Utah Bar, J. O. U. B. N. A. L.

Volume 30 No. 4 Jul/Aug 2017





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The Utah Bar Journal

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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.

Cover Photo

Flaming Gorge, Red Canyon, by Utah State Bar member Adam C. Buck.

ADAM C. BUCK is a trial lawyer with Snell & Wilmer L.L.P. in Salt Lake City. This photo was taken during the course of a Varsity/Venturing High Adventure weekend. As the scouts trekked the rim of the canyon on their mountain bikes, Adam paused for a moment to reflect on the beauty of Utah and its diversity. This photograph reflects that beauty and diversity – from the red canyon walls, to the pine forests, and from the rugged mountains to deep waters.



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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 <u>barjournal@utahbar.org</u>. Only the highest quality resolution and clarity (in focus) will be acceptable for the cover. Photos must be a minimum of 300 dpi at the full 8.5" x 11" size, or in other words 2600 pixels wide by 3400 pixels tall. If non-digital photographs are sent, please include a pre-addressed, stamped envelope if you would like the photo returned, and write your name and address on the back of the photo.

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Utah State Bar LAWYER The YEAR Paul Simmons, 2017

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Letter to the Editor

Dear Editor,

In the March/April 2017 issue of the *Utah Bar Journal*, I was pleased to see the announcement of the formation of the Utah Center for Legal Inclusion (UCLI) which promotes diversity within the legal community here in Utah.

However, I was dismayed to see in the article, "The Utah Center for Legal Inclusion" that lawyers with disabilities were not included in the discussion even though statistics regarding attorneys with disabilities was mentioned in the 2016 NALP report (see p. 16). There are plenty of wonderful attorneys with disabilities in Utah who make positive contributions to the Bar and who provide excellent services to the clients they serve. If the Utah Bar is seeking to create a more diverse and inclusive Bar, that cannot be achieved if attorneys with disabilities are left out of the conversation and not considered in the activities of the UCLI.

The Utah legal profession benefits from having paralegals, attorneys and judges who have a disability and that should be factored in future discussions about promoting diversity within our profession.

Sincerely, Jared Allebest

LETTER SUBMISSION GUIDELINES

- 1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.
- 2. No one person shall have more than one letter to the editor published every six months.
- 3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to <u>BarJournal@UtahBar.org</u> or delivered to the office of the Utah State Bar at least six weeks prior to publication.
- 4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
- 5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
- 6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
- 7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
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The Editor of the *Utab Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea, a particular topic that interests you, or if you would like to review one of the books we have received for review in the *Bar Journal*, please contact us by calling 801-297-7022 or by e-mail at <u>barjournal@utabbar.org</u>.

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

SUBMISSION FORMAT: Articles must be submitted via e-mail to <u>barjournal@utahbar.org</u>, 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 *Utab 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 *Utab Bar Journal* may be edited for citation style, length, grammar, and punctuation. While content is the author's responsibility, the editorial board reserves the right to make minor substantive edits to promote clarity, conciseness, and readability. If substantive edits are necessary, the editorial board will strive to consult the author to ensure the integrity of the author's message.

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

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



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President's Message

Thank You

by Robert O. Rice

"It's not enough to be busy. The question is: What are we busy about?"

- Henry David Thoreau

Your answer, Mr. Thoreau, is that we at the Utah State Bar have been busy about a great deal having to do with the practice of law, thank you very much. In my final days as Utah Bar President, it is my privilege to recognize the hard work of my colleagues on the Bar Commission, Bar junkies, friends, and volunteers for their efforts at ensuring that the Utah Bar continues to lead the nation in its service to our profession.

For example, Commissioners Cara Tangaro and President-Elect John Lund have led a crack team of lawyers in two important technology initiatives. Cara and John's team, including incoming President-Elect Dickson Burton and attorneys, John Rees, Heather White, and Greg Hoole, have been re-designing the Bar's website to bring you an attractive and user-friendly experience that will deepen your relationship with the Bar. The team is also taking the lead at developing a law practice management portal to assist you in managing your practices. The portal will include tools for legal research, calendaring, invoicing, e-filing, document management, Bar licensing, CLE, and many other aspects of your law practice. Look for a roll out on these technology developments in the near future.

Thanks to Commissioner Heather Thuet for adding an implicit bias, inclusion, and procedural fairness program to the Bar's award-winning New Lawyer Training Program. This curriculum gives new lawyers the benefit of the science of implicit bias to aid them in their courtroom presentations and client relations. In addition, the initiative aids the Bar in furthering its goal of "engaging all persons fully, including persons of different ages, disabilities, economic status, ethnicities, genders, geographic regions, national origins, sexual orientations, practice settings and areas, and races and religions." Utah State Bar Statement on Diversity and Inclusion, December 2, 2011. The Bar should continue to look for ways to advance diversity and inclusion in our practices, on the bench, and in our community at large.

Props to Commissioner Grace Acosta for her leadership organizing the Bar's Law Firm Membership Services Tour. Through Grace's efforts, bar commissioners have been visiting firms (mostly small and mid-sized firms) throughout the state to re-introduce our Bar to many of you in a one-on-one setting. On the tour, we introduced lawyers to the details behind the Bar's core services, like CLE, discipline, and licensing, as well as explaining other lesser-known services and opportunities, like Casemaker and Utah's Pro Bono Commission and Modest Means program. Plus, we got to hear from you – sometimes by the earful – about the job we are doing. Please contact me if you would like our team to visit you and your colleagues. We'll buy lunch!

Federal District Court Judge Robert Shelby and attorney, Amy Sorenson, co-chairs of the 2017 Summer Convention, deserve sustained applause for their efforts organizing a stellar return to Sun Valley. As you are reading this, anticipation is growing to hear United States Supreme Court Justice Ruth Bader Ginsburg, Bryan Stevenson, Professor Eugene Volokh, and Lt. Governor Spencer Cox make their keynote presentations. Another round of applause for Dickson Burton, who led a working group to study how best to manage the Bar's ongoing convention programming to ensure we are making good use of Bar resources to effectively serve all

of our members in our conventions for years to come.

The Bar owes a large debt of gratitude to its members who reached out to their legislators to voice their opinions about HB 93, a bill introduced in the legislature that would have de-emphasized the importance of



diversity in Utah's judicial selection process. Many of you reached out to your legislators to share your views on this important issue, which helped keep the bill from emerging from committee. Utah's reputation as having an excellent judiciary is unparalleled in the nation, thanks to Governor Gary Herbert's record of excellent judicial appointments and the legislature's attention to an effective third branch of government. Likewise, the Bar remains committed to an independent judiciary that fairly takes into account the importance of diversity on our bench.

On that note, the Bar supports the Utah Center for Legal Inclusion (UCLI), co-chaired by Utah Supreme Court Justice Christine Durham and attorney, Francis Wikstrom. Although not a Bar-sponsored program, UCLI deserves special mention this year because of its close association with our organization. UCLI enjoyed a warm welcome when Governor Herbert helped introduce UCLI to the Bar at the 2016 Fall Forum. Governor Herbert has emphasized the importance of filling the judicial appointment pipeline with excellent candidates. UCLI aims to do just that, by reaching deep into Utah's school system and communities to encourage diverse students to attend law school, enter the legal profession, and ultimately sit on the bench. Here's to another successful year of growth and opportunity for UCLI.

In furtherance of the substantial progress the Bar has made in improving access to justice in our state, the Bar formed an Access to Justice Council (the Council) to foster continued coordination of access to justice issues. This Council will meet periodically to provide a forum for the many thought leaders in Utah's access to justice community to further strengthen the programs managed by non-profits, the courts, and the Bar that offer free and reduced-cost legal services to needy Utahns. Utah continues to lead the nation in providing meaningful access to justice to the underserved. The work of the Affordable Access for All Task Force has made great strides to implement the recommendations of the Bar's Futures Commission, and I look forward to continued success under the leadership of its chairs, Charles Stormont and Heather Thuet.

It has been an absolute honor and pleasure serving as President of the Utah Bar for the last year. I've learned that the Utah Bar is in an enviable position of being well managed and forward thinking. In my interactions with other bar leaders from around the country, I've discovered that many look to Utah as a leader in access to justice issues and technological innovation, especially with the introduction of our lawyer referral service, <u>LicensedLawyer.org</u>, the success of which is largely due to the efforts of John Lund. I've also learned that many of you are fully engaged not only in your profession as lawyers, but also in what we do as Bar Commissioners. You are unafraid to contact me to explain your views about many issues, and it pleases me greatly that you are paying close attention to what we on the Bar Commission do. That is how it should be.

Looking forward, you are in good hands. Your Bar Commissioners, including John Bradley, Katie Woods, Grace Acosta, Heather Farnsworth, Michelle Mumford, Kate Conyers, Herm Olsen, Heather Thuet, Dickson Burton, Cara Tangaro, Liisa Hancock, Mary Kay Griffin, Steve Burt, and the Bar's ex-officio members have their hands firmly on the tiller. John Lund has absolutely dedicated himself to the Bar for nearly seven years and is as well qualified, prepared, and motivated to serve as Bar President as any lawyer could be. His counsel has been invaluable to me and his leadership will enhance our profession immensely. Thank you for the opportunity to have served as Bar President.

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ROBERT K. HILDER May 15, 1949 – April 26, 2017

It is with great sadness we announce the passing of our dear friend and colleague Robert K. Hilder on April 26, 2017. Robert was a leader at our firm and served for several years as our managing partner. He was an exceptionally skilled practitioner and an even better friend and mentor. He brought practical experience and wisdom to his work. We are honored to have known him and to have worked with him and are deeply saddened by this great loss. We will miss him.



Robert liked to say he felt privileged to have four distinct careers in the law. After he worked at the law firm of Christensen & Jensen he was appointed to the Third Judicial District Court on August 1, 1995, by Governor Michael O. Leavitt, where he heard cases for 16 years and served as Presiding Judge of the Third District. He was loved by many, being called "one of the kindest, most compassionate, gentlest people to sit on the bench," and in 2010 the Utah State Bar awarded Robert with the Judge of the Year award. Following his retirement in 2011, he established a private practice where he did extensive mediation and arbitration work, completing almost 800 arbitrations and mediations in just over four years. Most recently, he was elected Summit County Attorney, where he served until his death.

Robert was born May 15, 1949 in Sydney, Australia. His diverse educational and socio-economic status enabled him to bring a rare perspective to the four careers he had in law. Prior to emigrating to the U.S. and Utah, he worked as a jackeroo, cattle hide grader, police cadet, miner, pipeline construction, surveyor's chainman, barman, bouncer, and LDS missionary. Before entering law school, where he was senior editor of Law Review, and a member of the Moot Court Society, he earned a GED and completed a B.S. in Political Science at the University of Utah, graduating Phi Beta Kappa and magna cum laude while working as a day laborer in warehouses, unloading rail cars and at 7–11 on the graveyard shift.

Robert's compassion and genuine love of humanity was felt by many. He claimed there wasn't a person he met from whom he couldn't learn something. His view from his courtroom window of the location he worked as a security guard while obtaining his legal education, was a reminder of the importance of humanness in rendering judgment on others.



Utah Law Developments

Utab Becomes First State to Enact the Uniform Commercial Real Estate Receivership Act

by David E. Leta

Introduction

On March 25, 2017, Utah became the first state to enact the Uniform Commercial Real Estate Receivership Act (UCRERA), which was drafted by the National Conference of Commissioners on Uniform State Laws (the Conference) and adopted by the Conference at its annual meeting in July 2015. The Utah Uniform Commercial Real Estate Receivership Act (the Utah Act) mirrors UCRERA and applies to all commercial real property receiverships that are filed in the Utah district courts on and after May 9, 2017. The Utah Act is found at Utah Code Section 78B-21-101, *et seq*.

Background

Prior to the Utah Act, all state court receivership proceedings were governed by Utah Rule of Civil Procedure 66. Rule 66 is very short, and there are only a smattering of cases interpreting it. Several important questions governing receivers and receivership proceedings are not addressed in either Rule 66 or in the underlying cases. For instance, the rule states that, absent consent of all parties, a receiver cannot be "a party or attorney to the action" and must be "impartial and disinterested as to all parties and the subject matter of the action." Does this mean that a proposed receiver is disqualified because he or she also is serving as a receiver in another pending case involving one of the parties, even if the other pending case involves different assets and different counter-parties? Is a receiver disqualified if he or she owns a bank account at a financial institution that is a party to the action? Can a receiver appointed under Rule 66 be an entity? The Rule implies that the receiver must be a "person," but that word is undefined. What bond, if any, must be posted by a receiver? The rule makes a bond discretionary with the court and, if the court does require a bond, Rule 66 incorporates Utah Rule of Civil Procedure 64 in setting the amount. Rule 64, however, also is discretionary and is designed for situations where one of the parties is seeking to stay implementation of a provisional remedy under Rules 64A-E and 69A-C. In fact, Rule 64 does not even mention Rule 66. Can a receiver sell receivership property, and,

if so, is such a sale free and clear of liens? Rule 66 allows a receiver to "make transfers" and to "take other action as the court may authorize," but it does not address the impact of such transfers on affected constituents. Under the rule, a receiver can act, under the direction of the court, to "bring and defend actions..., seize property, to collect, pay and compromise debts...[and] invest funds," but does this grant allow the receiver, even with court authority, to adopt or reject executory contracts? What type of notice regarding the receivership, the appointment of the receiver, or the proposed actions of the receiver must be given to parties-in-interest? Rule 66 is silent on this question. How, if at all, can parties-in-interest file claims against the receivership and participate in distributions? Again, Rule 66 is silent. Can a receiver hire professionals to assist him or her in performing duties, and, if so, how is the professional's compensation determined? Not surprisingly, Rule 66 again is silent.

As a result of the uncertainties with Rule 66, courts and moving parties in receivership cases typically have drafted expansive receiver appointment orders that speak like operating agreements. Even here, however, there was no consistency from one case to another, from one court to another, or even between judges in the same court. In essence, prior to the Utah Act, every receivership case was an island in an archipelago, with each island governed by its own, unique receivership order. And, in every such case, there were lingering questions about whether such broad appointment orders could override other state laws governing lien rights, debt collection remedies, and foreclosure procedures.

DAVID E. LETA is a partner at Snell & Wilmer L.L.P. He concentrates his practice on commercial debtor-creditor relationships, including those that involve bankruptcies, receiverships, foreclosures, and collection proceedings.



The situation in Utah was not unique. As the Conference recognized when it appointed a special committee to draft UCRERA,

[u] nfortunately, very few states have comprehensive statutory guidance regarding the appointment and powers of receivers for commercial real estate. In the vast majority of states, receivers are appointed pursuant to a court's general equitable power to appoint a receiver, with minimal statutory guidance either expressly confirming or limiting the power of a receiver. A small handful of states (including California, Indiana, Nebraska, New Mexico, Ohio, Oklahoma, and South Dakota) provide a moderate amount of statutory guidance.... Only two states -Washington and Minnesota – provide a comprehensive statutory codification of the laws governing the appointment and powers of receivers and receivership procedures. Likewise, to date, no uniform law addresses the appointment and powers of real estate receivers in a comprehensive fashion....As a result, there is variation from state to state with regard to the laws governing appointment and powers of receivers. Furthermore, because most states have such minimal statutory guidance, there is even variation from one county, district, parish, or municipal subdivision to the next within a state, as individual judges might have disparate perspectives on the circumstances in which a receivership constitutes an appropriate remedy.

Uniform Commercial Real Estate Receivership Act, Prefatory Note at 2 (2015), *available at* <u>http://www.leg.state.nv.us/</u> Session/79th2017/Exhibits/Assembly/CPP/ACPP371E.pdf.

Accordingly, the Conference embarked on a four-year effort to craft a uniform statute, UCRERA. UCRERA has now been adopted by Utah. It also is being considered by other state legislative bodies, including those in Nevada, Oklahoma, and Maryland.

Summary of Key Statutory Provisions in the Utah Act

What follows is a summary of the Utah Act's key provisions. Practitioners are urged to read the statute carefully for a more comprehensive understanding of the legislation.

Definitions: Utah Code Section 78B-21-102

For the most part, the definitions in the Utah Act are helpful but not remarkable. In general, these definitions are *similar* to the definitions for like terms in the Bankruptcy Code, 11 U.S.C. § 101, and in the Utah Uniform Commercial Code, Utah Code sections 70A-1a-201, 70A-2-103 through -106, & 70-9a-102. There are some differences, however. For instance, the definition of "affiliate" is much broader than that found in 11 U.S.C § 101(2). Some defined terms, such as "companion," "executory contract," "owner," "proceeds" and "rents," have no corresponding definitions in the Bankruptcy Code. On the other hand, some terms in the statute are not defined, such as the term "dwelling unit," which is used to *exclude* certain real property from the scope of the law. *See* Utah Code Ann. § 78B-21-104(2) & discussion below. In this regard, practitioners will find the comments and examples in UCRERA to be instructive in interpreting the statute. *See, e.g.*, UCRERA, cmt. 2 to § 4 (mirroring Utah Code section 78B-21-104).

Notice and Opportunity for Hearing: Section 78B-21-103

Under the Utah Act, the court may enter orders only after such notice and opportunity for a hearing as is appropriate under the circumstances. The court, however, may issue an order without an actual hearing if no interested party timely requests a hearing or if the particular circumstances require an order before a hearing can be held. This is a significant improvement over Rule 66, which does not contain any requirements for notice of the receivership case, with the exception that a receiver must file a certified copy of the appointment order in the office of the county recorder where receivership real property is located before the receiver can be vested with an interest in the property. See Rule 66(g). This type of limited "record notice" is only effective for those searching the title records of the subject property. The notice provisions of Utah Code section 78B-21-103, on the other hand, are designed around the principles of due process and fairness in judicial administration. They require that persons affected by the particular receivership order be given actual notice and an opportunity to be heard before a final determination of their legal rights and responsibilities is made by the court. At the same time, section 78B-21-103 is flexible in allowing the court to fashion notice that is "appropriate" in the particular circumstances.

Scope and Exclusions: Section 78B-21-104

The Utah Act applies to all receiverships for *real property*, as well as *related* personal property, *except* where the real property is improved by one to four "dwelling units," *unless* (a) the dwelling units are used for agricultural, commercial, industrial, or mineral extraction purposes that are not incidental uses by an owner occupying the property as a primary residence; (b) the dwelling units secure an obligation incurred when the property

was used or planned for use for such commercial purposes; (c) the owner planned or is planning to develop the property with one or more dwelling units to be sold or leased in the ordinary course of the owner's business; or (d) the owner collects rents or other income from an unrelated tenant or other occupier. The Utah Act also does *not* apply to a receivership authorized by the laws of Utah in which the receiver is a governmental unit or an individual acting in an official capacity on behalf of the governmental unit. Furthermore, the Utah Act does *not* apply to receiverships that do not primarily involve *real property*. Finally, unless there is a specific provision of the Utah Act that provides otherwise, the statute can be supplemented by general principles of law and equity.

Power of the Court: Section 78B-21-105

The district courts of the state of Utah have *exclusive* jurisdiction of receivership proceedings brought under the statute. The Utah Act, however, does not contain any special venue provisions. So, with regard to the venue of a receivership case, the provisions of section 78B-3-301 will govern.

