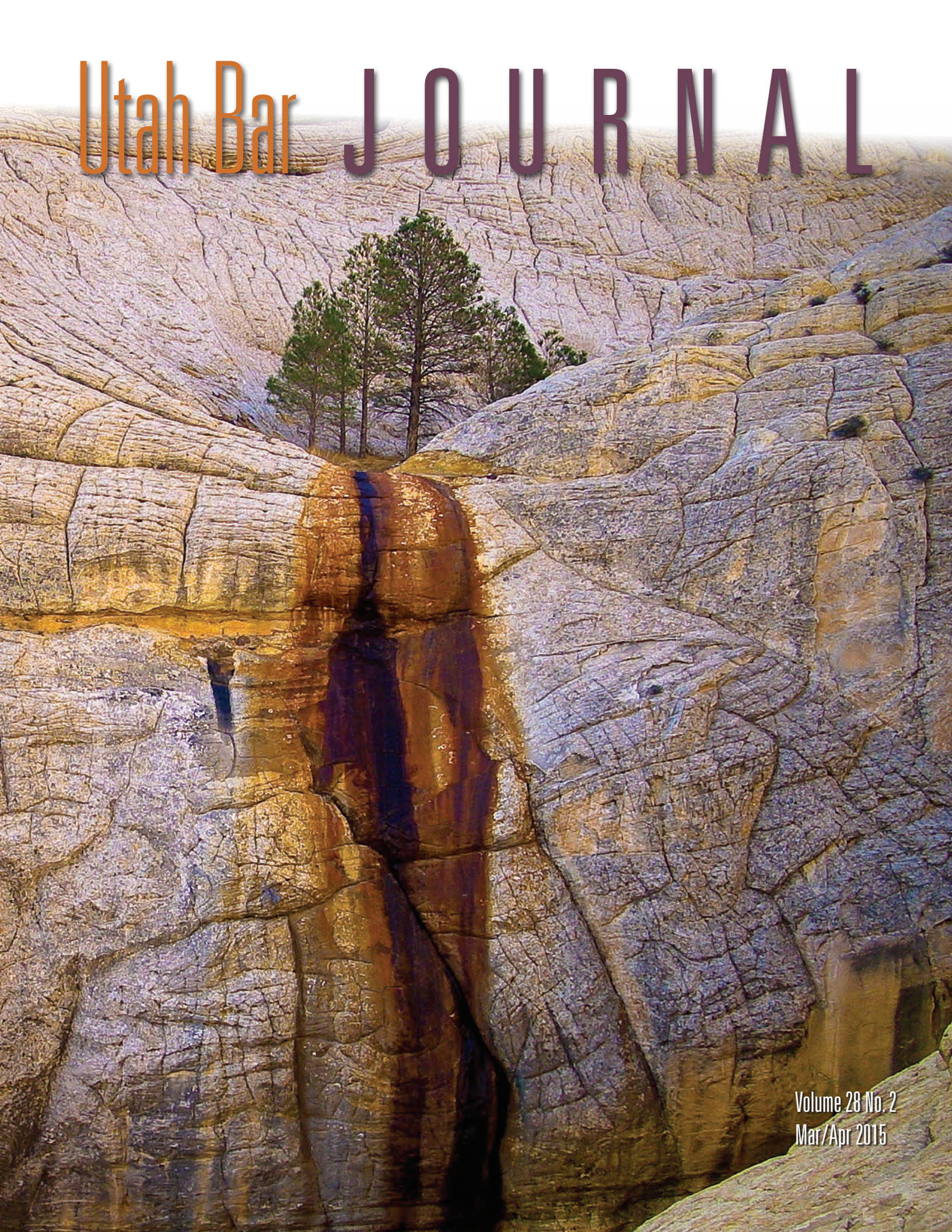
Utah Bar JOURNAL



Volume 28 No. 2
Mar/Apr 2015

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

Utah Bar® JOURNAL

Volume 28 No. 2
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Cover Photo

Capitol Reef Stain, taken in the back country of Capitol Reef National Park by Joro Walker of Salt Lake City.

JORO WALKER is Senior Attorney and Director of the Utah Office of Western Resources Advocates, a non-profit public interest environmental organization. Ms. Walker has backpacked and hiked throughout Utah's Red Rock Country and took the cover photograph while on an eight-day trip in the backcountry of Capitol Reef National Park.

SUBMIT A COVER PHOTO

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

The Utah Bar Journal

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

ARTICLE LENGTH

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

SUBMISSION FORMAT

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

CITATION FORMAT

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

NO FOOTNOTES

Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial endnotes to convey the author's intended message may be more suitable for another publication.

ARTICLE CONTENT

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

EDITING

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

AUTHORS

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

PUBLICATION

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

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Letter Submission Guidelines

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.

2. No one person shall have more than one letter to the editor published every six months.

3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.

4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.

8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

President-Elect & Bar Commission Candidates

Candidates for President-Elect

ROBERT O. RICE

I write to ask for your vote for President-Elect of the Utah State Bar when balloting opens on April 1, 2015. I am honored to be serving my second term as a Utah State Bar Commissioner. I now seek the office of President-Elect to build on several important accomplishments.

As a Bar Commissioner, I served as a founding member of the Utah Pro Bono Commission, an innovative program that matches needy clients with volunteer lawyers. Through the hard work of many, Utah is now a national leader in supplying free legal services to needy Utahns with the assistance of nearly 1,200 volunteer lawyers.

As a Ray Quinney and Nebeker lawyer for 21 years, I understand the business of running a law practice. Consequently, I opposed revising Utah's lawyer advertising rule, which I viewed as unnecessary and burdensome. I also deeply respect diversity in the law. To that end, I voted for adopting the Bar's Statement on Diversity and Inclusion.

If elected, I will continue to advocate for access to justice, for diversity in the Bar and for ways to strengthen your law practices. I respectfully ask for your support. For more information about my candidacy, please visit http://robriceutahbarcommission.wordpress.com.

THOMAS W. SEILER

I am running for President-Elect of the Utah State Bar. Since 2009, I have worked hard serving Utah lawyers as Utah Bar Commissioner. During that time, we have moved into new areas to better serve you. We have rolled out a new group benefits program for you, created a Modest Means project, been recognized nationally for our New Lawyer Mentoring Program, which improves the quality of the practice, developed a new website making access to the Bar easier for you and implemented a public relations program. I want to strengthen these and other services. We must also encourage our long tradition of ethical practice, fair dealing and superior legal work. Achieving these goals together will make us better, happier and more effective lawyers.

Strengthening these Bar programs, while embracing our goals will require experienced leadership. I have been the leader of the Central Utah Bar Association, American Inn of Court I, Fourth District Judicial Nominating Commission, the Utah Association for Justice and the Utah County Public Defenders Association. As Bar President, I will serve you, delivering services to help you in your practice and elevating the profession throughout Utah. I am honored to serve and ask for your vote.

Third Division Commissioner

KATE CONYERS

Background: Kate Conyers is a public defender at Salt Lake Legal Defenders. She previously litigated at Snell & Wilmer and Lokken & Associates. She graduated from the University of Utah S.J. Quinney College of Law.

Ms. Conyers served as an ex-officio member of the Bar Commission from 2012–2013 when she also served as the President of the Young Lawyers Division. She has successfully created and developed many Bar-related projects. She has served on the boards of Salt Lake County Bar Association, Women Lawyers of Utah, Utah Minority Bar Association, and Utah Association of Criminal Defense Lawyers.

In 2014, Ms. Conyers received the Pro Bono Publico Young Lawyer of the Year Award.

Statement of Candidacy: One of my greatest passions in life is volunteering and making a positive change in our legal community and the community at large. I would like to employ this passion to serve you as a Bar Commissioner for the Third Division.

As Bar Commissioner, I will work to:

- increase transparency and communication about what, why, and how the Commission acts and how bar dues are spent;
- ensure that the Bar evolves with changes in technology, innovation, and the economy; and
- be a voice for lawyers currently underrepresented on the Commission.

With my leadership experience and experience in various practice settings, I have the ability and knowledge to effectively represent the interests of the lawyers in the Third Division and I ask for your vote. Thank you.

JANISE MACANAS

I am dedicated to the mission of the Bar and will strive to make it more innovative, effective, and inspiring. I have had a strong, successful career with the Attorney General's Office for the past 17 years and bring a unique mind-set and skill-set to the table.

If elected, I will help find solutions to thorny problems and challenges facing the Bar. We should make wise use of social media, build stronger programs, further career development and marketability, and promote greater networking and sharing of information. I have the commitment, enthusiasm, and optimism to make all of these ideas come to life.

I will be passionate and sincere in building three core values within the Bar:

Connect. Help lawyers become super-connectors constantly seeking and building relationships with lawyers and clients beyond immediate boundaries which lead to lawyers who think differently and have a fresh perspective.

Engage. Help lawyers collaborate and promote integrity and kindness within the profession which leads to personal satisfaction.

Inspire. Help lawyers develop tenacity, resilience, and intensity to be more aware, engaged, streetwise, and focused which leads to greater success.

Feel free to connect, engage, and share your inspiration with me at jmacanas.blogspot.com or vote.janise.macanas@gmail.com.

MICHELLE MUMFORD

As attorneys, we work hard. The Utah State Bar operates to support that work and our service to the public. My professional experience and personal relationships with state decision-makers enables me to be a highly effective Bar Commissioner.

I enjoyed being a litigator in New York City with Milbank. I also clerked for Judge Monroe G. McKay on the Tenth Circuit, and continued that experience as a circuit staff attorney. I was Assistant Dean for Admissions at BYU Law School, and am currently in private practice in Salt Lake City. I hold a statewide community leadership position where I have learned the importance of good policy.

That is why leaders like Lieutenant Governor Spencer Cox and past bar president Nate Alder nominated me to be your Commissioner. Other support and encouragement comes from lawyer colleagues in law firms, business leaders, law professors, governmental officials, and legislators. These personal relationships with key decision-makers are particularly important, especially as the Bar's voice needs to be heard and understood.

I work hard. I study issues and will report with diligence and determination. I will work to ensure that our Bar runs smoothly to support you and your efforts. Thank you for your support.
michlmumford@gmail.com

Fourth Division Commissioner

LIISA A. HANCOCK

I am grateful for the opportunity to run for the position of Fourth Division Bar Commissioner. I have served on many state and local Bar committees and appreciate and understand the impact and benefit of the Bar on our professional lives.

I understand the importance of fiscal responsibility. As President of the Central Utah Bar Association (CUBA), I decreased member costs by implementing a new payment structure and policy for CUBA events, which significantly reduced waste while still providing valuable professional development.

I helped design and implement the Modest Means Program that provides much needed resources for the public while helping members of the Bar to expand their practice. I serve on the Fourth District Pro Bono Committee and Timpanogos Legal Center.

While on the Young Lawyers Division Executive Board, I served as the CUBA and Modest Means Liaisons. As a co-chair of the YLD Service Committee, I collaboratively worked to raise money and in-kind donations for local charities.

As bar commissioner, I will promote low cost, informative CLEs and be a voice for the needs of attorneys in the Fourth Division.

I have the experience and desire to serve in this position and appreciate your vote.

THOMAS W. SEILER

I have been the Bar Commissioner for the Fourth Division since 2009. I have worked hard and attended meetings faithfully. During that time we have started a new group benefits program, created a Modest Means Project, been nationally recognized for our New Lawyer Mentoring Program, and implemented a public relations program. I have been asked to serve as a member of the Performance Review Committee for the Office of Professional Conduct to evaluate and recommend improvements to that office. This project will likely last throughout 2015.

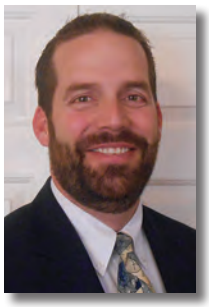
On my own initiative, I have undertaken a First Year Lawyer Proposal which seeks to involve the Bar, our two law schools, and many public agencies with law firms and the Chamber of Commerce, to help new members of the Bar launch their practice. The reality is many new lawyers are faced with starting as a solo practitioner or in a small group with classmates.

You may note that I am also running for President-Elect for the Utah State Bar. Both campaigns are important because, by being your Bar Commissioner, I will be able to continue to move programs forward irrespective of what happens in the other election. Thank you for your support.

Notice of Electronic Balloting

Utah State Bar elections have moved from the traditional paper ballots to electronic balloting. Online voting reduces the time and expense associated with printing, mailing, and tallying paper ballots and provides a simplified and secure election process. A link to the online election will be supplied in an email sent to your email address of record. You may update your email address information by using your Utah State Bar login at http://www.myutahbar.org. (If you do not have your login information please contact onlineservices@utahbar.org and our staff will respond to your request.) Online balloting will begin April 1 and conclude April 15, 2015. Upon request, the Bar will provide a traditional paper ballot by contacting Christy Abad at adminasst@utahbar.org.

Fifth Division Commissioner



AARON RANDALL

I attended Brigham Young University where I received my undergraduate degree in International Relations and Korean. I then attended and graduated from Santa Clara University School of Law in Santa Clara, California. I moved with my family to St. George, Utah and joined the firm of Hughes and Bursell in June 2002. In November 2005, the firm changed its name to Hughes and Randall at which time I became the managing partner. The firm subsequently changed its name to its current name of Hughes, Thompson, and Randall & Mellen. I practice in several areas including estate planning, probate, business, real estate, collections, foreclosures, civil litigation, and domestic law.

From 2006 through 2008, I served as a board member of the Southern Utah Bar Association and during 2008 served as the president of the Southern Utah Bar Association. Also, I served on the board of directors for The Learning Center for Families, a local non-profit serving the needs of at risk children between the ages of 0 and 3. My wife Amy and I have been married for 20 years and have five children. I enjoy coaching my kids, playing golf, camping, and outdoor recreation with my family.

KRISTIN K. "KATIE" WOODS

A native of St. George, I am seeking election to the Bar Commission for the Fifth District. Increased long-distance access to statewide programs is my main campaign focus, as the Fifth District is mostly rural and separate from Utah's large city centers. With communication technology like Skype and teleconferencing being available in most law offices, providing rural Utah attorneys with remote access to speakers and events happening in Salt Lake City should be the goal and the norm.

I am licensed to practice law in Utah, Nevada, Colorado, and Arizona, with my primary practice areas being in guardianship and bankruptcy. I have also received certification as a National Certified Guardian from the Center for Guardianship Certification. I received a bachelor's degree in psychology from Brigham Young University, and a law degree from the University of Missouri in Kansas City. I enjoy coaching high school basketball, playing with my Italian Greyhound, and driving my Jeep through the scenic landscapes of Southern Utah.

Helping Provide Access to Justice for All

by James D. Gilson

Lawyers make a positive, if not essential, difference in resolving legal disputes. Unfortunately, many individuals and small businesses cannot afford to hire a lawyer, or they do not know where they can find a lawyer who will represent them without charge or at a cost that they can afford.

While the Constitution guarantees access to the courts for all Americans, that right is rather hollow without a lawyer's assistance.

Through the generous help of hundreds of Utah lawyers, great strides have been made to improve access to legal services. But of course more work remains to be done.

In Utah, over 75% of all divorce cases have at least one side that is proceeding *pro se*. And in 50% of divorce cases, both sides are unrepresented.

I challenge every Utah lawyer to handle at least one *pro bono* case each year.

Consider the example of Odgen lawyer Chad McKay. Mr. McKay has been a member of the Utah Bar for twenty-five years. He's a solo practicioner with a general practice, including collections, personal injury, divorce, criminal law, and immigration. He also has nine children. All seven of his sons have joined him in earning the rank of Eagle Scout. Mr. McKay follows the scout oath to "help other people at all times." Doing *pro bono* work is simply part of his life and his practice. In 2014, he handled five *pro bono* cases through the Bar's Pro Bono Commission – in four different judicial districts. *Pro bono* work is approximately one fourth of his practice. Last September, when asked if he could accept an additional *pro bono* case, he (under)stated, "I want to help, but I am feeling a little burdened right now." At that time, he had ten pending *pro bono* cases.

The Bar honored Mr. McKay with the Pro Bono Lawyer of the Year award at last year's Fall Forum. Public recognition isn't what motivates Mr. McKay, or any of us, to do *pro bono* work. We do *pro bono* work simply because it's the right thing to do. There are people who really need our services; we have the skills and means to assist; and we accept our ethical duty to step forward to help.

Real progress will be made by having all of us doing a little bit more legal work for the public good, rather than having a few lawyers doing a lot more.

In addition to giving financial donations to very worthwhile organizations like *And Justice for All*, there are many ways that we can help provide greater access to legal services. Here are a few:

Sign up on the Bar's *pro bono* roster at https://www.surveymonkey.com/s/UtahBarProBonoVolunteer.

The Bar's "Pro Bono Commission" screens *pro bono* cases from eligible clients and matches them with willing attorneys in areas of their expertise. Since 2011 the program has recruited 1,135 attorneys and placed 573 cases referred by judges and Utah Legal Services (new participating organizations are being sought). In all eight judicial districts, the Pro Bono Commission has established committees co-chaired by a district court judge and a local attorney. Together they recruit attorneys, place cases, and determine solutions for the legal needs of low income people across the state.

Participate in the Modest Means Lawyer Referral Program.

The Bar's Modest Means Lawyer Referral program offers people affordable legal assistance that matches their salaries (up to $70,000 for a family of four) and gives lawyers work by offering services discounted to up to $75 an hour. Since its inception in 2012, the program has made

1,067 referrals and currently has 179 participating attorneys and 13 advisors. *See* www.utahbar.org/members/lawyer-referral/modest-means-information-for-attorneys/ for more information. If you know of clients who need legal help and cannot afford your hourly rate, consider referring them to the Modest Means program.

Consider offering limited scope, unbundled services. Many parties want to represent themselves for cost or other reasons but could greatly benefit by having an attorney assist them with just part of their case. Rule 75 of the Utah Rules of Civil Procedure and Rule 1.2 of the Utah Rules of Professional Conduct allow lawyers to provide limited representation services, such as coaching, document review, or argument of a motion, without being responsible for the entire case. Having a lawyer's assistance for certain parts of a case is better than having no lawyer at all, and is a cost efficient alternative to complete *pro se* representation.

Volunteer through various other *pro bono* programs. Many other Bar-related programs exist that provide legal services to those in need, including the Young Lawyer Division's Tuesday Night Bar, the Wednesday Night Bar (for Spanish speakers), Wills for Heroes, and Wills for Seniors. Other initiatives include the Southern Utah Community Legal Center, the Timpanogos Legal Center, the Senior Center Clinic and the Debtor's Counseling Clinic (part of the U of U's Pro Bono Initiative), and the BYU Law School Pro-bono Legal Center.

Spread the word about other Access to Justice resources.

1. The limit for Small Claims Court has been increased from $5,000 to $10,000. Unlike in district court, businesses can have a non-lawyer employee represent the business in small claims court.

2. Utah State Courts have a Self-Help Center that provides free legal information, forms, and referrals via the Internet, telephone, text, and e-mail to people who do not have a lawyer, in which thousands have participated. The court website has information on the court process in various practice areas and sample pleading and motion forms. *See* www.utcourts.gov/selfhelp/.

3. The Utah Online Court Assistance Program provides assistance in preparing court documents for people without an attorney. *See* www.utcourts.gov/ocap/.

In late 2014, the Utah Bar Commission formed a "Commission on the Future of Legal Services" (Future Commission) comprised of over twenty-five Bar and community leaders to evaluate access to legal services issues resulting from developments in technology and economics. The Commission is co-chaired by Nate Alder and John Lund. The Future Commission's charge is to study and recommend ways that current and future Utah lawyers can more cost effectively provide legal and law-related services to the public, focusing on individuals and small businesses. The Future Commission expects to provide its report to the bar in July.

If you have other suggestions about how we can provide greater access to legal services at less cost, please share them with me or any other member of the Bar Commission.

