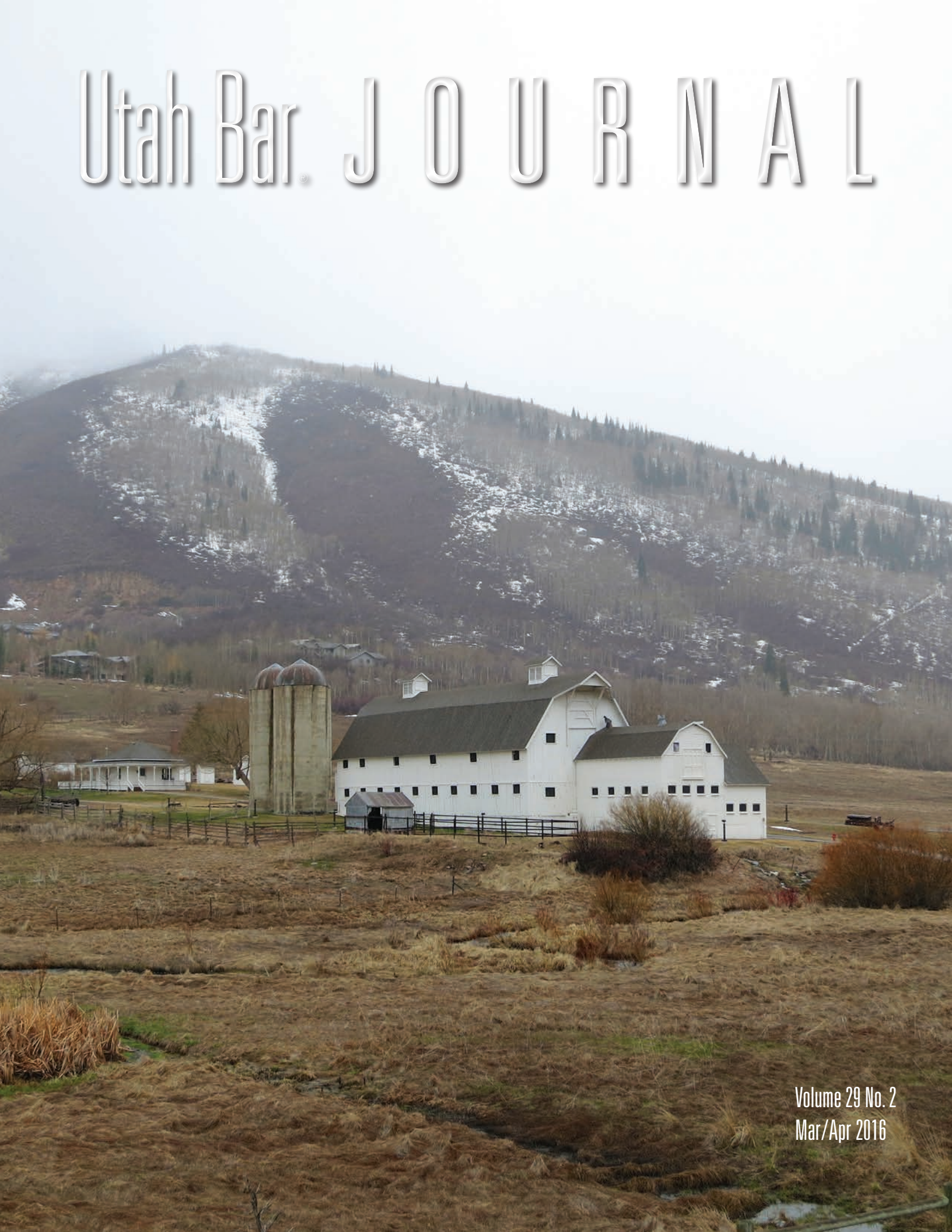
Utah Bar JOURNAL



Volume 29 No. 2
Mar/Apr 2016

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Utah Bar® JOURNAL

Volume 29 No. 2
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Cover Photo

White Barn, by Utah State Bar member Adam Bondy.

ADAM BONDY is a law clerk at the Utah Court of Appeals. Since moving from California, Adam has spent time exploring and enjoying Utah's beautiful landscapes, often snapping photos and posting them on Instagram (@instagradamb). He took this photo on the way back from Park City, after insisting that the driver pull over so he could run back to the best vantage point.

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.

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We envision a just legal system that is understood, valued, and accessible to all.

The Utah Bar Journal

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APPELLATE ATTORNEYS

Interested in writing an article for the Utah Bar Journal?

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

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

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

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

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

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

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

Letter to the Editor

Letter Submission Guidelines

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

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

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

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

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

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

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

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

Dear Editor:

Utah law has very few protections for debtors against usurious interest rates, which gives carte blanche to Utah lawyers to charge their clients whatever they would like for unpaid legal bills. In trying to help a client of mine with a small claims judgment obtained against her by her prior attorney, I had a chance to review her engagement letter. This letter entitled her prior attorney to charge her 24 percent per month, compounded monthly, on unpaid bills. To put this into numerical terms, after 1 year, a $100 unpaid balance would balloon to over $1,300.

Attorneys are ethically prohibited from charging an unreasonable fee for their services. This should extend to the interest rates attorneys charge their clients on unpaid bills. Given that the Utah legislature is highly unlikely to regulate interest rates broadly, the State Bar should act to prevent these types of abusive fee agreements.

Aaron C. Garrett

President-Elect & Bar Commission Candidates

Candidate for President-Elect

Retention of President-Elect: *John Lund has been nominated by the Bar Commission to serve as President-Elect in 2016–2017 and as President in 2017–2018, subject to a confirmation ballot submitted to all lawyers on active status. No other candidates petitioned the Commission to run for the office.*

JOHN LUND

The lawyers who make up the Utah bar have many different practices and perspectives. But they all seek to provide valued service to their clients. That common goal defines us as a profession. Through the Utah Bar's over 30 practice sections and dozens of committees and divisions, and with help from the Bar staff, we regulate ourselves, we educate ourselves, we stay connected with each other and we serve the public. We are a dynamic bar association at the national forefront in several areas. However, we also face challenges. Those challenges include changing expectations of our clients and our community, underemployed lawyers and underserved client populations, maintaining the integrity of our profession and keeping costs under control.

As president of the Utah Bar, I will work with all of you to keep our organization strong and address these challenges, as well as your own concerns, if you will share them. It has been my privilege to be a Utah lawyer for over 30 years. It has been my honor to have represented the lawyers of the Third District as a commissioner for the past six years. I write to ask all of you for your support in the upcoming election.

Second Division Commissioner

Uncontested Election: *According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected." John Bradley is running uncontested in the Second Division and will therefore be declared elected.*

JOHN BRADLEY

John W. Bradley is a graduate of Utah State University and BYU law school. He has practiced in Ogden for over 25 years. He started in private practice in a small firm doing mostly family law and criminal defense work. Later, he took a job with the Utah Attorney General's Office where he has remained for 20 years. The majority of his time is spent appearing in court in Weber and Davis County, although his office covers both the first and second district. John has served as president of the Weber County Bar where he was instrumental in starting the practice of obtaining CLE credit for bar luncheons. He volunteered as a small claims judge for a year and served for 14 years on the South Ogden City Council. He currently sits on the bar's character and fitness committee.

John seeks to be a voice for the attorneys in the second district, especially relative to issues surrounding small firms and solo practitioners. He has developed a reputation of creative thinking, giving a balanced view, and listening to people. Please give him your vote.

Third Division Commissioner

S. GRACE ACOSTA

I want to be your bar commissioner because I believe in hard work, listening to different viewpoints and being proactive. I am a mother, wife, girl-scout troop leader and faithful friend. I love Utah and practicing law in this state. I bring cheerfulness, kindness and even-handedness to all that I do. I would love the chance to bring all my enthusiasm, love of the law and love of Utah to the Utah State Bar Commission as the representative from the Third Division. If elected, I would maintain an open-door policy and would strive to listen wholeheartedly to all viewpoints and try to bring your voice back to the commission. If you give me the chance, I will make you proud and will work hard to better the commission and the Utah State Bar.

SUE CRISMON

Many of you know me through my current position as the Director of Pro Bono at Utah Legal Services. I have dedicated my time at ULS to increasing access to justice through improved pro bono infrastructure. From the statewide Pro Bono Commission, eight local district pro bono committees, and a pro bono database to coordinate efforts statewide, I know how to coordinate with others to get things done. I have had the opportunity to build relations with the Bar, private attorneys, law firms, and legal non-profits through joint initiatives. I want to increase the Bar's efforts to reach out to these community partners to minimize duplication efforts and make sure we are moving forward in the most efficient manner possible. I believe transparency and working with the right partners can make these efforts successful. I want to make sure the projects we undertake serve the members of the Bar, our law schools, and the community at large. I believe I have the leadership qualities necessary to help move the Bar forward. I ask for your support. Thank you.

MARK MORRIS

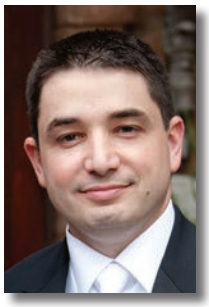
I ask for your support as a Bar Commissioner representing the Third Division. I co-chaired the Annual Meeting in 2012, chaired the Construction Law Section in 2014, and participated in the Bar's mentor program. Those associations provided wonderful camaraderie and fellowship. They remind me of the observation our Chief Justice Matthew Durrant made to a graduating class of law students a few years ago. He revealed, with good humor, that he actually likes lawyers. So do I. I am proud to be a member of a Bar full of people whom I genuinely like. The pace of changes in technology has made us all more efficient and streamlined in many ways how we help our clients. We should continue to strive to provide cost-effective legal services while not losing sight, however, of the value of collegiality promoted by the mentor program and the Code of Civility and Professionalism. After practicing law in Utah for more than 30 years in private practice at Snell & Wilmer and Ray, Quinney & Nebeker, I would welcome the opportunity to provide help and insight that will make Utah an even better place to live and practice law.

DAVID SMOOT

I am asking for your vote as a Bar Commissioner in the Third Division.

For over 25 years I have been practicing law and interacting with the legal community in the Third Division. My experience encompasses work as a member of a medium-sized law firm, the owner and operator of my own small law firm, a judicial law clerk, a bankruptcy trustee, as well as corporate work as an in-house attorney and general counsel for a locally-owned bank. I currently work as an executive for a large regional bank in a business capacity focusing on the management of credit operations addressing issues of people, processes, efficiency and fiscal responsibility.

I will bring this broad-based experience and the personal commitment of my time to fulfill the role and responsibilities of a Bar Commissioner.



PETER STRAND

To the Members of the Utah Bar's Third Division:

I am passionate about donating my time to assist both the community at large, and my fellow attorneys. I have a lot of experience balancing competing interests; both in my military service and working for a nonprofit. I understand that the Bar Commissioners must balance the needs of the legal community with the sometimes competing interests of the citizenry at large. I will work hard to make sure that balance is equitable and where possible, mutually beneficial.

As a Bar Commissioner I will:

- Work to increase Bar services for members, and
- seek an increase in quality for technology that the bar pays for to support members, and
- seek an increase in Bar Committees and posts for currently underrepresented groups, and
- work to increase transparency within the commission, and
- push for a modern web system for citizens to search for attorneys by practice area.

With my experience in working within and leading teams, I am prepared to help make a positive impact for the Bar's members. I humbly ask for your vote for Bar Commissioner in the Third Division. Thank you.

CARA TANGARO

My name is Cara Tangaro, and I am running for Third Division Bar Commissioner. I have been a practicing attorney for 15 years, with experience as both a prosecutor and defense attorney. With experience on both sides of the "v", I have a unique perspective of the complexities of both prosecuting and defending criminal cases.

Additionally, I have worked in both a large law office along with small/solo practices. Therefore, I know the issues faced by attorneys across the spectrum of practices.

Along with being a full-time criminal defense attorney, I am also a full-time mother of three wonderful kids. Running my own law practice and being a full-time attorney all the while raising three young children has been difficult, but also awarding. As a business owner, lawyer, mother, and wife, I have learned the importance of compromise and strategic planning, both of which I plan on using extensively as a Bar Commissioner.

I want to use my unique experiences acquired over the past 15 years to benefit attorneys statewide as a voice. I also want to specifically be a voice for criminal defense and small/solo practitioners.

HEATHER THUET

As this year's Litigation Section Chair, I've been addressing the Section's financial shortfall and other budgetary issues. Historically, the Section had ample resources to provide many high caliber programs such as "Rise and Shines" and Judicial Receptions. I spearheaded an effort to understand the escalating overhead charged by the Bar and encourage transparency on how these charges are calculated. Through a collaborative effort, the Bar's charges to the Bar Sections has been revised to enable all Sections to continue providing quality CLE to their members

We were able to recoup funds enabling us to expand our programs and initiate the Healthy Lifestyles for Litigators and Developing Collegial Relationships program. We're sponsoring a weekly yoga hour; co-sponsoring the Bar Review Social; and doing a Zen in Zion CLE event in May, a Ski & CLE; and our Annual Meeting in Moab in June.

I am grateful for Bar leadership's hard work and the dedication of the Bar Commissioners to address these issues. I have been inspired by them and would like to continue solving the difficult issues that we face.

Thank you to all those who have encouraged me to run and I ask for your vote in this election.

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Our Profession is Being Challenged to Reinvent Itself

by Angelina Tsu

We are lawyers at a moment in time when our profession is being challenged to reinvent itself. We are being called on to articulate the fundamental values of our profession and the judicial system that we, as lawyers, have been entrusted to uphold. We live in a world filled with promise for improving human lives, a world in which creativity and curiosity fuel the future. We must do more than reinforce outdated business models; rather, we must listen to and embrace new ideas.

We must be leaders in shaping not only the future of our profession but also the ways in which our profession can make the most powerful and positive impact in our community. So what is the Bar doing now to meet this future?

"We must be leaders in shaping not only the future of our profession but also the ways in which our profession can make the most powerful and positive impact in our community."

