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Volume 31 No. 1  
Jan/Feb 2018



**Spring Convention registration inside.**



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## Cover Photo

*Sundial Peak*, by Utah State Bar member Ryan Andrus.

*RYAN ANDRUS is a vice president and assistant general counsel at WCF Insurance. He took this photo of Sundial Peak standing just below Lake Blanche. It was early in the morning on December 17, 2016 after a snow storm.*



## SUBMIT A COVER PHOTO

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



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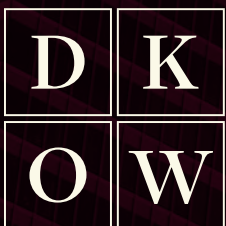
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The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea, a particular topic that interests you, or if you would like to review one of the books we have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

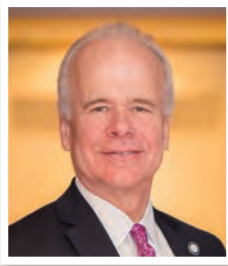
**AUTHORS:** Authors must include with all submissions a sentence identifying their place of employment. Authors are encouraged to submit a head shot to be printed next to their bio. These photographs must be sent via e-mail, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

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

### LETTER SUBMISSION GUIDELINES

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to [BarJournal@UtahBar.org](mailto: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.
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8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

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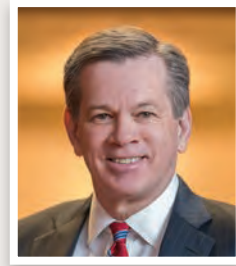
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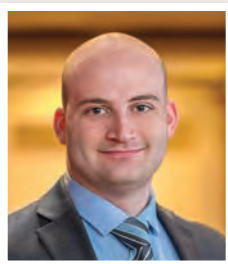
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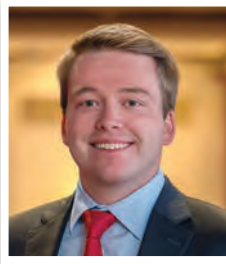
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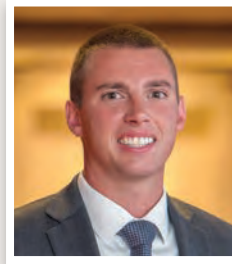
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### *Predictions for 2018*

by John R. Lund

"I don't need help, it's obvious what this means. There's going to be loads of fog tonight."

— Ron Weasley looking into a crystal ball, J. K. Rowling, *Harry Potter and the Prisoner of Azkaban* 297 (First Am. ed. 2009).

What is going to happen in 2018? Who knows? Considering the breadth and rate at which our norms have been challenged and altered in the past twelve months, can anyone be certain of anything? Perhaps it would work better to simply try to figure out what will stay the same; but, alas, we seem to have arrived at the point where change is in fact the only constant.

It was Alexander Pope, in 1711 in his poem *Essay on Criticism*, who first observed that: "Fools rush in where Angels fear to Tread." (Capitalization was apparently big in the early 1700s, sort of like ALLCAPS is done bigly by some people now.) Predicting what will happen next in our profession might be one of those areas where only fools rush in. However, Mr. Pope also observed in that very same poem: "To Err is Human, to Forgive, Divine." So please be divine and forgive me if I am in error, but here is what I see through the fog in my crystal ball:

#### **Prediction No 1. – The Office of Professional Conduct will be remodeled.**

These efforts are already well underway, and we are not talking about fresh paint and new furniture. In April of 2017, in response to a request from the Utah Supreme Court, the ABA issued a review of all aspects of attorney discipline in our state. While much good was found in the current process and in the intentions of the staff and volunteers involved, the ABA recommended lots of changes, everything from different titles for disciplinary counsel to taking disciplinary matters out of the district courts and eliminating the statute of limitations.<sup>1</sup> The supreme court formed an *ad hoc* committee to assess the report. The committee is led by Judge James Blanch and consists of various stakeholders and participants in Utah's attorney discipline system, including me as your bar president and several lawyers with key roles in the self-regulation of our profession. At this writing, we are well along in assessing the ABA report.

So, here is my first prediction affecting Utah's legal profession: By mid-2018, the Utah Supreme Court will have a report from Judge Blanch's committee as to which of the ABA recommendations should be implemented. While the specifics are harder to predict, the overall effect of recommended changes will be (1) to create more clarity about discipline being a function of the court, not of the bar, and about the related funding and oversight issues; (2) to create more transparency and accountability for the office; and (3) to improve the disciplinary process to promote both due process and speedy resolution.

#### **Prediction No. 2. – Lawyers will be challenged to show the value in their services.**

On several fronts, the role of Utah lawyers will remain under serious pressure in 2018 and beyond. Well-heeled clients won't see why their California law firm can't just do the Utah part of the legal project or lawsuit. Other less affluent prospective clients might be Utahns, but they won't see why they should hire a lawyer at all. They will see the available online information – including free court-approved forms, affordable business formation documents, and even brief phone consults via Legal Zoom – as good enough and much more accessible.

2018 probably will also bring the formal introduction of new legal professionals called Licensed Paralegal Practitioners (LLP). Just like nurse practitioners and physician's assistants have allowed doctors to leverage their skills into better and more efficient medical care, LPPs can do the same for lawyers; but they will also challenge us to better define our own roles in providing legal services.

Additionally, other professionals like accountants, financial planners, and real estate agents, as well as "vendors" plying e-discovery solutions and the like, will continue to offer services that overlap with what lawyers can provide.

Lastly, the momentum will increase for the





application of artificial intelligence in providing such “mundane” legal tasks as sorting through case law to find details relevant to the case at hand. Isn’t legal research the quintessential lawyer function? Apparently not.<sup>2</sup>

Personally, I don’t see these forces as ones that will drive lawyers into extinction. Rather, they will drive us into a process of reclaiming our best roles – those of advocate, adviser, strategist, and confidant – and, through that, they will provide us with an opportunity to reframe and restate the value proposition we make when we offer our services.

### **Prediction No. 3. – We will find out about the attitudes of Utah clients and other potential consumers of legal services.**

There are all sorts of legal pundits out there these days talking about what they think people want from lawyers, how clients perceive the cost and value of our services, and so on. However, there is precious little actual data about the subject in general and in particular about the attitudes of consumers. However, considering the issue critical to the future strength of the profession, the Bar Commission has retained Lighthouse Research and Development of Riverton, Utah, to conduct a survey of our bar’s potential customers, especially small businesses and individuals here in Utah.

The survey will address:

1. How and why individuals and businesses decide whether a

circumstance they face is one involving legal issues?

2. Why individuals and businesses do or do not choose to contact a lawyer about their issue?
3. Why individuals and business turn to sources other than lawyers, and what obstacles or attitudes prevent them from using lawyers?
4. On what part of “legal services” clients place value?
5. What clients are willing to pay for legal services?
6. What are clients’ preferred packages and pricing arrangements for those services?

The survey will be underway in January and February. So, by sometime in mid-2018, there will be some data and results to provide to the bar membership. We hope the results will aid in addressing Prediction No. 2.

### **Prediction No. 4 – The cloud will further free us from our desks, files, conference rooms, and courtrooms.**

This isn’t tough to predict. In fact, it is already happening and has been for some time. Powerful mobile devices have been married with secure subscription-based software on the worldwide web. This makes it now commonplace for law firms of all sizes to be providing virtual offices for their lawyers, if not for their legal assistants, paralegals, and secretaries.

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Consistent with this trend, the Utah State Bar now provides a virtual practice option to all members. It is called the Utah Bar Practice Portal, and it is available at: <https://services.utahbar.org/Practice-Portal>. The practice portal provides every member with easy access to a full complement of bar services and other information in a format you can customize to your preferences. And it also links in with electronic filing services for the Utah courts, legal research databases, and practice services like Clio and LawPay on a subscription basis, and single-sign on functionality where possible. Plus, it is mobile friendly. So, whether you are in Vernal or Venice, you have access to all of your information at your fingertips.

Cloud dynamics will also continue to change the way we do business with courts and judges. Think how e-filing has reduced the number of visits you make to the court. Now think how it will change things as the court's remote hearing rules permitting hearings with contemporaneous transmission from a different location begin to take hold.<sup>3</sup>

Seriously, we will soon need to decide what the reasons are to come in and work together under the same roof. To be sure there are most certainly good reasons – like developing personal rapport with clients, assessing body language of witnesses, collaborating with colleagues, or simply having peace and quiet to read and concentrate – to name a few.

But, according to my admittedly hazy crystal ball, we will be able to go into our actual offices less and get more done from our virtual offices. We won't need to come into our actual offices just to be in front of our screens and on our systems. And the same will be true for dealings with the courts, more phone conferences and more video conferences.

### **Prediction No. 5 – It's going to become clear, if it isn't already, that sexual harassment is unethical conduct for a lawyer and is also contrary to our Standards of Professionalism and Civility.**

Some of you might be following the Utah Supreme Court's consideration of an ABA-proposed change to Rule 8.4 of Model Rules. If adopted, the change would add a paragraph (g), which would make it professional misconduct to “engage in conduct the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.”<sup>4</sup>

Across the country there have been constitutional concerns raised about this ABA proposal and in particular its First Amendment implications on free speech and religious liberty. That is certainly an interesting issue and one about which our skills as analysts and advocates properly can and should be brought to bear.

But nowhere in that debate is there anyone suggesting that the harassment element of the proposed rule is objectionable. Harassment certainly can't be considered the free exercise of one's religion or of one's free speech.

One need only read the first sentence of the preamble to the Utah Standards of Professionalism and Civility to find this already stated in our rules in the converse:

“A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms.”<sup>5</sup>

Sexual harassment reflects the exact opposite of personal courtesy and professional integrity.

Maybe we shouldn't need to make such things clear, but recent revelations from elsewhere in the country and in other industries suggest that clarity is needed. So, it may be wishful thinking, and it is certainly not based on any inside information, but my prediction is that the Utah Supreme Court will adopt at least that portion of the ABA Model Rule that explicitly and expressly makes harassment unethical.

So, in 2018, I predict we might get a better discipline system, a challenge to show our value, a better understanding of what matters to clients, more flexibility in our work patterns, and, possibly, some clarity about how we should conduct ourselves. All things considered, I think it will continue to be a good thing to be a Utah lawyer in 2018.

1. American Bar Association, Utah Report on the Lawyer Discipline System (April 2017). The entire 107-page report, containing thirty separate recommendations, is available at: [https://www.utcourts.gov/resources/reports/docs/ABA-OPC\\_Report.pdf](https://www.utcourts.gov/resources/reports/docs/ABA-OPC_Report.pdf).
2. See, e.g., John Mannes, *Ross Intelligence lands \$8.7M Series A to speed up legal research with AI* (Oct. 11, 2017), <https://techcrunch.com/2017/10/11/ross-intelligence-lands-8-7m-series-a-to-speed-up-legal-research-with-ai/>.
3. See Utah R. Crim. P. 17.5; Utah R. Juv. P. 29B; and Utah R. Juv. P. 37B.
4. There might be a shorter cite somewhere, but here is one: [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html).
5. Utah Sup. Ct. R. Prof'l Practice 14-301.



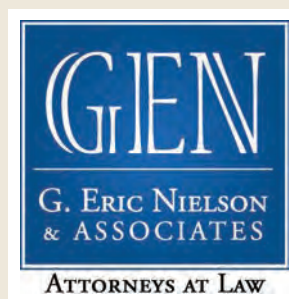
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## Lawyers: Meet Your Future Competition

by Marleigh Anderson and Edwin Wall

**L**izzie, Andres, Andrea, Ciara, Nicole, Tejita, Ann, Marleigh, and Kiyan. These are the members of the West High Mock Trial Senior Team (Team). With the help of Utah's legal community, these students were able to attend the Empire Mock Trial Competition in San Francisco, California in October 2017. This is the first time any team from Utah has competed in this national competition. The Team is a diverse group of hardworking high school students, all in the International Baccalaureate program. The Team is made up of nine students, including seven females and six minorities. Most, if not all, of the students want to be lawyers when they grow up. With luck, these students will be a part of the future of Utah's legal profession.



a once-in-a-lifetime invitation to participate in San Francisco because of the work by lawyer coaches Ed Wall and Sadé Turner. In addition to outstanding national teams, the Empire competition invited international championship teams to compete. The competition is held once a year in Atlanta, San Francisco, and New York. The competition is called the "Battle by the Bay." Teams from across the United States and elsewhere competed this year from October 5th to the 9th.

We, the West High Mock

Trial Club, have worked since the release of the case to the competitors, putting together our openings, closings, witness examinations, and motion arguments. We were required to put on the case from both the defense and plaintiff side. The case materials included forty-four exhibits and over 300 pages of facts, rules, procedures, pleadings, depositions, case law, and other materials.

### ABOUT THE COMPETITION

Unlike the Utah State Mock Trial Competition, the Empire Mock Trial Competition is an exclusive invitation only, international mock trial competition. The West High Mock Trial Club received

*MARLEIGH ANDERSON is a West High School International Baccalaureate Junior. She is the President of the West High Mock Trial Club and President of the West High Peer Court Club.*



*EDWIN WALL is a coach of the West High Mock Trial Team. Edwin is a Criminal Defense lawyer and has his own firm, Wall Law Office.*



## MEET THE WEST HIGH MOCK TRIAL TEAM

**Lizzie Peterson:** My name is Lizzie Peterson. My dad's from Utah, and my mom emigrated from the Philippines to Hawaii. I'm half white and half Filipino. I've always lived in Utah. I'm fifteen years old. I've gone to the Madeleine Choir School for nine years and then moved to West High. I'm going into my junior year and beginning my first year in the International Baccalaureate program. I'm almost a black belt in hapkido; I do debate, mock trial, Health Occupations Students of America, and volunteer at the University of Utah hospital in my free time. I enjoy mock trial because of the speaking and strategizing skills that I have developed and will continue to develop as I continue being part of this club. I like the strategizing and how similar it is to real trial work. I am constantly inspired by our coaches Ed and Sadé and look up to them as mentors. Not to mention how our team has bonded over the past few months. I love joking around with my team as well as preparing for our trials.

**Andres Fierro:** My name is Andres Fierro. I'm in the International Baccalaureate program at West High School. My whole family migrated from Northern Mexico about sixteen

years ago. Although we became financially independent, we still struggle(d) from time to time. I grew up learning in public schools, up until the fourth grade when I was transferred to the Madeleine Choir School. I always grew up thinking I was white in order to fit in and feel a sense of comfortability. I also grew up under the impression that I was a citizen, which I'm sadly not. My parents are really pushy in terms of school and grades, which I also began to push myself on. Besides mock trial I do cross country, Teen Council, and volunteer as a part of Peer Court. As a young gay man I enjoy mock trial because it's allowed me to develop both as a speaker and as a productive individual. Mock trial allows one the chance to adopt different perspectives regarding strategic planning and spontaneous responses to unexpected situations in court. The team mentality is vital. As a team we have bonded in ways other teams haven't. We're extremely open with one another, understanding of each other, and caring.

**Andrea Olta:** My name is Andrea Olta. I'm in the International Baccalaureate program at West High School. All of my family is from Spain. My dad, mom, brother, and I came to the U.S. on a visa when I was 8 years old and my brother was 6 because my

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mom found a teaching position in the states. We travel back to Spain some summers to be with family. I live in Layton and went to North Davis Preparatory Academy for middle school, and now I take the FrontRunner every day to do the International Baccalaureate program in Salt Lake City because education is really critical for me. In the future I want to go to college in Spain. I've been doing mock trial since 8th grade, and I love the new perspective I've gotten into the law world and the new opportunities I have received from it. Other than mock trial, I also play tennis, and I'm a part of the Layton Youth Court.

**Ciara Khor-Brogan:** My name is Ciara Khor-Brogan. I'm in the International Baccalaureate program at West High School. I'm fifteen years old and half Malaysian, half Irish. I love Mock Trial because I get to have a taste of a real life trial scenario. Taking part in Mock Trial is both interesting and exciting, and I'd love to take part in the Empire tournament as an opportunity to experience mock trial at a national level and gain skills that will help me in and out of the mock courtroom.

**Nicole Andrade:** My name is Nicole Andrade. I'm in the International Baccalaureate program at West High School. My father was born in Mozambique to a poor land owning family. When communism reached the country, they lost everything, and my father was subjected to extreme poverty. Seeing as his parents had only ever reached the end of elementary schooling, his parents pushed him to do good in school and he applied to a university in Portugal. After his schooling, he travelled to the United States to pursue a PHD in Black Hole Collisions. My mother was born in England where she and her four siblings also experienced food insecurity. Eventually, her father (my grandfather) decided to move the family back to the states (where he grew up). In the end, both of my parents found themselves at the University of Utah and eventually they married and had me, their only child. I grew up in accelerated programs and was and am continually pushed to strive for the top of the class. Mock Trial has been an amazing extracurricular experience in which I get to hone my skills in speaking and communication. Law as a future profession was never really on my mind until I joined Ed's team my sophomore

year of high school. Through all these amazing experiences, I'm glad to have found a family outside of school and be inside a circle in which everyone feels safe and is encouraged on their way to becoming the best they can be.

**Tejita Agarwal:** My name is Tejita Agarwal. My parents moved here from India, and I grew up in Utah. I went to Challenger School until I eventually transferred to West High School. Both of these schools are relatively diverse, and I was raised around people who constantly taught me to accept others. For one year of my life I went to a public school in Davis County where it seemed painfully obvious that I was different from everyone. I felt out of place often like when I was the only one in the class who had to take additional tests to make sure I knew English. That's why I came back to Challenger. I'm a rising sophomore,

and I do Mock Trial, Model United Nations, Health Occupations Students of America, debate, bagel club, cross country, and play piano. I really enjoy mock trial because I have amazing team members and coaches to look up to. Mock Trial gives me the opportunity to practice being well prepared and able to represent myself.

**Ann Kim:** My name is Ann Kim. I'm in the International Baccalaureate program at

West High School. My parents are both from South Korea, but my dad moved to Utah when he was six years old. I went to Juan Diego K-4th grade and I believed that I myself was white because of the lack of diversity at my school and the lack of exposure to different cultures. Even though I told myself I was just like the other kids, I never felt comfortable nor proud to call myself Asian. That didn't change until middle/high school, where I was part of a community where I felt comfortable and proud to say that I'm Korean. My mother and I volunteer every other Thursday and serve lunch to the homeless. I am currently part of the Draper Gives Back program where teens 15–18 volunteer to rebuild and repair parks, playgrounds, etc. I love Mock Trial and my team because of the multiple opportunities it has provided me and the accepting environment it provides. I love learning about law and working with my team to win cases.





**Kiyan Banuri:** My name is Kiyan Banuri. I'm a junior in the International Baccalaureate program at West High School in downtown Salt Lake City. Both of my parents were born and raised in Pakistan. My entire family follows the faith of Islam, which has been a discursive factor in modeling my subjectivity with who I am today. I was raised in Chicago and grew up in a diverse neighborhood. Moving to Salt Lake City, I have often found myself to be the only brown person in the room, and even the entire school. This has sparked my interest in law because I wanted to understand my rights and help others understand the court system that implicates people's lives. Besides Mock Trial, I am heavily involved in West High's policy debate team and travel nationally every month to compete in tournaments. I also have founded the Salt Lake Urban Debate League, a non-profit organization that helps students from lower-income backgrounds with argumentative resources, which often serves as a pipeline to high school debate and mock trial teams. I think that Mock Trial is an amazing activity to elucidate the ways in which a court functions and provides a professional environment. It improves speaking skills, which can be the key factor in determining almost every aspect in your life. Being able to travel nationally to the Empire tournament will be an amazing opportunity because it is the highest level of competition, meaning

that it will have the best speakers in the nation competing against each other. This benefits the entire community because a lot of us on the Mock Trial team plan to go into some form of political science or law when we grow up, and being exposed to the highest levels of competition can create a great incoming group of talented students.

