged the district court's refusal to instruct the jury that it was required to reject the trial testimony of the defendant's former CEO because that testimony was inconsistent with his deposition testimony under Rule 30(b)(6). The court rejected this argument, as the proposed jury instruction was not an accurate statement with respect to the "binding" nature of 30(b)(6) deposition testimony.

Fish v. Kobach

840 F.3d 710 (10th Cir. Oct. 19, 2016)

A group of unsuccessful voter registration applicants brought suit against the state of Kansas, alleging that the state's law

requiring documentary proof of citizenship was preempted by the National Voter Registration Act (NVRA). The Tenth Circuit agreed, holding that **the NVRA's attestation requirement established the presumptive minimum amount of information that a state needed to carry out its eligibility-assessment and registration duties.** To rebut this presumption and require documentary proof of citizenship, the state must make a factual showing that the attestation requirement is insufficient for these purposes. Kansas failed to make this showing, and thus, the NVRA preempted the state law.

Onyx Properties v. Elbert Board of County Commissioners 838 F.3d 1039 (10th Cir. Oct. 3, 2016)

In a suit by landowners against a board of county commissioners, the landowners alleged that their due process rights had been violated, as they had been required to rezone their property prior to the adoption of the regulation. The Tenth Circuit held that **a board of commissioners is not required to hold public hearings prior to adopting zoning regulations** so there was no procedural due process violation and the behavior of the board was not sufficient to shock the conscience and thus there was no substantive due process violation.

William v. Akers

837 F.3d 1075 (10th Cir. Sept. 20, 2016)

The Tenth Circuit dismissed this appeal for lack of jurisdiction. The defendants' motion for reconsideration of the denial of their motion to dismiss, which was filed eight months after that decision, did not toll the time for appeal of that decision. **By identifying the denial of the motion to dismiss as the order being appealed, the defendants did not sufficiently express an intent to appeal the denial of the motion for reconsideration.** The appeal was therefore untimely, and the court lacked jurisdiction.

Golicov v. Lynch

837 F.3d 1065 (10th Cir. Sept. 19, 2016)

A lawful permanent resident appealed an order of removal based upon his conviction for failure to stop at the command of a police officer. Extending the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Tenth Circuit vacated the order of removal and held that the **Immigration and Nationality Act's residual definition of "crime of violence" was unconstitutionally vague.**

Helping Utah's Lower Income Seniors

by Eric Olsen

Several weeks ago I was talking with an elderly widow. Her income was around \$1,100 in social security. She was paying \$300 to collectors each month for old debts. After rent and utilities, nothing was left. She quietly explained that she had been eating nothing but peanuts for the last two weeks. After I explained why she didn't need to continue paying that debt, she then asked, "You mean I can buy groceries this afternoon?" When I said yes, she began to weep.

The Kaiser Foundation recently reported that approximately 130,000, or 42%, of Utah seniors – people over age 65 – have incomes within 200% of the poverty line. But even more concerning, one in seven Utah seniors have incomes under the poverty line.

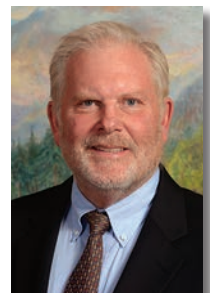
Many studies show that debt owed by seniors has risen dramatically in the last fifteen years. The federal Consumer Financial Protection Bureau recently released a report declaring abusive debt collection as the top complaint for older Americans. Most legal help today is disproportionately oriented towards seniors who do not fit in this lower income group. It is geared towards seniors with money. Lower income seniors, with little or no money to pay for advice or help, often have difficulty finding answers to their financial questions.

As the Executive Director of HELPS, a nationwide 501(c)(3) nonprofit law firm, I have learned that the vast majority of seniors do not understand one very important fact: **Social security, pensions, retirement, VA benefits, and disability income are protected from collection under federal law.** These income sources cannot be garnished for old debt, including state tax debt. Because of this law, seniors are often only minimally told they don't need bankruptcy. Yet what they are often not told is that they also have the right to be protected from collectors. Because they have not been informed of all their rights, seniors have found that when they don't pay old debts, collectors will call and make their lives miserable. Many then forego basics like food and medicine to pay old debt they don't have to pay.

After nearly forty years of practice, I have learned that other attorneys also want to help seniors, a population that can be most helpless in our society. What can we as attorneys do to help? The federal Fair Debt Collection Practices Act (the Act) provides that when a debtor sends what is called a "cease and desist letter" (in writing), a collector must stop all communication by mail or phone to the debtor. The law can be explained, and a template provided, to a senior. A template can be found on the internet or at the HELPS website www.helpsishere.org.

However, even when this law is explained to seniors, and a template provided, they may be unable to prepare or send the letter. Sometimes these legal matters are confusing and intimidating to seniors. Most have a very difficult time dealing with collectors on their own. Here is another way we can help: The Act provides that if a person is represented by an attorney, a collector may no longer communicate with that person, only with the attorney. HELPS nonprofit law firm represents seniors and persons with disabilities by receiving collector communication on an ongoing basis on their behalf. We never turn any senior away that needs our help. However, we are not large enough to assist all the seniors that need this kind of help. We encourage all attorneys to provide seniors who are in need with a "cease and desist letter." Perhaps, like HELPS, the attorney too can send the letter for the senior and offer to represent the senior, by receiving these communications from collectors on an ongoing basis. This is a simple service that will bring peace back to the lives of the poor and lower income seniors.

ERIC OLSEN is the executive director of HELPS, a nonprofit law firm.



There is other helpful information to know when counseling lower income seniors. Here are just some of those ways attorneys can help inform this population:

- Even when seniors learn their income is safe, they worry about the money in their bank accounts. Federal banking regulations automatically protect all money in an account into which social security is deposited. This protection is equal to twice the amount of monthly social security, no matter the source of the money in that account at the time of a garnishment. The bank must disregard the garnishment. If there is excess money, a claim of exemption can be filed to have that money returned.
- The internet has spawned an entire generation of for-profit companies that advertise helping people either to settle or to pay old debt. I have yet to talk with a senior enrolled with a debt consolidation company who were ever told “by the way you don’t need to pay us anything, all your income is protected by law.” I regularly talk with seniors with social security income of around \$1,200 per month who are paying \$300 or more to a debt consolidation company. Seniors do not need to go into utter poverty to make a payment to a debt consolidation company for old debt they can’t afford and do not need to pay.
- Some seniors have 15% of their social security garnished for past due IRS taxes. Lower income seniors can almost always be placed on uncollectable status, something we at HELPS assist seniors to do every day. Attorneys can help or tell seniors to contact the IRS to inquire about the process for obtaining uncollectable status.
- Although it is still relatively rare, some seniors are being garnished 15% of their social security for past student loans. Lower income seniors can almost always qualify under the income contingent repayment plan and pay nothing or just \$5 per month for a public student loan.
- HELPS will email any attorney instruction sheets on uncollectable and income contingent repayment procedures. State taxing agencies, including the Utah State Tax Commission, cannot garnish federally protected social security or other retirement income. State revenue agencies rarely advise seniors that their income is protected by federal law. If that

money is garnished from a bank account, the senior can file a claim of exemption to have the money returned.