Making the Case for Pro Bono Service – the Holland & Hart Experience

by David K. Broadbent

The Utah State Bar Pro Bono Commission encourages every attorney to be engaged in pro bono service. We have invited attorneys and firms throughout the state to establish internal policies that meet or exceed the fifty-hour annual standard of Rule 6.1 of the Utah Rules of Professional Conduct. The Commission has endorsed the practice of always having a pro bono matter as part of your case portfolio. When your current pro bono case is completed, a new pro bono case would be assigned to replace the matter you have followed to conclusion. Our 2014 Pro Bono Law Firm of the Year recipient, Holland & Hart, has adopted a pro bono policy that merits consideration. The Commission has invited the firm's managing partner, David Broadbent, to describe the policy in this issue of the Utah Bar Journal. We express appreciation to the attorneys and firms that have elected to participate in the Bar's pro bono program.

– Judge Royal Hansen

In a profession that places a premium on billing a high number of hours each year, hearing that one hundred *more* were expected was a bit of a surprise. Upon joining Holland & Hart in 2001, I became aware of the firm's strong commitment to pro bono service and learned that I would be expected to do pro bono work. This was clearly not a "Don't Ask, Don't Tell" approach to pro bono. Our pro bono policy states that every lawyer is expected to devote at least one hundred hours per year to pro bono work, which our policy defines as including both pro bono legal and public service. We recognize that not every lawyer will meet this goal every year, and that other lawyers will greatly exceed this goal in some years, but the expectation is that all lawyers will average at least one hundred pro bono hours annually over time.

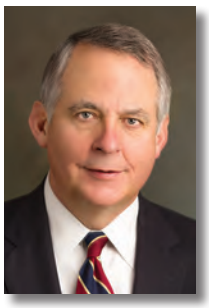
Judge Royal Hansen, on behalf of the Pro Bono Commission, asked me to share my insights and experience with pro bono work at Holland & Hart. Our Salt Lake office has been honored recently for its pro bono contribution by the Utah State Bar and the Federal Bar Association, and the firm as a whole is regularly ranked by the American Law Journal among the leading firms in the country for its pro bono work. I chair the firm's pro bono efforts and have served in that capacity for just over a decade.

Our Firm's Approach

The preamble to our firm's Public Service/Pro Bono Policy states, "We accept as a guiding principle that this firm has a special obligation to participate in public service activities without expectation of compensation and we expect each lawyer to accept and act upon that principle. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer…." (citing the Code of Professional Responsibility, Ethical Consideration 2-25).

The national Pro Bono Institute (the Institute) launched the Law Firm Pro Bono Challenge in 1993. Our firm was one of the founding firms of the Institute and has consistently been a signatory to the Pro Bono Challenge, which requires a firm to commit to provide pro bono services, as defined in ABA Model Rule 6.1, at one of two tiers for each lawyer: (a) a minimum of either five percent of the firm's total billable hours (ninety hours), or one hundred hours; or (b) a minimum of either

DAVID K. BROADBENT is a partner with the firm of Holland & Hart LLP.



three percent of the firm's total billable hours (fifty-four hours), or sixty hours. The Pro Bono Challenge further requires that a majority of the pro bono time contributed "should consist of the delivery of legal services on a pro bono basis to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means." *Law Firm Pro Bono Challenge: Commentary to Statement of Principles*, Pro Bono Institute, *available at* http://www.probonoinst.org/projects/law-firm-pro-bono/law-firm-pro-bono-challenge/.

For us, this commitment is real. In fact, when our associates fall short in meeting their pro bono expectations, the associates and partnership advancement committees make that clear in their evaluations. The deficits have occasionally slowed or derailed associates' progress toward partnership. When partner compensation issues are reviewed, all partners respond to the following: "If you fell materially short in meeting any of the firm's expectancies (total hours, chargeable hours or pro bono hours) during the past two years, please describe why."

A Pro Bono Tradition Not Without Controversy

It is, of course, one thing to have a written policy, and a different matter altogether to embed within a firm's culture a commitment to pro bono service. As with any effort to create and maintain an organization's culture, the example from the top speaks more loudly than any written policy possibly could. In short, modeling the desired activity by the firm's leaders is critical.

Our firm is fortunate to have leaders who are actively involved in and committed to pro bono service. This has included the representation of three Guantanamo Bay detainees in their habeas corpus petitions in the United States District Court for the District of Columbia and related matters by a group of attorneys led by the then-chair and the immediate past chair of our firm's management committee. Today, years after the Guantanamo legal action started, which was soon after the 2001 World Trade Center tragedy, it is easy to forget that providing pro bono representation of detainees was not universally viewed as a noble endeavor. In fact, some significant clients voiced their concerns, and a Deputy Assistant Secretary of Defense made comments, referring to law firms who were representing

detainees, that "corporate CEOs seeing this should ask firms to choose between lucrative retainers and representing terrorists." Ultimately, I am not aware of any clients who left the firm because of our involvement in the detainee cases. We subscribe to the belief that you will never regret doing the right thing even when it is not always the popular thing.

We remind each other and share with new attorneys accounts of significant pro bono work that are part of our history. One example is the firm's work in *Keyes v. School District No. 1*, which brought an end to school segregation in Denver. That work, which started in the late 1960s and continued until the last appeals were dismissed in 1997, involved many thousands of hours. Robert Connery, who worked on the case from beginning to end, recently related,

> While sustaining the work of several attorneys for many years, Holland & Hart weathered the adversity of an unpopular cause and along with the city, witnessed the bombing of the home of lead plaintiffs Wilfred Keyes and Lylaus Keyes and their children, the home of Judge William Doyle's family, and about thirty school buses. It was no small contribution.
>
> It was well known at the time that Safeway Stores, Inc. was one of Holland & Hart's major clients. Knowing this, opponents of the Supreme Court's decision (in 1969, to vacate the 10th Circuit's stay of the district court's injunction that required implementation of an integration plan) hanged Justice Brennan in effigy in front of one of Safeway's supermarkets and boycotted Safeway's stores in Denver. I was called into the office of the senior partner who represented Safeway Stores, Bill McClearn. He told me that he had the general counsel of Safeway Stores on the telephone and that he wanted to talk with me about the case. As I recall, the general counsel said something pretty close to the following: 'Our stores are being boycotted, we're losing money, and we don't like it one damn bit. But those are constitutional rights you are defending. I just wanted to let you know that we understand what you are doing, and we are not going anywhere.' To this day, I admire both Bill and this general counsel for their character and their respect for constitutional rights and the rule of law.

These accounts are part of our firm's lore and help reinforce and pass on to the next generation of lawyers the values we encourage. Every attorney and firm should have and share their own accounts of the pro bono matters that help define them.

A Procedure that Places Value on Pro Bono Work

Our policy provides that pro bono work is given the same weight as compensated work in screening and consideration of conflicts of interest and that pro bono work is conducted on the same basis as fully compensated work. Our client/matter intake memos require the same information for pro bono work as is required for compensated work, with one additional requirement: For pro bono work, we ask the responsible attorney to provide a brief explanation of why the matter should be pro bono. The explanations are usually satisfactory, but sometimes an attorney needs to be reminded that working for a family member or his or her homeowners' association is not pro bono work.

Finding Strong Pro Bono Opportunities

The matters we undertake are varied and involve nearly every legal area in which the firm is engaged. The common element, which we believe is a significant contributor to our level of pro bono participation, is that the attorneys doing the work find the

matters for themselves and have a passion for them. Recent pro bono matters in our Salt Lake City office include petitions for asylum; guardianship; adoption; landlord–tenant disputes; quiet title actions; water rights consultations; naturalization; post-conviction petition for relief; estate planning; new entity formation; the organization of a youth football league in Southern Utah; trademark applications; name change; bankruptcy; tax advice; labor and employment; lease matters; protective orders and divorce representation; and recovery for fraud on the elderly. Many referrals come from community, church, or legal organizations as well as from our paying clients. We also participate in the federal court's pro bono project, the Rocky Mountain Innocence Project, and the State Department's Hague Convention Attorney Network. Some referrals are directed to specific attorneys while others come as blanket solicitations for legal assistance. When we get those requests, we can usually meet the need by sending an email throughout the office or firm that explains the issue and asks for volunteers. Participation in the Bar's Tuesday Night Bar is also an excellent way for attorneys to meet their pro bono expectations.

Conclusion

Of course, we know that many ethical and "greater good" reasons exist for doing pro bono work. However, a compelling economic case can be made for having a robust pro bono program. Our experience is that a good pro bono program helps with recruiting and retention and provides an excellent training opportunity for young lawyers by giving them client interview, case management, courtroom, and transaction experience early in their careers. Pro bono matters also create opportunities to work with other attorneys in the firm with whom we might not otherwise work. Finally, while I cannot imagine telling a child or grandchild someday about the real estate, corporate, or receivership matters I spend much of my time on now (as exciting as they may be), I can picture myself asking, "Have I told you about the time we helped a family get their home back, just before Christmas, from the land pirate who stole it? Or the time we helped save a woman's life and kept her from losing what little money she had by getting her out of an abusive marriage?"

Our pro bono work can be the most rewarding and enjoyable work that we will do. It pays in ways far beyond the billable hour.

A not-to-be-missed event – 800 years in the making!

Photo credit: Donna Sokol, Law Library of Congress.

TRAVELING EXHIBIT

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Friday, April 3:
SALT LAKE CITY
Utah State Bar, kick-off event
645 South 200 East, SLC
Open House – 4:00 p.m. to 6:00 p.m.

Saturday, April 4:
SALT LAKE CITY
Main Public Library, Main Floor
210 East 400 South, SLC
801-524-8200
9 a.m. to 6 p.m.

Monday–Tuesday, April 6–7:
ST. GEORGE
Washington County Courthouse
206 West Tabernacle, St. George
435-986-5730
8:30 a.m. to 5 p.m.

Wednesday–Thursday, April 8–9:
OREM
Utah Valley University Library,
Lakeview Room (4th Floor)
800 West University Parkway, Orem
801-863-8886
April 8: 10 a.m. to 5 p.m.
April 9: 8 a.m. to 3 p.m.

Friday–Saturday, April 10–11:
LOGAN
Utah State University
Merrill-Cazier Library Atrium
3000 Old Main Hill, Logan
435-797-2678
April 10: 7 a.m. to 7 p.m.
April 11: 9 a.m. to 6 p.m.

Monday–Tuesday, April 13–14:
OGDEN
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3910 West Campus Drive, Ogden
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8 a.m. to 5 p.m.

Tuesday, April 14:
SALT LAKE CITY
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The University of Utah
451 South 1400 East, SLC
Ticketed event: magnacarta@utahbar.org

Wednesday–Friday, April 15–17:
SALT LAKE CITY
Matheson State Courthouse Rotunda
450 South State Street, SLC
8 a.m. to 5 p.m.

Saturday–Sunday, April 18–19:
SALT LAKE CITY
Main Public Library, Main Floor
210 East 400 South, SLC
801-524-8200
April 18: 9 a.m. to 6 p.m.
April 19: 1 p.m. to 5 p.m.

Please write to magnacarta@utahbar.org for more information.

Signatures were not common during medieval times; it was more common to stamp a legal document using a wax seal. King John's seal was not stamped directly onto the vellum of Magna Carta, but was attached by a cord. Shown at left and in above logo are both sides to one of King John's seals.

Patent Troll Legislation – Swinging Too Far?

by Chrystal Mancuso-Smith, Brett Johnson, and Joseph G. Pia

Introduction

This article focuses on a perhaps unanticipated conflict in patent law that has gained traction in both the media and the political arena and has become a major, ongoing issue in society – the prevalence of "Patent Trolls," namely, persons or entities who own patents but, for whatever reason, do not presently use the patent for its intended purpose, i.e., to make a widget, but instead challenge the rights of others who may infringe on that patent. The United States Patent and Trademark Office (USPTO) has defined patent infringement as "the act of making, using, selling, or offering to sell a patented invention, or importing into the United States a product covered by a claim of a patent without the permission of the patent owner." 35 U.S.C. § 271.

Terminology

Patent law, as you might imagine, is a field replete with acronyms. Examples relevant to this article include the terms NPE (a non-practicing entity) and PAE (a patent assertion entity). NPEs and PAEs are less pejorative terms to describe patent trolls. Notably, certain NPEs, such as university research laboratories, are generally excluded from being referred to as trolls though they technically may fall within the description of an NPE.

The NPEs actively, and quite often aggressively, seek to curtail the use of their patents by others without compensation, by first sending out demand letters that often result in a licensing agreement and fee, but they are not shy about filing suit. Use of the more pejorative term – "troll" – has come into vogue more recently and groups together all of the "enforcers," regardless of the veracity of their underlying enforcement efforts. As the number of patents began to increase exponentially, so did litigation over not only the ownership and/or user rights to the patents, but also, of relevance here, disputes over whether a person or entity was infringing on a patent owned by another.

Common Misconceptions

Of course, valid arguments can be made on both sides, and an in-depth analysis of the merits and weaknesses of both positions is not only extremely fact dependent but is also beyond the scope of this article. We would, however, like to provide some information as to some of the more common misperceptions/ misconceptions of the NPE that we have observed through the

CHRYSTAL MANCUSO-SMITH is a Partner at Pia Anderson Dorius Reynard & Moss (PADRM) practicing in the firm's civil litigation group. Her practice focuses primarily on business law, collection, insurance defense, and general contracts.

BRETT JOHNSON was a Partner at PADRM specializing in patent and complex litigation. It is with great sadness that PADRM reports that, just prior to the publication of this issue, Brett unexpectedly passed away due to a brief illness. His presence and friendship will be deeply missed by his colleagues.

JOSEPH G. PIA is a Founding Partner at PADRM where he has developed a significant practice in the areas of complex litigation including intellectual property, entertainment law, and commercial litigation.

recent efforts at the federal and state levels to address NPEs through the passage of legislation.

Enforcement of NPE Patents is Hardly a New Phenomenon

Despite the recent flurry of news articles and legislative proposals in the last several years – many written from a perspective of addressing this "new threat" to innovation and development – patent infringement claims from those who do not "practice" their invention, i.e., Patent Trolls, are not a new phenomenon. *See* Phil Goldberg, *Stumping Patent Trolls on the Bridge to Innovation*, Public Policy Institute (October 1, 2013), *available at* http://www.progressivepolicy.org/issues/economy/stumping-patent-trolls-on-the-bridge-to-innovation/. Eli Whitney, the famed inventor of the cotton gin, generated proceeds from patent infringement litigation. *Id*. Mr. Whitney did not achieve success in commercializing the cotton gin, but he spent years suing infringers. Indeed, the Patent Act does not, and never has, granted anyone any right to make or use anything; it grants the patent owner the right to exclude others from doing so without a license. Despite Mr. Whitney never achieving commercial success by selling the product himself, society benefited greatly from his invention.

When patent infringement cases brought by NPEs are looked at collectively, half of the cases were initiated prior to July 2005. For example, the Papst Licensing and Rates Technology filed its first cases in 1986. The bulk of the NPEs filed their first cases before 2000. The litigiousness of the NPEs, upon closer examination, appears to be attributed to the longevity of the NPE, rather than newness and aggressiveness. On average, Papst Licensing, for example, has filed roughly two cases per year for the past twenty-five years, arguably far fewer than many practicing companies today. Michael Risch, *Patent Troll Myths*, Seton Hall Law Review (2012), *available at* http://erepository.law.shu.edu/shlr/vol42/iss2/1. A similar misconception is that the dominant form of NPE patents cover "business methods patents" (patents that cover a method of doing business, rather than an invention apparatus), which are favored by NPEs because these types of patents have broad coverage and are difficult to defend in a patent infringement suit. This is confirmed by studies, including a 2013 study by Patent Freedom, which have found that between 75% and 89% of NE patents are not business-method patents. Patent Freedom, *Investigations into NPE Litigation Involving Business Method Patents* (September 3, 2013), *available at* https://www.patentfreedom.com/wp-content/uploads/2013/09/NPE-Ligitations-involving-Business-Method-Patents_Sept-4-2013.pdf. Instead, most of the patents are classified in the USPTO under "Communications and Computers" and "Mechanical Arts" with a minor number in the "Chemical Arts" categories. *Id*.; Risch, *supra*, at 475.

With respect to patent quality, we find that, contrary to the generalizations made, NPE litigation is often brought over important or influential patents. Of those which are fully litigated, only 28% are found invalid, in contrast to the 20% of other types of patents, which are found invalid through litigation.

PAE proponents also make general claims that do not appear to be fully supported by the facts and figures. For example, such proponents often defend their practice by claiming that the PAEs promote investment; however, this does not appear to be the case. One position favoring PAEs that is supported is the fact that PAEs do offer some amount of protection for individual inventors or small companies, who would be unable to enforce their patents against larger companies, to the extent that PAEs provide litigation funding and contingency fee support where litigation could not otherwise be funded by the small entities or individual inventors. *See* Sannu K. Shrestha, *Trolls or Market-Makers? An Empirical Analysis of Nonpracticing*

Entities, 110 Colum. L. Rev. 114, 119-31 (2010) (providing an overview of relevant literature and competing arguments).

History of Patent Law

The granting of exclusive rights to inventors of new products in the United States traces back to Colonial Massachusetts where, in 1641, the Massachusetts General Court gave exclusive commercial rights to Samuel Winslow for his salt-making process, with other colonies and subsequently states soon following suit. By the end of the 18th century, the generalized patent law of the various states was not only conflicting but was also burdensome to potential filers. This led to the decision to govern this area on a federal level, commencing with the Patent Act of 1790. Numerous amendments followed, culminating in the modern Patent Law as it exists today where patent cases are heard before the United States Court of Appeals for the Federal Circuit.

Recently Enacted Federal Legislation and Case Law

The Leahy–Smith America Invents Act, which amends 35 U.S.C. §§ 1 et seq., as well as recent case law, sought to address concerns that businesses were having to spend money in defending against meritless patent infringement claims. The Leahy–Smith Act added various measures and instituted a special review for Covered Business Methods (CBM) for a limited duration. For claims that fall within that category, a defendant to a patent infringement claim can seek to have the USPTO review the already issued patent and potentially cancel the claims of an already issued patent.

Business method claims seem to draw the most scrutiny from society because an idea in the area of finance or other areas of business simply does not feel like a protectable "invention" like those in the hard sciences. Like Congress, the United States Supreme Court has recently restricted patent coverage for business methods. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2352–53 (2014). Three Justices concurred in *Alice* that, in their view, a business method can never be patentable. *Id*.

Following *Alice*, the Federal Circuit invalidated an issued patent that covered a method of doing business, which involved claims that covered the exchange of advertising material in exchange for access to copyrighted material unpatentable. *Ultramercial v. Hulu, Inc*., 772 F.3d 709, 715–16 (Fed. Cir. 2014). Judge Mayer separately concurred and wrote that "[t]he problem [in *Alice*] was not that the asserted claims disclosed no innovation, but that it was an entrepreneurial rather than a technological one." *Id*. at 721 (Mayer, J., concurring). Judge Mayer continued that "[i]n assessing patent eligibility, advances in non-technological disciplines – such as business, law, or the social sciences – simply do not count." *Id*. To this point, however, neither the Supreme Court nor Congress has categorically invalidated business-method patents.

In addition to CBM proceedings, the Leahy–Smith Act provided for *inter partes* review (IPR) of patents that were not business-method patents. The IPR proceeding is similar to a trial, but it is conducted before a panel of three Administrative Law Judges at the USPTO. The proceedings must be conducted within eighteen months of the filing of a petition but upon good cause can be extended to two years from the filing of the petition. Some big-business law firms have taken the approach that an IPR should be sought as a matter of course along with a stay of the district court litigation. For example, a partner at Hiscock & Barclay, LLC, presented a seminar wherein he recommended that defendants file an IPR to "burn the clock" and "grind [the plaintiff] down."

So, the Leahy–Smith Act provides at least three opportunities where the claims of a patent can be found invalid. First, it must pass through the USPTO, which is an extensive process that takes about three years, costs around $15,000, and is examined before being issued (or not issued) by an individual trained in the particular field of the invention. Second, if the patent ultimately issues, it is now common practice for defendants in a patent case to seek another review of the claims by a three-judge panel before the USPTO and seek a stay of litigation pending the IPR proceeding. Finally, if the defendant is not successful in invalidating the patent during the IPR, it will then seek to do so in the district court litigation. With so many different forums, it is very likely that someone will decide that the claims are invalid.