**Marleigh Anderson:** My name is Marleigh Anderson. I'm in the International Baccalaureate program at West High. I have two learning disabilities, which made it difficult to succeed in school, but I'm proud of what I've accomplished through the constant support of my parents. Outside of school I'm in Mock Trial, Salt Lake City Peer Court, the president of Peer Court Club at West High School, Human (a peer led activism group with a focus on homeless youth), work as a caretaker to a disabled woman in my neighborhood, and a volunteer at the Youth Resource Center downtown. I love Mock Trial because it constantly challenges me to work with my team and make good arguments for a case. I have become more confident in myself and my identity because of Mock Trial, and the program itself helped me realize it's possible for someone like me to be an attorney. My Mock Trial team is very accepting of one another; our diversity makes us strong as a group.



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## REFLECTIONS FROM THE COMPETITION

Following the competition, some of the students put together “Reflections” about the event and what they learned:

**Lizzie Peterson:** This weekend in San Francisco was so fun and memorable. I want to go back again. I had a great time bonding with my team and enjoying the city. I learned so much from competing and preparing for this trial. The ballots we got back gave good comments to me on how to improve my performance for whatever comes next. It was exciting that I was awarded a trophy for being an “Outstanding Attorney.” I scored the fourteenth highest out of all the other attorneys in this competition! For the next competition, I know I can score higher if I keep in mind the critiques I was given and get off of my notes.

**Nicole Andrade:** This competition was an amazing experience for me and my teammates. It was the first time that I’ve ever traveled out of state for a school-related club, and I was so happy to be doing it with the good friends I’ve made on my team. We had lots of fun but also worked extremely hard. Having two trials within the course of the same day could become really exhausting at times.

I was glad to have the opportunity to meet teams from across the country and see their strategies and performances. We got a better idea of how to tackle our state competition this upcoming season. Unfortunately, Andres Fierro and I are seniors so this will have been our first and only year competing in Empire. However, through the people we met and the networking opportunities we’ve had, the two of us are set up with some great opportunities as college looms around the corner.

I wanted to thank you all personally for making this crazy, amazing trip happen for us. We were the first ever team from Utah to represent at an Empire national competition, and hopefully they will see us again in the future!

**Marleigh Anderson:** This competition gave me many leadership opportunities. I learned how to fundraise, organize, and plan an entire school trip. Alongside my team, I learned how to be a better team member and mock trial competitor. I’m so excited to compete this year in the regular Utah state competition with all the new information I know. The Empire Mock Trial Competition is unique because it gave me the chance to meet with other teams and discuss strategy in a competitive and fun environment. I was able to meet with teams from across the country and the world and to meet people with the same passion for mock trial as I have.

## SPECIAL THANKS TO THE UTAH LEGAL COMMUNITY

To take advantage of this once-in-a-lifetime experience, the Team had to raise over \$11,000 to cover its costs as West High School provides it no funding (or any class credit). The Team applied for and received a needs-based scholarship to cover the registration fee but still had a long way to go to get the funds it needed to attend the Competition. Thanks to Utah’s legal community and efforts spearheaded by Kate Conyers, the Team raised all of the money it needed as well as some extra funds to fund the team through the school year and beyond.

### Thank you to these generous sponsors:

- I.J. and Jeanne Wagner Charitable Foundation: \$4,500
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Thanks are also owed to many individuals who contributed financially and/or otherwise in providing space, supplies, and other things, including Federal District Court Judge Jill Parrish, Amy Oliver, Gil Athay, Loni Deland, Michael Langford, Scott Williams, David Finlayson, Herschel Bullen, Steven Killpack, Wojciech Nitecki, Carlos Navarro, Karthik Nadesan, Jiro Johnson, Professor James Holbrook, Jen Tomchak, Aida Neimarlija, Skye Lazaro, Heather Stokes, Adrianna Hebard, and Deb Larson.

## WHAT’S NEXT FOR THE TEAM

Currently, the West High Mock Trial students are preparing for the regular Utah mock trial season. They plan to go to Empire Mock Trial Competition in 2018 so they can build on what they learned and can continue to make a name for West High School and for Utah. Through the generosity of the legal community, the Team is financially set for the regular Utah season (not including national competitions). However, they are in need of three attorney coaches for the regular season, specifically for the Senior Team B and both Junior Teams. If you’re interested, please contact Edwin Wall ([edwin@edwinwall.com](mailto:edwin@edwinwall.com)) or Marleigh Anderson ([marleighba@gmail.com](mailto:marleighba@gmail.com)) for more information.





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## A Primer on Involuntarily Medicating Incompetent Defendants

by Blake R. Hills

In Utah, a defendant in a criminal case who is found to be incompetent to stand trial will be committed to the custody of the executive director of the Department of Human Services. *See* Utah Code Ann. § 77-15-6(1). In serious cases, the defendant will usually be placed at the Utah State Hospital for treatment to restore competency, which may involve medication. If the defendant refuses to take medication, the executive director can petition a court for an order authorizing the involuntary administration of antipsychotic medication. *See id.* § 77-15-6.5. Any such petition would be based on the request and recommendation of the doctors at the state hospital.

Few things are more frustrating for victims in these cases than when the defendant cannot be restored to competency because of a refusal to take medication. It can be particularly frustrating because the governing law in this area is not particularly well known. This article sets forth the basic framework for examining the issue.

### ALTERNATIVE GROUNDS

The United States Supreme Court has recognized that the Constitution permits the involuntary administration of antipsychotic medication to a criminal defendant in order to render the defendant competent to stand trial, if the state has shown a need for that treatment sufficiently important to overcome the defendant's protected interest in refusing it. *Sell v. United States*, 539 U.S. 166 (2003). The Court has also set forth the standard for examining this issue. But before a trial court even examines whether the need to medicate the defendant to restore competency outweighs the defendant's interest in refusing medication, the court must determine whether the defendant can be involuntarily medicated on alternative grounds. In brief, a defendant can be involuntarily medicated pursuant to *Washington v. Harper*, 494 U.S. 210 (1989), if the defendant is currently in danger of serious physical harm, manifests a severe deterioration in routine functioning, or poses a likeliness of serious harm to self or others. Because defendants can be involuntarily medicated on one of these alternative grounds without a judicial hearing, *id.* at 231, defense attorneys and prosecutors are likely to only deal with issues of involuntary medication that must be examined under *Sell*.

### SELL STANDARD

To determine whether a defendant can be involuntarily medicated to restore competency, the court must apply the four-part standard enunciated in *Sell*. "First, a court must find that *important* governmental interests are at stake." *Sell v. United States*, 539 U.S. 166, 180 (2003). "Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests." *Id.* at 181. "Third, the court must conclude that involuntary medication is *necessary* to further those interests." *Id.* Fourth, "the court must conclude that administration of the drugs is *medically appropriate*, i.e., in the patient's best medical interest in light of his medical condition." *Id.* This standard has been codified in Utah Code section 77-15-6.5.

### Are There Important Interests in Restoring the Defendant to Competency?

In regard to the first factor, the Supreme Court recognized that "the Government's interest in bringing to trial an individual accused of a serious crime is important." *Sell*, 539 U.S. at 180. "That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances the Government seeks to protect through application of the criminal law the basic human need for security." *Id.*

In short, the state will be able to show that it has an important interest in taking a serious case to trial. However, this interest must be balanced against the possibility that a defendant may be confined in an institution for the mentally ill for a significant

*BLAKE R. HILLS has been a career prosecutor for over seventeen years. He is currently a Prosecuting Attorney for Summit County.*



portion of the time that he or she could serve as a sentence for the criminal charge. *See id.* Essentially, the longer a defendant has been confined to an institution and the shorter his or her remaining sentence would be after conviction, the less weight the state's interest will have. *See id.* However, the mere fact that a defendant may face confinement pursuant to civil commitment will not defeat the state's interest in bringing the defendant to trial because "the Government has a substantial interest in timely prosecution. And it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost." *Id.*

Unfortunately, the Supreme Court did not define what a "serious offense" is for the required analysis. However, the Utah Supreme Court has held in one case that the first- and second-degree felonies at issue were "sufficiently serious" because of the potential length of sentence. *State v. Barzee*, 2007 UT 95, ¶ 40, 177 P.3d 48. The Utah Supreme Court also noted that courts in other jurisdictions have held that crimes with a maximum sentence of ten years are serious enough to create an important government interest in going to trial. *Id.* The bottom line is that for most cases involving first- or second-degree felony charges, the state will have little trouble establishing that it has an important interest in restoring a defendant to competency to proceed to trial.

### Will Involuntary Medication Significantly Further the Important State Interests?

In explaining the second factor, the Supreme Court stated that the court "must find that administration of the drugs is substantially likely to render the defendant competent to stand trial" and that "administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." *Sell v. United States*, 539 U.S. 166, 181 (2003). The Utah Code likewise divides this factor up into these same two subfactors. *See* Utah Code Ann. § 77-15-6.5(4)(c)(ii).

The Supreme Court did not define the term "substantially likely" as used in the analysis, but the Utah Supreme Court has. The Utah Supreme Court has stated that "to the extent that such a [substantial] likelihood can be quantified, it should reflect a probability of more than seventy percent." *Barzee*, 2007 UT 95, ¶ 45. This definition of "substantial likelihood" as a percentage makes this factor tricky.

Unless a defendant has previously been restored to competency through medication, no estimate about the odds of restoration to competency through medication can be made based on the

characteristics of the defendant alone. Thus, reference must be made to the restoration rates of patients similarly situated to the defendant. Indeed, the majority opinion in *Barzee* indicates that known restoration rates are a relevant consideration for this issue. *Id.* ¶ 94. The studies have shown varying rates of restoration, depending on the type of mental disorder and the type of medication used. Therefore, expert testimony will be required to show that the medication proposed for the defendant has at least a 70% success rate in restoring competency to similar individuals.

Neither the United States Supreme Court nor the Utah Supreme Court used a percentage to define the requirement that the medication be "substantially unlikely to have side effects" that lead to an unfair trial. The state can establish this factor by presenting expert testimony that there is a plan to minimize side effects and that the defendant's condition will be monitored in order to modify or stop medication if significant side effects develop. *See United States v. Gallaway*, 422 Fed. Appx. 676, 681 (10th Cir. 2011).

It should be noted that a court cannot properly perform the required analysis based only on generalized expert testimony that the defendant will be medicated with something. Although the analysis does not require the expert to identify one and only one

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possible medication, the expert must identify a treatment plan with a range of possible medications that could be used. *See United States v. Chavez*, 734 F.3d 1247, 1254 (10th Cir. 2013).

This factor (broken down into its two subfactors) will likely be the most significant factor in the analysis. Because it is so dependent on expert testimony, it also is likely to be the most contentious.

### Is Involuntary Medication Necessary to Further the State's Interests?

In regard to the third factor, the Supreme Court stated that the court “must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.” *Sell v. United States*, 539 U.S. 166, 181 (2003). “And the court must consider less intrusive means for administering the drugs . . . before considering more intrusive methods.” *Id.*

This factor is fairly straightforward. For the state to satisfy this factor, it must present expert testimony that reasonable less intrusive means such as educational and individual or group therapies have been attempted and have not significantly improved the defendant's symptoms or furthered progress towards competency restoration. Essentially, this factor should not be too difficult to establish if the expert testifies that the reasonable alternatives to medication have been tried and they have not been successful. There is no requirement that alternatives to medication be tried for any specified amount of time, but the time may well be a consideration. *See Gallaway*, 422 Fed. Appx. at 681 n.1 (noting that a year of non-medicated treatment had passed with no improvement before the court ordered involuntary medication).

### Is Administration of the Medication Medically Appropriate?

As to the fourth factor's question of whether administering medication is in the patient's best medical interest in light of his or her medical condition, the Supreme Court stated that the “specific kinds of drugs may matter” because “[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.” *Sell*, 539 U.S. at 181. When a court examines this factor, the potential penalty the defendant will face “is not a relevant consideration.” Utah Code Ann. § 77-15-6.5(5).

Whether administration of medication is medically appropriate will, of course, depend on any patient's particular mental disorder and situation. However, since the request for involuntary medication of the defendant essentially comes from the doctors at the state hospital, there will clearly be expert testimony from those doctors

that administration of medication is medically appropriate. Indeed, administering medically inappropriate medication would result in a defendant who is still incompetent, which defeats the purposes of the doctors' efforts to restore him or her to competency.

There is little question that anti-psychotic medication is medically appropriate. Behavioral and psychological “therapies are often not adequate by themselves to treat psychotic disorders.” Br. of Amicus Curiae American Psychological Association at 12, *Sell v. United States*, 539 U.S. 166. In addition, “[a]ntipsychotic medications are not only an accepted but often essential, irreplaceable treatment for psychotic illnesses,” and there is a “dearth of comparably effective alternatives to antipsychotic medication.” Br. of Amicus Curiae American Psychiatric Association & American Academy of Psychiatry and the Law Supporting Respondent at 13 & 25, *Sell v. United States*, 539 U.S. 166. Even the dissent in *Barzee* recognized that “antipsychotic medication is the ‘cornerstone’ of treatment for all psychotic disorders and ‘has been for the past fifty years.’” *State v. Barzee*, 2007 UT 95, ¶ 71, 177 P.3d 48.

In short, administration of antipsychotic medication is the standard medically appropriate treatment. The only real question for this factor will be about what the most effective medication is to use.

## CONCLUSION

Whether an incompetent defendant should be involuntarily medicated involves complex decisions for medical professionals, attorneys, and the court. For defense attorneys and prosecutors, the quest should be to simplify the issues as much as possible. Some of the factors are straightforward and will likely not involve great dispute. For instance, in most cases involving first- or second-degree felony charges, the state will have little trouble establishing that it has an important interest in restoring a defendant to competency. The major factors in dispute will be whether alternative therapies can restore the defendant to competency without medication and whether medication is substantially likely to result in restoration but unlikely to cause side effects that prevent the defendant from having a fair trial. If the defendant cannot be restored without medication, the medication is substantially likely to result in restoration, and the medication is unlikely to cause significant side effects, the court will almost certainly conclude that medication is medically appropriate. Keeping the complexity of these factors in mind will help practitioners ensure that the rights of the defendant and the state are properly balanced.

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# Tapping into the Power of the New Utah State Bar Websites

by Utah State Bar Innovation in Practice Committee

Chaired by Nate Alder and John Lund in 2014, the Futures Commission of the Utah State Bar was created to “gather input, study, and consider the ways current and future lawyers can provide better legal and law-related services to the public, especially to individuals and small businesses in Utah.” See Futures Commission of the Utah State Bar, Report and Recommendations on the Future of Legal Services in Utah (July 29, 2015), available at [www.utahbar.org/bar-operations/utah-bar-futures-project/](http://www.utahbar.org/bar-operations/utah-bar-futures-project/). Two of the five goals recommended by the Commission concerned leveraging technology and improving access to justice. These led to the creation or modification of three primary services: the updated website, LicensedLawyer.org, and the new member Practice Portal.

These sites are dedicated to improving the ability of prospective clients to find attorneys that can meet their needs and to provide attorneys with tools, services, and information to help meet those needs. Each of these projects was designed to operate in a mobile format to reach a wider audience and to recognize the continued growth of mobile demand. Development of these projects was overseen by volunteer committees of bar members and leadership making each of them “for lawyers by lawyers.”

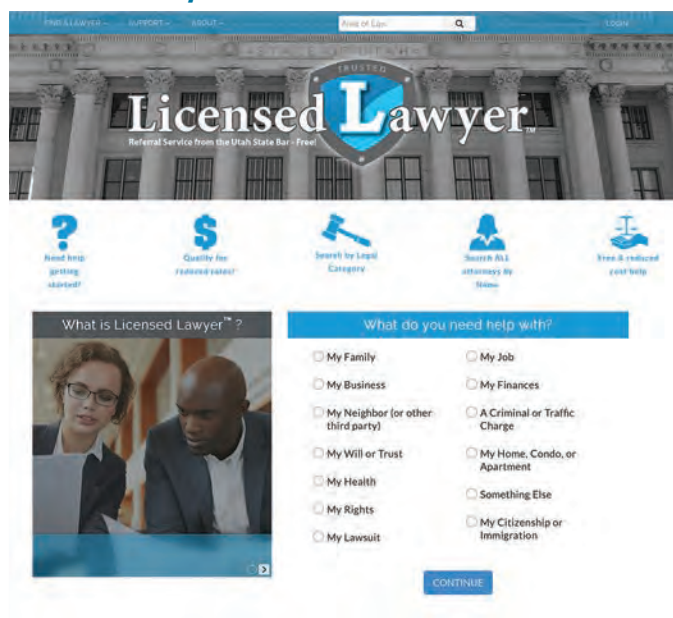
## New Utah Bar Website

At the 2017 Fall Forum Bar President John Lund released the new website. Attorneys and the public should find the new website



easier to navigate, more responsive to searches, and more visually appealing. The website’s master menu has been updated to organize the site into two primary sections, one for attorneys and one for the public with quick links to Licensed Lawyer, the Practice Portal, and an overview of bar operations and regulatory functions. Content is more tightly focused into groups with an emphasis on quickly completing common specific tasks. Some content has been shifted to other independent sites, such as the new *Bar Journal* website located at [barjournal.utahbar.org](http://barjournal.utahbar.org), to recognize their unique content and identity.

## Licensed Lawyer



The “oldest” of the new systems, LicensedLawyer.org, is an attorney-client outreach tool to help guide the public to Utah attorneys. LicensedLawyer does this through a simple Q&A process or through “power searches” to quickly zero-in on a suitable service provider with links to get them connected. To meet the access to justice needs identified in the futures report, the site also provides means testing to help the public locate low

cost legal services, free clinics, and those attorneys that provide alternative fee structures such as flat fee, limited scope, and support for modest means.

LicensedLawyer is free to attorneys and the public. Utah attorneys have a profile that they can update by logging into the system using their bar login and passcode and then clicking on the My Dashboard link. From here, attorneys enter their practice-specific information, the fee types they support, and the parts of the state in which they offer their services. These profile options, along with other service types, will continue to be developed over time, further strengthening the system and making it the single point for Utah citizens, or citizens outside of Utah, to find local counsel.

Other states have expressed an interest in participating. Colorado has recently migrated their membership into the system for their citizens, with Montana waiting in the wings to join the system. These new sister bars will expand the reach and depth of the services offered.

### Practice Portal

One of the most exciting new tools is the Practice Portal. The Practice Portal consists of a series of “cards” wrapped in a common interface, which allows attorneys to access many of the

practice tools they use every day without having to go to different websites for each.

Attorneys can select from a list of cards to display, all of which can be positioned on the page based on the attorney’s preference. The practice portal comes with a default set of cards, which include the Utah Bar Dashboard card, the Member Search card, the CLE Management card, the practice management tools Clio and LawPay cards, efilng services Tybera and GreenFiling cards, a LicensedLawyer card, Office 365 Suite and GoogleDrive cards, several specialized Casemaker cards, and information cards from the court and the legislative branch, to name just a few.

