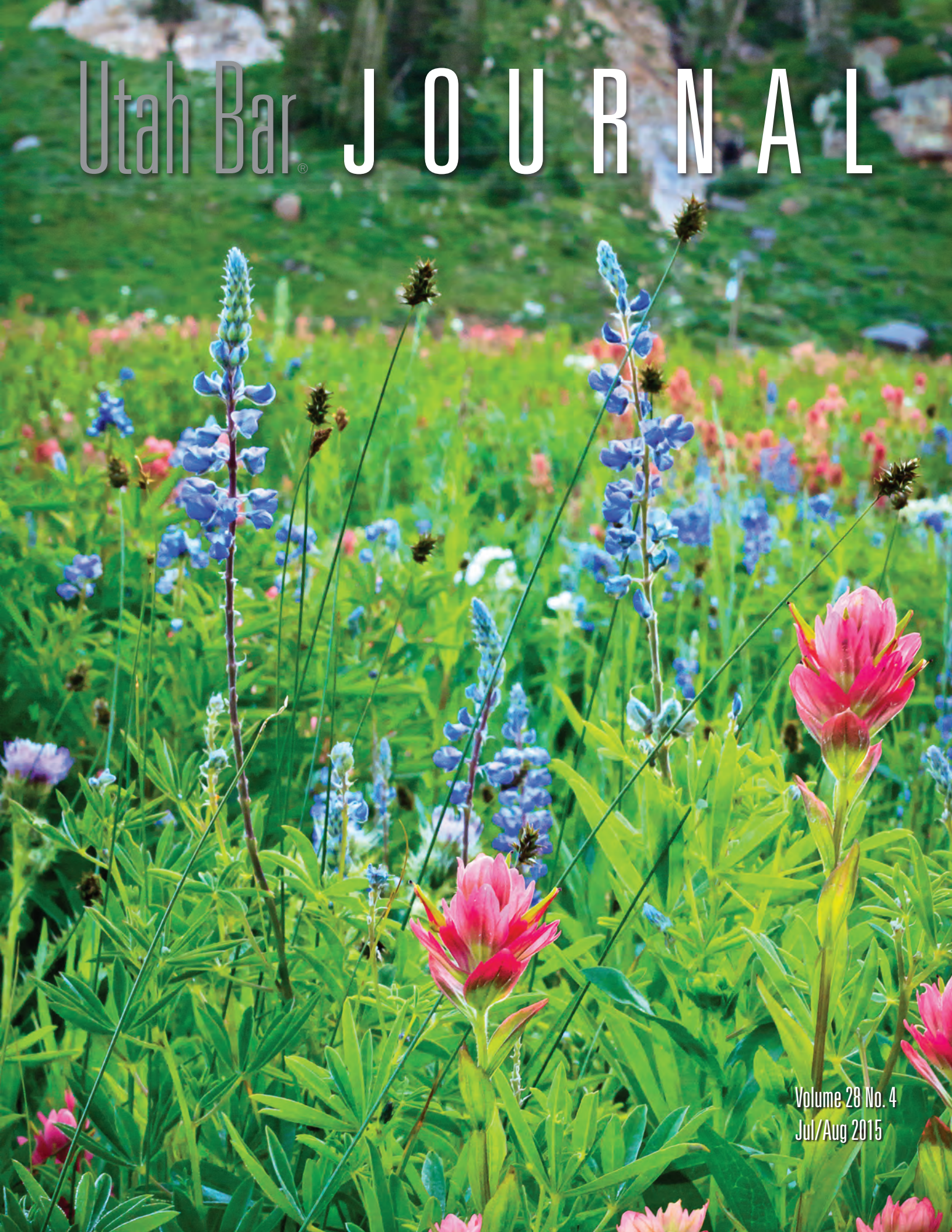
Utah Bar® JOURNAL



Volume 28 No. 4
Jul/Aug 2015

EISENBERG GILCHRIST & CUTT

ATTORNEYS AT LAW

CELEBRATING 15 YEARS OF HELPING INJURED CLIENTS

Over the past 15 years, Eisenberg Gilchrist & Cutt has obtained over $27 million in jury verdicts and $100 million in settlements for injured plaintiffs.

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

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

Let our experience add value to your case.

INNOVATIVE SOLUTIONS TO YOUR COMPLEX INJURY AND COMMERCIAL CASES.

900 PARKSIDE TOWER • 215 SOUTH STATE STREET • SALT LAKE CITY, UTAH 84111 • TEL: 801-366-9100 TOLL-FREE: 877-850-3030

FOUNDING PARTNERS ARE JEFFREY D. EISENBERG, ROBERT G. GILCHRIST AND DAVID A. CUTT

www.egclegal.com

Table of Contents

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

Utah Bar® JOURNAL

Volume 28 No. 4
Jul/Aug 2015

Cover Photo

Wildflowers at Albion Basin, by Utah State Bar member Steve Densley.

STEVE DENSLEY is a Senior General Attorney with Union Pacific Railroad. He is licensed to practice law in Utah, Nevada, Idaho, Oregon, and Washington. The Densley family has held a reunion every summer at Snowbird, Utah for over 25 years. This picture was taken during one of those events.

SUBMIT A COVER PHOTO

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

MISSION & VISION OF THE BAR:

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

The Utah Bar Journal

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

Utah's appellate law firm

www.zjbappeals.com

ZJB Zimmerman Jones Booher LLC
Appellate Lawyers

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

What we do:

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

801-924-0200

e-mail: zjb@zjbappeals.com

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

Letters to the Editor

Dear Editor:

Before I was licensed to practice law in this state I had to pass a background check. Upon being licensed I was sworn in and took an oath to uphold the law and professional standards. My continuing to be licensed depends upon my continuing to maintain the high standards set by the Utah Supreme Court for attorneys. This is as it should be. Practicing law is an honorable profession and should be treated as such by the public, the government, and most of all, by the judicial system.

I have an office where I meet people, but I also work at court. My profession entitles me and requires me to frequently visit the various courts of this state. As an attorney, I am not only a visitor to the court, I am also an officer of the court. I take that responsibility seriously.

As an officer of the court and a duly licensed member of the bar, I take exception to invasive court security. For the record, I do not mind being prohibited from taking a firearm into the courthouse. There is a sense of security knowing that attorneys and litigants are not armed. I do not object to emptying my pockets or having my briefcase x-rayed. I do object to having to removing my belt or my shoes. This is not required of others who work there. Court personnel walk right past security. As a duly licensed attorney and sworn officer of the court I am no more a risk to the security there than the clerks, administrators, GALs, and, I dare say, even the armed guards and the judges. Licensed attorneys should be allowed to come and go with minimal invasion of privacy and the courtesy and respect that should accompany their trusted and respected position in the judicial system.

Stephen J. Buhler, Attorney at Law

Dear Editor:

As a relatively new paralegal with Strong & Hanni Law Firm, I really appreciated the Salary Survey 2015: Highlights and Analysis in the May/June issue of the *Utah Bar Journal* authored by Karen McCall. The survey results were very interesting and it was remarkable to get an idea of the wide scope of our profession in Utah. Thank you, Karen and the *Utah Bar Journal* for providing us with this well written article.

Michelle Peters, Paralegal to Kent M. Brown
Strong & Hanni

Letter Submission Guidelines

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

Are you running your practice, or running in place?

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

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

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

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

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

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

UTAH STATE BAR ORGANIZED 1931

LexisNexis Firm Manager®

Interested in writing an article for the Utah Bar Journal?

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

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

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

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

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.

Top 10 Great Things About Being a Utah Lawyer

by James D. Gilson

In Dave Letterman-like fashion, for my final "President's Message," I would like to share ten great things about being a Utah lawyer. It's good to remind ourselves about the positive side of our profession.

10. The attorney-to-population ratio is (slightly) higher in Utah than the teacher-to-student ratio and higher than the national average.

As of May 31, 2015, there were 11,838 licensed attorneys in Utah (9,148 active; 2,690 inactive). This is an increase of 201 from May 31, 2014. The population in Utah is about 3 million. So, there is approximately one Utah lawyer for every 253 Utah residents. There are approximately 1,294,000 lawyers in the United States, with a national population of 319 million (1 to 247 ratio).

9. Utah is the only state where you can try a case and be related to both the plaintiff and the defendant, opposing counsel, the judge, the bailiff, and half the jury pool.

Okay, this point (from Bar Commissioner Susanne Gustin) may be a slight exaggeration, especially in Salt Lake County. But if you try a case in a rural county, it often takes a while to pick a jury because so many people either know each other or are related. (Those aren't necessarily mutually exclusive categories; many don't know their relatives.)

8. Two excellent law schools.

We are very fortunate and can be proud of our two top ranked Utah law schools. The Bar enjoys a very positive working relationship with both law schools. Dean Bob Adler of the S.J. Quinney College of Law at the University of Utah and Dean Jim Rasband of the J. Reuben Clark Law School at Brigham Young University are both great assets and are active ex-officio members of the Bar Commission.

7. Great public outreach programs such as Wills for Heroes, And Justice for All, Tuesday Night Bar, the Pro Bono Commission, and the Modest Means Lawyer Referral Program.

We have a great tradition in our Bar of being generous with our time and money to help provide legal services to those who can't afford to hire counsel. Mike Walch put it this way: "Utah lawyers are more concerned with clients and community and less concerned with themselves than lawyers from the other two states where I'm licensed." Lou Callister gave this reflection after fifty-four years of practicing law in Utah: "Because of the legal training we receive in law school we are better able to make contributions to society, outside the practice of law, that benefit the community at large and people in particular."

6. Wonderful clients.

Utah Lawyers get to meet and interact with some amazing people in challenging problem-solving situations. Brian Burnett observed that we have the "opportunity to evaluate life in six-minute increments." Most clients exhibit great courage and dignity when facing their legal troubles. It's a privilege to help clients resolve their problems. It's inspiring to watch them do so with their head held high. As problem-solving partners with our clients, we share ownership in their legal problems, victories, and defeats. Being an advocate may add gray hairs, but observing firsthand the positive traits of our clients makes it worthwhile.

5. Great mentors.

Our Bar was one of the first in the country to implement a mentoring program for new attorneys. Utah's "New Lawyer Training Program" began in 2009 and has been a great success. New lawyers are paired with experienced attorneys to meet

one-on-one at least once a month to work through a CLE curriculum highly relevant to new attorneys. The program benefits both the mentees and the mentors. Much informal mentoring also occurs within our Bar. I learned invaluable lessons from excellent attorney mentors at the beginning of my career – Tom Greene, Dee Benson, Paul Warner, Bill Fowler, and David Greenwood – to name just a few. Mentors model and teach aspects about the practice of law that you cannot learn in law school.

4. Great Bar conventions and CLE opportunities.

The Utah Bar and its sections sponsor some truly outstanding conventions and CLE events. Our Bar is unique in sponsoring three statewide conventions: the Spring Convention in St. George; the Summer Convention – this year in Sun Valley Idaho with keynote speaker Justice Anthony Kennedy; and the Fall Forum in downtown Salt Lake. This year the Fall Forum is going to be expanded to two days given the ever increasing number of lawyers attending this event. I highly recommend taking advantage of the opportunity to learn from and socialize with other Utah lawyers and judges by attending at least one of these conventions every year.

3. An independent judiciary.

Unlike about half the other states, Utah is fortunate to have its judges appointed rather than elected by popular vote. Electing judges compromises the integrity of the judicial process because judges in those states are inherently motivated to decide cases based on the perceived popularity of their decisions instead of focusing on the legally correct result. Utah judges do stand for retention election, which provides a mechanism to remove a judge who is unable to garner at least 50% approval. In this regard, the survey feedback that Utah lawyers provide to the Judicial Performance Evaluation Commission is critical, because those survey results are published to the electorate shortly before election day. Moreover, our judiciary is excellent. Bar Commissioner Dickson Burton said: "At least half of my cases the past twenty years have been in other states, and we have more consistently good judges here in Utah than in any other state I know."

2. Professionalism and civility.

I've previously written about the generally high degree of professionalism and civility manifested by Utah lawyers. The Standards of Professionalism and Civility that were adopted in 2003 by the Utah Supreme Court contain great guiding principles to remind us of our duty to be fair and courteous in our interactions with opposing counsel. Happily, it's second-nature for most Utah lawyers to abide by these standards. I'm glad they are in writing, though, as a helpful reminder about how we should behave.

1. It's better than working as a gandy dancer.

The summer before my senior year of high school my dad got me a job working for the Utah Railway Company on the track section crew in Hiawatha (Emery County), Utah. It was hot, back-breaking work. Working with those tough men that summer not only exposed me to a new vocabulary, but it reinforced my commitment to get an education. Whenever I think that practicing law is hard, I think about the summer of 1979, and the truly difficult jobs that people do to earn a living.

It's been a privilege to serve as your Bar President this past year. Thank you for your support of our noble profession.

Alimony Guidelines – An Idea Whose Time Has Come

by Lori W. Nelson and Taryn N. Evans

"How much alimony will I get?" and "How much alimony will I have to pay?" are the two questions we are most frequently asked in our family law practices. And, in a truly lawyerly fashion, we answer, "It depends." Then we run through the three primary factors Utah courts must consider when awarding alimony: (1) the recipient spouse's financial condition and reasonable needs (including standard of living during the marriage); (2) the recipient spouse's ability to meet his or her own needs (including the recipient's earning capacity); and (3) the payor spouse's ability to pay support. *See* Utah Code. Ann. § 30-3-5(8)(a).

There are a number of ways to give clients an approximation of what alimony will be. First, under an income equalization model, you can combine the parties' net incomes and divide the result by 50% to come up with an average. This estimate must be adjusted if you have to account for child support. *See id.* § 30-3-5(8)(a)(v). Second, using a marital lifestyle model, you can analyze the recipient spouse's actual budget and examine how much income was available during the marriage and use that income to approximate how much both parties need to meet roughly comparable standards of living.

In practically every case – even in cases with the largest marital estates and/or incomes to divide – there is not enough money to pay for two households. This is because the parties' pre-separation standard of living likely used all available income to meet the combined needs. Under such circumstances, there is no way, upon separation and divorce, for the parties to maintain their pre-separation standard of living at the same level they enjoyed during the marriage.

In addition to the foregoing, the alimony analysis can, and should, include a tax analysis because alimony is taxable to the recipient spouse and deductible for the payor spouse, changing the actual economic reality of the exchange of dollars between the parties. Further, the first method of income equalization is only appropriate "in those cases in which insufficient resources exist to satisfy both parties' legitimate needs." *Williamson v. Williamson*, 1999 UT App 219, ¶ 11, 983 P.2d 1103 (citing *Olson v. Olson*, 704 P.2d 564, 566–67 (Utah 1985)). The second method is more likely to achieve a result somewhere in the ballpark of the actual standard of living enjoyed by the recipient spouse during the marriage, but it does not account for temporary changes in the standard of living due to the parties' separation and one party generally having control of all available funds.

Given the unpredictability surrounding alimony awards, how do we help our clients better analyze their likely financial picture post divorce? How do we do so when no matter how many different analyses we run, the court could come up with its own formula, one which the attorney had never previously considered? None of us enjoy that moment at trial when our client looks questioningly at us, wondering why we hadn't come up with such a creative way to determine alimony. At the same time, we are not exactly in a position to tell the client that no one had ever come up with such a creative way to determine alimony.

LORI W. NELSON is a shareholder at Jones Waldo and leader of the firm's Domestic and Family Law Practice Group.

TARYN N. EVANS is an associate at Jones Waldo where her practice focuses on Litigation as well as Domestic and Family Law.

Other jurisdictions have recognized this very alimony conundrum. One response to this dilemma that is gaining national support is to adopt alimony guidelines in much the same way states have adopted child support guidelines. It is difficult to remember, but prior to the adoption of child support guidelines, attorneys and courts engaged in the same fuzzy science we now use to determine alimony to determine child support obligations. We believe that alimony guidelines are an idea whose time has come in Utah. Given the many states that have conducted extensive analyses of support guidelines, Utah is in the enviable position of being able to review all the work already performed in other states and adapt, for our specific state needs, a guideline formula that serves our citizens, reduces the time and expense of litigation, and serves the purposes of judicial economy.

Several states have adopted or are considering adopting formulas to determine alimony awards. For example, Massachusetts passed the Alimony Reform Act, which greatly changed how spousal support was calculated and ordered. *See* Mass. Gen. Laws Ann. ch. 208, §§ 48–55 (codifying the Alimony Reform Act of 2011). Massachusetts created a formula for the alimony payments and capped the duration depending on the length of the marriage. *Id.* §§ 49, 53. For example, alimony cannot be ordered for longer than 50% of the length of the marriage if the marriage was five years or less; 60% if ten years or less, but more than five years; 70% if fifteen years or less, but more than ten years; and 80% if twenty years or less, but more than fifteen years. *Id.* § 49(b). In a marriage that is more than twenty years, the court has the discretion to order alimony for "an indefinite length of time" but is not required to do so. *Id.* § 49(c). Retirement age is also a terminating factor. *Id.* § 49(f). Massachusetts also created general rules for calculating the amount of alimony. *Id.* § 53. Under those guidelines, alimony generally may not exceed the recipient's "need," which is considered to be 30 or 35% of the difference between the parties' gross incomes established at the time of the divorce. *Id.* § 53(b).

In arriving at the formula in Massachusetts, an alimony task force – the MBA-BBA Joint Alimony Task Force – analyzed what is commonly referred to as the 1/3–1/3–1/3 formula. The 1/3–1/3–1/3 formula suggests that alimony should be calculated as follows: Alimony equals the total of the payor spouse's gross income plus the recipient spouse's gross income divided by three, minus the recipient spouse's gross income. *See* Presentation of Linda Fidnick, Esq. to MCLE Family Law Conference, Boston, Massachusetts, March 14, 2008; *see also* James McCaskey, *Parsing Alimony: Deciphering the 1/3, 1/3, 1/3 Metric*, 5 Fam. Mediation Q. 6 (Fall 2006).