- We are harnessing the power of innovation to solve problems, both enduring and new. Our new Courthouse Steps program provides a forum for members to deliver unbundled flat-fee legal services to middle-class clients. Courthouse Steps is temporarily headquartered at the Law & Justice Center while we propose a rule change that will allow the program to operate inside courthouses across the state. If successful, lawyers will be able solicit clients, provide services and collect fees at the courthouse.

- We are embracing technology to make the practice of law more efficient and profitable. Our new convention app allows members to access convention materials and ask questions through their smart phones, tablets and computers. Our New Tech CLE series provides participants with in-depth knowledge of emerging technologies that impact profitability and the delivery of legal services. Our new lawyer directory, Trusted Lawyer, allows potential clients to search for lawyers.

- We are examining the structure of the Bar to ensure we are providing the efficient and effective services our members deserve. We have replaced the Bar CFO and lobbyist, resulting in significant cost reduction to members. These and other changes will allow us to provide improved services to members at a decreased cost.

- We are nurturing relationships with local law schools to provide greater opportunities for recent law graduates. The Bar's incubator program partners with the S.J. Quinney College of Law to provide funding for recent graduates to be placed with a non-profit legal services provider for six months. At the end of that period, the non-profit guarantees participants in the program will receive full-time employment. Our first participants are scheduled to start in early March. Similar efforts are underway with the J. Reuben Clark School of Law.

- We are strengthening our community by bringing lawyers closer together. We have created a networking event called Bar Review. With nearly 300 attorneys RSVPing for our last event, we plan to continue the events monthly through the end of the bar year. We have also created three new mentoring awards to honor those who give of themselves to help other lawyers.

- We are ensuring that the Bar's legacy of strong and principled leadership will continue for decades to come. The Utah Leadership Academy is training lawyers from across the state to become leaders through an intensive program of study, instruction and practical learning. Participants are learning leadership skills from some of the most inspiring leaders in our community.

In addition to these programs that are already in the implementation stage, we also have several exciting new projects in the works. We have plans for an innovative lawyer referral service where potential clients can post "help-wanted" style requests for legal services. I am interested in hearing from you if you want to participate in our upcoming pilot project.

Many of you have contacted me individually about concerns with the Office of Professional Conduct. I appreciate the time you have taken to reach out to me. We are currently working with the OPC and the Court to ensure that the office is operating in a way that is efficient and fair.

We are at a crossroads. The world's challenges have never been more pressing, more complex, or more shared. Knowledge and innovation have never been more important. As those entrusted with privileged access to justice, we must work together to innovate a future in which we extend that privileged right to all.

Thank you to all of you incredible volunteers who do the hard work to make these nascent programs possible. The Bar Commission deserves special thanks for rising to the challenge and working with me to do so much of the heavy lifting. I am grateful that they share my belief in the future as a place that we build together.

This year we celebrate the Bar's 85th Anniversary. I hope you will join us in commemorating our incredible past and our bright future at the Anniversary Gala this spring. We intend to mark this event by launching a scholarship fund to provide continuing legal education for attorneys in need of assistance.

Amendments to Rule 14-807: Law School Student and Law School Graduate Legal Assistance

by Carl Hernandez and Nancy Sylvester

For those hoping to find better access to legal services in the Beehive State, and for Utah Bar members desiring to magnify the pro bono service they already offer, help is on the way. As of January 6, Special Practice Rule 14-807[1] was amended to allow second- and third-year law students, as well as law graduates who will be taking the Utah Bar exam within a year of graduating, to engage in the limited practice of law. What this means is more practical experiences for our soon-to-be lawyers, more people providing legal help to those of limited means, and more opportunities for lawyers to expand their pro bono reach each year.

STUDENTS HELPING STUDENTS

The path to a better student practice rule was paved by law students who identified – and were frustrated by – the restrictive nature of Utah's rule. In fall 2014, Associate Professor Carl Hernandez at BYU's J. Reuben Clark Law School proposed a project to his Government and Legislative Practice students: identify whether the "3rd year practice rule" should be revised. Andy Gonzalez, Jessica Marinello, and Austin Martineau were among those who undertook the research and initial drafting of a better rule. "A more permissive rule," Andy Gonzalez said on behalf of the research group, "would allow students to have more practical legal training while promoting pro-bono services and increased legal support to individuals of limited means." Professor Hernandez agreed, concluding based on the students' research that Utah's rule was one of the most restrictive in the nation.

Rule 14-807 has not been substantially amended in decades. And the BYU students' research showed Utah's law students were at a significant educational and competitive disadvantage compared to other law students across the nation. Law students outside Utah are able to participate in expansive law practice experiences both inside and outside the courtroom. Yet students at two of the nation's premiere law schools, BYU and the University of Utah's S. J. Quinney School of Law, were restricted to limited practice areas and limited court room appearances – if they were lucky. Opposing counsel still had to stipulate to the student's courtroom participation; some did not.

A COMPARATIVE ANALYSIS

The following table provides a comparative analysis of Utah's pre-amendment rule 14-807 and other states' law student practice rules. It is not difficult to see why Utah's rule was ripe for change.

CARL HERNANDEZ is an Associate Professor at BYU's J. Reuben Clark Law School where he teaches constitutional litigation and professional skills courses and has initiated and supervises clinical alliances with the Utah State Legislature, non-profit organizations, community-based organizations and economic development agencies.

NANCY SYLVESTER is an attorney in the Utah State Courts' Office of General Counsel. She provides legal counsel to judicial personnel and numerous court committees, including the Judicial Council's Standing Committee on Resources for Self-represented Parties. Her practice also includes appellate litigation.

UTAH	OTHER JURISDICTIONS
Requires stipulation of all parties for law student appearances	49 states – Require consent of supervising attorney, client, and sometimes the court
Allows for appearances in civil, misdemeanor and administrative cases; does not specifically allow other practice activities	39 states – Permit felony appearances
Requires personal presence of supervising attorney in court for all cases	36 states – Allow student appearances without the personal presence of the supervising attorney for several categories of cases
No provisions for legal document preparation	43 states – Allow legal document preparation
No provisions for advising or negotiating	11 states – Permit advising clients or negotiating on their behalf
Requires completion of 2 years of law school	8 states – Require completion of 1st year 20 states – Require completion of 3 semesters

FROM CLASS PROJECT TO AMENDED RULE

In early 2015, the Judicial Council's Standing Committee on Resources for Self-represented Parties voted unanimously to advance this project as part of its 2015 Strategic Plan. To start, committee members Jaclyn Howell-Powers, S. J. Quinney School of Law, Lisa Collins, Utah Court of Appeals, and Professor Hernandez approached a veteran in clinical legal education, Professor Linda Smith of the S. J. Quinney School of Law, for her perspective. Professor Smith proposed ways in which the rule could better meet the needs of indigent community members seeking legal services. She recommended expanding, for example, the types of court cases in which law students could appear without the supervising attorney present. Previously, this was only permitted in uncontested default divorce proceedings when an appearing party was represented by a non-profit legal services organization. Now it is permitted, among other areas, in any civil case with the consent of the client.

In coordination with Elizabeth Wright, Utah Bar General Counsel, the committee members introduced the results of its project to the Bar Commission at its regularly scheduled December 2015 meeting. The Commission voted unanimously to support rule 14-807's amendments. The Utah Supreme Court, in turn, reviewed the proposed amendments, made some additional changes, and adopted the rule on an expedited basis on January 6, 2016.[2]

ALIGNING WITH THE FUTURES COMMISSION REPORT

Rule 14-807's amendments are perfectly timed. They are among the progress the Utah Bar's Futures Commission urged and has actively promoted through its implementation arm, the Affordable Attorneys for All (AAA) Task Force. In its July 29, 2015 Report, the Futures Commission wrote the following:

> By any measure, progress is needed. The number of self-represented litigants in the courts is burgeoning, even as the number of case filings is dropping. People think they can and should handle a court case on their own and sometimes even think it's better to try to address their problem without taking their case to court at all. This Do-It-Yourself mentality can and often does lead to the legal equivalent of a slapdash basement remodel: It is done, but it is not done well; there might be safety issues; and it probably won't stand up to the test of time. Of course whether to do it yourself or hire it out is an individual's choice. However, in no small number, lawyers and the courts are being called upon to come in after such attempts to make repairs, often at greater expense than if they had been involved in the first place.[3]

Among many other recommendations, the Futures Commission identified that rule 14-807 should be "expanded and enhanced" to address the problems identified above.[4] As the Commission recognized, allowing more student practitioners to provide legal

assistance increases the pool of individuals available to assist self-represented parties. This, in turn, improves the quality of justice in Utah.

PROFESSIONAL LAWYERING SKILLS TRAINING WITH APPROPRIATE SAFEGUARDS

The American Bar Association (ABA) recently urged accredited law schools to increase professional lawyering skills training and pro bono legal service opportunities for their students. The ABA defines professional lawyering skills as "interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation."[5] Amended rule 14-807 gives Utah's law schools a better way to respond to the ABA's clarion call; law students and recent law school graduates now have substantially more practice and pro bono legal service opportunities. And the amended rule still strikes an appropriate balance between student training opportunities and public protections.

14-807 practitioners may practice in the following scenarios: as part of a law school clinic or externship, or by volunteering for or being employed by a tax-exempt agency, governmental agency, or a for-profit entity. They must be supervised by an attorney authorized to practice law in the state of Utah and are not permitted to seek private clients or to provide assistance on their own without supervision. Moreover, in any work involving a client, the client must authorize in writing the activities the 14-807 practitioner will do on their behalf. If the student practitioner wishes to appear in court, they may only do so with permission of the judge, the client (if applicable), and the supervising attorney. If the client and supervising attorney consent, though, students can now appear in court in civil and misdemeanors B and C criminal matters outside the supervising attorney's presence.

Other notable practice area additions include depositions and felony criminal matters. In both, the student practitioner must work in the presence of the supervising attorney. The same is true in any Class B or C misdemeanor trial and any appellate oral argument (which also requires the court's specific approval for the law school student's or law school graduate's participation). Finally, student practitioners have an additional coursework burden when it comes to appearing in any evidentiary hearings or depositions: they must have passed a course in Evidence and, for a criminal evidentiary hearing, both a course in Evidence and in Criminal Procedure.

STUDENT PRACTITIONER PERSPECTIVES

Law students are eager to put the rule changes to work and receive more practical training before they leave law school. In Professor Hernandez's and others' experiences, students uniformly see these changes as a vehicle for providing greater access to justice to Utah's underrepresented minorities and those who cannot afford basic legal services. Eva Brady, a third-year law student at BYU, has seen an immediate impact on the services she and other law students provide to the Utah County Public Defender's Office where they represent juvenile offenders in detention hearings. She observed,

> Under the previous law student practice rule, we were unable to find attorneys who could supervise us because doing so would require frequently leaving their jobs to attend court. Thanks to the new law student practice rule, we now hope to be able to expand our clinical experience to benefit not only our education, but also those who stand in need of legal services. This change will make it much easier for attorneys to supervise us as they will not have to frequently adjust their schedules to attend court hearings.

Vinse Grover, a third-year law student at the University of Utah, also practices at the Utah County Public Defender's Office. On assisting in felony criminal defense matters, he said,

> Being in District Court helps [students] gain an appreciation of the severe consequences a defendant faces. For many defendants the consequences are extremely severe as they face loss of liberty, separation from family, loss of income, and the inability to live a normal life. Seeing this creates a sense of urgency to provide the best…representation possible to those accused.

Early rule change contributor, Andy Gonzalez, finds the amendments gratifying. "As a third-year student pursuing a career in criminal prosecution…I am confident that the newly adopted rule will allow law students to gain invaluable practical experience while ensuring greater accessibility to the legal system."

Many future Utah Bar members are trained at Utah's law schools. Rule 14-807 allows the law schools, in collaboration with current Utah Bar members, to better train our future members, thereby improving legal service delivery to the public.

PRACTICAL GUIDELINES FOR BAR MEMBERS

Members of the Utah Bar, the courts, and legal service organizations can expect requests from Utah's law students and recent law graduates for practice opportunities. The following are some guidelines for administering rule 14-807, which contain references to the rule's subsections.[6]

Eligibility to participate Rule 14-807(c):

1) Law School Students: R. 14-807(c)(1)

   a. In good standing;

   b. Completed the first year of legal studies (at least 2 semesters or the equivalent) from an ABA approved law school; AND

   c. Enrolled in a law school clinic or externship and supervised by an attorney authorized to practice law in the state of Utah; OR

   d. Volunteering for or employed by a tax-exempt or governmental agency, or a for-profit entity, and supervised by an attorney authorized to practice law in the state of Utah;

   e. Must provide to the supervising attorney the appropriate law school certifications in Rule 14-807(e) (See the *Requirements for Law Schools* section below.);

   f. **Ineligibility to participate:** cessation of law school enrollment unless by reason of graduation. R. 14-807(h)(1)

2) Law School Graduates: Rule 14-807(c)(2)

   a. Graduated from an ABA approved law school;

   b. Will be taking a regularly-scheduled bar exam within one year after graduating from law school, R,. 14-807(c)(2); AND

   c. Is working under the supervision of an attorney authorized to practice law in the state of Utah;

   d. Must provide to the Bar admissions office: R. 14-807(g)

      i. The name of his or her supervising attorney, R. 14-807(g)(1);

      ii. A signed and dated authorization to release information to the supervising attorney regarding the law school

graduate's Bar applicant status, R. 14-807(g)(2); and

iii. A signed and dated letter from the supervising attorney stating that he or she has read this rule and agrees to comply with its conditions. R. 14-807(g)(3).[7]

e. **Ineligibility to participate:** R. 14-807(h)(2)

i. Failure to submit a timely application for admission to the Bar under paragraph (c)(2) (within 1 year of graduating), R. 14-807(h)(2)(A);

ii. The Bar's admissions office's or its character and fitness committee's decision to not permit the law school graduate to take a regularly-scheduled bar examination under (c)(2), R. 14-807(h)(2)(B);

iii. Notification of the law school graduate's failure to successfully pass the bar examination under (c)(2) (within 1 year of graduating). R. 14-807 (h)(2)(C); or

iv. Failure to be admitted to practice within six months of taking and passing the bar examination under (c)(2) (for example, not taking the oath), R. 14-807(h)(2)(D).