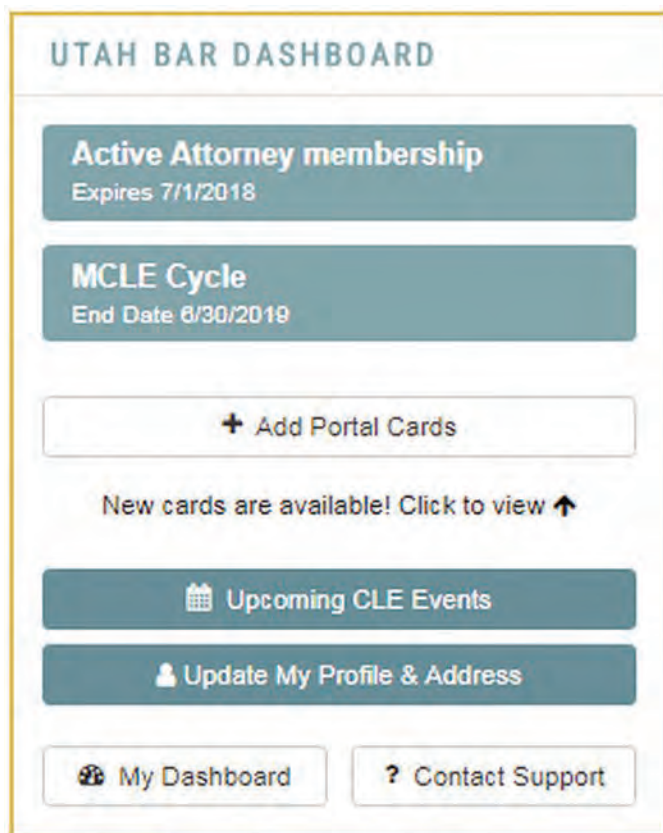
Cards with a dollar sign indicate third-party cards for which a subscription fee is required. Cards with an arrow pointing to a door indicates cards for which no additional sign-on is necessary. (Whether additional sign-on is necessary is determined by the third-party provider.)

The Utah Bar Portal Control is the anchor card, and the one card that an attorney cannot move or delete from the screen. This card provides a snapshot of an attorney’s current licensure and MCLE cycle status along with controls to access their bar record and update their information. From this card an attorney can review and add additional cards to their portal, quickly access bar events, and contact support should they need it.

### The Future

Bar leadership is committed to continuing to enhance these sites and services. This will mean adding additional partner services such as the online storage service DropBox or contract work service UpWork into the practice portal; adjusting the Utah Bar site as the practice continues to evolve; and, expanding the scope and reach of LicensedLawyer.org to meet the needs of Utah citizens. A key component of this growth will be the feedback we receive from the members and the public. This guidance will be sent on to bar leadership and the Innovation in Practice Committee, which will serve as an oversight group for the platforms and their content. You can contribute by sending your feedback to [SpecialProjects@utahbar.org](mailto:SpecialProjects@utahbar.org).

The leadership of the Utah State Bar looks forward to helping attorneys meet the challenges of the future while working to ensure that the people of Utah have access to the quality representation and counsel that Utah attorneys provide.





## Independence Day for an Innocent Man

by Team DeMarlo

Independence Day came a bit early this year for a Nevada man. On June 30, 2017, attorneys from Richards Brandt Miller Nelson (Richards Brandt), working in conjunction with their local counsel Weil & Drage and the Rocky Mountain Innocence Center (RMIC), saw three years of intense legal effort come to fruition when the Nevada Department of Corrections released DeMarlo Antwin Berry from custody after he spent more than twenty-two years in the Nevada prison system for a murder and robbery committed by someone else.

DeMarlo's journey from imprisonment to freedom is a compelling if disturbing example of what can go wrong when the ideals of the criminal justice system are abandoned or abused to other ends. And it is an example of what attorneys committed to those ideals can accomplish, not only for the exoneree and the system, but for themselves.

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**1994:** A young African-American male enters a North Las Vegas Carl's Jr. intent on committing robbery. When he exits the store and flees the scene in a waiting vehicle, the night manager has been shot execution style and lies dead or dying behind the counter. Las Vegas is outraged.

All but one eyewitness describes the perpetrator as roughly six feet tall and weighing 200 pounds or more. Anonymous tips identify two alternative suspects: Steven 'Sindog' Jackson, six

feet tall, 230 pounds, a leader of the San Bernardino Crips and a familiar face with a reputation on the streets of North Las Vegas, and eighteen year-old DeMarlo Berry, five feet, eight inches tall and 150 pounds who, as it turns out, was in the parking lot of the Carl's Jr. that night, along with several others, watching Jackson through the restaurant's windows. Las Vegas police never investigate Jackson because, as the state's attorney would explain later to the habeas court, police thought Jackson was the driver of the getaway vehicle. Instead, they arrest DeMarlo.

No physical evidence ties DeMarlo to the crimes, and he professes his innocence from the outset. Fearing for his family's safety, he refuses to tell authorities that it was a Crip – Steven "Sindog" Jackson – he saw in Carl's Jr. that night. But when it became clear that authorities weren't going to realize their mistake and were, instead, intent on pinning the crimes on him, DeMarlo tells authorities that it was Jackson he saw. It was too late. Authorities had their perpetrator. Four eyewitnesses who had initially described the perpetrator as being six feet tall, etc., had been shown headshot photos of DeMarlo – but never a photo of Jackson, let alone full-body images of DeMarlo and Jackson in the same line-up – and are "nudged" to point at DeMarlo. They'd been told by the authorities that they knew DeMarlo committed the crimes and just needed the witnesses' "help" to bring DeMarlo to justice. They were also told that the night manager was the father of two young children (he wasn't) and was killed execution style. And, at the invitation of authorities,

*TEAM DEMARLO included: Samantha Wilcox, Lynn Davies, Craig Coburn, Steve Bergman, Jack Reed, Joel Kittrell, Lenora Spencer, and others at Richards Brandt; John Wendland and others at Weil & Drage, and Jencie Anderson, Jennifer Springer and others at RMIC. To learn more about the Rocky Mountain Innocence Center, visit: <http://rminnocence.org/>.*



they attend DeMarlo's arraignment and pretrial where they see DeMarlo seated at defendants' table shackled and dressed in prison orange. How could it not be him?

**1995:** At DeMarlo's trial, the four eyewitnesses – including one who initially told police that he could not identify the perpetrator because he didn't see his face – identify DeMarlo as the perpetrator. But the coup de grace that seals DeMarlo's fate is delivered by "jailhouse snitch" Richard Iden – a five-time convicted felon facing multiple additional felony charges and a habitual criminal sentence – who tells the jury that DeMarlo confessed to the crimes while they shared a holding cell. Iden walks out of the court room a free man, and DeMarlo, now nineteen, begins serving two consecutive life terms for the Carl's Jr. crimes.

**2012–2013:** The RMIC agrees to investigate DeMarlo's case. A University of Utah law student serving a clinical externship with RMIC selects DeMarlo's file from a stack of files and begins her investigation. When she's done she has a signed declaration from Jackson – who is serving life without parole in California for murder – confessing to and detailing the Carl's Jr. crimes, and absolving DeMarlo. She also has a signed declaration from

Iden admitting that he lied when he testified that DeMarlo confessed to him in order to avoid prison; that authorities supplied all the information he knew about the crimes when he testified; that pending DeMarlo's trial, authorities twice paid his expenses to visit his ailing father in Ohio; and that authorities paid for his lodging and expenses during DeMarlo's trial. And she has a signed declaration from a female acquaintance of Jackson saying that he admitted committing the Carl's Jr. crimes in her presence shortly after committing them.

**2014:** Richards Brandt and Weil Drage, working *pro bono* with RMIC, file a Petition for Writ of Habeas Corpus, supported by the Jackson declaration and other declarations obtained by RMIC, in the 8th District Court for Clark County, Nevada. They ask the court for an evidentiary hearing where DeMarlo can present this newly-discovered evidence and prove his actual innocence. The state moves to dismiss DeMarlo's petition, trivializing DeMarlo's evidence in the process. The district court denies DeMarlo's request for a hearing and dismisses his habeas petition for reasons neither the state nor DeMarlo argued, deeming DeMarlo's evidence as "not credible." DeMarlo's legal team appeals.

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**2015:** Richards Brandt argues DeMarlo's appeal to the Nevada Supreme Court in November, asking the court to simply ask itself what DeMarlo's jury would have done had they heard Jackson's confession, Iden's recantation, and DeMarlo's other newly-discovered evidence of innocence. In an opinion issued December 24, the Nevada Supreme Court reverses the district court and orders it to give DeMarlo an evidentiary hearing, stating "this new evidence, *if true*, shows that it is more likely than not that no reasonable jury would convict Berry beyond a reasonable doubt." *Berry v. State*, 363 P.3d 1148, 1159 (Nev. 2015).

**2016:** Reinvigorated, Richards Brandt and Weil Drage renew their efforts to present DeMarlo's evidence of actual innocence at an evidentiary hearing, including a second three-hour interview of Jackson during which he provided additional information regarding the Carl's Jr. crimes – information he previously refused to provide RMIC – that would prove critical in securing DeMarlo's freedom.

In late 2016, DeMarlo's legal team learns that the Clark County District Attorney's office has created a Conviction Review Unit (CRU) and, just as importantly, that the newly-formed CRU is headed by a career public defender experienced in defending capital and other felony cases. And they also learn that the CRU is interested in DeMarlo's case.

**2017:** DeMarlo agrees to forego his scheduled evidentiary hearing and submits his claim of innocence to the CRU. The CRU interviews Jackson (who now has court-appointed counsel) a third time, interviews DeMarlo, and completes its investigation in May. On June 14, the CRU advises DeMarlo's team that the Clark County District Attorney has accepted the CRU's recommendation that DeMarlo be released from prison. Two weeks later, the same district court that had dismissed DeMarlo's habeas petition in 2014 signs an order vacating DeMarlo's criminal convictions, dismisses all charges against DeMarlo with prejudice, and orders his release from prison.

At 6:00 AM on the morning of June 30, two hours earlier than agreed, prison officials drop DeMarlo off in the parking terrace of the Nevada Division of Parole and Probation in downtown Las Vegas. Wearing prison blues, DeMarlo does what he knows he wants to do – what he needs to do. Taking his bearings in a city that has changed dramatically since 1995, DeMarlo walks the two or so miles to the home of the woman who had raised him, his grandmother, knocks on the door and, in an emotional reunion, proves to her once and for all what he had been telling her all along – that he was innocent.

## LESSONS LEARNED

Securing DeMarlo's freedom was a team effort. Nine Richards Brandt attorneys (and several law clerks) worked to secure DeMarlo's freedom; four (including the former RMIC extern) from beginning to end. Weil Drage served as 'boots on the ground' in Las Vegas and, along with RMIC, brought valuable insight and perspective to the case. There were countless meetings, phone conferences and side bars vetting and modifying strategies, prompting one participant to say, "I wish DeMarlo could see this." Witness statements, trial transcripts, and other court records were scrutinized. Multiple trips to Las Vegas and phone conferences occurred to update and advise DeMarlo. Witnesses were tracked down and interviewed, then interviewed again. Expert witnesses were retained, and expert reports prepared. Family and friends pitched in to defray expenses and supported and encouraged team members behind the scenes.

So what did we learn? Well, given that we told DeMarlo as we parted ways after our first meeting in 2014 that someday we would walk him out of Nevada's Southern Desert Correctional Center a free man, we learned that we had a lot to learn.

One of the first things we learned and had begun to suspect is that our criminal justice system fails the accused more often than one would think, and far more often than one would hope. We learned, if results are the measure, how to prosecute an actual innocence habeas case, even though we never took DeMarlo's case to trial. We also learned from Jackson that the guilty often have a conscience and are wont to do the right thing, even at great risk to themselves, if given the opportunity. And we learned that the mission of RMIC and other innocence centers – to prevent and correct wrongful convictions – is critical if we are to be, as we claim, "a nation of laws, not men."

But most importantly, we learned that lawyers who are truly committed to a cause and willing to do the work can accomplish great things. In DeMarlo's case, not only were we committed and willing to do the work, we were inspired. For even after twenty-two years behind bars for crimes he did not commit, DeMarlo never lost hope, clung to his humanity, and kept his sense of humor.

As for our reunion with DeMarlo later on that hot June morning, amidst all the tears and hugs and laughter, DeMarlo reminded us of the promise we made to him in 2014 – that someday we would walk him out of Nevada's Southern Desert Correctional Center a free man – then smiled and said, "Here we are." For a lawyer, it doesn't get any better than that.

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## Script for Mock Board Meeting of Pure Play, Inc.

by James U. Jensen

### INTRODUCTION

This meeting is for board training purposes. The Play illustrates legal, ethical, and governance issues encountered by private companies that have taken in outside capital. Embedded numbers lead to points of discussion by counsel during the “intermissions.” This is not legal advice. Attendees should seek separate legal advice on any matter discussed here.

### PLAYERS

**Able Meister:** Independent Director and Chair; holds common, Series A, and options

**Betcher Pay:** CEO Director; a founder; holds common and options

**Carol Singer:** Independent Director; holds Series A and options

**Dag Namit:** Independent Director/Investor; holds Series B shares

**Esher B. Good:** The Sr. VP & General Counsel (GC); holds common and options

**Fran Tastic:** The Sr. VP & CFO; holds common and options

**Grinn N. Barrett:** Independent Director; holds Series A and options

### ACT I

*[The Meeting begins with Able, Carol, and Grinn seated at the table. Waiting nearby are Betcher, Dag, Fran, and Esher.]*

**ABLE:** OK, let’s get started. Carol and Grinn, we comprise an Executive Session of the Board meeting. [1] Generally, we have not recorded minutes for these sessions, and I just give a summary report into the full meeting minutes. Let’s start with Board nominees. Carol?

**CAROL:** I know that our new investment contract gave us needed cash and gave Deep Pockets the right to name a Director, [2] but I was surprised that Deep’s long time CEO, Amazon Grace, was not named. I don’t know Dag Namit, although I hear good things about him. I just ask if we should go back to Deep and ask for Amazon himself.

**ABLE:** Well, I checked with Escher, our General Counsel, and the Agreement gives Deep the sole right to appoint. Grinn, what do you think?

**GRINN:** Well, as you requested earlier, I have not kept my notes from the previous board meeting [3] when we addressed the term sheet for the Deep deal. But I recall that it included a “Director Nominee” provision. I know both of these folks. Candidly, I think Dag will fit our board culture [4] better than Amazon, anyway. Amazon has a well-earned reputation of being occasionally wrong but never in doubt.

**CAROL:** Well, we also have pending the request from Betcher, our CEO, that we add to the board Betcher’s favorite consultant. What’s the name? Flatter Ing. I take the position that a nominee from the CEO is not an “independent Director” so appointment of Flatter would violate our policy of having only one Director from management. [6]

**GRINN:** I accept your point, Carol. But we already have a mix of a “working Board” and an “oversight Board” because each of the three of us is engaged to some degree, with assisting management. So our pure role of oversight is compromised in that regard. [7] Moreover, Deep Pockets is known to stay close to management in practice and to contract for control of various decisions by written agreement. [8] And I agree that adding Flatter wouldn’t add a new perspective to the Board.

**ABLE:** I agree, and I see no need to act now. I want us to do a self-assessment [9] to identify the talents and skills we have now so we’ll know what to add to our Board. We can just expand the Board by motion and get an election with the next

*JAMES U. JENSEN practices at ClearWater Law & Governance Group. He has served on several for-profit and non-profit boards. He was a founder of the Green River Conference on Corporate Governance, the Utah Ronald McDonald House, and the MountainWest Capital Network.*





shareholders' meeting, and we need to be sure that Betcher and the other officers support this approach. Our early "Angel Investors" accepted the fact that none of them would be on our Board and that we would add people as the need arose. [10]

In building the agenda with Betcher for the full Board meeting, [11] I suggested to Betcher that I thought the Board would decline to add anyone else at this time. So I expect that Betcher is OK with that approach.

**CAROL:** OK. I will accept your suggestion.

**GRINN:** I'm fine, too.

**ABLE:** Great. Before we bring in the others, let's discuss compensation for Dag. [12] I think it is fairly common that a contracted member is not compensated. If you will permit me, I will discuss it off-line with our GC. So we can keep moving, I will bring it back to a further Executive Session meeting if [13] it appears that compensation is expected. Will that be acceptable?

**CAROL:** That sounds find.

**GRINN:** Good.

*[End of Act I – the lights go down.]*

**STATION BREAK:** The Narrator, Players, and guests will discuss legal, ethical, and governance issues presented in Act One:

1. Executive Session and committee meetings frequently have no minutes. Their recommendations are summarized into the regular meeting minutes. Audit Committee minutes are common, however.
2. Investors frequently negotiate for the right to appoint a Director. Delaware cases have confirmed the full fiduciary Director duties for such Directors.
3. Private notes of Board meetings are discouraged and can be troublesome in litigation.
4. The writings address the advantages and disadvantages of Director Board terms, and the writers discuss productive Board culture vs. downside of imbedded attitudes.
5. Board diversity is much in the news. Some European countries have mandated minimum female representation as high as 20% to 40% for public companies.

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6. SEC rules require a majority of outside Directors (and exclusively outside Directors on the Audit Committee). Many private companies have moved in that direction too.
7. Note the trade-off that exists between traditional views of Board oversight and activist views of a working Board. Note the challenge to independence where Directors create (and execute) corporate strategy.
8. Some professional investors contract to move some decisions from the Board to shareholders or to require super majority votes on some issues. This compromises the traditional view of Board oversight.
9. Board self-assessment (required by SEC rules for public companies) is commonly integrated with Director selection.
10. This discussion demonstrates that this Company lacks specific representation for minority shareholders.
11. An independent Board chair frequently helps to build the Board agenda.
12. Directors set their own compensation. But some litigation and “say-on-pay” developments have put a light on potential for self-serving activity. Recent Delaware cases reflect the challenge of “interested Director” issues when setting Director compensation.
13. An effective chair can manage some matters off-line when trusted by the other Directors.

## ACT II

*[The lights come up. Betcher, Dag, Fran, and Esher have joined Able, Carol, and Grinn.]*

**ABLE:** Welcome, Dag. And welcome Betcher, Fran, and Esher. Dag, I believe that you met everyone as part of your due diligence. Esher, will you take minutes of the meeting? We are now in full session. The minutes will reflect that all Board members are present and that they have received and reviewed the Board materials ahead of the meeting. [1]

Will you please reflect in the minutes, Esher, that the three Independent Directors held an Executive Session before this meeting. Based on our review and the Company’s contractual obligations, this ad hoc committee recommends that the Board expand its positions by one and that Dag be named to fill that vacancy. The Chair will entertain a motion.

**CAROL:** I move the Board adopt the recommendation of the Independent Directors and that Dag be added to the Board to fill a newly created vacancy.

**BETCHER:** I’ll second.

**ABLE:** All in favor.

*[The 4 Directors, Able, Betcher, Carol, and Grinn say “aye”.]*

**DAG:** Thank you. I look forward to working with you to help the Company reach the potential we see.

**ESHER:** Able, I have just one clean-up item. Dag, will you stay after the meeting for a few minutes to get your “Board Book.” [2] And we can work on adding you to our D & O insurance coverage. [3] Oh, and one more thing; you will need to sign the Company’s standard “Director’s Service Agreement.” [4]

**DAG:** Thanks. I will be happy to. I was going to work with Betcher on another matter, [5] so I will just come by your office after that.

**ABLE:** Betcher, we are also recommending that we conduct a form of self-assessment before we seek further nominees. Esher will drive the process, and everyone will respond to Esher’s memo.

**BETCHER and DAG:** Fine.

**ABLE:** Esher, please put that in the minutes then. Yes, Betcher?

**BETCHER:** I assumed we were headed in that direction, and Fran and Esher have already begun. But I have asked Esher to address the question of confidentiality in this sensitive area of self-assessment.

**ESHER:** Briefly, it is fairly common for counsel to collect and consolidate the several responses on a Board self-assessment drill. And it is fairly common that no copies of the document be retained, except the final consolidation. [6] This will be our approach.