Appointment: Section 78B-21-106

The Utah Act establishes standards under which a court may appoint a receiver in the exercise of its equitable discretion. These standards include circumstances both before and after judgment. Before judgment a receiver may be appointed to protect a party that demonstrates an apparent right, title, or interest in the subject real estate, if that property, or its revenueproducing potential, is subject to, or in danger of, waste, loss, dissipation, or impairment or is the subject of a voidable transaction. After judgment, a receiver may be appointed to carry the judgment into effect, preserve nonexempt property pending appeal, or where the owner refuses to apply the property in satisfaction of the judgment. In addition, the statute contains broad authority to appoint a receiver "on equitable grounds." Id. It also allows for appointment "during the time allowed for redemption to preserve a property sold in an execution or foreclosure sale" and to secure the rents during such time. The Utah Act establishes standards under which a petitioning mortgage lienholder is entitled to appointment of a receiver, either as a matter of right or as a matter of the court's discretion, in connection with a foreclosure. In particular, the

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statute expressly recognizes the right of a mortgagee to have a receiver appointed (a) if necessary to protect the property; (b) if, before default, the mortgagor agreed in a signed record to such an appointment on default; (c) if, after default, the mortgagor so agreed in writing; (d) if the collateral is insufficient to satisfy the debt; or (e) if the owner fails to turn over the proceeds or rents that the mortgagee is entitled to collect. Where the court appoints a receiver on an *ex parte* basis, the court may require the party seeking appointment to post security for any damages, attorney fees, and costs incurred by a person injured if the appointment is later determined to have been unjustified.

Identity and Independence of Receiver: Section 78B-21-107

The Utah Act requires that the receiver provide sworn evidence of the receiver's independence. With respect to disinterestedness, the statute contains broad prohibitions against appointment of persons who are affiliates of a party, have a material interest in the property, have a financial interest in the outcome of the proceeding, are a debtor or creditor of a party, or hold an equity interest in a party, other than a non-controlling interest in a publicly-traded company. Certain types of relationships are excluded from these broad categories, however, such as being

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801-355-6655 www.salesandauction.com appointed as a receiver, or being owed money in connection with another unrelated receivership case involving a party, being obligated to pay a debt that is not in default and is for personal, family, or household purposes, or maintaining a deposit account with a party. Furthermore, while a party seeking appointment of a receiver may nominate someone, the court is not bound by any such nomination.

Receiver's Bond: Section 78B-21-108

Every receiver *must* post a bond that is conditioned on the faithful discharge of the receiver's duties, is in an amount specified by the court, and is effective upon appointment. Where required by the circumstances, the court may authorize the receiver to act before the bond is posted. The statute does not authorize the court to waive the bond requirement, however. The court also may approve alternative forms of security, such as letters of credit or deposit of funds, but receivership property may not be used as security. Interest earned on any deposited funds posted for the bond must be paid to the receiver upon the receiver's discharge. And, any claim against the receiver's bond must be made not later than one year after the date the receiver is discharged.

Effect of Appointment; Receiver as Lien Creditor: Section 78B-21-109

On appointment, and with respect to personal property, a receiver has the status and priority of a lien creditor under Chapter 9a of the Utah Uniform Commercial Code. With respect to real property, a receiver has a similar status under Chapter 9 of the Marketable Record Title statute.

Effect on After-Acquired Property: Section 78B-21-110

Appointment of a receiver does not affect the validity of a pre-receivership security interest in receivership property. Any property acquired by the receiver after appointment is subject to any pre-receivership security agreement to the same extent as if no receiver had been appointed.

Collection and Turnover of Receivership Property: Section 78B-21-111

On appointment, persons having possession, custody, or control of receivership property must turn over the property to the receiver, and persons owing debts that constitute receivership property must pay those debts to the receiver. A person with notice of the receivership and who owes a debt that is receivership property may not satisfy the debt by paying the owner. Doing so exposes such a person to the possibility of paying the debt twice. The court also may sanction as civil contempt a person's failure to turn over property when required, unless there is a bona fide dispute about the receiver's right to possession, custody, or control of the property. The only exception to this broad turnover principle is if a debt is subject to setoff or recoupment or if continued possession, custody, or control of the receivership property is necessary for the person to maintain a lien against the property. In such cases, the person can retain possession until the court orders adequate protection.

Powers and Duties of Receiver: Section 78B-21-112

The Utah Act grants a receiver very broad presumptive powers, unless limited by court order or other applicable state law. These powers include the right to (a) collect, manage, control, conserve, and protect the receivership property; (b) operate a business constituting receivership property in the ordinary course; (c) incur debt and pay expenses in the ordinary course of business; (d) bring lawsuits and assert claims; and (e) issue subpoenas for examinations and documents. In addition, the statute specifies certain powers that the receiver may exercise only with court approval, such as (a) incurring debt outside the ordinary course of business; (b) making improvements to the property; (c) transferring property outside the ordinary course of business; (d) adopting or rejecting executory contracts made by the owner; (e) paying compensation to himself or herself or to retained professionals; (f) recommending allowance or disallowance of claims; and (g) distributing receivership property. The Utah Act also sets

forth the performance and reporting duties of the receiver. The court may expand, modify, or limit all of these powers and duties.

Duties of Owner: Section 78B-21-113

The statute places duties of cooperation and turnover on owners of receivership property. If the owner is not an "individual," then these duties apply to *each* officer, director, manager, member, partner, trustee, or other person exercising or having the power to exercise control over the affairs of the owner. The owner must assist and cooperate with the receiver, preserve and turn over property, identify and provide access to records and other information, and submit to examination, under subpoena. A knowing failure of *a person* to perform these duties can subject the person to payment of the receiver's resulting actual damages, reasonable attorney fees and costs, together with possible civil contempt sanctions.

Automatic Stay; Injunctions: Section 78B-21-114

Entry of the order of appointment effects a stay, applicable to all persons, of any act to obtain possession of, exercise control over, or enforce a judgment against receivership property. It also stays any act to enforce a lien against receivership property. In appropriate situations, the court can expand the scope of the stay and also grant relief from the stay. For policy reasons, certain actions are excluded from this stay, including actions to foreclose or enforce a mortgage by the person seeking appointment of the receiver, an act to perfect, or maintain



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perfection of, an interest in receivership property, a criminal proceeding, and actions by governmental units to enforce police or regulatory powers, including assessment of taxes. The court may void an act that violates this stay suggesting that such violations are not void *ab initio*. The statute also addresses the consequences of a violation of the stay, and allows the court to award actual damages caused by the violation, including reasonable attorney fees, costs, and civil contempt sanctions.

Engagement and Compensation of Professionals: Section 78B-21-115

The Utah Act authorizes the receiver to engage and pay professionals to assist in the administration of the receivership. A professional is not disqualified from being hired solely because of the person's engagement by, representation of, or other relationship with the receiver, a creditor, or a party. This is a much less rigorous qualification standard than the "disinterestedness" test typically applied in cases under the Bankruptcy Code. In addition, the statute does not prevent the receiver from serving in the receivership as an attorney, accountant, auctioneer, or broker "when authorized by law." Both receivers and their retained professionals must file itemized statements of their time spent, work performed, billing rates,

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services such as car rentals, resort getaways, cruises, luggage, entertainment and much more! To access the site, simply log in with your username and password via www.utahbar.org/members and start saving today! and expenses incurred and can only be paid upon court approval.

Use, Sale, Lease, License, or Other Transfer of Receivership Property Other than in Ordinary Course: Section 78B-21-116

With court approval, the Utah Act permits the receiver to use, sell, lease, license, exchange, or otherwise transfer receivership property, other than in the ordinary course of business. Unless the agreement of transfer provides otherwise, the transfer is free and clear of a lien of the person that obtained appointment of the receiver, any subordinate lien, and any rights of redemption, but such a sale is subject to liens that are senior to the lien of the person who obtained the receiver's appointment. Liens extinguished by the receiver's sale attach to proceeds with the same validity, perfection, and priority as they had with respect to the property sold, even if the proceeds are not sufficient to satisfy all obligations secured by the liens. The sale may be conducted as either a public auction or a private sale. Creditors with valid secured claims may credit bid in connection with any proposed sale, but only if the creditor tenders funds sufficient to satisfy, in full, the reasonable expenses of transfer and the obligations secured by any senior liens extinguished by the transfer. The Utah Act also provides a safe harbor for good faith purchasers in case a party objects to the sale but fails to obtain a stay of the sale order.

Executory Contracts and Unexpired Leases: Section 78B-21-117

With court approval, a receiver may adopt or reject an executory contract of the owner relating to the receivership property. If, under applicable Utah law, the owner could assign the contract, then the receiver also may assign the contract with court approval. Performance of a contract by a receiver prior to adoption is not an implied adoption of the contract, nor does it preclude a subsequent rejection. The Utah Act specifies the mechanics for adoption, assignment, or rejection of executory contracts and the resulting consequences. For instance, the court may condition the receiver's adoption and continued performance of the contract. Importantly, if the receiver does not request approval to adopt or reject an executory contract "within a reasonable time after the receiver's appointment," then the receiver is "deemed to have rejected the executory contract." There is no definition of "reasonable time" in the statute. Furthermore, a provision in a contract that requires or permits a forfeiture, modification, or termination of the contract because of the appointment of a receiver or the financial condition of the owner does not affect a receiver's power to adopt the executory contract. The Utah Act also contains protections for purchasers in possession of real property or real property timeshare interests that are analogous to those contained in the Bankruptcy Code. Finally, the Utah Act limits the receiver's ability to reject the unexpired lease of a tenant, permitting rejection of the lease only in very limited situations.

Immunity of Receiver: Section 78B-21-118

Consistent with the receiver's status as an officer of the court, the statute provides the receiver with immunity for acts or omissions within the scope of the receiver's appointment. As such, the Utah Act incorporates the *Barton* doctrine, *see Barton v. Barbour*, 104 U.S. 126, 129 (1881), and provides that a receiver cannot be sued personally for an act or omission in administering receivership property, except with the approval of the appointing court.

Claims: Section 78B-21-120

The Utah Act requires the receiver to notify "creditors of the owner" of the appointment of the receiver unless the court orders otherwise and prescribes the content of the notice and the manner in which it must be given. The notice must advise creditors of their rights to file a claim and must specify the date by which such claims are to be filed. Unless the court orders otherwise, a claim that is not submitted timely is not entitled to a distribution from the receivership. The Utah Act specifies the information that must be included with a claim and permits the receiver to recommend disallowance of claims. The statute also authorizes the court to forgo the filing of unsecured claims where the receivership property is likely to be insufficient to satisfy secured claims against the property.

Receiver's Reports; Discharge: Section 78B-21-119 & -123

The receiver may file and, if ordered by the court, must file, interim reports that contain certain specified information. On completion of the receiver's duties, the receiver also must file a final report that, again, contains certain prescribed information. Once the court approves the receiver's final report, and the receiver has distributed all of the receivership property, the receiver is discharged.

Receiver's Fees and Expenses: Section 78B-21-121

The court may award a receiver from receivership property the reasonable and necessary fees and expenses of performing the duties of the receiver and exercising the powers of the receiver. In addition, the court may order the person that requested the

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Our friend, Justin Olsen, left private practice to serve as Vice-President of Legal and Risk at England Logistics.

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appointment to pay such fees and expenses if the receivership does not produce sufficient funds to pay the same. The court also may order payment of the receiver's fees and expenses from a person whose conduct justified or would have justified the appointment under Subsection 106(1)(a) (i.e., a situation involving waste, loss, dissipation, or impairment of receivership property or a voidable transaction).

Removal or Replacement of Receiver; Termination: Section 78B-21-122

The court may remove a receiver "for cause" and may replace a receiver that dies, resigns, or is removed. The statute does not define "cause" but leaves the determination of whether "cause" exists to the courts on a case-by-case basis. Certainly, cause would include the receiver's refusal or failure to carry out duties. If the prior receiver fully and faithfully accounts and turns over property to the successor receiver, then the prior receiver, or his or her estate, is discharged. The court also may discharge a receiver and terminate administration of receivership property if it finds that the appointment was "improvident" or that the circumstances no longer warrant continuation of the receivership. Utah Code Ann. § 78B-21-122(4)(a). Moreover, if the court finds that the appointment was sought "wrongfully or in bad faith," the court may assess fees, expenses, and actual damages, including reasonable attorney fees and costs, against the person that sought the appointment. Id. § 78B-21-122(4)(b).

Ancillary Receivership: Section 78B-21-124

Where a receiver has been appointed by another state, the Utah Act authorizes the court to appoint that person or its designee as an ancillary receiver for the purpose of obtaining possession, custody and control of receivership property located within Utah. The statute also permits the Utah court to enter any order necessary to effectuate an order of a court in another state appointing or directing a receiver. Once an ancillary receiver is appointed by the Utah court, that receiver has all of the rights, powers and duties of an original receiver appointed under the statute, unless the court orders otherwise.

Receivership in Context of Mortgage Enforcement; Anti-deficiency Rules: Section 78B-21-125

The Utah Act makes clear that the appointment of a receiver on request of a mortgagee or assignee of rents, and actions taken by the receiver, do not make the mortgagee or assignee a "mortgagee in possession," do not constitute an election of remedies, do not make the secured obligation unenforceable, and do not constitute an "action" within the meaning of Utah's "one-action" rule. See Utah Code Ann. § 78B-6-901. Importantly, where a Utah receiver conducts a sale of receivership property free and clear of a lien, Utah's anti-deficiency rules will apply to any person who held a lien extinguished by the sale to the same extent that those rules would have applied after a foreclosure sale not governed by the Utah Act. It will be left to the courts to determine if such a receivership sale is more like a judicial foreclosure, where the deficiency is determined by the difference between the debt and the sale price, or by a trust deed sale, where the deficiency is determined by the difference between the debt and the greater of the sale price or the fair market value of the property. This issue, however, would not involve the receivership court but, instead, would be an issue for a separate court to decide in a separate collection action brought by the creditor against the owner or guarantor. In any event, the sale by the receiver would be free and clear of any rights of redemption (see subsection 116) and, in this regard, would be more like a trust deed sale under section 57-1-19, et seq.

Finality of Receivership Orders: Section 78B-21-129

Prior to the Utah Act, there was uncertainty about when an order entered by a court in a receivership proceeding was "final" for purposes of appeal. The statute now eliminates that ambiguity by expressly providing that an order is final for purposes of Utah Rule of Civil Procedure 54(a), if it resolves a discrete factual dispute or legal issue, unless the court expressly states otherwise in the order. This section of the Utah Act is unique to Utah and is not contained in UCRERA.

Conclusion

The Utah Act vastly improves the administration of commercial real estate receiverships in Utah by providing judges, practitioners, and participants with more procedural structure and predictability than previously existed for such cases under Rule 66. While the statute is not a replacement for liquidations or reorganizations of commercial real estate properties under Chapters 7 and 11 of the Bankruptcy Code, it is likely to provide secured creditors with a more efficient, less costly, and quicker alternative for managing and liquidating distressed collateral.



Clyde Snow & Sessions Congratulates Clark W. Sessions as he Announces his Retirement and Assumes an Of Counsel Position with the Firm

Clark Sessions' colleagues at Clyde Snow & Sessions extend their sincere appreciation and congratulations to him on his retirement. As one of the principals of the Firm, his experience and counsel will be missed.

For more than 50 years, Mr. Sessions has represented individuals in high-asset divorces as well as businesses; condemning agencies; and individuals in eminent domain matters and complex business litigation.

He has been recognized as:

- Utah State Bar, Outstanding Family Law Lawyer of the Year, Family Law Section (2004)
- Fellow, American College of Trial Lawyers
- AV Preeminent or AV Ratings, Martindale-Hubbell, for over 35 years
- Associate, American Board of Trial Advocates
- Fellow, American Academy of Matrimonial Lawyers
- Best Lawyers in America: Family Law and Family Law Mediation (1989–2017)
- *Best Lawyers in America*: Lawyer of the Year (Family Law) (2012)
- Mountain States Super Lawyers: Family Law, Eminent Domain, General Litigation (2007–2017)
- Former Master of the Bench, American Inns of Court
- Chairman of the Board, Clyde Snow & Sessions (1998–2016)

A true leader in the field and an exemplar of legal professionalism, his absence will be sorely felt. One of the most rewarding aspects of his profession was acting as a mentor to new, inexperienced lawyers both in the Firm and as a participant in the Mentoring Program of the Utah State Bar. He often quotes the statement of new lawyers, "Gee, they didn't teach us that in law school," saying "Their transition, particularly into a litigation practice, was amazing to witness." Clark will continue to provide this guidance and leadership to the Firm and its attorneys in his new Of Counsel status.



Views from the Bench

Civility in a Time of Incivility

by Judge J. Frederic Voros, Jr.

EDITOR'S NOTE: The following remarks were given by Judge Voros at a CLE sponsored by the J. Reuben Clark Law Society in the Joseph Smith Memorial Building, Salt Lake City, on June 15, 2016. We republish them bere with the author's permission. To avoid disrupting the flow of Judge Voros's remarks, while providing our readers with citations to the many resources on which Judge Voros draws, we suspend our usual limitation on endnotes.

▲ appreciate the opportunity to speak at this CLE sponsored by the J. Reuben Clark Law Society. I graduated from the J. Reuben Clark Law School and am in fact the first – but not the only one – of its graduates to serve on a Utah appellate court. I also taught at the S.J. Quinney College of Law for 10 years. So today I'm wearing my "game-day tie" – blue and red stripes – proclaiming my dual allegiance to our two great law schools.

My topic today is Civility in a Time of Incivility. I understand that you are here in large part to earn ethics CLE hours, even though earning those hours requires you to listen to a judge talk about civility. I hope to persuade you today that civility is not as dull a topic as you might think – and also that eschewing incivility is in everyone's best interest.

The Utah Supreme Court has added compliance with the Utah Standards of Professionalism and Civility to the Attorney's Oath. So you younger lawyers have taken an oath to act civilly. Our supreme court has also incorporated the Standards of Professionalism and Civility into the Utah Rules of Professional Conduct. So now an "egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility" may support a finding that a lawyer has committed misconduct.¹ In addition, the Judicial Council has adopted Utah Standards of Judicial Professionalism and Civility.² We judges should be setting a good example. More on that in a moment.

Today I would like to focus on one rule of attorney civility in particular, Rule 3:

Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

The rule is not difficult to understand: give others the benefit of the doubt; no name-calling; don't make it personal. Treat others as you want to be treated.

But you would be wrong to think these simple rules of good conduct command universal support in America today. When I googled "Is civility," Google suggested the following searches: "Is civility dead," "Is civility dead today show," and "Is civility dead in America." Apparently Google users are wondering if civility is dead in America. And who would blame them?

What a presidential season it has been! Mocking an opponent's physical characteristics; accusations of pants-wetting; name-calling such as "little baby," "spoiled brat without a properly functioning brain," "a person with no natural talent," and "delusional narcissist." As you know, I'm not making this stuff up.

To be fair, though, politics in America has long been a contact sport. President Lincoln was castigated by the press and his political opponents as a "monster," a "perjurer," an "ignoramus," a "buffoon,"

JUDGE J. FREDERIC VOROS, JR. has served on the Utab Court of Appeals since 2009. He will retire from the court on August 1. He is the co-recipient of this year's Judge of the Year award.