Course Prerequisites for Law Students: (d)

1. Completed Evidence Course if participating in (1) depositions, R. 14-807(d)(2), (2) evidentiary hearings, R. 14-807(d)(3), or (3) criminal evidentiary hearings. R. 14-807(d)(3).

2. Completed Criminal Procedure Course if participating in criminal evidentiary hearings. R. 14-807(d)(3).

Permissible Activities: Rule 14-807(d)

Prerequisites:

a. The client (if there is one) and supervising attorney must consent in writing to each activity, and the supervising attorney remains fully responsible for the manner in which the activities are conducted. R. 14-807(d)

b. If appearing in court, the supervising attorney's and the client's written consent and approval, along with the law school student's certification, must be filed in the record of the case and must be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.[8] R. 14-807(d)(3)

c. The student or graduate must orally advise the court at the initial appearance in a case that he or she is certified to appear pursuant to this rule. R. 14-807(d)(3)

Activities:

Under the general supervision of the supervising attorney and subject to their final approval: Rule 14-807(d)(1)

1. Negotiate for and on behalf of the client, but the student or graduate must obtain the approval of the supervising attorney regarding the plan of negotiation;

2. Give legal advice to the client, but the student or graduate must obtain the approval of the supervising attorney regarding the legal advice to be given.

Under the direct supervision and in the personal presence of the supervising attorney: Rule 14-807(d)(2)

3. Appear on behalf of the client in depositions.

Supervision requirements vary with the following activities: Rule 14-807(d)(3)[9]

4. Appear in any court or before any administrative tribunal in this state.

   a. Civil Matters. In civil cases in any court, the supervising attorney is not required to be personally present in court if the person on whose behalf an appearance is being made consents to the supervising attorney's absence. R. 14-807(d)(3)(A)

   b. Felony or Class A Misdemeanor Criminal Matters on Behalf of the Prosecuting Authority. In any felony or Class A misdemeanor prosecution matter in any court, the supervising attorney must be personally present throughout the proceedings. R. 14-807(d)(3)(B)

   c. Infraction or Class B or Class C Misdemeanor Criminal Matters on Behalf of the Prosecuting Authority. In any infraction or Class B or Class C misdemeanor matter in any court with the written approval of the supervising attorney, the supervising attorney is not required to be personally present in court; however, the supervising attorney must be personally present during any Class B or Class C misdemeanor trial. R. 14-807(d)(3)(C)

   d. Felony or Class A Misdemeanor Criminal Defense Matters. In any felony or Class A misdemeanor criminal defense matter in any court, the supervising attorney must be personally present throughout the proceedings. R. 14-807(d)(3)(D)

   e. Infraction or Class B or Class C Misdemeanor Criminal Defense Matters. In any infraction or Class B or Class C misdemeanor criminal defense matter in any court, the supervising attorney is not required to be personally present in court, so long as the person on whose behalf an appearance is being made consents to the supervising attorney's absence; however, the supervising attorney must be personally present during any Class B or Class C misdemeanor trial. R. 14-807(d)(3)(E)

   f. Appellate Oral Argument. In any appellate oral argument, the supervising attorney must be personally present and the court must give specific approval for the law school student's or law school graduate's participation in that case. R. 14-807(d)(3)(F)

5. Perform the following activities under the general supervision of the supervising attorney, but outside his or her personal presence: Rule 14-807(d)(4)

   a. Prepare pleadings and other documents to be filed in any matter in which the law school student or law school graduate is eligible to appear, provided such pleadings or documents are reviewed and signed by the supervising attorney, R. 14-807(d)(4)(A);

   b. Prepare briefs and other documents to be filed in appellate courts of this state, provided such documents are reviewed and signed by the supervising attorney, R. 14-807(d)(4)(B);

   c. Provide assistance to indigent inmates of correctional institutions or other persons who request such assistance

in preparing applications and supporting documents for post-conviction relief, except when the assignment of counsel in the matter is required by any constitutional provision, statute, or rule of this Court; if there is an attorney of record in the matter, all such assistance must be supervised by the attorney of record, and all documents submitted to the court on behalf of such a client must be reviewed and signed by the attorney of record and the supervising attorney, R. 14-807 (d)(4)(C); and

d. Perform other appropriate legal services, but only after prior consultation with the supervising attorney, R. 14-807 (d)(4)(D).

Requirements for Law Schools: Rule 14-807(e)

1. The law school's dean, or his or her designee, must certify to the supervising attorney that

   a. the student is in good standing;

   b. has completed the first year of law school studies;

   c. in the case of a clinic or externship, that the student is enrolled in a law school clinic or externship;

   d. if the student will be participating in depositions or evidentiary hearings, that the student has passed an evidence course; and

   e. if the student will be participating in criminal evidentiary hearings, that the student has passed a criminal procedure course.

Requirements for Supervising Attorneys:

1. The supervising attorney is responsible for ensuring that the conduct of the law school student or law school graduate complies with this rule, which includes verifying the participant's eligibility. R. 14-807(f)

2. The supervising attorney remains fully responsible for the manner in which the activities are conducted. R. 14-807(d) (See generally the *Rules of Professional Conduct*.)

The supervising attorney may or may not be required to be personally present, but must generally supervise all activities. R. 14-807(d) (See *Permissible Activities* section above for specifics.)

Conclusion

It is our hope that Utah Bar members will embrace the opportunity to improve law students' practical skills by providing the supervision needed for them to practice. By so doing, the profession will improve as a whole as rising new lawyers bring more practical experience helping the under- and unrepresented to the community. And with this experience, it stands to reason, will come innovative ideas for growing community demand for competent legal representation. This can only improve the quality of and access to legal services in Utah long-term.

1. Special Practice Rule 14-807 may be found on the Utah State Courts website at http://www. utcourts. gov/resources/rules/ucja/view. html?rule=ch14/08%20Special%20Practice/USB14-807. html.

2. Although still subject to amendment following the comment period, the spirit of reform and expansiveness in rule 14-807 will not change.

3. Futures Commission of the Utah State Bar, Report and Recommendations on the Future of Legal Services in Utah 4 (2015), https://www. utahbar. org/wp-content/uploads/2015/07/2015_Futures_Report_revised. pdf. According to the same report,

   > In 2014, there were 66,717 debt collection cases filed in the Utah courts. In 98% of those cases, the defendant was not represented by counsel and in 96% of the cases, the plaintiff had an attorney. That means more than 60,000 Utahns fended for themselves in court. In the 7,770 eviction cases filed that year, 97% of the people defended themselves. In the family law arena, out of the 14,088 divorce cases filed in 2014, there were attorneys for both parties in only 12% of the cases. In 29% of the cases, just one party had an attorney and in 60% of the cases, neither party had counsel. The number of people trying to represent themselves in the Utah courts is not only large, it is steadily increasing.

   Id. at 9.

4. *Id*. at 6.

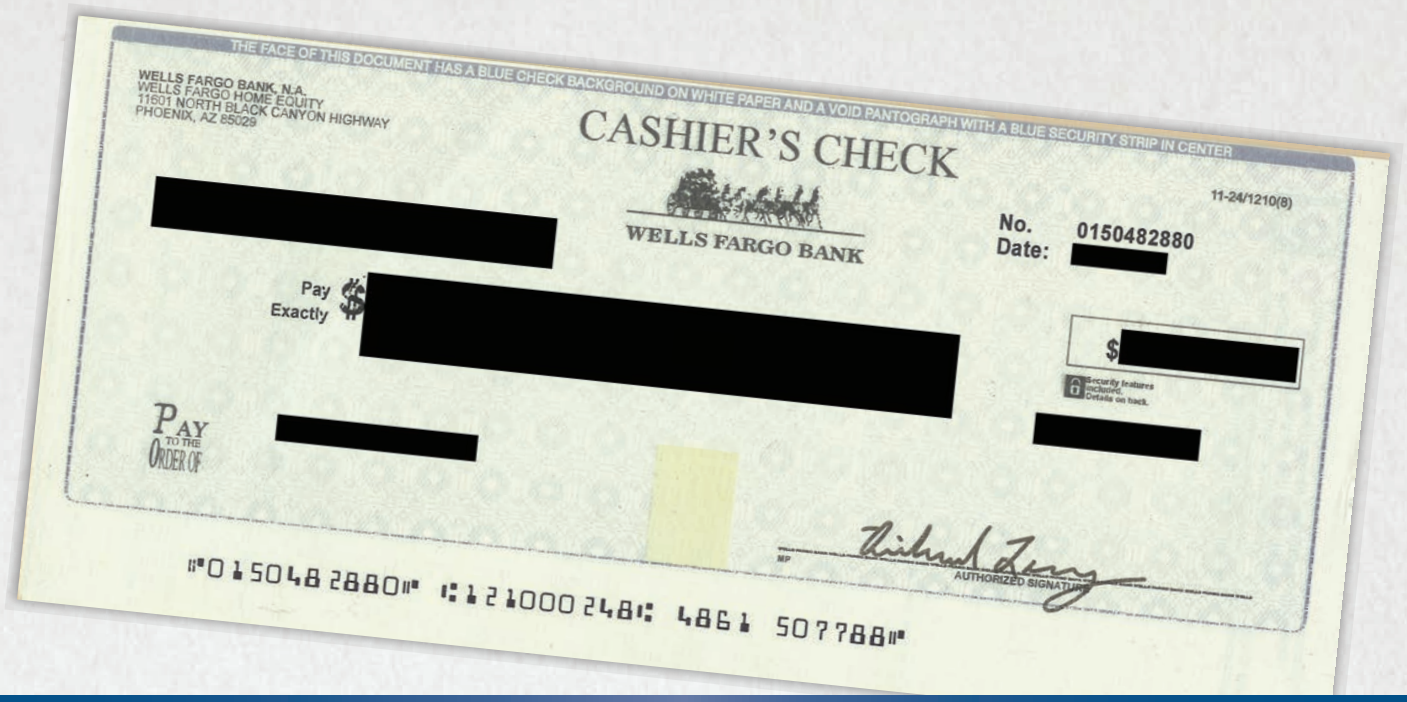
5. American Bar Association, ABA Standards and Rules of Procedure for Approval of Law Schools 2015–2016 16 (2015), (emphasis omitted), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_aba_standards_for_approval_of_law_schools_final.authcheckdam.pdf.

6. These guidelines are not intended to be an official statement on rule 14-807. They are provided only for practitioners' convenience. Amended Rule language can be found at www. utcourts. gov/resources/rules/comments/USB14-807%2001112016. pdf.

7. A sample letter to the Bar admissions office is available at http://www. utcourts. gov/howto/family/gc/signature/docs/Bar_Admissions_Certificate. pdf.

8. A Certificate of Eligibility approved by the Board of District Court Judges for use by rule 14-807 practitioners is available at http://www. utcourts. gov/howto/family/gc/signature/docs/Certificate_of_Eligibility. pdf.

9. The court may at any time and in any proceeding require the supervising attorney to be personally present for such period and under such circumstances as the court may direct. R. 14-807 (d)(3)(G)



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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Protecting Privilege Claims in Discovery

by Philip J. Favro

By all accounts, the legal profession is exhausted with eDiscovery. And who can blame lawyers for being fatigued? Today's discovery process is a time-consuming, expensive, and generally thankless task for those involved. Moreover, many aspects of civil discovery practice can be challenging for even the most sophisticated counsel. From seeking to isolate relevant materials from massive troves of electronically stored information (ESI) to dealing with increasingly savvy adversaries and jurists, discovery often seems like a high risk / low reward practice area.

Despite these and other challenges, the importance of discovery in the digital age remains the same as in the paper era: to "narrow and clarify" the issues in dispute and to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947); *United States v. Procter & Gamble Co*., 356 U.S. 677, 682 (1958). To satisfy these objectives, however, clients will require far better advocacy than in previous decades. Counsel must engage in better planning at the outset of litigation, have a solid grasp of the law, strategically cooperate with adversaries, and gain a better understanding of technology.

Nowhere are these new rules of engagement needed more than with protecting the attorney-client privilege in discovery. Successfully asserting the privilege in discovery can be challenging. Consider the following questions, which exemplify the complexities underlying today's privilege issues:

- What materials must be identified on a privilege log?
- What wording should be included in Federal Rule of Evidence 502(d) orders to avoid wrangling with adversaries in federal court over whether a disclosure of privileged information was inadvertent?
- What are the key steps to ensuring that a privilege review is effectively handled?

The answers to these questions and others will often determine the fate of a privilege claim. More importantly – and getting beyond of the microcosm of discovery, a litigation outcome may turn on the resolution of a discovery dispute over a privileged document. For example, a defendant's inadvertent production of a "smoking gun" email that it originally claimed as privileged significantly strengthened a plaintiff's copyright infringement claims in *Oracle America v. Google. See generally Oracle Am., Inc. v. Google, Inc.*, No. C-10-03561-WHA DMR, 2011 WL 3794892, at 9 (N.D. Cal. Aug. 26, 2011), *aff'd*, 2011 WL 5024457, No. C 10-03561 WHA (N.D. Cal. Oct. 20, 2011), *aff'd*, *In re Google Inc*., 462 Fed. Appx. 975, 977–78 (Fed. Circ. 2012); Philip Favro & Shawn Cheadle, *The Impact of Oracle America v. Google: Are You Certain Your Emails Are Privileged?*, ACC Docket, Jan/Feb 2014, at 73. Getting the privilege process right is an essential component of a successful litigation strategy.