For example:

Calculation of *Suggested* Alimony Order:

John's Gross Income	$125,000
+ Jane's Gross Income	$ 25,000
=	$150,000
÷	3
=	$ 50,000
– Jane's Gross Income	$ 25,000
= Suggested Annual Alimony Order:	$ 25,000 from John to Jane

Several other states that have considered or implemented guidelines have proposals or statutes that make the guidelines advisory only or to be used in limited circumstances, such as during pre-trial and negotiation stages. For instance, California began experimenting with guidelines for interim support leaving final awards to the courts after considering factors set forth in statute. *See, e.g.*, Superior Court of California, County of Santa Clara Loc. Fam. R. 3C, *available at* http://www.scscourt.org/court_divisions/family/family_rules/family_rule3.shtml.

Pennsylvania followed California in enacting guidelines for making interim support orders. Pa.R.C.P. No. 1910.16-4, amended by 2015 Pennsylvania Court Order 0018 (Apr. 29, 2015). New Mexico has also adopted guidelines, which are a starting point for discussion in collaborative divorce cases. Muriel McClelland et al., *Alimony Guidelines and Commentaries (Revised)* (Sept. 6, 2006), *available at* https://www.nmcourts.gov/newface/new/alimony/guidelines.pdf. New Mexico's alimony guidelines are also used in negotiating settlement of litigated cases but cannot be used at trial. *Id.*

New York State has proposed a formula that is based on the incomes of both spouses. Assemb. A09606, 2013–14 State Assemb. (N.Y. 2014), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A09606&term=2013&Summary=Y&Text=Y. The initial dollar amount is 30% of the payor spouse's income minus 20% of the recipient spouse's income. *Id.* There would be a maximum up to 40% of the combined incomes from all sources of both spouses. *Id.* This limits post-marital income awards to cases where the potential payee has an income that is at most two-thirds of the payor spouse's income. *Id.*

The New York proposal also fixes the duration of the award based on the duration of the marriage as follows:

Length of the Marriage	% of the Length of the Marriage for which Post-marital Income Would Be Paid
Up to 5 years	20%
More than 5 years to 7.5 years	30%
More than 7.5 years to 10 years	40%
More than 10 years to 12.5 years	50%
More than 12.5 years to 15 years	60%
More than15 years to 17.5 years	70%
More than 17.5 years to 20 years	80%
More than 20 years to 25 years	90%
More than 25 years	Permanent

Id.

The New York proposal allows for deviations to address situations where the results would be less than equitable. *Id.*

Some factors that may be considered include

> the age and health of the parties; the present or future earning capacity of the parties…; …the availability and cost of medical insurance for the parties; the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity; …[and] the reduced or lost earning capacity of the payee as a result of having foregone or delayed education, training, employment or career opportunities during the marriage.

Id.

A similar proposal was working its way through the Florida Legislature. H.B. 943, 2015 Leg., Reg. Sess. (Fla. 2015), *available at* http://www.flsenate.gov/Session/Bill/2015/0943. That bill defined short and long-term marriages and identified a specific calculation for determining the amount of alimony based on the length of marriage: a low-end range for marriages of less than twenty years and a high-end range for marriages of more than twenty years. *Id.* A payor spouse married less than twenty years would pay alimony of .015 X years of marriage, with X being the difference between the monthly gross incomes of the parties. *Id.* A payor spouse married more than twenty years would pay .020 X the years of marriage, with X being the difference between the monthly gross incomes of the parties. *Id.* Under the proposed Florida bill, the calculation for determining the length of alimony uses the same low end/high end of twenty years, with the low end being .25 X the years of marriage and high end at .75 X the years of marriage. *Id.* In addition, the bill mandates that child support and alimony combined cannot amount to more than 55% of a payor spouse's net income. *Id.*

Virginia section 16.1-278.17:1 provides that alimony shall be calculated as follows:

> If the parties have minor children in common, the presumptive amount of an award of pendente lite spousal support and maintenance shall be the difference between 28% of the payor spouse's monthly gross income and 58% of the payee spouse's monthly gross income. If the parties have no minor children in common, the presumptive amount of the award shall be the difference between 30% of the payor spouse's monthly gross income and 50% of the

payee spouse's monthly gross income.

Va. Code Ann. § 16.1-278.17:1(C).

Canada also has alimony guidelines which, like much of family law in Canada, are national and not state or regional guidelines. *See* Canada's Spousal Support Advisory Guidelines (July 2008), *available at* http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/toc-tdm.html. Canada's alimony guidelines are advisory and not binding. *Id*. Canada also has two different formulas depending on whether or not there are children. *Id*. The formula for alimony without child support is:

> The amount of support is 1.5 to 2 percent of the difference between the spouses' gross incomes for each year of marriage, to a maximum range of 37.5 to 50 percent of the gross income difference for marriages of 25 years or more. (The upper end of this maximum range is capped at the amount that would result in equalization of the spouses' net incomes – the net income cap.)
>
> Duration is .5 to 1 year of support for each year of marriage, with duration becoming indefinite (duration not specified) after 20 years or, if the marriage has lasted 5 years or longer, when the years of marriage and age of the support recipient (at separation) added together total 65 or more….

Id. The formula for alimony with child support in Canada takes into account the theoretical concepts of economic disadvantage due to raising children. *Id*. As such, the formula is somewhat different than the without children support calculation. The formula for alimony with child support is: "Spousal support is an amount that will leave the recipient spouse with between 40 and 46 percent of the spouses' net incomes after child support has been taken out…." *Id*. Durational limits in cases with children are also much more complex and flexible given the competing considerations. *Id*.

What is most interesting about the guidelines in the other states and Canada is the two-part component of the guidelines: the formula for calculating the alimony amount is one component, and the other component is the duration of the payment obligation. While many clients focus on the first component – the alimony amount – analyzing duration is almost as problematic as determining the amount of support that will be paid. This is because it has become a common practice to annualize the alimony and then multiply that amount by a certain number of years to determine an alimony buy-out dollar amount. Alimony buy-outs are one method parties use, when there is enough marital property subject to division to make it possible, to permanently cut off all financial contact between them. This option presents risks for the payor spouse because alimony permanently terminates in Utah upon remarriage or cohabitation. Therefore, a payor spouse could make a lump-sum alimony payment equal to a certain number of years of support only to have the receiving spouse marry well before the anticipated term of years ends. Lump-sum alimony payments can also be problematic without an expert to assist in determining the tax impact to ensure the parties are exchanging like dollars (after-tax property vs. pre-tax alimony).

Utah presently has no formula for determining the alimony amount or duration of the payment obligation. This creates confusion, expense, and vastly inconsistent results. The lack of uniformity further causes clients to spend money they likely do not have to litigate their alimony claims. Compared to the above formulas, Utah's current statute provides that:

> (a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or enabling the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining whether to award alimony and the terms thereof.

(c) "Fault" means any of the following wrongful conduct during the marriage that substantially contributed to the breakup of the marriage relationship:

(i) engaging in sexual relations with a person other than the party's spouse;

(ii) knowingly and intentionally causing or attempting to cause physical harm to the other party or minor children;

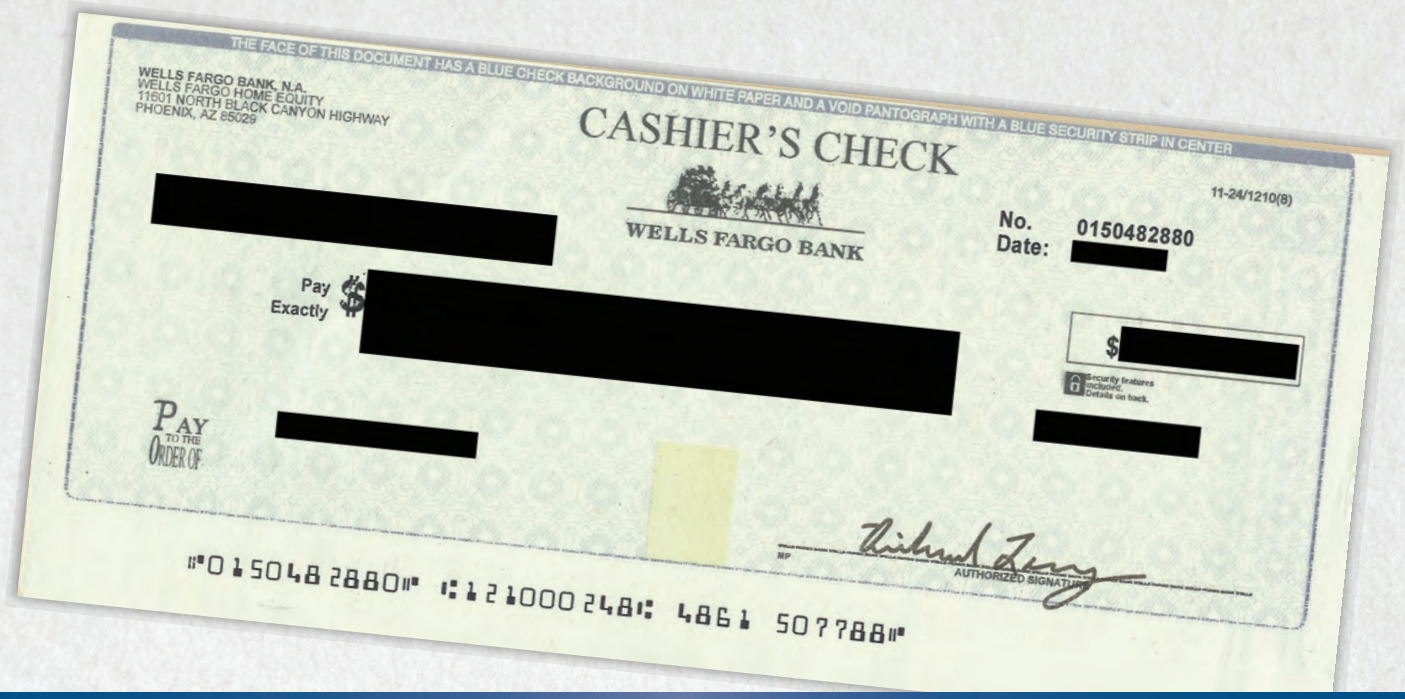
(iii) knowingly and intentionally causing the other party or minor children to reasonably fear life-threatening harm; or

(iv) substantially undermining the financial stability of the other party or the minor children.

Utah Code Ann. § 30-3-5(8)(a)–(c). While this statute provides some guidance, it is not specific enough to allow a client to have assurance that the ordered alimony will be within a guaranteed range. The child support tables have greatly eased the calculation of child support, and alimony guidelines could provide the same benefit.

There are contrary voices to the alimony guidelines proposals. One of those is that alimony should be considered as compensation. Randy Kessler, former chair of the ABA Family Law Section, stated, "[I]f workers' compensation law 'can put the value on a [human] toe, how do you quantify how much the loss of a marriage means to somebody?" L.J. Jackson, *Alimony Arithmetic: More States Are Looking at Formulas to Regulate Spousal Support*, A.B.A. J. (Feb. 1, 2012) (second alteration in original), *available at* http://www.abajournal.com/magazine/article/alimony_arithmetic_more_states_are_looking_at_formulas_to_regulate_spousal. Kessler added, "'Divorce law is one of the most discretion-filled areas of law there is.'" *Id.* Linda Lee Viken, in the same article, posited that "'you have a greater chance of the result fitting the facts of the case if you simply have criteria that are considered by the court,'" as we have in Utah. *See id.* Despite these dissenting opinions, that very lack of specificity is the problem solved by clear guidelines for alimony. The article also pointed out that guidelines are used every day in the law. *Id.* For example, family law has child support guidelines, which are mandated by the federal government but are state specific. There are also federal sentencing guidelines with mandatory minimum sentences, which eliminate some of the discretion criminal judges historically held. Further, to resolve the tension between guidelines and elimination of the family court's discretion, some states provide that the guidelines may only be strictly adhered to for temporary orders but that the court retains discretion to make a determination of final or permanent alimony at the final hearing.

While we are not suggesting that New York's formula is the best for Utah, as states including New Mexico, Arizona, Kansas, and Nevada have guidelines that are possible models, we are suggesting that the adoption of some type of guidelines will greatly serve clients and courts in analyzing what alimony should be awarded. Not only will this allow the parties to better plan for their post-divorce lives, it will reduce the time and expense of divorce litigation. It will provide a degree of certainty in an uncertain world. That certainty, in turn, will enable parties and their counsel to better assess their positions on alimony and encourage settlements in cases that otherwise would need to proceed to trial for an alimony determination. And it will allow us attorneys, when consulting with our clients, to give them a real answer to the very basic question: "How much support will I be awarded/have to pay?"



WE CAN'T TELL YOU ABOUT OUR LATEST SETTLEMENT.

We can tell you about the case. Catastrophic birth injury; eight-year-old plaintiff with severe cerebral palsy. The referring attorneys had neither the resources nor the expertise to dedicate years of effort to a single case. We consulted with 19 different experts and retained 11 of them. Nine were deposed. The case required over 4,000 hours of partner and associate time, more than 2,000 hours of paralegal time, over $250,000 in costs and 3 mediations. According to the third and final mediator, the result was one of the largest birth injury settlements in Utah history.

While we can't tell you about the defendants or the amount, we can tell you that our clients are very happy that we represented them. A profoundly handicapped child will now grow up with the care and support he deserves. His parents will not have to worry about having the resources to take care of him. They can go back to being parents.

The defense wants you to go it alone. Don't give them the upper hand. G. Eric Nielson and Associates co-counsels with referring attorneys on all types of medical negligence cases. In fact, medical malpractice is all we do. We'll work with you as a dedicated partner, adding our decades of experience to your expertise.

GEN
G. Eric Nielson & Associates
Attorneys at Law

MEDICAL MALPRACTICE IS ALL WE DO.

Don't go it alone.
We know the process.
We know the law.
We know the experts.

801.424.9088
866.605.4556
ericnielson.com

Preferred-Lender Arrangements – Coloring within the Lines of RESPA

by Jon Allen and Jeremy Gray

Some time ago, Jeremy purchased a piece of artwork to display in his home. When he showed it to a few friends, they immediately inquired as to where he found the piece. He replied that he knew the artist and he could help them buy a piece for themselves. After he had later facilitated about twenty sales of this particular piece, he thought to himself, "Gee, you'd think the artist would cut me a check for all of these referrals." He continued to act as the "middle man" for some time at the very lucrative rate of zero dollars.

What he really wanted was a…a…a kickback…or a cut…or something of value in exchange for his referrals! Who wouldn't want a kickback for helping to enrich someone else, right?

In the home-mortgage world, some may feel the same way when they refer consumers to mortgage lenders or other settlement-service providers. Some are probably thinking the same thing Jeremy thought when he facilitated the art sales – those who refer business help the party who receives the referral, and knowing this, they feel entitled to a cut. The Real Estate Settlement Procedures Act, or RESPA, calls these cuts "kickbacks" or "unearned fees."

Over the last few years, we've noticed a proliferation of arrangements in which a party in a position to make referrals expresses a preference for another party who is in a position to receive referrals. Often these arrangements involve a realtor listing a "preferred lender" on his website or a homebuilder incentivizing her buyers to use a particular lender to finance homes they buy from her. We call these "preferred-lender arrangements," and we wonder how bank regulators view them in light of RESPA's prohibition on kickbacks and unearned fees.

SECTION 8

The Consumer Financial Protection Bureau's (CFPB) (formerly the Federal Reserve's) Regulation X implements RESPA. The section in RESPA that prohibits kickbacks and unearned fees is commonly referred to as "Section 8" and is found in 12 U.S.C. § 2607. Its companion section in Regulation X is 12 C.F.R. § 1024.14. Subsection (b) of § 1024.14 states:

> No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 1024.14(g)(1). A company may not pay any other company or the employees of any other company for the referral of settlement service business.

So what exactly is meant by the phrase "thing of value"? We have now opened up the proverbial can of worms.

JON ALLEN is an attorney and compliance officer for Bank of American Fork and Lewiston State Bank.

JEREMY GRAY, MBA is Director of Loan Review & Compliance for Rock Canyon Bank, headquartered in Provo.

The term "thing of value" is explained in subsection (d) of § 1024.14:

> This term is broadly defined.... It includes, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. The term "payment" is used throughout §§ 1024.14 and 1024.15 as synonymous with the giving or receiving of any "thing of value" and does not require transfer of money.

Of course, this is compliance so there are some exceptions. Regulation X expressly enumerates cases in which fees, salaries, compensation, and other payments are allowed, even if referrals are also involved, but those cases involve either the actual rendering of services (not just giving of referrals), the actual furnishing of goods or facilities, agreements among real-estate agents and brokers (not mortgage brokers), payments by an employer to its employees, returns on ownership interests or payments for franchise arrangements, or payments for normal promotional or educational activities.

Application of Section 8 to Preferred-Lender Arrangements

Clearly, a given preferred-lender arrangement might fall within an enumerated exception from Section 8's prohibition, such as furnishing a facility where the payment bears a reasonable relationship to the value of the facility being furnished. Think of an agreement where a loan officer rents a desk in a realtor's office and pays rent based on the size and location of the desk rather than on referrals, even though the realtor might express to his or her clients a preference for this particular loan officer. In such case, the rent would not be prohibited by Section 8 because an exception applies.