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a "butcher," and a "devil." He was accused of behaving "like a thief in the night," of being a "miserable tool of traitors and rebels," and of being "adrift on a current of racial fanaticism."³ Lin-Manual Miranda, creator of the Broadway hit Hamilton, reminds us that in the election of 1800, Jefferson called Adams "a blind, bald, crippled, toothless man who is a hideous hermaphroditic character with neither the force and fitness of a man, nor the gentleness and sensibility of a woman."4 Adams responded that Jefferson was "a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto father."5 And an atheist.⁶ And dead, so don't waste your vote on him.⁷

I wish this phenomenon were limited to politicians, and usually it is, but some judges have also acted in a way we would have to call uncivil. To be honest, I think it started at the top. Consider these gems from the late Justice Antonin Scalia, a brilliant jurist, but one often criticized as an example of incivility:

The [majority] opinion is couched in a style that is as pretentious as its content is egotistic

If, even as the price to be paid for a fifth vote, I ever

joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag.8

In another opinion he wrote, "Even accepting Justice Brever's rewriting of the Eighth Amendment, his argument is full of internal contradictions and (it must be said) gobbledy-gook."9 He concluded by stating, "Justice Brever does not just reject the death penalty, he rejects the Enlightenment."¹⁰

How did Justice Scalia do under Rule 3? "Hostile, demeaning, humiliating"? I think so. Disparaging the intelligence of another? Again, I think so. I leave you to decide whether the pejorative "gobbledy-gook" in fact "must be said" in a judicial opinion. So even if you look to Justice Scalia as a model in other ways, please do not imitate his tone of incivility.

But others have. Consider this in-court exchange between Chief Judge Edith Jones and Judge James L. Dennis of the United States Court of Appeals for the Fifth Circuit:



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JUDGE JONES: [slams her hand down on the table] Would you like to leave?

JUDGE DENNIS: Pardon? What did you say?

JUDGE JONES: I want you to shut up long enough for me to suggest that perhaps...you should give some other judge a chance to ask a question.¹¹

Hostile? Yes. Demeaning? Yes. Attributing improper conduct? Yes. Where do you suppose Judge Jones got the idea that she could talk to a colleague, a fellow judge, that way right there in the courtroom?

But even Justice Scalia and Judge Jones must, if the reports are true, take a back seat to Justice David Prosser of the Wisconsin Supreme Court. In a closed-door debate he called former Wisconsin Chief Justice Shirley Abrahamson a "bitch" and threatened to "destroy" her.¹² He later described his tirade as "entirely warranted" on the ground that she had goaded him into it.¹³

That's bad, but things got worse. In a separate incident, Wisconsin Supreme Court Justice Ann Walsh Bradley told the *Milwaukee Journal Sentinel*, "I was demanding that he [Justice Prosser] get out of my office and he put his hands around my neck in anger in a chokehold"; another source – I'm not sure who, but this incident happened in the presence of four other supreme court justices – said, "She charged him with fists raised," and he "put his hands in a defensive posture" and "blocked her."¹⁴ In doing so, the source said, he made contact with Justice Bradley's neck. The source almost literally said that she hit him in the fist with her face.¹⁵

Let's take a brief time-out, step back, and think how grateful we are to practice law in Utah, where nothing remotely like this happens. (There is a structural reason for that – aside from the fact that we in Utah generally prize civility – but that is a topic for another day.)

Anyway, we see a lot of incivility today from politicians and even judges. The former, at least, is not new. But what strikes me as perhaps somewhat new is the current challenge to the notion of civility itself.

That civility is a positive civic virtue seems self-evident. But it is not. Some see it as another word for "political correctness," and see political correctness as repressive self-censorship. Bruce Thornton, a scholar at the Hoover Institution, recently authored an essay entitled "Three Cheers for Political Incivility," in which he contended that incivility is neither new nor unwelcome. He argued that "trying to moderate or police, based on some subjective notions of 'civility' or decorum, the clashing expressions of passionate beliefs often is an attempt to limit the freedom to express those beliefs, and a way to benefit one faction at the expense of others."16 Historian and author Craig Shirley recently published an essay entitled "In Defense of Incivility," in which he wrote, "The elites always talk about civility in politics. That is a way to control the citizenry, by shaming them into silence."¹⁷ And a student at the University California at Irvine - not Berkeley, mind you, but Irvine recently argued that civility "as an ideology is a pillar of white supremacist imperialism."18 And of course the deadly terrorist attack on the satirical magazine Charlie Hebdo in France ignited a debate here at home about the positive role in our public discourse for offensive - thus arguably uncivil - satire.

Furthermore, online publications – *Reuters, Popular Science*, and the *Chicago Sun-Times* to name a few – are increasingly phasing out comments sections because, in the words of one commentator, "when Internet users are allowed to post their thoughts anonymously, online discussions inevitably deteriorate into uncivil flame wars."¹⁹ Maybe you are familiar with "Godwin's Law": "As an online discussion grows longer, the probability of a comparison involving Hitler approaches 1."²⁰ More on that later.

I understand that the powerless, those without a platform, sometimes have to scream to be noticed – Dr. Martin Luther King said that "a riot is the language of the unheard."²¹ Incivility is, in a sense, a cousin of civil disobedience, which has a long moral pedigree. Democracy is messy and impolite,²² and "mockery is a leveller."²³ Maybe sometimes mockery or another form of incivility – however impolite – is your only weapon, your only voice.

But that's not true for us lawyers and judges. We are not powerless. We have voices. We need not and should not resort to incivility. And I would like to suggest three reasons why not.

First, incivility is bad for the administration of justice. Hammurabi said he enacted his code "so that the strong should not harm the weak."²⁴ An important purpose of law, perhaps its fundamental purpose, is to protect the weak from the strong; in a lawless environment, the strong have their way. They take what they want; only those even stronger can stop them. But in our system, the law limits the dominance of the powerful.

I understand that we live in a world of relative haves and have-nots, of rich and poor -a state of affairs, by the way, that the man whose name adorns this building described as "sin."²⁵ But sinful,

virtuous, or morally neutral, in this world of relative haves and have-nots, the former can afford more justice than the latter. If you want equal justice for all, that's a flaw in our system, not a feature - a necessary one, perhaps, but a flaw nonetheless.

Anyway, we aspire to a system in which legal outcomes flow from the impartial application of neutral rules, not from the threats of bullies. And make no mistake, the conduct condemned by Rule 3 – hostile, demeaning, and humiliating words and personal attacks – is not just uncivil, but bullying and abusive. And to seek a result in our system of justice by bullying is to repudiate the rule of law. It relies on might, not right.

Your presence at a presentation on civility suggests that you are probably more often on the receiving end, rather than dispensing end, of abusive language. What is your appropriate response? I can tell you what Justice Kennedy and Justice Breyer did when Justice Scalia mocked their writing and reasoning. They ignored it. And that is the approach I have usually taken. I was a young lawyer filing an unlawful detainer action against a business tenant when my opposing counsel screamed at me, "If you go through with this, I will have your freaking bar license!" (Only he didn't say freaking). I ignored his tantrum and proceeded with the eviction. (And, as it turned out, as little as I knew, I knew more about unlawful detainer than he did. His bluff, like so many bluffs, was borne of ignorance and insecurity.)

But in retrospect, I believe – or at least think I believe – that the better response would be to step out of the frame of the conversation and have a meta-conversation: "Whoa, there's no need to shout or get abusive. Can we discuss this civilly, or are we done here?" In fact, I offer this to you as a ready-made response for use in these situations: "Counsel, can we discuss this civilly?"

Second, you should avoid incivility because it is bad advocacy. Remember Godwin's Law? "As an online discussion grows longer, the probability of a comparison involving Nazism or Hitler approaches 1."²⁶ It comes with a corollary: "Once such a comparison is made, the thread is finished, and whoever mentioned the Nazis has automatically lost whatever debate was in progress." In other words, by playing the Hitler card you admit you have no better card.

Two years ago my court addressed the risk of abusive litigation tactics. An attorney had described a judge's minute entry as "a complete fabrication" and, without factual basis, accused opposing counsel and the judge of collaboration. In the end these tactics hurt, not helped, the lawyer's case. Our opinion stated:

Assigning Machiavellian motives to errors of judges and lawyers is improper and usually inaccurate. And aside from implicating the Rules of Professional Conduct and the Standards of Professionalism and Civility, inflammatory language and personal accusations undermine the position they ostensibly support. Knowledgeable readers understand that those with persuasive arguments based on law and logic rarely resort to ad hominem attacks.²⁷

Abusive language in a brief betrays weakness.

Another reason incivility is bad advocacy is that it causes the judge to identify with the lawyer you attack. When one person attacks another, we humans tend to sympathize with the victim. So if you accuse your opposing counsel of "cheating on the facts" or "mischaracterizing the record," the reader – the judge – may instinctively feel you must be exaggerating or perhaps even feel that you are a bad person for having accused another lawyer so brazenly. So as much as you want to vent, as much as you want to express your outrage, my advice is: don't.

Instead, I offer this practice pointer. Instead of venting, instead of expressing your outrage, just give the judge the facts and let the judge experience the outrage first-hand. For example, suppose you are briefing a negligence case in which liability depends on whether the traffic light was red or green just before the collision. And suppose that the testimony is conflicting on what color the light was. You're on appeal or briefing a JNOV motion, and your opponent writes that witness X testified that the light was green. But she didn't! You know she didn't! And you know your opponent knows she didn't! How could they say that? In a just world, they should pay a price for mischaracterizing the record! I agree; they should pay a price. So what's your play?

You could play it like a 2016 presidential candidate and call your opponent "lyin' Fred." You could play it like Justice Scalia and say that even with opposing counsel's rewriting of the record, their argument is full of (it must be said) gobbledy-gook, and you'd sooner put a bag over your head than make that argument. Or you could play it like Justice Prosser is alleged to have done, and grab your opponent's neck. But let me propose a response that is not only more civil, but, I believe, better advocacy. And – bonus – one that lets you be a better person and a better lawyer at the same time.

I suggest that you don't call your opponent anything. Make this about their argument – their words – not their character. You cannot judge another's character; but you can test the accuracy

of their words. So don't say your opposing counsel misrepresented the record, twisted the witness's words, or anything like that. Don't frame yourself as the victim. Instead say, "[the opposing party] states that Witness X testified, quote, the light was green [cite to opposing brief]. In fact, the witness testified, quote, the light was red [cite to record]." Done. No outrage, at least on your part. But the judge will feel it, because now you have framed the judge as the victim of the mischaracterization. You are just pointing it out. You won that exchange.

A third and final reason to avoid incivility is that uncivil attacks are often factually wrong. I understand that lawyers and clients lie. Still, in this particular case, are you sure your opposing counsel, or their client, lied, rather than misremembered? Hanlon's Razor often applies: Never attribute to malice what is adequately explained by stupidity. It, too, comes with a corollary: Don't rule out malice. But I don't think I'm being naïve in believing that we as lawyers and judges err more than we cheat. Your opponent may be deliberately lying, but then again, they may be careless, sloppy, or overworked. So while I believe we need to face down bullies and refute false statements by showing them to be false, our rules of civility remind us, and I think it's sensible advice, to be cautious about casting aspersions. Let's start, at least, by judging others as we would want to be judged.

In sum, I hope I have convinced you that civility is less boring than you thought. Incivility is practiced even by public figures who should know better, and more people than you might think applaud that trend. But those of us in the law should not follow their lead. To quote my favorite songwriter, "You and I, we've been through that, and this is not our fate."²⁸

We should reject incivility as bad policy, bad advocacy, and – usually – factually wrong. Besides, incivility is hardly risk-free: if we try to be good lawyers without also being good people, we run the risk of being neither. Thank you.

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A Primer on Pleading Fraud Claims in Utab

by Spencer Macdonald

Introduction

Civil litigators sometime take the "kitchen sink" approach to preparing a complaint by including various tort claims that may have only marginal application to the underlying factual elements of the case. Of these causes of action, a claim for "fraud" is often the most susceptible to summary disposition via a motion to dismiss under Rule 12 of the Utah Rules of Civil Procedure or else a motion for summary judgment under Rule 56. Such dismissals can sometimes be attributable to the practitioner's insufficient attention to properly pleading the prima facie elements of this cause of action, which include the following:

(1) [t]hat a representation was made; (2) concerning a presently existing material fact; (3) which was false;
(4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity;
(7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Prince v. Bear River Mut. Ins. Co., 2002 UT 68, ¶ 41, 56 P.3d 524 (citation and internal quotation marks omitted).

Unfortunately, even summarily dismissed fraud claims can consume significant resources of both the court and the opposing party, which is perhaps why the Utah Court of Appeals has cautioned litigants and attorneys that "a plaintiff alleging fraud must know what his claim is when he files it." *Shah v. Intermountain Healtbcare, Inc.*, 2013 UT App 261, ¶ 12, 314 P.3d 1079 (citation and internal quotation marks omitted). To that end, this article presents eight basic questions that practitioners can use to vet potential fraud claims.

Question 1: What was the Purported "Misrepresentation," and Does It Have the Necessary Characteristics?

To be liable for fraud, a defendant's misrepresentation must be of "presently existing material fact." *Jones & Trevor Mktg., Inc. v. Lowry*, 2010 UT App 113, ¶ 12, 233 P.3d 538 (citation omitted).

This gives rise to three specific characteristics

- First, the representation must pertain to an objective and quantifiable "fact," as opposed to non-testable statements such as "mere expressions of opinion," *Kinnear v. Prows*, 16 P.2d 1094, 1096 (Utah 1932). Distinguishing "fact" from "opinion" is determined "by the subject matter,... the form of the statement, the attendant circumstances, and the knowledge of the parties." *Condas v. Adams*, 388 P.2d 803, 805 (Utah 1964). Misrepresentations of law or of the legal effects of contracts are also not categorized as fraudulent, *Gadd v. Olson*, 685 P.2d 1041, 1044 (Utah 1984), nor are statements pertaining to marketing or advertising, commonly referred to as "puffery." *See McBride v. Jones*, 615 P.2d 431, 434 (Utah 1980).
- Second, the representation must pertain to a fact that was "presently existing" at the time the representation was made. Speculative statements about the future are, like opinions, untestable and therefore do not generally give rise to a fraud claim. However, when a fraud claim is based on a promise of some sort of future performance, the promise may be treated as concerning a "presently existing" fact if the claimant shows that the promisor, when making the promise, did so with a present intent not to perform and made it to induce a party to act in reliance on that promise. *Jones & Trevor Mktg., Inc.*, 2010 UT App 113, ¶ 12 (citation omitted).
- Third, the representation must pertain to a fact that is "material." A fact is "material" only if "the knowledge or ignorance of [it] would naturally influence [a party's] judgment...in estimating the degree and character of the risk involved in a transaction." *Walter v. Stewart*, 2003 UT App 86, ¶ 23, 67 P.3d 1042 (second alteration and omission

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in original) (citation and internal quotation marks omitted).

Question 2: Was there Scienter/Recklessness?

"[A] mere naked falsehood or misrepresentation is not enough" to properly plead a fraud claim. *Christensen v. Bd. of Review of Indus. Comm'n*, 579 P.2d 335, 338 (Utah 1978) (citation and internal quotation marks omitted). The claimant must therefore include allegations pertaining to the representor's knowledge or awareness of the falsity of his statement, often termed "scienter," which is "the mental element of fraud." *Galloway v. Afco Dev. Corp.*, 777 P.2d 506, 508 (Utah Ct. App. 1989).

To adequately plead this element, the claimant must allege "knowledge on the part of a person making representations, at the time they are made, that they are false." *Cbristensen*, 579 P.2d at 338. In the alternative, the claimant can allege "that the misrepresentation must be made knowingly or recklessly (as opposed to carelessly or negligently)." *Robinson v. Tripco Inv., Inc.*, 2000 UT App 200, ¶ 13 n.3, 21 P.3d 219. For a representation to be "reckless," the representor "would have to know that [he or she] had insufficient knowledge upon which to base the representation made." *Rawson v. Conover*, 2001 UT 24, ¶ 28, 20 P.3d 876.

Question 3: Was There Reliance on the Misrepresentation, and Was It Reasonable?

In order to prevail on a fraud claim, the plaintiff must establish that he or she was unaware of the falsity of the defendant's statement, that he or she actually relied on the statement, and that reliance on misrepresentation was "reasonable."

A party cannot successfully "claim to have been defrauded in reliance on representations on which he had no right to rely." *Oberg v. Sanders*, 184 P.2d 229, 234 (Utah 1947). Actual reliance is therefore a critical element of a fraud claim. *DeBry v. Cascade Enters.*, 879 P.2d 1353, 1358 (Utah 1994). In determining whether the claimant reasonably relied on the representation, "factors such as the respective age, intelligence, experience, mental condition, and knowledge of each party should be considered, along with their relationship, their access to information, and the materiality of the representations." *Cheever v. Schramm*, 577 P.2d 951, 954 (Utah 1978).

Whether a practitioner should investigate the claimant's awareness or ignorance of the falsity of the defendant's statement depends on the specific circumstances of the case. "[I]n the absence of some warning that something was amiss, [a person alleging fraud] had no duty to investigate." *Haupt v. Heaps*, 2005 UT App 436, ¶ 36, 131 P.3d 252. Consequently, a claimant is only required to make his own investigation "where,

under the circumstances, the facts should make it apparent to one of his knowledge and intelligence, or he has discovered something which should serve as a warning that he is being deceived." *Conder v. A.L. Williams & Assocs., Inc.*, 739 P.2d 634, 638 (Utah Ct. App. 1987).

Question 4: What was the Injury Resulting from the Misrepresentation?

"No injury, no tort, is an ingredient of every state's law." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002). Consequently, a party claiming fraud "must have suffered a loss as a direct result of his foreseeable, justifiable or expected reliance on the alleged misrepresentations...in order to recover on these claims." *Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 797 (10th Cir. 1998).

Question 5: Are All Nine Prima Facie Elements of Fraud Pleaded with "Particularity"?

In addition to the foregoing questions, a practitioner evaluating a fraud claim should scrutinize rule 9(b) of the Utah Rules of Civil Procedure, which provides that "[i]n all averments of fraud..., the circumstances constituting fraud...shall be stated with particularity." Utah R. Civ. P. 9(b). This requirement acts as an exception to the general rule that "allegations in a complaint should be construed

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The Utah appellate courts have provided extensive guidance on pleadings which do, and do not, meet this heightened pleading requirement. "[A] complaint cannot survive dismissal by pleading mere conclusory allegations...unsupported by a recitation of relevant surrounding facts." *State v. Apotex Corp.*, 2012 UT 36, ¶ 21, 282 P.3d 66 (omission in original) (citation and internal quotation marks omitted). Instead, to satisfy this requirement, the claimant must "set forth in specific terms the time, place, content, and manner of [the] defendant's alleged material misrepresentations or otherwise fraudulent conduct." *Cook v. Zions First Nat'l Bank*, 645 F. Supp. 423, 425 (D. Utah 1986). These are what the Utah Court of Appeals has described as "the who, what, when, where, and how: the first paragraph of any newspaper story." *Coroles v. Sabey*, 2003 UT App 339, ¶ 28 n.15, 79 P.3d 974 (citation and internal quotation marks omitted).

Question 6: Does the Economic Loss Rule Bar the Claim?

Fraud, as a claim sounding in tort, is generally unavailable as between parties to a contract where the alleged misrepresentation pertains to the contract. This concept, generally called the "Economic Loss Rule," requires "that contract law define the remedy when the loss is strictly economic, that is, when no damage occurs to persons or property other than the product in question." *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 42, 70 P.3d 1. The Utah Supreme Court has clarified that "[t]he proper focus in an analysis under the economic loss rule...is that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." *Hermansen v. Tasulis*, 2002 UT 52, ¶ 16, 48 P.3d 235 (citation omitted).