This notion – developing an effective process for protecting the privilege in discovery – is the focus of this article. Among the issues the article covers are the approaches that counsel should consider for addressing key external-facing challenges to privilege claims. I also discuss internal-facing issues and how they can be addressed in the privilege review process.

External-Facing Privilege Issues

While the development of an effective privilege review workflow and the need to tackle other internal review issues are significant, the external issues – those which directly impact litigation

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adversaries and the courts – must be addressed first. Doing so will ultimately help counsel prepare its review workflow for identifying privileged information and determine the form and content of the privilege log.

One of the principal external-facing issues that counsel should consider at the outset is how to simplify privilege log requirements. Doing so can be accomplished by working with opposing counsel and, when necessary, by seeking judicial relief. Counsel's approach to this issue will likely impact two other critical issues: determining what privileged communications must be identified on a privilege log and ameliorating the effects of mistaken disclosures of privileged information.

Simplify Privilege Logging Requirements

Privilege logging is perhaps the most despised element of discovery practice. A few years ago, civil discovery expert Kevin Brady concisely summarized why courts, counsel, and clients universally loathe the practice of privilege logging:

> Judges don't want to hear about the disputes or do any in camera review. Partners do not want to oversee the work on the log and associates don't want to be bothered with such mundane tasks. Clients don't want to pay significant amounts of money for something that poses only risk and no reward.

Kevin F. Brady, *Top 10 Things You Never Hear on Privilege Logs*, Law Technology News (Jan. 10, 2013).

Despite such understandable contempt, the Federal Rules of Civil Procedure (FRCP) and the Utah Rules of Civil Procedure (URCP) still require a privilege log – a vehicle to expressly assert a privilege claim and provide key details regarding the claim so it can be substantiated by an adversary. Fed. R. Civ. P. 26(b)(5); Utah R. Civ. P. 26(b)(8)(A). While this requirement must be satisfied, there is no reason why it cannot be simplified. Indeed, the substantial growth of ESI has fueled the need to do so. Privilege logs are now so long as to be unwieldy and frequently are not that useful. Inadvertent productions of privileged communications are commonplace since even the most robust workflows generally fail to identify all privileged information.

The surest method for simplifying the privilege log burden is by seeking agreements with litigation adversaries. In federal court, such a procedure is specifically contemplated by the rules. FRCP 26(f) expressly requires parties to develop a "discovery plan" that addresses "any issues about claims of privilege." During the FRCP 26(f) conference, counsel can explore possible limitations on privilege logs such as: (1) only identifying the last-in-time email in a particular string; (2) preparing a privilege log by category; or (3) eliminating the log altogether.

While Utah has eliminated its version of the 26(f) conference, lawyers should still seek similar arrangements with opposing counsel that limit privilege logging burdens. Negotiating a stipulation with opposing counsel that restricts or even eliminates the scope of the parties' privilege log obligations would bring much needed simplicity to the privilege logging process.

If the lawyers are unable to reach an agreement, they should seek judicial intervention to help fashion an acceptable protocol. Regardless of the proposed method, a party who proposes to reasonably narrow the scope of its log may very well receive judicial approval, particularly in federal court. This is because courts are generally watchful for opportunities to decrease privilege burdens and thereby enable the "just, speedy, and inexpensive determination" of a particular case. Fed. R. Civ. P. 1.

Determine What Should Be Identified on a Privilege Log

Whether an agreement can be reached with an adversary or judicial relief is needed, counsel must determine what should be identified on a privilege log. In state court actions, counsel may be forced to abide by the express requirements of URCP 26(b)(8)(A) if an agreement cannot be reached with opposing counsel. This is because the Utah Supreme Court recently clarified the restrictive scope of a "proper privilege log." In *Allred v. Saunders*, the court held that a log "must provide sufficient foundational information for each withheld *document* or *item* to allow an individualized assessment…" of the claimed privilege. *Allred v. Saunders*, 2014 UT 43, ¶ 27, 342 P.3d 2004. Nevertheless, a protective order may be appropriate if the responding party can show undue burden or an otherwise disproportionate result in requiring a full-blown privilege log. *See* Utah. R. Civ. P. 37(a)(7).

In contrast, counsel may not need to share details regarding every byte of data that is privileged when in federal court. The advisory committee note to FRCP 26(b)(5) confirms as much. Revealing specific details regarding the who, what, when, and why of a privileged discussion "may be appropriate *if only a few items are withheld*." Fed. R. Civ. P. 26(b)(5) advisory committee's note (emphasis added). On the other hand, it "may be unduly burdensome" to require such detail if many documents are claimed as privileged. *Id*.

Keeping in mind the objective of simplification, counsel should follow the direction of the committee note and prepare a log that describes documents "by categories." Such an approach has been adopted by various courts and encouraged by eDiscovery cognoscenti such as U.S. Magistrate Judge John Facciola (ret.) and Jonathan Redgrave. Regarding the nature of the categories, Messrs. Facciola and Redgrave provide the following direction:

> The categories can be any manner of reasoned organization. For example, they could be by subject matter, by date range, or by specific name or type of author, sender, or recipient.… The object of this exercise is to create a set of natural differentiations among documents so the parties can say, once again with confidence, what is true of items within the category is true of the whole.

Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 2009 Fed. Cts. L. Rev. 19, 46 (2009).

Beyond the use of categorical privilege logs, another method for achieving simplification is to identify the last-in-time message from an email string on the log. Such a logging method has many benefits given that it can eliminate a substantial amount of work and documentation that would be required if all messages in the string were described. While this logging approach has been adopted by some courts, it has its opponents. One court rejected such a request over fears that non-privileged information might be concealed if only the last-in-time message was identified. *United States, ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, No. 6:09-cv-1002-Orl-31TBS, 2012 WL 5415108, at *5 (M.D. Fla. Nov. 6, 2012).

The concerns that courts have about logging the last-in-time email message will likely be addressed if agreements can be reached with litigation adversaries. If such a task is not possible, counsel should then do as the committee note suggests and seek a protective order. Demonstrating the undue burden of identifying every message in an email string will likely turn on the reasonableness of counsel's logging approach, the character of the discussions with opposing counsel, and the credibility that counsel has established with the court.

Ameliorate the Effect of Inadvertent Disclosures

Another area of complexity and potential satellite litigation involves mistaken productions of privileged information. While inadvertent disclosures are not unique to the digital age, they have become particularly significant in contemporary privilege practice given the vast amounts of ESI now existing in most corporate electronic information systems. With so much ESI, it is generally cost prohibitive to conduct an intensive, document-by-document privilege review. Furthermore, it is inevitable that privileged information will slip through and be produced, raising the prospect of waiver arguments from opposing counsel.

To avoid the risk of inadvertent disclosure when litigating in federal court, along with the time and expense of an exhaustive privilege review, counsel should seek a court order under Federal Rule of Evidence 502(d). Rule 502(d) orders generally reduce the expense, hassle, and risk of litigating over the mistaken disclosure of privileged ESI. In particular, properly drafted 502(d) orders eliminate the need for counsel to show that a disclosure of privileged information was "inadvertent" as a matter of law. Instead, counsel may simply demand that opposing counsel return or destroy the mistakenly produced materials.

While an adversary could still challenge the claim of privilege, a 502(d) order should foreclose any argument that its mistaken production resulted in a waiver of its privileged character.

The best and most expeditious way to obtain a rule 502(d) order is to execute a claw-back agreement with an adversary reflecting this process and then have the court enter it as a 502(d) order. Even if opposing counsel declines to execute such an agreement, courts are generally amenable to entering 502(d) orders. *See, e.g.*, Hon. Andrew J. Peck, *Forward*, 26 Regent U. L. Rev. 1, 5 (2013–14).

Nevertheless, counsel should be certain that the order is issued pursuant to 502(d) *and not 502(b)*. Rule 502(b) delineates the legal framework for analyzing whether a document was inadvertently produced. Under 502(b), the court must determine the reasonableness of the producing party's efforts to both "prevent the disclosure" and "rectify the error" in producing the privileged materials. Thus, 502(b) – in contrast to 502(d) – places a substantial burden on the producing party to establish inadvertence as a matter of law.

Similarly, counsel must exercise care in drafting a proposed 502(d) order so as to not incorporate the 502(b) inadvertence test. Because courts look to the precise language of the order to determine the rights and obligations of the parties, 502(d) orders that either include the reasonableness factors from 502(b) or that otherwise equivocate on how mistaken disclosures are to be resolved could be construed as 502(b) orders. *See generally* John M. Barkett, *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era*, 81 Fordham L. Rev. 1589, 1617–18 (2013) (discussing practice tips for drafting 502(d) orders).

While Utah does not have an equivalent provision to Rule 502(d), counsel who are concerned about inadvertent waiver in state court actions should still try to reach claw-back agreements with opposing counsel or alternatively seek judicial relief through a protective order.

Internal-Facing Privilege Issues

Once these critical external-facing privilege issues have been addressed, counsel can then design a privilege workflow whose

goals are consistent with the established framework. While there is no "right way" to handle an internal review process, there are certain steps that will likely yield better results. Those steps include not treating all privilege reviews equally, adopting a top-down approach to the review process, and ensuring that vendors and service providers support counsel's review objectives.

Not Every Privilege Review Merits Equal Treatment

One of the first steps that counsel should consider is to determine how much attention a privilege review merits in a particular case. While care should always be given to ensure that key privileged materials are protected, not every matter involves high stakes or otherwise requires an inordinate amount of attention to protect the privilege. In smaller cases or in those matters where issues of privilege may not be consequential, counsel should consider scaling back the resources that would otherwise be deployed for a full-blown privilege review. Variables such as the number of review cycles and the nature and extent of the analytical tools used will likely turn on the demands of a given case.

Regardless of the course adopted, counsel should be certain to obtain approval from the client for its privilege review strategy. Discussing the particular review options, analyzing their merits, and then sharing estimated budgets for each approach will better enable the client to make an informed decision about the proposed course of action. Once the client has given its direction, counsel should then feel confident about moving forward with its specific review strategy.

A Top-Down Approach

With an approved strategy in place, the next step that counsel should consider is to adopt a top-down approach to the review process. A bottom-up approach – where individual members of the review team unilaterally apply their understanding of the law and the facts to make decisions on privilege – is not an ideal method for conducting privilege reviews. Without appropriate guidance from senior subject matter experts at the outset of the review process, decisions on privilege among reviewers could widely vary. This can lead to results that are both over-inclusive (too many non-privileged documents claimed as privileged) and under-inclusive (too many privileged documents inadvertently disclosed to adversaries). While both scenarios are problematic, under-inclusive reviews are particularly troubling since (even with a rule 502(d) order or a claw-back agreement in place) they provide opposing counsel with snapshots of privileged communications.

In contrast, a top-down approach reflects formal direction from counsel as the team leader on the pertinent facts, the pressing matters in the case, and the need to be aware of specific privilege issues. Another key matter about which team members should be aware is the governing law. While the other matters are certainly important, this issue is no less significant since privilege law on particular issues may vary from state to state and in comparison to federal common law. Understanding which law applies in a given case and why will likely obviate questions that could subsequently arise if the wrong law is applied by the review team. *See, e.g.*, David M. Greenwald, Robert R. Staufer & Erin R. Schrantz, *Testimonial Privileges* §1.7 (3rd ed. 2015).

With uniform, top-down direction on both legal and factual matters, counsel will ultimately obtain more consistent review results from its team on designating documents as privileged.

Proper Support from Vendors

A logical corollary to adopting a top-down approach is ensuring that vendors support the approved review strategy. Counsel should carefully review a vendor's approach to privilege reviews, along with its analytical tools and pricing, to confirm they are consistent with the approved strategy. In addition, counsel should ensure that document reviewers supplied by the vendor are properly trained and supervised on the issues.

In addition, counsel should not defer to the standard privilege log template that a vendor typically uses. Instead, counsel should provide direction on the nature and format of the log at the outset of the process to ensure that its expectations are satisfied. Taking such a step will frequently eliminate the need for substantial rework after the log is created.

Finally, counsel should be entitled to evaluate metrics on review performance. Metrics should enable counsel to gauge review accuracy and speed among the review team and should ultimately lead to greater vendor accountability.

Conclusion

The foregoing represents only a few of the steps that counsel can take to ensure its review process efficiently and effectively protects privilege claims in discovery. While these suggestions may not address every problem that could arise, they can yield solutions to many privilege review conundrums and provide cost effective methods that clients expect in the age of eDiscovery.

Parsons Behle & Latimer is pleased to announce that Robert H. Hughes and Nora R. Pincus have joined the firm as of counsel in the Salt Lake City office.

Rob Hughes is a member of the Environmental and Natural Resources department. Rob advises public and private clients on land use and zoning issues, eminent domain and natural resources matters. Before joining the firm, he served as in-house counsel at Utah Transit Authority, where he handled real estate transactions, interlocal agreements, procurement, construction matters and regulatory issues.

Nora Pincus is a member of the Corporate Transactions & Securities department with a practice that focuses on natural resource development; land use and real estate, with emphasis on oil and gas exploration and production; mining; real estate development; and renewable energy projects. Nora advises clients on asset purchases, mineral leasing, royalty agreements and public land laws. She also assists clients with permitting and environmental compliance related to energy, mining and real estate projects.

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The Parol Evidence Rule in Utah: A Brief Survey

by Joshua L. Lee

The parol evidence rule is simple in theory but has some nuances that are not always obvious or intuitive. Moreover, appellate decisions often recite the rule in loose and imprecise terms. This article provides a concise overview of key aspects of the parol evidence rule under Utah law.