Proposed Federal Legislation

Recent proposed legislation is directed specifically toward making it more difficult for non-practicing entities to bring patent suits. The Innovation Act, H.R. 3309, sponsored by House Judiciary Chairman Robert Goodlatte, passed in the U.S. House of Representatives on December 5, 2013, and requires: (1) heightened pleading requirements in that plaintiffs in infringement suits must identify all asserted patents and describe in a high degree of detail the alleged infringement, including the specific infringed claims of each patent and the name or model number of each accused product; (2) fee-shifting to the losing party, where the court must award the prevailing party reasonable fees and expenses incurred unless it finds the losing party was justified in its position; (3) additional ownership disclosure requirements, where patent holders must disclose all beneficial owners of a patent-in-suit, allowing a defendant to join such beneficial owners to the suit; and (4) preclusion from pursuing certain types of defendants in some circumstances, e.g., where a plaintiff sues a product manufacturer and its customers, suits against customers may be stayed if the manufacturer agrees to handle the suit on behalf of its customers, avoiding duplicative defense costs.

One of the difficulties with the first suggested change, heightened pleading requirements, is that there is often a lack of publically available information to patent owners before filing suit. Although parties and their counsel have an obligation under Federal Rule of Civil Procedure 11 to have a good faith basis before filing suit, the plaintiff in patent litigation often cannot know all products that infringe without the benefit of discovery. Should the heightened pleading requirements be required, it might be necessary to allow plaintiffs some form of pre-suit preliminary discovery in order to be able to make informed decisions and meet the heighted pleading standards. This is particularly true in cases involving methods of manufacture where there is often little to no public information about such things. Otherwise, ideas could be stolen and used without consequence.

With respect to the second proposal, fee-shifting, the standard default rule in the United States is that each party bears its own respective attorneys fees. The current version of the Patent Act provides for attorneys fees to the prevailing party in "exceptional" cases, *see* 35 U.S.C. § 285, and the United States Supreme Court recently lowered the standard, essentially moving from a subjective bad faith standard to an objectively unreasonable standard. *Octane Fitness, LLC v. Icon Health & Fitness, Inc*., 134 S. Ct. 1749, 1756 (2014). Arguments can be made for and against a fee-shifting approach, but it is not clear that patent litigation should be treated differently than other types of litigation in that regard. Proponents of a fee-shifting paradigm will typically argue that the prevailing party cannot be made whole if it still must pay attorneys fees, while opponents of a fee-shifting provision will typically argue that the fee-shifting hurts the small party more than the big party because an award of attorneys fees could be devastating, and in some cases, bankrupt a small company.

With respect to the third proposed change requiring additional ownership information, that information is generally sought and provided during discovery. Again, there does not appear to be any good reason to deviate from other areas of the law in this regard.

Finally, with respect to the last proposed change, which involves the ability of retailers to get out of the suit if the manufacturer of an infringing product agrees to be wholly responsible, the concern by patent owners of course is that the manufacturer will be insolvent in the event a judgment is ultimately obtained. Retailers argue that this is necessary to avoid costly litigation. In reality, though, in most cases, the retailer is indemnified by the manufacturer, and often a single law firm will represent all defendants in patent litigation.

State Legislation

Many states have also jumped into the mix. Led by Vermont, more than twenty states have passed legislation aimed at curtailing patent enforcement. The laws generally state that meritless assertion of patents is a violation of the consumer protection

laws of the state. Problems abound from this, including the fact that subject matter jurisdiction for patents lies exclusively with federal courts, thus implicating the federal preemption doctrine. To determine whether a patent claim lacks merit, the technology at issue must be understood. This raises not only a concern that an individual charged with enforcement of the respective state acts has complete discretion whether to bring a claim but also issues of federal preemption.

The states that have followed Vermont's model include Alabama, Georgia, Idaho, Louisiana, Maine, Maryland, Missouri, New Hampshire, North Carolina, Oregon, South Dakota, Utah, and Virginia. *See* S.B. 121, 2014 Reg. Sess. (Ala.); Ga. Code Ann. §§ 10-1-770 to -774; Idaho Code Ann. §§ 48-1701 to -1708; La. Rev. Stat. § 51:1428; Me. Rev. Stat. Ann. §§ 8701-02; Md. Code Ann., Com. Law §§ 11-1601 to -1605; Mo. Rev. Stat. §§ 416.650 to .658; N.H. Rev. Stat. Ann. §§ 359-M:1 to -M:5; N.C. Gen. Stat. §§ 75-136 to -141; S.B. 1540, 77th Leg., Reg. Sess. (Or. 2014); S.B. 143, 89th Leg., Reg. Sess. (S.D. 2014); Utah Code Ann. §§ 78B-6-1901 to -1905; Va. Code Ann. §§ 59.1-215 to -215.4.

Recently, the United States District Court for the District of Nebraska found that the Nebraska State Attorney General's Office had overstepped its bounds in seeking to enforce anti-patent litigation. *Activision TV, Inc. v. Bruning*, No. 8:13-cv-00215, (D. Neb. Dec. 2, 2014). The federal court ordered the Nebraska Attorney General to pay $725,000 for attorneys fees to affected parties because the attorney general had sent a cease and desist letter to a law firm representing purported "patent trolls." The attorneys fees award amounts to more than ten percent of the total annual budget for the Nebraska Attorney General's Office.

Utah's State Act

In the 2014 General Session, House Bill 117 was proposed in an effort to set minimum standards for demand letters in patent infringement matters. The bill was supported by a number of Utah organizations, including, among others, the Utah Association of Realtors, the Utah Bankers' Association, the Utah Food Industry, the League of Credit Unions, the Mining Association, and the Utah Technology Counsel. The Bill, later enacted and codified as

Utah Code Ann. § 78B-6-1901 through -1905, addressed the potential for a bad faith component to those individual, not just NPEs, who send out demand letter(s) to Utah residents or business entities asserting patent infringement. Interestingly, the statute acknowledged the federal preemption issue at the start but stated that the statute did not "interfere[] with legitimate patent enforcement efforts" and instead sought "to protect Utah business…and to build Utah's economy."

The statute provides for both punitive damages up to $50,000, plus actual damages, attorneys fees and costs for recipients of letters that are determined to have been sent in bad faith. Not only does the law allow a recipient to bring suit, but it also empowers the attorney general to conduct civil investigations and bring civil actions. Lastly, the statute contains a bond provision, currently capped at $250,000.

While this statute appears to have real teeth to discourage NPEs from sending out demand letters that may be of questionable merit, it is simply too early to evaluate the effectiveness and/or overall usefulness of this new law until cases work their way through the Utah court system.

"[T]here is no incentive to disclose how to make and use the patented invention, absent the patent system. The patent system rewards innovation and disclosure in exchange for a limited-term monopoly."

Have we possibly swung too far?

Stephen Haber, a professor of political science and senior fellow of the Hoover Institution, and Ross Levine, a professor of business at the University of California, Berkeley, offer the opinion that the patent system is not broke and does not need to be fixed. Stephen Haber and Ross Levine, *The Myth of the Wicked Patent Troll*, Wall St. J., June 29, 2014, *available at* http://www.wsj.com/articles/stephen-haber-and-ross-levine-the-myth-of-the-wicked-patent-troll-1404085391.

Haber and Levine write that the "truth is that patent reform activists have not provided any evidence that the current patent system or Patent Monetization Entities – PME's, the technical, non-pejorative term for a 'patent troll' – have hindered innovation and entrepreneurship." *Id*. They continue that "[r]esearch [they] conducted with Alexander Galetovic of the Universidad de Los Andes found that innovation rates have been strongest in exactly the industries that patent-reform advocates claim are suffering from 'trolls' and a broken patent system. The innovation in these industries is matched with a rapid decline in prices." *Id*.

They conclude that

> [t]here is one basic reason behind the attacks on trolls: Big Money.… Indeed, some corporations are looking to gain a competitive edge by changing the rules of the game.… Corporations that pay large sums for patented technologies will point to lawsuits, trolls and anything else that will encourage lawmakers to pass such reforms. But when policy makers consider reforming the patent system, they should not rely on often repeated, but never substantiated, claims that patent trolls and lawsuits stymie innovation and the commercialization of complex technologies. They should demand robust evidence that the current system is slowing down innovation. That evidence does not exist.

Id.

Big business driven patent-reform legislation has not provided an answer to the question of why an individual inventor or small company should be provided less protection under the law than a goliath corporation.

Harbor and Levine do not really discuss the basic philosophical belief behind a patent system. The patent system rewards innovation. It grants the patent owner a limited-term monopoly in exchange for the requirement that a patent owner must disclose the technology sufficiently that one of "ordinary skill in the art" could make and practice the invention from reading the patent. *See* 35 U.S.C. § 112.

The alternative to patents is trade secrets because there is no incentive to disclose how to make and use the patented invention, absent the patent system. The patent system rewards innovation and disclosure in exchange for a limited-term monopoly. It is very difficult to convince an individual inventor that he or she should use resources to develop ideas or spend $15,000 or more of his or her own hard-earned money to obtain a patent if there is no way to enforce the patent if and when it is granted. Indeed, the patent system is really just a subcomponent of the capitalistic ideal that humans function best when they are given a direct incentive.

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Whether to Appeal in Civil Cases

by Beth E. Kennedy

Whether to appeal is the first question in the appellate process. And often, it is also the most important one.

The presence of an error alone is not a sufficient reason to appeal. Indeed, all trial courts err. This is true because the judicial system has chosen efficiency at the expense of correctness in some circumstances. For example, consider what happens at trial when an evidentiary objection is made. The trial judge does not have time to stop the trial and research the issue extensively before issuing a ruling. The system, by design, places trial judges in an impossible position. Lawyers should warn clients not to expect error-free litigation.

> *"[A]sk yourself: Did the trial court err, or are you just dissatisfied with the result? Answering this question early and honestly can sometimes save significant resources."*

In light of these realities, deciding whether to appeal requires more than the identification of an error. It involves an evaluation of the potential costs, the potential benefits, and the probable result after the appeal. Below are questions every potential appellant should ask before deciding to file a notice of appeal.

What are the potential costs?

The costs of an appeal can extend beyond the financial cost of paying counsel to submit briefs and present oral argument. In some cases, an appeal presents a risk that your client will have to pay the opponent's attorney fees under a statutory or contractual fee provision. Depending upon the nature of the case, it can also create stress and prevent closure for your client during the long appellate process.

What are the potential benefits?

Victory in the appellate court doesn't always mean your client has obtained the result he wants. Reversal on appeal could end the case in your favor, but it could also simply provide another opportunity to prevail in the trial court. If a new trial is the best result you can achieve on appeal, then deciding whether to appeal will require you to consider your likelihood of success in the new trial, along with the costs of a second trial.

What is the probable result?

Attempting to determine the probable result after appeal is more complicated than predicting the likelihood that your argument will prevail. For example, even the best legal arguments can fall flat when faced with appropriate procedural bars. Lawyers should warn clients that the appellate courts will not correct every error that the trial courts make. Instead, lawyers should consider a number of questions when analyzing the probable result after appeal:

Basis for Appeal

The first step is of course to identify and analyze the trial court's errors to determine whether it is worthwhile to

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proceed. But also ask yourself: Did the trial court err, or are you just dissatisfied with the result? Answering this question early and honestly can sometimes save significant resources.

Jurisdiction

Would the appellate court have jurisdiction over your appeal? On one hand, your appeal may be too late. The trial court may be able to extend the deadline, but don't count on it. Utah R. App. P. 4(e).

On the other hand, your appeal may be too early. If there is not a final judgment in your case that triggers the right to appeal, your appeal may be dismissed without prejudice. But it can sometimes be difficult to figure out whether you have an appealable ruling. The supreme court has issued a few opinions recently that help to answer that question:

- *Central Utah Water Conservancy District v. King*, 2013 UT 13, ¶¶ 9–16, 297 P.3d 619 (identifying the requirements for a final, appealable judgment)
- *Butler v. Corporation of President of the Church of Jesus Christ of Latter-day Saints*, 2014 UT 41, ¶¶ 17–19, 337 P.3d 280 (stating the conditions for appealing from an interlocutory order)
- *Garver v. Rosenberg*, 2014 UT 42, ¶¶ 7–15, ___ P.3d ___ (discussing the effect of a premature notice of appeal)

Preservation

Are your issues preserved? In other words, did trial counsel notice the errors and give the trial court an opportunity to correct them? If not, you should probably not challenge them on appeal. *In re Guardianship of A.T.I.G.*, 2012 UT 88, ¶ 21, 293 P.3d 276 (explaining that an issue is preserved for appeal only if it was specifically raised in a timely fashion and with "supporting evidence or relevant legal authority"). Unpreserved issues can serve as the basis for reversal only in very limited circumstances – if "the trial court committed plain error or exceptional circumstances exist." *State v. Nelson-Waggoner,* 2004 UT 29, ¶ 16, 94 P.3d 186.

Re-creating the Record

Is trial counsel's objection on the record? In some cases, trial counsel has made the relevant objection in chambers or in a document that is not in the trial court's docket – for example, counsel may have handed the objection to the judge in open court. If the objection is not in the record, you will need to determine whether the record can be re-created to show that the issue was preserved. Utah R. App. P. 11(f), (g). If you do not re-create the record, then you are likely out of luck. *State v. Prawitt*, 2011 UT App 261, ¶¶ 9–10, 262 P.3d 1203.

Standard of Review

What standard of review will the appellate court apply? If the standard of review is deferential to the trial court, it will not be enough for you to convince the appellate court that it would have reached a different result. For example, if the error was in a finding of fact or the admission of evidence, then the error must be fairly straightforward and serious to warrant relief. But if the standard of review is not deferential, then the appellate court's opinion is all that matters. And if the error was in giving a certain jury instruction or in the interpretation of a statute, then your chances are considerably better. In other words, your chances of reversal increase as the deference given to the trial court decreases.

Prejudice

Did the error influence the outcome of the case? Put differently, if the trial court had not erred, is there a substantial likelihood that the outcome would have been different? If the error was harmless, it will not warrant reversal. Utah R. Civ. P. 61; Utah R. Crim. P. 30(a).

In some cases, determining whether the error was harmless hinges upon what is in the record for the appellate court to consider. For example, if you claim correctly that the trial court erred in excluding your expert witness, but you do not place in the record what the expert would have said had he or she testified, then you probably cannot demonstrate what impact that testimony would have had at trial to show that the outcome likely would have been different.

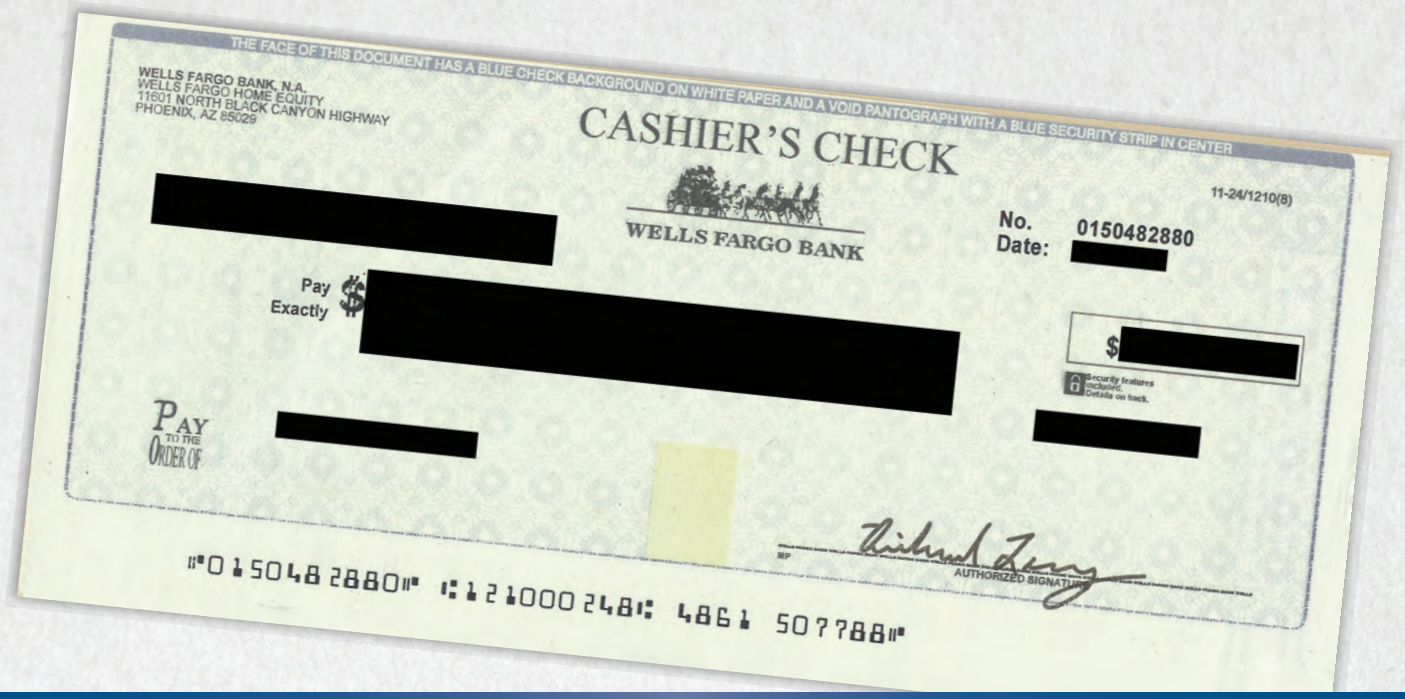
Cross-Appeal

Is your opponent likely to file and prevail on a cross-appeal? If you prevailed on any issue before the trial court, filing an appeal could prompt your opponent to file a cross-appeal, potentially jeopardizing your partial victory.

Alternate Grounds for Affirmance

Could the appellate court affirm on alternate grounds? If your opponent presented more than one basis for prevailing below, but the court only ruled on one, the appellate court in some circumstances may affirm the ruling on one of the remaining grounds. If this is a possibility, you should consider the merits of each alternate ground and determine whether it was raised sufficiently in the trial court to permit the appellate court to affirm. *See, e.g., Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29 P.3d 1225.

Ultimately, these factors operate to favor the party who prevailed in the trial court. This makes the question of whether to appeal in civil cases a complex one. If there is any question, it is almost always a good idea to file a timely notice of appeal. Filing that simple document will preserve your right to appeal while you assess whether it will be worthwhile to move forward. If the answer turns out to be "no," you can dismiss your appeal. But either way, reaching the answer requires a complex cost-benefit analysis and some familiarity with the appellate process.



WE CAN'T TELL YOU ABOUT OUR LATEST SETTLEMENT.

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

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

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

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Appellate Highlights

by Rodney R. Parker and Julianne P. Blanch

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

iMatter Utah v. Njord
No. 13-4173, 2014 U.S. App. LEXIS 24164 (10th Cir. Dec. 22, 2014)

Utah Department of Transportation's parade permitting requirements, which include insurance and indemnification requirements, were not unconstitutional as applied even though Utah does not exempt indigent applicants from the requirements. The court held, however, that **the insurance and indemnification requirements were not narrowly tailored to serve Utah's significant public interests of promoting public safety.** There was no evidence that the requirements addressed public safety or had any effect on the direct expenses Utah incurs in hosting a parade, and the requirements were not narrowly tailored to serve the state's interest in protecting itself from liability.