In other words, if an attorney plans to litigate a dispute between parties to a contract and if that dispute relates to duties imposed and governed by the contract, then a claimant must pursue contract claims only and is precluded from pursuing tort claims such as fraud.

Question 7: Is Another Species of Fraud More Appropriate?

Not all claims sounding in fraud fit within the parameters of the tort generally described as "fraud" or "fraudulent misrepresentation." Practitioners should therefore consider alternative types of fraud claims, which may be more appropriate to the circumstances of a specific case. For example, a claim for "fraudulent concealment" (also called "fraudulent nondisclosure") may fit a situation where the tortfeasor has not made an affirmative false statement and instead has hid important information which he is obligated to disclose. "The three elements of fraudulent concealment are...: (1) there is a legal duty to communicate information, (2) the

nondisclosed information is known to the party failing to disclose, and (3) the nondisclosed information is material." *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 35, 143 P.3d 283.

Another alternative is "negligent misrepresentation," the elements of which are similar to those of fraud except that it "does not require the intentional mental state necessary to establish fraud." *Price–Orem Inv. Co. v. Rollins, Brown & Gunnel, Inc.*, 713 P.2d 55, 59 n.2 (Utah 1986). A claim for negligent misrepresentation requires a party to demonstrate that: (1) a party "carelessly or negligently makes a false representation..., expecting the other party to rely and act thereon"; (2) the plaintiff actually relies on the statement; and (3) the plaintiff suffers a loss as a result of that reliance. *Smith v. Frandsen*, 2004 UT 55, ¶ 9, 94 P.3d 919 (omission in original) (citation and internal quotation marks omitted).

Yet another type of fraud, "constructive fraud," arises where there exists "(i) a confidential relationship between the parties; and (ii) a failure to disclose material facts." *d'Elia v. Rice Dev., Inc.,* 2006 UT App 416, ¶ 51, 147 P.3d 515 (citation and internal quotation marks omitted), *bolding modified on other grounds by Jones & Trevor Mktg., Inc. v. Lowry*, 2009 UT 39, 284 P.3d 630.

Question 8: What is the Likelihood of Accumulating "Clear and Convincing" Evidence of the Fraud?

Fraud is never presumed, *Territorial Sav. & Loan Ass'n v. Baird*, 781 P.2d 452, 462 (Utah Ct. App. 1989), nor can it be based on "mere suspicion or innuendo," *Taylor v. Gasor, Inc.*, 607 P.2d 293, 294–95 (Utah 1980) (citation and internal quotation marks omitted). Instead, a claimant must prove all nine prima facie elements by "clear and convincing evidence." *Embassy Grp., Inc. v. Hatch*, 865 P.2d 1366, 1371 (Utah Ct. App. 1993) (citation omitted). Black's Law Dictionary defines "clear and convincing evidence" as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials." *Black's Law Dictionary* 636 (9th ed. 2009).

Conclusion

The Utah Court of Appeals has advised litigants and their attorneys that "[a] complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should serve to seek redress for a wrong, not to find one." *Shah v. Intermountain Healtbcare, Inc.*, 2013 UT App 261, ¶ 12, 314 P.3d 1079 (quoting *Segal v. Gordon*, 467 E2d 602, 607–08 (2d Cir. 1972). Practitioners can therefore best serve their clients by scrutinizing and vetting potential fraud claims before including them in pleadings and by excluding fraud claims unless they meet the pleading requirements described above.



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Article

The Bamboozling Bite of Bitcoin Bitcoin Doesn't Make White Collar Crime Possible, But It Does Make It Easier!

by Scott Isaacson

Introduction

Virtual currencies, such as Bitcoin, have been referred to as the Wild West of financial products. Bitcoin is technically complex, digitally innovative, and evasively intangible. These characteristics lead to risks of misuse, confusion, and obfuscation. White collar criminals leverage these attributes to make their schemes and artifices even more effective, less accessible to detection, and increasingly attractive to potential victims.

Bitcoin is being utilized to perpetrate new instances of fraud on victims who either trust too much or simply do not understand its digital wizardry. Some experts suggest that any new technology does not officially arrive until scammers start leeching off the new technology. For example, the telegraph brought betting fraud (placing bets after races were run); telephones brought scam calls (anonymity); and email brought a flood of spam in the form of scam messages. Given the rise in scams using Bitcoin, it would appear that Bitcoin has arrived!

Bitcoin

Bitcoin is a decentralized digital currency used to purchase goods and services online. Since its introduction in 2009, Bitcoin's value has been volatile, ranging from \$2 to \$1,200. Some estimate that there are more than 12.2 million bitcoins in circulation. The theory and crypto-science behind Bitcoin are beyond the scope of this article, however, one description for the uninitiated is: "Bitcoin is a consensus network that enables a new payment system and a completely digital money....From a user perspective, Bitcoin is pretty much like cash for the Internet." *What is Bitcoin?*, <u>bitcoin.org</u>, <u>https://bitcoin.org/en/faq#what-is-bitcoin</u> (last visited May 29, 2017).

Bitcoin is used to pay and get paid. It is easy and accessible to everyone. It is virtual cash. There is no sharing of sensitive credit card information or identity and so there can be no identity theft. If your tangible wallet is stolen and all you had in it was cash, you would lose no more than cash itself. Bitcoin is like that. However, it is also vastly more technically sophisticated than cash. When attempts to describe Bitcoin technology to the novice user include phrases like block chains, shared public ledger, cryptography, private keys, mining, distributed transactions, chronological order, and decentralized control, one can almost sense that a scamming criminal is anxiously entreating: "Don't worry. Trust me. It is safe!" *See, e.g., How does Bitcoin work?*, <u>Bitcoin.org</u>, <u>https://bitcoin.org/en/how-it-works</u> (last visited May 29, 2017).

The mystique of incomprehensibility can give the white collar criminal the upper hand. Some of the key elements of white collar crime include a lie followed by the voluntary transfer of something of value from the victim to the perpetrator. The perpetrator uses the trust in, and the belief of, the lie to lure in the victim. The complex and sophisticated bitcoin "system" enables the criminal to tell a better lie and to engender even more trust in the very system that is then used to hide the lie.

Bitcoin has become a major player in fraud. In 2015, some researchers estimate that scammers promising Bitcoin riches have swindled over \$11 million in the last four years. They also claim that some 13,000 victims handed over their money unwittingly in forty-two different types of scams over that time period. The total amount is almost certainly higher.

Enabling White Collar Crime

Financial Transactions and Monetary Instruments Many white collar crime statutes require some sort of financial transaction involving a monetary instrument. Some defendants try

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to argue that a Bitcoin transaction is not a financial transaction because Bitcoin is property and not currency. If the underlying statute defines monetary instrument as the coin or currency of a country, personal checks, bank checks, money orders, the prosecution might have a hard time showing a financial transaction involving a monetary instrument. However, if the definition includes negotiable instruments there might be room to find that a monetary instrument has been used. See United States v. Ulbricht, 31 F. Supp. 3d 540 (S.D.N.Y. 2014) (finding that Bitcoin transactions were financial transactions using monetary instruments); Sec. & Exch. Comm'n v. Shavers, No. 4:13-CV-416, 2013 U.S. Dist. LEXIS 110018, 2013 WL 4028182 (E.D.Tex. Aug. 6, 2013) (finding that Bitcoin can be used as money).

Bitcoins do allow for anonymous transactions, which might aid in setting up the facts for a cash-equivalency argument. Defendants could argue that virtual currencies have some but not all of the attributes of currencies of national governments and that virtual currencies do not have legal tender status. The opposing argument would go to a plain reading of the statute that captures all movements of funds by any means. Bitcoins transactions most likely will be determined to be financial transactions using monetary instruments. The argument should include facts to show that the only value of Bitcoin lies in its ability to pay for things. Its form is digital, bits and bytes, but because of technology those bits and bytes constitute something of value. An analogy might include a reference to paper-based currency just being composed of flexible fibers and printed ink but consist of something of value whose only purpose is to pay for things.

Some cases require a showing that a transaction using Bitcoin needs to include the element of transmitting money. If a defendant receives cash deposits from his or her customers and then, after exchanging them for Bitcoins, transfers those funds over the internet, there could be a showing of transmitting money. Bitcoin mints often argue that they do not transfer money. However, at least one court has found that online transactions using Bitcoin were transactions that involved the "transmitting" of "money." United States v. Faiella, 39 F. Supp. 3d 544, 546 (S.D.N.Y. 2014). Also, the use of Bitcoin might not create an exception for persons only involved in the sale of goods or the provision of services. Id.

These cases support the arguments that Bitcoin is a virtual currency, that it is not property or services, and that transactions transmitting Bitcoin are transactions transmitting money.

Anonymity

In 2015, an infidelity enabling website (Ashley Madison) was hacked and the private details of the site's clients were exposed to the public. The exposure quickly led to blackmail schemes using Bitcoin. CoinDesk reported that customers of the website were receiving blackmail threats derived from the cache of released information. One team tracked Bitcoin payments around the time the blackmail threats emerged using block chain analysis. They were looking for patterns in transactions within the extortion time frame. One inviting characteristic of using Bitcoin in these blackmail schemes is the anonymity of the transaction. A blackmailer can receive untraceable monies, and a blackmailee can pay equally untraceable monies. The only way Bitcoin blackmailers



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can be traced is the addresses or phone numbers used in the blackmailer's email or phone call communications. The Bitcoins cannot be traced. This anonymity emboldens those conducting the blackmail attempts because of the extremely minimal resource requirements (only an email or Bitcoin address is required). *See*, Robert Hackett, *What to Know About the Asbley Madison Hack*, FORTUNE (Aug. 26, 2015, 7:24 AM EDT), http://fortune.com/2015/08/26/ashley-madison-hack/; Stan Higgins, *Research: Asbley Madison Bitcoin Blackmail is Cheap and Profitable*, COINDESK (Sept. 4, 2015), http://www.coindesk.com/research-ashley-madison-bitcoin-blackmail-is-cheap-and-profitable/.

However, while the use of Bitcoin is anonymous, the patterns of its use are not. The most recent attempts at blackmail were discovered because of the consistent demand amounts that were requested in the extortion notices. The pattern-matching search seemingly exposed some blackmail payments and, from thence, the blackmailers themselves. Since this exposing research would not have been possible without a consistent extortion amount, most likely future attempts at Bitcoin-based blackmail will randomize the amount they demand. Thus, while there may be anonymity in any one Bitcoin transaction, the use of Bitcoin in repeated patterns may reveal more information than Bitcoin parties ever intended. "There's this tension between anonymity and usability with Bitcoin.'...'If you're an amateur Bitcoin user and you don't want to mess with complicated Bitcoin clients and just use an [easy] online service, your anonymity is quite a lot less than what you might imagine." Andy Greenberg, Follow The Bitcoins: How We Got Busted Buying Drugs On Silk Road's Black Market, Forbes, Sept. 5, 2013, http://www.forbes.com/ sites/andygreenberg/2013/09/05/follow-the-bitcoins-how-wegot-busted-buying-drugs-on-silk-roads-black-market/#31c08c4aadf7 (quoting Sarah Meiklejohn, a Bitcoin-focused computer science researcher at the University of California at San Diego).

Lulling

One tool a white collar criminal uses is the lull. This can be either words or conduct that encourages the victim to believe that all is well. It also includes any activity that causes a delay in detection or exposure of any illegal activity. *See, e.g., United States v. Shively*, 927 F.2d 804 (5th Cir. 1991) (noting that the defendant's acts caused a delay that may have allowed the illegal scheme to continue). The Bitcoin scammer can do this lulling that covers and delays in at least two different ways.

First, the schemer can cause a distributed denial of service (DDoS) attack that prevents the victim from accessing their Bitcoins, causing a delay in the exposure of any missing Bitcoins. One example of this behavior was in the conduct of the extortion group known as DD4BC. DD4BC recently increased the number of its attacks

and is now targeting the financial services industry. The group typically uses multi-vector DDoS attacks. The attack repeatedly exploits hyper-text transfer protocol GET requests to the target, thus overloading the victim's website. *See*, Yessi Bello Perez, *Bitcoin Extortion Group DD4BC Now Targeting Financial Services*, COINDESK (Sept. 9, 2015), http://www.coindesk.com/bitcoin-extortion-group-dd4bc-now-targeting-financial-services/.

This obstruction of electronic communications is key. The victim is so busy trying to restore general service and network availability that the criminal activity of Bitcoin scamming goes undetected. The longer the crooks have to cover their tracks, the less likely the criminal activity can be detected and, then, even be traced back to the bad guys. In a double whammy, some perpetrators then extort Bitcoin payments for offers to stop the very attack that was causing the obscuring delay in the first place.

This ingenious DDoS attack is like a team of robbers walking into a bank followed by a small army of robots. The robots are of the robbers' own making and are under their control. The thieves program the robots to actively block the front door so that neither can the police get in nor can customers or employees get out. The crooks then steal money and exit out a side door while all the attention is focused on the front door where the robots are "blocking" the entrance and no one knows about the side entrance. The villains, then masquerading as "robot exterminating experts," demand payment to deactivate the robots and get them out of the way so that the police can get in. The robots are remotely directed to leave and are deactivated. When the police finally get in, there is no money and no trace of who took the money. There are no criminals to accuse and no one to arrest. There is no way to trace the source of the robots; their memories and control systems are wiped clean. Not only did the bank suffer loss from the theft, but it paid additional monies to the thieves to clean up the very mess that caused the diversion in the first place.

Second, the Bitcoin criminal can propagate waves of attacks against Bitcoin mining pools and a variety of Bitcoin-related websites and services. Some researchers have found criminal incentives to gain short-term profits by attacking Bitcoin mining pools which then threaten the long-term viability of Bitcoin.

For example, consider a check printing company in the physical world. If a white collar criminal could redirect business from a legitimate check printing facility, the customers would be redirected to a criminal enterprise. That fake company might charge too much, print compromised checks, steal sensitive identity information, or print checks using the resources of one of their competitors. Here, the victim does not even know that they are dealing with a nefarious entity. The attack on Bitcoin miners is similar; it is just carried out in the digital world.

New Technology, Same Old Tricks

Bitcoin does not create a new class of white collar crimes, rather it is used in, and for, many crimes that are actually quite similar to their non-digital counterparts.

Valid Investment Opportunity

In the past, some criminals would take advantage of their victims by luring them into valid investment opportunities but then simply take the victim's money. The mislaid trust was not in the investment opportunity but in the scammer. The same happens in the Bitcoin world. Bitcoin mining is a valid business opportunity. People can invest their own computing resources (essentially a computer's CPU's idle processing power) to mine Bitcoin for which they are rewarded with Bitcoin profit. However, if an investor is promised the chance to perform valid mining operations but then is denied that opportunity, the scam is in the scheming trickster, not in the mining opportunity. There are several pending cases in federal courts where the scammer promised to deliver perfectly legit digital, mining devices, but then they just took the money and ran. See, F.T.C. v. BF Labs Inc., No. 4:14-CV-00815-BCW, 2014 U.S. Dist. LEXIS 174223, 2014 WL 7238080 (W.D. Mo. Dec. 12, 2014); Morici v. Hashfast Techs. LLC, No. 5:14-CV-00087-EJD, 2015 U.S. Dist. LEXIS 24251, 2015 WL 906005 (N.D. Cal. Feb. 27, 2015). These types of scams are not unique to Bitcoin and are common occurrences in the traditional, non-digital world of white collar criminals.

Agents or Brokers

Some fraudsters commit white collar crimes by promising to "hold onto" the money or be an agent responsible for the money, then they just disappear. The corollary in the Bitcoin world is when some victims allow another entity to manage their Bitcoin wallets. The criminal offers to hold Bitcoin for another person. Once the deposit level rises above a certain level, the scammers simply move the Bitcoins into their own wallet. Bitcoin makes these crimes especially easy because when the Bitcoins are transferred between wallets there is an actual loss of ownership; it is like a cash transfer or the possession of bearer bonds – whoever holds the money is the owner. These transactions are very difficult to trace. It would not be unlike someone walking up to you after an ATM withdrawal and saying, "Do you want me to hold onto your cash for you?" If you gave that individual your cash, it would be nearly impossible to prove that money is really yours once the individual disappeared.

This seems like an almost ludicrous proposal. No one would give his or her money to another stranger who says that he or she will just "hold onto" the victim's cash for a little while. However, when victims do not understand what Bitcoin is or does, they might fall for such a simple trick. Victims do not realize that Bitcoin is literally negotiable currency that does not need to be cashed in like tokens, checks, or vouchers.

Phishing Scams

Phishing scams can involve notices (emails, texts, phone calls, etc.) informing a person that he or she has been awarded Bitcoins. The crook's message is essentially: All you have to do is log into your Bitcoin wallet, and we will transfer Bitcoins into your wallet. If the victim receives an email and he or she clicks on a link in that email, unbeknownst to him or her, that act could give the phishers complete control of his or her Bitcoin account. This is not unlike the grandparent scams where a plea is made to an unsuspecting grandparent regarding one of their distant grandchildren in an attempt to get the grandparent either to transfer money to the fraudster or to grant the fraudster access to the victim's accounts. Sometimes, the criminal pretends to be an arresting police officer, a lawyer, a doctor at a hospital, or some other per se trustworthy person. The scammer is not trustworthy but puts on the trappings of a trustworthy person to engender trust. When the scammer looks and sounds like a technology expert, they can build unwarranted trust quite quickly. Bitcoin makes these crimes especially appealing because the transfer of "money" is so easy.

Bitcoin Satisfies Some Elements of White Collar Crimes

Federal Wire Fraud

Statutes make it illegal to devise or intend to devise any scheme or artifice to defraud through use of wires (meaning any interstate electronic communication) for the purpose of obtaining money or property by means of false or fraudulent pretenses. *See, e.g.*, 18 U.S.C § 1343. The use of Bitcoin for any false or fraudulent purpose, almost by definition, satisfies these elements. Bitcoin is only used via electronic communications. It is highly likely that there would be an interstate element. Bitcoin is mined in a peer-to-peer process using computing chains that can be done anywhere and are often distributed. It is likely that in any Bitcoin acquisition or exchange there would be a number of computing resources that are used, and it is very likely that those resources are spread across state boundaries.

RICO

In RICO cases, an organization or enterprise based scheme to defraud is required and can be used to charge crimes against those that do not participate directly but merely orchestrate criminal activity by others. *See*, 18 U.S.C. §§ 1961–1968. In these cases, Bitcoin transactions could be the foundational elements for those criminal acts (money transactions for

extortion, money laundering, racketeering, blackmail, bribes, pay offs, and other criminal activity).

Charlie Shrem is an example of a criminal orchestrator. Shrem entered federal prison in early 2015 after pleading guilty in 2014. Daniel Roberts, Bitcoin's First Criminal Goes to Prison Today, FORTUNE, Mar. 30, 2015, http://fortune.com/2015/03/30/ bitcoins-criminal-prison-shrem/ (last visited May 29, 2017). He was recognized in the Bitcoin community and was an early endorser of its use. In 2011 he founded the Bitcoin exchange BitInstant, which had a range of legitimate investors. He was charged with failing to report suspicious banking activity, laundering money, and operating an unlicensed money-transmitting business. The nature of Shrem's organized crimes was not very apparent, but in his own blog post, Shrem recounts the many ways he was involved in Bitcoin fraud: he consulted with other Bitcoin companies, made speeches, met with venture capitalists, and admitted to orchestrating his illegal activities sufficient for charges under RICO.