In cases where no exception applies, the analysis comes down to whether a thing of value is given pursuant to an agreement or understanding to refer a settlement service and whether a referral is actually given. A bank regulator who strictly interprets Section 8 might view the mention of a lender's name as a "preferred lender" on a realtor's website as a referral pursuant to an agreement to refer, because the obvious implications are that the realtor "prefers" this lender and wants his clients to use it and that the realtor and the lender have presumably agreed together to list the lender in this way on the realtor's website. The word "preferred" sounds suspiciously like the word "referred." And that regulator could also conclude that the arrangement provides a thing of value to the realtor, otherwise why would he enter into it? Even if no money changes hands, the realtor arguably thinks he benefits when his clients use the preferred lender because the financing experience goes better or faster for his client, the loan is more likely to close, etc.

Conversely, a bank regulator might take a more common-sense approach and conclude that if a preferred-lender arrangement involves no direct payments, then the thing-of-value test is not met. For instance, if the realtor's sole purpose in mentioning the preferred lender on his website is to provide a courtesy to his clients and if the realtor is truly indifferent as to whether the clients actually use the lender or not, then it is hard to argue that the realtor receives a thing of value, even if the mention amounts to a referral. Lenders are permitted to advertise jointly with realtors, builders, title companies, etc. as long as the costs are shared in a way that reasonably relates to the respective value of the advertisement to each party rather than to the referrals generated by the advertisement. Obviously, if an advertisement never generated any business, it would likely be discontinued at some point, but the more a preferred-lender arrangement looks like an advertisement and the less it looks like a payment-for-referrals scheme, the safer it is under Section 8.

"We suggest caution any time preferred-lender arrangements are being contemplated....Exactly how bank regulators will deal with [them] remains to be seen."

Let's return to the example of the homebuilder who incentivizes her clients to use a particular lender. Let's say that she gives a free upgrade to all of her clients who get their mortgage from Acme Bank. Let's assume that Acme knows about the incentive and enjoys receiving the referrals but gives nothing to the homebuilder in return for the referrals. Assume that the upgrade truly is "valuable" to the clients, meaning that the homebuilder doesn't increase the cost of something else to make up for cost of the upgrade. And let's say that the homebuilder believes her clients' mortgage applications are more likely to be approved if they apply with Acme than if they apply anywhere else and that that is her reason for offering the free upgrade. And assume that no enumerated exception applies. A strict reading of Section 8 would prohibit this preferred-lender arrangement if it could be shown that there was an agreement or understanding between Acme and the builder because referrals are given and a thing of value is received.

However, a more common-sense approach might allow such an arrangement because in this example the thing of value goes to the consumer rather than to the party giving the referral. Although RESPA and Regulation X do not expressly exempt kickbacks that go to the consumer–borrower (one wonders if these really are "kickbacks"), Congress's stated purpose for RESPA was to protect consumers from kickbacks or referral fees that tend to increase unnecessarily the costs of settlement services. In our example with the homebuilder, the costs of settlement services are the same regardless of whether the consumer chooses to use the preferred lender. In our review of recent CFPB press releases announcing Section 8 enforcement, we did not find any case in which a Section 8 violation was alleged without consumer harm also being alleged. But it does appear that the CFPB has stepped up its enforcement activity in this area during the last couple of years. CFPB consent orders and press releases relating to alleged Section 8 violations can be found by searching for "kickback" on the CFPB's website, www.consumerfinance.gov.

Conclusion

We suggest caution any time preferred-lender arrangements are being contemplated. These arrangements seem to be happening with more frequency. Just like Jeremy wanted some kind of reward for helping to sell some art, referrers in the home-mortgage context want to be rewarded for their referrals. Kickbacks might be okay in the art world but not in the consumer-mortgage world. It's clear that they are on the CFPB's radar. Exactly how bank regulators will deal with the preferred-lender question remains to be seen.

KIRTON | McCONKIE

Expanded Bankruptcy practice, New attorneys

Adelaide Maudsley
Shareholder, Litigation

Kirton McConkie is pleased to announce the expansion of its Commercial Bankruptcy & Creditors' Rights practice with the addition of business bankruptcy and workout attorney Adelaide Maudsley, who joined the firm as a Shareholder in the Litigation section. Her practice focus is representation of banks, lenders, and other types of creditors in bankruptcy, receivership, restructuring and workout matters.

The Commercial Bankruptcy & Creditors' Rights practice also draws on the firm's extensive real estate, tax, litigation, corporate and intellectual property capabilities.

In addition to Ms. Maudsley, members of the core bankruptcy group include Ralph Mabey, Darren Neilson, Robert Prince, Cameron Hancock, Loyal Hulme, Gregory Moesinger and Shawn Richards.

Kirton McConkie also welcomes two new Associates:

Judson D. Burton
Associate, Litigation

Jordan F. Dez
Associate, International

ATTORNEYS AT LAW

Kirton McConkie is a full-service firm representing litigation, international, corporate, real estate, intellectual property, employment, immigration, First Amendment, tax, estate planning, family and elder law clients.

Salt Lake City
801.328.3600
www.kmclaw.com

A Primer for Recognizing and Supporting Utah Victims of Human Trafficking

by Janise Macanas

As a member of the judicial system, you may encounter victims of human trafficking in the courtroom setting. Human trafficking is fueled by a demand for cheap labor, services, and commercial sex and is a modern day form of slavery involving the illegal trade of people for exploitation or commercial gain. Human traffickers employ force, fraud, inducement, or coercion to victimize others in order to profit. Trafficking victims are most commonly associated with prostitution cases, but elements of human trafficking may be present in theft, drug offenses, assault, health code violations, and dependency cases. As you represent clients, provide legal advice, or assist individuals or other vulnerable populations on legal matters, be aware that the case you are involved with, whether it be a criminal, civil, family, or juvenile case, may also include elements of human trafficking.

Tammie Garcia-Atkin, the Victim Witness Coordinator for the Utah Attorney General's Office reports that human trafficking is the fastest growing criminal enterprise right now in Utah because it is a low-risk, high-return enterprise. Human trafficking includes sex trafficking, domestic servitude, and agriculture trafficking. The National Human Trafficking Resource Center (NHTRC), one of the most extensive data sets on the issue of human trafficking in the United States, fielded 121 calls from Utah in 2014 and 138 calls in 2013. Ms. Garcia-Atkin believes the number of cases being seen in Utah is due to Salt Lake City being a crossroads to other areas where human trafficking is a bigger problem, such as Las Vegas.

Attorneys, judges, and court personnel may find themselves in a unique position of encountering human trafficking victims in the courtroom. Human trafficking victims are often found in plain sight, which is why attorneys are in a unique position to identify victims, report suspicions, involve the proper authorities, and connect victims with support services. Attorneys can use the following checklist in recognizing key indicators that may be manifested by human trafficking victims:

- Individual responds to questions as if he or she has been coached.
- Individuals may be fearful and unable to speak freely.
- Disconnection from family, friends, community organizations, or houses of worship.
- Just because the individual has a cell phone does not mean the individual is "free to leave."
- Individual has a history of being forced to perform sexual acts.
- Signs of disorientation, confusion, or mental/physical abuse.
- Signs of being fearful, timid, or submissive.
- Signs of having been denied food, water, sleep, or medical care.
- Signs of bruises in various stages of healing.
- The individual is living in unsuitable conditions, lacks personal possessions, or appears to not have a stable

JANISE MACANAS is the Director of Special Prosecutions in the Justice Division at the Utah Attorney General's Office which prosecutes high profile human trafficking cases. She is also a Third Division Bar Commissioner.

living environment.

- The individual is in the company of or defers to a representative who seems to be in control of the situation.
- The individual does not possess personal identification documents.
- Someone who is not a lawyer appears to be concerned with the individual's legal rights.
- The individual does not have freedom of movement.
- The individual has a mindset of conflicting loyalties.

There are many Utah non-profit organizations and resources for attorneys who may want to report their suspicions or seek assistance on suspected human trafficking cases:

- The Refugee and Immigration Association: (801) 467-6060
- Family Justice Center: (801) 236-3370
- Utah Legal Services: (801) 328-8891
- UTP – Utah Trafficking in Persons Task Force: (801) 200-3443
- Your Community Connection: (801) 392-7273

To speak confidentially about human trafficking with a non-governmental organization, attorneys may call the National Human Trafficking Resource Center (NHTRC) at (888) 373-7888.

To report suspected human trafficking to Utah law enforcement, call the confidential TIPLINE at (801) 200-3443.

For attorneys interested in providing pro bono work or volunteer legal services relating to human trafficking, contact Alex McBean at Utah Legal Services at (801) 323-8891 or Amy Thurston at The Refugee and Immigration Association at (801) 467-6060.

Whistleblower Claims under the Dodd-Frank Act: Highlights from the SEC's Annual Report to Congress for the 2014 Fiscal Year

by Jennifer R. Korb

On November 17, 2014, the U.S. Securities and Exchange Commission (the SEC or Commission) issued its annual report to congress on the Dodd-Frank Whistleblower Program for the 2014 fiscal year, which ended September 30, 2014 (the Report). *See 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, available at* http://www.sec.gov/about/offices/owb/annual-report-2014.pdf. This is the third such report since the Whistleblower Program went into effect in August 2011.

The Report provides an overview of the Whistleblower Program, including its history and purpose, the activities of the Office of the Whistleblower (OWB),[1] detailed information regarding the claims for whistleblower awards and profiles of whistleblower award recipients, and information about the Commission's efforts at combatting retaliation. The Report acknowledges three "integral" components of the Whistleblower Program: (1) monetary awards, (2) protection from retaliation, and (3) confidentiality protection. It also recognizes that the success of the program depends upon the Commission's and OWB's ability to further these objectives.

Amongst the notable events of 2014 are the issuance of the largest whistleblower award to date ($30 million) and the filing of the Commission's first enforcement action under the anti-retaliation provisions of the Dodd-Frank Act. These events signify that the Commission is serious about encouraging whistleblowers, and public companies should pay particular attention to how they handle internal reports.

The Commission has experienced a few setbacks, however, when it comes to the scope of the anti-retaliation provisions. In two private actions, the anti-retaliation provisions have been narrowed to cover only those who complain to the Commission, thus excluding those who complain only to a company supervisor or compliance officer. This narrowing goes against the Commission's recommendation and final rule, and the Commission has filed several *amicus curiae* briefs endorsing the more liberal interpretation expanding anti-retaliation protection to those who report to the Commission or to their employer.

The Basics of a Dodd-Frank Whistleblower Claim

A whistleblower claim is only available to an individual or individuals, not entities. *See* 17 C.F.R. § 240.21F-2(a)(1). A claim may be submitted online through the Commission's Tips, Complaints and Referrals Portal or by mailing or faxing the appropriate form to the OWB.[2] A claim may be submitted anonymously as long as the individual is represented by an attorney. While an individual may submit a claim without the assistance of counsel (if anonymity is not a concern), a knowledgeable attorney can help the whistleblower craft a strong submission and advocate for a higher award during the decision making process.

In the event the Commission does not take an action based on the information provided by a whistleblower, the Dodd-Frank Act *does not* allow a whistleblower the right to continue on his or her own with a private action.

JENNIFER R. KORB is an attorney at Ray, Quinney & Nebeker P.C., where her practice includes representation of federal equity receivers, bankruptcy and creditors' rights litigation, general commercial litigation, and regulatory compliance.

A claimant is eligible to receive a whistleblower reward if he or she voluntarily provides the Commission with "original information" about a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur. The information provided must lead to a successful Commission action that results in an award of monetary sanctions exceeding $1 million. *See* 15 U.S.C.A. § 78u-6(a)(1), (b).

The Commission's Rule 21F-4 provides a tremendous amount of detail regarding what it means to provide "original information." *See* 17 C.F.R. § 240.21F-4(b). The short answer is that original information is derived from a person's independent knowledge (not from publicly available sources) or independent analysis (evaluation of information that may be publicly available but which reveals information not generally known) that is not already known by the Commission. *See* Commission's Frequently Asked Questions #4, *available at* https://www.sec.gov/about/offices/owb/owb-faq.shtml.

An eligible whistleblower may receive an award of anywhere from 10 to 30% of monetary sanctions collected in actions brought by the Commission *as well as* related actions brought by other regulatory and law enforcement authorities. *See* 15 U.S.C.A. § 78u-6(b). "Related actions" include judicial or administrative actions brought by the Attorney General of the United States, an appropriate regulatory authority, a self-regulatory organization, or a state attorney general in a criminal case that is based on the same original information the whistleblower voluntarily provided to the Commission. *See* 17 C.F.R. § 240.21F-3.

The OWB posts on its website Notices of Covered Actions for each Commission action exceeding $1 million in sanctions. In the 2014 fiscal year alone, the OWB posted 139 such notices. *See* Report at 13. If a claimant has been working with the Commission on a particular matter, the Commission will contact the claimant or his or her counsel and alert them to the opportunity to apply for an award. *See* Commission's Frequently Asked Questions #11, *available at* https://www.sec.gov/about/offices/owb/owb-faq.shtml. Claimants have ninety days from the date of the Notice of Covered Action in which to file a claim for an award or the claim will be barred. *See* 17 C.F.R. § 240.21F-10.

To file a claim for an award, the claimant must complete the appropriate form and either mail or fax it to the OWB. According to the Commission, the majority of applicants who went on to receive an award, were represented by counsel when they applied for the award. *See* Report at 17.

The Commission considers a number of factors in determining the appropriate amount of an award. The award percentage may be increased depending on the significance of the information provided, the extent of the assistance provided, the extent to which the claimant participated in the company's internal compliance systems, and the Commission's interest in deterring violations of the particular securities laws at issue. The Commission may reduce the amount of an award if the claimant has some culpability for the violations, if there was an unreasonable delay in reporting the violations, or if the claimant interfered with the company's internal compliance systems. A complete list of criteria used to determine award amounts is included in the Commission's Rule 21F-6. *See* 17 C.F.R. § 240.21F-6.

Attorneys at the OWB evaluate each application for an award and work with the enforcement staff responsible for the action to get a full understanding of the contribution made by the applicant. Based on the information collected, the OWB prepares a written recommendation as to whether the applicant should receive an award and, if so, how much. A Claims Review Staff (comprised of five senior officers in Enforcement, including the Director of Enforcement) then considers the OWB's recommendation and issues a Preliminary Determination setting forth its opinion regarding allowance of the claim and the amount of any proposed award. *See* Report at 13.

An applicant can seek reconsideration of the Preliminary Determination by submitting a written response within sixty days of (i) the date of the Preliminary Determination or (ii) the date OWB made the record available to the applicant for review, whichever comes later. After considering the applicant's written response, the Claims Review Staff issues a Proposed Final Determination, and the matter is then handed to the Commission for its decision and Final Order. All Final Orders are redacted before being posted on the OWB's website, to protect the identity of the applicant. *Id*. at 14.

The denial of an award may be appealed within thirty days of the issuance of the Commission's Final Order. The applicant may appeal to the United States Court of Appeals for the District of Columbia or to the circuit court where the claimant resides or has his or her principal place of business. An award that is based on "appropriate" factors and that is within the specified range of 10 to 30%, however, is not appealable. *See* 17 C.F.R. § 240.21F-13. The three most common reasons for a denial of a claim are that (1) the information was not "original" because it was not provided to the Commission for the first time after July 21, 2010 (when the Dodd-Frank Act was signed into law), (2) the claimant failed to submit the application for award within ninety days of the posting of a Notice of Covered Action, and (3) the claimant's information did not lead to a successful enforcement action. *See* Report at 15.

The anti-retaliation provisions of the Dodd-Frank Act provide a private right of action for a whistleblower who alleges he experienced retaliation from his employer as a result of providing information to the Commission under the whistleblower program or assisting the Commission in any investigation or proceeding based on the information submitted (a whistleblower-protection claim). A whistleblower has a generous six to ten years from the date of the alleged violation in which to file a whistleblower-protection claim. 15 U.S.C. § 78u-6(h)(1)(B)(iii) (statute of limitations). Relief available to a prevailing whistleblower includes reinstatement to his former position, two times the amount of back pay owed

plus interest, and compensation for litigation costs, expert witness fees, and reasonable attorneys fees. *Id.* § 78u-6(h)(1). Additionally, under Rule 21F-2, the Commission itself may take legal action through an enforcement proceeding against an employer who retaliates against a whistleblower. As discussed below, the Commission took advantage of this provision for the first time in 2014.

Whistleblower Tips (and Awards) Are on the Rise.

From 2012 to 2014, the number of whistleblower tips received by the Commission increased more than 20%, and the SEC issued more whistleblower awards in the 2014 fiscal year than in all previous years combined. *See* Report at 1 and 20. According to the Report, the Commission received a total of 10,193 tips since the inception of the program in August 2011. Of those 10,193 tips, fourteen resulted in monetary awards, nine of which were authorized during the 2014 fiscal year.

Of those individuals who have received awards since the inception of the program, over 40% were current or former company employees and 20% were contractors or consultants. Of those current or former company employees, over 80% went to their supervisor or compliance personnel before going to the Commission, in an attempt to remedy the problem internally. *See id.* at 16.

In their complaint forms, whistleblowers are asked to identify the nature of their allegations. The three most commonly picked categories are Corporate Disclosures and Financials, Offering Fraud, and Manipulation. *Id.* at 21. These three have consistently ranked the highest since the beginning of the program. *Id.*

The hot spots for whistleblower tips in the United States are California, Texas, Florida, and New York. Utah tipsters numbered 33 in 2014, compared to 556 in California, 264 in Florida, 204 in New York, and 208 in Texas. International hot spots include the United Kingdom, India, Canada and China. The total number of tips from abroad during 2014 was 448, or approximately 11.51% of all tips received by the Commission that year. *Id.* at 28–29.