Dish Network Corp. v. Arrowood Indemnity, Co.
772 F.3d 856 (10th Cir. Nov. 25, 2014)

Applying the mandate rule to an effort by insurers to file post-appeal motions for summary judgment raising additional policy-based challenges to the insured's claim that the insurers had a duty to defend, the court held that **the remand language, which "directed the district court 'to address…in the first instance' the additional arguments that were asserted by the Insurers in their original summary judgment motions but not resolved by the district court in granting those motions,"** *id*. at 866 (emphasis added) (omission in original), **did not limit the district court from considering other arguments the insurers might have regarding the duty to defend.**

In re Millennium Multiple Employer Welfare Benefit Plan
772 F.3d 634 (10th Cir. Nov. 13, 2014)

Participants and employers in multiple states sued the Millennium Multiple Employer Welfare Benefit Plan (the Plan) and multiple insurance companies that held their life insurance policies. The plaintiffs alleged tort claims and sought a declaratory judgment over ownership of their policies. The Plan declared Chapter 11 bankruptcy, and one insurance company sought to interplead the cash value of the policies it held into the court and enjoin the plaintiffs from prosecuting any state tort claims against it. The bankruptcy court granted the interpleader petition in part, but denied injunctive relief relating to the state tort claims. The Tenth Circuit affirmed, holding that **interpleader relief does not permit the insurance company to shield itself from its tort liability or to limit its total liability in tort to the value of the policies.**

Woods v. Standard Ins. Co.
771 F.3d 1257 (10th Cir. Nov. 10, 2014)

State employees, representing a class of New Mexico state and local government employees, commenced action in state court

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alleging that they paid for insurance coverage through payroll deductions and premiums pursuant to a policy issued by their insurer but did not receive the coverage for which they paid. Defendants removed to federal court under the Class Action Fairness Act (CAFA). The district court remanded to state court, finding that the local controversy exception to CAFA required it to decline jurisdiction. The Tenth Circuit reversed. **Although plaintiffs could not satisfy the "local defendant" requirement of CAFA's local controversy exception, 28 U.S.C. § 1332(d)(4)(A), simply by naming the insurance company's local agent as a defendant, the local agent's conduct did not form a significant basis for the plaintiff's claims,** and the plaintiffs did not seek significant relief from her.

Tennille v. Western Union Co.
Nos. 13-1378, 13-1456, 2014 U.S. App. LEXIS 24168 (10th Cir. Dec. 22, 2014)

A Rule 7 appeal bond cannot cover costs of notifying class members of an appeal or administrative costs in maintaining a settlement pending appeal. Several class members had objected to a settlement of claims against Western Union relating to how it handled failed wire transfers. The district court overruled their objections, certified the class, approved the settlement, and entered final judgment. The district court's order required the objectors to post a bond of over $1 million in order to pursue an appeal of their objections, covering three categories of costs: $647,674 to send class members notice of the appeal, $334,620 in administrative costs to maintain the settlement pending appeal, and $25 for "printing and copying." The court decreased the amount of the bond to $5,000, which it deemed to be the reasonable cost of printing and copying.

B.R. v. Rodier
2015 UT 1, 2015 Utah LEXIS 1 (Jan. 9, 2015)

The children of a man who shot and killed his wife – their mother – while under the influence of medications prescribed to him, filed suit against the nurse practitioner who had prescribed the medication as well as the consulting physician. In *B.R. ex rel. Jeffs v. West*, 2012 UT 11, 275 P.3d 228, the Utah Supreme Court reversed the dismissal of the childrens' tort claims against the nurse practitioner, holding she had a duty of reasonableness that extended to third parties who might be injured as a foreseeable result of her negligence. In this case, the court affirmed the dismissal of the childrens' claims against the consulting physician, holding that the provision of the Nurse Practice Act allowing a nurse practitioner to prescribe schedule II–III controlled substances "in accordance with a consultation and referral plan," *id.* ¶ 6 (citing Utah Code Ann. § 58-31b-102(13)(c)(iii)), **does not impose a duty on a physician to consult with the nurse practitioner on each individual prescription of a controlled substance.**

State v. Collins
2014 UT 61 (Dec. 30, 2014)

Defendant was convicted of murder and robbery. Several months after his conviction, he filed for reinstatement of his right to appeal pursuant to *Manning v. State*, 2005 UT 61, 122 P.3d 628, and Rule 4(f) of the Utah Rules of Appellate Procedure. He claimed neither counsel nor the trial court informed him of the thirty-day deadline to appeal. The court held that **reinstatement of the right to appeal must be based on a showing by a preponderance of the evidence that neither the court nor counsel properly advised of right to appeal, and but for that failure, the defendant would have appealed.**

Utah Resources International, Inc. v. Mark Technologies Corp.
2014 UT 59 (Dec. 23, 2014) & 2014 UT 60 (Dec. 23, 2014)

These companion cases involve the same underlying fair value proceedings initiated by dissenting minority shareholders. In 2014 UT 60, the court affirmed the district court's refusal to rule on Utah Resources International's motion for abatement of interest on the judgment under Rules 60(b) and 62. The court explained that district courts are not empowered to abate interest under those rules and that **the proper way to abate interest pending appeal would be to tender payment and then seek a satisfaction of judgment under Rule 58B.**

In 2014 UT 59, the court addressed the related issue of whether a judgment debtor waives his right to appeal by voluntarily paying a judgment. The general rule is that "if a judgment is voluntarily paid, which is accepted, and a judgment satisfied, the controversy has become moot and the right to appeal is waived." *Id.* ¶ 31 (citation and internal quotation marks omitted). The court clarified that while this general rule remains valid, **a judgment debtor may preserve his or her right to appeal as long as the intention of preserving the right to appeal is "made to appear" clearly on the record.** *Id.* ¶ 32 (emphasis added) (citation and internal quotation marks omitted). The case also contains a useful discussion of the circumstances under which various valuation discounts may be applied in valuing dissenters' shares.

Lane Myers Construction, LLC v. National City Bank
2014 UT 58 (Dec. 19, 2014)

Property owners secured a construction loan through the defendant, which they used to make periodic draws to pay a contractor for the development of two residential properties. Defendant required the plaintiff to hand write lien waivers on the requests for draws. Upon the owners' default, contractor attempted to enforce the lien against the defendant. Defendant asserted the contractor waived his liens. The plaintiff–contractor challenged the handwritten waivers as insufficient to effect a release under the Utah Mechanic's Lien Act (the Act). The trial court held the waivers constituted substantial compliance, but the court of appeals reversed, holding the language was missing essential elements set out in the Act. The supreme court held

that the statute is a safe-harbor, not a requirement, and the handwritten terms alone were not sufficient to effect a lien release. **For an effective lien release, the defendant must demonstrate both a knowledge of a right in a lien and the intentional relinquishment of that right.**

Johnson v. Office of Professional Conduct, Utah State Bar 2014 UT 57 (Dec. 12, 2014)

The Office of Professional Conduct (OPC) investigated allegations of professional misconduct against an attorney and referred the matter to a screening panel of the Ethics and Discipline Committee of the Utah Supreme Court (Committee). The screening panel provided a notice of informal complaint (NOIC) to the attorney notifying him that the OPC believed he may have violated certain rules. At the hearing, the screening panel determined that the attorney had violated another rule – Utah Rule of Professional Conduct 1.2 (representation) – which the attorney was unprepared to address because it was not listed in the NOIC. The attorney filed an exception to the screening panel's determination and presented additional evidence that he had not violated Rule 1.2 but did not request a hearing. The committee chair did not consider the additional evidence in ruling on the exception and affirmed the screening panel's determination. On appeal, the supreme court considered the additional evidence and reversed the Committee's determination that the attorney violated the rules, finding that it was not supported by substantial evidence. **The court instructed the rules committee to propose changes to the rules to address its concerns over the procedural fairness and efficiency of new charges arising in screening panel hearings.**

Gardiner v. Taufer 2014 UT 56 (Dec. 9, 2014)

A woman petitioned for and obtained a declaration of unsolemnized marriage between herself and her deceased partner. The district court allowed several of the partner's cousins to intervene in the action, granted their Utah Rule of Civil Procedure 60(b) motion to set aside the marriage declaration, and then dismissed the case on its own initiative for untimely service under Rule 4(b)

(i) of the Utah Rules of Civil Procedure. The supreme court reinstated the marriage declaration, agreeing with the woman's arguments on appeal that she had waived service of process on behalf of her partner's estate during the time she served as its personal representative. The court also noted that **it was improper for the district court to dismiss the case on its own initiative without giving the woman notice and an opportunity to respond to its determination on service.**

Tomlinson v. NCR Corp.
2014 UT 55 (Nov. 25, 2014)

This case involved whether language, and lack of language, in a Corporate Management Policy Manual can create an implied contract that "core" employees could not be terminated without cause or certain procedures. One policy in the manual designated "tactical" employees as at will but said nothing about core employees. Another policy contained language on performance improvement but did not state employees were at will. Relying on language in *Cabaness v. Thomas*, 2010 UT 23, 232 P.3d 486, the court of appeals had reversed the district court's grant of summary judgment to the employer and concluded the lack of language about core employees as well as the performance improvement language raised a factual question about at-will status of a core employee such as plaintiff. In reversing the court of appeals and finding plaintiff's employment was at will, the supreme court examined prior cases, distinguished *Cabaness*, and once again **reiterated the strong presumption of at-will employment in Utah.**

Cope v. Utah Valley State College
2014 UT 53 (Nov. 21, 2014)

In this case dealing with the common law public duty doctrine, the supreme court reversed, in part, prior case law and clarified that doctrine. Plaintiff was injured while she was a dancer on defendant college's ballroom dancing team and was practicing with a partner. She sued the college, and the district court granted summary judgment on grounds that under the common law public duty doctrine, defendant-college owed no duty of care to plaintiff because there was no special relationship. In *Cope v. Utah Valley State College*, 2012 UT App 319, 290 P.3d 314, the court of appeals reversed, finding there was a special relationship so that this exception to the public duty doctrine applied. In a significant decision, the supreme court upheld the court of appeals, but for different reasons. The supreme court held that the doctrine does not even apply to ballroom dancing instruction because that instruction is not a public duty "owed to the general public at large" or in the instant situation to the college's student body and faculty. *See Cope*, 2014 UT 53, ¶ 38. In the decision, however, the court **examined the common law public duty doctrine in depth and affirmed its continued applicability in Utah despite the later adoption of the Utah Governmental Immunity Act.** It also reversed a prior public duty case, *Webb v. University of Utah*, 2005 UT 80, 125 P.3d 906, to the extent that Webb states or implies the public duty doctrine applies to acts of a public entity, finding that the doctrine applies only a public entity's omissions.

Advanced Forming Technologies, LLC v. Permacast, LLC
2015 UT App 7 (Jan. 8, 2015)

In a breach of contract case, the defendant's claim that the plaintiff had not provided evidence to support its damages claim did not qualify as a showing that the defendant was entitled to summary judgment, given that the motion was filed before the end of fact discovery. "Considering that discovery has not yet closed, there is nothing unusual or inappropriate about the fact that [the plaintiff] had not yet proved its damages." *Id.* ¶ 11. **Unless the defendant had submitted a well-supported motion establishing that the plaintiff had suffered no damages, the plaintiff did not yet need to prove its damages to avoid summary judgment.**

Lodges at Bear Hollow Condominium Homeowners Association v. Bear Hollow Restoration
2015 UT App 6 (Jan. 2, 2015)

"To survive a motion for summary judgment on an alter ego theory, the party alleging alter ego liability must present evidence creating a genuine issue of disputed material fact with respect to both [the formalities requirement,]" which assesses whether the personalities of the two entities demonstrate a degree of the unity of interest and ownership such that they are one and the "fairness requirement," which requires the movant show observance of the corporate form would sanction a fraud, promote injustice, or condone an inequitable result. *See id.* ¶ 12 (citation and internal quotation marks omitted). **"[T]he possibility that a plaintiff may have difficulty enforcing a judgment against [the corporate entity] alone is not the type of injustice that warrants piercing the corporate veil."** *Id.* ¶ 21 (emphasis added) (alteration in original) (citation and internal quotation marks omitted).

Faucheaux v. Provo City
2015 UT App 3 (Jan. 2, 2015)

Applying *Cope v. Utah Valley State College*, 2014 UT 53, decided just six weeks earlier, the court of appeals held that **the public duty doctrine exception to liability for public entities applies only if the actor has not established a special relationship "'that imposes a specific duty of care toward the plaintiff as an individual that is distinguishable from a public duty owed to the general public.'"** *Id.* ¶ 17 (emphasis added) (citation omitted). The court lists four circumstances creating a special relationship, one of which is "when a government agent undertakes specific action to protect a person or property." *Faucheaux*, 2015 UT App 3, ¶ 18 (citation and internal quotation marks omitted). The plaintiff-husband had called police because he believed his wife was suicidal. Police arrived, and the wife denied overdosing, saying she took the pills as prescribed and that the powder was from making pancakes. Police tucked the wife into bed and told the husband that his wife did not overdose and just needed to sleep it off. The husband asked police to take his wife to the hospital, and the police told him to leave the wife alone and if he called again, they would arrest him. The wife died. The court held these facts sufficient to describe a special relationship but stated the holding only "imposes on police officers the duty to act reasonably when they enter a person's home, undertake specific action to protect that person, and prevent others in the home from taking protective action." *Id.* ¶ 25.

Hunsaker v. American Healthcare Capital
2014 UT App 275 (Nov. 20, 2014)

Defendant moved to dismiss based on lack of personal jurisdiction, the district court agreed, and the court of appeals reversed. *Hunsaker* goes into detail on personal jurisdiction requirements, and it is significant for its reminder that **personal jurisdiction must be examined at the beginning of every lawsuit and that contacts with Utah via the internet can**

be sufficient to establish personal jurisdiction. The court held that an out-of-state company subjected itself to personal jurisdiction in Utah by: (1) advertising on a website that it was available to serve Utah clients; (2) contracting with a Utah resident to determine the value of her Utah company using Utah-based data; (3) researching the company's value; (4) receiving payment from the resident; and (5) sending the resulting appraisal to the resident.

R.B. v. L.B.
2014 UT App 270, 339 P.3d 137 (Nov. 14, 2014)

Parents' custody agreement provided that mother would have physical custody of the son until he entered seventh grade, at which point custody would switch to the father. The agreement also provided that a custody evaluator would be retained at that time to assess whether the change in custody to the father until tenth grade remained in the child's best interest. Although the evaluator agreed that the change was in the child's best interest, the district court nevertheless allowed the mother to retain custody. In response to the father's argument that the court should have been reluctant to set aside the stipulated-to change-of-custody provision, the court of appeals held that the district court did not err by ruling it had the statutory authority to conduct a best-interest analysis. **The parents could not by stipulation divest the court of its statutory charge to ensure that any custody arrangement or change of custody serves the child's best interest.**

Depatco, Inc. v. Teton View Golf Estates, LLC
2014 UT App 266, 339 P.3d 126 (Nov. 14, 2014)

A member of an LLC held a first-position deed of trust on property owned by the LLC, and a non-member creditor held a mechanics' lien, junior to the deed of trust, on the same property. The court held that **Section 48-2c-1308 of the Revised Limited Liability Company Act gives the non-member creditor priority over the member creditor, irrespective of the deed of trust.** The court also rejected the member creditor's argument that the LLC had altered the priority scheme of Section 48-2c-1308 in its operating agreement. The law requiring this result has been repealed, but it remains in effect for limited liability companies formed before January 1, 2014, until the newly enacted Utah Revised Uniform Limited Liability Company Act fully replaces the old law on January 1, 2016.

State v. Thornton
2014 UT App 265, 339 P.3d 112 (Nov. 14, 2014)

The trial court failed to conduct a scrupulous examination of the evidence that rule 404(b) analysis requires. **The trial court erroneously "took two separate categories of bad acts – drug dealing and encouragement of prostitution – and analyzed them as a single unit,"** *id.* ¶ 40 (emphasis added), potentially preventing the jury from accounting for marked differences between the acts that lead to improper inferences.

Veysey v. Veysey
2014 UT App 264, 399 P.3d 131 (Nov. 14, 2014)

In a case involving a claim for reimbursement for the father's share of preschool expenses more than eight years before the claim was asserted, the court held that **the statute of limitations applicable to child support orders (four years after the child reaches majority) controls claims for reimbursement of child care expenses,** even though the applicable code section seems to exclude child care expenses from the definition of "child support."

State v. Melancon
2014 UT App 260, 339 P.3d 151 (Nov. 14, 2014)

The *Shondel* doctrine requires the lesser of sentences when two crimes impose "disparate penalties for identical conduct [same elements for two different crimes]." *Id.* ¶ 24. In this arson case, defendant argued that the elements of solicitation and accomplice liability are one in the same. The court disagreed, holding that accomplice liability is not a crime in itself but an extension of liability for the underlying crime. Therefore, **one cannot be convicted of accomplice liability without the completion of the underlying crime, whereas one can be convicted of solicitation without completion of the underlying crime.** "[T]he accomplice-liability and criminal-solicitation statutes do not require proof of the same elements and [] the *Shondel* doctrine is therefore inapplicable." *Id.* ¶ 29.

Judy Wolferts, Dani Cepernich, Taymour Semnani, and Adam Pace also contributed to this article.

Craig Vernon Wentz

1941 ~ 2015

Craig Vernon Wentz, 73, passed away peacefully at home on January 15, 2015. Craig was born on July 19, 1941, to Hugh and Evelyn Wentz, in Richfield, Utah. He was a faithful member of the LDS Church and honorably served in the South German Mission. He obtained degrees from BYU, Univ. of Washington, and Univ. of Utah. He was sealed to Mary Harper in the Salt Lake Temple on September 12, 1969. Together they raised five children: Derek, Christian, Jonathan, Adam, and Katie. Craig practiced law in Seattle and Salt Lake City for 40 years and left a lasting impression on the legal community. Craig will be remembered for his jovial spirit, kindness, patience, sharp wit, lively sense of humor, positive outlook, and loyalty and devotion to his wife and children.

Issues for a New U.S. Attorney General

by Henri Sisneros

How will you protect our civil liberties?

President Obama nominated Loretta Lynch to replace Attorney General Eric Holder and, recently, a confirmation hearing on her nomination was held before the Senate Judiciary Committee. We should use the nomination period to think clearly and deeply about how important this nomination has become.

While there are many issues we might consider, including the capacity of the nominee to lead in the War on Terror, there are critical concerns that the people ought to weigh as the President nominates, and the Senate considers, a nominee. The first of these is how the nominee will act to defend our civil liberties.

The Attorney General or "A.G." is a political appointment made by the President and confirmed by the Senate, and he or she serves at the President's pleasure as a member of his Administration. Some might say that, as a member of the Administration, the A.G. serves the President who appointed him or her, much as a lawyer represents a client.

This is not so. The A.G. serves in the Administration and represents the Government and the People, yet his or her responsibility is to preserve, protect, and defend the Constitution.

Since the 9/11 attacks, we see clearly that in times of pressure and stress, usually attributable to war, the A.G. becomes more important, and at times, pre-eminent. We must consider the quiescence of the A.G. in the immediate aftermath of the attacks and what that meant to sitting prisoners at Guantanamo Bay while providing extremely limited due process to them, the use of torture by American agents, and the wholesale and judicially unapproved examination of private electronic records by our government.

In an October 12, 2014, interview on the news program *60 Minutes*, Federal Bureau of Investigations Director James Comey spoke plainly about what Americans should know on this subject: "I believe that Americans should be deeply skeptical of government power. The founders knew that."

Well and sufficiently said, and if we are innately skeptical of government power, particularly as applied to our civil rights and privacy, it seems necessary to ask that a new A.G. explicitly and clearly define his or her position on the subject.

In fact, this is so important it ought to be a litmus test: "Ms. A.G. Nominee, would you ever authorize the seizure of private records by government actors without judicial approval and without reporting to Congress?"

A follow-up query might show the measure of the nominee's commitment to constitutional principles by asking for specifics: "What steps would you take as the head of the Justice Department to assure that no government actor violated this principle? And if they did, what would you do about it?"

FBI Director Comey, who was the Deputy Attorney General in 2004 under John Ashcroft when shady dealings were afoot, acted as Attorney General due to Ashcroft's illness. He knew that his role wasn't to blindly support then-President Bush and his advisors. In the face of fervid opposition by the President's Chief of Staff Andy Card and White House Counsel Alberto Gonzales, Comey declined to reauthorize illegal, warrantless searches.