Conspiracy

As with most of the other white-collar crimes, conspiracy is a crime in itself; the government does not need to bring substantive charges of law violation to successfully charge an individual with conspiracy. Prosecutors would need to show an agreement to achieve an unlawful goal with knowledge, intent, and participation and at least one overt act being committed in furtherance of the conspiracy. *See, e.g.*, 18 U.S.C. § 371. Bitcoin solicitation or transactions could easily be used to show the one overt act necessary to establish a conspiracy. Using Bitcoins might be technically misunderstood, but their use is almost certainly intentional. One does not just "accidentally" reach into another's wallet and pull out cash and unintentionally give that cash to someone else.

Obstruction of Justice

Even when a defendant is able to successfully defend against a substantive criminal law violation, that person may be guilty of obstruction of justice. *See, e.g.*, 18 U.S.C. §§ 1503, 1505, and 1510. The crime of obstruction of justice includes the obstruction of proceedings before governmental departments, agencies, and committees including investigative and administrative agency functions. By its very nature, Bitcoin could be used to provide such obstruction because of the encryption and anonymity involved in Bitcoins.

Aiding and Abetting

Federal statute provides that one who aids or abets is responsible as if he or she were acting as a principal in a crime. 18 U.S.C. § 2. Bitcoin would make it fairly straightforward to aid or abet a criminal by way of anonymously funding the criminal. The burden for proving such support includes the need to prove both that a transaction occurred and who the parties were. Bitcoin makes such actions extremely difficult, if not impossible. Confessions may be required because Bitcoin evidence is encrypted and layered in digital coverings.

Money Laundering

There are two sections of the federal criminal code aimed at money laundering. 18 U.S.C. §§ 1956–1957. The first targets transactions intended to promote or conceal illegal activity while the second covers any transaction involving criminally derived property. If Bitcoin is used, it can be very effective at both concealing any illegal activity and hiding any transaction involved in criminally derived property. Bitcoin could be used to make fencing easier and faster. One statute declares that any transaction involving at least \$10,000 known to be the proceeds of an illegal act is a criminal act in and of itself. A Bitcoin transaction of \$10,000 could be that criminal transaction.

The Appeal of Bitcoin in White Collar Crime

Two former federal agents expected to get away with wire fraud, money laundering, and related offenses for stealing Bitcoin during their investigation of Silk Road. U.S. Department of Justice, Former Federal Agents Charged with Bitcoin Money Laundering and Wire Fraud, FBI (March 30, 2015), https://www.justice.gov/opa/pr/ former-federal-agents-charged-bitcoin-money-laundering-andwire-fraud. One agent developed unauthorized online personas and engaged in a broad range of illegal activities. He engaged in complex Bitcoin transactions to steal from the government and the targets of the investigation. The other agent invested in and worked for a digital currency exchange company while still working for the government, freezing a customer's account with no legal basis to do so. That agent allegedly diverted to his personal account over \$800,000 in Bitcoin. Apparently, both agents, even though they were trained and sworn law enforcement officers, felt that they could use the new Bitcoin technology to commit their crimes and then cover their tracks. As it turns out, they were essentially correct. Indeed, they were only discovered through other evidence, not by tracking the Bitcoin transactions.

Conclusion

For the unaware, Bitcoin is a virtual currency that will either revolutionize their world or messily end it. But, while Bitcoin may be the new kid on the block, it will not be the last. People are being bitten by Bitcoin. Perhaps the cure includes not stronger and more sophisticated digital muzzles, but simple due diligence and common sense. Remember, Bitcoin does not make white collar crime possible, it just makes it easier.
In Memory of William S. Britt

August 2, 1931 - April 22, 2017

"Unfailing respect for others."



We are sorry to announce that our long-time partner and colleague Bill Britt passed away on Saturday, April 22, 2017, following a long illness. We will miss Bill Britt's presence as an enduring example of commitment to excellence and unfailing respect for others. Bill and his best friend David Trask officially established the law firm of Trask & Britt in April 1973. That firm, now TraskBritt, has become one of the leading Intellectual Property law firms in Utah and around the country.

In 2013, Bill was formally recognized by the Utah State Bar with the annual Professionalism Award, an award bestowed each year on just one lawyer or judge in Utah "whose deportment in the practice of law represents the highest standards of fairness, integrity, and civility." Indeed, Bill was known by colleagues, adversaries and the judiciary for his true professionalism and civility while advocating effectively for his clients. TraskBritt is committed to upholding these standards as part of Bill's legacy to the firm.



Stenquist v. JMG Holdings – A Lesson in Addressing Nonperforming Debts

by Thomas N. Jacobson

T he recent Utah Court of Appeals decision in *Stenquist v. JMG Holdings, LLC,* 2016 UT App 180, 379 P.3d 941, *cert. denied sub nom. Stenquist v. McBride,* 387 P.3d 508, held that a senior lienholder accepting a deed in lieu of foreclosure extinguished the security interest held by the senior lienholder and did not affect the priority of remaining lienholders. *Id.* ¶¶ 22–23. This case is an important reinforcement of the Utah real property security laws and a practical reminder to carefully work through all scenarios when agreeing to extinguish a debt secured by real property in exchange for conveyance to the creditor of the secured real property. As the real estate market enters a new cycle in 2017, issues of priority will once again become very important when addressing alternatives for the resolution of existing debts.

The facts of the *Stenquist* case are typical of situations when a property is encumbered by multiple security interests.

Before 2006, Lavon McBride, owner of McBride Construction, owned the property that was the subject of the dispute (the Property). *Id.* ¶ 2. McBride developed the Property into a residential subdivision. *Id.* In June 2006, McBride sold and conveyed the Property to Golden Crest Homes, Inc. *Id.* Golden Crest then executed a trust deed in McBride's favor (the McBride Trust Deed), securing the repayment of a \$240,000 promissory note (the McBride Note). *Id.*

In September 2006, Golden Crest conveyed the Property to JMG Holdings LLC. *Id.* ¶ 3. JMG then executed a trust deed (the Stenquist Trust Deed) in the Stenquists' favor, securing the repayment of a \$300,000 promissory note by June 30, 2008 (the Stenquist Note). *Id.* JMG eventually defaulted on its obligations to McBride and the Stenquists. *Id.*

In January 2011, in lieu of foreclosure and in full satisfaction of the McBride Note, JMG conveyed, and McBride accepted, a quitclaim deed of the property. *Id.* ¶ 4. Specifically, in a document executed by JMG and McBride entitled "Estoppel Affidavit," JMG and McBride agreed that the consideration for the quitclaim deed was the full cancellation of the McBride Note secured by the McBride Trust Deed. *Id.*

In December 2012, the Stenquists filed an action seeking foreclosure of the Stenquist Trust Deed and Stenquist Note. *Id.* ¶ 5. In their amended complaint, the Stenquists asserted that the McBride Trust Deed "had been extinguished by virtue of the Quit Claim Deed." *Id.* They also contended that any security interest in the Property claimed by McBride was inferior to their security interest. *Id.* McBride answered the Stenquists' complaint and filed a counterclaim, arguing that his interest in the Property "ha[d] never been subordinated to the [Stenquist Trust Deed]" *Id.*

In June 2014, the trial court granted the Stenquists' Motion for Summary Judgment. *Id.* \P 7. The court concluded:

These facts, when applied to the law..., establish the McBride Trust Deed was extinguished by virtue of JMG's satisfaction of the debt secured by the

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property in question." Further, it concluded, "As there is no additional debt left payable under the terms of the McBride Note having been fully satisfied,...the McBride Trust Deed was extinguished and that [the Stenquist Trust Deed and Note] is superior to any identified claims of [McBride].

Id. Finally, the trial court concluded that "because it 'decided this motion based on the issue of satisfaction, it need not address the issues concerning merger." *Id*.

The Utah Court of Appeals held that when McBride accepted title to the Property in exchange for full cancellation of the McBride Note, the McBride Trust Deed was extinguished. *Id.* ¶¶ 22–24. "The ancillary obligations inherent in a trust deed cannot survive the satisfaction of the note because the beneficiary no longer has a legitimate interest in the security once the debt or loan has been repaid." *Id.* ¶ 24.

The result reached by the court should not have been a surprise to anyone experienced in addressing real estate financing. The significance of the case is the fact that the court did not succumb to making an exception for the McBride interest to correct what was probably a mistaken assumption of how to accomplish the remedy of taking the security in satisfaction of the debt. If McBride would have filed an action for judicial foreclosure, or commenced a nonjudicial foreclosure, the result would have been different. Arguably, if McBride could have prevailed on a sympathetic court that McBride's mistaken belief in utilizing a different remedy should not change the result, a new direction in security priority would have ensued. What at the time might have seemed like the easy path for McBride to achieve its remedy, turned into a situation of the junior lienholders having their security interest preserved and McBride assuming JMG's obligation to the junior lienholders. Unquestionably, the Stenquists became the beneficiaries of McBride's mistaken assumption and became, as some might argue, unjustly enriched. It would be pure fantasy to contend

In Memoriam Robert W. Brandt "A Giant of the Utah Bar" 1923-2017

Founding Member of Richards Brandt Miller Nelson

Veteran - Army Air Corps Gentleman Family Man Avid Pilot Businessman Community Servant

We will miss this thoughtful, kind and gentle leader.



that the Stenquists contemplated at the time they took the junior security interest they would one day be in the senior position, ahead of the McBride interest. After all, when the Stenquists accepted the note secured by the junior trust deed, the Stenquists knew McBride was in a higher priority and would eliminate Stenquists' security interest if McBride pursued a foreclosure remedy to take back the property in satisfaction of the debt to McBride.

No matter how unfair this situation may appear to McBride, the court was compelled to follow the basic rules relating to the priority of real estate used as security for a debt. To have done anything different would have opened up avenues to defeat security priority and possibly create circumstances of a property owner attempting to protect itself from foreclosure by a junior lienholder by obtaining the senior lien at a discount and then holding the junior lienholder hostage on the basis there was no merger of the estates even though the reason for the security interest no longer exists. Utah law contemplates that when an obligation secured by a trust deed is satisfied, the security interest is no longer enforceable. Utah Code Ann. § 57-1-38.

By way of example, if a property owner obtained a loan (Loan One) secured by the real property and then later obtained another loan (Loan Two) and secured Loan Two with the real property, under traditional use and interpretation, Loan Two would be considered a junior loan and taken with full knowledge that if Loan One forecloses, it could become a sold out junior and lose its security interest. Under accepted law, if the property owner paid off Loan One at a discount and obtained an assignment of the promissory note and assignment of the trust deed securing Loan One, there should be no legal necessity for the trust deed, as there is no remaining debt to secure. But if the property owner could do what McBride argued, then our hypothetical property owner could purchase the senior promissory note, receive an assignment of the first trust deed with Loan Two remaining in a junior position, foreclose on the Loan One trust deed, and effectively eliminate Loan Two's security interest.

The consequence of following the argument made by McBride would have a negative effect on lending practices because the junior lienholder, though having sufficient equity to secure the underlying note, could lose its security and its ability to pursue security for repayment in the event the payor of the promissory note and owner of the property could "pay off" the senior encumbrance, retain the trust deed, and foreclose on the trust deed.

The court also preserved realism of the security process. The underlying concept of the trust deed is that it serves as a security instrument for the performance of the underlying promissory note. As the court pointed out, when the underlying debt no longer exists, the rationale for the continued existence of the security instrument disappears. *Stenquist v. Jmg Holdings LLC*, 2016 UT App 180, ¶ 22, 379 P.3d 941, 944, *cert. denied sub nom. Stenquist v. McBride*, 387 P.3d 508. It would not only be a fiction, but also professionally dishonest, to assert the trust deed had life beyond the underlying debt.

Rightfully so, there may be some sympathy for McBride and those similarly situated when they attempt to streamline the foreclosure process by accepting a deed in lieu of foreclosure. But the predicament McBride found itself in can be avoided by following the process established to enforce the priority of the security interest. When a junior lien is present, there are several opportunities for all the parties concerned to protect their interests. By proceeding to foreclose, either judicially or nonjudicially, the junior lienholder can bid in its debt, attempt to purchase the property at foreclosure to preserve its equity interest, or sue on the note after foreclosure is completed (sold out junior lienholder). By following established law, all the parties have the opportunity to protect their interests, but if the senior lienholder accepts a deed to the property, the senior lienholder takes the property like any grantee, subject to all existing liens and encumbrances. Id. ¶ 15.

This case reinforces the practice to advise clients to order at least a preliminary report before considering a deed in lieu. Clients should be advised that in effect they are making a choice: if they take a deed in lieu of foreclosure, they alter their position from secured party to owner. If their primary interest is to obtain the amounts owed under the promissory note, then barring equity issues with the property, foreclosure is a more appropriate route. Taking a deed in lieu subjects the grantee to all existing liens and encumbrances, and it is paramount to real estate financing that the rules and precedent relating to priorities of security and extinguishment of security not be altered on a case-by-case basis.





Equal Justice Under Law

The Utah State Bar remains committed to increasing access to justice for its residents and has recently adopted a program designed to assist qualifying pro se litigants involved in nondischargeability actions within a bankruptcy case.

What is an Adversary Proceeding?

Simply stated, an adversary proceeding is litigation that occurs within the context of a bankruptcy case, (e.g., recovery of transferred assets).

What are the ramifications of a nondischargeability action?

- » A debtor may be permanently denied a discharge of either a particular debt or the debtor's entire estate.
- » This is an extraordinary measure that has the potential to bar the unfortunate debtor from ever receiving a "fresh start."

Pro se Proliferation

- » The inherent nature of bankruptcy lends itself to a significant number of pro se filings.
- Adversary proceedings often involve pro se litigants either due to:
 ¤ an underlying bankruptcy petition filed pro se, or
 ¤ withdrawal of representation upon the filing of an adversary proceeding.
- » Pro se filings in nondischargeability actions expose indigent litigants to increased injustice due to the potential severity of the outcome of the litigation.
- » Pro se filings often complicate and delay proceedings while decreasing judicial efficiency.

Scope of the Project

The Utah State Bar Pro Bono Bankruptcy Project allows pro se litigants within 125% of the federal poverty guidelines the opportunity to secure pro bono representation for nondischargeability actions.

Increased Access to Justice Through Voluntary Pro Bono Representation

By allowing qualifying beleaguered pro se litigants facing nondischargeability actions the opportunity to secure competent and qualified pro bono representation, the Utah State Bar is effectively increasing its residents' access to justice.

Volunteer Today:

If you are interested in participating in The Utah State Bar Pro Bono Bankruptcy Project, please contact Tyler Needham, Access to Justice Director, at Tyler.Needham@utahbar.org.

Focus on Ethics & Civility

Fragile Contents: Dropping the Box Can Waive Privileges; Opening the Box Can Get You Sanctioned

by Keith A. Call

The Virginia federal district court just issued a decision that should make every litigator shiver. The court ruled that a seemingly innocent mistake when using a file sharing site waived the attorney-client privilege and work-product protection. At the same time, the court sanctioned the receiving party for the way it handled the now unprotected material. *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15CV00057, 2017 WL 1041600, at *8 (W.D. Va. Feb. 9, 2017). This case provides a warning to all attorneys who handle electronically stored information (ESI).

"Innocent" Mistake

When the Holding Funeral Home in Castlewood, Virginia, burned down, Harleysville Insurance Company suspected arson. *Id.* at *1. To further the investigation, a Harleysville agent sent a video of the fire to the National Insurance Crime Bureau (NICB). *Id.* It delivered the video by uploading it to a cloud storage and file sharing service operated by Box, Inc. (the Box Site). *Id.* On September 22, 2015, the Harleysville agent emailed a hyperlink to the video to an NICB investigator (the September 22 email), who was then able to view and download the video. *Id.* The Box Site was not password protected. *Id.*

Seven months later, a Harleysville agent used the same Box Site to transfer the entire claims file to its outside counsel. *Id.* at *2. A few weeks after that, lawyers for the Funeral Home issued a subpoena to NICB, requesting NICB's entire file. *Id.* In response, NICB produced all documents it had received from Harleysville, including a copy of the September 22 email that contained the hyperlink to the Box Site. Funeral Home's counsel checked out the hyperlink, which now contained Harleysville's entire claims file. *Id.* Funeral Home's counsel downloaded and reviewed the entire file without notifying Harleysville or its counsel. *Id.*

Privilege Waived

Harleysville's counsel filed a motion to disqualify Funeral Home's counsel. *Id.* The court ruled that Harleysville had waived any attorney-client privilege or work-product protection that had attached to the file. *Id.* The court reasoned that Harleysville had taken no precautions to prevent the unwanted disclosure. *Id.* at *3. Rather, Harleysville knowingly uploaded the claims file to a folder that was accessible to anyone with access to the internet. *Id.* The court rules this was not an "inadvertent" disclosure. *Id.* The court was especially critical of Harleysville's failure to use password protection. *Id.* The court described this as the "cyber world equivalent of leaving its claims file on a bench in the public square and telling its counsel where they could find it." *Id.* at *5.

This case demonstrates how easy it is to waive privileges when dealing with electronic information. Harleysville's counsel never dreamed that its innocent email containing the hyperlink would, many months later, somehow find its way into its adversary's hands. And at the time Harleysville uploaded its claims file to the Box Site, it was certainly not thinking about the poisonous email it had "innocently" sent several months earlier. Harleysville and its counsel also overestimated the privacy attached to the Box Site.

There is at least one simple lesson here: Never put privileged material on any cloud storage or file sharing site without using

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appropriate passwords or other privacy protection.

Sanctions Issued

Funeral Home's counsel did not get away unscathed. Even though Harleysville had waived any privilege, the court still sanctioned Funeral Home's counsel for mishandling the information. *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15CV00057, 2017 WL 1041600, at *8 (W.D. Va. Feb. 9, 2017).

Harleysville's September 22 email contained a confidentiality notice, similar to boilerplate notices most sending attorneys now use on their emails—and most receiving parties completely ignore. The notice stated:

> CONFIDENTIALITY NOTICE: This e-mail contains information that is privileged and confidential, and subject to legal restrictions and penalties regarding its unauthorized disclosure or other use. You are prohibited from copying, distributing or otherwise using this information if you are not the intended recipient. If you received this e-mail in error, please notify me immediately by return e-mail, and delete this e-mail from your system.

Id. at *1.

The court stated that this notice gave Funeral Home's counsel adequate notice that Harleysville was asserting privilege. *Id.* at *8. "[B]y using the hyperlink contained in the email also containing the Confidentiality Notice to access the Box Site, defense counsel should have realized that the Box Site might contain privileged or protected information." *Id.* The court concluded that the receiving counsel should have contacted Harleysville's counsel and revealed that it had access to this information. *Id.* They also should have asked the court to decide the privilege issue before making any use of the information. *Id.* It was not enough that Funeral Home's counsel had called the Virginia state bar ethics hotline for advice. The court seemed to be on the edge of disqualifying Funeral Home's counsel but ultimately imposed costs as a sanction, along with an unflattering written decision. *Id.*

The lesson here is that lawyers should notify opposing counsel if there is any doubt about whether documents were inadvertently produced. It is much better to raise the issue and involve the court if necessary, rather than risk sanctions. Moreover, Utah lawyers must comply with Utah Rule of Professional Conduct 4.4(b), which states, "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."