The Basics

The parol evidence rule can be boiled down to the principle that, with certain exceptions, evidence of prior or contemporaneous agreements or statements is not admissible to supplement or contradict the terms of an integrated and unambiguous written contract. *See, e.g., Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 11, 182 P.3d 326. In practice, the parol evidence rule "functions as a rule of evidence." *Spears v. Warr*, 2002 UT 24, ¶ 18, 44 P.3d 742. Technically, however, the rule is "a rule of substantive law and not evidence." *State v. Laine*, 618 P.2d 33, 34 (Utah 1980). Indeed, "[p]arol evidence is not so much *inadmissible* to vary the terms of an integrated writing as it is irrelevant, because 'the later agreement discharges the antecedent ones in so far as it contradicts or is inconsistent with the earlier ones.'" *Novell, Inc. v. Canopy Group, Inc.*, 2004 UT App 162, ¶ 11, 92 P.3d 768 (emphasis added) (citation omitted).

Utah courts often describe application of the parol evidence rule as a two-step process: "First, the court must determine whether the agreement is integrated. If the court finds the agreement is integrated, then parol evidence may be admitted only if the court makes a subsequent determination that the language of the agreement is ambiguous." *Hall v. Process Instruments & Control, Inc.*, 890 P.2d 1024, 1027 (Utah 1995). As a practical matter, this formulation of the rule is sufficient for most cases. However, after performing the first step – i.e., deciding whether a writing is integrated – ambiguity may be only one of several potential issues to address.

Integration

In determining the admissibility of extrinsic evidence, the first step is to determine whether, and to what extent, a writing is integrated. An "integration" is "'a writing or writings constituting a final expression of one or more terms of an agreement.'" *Tangren*, 2008 UT 20, ¶ 12 (citation omitted). The question of integration is whether an agreement appears to be "*final and complete*." *Id.* (emphasis in original). In Utah, there is a "rebuttable presumption that a writing which on its face appears to be an integrated agreement is what it appears to be." *Union Bank v. Swenson*, 707 P.2d 663, 665 (Utah 1985). Moreover, if the writing at issue contains a "clear" integration clause, the writing will conclusively be deemed integrated as a matter of law. *Tangren*, 2008 UT 20, ¶ 16. Otherwise, the question of integration is a factual question on which "any relevant evidence is admissible." *Hall*, 890 P.2d at 1026.

In determining whether a writing is subject to exclusion on parol evidence grounds, it is necessary to assess whether that document is part of the same "integration" at issue. If several documents are "executed 'substantially contemporaneously' and are clearly interrelated, [courts] must construe them as a whole and harmonize their meanings if possible." *Winegar v. Froerer Corp.*, 813 P.2d 104, 109 (Utah 1991) (citation omitted). Where such documents exist, they may be considered together and are not excluded by virtue of the parol evidence rule. *See id.; accord, e.g., Shields v. Harris*, 934 P.2d 653, 657 (Utah Ct.

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App. 1997) (interpreting option agreement in light of contemporaneous lease). In other words, a substantially contemporaneous and related document may expand the scope of the "four corners" from which the intent of the parties must be derived.

Ambiguity

There are two types of ambiguity: ambiguity in language (facial ambiguity) and ambiguity with respect to the parties' intent (latent ambiguity). *Daines v. Vincent*, 2008 UT 51, ¶ 24, 190 P.3d 1269. The question of facial ambiguity "is a question of law to be determined by the judge." *Id.* ¶ 25. A facial ambiguity exists where a contractual provision "is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" *Id.* (citations omitted). To qualify as a facial ambiguity, the trial court must be presented with more than one "plausible" interpretation of a provision. *See, e.g., Bennett v. Huish*, 2007 UT App 19, ¶ 21, 155 P.3d 917.

The question of latent ambiguity, or ambiguity in the parties' intent, is a question of fact. *Id.* ¶ 25. "While a 'facial ambiguity arises solely from the terms of the instrument, a latent ambiguity is one not appearing upon the face the instrument, but is developed by extrinsic evidence." *Watkins v. Henry Day Ford*, 2013 UT 31, ¶ 28, 304 P.3d 841 (citation omitted). One example of a latent ambiguity is whether a contract is intended to be a true lease or a security agreement. *See Colonial Leasing Co. v. Larsen Bros. Constr. Co.*, 731 P.2d 483, 487 (Utah 1986).

If a court determines an ambiguity exists and receives parol evidence to resolve competing interpretations, "the judge must ensure that 'the interpretations contended for are reasonably supported by the language of the contract.'" *Daines*, 2008 UT 51, ¶ 26 (citation omitted). In other words, a proposed interpretation must have a rational basis in the language of the instrument itself, and parol evidence may not be used "to create ambiguity where the language of a contract would not otherwise permit." *Id.* ¶ 27.

In considering whether a contract has a latent ambiguity (as distinct from a facial ambiguity, which is determined solely from the terms of the writing), courts may consider parol evidence on the question of ambiguity itself. *Watkins*, 2013 UT 31, ¶ 28. Courts reason that extrinsic evidence should be admissible on the question of ambiguity because "[o]therwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the 'extrinsic evidence of the judge's own linguistic education and experience.'" *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995) (citation omitted). *Ward* and *Daines* (and other cases) loosely suggest that extrinsic evidence is admissible on the question of ambiguity without distinguishing between facial and latent ambiguities. However, in light of the fact that facial ambiguity is determined as a matter of law, and the more precise opinion in *Watkins*, it seems clear that extrinsic evidence should be admissible only on the question of latent ambiguity.

Application and Exceptions

If a contract is fully integrated, the parol evidence rule prohibits the introduction of both evidence that contradicts the writing and evidence that supplements the writing. *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 11, 182 P.3d 326; *Hall v. Process Instruments & Control, Inc*., 890 P.2d 1024, 1027 (Utah 1995). If a contract is only partially integrated, however, "parol evidence not inconsistent with the writing is admissible to show what the entire contract really was, by supplementing, as distinguished from contradicting, the writing." *Stanger v. Sentinel Life Ins. Co*., 669 P.2d 1201, 1205 (Utah 1983) (citation omitted). Specifically, parol evidence is admissible "to prove the part [of the agreement] not reduced to writing." *The Cantamar, L.L.C. v. Champagne*, 2006 UT App 321, ¶ 10, 142 P.3d 140 (citation omitted).

The Utah Supreme Court has stated that, "as a principle of contract interpretation, the parol evidence rule has a very narrow application." *Hall*, 890 P.2d at 1026. Therefore, as a general rule, "[p]arol evidence is admissible to show the circumstances under which the contract was made or the purpose for which the writing was executed." *Union Bank v. Swenson*, 707 P.2d 663, 665 (Utah 1985). For example, even where there is an integration, and "even in the face of a clear integration clause," parol evidence is admissible "where the contract is alleged to be a forgery, a joke, a sham, lacking in consideration, or where a contract is voidable for fraud, duress, mistake, or illegality." *Tangren*, 2008 UT 20, ¶ 15. Similarly, the parol evidence rule does not preclude evidence of the failure of a condition precedent to the contract becoming effective. *See FMA Fin. Corp. v. Hansen Dairy, Inc*., 617 P.2d 327, 329 (Utah 1980). "Admitting parol evidence in such circumstances avoids the judicial enforcement of a writing that appears to be a binding integration but in fact is not." *Union Bank*, 707 P.2d at 665.

> *"Though the parol evidence rule is often recited in general terms, its application is not so straightforward in every case."*

Similarly, "if the genuineness or authenticity of a material expression is in question, the parol evidence rule does not come into play; otherwise, it would be a means of destroying all defenses of a forgery victim and making a false document genuine, simply by silencing the person who most clearly knows of its falsity." *Tates, Inc. v. Salisbury*, 795 P.2d 1140, 1141 (Utah Ct. App. 1990).

Importantly, the parol evidence rule only bars evidence of prior or contemporaneous agreements, and it does not apply to subsequent agreements or amendments. *See Gary Porter Constr. v. Fox Constr., Inc*., 2004 UT App 354, ¶ 21 n.5, 101 P.3d 371.

The parol evidence rule generally does not bar extrinsic evidence of post-contractual events relating to the performance (as opposed to construction) of a contract, "so long as they are not inconsistent with nor in repudiation of the terms of the written agreement." *See FMA Fin. Corp*., 617 P.2d at 329. Similarly, parol evidence is admissible to prove breach of the implied covenant of good faith and fair dealing. *See Eggett v. Wasatch Energy Corp*., 2004 UT 28, ¶ 14, 94 P.3d 193.

The parol evidence rule does not bar evidence of lack of consideration and "does not prevent a party from showing the actual consideration when a nominal consideration is recited." *Miller v. Archer*, 749 P.2d 1274, 1277 (Utah 1988). The parol evidence rule also does not bar evidence introduced to prove compliance with a statute. *Stewart v. Bova*, 2011 UT App 129, ¶ 18, 256 P.3d 230 (admitting evidence to prove compliance with statutory requirements for the valid execution of a medical malpractice arbitration agreement).

Generally, the parol evidence rule generally does not apply in a criminal case, as the prosecuting entity is typically not seeking to enforce a contract, but rather is seeking to prove the elements of a crime. *See State v. Laine*, 618 P.2d 33, 34 (Utah 1980).

Real Property

The parol evidence rule generally applies to deeds, *see Panos v. Olsen & Assocs. Constr., Inc*., 2005 UT App 446, ¶ 15, 123 P.3d 816, and even to plat maps. *See Rowley v. Marrcrest Homeowners' Ass'n*, 656 P.2d 414, 417 (Utah 1982).

Under the equitable mortgage doctrine, which is a species of latent ambiguity, "parol evidence is admissible in equity to show that a deed, although absolute on its face, was intended as a

mortgage." *Winegar v. Froerer Corp*., 813 P.2d 104, 110 (Utah 1991). "Thus, if a party claims a deed was intended as a mortgage, and no written agreement regarding the transaction exists, courts have no choice but to consider parol evidence to determine the parties' intent." *Glauser Storage, L.L.C. v. Smedley*, 2001 UT App 141, ¶ 20, 27 P.3d 565. However, if a deed is executed with a contemporaneous document explaining the transaction, "resort to parol evidence is unnecessary." *BMBT v. Miller*, 2014 UT App 64, ¶ 10, 322 P.3d 1172.

Parol evidence is sometimes admissible to clarify a property description in an agreement relating to real property. *See Hackford v. Snow*, 657 P.2d 1271, 1276 (Utah 1982); *but see id*. at 1278 (Howe, J., dissenting) ("[P]arol evidence is admissible to apply, not to supply, a description of lands in a contract.").

Types of Evidence Considered

Though the most typical type of parol evidence would be direct testimony from the parties regarding their intent, other types of evidence might be admitted. For example, prior versions of an agreement, term sheets, or pro formas may be admissible to shed light on the meaning of the final agreement. *See Craig Food Indus. v. Weihing*, 746 P.2d 279, 282(Utah Ct. App. 1987). Additionally, "[t]rade usage or custom is permissible to explain technical terms in contracts to which particular meanings attach," whether to clarify ambiguity, to fill gaps, or "generally to elucidate the intention of the parties." *Id*. Expert testimony may be admissible (subject to Rule 702 considerations) on the interpretation of industry-specific terms. *See id*.; *see also Richins v. Golf Servs. Group*, 2008 UT App 262, ¶ 4, 189 P.3d 1280 (admitting expert testimony to interpret contractual provision requiring adherence to "generally accepted practices and methods customary in the industry"). Part performance may be used to assist in determining the intent of the parties. *See Hackford*, 657 P.2d at 1276; *but see Key Bank Nat'l Ass'n v. Systems West Comp. Res., Inc*., 2011 UT App 441, ¶ 18, 265 P.3d 107 ("Although we do not consider the parties' course of conduct as evidence of intent, we do consider it as evidence of facial ambiguity.").

Procedural Considerations

The Utah Supreme Court has stated that "[a] motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended." *WebBank v. Am. Gen. Annuity Serv. Corp*., 2002 UT 88, ¶ 22, 54 P.3d 1139. However, this statement seems slightly overbroad, since "it is appropriate for a court to grant summary judgment on an issue that is normally a question of fact when no reasonable jury could conclude that [an issue of] fact exists." *Oman v. Davis Sch. Dist*., 2008 UT 70, ¶ 48, 194 P.3d 956. Though Utah courts have not directly addressed the issue, the United States Court of Appeals for the Second Circuit has persuasively held that "ambiguity itself is not enough to preclude summary judgment. Rather, in order for the parties' intent to become an issue of fact barring summary judgment, there must also exist relevant extrinsic evidence of the parties' actual intent." *Mellon Bank, N.A. v. United Bank Corp*., 31 F.3d 113, 116 (2d Cir. 1994). Furthermore, a "court may resolve ambiguity in contractual language as a matter of law if the evidence presented about the parties' intended meaning is so one-sided that no reasonable person could decide the contrary," or if "the non-moving party fails to point to any relevant extrinsic evidence supporting that party's interpretation of the language." *Compagnie Financiere v. Merrill Lynch*, 232 F.3d 153, 158 (2d Cir. 2000).