**CAROL:** Is there anything sinister about that?

**ESHER:** No, not at all. It is just careful house-keeping – just as the official minutes are the only record of the Board’s deliberations, we will take the same approach here.

**DAG:** That is my understanding from other Boards we work with. And the Nav-gri recommends this approach too.

**CAROL:** Nav-gri?

**DAG:** You know, the National Association of Very Greedy and Rich Investors. Nav-gri [7] has some good materials on self-assessment for private companies, and I will send a reference to Betcher.

**ABLE:** Good. Let's turn to agenda item number 2. Approval of the minutes. You have all read the draft minutes. [8] Are there any corrections?

**BETCHER:** Fran has raised with me the issue of our Equity Incentive Plan as addressed in the contract with Deep Pockets. [9] Fran?

**FRAN:** You may have noticed that the minutes fail to mention Deep's veto rights on any changes in the plan. I think the minutes should reflect this right, and Esher has some simple added text to cover this.

**ABLE:** Good. Assuming that is acceptable to everyone, are there any other corrections? Hearing none, may I have a motion?

**CAROL:** I move approval as amended.

**BETCHER:** Seconded.

**ABLE:** All in favor? Dag will abstain as he was not then on the Board.

*[All Directors say "aye".]*

**ABLE:** Then the minutes will be finalized as approved and filed with the records of the Company. Let's move to agenda item number 3: the business and financial presentations. Betcher, you have the floor.

**BETCHER:** I wanted you to hear from our Sales Vice President, but [10] I made the hard call to send the Sales Vice President to an important client meeting today. So I call your attention to Tab 3. The good news is the bad news. The trends continue. Last quarter our sales were on target with 2% over the prior quarter and up by 12% over the same quarter year-on-year. But the sales cycle is further extended, receivables are now about sixty-six days, and our quantity purchases of raw materials have improved our gross margin, but are putting a real pinch on cash. We have had to delay many needed promotional items and cut back on R & D to find the cash. So even with the Deep Pockets' cash, our growth is hampered with cash constraints. [11] Fran, what more do you want the Board to see?

**FRAN:** Just this one note. We continue to be talent constrained. As you read in the next item, the issue of human resource

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management at our semi-autonomous subsidiary, [12] Easy Does It, Inc., continues to soak up senior management time. But I am getting ahead of myself. So please just look at page 19, [13] sources and uses of cash. We will experience our largest cash shortage out nine months in the amounts shown there. [14] Then it starts to turn around.

But...

**BETCHER:** Fran, that sets the table nicely for the next item on the agenda. Much of what Fran was describing was operational, and I don't want to bother the Board with it. So can we move to Tab 4?

**ABLE:** Assuming that's acceptable, Esher, will you just reflect in the minutes on this item that the Board considered the materials and heard a presentation from the CEO and CFO? [15]

**ABLE:** At this point, then, let's move to Tab 4 – the proposed funding. Betcher, you have the floor.

**BETCHER:** Thank you. Based on our need for more cash, I propose a convertible debt offering [16] using Deep Pockets [17] as our lead investor. We can do it quickly and the convertible debt will delay the need to strike a "valuation" for the Company, [18] even if for just a few months, so no need to think about a "down-round." Fran or Esher?

**FRAN:** I will just add that the proposed term sheet in the Board materials was jointly prepared by us and Deep Pockets. We are really pleased to have this Deep Pockets cash.

**ABLE:** Betcher, will you briefly describe the other approaches that you considered?

**CAROL:** Just a minute, everyone. Should we discuss these items without the help from Dag for the time being – since he is potentially on the other side?

**ABLE:** Good point Carol. Dag, will you step out for a bit, so we can consider your proposal openly. [19]

**DAG:** That is as it should be. I will just answer some calls while I wait. You know, as a VC, I have a short attention span anyway.

*[Dag rises and moves toward the door. The lights fade.]*

**STATION BREAK:** The Narrator, Players, and guests will discuss legal and governance issues from Act II;

1. It is best practice to send Board materials to Directors in advance.

2. The electronic Board Book is one of several tools to keep Directors informed.
3. Management and Board work together on the scope of D&O Insurance and any double coverage questions.
4. Opinions differ on the merits of using a Director's signed agreement versus reliance on the known fiduciary duties of Directors.
5. Every Board should address the ways in which Directors stay informed and interact with company personnel,
6. The Company will have its own records retention policy, but Board members may have a separate rule concerning their separate notes.
7. There are many sources of information and expectations of information sharing.
8. It is common to have Boards express timely approval of minutes. But this practice can produce complications and its implications should be understood.
9. One of the major demands on Boards is their role in equity issuances, valuations, and pricing. Complications can arise in the interplay between pricing of common and pricing of preferred.
10. This discussion illuminates a source of management information and the potential for CEO filtering. Director access to other executives is also shown. See also note 7.
11. Note the separate roles of management and Board in strategic planning.
12. A Board can lose some oversight by allowing the Board of a subsidiary to be populated only by executives.
13. Voluminous materials can force the Board to deal with the urgent at the expense of the essential.
14. Cash short fall must certainly be an important Board matter.
15. Minutes must balance brevity with thoroughness. Unanimous consent resolutions are not eligible for the protection of the "business judgment rule" because they reflect no Board deliberations.
16. Convertible debt is another major Board issue with many subtle and vexing implications-sole funding by an existing

investor is replete with issues.

17. Different funding from the same investor presents thorny conflicts issues and tough oversight challenges.
18. The use of convertible debt can delay company valuation until a later event is completed, but it brings other challenges.
19. This is just another example of the subtle ways in which a Board can encounter a potential Director conflicting interest transaction.

### ACT III

*[The lights come up; Dag is absent.]*

**CAROL:** May I start? This is as weak as water. I have grave concerns about this proposal. I see the potential that the Company can get deeply into negotiations with Deep, no pun intended. They must have a back-up alternative.

**ABLE:** Don't hold back, Carol. Tell us how you really feel. But candidly, I too, have concerns about this approach. I see at least these complications: (1) Deep's interest in their current Series B, (2) Deep's possible investment in a new Series C, and (3) the competing potential for Deep to have a collateral position in the convertible preferred.

**GRINN:** We have an additional complication. Deep may expect to liquidate its second fund soon. So dependence on them, when we may be facing a long-term climb under current market conditions, could put the Company in a risky situation. [1]

**FRAN:** Well, there may be something to that, and I expect that Deep would like to postpone adding a new professional investor to provide a market "valuation" so as to avoid any potential of a down round. [2] I see that, but I would hate to lose this option-even with its limitations.

**CAROL:** Betcher, do you feel that you are too close to Deep Pockets and Dag? [3] I could help by playing Bad-Cop.

**BETCHER:** Thanks, Carol, but I will be just fine. This is not my first county fair. What we really need from the Directors here is clarity of strategic objectives. I recognize the dilemma. But I need the cash yesterday.

**GRINN:** I can see a situation where only the late arriving investors will get anything because of the liquidation preferences. I want assurances that potential increased risk [4] will benefit the common, not just the VCs who negotiate for liquidation preferences and

perhaps even security interests in the assets of the Company. There may be much more risk here than we first thought.

**ABLE:** All right everyone. Let's sit back in our seats. Grinn and Carol make good points. The Board needs to confirm a strategic vision, and we can take into account the interests of each of the investor groups and management. [5] Esher, I know Dag can't vote on his funding proposal, but will he be eligible to vote on the strategic vision matter?

**ESHER:** I believe that the state statute on Director conflicting interest transactions is applicable to the Deep proposal, but not applicable to the strategic planning matter. I would want to do more research before giving you definitive legal guidance. But I am not the right place to go for the question of fairness of a Deep deal – that is the work of the Directors to consider an evaluation of terms AND price. Of course, the Board can get expert advice on this matter and the Board is entitled to rely on that advice. [6] Carol raised an important issue of terms that are still to be negotiated, and we have not yet addressed the question of fairness in the valuation, the price.


**GRINN:** I have some concerns that management assessment of cash flow short-fall can use some more rigor. Betcher, if you

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took another look at it, might you find some options that you have discounted because of the attraction of easy money? [7]

**CAROL:** We have time constraints today; so I suggest that we appoint a subcommittee comprised of Betcher and me? We will call on Fran and Esher for support. Our charge will be to come back to the Board with a recommendation of the priority of our strategic interests, our appetite for risk, and our optimum time horizon for a liquidity event. With that, the full Board, or the Board excluding Dag, will then be enabled to adopt a favored funding approach and an acceptable alternative approach.

**ABLE:** You didn't mention Dag on the subcommittee. Would you be willing to include Dag on the subcommittee? Is that acceptable?

**ESHER:** From a corporate governance perspective, each Director must discharge a fiduciary duty to all the shareholders, not just to his class or her series, so, in that sense, Dag has the same duty as you other Directors. [8] And, if you separate the establishment of strategic interests from tactical approaches, Dag would probably not be disqualified any more than any other Director or officer.

**CAROL:** OK. Add Dag.

**BETCHER:** I am willing to take Carol's approach, provided it doesn't take too long. I have a business to run here.

**FRAN:** Betcher, I think we will be all right. As you know, we have been working on a long-range business plan, and I think much of the work the Directors want has already been done.

**ABLE:** Let's take Carol's suggestion as a motion. Do I have a second?

**BETCHER:** Second.

**ABLE:** With my vote, that is unanimous as to the Directors present, at least. Esher, will you invite Dag to come back into the meeting.

*[Dag enters and takes a seat at the table.]*

**ABLE:** Dag, you will be pleased to know that you have joined a subcommittee of Directors, with Carol and Betcher, to recommend our long-range strategic plan objectives. This approach will better enable us to sift through alternative financing ideas. And if we have clarity on that, we will be in a better spot to consider the Deep Pockets generous offer. Assuming agreement from all, at this point, then, I propose that we move to Tab 5 in the agenda and in the Board materials – the proposed management change

at our subsidiary, Easy Does It, Inc.

Recall that the Board materials separately presented the Easy financials, so you all know that it is contributing to earning at an even higher rate than it contributes to sales. Esher?

**ESHER:** Remember, we are the sole shareholder of Easy, so we have absolute authority to control. As Able directed, I have arranged that our Board is also the Board for Easy. We meet simultaneously, and [9] I do the minutes that way.

**ABLE:** Thanks, Esher. Betcher?

**BETCHER:** You know that Billy Bob and Waldorf, the two young Turks at Easy Does It, Inc. have an uneasy truce. Billy Bob is southern right down to the sand between his toes. Waldorf moved to Boston when he was young, but his German heritage is still quite dominant. Neither really likes living in Fargo at corporate headquarters, but they travel a great deal because suppliers and customers are so spread out. They are each capable and opportunistic. Right now, I need them both. Neither is quite ready. So I propose to continue as CEO, and we will appoint them as co-Presidents. That way, they can each have a strong business card to carry and they will both be building a good resume. I think this approach will help us continue an evaluation of their work and that a winner should emerge in time. So that is my proposal. The compensation implications are in the Board materials. [10]

**CAROL:** Betcher, this is the craziest proposal I ever heard. You are creating a two-headed monster. If they are that good, why don't you just bring one of them up to headquarters and leave the other one there to run the store?

**ABLE:** Moving right along, Dag, I think you met these folks in your due diligence. What do you think?

**DAG:** Well, I agree with Betcher that they are capable and ambitious. It might work. I usually think we should leave management decisions to the CEO and defer to him or her.

**GRINN:** Carol is right that there is little evidence that this works over a long period of time. Betcher, how long would it go on?

**BETCHER:** I'm not sure about timing. It may depend on the decision about funding. And I think you will see that they continue to perform as they have been doing. If we can keep them.

**GRINN:** And what about the idea of bringing one of them up to headquarters?



**BETCHER:** Thanks, but no thanks. I don't need another spitfire here. I need them both there.

**ABLE:** May I suggest that we postpone decision on this proposal until we have the work of the strategic interests subcommittee? It is quite possible that the subcommittee's work will provide needed clarity on this issue.

**CAROL:** I so move.

**DAG:** Second.

**ABLE:** Betcher, can you accept this approach?

**BETCHER:** Not really; I have made commitments to these fellows. I will just have to see what I can do. I would prefer to get a unanimous supporting vote today.

**CAROL:** Well that's not going to happen.

**BETCHER:** OK, Carol.

**ABLE:** Well, let's just record this as a majority vote. In the interest of time, I propose that we pass to Tab 6 in the agenda and in the Board materials – the proposed amendment to the equity incentive plan.

**ABLE:** Management is proposing an amendment to the equity incentive plan. [11] And management has proposed an allocation formula for distribution of new options to management and to Directors. Betcher?

**BETCHER:** The Board materials show what we think the market place is doing on equity compensation today. And I think there is broad support among our leadership for the proposal.

**CAROL:** It would be easy to be very supportive of this proposal. I like the idea that the Directors are getting a substantial boost in the number of options. But I don't want to feel "bought-off." Moreover, I am concerned that the distribution seems top-heavy and fails to adequately reward the employees generally. Senior management seems to be taken care of very nicely here; thank you very much. [12]

**ABLE:** Any other comments?

**FRAN:** The contract with Deep Pockets governs the grant for Betcher and the other members of senior management. So it may be that the Board has a contractual obligation to grant these options to management. [12] The other options are just filling out the dance card. Right, Esher?

**ESHER:** True, the management numbers are in the Deep contract. But the agreement contains this proviso: "Except as the Board of the Company shall specifically find that good governance conditions require otherwise...." So I believe the Board can make a determination that some other numbers are required under current conditions.

**GRINN:** What does that mean? What is "good governance conditions" in this context?

**ESHER:** Well, it is pretty much what you say it is. If you discharge your duty of good faith, and your duty of care, and assuming that you have made yourselves adequately informed, your determination is final. [13]

**DAG:** Look, Deep Pockets negotiated for the numbers that Betcher has in his proposal because we don't want to have to deal with disgruntled management any time during our ownership. And we don't really expect the Board to be better informed than we are on these subjects, since we deal with management incentives all the time. [14]

**ABLE:** Well, actually, you have just joined a Board that is determined to do its best to discharge its duties and we are not accustomed to contracting out the performance of our statutory

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duties. So, Dag, I think you will have to set aside what you felt you wanted as a contracting party. We expect that all Directors will be discharging their duties to the Company. [14] We are very pleased to hear of your other experiences, and we trust you will use that learning to help us do our work. OK?

**DAG:** OK. So maybe I overstated our position. We invested in the Company because of the people and the potential. We are committed to helping both succeed.

**ABLE:** Well, this is a very interesting topic, and we need to come to a conclusion. But we are out of time now, so we will put it on the agenda for the next meeting.

**ABLE:** Tab 7 calls for a recess at this point. Without objection, I declare the meeting recessed.

*[The lights come up.]*


**STATION BREAK:** Here the Narrator, Players, and guests will discuss legal and governance issues from Act III:

1. It is always a matter for Director concern to match the time horizon and capability of an investor or investors with the business plan of the Company.

2. Down rounds can be procrastinated but with increased pressure on the Directors to watch for conflicting interests and discharge of duties.
3. Directors may be tempted to “help,” but notice that the oversight function will be compromised by such working contributions.
4. Risk discussions are all the rage since Dodd-Frank, but evaluation of ERM is a complex project that deserves off-meeting work and further meeting consideration.
5. For our Company, the discussion of a strategic vision seems to be arriving late, but better late than never.
6. Fairness and valuation are two prominent examples of matters where the Board can seek expert advice.
7. This is a good example of Director skepticism of management numbers and an appropriate first request for further evaluations.
8. This statement of Directors’ duties to all shareholders is sometimes overlooked by Directors representing a particular class of shares.
9. Of course this dual Board meeting is not the only way to govern a subsidiary. Frequently, only management comprises the Board of a subsidiary and sometimes it is only the CEO – a much more fluid approach.
10. Directors have a special duty to provide for CEO evaluation and succession. It is possible that Betcher would never tolerate a co-CEO at his level.
11. It is the Board’s duty to determine executive compensation, and it can be a very imperfect science.
12. The Company has previously agreed with Deep about the options for the CEO, this is not uncommon, but it can receive less attention than it deserves when it is packaged as part of an external financing deal or as part of an acquisition.
13. The Business Judgment Rule is still good law and applicable when all the necessary steps are taken.
14. It is not uncommon for an “investor-appointed Director” to assume that the investor’s contractual rights give it more control than the law. But sometimes those rights are actually contracted away.

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# Keeping Pace with the Legislature

by Steve Foxley, Frank Pignanelli, and Doug Foxley

2018 promises as full and interesting a winter as ever for Utah politicians, with the General Session of the Utah State Legislature convening on January 22. With only forty-five days to pass bills and adopt a budget, Utah's Legislature runs at a frenetic pace and typically many bills fail to make it across the finish line. That said, the biggest question on Capitol Hill seems to be whether the state will break its 2017 record of passing 535 bills.<sup>1</sup> Early reports indicate that more bill files have been opened than ever (nearly 1,000 as of November).<sup>2</sup> While legislators can keep bills concealed from the public until introduction by labeling them "Protected," basic information is available for about half of the bills requested.<sup>3</sup>

Included among the large number of open bill files are so-called "committee bills." These bills are discussed throughout the summer and fall during the legislature's monthly meetings. The Judiciary Interim Committee, co-chaired by Sen. Todd Weiler and Rep. Mike McKell, advanced several bills that will be eligible for fast-tracking during the session. These bills include revisions to divorce proceedings,<sup>4</sup> parenting plans,<sup>5</sup> the Child Support Guidelines Advisory Committee<sup>6</sup> blood testing by peace officers,<sup>7</sup> domestic violence, dating violence and stalking,<sup>8</sup> post-conviction DNA testing,<sup>9</sup> and the Administrative Office of the Courts.<sup>10</sup> The Judiciary Interim Committee also spent significant time discussing the state's Justice Reinvestment Initiative, mens rea reform, and jury nullification. These topics will likely be attached to legislation during the session.

Other committees, particularly the Law Enforcement and Criminal Justice Interim Committee and the Judicial Rules Review Committee, also discussed legislation and proposed court rules of interest to attorneys.

The bar adheres to Rule 14-106 of the Judicial Council Rules of Judicial Administration, which limits its authority to engage in legislative activities. These updates will include the status of selected bills. The bar wants to assist you in tracking the legislation important to your practice area, with regular informational updates posted to its website during the session. Legislation of extra importance might also be highlighted in the Bar President's regular communications with members.

The bar's Government Relations Committee (GRC) vets legislation on behalf of the Bar Commissioners, who ultimately determine on which bills our organization takes a position. The GRC is co-chaired by Jaqualin Friend Peterson and Sara Bouley, who both have several years' experience with the GRC. The GRC meets on a weekly basis

during the legislative session. Section representatives will receive notice in advance of these meetings, whenever practicable, to solicit input. We encourage all members to engage with their practice sections to ensure their voices are heard in the process.

The Bar Commissioners will be hosting an annual breakfast for attorney-legislators. With their understanding of the legal profession, the seventeen attorneys in the legislature continue to play an important role, providing valuable feedback, guidance, and assistance to the bar. The House of Representatives includes fourteen attorneys, while the Senate has three.<sup>11</sup>

As in the past, the bar will provide post-session CLE opportunities with legislative wrap-ups. We believe these activities provide 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. In our respective legislative and lobbying roles, we are happy to address questions and requests for information from bar members regarding the legislative process.