- Attorneys in private practice willing to answer questions for a few minutes on the phone can be a godsend to the poor elderly. There is nothing wrong with attorneys providing common sense advice. Here is some of that simple common sense advice:
- Some seniors drain protected retirement to continue paying old debt that will never be repaid. They can stop payments for purchases they simply can’t afford. Seniors can be advised about the option of stopping a house payment they can’t afford, selling the home, or living in the home while it is going through foreclosure. Many seniors don’t know about the availability of Section 8 subsidized housing. Or, if there is enough equity in the home, a reverse mortgage can pay off an existing mortgage, allowing the senior to stay in a home they otherwise could no longer afford.
- Some seniors are worried about difficulty renting because of poor credit. An attorney can write a “to whom it may concern” letter simply explaining to any “prospective landlord” that the senior’s income is protected, can’t be garnished, and is all available to pay rent and provide for their needs. We at HELPS have found this often solves concerns for most landlords worried about a senior’s possible poor credit.

In conclusion, most seniors want to pay their debt. But some are simply not able. There is a reason laws protect this income. We want seniors to be able to provide for their needs. According to estimates by the United Health Foundation, more than one out of seven seniors over age sixty-five in Utah in 2015 faced the threat of hunger. This is not a small problem. Utah attorneys can help seniors understand their rights, especially that their income is protected. If attorneys are unable to help, HELPS nonprofit law firm is always available to help seniors and persons with disabilities to stop unwanted collector contact and to help advise in many of the ways mentioned above. HELPS always welcome calls from attorneys with questions or in need of forms. (855-435-7787) Together, with the help of Utah attorneys, fewer seniors will face hunger, they will be able to pay for the medicines they need, and they can have peace return to their lives.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the October 21, 2016 Commission Meeting held at the Utah Valley Convention Center in Provo, Utah.

1. The Bar Commission voted to purchase a table for the Utah Minority Bar Association (UMBA) awards banquet on November 17, 2016.
2. The Bar Commission voted to give **Patrick Anderson** the Professionalism Award.
3. The Bar Commission voted to give **JoLynn Spruance** the Community Member of the Year Award.
4. The Bar Commission voted to give **Andrea Martinez Griffin** and **Blake Hills** the Outstanding Mentor Award.
5. The Bar Commission voted to give **Greg Skordas** the Outstanding Pro Bono Service Award.
6. The Bar Commission voted to accept the audit report for the 2015–2016 fiscal year.
7. The Bar Commission voted to approve spending up to \$3,000 through the end of year for a Practice Management Advisor to consult regarding all of the practice management projects currently before the Commission.
8. The Bar Commission approved by consent agenda the Minutes of the September 16, 2016 Commission Meeting.
9. The Bar Commission approved by consent agenda combining the Cyber Law and Communications Law Sections.
10. A list of suggestions for appropriate uses of Section funds was distributed to the Commission liaisons to Bar Sections. These suggestions have been presented to the leadership of each Section in various settings, and will be again, to help

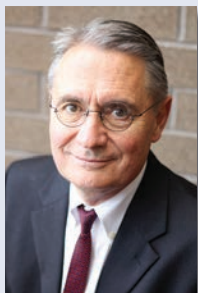
them engage in valuable and appropriate activities and to utilize their funds in valuable ways for their members. The suggested uses are:

- Subsidize Outstanding and Specialized Outside Speakers for CLE's and Bar Conventions
- Subsidize CLE Registration Fees for Members
- Subsidized CLE Lunches for Members
- Provide Scholarships for Members or Officers to attend Bar Conventions
- Contribute Tuition Funds to Law Students
- Organize and Subsidize Section Socials
- Make Contributions to Worthy Related Charitable Groups
- Reduce next year's dues for those who were members last year
- Develop Section resources, like creating form libraries, mentoring videos, creating newsletters
- Help Sponsor YLD Programs, like Serve our Seniors and Wills for Heroes
- Provide free memberships or 'scholarships' for new admittees/non-profit attorneys
- Promote the section to the public, publicizing topics like, "What a (Section) law attorney can do for you."

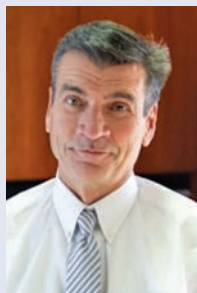
The minute text of this and other meetings of the Bar Commission are available at the office of the Executive Director.

2016 Fall Forum Award Recipients

Congratulations to the following who were honored with awards on November 18 at the 2016 Fall Forum in Salt Lake City:



Patrick Anderson
Professionalism Award



Gregory G Skordas
Outstanding Pro Bono Service



JoLynn Spruance
Community Member



Blake Hills
Outstanding Mentor



Andrea Martinez Griffin
Outstanding Mentor



Ken McCabe
Pro Bono Attorney of the Year

Utah Bar Mentoring Awards – Call for Nominations

The Utah Bar is seeking nominations for its annual Breakfast of Champions mentoring awards. All members of the Bar are eligible – this is not a New Lawyers Training Program award. The annual Breakfast of Champions will be held on February 23 to recognize nominees as well as honor the three award recipients.

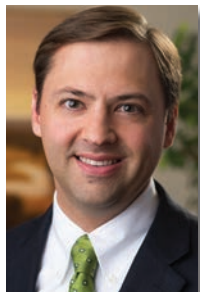
The mentoring awards have been named after three exceptional mentors in our community:

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

Recognized nominations will be included in a published booklet in appreciation of our great mentors. Nominations should be substantive, and include details including how the attorney mentor exceeded expectations in the mentoring relationship. Send nominations, in 400 words or less, to Christy Abad, christy.abad@utahbar.org, by January 31. One submission/nomination per attorney.