Stay Tuned

In a future installment of this column, I will address a recent ethics opinion that also addresses a lawyer's duties when handling ESI. This landscape changes fast, so lawyers must pay attention to these evolving issues.

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



Durham Jones & Pinegar is pleased to welcome

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Utah Law Developments

Appellate Highlights

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

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

State v. Martinez, 2017 UT 26 (May 2, 2017)

The court held that officer safety concerns justified a voluntary interaction during a traffic stop, in which the officer requested a passenger's identification. The court also held that the secondslong extension of the traffic stop resulting from running the identification did not unreasonably prolong the stop.

Truck Ins. Exch. v. Rutherford, 2017 UT 25 (Apr. 27, 2017)

The court reconciled two seemingly conflicting provisions of Utah's underinsured motorist coverage statute: one saying that underinsured motorist coverage is "secondary to the benefits provided by" workers' compensation, and the other saying that underinsured motorist coverage "may not be reduced by benefits provided by workers' compensation insurance." *Id.* ¶ 6. The court held that under these provisions the UIM insurer was required to fully compensate the injured driver within its policy limits but only for damages in excess of what workers' compensation paid, so as to avoid an inappropriate double recovery.

State v. Lowther, 2017 UT 24 (Apr. 21, 2017)

This appeal arose out of a conditional plea entered after the district court concluded that evidence of similar prior acts involving the defendant and other victims was admissible under the doctrine of chances. The supreme court held that the doctrine of chances was not limited to rebutting charges of fabrication but instead could be used to prove elements of the offense. In doing so, the court clarified that courts should first evaluate whether the four foundational requirements of the doctrine have been met and, if so, independently analyze whether the evidence is admissible under Rule 403.

State v. DeJesus, 2017 UT 22 (Apr. 21, 2017)

In this direct criminal appeal, the defendant argued that the loss or destruction of video footage of the assault for which she was charged violated her due process rights. The court applied the due process analysis applicable to such a claim, outlined in *State v. Tiedemann*, 2007 UT 49, ¶ 44, 162 P.3d 1106. In doing so, the court reaffirmed that the *Tiedemann* test encompasses a threshold requirement that the defendant demonstrate there is a reasonable probability

that the lost or destroyed evidence would have been exculpatory.

State v. Rushton, 2017 UT 21 (Apr. 7, 2017)

Utah Code Section 76-1-401 prohibits the State from prosecuting a defendant in separate actions for conduct that may establish separate offenses under a single criminal episode. The court adopted a totality of the circumstances test with enumerated factors to determine whether conduct aims at a single criminal objective. Applying this new test, the court concluded that the petitioner's wage and tax crimes did not have a single criminal objective.

State v. Hummel, 2017 UT 19, 393 P.3d 314 (Apr. 4, 2017)

The Unanimous Verdict Clause of the Utah Constitution does not require unanimity as to theories, methods, or modes of the crime. Rather, all that is required is unanimity as to guilt – that the prosecutor has proven each element of the crime beyond a reasonable doubt.

Tesla Motors UT, Inc. v. Utah Tax Comm'n, 2017 UT 18 (Apr. 3, 2017)

The court affirmed the Utah Motor Vehicle Enforcement's decision to deny Tesla Motor UT, Inc.'s application for a license to sell new motor vehicles. The court held that Utah Code Sections 41-3-101 (licensing act) and 13-14-101 (franchise act), when read together, prohibit a wholly owned subsidiary of a motor vehicle manufacturer from obtaining a license to sell the manufacturer's new motor vehicles in stores in Utah.

Express Recovery Servs. v. Olson, 2017 UT App 71 (Apr. 27, 2017)

In this suit over an employment contract, the defendant asserted a counterclaim seeking a setoff (but no net damage award). Neither party prevailed on their claims at trial. The court of appeals held that, although he had not prevailed on his claims, Olson was the prevailing party for purposes of a contractual attorney fee award because he had achieved his optimal outcome: zero recovery.

Spencer v. Glover, 2017 UT App 69 (Apr. 20, 2017)

The court of appeals affirmed the dismissal of an attorney's

Case summaries for Appellate Highlights are authored by members of the Appellate Practice Group of Snow Christensen & Martineau. defamation complaint against a former client who posted an unfavorable review online. The court analyzed the review in detail and concluded that the majority of the statements in it could not be objectively verified, which weighed in favor of the court's ultimate determination that the unfavorable online review expressed an opinion and was not defamatory under Utah law.

ConocoPhillips Co. v. Utah Dep't of Transp., 2017 UT App 68 (Apr. 20, 2017)

Discussing experiential expert testimony, the court of appeals held the district court did not abuse its discretion in excluding excerpts of an expert's deposition, where the expert failed to explain how prior experience supported the particular opinion at issue.

Miller v. W. Valley City, 2017 UT App 65 (Apr. 13, 2017)

The court of appeals affirmed the dismissal of the appellants' claims for premises liability and negligence arising from an accident in a West Valley City swimming pool, concluding that the appellant failed to sufficiently plead a waiver of immunity under the Governmental Immunity Act. On the premises liability claim, the court concluded that governmental immunity is only waived for defective or dangerous conditions of a building, which does not extend to the conditions inside the building or conditions unrelated to the structure of the building, such as the condition alleged by the appellant (another teenager obstructing her swim lane). The court concluded that the negligence claim was barred by the public duty doctrine and that the appellant had not established the special relationship with West Valley City necessary to support her claim.

State v. Courtney, 2017 UT App 62 (Apr. 6, 2017)

A member of the jury venire made comments that prejudiced the entire jury pool. The court held that trial counsel's failure to timely move for a mistrial, before the jury was sworn, constituted ineffective assistance of counsel.

State v. Bazzelle (In the Interest of M.L.), 2017 UT App 61 (Mar. 30, 2017)

The central issue here was whether the juvenile court had subject matter jurisdiction to adjudicate parentage after the mother had voluntarily relinquished her parental rights. The court of appeals denied the State's petition, concluding that the juvenile court's jurisdiction extended to the father's petition to adjudicate parentage pursuant to the joinder provision of the Utah Uniform Parentage Act because the petition had been joined with the child welfare proceeding before the mother relinquished her parental rights.

Judd v. Bowen, 2017 UT App 56 (Mar. 30, 2017)

In this appeal of a dispute arising out of the use of a driveway in Big Cottonwood Canyon, the court of appeals held that the district court correctly awarded the claimant a prescriptive easement for the purpose of using the driveway to access the claimant's property but erred in determining that the claimant was entitled to use the driveway for parking purposes. In doing so, the court engages in a thorough discussion of the standards governing prescriptive easements, adverse possession, and continuous use.

United States v. Jordan, 853 F.3d 1334 (10th Cir. Apr. 18, 2017)

The defendant pled guilty to a felony drug charge and agreed to be sentenced in accordance with a sentencing range established by the Sentencing Commission. After the sentencing, the Sentencing Commission lowered the sentence range. The Tenth Circuit held that if a plea agreement calls for a defendant to be sentenced within a particular sentencing range, "the district court's acceptance of the agreement obligates the court to sentence the defendant accordingly," and the court has authority to reduce the sentence under 18 U.S.C. § 3582(c)(2). *Id.* at 1339 (citation and internal quotation marks omitted).

BOSC, Inc. v. Bd. of Cnty. Comm'rs, 853 F.3d 1165 (10th Cir. Apr. 11, 2017)

After filing suit against BOSC in state court, the Board voluntarily dismissed the suit and sought to enforce an agreement to arbitrate. BOSC opposed, arguing the Board had waived its right to arbitrate by filing the suit. The court held that the Board had not waived its right to arbitrate because it was not improperly manipulating the judicial process, litigation had not proceeded too far, significant inefficiencies would not result, and neither party was prejudiced by the delay.

VR Acquisitions, LLC v. Wasatch Cnty. 853 F.3d 1142 (10th Cir. Apr. 10, 2017)

The district court dismissed three section 1983 claims and five state-law claims for lack of standing. On appeal, the Tenth Circuit held that (a) the plaintiff lacked prudential standing to assert due process or takings claims that belonged to a prior owner of the property and (b) the district court should have simply declined to exercise supplemental jurisdiction over remaining state law claims after dismissing the federal claims.

Stanley v. Gallegos, 852 F.3d 1210 (10th Cir. Mar. 17, 2017)

This appeal presented the question of whether a state employee who acts without state authority can nevertheless be entitled to qualified immunity in a claim under 42 U.S.C. § 1983. In this divided opinion, the three judges agreed that the district court's decision holding the defendant district attorney was not entitled to qualified immunity must be reversed. They disagreed, however, as to whether and to what extent the court should adopt the "scope-of-authority" exception to qualified immunity, and whether to even reach that issue in this case. Judge Hartz, who drafted the lead opinion, concluded the exception should apply, if at all, only when the authority under state law is clearly established. Because the district attorney's authority under New Mexico law was not clearly established, the exception would not apply even under Judge Hartz's reasoning.

What Not to Say to a Guardian ad Litem

by Martha Pierce

Let's just say I was disappointed and worried, but not surprised, when I read Ted Weckel's commentary "On Becoming a More Effective Private Guardian ad Litem" in the May/June 2017 *Utab Bar Journal*.

Disappointed that Mr. Weckel's description of Utah's Guardian ad Litem program did not reflect our statutes, rules, case law, or actual practice. Worried that our office would be flooded with even more requests for production of documents (disallowed under Utah Code Section 78A-6-902(12)) and subpoenas for us to testify in our own cases (disallowed under Utah Rule of Professional Conduct 3.7). Worried that a less informed guardian ad litem, private guardian ad litem, or judge might, relying on the article, breach ethical rules or commit reversible error. Ultimately, I was not surprised because the article repeats common misperceptions about attorneys guardian ad litem (GAL) in Utah. Which brings me to:

What not to say to a Guardian ad Litem:

"It's like you're a low-budget custody evaluator."

We're not custody evaluators, expert witnesses, fact-finders, parenting coordinators, special masters, third-party neutrals, or visitation supervisors. *See* Utah R. Jud. Admin. 4-903 (qualifications for custody evaluators); Utah R. Prof'l Conduct 3.7 (lawyer as witness); *In re A.D.*, 2000 UT App 216, ¶ 11, 6 P.3d 1137 (appropriate to quash subpoena for GAL to testify).

We don't file reports. We file pleadings and memoranda. We don't make recommendations. We argue our positions supported by admissible evidence. Utah Code Ann. § 78A-6-314(3) (b).

Our independent investigation is to help us "obtain, first-hand, a clear understanding of the situation and needs of the minor." *Id.* §§ 78A-2-705(12) (b), 78A-6-902(3) (c).

"Oh, you don't have to attend! This meeting is just for the attorneys on the case."

We are attorneys on the case. We have party status. *In re A.C.M.*, 2009 UT 30, \P 20, 221 P.3d 185.

"I didn't receive your discovery."

If you're waiting for discovery from us, it's going to be a long wait. Our records are not subject to subpoena or discovery. Utah Code Ann. § 78A-6-902(11) (b). Unless you have a legislative subpoena, we can't help you. *Id*.

"So, what did the child tell you?"

So, what did your client tell you? Like you, we're bound by a duty of confidentiality. Utah R. Prof'l Conduct 1.6.

"But what if the child wants something that's not in the child's best interests"

Lawyers for adults as well as children are required to exercise independent professional judgment when acting as counselor. Utah R. Prof'l Conduct 2.1. Lawyers for adults as well as children counsel clients whose stated desires might undermine their interests. Like you, when counseling our clients, we accommodate for age, maturity, and diminished capacity. *Id.* 1.14. More often than not, we reach a place where best interests and desires begin to merge. When that doesn't happen, the law requires us to inform the court, but the law does not presume a conflict. Utah Code Ann. §§ 78A-2-705(13), 78A-6-902(8).

"I guess you're not going to interview your client. She's only six months old."

The statute does not require a GAL to meet personally with a client who is too young to communicate. *Id.* §§ 78A-2-705(12), 78A-6-902(3). Our experience is that babies communicate. Babies and toddlers have a lot to say about where they thrive, where they wither, who nurtures them, who makes them feel safe. We agree with Yogi Berra that "you can observe a lot by just watching."

MARTHA PIERCE works as the appellate attorney at the Office of Guardian ad Litem, where she has worked since 1994. She was certified in 2010 as a Child Welfare Law Specialist by the National Association of Counsel for Children as approved by the ABA.



State Bar News

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the May 12, 2017 Commission Meeting held at the Logan Golf and Country Club in Logan, Utah.

- 1. The Bar Commission voted to approve the 2017–2018 budget.
- 2. The Bar Commission voted to petition the Utah Supreme Court to approve a limited practice rule for lawyers who are licensed in other jurisdictions and awaiting admission in Utah.
- 3. The Bar Commission voted to award **Paul Simmons** Lawyer of the Year Award.
- 4. The Bar Commission voted to award **Hon. Frederick Voros** and **Hon. Stephen Roth** Judge of the Year Award.
- 5. The Bar Commission voted to award the Governmental

Relations Committee the Committee of the Year Award.

- 6. The Bar Commission voted to award the **Limited Scope Section** the Section of the Year Award.
- The Bar Commission voted to select Grand Summit at the Canyons as the hotel and conference center for the 2019 Annual Meeting. (Commission voted on December 4, 2015 to hold annual meeting in Park City).
- 8. The Bar Commission voted to select **Rob Rice** as the Commission Representative on the Utah Judicial Council.
- 9. The Minutes of the April 14, 2017 Commission Meeting were approved by consent.

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

2017 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2017 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 <u>adminasst@utahbar.org</u> by Friday, September 29, 2017. 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: <u>http://www.utahbar.org/</u> <u>bar-operations/history-of-utah-state-bar-award-recipients/</u>.



The Utah Court of Appeals announces a reception in honor of the retirements of

Judge J. Frederic Voros, Jr.

and

Judge Stephen L. Roth

Thursday, July 20, 2017, 4:00 – 6:00 p.m.

Fifth Floor Rotunda Scott M. Matheson Courthouse 450 South State Street Salt Lake City, Utah

Ethics Advisory Opinion Committee – Recent Opinions

Opinion Number 16-03 Issued September 13, 2016

ISSUE

When a client asks a lawyer to modify a fee arrangement, what Utah Rules of Professional Conduct ("URPC") apply?

OPINION

The particular rules of the URPC concerning conflicts of interest govern this issue. Rule 1.5 of the URPC applies to all modifications of fee arrangements, which requires that clients be charged a reasonable fee throughout the representation. It governs when the fee modification is clearly beneficial to the client. Rule 1.7(a) provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." URPC 1.7(a). Rule 1.7(a) of the URPC may also apply to a fee modification if the modification is not clearly beneficial to the client and/or is the result of a fee dispute with the client. In addition, Rule 1.8 applies in two situations: (1) the lawyer enters into a "business transaction" with the client; or (2) the lawyer "acquires an ownership, possessory, security or other pecuniary interest adverse to a client." URPC 1.8(a). A situation that implicates Rule 1.8 is permissible so long as the lawyer complies with all of the safeguards of Rule 1.8(a)(1) through (a)(3), complies with Rule 1.7, and the modified arrangement satisfies Rule 1.5(a)'s reasonableness requirement.

Opinion Number 17-01 Issued April 3, 2017

ISSUE

The Utah State Bar Ethics Advisory Opinion Committee ("EAOC") received a request for an ethics opinion "explaining the limits or constraints on lawyers with respect to advocacy in connection with an election for confirmation of a judge in Utah." The opinion request includes the following inquiries:

- 1. "May a lawyer contribute to an entity that engages in advocacy concerning the retention of a Utah judge? If so, must the entity comply with the Utah Rules of Professional Conduct?"
- 2. "May a lawyer be an officer or employee of such an entity?"

OPINION

When a judge standing for retention election has drawn opposition, the judge may establish a committee to support his or her retention, and an attorney may contribute financially or through statements of support to that committee. See Rule 4.2, Utah Code of Judicial Conduct ("UCJC"); Rules 8.2 & 8.4, Utah Code of Professional Conduct ("URPC"). In accordance with an attorney's constitutional right to free speech, an attorney may also make public statements against the retention of a judge and make contributions to a campaign committee or entity advocating against the retention of a judge. However, whether supporting or opposing retention, an attorney may not personally or through the acts of another make a statement that the attorney "knows to be false or with reckless disregard as to truth or falsity concerning the qualifications or integrity of a judge." URPC Rule 8.2. Nor may an attorney "engage in conduct that is prejudicial to the administration of justice" or "knowingly assist a judge...in conduct that is a violation of applicable rules of judicial conduct or other law." URPC Rule 8.4(d) & (f).

BACKGROUND

A. Utah Judge Retention Elections

Utah Code Section 20A-12-201 codifies the Utah judicial appointment and retention election process. The Utah governor appoints a committee of lawyers and non-lawyers for each Utah judicial district, including the Utah appellate courts. These committees are called judicial nominating commissions (justice.utah.gov). Commission members review the applications for vacant judicial positions and select candidates to interview. After interviews have been conducted, the commission refers five names (for each district and juvenile court judge) or seven names (for appellate court judges) to the governor. The governor then appoints one of the nominated judicial candidates as a Utah judge, who the Utah State Senate must thereafter confirm by majority vote.

Pursuant to Article VII, Section 9 of the Utah Constitution, Utah judges must stand for retention election at the end of each term of office, which term expires after eight years of service. Section 20A-12-201(1) (a) provides: "Each judicial appointee to a court is subject to an unopposed retention election at the first general election held more than three years after the judge or justice was appointed." Utah law further provides:

At the general election, the ballots shall contain, as to each justice or judge of any court to be voted on in the county, the following question:

Shall

(name of justice or judge) be retained	ed in the office
of	? (name
of office, such as "Justice of the Supp	reme Court of

Utah"; "Judge of the Court of Appeals of Utah"; "Judge of the District Court of the Third Judicial District"; "Judge of the Juvenile Court of the Fourth Juvenile Court District"; "Justice Court Judge of (name of county) County or (name of municipality)")

Yes () No ()

Utah Code Ann. § 20A-12-201(4)(a).

B. Requested EOAC Opinion Issues

This requested EOAC opinion, deciding whether a Utah attorney may "contribute to an entity that engages in advocacy concerning the retention of a Utah judge," raises multiple related, yet distinguishable, issues depending upon what accurately describes a "contribution" to entity advocacy. Hypothetically, for example, an attorney's "contribution to an entity" could conceivably be the attorney's financial contribution to an entity, such as a nonprofit foundation, which advocates in favor of or against political issues, including advocacy for Utah citizen confirmation or defeat of a Utah judge in a retention election. An attorney's "contribution to an entity" could also conceivably be the attorney's direct comment, either positive or negative, intended for a publication that impacts Utah citizens voting in a judge's retention election. The attorney submits his or her comments to an entity, which then publishes and/or makes such comments publically available. These hypothetical examples raise different applicable analyses that this EOAC opinion discusses and decides based upon the Utah Rules of Professional Conduct.

Opinion Number 17-02 Issued April 24, 2017

ISSUE

Is a lawyer required to report to the Bar a fellow lawyer who orally articulates an anticipated violation of the Rules of Professional Conduct?