1. <http://archive.satrib.com/article.php?id=5067809&itype=CMSID>
2. <http://utahpolicy.com/index.php/features/today-at-utah-policy/14876-lawmakers-have-already-opened-nearly-1-000-bill-files-ahead-of-the-2018-session>
3. <https://le.utah.gov/asp/billsintro/index.asp>
4. <https://le.utah.gov/interim/2017/pdf/00004666.pdf>
5. <https://le.utah.gov/interim/2017/pdf/00004113.pdf>
6. <https://le.utah.gov/interim/2017/pdf/00004667.pdf>
7. <https://le.utah.gov/interim/2017/pdf/00004885.pdf>
8. <https://le.utah.gov/interim/2017/pdf/00004836.pdf>
9. <https://le.utah.gov/interim/2017/pdf/00003827.pdf>
10. <https://le.utah.gov/interim/2017/pdf/00003993.pdf>
11. Not all lawyer-legislators are currently active with the Utah State Bar.

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





## 2018 Utah State Lawyer Legislative Directory

### 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

**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

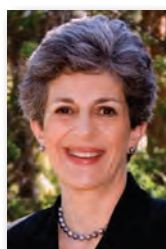


**Todd Weiler (R)** – District 23 (Elected to Senate: 2012; Re-Elected: 2016)

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

**Practice Areas:** Civil Litigation and Business Law.

### THE UTAH STATE HOUSE OF REPRESENTATIVES



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

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

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



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

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

**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

**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

**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



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

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

**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

**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

**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

**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

**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

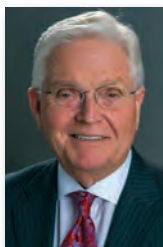
**Practice Areas:** Estate Planning, Elder Law, and Probate and Estate Settlement.



**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

**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

**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

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

Contact information and committee assignments for Utah's lawyer/legislators can be found at the following websites:  
Senate – <http://senate.utah.gov/senators/full-roster.html>. House of Representatives – <http://house.utah.gov/house-members/>.

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# If You Are Local Counsel in Utah, You Should Read This

by Keith A. Call

A year and a half ago, I wrote about the ethics of serving as local counsel. See Keith A. Call & Robert T. Denny, *Serving as Local Counsel*, 29 UTAH B.J. 48 (July/Aug 2016). Since that time, the Utah law of local counsel has had a major shakeup.

In September 2017, the Utah Bar Ethics Advisory Opinion Committee (EAOC) gave Utah lawyers important new guidance. Any Utah lawyer who serves as local counsel should read this opinion. See Utah State Bar Ethics Adv. Op. Comm., Op. No. 17-04 (Sep. 26, 2017). Here are a few highlights.

### Acting as Mail Drop is Insufficient

Sometimes out-of-state counsel seeks to retain local counsel for no other reason than to “rent” a Utah Bar license with a Utah address. Perhaps the most important take-away from the new EAOC opinion is that acting as a mere mail drop will not fulfill your ethical duties as local counsel.

Quoting Rule 5.5(c) of the Utah Rules of Professional Conduct, the EAOC opines that local counsel must “actively participate[] in the matter.” Op. 17-04, ¶ 6. Based on this standard, the EAOC concludes, “Acting as local counsel for a pro hac vice attorney is not a minor or perfunctory undertaking. *Local counsel violates the Utah Rules of Professional Conduct when local counsel acts as nothing more than a mail drop or messenger for the pro hac vice attorney.*” *Id.* ¶ 2 (emphasis added).

So, to the extent Utah local counsel have acted only as a mail drop in the past, the EAOC has made it clear this practice should stop.

### Know the Case

By rule, Utah local counsel must sign the first pleading signed in any case filed in Utah district courts. See Utah R. Jud. Admin. 14-806(f)(4). According to the EAOC, only licensed Utah local counsel should electronically file any documents in Utah district courts. Op. 17-04, ¶ 12 (citing Utah R. Jud. Admin. 4-503).

Local counsel is therefore responsible to make sure the pleadings and other documents comply with Rule 11. “Local counsel must...investigate the merits of the case to the extent necessary to be satisfied that the substance of the documents, both legal and factual, prepared by the pro hac vice attorney complies with Rule 11 and Utah law generally before filing them with the district court.” *Id.* The opinion further suggests that this is a personal, non-delegable duty. See *id.*

Local counsel must also “keep reasonably informed about the case as it progresses” and “monitor the pro hac vice attorney closely enough to know whether the pro hac vice counsel is following [pertinent law, rules, procedures and customs].” Utah State Bar Ethics Adv. Op. Comm., Op. No. 17-04, ¶¶ 9, 13 (Sep. 26, 2017). The opinion suggests that one way to do this is for the client and pro hac vice lawyer to copy local counsel on all substantive written communications and to include him or her in all substantive attorney-client meetings. *Id.* ¶ 9.

### Use Independent Judgment

Local counsel should not simply defer to pro hac vice counsel. Instead, “local counsel has a duty to advise the client of local counsel’s independent judgment that differs from that of the pro hac vice attorney.” Moreover, local counsel must “take action to protect the client’s interests, even where local counsel has agreed not to have any direct contact with the client.” *Id.* ¶ 15.

Of course, it will be impossible to use independent judgment if

*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 are not actively involved with the case. The EAO opinion clearly requires local counsel to be actively engaged.

### Some Duplication Will Be Required

The EAO recognized that one goal of the pro hac vice attorney – and the client – may be to reduce or eliminate duplication of work by local counsel. The opinion states that “local counsel does not have to duplicate the work already performed by the pro hac vice attorney so long as the pro hac vice attorney is complying with the Utah Rules of Professional Conduct.” *Id.* ¶ 8. Yet, it is hard to imagine how the local counsel can fulfill their obligations described elsewhere in the opinion without significant duplication. Indeed, the opinion specifically states that local counsel must ensure pro hac vice counsel is complying with the rules, “even if that entails some duplication of efforts.” *Id.* ¶ 9.

Without question, fulfilling local counsel’s obligations as described in the opinion will usually require significant duplication of effort.

### Limiting Communication to Pro Hac Vice Counsel

The EAO recognizes that the Rules of Professional Conduct allow a lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Utah State Bar Ethics Adv. Op. Comm., Op. No. 17-04, ¶ 10 (Sep. 26, 2017) (quoting Utah R. Prof’l Conduct 1.2(c)). It is therefore possible for the client to agree

that local counsel will only communicate with the pro hac vice attorney and that local counsel may rely on what the pro hac vice attorney tells them. *Id.* In such cases, you should carefully memorialize this in your engagement letter *with the client*.

Remember, however, that local counsel remains responsible to make sure pro hac vice counsel is complying with all applicable rules and is representing the client’s best interests. If you determine, using your independent judgment, that the pro hac vice attorney is not representing the client properly, you have to inform the *client* no matter what. *See id.* ¶ 15.

### Read Opinion 17-04 and Send it to Pro Hac Vice Counsel

In my view, Opinion 17-04 represents a potential tectonic shift in the nature of local counsel practice in Utah. Love it or hate it, the opinion is full of important guidance that, if followed, will dramatically change the way local counsel in Utah operate.

In addition to making sure the client understands your role through a carefully crafted engagement agreement and other communications, I suggest you send this opinion to any out-of-state lawyer who asks you to serve as local counsel. It will help them understand the importance of having you “actively participate in the case.”

*Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case.*



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## Appellate Highlights

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

*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.*

### UTAH SUPREME COURT

#### ***Outfront Media, LLC v. Salt Lake City Corp.*, 2017 UT 74 (Oct. 23, 2017)**

This appeal arose out of a city's denial of a billboard owner's sign relocation request. Affirming, the supreme court clarified that **it would no longer defer to a local agency's interpretation of its own ordinances and would instead review for correctness.**

#### ***Dircks v. Travelers Indem. Co. of Am.*, 2017 UT 73 (Oct. 17, 2017)**

The federal court certified the question whether a company that had purchased liability coverage for an employee's vehicle was also required to purchase underinsured motorist insurance. The Utah Supreme Court held that **any vehicle that is covered by a policy's liability insurance must also be covered by underinsured motorist insurance, unless the coverage is waived by a formal acknowledgement.**

#### ***Rawcliffe v. Anciaux*, 2017 UT 72 (Oct. 11, 2017)**

A shareholder brought this action against the company's board of directors and several of its officers for authorizing and receiving spring-loaded, stock-settled stock appreciation rights. Because there was no allegation the defendants intended to circumvent the company's compensation plan, the district court dismissed the complaint under Rule 12(b)(6). On appeal, the Utah Supreme Court **engaged in a detailed analysis of what is required to state a claim against directors and officers under Utah's Revised Business Corporation Act.** Applying that standard to this case, the court affirmed the dismissal.

#### ***Wilson v. Educators Mut. Ins. Ass'n*, 2017 UT 69 (Sept. 28, 2017)**

The Utah Court of Appeals dismissed an insurance company's subrogation action for lack of standing. The Utah Supreme Court granted certiorari and held that **an insurance company had the right to file the subrogation action in its own name pursuant to the express terms of the insurance policy,** and it clarified the distinction between a right of subrogation arising under contract and one arising under the right of equitable subrogation.

#### ***Bivens v. Salt Lake City Corp.*, 2017 UT 67 (Sept. 26, 2017)**

The plaintiffs in this suit all received parking tickets from Salt Lake and brought suit, alleging that the notice provided was insufficient to apprise them of the right to challenge the ticket. Affirming dismissal, the Utah Supreme Court held that, **although the City's parking violation notices contained certain misstatements, they were sufficient to apprise the plaintiffs of their rights and opportunity for a hearing.** Because the plaintiffs had received adequate notice, they were required to exhaust their administrative remedies, which they had failed to do.

#### ***Scott v. Scott*, 2017 UT 66 (Sept. 21, 2017)**

In this case, Husband sought termination of alimony because Wife had cohabited with her boyfriend, although she was not cohabiting with him at the time of filing of the motion to terminate. Utah Code subsection 30-3-5(10) provides, "[A]limony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person." The Utah Supreme Court held that **the plain language of the cohabitation statute, and particularly the word "is," requires that the former spouse be cohabiting at the time of filing.**

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

***McElhaney v. City of Moab,***  
**2017 UT 65 (Sept. 21, 2017)**

This appeal arose from a city council's denial of a conditional use permit to operate a bed and breakfast in a residential neighborhood. The plaintiff appealed the council's decision to the district court, which reversed it, and the council sought review from the Utah Supreme Court. **The supreme court clarified that, contrary to what it had suggested in some cases, in cases like this one, it reviews the decision of the district court and not that of the underlying administrative body.** On the merits, the supreme court vacated the district court's decision and remanded with instructions to the district court to remand to the council to generate more detailed findings of fact and conclusions of law.

***Living Rivers v. Exec. Dir. of the Utah Dep't of Env'tl. Quality,***  
**2017 UT 64 (Sept. 20, 2017)**

In this appeal of an agency action, the supreme court reminded administrative tribunals of their "independent obligation" to assess a party's standing before reaching the merits. Conducting an independent review on appeal, the court held that **an environmental organization possessed standing as an**

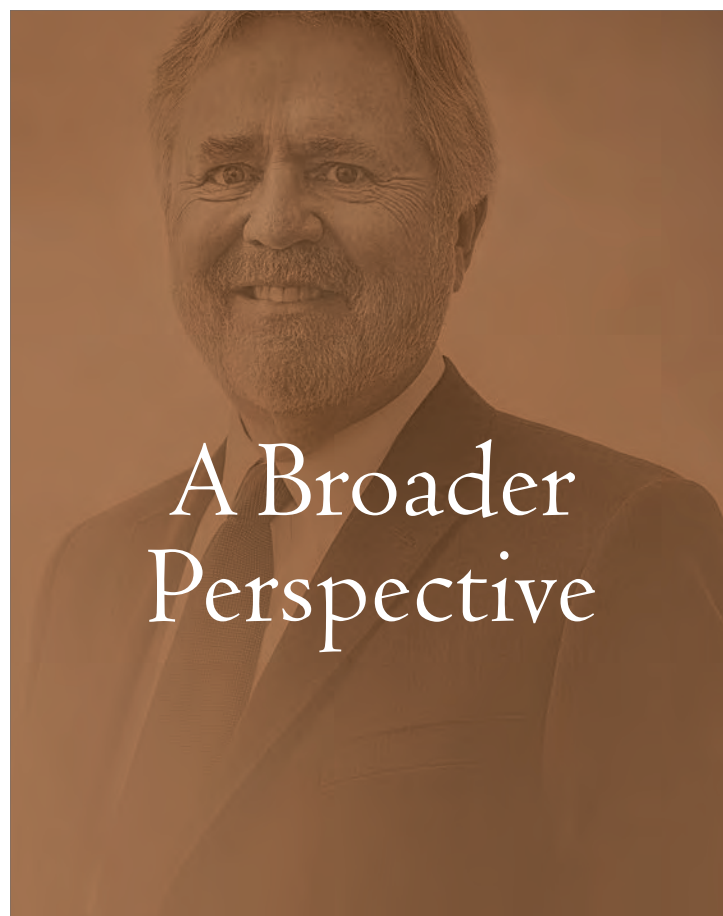
**association, where its director and members made a sufficient showing that their recreational, aesthetic, and other interests in the land would be harmed by the expansion of mining operations in the absence of relief.**

***State v. Goins,***  
**2017 UT 61 (Sept. 6, 2017)**

The court overruled its prior holding in *State v. Brooks* and held that Rule 804 of the Utah Rules of Evidence precludes the admission of preliminary hearing testimony at trial as a matter of law because defense counsel does not have a similar motive to develop testimony at the preliminary hearing as they do at trial. Regardless, the court affirmed the appellant's felony conviction, finding that the admission of preliminary hearing testimony at trial was harmless.

***2DP Blanding, LLC v. Palmer,***  
**2017 UT 62 (Sept. 6, 2017)**

A buyer purchased the property at issue at a foreclosure sale resulting from an order authorizing the sale entered in a prior proceeding. The original owner had appealed that order but did



# A Broader Perspective



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J. Frederic Voros, Jr., brings a wealth of experience and perspective to Zimmerman Booher. As a young lawyer, he was a law clerk at the Utah Supreme Court and then a private practitioner. He spent most of his career serving the State of Utah as an assistant attorney general and a judge on the Utah Court of Appeals. He has a sterling reputation as a disciplined legal mind, an experienced advocate, a caring mentor, and a true music aficionado. We are delighted to welcome Fred to our team.

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not seek to stay it pending appeal, and the sale occurred while the appeal was pending. In the present case, the Utah Supreme Court held that the buyer did not take the property subject to the resolution of the first appeal. “[A]n appellant who takes no action to preserve his interests in property at issue on appeal has no recourse against a lawful third-party purchaser.” *Id.* ¶ 1 (emphasis added).

## UTAH COURT OF APPEALS

### *Brand v. Paul,* 2017 UT App 196 (Oct. 26, 2017)

Neighboring landowners each filed suit to quiet title to a strip of land adjoining their respective properties. On appeal, the prevailing landowner argued the appellants lacked standing because they had failed to demonstrate an interest in the property. Because the trust raised this challenge to the appellants’ standing, **appellants had the burden of “demonstrat[ing] how they are aggrieved by the district court’s judgment and how possession of [the] quitclaim deed [they relied on] provides sufficient interest in the matter to invoke th[e] court’s jurisdiction.”** *Id.* ¶ 10 (emphasis added). The appellants’ limited briefing on this issue was insufficient to carry this burden. As a result, the court of appeals dismissed the appeal of the district court’s summary judgment ruling for lack of jurisdiction.

### *State v. Yalowski,* 2017 UT App 177, 404 P.3d 53, reh’g denied (Oct. 27, 2017)

In an appeal from a criminal conviction, the defendant challenged the district court’s refusal to allow him to question the victim about her plea in abeyance and uncharged arrest for giving a false name to a police officer under Rule 608 of the Utah Rules of Evidence. The court of appeals held that **the limitations placed on defendant’s cross-examination were harmless because defendant was able to question the victim about the facts underlying the arrest and her testimony was corroborated by other witnesses whose credibility was not attacked.**

### *Estate of Flygare v. Ogden City,* 2017 UT App 189 (Oct. 13, 2017)

Pedestrians who were struck by a car on an unlit street alleged the city was negligent in failing to repair its streetlights. After dismissal on summary judgment, the plaintiffs filed a Rule 59 motion to alter or amend the judgment. The district court ruled against the motion and held that it was an inappropriate motion to reconsider. Plaintiffs then appealed the summary judgment

decision. Defendants argued that because the Rule 59 motion was deemed an inappropriate motion to reconsider, the motion had not tolled the time to appeal, and the appeal was therefore untimely. The Utah Court of Appeals held that **because the motion for relief was styled as a Rule 59 motion, and it plausibly requested the relevant relief, the motion was procedurally proper and tolled the time for appeal.**

### *Goldenwest Fed. Credit Union v. Kenworthy,* 2017 UT App 191 (Oct. 13, 2017)

In its January 12, 2017 opinion in this matter, the court reversed summary judgment granted to the defendant in the underlying contract dispute on statute of limitations grounds. The court reasoned that plaintiff’s complaint was not time barred because the statute began to run on the maturity date of the loan of the installment contract. The court granted a petition for rehearing and changed the result from a reversal to an affirmance of the summary judgment. The court **concluded that its reasoning for the earlier decision was sound, but that it could not consider the winning argument because the appellant had not preserved it and had not raised it on appeal.**

### *State v. Homer,* 2017 UT App 184 (Oct. 5, 2017)

The court of appeals concluded that **in appropriate cases, the probable cause standard required for bindover can be satisfied by circumstantial evidence regarding drug identity and that it is not always necessary to present evidence of drug identity at a preliminary hearing.** The State had not presented scientific evidence as to the identity of the drug.

## TENTH CIRCUIT

### *Pyle v. Woods,* 874 F.3d 1257 (10th Cir. Nov. 1, 2017)

Plaintiffs asserted a civil rights claim based on a warrantless search of Utah’s prescription drug database in the course of a theft investigation. On appeal, the Tenth Circuit held that a **detective who accessed a state-run prescription drug database without a warrant was entitled to qualified immunity because the right to privacy in prescription records was neither absolute nor clearly established at the time of the alleged conduct.**

***First Western Capital Mgmt. Co. v. Malamed,*  
874 F.3d 1136 (10th Cir. Oct. 30, 2017)**

In this appeal from the issuance of a preliminary injunction, the Tenth Circuit applied its recent holding in *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016), and reversed. **Under *Fish*, issued six weeks after the district court's issuance of the preliminary injunction, it was error to relieve the plaintiff of the obligation to establish irreparable injury on the basis that the two statutes at issue provided for, but did not mandate, injunctive relief as a remedy.**

***Wyoming v. Zinke,*  
871 F.3d 1133 (10th Cir. Sept. 21, 2017)**

This case arose out of a challenge to fracking regulations promulgated by the Bureau of Land Management. The Tenth Circuit **abstained from exercising its jurisdiction based on the prudential ripeness doctrine because (a) the current administration had announced its intent to rescind the regulations and (b) withholding review did not impose a hardship on the parties seeking review of the lower court's decision.**

***In re: Cox Enters., Inc.,*  
871 F.3d 1093 (10th Cir. Sept. 19, 2017)**

This appeal arose out of a class action suit alleging that Cox Communications, a cable service provider, had illegally tied its premium cable services, such as interactive program guides, pay-per-view programming, and recording or rewinding capabilities, to its own set top box, in violation of the Sherman Act. The Tenth Circuit affirmed, holding that **there was insufficient evidence that the tie of services to the set top box had foreclosed a substantial volume of commerce, as the tie did not foreclose any commerce, nor did it prevent or discourage other competitors from entering the market.**

***W. Watersheds Project v. Michael,*  
869 F.3d 1189 (10th Cir. Sept. 7, 2017)**

Plaintiffs asserted a First Amendment challenge to a Wyoming statute prohibiting trespass on private land while in the course of collecting resource data from public land. As a matter of first impression, **the Tenth Circuit held that the statute was subject to First Amendment protection because the statute regulated the creation of speech.**

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# Unlawful Conduct in Utah is Not a Strict Liability Offense

by Garrett A. Walker

The Utah Division of Occupational and Professional Licensing (DOPL) is charged with investigating and prosecuting claims that contractors have engaged in unlawful conduct. *See* Utah Code Ann. § 58-55-503. However, DOPL has taken the position that it is not required to present proof that the unlawful conduct was committed with a culpable mental state. Instead, DOPL contends that contractors are strictly liable for unlawful conduct. This position is incorrect.