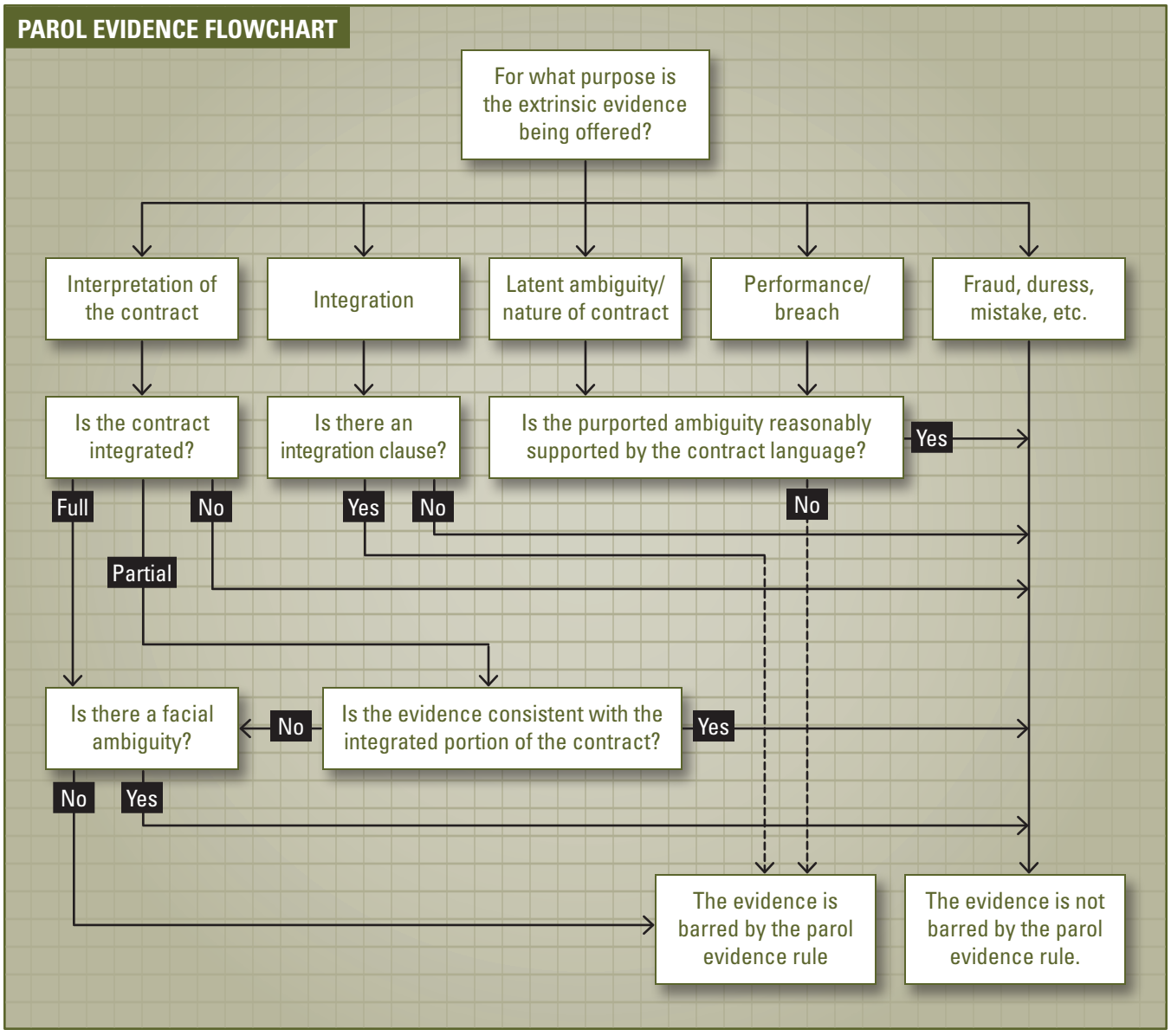
On appeal, "the determination to admit parol evidence is a question of law" reviewed for correctness, but the "clearly erroneous"

standard applies to "subsidiary factual determinations." *Spears v. Warr*, 2002 UT 24, ¶ 18, 44 P.3d 742; *but see Eggett*, 2004 UT 28, ¶ 12 (holding that "[t]he court of appeals correctly applied an abuse of discretion standard of review" in determining "whether the trial court properly admitted" certain extrinsic evidence). If parol evidence is excluded, and an agreement is interpreted as a matter of law, an appellate court reviews that determination without deference. *Craig Food Indus.*, 746 P.2d at 283. However, if parol evidence is considered, the construction of an agreement is a question of fact, and an appellate court's review is "strictly limited." *Id.* (citation omitted).

In federal court, the parol evidence rule is viewed as substantive law, rather than a procedural rule of evidence, and "[i]n deciding the application of the parol evidence rule, a federal court looks to state law." *Wolt v. Sherwood, a Div. of Harsco Corp.*, 828 F. Supp. 1562, 1565 (D. Utah 1993).

Conclusion

Though the parol evidence rule is often recited in general terms, its application is not so straightforward in every case. Courts and practitioners should pay particular attention to the purpose for which evidence is offered and whether it is, in fact, subject to exclusion as parol evidence. As mentioned above, Utah courts have articulated a two-step process, but this overly simple formulation often misses the mark. Included with this article is a flowchart that attempts to account for the many factors that may be relevant.



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LGBT Attorneys Have Much to Celebrate

by Ruth Hackford-Peer

Let me tell you a story. A story that some remember but few retell. But this story is central to LGBT legal history in Utah and deserves to be retold.

Once upon a time there was a semiannual publication of the Litigation Section of the Utah State Bar called *Voir Dire*. The Winter 1996 issue featured local attorney Jane Marquardt in its regular "A Credit to the Profession" column. Shortly thereafter, a local attorney[1] wrote a letter to the editor of *Voir Dire* in which he explained that he took offense to the publication honoring Jane because she is "an admitted homosexual." He noted that "[t]hose who enter into this lifestyle are behaving illegally and immorally" and said he found it "very upsetting" that the magazine chose "[t]o hold this person up as some kind of role model."

I recently had the chance to talk with Jane, and I heard for the first time this story that shaped her experience in the law. More importantly, I learned the story the way she remembers it. Her reflections on the incident were insightful and I'll share them momentarily. That's not the end of the story, but I want to fast-forward almost twenty years and tell another story before I conclude the first.

In a November 10, 2015 ruling, Judge Scott Johansen of Utah's Seventh District Juvenile Court ordered state child-welfare officials to remove a nine-month-old child from the home of April Hoagland and Beckie Peirce because he believed it was not in the best interest of children to be raised by same-sex couples.

The story hit me in the gut. It was too close to home. I grew up in Roosevelt, not far from Price, Utah, where this occurred. I too am a lesbian parent, a mother of two children, who once had to trust the court to allow my partner – now wife – to adopt.

The media quickly picked up the story and intense criticism of the ruling followed. Governor Herbert called the ruling "puzzling." Hillary Clinton expressed support for the couple on Twitter. The Human Rights Campaign filed a formal complaint against the judge with the Utah Judicial Conduct Commission.

Just days later the Utah Division of Child and Family Services sought reconsideration of the order. The judge rescinded his own order and then recused himself from the case.

Which reminds me of the ending to the Jane Marquardt story I started to tell.

Jane remembers the letter to the editor from Mr. G. She was originally worried about how others would respond to Mr. G's letter and she worried about how the letter might impact her career. But then an outpouring of support from members of the state bar began.

More than one hundred well-known lawyers signed a letter of support for Jane and published it in the *Utah Bar Journal*. The letter stated that "[Jane] is indeed, a credit to our profession." She has "demonstrated an uncompromising integrity and adherence to ethical standards to which we all should aspire." The signers agreed that Jane's "sexual orientation has nothing to do with her ability to practice law or to be an outstanding member of the bar" and shared the view that "[i]ntolerance has no place in our profession."

Especially now, the letter reads like a who's who of the legal profession. The letter was signed by then Utah Attorney General Jan Graham, and by several former bar presidents, including Paul T. Moxley and Dennis V. Haslam. It was signed by now Tenth Circuit Judge Carolyn B. McHugh, now federal Judge Dale A. Kimball, and now federal Magistrate Judge Brooke C. Wells. Renowned attorney David K. Watkiss signed. Jane recalls that Fran Wikstrom was central to the efforts to forcefully respond to Mr. G.

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The Deseret News then published an article about the entire situation, which was picked up by the Associated Press, and somehow this became a story of national interest. The responses to Jane were almost entirely favorable. Jane believes that the public support she was shown by members of the bar was critical to other LGBT attorneys coming out of the closet, which allowed our colleagues, friends, and neighbors to get to know the real "us." As more straight people got to know more LGBT people, our network of allies grew. Jane believes that much more good came out of Mr. G's letter to the editor than bad. She chooses to remember the support. She chooses to remember the good.

Which brings me back to the Judge Johansen situation. I was relieved to hear that Judge Johansen retired on January 1, 2016. I was relieved because I knew that I would not feel comfortable appearing in front of him. I knew that many in my LGBT communities now believe, perhaps rightly, that we would not be afforded justice in his court. But I also know Judge Johansen is no more the villain here than Mr. G was in Jane's story. They are human beings, like you and me, shaped by their own experiences and perspectives, as we all are.

The real story here is that "one's eligibility to participate in civilized society, much less to practice law, is substantially compromised by bigotry and insensitivity." It is a message as true now as it was in 1997 when Jane's allies used these words to defend her. And to my fellow members of the bar and bench, I urge us all to see injustice, to call it out publicly and to support those who are targeted by it. But I also urge us all to celebrate the progress we have made. I married the love of my life after Judge Shelby's December 2013 ruling. Utah now has passed a statewide inclusive nondiscrimination law. Salt Lake City has a lesbian mayor. There is still so much work to be done on LGBT issues and on other issues of social justice. But let's remember how far we have come.

Together we have the power to create so much good. On an individual level, this support shaped Jane. This support will forever shape the lives of the nine-month-old girl and her family in Price. On a systemic level, long-lasting change shapes us all and our profession.

I am a benefactor of what and who has come before me. I also am a benefactor of what and who surrounds me now. I have benefitted greatly by Jane and others who took risks to live open and authentic lives. I also benefit greatly by being a member of a fair and vibrant bar.

Like Jane, I choose to remember the good that comes when we unite against what we know to be unjust. Recently, we fought to keep a little girl with her loving family. Our voices are powerful. Today, I choose to remember the good.

1. While the attorney identified himself in his 1997 letter to the editor, I've decided only to refer to him as Mr. G in this piece. Many people have changed their views on LGBT issues over the past eighteen years, and I do not know what this attorney's current views are. In addition, my purpose in writing this piece is not to vilify anyone.

Appellate Highlights

by Rodney R. Parker, Dani N. Cepernich, Nathanael J. Mitchell, Adam M. Pace, and Taymour B. Semnani

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

Westgate Resorts, Ltd. v. Adel
2016 UT 2, 803 Utah Adv. Rep. 52 (Jan. 5, 2016)
The Utah Supreme Court confirmed an arbitration panel's award of reasonable attorney's fees to the prevailing party under the Utah Pattern of Unlawful Activity Act, even though the fee award was greater than the amount the party contracted to pay its attorneys. The court held that the arbitration panel did not commit an obvious error in its calculation of reasonable fees because "**the UPUAA does not expressly limit a plaintiff's reasonable attorney fees to those actually incurred.…**" *Id.* ¶ 30 (emphasis added).

State v. Cuttler
2015 UT 95 , 802 Utah Adv. Rep. 15 (Dec. 24, 2015)
In this criminal appeal, the Utah Supreme Court **extended its holding in *State v. Lucero*, 2014 UT 15, 328 P.3d 841 to the examination of Rule 404(c) evidence under Rule 403 of the Utah Rules of Evidence.** In *Lucero*, the court had held that while the factors announced in *State v. Shickles*, 760 P.2d 291 (Utah 1988), may be useful in evaluating whether Rule 404(b) evidence satisfies Rule 403, the plain language of Rule 403 controls and not all *Shickles* factors need be considered. With this holding, the *Cuttler* court makes clear that the same analysis applies to Rule 404(c) evidence.

Mind & Motion Utah Investments, LLC v. Celtic Bank Corp.
2016 UT 6 (Jan. 27, 2016)
The court held that **a provision in a real estate purchase contract that required a plat to be recorded was unambiguously a mandatory covenant, even though fulfillment of the provision depended on something outside the contracting party's control, because the parties used explicitly mandatory language to characterize it,** while using explicitly conditional language elsewhere in the agreement.

DIRECTV v. Utah State Tax Comm'n
2015 UT 93, 802 Utah Adv. Rep. 20 (Dec. 14, 2015)
Satellite companies brought constitutional challenges against a statute that created a **tax credit favoring cable companies. Surveying constitutional jurisprudence, the Utah Supreme Court held the tax credit statute did not trigger strict scrutiny under the dormant Commerce Clause, where the statute did not discriminate on the basis of geographic connection, but instead on the basis of differing business models.** In doing so, the court rejected an argument that differences in "the relative economic footprint of competing models is sufficient" to trigger strict scrutiny. *Id.* ¶ 35.

In re K.C.
2015 UT 92, 362 P. 3d 1248 (Nov. 24, 2015)
The provision of reunification services by the Department of Child and Family Services is subject to the Americans with Disabilities Act, and an alleged violation of the ADA in connection with reunification services may be raised as a defense or other means of altering a service plan in a parental rights termination proceeding. The court nevertheless affirmed, agreeing with the juvenile court's determination that there were no additional services DCFS could have provided to accommodate the mother's disabilities.

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

Irving Place Assoc. v. 628 Park Ave, LLC
2015 UT 91, 362 P. 3d 1241 (Nov. 13, 2015)
The Utah Supreme Court interpreted Utah Code section 78B-5-202(7)(a), regarding when a judgment entered by a district court or justice court becomes a lien upon real property. The Court held that **only a final judgment qualifies as a lien** under this provision. The court also clarified the requisite elements of information which must be included in a recorded judgment or abstract to create a valid lien.

Bad Ass Coffee Co. of Hawaii v. Royal Aloha Int'l, LLC
2015 UT App 303, 802 Utah Adv. Rep. 11 (Dec. 24, 2015)
The Utah Court of Appeals held that **the district court applied the wrong legal standard when it dismissed a complaint based on a plain-language reading of the forum-selection clause without considering whether alleged fraud or overreaching made it unfair or unreasonable to enforce the forum-selection clause.**

Majors v. Owens
2015 UT App 306, 802 Utah Adv. Rep. 33 (Dec. 24, 2015)
The district court excluded expert testimony proffered in support of a personal injury claim after concluding the testimony failed to meet the requirements of Rule 702 because it did not sufficiently analyze the causal relationship between the accident and the injury. **While recognizing the foundation was "somewhat thin," the Utah Court of Appeals held the lower court exceeded its discretion when it excluded the expert opinion of treating physicians.** *Id.* ¶ 24 (emphasis added).