We would like to sincerely thank Xact Data Discovery for their sponsorship of the commemorative booklets, and the Stewart Hansen Society for their sponsorship of this event.

2016 Utah Bar Journal Cover of the Year

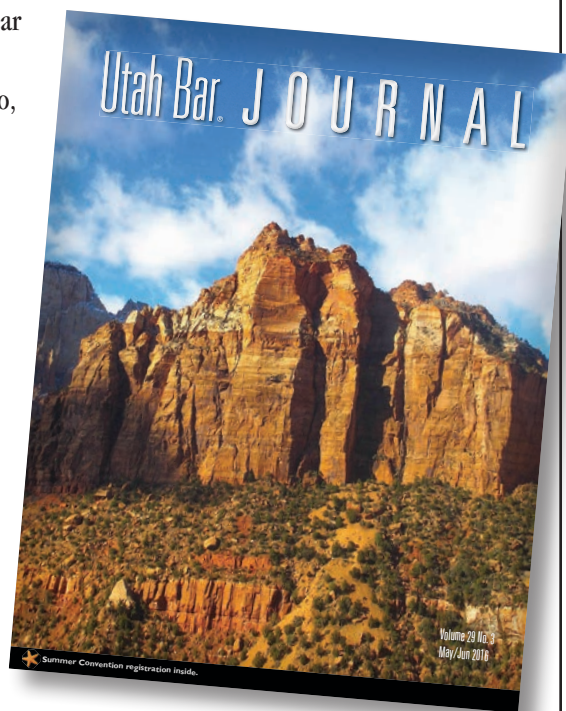


James C. Bergstedt

The winner of the *Utah Bar Journal* Cover of the Year award for 2016 is *Blue Sky Over Red Rock* by Utah State Bar member James C. Bergstedt. James's photo, taken while on a hike in Zion National Park, appeared on the cover of the May/June 2016 issue.

Congratulations to James, and thank you to the more than 100 contributors who have provided photographs for the *Bar Journal* covers over the past twenty-eight 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 5 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.)



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LAUREN JOHNSON



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Utah State Bar
Lawyers working for justice.

Notice of Bar Commission Election

First and Third Divisions

Nominations to the office of Bar Commissioner are hereby solicited for one member from the First Division and three members from the Third Division, each to serve a three-year term. Terms will begin in July 2017. 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 1, 2017, by 5:00 p.m.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 3rd with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 17th.

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.

2017 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2017 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 13, 2017. 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/>.

MCLE Reminder – Odd Year Reporting Cycle

July 1, 2015–June 30, 2017

Active Status Lawyers complying in 2017 are required to complete a minimum of 24 hours of Utah approved CLE, which shall include a minimum of three hours of accredited ethics. **One of the ethics hours shall be in the area of professionalism and civility.** A minimum of twelve hours must be live in-person CLE. Please remember that your MCLE hours must be completed by June 30 and your report must be filed by July 31. For more information and to obtain a Certificate of Compliance, please visit our website at www.utahbar.org/mcle.

If you have any questions, please contact Sydnie Kuhre, MCLE Director at sydnie.kuhre@utahbar.org or 801-297-7035, Laura Eldredge, MCLE Assistant at laura.eldredge@utahbar.org or (801) 297-7034, or Lindsay Keys, MCLE Assistant at lindsay.keys@utahbar.org or (801) 597-7231.

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Utah Minority Bar Association
Jimi Mitsunaga Excellence
in Criminal Law Award

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Lifetime Achievement Award

PATRICK ANDERSON



Utah State Bar
Professionalism Award

KATE CONYERS



American Inns of Court
Sandra Day O'Connor Award
for Professional Service

ANDREA
MARTINEZ GRIFFIN



Utah State Bar
Outstanding Mentor Award



Salt Lake Legal Defender Association
424 East 500 South Suite 300
Salt Lake City, UT 84111
801-532-5444

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 – Public Education. Standing – Public Utilities & Technology; Government Operations. Other House Committees – Ethics (Co-Chair); Legislative Informational Technology Steering Committee, International Relations & Trade Commission; Legislative Process; Capitol Preservation Board.

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.



E. 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; Economic Development & Workforce Services. Other House Committees – Retirement & Independent Entities.

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. Other House Committees – Administrative Rules (Chair); Occupational and Professional Licensure Review..

Practice Areas: Administrative Law, Government Affairs & Public Policy, and Real Estate & Business 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; Political Subdivisions (Vice Chair).

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 – Business & Labor; Natural Resources, Agriculture & Environment. Other House Committees: Retirement & Independent Entities (Vice Chair).



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

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

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

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 – Social Services.
Standing – Health & Human Services (Vice Chair); Transportation.

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 – Public Education (Chair).
Standing – Education; Government Operations.
Other House Committees – Retirement & Independent Entities.

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



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

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

Committee Assignments: Appropriations – Infrastructure & General Government.
Standing – Business & Labor; Judiciary (Chair).

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



Kelly Miles (R) – District 11 (Elected to House: 2016)

Education: B.S., Weber State University; J.D., University of Utah S.J. Quinney College of Law; MBA, University of Utah Eccles School of Business

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

Practice Areas: Estate Planning, Elder Law, Probate and Estate Settlement.

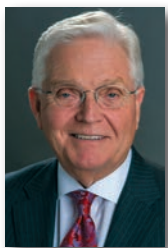


Merrill Nelson (R) – District 68 (Elected to House: 2012)

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

Committee Assignments: Appropriations – Executive Offices & Criminal Justice.
Standing – Public Utilities & Technology (Vice Chair); Government Operations.

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



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: Appropriations – Executive Offices & Criminal Justice.
Standing – Education; Judiciary (Vice Chair).

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



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

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

Committee Assignments: Appropriations – Natural Resources, Agriculture & Environmental Quality.
Standing – Public Utilities & Technology; Natural Resources, Agriculture & Environment (Chair).

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

The Utah State Senate

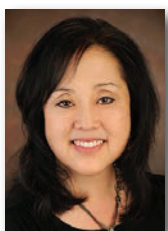


Lyle W. Hillyard (R) – District 25 (Elected to House: 1980; Elected to Senate: 1984)

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

Committee Assignments: Appropriations – Public Education (Chair); Infrastructure & General Government.
Standing – Education; Judiciary, Law Enforcement & Criminal Justice; Judiciary Confirmation.