## DOPL Contends that Unlawful Conduct is a Strict Liability Offense

DOPL cited a contractor for engaging in unlawful conduct by hiring an unlicensed subcontractor. “Unlawful conduct includes... hiring or employing a person who is not licensed [by DOPL] to perform work on a project.” *Id.* § 58-55-501(3).

DOPL was correct that the contractor had hired an unlicensed subcontractor for a number of projects. The subcontractor falsely represented that it was licensed when it executed the master subcontract agreement, and the contractor’s license verification process failed to reveal that the subcontractor was not licensed.

Accordingly, DOPL established that the subcontractor was not licensed, asserted that the subcontractor’s deception was irrelevant, and invited the contractor to enter into a stipulated settlement under the threat of a harsher punishment if the case progressed to an adjudicative proceeding. The stipulated settlement included an admission of wrongdoing, payment of a fine, and the imposition of a period of probation.

In maintaining that the subcontractor’s deception was irrelevant, DOPL took the position that contractors are strictly liable for unlawful conduct. “Strict liability” is defined as “[l]iability that does not depend on proof of negligence or intent to do harm.” BLACK’S LAW DICTIONARY 1055 (10th ed. 2014). According to DOPL, the fact that unlawful conduct occurred – and not how or why it occurred – was the only relevant consideration.

## Unlawful Conduct is Not a Strict Liability Offense

The commission of unlawful conduct is not a strict liability offense. Engaging in unlawful conduct is – with few exceptions – a criminal offense. *See* Utah Code Ann. § 58-55-503(1). Criminal offenses are

not subject to strict liability unless “the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.” *See id.* § 76-2-102. The statute defining unlawful conduct does not clearly indicate a legislative purpose to impose criminal responsibility for the commission of unlawful conduct without the culpable mental state. *See id.* § 58-55-501.

As a result, DOPL must prove that the contractor intended to engage in unlawful conduct, knowingly engaged in unlawful conduct, or recklessly engaged in unlawful conduct. “Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility.” *Id.* § 76-2-102. The requirement for DOPL to prove a culpable mental state applies even though an adjudicative proceeding is civil rather than criminal in nature. *See, e.g., Ellsworth Paulsen Constr. Co. v. 51-SPR-LLC*, 2008 UT 28, ¶¶ 25–32, 183 P.3d 248 (applying the culpable mental state requirement to a civil proceeding involving a criminal offense).

## Conclusion

Contractors confronted with claims of unlawful conduct – or any other criminal offense – should insist that DOPL produce proof that the conduct was committed with intent, knowledge, or recklessness. Although the contractor in this case was forced to defend itself in the context of an adjudicative proceeding, midway through the hearing DOPL voluntarily dismissed its claim that the contractor engaged in unlawful conduct by hiring an unlicensed subcontractor. The voluntary dismissal operated as a tacit acknowledgement that contractors are not strictly liable for unlawful conduct.

*GARRETT A. WALKER is a trial attorney at Walker Law PLLC in Salt Lake City. His practice focuses on complex construction litigation.*





## Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the November 17, 2017 Commission Meeting held at the Weber County Courthouse in Ogden, Utah.

1. The Bar Commission voted to approve the Client Security Fund report and recommendations for payments to claimants.
2. The Bar Commission voted to accept **Judge David Hamilton**'s resignation as Chair of the Client Security Fund and to appoint **Stephen Farr** as the new Chair.
3. The Bar Commission voted to amend Fund for Client Protection Rule 14-904 to clarify that any lawyer on whose behalf a claim is paid can be administratively suspended for failure to reimburse the Fund.
4. The Bar Commission voted to select Lighthouse to conduct a survey of clients.
5. The Bar Commission voted to approve the ABA Delegate Selection and Reimbursement Policy as amended during the discussion.
6. The Bar Commission voted to select **Erik Christiansen** for the State ABA Delegate.
7. The Bar Commission voted to select **Bebe Vanek** for the YLD ABA Delegate.

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



## 2018 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2018 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 Wednesday, January 10, 2018. You may also fax a nomination to 801-531-0660 or email to [adminasst@utahbar.org](mailto: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/award-recipient-history/>

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## Pro Bono Honor Roll

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a free legal clinic in October and November of 2017. To volunteer call the Utah State Bar Access to Justice Department at 801-297-7049 or go to <https://www.surveymonkey.com/s/UtahBarProBonoVolunteer> to fill out a volunteer survey.

### American Indian Legal Clinic

Matt Harrison  
Jeff Simcox  
Jason Steiert

### Bankruptcy Case

Lee Gaugh  
Malone Molgard  
Ryan Simpson  
Jory Trease

### Community Legal Clinic: Ogden

Jonny Benson  
Travis Marker  
Chad McKay  
Francisco Roman  
Mike Studebaker  
Gary Wilkinson

### Community Legal Clinic: Salt Lake City

Ashley Anderson  
Jonny Benson  
Kendall Moriarty  
Carlos Navarro  
Bryan Pitt  
Brian Rothschild  
Paul Simmons  
Kate Sundwall  
Ian Wang  
Russell Yaune

### Community Legal Clinic: Sugarhouse

Skyler Anderson  
Sue Crismon  
Craig Ebert  
Sergio Garcia  
Lynn McMurray  
Melissa Moeinvaziri  
Brian Rothschild  
Heather Tanana

### Contract Case

Kent Scott

### Debt Collection Pro Se Calendar

Matt Ballard  
Mike Barnhill  
James Bergstedt  
Lauren Biber  
David Billings  
Christopher Bond  
John Cooper  
Ted Cundick  
Jesse Davis  
T. Rick Davis  
David Jaffa  
Parker Jensen  
Lexi Jones  
Wayne Petty  
Grace Pusavat  
Brian Rothschild  
Ian Wang  
Fran Wikstrom

### Debtor's Legal Clinic

Ellen Ostrow  
Brian Rothschild  
Paul Simmons  
Tami Gadd Willardson  
Nathan Williams

### Expungement Law Clinic

Josh Egan  
Tyler Hawkins  
Mary Ann May  
Stephanie Miya  
Ian Quiel

### Family Justice Center

Randall Bateman  
Kraig Brinkerhoft  
Drew Clark  
Elaine Cochran  
Danielle Dallas  
Amy Fiene  
Thomas Gilchrist  
Liisa Hancock  
Michael Harrison  
Dani Hartvigsen  
Val Jolley  
Scott Maughan  
Lillian Meredith

Samuel Poff  
Richard Sheffield  
Debbie Snow  
Babata Sonnenberg  
Paul Waldron

### Family Law Case

Bryan Baron  
Joe Bilinski  
Cleve Burns  
Brent Chipman  
Bronwen Dromey  
Robert Falck  
Jade Farris  
Sergio Garcia  
Chad Gessel  
Christine Hashimoto  
Katherine Kang  
Christian Kesselring  
Marva Match  
Jurhee Rice  
Alex Scherf  
Eric Swinyard  
Kenton Walker  
Tonya Whipple

### Family Law Clinic

Justin T. Ashworth  
Carolyn R. Morrow  
Stewart Ralphs  
Linda F. Smith  
Simon So  
Sheri Throop  
Russell Yaune

### Guardianship Case

Perry Bsharah

### Guardianship Signature Program

Richard S. Brown  
Dara Rosen Cohen  
Rob Denton  
Scott W. Hansen  
Kathie Brown Roberts  
Kent Snider

### Lawyer of the Day

Jared Allebest  
Jared Anderson  
Laina Arras  
Ron Ball  
Nicole Beringer  
Justin Bond  
Scott Cottingham  
Chris Evans  
Jonathan Grover  
Roland Douglas Holt  
Lorena Jenson  
Robin Kirkham  
John Kunkler  
Ben Lawrence  
Allison Librett  
Ross Martin  
Christopher Martinez  
Suzanne Marychild  
Shaunda McNeill  
Keil Myers  
Lori Nelson  
Stewart Ralphs  
Jeremy Shimada  
Joshua Slade  
Linda Smith  
Samuel Sorensen  
Laja Thompson  
Paul Tsosie  
Brent Wamsley  
Leilani Whitmer

### Medical Legal Clinic

Stephanie Miya  
Micah Vorwallner

### Property Law Case

J. Taylor Fox

### Rainbow Law Clinic

Jessica Couser  
Russell Evans

### Real Estate Case

Matthew Ekens

**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

**SMAV Case**

Chip Shaner

**Street Law Clinic**

Renee Blocher  
Devin Bybee  
Ben Carroll  
Dave Duncan  
Karma French  
Jennie Garner  
Jeff Gittins  
Matt Harrison  
John Macfarlane  
Cameron Platt  
Elliot Scruggs  
Jonathan Thorne  
Gary Wilkinson

**Third District ORS Calendar**

Katherine Benson  
Robert Harrington  
Whitney Krogue  
James Sorenson  
Liesel Stevens  
Kelly Williams  
Maria Windham

**Timpanogos Legal Clinic**

Linda Barclay  
Elaine Cochran  
Scott Goodwin  
Zach Jones  
Samuel Poff  
Brittany Rattelle  
Eryn Rogers

**Tuesday Night Bar**

Mike Anderson  
Mike Black  
Madelyn Blanchard

Christopher Bond  
Lyndon Bradshaw  
Tyler Cahoon  
Trinity Car  
Lauren Chauncey  
Kate Conyers  
Cedar Cosner  
Olivia Crellin  
Colw Crewther  
Steve Glassford  
Katie James  
Patrick Johnson  
Mason Kjar  
Rachel Konishi  
Clemens Landau  
Emily Lewis  
Alexis Lyons  
Chris Mancini  
April Medley  
Liz Mellem  
Audrey Olson  
Ben Onofrio  
Kristen Overton  
Fred Pena  
Brooke Pettegrew  
Grace Pusavat  
Alexandre Sandrik  
LaShel Shaw  
Sam Slark  
Jeff Tuttle  
Lynda Viti  
Morgen Weeks  
Adam Weimacker  
Bion Wimmer  
Nathan Wolfley  
Matt Wright

**Veterans Legal Clinic**

Joseph Rupp  
Katy Strand  
Peter Strand

**West Jordan Pro Se Calendar**

Brad Blanchard  
Christopher Bond  
Katie Bushman  
Drew Clark  
RuthAnne Frost  
Kim Hammond  
Janice Macanas  
Sean Umipig

**Wills/Trusts/Estate/ Probate Case**

Jacob Gunter  
Douglas Neeley

**MCLE Reminder – Even Year Reporting Cycle****July 1, 2016–June 30, 2018**

Active Status Lawyers complying in 2018 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](http://www.utahbar.org/mcle).

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

**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 22, 2018, 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](mailto:christy.abad@utahbar.org), by January 31. One submission/nomination per attorney.



## 2017 Utah Bar Journal Cover of the Year



*Steven T. Waterman*

The winner of the *Utah Bar Journal* Cover of the Year award for 2017 is *Milky Way over Pass Lake*, taken in the high Uinta mountains by Utah State Bar member Steven T. Waterman. Steven's photo appeared on the cover of the May/June 2017 issue.

Congratulations to Steven, and thank you to the more than 100 contributors who have provided photographs for the *Bar Journal* covers over the past twenty-nine 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 3 of this issue. **A tip for prospective photographers:** preference is given to high resolution portrait (tall) rather than landscape (wide) photographs.



## 2017 Fall Forum Award Recipients

Congratulations to the following who were honored with awards on November 18 at the 2017 Fall Forum in Salt Lake City:



**Linda M. Jones**  
Professionalism Award



**Julia D. Kyte**  
Outstanding Mentor



**Leonor E. Perretta**  
Outstanding Mentor



**Marianna Di Paolo**  
Community Member



**Robert O. Rice**  
Outstanding Pro Bono Award



**Rodney G. Snow**  
Outstanding Pro Bono Award

## *Utah State Bar Members Go “Over the Edge”*

A group of Utah State Bar members participated in the Salt Lake Area Family Justice Center at the YWCA “Over the Edge” fundraising event in October.

“Over the Edge asks the community to go over to help others rise up” said Amberlie Phillips, Chief Development Officer at YWCA Utah. “The outpouring of support we received from the legal community this year was amazing.”

Participants rappelled thirteen stories down the Maverik Basecamp building in Salt Lake City to raise funds for the center, which provides walk-in services to victims of domestic violence and sexual assault. Several Utah law firms and legal organizations took part in the event.

The Salt Lake Area Family Justice Center at the YWCA uses the yearly event to raise awareness of domestic violence and sexual abuse. The center offers services from a variety of

different resources designed to help victims change their lives.

“One in three women in Utah will experience domestic violence or sexual assault in their lifetime,” said Nora Scholle, a coordinator of the event.

Utah lawyers helped raise more than \$44,000 at the event, and eight of the top ten fundraisers were attorneys.

Participating attorneys included Peggy Hunt of the Federal Bar Association; Katherine Venti of Parsons Behle & Latimer; Kelsey Kozier of Stoel Rives; Sarah Starkey of Women Lawyers; Kara Houck of Parr Brown; Bebe Vanek, Young Lawyers Division; David Billings, Fabian VanCott; Blake Hamilton, Durham Jones & Pinegar; Rachel Phillips, Snow Christensen & Martineau; Kristina Ruedas, Richards Brandt Miller Nelson; Abby Dizon Mitchell, Utah Minority Bar Association; and Lauren Shurman of the Salt Lake County Bar.

## *Thank You to Bar Members*

Dear Ladies and Gentlemen:

We want to thank all members of the Utah Bar and their personnel who participated in the twenty-eighth Annual Food and Clothing Drive! We continue to enjoy strong and wonderful support from the entire Utah legal community! It was great to see representatives from the West Jordan Courts, Trask Britt, Donovan Dart & Adamson, Kirton and McConkie, The Lundberg Firm and the Salt Lake County District Attorney’s office. Bar leadership was well represented by John Lund and Robert Rice. We saw old friends return like Brooke Wells and Paul Moxley and made many new ones as well. We hope you look forward to this event just like we do every year.



a number of cash donations totaling approximately \$3,000, mostly for the Utah Food Bank; and we reminisced with Jennie Dudley of the Eagle Ranch Ministry, who was amazed that we have been conducting this food and clothing drive for twenty-eight years, and she recalled her first serving of the less fortunate and homeless persons under the 600 South freeway viaduct over thirty-two years ago. We don’t know how many semi-trucks your donations have filled over these twenty-eight years, but we believe it would be a very large number and the donations would have helped thousands.

We believe we were very successful in our efforts for the charities that we annually support, all through your continued generosity and efforts. We

look forward to seeing you next year!

Thank you again and Happy Holidays!

Our best,  
Leonard and Lincoln

We had a very successful year, and that does not take into account the coordinated donations of 150 hams and all the trimmings for 150 families to prepare for their holiday feast. We also received

## ***Ethics Advisory Opinion Committee – Recent Opinions***

### **Opinion Number 17-03 | Issued May 9, 2017**

**ISSUE:** Is it ethical for a criminal defense attorney who suspects his client is not competent to allow that client to enter a guilty plea without first filing for a competency evaluation? What are the defense attorney's ethical obligations toward a client of questionable competence?

**ANSWER:** The criminal defense attorney who questions her client's competence is not obligated to seek a competency evaluation unless she is otherwise unable to proceed in a way that protects her client's interests and autonomy. An attorney who questions the client's competence should first try to carry out a normal client-attorney relationship. When there is risk of substantial harm and the client cannot act in his own interest, the attorney is permitted to take protective action, such as involving family and professionals serving the client to assist. If the attorney needs guidance from a mental health expert, the attorney should generally seek a confidential psychological evaluation protected by attorney-client privilege before asking for a competency evaluation.

### **Opinion Number 17-04 | Issued September 26, 2017**

**ISSUE:** When a Utah attorney acts as local counsel, what are the Utah attorney's duties under the Utah Rules of Professional Conduct where the lead attorney is not licensed in Utah and is admitted pro hac vice, and the client and/or the pro hac vice attorney want local counsel to do as little as possible so that the client incurs the minimum amount of fees for local counsel's work?

**OPINION:** Acting as local counsel for a pro hac vice attorney is not a minor or perfunctory undertaking. Local counsel violates the Utah Rules of Professional Conduct when local counsel acts as nothing more than a mail drop or messenger for the pro hac vice attorney. All attorneys admitted to the Utah State Bar are required to comply with all of the Utah Rules of Professional Conduct, including when they are acting as local counsel. Under Rule 5.1 of the Utah Rules of Professional Conduct, local counsel has a general duty to adequately supervise pro hac vice counsel and to provide expertise regarding Utah law, statutes, cases, rules, procedures, and customs in Utah. Local counsel is responsible to the client and responsible for the conduct of the

Utah court proceedings. Under Rule 1.2 of the Utah Rules of Professional Conduct, local counsel may be able to limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Regardless of any limited scope representation agreement, if local counsel determines that the pro hac vice attorney is engaging in conduct that is likely to seriously prejudice the client's interests, or the administration of justice, local counsel must communicate local counsel's independent judgment to the client, and, if necessary, to the court or tribunal.

### **Opinion Number 17-05 | Issued September 27, 2017**

**ISSUE:** What are the ethical implications of a referral service with the following features:

1. Potential clients contract with the service to receive specific legal services at fixed rates.
2. The potential client then selects a lawyer from a list of lawyers who have contracted with the service. The lawyer can then review the case and decide whether to accept it.
3. If the lawyer accepts the case, the service, which has been given access to the lawyer's operating and trust accounts, deposits the client's fixed fee into the lawyer's trust account and withdraws an agreed-upon referral fee, which varies based on the type of service the potential client has requested, from the lawyer's operating account.

**OPINION:** The service described above violates Rule 5.4's prohibition on splitting fees with a non-lawyer. It also violates Rule 7.2's restrictions on payment for recommending a lawyer's services and it may violate a number of other Rules related to client confidentiality, lawyer independence, and safekeeping of client property, depending on facts not presented.

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The full text of these and all other Ethics Advisory Opinion Committee opinions can be found at: <http://www.utahbar.org/opc/index-ethics-advisory-opinions/>.



## 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/](http://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/rules-governing-eaoc/](http://www.utahbar.org/opc/rules-governing-eaoc/).



### ADMONITION

On November 16, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.16(d) of the Rules of Professional Conduct.

#### *In summary:*

The attorney was appointed to represent a client in his appeal. The client requested a copy of the client's trial file and appellate file. The attorney told the client he would provide the trial transcripts and associated notice of appeal once the opening brief was filed. The court of appeals issued a memorandum decision affirming the district court's decision. Approximately three months later the court of appeals wrote to the client acknowledging the client's difficulties obtaining the file and provided the client with a copy of the appellate file. The attorney failed to return case files to the client after requests from the client.

### PUBLIC REPRIMAND

On November 16, 2017, the Chair of the Ethics and Discipline Committee for the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Alan R. Stewart for violating Rule 1.3 (Diligence), Rule 1.4(a) (Communication), and Rule 1.8(a) (Conflict of Interest: Current Clients: Specific Rules) of the Rules of Professional Conduct.

#### *In summary:*

Mr. Stewart was retained by a client to represent the client in a property dispute with the client's neighbor. Approximately three months later the court ordered the parties to attend a session of mediation.