Director Comey put his professional future on the line with his decision. Yet he thought that risk necessary – and thereby earned our respect – by weighing his career against the hard-won zone of privacy afforded each of us by our Constitution.

HENRI SISNEROS is a criminal trial lawyer practicing in Salt Lake City, Utah.

When considering a new Attorney General, be deeply skeptical of government power, as individuals in government can justify any decision in a time of stress. As Comey urges, don't allow government actors to "become untethered to oversight and accountability," and, as an active citizen, treasure and defend your personal privacy.

How will you guard my privacy?

It's 1977 and "Pete" returns home carrying three bags from a shopping trip. He shouts: "Martha, it's time for the *Donny & Marie Show*!" In one bag is a prescribed drug, in a second bag is an adult novel, and in the third bag is an unopened box of doughnuts.

The phone rings. Pete answers, and it's his supervisor, who tells him that because of his health problems, he needn't return to work. How did she know? Pete wonders.

The doorbell rings. Glancing through the window, Pete sees a line of seedy salesmen carrying every manner of illicit adult material. "Goodness," Pete thinks, "I shouldn't have bought the adult novel." The line soon extends down the block with every manner of salesman clamoring for his attention.

Pete turns to see Martha glaring. "Is this about the novel?" he asks.

Martha shakes her head. Of course not – she'll probably read it later, too. But holding up the bag of doughnuts she snaps, "Isn't this wonderful for your diet?"

Suddenly, Pete hears his high school fight song sung by the group of salesmen loitering outside. Aw fellas, a sentimental Pete thinks, maybe I ought to buy something.

Later, at the conclusion of the dizzying day, Pete wonders what happened: no job, an annoyed Martha, neighbors concerned with his private habits, and an armful of unwanted merchandise.

One critical concern the people ought to weigh as our President nominates, and the Senate considers, a new A.G. is how the nominee will educate and then protect citizens from illicit use of our private information by commercial entities.

What happened to Pete happens every day to everyone online sharing personal information, purchasing any item, or posting on social media.

I'm no expert on technology and privacy, but I know enough to be worried. We know that any information put online is accessible. We know that a record of every item you purchase is made, and subsequently sold, to other marketers. We know that sophisticated software targets and predicts your behavior based on what you've done before.

Perhaps most alarmingly, we've learned that Facebook, a marketing juggernaut posing as social media, conducted an experiment on users where negative and positive emotions were deliberately manipulated by ads and then measured. The fact of the experiment certainly made me feel a negative emotion…fury.

Technology that allows corporate or other interests to use our private information is moving faster than our ability to understand, much less to control or regulate. And unlike Pete, how our private information is used is not immediately apparent. There are no seedy salesmen camped outside our front door.

"If Mr. Holder is right and we've gone astray, his replacement should lead us in a critical self-examination. Then she should lead us to a smarter, gentler, more cost-effective system."

In his or her role as Attorney General, we should ask the nominee to be the guardian of constitutionally protected privacy interests, "our persons, houses, papers, and effects" and to lead us in this new era. A good start would be to educate us about what is happening and what it means to us personally.

Maybe – like Pete – we view the world as if from an older time. That's okay, as that perspective provides ample experience for what makes sense today.

First, there ought to be a core zone of private information that is restricted by law from use without explicit and clear consent by the individual or after authorization by a court after consideration of constitutional protections. Included in a core zone might be health and medical information, relationship status, sexual orientation, financial information, and the like.

Second, if corporate interests obtain private information about us in a non-commercial environment, such as Facebook or LinkedIn, they must obtain consent from each user each time the private information is shared and the purpose for which it will be used by each downstream user. If a marketer wants to mine my Facebook contact list, he needs to get my consent and define the outermost limits of how it will be used, each and every time.

Third, my browsing habits should be inaccessible without consent or authorization by a court. It's no one's business what one reads or views at the library or online.

Fourth, all Internet communications are private and should not be accessed without consent or authorization. "What" we say and "who" we say it to is private.

Our new A.G. ought to champion an Internet User's Bill of Rights that succinctly asserts that a citizen's private information is his or hers alone even when voluntarily provided to private interests. Private information ought to only be used in a manner that we knowingly choose or a court approves.

The question to a nominee: What will you do to protect my private online information?

Is it time for a truce in the War on Crime?

If you're fifty years old or younger, we've been at war your entire life.

It's fairly clear when the first shots were fired. President Lyndon B. Johnson, a community organizer nurtured in the shadow of Roosevelt's New Deal, promoted a Great Society where America's resources were committed to eliminating poverty and racial injustice.

Yet Johnson, beset by civil unrest, including civil rights and Vietnam War protestors, declined to run for a second term.

Many credit the turmoil of this era with Johnson's decision to not seek reelection. Activist Sargent Shriver told the Washington Post: "The placid life of most middle-class Americans was

stunned, shocked, by all this social explosion and then a lot of fear came into the hearts and minds of a lot of middle-class people – not only fear but real hostility."

Another direct result: Republican candidate, Richard Nixon, railed against public disorder in a series of prominent speeches. The War on Crime was on.

Great Society programs expanded in the 1970s, even under Republican administrations, but after the public disorder, there was a group that was demonized and became the "Other": lawbreakers.

Every president, Democratic or Republican, since that time, has talked the talk of the War on Crime and the War on Drugs and walked the walk: law enforcement and corrections budgets exploded while rehabilitation was mostly ignored.

Turns out, when politicians attack those who run afoul of our laws, there's no one to speak on their behalf.

Somehow we've forgotten that when "criminals" are released from jail – as 98% of them will be – they must somehow live and support themselves and their families in the community.

Our leaders' words resonate. If you hear anyone lambasting a particular class of people, creating a new class of "Others," rest assured that group will soon be targeted.

In August 2013, the first national-level leader in memory called for a truce in the War on Crime. In a speech to the American Bar Association, Attorney General Eric Holder characterized American policies leading to mass incarceration as a moral and economic failure.

This is strong stuff, a direct challenge to national policies over forty years.

Actually, Holder had moved earlier. In January 2011, Holder convened a cabinet level Reentry Council to promote a new approach to criminal justice. The Reentry Council consists of sixteen federal agencies including the Department of Justice, Veteran Affairs, Health and Human Services, and others. The Council's explicit goals include reducing recidivism, assisting those returning to their communities, and saving taxpayer dollars.

On the subject of justice system reform, the states have led the way. Reform in the federal justice system trails and demands the personal leadership of the next A.G.

Recently, I asked the Federal Defender for Las Vegas about the impact of Holder's statements on federal prosecutors. He laughed and shared a story. Apparently, a prosecutor threatened to sever all communication with him if he continued to argue Holder's statements as a basis for a more lenient outcome.

Attorney General Holder called us out and challenged us. Each of us, particularly those who work in the justice system, should carefully consider what we have believed and how we've acted. Have we applauded heavy sentences? Do prosecutors and judges care about the defendants before them and consider that they must reintegrate into the community? Have we invested to help offenders improve their chances of success on the outside?

The A.G. is our nation's top law enforcement official and thus is the preeminent voice on justice system issues. If Mr. Holder is right and we've gone astray, his replacement should lead us in a critical self-examination. Then she should lead us to a smarter, gentler, more cost-effective system.

Ten Tips for Avoiding Malpractice

by Keith A. Call

It's March. With any luck, I'll be at Major League Baseball Spring Training in Arizona when you read this. Back in 2005, after watching a spring Giants game, my family and I had dinner at the Sugar Bowl diner in Old Scottsdale. A group of retired people – obviously hearing impaired – sat at the table next to us and carried on a loud conversation we could not help but overhear. I enjoyed listening to a lengthy conversation in which they mistook *me* for a Big League pitcher. I count it the "Best Day of my Life."

On the opposite end of the spectrum, perhaps one of the worst days of any attorney's life would be the day he learns he is being sued for malpractice. I hope that never happens to me, although I've seen it happen to some pretty great lawyers.

Here is a list of ten things to help you avoid a malpractice lawsuit. These tips are not meant to establish any applicable standard of care, but they are certainly "best practices" to follow.

1. Don't Accept Every Client or Every Case.
Taking on the wrong client is one of the most common paths to a malpractice lawsuit. Make an honest evaluation of whether you are qualified and can meet the client's expectations. Beware of red flags, such as clients who are changing lawyers, clients with hidden agendas, clients who are in a rush that cannot be explained, clients with unreasonable expectations, clients with a litigious history, clients who refuse to pay the required consultation fee or retainer, and any client that makes you uncomfortable for any reason. It can be difficult to fight off the feeling that you have to accept every client or case, but it's one of the best things you can do to avoid getting sued.

2. Complete a Broad Conflict Check.
And keep checking. A high percentage of legal malpractice cases involve alleged conflicts of interest. These types of cases can also be difficult to defend. Your initial conflict check should include the names of all parties to the lawsuit, all related entities, all principals of the entities, and key players or witnesses. As the case progresses, don't forget to run conflict checks on other names that become relevant. Most importantly, heed what your conflict check results tell you. If there is any hint of a problem, address it, and resolve the conflict with informed consents or don't take the case.

3. Document Client Identity – In Writing.
Many lawsuits involve disputed claims of an attorney-client relationship. For example, a former president of a corporate entity client may not appreciate it when you, acting as the company's lawyer, take action adverse to him individually. He may feel that his "confidential relationship" with you has been breached. You can save yourself a lot of trouble if you have documented the attorney-client relationship in writing, defining who you do – and who you don't – represent.

4. Document the Scope of Your Work – In Writing.
In your representation agreement, document as precisely as you can what it is you are agreeing to do. To the extent reasonable or foreseeable, document what it is you are not agreeing to do. Be very wary of scope creep! As necessary or appropriate during the representation, clarify, preferably in writing, the scope of what you are doing and not doing for the client. To the extent you identify related or new legal issues that could impact your client, disclose those issues and document what you will and won't do to address them.

KEITH A. CALL is a shareholder at Snow, Christensen & Martineau, where his practice includes professional liability defense, IP and technology litigation, and general commercial litigation.

5. Document Fee Provisions and Hold the Client to Them.
Most clients don't like paying legal fees, especially for litigation. It's like paying for a dead horse. Fee disputes can easily lead to larger disputes about the attorney's performance. Make sure the method of calculating the fee is spelled out clearly and in writing. Make sure the client stays current on his or her payment. If the client doesn't, re-read Tip No. 1, above. That said, don't just withhold legal services on condition of payment. This can lead to its own set of problems.

6. Don't Miss Deadlines.
If you don't have or use a reliable docketing and calendaring system with built-in redundancy, start using one immediately. Enter deadlines into your system as soon as the deadline becomes known. It's okay to use your secretary or others as a backup, but remember you are the person responsible to make sure you comply with all deadlines.

7. Document Key Decisions.
Ultimately, it is the client's right and responsibility to make most strategic decisions about a lawsuit. It's your responsibility, as the lawyer, to provide information and counsel relevant to those decisions. These exchanges with your client will often be in person or by telephone. Whenever key decisions are made, it is a good idea to document them in writing, including the basis for the decision. This can often be done in a follow-up letter or email to the client to make sure communication has been clear. At a minimum, the lawyer can protect himself or herself by making contemporaneous notes or a memorandum for the file.

8. Beware of Casual Communications, Both External and Internal.
A flippant, "funny," or otherwise casual email can easily become a smoking gun in a malpractice lawsuit. Even if it doesn't become the smoking gun that proves liability, it can still be extremely embarrassing and could incite a jury to a large damage award. Many news stories have proven that email communications are never, ever completely private. Assume that everything you put in any email or similar message can and will be used against you.

9. Be Extremely Careful When Doing Business with a Client.
Courts and juries closely scrutinize business transactions between lawyers and clients. Read and strictly follow Utah Rule of Professional Conduct 1.8. Don't provide financial assistance to clients. Don't acquire a proprietary interest in the subject matter of the litigation (except for permitted contingent fee cases and liens authorized by law). Be very cautious when accepting equity ownership in the client in lieu of a fee or when accepting a management or director position with a client.

10. Follow the Rules of Professional Conduct.
The Rules of Professional Conduct were not designed to set the applicable standard of care in a malpractice case. See Utah R. Prof'l. Cond., Preamble [20]. But understanding and following the ethical rules will always go a long way to keep you out of civil hot water. Being ethical and avoiding malpractice are often closely related.

Finally, perhaps the best advice I can offer is to take some time this summer to enjoy a baseball game. Take your client with you. If you and your client are getting along and communicating well, chances are your business relationship will go well too.

The Billable Hour

Reviewed by Jeremy J. Hansen

As a newly-minted associate, I was somewhat optimistic that *The Billable Hour* by Annie Dike, a book on how to "bill smarter" and "bill more," would prove useful as I move into a world where time is measured in 0.1 hour increments. As the book duly notes, much time is spent in law school preparing lawyers for the research and writing aspects of the profession (the billable tasks), but exactly zero time (not even 0.1 hour) on how to collect on those tasks using effective billing practices. When the book was placed on my desk for review, I was hopeful that it might contain some valuable recommendations about best billing practices.

The Billable Hour:
A Legal Practitioner's Guide to Smarter Hourly Billing. Bill Smarter. Bill More.

by Annie Dike
Publisher: CreateSpace Independent Publishing Platform (2013)

Available in paperback and e-book formats

Ms. Dike promises that her book will not only help new associates, like me, but also law clerks, young attorneys, and even seasoned attorneys bill smarter, more efficiently, and more ethically.

The Billable Hour's advice ranged from useful, to repetitive (the e-book I was given to review is nintey-nine pages long but could probably be half that length and still be at least as effective), to overly dogmatic.

In substance, perhaps more than any other point, *The Billable Hour* advocates and emphasizes the need for detailed and descriptive billing entries. This is, without doubt, a point that clients, courts, and partners (if one is an associate) would appreciate if effectuated. In just about every example time entry in the book, of which there are many, this point is not only merely demonstrated but is explicitly identified. While the point is perhaps overemphasized in the book (it not only has its own chapter, but is also mentioned in all of the other chapters), it is probably the tip most likely to prove useful to any attorney, no matter his or her practice area or years of practice.

One caveat to the usefulness of this point is the suggestion that document review be billed in abundant detail without exception. *The Billable Hour* suggests that a billing entry for document review should state exactly what documents were reviewed and how much time it took. Granted, if there are only 2,000 or so documents falling into a limited number of easy-to-describe categories being reviewed, as in the example in the book, this may be a good practice. However, if 20,000 unique emails are being reviewed, such a practice may prove impracticable. The documents being reviewed are unlikely to be organized in a way in which billing for review of "invoices" is going to be practical. In that situation, a different approach may be both preferable and more useful to the client. This is just one example where *The Billable Hour* is overly dogmatic in its approach. More generally, *The Billable Hour* does not do a good job pointing out where the usefulness of its specific suggestions may end and where an alternative may be preferable.

The Billable Hour recommends that attorneys not bill by the "stopwatch" method, forcing oneself to work in six-minute increments no matter what other matters or distractions may

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arise. As the book describes it, the stopwatch method of beginning and ending each and every billable task on the six-minute increment is an impossible endeavor. Inevitably, clients will call, colleagues will email, and assistants will need signatures. Instead, *The Billable Hour* suggests task billing, where a log is kept of all tasks performed and then a reasonable estimate of the time each task required is calculated and billed to the lowest possible 0.1 hour increment.

While *The Billable Hour's* suggested remedy to this problem may be an acceptable one, it is by no means revolutionary, much less meriting the reading of an entire book in order to recognize this as an option. Any conscientious attorney concerned enough about effective billing practices to read an entire book dedicated to the subject has likely already figured out how to manage this issue. The book gives one example of one reasonable way of accounting for these small tasks, but there may be other ways of doing so that are just as effective at capturing the time spent working on a task, while also dealing with a work day's inevitable interruptions. Different attorneys may need different solutions to this issue based on personal preference or the nature of their practice. Again, *The Billable Hour* suggests only one way of dealing with the issue without exploring the possibility of alternatives or providing more generalized guidance.

One recommendation *The Billable Hour* gives again and again is to break up time entries and to never block bill. The book cites multiple court cases where attorney fees were sought, as well as quotes from clients who disdain the practice of block billing, in support of its contempt for the practice. While this is certainly good advice for those in certain practices and, most importantly, for those whose clients prefer individual time entries, *The Billable Hour* is far too dogmatic in its position that all billing must be broken up and that block billing is never appropriate.

Some clients may require that billing entries be broken up into individual tasks, and others may require block billing. It's even conceivable that a client may prefer individual entries for litigation but not for corporate work. Here again, *The Billable Hour* falls into the trap of not even entertaining the possibility that different clients may have different requirements.

The Billable Hour wraps up by recommending that attorneys read the billing guideline given to them by clients. This is undoubtedly great advice; but, it seems to be a fairly low-hanging and obvious recommendation. One would hope that an attorney would understand his or her billing obligations to the client before billing the first 0.1 hour, especially if a client has provided formal billing guidelines.

While *The Billable Hour* provides some good recommendations, and certainly some great examples of effective and descriptive time entries that any attorney could stand to gain from, it is certainly not the "Billable Bible" by any means. Too many recommendations are presented as the best, or possibly only, way of effective billing.

A quick skim of the book, along with an attentive look at many of the example billing entries, would probably be useful for most. However, I don't know that I could suggest that anyone but the newest of associates, and only those with ample time to burn, take the time to read through *The Billable Hour* in detail. The real question for any attorney is whether or not implementing the recommendations in *The Billable Hour* can bring value to the client and compensate for the billable hours forfeited in taking the time to read it. The answer to that question depends on the individual.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the January 23, 2015 Commission Meeting held at J. Reuben Clark Law School on the Brigham Young University Campus, Provo.

1. The Commission voted to nominate Rob Rice and Tom Seiler to run for Bar President-Elect.

2. The Commission selected Patrice Arent to receive the Dorathy Merrill Brothers Award.

3. The Commission selected Andrea Martinez Griffin to receive the Raymond S. Uno Award.

4. The Commission selected the following six nominees to present to the Governor for the 3rd Judicial District Nominating Commission: Cheryl Mori, Grace Acosta, Loren Weiss, Benson Hathaway, David Leta, and Joanna Landau.

5. The Commission selected the following six nominees to present to the Governor for the 4th Judicial District Nominating Commission: Jared Anderson, Randall Jeffs, Patricia Lammi, Marilyn Moody Brown, Randall Spencer, and Simón Cantarero.

6. The Commission approved taking formal action against Deron Brunson for the unauthorized practice of law.

7. Commissioners agreed to reach out to legislators about increasing judicial compensation.

8. Commissioners agreed to reach out to legislators about proposed joint resolution to deregulate some types of law practice.

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

2015 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2015 Summer Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org, no later than Wednesday, June 3, 2015. The award categories include:

1. Judge of the Year

2. Distinguished Lawyer of the Year

3. Distinguished Section/Committee of the Year

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

Notice of Legislative Rebate

Bar policies provide that lawyers may receive a rebate of the proportion of their annual Bar license fee which has been expended during the fiscal year for lobbying and any legislative-related expenses by notifying Executive Director John C. Baldwin, 645 South 200 East, Salt Lake City, Utah 84111 or at jbaldwin@utahbar.org.

The amount which was expended on lobbying and legislative-related expenses in the preceding fiscal year was 3.37% of the mandatory license fees. Your rebate would total: Active Status – $14.32; Active – Admitted Under 3 Years Status – $8.43; Inactive with Services Status – $5.06; and Inactive with No Services Status – $3.54.

Tax Notice

Pursuant to Internal Revenue Code 6033(e)(1), no income tax deduction shall be allowed for that portion of the annual license fees allocable to lobbying or legislative-related expenditures. For the tax year 2014, that amount is 3.37% of the mandatory license fee.