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



Jani Iwamoto (D) – District 4 (Elected to Senate: 2014)

Education: B.S., University of Utah, Journalism and Mass Communication, Magna Cum Laude; J.D., University of California Davis School of Law

Committee Assignments: Appropriations – Public Education, Executive Offices & Criminal Justice.
Standing – Education; Government Operations & Political Subdivisions; Natural Resources, Agriculture & Environment; Senate Rules; Ethics.



Todd Weiler (R) – District 23 (Elected to Senate: 2012; Re-Elected: 2016)

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

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

Practice Areas: Civil Litigation and Business Law.

Pro Bono Honor Roll

American Indian Legal Clinic

Sue Crismon
Elliot Scruggs
Jason Steiert
Jonathan Thorne

Bankruptcy Case

Eric Johnson

Community Legal Clinic: Ogden

Jonny Benson
Joshua Irvine
Jacob Kent
Chad McKay
Francisco Roman

Community Legal Clinic: Salt Lake

Mike Barnhill
Jonny Benson
Dan Black
Leonor Perretta
Bryan Pitt
Brian Rothschild
Paul Simmons
Catherine Sundwall
Brian Tanner
Janet Thorpe
Ian Wang
Russell Yaune

Community Legal Clinic: Sugarhouse

John Adams
Skyler Anderson
Brent Chipman
Kelly Echols
Travis Hyer
Carlos Navarro
Brian Rothschild
Alyssa Williams

Debt Collection Pro Se Calendar

David P. Billings
Mark Burns
Mark Emmett
David Hodgson
Lynn Kingston

Brian Rothschild
Charles A. Stormont

Debtor's Legal Clinic

Tyler Needham
Brian Rothschild
Paul Simmons
Brent Wamsley

Education Case

Jared Allebest

Expungement Law Clinic

Josh Egan
Amy Fowler
Stephanie Miya
Amy Powers
Bill Scarber

Family Law Case

Justin T. Ashworth
Sean Brian
Rex Bushman
Nathan Carrol
Cathy Day
Zal Dez
Jonathan Felt
Lorie Fowlke
Carolyn Morrow
Kayla Quam
Stewart Ralphs
James Douglas Smith
Linda Smith
Simon So
Mark Tanner
Sheri Throop

Guardianship Case

Mark Andrus

Guardianship Signature Program

William M Fontenot
Daniel G Shumway

Justice Court Project

Cara Baldwin
Emilie Bean
Deven Coggins
Lindsay Jarvis

Camille Neider
Craig Peterson
Keith Stoney

Medical Legal Clinic

Stephanie Miya

Rainbow Law Clinic

Jessica Couser
Russell Evans
Stewart Ralphs
Chris Wharton

Senior Center Legal Clinics

Kyle Barrick
Sharon Bertelsen
Kent Collins
Phillip S. Ferguson
Richard Fox
Michael A. Jensen
Jay Kessler
Terrell R. Lee
Joyce Maughan
Stanley D. Neeleman
Kristie Parker
Jane Semmel
Jeannine Timothy

Street Law Clinic

Nathan Bracken
Kate Conyers
Jennie Garner
Jeffrey Gittins
Matt Harrison
Brett Hastings
Adam Long
John Macfarlane
Elliot Scruggs
Craig Smith
Zac Sparrow
Jonathan Thorne

Tuesday Night Bar

James Ahlstrom
Mike Anderson
Courtland Astill
Matt Ballard
Alain Blamanno
Dan Barnett
Eric Bawden

Mike Black
Matt Brahana
David Broadbent
Tory Christensen
Kate Conyers
John Davis
Joshua Figueira
Dave Geary
John Hurst
Annette Jan
Scott Johnson
Scott Karen
Derek Kearl
Nina Kim
J. Mason Kjar
Lucia Maloy
Mike McDonald
April Medley
Liz Mellem
Alan Mouritsen
Eric Nielson
Grace Pusavat
Karina Sargsian
LaShel Shaw
Clark Snelson
Jason Steiert
Kristen Sweeny
Jefferey Trousdale
Ryan Wallace
Adam Weinacker

West Jordan Pro Se Calendar

Fred Anderson
Steven Bergman
Brad Blanchard
Brian M. Burn
Paul Cabrera
D. Scott DeGraffenried
Bryan Gillespie
Kimberly Hammond
Jonathan Kirk
Todd Livingston
Keri Nielsen
Vaughn Pedersen
Trent A. Raleigh
Sheldon Smith
Shane Stroud
Scott Swallow
Melinda Varszegi
Kevin Worthy

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in the months of October & November 2016. To volunteer call Tyler Needham at (801) 297-7027 or go to <https://www.surveymonkey.com/s/UtahBarProBonoVolunteer> to fill out a volunteer survey.

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

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

More information about the Bar's Ethics Hotline may be found at:

www.utahbar.org/opc/office-of-professional-conduct-ethics-hotline/

Information about the formal Ethics Advisory Opinion process can be found at:

www.utahbar.org/opc/bar-committee-ethics-advisory-opinions/eaoc-rules-of-governance/



801-531-9110

SUSPENSION

On September 15, 2016, the Honorable Paige Petersen, Third Judicial District Court, entered an Order of Suspension, suspending Benjamin Horton from the practice of law for three years for Mr. Horton's violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.8(h)(1) (Conflict of Interest: Current Clients: Specific Rules), 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), 5.4 (Professional Independence of a Lawyer), 7.1 (Communications Concerning a Lawyer's Services), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(c) (Misconduct), of the Rules of Professional Conduct.

In summary, there are three matters:

In the first matter, Mr. Horton's firm was hired by two Wisconsin homeowners to obtain a modification of their home mortgage loan. Mr. Horton operated his law firm in conjunction with nonlawyer companies and shared the clients' fees and account with other companies managed by a nonlawyer. Mr. Horton did not deposit the fees paid by the clients into his client trust account. Mr. Horton failed to adequately supervise the nonlawyer employees and agents at his firm to ensure the actions and conduct of these nonlawyers was compatible with Mr. Horton's professional obligations to his clients.

Mr. Horton failed to respond to his clients' requests for information and failed to keep his clients informed regarding the status of their application for loan modification. The clients' mortgage lender was unable to process the clients' application for a loan modification because Mr. Horton failed to respond to

the lender's requests for information. Mr. Horton failed to provide any meaningful legal services to the clients in exchange for the fees paid.