Three more months passed and Mr. Stewart filed a request for hearing on the client's verified motion for additional preliminary orders. Counsel for the defendants informed Mr. Stewart that the defendants in the case would be out of the country for the

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summer and requested the hearing be scheduled after their return. The client was not informed that the defendants would be out of the country, and was not informed concerning the agreement Mr. Stewart had with the defendants' counsel.

Approximately ten months later and more than a year after the client retained Mr. Stewart, the court issued an order to show cause. Mr. Stewart did not inform the client about the order to show cause.

Two months later the client loaned Mr. Stewart an amount of money while he was still representing the client. Mr. Stewart did not advise the client in writing to seek advice of independent counsel concerning the loan while he was still serving as the client's counsel. The client did not give informed consent in writing regarding the loan transaction and the full terms of the loan.

Mr. Stewart failed to move the case forward within a reasonable timeframe, and instead caused time delays and frustrations for the client. Mr. Stewart failed to adequately disclose dates and times of court dates, and failed to adequately explain developments in the case to the client. Mr. Stewart failed to move the case forward which resulted in an order to show cause. Mr. Stewart accepted a loan from the client without disclosing a conflict and advising the client to obtain independent counsel.

*Aggravating factors:*  
Prior bar actions.

No mitigating factors.

## ***Discipline Process Information Office Update***

Eighty attorneys contacted the Discipline Process Information Office for assistance and information during 2017. Jeannine Timothy is ready and available to explain the disciplinary process to all attorneys who find themselves the subject of a Bar complaint. Give Jeannine a call with all your questions about the disciplinary process.



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## **PUBLIC REPRIMAND**

On October 24, 2017, the Honorable Barry G. Lawrence, Third Judicial District Court entered an Order of Reciprocal Discipline: Public Reprimand against Richard P. Gale for his violation of Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct, and is based upon discipline before the United States Tenth Circuit Court of Appeals (Tenth Circuit).

*In summary:*

The Tenth Circuit issued an Order of public admonishment on April 12, 2017, for Mr. Gale's failure to comply with the court's deadlines, rules, and directives, and his failure to adequately represent his client, which are inconsistent with the standards of practice for the Tenth Circuit.

The Tenth Circuit's public admonishment is equivalent to a public reprimand in Utah.

There were no aggravating or mitigating circumstances.

## **PROBATION**

On October 16, 2017, the Honorable Mark S. Kouris, Third Judicial District Court, entered an Order of Probation, against Eliza R. Van Orman, placing her on probation for a period of eighteen months or until the end of the criminal probation, whichever comes first, for Ms. Van Orman's violation of Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

*In summary:*

Ms. Van Orman drove or operated a motor vehicle while having a blood alcohol level of 0.08 or above and caused bodily injury to another. Ms. Van Orman pleaded guilty to a Class A Misdemeanor of driving under the influence of alcohol and was sentenced to probation for eighteen months in Third District Court.

The following mitigating factors were found: absence of prior record of discipline; absence of a dishonest or selfish motive; timely good faith effort to make restitution or to rectify the consequences of the misconduct involved as Ms. Van Orman paid the victim an amount to cover medical expenses; cooperative attitude towards the proceedings; and remorse.

There were no applicable aggravating factors.

## **DISBARMENT**

On November 3, 2017, the Honorable Royal I. Hansen, Third Judicial District Court, entered an Order Lifting Stay and Imposing Disbarment based upon the November 2, 2015 Findings of Fact, Conclusions of Law and Order of Disbarment, disbarring Susan Rose from the practice of law for her violations of Rule 1.1

(Competence), Rule 1.7(a) (Conflict of Interest: Current Clients), Rule 3.1 (Meritorious Claims and Contentions), Rule 3.2 (Expediting Litigation), Rule 4.2(a) (Communication with Persons Represented by Counsel), Rule 8.2 (Judicial Officials), and Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct. The misconduct was predicated on conduct in two cases.

*In summary:*

In the first matter, Ms. Rose filed a lawsuit in the Navajo Tribal Court against numerous individual defendants and San Juan County. The tribal court issued an order granting the relief requested and directing defendants to pay an amount as a fine per day for each day the mandate was not carried out. Ms. Rose sought to enforce the order of the tribal court in the federal courts.

Ms. Rose filed a Complaint in the United States District Court for Utah on behalf of her clients to enforce the Navajo Tribal Court's order. The claims in the Complaint included civil rights violations, RICO claims, federal antitrust claims, mail fraud, witness tampering, interference with commerce by threats, claims under the Freedom of Access to Clinic Entrances Act, Health Care Quality Improvement Act, Emergency Medical Treatment and Active Labor Act, and the Medical Bill of Rights. The Complaint included numerous state law torts, contract claims, and federal common law claims. The Complaint also sought the entry of sweeping declaratory judgments and writs of mandamus that would require audits of federal funds expended by the county for the previous ten years, an IRS audit of payroll tax withholding, the convening of a federal grand jury investigation, and the immediate seizure or sequestration of the defendant entities' financial records by U.S. Marshals.

Throughout Ms. Rose's representation of the plaintiffs and over a period of several years, Ms. Rose filed numerous pleadings and claims in the District Court and in the Tenth Circuit Court of Appeals that were found to be frivolous and which contained inaccurate information. Ms. Rose also filed a constant stream of motions, corrections to motions, amendments to motions, filed corrected and amended motions after the opposing parties had filed their responses, filed lawsuits in other courts, and filed appeals that were found to have no basis.

At one point, Ms. Rose communicated with and attempted to represent a person she named as a defendant in the same case, whose interests were directly adverse to those of Ms. Rose's client, and whom she knew to be represented by counsel. In the same matter, Ms. Rose filed a motion to recuse a judicial official and in the memoranda supporting the motion, Ms. Rose made disparaging remarks about the judge's integrity and qualifications with reckless disregard as to the truth or falsity of the statements. In addition, Ms. Rose failed to understand the law

or follow the Rules of Civil Procedure, the local rules, and the Rules of Professional Conduct. Ms. Rose unnecessarily delayed litigation to the detriment of the parties and the judicial system, and failed to make reasonable efforts to expedite the litigation.

In the second matter, Ms. Rose represented a client in a grandparent visitation case. Ms. Rose filed an appearance in the case and asked for additional time to answer the complaint, which was filed in state court. When the request was denied, Ms. Rose filed a motion to stay the proceedings. The court set a hearing for oral argument on the motion to stay. The morning of the hearing, Ms. Rose faxed a letter to the court indicating she would not attend the hearing due to an order from the tribal court that stated anyone appearing in the state court would be subject to confinement for a year or a \$5,000 fine. Also on the day of the hearing, Ms. Rose filed an objection to the proceedings. In addition, Ms. Rose initiated a lawsuit in federal court on behalf of the minor child of her client against the grandparents. The state court went forward with the hearing, but Ms. Rose did not appear. The court issued an order and in the order indicated the quality of pleadings filed in the case on behalf of Ms. Rose's client suggested that her counsel was only marginally competent, if that, to practice law in Utah. The court directed the clerk to make copies of the pleadings and submit them to the Utah State Bar Office of Professional

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Conduct with a copy of his order. The court explained that the claim that Ms. Rose was forbidden to appear in the matter was “entirely self-imposed” because Ms. Rose’s client sought and obtained the restriction on her own. Another hearing was set. On the same day as the new hearing, Ms. Rose filed a Motion for Disqualification of the judge. The reviewing judge issued an order indicating the motion was untimely and ruled that all eleven of the allegations “fell woefully short of the standard.” Ms. Rose was sanctioned and ordered to pay attorney fees and submit a report regarding the standard for judicial disqualification. The grandparents ultimately dismissed the state court case because they could not afford to continue after Ms. Rose sued them in federal court, and then appealed when her claim was dismissed.

In both matters, Ms. Rose’s filings of motions even after being warned and sanctioned caused significant delays and expense to the parties and the judicial system.

The following aggravating factors were found: dishonest or selfish motive; pattern of misconduct; multiple offenses; obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of disciplinary authority; submission of false evidence, false statements, or other deceptive practices during the disciplinary process; refusal to acknowledge the wrongful nature

of misconduct involved either to the client or to the disciplinary authority; and, lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved.

### RESIGNATION WITH DISCIPLINE PENDING

On November 22, 2017, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Andrew A. Stewart, for violation of Rules 8.4(b) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

#### *In summary:*

Mr. Stewart was charged with eight counts of Making and Uttering a False Prescription and three counts of Obtaining a Prescription under False Pretenses, all are third degree felonies in violation of Utah Code section 58-37-8. Mr. Stewart pled guilty to five counts of Falsify/Forge/Alter a Prescription of a Controlled Substance, all class A misdemeanors. The facts of Mr. Stewart’s conviction based on a guilty plea were as follows: Mr. Stewart obtained prescriptions for a controlled substance from two providers without disclosing to either physician that the other was prescribing the same controlled substance to him. Mr. Stewart intentionally made false or forged prescriptions by “whiting out” the dates on the original prescriptions, photocopying them, and inserting new dates by hand.



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## *Transformational Servant-Focused Leadership: An Intention for Your Career*

by Bebe Vanek

Every journey starts at the beginning and what an incredible place to stand together. We, as young lawyers, are at the beginning of something monumental, and we are not alone. We stand with attorneys in the middle, and apex of experience, who are our mentors and friends. We stand at a crossroads together, with a base of knowledge, a lot of grit, and an immense anticipation of what is possible. Have you set an intention for your career? I do not refer to professional aspirations; I ask about something else: an internal focus to guide your actions and interactions with clients and colleagues. Consider: “Transformational Servant-Focused Leadership”; an intention that can improve our service to our clients and inspire our colleagues. Through this article, I will explain the meaning and value of this intention and provide useful tips for young and experienced attorneys to use it for personal and professional development.

In July, I begin my term as president of the Young Lawyers Division (YLD) of the Utah State Bar and will lead a group of over 2,000 young lawyers in furtherance of professional development through free CLEs, networking opportunities, pro bono clinics, and social events. In preparing for this role, I discovered Servant-Focused Leadership and Transformational Leadership: two leadership styles with applicability for the practice of law. Every attorney has the capacity to be a leader and stands in a unique position to influence individual effort towards the achievement of a goal. Regardless of whether today is your first day on the job or your thousandth, any attorney can use these tips to maximize their impact and benefit to our community.

Leadership is a process of influence to maximize individual effort towards the achievement of a goal. Servant-Focused Leadership is leadership driven by the desire that one wants to serve, then by conscious choice, one aspires to lead, and through leading, one focuses primarily on the growth and well-being of people and the communities to which they belong. Robert K. Greenleaf,

*The Servant as Leader* (1970). Transformational Leadership is a focus on inspiring followers to enable them to enact revolutionary change using three factors: (1) charisma and inspiration, (2) intellectual stimulation, and (3) individual consideration. Afsaneh Nahavandi, *The Art and Science of Leadership* 193 (2000). Take the two together, Transformational Servant-Focused Leadership, and you create a leader who focuses on the betterment of the followership through personal connection, intellectual stimulation, and inspiring progress towards a goal.

Transformational Servant-Focused Leadership can create a holistic view of public service through the practice of law. The goal of this process is to consider the practice of law as an opportunity to better our community by leading clients towards a beneficial resolution. Attorneys are leaders by definition – we must achieve a goal, influence and maximize efforts of others, and inspire change. An attorney should not accomplish this alone. The client will become a member of the followership, and an attorney can use Transformational Servant-Focused Leadership as an intention throughout the legal process. The attorney considers the best outcome for the client and serves his or her client with an eye towards the well-being and growth of the communities in which the client belongs. Moreover, the attorney considers how to impact the client for the better through participation in the legal process. This may look different for each area of the law we practice, but the question is the same: How do I improve the life

*BEBE VANEK works at the University of Utah in healthcare law and will be the president of the Young Lawyers Division of the Utah State Bar in July 2018. Bebe is the Young Lawyer Delegate for the State of Utah to the American Bar Association House of Delegates.*



of my client for having served them as their attorney? The attorney provides opportunity for intellectual stimulation by engaging his or her client in determining case management and encouraging discussion through disagreement. An attorney can inspire their clients to revolutionize their actions for the betterment of themselves and their community and reach a beneficial conclusion to the case. Attorneys can bring about systematic change through the practice of law by focusing on making our community better in every interaction.

Attorneys may set an intention of Transformational Servant-Focused Leadership as their professional and personal focus using this framework:

(1) Consider followership: Consider those you serve, i.e. those you lead. This may be the members of your organization, your clients, or the people in your firm or office. Consider how you can make their lives better with your actions and use that as a factor in your decisions and interactions with them.

*“Setting Transformational Servant-Focused Leadership as an intention for your career will create positive changes in the legal profession and our community as a whole.”*

(2) Charisma and inspiration: Charisma is the ability to attract, charm, and influence the people around you. Charisma comes from authenticity and the being the best version of yourself. Self-awareness and authenticity inspires others to bring themselves to your level and be their best selves as well. When everyone exists as his or her best self, working together and inspiring each other is as simple as showing up.

(3) Intellectual stimulation: Provide others, clients or colleagues, with an opportunity to learn and grow through delegation and active communication. Communicate with members of your organization and clients to encourage debate and conversation about differing views. Delegate tasks and set clear, high expectations. Allow your followership to make mistakes and value openness and the experience of problem solving through trial and error.

(4) Individual consideration: Be available and actively present to meet and connect with others and build trust. Building trust is a critical element for professional and personal development. Simple tasks such as following through with assignments at work, going out to lunch with a mentor or colleague, and returning your clients' calls and emails, all build trust. Be actively present with your clients; do not let your mind wander to the list of things left to do. Listen, and seek to understand the issue fully.

Setting Transformational Servant-Focused Leadership as an intention for your career will create positive changes in the legal profession and our community as a whole. I am not suggesting that every attorney must seek a formal leadership appointment

in order to reap the rewards of this intention. However, if formal leadership is your goal, speak to those who hold positions you seek and ask for mentorship – more often than not, people are gracious with their time and willing to help raise you up and support

your dreams. Concurrently, consider situations in your professional and personal life each day to practice this intention and work to inspire your colleagues and clients through your service to each. “The final test of a leader is that they leav[e] behind [them] in other [people] the conviction and the will to carry on.” Walter Lippmann, *New York Herald Tribune* (1945), reprinted in *The Oxford Dictionary of Phrase, Saying & Quotation* 258 (2d. ed. 2002).

When we took the Attorney's Oath at our respective swearing in ceremonies, we began a journey to serve others in their times of need, joy, and sorrow. Regardless of whether we know the destination, service to others brought each of us to this profession. Setting the intention for your career to focus on the betterment of our community through this service can guide any decision or action. As an attorney, you are already a leader. Incorporate the Transformational Servant-Focused Leadership framework into your practice and watch the revolution occur around you.



## Crossing into the Blue

### *My Experience as a Reserve Judge Advocate in the U.S. Air Force*

by Kim Bowman

In 2016 I ran for Lt. Governor of Utah, losing the election after almost eighteen months on the campaign trail. Running for office is a lot of things, including a serious challenge and a lot of fun, but it doesn't present a substantial opportunity to serve your community until after you win and are sworn into office. I was uncertain as to my next career move after the election, but I knew I still wanted to do something of service after so much time devoted to politics. While I wasn't sure what path my civilian career would take, I was able to use the months of transition after the election as an opportunity to serve a tour of duty at Hill Air Force Base as a Judge Advocate, commonly known as a JAG, in my role as a Reserve Officer in the U.S. Air Force.

#### What is a JAG?

JAG is a moniker drawn from the name of our service's highest-ranking attorney, a lieutenant general who is called The Judge Advocate General (TJAG). TJAG serves as the leader of the Air Force's legal community, collectively called The Judge Advocate General's Corps (JAG Corps). TJAG is appointed by the President and confirmed by the U.S. Senate as the senior legal adviser to the Secretary of the Air Force, all officers and agencies of the Department of the Air Force, and the head of the officers of the Air Force designated as judge advocates. 10 U.S.C. § 8037. TJAG is also responsible to receive, revise, and have recorded the proceedings of Air Force courts of inquiry and military commissions. *Id.*

The JAG Corps delivers full-spectrum legal capabilities everywhere the Air Force executes its mission around the world. That legal support is provided to commanders, in courts-martial, to family members back home while service members are deployed, and in any number of other mission-critical environments. The JAG Corps mission is to provide the Air Force, commanders, and Airmen with professional full-spectrum legal support required for mission success in air, space, and cyberspace. If the JAG Corps was an international law firm, it would be one of the largest, with military and legal professionals consisting of more than 4,500 attorneys and paralegals made up of military and civilian personnel

working in the Regular Air Force (RegAF), Air National Guard, and Air Force Reserve components. The three components taken together are integrated into a "Total Force," where all service members wear the same uniform and serve the same mission regardless of component. The difficult work of the Air Force wouldn't be possible without all three components providing vital capabilities in a functionally unified way.

JAGs are Air Force Line Officers first, in addition to being competent and professional attorneys. That means developing and maintaining the leadership and war fighting skills necessary to serve our country as a practitioner of both the law and of the profession of arms. JAGs are tasked with providing the entire array of legal services necessary for a fully functioning Air Force legal system, both civil and criminal.

Military criminal law is known as Military Justice and encompasses both judicial and non-judicial punishment designed to ensure good order and discipline. The judicial process, including proper procedure, jurisdiction, and elements of offenses are codified in the Uniform Code of Military Justice (UCMJ). 10 U.S.C. §§ 801–946. The UCMJ was initially drafted and passed by Congress in 1950 under the powers vested to it under Article I, Section 8 of the United States Constitution, which provides, "The Congress shall have power to make rules for the Government and Regulation of the land and naval forces." Practicing Military Justice includes criminal prosecution in courts-martial, which can result in federal convictions. A JAG's role may begin as early as the start of the investigation carried out by Special Agents of the Air

*KIM M. BOWMAN JR. is an Attorney at Pearson, Butler & Carson PLLC. He is also a Captain in the U.S. Air Force Reserve and a member of the Air Force Judge Advocate General's Corps.*



Force Office of Special Investigations (the Air Force equivalent of the Navy's Naval Criminal Investigative Service, or NCIS). Trial practice mirrors civilian prosecution, including screening charges, drafting motions and briefs, the potential for plea deals, and bench and jury trials.

On the civil side, JAGs conduct legal research and investigations, write briefs and opinions, and represent the Air Force and its members in contract, employment, environmental, air and space, cyber, procurement, and medical law matters. JAGs also provide free legal assistance to RegAF military members and their immediate family members, retired military members and their immediate family, widows and dependents of deceased retired military members, as well as Guard and Reserve members who are on extended orders. Here in Utah, Hill Air Force Base's mission includes three Wings and fifty-one associate units employing 21,000 civilian and military personnel. One of the 75th Air Base Wing Legal Office's primary responsibilities at Hill is to ensure quality legal assistance is provided to 45,000 eligible members of the Armed Forces and their families who live on or near the base.

RegAF JAGs and members of the Air Reserve Component (ARC) perform a myriad of legal work. However, while ARC members practice in the same fields as RegAF JAGs, ARC members also are regularly called upon as specialists based on their civilian experience, which is often unique in the legal office (e.g., health sciences or real estate law). This is especially true in cases where a familiarity with local law is helpful, as many of the JAGs in a legal office are licensed in another state. Some examples of where there's benefit in having someone who isn't regularly part of the office's proceedings come in for a specific assignment would be as a Preliminary Hearing Officer in a UCMJ Article 32 hearing (akin to a preliminary hearing under the Utah Rules of Criminal Procedure) or to serve as the Legal Adviser in an administrative discharge board, which is a role similar to an administrative law judge.