In September 2014, the largest award to date ($30 million) was given to a foreign national. The Commission revealed that the information provided by this whistleblower allowed it to "discover a substantial and ongoing fraud that otherwise would have been very difficult to detect." *Id.* at 10. The information led to not only a successful Commission enforcement action but to successful related actions. Apparently the award would have been even larger had the Commission not determined that the whistleblower's delay in reporting the securities violation was unreasonably long. The Commission did not reveal the length of the delay that it found unreasonable, only that during the delay "investors continued to suffer significant monetary injury that otherwise might have been avoided." Order Determining Whistleblower Award Claim, SEC Rel. No. 73174, File No. 2014-10, dated September 22, 2014.

In August 2014, the Commission awarded more than $300,000 to a whistleblower who had compliance or internal audit responsibilities within the company. Under the whistleblower rules, information provided by such a person is not considered to be "original information" unless an exception applies. In this instance, the Commission applied an exception that allows a person occupying a compliance or internal audit position with the company to receive a whistleblower award if he or she reported the violations internally at least 120 days before providing the information to the Commission. Report at 11.

In July 2014, the Commission awarded more than $400,000 to a whistleblower who "aggressively worked internally to bring

the securities law violation to the attention of appropriate personnel in an effort to obtain corrective action." *Id*. The Commission recognized the whistleblower's persistence in reporting the information to the Commission after the company failed to address the issue on its own.

The Commission also made awards to groups of whistleblowers who reported on the same company. In July 2014, the Commission awarded three whistleblowers 30% of monetary sanctions collected in the action. One whistleblower received 15%, another 10%, and the third 5%, based on the level of assistance each provided to the Commission. *See* Order Determining Whistleblower Award Claim, SEC Rel. No. 72652, File No. 2014-6, dated July 22, 2014. In June 2014, the Commission awarded a total of $875,000 to be divided equally between two whistleblowers who "acted in concert to voluntarily provide information and assistance that helped the SEC bring a successful enforcement action." Report at 12; *see also* Order Determining Whistleblower Award Claim, SEC Rel. No. 72301, File No. 2014-5, dated June 3, 2014.

The Commission's First Anti-retaliation Action.

On June 16, 2014, the Commission issued its very first administrative cease-and-desist proceeding under the authority of the anti-retaliation provisions of the Dodd-Frank Act. As mentioned above, the anti-retaliation provisions not only provide a private right of action for individuals who experience retaliation from whistleblower activities, Rule 21F-2 gives the Commission the ability to enforce the anti-retaliation provisions as well.

The Commission's first action charged hedge fund advisory firm Paradigm Capital Management, Inc. out of New York with retaliating against its head trader. *In the Matter of Paradigm Capital Management, Inc. and Candace King Weir*, Investment Advisers Act Release No. 3857 (June 16, 2014). The head trader reported activity to the Commission that suggested Paradigm was engaging in prohibited principal transactions with an affiliated broker-dealer that were not disclosed to a hedge fund client. When Paradigm was notified of the report by the head trader, it allegedly engaged in a series of retaliatory actions, including, but not limited to, removing the whistleblower from the head trader position and stripping the whistleblower of supervisory responsibility. The whistleblower was not terminated (although he or she resigned), and his or her compensation remained the same.

Without admitting or denying the Commission's allegations, Paradigm agreed to settle the charges by payment of $2.1 million, comprised of disgorgement, prejudgment interest, and a civil penalty. *See id*. at 12. The Commission's order does not specify what portion of the penalty was attributable to the retaliation claims and what portion was attributable to the alleged trading violations.

Whistleblowers Who Do Not Report to the Commission May Not be Protected by the Anti-Retaliation Provisions

As the number of whistleblower complaints increases, so do the number of anti-retaliation suits. Employers facing private anti-retaliation actions by whistleblowing employees have had some success arguing that the employee does not qualify as a "whistleblower" and therefore is not entitled to the protections of the anti-retaliation provisions.

"[T]he majority of courts that have considered the conflicting sections of the Act have adopted the more liberal interpretation allowing the anti-retaliation protections to extend to individuals who complain internally alone."

A "whistleblower" is defined in the Dodd-Frank Act as, "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C.A. § 78u-6(a)(6). Accordingly, you must report to the Commission to be considered a "whistleblower."

The anti-retaliation provisions of the Act, however, are not so limited and open the door to the possibility that a whistleblower may be someone who reports information to someone other than the Commission, such as an employer. Specifically, section 78u-6(h)(1)(A) provides:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower –

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Id. § 78u-6(h)(1)(A) (emphasis added). The third category of protected activity *does not* require that the whistleblower "make disclosures" to the Commission and has been successfully used to argue a more liberal interpretation of what it means to be a "whistleblower" under the anti-retaliation provisions. In fact, the majority of courts that have considered the conflicting sections of the Act have adopted the more liberal interpretation allowing the anti-retaliation protections to extend to individuals who complain internally alone. *See, e.g., Kramer v. Trans–Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820, at *4 (D.Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F.Supp.2d 986, 994 n. 9 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at *4–5 (S.D.N.Y. May 4, 2011). *But see, Asadi v. G.E. Energy LLC*, 720 F.3d 620 (5th Cir. 2013), and *Berman v. Neo@Oglivy LLC*, No. 1:14-cv-523-GHW-SN, 2014 WL 6860583, at *2 (S.D.N.Y Dec. 5, 2014).

The Commission has made its opinion known, by rule and *amicus brief*, and is squarely in favor of the more liberal interpretation. In Rule 21F-2(b)(1) the Commission clarified that it considers an individual to be a "whistleblower" "for purposes of the anti-retaliation provisions" if he or she provides information regarding a possible securities law violation in a manner described in § 78u-6(h)(1)(A). *See* 17 C.F.R. § 240.21F-2(b)(1)(i-iii). As discussed above, the third category of protected activity in § 78u-6(h)(1)(A) *does not* require that the

information be provided to the Commission. In several *amicus briefs* filed by the Commission arguing in favor of judicial deference to Rule 21F-2(b)(1) and thus in favor of a more liberal interpretation of "whistleblower," the most recent of which was filed in February 2015, the Commission stated:

> The Commission has a strong programmatic interest in demonstrating that [Rule 21F-2(b)(1)'s] reasonable interpretation of certain ambiguous statutory language was a valid exercise of the Commission's broad rulemaking authority under Section 21F. . . .*First*, the rule helps protect individuals who choose to report potential violations internally in the first instance (i.e., before reporting to the Commission), and thus is an important component of the overall design of the whistleblower program. *Second*, if the rule were invalidated, the Commission's authority to pursue enforcement actions against employers that retaliate against individuals who report internally would be substantially weakened.

Brief of the Securities and Exchange Commission, *Amicus Curiae* in Support of the Appellant at 4, *Berman v. Neo@Ogilvy LLC et al.*, Case No. 14-4626, Docket No. 54, filed February 6, 2015 (SEC's *Berman Amicus Curiae Brief*).

Despite the Commission's rule and case law in favor of a more liberal interpretation of "whistleblower," a few courts, including the Fifth Circuit, have applied a narrow interpretation, citing statutory construction and reliance on the intent of Congress.

In *Asadi v. G.E. Energy*, 720 F.3d 620 (5th Cir. 2013), Khaled Asadi filed a complaint against G.E. Energy alleging that it violated the anti-retaliation provisions of the Dodd-Frank Act when it terminated him after he made an internal report to his supervisor of a possible securities law violation. Asadi was employed by G.E. Energy as its Iraq Country Executive, which required him to relocate to Amman, Jordan. In 2010, while working in Jordan, Iraqi officials told Asadi that G.E. Energy had hired a woman who was close with a senior Iraqi official and that they suspected GE Energy had done so to "curry favor" with that official in negotiating a joint venture agreement. *Id.* at 621. Asadi was concerned that this alleged conduct might violate the Foreign Corrupt Practices Act (FCPA),[3] and he reported the issue to his supervisors. Shortly thereafter, Asadi received a negative performance review and was pressured to step down from his position and accept a position with minimal responsibility. Asadi refused, and approximately one year after he reported his concern to supervisors, G.E. Energy fired him. *Id.*

G.E. Energy moved to dismiss under Rule 12(b)(6) arguing that Asadi did not qualify as a "whistleblower" and that the whistleblower provisions do not apply outside of the United States. The district court granted G.E. Energy's motion to dismiss with prejudice based on the latter argument regarding the extraterritorial reach of the protection and as a result did not decide whether Asadi qualified as a "whistleblower." *Id.*

Asadi argued on appeal that the protected activity included in the anti-retaliation provisions of the Act conflict with the Act's definition of "whistleblower." He acknowledged that he did not fit squarely within the definition of "whistleblower" under the Act but argued that the anti-retaliation protections should be construed to protect individuals who take actions that fall within any category of protected activity in § 78u-6(h)(1)(A)(i-iii) (particularly category iii), even if they do not complain to the Commission. *Id.* at 624. Asadi had several district court decisions in his favor as well as an SEC rule. Despite this, the Fifth Circuit disagreed.

Asadi held that the Dodd-Frank Act does not contain conflicting definitions of "whistleblower" but in fact contains a single clear and unambiguous definition in § 78u-6. *Id.* at 627. It also held that the definition in § 78u-6 does not render the language in the third category of protected activity superfluous, because that category has effect "even when we construe the protection from retaliation under Dodd-Frank to apply only to individuals who qualify as 'whistleblowers' under the statutory definition of that term." *Id.* To illustrate this point, the court suggested that the intended application of the third category of protected activity would apply to protect an employee who, on the same day he discovered a securities violation, reports the violation to both his supervisor and to the Commission. The supervisor, unaware that the employee also reported the violation to the Commission, terminates the employee. The first and second categories of protected activity would not protect the employee because the supervisor was not aware that the employee had reported the violation to the Commission. Only the third category, which does not require that the retaliation result from the reporting of information to the Commission, would protect this employee. *See id.*

The *Asadi* court would not defer to the Commission's rule expanding the definition of whistleblower, because "the statute…clearly expresses Congress's intention to require individuals to report information to the SEC to qualify as a whistleblower." *Id*. at 630. The court affirmed the district court's dismissal of Asadi's whistleblower-protection claim, finding that Asadi did not fall within the definition of a whistleblower under the Act.

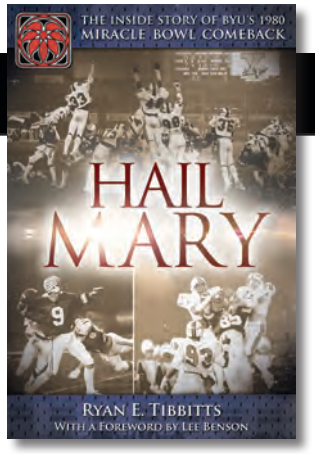
In December 2014, the Southern District of New York followed *Asadi* and ruled that internal reporting was not protected under the Dodd-Frank Act. *See Berman v. Neo@Oglivy LLC*, No. 1:14–cv–523–GHW–SN, 2014 WL 6860583 (S.D.N.Y. Dec. 5, 2014). That case is now on appeal before the Second Circuit, and the Commission has filed an *amicus brief* arguing that the Court should "defer to the Commission's rule and hold that individuals are entitled to employment anti-retaliation protection if they make any of the disclosures identified in Section 21F(h)(1)(A)(iii) of the Exchange Act, irrespective of whether they separately report the information to the Commission." SEC's *Berman Amicus Curiae* Brief at 37. Oral argument before the Second Circuit is scheduled for June 17, 2015.

For now, the question of whether internal reporting is protected under Dodd-Frank is up in the air. As a result of the indecision, a would-be whistleblower may decide to complain internally as well as to the Commission, just to be safe. Alternatively, he or she may decide not to report at all. From the employer's perspective, a company would no-doubt be best served by implementing programs that encourage internal reporting before the employee runs to the Commission.

1. The Office of the Whistleblower is a separate office within the Commission established to administer and enforce the Whistleblower Program. The OWB includes a Chief of the Office, a Deputy Chief, nine staff attorneys, and three paralegals.
2. While this article focuses on whistleblower claims for alleged violations of U.S. securities laws, the whistleblower provisions also cover tips regarding violations of the U.S. Commodity Exchange Act, which are submitted to the U.S. Commodity Futures Trading Commission (CFTC).
3. The Commission and the Department of Justice share FCPA enforcement authority.

Hail Mary: The Inside Story of BYU's 1980 Miracle Bowl Comeback

Reviewed by David C. Castleberry



From 1922, when BYU began playing football as a college, until 1971, the University of Utah enjoyed a record of 41 wins, 8 losses, and 4 ties against BYU. In 1972, when BYU elevated an unheralded assistant coach named LaVell Edwards to the position of head coach, the rivalry game underwent a dramatic shift. With LaVell Edwards at the helm and with a cutting-edge and revolutionary passing attack, BYU only lost twice to Utah from 1972 until 1992. During this twenty-year span, BYU enjoyed a golden age as it won a national championship, had a Heisman Trophy winner, sent quarterbacks to the NFL on a regular basis, and won fifteen conference championships, including an eleven-year streak of conference championships from 1974 until 1985.

Hail Mary: The Inside Story of BYU's 1980 Miracle Bowl Comeback

by Ryan E. Tibbitts
Publisher: Plain Sight (December, 2014)

Available in hardcover and e-book formats

Despite the record-setting NFL quarterbacks, top twenty finishes, and conference titles, BYU had not won a bowl game when it played against SMU in the 1980 Holiday Bowl. BYU had played in and lost the 1974 Fiesta Bowl, the 1976 Tangerine Bowl, and the first two Holiday Bowls in 1978 and 1979.

Ryan Tibbitts, a Utah attorney who played football for BYU in the 1970s and 1980s, has written a book, *Hail Mary: The Inside Story of BYU's 1980 Miracle Bowl Comeback*, which chronicles BYU's first bowl victory against a talented SMU team, led by Eric Dickerson, a future hall-of-fame and record-setting NFL running back. This game has been dubbed the "Miracle Bowl."[1] BYU overcame a twenty-point deficit with only four minutes left in the game; the improbable win was punctuated by a forty-one-yard touchdown pass with no time remaining from Jim McMahon to Clay Brown in the end zone as Brown out jumped four SMU defenders to secure the touchdown.

My father told me that he had watched the Miracle Bowl live when we lived in Pennsylvania. In fact, because BYU games were hard to find on the East Coast, it was the only game he was able to watch all that year. My father told me that his excitement quickly fell away to depression as he watched SMU run roughshod over the hapless Cougars. He decided to watch the game until the end, even though it was well past 1:00 a.m., because he did not know when he would be able to watch another live BYU football game again. When BYU began making its comeback he purposefully refused to change his body position with his chin resting on his hand, worrying that any change in his body position could somehow jinx the miracle comeback he was witnessing. He only broke this position when he leaped in the air with loud shouts of excitement after BYU scored its final touchdown.

In his book, Tibbitts notes that the pass was correctly called a "Hail Mary," even though BYU is a Mormon school, because it was thrown by a Catholic, Jim McMahon, and caught by another Catholic, Clay Brown. Tibbitts explained that when he once told

DAVID C. CASTLEBERRY is a partner with the law firm of Manning Curtis Bradshaw & Bednar LLC. He also serves as the Utah Law Developments Editor for the Utah Bar Journal.

a group of law students that the Catholics had won the 1980 Holiday Bowl for BYU, LaVell Edwards pointed out to the same group of law students that a Mormon returned missionary actually won the game when he kicked the winning extra point after the Clay Brown touchdown. Tibbitts relates other interesting tales about the game. For example, broken plays led to many of BYU's touchdowns or long gains. Also, Andy Reid, the current head coach for the Kansas City Chiefs, was an offensive lineman for BYU at the time, and his wife, Tammy, was a BYU student and fan. When BYU fans, not wanting to see any more of the SMU blowout, began to leave the stadium before the game ended, Tammy began to yell at the departing BYU fans, telling them they should sit back down or they would regret it.

Tibbitts also outlines nine life lessons in his book that he has internalized from this game. For example, Kirk Gunther, who kicked the winning extra point, was fixated by a missed field goal by another BYU kicker in the previous Holiday Bowl as he was running on the field to kick the final extra point. Usually, a team would prefer to have its placekickers coming from a more positive mental place before a pressure-filled kick. In the face of what could be debilitating negative thinking in that critical moment, Kirk Gunther kept his head down, followed through, and trusted in the basic fundamentals to get him through adversity. We would be wise to do the same.

Finally, Tibbitts relates the well-known story that the BYU coaches called for a punt on fourth down late in the game, essentially giving up. Jim McMahon, however, refused to leave the field, knowing if BYU punted the game was over. The coaches called time out in the confusion and decided to let McMahon try to convert the first down. He did. Momentum began to change. And the rest is history. A history that is now richer with the publishing of *Hail Mary*.

1. A four-minute highlight of the game can be watched at https://www.youtube.com/watch?v=b55Tn_YbLK8.

PROTECT YOUR STUFF

Left to Right: Sarah Matthews, Randall Bateman, Tenley Schofield and Christopher Wight

ANNOUNCING THE ACQUISITION OF BATEMAN IP ATTORNEYS

The addition of the Bateman IP team adds depth and decades of prosecution experience to our patent, trademark and copyright litigation prowess. We are positioned to offer our clients unparalleled expertise with an even deeper and broader range of intellectual property solutions.

SNOW CHRISTENSEN & MARTINEAU

10 Exchange Place, 11th Floor, Salt Lake City, Utah 84111 | *801.521.9000* | www.scmlaw.com

KNOW YOUR STUFF

Left to Right: Nathanael Mitchell, Andrew Morse, Samuel Alba, Nathan Crane and Scott Young

SNOW TRIAL SERVICES

Our uniquely customized trial simulation service offers both clients and their law firms a valuable way of testing the strengths and weaknesses of their case. From jury selection and full mock trials, through client preparation and closing arguments, we help increase the odds for a successful outcome.