The OPC served Mr. Horton with a Notice of Informal Complaint (NOIC) requiring his written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Horton did not timely respond in writing to the NOIC.

In the second matter, Mr. Horton's firm sent a letter to a Tennessee homeowner which guaranteed that a mortgage loan modification could be secured for the homeowner conditioned upon several requirements. Mr. Horton and the homeowner entered into an engagement agreement to obtain a home mortgage loan modification, which contained a liability waiver. Mr. Horton failed to take adequate steps to ensure the client obtained independent representation in connection with the engagement agreement and failed to advise the client to seek independent legal review of the liability waiver included in his engagement agreement.

Mr. Horton operated his law firm in conjunction with nonlawyer companies and shared the clients' fees and account with other companies managed by a nonlawyer. Mr. Horton did not deposit the fees paid by the clients into his client trust account. Mr. Horton failed to adequately supervise the nonlawyer employees and agents at his firm to ensure the actions and conduct of these nonlawyers was compatible with Mr. Horton's professional obligations to his client. Mr. Horton allowed his

other companies and nonlawyer employees to make misrepresentations to the client and to provide legal services to the client. Mr. Horton's firm failed to provide any meaningful legal services to the client in exchange for the fees paid and the client was in a far worse position as a result of Mr. Horton's representation.

The OPC served Mr. Horton with a NOIC requiring his written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Horton did not timely respond in writing to the NOIC.

In the third matter, Mr. Horton's firm was hired by a homeowner in California to obtain a home mortgage loan modification. Mr. Horton's firm sent information to the client which guaranteed that a mortgage loan modification could be secured for the client conditioned upon several requirements.

Mr. Horton operated his law firm in conjunction with nonlawyer companies and shared the client's fees and account with other companies managed by a nonlawyer. Mr. Horton failed to adequately supervise the nonlawyer employees and agents at his firm to ensure the actions and conduct of these nonlawyers was compatible with Mr. Horton's professional obligations to his client. Mr. Horton allowed his other companies and nonlawyer employees to make misrepresentations to the client and to provide legal services to the client. Mr. Horton's firm failed to

provide any meaningful legal services to the client in exchange for the fees paid. Mr. Horton failed to respond to his client's requests for information and failed to keep his client informed regarding the status of their application for loan modification. As a result of Mr. Horton's representation, the client was no longer eligible for a mortgage loan modification.

SUSPENSION

On October 4, 2016, the Honorable Katie-Bernards Goodman, Third Judicial District Court, entered an Order of Suspension, suspending M. David Eckersley from the practice of law for two years based on Mr. Eckersley's violation Rules 1.3 (Diligence), 1.4(a) (Communication), and 8.4(c) (Misconduct), of the Rules of Professional Conduct.

In summary:

Mr. Eckersley was hired for representation in a medical malpractice claim. Mr. Eckersley failed to file the requisite notices and pleadings on behalf of his client prior to the expiration of the statute of limitations for the client's claim. Mr. Eckersley concealed and misrepresented the status of the client's case to his firm. He indicated that the case was active and progressing, when it was not.

After the expiration of the statute of limitations for the client's medical malpractice claim, Mr. Eckersley sent a Notice of Intent

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to the doctor involved and filed a Request for Pre-Litigation Panel Review. Mr. Eckersley failed to interview an expert witness on behalf of his client, who had previously offered to testify on the client's behalf. Mr. Eckersley did not inform his client that a pre-litigation hearing was held for his case and did not inform the client of the determination of the pre-litigation panel. Mr. Eckersley failed to provide information to his client and provided false information to his client regarding the work he was performing on the case.

DISBARMENT

On July 2, 2015, the Honorable Fred D. Howard, Fourth Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Disbarment disbaring Donald D. Gilbert from the practice of law for his violation of Rules 1.7 (Conflict of Interest: Current Clients), Rule 1.15(e) (Safekeeping Property), 3.4(c) (Fairness to Opposing Party and Counsel), 8.4(d) (Misconduct) of the Rules of Professional Conduct. On July 20, 2016, the Utah Supreme Court issued a decision affirming the district court's order.

In summary:

Mr. Gilbert was retained to represent two chapter dbas (Chapters) of a non-profit. The Chapters questioned whether the acting State officials (State Board) of the non-profit were complying with Articles of Incorporation and other requirements of the non-profit corporation. Lawyers for the State Board sent a letter to several individual members acting as officers for the Chapters, removing them as officers of the Chapters after they incorporated a new non-profit association (Association). The letter asserted that all Chapter assets belonged to the non-profit and demanded they relinquish all such assets. Mr. Gilbert filed a petition in district court (Chapter lawsuit) against the State Board on behalf of the Chapters, the non-profit and two of the individual members to remove the State Board.

The State Board then filed a lawsuit (Board lawsuit) against the Association and other individually named board members of the

Chapters (individual defendants) seeking the removal of the individual defendants from the Chapter and the non-profit and to regain control of donations and other property claimed by the State Board. Initially, Mr. Gilbert only represented the Chapters and later simultaneously represented both the Chapters and the individual defendants.

An Order (the Order) was issued in the Board lawsuit stating that the individual defendants did not have authority to act under the name of the non-profit or the Chapters. The Order enjoined the individual defendants from using money in specified Chapter bank accounts (Chapter accounts). At a hearing in the Chapter case (Chapter hearing), the court relied on the Order as evidence that Mr. Gilbert's clients were not members of the non-profit and therefore lacked standing to bring their lawsuit and granted summary judgment for the non-profit.

After the Chapter hearing, Mr. Gilbert received three separate checks (Chapter checks) paid to him from the Chapter accounts for his attorney's fees in the two lawsuits. Thereafter, Mr. Gilbert received further notice of the non-profit's claim to the funds in the Chapter accounts when the State Board served on him a motion for judgment against the individual defendants for funds spent from the Chapter accounts since the entry of the Order. Although Mr. Gilbert filed a motion to set aside the Order in response to the motion for judgment, he did not notify opposing counsel or the court that he received the three Chapter checks.

Later the State Board filed a Motion to Disgorge Funds specifically requesting the court order Mr. Gilbert to return the funds he received from the first three Chapter checks. After receiving the disgorgement motion, Mr. Gilbert received a fourth Chapter check for attorney's fees written against funds from the Chapter accounts (fourth Chapter check). The day after receiving the fourth Chapter check, Mr. Gilbert filed an opposition to the disgorgement motion which made no mention of the fourth Chapter check.