OPINION

Under the circumstances of the requested opinion, there is no duty to report.

BACKGROUND

Lawyer A overhears Lawyer B telling third persons that he was contemplating forming a business relationship with his non-attorney employee. Lawyer A requests an opinion as to her duty to report the conversation to the appropriate disciplinary authority.

Mandatory Online Licensing

The annual Bar licensing renewal process has started and can be done online only. An email containing the necessary steps to re-license online at <u>services.utahbar.org</u> was sent the first week of June. **Online renewals and fees must be submitted by July 1 and will be late August 1. Your license will be suspended unless the online renewal is completed and payment received by September 1.**

To receive support for your online licensing transaction, please contact us either by email to <u>onlineservices@utahbar.org</u> or, call 801-297-7023. Additional information on licensing policies, procedures, and guidelines can be found at <u>http://www.utahbar.org/licensing</u>.

Upon completion of the renewal process, you will receive a licensing confirmation email.

MCLE Reminder – Odd Year Reporting Cycle

July 1, 2015–June 30, 2017

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

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

Pro Bono Honor Roll

Adoption Case

Clark Allred

Appeals Case

Cory Talbot

Bankruptcy Case

Lillian Meredith Ellen Ostrow

Bountiful Pro Se Calendar

Melanie Adams Cook Jonathon Felt William M. Fontenot Keil Myers Zachary Myers Kelly Silvester Jordan White

Community Legal Clinic: Ogden

Jonny Benson Jacob Kent Chad McKay Francisco Roman Mike Studebaker

Community Legal Clinic: Salt Lake

Heath Becker Jonnny Benson Matt Harmer Brian Rothschild Paul Simmons Kate Sundwall Brian Tannner Ian Wang Russell Yauney

Community Legal Clinic: Sugarhouse

Skyler Anderson Brent Chipman Sue Crismon Sergio Garcia Carlos Navarro Paul Simmons Heather Tanana

Debtor's Legal Clinic

Aria Nejad Brian Rothschild Paul Simmons Brent Wamsley

Expungement Clinic

Josh Egan Stephanie Miya Ian Ouiel

Family Justice Center Clinic

Chuck Carlston Drew Clark Matt Goble Doug Holt Karen Smith Babata Sonnenberg

Family Law Case

David Blaisdale Brian Burn **Kris Tina Carlston** Nathan Carroll Drew Clark Lorie Fowlke Josh Gigger Cathy Graham Pilar Hayes **Barry Huntington** Shirl LaBaron Maureen Minson Keil Myers Karina Sargsian Jeremy Shimada Tara Umpig

Family Law Clinic

Zal Dez Carolyn Morrow Lori Nelson Kayla Quam Stewart Ralphs Linda F. Smith Simon So Sheri Throop Greg Wall

Guardianship Signature Project

Rob Denton Scott W. Hansen Richard Matheson

Homeless Youth Legal Clinic

Frank "Gil" Brunson Kate Conyers Victor Copeland Alison Fresques Jason Greene Nicole Lowe Joshua Stanley Owen Stewart

Immigration Case

Carolyn Morrow

Lawyer of the Day

Jared Allebest Jared L. Anderson Laina B. Arras Ron Ball **Justin Bond** Brent Richard Chipman J. Scott Cottingham **Christopher Evans** Amv Fiene Crystal Flynn **Jonathan Grover** Mark Hales **Roland Douglas Holt** Ben Lawrence Allison Librett **Ross Martin** Suzanne Marvchild Shaunda McNeill **Keil Myers** Lori Nelson Lorena Riffo-Jenson Jeremy Shimada Joshua Slade Linda Fave Smith Samuel J. Sorensen Laja Thompson Cristina S. Wood Kevin R. Worthy

Matheson Debt Collection Pro Se Calendar

Paul Amann Matt Ballard Michael Barnhill John S. Chindlund Ted E. Cundick R. Jesse Davis T. Richard Davis Alexis Jones Jon-David Jorgensen Vaughn Pedersen Karra Porter Justin Riley Francis Wikstrom

Medical Legal Clinic

Stephanie Miya Micah Vorwaller

Minor Guardianship Case

Rick Sorenson

Rainbow Law Clinic

Jess Couser

Senior Center Legal Clinics

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

Street Law Clinic

Dara Cohen Kate Conyers Nicholas Daskalas Jeff Gittins Matt Harrison Brett Hastings John Macfarlane Clayton Preece Elliot Scruggs Jeff Simcox Kathryn Steffey Jonathan Thorne

TLC Virtual Document Clinic

Danielle Dallas Brittani Harris Joni Lawrence Mitchell Brittany Ratelle Eryn Rogers

Tuesday Night Bar

James Ahlstrom Parker Allred Michael Anderson Alain Balmanno Dan Barrett Nick Bernard

State Bar News

Mike Black David Broadbent Kate Conyers John Cooper Doug Farr Joshua Figueira Dave Geary Mike Green Jessica Horton Emily Iwasaki Annette Jan Craig Jenson Derek Kearl Mason Kjar Emily E. Lewis Trent Lowe Lucia Maloy Trent Maxwell Mike McDonall April Medley Ed Munson Ben Onofrio John Pennington Josh Randall LaShel Shaw Jeremy Shimada Tiffany Shimada Samantha Slark Clark Snelson George Sutton Mark Thornton Roger Tsai Jeff Tuttle Adam Weinacher Ben T. Welch Matt Wells Bion Wimmer Adam Wright Bruce Wycoff

The Utah State Bar wishes to thank these volunteers for accepting a pro bono case or helping at a clinic in April and May of 2017. To volunteer call Tyler Needham at (801) 297-7027 or go to <u>https://www.surveymonkey.com/s/UtahBarProBonoVolunteer</u> to fill out a volunteer survey.





utah state bar. 2017 Summer Convention Awards

During the Utah State Bar's 2017 Summer Convention in Sun Valley, Idaho the following awards will be presented:



PAUL SIMMONS Lawyer of the Year

HON. STEPHEN L. ROTH Judge of the Year



HON. J. FREDERIC VOROS, JR. Judge of the Year

LIMITED SCOPE SECTION Section of the Year **GOVERNMENTAL RELATIONS COMMITTEE** Committee of the Year

Thank You to Our 2017 Summer Convention Sponsors & Exhibitors

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EXHIBITORS

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Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

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

More information about the Bar's Ethics Hotline may be found at: www.utahbar.org/opc/office-of-professional-conduct-ethics-hotline/

Information about the formal Ethics Advisory Opinion process can be found at: www.utahbar.org/opc/bar-committee-ethics-advisory-opinions/eaoc-rules-of-governance/.

SUSPENSION

On March 22, 2017, the Honorable Laura S. Scott, Third Judicial District Court, entered an Order of Suspension, against Michael R. Power, suspending his license to practice law for a period of eighteen months. The court determined that Mr. Power violated Rules 1.4(a) (Communication), 1.5(a) (Fees), 1.15(c) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

Mr. Power was hired to represent a client in a divorce action and in a criminal case. Mr. Power failed to adequately communicate with the client which resulted in a default being entered against the client in the divorce matter. Mr. Power charged the client the full amount of time involved for the motion to set aside the default entered in the divorce matter.

Due to the client's incarceration, the client provided Mr. Power with the client's financial account information by which Mr. Power had access to the client's financial accounts. The client provided the financial account information to Mr. Power for limited purposes. Mr. Power did not obtain his client's express authorization prior to using the funds in the client's financial accounts to pay his legal fees. Mr. Power did not provide the client with any invoices or otherwise inform the client of the payments prior to effectuating payment from the client's financial accounts. There were at least six instances when Mr. Power obtained funds from the client's financial accounts in an amount which resulted in an overpayment to Mr. Power. The funds Mr. Power obtained from the client's financial accounts were not deposited into Mr. Power's trust account. Mr. Power received funds from the client's financial accounts in anticipation of hiring an expert witness to testify on the client's behalf in the criminal case. Mr. Power failed to deposit the advance expert witness fee into his trust account. An expert witness was not retained on behalf of the client. Mr. Power failed to refund the advance fee at the time his representation was terminated and instead, applied the amount of the advance fee to the client's final invoice, which was not sent to the client for several months after Mr. Power's representation was terminated.

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

Aggravating factors:

Multiple offenses; vulnerability of victim; and refusal to acknowledge the wrongful nature of the misconduct involved.

INTERIM SUSPENSION

On April 7, 2017, the Honorable Ryan M. Harris, Third Judicial District Court, entered an Order of Interim Suspension, pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, against Jefferson B. Hunt, pending resolution of the disciplinary matter against him.

In summary:

Mr. Hunt was placed on interim suspension based upon his criminal convictions for Attempted Possession or Use of a Controlled Substance, a Class A Misdemeanor; Possession or Use of a Controlled Substance, a Class B Misdemeanor; Impaired Driving, a Class B Misdemeanor; and three counts of Attempted Purchase, Transfer, Possession or Use of a Firearm by Restricted Person, a Class A Misdemeanor.



ADMONITION

On April 25, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.3 (Diligence), 1.4(a), and 1.4(b) (Communication) of the Rules of Professional Conduct.

In summary:

The attorney was hired to represent the clients in an immigration matter to pursue an Application to the USCIS. USCIS issued a Request for Evidence in association with the Application allowing a deadline of thirty days to respond. Upon review of the Request for Evidence, the attorney mistakenly assumed and informed the clients they had a longer period of time to respond to the Request for Evidence. The application was subsequently denied due to the lack of timely response to the Request for Evidence.

The clients instructed the attorney to file a second Application and provided the attorney with the necessary information. The attorney failed to complete the work that needed to be done in association with the second Application and failed to communicate with the clients. The clients attempted to schedule meetings with the attorney but the meetings were cancelled by the attorney for various reasons. When the clients were unable to speak to the attorney, they met with another attorney and went a different route. Many months later, the attorney discovered the Application had not been filed and the attorney proceeded and filed the Application without having any communications with the clients.

PUBLIC REPRIMAND

On April 25, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Roy D. Cole for violating Rules 1.5(b) (Fees) of the Rules of Professional Conduct.

In summary:

Mr. Cole was retained for representation in a custody matter. Mr. Cole provided a fee agreement indicating the client would be billed according to the attorney's hourly rate. Mr. Cole received an initial retainer from the client. The client requested a breakdown of his bill from Mr. Cole monthly for two months. Mr. Cole did not provide the requested billing. The client ultimately requested his case file, final bill and the unused portion of his retainer. When the client received his final bill, Mr. Cole had charged the client a flat fee for email and text communications.

Mr. Cole failed to communicate with the client that he would be

charging the client a flat fee for each email and each text message. Mr. Cole charged fees to the client in a manner that violated the fee agreement.

PUBLIC REPRIMAND

On April 25, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Rocky D. Crofts for violating Rules 1.1 (Competence), 1.3 (Diligence), and 1.5(a) (Fees) of the Rules of Professional Conduct.

In summary:

Mr. Crofts was retained to obtain a loan modification from the client's lender. The client's fee was broken up into three installments to be paid over three months. Several months passed and the client called Mr. Croft's office and often spoke with Mr. Croft's assistant to check on the progress of his loan modification at which time the assistant would request additional documents from the client. The client contacted his lender directly almost seven months after retaining Mr. Crofts and was told that no request for loan modification had been received. The client also learned that his home was in foreclosure proceedings. The lender instructed the client on how to complete a loss mitigation packet for submission, which the client completed and returned to the lender. The client was ultimately approved for a loan assistance offer.

Mr. Crofts failed to complete and submit the loan modification package to the lender within seven months after being retained by the client.

Mr. Crofts did not provide a satisfactory explanation for his failure to submit the loan modification package to the lender. He refused to refund any of the money paid by the client, even though the contract signed by the client indicated that the fees for assembling and submitting the package were only part of the total fee.

PUBLIC REPRIMAND

On April 25, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Terry R. Spencer for violating Rules 1.4(a) (Communication) and 1.5(a) (Fees) of the Rules of Professional Conduct.

In summary:

Mr. Spencer was retained for representation in a grandparent visitation matter. The clients paid a retainer for legal services. Mr. Spencer filed the client's Verified Petition for Grandparent Visitation. Several months later, the clients called Mr. Spencer's office with questions concerning a recent Supreme Court Ruling and the merits of going forward with the case. The clients also requested an estimate of what it would cost to finish the case. Mr. Spencer never provided the clients with the requested estimate, nor did he answer the clients' questions concerning the merits of the case.

After two months of no communication, Mr. Spencer withdrew from the case and charged the clients for two hours of time associated with withdrawing from the case. Mr. Spencer did not contact the clients before withdrawing to communicate his intention or to inquire as to whether the client wished to have the case move forward.

Mr. Spencer charged for two hours of time to withdraw and close the file, which was not a reasonable fee. Mr. Spencer did not track and bill actual time instead he used two hours as a standard charge for each file.

PUBLIC REPRIMAND

On March 16, 2017, the Honorable Ryan M. Harris, Third Judicial District Court entered an Order of Discipline: Public Reprimand against L. Miles Lebaron for violations of Rules 1.3 (Diligence) and 1.4(a) (Communication) of the Rules of Professional Conduct.

In summary:

Mr. Lebaron was retained for representation in a litigation matter. Mr. Lebaron received discovery requests including Requests for Admissions from defendants. Mr. Lebaron did not provide the clients with copies of the discovery requests and missed the deadline for responding, which resulted in the clients' Requests for Admissions being deemed admitted. The defendants filed a Motion for Summary Judgment against the clients based on the requests for admissions being deemed admitted. A couple of months later, the clients emailed Mr. Lebaron requesting a status update after being unable to reach Mr. Lebaron by telephone. Mr. Lebaron's assistant emailed the clients a copy of defendants' second set of interrogatories but did not inform the clients of the summary judgment motion. The court set the matter for oral arguments on the Motion for Summary Judgment. The court ultimately granted a Motion for Summary Judgment in favor of the defendants.

Mr. Lebaron failed to make sure he had information from his clients so that he could submit responses to discovery requests in a timely fashion. Mr. Lebaron failed to timely respond to discovery requests on behalf of his client and failed to file a motion to set aside the admissions.

Mr. Lebaron failed to return messages and phone calls from his clients, failed to keep the clients informed, failed to comply with his clients' requests for information and failed to consult with his clients regarding important matters in the case.

ADMONITION

On March 3, 2017, the Honorable Ryan M. Harris, Third Judicial District Court, entered an Admonition against an attorney for violating Rules 1.3 (Diligence) of the Rules of Professional Conduct.

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In summary:

The attorney was retained by a client to prepare and file a complaint. The attorney prepared a demand letter and a draft complaint. The attorney sent the demand letter along with a copy of the draft complaint to an attorney he believed was representing the Utah resident. He asked that attorney for a response to the demand letter but did not receive one. After sending the demand letter, the attorney placed a copy of the letter and a copy of the draft complaint in a file. The attorney and staff failed to calendar the statute of limitations deadline. Consequently, the attorney failed to file the complaint before the statute of limitations expired.

SUSPENSION

On March 3, 2017, the Honorable Ryan M. Harris, Third Judicial District Court, entered an Order of Suspension, against David J. Hardy, suspending his license to practice law for a period of 12 (twelve) months for Mr. Hardy's violation of Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct. A Final Judgment was issued on March 24, 2017.

In summary:

Mr. Hardy was retained to represent an out of state client in a civil matter against a Utah resident. He had been advised by his client that a statute of limitations existed. Mr. Hardy drafted the complaint and placed it in a file. The statute of limitations deadline was not calendared by Mr. Hardy or his staff. Mr. Hardy failed to file the complaint in time to meet the statute of limitations deadline. A few months went by before Mr. Hardy discovered his error and realized he had failed to file the complaint before the statute of limitations expired. Mr. Hardy told no one in an effort to buy time with the hope that the problem would resolve itself over time. He informed his client that the complaint had been filed even though he knew it had not. When the client followed up with Mr. Hardy every few months, Mr. Hardy continued to tell the client that the case was proceeding nicely, even though he knew it was not. Mr. Hardy fabricated details about the case to make it appear to the client that the case was in fact proceeding. He represented to the client that there was a trial date then a few months later told the client the trial date had been postponed and a new date was in the process of being scheduled, which Mr. Hardy knew was not true.

Mr. Hardy told the client he had filed a motion for entry of default, but no such motion had been filed and Mr. Hardy knew it. A few weeks after, Mr. Hardy took an extra step of creating a document that he captioned "Entry of Default." He created the document with the intent of making it appear that the document was an authentic court document signed by a clerk of the court, signifying that the Utah resident was in default. After creating the fake Entry of Default, Mr. Hardy sent the document to the client with the intent of deceiving him into believing that the court had actually entered default against the client's opponent.

Aggravating Factors:

Selfish and dishonest motive. Pattern of misconduct. Substantial experience.

Mitigating Factors:

No prior record of discipline. Cooperative attitude towards proceedings. Remorse. Timely good faith effort to make restitution or to rectify consequences. Acknowledged wrongful nature of actions.

STAYED SUSPENSION/PROBATION

On March 6, 2017, the Honorable James D. Gardner, Third Judicial District Court, entered an Order of Discipline (Stayed Suspension/ Probation), against Kelly Ann Booth, placing her on probation for a period of 12 (twelve) months for Ms. Booth's violation of Rules 1.3 (Diligence) and 8.4(c) (Misconduct) of the Rules of Professional Conduct. A Final Judgment was issued on March 21, 2017.

In summary:

Ms. Booth was hired on a contingency basis to provide legal services to a client for the recovery of damages and restitution for retail theft from the client's company. The client was asked to pay a retainer for costs, which he did. Ms. Booth filed a Complaint on behalf of the client against several defendants. One of the defendants was served with the Complaint who indicated that although they had similar names, he was not the same person as the defendant they were seeking. Ms. Booth continued to pursue the case against the wrong defendant ("individual") eventually obtaining a default judgment and garnishing money from the individual's account. The individual retained an attorney to file a motion to bar garnishment of his account. The court granted the motion and entered an order in favor of the individual for more than the garnishment amount, plus attorney's fees to be paid by Ms. Booth's client.

Ms. Booth emailed the client and told him the trial had been cancelled because of a pending motion for summary judgment. The client later found out that no motion had been filed. The client communicated with Ms. Booth numerous times to get updates and information regarding his case. Ms. Booth failed to return many calls. Ms. Booth filed a Motion for Default Judgment against some of the defendants. The court entered a Default Judgment against the defendants. After the default was entered by the court, Ms. Booth filed no further pleadings in the client's case and failed to timely pursue collections options on behalf of the client.

Ms. Booth contacted the client and told him they had won by default in a small claims action against one of the defendants when no small claims action had ever been filed. For several months, the client contacted Ms. Booth to inquire if the trial was still taking place so that he could make necessary travel arrangements to be in Utah for the trial. No trial date had been set.

DISBARMENT

On April 25, 2017, the Honorable Ryan M. Harris, Third Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Disbarment disbarring Jeremy D. Eveland from the practice of law for his violation of Rules 8.4(b) and 8.4(c) (Misconduct) of the Rules of Professional Conduct. A Final Judgment was issued on May 9, 2017.

In summary:

Between 2006 and 2012, Mr. Eveland devised a scheme to defraud individuals into signing over their homes to him through deeds to a trustee to avoid foreclosure. Mr. Eveland told the individuals that by signing the documents they would be allowed to keep their homes or transfer their homes back into their names. Mr. Eveland failed to inform the individuals that he was in control of the trust. Mr. Eveland transferred the ownership of the homes to himself through various trusts and companies that he controlled. The individuals were not aware that they were no longer owners of their homes.