UTAH STATE BAR

2015 Summer Convention

July 29–August 1 • Sun Valley, Idaho • Reservation Request

SUN VALLEY LODGE: (single or double occupancy)

Lodge Premier King – LPK	$300.00
Lodge Suite King – LKS	$320.00
Lodge 2 Queen Suite – L2QS	$340.00
Lodge Terrace Suite – LTS	$409.00
Lodge Celebrity Suite – LCS	$669.00

SUN VALLEY INN: (single or double occupancy)

Traditional Queen (1 queen-sized bed)	$189.00
Traditional 2 Doubles	$259.00
Deluxe (1 king-sized bed)	$250.00
Deluxe (2 queen-sized beds)	$290.00
Junior Suite (king-sized bed)	$350.00
Family Suite (1 queen & 2 twin beds)	$329.00
Inn Parlor (1 king-sized bed)	$439.00
Three Bedroom Inn Apartment	$579.00

DELUXE LODGE APARTMENTS & WILDFLOWER CONDOS:

Lodge Apartment Hotel Room	$220.00
Lodge Apartment Suite (up to 2 people)	$489.00
Two-bedrooms (up to 4 people)	$539.00
Three-bedrooms (up to 6 people)	$629.00

STANDARD SUN VALLEY CONDOMINIUMS:
Atelier, Cottonwood Meadows, Snowcreek, Villagers I & Villagers II

Studio (up to 2 people)	$309.00
One Bedroom (up to 2 people)	$259.00
Atelier 2-bedroom (up to 4 people)	$309.00
Two Bedroom (up to 4 people)	$339.00
Three Bedroom (up to 6 people)	$369.00
Four Bedroom (up to 8 people)	$419.00
Extra Person	*$15.00*

(These rates do not include resort fee, which is 6% and tax, which is currently 12% and subject to change.)

RESERVATION DEADLINE:
This room block will be held until June 29, 2015; 30 days prior to arrival. After that date, reservations will be accepted on a space available basis.

Confirmed reservations require an advance deposit equal to one night's room rental, plus resort fee and tax. **In order to expedite your reservation, see the online reservation option at www.utahbar.org or call 800-786-8259.** You may also complete this form and return it to: **Reservations Office, P.O. Box 10, Sun Valley, Idaho 83353** *or* **fax to 208-622-2030.**

Name:_____

Address:_____

City/State/Zip:_____

Phone: (day)_____

(evening)_____

Accommodations requested:_____

Rate:_____ # in party:_____

Do you need complimentary Sun Valley Airport transfer (Hailey to Sun Valley Resort) ❑ Yes ❑ No

Airline/Airport:_____

Arrival Date/Time:_____

Departure Date/Time:_____

Please place the $_____ deposit on my _____

Card #:_____ Exp. Date:_____

Name as it reads on card:_____

(Your card will be charged the first night's room & tax deposit. We accept MasterCard, VISA, Am. Express, & Discover.)

If you have any questions, call Reservations at 800-786-8259.

A confirmation of room reservations will be forwarded upon receipt of deposit. **Please make reservations early for best selection!** If accommodations requested are not available, you will be notified so that you can make an alternate selection. No pets allowed.

Cancellation: Cancellations made more than 30 days prior to arrival will receive a deposit refund less a $25 processing fee. Cancellations made within 30 days will forfeit the entire deposit.

Check in Policy: Check-in is after 4:00 pm. Check-out is 11:00 am.

MCLE Reminder – Odd Year Reporting Cycle

July 1, 2013 – June 30, 2015

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

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

CLE on Facebook

As per a number of requests from members, CLE is expanding their online presence into a new Facebook page. Upcoming training courses, convention information and CLE updates will be posted to https://www.facebook.com/pages/Continuing-Legal-Education/951373118206441. "Like" this page to receive the latest feeds.

Mandatory Online Licensing

The annual Bar licensing renewal process will begin June 1, 2015, and will be done only online. Sealed cards will be mailed the last week of May to your address of record. (*Update your address information now at* http://www.myutahbar.org). The cards will include a login and password to access the renewal form and will outline the steps to re-license. Renewing your license online is simple and efficient, taking only about five minutes. With the online system you will be able to verify and update your unique licensure information, join sections and specialty bars, answer a few questions, and pay all fees.

No separate licensing form will be sent in the mail. You will be asked to certify that you are the licensee identified in this renewal system. Therefore, this process should only be completed by the individual licensee, not by a secretary, office manager, or other representative. Upon completion of the renewal process, you will be shown a Certificate of License Renewal that you can print and use as a receipt for your records. This certificate can be used as proof of licensure, allowing you to continue practicing until you receive your renewal sticker, via the U.S. postal service. If you do not receive your license in a timely manner, call (801) 531-9077.

Licensing forms and fees are due July 1 and will be late August 1. Unless the licensing form is completed online by September 1, your license will be suspended.

We are increasing the use of technology to improve communications and save time and resources. Utah Supreme Court Rule 14-507 requires lawyers to provide their current e-mail address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org.

Notice of Utah Bar Foundation Annual Meeting and Open Board of Director Position

The Utah Bar Foundation is a non-profit organization that administers the Utah Supreme Court IOLTA (Interest on Lawyers Trust Accounts) Program. Funds from this program are collected and donated to nonprofit organizations in our State that provide law related education and legal services for the poor and disabled.

The Utah Bar Foundation is governed by a seven-member Board of Directors, all of whom are active members of the Utah State Bar. The Utah Bar Foundation is a separate organization from the Utah State Bar.

In accordance with the by-laws, any active licensed attorney, in good standing with the Utah State Bar may be nominated to serve a three-year term on the board of the Foundation. If you are interested in nominating yourself or someone else, you must fill out a nomination form and obtain the signature of twenty-five licensed attorneys in good standing with the Utah State Bar. To obtain a nomination form, call the Foundation office at (801) 297-7046. If there are more nominations made than openings available, a ballot will be sent to each member of the Utah State Bar for a vote.

Nomination forms must be received in the Foundation office no later than 5:00 pm on Wednesday, May 13, 2015 to be placed on the ballot.

The Utah Bar Foundation will be holding the Annual Meeting of the Foundation on Saturday, August 1st at 9:00 am in Sun Valley, Idaho. This meeting will be held in conjunction with the Utah State Bar's Annual Meeting.

For additional information on the Utah Bar Foundation, please visit our website at www.utahbarfoundation.org.

Call for Nominations for the 2015 Pro Bono Publico Awards

The deadline for nominations is April 1, 2015.

The following Pro Bono Publico awards will be presented at the Law Day Celebration on May 1, 2015:

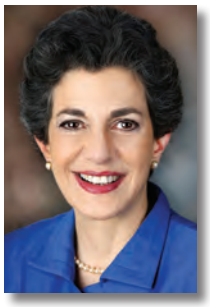
- **Young Lawyer of the Year**
- **Law Firm of the Year**
- **Law Student or Law School Group of the Year**

To download a nomination form and for additional information please go to:
http://lawday.utahbar.org/lawdayevents.html

If you have questions please contact the Access to Justice Director, Michelle Harvey at:
probono@utahbar.org or 801-297-7027

Utah State Bar 2015 Spring Convention Award Winners

During the Utah State Bar's 2015 Spring Convention in St. George the following awards will be presented:



PATRICE ARENT
Dorathy Merrill Brothers Award
For the Advancement of Women
in the Legal Profession

ANDREA MARTINEZ GRIFFIN
Raymond S. Uno Award
For the Advancement of Minorities
in the Legal Profession

"Like" us on facebook at: www.facebook.com/UtahBarJournal

The Utah Pro Bono Commission invites you to

Lift a Life!

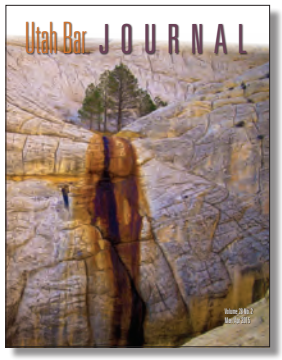
Lend a "Learned Hand"

You can make a difference! Stretch yourself, personally and professionally, by taking on a pro bono case. Sign up and choose your case preferences today at:

utahbar.org/volunteer

Be a Part of the Bar Journal

Have an idea for an article? We want to read it!



The *Utah Bar Journal* Board of Editors is always looking for quality, substantive articles to publish in these pages, so let your voice be heard! As an added bonus, if your article is selected for publication, you may be eligible to receive MCLE self-study credit. See page six of this issue for more information and submission guidelines.

Have you taken a stunning picture of a Utah scene? We may want to put it on a *Bar Journal* cover!

Members of the Utah State Bar, including the Paralegal Division, are responsible for all of the beautiful photography you see on *Utah Bar Journal* covers. If you would like to see one of your photos of a Utah sceone featured on a future cover, see page four of this issue for more information.

SUPPORT LAW DAY

Be a part of the special Law Day edition of *The Salt Lake Tribune* and the *Deseret News* on April 26 as we celebrate the 800th anniversary year of the document that first codified the "law of the land" as above the law of the king. Join us in helping people understand the most enduring symbol of the rule of law and how our constitutional freedoms continue to evolve 800 years later.

By advertising in the special edition you can showcase your expertise in a targeted editorial environment read by thousands of potential clients. Contact Ken Stowe at kstowe@utahmediagroup.com or 801-204-6382.

If you have suggestions for editorial content, please write to sean.toomey@utahbar.org or call 801-297-7059.

LAW DAY – MAY 1, 2015

MAGNA CARTA

THE RULE OF LAW 1215–2015

lawday.utahbar.org

Law Day Luncheon

Friday May 1, Noon

Marriott at City Creek
75 South West Temple
Salt Lake City, UT 84101

AWARDS WILL BE GIVEN HONORING:

- Art & the Law Project (Salt Lake County Bar Association)
- Liberty Bell Award (Young Lawyers Division)
- Pro Bono Publico Awards
- Scott M. Matheson Award (Law-Related Education Project)
- Utah's Junior & Senior High School Student Mock Trial Competition
- Young Lawyer of the Year (Young Lawyers Division)

For further information, to RSVP for the luncheon and/or to sponsor a table please contact:

JOELLE KESLER
(801) 521-6383 • jkesler@dadlaw.net

For other Law Day related activities visit the Bar's website:
lawday.utahbar.org

Sponsored by the Young Lawyers Division.

Pro Bono Honor Roll

Allen, Kirsten – Tuesday Night Bar

Allred, McKette – Family Law Case

Allred, Parker – Tuesday Night Bar

Amann, Paul – Tuesday Night Bar

Anderson, Fred – GAL Case, Guardianship Case

Anderson, Sklyer – Immigration Clinic

Ashworth, Justin – Family Law Clinic

Ball, Matt – Tuesday Night Bar

Balmanno, Alain – SMAV Case

Benson, Jonny – Immigration Clinic

Black, Mike – Tuesday Night Bar

Bogart, Jennifer – Street Law Clinic

Bown, Ashley – Family Law Case

Brimhall, Clinton – Family Justice Center, Family Law Clinic, Family Law Cases, Protective Order Case

Brody Keisel – Family Law Case

Bulkeley, Deb – Tuesday Night Bar

Carlston, Chuck – Family Justice Center

Chandler, Josh – Tuesday Night Bar

Chipman, Brent R. – Family Law Clinic

Christiansen, Brant – Adult Guardianship Case

Cohen, Dara – Street Law Clinic

Conyers, Kate – Tuesday Night Bar, Street Law Clinic

Cook, David – Bankruptcy Case

Coombs, Brett – Street Law Clinic

Couser, Jessica – Medical-Legal Clinic, PGAL Case

Crapo, Douglas – Tuesday Night Bar

Cundick, Ted – Bankruptcy Case

Dez, Zal – Family Law Clinic

Engstrom, Jerald – Bankruptcy Case

Enquist, Jeff – Medical-Legal Clinic

Figueira, Josh – Tuesday Night Bar

Franklin, Jacob – Tuesday Night Bar

Geary, Dave – Tuesday Night Bar

Gittins, Jeff – Street Law Clinic

Goodwin, Thomas – Tuesday Night Bar

Gregson, Ashley – Tuesday Night Bar

Hancock, Lisa – Family Law Case

Hansen, Elicia – Family Law Case

Hansen, Justen – Tuesday Night Bar, Family Law Clinic

Hardy, Dustin – Family Justice Center

Harrison, Matt – Street Law Clinic

Hartvigsen, Dani – Document Clinic

Henriod, Steve – Street Law Clinic

Houdeshel, Megan – Tuesday Night Bar

Hurst, John – Tuesday Night Bar

Hyde, Ashton – Tuesday Night Bar

Jan, Annette – Tuesday Night Bar

Jelsema, Sarah – Family Law Clinic

Jenson, Craig – Tuesday Night Bar

Johnasen, Bryan – Tuesday Night Bar

Johnsen, Bart – Family Law Case

Jorgensen, Sonja – Bankruptcy Case

Kaas, Adam – Tuesday Night Bar

Kern, Peter – Tuesday Night Bar

Lau, Dan – Tuesday Night Bar

LeBaron, Shirl Don – Family Law Case

Lee, Jennifer – Family Law Case

Macfarlane, John –Street Law Clinic

Marx, Shane – Medical-Legal Clinic

McDonald, Michael – Tuesday Night Bar

McKay, Chad – Family Law Case

Miya, Stephanie – Expungement Case

Morrison, Jess – Guardianship Case

Morrow, Carolyn R. – Family Law Clinic

Navarro, Carlos – Immigration Clinic

Nielson, Nathan – Family Law Case

Nillson, Aaron – Family Law Clinic, Bankruptcy Case

O'neil, Shauna – Debtor's Clinic

Olsen, Rex – Tuesday Night Bar

Pena, Fredrick – Tuesday Night Bar, Family Law Clinic

Peterson, Janet – Document Clinic

Pranno, Al – Family Law Clinic

Prignano, Eddie – Street Law Clinic, Debtor's Clinic

Ratelle, Brittany – Document Clinic

Roberts, Stacy – Family Law Clinic

Roman, Francisco – Immigration Clinic

Rupp, Joshua – Tuesday Night Bar

Schmidt, Samuel – GAL Case

Scholnick, Lauren – Street Law Clinic

Scruggs, Elliot – Street Law Clinic

Shaw, LaShel – Tuesday Night Bar

Sheinberg, Traci – Family Law Case

Smith, Linda F. – Family Law Clinic

Smith, Shane – Street Law Clinic

So, Simon – Family Law Clinic

Sonnenberg, Babata – Family Justice Center, Family Law Case

Stewart, Jeremy – Tuesday Night Bar

Stroud, Shane – Tuesday Night Bar

Sumsion, Grant – Family Justice Center, Family Law Case

Tan, Fay – Tuesday Night Bar

Tejada, Engels – Post Conviction Case

Thompson, Marshall – Appeal Case

Thorne, Jonathan – Street Law Clinic

Throop, Sheri – Family Law Clinic, SMAV Case

Tuttle, Jeff – Tuesday Night Bar

Vogt, Colby – Tuesday Night Bar

Wade, Chris – Tuesday Night Bar

Wheeler, Lindsey – Tuesday Night Bar

Woods, Kristen – Family Law Case

Wycoff, Bruce – Tuesday Night Bar

Yauney, Russell – Medical-Legal Clinic, Family Law Clinic

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

Utah State Bar Request for 2015–2016 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more of twelve different committees which participate in regulating admissions and discipline and in fostering competency, public service and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name _____ Bar No. _____

Office Address _____ Telephone_____

Email Address _____ Fax No. _____

Committee Request:

1st Choice _____ 2nd Choice _____

Please list current or prior service on Utah State Bar committees, boards or panels or other organizations:

_____

_____

_____

Please list any Utah State Bar sections of which you are a member:

_____

_____

_____

Please list *pro bono* activities, including organizations and approximate *pro bono* hours:

_____

_____

_____

Please list the fields in which you practice law:

_____

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Please include a brief statement indicating why you wish to serve on this Utah State Bar committee and what you can contribute. You may also attach a resume or biography.

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Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday.

Date_____ Signature _____

Utah State Bar Committees

1. **Admissions.** Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.
2. **Bar Examiner.** Drafts, reviews, and grades questions and model answers for the Bar Examination.
3. **Character & Fitness.** Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.
4. **CLE Advisory.** Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality, and conformance.
5. **Disaster Legal Response.** The Utah State Bar Disaster legal Response Committee is responsible for organizing pro bono legal assistance to victims of disaster in Utah.
6. **Ethics Advisory Opinion.** Prepares formal written opinions concerning the ethical issues that face Utah lawyers.
7. **Fall Forum.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
8. **Fee Dispute Resolution.** Holds mediation and arbitration hearings to voluntarily resolve fee disputes between members of the Bar and clients regarding fees.
9. **Fund for Client Protection.** Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.
10. **Spring Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
11. **Summer Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
12. **Unauthorized Practice of Law.** Reviews and investigates complaints made regarding unauthorized practice of law and takes informal actions as well as recommends formal civil actions.

Detach & Mail by June 5, 2015 to:
Angelina Tsu, President-Elect
645 South 200 East
Salt Lake City, UT 84111-3834

"and Justice for all"

33rd Annual Law Day 5K Run & Walk

May 16, 2015 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

"Magna Carta: Exercise your Right to a Speedy Race"

REGISTRATION INFO: Register online at http://andjusticeforall.org/law-day-5k-run-walk/. Registration Fee – before May 1: $30 (plus $10 for Baby Stroller Division extra t-shirt, if applicable), after May 1: $35. Day of race, registration from 7:00–7:45 a.m. Questions? Call 801-924-3182.

HELP PROVIDE CIVIL LEGAL AID TO THE DISADVANTAGED: All event proceeds benefit "and Justice for all", a collaboration of Utah's primary providers of free civil legal aid programs for individuals and families struggling with poverty, discrimination, disability and violence in the home.

DATE: Saturday, May 16, 2015 at 8:00 a.m. Check-in and day-of race registration in front of the Law School from 7:00–7:45 a.m.

LOCATION: Race begins and ends in front of the S. J. Quinney College of Law at the University of Utah, 332 South 1400 East, Salt Lake City.

PARKING: Available at Rice Eccles Stadium (451 S. 1400 E.). Or take TRAX!

USATF CERTIFIED COURSE: The course is a scenic route through the University of Utah campus. A copy of the course map is available at: www.andjusticeforall.org.

CHIP TIMING: Timing will be provided by Sports-Am electronic race monitoring. Each runner will be given an electronic chip to measure their exact start and finish time. Results will be posted after the race at www.sports-am.com/raceresults/.

RACE AWARDS: Prizes will be awarded to the top male and female winners and the top two winning speed teams. Medals will be awarded to the top three winners in every division, and the runner with the winning time in each division will receive two tickets to the Utah Arts Festival.

- Speed Team Competition
- Wheelchair Division
- Chaise Lounge Division
- Baby Stroller Division
- "In Absentia" Runner Division

For information visit: www.andjusticeforall.org

Exercise your right to a speedy race!

LAW DAY RUN
MAGNA CARTA
SATURDAY, MAY 16, 2015

RECRUITER COMPETITION: The organization that recruits the most participants for the Run will be awarded possession of the Recruiter Trophy for one year and air transportation for two on JetBlue Airways for non-stop travel between Salt Lake City and New York, NY or Long Beach, CA. However, all participating recruiters are awarded a prize because success of the Law Day Run depends upon our recruiters! To become the 2015 "Team Recruiter Champion," recruit the most registrants under your organization's name. Be sure to sign up as a team and list your organization as you register online.

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Utah State Bar Ethics Advisory Opinion Committee Revised Opinion Number 14-04 / Issued November 12, 2014

ISSUE

What are the ethical limits to participating in attorney rating systems, especially those that identify "the Best Lawyer" or "Super Lawyer?"

OPINION

Rule 7.1 of the Utah Rules of Professional Conduct (the "URPC") prohibits false or misleading communications concerning a lawyer or a lawyer's services. An unsubstantiated comparison of lawyers is false or misleading if it would lead a reasonable person to conclude that the comparison can be substantiated. Advertisement of a rating, or of inclusion in a ranking list as being "super" or "best" or the like, by a comparing organization is permissible where the comparing organization has made an appropriate inquiry into the lawyer's fitness, the lawyer does not pay to receive the rating itself (although she may pay for an investigation in accordance with Rule 7.2), the comparing organization's methodology or standard used to determine the rating or ranking is fully disclosed and explained and conveniently available to the public, and the communication disclaims the approval of the Utah Supreme Court and/or the Utah State Bar. The factual basis for the comparison of the rated or listed lawyer's services to the services of other lawyers must be verifiable in order to pass muster under Rule 7.1. Any advertisement must state that the lawyer was included in a "super" or other such list or ranking rather than describe the lawyer as being a "super lawyer" or the "best lawyer." The statements that a lawyer is "super" or the "best" cannot be factually substantiated and are inherently misleading.