Did You Know... You can earn Continuing Legal Education credit if an article you author is published in the *Utah Bar Journal*. Article submission guidelines are listed above. For CLE requirements see Rule 14-409 of the Rules of the Utah State Board of Continuing Legal Education.

The court ordered the return to the State Board of all funds paid out from the Chapter accounts from the date of the Order to present. The court also ordered Mr. Gilbert to disgorge the \$30,000 in legal fees he received based on the four Chapter checks. Mr. Gilbert's motion to set aside the Order was denied.

Mr. Gilbert failed to hold any money he received from the Chapter accounts in his attorney trust account or pay the money to the State Board pursuant to the Order. Mr. Gilbert spent the money. Prior to each acceptance of the Chapter checks, Mr. Gilbert did not notify opposing counsel or the court of his intention to accept and use the Chapter checks based on his position that the Order was invalid or otherwise did not apply to the funds. Mr. Gilbert failed to comply with the Order or subsequent court orders. Mr. Gilbert did not return the \$30,000 he received from the Chapter accounts to the non-profit or take any legal action to appeal or otherwise stay the court's disgorgement order.

A concurrent conflict of interest existed between the Chapters and the individual defendants. Once Mr. Gilbert accepted and cashed the checks paid to him from the Chapter accounts, his interest in getting paid and avoiding disgorgement of the legal fees he received created a concurrent conflict of interest with the interest of his clients and their need to comply with the Order. Even if the conflicts were waivable, Mr. Gilbert failed to consult with his clients about their concurrent conflicts and his conflict of interest and obtain written waivers giving their informed consent to each conflict.

After Mr. Gilbert filed a Notice of Withdrawal of his representation of his clients, the State Board filed a second disgorgement motion and served a copy on Mr. Gilbert. The State Board received a judgment against Mr. Gilbert for \$30,000.00 plus interest for the money he received from the Chapter accounts. Mr. Gilbert did not repay the money owed to the non-profit nor did he take any legal action against the second disgorgement judgment until after a Bar complaint was filed against him.

Aggravating factors:

Selfish motive; multiple offenses; refusal to acknowledge the wrongful nature of the misconduct and lack of remorse; substantial experience in the practice of law; and lack of good faith effort to rectify the consequences of the misconduct.

Mitigating factors:

Absence of a prior record of discipline.

INTERIM SUSPENSION

On December 1, 2016, the Honorable Randall Skanchy, Third Judicial District Court, entered an Order of Interim Suspension, pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, against Andrew A. Stewart, pending resolution of the disciplinary matter against him.

In summary:

Mr. Stewart was placed on interim suspension based upon his criminal convictions for five counts of Falsify/Forge/Alter a Prescription of a Controlled Substance, a Class A Misdemeanor.

Discipline Process Information Office Update

Most complaints filed with the Office of Professional Conduct are without merit. If you find yourself the subject of a Bar complaint, contact Jeannine P. Timothy with your questions about the discipline process. Jeannine is happy to answer your questions and clarify the process.



DISCIPLINE PROCESS
INFORMATION OFFICE

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(801) 257-5515
DisciplineInfo@UtahBar.org

All Rise and Other Modest Health Tips for the Practicing Lawyer

by Jordan Call

The practice of law has its pitfalls when it comes to physical health and well-being. Sitting at a desk all day may lead to weight gain, muscle soreness, back pain, or a number of other issues that can lower satisfaction and productivity.

Fortunately, you don't have to start running marathons to fight back against these effects. Here are a few simple tips for improving your physical well-being as an attorney:

Download a fitness app.

There are many helpful, easy-to-use, and cheap (or free) apps to help you be more active, eat healthier, or lose weight. Whether you want to track your steps, measure caloric intake, be reminded to work out, or do something else entirely, you're bound to find an app. If you'd rather not swim through a sea of products to find the right one, there are many useful websites that review fitness apps and can help you find a good fit.

Snack, but snack right.

Most people probably don't think of the practice of law as being physically demanding but that doesn't mean you won't work up an appetite as the billable hours roll by. You may be tempted to keep your energy up with soda, coffee, salty snacks, or sugary treats. Consider instead dried fruit, nuts, or raw vegetables (snap peas are a personal favorite). Even better, try keeping water always on hand. Being well-hydrated will help manage your appetite and can help replace snacking out of distraction or boredom.

Consider getting an adjustable-height workstation.

Research suggests that sitting all day long can have a surprising number of adverse effects on your health. See Richard A. Lovett, *Desk Jobs Can Be Killers, Literally*, WASHINGTON POST (July 16,

2013), available at https://www.washingtonpost.com/national/health-science/desk-jobs-can-be-killers-literally/2013/07/15/ce61f9e8-e59b-11e2-af3-339619eab080_story.html.

Fortunately, there is evidence that even small, brief increases in activity can make a significant difference. *Id.* For example, taking five minutes every hour to get up and walk around your office is one way to counteract the adverse effects of a sedentary desk job.

If you want to integrate movement more seamlessly into your work, consider an adjustable-height workstation. These nifty contraptions allow you to switch between sitting and standing without missing a beat. Whenever your body tires of one position, just switch to the other. As with fitness apps, there are many different types and price ranges to choose from and plenty of reviews to help you sort through the options.

Practice posture.

Another way to mitigate some of the effects of working at a desk all day is to work on improving your posture. A lot of muscle soreness, back pain, and even headaches are a result of the unhealthy positions we maintain for hours on end at a desk. Extending one's head forward, slouching in the back, and letting one's shoulders roll forward all can contribute to back and neck pain. A quick Google search for "proper posture at a

JORDAN CALL is an attorney at Snow, Christensen & Martineau. He has a J.D. from the University of Chicago Law School and a B.A. in English from Brigham Young University. He will be clerking for Justice Lee on the Utah Supreme Court in the Fall of 2017.



desk” will yield many helpful results for correcting these bad habits. It may be helpful to set alarms for yourself to remind you to be mindful of how you’re sitting.

Try some office-friendly stretches and exercises.

Another way to get the blood flowing is to shut your office door for a few minutes a day for a little stretching or exercising. It doesn’t take many squats, calf raises, or wall-sits before you’ll feel invigorated, and reaching for your toes or stretching through a lunge can help you feel fresh and productive. There are many magazine and online articles that outline “office workouts,” so find one you like and give it a shot!