SNOW CHRISTENSEN & MARTINEAU

10 Exchange Place, 11th Floor, Salt Lake City, Utah 84111 | *801.521.9000* | www.scmlaw.com

Appellate Highlights

by Rodney R. Parker, Dani Cepernich, Nathanael Mitchell, Adam Pace, and Taymour Semnani

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

Certain Underwriters at Lloyd's London v. Garmin Int'l, Inc.
781 F.3d 1226 (10th Cir. March 27, 2015)

The district court refused to consider the evidence the appellant submitted in opposition to a motion for summary judgment because the evidence failed to conform to local rules regarding proper citation. The Tenth Circuit affirmed the grant of summary judgment, concluding that **the district court did not abuse its discretion by refusing to consider evidence that was not submitted with citations in accordance with the local rules.**

ACAP Financial, Inc. v. S.E.C.
783 F.3d 763 (10th Cir. April 3, 2015)

The Tenth Circuit denied this petition for review of sanctions issued by the Securities Exchange Commission against a Utah penny stock brokerage firm. The court rejected the petitioner's argument that an intentional or knowing violation of a regulatory duty was required to find "egregious" conduct sufficient to support the all-capacity suspension sanction that the SEC issued. However, **the court indicated that it may have been persuaded by other arguments challenging the propriety of the SEC's decision-making process** that the petitioner failed to make. One potential argument was that the SEC has failed to give sufficient content to the term "egregious" in its proceedings, leaving members of the securities industry without fair warning about when their conduct might cross the line. Another potential argument was that it was arbitrary and capricious for the SEC to use the adjudicative proceeding against the petitioner to expand its definition of "egregious" and then apply its newly expanded definition retroactively.

United States v. Huff
782 F.3d 1221 (10th Cir. April 14, 2015)

The district court suppressed evidence of firearms. The government moved the court to reconsider, citing a new legal basis for the seizure. The district court granted the request to reconsider. The defendant appealed the conviction, arguing that the district court abused its discretion when it reconsidered the motion in the absence of new evidence or a justification for failing to present the legal argument in the prior proceeding. As a matter of first impression, the Tenth Circuit held that **a district court may reconsider a motion to suppress under a newly raised legal theory for the seizure.** The court reasoned that the exclusionary rule had limited utility in this context, because it operates to deter police misconduct rather than "judicial or prosecutorial error or oversight." *Id.* at 1225.

Caplinger v. Medtronic, Inc.
784 F.3d 1335 (10th Cir. April 21, 2015)

The Tenth Circuit held that the appellant's **state law tort claims against the manufacturer of a medical device were preempted** under the Medical Device Amendments to the Federal Food, Drug and Cosmetics Act (MDA). The court discussed the convoluted standard for preemption under the MDA at length and emphasized the need for the plaintiff to have identified a parallel federal duty supporting her state law claims in order to avoid preemption. The court also rejected the appellant's attempt to carve out an exception to preemption for her state law tort claims concerning off-label use of the device.

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

United States v. Howard
784 F.3d 745 (10th Cir. April 28, 2015)

The Tenth Circuit vacated in part and remanded the district court's restitution order of almost $9 million against a defendant who pled guilty to fraud and money laundering in a mortgage-fraud scheme. **The district court improperly calculated the amount of restitution due to downstream holders of mortgage notes** based on the unpaid principal balance of the defaulted loans, minus whatever was recovered through foreclosure. To avoid a windfall, the proper analysis requires consideration of the purchase price paid by the downstream note holders instead of the face value of the note.

State v. Houston
2015 UT 40 (March 13, 2015)

The defendant, who was seventeen at the time of the crime, pled guilty to aggravated murder in exchange for the prosecution dropping other charges and agreed to a sentencing hearing by jury to determine his sentence that would range between twenty years and life. The jury returned a life sentence without the possibility of parole. The boy made a number of constitutional challenges to his sentence. The prosecution countered that he failed to preserve those challenges. The court held that **Rule 22(e) of the Utah Rules of Criminal Procedure can be used to challenge the sentence regardless of whether the challenge was properly preserved for appeal because "an illegal sentence is void and, like issues of jurisdiction [may be raised] at any time."** *Id.* ¶ 20 (alteration in original) (emphasis added). The court denied his constitutional challenges on other grounds.

State in Interest of A.T.
2015 UT 41 (March 27, 2015)

On certiorari, the Utah Supreme Court reversed the court of appeals holding that a juvenile court is required to order reasonable reunification services to an incarcerated parent unless it determines on the record that those services would be detrimental to the child. The court held that Utah Code section 78A-6-312 requires reasonable reunification services for an

incarcerated parent only when the services are consistent with a primary permanency goal for the child that is set by the court. Therefore, **the juvenile court does not need to order reunification services if the primary permanency goal does not contemplate reunification with the parent.**

State v. Taylor
2015 UT 42 (March 31, 2015)

On a petition for interlocutory review, the Utah Supreme Court reversed the district court's denial of the defendant's motion to dismiss eight counts of securities fraud and theft against the defendant as barred by the statute of limitations. The court held that **securities fraud and theft are not continuing offenses.** In determining whether a criminal statute is a continuing offense, the court looks to the plain meaning of the enacted text, considering that meaning in the context of the whole statute and harmonizing the statute with related provisions of the code. The Utah Uniform Securities Act ties the offense to the "discrete events of an 'offer, sale, or purchase of any security'" and therefore does not indicate that the legislature intended securities fraud to constitute a continuing offense. *Id.* ¶ 18.

VCS, Inc., v. Countrywide Home Loans, Inc.
2015 UT 46 (April 14, 2015)

The court held that the appellant's mechanics' lien was junior to a deed of trust held by a lender to the developer of the real property at issue. The court **adopted the majority "partial subordination" approach, in which the parties to the subordination agreement simply swap places and non-parties to the agreement are unaffected.** *Id.* ¶ 36.

Coroles v. State
2015 UT 48 (April 21, 2015)

Pursuant to Utah's Medical Malpractice Act, plaintiff's case was first heard by a prelitigation panel. Later, plaintiff exposed her trial experts to the findings of the prelitigation panel, whose findings are confidential pursuant to the act. The trial court excluded plaintiff's experts as tainted by the panel's confidential opinions. Plaintiff attempted to designate a new expert after the deadline, but the trial court struck that designation as untimely. The court granted defendant's motion for summary judgment citing plaintiff's lack of a necessary expert witness. Looking to federal statutes for remedies when experts are tainted, the court held that **the trial court must make an inquiry as to whether the experts' opinions are actually tainted before excluding those witnesses under the act.**

State v. Reece
2015 UT 45 (April 14, 2015)

Affirming defendant's convictions for aggravated murder, aggravated burglary, possession of a weapon by a restricted person, and obstruction of justice, the Utah Supreme Court held that **a trial court's failure to provide a lesser-included-offense instruction was not a structural error falling within the exception to harmless error review.**

Kielkowski v. Kielkowski
2015 UT App 59, 346 P.3d 690 (March 12, 2015)

Husband appealed from the court's denial of his petition to modify a divorce decree to address the custody of a minor child. The child was born to the wife during the marriage but was not the husband's biological child. The husband had relied on the Online Court Assistance Program and had marked the box that no children were involved in the divorce, believing this referred only to biological children. The automatically generated divorce decree stated simply that "[t]here are no children at issue in this marriage." The court of appeals held that **the default divorce decree did not constitute an "adjudication" under Utah**

Code section 78B-15-607(3) to rebut the presumption that the husband was the child's legal father.

Aghdasi v. Saberin
2015 UT App 73, 347 P.3d 427 (March 26, 2015)

Plaintiff had not responded to a motion for summary judgment and moved to set aside the summary judgment on the basis of excusable neglect. The motion was supported by an affidavit speculating that court email notices may have gone to counsel's spam folder. The court held that **counsel's failure to receive electronic notices is "an updated version of the classic 'my dog ate my homework' line,"** *id.* ¶ 7 (emphasis added), **and therefore, the misplacement of electronic documents receives the same treatment as paper documents in the context of excusable neglect.**

State v. Salt
2015 UT App 72, 347 P.3d 414 (March 26, 2015)

Defendant was convicted of aggravated assault involving domestic violence. The victim of the assault was defendant's ex-girlfriend, with whom he had lived for approximately two years before their relationship ended two months prior to the incident giving rise to the charges. The court held that **"cohabitant" as used in the Cohabitant Abuse Act is not unconstitutionally overbroad.** The act does not constrain any speech or conduct protected by the First Amendment. The fact that the definition of "cohabitant" may reach attenuated relationships might raise questions of policy but does not implicate constitutional overbreadth.

Zundel v. Magana
2015 UT App 69, 347 P.3d 444 (March 26, 2015)

The district court erred under Rule 7(e) of the Utah Rules of Civil Procedure by refusing to hold a hearing on cross-motions for summary judgment. This error likely contributed to the lack of clarity in the district court's order as to whether a dispute of fact over signage was material.

State v. Kelson
2015 UT App 91 (April 16, 2015)

The trial court did not deny defendant the right of allocution where defendant addressed the court at length at sentencing, even though defendant requested a continuance to present new documents and evidence. Defendant did not attempt to submit the documents to the trial court during the sentencing hearing and, on appeal, failed to

explain the relevance of new evidence or the prejudice that resulted from their absence.

Alliant Techsystems, Inc. v. Salt Lake County Bd. of Equalization
2015 UT App 97 (April 23, 2015)

Alliant Techsystems (ATK) conducts business on property owned by the Navy. The county sought to impose the privilege tax, arguing that ATK had "exclusive possession" of the property. The court held that ATK's possession was not exclusive because the Navy had a right to enter, occupy, and control the property that was inconsistent with the plaintiff's exclusive possession, regardless of whether the Navy chooses to exercise that right. **The court's strict application of the exclusive possession requirement has potentially wide-reaching effects for application of the privilege tax.**

In re A.C.
2015 UT App 107 (April 30, 2015)

Affirming the termination of parental rights of a Peruvian national, the Utah Court of Appeals held that **the trial court did not err in denying a father's motion to appoint bilingual counsel where the purported language barrier did not result in a complete breakdown in communication between the father and counsel.** In doing so, the court recognized that "a substantial language barrier may deprive an indigent party of the statutory right to effective assistance of counsel" but nevertheless concluded that the standard was not met where the father spoke limited English and benefited from the services of an interpreter. *Id.* ¶ 22. A parent also cannot show a communication breakdown if the parent fails to respond to communications or fails to cooperate in proceedings.

American Family Ins. v. S.J. Louis Const., Inc.
2015 UT App 115 (April 30, 2015)

Applying *Powell v. Cannon*, 2008 UT 19, 179 P.3d 799, the Utah Court of Appeals held that **an order setting aside a default judgment and compelling arbitration was not a final order, because the claims remained "live" following the order.** For that reason, the court of appeals lacked appellate jurisdiction and dismissed the appeal.

Keyes v. Keyes
2015 UT App 114 (April 30, 2015)

Utah's premarital agreement statute prohibits enforcement of a premarital agreement if it is fraudulent when executed and before the execution, the party against whom enforcement is sought (1) was not provided a reasonable disclosure of assets and obligations, (2) did not expressly waive in writing the right to that disclosure, and (3) did not otherwise have constructive knowledge of that disclosure. The district court conflated the fraud and nondisclosure elements, holding the agreement was not enforceable because of inadequate disclosure. The Utah Court of Appeals reversed, holding that **both actual fraud and the three non-disclosure elements must be present in order to invalidate a premarital agreement on the basis of fraud.**

State v. Moore
2015 UT App 112 (April 30, 2015)

The Utah Court of Appeals reversed defendant's convictions for securities fraud because of an incorrect jury instruction defining the "willfulness" *mens rea* for the charges. The instruction essentially instructed the jury to convict if it found defendant had failed to satisfy a "duty to investigate" or "duty to know" about the securities that were recommended. The court held that **the "duty to investigate" standard "greatly distorted" the willfulness requirement, erroneously converting it into a recklessness standard in violation of the securities fraud statute.** *Id.* at ¶ 14.

Sorry I Lost Your Files: Cybersecurity Threats to Confidentiality

by Tsutomu Johnson

If lawyers were bankers, our currency would be confidentiality. We may be advocates and counselors, but our position of trust flows from our unique ability to keep our clients' information confidential.

Traditionally, lawyers kept their clients' information private by tightly managing the paper documents stored at the firm. But today, lawyers use a variety of electronic document management systems and devices. These systems store more information, are often easier to use, and provide greater access to files. However, most lawyers do not properly secure that electronic information. Given the ease of accessing this electronic data, a hacker looking to steal this information will likely find the vault unlocked.

Our obligation to keep information confidential is not new. Utah Rule of Professional Conduct 1.6(a) states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Utah R. Prof'l Conduct 1.6(a). Comment 18 requires us to "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client."

Id. R. 1.6, cmt. 18. Comment 19 obligates us to take "reasonable precautions to prevent [client] information from coming into the hands of unintended recipients." *Id.,* cmt. 19.

In addition to our ethical obligations, we are required by statute to keep information confidential. Utah Code section 13-44-201 states that "[a]ny person who conducts business in the state and maintains personal information shall implement and maintain reasonable procedures to: (a) prevent unlawful use or disclosure of personal information collected…; and (b) destroy…records containing personal information that are not to be retained." Utah Code Ann. § 13-44-201. Failing to follow this statute can lead to civil fines up to $2,500 per person affected by a loss (with a cap of $100,000 per incident). *Id.* § 13-44-301(3).

This threat is real. The FBI warned lawyers in November 2009 that "hackers are targeting U.S. law firms to steal confidential information." Jill D. Rhodes et al., *The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms and Business Professionals* (2013). Despite that warning, lawyers consistently fail to address this threat. At the end of 2014, Marsh USA, Inc. conducted a cybersecurity survey for law firms throughout the world. The result: most law firms are not prepared for a data breach. The report found:

- 51% of respondents have not taken measures to insure their cyber risk or do not know if their firm has taken measures;
- 72% of respondents said their firm had not assessed and scaled the cost of a data breach based on information it retains; and
- More than 60% of respondents had not calculated the revenue that could be lost after an attack.

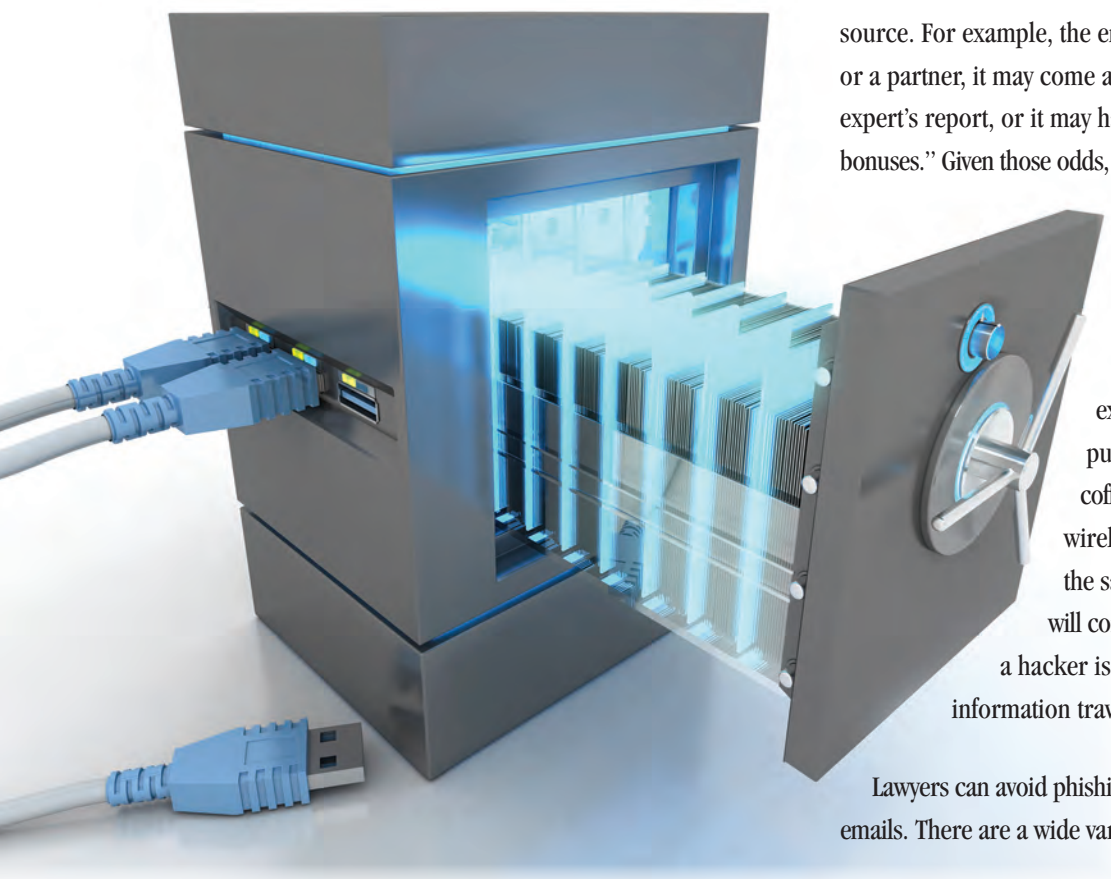
Marsh USA Inc., *More Cyber Preparedness Needed, According to 2014 Law Firm Cyber Survey* (Jan. 15, 2015), *available at* https://usa.marsh.com/NewsInsights/ThoughtLeadership/

TSUTOMU JOHNSON is Associate-General Counsel for Data Security at Teleperformance USA.

Articles/ID/43529/More-Cyber-Preparedness-Needed-According-to-2014-Law-Firm-Cyber-Survey.aspx.