Express Recovery Servs. Inc. v. Reuling
2015 UT App 299, 802 Adv. Rep. 28 (Dec. 17, 2015)
The appellants filed a post-judgment motion to amend the district court's findings and judgment under Utah Rules of Civil Procedure 52 and 59, which the district court denied and concluded was, in substance, a disfavored post-judgment

motion to reconsider. Appellants filed their notice of appeal within thirty days of that order. **The Utah Court of Appeals treated the post-judgment motion as a properly filed motion that tolls the time for appeal under Utah Rule of Appellate Procedure 4(b) and held that it had jurisdiction to hear the case.** The court noted that nothing in the record suggested that the appellants filed their motion in bad faith, or with knowledge that the district court would recast it as a motion to reconsider.

State v. Karr

2015 UT App 287, 801 Utah Adv. Rep. 25 (Nov. 27, 2015)

In this murder case, the defendant asserted the right to use force to defend his home pursuant to Utah Code section 76-2-405. The Utah Court of Appeals held that **the statutory presumption of reasonableness of the force used is rebuttable by a showing of evidence of objective reasonableness,** and that defendant's subjective belief of whether his actions were reasonable do not control.

Solid Q Holdings LLC v. Arsenal Energy Corp.

2015 UT App 272, 362 P.3d 295 (Nov. 12, 2015)

Appealing the denial of a motion to compel arbitration, appellant argued that appellee should be estopped from avoiding arbitration, because appellant's counterclaims were based on the same facts, relationships, and dispute as appellee's claims. The Utah Court of Appeals **rejected the argument that the intertwined nature of the claims and counterclaims supplied a basis for compelling arbitration** and instead applied the non-signatory exception to the general rule recognized in *Ellsworth v. American Arbitration Ass'n*, 2006 UT 77, 148 P.3d 983.

State v. Mooers

2015 UT App 266, 362 P.3d 282 (Nov. 5, 2015)

A criminal defendant appealed from an order of restitution following **a plea in abeyance. The Utah Court of Appeals held that a plea in abeyance is not a final, appealable judgment, and that an order of restitution following a plea in abeyance does not constitute an exception to the final judgment rule.** As a result, the court dismissed the appeal for lack of jurisdiction.

In re Lavenhar

808 F.3d 794, 796 (10th Cir. Dec. 17, 2015)

This appeal arose out of a Chapter 7 bankruptcy petition where the debtor's ex-wife filed a proof of claim in the bankruptcy proceedings for a "domestic support obligation" in the amount of nearly $350,000. The Tenth Circuit Court of Appeals held that **a judgment creditor has standing to intervene in a debtor's state-court divorce proceedings to seek a declaration that the divorce decree underlying the ex-wife's proof of claim was obtained by fraud on the court.**

United States v. Makkar

2015 WL 7422599, 2015 U.S. App. LEXIS 20372 (10th Cir. Nov. 23, 2015)

In a case alleging violation of the Controlled Substance Enforcement Act, the Tenth Circuit Court of Appeals held that it was **plain error to allow the jury to infer that defendants had knowledge of the chemical structure of incense from their knowledge that the incense had similar effects as marijuana.**

Tennille v. Western Union Co.

809 F.3d 555 (10th Cir. Nov. 17, 2015)

The Tenth Circuit Court of Appeals held a class-action defendant **lacked Article III standing to challenge an award of $40 million in attorney fees to plaintiffs' counsel.**

United States v. Hill

805 F.3d 935 (10th Cir. Nov. 9, 2015)

A DEA agent boarded a train at a stop, went to a luggage car, pulled a bag with no name tag, then carried it through the passenger car asking people if it was theirs. Everyone, including the defendant, denied ownership. Deeming it abandoned, the agent searched it and found 500 grams of cocaine. The Court held that **the agent's actions amounted to a "meaningful interference with [Defendant's] possessory interests" in the bag, and that the seizure was at odds with the expectation of the reasonable traveler.** *Id.* at ¶ 37 (emphasis added).

Utah State Bar

2016 Summer Convention

Loews Coronado Bay Resort in San Diego July 6–9

THE RESORT

The Loews Coronado Bay is situated on a private 15-acre peninsula surrounded by the Pacific Ocean and Coronado Bay. It is located minutes from downtown Coronado, a charming resort village, and a short drive to San Diego's world-famous attractions. With San Diego's sun and surf still beckoning from its waterfront location, Loews Coronado Bay epitomizes the Southern California lifestyle better than ever.

Resort Amenities

- Guest rooms including with bay, marina, pool or resort views
- Direct access to the Silver Strand State Beach
- Five restaurants and lounges
- Excursion dock and marina
- Three bayside tennis courts
- Three outdoor heated swimming pools
- Complimentary Wi-Fi in guest rooms
- Full service spa and salon

RESERVATIONS

Group room rates starting at $239.00 for king beds and $259.00 for two double beds.

Reservation can be made by calling the Loews Reservations Center at 800-235-6397. Refer to 2016 Utah State Bar Summer Convention or Group Code ANN727 to receive the discounted rate.

Online reservations can also be made using the following reservations link.

https://resweb.passkey.com/go/USBA2016

Reservations need to be made on or before June 6, 2016 to receive the discounted rate.

LOEWS CORONADO BAY RESORT

Is it Ethical to Be Dishonest in Negotiations?

by Keith A. Call

Plaintiff's Attorney: "My client is going to have to have at least three future surgeries. I need at least $200,000 to settle this case."

Defense Attorney: "I have an eyewitness who says [he thinks, but is not sure] the light was green. My bottom line is $50,000. My client will never pay a penny more."

Are these statements ethical? Some lawyers in negotiation may understate their willingness to make concessions in order to resolve a dispute. Some lawyers may also exaggerate or understate strengths and weaknesses of a factual position. Where is the ethical line between puffing and fraud?

The Rule

Rule 4.1 of the Utah Rules of Professional Conduct provides:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) Make a false statement of material fact or law to a third person; or
>
> (b) Fail to disclose a material fact, when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Analysis

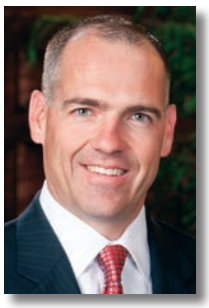
The question of puffery vs. dishonesty or fraud has spawned volumes of commentary and debate. Comment [2] to Rule 4.1 adds, somewhat obtusely:

> Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category…

Legal commentators are all over the map. Some have argued that *every* negotiation involves some level of deception, and that those who piously argue otherwise are simply wrong (or dishonest). "To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation." The argument continues that we must expect a negotiator to mislead, "but fairly." James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 Am. B. Found. Res. J. 921, 927-28 (1980). *See also*, Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Safe Harbor?*, 18 Geo. J. Legal Ethics 179, 181 (2004) (current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far). These writers seem to accept that consensual deception is intrinsic to the negotiation process.

Others argue that principles of morality should drive lawyers to reject the concept that negotiation is inherently and appropriately deceptive. *See* Reed Elizabeth Loder, "Moral Truthseeking and the Virtuous Negotiator," 8 Geo. J. Legal Ethics 45, 93-102 (1994). And some have warned that the language of the comment to Rule 4.1 cannot repeal the meaning of the rule, and does not give license to lie. *See* 2 Geoffrey C. Hazard, Jr., W. William Hodes and Peter R. Jarvis, *The Law of Lawyering* § 37.3 (3d ed. 2014).

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.



It is helpful to compare the language of Rules 4.1 and 3.3. With regard to statements to a "tribunal" (such as a court), Rule 3.3 prohibits any knowing "false statement of fact or law." Rule 4.1, in contrast, prohibits any knowing "false statement of *material* fact or law." Rightly or wrongly, the inclusion of the word "material" in Rule 4.1, seems to be a recognition that the rules of engagement in negotiation are less strict than the rules before a judge.

The American Bar Association has issued an authoritative (and very interesting) ethics opinion on this issue. *See* ABA Comm. on Ethics and Prof. Resp., Formal Op. 06-439 (2006). The opinion confirms that a lawyer may not make a false statement of material fact to a third person. However, "statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing,' are not considered 'false statements of material fact'…" *Id*. p. 8.

The opinion cites several examples of "false statements of material fact" in negotiations, including a plaintiff lawyer's failure to disclose that his client had died, and a defense lawyer's statement that insurance coverage was limited to $200,000 when documents in his file showed the client had $1,000,000. In contrast, Rule 4.1 allows a lawyer to downplay a client's willingness to compromise, present a client's bargaining position without disclosing the client's "bottom line," and make "overstatements" or "understatements" of the strengths or weaknesses of a client's position. "Such statements generally are not considered material facts subject to Rule 4.1." *Id*. pp. 5–6. *See also generally*, ABA Lit. Section, *Ethical Guidelines for Settlement Negotiations*, (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.authcheckdam.pdf (last viewed 1/13/16).

The dividing line between ethical and unethical deception, assuming such concepts exist, is hard to draw. It has been argued that the appropriate line "must approximate the point where a statement *will not mislead the opposing party* – the very point where 'puffery' would have little practical effect anyway." *The Law of Lawyering*, § 37.3. Lawyers have been disciplined for misrepresenting material facts in negotiations. But given that most negotiations are done in private, the line must ultimately be guided by each individual lawyer's ethical and moral compass.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the January 22, 2016 Commission Meeting held at the Utah State Bar Law & Justice Center in Salt Lake City.

1. Commissioners voted to approve making the 2016 Fall Forum a two day event.

2. Commissioners voted to support the concept that all judges, including Justice Court judges, have a law degree.

3. Commissioners voted to approve spending $4,500 for half of the cost of the ABA review of OPC.

4. Commissioners voted to nominate John Lund to run for Bar President-Elect.

5. Commissioners selected Barbara Hjelle to receive the Dorathy Merrill Brothers Award.

6. Commissioners selected Reyes Aguilar and Carl Hernandez to receive the Raymond S. Uno Award.

7. Commissioners selected Robert A. Oliver, Joane Pappas White, Craig C. Halls, and Christina Ross Sloan as the nominees to present to the Governor for the Seventh Judicial District Nominating Commission.

8. Commissioners agreed to review section allocation figures for vote in two weeks via telephone conference to approve changes to allocation policies.

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

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 2015, that amount is 1.68% of the mandatory license fee.

MCLE Reminder – Even Year Reporting Cycle

July 1, 2014–June 30, 2016

Active Status Lawyers complying in 2016 are required to complete a minimum of 24 hours of Utah approved CLE, which shall include a minimum of three hours of accredited ethics. **One of the ethics hours shall be in the area of professionalism and civility.** A minimum of twelve hours must be live in-person CLE. Please remember that your MCLE hours must be completed by June 30 and your report must be filed by July 31. For more information and to obtain a Certificate of Compliance, please visit our website at www.utahbar.org/mcle.

If you have any questions, please contact Sydnie Kuhre, MCLE Director at sydnie.kuhre@utahbar.org or (801) 297-7035 or Hannah Roberts, MCLE Assistant at hannah.roberts@utahbar.org or (801) 297-7052.

Call for Nominations for the 2016 Pro Bono Publico Awards

The deadline for nominations is April 1, 2016.

The following Pro Bono Publico awards will be presented at the Law Day Celebration on May 1, 2016:

- **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, Tyler Needham at: probono@utahbar.org or 801-297-7027

Food and Clothing Drive Participants and Volunteers

We would like to thank all participants and volunteers for their assistance and support in this year's Food and Clothing Drive. This year's Drive had great participation, and we collected at least one-third more food and clothing than in recent previous years, with far wider personal participation by individual members. A full large truck full of food, clothing and toiletries were donated and delivered for immediate distribution. Jason Ensign provided approximately 100 toiletry packages that he personally assembled as an Eagle Scout project; and the employees at the Utah State Bar assembled approximately seventy-five toiletry packages too. They were first class!! An additional approximate aggregate amount of over $4,000 in cash donations was also donated to The Utah Food Bank, Eagle Ranch Ministries, Women & Children in Jeopardy, and The Rescue Mission. Further, we purchased complete hams and all the trimmings to assist 150 low income families to prepare their Holiday feast; these items were distributed to these families on December 22, 2015, through The Eagle Ranch Ministry.

Lincoln Mead and Leonard Burningham

We would also like to thank all of the individual contacts that we made this year and look forward to working with you next year; we also appreciated all of the email correspondence and comments that we received from many Bar members and others about this year's Drive. The publicity we received encouraged a number of non-Bar members to participate, and we also had the opportunity to outfit one homeless veteran who had heard about the Drive and had come down to see if we could help him. He went away with two changes of clothing, a blanket, a toiletry package, a ski hat and a pack to hold it all! It provided a very special moment for us, and made us wonder how it would be to be able to do that for everyone that is out in the cold on our winter nights. We plan to discuss that issue further.

Thank you all for your kindness and generosity.

Yours very sincerely,
Leonard W. Burningham
Lincoln Mead
April Burningham

Thank You!

When the Constitution Moved into the Police Station: Miranda at 50

by Sean Toomey, Utah State Bar Communications Director

The 2016 Law Day theme is "*Miranda*: More than Words." Law Day was established by Congress in 1961 as "a special day of celebration by the American people in appreciation of their liberties." The Utah State Bar's public campaign for Law Day 2016 has the advantage that people know about their "right to remain silent" in a way they were not familiar with King John's proclamation of 1214, Magna Carta. We hope to help people understand how their *Miranda* rights derived directly from the Constitution.

As many readers may remember from law school, in the decades before *Miranda v. Arizona*, 384 U.S. 436 (1966), was decided, a number of opinions recognized rights based on the Sixth Amendment, which states that "the accused shall…have the Assistance of Counsel for his defense."

In *Powell v. Alabama*, 287 U.S. 45 (1932), the United States Supreme Court reversed an Alabama conviction in which four men stood trial six days after indictment.

> Prior to that time, the trial judge had 'appointed all the members of the bar' for the limited 'purpose of arraigning the defendants.' Whether they would represent the defendants thereafter if no counsel appeared in their behalf was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court.

Id. at 56.