Rule 7.2 of the Utah Rules of Professional Conduct prohibits giving "anything of value to a person for recommending the lawyer's services; except that a lawyer may: …pay the reasonable costs of advertisements or communications permitted by this Rule…." Rule 7.2(b)(1). A lawyer who pays an entity to list her as the "best lawyer" in an area or to otherwise compare her favorably to other lawyers violates Rule 7.2 because she is giving something of value to another to recommend the lawyer's services. She is not paying the reasonable costs of advertising. Similarly, trading votes with another in a survey to determine the "best lawyer" is giving something of value for the other person to recommend the lawyer's services and violates Rule 7.2. "[A]nything of value" would also include monies paid to a public figure or celebrity to recommend a lawyer. It is permissible for a lawyer to pay a fee to a comparing organization to conduct an investigation into the lawyer's fitness, but the outcome of the investigation must be independent of the fee.

BACKGROUND

Certain websites, advertisers and companies offer services in which they list lawyers as the "best" in a particular locale, practice area, city, etc. Sometimes these entities determine who they will list as the "best" simply by including whoever signs up (and pays them) first. Other times companies will run on-line voting contests to determine which lawyers, restaurants, and businesses are the "best" in the area based solely on the number of votes cast, a system that can be easily manipulated by lawyers with large staffs or multiple email addresses. Other entities purport to have more scientific or valid methods of identifying outstanding lawyers, in which they investigate each lawyer's fitness before deciding whether to rate the lawyer favorably. Still other entities investigate and approve of law firms or lawyers who have good business practices (*e.g.*, have current business licenses and Utah State Bar licenses, have not been publicly disciplined, etc.), separate and apart from the lawyers' legal experience, skill, and expertise, or lack thereof, which they do not investigate or evaluate. The Committee has been asked to opine as to when these arrangements violate the Rules of Professional Conduct.

ANALYSIS

This Committee has twice stated that

> [t]he U.S. Supreme Court has made it clear that public communication concerning a lawyer's services (including any form of advertising) is commercial speech, enjoys First Amendment protection, and can be regulated only to further substantial state interests, and then only in the least restrictive manner possible. The cardinal rule concerning all public communication about a lawyer and her services is that the communication not be false or misleading.

Ethics Advisory Op. 09-01, ¶ 3 (Feb. 23, 2009) (quoting Ethics Advisory Op. 00-02 (Mar. 9, 2000)). Deceptive advertising in the legal profession poses a particular risk because "the public lacks sophistication concerning legal services, [and therefore] misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Bates v. State of Arizona*, 433 U.S. 350, 383 (1977). As an example, the U.S. Supreme Court indicated that "advertising claims as to the quality of services…not susceptible [to] measurement or verification…may be so likely to be misleading as to warrant restriction." *Id*. at 383-84. Similarly, the Utah Supreme Court has found that "[t]he state obviously has a substantial and compelling interest in protecting the public from false, deceptive, or misleading advertising…." In re Utah State Bar Petition, 647 P.2d 991, 993 (Utah 1982) (citing Bates, 433 U.S. at 383).

Rule 7.1 of the Utah Rules of Professional Conduct states:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Thus, an advertisement that has either: (1) "a substantial likelihood [to] lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation," or (2) "an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers…presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated" would be considered misleading and therefore prohibited. URPC Rule 7.1, cmts. 2 & 3.

This Committee previously analyzed the current version of Rule 7.1 and issued several interpretive guidelines instructing lawyers how to avoid false or misleading statements in advertising.[1] Ethics Advisory Op. 09-01, ¶¶ 6–12. Of specific relevance to the present issue, this Committee cited Connecticut Informal Ethics Advisory Op. 01-07 (2001), which states that "comparative statements would require factual substantiation to avoid being misleading. Because it is almost impossible to substantiate certain comparisons ('best attorney in town') the wiser course is to advertise qualities that can be substantiated." *Id*. at ¶ 9 (citing Geoffrey Hazard, W. William Hodes & Peter Jarvis, *The Law of Lawyering* (3d) § 55.4, at 55-21). This does not foreclose the possibility of advertising as a "best lawyer" but does require that the lawyer using the comparative language be able to factually substantiate the claim.

Commentators Hazard, Hodes and Jarvis have also addressed the use of rating systems such as "Super Lawyers" and "Best Lawyers in America" publications:

> Publications such as "Super Lawyers" and "Best Lawyers in America" use a variety of peer review and research procedures to generate lists of highly qualified lawyers in various fields of practice in most states. Because of the precautions taken to avoid "vote trading" or "ballot stuffing" and because advertisements in these publications cannot be purchased until after the separate selection process has been completed, most states have recognized these rating to be bona fide ratings that have real informational value; thus not being misleading, they are permissible.

Id. § 55.4, at 55-14 (Supp. 2014).

The issue of how a lawyer may factually substantiate the claim to be "the best" was thoroughly considered in New Jersey. In *In re Opinion 39 of Committee on Attorney Advertising*, 961 A.2d 722 (N.J. 2008), the New Jersey Supreme Court was presented with the question of whether lawyers could use the designation of "Best Lawyer," or "Super Lawyer," or Martindale–Hubble rankings in their advertisements. The Supreme Court Committee on Attorney Advertising concluded that comparative titles violated the N.J. Rules of Professional Conduct, and announced this decision in Opinion 39. The companies who provided the designations (Key Professional Media, Inc., d/b/a "Super Lawyers;" Woodward White, Inc. – publisher of "Best Lawyers in America;" and New Jersey Monthly, LLC) appealed the opinion, and the New Jersey Supreme Court referred the matter to a special master who researched the issue and compiled a report. In his report, which garnered the support of the Court, the special master recommended "twelve 'regulatory components… extracted from [the advertising decisions of other states] to provide[] some guidance to the Court…." *Id*. at 728–29. The twelve components are:

1. The advertising representation must be true;

2. The advertisement must state the year of inclusion in the listing

as well as the specialty for which the lawyer was listed;

3. The basis for the implied comparison must be verifiable by accurate and adequate disclosure in the advertisement of the rating or certifying methodology utilized for compiling the listing or inclusion that provides a basis upon which a consumer can reasonably determine how much value to place in the listing or certification; as a minimum, the specific empirical data regarding the selection process should be included (*e.g.*, in a peer-review methodology, the number of ballots sent and the percentage of the ballots returned. . . .);

4. The rating or certifying methodology must have included inquiry into the lawyer's qualifications and considered those qualifications in selecting the lawyer for inclusion;

5. The rating or certification cannot have been issued for a price or fee, nor can it have been conditioned on the purchase of a product, and the evaluation process must be completed prior to the solicitation of any advertising, such as for a special advertising supplement in a magazine or other publication;

6. Where superlatives are contained in the title of the list itself, such as here, the advertising must state and emphasize only one's ***inclusion*** in the *Super Lawyers* or *The Best Lawyers in America* list, and must not describe the attorney as being a "Super Lawyer" or the "Best Lawyer;"

7. Likewise, claims that the list contains "the best" lawyers or, *e.g.*, "the top 5% of attorneys in the state," or similar phrases are misleading, are usually factually inaccurate and should be prohibited;

8. The peer-review or certification methodology must contain proper usage guidelines that embody these requirements and must be adhered to in the advertisement;

9. The advertising must be done in a manner that does not impute the credentials bestowed upon individual attorneys to the entire firm;

10. The peer-review or certification methodology must be open to all members of the Bar;

11. The peer-review rating methodology must contain standards for inclusion in the lists that are clear and consistently applied; and

12. The advertisement must include a disclaimer making it clear that inclusion of a lawyer in a *Super Lawyers* or *The Best Lawyers in America* list, or the rating of an attorney by any other organization based on a peer-review ranking is not a designation or recognized certification by the Supreme Court of New Jersey or the American Bar Association.

Id. at 729 (emphasis in original in ¶ 6).

After receiving these recommendations, Rule 7.1 of the N.J. Rules of Professional Conduct was amended as follows: "[a] communication is false or misleading if it. . .compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication" disclaims approval by the Supreme Court of New Jersey. N.J. Court Rules, RPC 7.1(a)(3). The official comment from the New Jersey Supreme Court following this rule describes the requirements for a comparison to be truthful:

> A truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney's fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source.

N.J. Court Rules, RPC 7.1, cmt.

We consider the New Jersey special master's analysis to provide useful guidance. While Rule 7.1 of the Utah Rules of Professional Conduct has not been redrafted (as Rule 7.1 of the N.J. Rules of Professional Conduct has), we also find the comments to New Jersey's Rule 7.1 helpful and instructive. We conclude that a lawyer's participation in any rating system and use of that rating in the lawyer's advertising is permissible where: (1) the comparing organization has made appropriate inquiry into the lawyer's fitness; (2) a favorable rating from the comparing organization is not for sale and may not be purchased by the lawyer; (3) the lawyer ensures that the methodology or process used to determine the rating is fully disclosed and explained using plain language and is conveniently available to the public; and (4) the communication

disclaims the approval of the Utah Supreme Court and/or the Utah State Bar. Statements that explain in laymen's terms, and do not exaggerate the meaning or significance of professional credentials, are permissible.

Rule 7.1 prevents a lawyer from communicating to the public credentials that are not legitimate. A recommendation or endorsement that is not based upon objective criteria or a legitimate peer review process, but is available to any lawyer who is willing to pay a fee, is misleading to the public and therefore prohibited. Likewise, implying in advertising that a lawyer has been selected for inclusion in a rating system based upon the quality of the lawyer's services or some other process of independent endorsement when in fact no bona fide judgment as to quality has been objectively made is misleading and violates Rule 7.1. For example, paying the reasonable costs of advertising to a comparing organization for an endorsement, even after an investigation, violates Rule 7.1 where the basis for and scope of the investigation and endorsement is not fully disclosed to the public in clear and simple terms that the average consumer can understand. Without that information, a consumer cannot reasonably determine how much value to place on the endorsement. Similarly, some publications hold contests that rely solely upon unsolicited votes in order to designate the "best" restaurants, businesses, lawyers, etc. in a certain geographical area without any inquiry into the fitness of the lawyers who garner the most votes. Such contests invite ballot stuffing, cannot be factually substantiated, and do not pass muster under Rule 7.1.

Even where appropriate disclosures have been made to satisfy Rule 7.1, the advertisement must still comply with all of the other Utah Rules of Professional Conduct, including Rule 7.2.

Rating systems may implicate Rule 7.2 of the Utah Rules of Professional Conduct, which prohibits giving anything of value to another to recommend the lawyer's services. A lawyer may not pay another person for channeling professional work. If a lawyer pays a fee to be listed as among the "best" lawyers, then the lawyer violates this rule. This is true whether or not the lawyer thereafter advertises this rating herself or not. A lawyer who trades votes with other lawyers violates Rule 7.2. This Committee established in Ethics Advisory Opinion 13-02 that reciprocal referral arrangements violate Rule 7.2. "If a lawyer refers a client to another lawyer or other professional pursuant to a reciprocal referral agreement,[2] then the first lawyer is giving 'something of value' in exchange for a past or future recommendation from the other professional." Hazard, Hodes & Jarvis, *The Law of Lawyering* (3d) § 56.5, at 56-9. Likewise, if one lawyer votes for her friend with the understanding that her friend will vote for her, this is "giving something of value" for a recommendation and violates Rule 7.2 in the same way. Further, a lawyer who pays a celebrity or public figure to recommend the lawyer violates Rule 7.2.

A lawyer may, for advertising purposes, pay a comparing organization to investigate that lawyer, provided that the outcome of the investigation is not predetermined and is independent of the fee. If the results from an appropriate investigation are thereafter advertised, the nature and scope of the investigation must be fully disclosed and explained using plain language and must be conveniently available to the public. Such an investigation may require "the inclusion of an appropriate disclaimer or qualifying language," especially if the investigation is limited to certain matters, such as good business practices. See Ethics Advisory Op. 09-01, ¶ 7. For example, the Better Business Bureau (the "BBB") indicates that its "accreditation does not mean that the business' products or services have been evaluated or endorsed by the BBB, or that BBB has made a determination as to the business' product quality or competency in performing services." BBB, http://www.bbb.org/utah/for-businesses/about-bbb-accreditation/ (last visited Oct. 22, 2014). Otherwise, a general endorsement may "create unjustified expectations or otherwise mislead a prospective client." *See* Ethics Advisory Op. 09-01, ¶ 7.

Once a lawyer has been appropriately investigated or evaluated by a comparing organization, it is not a violation of Rule 7.2 for a lawyer to pay "the reasonable costs of advertisements or communications" that the comparing organization incurs to include the lawyer in its rating system. However, it is impermissible for a lawyer to participate in a rating system in which the comparing organization charges ongoing fees for purported "reasonable costs of advertisements" that in reality are improper payments for its continued recommendation of the lawyer.

1. We again note that Utah's Truth in Advertising Statute, Utah Code Ann. § 13-11a-1, *et seq.*, and Utah's Consumer Sales Practices Act, Utah Code Ann. § 13-11-1, *et seq.*, should be consulted as well.
2. We note that Rule 7.2 of the Model Rules of Professional Conduct ("MRPC") permits reciprocal referral agreements if they are "not exclusive" and if "the client is informed of the existence and nature of the agreement." MRPC Rule 7.2(b)(4). Utah has not adopted this provision; thus, any reciprocal referral agreement in Utah violates Rule 7.2 of the Utah Rules of Professional Conduct.

Dissent to Revised Opinion Number 14-04 (two members dissenting)

We fully agree with the Committee's Opinion with respect to Rule 7.1 regarding false or misleading communications. However, we disagree with one aspect of the Committee's Opinion regarding Rule 7.2 and write separately to outline that disagreement.

Rule 7.2(b) prohibits giving "anything of value to a person for recommending the lawyer's services; except that a lawyer may: (1) pay the reasonable costs of advertisements or communications permitted by this Rule." The Committee opines: "'[A]nything of value' would also include monies paid to a public figure or celebrity to recommend a lawyer." (Para. 3) and "Further, a lawyer who pays a celebrity or public figure to recommend the lawyer violates Rule 7.2" (Para. 13). We believe that prohibiting celebrity recommendations unhelpfully confuses what may be the "reasonable costs of advertising" with what Rule 7.2 clearly prohibits – paying "others for channeling professional work." Comment [5].[1]

The context in which a celebrity would recommend an attorney would typically be through a paid advertisement. The Committee's Opinion will, apparently, permit the celebrity to appear in an ad and to say "Let me tell you about Firm Abbott & Costello…" but not to say "We recommend that if you have a legal problem in z, you contact the Abbott & Costello firm." We think most of the public will fail to see a difference between the two scenarios and will think that either scenario involves the celebrity endorsing or recommending the attorney.

Presumably the celebrity will charge more to appear in the advertisement simply because he is a celebrity. We do not think it wise to have a rule that asks what portion of the celebrity's fee is for acting and what portion is for being willing to recommend the attorney.

Commentators Hazard, Hodes & Jarvis appear to agree with my analysis, writing:

> Rule 7.2(b0(1) addresses the sometimes uncertain line between permitted advertising and prohibited solicitation as it applies to the use of "runners" and other third party facilitators of communications.… [S]peaking in the most literal terms, it might be said that the proprietor of an advertising medium is also a "runner" of sorts, who is being paid to "recommend," after all, the subject of the advertisement. The same could be said of a television actor paid to endorse a lawyer's "product," or a company that produces and auto-dials pre-recorded commercial messages. To avoid these awkward results, Model Rule 7.2(b0(1) clearly permits such arrangements on the theory that they are merely instrumentalities of permitted advertising.

The Law of Lawyering (3d) § 56.2, at 56-4 (2014).

We think celebrity appearances in ads are better addressed solely under Rule 7.1 regarding misleading advertising. If the celebrity purports to have some special expertise in order to recommend the attorney (e.g. a Utah Jazz player recommending an attorney engaged in sports law), then a disclaimer may be necessary to indicate that this is a paid advertisement to avoid misleading the consumer.

We would eliminate the two references forbidding paying celebrities to recommend an attorney for the above reasons.

1. Comment 5 of Rule 7.2 states in relevant part:

   > Paragraph (b)(1), however, allows a lawyer to ***pay for advertising*** and communications permitted by this Rule, ***including*** the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. (emphasis added).

   The Committee appears to believe that paying for "airtime" is permitted but paying celebrities to perform during that air time is not. This is a flawed approach to construing this comment. "The word 'include' in a statute generally signals that entities not specifically enumerated are not excluded." *Singer, Sutherland's Statutes and Statutory Construction* § 47:25 at 444 (2014).

Utah State Bar Ethics Advisory Opinion Committee Summary of Opinion Number 14-05 / Issued December 22, 2014

ISSUE

When an Attorney (A) is representing another Lawyer (L) in a legal malpractice or disciplinary action, and Lawyer L undertakes to represent a client in a matter adverse to a client of Attorney A, what are the ethical considerations?

OPINION

Attorney A representing a Lawyer L in a disciplinary or legal malpractice matter may face a concurrent conflict of interest if the Lawyer L (client) represents an individual who is an opposing party to a client represented by Attorney A. A concurrent conflict of interest would arise if there is a significant risk that Attorney A's representation of Lawyer L be will materially limited by her responsibilities to the client being sued by Lawyer L's client; or if there is a significant risk that Attorney A's representation of a client against Lawyer L's client will be materially limited by her representation of Lawyer L.

Whether this situation poses a serious risk of materially limiting Attorney A's representation requires analyzing the factual situations presented.

Lawyer L may also face a concurrent conflict of interest if this dual relationship creates a significant risk that Lawyer L's representation of his client against Attorney A will be materially limited. Here, too, the factual context will be determinative.

Even if such a concurrent conflict of interest is created, it may be possible for all affected clients to give informed consent, confirmed in writing, to the conflict.

Because the risk that representation may be materially limited due to this situation will often be due to a personal conflict of interest, in many cases other lawyers in the firms of Attorney A and Lawyer L will be able to be involved in the representation without creating a conflict of interest.

Utah State Bar Ethics Advisory Opinion Committee Summary of Opinion Number 15-01 / Issued January 13, 2015

ISSUE

The Utah Board of Pardons and Parole (the "Board") and a private attorney have jointly requested the Ethics Advisory Opinion Committee issue an opinion on what constitutes a "matter" as discussed in Utah Rules of Professional Conduct 1.11(a)(2) and 1.12(a). Specifically, in light of the nature of Board proceedings, do all decisions involving an individual offender constitute the same "matter" for purposes of Rule 1.11(a)(2) and 1.12(a)? What are the limitations on a former member of the Board or hearing officer in representing offenders before the Board?

OPINION

A former member of the Board (or hearing officer) may not represent an offender before the Board without the informed written consent of the Board where the former Board member (or hearing officer) personally and substantially participated in prior Board proceedings involving the same offender. However, the specific facts and circumstances of the subsequent representation, including, without limitation, the lapse of time between the two Board proceedings and nature of the offenses involved, may often provide a basis for the Board to waive any potential conflict in such a situation.

The full text of these opinions, as well as all other opinions issued by the Utah State Bar Ethics Advisory Opinion Committee, are available at: www.utahbar.org/opc/eaoc/

Attorney Discipline

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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.

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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/.

RECIPROCAL DISCIPLINE

On December 1, 2014, the Honorable Richard McKelvie, Third Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Reciprocal Discipline: Public Reprimand against Julie C. Molloy for violating Rule 1.15(a) (Safekeeping Property) and Rule 8.4(c) (Misconduct) of the Rule of Professional Conduct.