Hackers know lawyers are a warehouse for confidential information and lawyers do very little to protect that information. From a hacker's perspective, it doesn't make sense to attack an organization head on when you can attack the organization's weak spot: their lawyer. In one attack, hackers tried to spoil a $40 billion acquisition by grabbing sensitive information about the deal. Bloomberg News, *China-Based Hackers Target Law Firms to Get Secret Deal Data* (Jan. 31, 2012), *available at* http://www.bloomberg.com/news/articles/2012-01-31/china-based-hackers-target-law-firms. Targeting lawyers on both sides of the transaction, hackers sent fake emails containing spyware "designed to capture confidential documents." *Id.* Although the deal "fell apart for unrelated reasons," this incident highlights the fact that lawyers are an easy target for stealing confidential information. *Id.*

Hacking may sound like a difficult endeavor, but most breaches require little-to-no experience. In 2013, Verizon gave 78% of initial attacks a "low" or "very low" difficulty rating. Verizon 2013 Data Breach Investigations Report 48–49. In other words, an initial attack did not require special skills, an average user could have been the attacker, or the attack utilized readily available tools. *Id.* Hackers – or more accurately, anyone with an internet connection – can download programs like Metasploit, Angry IP Scanner, and John the Ripper. Within an hour, a hacker with no training can use those programs to evade security systems, silently steal information from our clients and use that information for their own ends.



Lawyers can reduce their risk profile by addressing two attack vectors: phishing scams and "man-in-the-middle" attacks. Phishing scams rely on users clicking fake emails with hidden and malicious code. Once the target clicks the email, a program runs in the background. That program monitors the target's key strokes and steals the target's login credentials. The hacker will use those credentials to gain broader access to the lawyer's files and steal documents with social security numbers, financial data, or intellectual property.

You may think you would never click on a fake email, but statistically, an attack sending eight emails to a target has about an 85% chance of success. *Id.* at 38. Hackers increase their odds by tailoring their emails to the target; this is called spear phishing. The email will still contain malicious code, but the hacker tailors the email so it looks like it's from a trusted source. For example, the email may look like it's from a client or a partner, it may come at a time when you are expecting an expert's report, or it may have an enticing title like "year-end bonuses." Given those odds, you – or someone at your organization – will click the fake email.

Man-in-the-middle attacks occur when a hacker steals information communicated between devices. For example, a hacker will go to a place with public wireless internet – like a library, coffee shop, or airport – and set up a fake wireless network with their phone that has the same name as the real network. People will connect to the fake network not knowing a hacker is monitoring and stealing all the information traveling through the fake network.

Lawyers can avoid phishing attacks by learning to spot fake emails. There are a wide variety of fake emails, but most fake

emails have some characteristic betraying their true intent. Keep an eye out for misspelling or grammar errors. Be cautious of any email that asks you to download a file. If an email asks you to download something (even if it's a pdf or a picture), you should avoid it until you can call the sender and verify he or she sent the attachment. Delete all emails that ask for your social security number, financial account number, or credit card number; reputable organizations don't ask for this information through email. If an email has a link in it, don't click the link. Go to your web browser and manually type the address into the browser. Finally, establish a protocol with clients, experts, and employees for sending and receiving sensitive information. If an email breaks the protocol, it's probably a fake.

Lawyers can avoid man-in-the-middle attacks by simply refusing to use public wireless networks. Don't use free networks at airports, cafes, and hotels. Instead, have your phone create a wireless hotspot, set a password to use the hotspot, and connect to your phone's hotspot. If you absolutely must use a public wireless network, use a virtual private network (VPN) to access client files.

Attorneys can also protect their clients' files by using comprehensive anti-virus programs like Malwarebytes or Kaspersky that continually scan for threats. Lawyers should also enable their computers' firewall. Finally, lawyers should avoid using free email or cloud storage services like Gmail and Dropbox. The free versions allow Google and Dropbox to scan everything sent to the service, which compromises client confidentiality.

Our security weaknesses are largely driven by failure to keep pace with cybersecurity threats. Hackers know this and target us to steal our clients' information. Lawyers can reduce that threat by carefully monitoring their email, refusing to use public wireless internet, and maintaining basic security with anti-virus and firewall solutions.

Insurance Subrogation The What, The Who, and The How

by Michael Swensen

As an attorney, I am constantly asked what type of law I practice. When I respond by telling people that I work in insurance subrogation, it becomes clear that very few people know what I do for a living. This lack of understanding not only exists with the average individual but is also commonly found in the legal community and among litigation professionals themselves. In fact, upon entering this practice area, I had little understanding of insurance subrogation. The purpose of this article is to help clarify and simplify the practice area of insurance subrogation and to hopefully prepare attorneys to work in this area of law.

The What

Insurance subrogation is a concept that developed out of equitable principles. *See Educators Mut. Ins. Ass'n v. Allied Prop. & Cas. Ins. Co.*, 890 P.2d 1029, 1030–31 (Utah 1995). In its simplest form, subrogation allows an individual, corporation, or other entity, which has paid money to a third party for a claim, to stand in the shoes of that person and to assert all available legal claims. *See Martin v. Hickenlooper*, 59 P.2d 1139, 1141 (Utah 1936). One of the best examples to explain insurance subrogation, or subrogation in general, is the example of an insured individual involved in an accident with an uninsured motorist. In a claim involving an uninsured motorist, the insurance company pays the claim of its insured under an existing uninsured motorist policy. After paying the claim of its insured, the insurance company then steps into the shoes of its insured, as subrogee. As subrogee, the insurance company may bring any and all claims originally held by its insured against the uninsured motorist. It is upon filing an action as a subrogee that an insurance subrogation case begins.

The Who

Upon bringing a subrogation action, it is important that each party, plaintiff and defendant, understand who the parties to the litigation are.

Continuing with the above example, the insurance company would be the real party plaintiff and the uninsured tortfeasor would be the real party defendant. While identifying the appropriate parties seems straightforward, there is a tendency for people to get confused.

One of the most common misconceptions in an insurance subrogation action is that the defendant believes that the insurance company's insured is a party to the litigation. This misconception is not supported by applicable case law and often leads to frustrating consequences.

In Utah, and throughout the Tenth Circuit, it has been consistently ruled that in a subrogation action,

> an insured who had been paid in full by his insurer is not the real party in interest, and is not entitled to bring an action in his own name against the third party tortfeasor. Instead the action must be brought by the insurer who by virtue of subrogation becomes the only real party in interest.

Am. Fidelity & Cas. Co. v. All Am. Bus Lines, Inc., 179 F.2d 7, 10 (10th Cir. 1949); *see also Spero & W. Am. Ins. v. Fricke & Nationwide Mut. Ins. Co.*, 2004 UT 69, ¶ 3 n.1, 98 P.3d 28 (noting that West American Insurance was the real party in interest even though the suit was brought in the name of the insured); *Conklin v. Walsh*, 113 Utah 276, 193 P.2d 437 (Utah 1948). Hence, the insured

MICHAEL SWENSEN is an attorney at Cannon Law Associates.

party of the plaintiff–insurance company, when a claim has been paid in full, is not a party to the litigation.

Notwithstanding the above, there is, as is typical in the legal industry, an exception to the general rule. In cases where the insurance company has not fully reimbursed their insured, the insured remains a real party in interest to the litigation. *See Garcia v. Hall*, 624 F.2d 150, 151 (10th Cir. 1980). An example of this situation may involve a claim involving an uninsured motorist where the driver of an insured vehicle has received a payout under the provisions of the uninsured motorist policy but seeks additional damages above the uninsured motorist policy limits. In this situation, both the insured and insurance company would be essential parties to the litigation. However, in the vast majority of insurance subrogation actions, the insured individual will not be a party to the litigation.

One might, in either defending or asserting an insurance subrogation action, note that the insured's name appears in the caption of the case. This, however, does not mean that the insured is a real party in interest to the litigation. Utah law specifically provides, "Subrogation actions may be brought by the insurer in the name of its insured." Utah Code Ann. § 31A-21-108. Thus, even though the insured's name is present in the caption of the case, the insured is generally not a party to the litigation.

The How

With the basic understanding of insurance subrogation, the question then becomes, how does one properly handle and defend subrogation actions? One of the most common errors seen in insurance subrogation cases is that a defending attorney treats discovery as if the case were an average personal injury action against a personal injury plaintiff. This common mistake often leads to inappropriate discovery requests that can severely impact the flow of the case.

It is important, when handling insurance subrogation cases, to remember that the real party in interest is the insurance company and not the insured. Consequently, when preparing discovery requests, it is not appropriate to ask the plaintiff to, for example, "[a]dmit that you were driving a car." The response to this admission is a simple and unequivocal, "Deny." The insurance company was not driving the vehicle at the time of the accident. The more appropriate request would be "[a]dmit that [name of the insured] was driving the vehicle." Though subtle, this change is significant. Because this question asks for a fact that may exist in evidence, the insurance company would be obligated to either admit or deny based on the available evidence.

Another appropriate discovery request could be "[a]dmit that [name of the insured] turned left in front of [Q client]." These facts should also be in any available evidence and thus would require a response. However, it would be inappropriate to ask, "Admit that you turned left in front of [Q client]." Once again, the use of the word "you" would infer the insurance company itself had turned left in front of Q client. Such a request would be immediately denied.

This method of crafting admissions should also be applied to any interrogatories or request for production of documents. For example, it would be inappropriate to issue a request for production that asks a plaintiff insurance company to produce "all cell phone records for [the name of the insured]." The reason this request is inappropriate is because the insurance company is not likely to have the phone records nor is it in a position to secure them. The best way to get this type of information would be through the use of a subpoena duces tecum to the insured individual.

Perhaps the most common difficulty that surfaces in insurance subrogation cases comes when trying to conduct depositions. Often in insurance subrogation actions, the insured is an important fact witness to establishing the plaintiff insurance company's claim. Because the insured individual is often a vital witness, a deposition of the insured is usually appropriate. Notwithstanding the essentiality of the insured to the insurance company's claim, it is not the insurance company's obligation to produce the insured at a deposition. While the plaintiff's attorney may assist in setting up a deposition, as appropriate for proper cooperation, if the plaintiff's attorney is unable to secure the cooperation of the insured individual, the party requesting the deposition must then work through the appropriate Utah Rules of Civil Procedure, specifically, Rule 45 dealing with subpoenas, to secure the appearance of the insured at the deposition.

In support of this position is a case that was decided in the Texas State Court of Appeals. While not precedential, it is highly persuasive.

In *Prudential Property & Casualty Company v. Dow Chevrolet-Olds, Inc*., 10 S.W.3d 97 (Tex. App. 1999), the Texas Sixth Circuit Court of Appeals was asked to determine whether an insurance company, who had initiated a subrogation action, was required to produce its insureds for a deposition. The defendant, Dow, had argued that Prudential's insureds should be considered a real party in interest in the litigation and that, as a real party in interest, Prudential should be required to produce the insureds for a deposition. Dow, in support of its position, argued three main points: (1) because Dow asserted an affirmative defense of contributory negligence, the insureds were necessary parties; (2) by answering discovery interrogatories, the insureds became parties to the litigation; and (3) because Prudential brought the claim in the names of the insureds without the insureds' consent and with the intent to harass Dow, the insureds were a necessary party. *Id*. at 100–01.

In reviewing the defendant's assertions, the appellate court first determined that, in a subrogation action, all defenses that may be raised against the insured may be raised against the subrogee. *Id*. Accordingly, because the claim of contributory negligence is an appropriate defense to a traditional tort claim for negligence, it may be asserted in a subrogation action. *Id*. However, the assertion of such a defense does not mean that the insured is a necessary party to the litigation. *Id*.

Second, the court determined that an insured who answers general discovery requests does not become a party to the litigation. *Id*. at 101. Specifically, the court held that, in Texas, "to constitute a general appearance where the party has filed no written pleading, the party must seek a specific adjudication by the court on some question other than the court's jurisdiction." *Id*. The court went on to determine that no such request was made and therefore the insureds had not become a party to the litigation merely by answering the discovery requests. *Id*.

Finally, the court determined that the harassment claim set forth by the defendant was not supported in the trial court's determination and did not apply in the action. *Id*. at 102.

The court ultimately determined that the trial court should have treated the plaintiff's insureds as ordinary fact witnesses and not as parties to the litigation. *Id*. at 104. Accordingly, the court determined that the plaintiff was not obligated to produce the insureds for a deposition and that the defendant was required to take the deposition of the insureds in their county of residence or in another convenient forum. *Id*.

While not yet directly decided in Utah, the position described above is likely to be that applied by Utah courts and the Tenth Circuit. Specifically, Utah holds that an insurance company in a subrogation action is the only real party in interest in the suit. Moreover, Utah courts have also held that an appearance in a case only occurs by the filing of a formal pleading with the court. *Arbogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶ 31, 238 P.3d 1035. Accordingly, because Utah case law supports many of the same points discussed in the Texas court's ruling, it is likely that a Utah court would make a similar determination.

Based on the above, it is imperative that when working a subrogation case, both sides understand who the parties are. Remembering this small fact will help ensure that discovery is conducted properly and that the case is handled efficiently.

Conclusion

In an insurance subrogation action, whether acting as counsel for the plaintiff or the defendant, it is important to understand what subrogation is; who the parties are; and how to properly prepare, manage, and work a subrogation case. If the basic facts described in this article are understood, one can avoid costly delays that occur with improper discovery requests and ensure that the case is handled in a highly efficient manner.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the May 1, 2015 Commission Meeting held at the Marriott City Creek in Salt Lake City.

1. The Bar Commission voted to reappoint John Lund to the Judicial Council.

2. After reviewing budget figures for the projected cost of expanding the convention, the Bar Commission voted to expand 2015 Fall Forum to two full days.

3. The Bar Commission voted to ask lawyers to voluntarily report pro bono hours on 2015–2016 licensing form.

4. The Bar Commission is seeking volunteers to serve on Legal Access to Middle Class Committee and subcommittees.

5. The Bar Commissioners are finalizing Program Review Committee Reports and will submit completed reports on July 17, 2015.

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

Mandatory Online Licensing

The annual Bar licensing renewal process has started and can be done only online. Sealed cards have been mailed and include a login and password to access the renewal form and the steps to re-license online at https://www.myutahbar.org. **No separate form will be sent in the mail. Licensing forms and fees are due July 1 and will be late August 1. Unless the licensing form is completed online by August 31, your license will be suspended.**

If you need to update your email address of record, please visit www.myutahbar.org. To receive support for your online licensing transaction, please contact us either by email to onlineservices@utahbar.org or, call (801) 597-7023. Additional information on licensing policies, procedures, and guidelines can be found at http://www.utahbar.org/licensing.

Upon completion of the renewal process, you should receive a Certificate of License Renewal that you can print and use as a receipt for your records. This certificate can be used as proof of licensure, allowing you to continue practicing until your renewal sticker, via the U.S. Postal Service.

Notice of Petition for Reinstatement to the Utah State Bar by Bruce L. Nelson

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Second Verified Petition for Reinstatement ("Petition") filed by Bruce L. Nelson, in *In the Matter of the Discipline of Bruce L. Nelson*, Fourth Judicial District Court, Civil No. 100403156. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Pro Bono Honor Roll

Adoption
Lyon, Nathan
Robertson, James

Bankruptcy Case
Harrison, Jane
Marychild, Suzanne
O'Neil, Shauna
Tanner, Mark

Community Legal Clinic
Becker, Heath
Benson, Jonny
Chipman, Brent
Hammond, Kim
Macfarlane, John
Moss, Jim
Navarro, Carlos
Nichols, Jason
Nichols, Tim
Pascual, Margaret
Rothschid, Brian M.
Tanner, Brian
Wang, Ian
Werner, Paul
Yauney, Russell

Custody Case
Allred, McKette

Debt Collection Calendar
Amann, Paul
Billings, David
Hansen, Greg
Stormont, Charles

Debtor's Clinic
Bsharah, Perry
Hansen, Scott
Pietrzak, Anetta
Rothschid, Brian M.
Sink, Jeremy
Wang, Ian

Estate Planning
Angelides, Nick
Loveridge, Michael

Expungement Clinic
Miya, Stephanie

Family Law Cases/Clinic
Ashworth, Justin
Beins, Christopher
Buchanan, Don
Chipman, Brent
Dez, Zal
Donavan, Sharon
Fowlke, Lorie
Hancock, Lisa
Jelsema, Sarah
Lund, Neil
Morrow, Carolyn
O'Neil, Shauna
Rasch, Tamara
Roberts, Stacy
Rothschid, Brian M.
Smith, Linda
So, Simon
Suesser, Laura
Throop, Sheri
Yauney, Russell

Guardianship
Gustin, David
Reutzel, Jeremy

Housing Case
Hogle, Chris

LL/Tenant
Burn, Brian

Medical–Legal Clinic
Miya, Stephanie
Morrison, Jacqueline

ORS Calendar
Erickson, Mike
Heckel, Maria
McConkie, Bryant
Rice, Rob
Rose, Rick
Spence, Mike

Rainbow Law Clinic
Couser, Jessica
Evans, Russell
Kesselring, Christian
Knight, Elizabeth
Marx, Shane
Ralphs, Stewart

Senior Center Legal Clinic
Barrick, Kyle
Bertelsen, Sharon
Collins, Kent
Conley, Elizabeth
Ferguson, Phillips
Fox, Richard
Hart, Laurie
Kessler, Jay
Lee, Terrell
Maughan, Joyce
McCoy ll, Harry
Neeleman, Stanley
Parker, Kristie
Roberts, Kathie
Semmel, Jane
Thorpe, Scott
Timothy, Jeannine
Williams, Timothy

Street Law Clinic
Cohen, Dara
Coombs, Brett
Black, Daniel
Bogart, Jennifer
Henriod, Stephen
Macfarlane, John
Preece, Clayton
Prignano, Eddie
Smith, Craig
Strindberg, Erik
Thorne, Jonathan

Tuesday Night Bar
Adamson, Jeremy
Amann, Paul
Anderson, Michael
Barnett, Dan
Bowman, Jeff
Burton, Mona
Chandler, Josh
Christensen, Tory
Depaulis, Megan
Farraway, Wade
Figueira, Joshua
Geary, Dave
Goodwin, Thomas
Hardy, Chris
Houseshel, Megan
Hyde, Ashton
Jan, Annette
Jensen, Michael
Macfarlane, Mac
Masters, Eugene
Mellem, Liz
Munson, Edward
Neilson, Darren
Peterson, Jessica
Peterson, Natalia
Rosevear, DJ
Shaw, LaShel
Sigety, Joe
Sparks, Ryan
Stevenson, Tammy
Stormont, Charles
Sutton, George
Trousdale, Jeff
Turner, Jenette
Vasquez, Edward
Wade, Chris
Wells, Matthew
Winzeler, Zack
Wycoff, Bruce

Thank you!