Maybe you’re looking to make a slightly more ambitious lifestyle change, but you’re still stinging from that gym membership that you paid for weekly and used semi-annually. If so, don’t let discouragement beat you before you’ve begun. Here are a couple of ideas for implementing and sticking with a healthier routine:

Sign up for a race.

If you’ve considered taking up running, cycling, or another endurance sport, few things provide more motivation than an impending race date. Races come in all shapes and sizes, so you’re sure to be able to find something that is a healthy stretch for you. Then do a little research and create a training schedule that will give you a reasonable amount of time to prepare for the race.

The beauty of this approach is that it gives you an objective to work towards, rather than the not-so-motivating sunk costs of something like a gym membership. At worst, you’ll train just to prevent a crash-and-burn on race day. At best, you’ll track your progress and try to beat your personal records. This can be addicting in the best way.

Schedule time for consistent exercise with a buddy.

It probably goes without saying that a scheduled exercise routine is more likely to stick than simply working out whenever you happen to feel like working out (read: never).

Once you’ve established a schedule, accountability is the name of the game. Skipping your workout becomes all too easy to rationalize when you are legitimately tired, busy, or just plain unmotivated. On those days, it can make all the difference to have a friend to remind you of your commitment to better health. Just make sure that they can depend on you to return the favor when they need it!

If you’re ready to make a positive change in your physical health – even if only a small one – then give one or two of these tips a try and see if you notice a difference. Your body will thank you.



Even minds we don't
understand grow
beautiful things.

Let's rethink
mental illness.

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Utilizing Paralegal Skills in Community Service

by Cheryl Jeffs and Laura Summers

The Paralegal Division of the Utah State Bar recognizes the value of community service and pro bono activities for paralegals.

Pro bono, short for *pro bono publico*, translates to “for the public good.” Generally, pro bono means lawyers, law students, and paralegals (under the direct supervision of an attorney) volunteer their time and resources, at no cost, to clients who could not otherwise afford legal counsel. In some cases, lawyers, law students, and paralegals assist organizations involved in social causes.

The Paralegal Division participates in varied non-representational pro bono activities. Non-representational is defined as “civic, educational, and community activities that improve the law, the legal system, or the legal profession.”

Paralegals may also assist in legal representation for governmental entities or under-represented individuals, groups, or causes but only under the direct supervision of a licensed attorney.

Examples of how utilization of paralegal skills in community service applies to representational pro bono work include:

- Assisting a licensed attorney with direct representation or assisting an attorney who works for a civic, charitable, governmental, educational, or other public-service organization with limited income;

- Assisting a licensed attorney with direct representation for low-income clients through a legal aid office, clinic, or pro bono program;
- Assisting a licensed attorney with direct representation for a group or organization seeking to secure or protect civil rights, civil liberties, or public rights; or
- Assisting a licensed attorney with direct representation for an indigent client where the attorney intentionally opts not to charge before providing legal services.

Examples of how utilization of paralegal skills in community service applies to non-representational pro bono:

- Volunteering for law-related work for a federal, state, or local government, including government agencies, courts, and judges but not including law enforcement work;
- Volunteering to participate in the administrative rulemaking process or to assist with legislative lobbying activities for governmental organizations or organizations seeking to secure or protect civil rights, civil liberties, or public rights;
- Volunteering for “know your rights” hotlines and volunteering for activities designed to preserve civil and legal rights;

CHERYL JEFFS is a paralegal at Stoel Rives where she works in the area of litigation.



LAURA SUMMERS is a senior paralegal at the firm of Dolowitz Hunnicutt.



- Volunteering as a coach or judge of an off-campus mock trial team;
- Volunteering as a mediator; or,
- Volunteering to assist court staff or organizations to assist court users.

More specifically, the Paralegal Division of the Utah State Bar assists in the following local community service projects:

Wills for Heroes (WFH)

Wills for Heroes is a national program helping provide to first responders (police, fire, and military) essential legal documents, which includes wills, advance health care directives, and powers of attorney. The idea of “protecting those who protect us” is what makes the Wills for Heroes program such a rewarding experience. In conjunction with the Young Lawyers Division, the Paralegal Division provides paralegal support for these events, such as notaries and witnesses needed to complete these crucial estate



planning documents.

Wills for Heroes events take place up and down the Wasatch Front and in other locales across the state. The events are staffed solely by volunteer attorneys and paralegals, who welcome the opportunity to provide this much-needed service to the members of our community.

Wills for Heroes events take place at least four times each calendar year and are very well-received. It is such a great pleasure to meet and get to know the first responders who make it their mission to protect and serve our community. The Paralegal Division is honored to be a part of this worthy cause.

Serving our Seniors (SOS)

In a similar fashion, Serving our Seniors is aimed at providing senior citizens important estate planning documents. Serving our Seniors helps to provide advance health care directives and powers of attorney. This event is generally marketed to the community population over the age of fifty-five and held twice a year at the Utah State Bar. The Paralegal Division staffs this event with paralegal volunteers providing notarial and witness services.

Utah State Bar Fall Forum 2016

by Greg Wayment

I was fortunate this year to be able to attend the Utah State Bar's Fall Forum, which took place on November 17 and 18 at the Little America. The Division is pleased to report that a handful of a Paralegals were able to attend. There were several excellent keynote speakers including (among others) Erin Brokovich, Professor Daniel Medwed, and our own Governor Gary Herbert.

I was able to attend all nine hours of the “Trial Academy: The Art of Persuasion.” The Trial Academy featured a rotating panel of judges and attorneys sharing ideas, stories, and tips on topics ranging from developing the case narrative, finding compelling experts, dealing with damages, and use of technology and demonstratives.

The Paralegal Division wants to extend a thank you to the Bar and the Fall Forum Committee for making the Forum available to members of the Paralegal Division at a reduced price. We continue to strongly urge all members of the Paralegal Division to support the Bar by attending as many Bar functions as possible.

NEW BAR POLICY: BEFORE ATTENDING A SEMINAR/LUNCH YOUR REGISTRATION MUST BE PAID.

SEMINAR LOCATION: Utah Law & Justice Center, unless otherwise indicated. All content is subject to change.

January 10, 2017 | 4:00–6:00 pm **2 hrs. CLE**

Litigation 101: Dealing the Experts. \$25 for YLD members, \$50 for others.

January 11, 2017 | 11:00 am **1 hr. Self-Study CLE**

WEBINAR: Discover Hidden and Undocumented Google Search Secrets. \$51.