Ms. Molloy is a member of the Utah State Bar and is also licensed to practice law in Massachusetts. The Commonwealth of Massachusetts Board of Bar Overseers of the Supreme Judicial Court issued an Order of Public Reprimand reprimanding Ms. Molloy for her conduct in violation of the Massachusetts Rules of Professional Conduct. An Order was entered in Utah based upon the discipline order in Massachusetts.

In summary:

Ms. Molloy deposited personal funds to her IOLTA account and kept earned fees in her IOLTA account to avoid an Internal Revenue Service levy against her personal account and operating account.

Ms. Molloy made cash withdrawals and internal debits from the IOLTA account that did not identify the recipient or source of the funds. Ms. Molloy made payments from her IOLTA account from personal funds and earned fees directly to creditors or vendors for her personal expenses. Ms. Molloy did not maintain a ledger

for each client matter that listed all transactions for the client and the balance remaining for the client after each transaction.

In addition, Ms. Molloy did not perform a three-way reconciliation of her IOLTA account at least every sixty days. To the extent that Ms. Molloy reconciled her IOLTA account, she did so incorrectly and calculated incorrect balances. Ms. Molloy did not maintain and retain any reconciliation reports.

Aggravating factors:
Prior record of discipline.

Mitigating factors:
Health problems.

ADMONITION

On December 15, 2014, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rule 1.6 (Confidentiality of Information) of the Rules of Professional Conduct.

In summary:
A law firm was hired to represent a client in a family law matter. After the representation was terminated, the client posted an anonymous and disparaging comment regarding the law firm online. The attorney who owned the firm posted some general information regarding the representation as a rebuttal on the website, including the disclosure of the client's name.

Named in a Bar Complaint?

Many complaints are dismissed in the early stage of the discipline process, and less than 3% result in Orders of Discipline, but all are disconcerting.

The newly formed Discipline Process Information Office is here to help. Jeannine P. Timothy will answer questions about the discipline process, refer you to the appropriate procedural rules at various points in the process, and inform you about the progress of your individual matter with the Office of Professional Conduct. Call Jeannine at 801-257-5515 or email her at DisciplineInfo@UtahBar.org.

DISCIPLINE PROCESS
INFORMATION OFFICE
Jeannine P. Timothy
801-257-5515
DisciplineInfo@UtahBar.org

The Devil's Advocate is Dead; Long Live the Rule

by Eric Boyd Vogeler and Kyle E. Witherspoon

The Utah Supreme Court recently and significantly reformed appellate practice in Utah, though you may not have noticed.

In *State v. Nielsen*, 2014 UT 10, 326 P.3d 645, the court put to rest the judicially created default notion of the marshaling doctrine in favor of Rule 24(a)(9) of the Utah Rules of Appellate Procedure and marshaling's traditional role as an element of an appellant's burden of persuasion.

The Marshaling Doctrine

For years, Utah's marshaling doctrine had come to serve as an unpredictable minefield for appellants. Put simply, the marshaling doctrine requires an appellant to present the evidence supporting the factual findings she challenges on appeal. Over time, however, the marshaling standard grew increasingly mercurial. Depending on the panel and the case, the doctrine could be as innocuous as a speed bump on the road to a case's merits or, as recent cases had sometimes applied it, marshaling could stand as a full-stop, procedural default of an appellant's case. And even in a world governed by strict rules of procedure, default is harsh medicine.

As a result of the appellate courts' inconsistent application of the doctrine and the unclear requirements for marshaling, arguments aimed at the sufficiency of an appellant's marshaling became something of a procedural necessity in practically all appellees' briefs. Thus, marshaling evolved into something it was never meant to be: a trap for even the wariest of appellants.

That trap looks to have been removed. In *Nielsen*, the Utah Supreme Court retooled the marshaling doctrine and sought to firmly plant it in clear and predictable principles of law. At first blush, the result appears to be a substantial overhaul of the marshaling requirement. In reality, however, while the practical impact of *Nielsen* is significant, *Nielsen* simply brings the marshaling doctrine back to its roots as a substantive element of both the court's evaluation of the merits of a case and of the appellant's burden of persuasion rather than a matter of procedural form and compliance. *See id.* ¶¶ 34–35. Practitioners and jurists should welcome the change.

A Page Out of History

As the *Nielsen* court itself noted, marshaling has long been enshrined in our law. Going back to 1949, the state's highest court stated it plainly: "[C]ounsel who asserts error has the burden of showing that error exists. It is not [the court's] duty to search the record in quest for error." *Reid v. Anderson*, 211 P.2d 206, 208 (Utah 1949). Decades later, the Utah Supreme Court coined the term "marshal the evidence" but essentially echoed the principle laid out in *Reid*: that an appellant must "demonstrate that even viewing [a trial court's decision] in the light most favorable to the court below, the evidence is insufficient to support the findings." *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070.

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KYLE E. WITHERSPOON is an associate at Dorsey & Whitney, LLP. His areas of emphasis include general and complex commercial litigation, white collar criminal defense, and appeals. He clerked for Justice Thomas R. Lee of the Utah Supreme Court from 2013–2014.

Somewhere in its development, however, the marshaling doctrine evolved from a general principle of appellate persuasion into an unbounded imperative, governed more by the discretion of the court than by any reliable standard. Inconsistent application of the doctrine left appellants without any sense of where their marshaling fate might fall. Indeed, as recently as 2007, the court reminded litigants that precedent demanded that appellate courts "affirm the accuracy of the agency's or trial court's factual findings in the absence of marshaling." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 18, 164 P.3d 384. In the same breath, however, the court softly backed away from that hardline stance, stating that the marshaling requirement was "not, itself, a rule of substantive law" or some "limitation on the power of appellate courts," but "[r]ather…a tool pursuant to which the appellate courts impose on the parties an obligation to assist them in conducting a whole record review." *Id.* ¶ 19.

As the *Nielsen* court noted, whether an appellant had adequately marshaled her evidence – and what effect, if any, that had on her case – became a jurisprudential game of whack-a-mole:

> Sometimes we have openly overlooked a failure to marshal and proceeded to the merits. *See, e.g., State v. Green*, 2005 UT 9, ¶¶ 12–13, 108 P.3d 710. In many other cases, moreover, we have reverted to our earlier conception of marshaling, and disposed of the case on its merits despite an alleged failure to marshal "every scrap" of contrary evidence. And in all events we have declined to state a limiting principle, leaving the question of whether to treat marshaling as a basis for a default or instead as a component of the burden of persuasion purely a matter of our discretion.

State v. Nielsen, 2014 UT 10, ¶ 39, 326 P.3d 645 (citing *Martinez*, 2007 UT 42, ¶¶ 19–20). Thus, appellants were left to wonder whether their marshaling efforts would be entirely legitimized by the court, deemed helpful enough to move onto the merits, or found so wanting as to preclude any appellate relief.

As the *Nielsen* court observed, appellate caselaw sometimes migrated toward a "hard-and-fast *default* notion of a procedural rule," allowing a court to use an appellant's "marshaling deficiency as a ground for [her] procedural default – citing a lack of marshaling as a basis for not reaching the merits." *Id.* ¶¶ 37–38.

The specter of default – sometimes without so much as a nod to the merits of a case where the court concludes that an appellant's marshaling is inadequate – has troubled appellate litigants for years, turning marshaling into a potential and de facto procedural bar. *Id.* (citing *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶¶ 38, 41, 140 P.3d 1200).

The *Nielsen* Case

The concept of marshaling as a procedural bar troubled the *Nielsen* court as well. The facts before the *Nielsen* court were gruesome and of little moment for our purposes. In sum, Nielsen killed fifteen-year-old Trisha Autry of Hyrum and buried her body in a hole he dug at the U.S.D.A. Predatory Research Facility in the nearby town of Millville. *Id.* ¶¶ 3–9. Nielsen was ultimately charged with one count of aggravated murder, two counts of desecration of a human body, one count of aggravated kidnapping, and one count of kidnapping. *Id.* ¶ 13.

The jury convicted Nielsen on all charges and found that the kidnapping and aggravated kidnapping charges warranted an aggravated murder conviction. *Id.* ¶ 14. Nielsen received a sentence of life without parole under Utah's capital sentencing

statute for the aggravated murder charge and additional sentences of fifteen years to life for aggravated kidnapping and up to five years for each count of desecration of a human body. *Id*. ¶ 16.

Nielsen challenged his convictions on several grounds, including – most importantly for our purposes – sufficiency of the evidence as to his kidnapping convictions. *Id*. ¶ 29. Nielsen argued that there was insufficient evidence for a reasonable jury to decide beyond a reasonable doubt that the victim went with him against her will, a necessary element of kidnapping. *Id*.

The State gave what has become an appellee's stock response, arguing first that the court should not reach the merits of the appeal because Nielsen had failed to adequately marshal the evidence as required by Utah Rule of Appellate Procedure 24(a)(9) and did not present, "'in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" *Id*. ¶ 31 (citation omitted). The State also argued the merits of the appeal – and ultimately prevailed on the sufficiency of evidence argument – but did so only as an alternative ground of affirmance. *Id*.

> *"While appellants must still shoulder the burden of collecting and presenting the evidence that would support the challenged decisions of the trial court, they no longer run the risk of having their appeal summarily disposed of for having failed to adequately advocate for the other side."*

The *Nielsen* Opinion

The court, in a unanimous opinion by Justice Lee, rejected the State's marshaling argument and took the opportunity to reevaluate the mechanics and substance of the marshaling requirement. *State v. Nielsen*, 2014 UT 10, ¶¶ 33–44, 326 P.3d 645. After tracking the doctrine's history and development, the court concluded that marshaling had at times diverged from its historical understanding as an element of the appellant's burden of persuasion, to a potential procedural default mechanism that improperly emphasized "technical deficiency." *Id*. ¶ 41.

The time, therefore, had come for the court to "reconcile and regularize" its marshaling jurisprudence. While "recogniz[ing] and reiterate[ing] the importance of the requirement of marshaling," the court repudiated the "default notion of marshaling sometimes put forward in our cases," and "reaffirm[ed] the traditional principle of marshaling as a natural extension of an appellant's burden of persuasion." *Id*. ¶ 40. Thus, the *Nielsen* court clarified that the marshaling requirement is not a procedural hurdle, separate and apart from the merits. It is, rather, *part of the merits*. Importantly, the court also went out of its way to repudiate the "heightened" standards that required appellants to present "every scrap of competent evidence,"[1] "fully assume the adversary's position,"[2] and play "devil's advocate."[3] *Id*. ¶¶ 33–44.[4]

The *Nielsen* Effect

It is important to note that *Nielsen* does not do away with "marshaling." The term itself survives as a matter of both precedent and law. *Id.* ¶ 40; *see also* Utah R. App. P. 24(a)(9). But it's not what it used to be. The *Nielsen* court in fact went out of its way to reaffirm marshaling's importance, noting that any marshaling "is a boon to both judicial economy and fairness to the parties" and that the "appellant who seeks to prevail in challenging the sufficiency of the evidence to support a factual finding or a verdict on appeal should follow the dictates of rule 24(a)(9)."

Instead of creating a new marshaling regime out of whole cloth, the *Nielsen* court "reconcile[d] and regularize[d]" the marshaling doctrine in its original form and its ever-evolving incarnation, all while still "recogniz[ing] and reiterat[ing] the importance" of it. 2014 UT 10, ¶ 40. That reconciliation appears to have been aimed at two important objectives: (1) doing away with the "hard-and-fast default notion of marshaling" by walking it back to the "traditional principle of marshaling as a natural extension of an appellant's burden of persuasion," *id*. ¶ 41; and (2) excising the troubling subjective elements of the doctrine – "the requirements of playing 'devil's advocate' and of presenting 'every scrap of competent evidence' in a 'comprehensive and fastidious order.'" *Id*. ¶ 43.

Put another way, the court has turned marshaling back to the maxim outlined in *Reid v. Anderson* and Rule 24: an appellant

who alleges error must demonstrate that error. And where error is alleged, appellate courts defer heavily to the district court, thus requiring a presentation of all evidence available to the district court in making its decision. *See, e.g., In re Adoption of Baby B.*, 2012 UT 35, ¶ 40, 308 P.3d 382. If an appellant cannot (or willfully does not) present that requisite field of evidence and show how the available evidence could not have supported the decision he challenges, his appeal is doomed.

Where Does *Nielsen* Leave Us?

So, where does *Nielsen* leave attorneys litigating an appeal in state courts? Has marshaling really changed at all? The answers to those questions are "better than they were before" and "YES."

For appellants, *Nielsen* provides some procedural breathing room. Appellants are no longer in the unenviable position of arguing against their own case. That said, *Nielsen* does not appear to alter the substance of marshaling – *i.e.*, the burden of persuasion – in any meaningful way. Indeed, although the reins may *appear* to be looser – no longer requiring the appellant to perform a fastidious overview of every possible scrap of evidence at the district court's disposal and applying it to his own detriment – an appellant must still thoroughly scrub the record for *any* "evidence that supports [a] challenged finding," and substantively grapple with that evidence. Utah R. App. P. 24(a)(9).

Accordingly, appellants should still take it upon themselves to "educate the court as to exactly how the trial court arrived at each of the challenged findings." *Friends of Maple Mountain, Inc. v. Mapleton City*, 2010 UT 11, ¶ 10, 228 P.3d 1238. To do this, appellants should "show [the court] where the evidence can be located and list the specific evidence supporting the" decision. *State ex rel. W.A.*, 2002 UT 127, ¶ 45, 63 P.3d 607. To shirk that burden and "fail[ ] to identify and deal with that evidence" or rely on "overbroad assertions" could (as the *Nielsen* court observed of the appellant there) result in a "greatly undermined" argument. *State v. Nielsen*, 2014 UT 10, ¶ 44, 362 P.3d 645. And a "greatly undermined" argument is a nice way of saying "loser." *See id.* ¶ 47 (concluding that the appellant's "sweeping assertion" stating that the State had "produced no direct evidence" fell "far short under the…deferential standard of review").

For the appellee, it may seem that not much has changed in the marshaling regime. But *Nielsen's* strategic impact on an appellee's response brief is potentially as substantial as the changes on the appellant's end. *Nielsen* reads as a gentle, but firm, invitation to appellees to stop harping on an appellant's alleged failure to marshal. Practitioners would be wise to take that invitation to heart. Advancing a separate marshaling argument is no longer *de rigueur* for appellees. And doing so won't prevent an appellate court from reaching the merits; it's simply a part of them. Thus, for an appellee, the first step is to confront each of the appellant's challenged findings and conclusions on their merits rather than attempting to avoid them as a matter of procedure. While the distinction is fine, it is not one without a difference. And failing to heed it could do substantial injury to an advocate's credibility before the court.

At bottom, *Nielsen* has altered appellate advocacy in Utah state courts. While appellants must still shoulder the burden of collecting and presenting the evidence that would support the challenged decisions of the trial court, they no longer run the risk of having their appeal summarily disposed of for having failed to adequately advocate for the other side. Put simply, an appellant's marshaling prowess – whether formidable or feeble – is no longer an independent basis to avoid the merits or dismiss the case. And it is this point that should allow appellate counsel, regardless of side, to sleep a bit easier at night.

1. *Chen v. Stewart*, 2004 UT 82, ¶ 77, 100 P.3d 1177; *see also Oneida/SLIC, v. Oneida Cold Storage & Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994); *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991).

2. *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). In reading the opinion expansively, as it suggests, and consistent with returning marshaling to its proper place "as a natural extension of an appellant's burden of persuasion," we read *Nielsen* to remove the additional "teeth" the court had added to the rule over the years. 2014 UT 10, ¶ 38, 362 P.3d 645. This includes the requirement to "fully assume the adversary's position," notwithstanding the court's more frequent mention of the "every scrap" and "devil's advocate" requirements in *Nielsen*.

3. *See In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994).

4. These requirements sprang up in caselaw but do not appear (and have never appeared) in the text of Utah Rule of Appellate Procedure 24(a)(9). The rule states only that "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." *Nielsen* 2010 UT 14, ¶¶ 38, 40. *But see* Advisory Committee Note (asserting that the text of Rule 24(a)(9) "now reflects what Utah appellate courts have long held," that marshaling requires appellate counsel to "play the devil's advocate," "extricate [themselves] from the client's shoes and fully assume the adversary's position," and present "every scrap of competent evidence" which supports the challenged findings).

   Your authors respectfully contend, and the court in *Nielsen* seemed to agree, that this interpretation stretches the phrase "marshal all record evidence" past the breaking point. *See id.* ¶ 38 (noting the "additional teeth" the court had added to the rule despite relative simplicity of its text).

CLE Calendar

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

March 11, 2015 | 4:00–6:00 pm — **2 hrs. Ethics**

PRACTICE IN A FLASH: LITIGATION 101 SERIES – Ethics and Civility. *Learn What They Didn't Teach You in Law School!* This is the sixth in a six part series of courses. Food and drink provided. Cost: $25 for YLD, $50 for all others.

March 12–14, 2015 — **Up to 10 hrs. CLE (incl. 2 hrs. Ethics and 1 hr. Prof./Civ.)**

Spring Convention in St. George. Dixie Center, 1835 South Convention Drive, St. George, UT 84790.

March 18, 2015 | 9:00 am–3:45 pm — **6 hrs. Ethics (incl. 1 hr. Prof./Civ.)**

OPC Ethics School – "Everything They Didn't Teach You in Law School"

April 9, 2015 | 5:00 pm

An Evening With the Fourth District Court. More details to follow.

April 23, 2015 | 8:30 am–12:30 pm — **Fulfills the NLTP requirement**

New Lawyer Required Ethics Program. This program is required for all new lawyers who took the two day Bar Exam and are admitted to practice in Utah. The New Lawyer Ethics Program satisfies the ethics and Prof/Civ. credits for NLTP and your first compliance term. For this program only – attendees must be in the door by 9:00 a.m. After that time your registration will be transferred to the next program. Please leave early to avoid traffic congestion. Price: $75.

April 30, 2015 | 9:00 am–12:00 pm — **3 hrs. CLE**

Annual Collection Law Section Seminar. Price Pending

May 8, 2015 — **7 hrs. CLE pending**

Annual Family Law Seminar. University Guest House.

May 8, 2015 — **7 hrs. CLE pending**

Utah Elder Law, Estate Planning, and Medicaid Planning Seminar.

May 21, 2015 | 12:00 pm–1:15 pm — **1 hr. Prof./Civ.**

Professionalism and Civility. $40, with proceeds going to Law Related Education.

June 2, 2015 — **6 hrs. (incl. 1 hr.Ethics)**

How to Manage a Small Law Firm. $100 for active under three, $150 for Solo Small Firm Section Members. $210 for others.

June 5, 2015 | 8:30 am–5:00 pm — **7.5 hrs. CLE (incl. 1 hr. Prof./Civ.)**

Personal Injury – Beyond the Basics – Part III. Topics include: The Basics of FTCA and GIA Malpractice Actions, presenter: Ryan M. Springer; Litigating with Governmental Entities, presenter: Eric Olson; Avoiding the Pitfalls of Appellate Preservation, presenter: David M. Corbet; Changes in the Discovery Process, presenters: Francis J. Carney and Hon. Todd M. Shaughnessy; Uses of Technology in Your Practice, presenter: Jeff M. Sbaih; How to be Most Effective in Arbitrations and Mediations, presenter: R. Scott Williams; Attention-Grabbing Demonstrative Evidence, presenter: David A. Cutt; and The Whys, Whens and Hows of Experts, presenters: Jordan Kendall, Esq. and Jeff Oritt. Price: TBA.

June 11, 2015 | 8:30 am–11:45 am — **3 hrs. Ethics**

TechEd 2015. Presenters include: Heather White, Hon. Todd Shaughnessy, Hon. Mark Kouris, Hon. David Nuffer, Janise Macanas, Lincoln Mead, Russell Minas. Cost $100.

June 12–13, 2015 — **CLE pending**

New Lawyer Basic Criminal Law Trial Skills. Two full days. Pricing pending.

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

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For July 1 _____ through June 30_____

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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

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

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

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