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in April and May of 2015. To volunteer call Michelle V. Harvey (801) 297-7027 or C. Sue Crismon at (801) 924-3376 or go to https://www.surveymonkey.com/s/UtahBarProBonoVolunteer to fill out a volunteer survey.

2015 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2015 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org by Friday, October 2, 2015. The award categories include:

1. Distinguished Community Member Award
2. Professionalism Award
3. Outstanding *Pro Bono* Service Award

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

MCLE Reminder
Odd Year Reporting Cycle
July 1, 2013–June 30, 2015

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

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

Utah State Bar 2015 Law Day Awards

Salt Lake County Bar Association Art & the Law Project

Elementary School Winners –
1st Place: Jack Vitek & Maddie Carlin, 4th Grade, Rowland Hall Lower School | Teacher: Kathryn Czarnecki
2nd Place: Camden McEwen, 5th Grade, Herriman Elementary | Teacher: Joan Richards
3rd Place: Jackson Price and Kate Altman, 4th Grade, Rowland Hall Lower School | Teacher: Kathryn Czarnecki

Middle School Winners –
1st Place: Annie Than, Northwest Middle School | Teacher: Jillana Butler
2nd Place: Daniel Lerma, Northwest Middle School | Teacher: Jillana Butler
3rd Place: Osman Kassim, Northwest Middle School | Teacher: Jillana Butler

Best in Show – Quinn Yeates, 4th Grade, Rowland Hall Lower School | Teacher: Kathryn Czarnecki
The winners' schools also receive a prize for their art teachers:

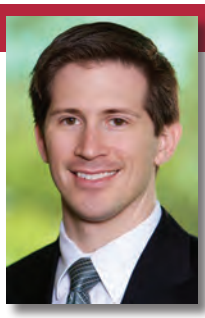
Law Related Education – Mock Trial Competition

West High School: Scout Asay, Jenny Chen, Marcelina Kubica, Katherine Morelli, Vivian Lam, Sophie Nebeker, Caroline Nester, Chandler Stepan, Priya Swaminathan | Instructor: Laura Nava | Attorney Coach: Andrew Deiss | Volunteer Community Coach: Jacqueline Orton

Centennial Middle School: Isa Benjamin, Christy Bradford, Isaac Fillmore, Cobe Jensen, Grace Miller, Jackson Sevison, Ben Smith, Sarah Tobey | Instructor: Krista Thornock | Attorney Coach: Judge Charles Abbott

Scott M. Matheson Awards

Law Related Youth Education


Christopher Reynoso


John Fay

Pro Bono Publico Awards

Recognizing people providing donated legal services to those most in need.

Law Firm: Attorney General's Office


Young Lawyer Pro Bono
Aida Neimarlija

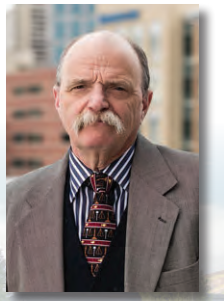

Law Student of the Year
Adrianna Anderson


Young Lawyer of the Year
Russell Yauney


Liberty Bell Award
Paralegal Division

Utah State Bar 2015 Summer Convention Award Winners

During the Utah State Bar's 2015 Summer Convention in Sun Valley, Idaho the following awards will be presented:



RONALD J. YENGICH
Lawyer of the Year

JUDGE CLAUDIA LAYCOCK
Judge of the Year

DISASTER LEGAL RESPONSE
Committee of the Year

YOUNG LAWYERS DIVISION
Section of the Year

Ethics Advisory Opinion Committee Seeks Applicants

The Utah State Bar is currently accepting applications to fill vacancies on the fourteen-member Ethics Advisory Opinion Committee. Lawyers who have an interest in the Bar's ongoing efforts to resolve ethical issues are encouraged to apply. The charge of the Committee is to prepare and issue formal written opinions concerning the ethical issues that face Utah lawyers. If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in resume or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.) and substantive areas of practice, and
- A brief description of your interest in the Committee, including relevant experience, ability and commitment to contribute to well-written, well-researched opinions

Appointments will be made to maintain a Committee that:

- Is dedicated to carrying out its responsibility to consider ethical questions in a timely manner and issue well-reasoned and articulate opinions, and
- includes lawyers with diverse views, experience and background.

If you want to contribute to this important function of the Bar, please submit a letter and resume indicating your interest by July 31, 2015 to: jsnow@vancott.com.

Chambers of
Chief Justice Matthew B. Durrant

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210
Telephone (801) 238-7937
Fax (801) 238-7980

Dear Counsel:

The Judicial Performance Evaluation Commission (JPEC) will soon conduct its survey of lawyers on the performance of Utah's judges. We take this opportunity to ask for your valuable time in completing the surveys. Surveys have become ubiquitous, it seems, but this one matters a great deal—to the judges and to the people of Utah. Your first-hand observations, together with other information, will help inform JPEC's recommendation on whether judges standing for election should be retained.

Not every lawyer will be asked to complete a survey, but, if you are, please participate. Not only is your individual opinion important, but also, as with any survey, the results of the attorney survey are more reliable with a higher participation rate. Please complete the questionnaire personally based on your first-hand experience. Be candid in your responses; your anonymity will be protected.

If you are selected to complete one or more surveys, more detailed instructions will be included in a communication from JPEC.

Thank you for your participation.

Sincerely,

Matthew B. Durrant
Chief Justice, Utah Supreme Court

James D. Gilson
President, Utah State Bar

Thank you to all the sponsors of the 2015 "AND JUSTICE FOR ALL" Law Day 5K Run & Walk

Gold Gavel Sponsors

Energy Solutions
S.J. Quinney College of Law
Utah State Bar

Silver Gavel Sponsors

The Bar Method
Great Harvest
JetBlue Airways
Kimi's Chop & Oyster House
Real Property Section
Rocky Mountain Advisory
Sage Forensic Accounting
Sale Lake Legal
Workers Compensation Fund of Utah
Young Living Essential Oils

Bronze Gavel Sponsors

Bank of American Fork
Dannon
Eide Bailly
Hale Center Theater
Iron Mountain
Lexis Nexis
Mitton Donor Advised Fund
Red Mountain Resort
Title Boxing Club
Trader Joe's
Utah Arts Festival

Copper Gavel Sponsors

Beans & Brews
Banbury Cross
Costa Vida
Dodo Restaurant
Fresco
Gastronomy
The Gym at City Creek
Harmons
Jennins & Medura
Judge's Run 5K
Key Bank
Lagoon
Luna Blanca Taqueria
Millcreek Coffee
Law Day Run Committee
Nova Barton Design
Old Spaghetti Factory
Real Salt Lake
Red Cliffs Lodge
Red Mountain Resort
Salt Lake Running Company
Salt City Sound
Sprouts
Starbucks
St. Regis Deer Valley
Target
Trio Café
Utah Symphony
We are Yoga

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

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

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

PUBLIC REPRIMAND

On April 28, 2015, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Kyle Hoskins for violating Rules 1.3 (Diligence), 1.4(a) (Communication), 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation) and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rule of Professional Conduct.

In summary:

Mr. Hoskins was retained by a client to prepare a purchase agreement. The client paid Mr. Hoskins a retainer. About four weeks after Mr. Hoskins was retained, the client emailed Mr. Hoskins regarding the status of the purchase agreement and Mr. Hoskins did not respond. After not hearing back from Mr. Hoskins for another two weeks, the client contacted Mr. Hoskins and requested that Mr. Hoskins stop working on the purchase agreement. Mr. Hoskins responded by text message and agreed to call the client the next day.

Mr. Hoskins instructed the client to prepare a letter for him to review. The client prepared the letter and emailed it to Mr. Hoskins the same day. When the client contacted Mr. Hoskins to confirm receipt of the letter, it took Mr. Hoskins several days to respond. The next day, the client told Mr. Hoskins to stop all work and requested a refund of the unused portion of the retainer. Mr. Hoskins indicated he would provide a final bill and refund to the client, but failed to provide an accounting or refund. Mr. Hoskins never provided the purchase agreement to the client.

The Office of Professional Conduct served Mr. Hoskins with a Notice of Informal Complaint requiring his written response to the informal Bar complaint within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Hoskins did not timely respond in writing to the Notice of Informal Complaint.

Mitigating factors:

Absence of a prior record of discipline; personal and health problems.

SUSPENSION

On March 12, 2015, the Honorable Elizabeth Hruby-Mills, Third Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Discipline: Suspension, suspending Daniel R. Reed from the practice of law for one year for Mr. Reed's violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation, and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary, there are two matters:
In both matters, Mr. Reed was retained to represent a client in a potential lawsuit against a company that had filed for bankruptcy, its principals and a bank. Both clients paid Mr. Reed an initial retainer.

Mr. Reed later requested a second payment from the clients for the representation and the clients made the payment. A settlement offer was rejected by the clients. In the months after the settlement offer was rejected, the clients made efforts to contact Mr. Reed, but were unable to. Mr. Reed did not inform the clients that his contact information had changed. Mr. Reed did not pursue litigation on behalf of the clients and failed to provide notice to the clients that he was terminating the legal representation. Mr. Reed did not refund the unearned fees he collected from the clients upon termination of his representation.

In both cases, the Office of Professional Conduct served Mr. Reed with a Notice of Informal Complaint requiring his written response to the informal Bar complaint within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Reed did not timely respond in writing to the Notice of Informal Complaint in either matter.

Aggravating factors:
Multiple offenses; failure to make restitution.

INTERIM SUSPENSION

On April 20, 2015, the Honorable James Gardner, Third Judicial District Court, entered an Order of Interim Suspension pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability granting the OPC's Motion for Interim Suspension against Matthew G. Nielsen pending resolution of the disciplinary matter against him.

In summary:
Mr. Nielsen was placed on interim suspension based upon his criminal convictions for the following offenses: three counts of Assault; one count Attempted Failure to Stop at the Command of Law Enforcement; two counts Child Abuse Involving Physical Injury; four counts Obtaining a Prescription Under False Pretenses; two counts of Retail Theft (Shoplifting); one count Disorderly Conduct (Domestic Violence Related); one count Attempted Possession of a Controlled Substance Schedule I or II; one count Possession of a Controlled Substance Schedule I or II; one count Reckless Driving; and one count Attempted Burglary.

PUBLIC REPRIMAND

On April 23, 2015, the Honorable Barry Lawrence, Third Judicial District Court, entered an Order of Discipline: Public Reprimand against Todd D. Wakefield for violating Rules 3.1 (Meritorious Claims and Contentions), 4.4(a) (Respect for Rights of Third Persons), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Wakefield represented several defendants in a malicious prosecution lawsuit. Mr. Wakefield filed a motion to compel arbitration that was without basis in fact and lacked evidentiary support. The court entered an order of sanctions for violation of Rule 11 against Mr. Wakefield and his client.

Mr. Wakefield subsequently sent a letter to opposing counsel in the litigation stating that certain audio tapes had been made of the parties' conversations. In his letter to opposing counsel, Mr. Wakefield asserted that if the opposing party would pay a settlement, dismiss all claims against his clients and waive collection of the Rule 11 sanctions awarded; Mr. Wakefield's clients would sign a general release, forgo any filings with the Utah State Bar regarding disciplinary complaints and turn over the audio tapes and other items.

PUBLIC REPRIMAND

On April 30, 2015, the Honorable Fred D. Howard, Fourth Judicial District Court, entered an Order of Discipline: Public Reprimand against Ronald K. Fielding, for Mr. Fielding's violation of Rule 8.1(b) (Bar Admission and Disciplinary

Have you received a letter from the Office of Professional Conduct (OPC)? Do you have questions about the disciplinary process? For all your questions, contact Jeannine P. Timothy at the Discipline Process Information Office. Since January, thirty-four attorneys have called Jeannine with questions about the complaints filed against them. Jeannine has provided information about the process and given updates on the progress of each attorney's individual matter with the OPC. Call Jeannine at 801-257-5515 or email her at DisciplineInfo@UtahBar.org.

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

Matters) of the Rules of Professional Conduct.

In summary:
The Office of Professional Conduct served Mr. Fielding with a Notice of Informal Complaint requiring a written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Fielding did not timely respond in writing to the Notice of Informal Complaint.

RECIPROCAL DISCIPLINE ADMONITION

On May 15, 2015, the Honorable Richard McKelvie, Third Judicial District Court, entered an Order of Reciprocal Discipline: Private Admonition, against an attorney for the attorney's violation of Rule 1.15(a) (Safekeeping Property) of the Rules of Professional Conduct.

The attorney is a member of the Utah State Bar and is also licensed to practice law in another state. The attorney discipline committee of the supreme court in the other jurisdiction issued an Order of Admonition, Probation and Costs against the attorney for violation of the Rules of Professional Conduct in that state. An Order was entered in Utah based upon the discipline order in the other jurisdiction.

In summary:
The attorney failed to properly perform three account reconciliations. As such, the attorney was not aware when the attorney's trust account became deficient, which led to commingling of funds.

DISBARMENT

On April 7, 2015, the Honorable Andrew H. Stone, Third Judicial District Court, entered an Order of Discipline: Disbarment against Stephen T. Hard for violation of Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Hard was convicted of one count of Conspiracy and eight counts of Wire Fraud, Aiding and Abetting. The conviction was in connection with a fraudulent high yield investment scheme promising extremely high returns at little or no risk to principal.

Magna Carta: Symbol of Freedom Under the Law

Remarks by Judge Bruce S. Jenkins

EDITOR'S NOTE: *United States District Court Senior Judge, Bruce S. Jenkins, provided the following remarks at the Law Day Luncheon hosted by the Young Lawyers Division of the Utah State Bar on May 1, 2015. These remarks are reprinted here with Judge Jenkins's permission.*

First, of course, congratulations to all of the awardees. It's nice to be recognized for your good works. Better yet, and more lasting, is your personal satisfaction for having done the good works. Keep it up. Our culture, indeed, the cultures of the world, are hungry for good works by good people.

Today, May 1, 2015, is Law Day, set aside to celebrate the rule of law. It is birthday number 57, thanks to a Presidential Proclamation issued by Dwight Eisenhower in 1958, at the urging of Charles Rhyne, then President of the American Bar Association. Law Day was designed to provide contrast to the May Day celebration of the old Soviet Union, marked by gigantic displays of military might in an endless parade of tanks and mounted cannons and armed soldiers passing in review in Moscow. Law Day, in short, is an effort to contrast freedom through law versus compulsion through might. Although the Proclamation had been signed by the Secretary of State, it got bogged down in the White House and Rhyne went there to find out why. His words:

> 'I want to see Governor Adams.' (Ike's Chief of Staff). He pulled the proclamation out of his desk where it had stopped, and gave it back to me saying, 'the President will not sign a Proclamation praising lawyers.' I strode down to the oval office and handed it to President Eisenhower himself. As he stood there reading it Adams burst into the room yelling 'don't sign that paper praising lawyers!' The President held his hand up for silence until he had read the entire document. Then he said, 'Sherm, this document does not contain one word praising lawyers. It praises our constitutional system of government, our great heritage under *the rule of law*, and asks our people to stand up and praise what they have created. I like it, and I am going to sign it.'

And he did. In 1961 Congress, by joint resolution, officially set May 1st aside as a day to honor the rule of law.

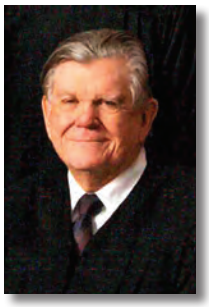
Adams' attitude toward lawyers echoes similar attitudes down through the ages. Even in our own history, Brigham Young used to rail against lawyers in the bowery on temple square. "A lawyer is a stink in the nostrils of every Latter-Day Saint." "A lawyer is like a bird of prey smelling the carcass from afar." Then he said, "May God Almighty curse them from this time henceforth and let all Saints in this house say, Amen." Everybody, all 3,000 of them in his congregation, said amen.

June 15, 2015, the British document called Magna Carta will mark its 800th birthday.

The theme of Law Day this year is "Magna Carta Symbol of Freedom Under Law." As you know, it is called Magna (big) Carta (leaf of paper), not because of its content, but because of its size and to distinguish it from a multitude of smaller versions which successor kings issued capsulizing some subjects from the big one. By the way, it is fun to know that Magna Carta was written in Latin. The parties to it, barons and King John all spoke French at that time and only the peasantry and serfs spoke English – well 'olde' English.

Before we get to a few of the big paper's significant words, I want to take a moment to call your attention to some significant

JUDGE BRUCE S. JENKINS is a U.S. Senior District Judge for the District of Utah. He was appointed by President Jimmy Carter in 1978.



words in documents of our own with a life span far less than 800 years. Some parts are distantly related to the Magna Carta. Our documents have a little bit of the big paper's DNA. We're related, but of a different species. We differ as to the source of government power.

In front of you are complimentary copies of our Declaration and our Constitution. They are yours to keep. I want to call your attention to and have you read along with me just 108 words. Fifty-six words are found on page 35, second paragraph.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness – that to secure these rights, governments are instituted among men, *deriving their just powers from the consent of the governed*…

(emphasis added) 56 words.