There are three main categories of the ARC, and while each is slightly different in terms of scheduling, all provide full-time attorneys the opportunity to serve our nation with an approximately four-week military service obligation over the course of a year:

- **Individual Mobilization Augmentees (IMAs):** IMAs are Reservists assigned or attached to a RegAF legal office during regular work days (i.e., Monday through Friday). This is considered the most flexible and individualized component due to the way schedules are set and requires two concurrent weeks of duty in addition to twelve days of duty scheduled as the legal office's needs dictate.

- **Traditional Reservists (TRs):** TRs are Reservists that serve two concurrent weeks at a unit located at a Reserve base in addition to one weekend a month with that unit on regularly scheduled weekends. While TRs are what most people think of when they hear "Air Force Reserve," TRs comprise a minority of the Reserve JAG mission.
- **Air National Guard (ANG):** ANG members also serve two concurrent weeks at an ANG unit, in addition to one weekend a month with that unit on regularly scheduled weekends; however, they serve both a federal mission and a state mission, and can be called upon to serve their local community or the nation as needed.

### Deployment and Extended Tours

The Air Force has been continuously engaged in combat operations for over two decades, and high-tempo operational needs will continue for the foreseeable future. While ARC JAGs deploy in support of contingency operations, in recent times the Air Force has not involuntarily activated an ARC judge advocate or paralegal to deploy thanks to the number of ARC members who volunteer for deployments.

ARC tours can last anywhere from one week to three years, and it isn't uncommon to find ARC members performing essential functions in any given legal office anywhere in the world.

### Becoming a JAG

As with many things in life, becoming a JAG starts with an application, including letters of recommendation and a personal statement. After submitting the application materials, candidates schedule an interview with a RegAF Staff Judge Advocate (SJA) at a nearby Air Force base. The interview lasts up to an hour, and unlike most job interviews as an attorney, the focus isn't just on law, but also physical fitness, and the Air Force's core values of integrity first, service before self, and excellence in all we do. After the interview, the SJA writes a recommendation memorandum that is ultimately sent up to TJAG for a decision on who makes the cut and will be permitted to join the JAG Corps.

In order to qualify as an attorney in any component of the JAG Corps, an applicant must meet minimum qualifications, including:

- Be a United States citizen;
- Graduate from an ABA-accredited law school;
- Be a member in good standing of a bar of a state or territory of the United States, or D.C.;

- Not exceed the age limit (thirty-four years old without prior military service, with a potential waiver up to thirty-seven); and,
- Meet medical and physical qualification criteria for appointment in the Air Force. That includes regularly passing a physical fitness test composed of running, pushups, sit ups, and an abdominal measurement.

In addition to meeting the minimum qualifications, the ARC is very competitive, accepting only a small number of the most highly qualified candidates as needed to manage the attrition rate, as attorney staffing is currently near 100%. Inexperienced or recently barred attorneys are accepted into the RegAF component at a rate under 10%, but the most qualified candidates for the ARC have prior JAG experience, at least four years' experience practicing law, and have work experience that is directly transferrable to the JAG Corps' mission.

After being selected and commissioning, the next step is to attend five-and-a-half weeks of Commissioned Officer Training (COT), which provides an introduction to military customs, courtesies, and leadership techniques (for those without previous AF Officer experience). JAGs will then attend the Judge Advocate Staff Officer Course, a nine-week course similar to a semester of law school and designed for licensed attorneys to learn the fundamentals of military-specific laws and practice.

After completing initial training, JAGs will begin working at their assigned units, but continuing legal education and additional field-specific training opportunities will continue for the rest of a JAG's career.

For more information about becoming an Air Force Reserve JAG, please visit <https://afreserve.com/JAG/> (last visited September 29, 2017).

### My Journey in the JAG Corps

From a young age, I knew that I wanted to serve in the Armed Forces, and that nowhere except the Air Force would I have the opportunity to meet men and women of such a high caliber, some of whom may literally make history. When I got to law school I was dedicated to fulfilling my lifelong ambition of becoming a JAG.

During my 3L year, I worked as an extern in the legal office at Beale Air Force Base in California, where I was fortunate to be a part of a highly skilled legal team. Each member of the 9th Reconnaissance Wing Legal Office taught me valuable lessons about the practice of law and what it meant to serve as a member of the Air Force. The SJA demonstrated the importance and effectiveness of a

leader who listens more than he or she speaks. The JAGs enjoyed the challenge and excitement of practicing in an environment where they could handle wills, procurement, and preferring charges on a series of serious crimes, all in the same afternoon. The officers succeeded in and out of the courtroom because they were comfortable asking well-trained non-commissioned officers and civilians with decades of experience for help and advice and the entire office acted together as a team.

After graduating law school and passing the bar, I put together my application for a Direct Appointment as an Air Force Reserve JAG. I filled out the forms, collected letters, and completed my SJA interview, all of which resulted in a polite but conclusive rejection from TJAG's office. I later learned that this was a common experience and that most JAGs had to apply two or more times before being selected due to the competitiveness of the JAG Corps. Undeterred, I applied again after gaining more experience, and the day before Thanksgiving 2013, I received a call informing me of my selection.

When I commissioned and completed my training, I began working at my regular duty station: the 75th Air Base Wing Legal Office at Hill Air Force Base, Utah. Unlike a Hollywood depiction, I've never asked anyone if they can "handle the truth" or been given my own combat fighter aircraft to fly to a hearing. What I have been is part of a team that works together to serve something so much greater than anything I had been a part of before. Whether I'm performing physical training with the whole unit, working alone on a complex issue where state and federal law intersect, or trying a case with colleague in a court-martial, I am never far from the knowledge that the work done is mission critical to maintaining America's superiority in the air, space, and in cyberspace.

Certain moments of my experience in the Air Force stand out in my memory, like the first time I was corrected by a Military Training Instructor for marching improperly; the first line of my opening statement when my co-counsel and I tried an attempted murder court-martial, and the first time I introduced myself in voir dire by saying "My name is Captain Kim Bowman, and I represent the United States of America." While those firsts stand out, the things I cherish most from my experience have been much less dramatic, but no less emotionally charged, and almost all come from time spent with my fellow Airmen and the sense of camaraderie I've felt with them.

*The views expressed by Mr. Bowman are his own, and do not reflect the official policy or position of the Department of the Air Force, Department of Defense, or the U.S. Government.*





## 2017 Salary Survey

by Greg Wayment

With the gracious support of the Utah paralegal community, the Paralegal Division has recently completed the 2017 salary survey. The first one was conducted in 2008, followed up in 2012 and again in 2015. The goal of the paralegal salary survey is to firstly answer the question, "What can a paralegal in Utah expect to make?"; but also to track the education, skills, CLE opportunities, and requirements, membership in professional organizations, and benefit trends for paralegals in the state. Hopefully by doing so, we can provide a baseline for paralegals when negotiating benefits, salaries, and bonuses.

The survey was open to Paralegal Division members and non-members alike. For full sake of disclosure, there was no eligibility screening, meaning anyone that had access to the link was welcome to answer the questions. By and large, most of the respondents (at least 92%) reported their job title as paralegal. The other 8% reported as being legal assistants, administrative assistants, and other compliance related positions.

The 2017 survey contained sixty-one questions and was taken by a total of 122 individuals. Unfortunately that is down from 173 in 2015, but more than the eighty-four that took it in 2012, or the ninety-nine that took it in 2008. We would like to thank the 122 people that took the time this year to take the survey! The following is a reporting and analysis of the results.

As has been the trend, the majority of respondents are employed in Salt Lake County (85%), with just 5% reporting from Utah County, and 2.5% in Weber and Washington Counties respectively. At 96% of the respondents, women still account for the large majority of paralegals working in Utah.

Almost 33% of respondents have been employed in the field for over twenty years, with 31% in the one-to-five year category. As for current employment, almost 39% have been with the same employer for over ten years and just roughly 1% more (or almost 40%) have held their current positions for between one and five years, indicating some mobility among Utah paralegals. Surprisingly, we only had one respondent who reports as working part-time, and no self-employed.

Membership in paralegal organizations has remained robust, with 70% of respondents belonging to the Paralegal Division (up 18% from the last survey) and approximately 24% enjoying membership in the Utah Paralegal Association. Roughly 22% are members of the National Association of Legal Assistants (NALA). The vast majority of respondents, over 93%, were not required to have passed a national paralegal certification exam prior to being hired. This number has held steady since our 2012 survey. Sixteen percent answered affirmative to obtaining a C.P. designation, and 7% answered to having obtained an A.C.P. designation.

Twenty-five percent of Utah paralegals report having earned a bachelor's degree (down 15%), while 22% have a paralegal certificate (down 17.5%). According to our survey, the majority of paralegals in Utah have an associate degree (36%).

As for employers, 61% require their paralegals to have met a minimum education level; of these, 28% require a certificate from an American Bar Association-approved paralegal program (down 16%), which nearly 70% of Utah paralegals possess (down 9%). Education is not often directly tied to compensation, however, as over half of respondents indicated that their employers do not consider education levels as a factor in setting compensation. Surprisingly, only about 18% of law firms require paralegals to have a bachelor's degree.

The second part of our survey addressed firm environment, duties and responsibilities. Of respondents, nearly 53% work in private law firms, with approximately 18% working in corporations, and 23% work in the public sector. As for practice areas, we

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found that 49% of respondents practice in the litigation arena, with 44% of paralegals doing defense work and nearly 37% doing plaintiffs' work. Other big areas of employment are corporate, personal injury, and business law.

A clear majority of respondents, 56%, work in organizations that employ no more than five paralegals. As for firm size, the vast majority are either quite small or quite large, with nearly 44% employing between one and ten attorneys and 37% employing over forty attorneys.

Utah paralegals are near-unified in their use of Microsoft Word at 96%. For legal research, the use of Lexis/Nexis and Westlaw is almost evenly split (with a small majority using Westlaw). A new question on this survey asked paralegals "What software does your firm/you currently use to manage large formal document productions?" The overwhelming majority (thirty-six respondents) use Adobe. iPro and Concordance were evenly split with eleven, and Summation and Relativity had two. A few other responses included PIMS, Worldox, NetDocs, and Nuance.

A large number of people skipped this question.

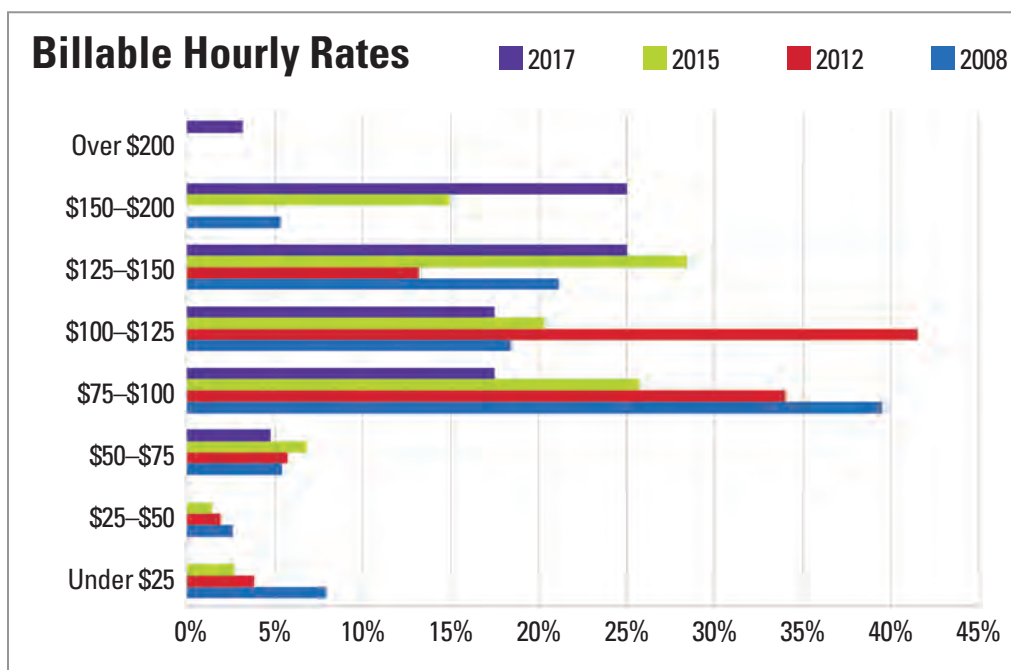
Most respondents, almost three-quarters, work very little or no overtime in the average month. Six percent work over twenty hours a month. The question of whether respondents bill time to clients is nearly evenly split. Of the 51.6% who do bill their time, the majority bill over 75% to clients, with under 10% of their time spent on non-billable administrative work. Nearly 43% have no billable hour requirement. Of those that do, 1,500–1,600 was the biggest category with 25% of the respondents, followed by 1,600–1,700 hours at 14%. In addition, nearly 31% of respondents supervise a secretary.

In this survey, we found that a higher number of employers are providing in-house CLE (46% yes, 54% no). Over 85% of employers pay for outside CLE, which is a trend we are pleased to see has increased. Of those who pay for outside CLE, 100% of

respondents receive payment of registration fees, with nearly half receiving hotel accommodations and mileage as well. A slightly smaller number provide reimbursement for airfare and a per diem. Nearly 21% of paralegals have annual CLE budgets, while another 31% having no limit for CLE that will be paid. We are also pleased to report that a majority of respondents report attending Paralegal Day and the Brown Bag CLE events.

Turning to paralegal salary, benefits and other compensation. The largest category of respondents at 16%, report making between \$70,000 and \$74,999. The next largest category at 12%, make between \$45,000 and \$49,999. With a three-way tie at 11%, we have \$40,000 to \$44,999; \$50,000 to \$54,999, and \$55,000 to \$59,999. The lowest reported salary was in the \$25,000 to \$29,999 range and the highest (one respondent) was in the \$100,000 and higher category.

In our last survey we wrote "disappointingly, nearly 55% of employers do not have a bonus structure in place for their paralegals." We are happy to report that 38% reported this time that there is not a bonus structure in place (meaning 17% more paralegals are being recognized for their good work with a bonus incentive). Of those who do, about 32% tie bonuses directly to billable hours and fees collected. Primarily bonuses are based on personal performance and company success. The majority of reported yearly bonus amounts is between \$1,000 and \$4,999. The second largest category was between \$5,000 and \$9,999. And the outliers are two at \$20,000+ and ten in the \$1 to \$999 category.



A large percentage at 79% reported receiving a raise in the last twelve months, with the majority (70%) reporting the percentage of the raise being 1–3% of their annual salary.

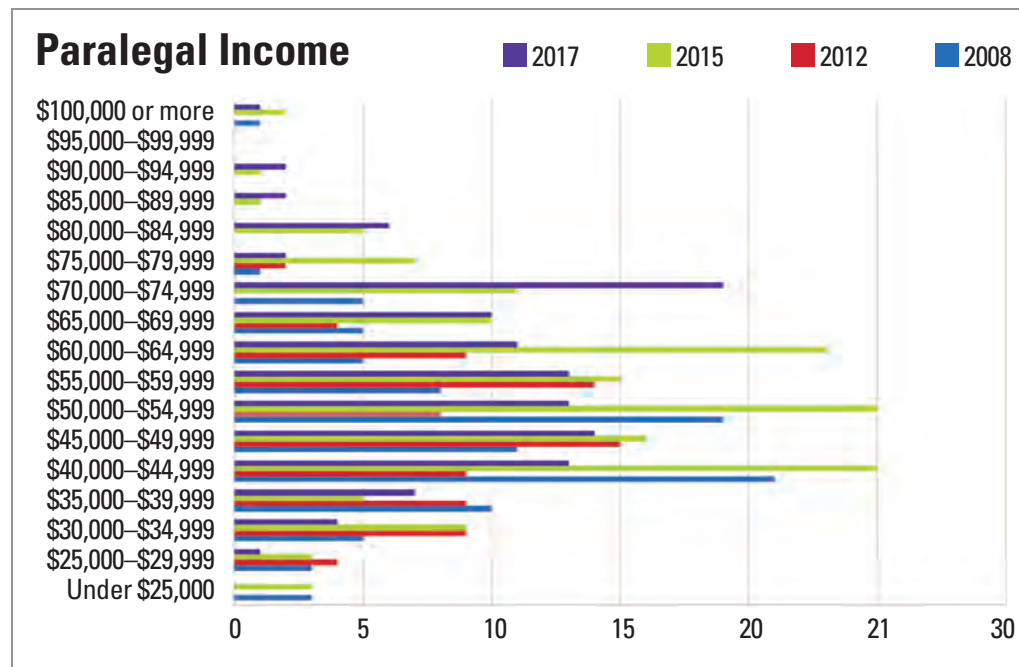
About an even number of paralegal report being paid salary vs. hourly (47% and 52% respectively). As for benefits provided, 89% of respondents have access to health insurance for

themselves (with slightly less having access for their families) and roughly 75% having access to dental insurance. Over 87% have a 401(k) plan with their employer, and just under 25% have profit sharing or another pension plan in place.

An astonishing 95% of respondents answered that they feel secure in their position with 52% reporting that if they needed

to find new employment, they are optimistic they could do so. We did have several people comment that their biggest concern in finding a new position would be their age.

The completed survey with all the responses will be posted on the Paralegal Division's social media sites. We greatly appreciate your participation and hope that this information is valuable for you during salary negotiations with your employers.



## Utah State Bar Fall Forum 2017

by Greg Wayment

I was fortunate once again to be able to attend the Utah State Bar's Fall Forum which took place on November 9th and 10th at the Little America in Salt Lake City.

I attended three hours of the litigation track this year, which focused on depositions. The topics included preparing to take and defend depositions, winning the battles to win the war, expert depositions, and using depositions at trial. Jonathan Hafen once again put together an outstanding faculty with both new and familiar faces.

The lunch keynote was delivered by Nina Meierding, who spoke about miscommunication across cultures and genders. After lunch, I attended a session titled "Who is your client" with Melyssa Davidson and Paxton Guymon. And finally, for the last hour, I attended an informal but informative update on the state of the Licensed Paralegal Program in Utah with Justice Himonas.

The Paralegal Division wants to extend a thank you to the co-chairs Juli Blanch and Judge Blanch as well as the rest of the Fall Forum Committee. Also, we'd like to particularly thank the committee for again offering a reduced rate for paralegals and Paralegal Division members. To all paralegals in Utah: We continue to strongly encourage you to attend the Bar's three annual conventions, and believe there is not a better way increase your education, sharpen your skills, and make valuable connections with other members of the Utah State Bar.



**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 22, 2018 | 11:00 am – 1:00 pm**

**An Update on Legislative Responses to Sexual Harassment Issues.**

**January 24, 2018 | 8:00 am – 12:30 pm**

**Ethics for Lawyers: How to Manage Your Practice, Your Money & Your Files.** Hosted by the Office of Professional Conduct.

**February 15 (evening) & 16th**

**First Annual Litigation Section Midwinter Conference.** Save the dates!

**February 23, 2018 | 8:00 am – 5:00 pm**

**7 hrs. CLE, 1 hr. Ethics**

**IP Summit.** Salt Lake City Center Hilton, 255 South West Temple. To register and for more details, go to: [https://services.utahbar.org/Events/Event-Info?sessionaltcd=18\\_9007](https://services.utahbar.org/Events/Event-Info?sessionaltcd=18_9007).

**March 8–10, 2018**

**Spring Convention in St. George.** Dixie Center at St. George, 1835 Convention Center Drive. Join the Bar in southern Utah for CLE, networking opportunities, and family recreation. Look for details in the brochure in the center of this *Bar Journal* or online at: [www.utahbar.org/cle/utah-bar-conventions/](http://www.utahbar.org/cle/utah-bar-conventions/).



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

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Located at 480 East 400 South, Suite 201, Salt Lake City, Utah 84111 on the 2nd floor of the First National Bank building. Secretarial help available. Please call: 801-532-5951.

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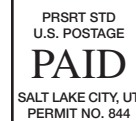


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