On March 13, 2015, in the Third District Court for Salt Lake

County, State of Utah, Mr. Eveland was convicted of Communications Fraud, a 3rd Degree Felony.

On December 28, 2015, Mr. Eveland was placed on Interim Suspension for having been convicted of a crime that reflects adversely on his honesty, integrity and fitness as a lawyer. Mr. Eveland violated Rule 8.4(b) by committing a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer. Mr. Eveland violated Rule 8.4(c) by committing a criminal act involving dishonesty, fraud, deceit or misrepresentation.

After balancing aggravating and mitigating factors, the court determined that the mitigating factors were not significant enough to outweigh the aggravating factors, or to outweigh them by a large enough amount to be considered sufficiently "significant" or "unusual or substantial" to permit a reduction in the sanction down from the presumptive penalty of disbarment. Some of the mitigating factors (restitution) could not, by Rule, be considered mitigating at all, and others (inexperience, character, other penalties, remorse) are factors that under the facts of this case cannot be given great weight. In sum, the Court held that mitigating factors are simply not significant enough here to merit a downward departure in sanction.

The court determined that Mr. Eveland defrauded at least eleven customers, four of whom he admitted were his own former clients. These individuals were in an extremely vulnerable situation, and they trusted Mr. Eveland to ethically help them with their situation. Mr. Eveland broke their trust. Not only did Mr. Eveland's actions constitute felony communications fraud, they also constituted actions completely inappropriate for a member of the Utah State Bar. The court stated that actions like these are materially indistinguishable from raiding a client's trust account and deserved the highest sanction.

Discipline Process Information Office Update

From January through May of this year, the Discipline Process Information office opened 33 files. In addition to answering questions posed by attorneys who are named as subjects of Bar complaints, Jeannine Timothy responded to several complainants who had questions about the confidentiality requirement. Jeannine is available to answer all questions about the complaint process, and she is happy to be of service to you.



Jeannine P. Timothy (801) 257-5515 | <u>DisciplineInfo@UtahBar.org</u>

Young Lawyers Division



Making Connections

by Jaelynn R. Jenkins

Of all the dirty words in a person's repertoire, "networking" should not be one of them. Attorneys, young and old, shudder when forced to network. The idea of asking for business causes some to cringe while others dislike small talk and still others find mingling beneath them. The truth is networking is essential to everyone's career. Yes, even for government attorneys or those settled into their dream job with no intention of leaving.

The obvious benefit of networking is business development or the ability to make it rain clients and collectibles. Networking, however, has many other benefits, including career advancement and professional relevancy and resilience. Tomorrow's lunch appointment is the source of next year's job offer, and a fellow committee member may just be the person who can talk you through the unusual case you cannot quite wrap your head around. Learning about your colleagues' triumphs and failures reminds you why you chose this profession in the first place. Networking opens dialogues about the best service providers inside and outside of the legal community and creates informal mentor and mentee relationships. In essence, networking is building a community.

Whether you are building a pipeline of potential clients or a web of support and resources, building a community is a lifetime practice that is ever evolving. A strong and sustainable network does not spring into existence after one lunch or cocktail hour. Start building the infrastructure for a pipeline or a web today to maximize career benefits.

The first step in starting a networking practice, besides choosing and attending an event, is to put yourself in the right mindset. The best networkers understand that giving is the key to receive. Rating an event based solely on how it benefits oneself is a less than fruitful approach. Choose to view the world with an abundance mindset rather than a scarcity mindset. A one-time competitor may become a valued mentor, employer, or team member.

If a room full of the unknown is intimidating, set small goals such as introducing yourself to three individuals. The sooner you learn to tackle an intimidating room, the better. Look for small groups that are standing in a manner to welcome additional members (e.g. open to the room as opposed to tightly circled and closed off). Others standing or roaming by themselves may be a good place to start. If you know someone in attendance, start with him or her and then ask if there is someone in the room he or she think you should meet, followed by a request for an introduction. Seek out the organizers of the event and thank them for their efforts and possibly ask about becoming involved. For some, having an official position is the best way to tackle networking.

Carry business cards in an easily accessible spot. Do not hand out business cards as if they are free drinks. Instead, try making connections and establishing common grounds of interest. When receiving a business card from someone else, take the business card and review it before putting it away in a pocket or purse. Peruse the day's headlines before attending an event to arm yourself with topics of conversation. Until you understand the dynamics of the group you are networking with, leave the topics of sex, religion, and politics at the door.

Be sure to bring your thirty-second elevator pitch. Your pitch should include your name, place of work, and the type of work you do. Feel free to talk about what you do; you are there to network, but remember that conversations are best played as tennis matches as opposed to a round of golf. Be sure to engage the other individual and find out about him or her.

For those limited on time or inclination, try networking online through sites such as LinkedIn and Twitter. Both provide the opportunity to follow and connect with others in your industry. Look for those who regularly post and stay current in their field. Comment on and share their posts as well as post your own thoughts and comments. Take online networking offline by inviting individuals for coffee or lunch meetups.

By way of review, network for community. The networking you do today will lead to business tomorrow. Keep an abundance and giver mindset. Start early and network often. Networking is a career-long necessity that requires hours of practice. Happy networking!

JAELYNN R. JENKINS is an associate at Fetzer Simonsen Booth Jenkins. She practices in the areas of business law, franchise, estate planning, and nonprofits. Jaelynn is the 2016–2017 Young Lawyer Division President.



Volume 30 No. 4

Paralegal Division



2017 Paralegal of the Year Award

On Thursday, May 18, 2017, 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. The Honorable Dale A. Kimball was the keynote speaker and talked about paralegals and their ethical responsibilities. Judge Kimball shared with us some highlights from his years on the bench and insight on how paralegals can enhance the profession.

One of the highlights of this event is the opportunity to recognize the individuals who have achieved their National Certification through NALA. This year there were seven individuals recognized: Cyndie Bayles, Dixie Calkins, Stacey Luby, Diane Samudio, Erin Stauffer, Suzanne Nelson, and Clover Owen. Well done!

Paralegal Day is also the day to recognize the Distinguished Paralegal of the Year award. The purpose of this award is to honor 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 the epitome of professionalism and rendered extraordinary contributions and service.

This year we received some outstanding nominations and are pleased to announce that the winner of the 2017 Distinguished Paralegal of the Year award is Teresa Robison. Teresa has been a paralegal for thirty-nine years. She earned a certificate in paralegal studies at the Rancho Santiago Community College located in Santa Ana, California. She began her career as a deposition paralegal for the law firm of Portigal and Hammerton in Irvine, California.

In 1980, she moved to Utah and joined the law firm of Callister Nebeker & McCullough (CNM). For fourteen years at CNM, Teresa organized and conducted a paralegal training program. The program enlisted attorneys and other speakers who presented professional training for paralegals at monthly lunch meetings. Topics included: documentation and purposes of wills, revocable trusts, probate (both formal and informal), charitable foundation creation and operation, charitable giving, small business planning, and tips on drafting the various related documents. She is currently a senior paralegal with The McCullough Group.

Teresa is a champion of the fair treatment and professional respect for paralegals. In 1984 she proposed and negotiated an overtime pay policy for paralegals at her firm.

Not only has Teresa done amazing things to help other paralegals at her firm, she has also been involved in a variety of community service activities, including:



Teresa Robison, 2017 Paralegal of the Year.

1998–2003: Teresa served as a Study Buddy for the volunteers of America, in that organization's Transition Home and Homeless Youth Outreach Program. This program helps to educate homeless children and serves as a transitional home for homeless children who need protection and lifestyle education. She taught the children to be self-reliant and to develop sewing, cooking, and lifestyle skills.

2002: She was a volunteer for the opening and closing ceremonies of the 2002 Salt Lake Para Olympics.

2003–2004: She served the Odyssey House of Utah as a volunteer substance abuse counselor.

2007–2009: She taught paralegal studies as an adjunct professor at Salt Lake Community College.

2012-2013, 2015: Teresa was a guest speaker for the Decker Lake youth detention center. She spoke to the young people about the dangers of drug addiction and the importance of avoiding drugs.

2013–2014: She served as a volunteer for the Huntsman Cancer Foundation in conducting the Out Climb Stairs Challenge, raising money for cancer victims.

Since 2015: Teresa has been a volunteer with the Utah State Bar Paralegal Division on the Wills for Heroes program.

In 2016: She was the first paralegal to volunteer at the Veterans Administration legal clinic, where she has helped veterans obtain legal aid in various ways. She, herself, graduated from the U.S. Army's basic training program in Fort Jackson, SC in 1982.

In recognition of Teresa's dedication to the paralegal profession

including her championing for the fair treatment or paralegals, mentoring and training, and her involvement in various worthy causes we are honored to recognize her as Paralegal of the Year. Congratulations, Teresa Robison!

The Paralegal Division would also like to thank Judge Todd Shaughnessy, Frank Compagni, Rob Rice, Jodie Scartizina, and Heather Allen for their work as a committee evaluating and choosing the Paralegal of the Year.

Message from the Chair

by Julie Emery

Serving on the Paralegal Division Board (the Board) for the past five years has taught me to focus on the strengths of others. I am continually amazed at the amount time and effort the Board members devote to the Division and the paralegal profession. They truly are talented, professional individuals, and I would like to thank them for making my service as Chair this past year both amazing and rewarding.

I have also been honored to attend Bar Commission meetings this year. The commissioners and Bar staff are simply remarkable. It has been an eye-opening experience to witness the commissioners' devotion to the Bar and the community by volunteering numerous hours to promote access to justice.

It has been my privilege, since January 2016, to sit on the Utah Supreme Court Paralegal Practitioner Steering Committee as well as the Admission and Administration and Exam Subcommittees. It has taken countless hours and hard work to complete the Supreme Court's charge to implement the Limited Legal Licensing Task Force's recommendation to create the new Paralegal Practitioner profession. We have prepared a survey to gather feedback and input from all Utah paralegals, so watch your email.

Here are some of the year's activities the Board accomplished to satisfy the purposes of the Paralegal Division, as stated in the Division's Bylaws.

- Implemented the fifth Utah Paralegal Salary Survey
- Sponsored six amazing and well-attended FREE Brown Bag CLE events
- Arranged for videotaped Division CLE seminars to be made available to view through the Bar's website for a nominal fee

- Planned and coordinated Paralegal Day Luncheon and CLE
- Participated on the planning committees and secured speakers for the Utah State Bar's Fall Forum, Spring Convention, and Summer Convention.
- Coordinated a social and CLE regarding Bar membership benefits in St. George, during Spring Convention
- Coordinated and provided volunteers for five Wills For Heroes events, helping 235 first responders and their spouses to complete their wills, powers of attorney, and advanced health care directives
- Coordinated and provided volunteers for two Serving Our Seniors events, helping twenty-one members of the senior community to prepare their powers of attorney and advanced health care directives
- Provided volunteers to assist the Rocky Mountain Innocence Center
- Performed monthly research to identify potential ethical and unauthorized practice of law violations
- Provided six relevant articles for the Utah Bar Journal
- Represented the Division in monthly Bar Commission meetings
- Developed social media platforms to increase communication to members of the Paralegal Division and community
- Created a "Paralegal Community" listserv to help paralegals who are not members of the Division stay connected to current events related to the paralegal profession.

The Heather Johnson Finch Memorial Endowed Scholarship

Paralegal Day is also a time when we reflect on Heather Finch, who was serving as the Chair of the Paralegal Division at the time of her tragic passing on August 24, 2010. Heather was the consummate professional and model for what every paralegal should be. She devoted over twenty years to the profession. This is the fourth year the scholarship has been awarded. This year's winner is Lynette Curtin. Lynette is a wife and mother of two children. She grew up in New York and has been interested in the law since high school. Two years ago she decided to go back to school to finish her bachelor's degree. She specifically

To honor the life and accomplishments of Heather Finch, the Paralegal Division of the Utah State Bar created the first-ever endowed scholarship for students pursing undergraduate degrees in Paralegal Studies at Utah Valley University (UVU). 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, the Heather Johnson Finch Memorial Endowed 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 pursing the best paralegal education available.



Lynette Curtin, 2017 recipient of the Heather Johnson Finch Memorial Endowed Scholarship

chose the legal studies program at Utah Valley University because she wants to work as a paralegal when she is finished.

After graduation, she hopes to find a good job and become an active member of the Utah State Bar Paralegal Division. Lynette is grateful to be this year's scholarship recipient, which will help her finish her last year of college. The scholarship selection committee stated that:

Lynette is considered to be one of the top students in the Paralegal Studies Program and has tremendous promise as a professional. She successfully maintains a 3.8 GPA, while raising a family and being extensively involved with extra-curricular activities. Lynette's determination to complete her education is setting an example for her children, classmates, and other around her.

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

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

July 12, 2017 | 12:00 pm – 1:30 pm & 5:00 pm – 6:30 pm

Eat & Greet with Apple – Find and Share the Best Apps for the Legal Profession. Cost \$15 for lunch session (includes lunch), \$10 for afternoon session (includes snacks). To register go to: https://services.utahbar.org/Events/Events/Event-Info?sessionaltcd=17 9279[UL. Be sure to select the proper session when registering.

July 26-29, 2017

2017 Summer Convention in Sun Valley, Idaho. Save these dates and plan to attend! Co-Chairs: Hon. Robert J. Shelby and Amy Sorenson.

August 4, 2017 | 8:00 am – 12:00 pm

Salt Lake County Golf & CLE: Inside the Court Clerks' Office – What the Federal and Third District Court Clerks Wish You Knew. To register, go to: https://services.utahbar.org/Events/Event-Info?sessionaltcd=18 9038.

Breakfast 8:00-8:00 am 9:00 am-noon CLE Golf at River Oaks Golf Course, 9300 Riverside Drive, Sandy, UT. Noon-

August 9, 2017 | 12:00 pm – 1:30 pm & 5:00–6:30 pm

Eat & Greet with Apple - Cloud Storage & Collaboration. Cost \$15 for lunch session (includes lunch), \$10 for afternoon session (includes snacks). To register go to: https://services.utahbar.org/Events/Event-Info?sessionaltcd=17 9279AUG. Be sure to select the proper session when registering.

August 11, 2017 | 8:00 am – 4:00 pm

Mangrum & Benson on Expert Testimony. \$175 for paralegals, \$210 standard for all others. To register go to: https://services.utahbar.org/Events/Event-Info?sessionaltcd=18 9185.

August 25, 2017 | 9:00 am – 12:00 pm

Cache County Golf & CLE. Location and presentation TBD. Breakfast starts at 8:30 am.

September 13, 2017 | 12:00 pm – 1:30 pm & 5:00–6:30 pm

Eat & Greet with Apple - Manage Paperless Document Workflow. Cost \$15 for lunch session (includes lunch), \$10 for afternoon session (includes snacks). To register go to: https://services.utahbar.org/Events/Eve Be sure to select the proper session when registering.

September 27, 2017 | 9:00 am – 3:45 pm

OPC Ethics School. Save the date, more information to follow.

September 29, 2017 | 9:00 am – 12:00 pm

Utah County Golf & CLE. Hobble Creek Golf Course, 5984 Hobble Creek Canyon Road, Springville. Breakfast starts at 8:30 am and golf at 12:15 pm. Presentation: "The Nuts and Bolts of Expert Witnesses from Retention to Trial" by Judge Ryan Harris and Wally Bugden.

6.5 hrs. CLE

1.5 hrs. CLE

5 hrs. Ethics, 1 hr. Prof./Civility

1.5 hrs. CLE

1.5 hrs. CLE

TBD

TBA

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.

Utab 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.

WANTED

Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201.

JOBS AVAILABLE

Wrona DuBois Law Firm is interested in hiring experienced litigators to work out of its Park City office. Compensation will be commensurate with experience. Please submit resume to Angela Gebhard at <u>Gebhard@wdlawfirm.com</u>.

DNA-PEOPLE'S LEGAL SERVICES INTERIM EXECUTIVE

DIRECTOR. DNA is a non-profit legal services provider celebrating 50 years of service with approximately 25 attorneys delivering legal services to an underserved population in Arizona, New Mexico, and Utah. DNA is seeking an innovative growth-oriented Individual capable of revitalizing the organization and setting direction for the next 50 years. Visit <u>www.dnalegalservices.org</u> for more information. Email <u>dnaexec.dir.apps@sackstierney.com</u> to obtain a job description, qualifications, and procedure to apply. CLOSING DATE: Open until filled. DNA is an equal opportunity/affirmative action employer. Preference given to qualified Navajo and other Native American applicants.

OFFICE SPACE

For Sublease: Two offices (fully furnished if desired) in historic Main Street building next to City Creek Center in a beautiful suite currently occupied by a law firm in downtown Salt Lake City. Perfect for a solo attorney who is looking for a prestigious address and an opportunity to build his/her practice with a well-established law firm. Terms: negotiable flat fee. Convenient Trax stop location and only one stop (or short walk) away from federal/state courthouses. Prime parking available. For additional information, call Jeff H. at 801-531-8400.

PRACTICE DOWNTOWN ON MAIN STREET: Nice fifth floor Executive office in a well-established firm, now available for \$775 per month. Enjoy great associations with experienced lawyers. Contact Richard at (801) 534-0909 or <u>richard@tjblawyers.com</u>.

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.

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

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

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Use your current Bar login to update your profile at <u>www.licensedlawyer.org/login</u>; select "My Dashboard" then "Update Profile." Your Bar public business information is already pre-loaded for your convenience. To be included in all search options for clients looking for a new attorney, be sure to **UNCHECK** the box to **"OPT-IN"** and **CHECK** the box for "accepting new clients" when you update your profile.

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Office Space, prime Holladay location. 4625 S 2300 E #206. One office in three-office suite. \$575/month, parking, conference room, copier. Call Steve 801-424-1520.

Office space for lease. Total building space 5260 sf. Main floor 1829 sf, \$16/sf. Upper floor 3230 sf (may be divided), \$10/sf. Owner would consider offer to purchase. Walking distance to city and courts. Easy access to TRAX. Lots of parking. 345 South 400 East. Call Larry Long 801-328-8888.

A well-established boutique real estate law firm located on Main Street in Park City has a large office available for lease (207 sq. ft.). The lease is an ideal opportunity for an accomplished litigator and an attorney who specializes in areas not directly related to real estate laws such as trusts and estates. The firm would like to refer these types of matters to a trusted attorney in the rented office in a manner that effectively meets the needs of the clients. Contact Tassie Williams, tassiew@teschlaw.com.

SERVICES

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

GUY FRIDAY – Semi-retired, seeking hourly work. 39 years as counsel, Super Lawyer, National Board of Trial Advocacy, Utah's Legal Elite: civil litigation, P.I., broken contracts, insurance disputes, fraud and deceit, etc. 2nd chair at trial, summary judgment and discovery motions, motions in limine, voir dire and jury instructions, trial and appellate briefs, depositions, arbitrations and mediations. Call John Fay – 435-649-6224.

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.

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@utah	
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.

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 <u>www.utahmcle.org</u> 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. Returned checks will be subject to a \$20 charge.

Billing Address:		Zip Code
Credit Card Type: 🗌 MasterCard	UISA VISA	Card Expiration Date:(e.g. 01/07)
Account #		Security Code:
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