Why government? To *secure* these rights by consent.

Now please turn to the Constitution, page 1, and read with me the Preamble.

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Fifty-two words. 108 words total. The 56 words gave us the justification for government. The 52 words gives us the purpose, the goals, the ideals for which we continue to seek.

Like President Eisenhower, this Law Day I am here to praise our great heritage under the rule of law, noting that even our Constitution is not a perfect document. It is a work in process. It has been amended twenty-seven times and construed hundreds of times and, as a result, is better than it was.

We are made free through law. As John and others have demonstrated, we can be enslaved through law. Our founders knew that. With their bitter experience of colonial status, their natural mistrust of undue power in the hands of one man, they deliberately fractured governmental power into three great departments – legislative, executive, and judicial – each to balance or check the power of the other.

The contrast between the rule of law and rule of the gun is vivid. Consent to abide by the rules, having directly or indirectly participated in making the rules, is far different than gun-enforced rules made by a supreme leader.

Magna Carta is an agreement, a contract, between warring factions – King John and his supporters on the one hand, and the rebel barons on the other. It was supposed to end an armed conflict. The rebel barons had taken control of the city of London and John wanted the city back. Both said they wanted peace.

John, the fifth son of Henry II, was an accidental king. His four older brothers with prior rights to the kingship preceded him in death. He was a poor administrator, a profligate spender, and failure as a military leader. His empire in France had been lost.

Many of the barons had large estates seized by John and they wanted them back. They wanted to limit his power and wanted to participate in important decisions. They wanted their agreement to be written, overseen by a committee of barons, to insure that John kept his word, with securities and forfeitures if he did not.

Limiting a king went against custom and history. After all, a king had a divine right. He was God's agent on earth. Like God, he could do no wrong. The barons knew better. The agreement limited the power of the king. That was an earth-shaking, if not a heaven-shaking moment.

The document called by many, including the American Bar Association, "a symbol of freedom under law," is an amalgam of sixty-two subjects. Only three and one-half subjects remain in English law today. Some of importance we find mirrored in our fundamental documents. For example, the famous Article 39 says this,

> [n]o free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor we will proceed with force against him, or send others to do so, except by lawful judgment of his equals or by the law of the land.

Compare at your leisure Amendment V, found on page 22, where, "[n]o person shall…be deprived of life, liberty or property without due process of the law." And Amendment IV

on page 22 prohibiting "unreasonable searches and seizures."

As well as vital subjects of liberty, the ancient document deals with mundane things which we continue to deal with today: free trade, commerce, inheritance, marriage, and appointment of judges who know the law. For example, Article 7 says in part "[a]t her husband's death, a widow may have her marriage portion and inheritance at once and without trouble." And then a quaint Article 8,

> [n]o widow shall be compelled to marry, so long as she wishes to remain without a husband. But, she must *give security* that she will not marry without royal consent, if she holds her lands of the Crown, or without the consent of whatever other lord she may hold them of.

(emphasis added). Some enthusiasts find that the beginning of women's liberation.

Some of you may be following in the newspapers the controversy over fishermen having access over private land to the upper Provo River. Article 47 of our 800 year old document speaks of access to forests and, believe it or not, access to riverbanks. After 800 years we still can't get that one settled.

One more reference. Article 35 says in part, "[t]here shall be standard measures of wine, ale and corn…throughout the kingdom." A part of free trade. When I read that, I remembered that in the 1850s the first appointed officer during Utah territorial days was a man called "the inspector of spiritous liquors" and the first standard adopted by the territorial legislature was the Sykes hydrometer test so as to provide standard measure of the alcoholic content of liquor. Also, Article I of the Constitution at Section 8: Congress has power to "fix the Standard of Weights and Measures." Times change and things remain the same.

It was by agreement that limits were imposed on the king. I want to note an important difference here. It is very important. The barons were subjects. The kings gave up power, but the barons remained subjects. In theory, the king could take back that which he had given. And he did. Magna Carta had a first life of three months. In the mixed-up sovereignties of the 1200s, John claimed he signed under duress, and his agreement was extorted. He appealed to the Pope and the Pope declared the Magna Carta null and void, and war broke out *again*.

A year or two after Hitler assumed power, the head of the German Bar Association was asked about German law, and responded, "Law? Law? Hitler is the law."

When we talk of the "rule of law" – I like to shorten it and simply say "law rules." That is a profoundly different idea than saying "John rules" or "George rules" or "Putin rules." In our modern day, a classic illustration of this was President Nixon's refusal to turn over the White House tapes, claiming executive privilege. District Judge Sirica said, "turn over the tapes." When there was some White House hesitation, it was as if a "fire storm had hit the White House." The tapes were turned over to the court and co-conspirator Nixon, on the verge of impeachment, was soon gone.

While the Magna Carta is a revered symbol, our fundamental documents are revered for their substance and longevity. Magna Carta, in its original form, lasted three months. War erupted. In contrast, our constitution has survived more than two centuries – the longest run in history of such a document.

With the chaos in the streets we have seen these past few months, all of us, particularly lawyers, must stand up and speak up to champion the way of peace, the way of reason, the way of process, the rule of law.

Cultures change. The law, while stable at its best, is capable of change. A quick example is, "We the People" in 1789 is far different than "We the People" in 2015. "Equal" in John's time (equal for the barons) is far different than "equal" in our time.

So, I come full circle. Law day symbolizes order, process, evidence, reason, consent, judgment, trust, fairness, with all of us subject to the rules.

Lessons from the big paper:

> Fundamentals in writing
>
> Citizens not subjects
>
> Shared power of decision
>
> Rights, not kingly grants

We tip our hat to our distant relative Magna Carta and say thank you. We find our liberty under law in our Constitution and to that revered document, with President Eisenhower, we stand and praise.

Law rules!

Paralegal Division Happenings

On May 21, 2015, the Paralegal Division of the Utah State Bar and the Utah Paralegal Association held the Annual Paralegal Day Luncheon at the Hilton in Salt Lake City. One of the highlights of this event is the opportunity to recognize everyone that has achieved National Certification through NALA. This year there were eight individuals recognized for passing the Certified Paralegal Exam and three individuals recognized for passing the Advanced Certified Paralegal Exam. We commend these eleven paralegals on their dedication and passion for the profession.

Diane Samudio, Distinguished Paralegal of the Year

Paralegal Day is also the day to recognize the Distinguished Paralegal of the Year award. This award was presented to a Utah paralegal who, over a long and distinguished career, has by his or her ethical and personal conduct, commitment, and activities, exemplified for his or her fellow paralegals and the attorneys with whom he or she works the epitome of professionalism and who has also rendered extraordinary contributions that coincide with the purposes of the Paralegal Division and/or the purposes of UPA. The 2015 Distinguished Paralegal of the Year was Diane Samudio, CP.

Diane has been a paralegal since 1993 working in corporate law. She achieved her national certification from NALA in the 90s and began her involvement with UPA over twenty years ago. She was adjunct faculty at UVU for eleven years. She has devoted countless hours to the growth and development of the paralegal profession.

Diane is currently relocating from Utah County to St. George. Her supervising attorney, Brock Faubus, Associate Corporate Counsel at Property Solutions in Utah County, recognizes Diane's value to their team and describes her as a tremendous asset. With her move to St. George, she has demonstrated her commitment to see things through and is currently dividing her time between Property Solutions and her new employer in St. George. Brock appreciates that Diane is knowledgeable and capable. She knows Property Solutions's business and contracts inside and out. The company supported her involvement in professional associations and continuing CLE. With regard to her continuing education, she would report back to the company and train their whole team on what she had learned. Diane takes her work seriously and does what it takes to get it done right.

She has been an example of dedication and proficiency in her employment as well as in her leadership and involvement with professional organizations and truly embodies the qualities set forth in the nomination guidelines for this award. We are pleased to recognize Diane for her accomplishments and are proud to present her with this award on behalf of the Paralegal Division of the Utah State Bar and the Utah Paralegal Association. Congratulations, Diane Samudio!

Liberty Bell Award

On May 1, 2015, the Young Lawyers Division of the Utah State Bar hosted the Law Day Luncheon. At that luncheon, the Paralegal Division was honored with the award of the Liberty Bell Award. The Chair, Heather J. Allen, was able to accept this award on behalf of the Division. This award is given to a non-lawyer community member or organization for promoting better understanding of the rule of law, encouraging a

greater respect for law and the courts, stimulating a sense of civic responsibility, and contributing to good government in the community. Through the Division's efforts with the various projects like Wills for Heroes and Serving our Seniors, participation in Law Day activities and other efforts to enhance the legal community, this was able to come to be.

The Community Service committee and the Board of Directors are brainstorming ideas for other community involvement activities and will send further information in the coming months, so look for those emails.

The Heather Johnson Finch Memorial Endowed Scholarship

Heather Johnson Finch was the consummate professional and model for what every paralegal should be. She devoted over twenty years to the paralegal profession, including serving as the Chair of the Paralegal Division of the Utah State Bar at the time of her tragic passing. To honor the life and accomplishments of Heather Finch, the Paralegal Division of the Utah State Bar has created the first-ever endowed scholarship for students pursing undergraduate degrees in Paralegal Studies at Utah Valley University. Heather's life was given to hard work and service to the legal community through countless hours of volunteering. In 2009, Heather was given Utah's highest award available to paralegals: the Distinguished Paralegal of the Year Award. In Heather's honor, this scholarship was created on September 15, 2010. Heather's legacy and dedication to the paralegal profession will live on through this newly endowed scholarship. Dedicated, aspiring, service-oriented students majoring in Paralegal Studies at UVU will be able to benefit from pursuing the best paralegal education available. In order to receive this scholarship, UVU has outlined the following criteria:

1. Students who are in good academic standing, as determined by UVU.
2. Student completed the first year requirements of Paralegal Studies Program, on track toward completion of Program's requirements.
3. 3.0 GPA or higher.
4. Student is considered to be one of the top students in the Paralegal Studies Program, someone who has tremendous promise as a professional.
5. Must show recent and ongoing community service.
6. Character assessment, having high moral values.
7. Student interested in involvement with the Paralegal Division of the Utah State Bar.

This is the second year the scholarship has been awarded. This year's winner is Meagan Baker. Meagan has been a student at UVU for the past two years and will be receiving her bachelor's in legal studies. She was drawn to the legal studies program at UVU because it is an accredited ABA school and because of her love for the law. Meagan wants to be a paralegal because it has all the elements of the career goals she wanted while in school. Working as a paralegal at Utah Legal Services, Meagan has an understanding of what a typical day looks like in our profession, and she said it only strengthens her determination to be a paralegal and possibly an attorney in the future.

CLE Calendar

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

July 29–August 1, 2015 — **16 hrs. CLE, includes up to 2 hrs. Prof./Civ., up to 2 hrs. Ethics, up to 4 hrs. self-study**

2015 Summer Convention in Sun Valley, Idaho!

- Keynote Address by Justice Anthony M. Kennedy, Associate Justice, U.S. Supreme Court.
- 30 breakouts to choose from with subjects ranging from the latest in technology to litigation tips
- Join in on the family events and/or the new after hours activities
- Sports, recreation, and the Sun Valley Ice Show

August 7, 2015 | 8:00 am–5:00 pm — **5 hrs. CLE**

Annual Securities Law Seminar
Little America Hotel | 500 South Main Street | Salt Lake City, UT 84101

August 14, 2015 | 8:00 am–4:00 pm — **6 hrs. CLE**

Mangrum and Benson on Expert Testimony in Utah

September 16, 2015 | 9:00 am–3:45 pm — **5 hrs. Ethics, 1 hr. Prof./Civ.**

OPC Ethics School

September 18, 2015 | 8:00 am–5:00 pm — **7 hrs. CLE**

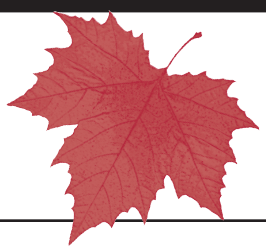
Patent Prosecution Bootcamp

September 21, 2015 | 9:30 am–3:30 pm — **5 hrs. Self-Study CLE**

23rd Annual Estate and Charitable Gift Planning Institute: Tailoring the Estate Planning Wardrobe

November 19 & 20, 2015

2015 Fall Forum in Salt Lake City
Grand America Hotel – 555 Main Street, Salt Lake City, UT.
Co-Chairs: Amy Fowler – Salt Lake Legal Defenders, Gabriel White – Christensen & Jensen.



Classified Ads

RATES & DEADLINES

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

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

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

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

OFFICE SPACE

Downtown law firm office space. One office available for $750 on month-to-month or longer sublease. Beautiful space with access to conference rooms and kitchen/breakroom. Call Candace at 801-961-1300.

Convenient Downtown Offices With Covered Parking: Two offices in Garff Building adjacent to State and Federal Courts with receptionist, conference and a break rooms. Copiers, digital phones and high speed internet available. Competitive negotiable terms. Please contact Maddie at 801-364-4040 or jack@rwsutahlaw.com.

PRACTICE DOWNTOWN ON MAIN STREET: Nice fifth floor Executive offices in a well-established firm. 1 to 3 offices now available for as low as $499 per month. Enjoy great associations with experienced lawyers. Contact Richard at (801) 534-0909 or richard@tjblawyers.com.

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

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

POSITIONS AVAILABLE

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

WANTED

SELLING YOUR PRACTICE? RETIRING? Selling or retiring from your estate planning, business planning, and/or social security disability practice in Salt Lake or Utah County? Want an experienced Utah licensed attorney to take special care of your clients? Call Ben at 480-296-2069 or email at Ben@ConnorLegal.com.

SERVICES

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

Consultant and Expert Witness: Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics. Charles M. Bennett PLLC, 15 West South Temple St. #1700, Salt Lake City, UT 84101; 801-524-1048. Fellow, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.

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

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

WHAT IS YOUR CASE WORTH? A medical cost projection/ disability cost analysis or life care plan can assist you in determining this. Which medical bills are related to your liability claim and which are not? Assistance with this is also available as well as a medical record analysis to help you understand the strengths and weaknesses of your case. Put over 25 years of experience to work for you. Call (435) 851-2153 for a free initial consultation or check out www.utahlegalnurse.com.

1099 LAW, LLC. We limit our services to referral, marketing and billing. We will find the appropriate lawyer for your needs, manage his/her billing and make sure your needs are met at the highest level of professional competence. Lawyers already working on a 1099 basis: we can do your billing and collection so that you can get paid in a timely manner. Our services comply with the relevant "Rules of Professional Practice" promulgated by the Utah Supreme Court. 1. Discovery response; 2. Court appearances; 3. Client/witness interview; 4. Depositions; 5. Research; 6. Drafting documents. 1099law@xmission.com; 801.201.3586. Daniel Darger (0815) Proprietor.

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

Certificate of Compliance

UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION
Utah State Bar | 645 South 200 East | Salt Lake City, Utah 84111
Phone: 801-531-9077 | Fax: 801-531-0660 | Email: mcle@utahbar.org

For July 1 _____ through June 30_____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____ Email: _____

_____

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

1. **Active Status Lawyer –** Lawyers on active status are required to complete, during each two year fiscal period (July 1–June 30), a minimum of 24 hours of Utah accredited CLE, which shall include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of the ethics or professional responsibility shall be in the area of professionalism and civility. Please visit www.utahmcle.org for a complete explanation of Rule 14-404.

2. **New Lawyer CLE requirement –** Lawyers newly admitted under the Bar's full exam need to complete the following requirements during their first reporting period:
   - Complete the NLTP Program during their first year of admission to the Bar, unless NLTP exemption applies.
   - Attend one New Lawyer Ethics program during their first year of admission to the Bar. This requirement can be waived if the lawyer resides out-of-state.
   - Complete 12 hours of Utah accredited CLE.

3. **House Counsel –** House Counsel Lawyers must file with the MCLE Board by July 31 of each year a Certificate of Compliance from the jurisdiction where House Counsel maintains an active license establishing that he or she has completed the hours of continuing legal education required of active attorneys in the jurisdiction where House Counsel is licensed.

EXPLANATION OF TYPE OF ACTIVITY

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

1. **Self-Study CLE:** No more than 12 hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit www.utahmcle.org for a complete explanation of Rule 14-413 (a), (b), (c) and (d).

2. **Live CLE Program:** There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at a Utah accredited CLE program. **A minimum of 12 hours must be obtained through attendance at live CLE programs during a reporting period.**

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

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

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

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

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

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

Date: _____ Signature: _____

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

Credit Card Type: ☐ MasterCard ☐ VISA Card Expiration Date:(e.g. 01/07) _____

Account # _____ Security Code: _____

Name on Card: _____

Cardholder Signature _____

Please Note: Your credit card statement will reflect a charge from "BarAlliance"
Returned checks will be subject to a $20 charge.

PROLIABILITY LAWYERS PROGRAM

PROTECT what you've worked hard to build!

PROGRAM HIGHLIGHTS:

50 State Solutions

Exceptional Customer Service

Dedicated Account Managers and Agents

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

PROLIABILITY LAWYERS PROGRAM

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

Endorsed by Utah State Bar

GET YOUR QUOTE TODAY!

To obtain your Professional Liability Insurance quote:

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

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

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

MERCER

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

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

We take on complex cases and win.

We've earned our reputation for winning the toughest medical malpractice cases. Did you know that we're also experienced in prosecuting all types of complex personal injury and product liability claims including auto and construction accidents and toxic torts?

With over 20 years of proven results, we can help you determine liability and build a solid case for your clients that will hold up in court.

Make us part of your team.

Call us now:
(801) 384-4599 or toll free: (855) 391-4711
www.injuryutah.com
Norman J. Younker, *Esq. – Team Leader*

Fabian Clendenin

215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323