January 13, 2017 | 11:00 am **1 hr. Self-Study CLE**

WEBINAR: Advanced Google Search for Lawyers. \$51.

January 18, 2017 | 11:00 am **1 hr. Self-Study CLE**

WEBINAR: Cybersleuth Investigative Series – Using Free Public Records and Publicly Available Information for Investigative Research. \$51.

January 20, 2017 | 11:00 am **1 hr. Self-Study CLE**

WEBINAR: Cybersleuth Investigative Series – Investigative Due Diligence on a Budget. \$51.

January 25, 2017 | 11:00 am **1 hr. Self-Study CLE**

WEBINAR: Social Media as Investigative Research and Evidence. \$51.

January 26, 2017 | 11:00 am **1 hr. Self-Study Ethics**

WEBINAR: The Ethics of Social Media Research. \$51.

February 15, 2017 | 4:00–6:00 pm **2 hrs. CLE**

Litigation 101: Opening Statements & Closing Arguments. \$25 for YLD members, \$50 for others.

February 24, 2017 **7 hrs. CLE + 1 hr. Ethics**

I.P. Summit. Sheraton Hotel, \$340 for non-I.P. Section members, \$330 for I.P. Section members, \$175 for paralegals and Patent Agents. The full agenda is online



March 9–11, 2017

2017 Spring Convention in St. George, Utah. Save these dates! Co-Chairs: Hon. Michael F. Leavitt and Melinda Bowen. Accommodation information can be found on pages 48 and 49 of this issue of the *Utah Bar Journal*. Watch for the agenda and registration information in the Jan/Feb 2017 issue of the *Journal*.

March 15, 2017 **5 hrs. Ethics + 1 hr. Prof./Civ.**

OPC Ethics School: What They Didn't Teach You in Law School. \$245 on or before March 3, \$270 after March 3.

March 29, 2017 | 4:00–6:00 pm **2 hrs. CLE**

Litigation 101: Ethics. \$25 for YLD members, \$50 for others.

July 26–29, 2017

2017 Summer Convention in Sun Valley, Idaho. Save these dates and plan to attend!

Co-Chairs: Hon. Robert J. Shelby and Amy Sorenson.



Classified Ads

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

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

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

OFFICE SPACE

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.

DOWNTOWN OFFICE LOCATION: Opportunity for office sharing or participation in small law firm. Full service downtown office on State Street, close to courts and State and City offices: Receptionist/Secretary, Internet, new telephone system, digital copier/fax/scanner, conference room, covered parking. Call Steve Stoker at 801-359-4000 or email sgstoker@stokerswinton.com.

Office space for lease. Total building space 5260 sf. Main floor 1829 sf, \$16/sf. Upper floor 3230 sf (may be divided), \$10/sf. Owner would consider offer to purchase. Walking distance to city and courts. Easy access to TRAX. Lots of parking. 345 South 400 East. Lynn Rasmussen, Coldwell Banker, 801-231-9984.

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

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Consultant and Expert Witness: Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics. Charles M. Bennett, PLLC, 370 East South Temple, Suite 400, Salt Lake City, UT 84111; 801 883-8870. Fellow, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.

CALIFORNIA PROBATE? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, North Salt Lake, 801-721-8384. Licensed in Utah and California – over thirty-five years experience.

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For July 1 _____ through June 30_____

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Address: _____ Telephone Number: _____

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Date of Activity	Sponsor Name/ Program Title	Activity Type	Regular Hours	Ethics Hours	Professionalism & Civility Hours	Total Hours
		Total Hrs.				

- 1. Active Status Lawyer** – Lawyers on active status are required to complete, during each two year fiscal period (July 1–June 30), a minimum of 24 hours of Utah accredited CLE, which shall include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of the ethics or professional responsibility shall be in the area of professionalism and civility. Please visit www.utahmcle.org for a complete explanation of Rule 14-404.
- 2. New Lawyer CLE requirement** – Lawyers newly admitted under the Bar’s full exam need to complete the following requirements during their first reporting period:
 - Complete the NLTP Program during their first year of admission to the Bar, unless NLTP exemption applies.
 - Attend one New Lawyer Ethics program during their first year of admission to the Bar. This requirement can be waived if the lawyer resides out-of-state.
 - Complete 12 hours of Utah accredited CLE.
- 3. House Counsel** – House Counsel Lawyers must file with the MCLE Board by July 31 of each year a Certificate of Compliance from the jurisdiction where House Counsel maintains an active license establishing that he or she has completed the hours of continuing legal education required of active attorneys in the jurisdiction where House Counsel is licensed.

EXPLANATION OF TYPE OF ACTIVITY

Rule 14-413. MCLE credit for qualified audio and video presentations; computer interactive telephonic programs; writing; lecturing; teaching; live attendance.

- 1. Self-Study CLE:** No more than 12 hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit www.utahmcle.org for a complete explanation of Rule 14-413 (a), (b), (c) and (d).
- 2. Live CLE Program:** There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at a Utah accredited CLE program. **A minimum of 12 hours must be obtained through attendance at live CLE programs during a reporting period.**

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION, SEE RULE 14-409 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Rule 14-414 (a) – On or before July 31 of alternate years, each lawyer subject to MCLE requirements shall file a certificate of compliance with the Board, evidencing the lawyer's completion of accredited CLE courses or activities ending the preceding 30th day of June.

Rule 14-414 (b) – Each lawyer shall pay a filing fee in the amount of \$15.00 at the time of filing the certificate of compliance. Any lawyer who fails to complete the MCLE requirement by the June 30 deadline shall be assessed a \$100.00 late fee. Lawyers who fail to comply with the MCLE requirements and file within a reasonable time, as determined by the Board in its discretion, and who are subject to an administrative suspension pursuant to Rule 14-415, after the late fee has been assessed shall be assessed a \$200.00 reinstatement fee, plus an additional \$500.00 fee if the failure to comply is a repeat violation within the past five years.

Rule 14-414 (c) – Each lawyer shall maintain proof to substantiate the information provided on the certificate of compliance filed with the Board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders, or materials related to credit. The lawyer shall retain this proof for a period of four years from the end of the period for which the Certificate of Compliance is filed. Proof shall be submitted to the Board upon written request.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Rule 14-414.

A copy of the Supreme Court Board of Continuing Education Rules and Regulation may be viewed at www.utahmcle.org.

Date: _____ Signature: _____

Make checks payable to: **Utah State Board of CLE** in the amount of **\$15** or complete credit card information below.

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