The court concluded:

> In a capital case, where the defendant is unable to employ counsel…it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law, and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

Id. at 71.

Thirty-one years later, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court decided that

> the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of 'liberty,' just as for deprival of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved.

Id. at 349.

In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the right to counsel guaranteed by the Sixth Amendment was extended from the trial court to the station house. The Court determined that statements made by a suspect in police custody who had been refused an opportunity to consult with his counsel and who had

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

**Justice Sutherland, *Powell v. Alabama*
287 U.S. 45, 68–69 (1932)**

not been warned of his constitutional right to keep silent, could not be used against him at trial.

Escobedo holds that a defendant must be afforded his right to counsel as soon as "…the process shifts from investigatory to accusatory – when its focus is on the accused and its purpose is to elicit a confession – our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." *Id*. at 492.

The following year, in *People v. Dorado*, 62 Cal.2d 338, 349 (1965), the California Supreme Court explored the question of when that right to counsel is triggered: "The right to counsel matures at this critical accusatory stage; the right does not originate in the accused's assertion of it." It concluded that "defendant's confession could not properly be introduced into evidence because…the authorities had not effectively…informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establish[ed] that he had waived these rights." *Id*.

Shortly after the California decision in *Dorado*, the Arizona Supreme Court upheld Ernesto Miranda's 1962 conviction of rape and robbery. Miranda's confession was the only constitutional issue preserved for appeal. At a lineup, the rape and robbery victims could not positively identify Miranda. After the lineup, Miranda asked Detective Cooley, "How did I do?" Cooley replied, "Not too good, Ernie." Miranda asked, "They identified me then?" Cooley said, "Yes, Ernie, they did." Miranda replied, "Well, I guess I better tell you about it then." Miranda completed a written confession on a form that included the words "…with full knowledge of my legal rights, understanding any statement can be used against me." Gary L. Stuart, *Miranda: The Story of America's Right to Remain Silent* 6–7 (2004).

In 1965, in *State v. Miranda*, the Arizona Supreme Court stated:

> We are familiar with the case of *State of California v. Dorado*…and, like the Supreme Court of Nevada, do not choose to follow *Dorado* in the extension of the rule announced in *Escobedo, supra*…. The *Escobedo* case merely points out factors under which if all exist it would not be admissible. We hold that a confession may be admissible when made without an attorney if it is voluntary and does not violate the constitutional rights of defendant.

State v. Miranda, 401 P.2d 721 (Ariz. 1965).

Because of the differing decisions by state and federal courts on the issue, in 1965 the U.S. Supreme Court granted certiorari on Ernesto Miranda's petition, and on those of four related cases, out of the approximately 150 petitions for cases involving *Escobedo* issues that the Court had received during the previous eighteen months.

Attorney John Flynn, left, with Ernesto Miranda. Source: University of Texas

Attorney John Frank based his petition and his brief for Ernesto Miranda on the Sixth Amendment.

> The day is here to recognize the full meaning of the Sixth Amendment. As a matter of constitutional theory and of criminal procedure, if a defendant cannot waive counsel unwittingly in one part of the conviction procedure, he should not be able to waive it at another. As a matter of practicality in law enforcement, we cannot know the precise effects of giving counsel at the beginning as the law does at the end; but we can know that there is not the faintest sense in deliberately establishing an

> elaborate and costly system of counsel – to take effect just after it is too late to matter.

Brief for Petitioner at 49, *Miranda v. Arizona*, 384 U.S. 436 (1966), (No. 759), 1966 WL 100543, at *49.

For the oral argument, John Frank deferred to his partner, John Flynn, who had more firsthand experience with police tactics. Flynn had a sense that Miranda's case was about compulsory self-incrimination – a Fifth Amendment case – and had practiced how he would address this issue. The opportunity arose less than 15 minutes into the oral argument when Justice Stewart asked Flynn, "What do you think is the result of the adversary process coming into being when this focusing takes place? What follows from that? Is there, then, a right to a lawyer?" Flynn replied

> I think that the man at that time has the right to exercise, if he knows, and under the present state of the law in Arizona, if he is rich enough, and if he's educated enough to assert his Fifth Amendment right, and if he recognizes that he has a Fifth Amendment right to request counsel. But I simply say that at that stage of the proceeding, under the facts and circumstances in Miranda of a man of limited education, of a man who certainly is mentally abnormal who is certainly an indigent, that when that adversary process came into being that the police, at the very least, had an obligation to extend to this man not only his clear Fifth Amendment right, but to accord to him the right of counsel.

A few minutes later, Justice Stewart said, "I think it's first important to define what those rights are – what his rights under the constitution are at that point. He can't be advised of rights unless somebody knows what those rights are." Flynn replied, "Precisely my point. And the only person that can adequately advise a person like Ernesto Miranda is a lawyer." Concluding his discussion with Justice Stewart, Flynn said

> Well, I simply mean that when it becomes an adversary proceeding, at the very least, a person in Ernesto Miranda's position needs the benefit of counsel, and unless he is afforded that right of counsel he simply has, in essence, no Fifth or Sixth Amendment right, and there is no due process of law being afforded to a man in Ernesto Miranda's position.

Argument, *Miranda v. Arizona* (Feb. 28, 1966), *available at* https://www.oyez.org/cases/1965/759.

Shortly thereafter – fifty years ago this year – the U.S. Supreme Court determined that, in addition to a Fifth Amendment right to not incriminate oneself, there existed a newly recognized Fifth Amendment right to counsel.

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.

Miranda, 384 U.S. at 469.

If you are interested in writing related articles – for the Bar, the *Deseret News*, *The Salt Lake Tribune*, etc. – to help people become aware of these and other constitutional protections, please contact Sean Toomey at sean.toomey@utahbar.org.

"The defendant who does not ask for counsel is the very defendant who most needs counsel."

California Supreme Court, *People v. Dorado, 62 Cal. 2d 338, 352 (1965)*

Law Day 2016

MIRANDA

more than words

SUPPORT LAW DAY

Be a part of the special Law Day edition of the *Deseret News* and *The Salt Lake Tribune* on May 1st as we celebrate the 50th anniversary of the U.S. Supreme Court decision that established the *Miranda* warnings, protecting basic rights that are enshrined in our Constitution.

By advertising in the special edition you can showcase your expertise in a targeted editorial environment read by thousands of potential clients. If you would like to advertise, or if you have suggestions for editorial content, please contact Sean Toomey at: sean.toomey@utahbar.org or 801-297-7059.

Law Day Luncheon

Monday, May 2, 12:00 noon

Little America Hotel
500 South Main | Salt Lake City

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.

Utah State Bar 2016 Spring Convention Award Recipients

During the Utah State Bar's 2016 Spring Convention in St. George the following awards will be presented:

BARBARA HJELLE
Dorathy Merrill Brothers Award
for the Advancement of
Women in the Legal Profession

REYES AGUILAR
Raymond S. Uno Award
for the Advancement of
Minorities in the Legal Profession

CARL HERNANDEZ
Raymond S. Uno Award
for the Advancement of
Minorities in the Legal Profession

Mandatory Online Licensing

The annual Bar licensing renewal process will begin June 1, 2016, 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 the 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 receive a licensing confirmation email. Subsequently, you will receive an official licensing receipt along with your renewal sticker, via the U.S. Postal Service. If you do not receive your renewal sticker in a timely manner, please 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 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 1.68% of the mandatory license fees. Your rebate would total: Active Status – $7.14; Active – Admitted Under 3 Years Status – $4.20; Inactive with Services Status – $2.52; and Inactive with No Services Status – $1.77.

Southern Utah Bar Association Pro Bono Attorney of the Year

K. Jake Graff was named the SUBA Pro Bono Attorney of the Year. The award was presented by Judge Jeffrey C. Wilcox and Matthew Ekins.

Notice of Utah Bar Foundation Annual Meeting

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 will be holding the Annual Meeting of the Foundation on Saturday, July 9th at 9:00 am at the Loews San Diego. 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.

2016 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2016 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 Friday, May 6, 2016. 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/

Pro Bono Honor Roll

2nd District ORS Calendar
Jake Cowdin
Lauren Schultz

3rd District ORS Calendar
Michael Erickson
Scott Hagen
Kristy Larsen
Rob Rice
Liesel Stevens
Maria Windham

Adoption/Termination
Richard Armstrong
Kathryn Smith
Paul Wauldron

Bankruptcy Case
Scott Blotter
Jacob Gunter
Jeffrey Hagen
Jane Harrison
Jeffrey Mortimer
Judge Karlin Myers
Phillip B. Shell
Ted Stokes
Derek Williams

Community Legal Clinic: Ogden
Skyler Anderson
Heath Becker
Jonny Benson
Dan Black
Robert Falck
Joshua Irvine
Jacob Kent
Chad McKay
Carlos Navarro
Jason Nichols
Tim Nichols
Bryan Pitt
Francisco Roman
Brian Rothschild
Patrick Thomas
Brent Wamsley
Ian Wang
Russell Yauney

Debt Collection Calendar
David P. Billings
Grant Gilmore
Charles A. Stormont

Debtor's Legal Clinic
Todd Jesnson
Tyler Needham
Brian Rothschild
Paul Simmons
Brent Wamsley
Ian Wang

Expungement Legal Clinic
Kate Conyers
Stephanie Miya
Hollee Petersen
Amy Powers
William Scarber
Melissa Stirba

Family Law Case
Justin Ashworth
Clinton Brimhall
Brent Brindley
Frank Chiaramonte
Brent Chipman
Derek J. Conver
Sharon Donovan
Aaron Garrett
Richard Hutchins
Chase Kimball
Thomas King
Robert Latham
Jennifer P. Lee
Christopher Martinez
Carolyn Morrow
Kenneth McCabe
Jeremy McCullough
Chad Mckay
Chris Morgan
Carolyn Morrow
Tamara Rasch
Joyce Smith
Linda Smith
Simon So
Sheri Throop
Anthony Werrett
Lane Wood
Russell Yauney

Free Legal Clinics
William Allen
Brent Brindley
Mary Ellen Brown
Eric Carson
Jason Dixon
Jake Graff
Terry Hutchinson
Jenny Jones
Topher Lund
Maureen Minson
Russell Mitchell
Mike Welker

Guardianship Case
Christopher Beins
Susan Broberg
Sydnee Christensen
Adam Hensley
Randall M. Larsen
Niel Lund
Chad Mckay

Housing Case
Jason Duston

Name Change
Mary Ellen Brown
Barry Huntington

PGAL Case
Jessica Couser
David Ward
Ted Weckel
Orson West

Probate Case
Richard S Brown
Paul W. Hess
Christian Kesselring
Jonathon Miller
Gregory Misener
Daniel Shumway

Rainbow Law Clinic
Russell Evans
Stewart Ralphs

Social Security Case
William Frazier

Street Law Clinic
Dara Cohen
Kate Conyers
Brett Coombs
Matt Harrison
Kass Harstad
Brett Hastings
Adam Long
John Macfarlane
Tyler Needham
Elliot Scruggs
Paul Simmons
Jonathan Thorne

Tuesday Night Bar
Michael Anderson
Robert Anderson
Adrienne Bell
Mike Black
Lyndon Bradshaw
Matt Brahana
David Broadbent
Josh Chandler
Megan DePaulis
Jordan Dez
Figueira, Joshua
Steve Gray
Ruth Hackford-Peer
Chris Hadley
Laura Hansen-Pelcastre
Carlyle Harris
Melinda Hill
Emily Holt
John Hurst
Ryan Jibson
Patrick Johnson
Matthew Kaufmann
Beth Kennedy
Emilie Lewis
Hyrum Miller
Megan Nelson
Ben Onofrio
J. Shea Owens
Grace Pusavat
Josh Randall
Ron Russell
LaShel Shaw
Tiffany Smith
Jason Steiert
Tammy Stevenson
Kathryn Tipple
Chris Wade
Adam E. Weinacker

Wills and Estates Case
Richard Arnold

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 December and January of 2015/2016. To volunteer call Tyler Needham (801) 297-7027 or go to https://www.surveymonkey.com/s/UtahBarProBonoVolunteer to fill out a volunteer survey.

Utah State Bar Request for 2016–2017 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:

_____

_____

_____

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.

_____

_____

_____

_____

_____

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 3, 2016 to:
Robert Rice, President-Elect
645 South 200 East
Salt Lake City, UT 84111-3834

"and Justice for all"

34th Annual Law Day 5K Run & Walk

May 14, 2016 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

"Me Ran Da 2016 Law Day Run."

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. 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 14, 2016 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!

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

Law Day 2016
MIRANDA
more than words

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 2016 "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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IRON MOUNTAIN

Rocky Mountain RMA ADVISORY

Banking and Finance Section Utah State Bar

Register today at – http://andjusticeforall.org/law-day-5k-run-walk/

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

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

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

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

ADMONITION

On December 17, 2015, 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 1.7(a) (Conflict of Interest: Current Clients) of the Rules of Professional Conduct.

In summary:

The attorney communicated with, provided legal advice to and represented a client in connection with financial matters. The attorney subsequently referred the client to work with a company as a sales and marketing consultant. At the time the attorney made the referral, the attorney was acting as general counsel for the company to which the attorney referred the client.

The client entered into two consecutive consulting agreements with the company and served as the CEO for the company during that time. During the time the client was acting as CEO, the attorney further represented the client in two separate, unrelated legal matters.

After the company and the client entered into the second consulting agreement, a dispute arose between the client and the company. At the time the dispute arose, the attorney was acting as general counsel to the company and represented the company in the dispute which was directly adverse to another client. The attorney acted negligently and there was little or no injury to the client.

RECIPROCAL DISCIPLINE

On November 30, 2015, the Honorable Paige Petersen, Third Judicial District Court, entered a Default Judgment and Order of Reciprocal Discipline: Suspension suspending Gregory Vietz from the practice of law for nine months for his violation of Rules 8.4(b) (Misconduct) and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

Mr. Vietz is a member of the Utah State Bar and is also licensed to practice law in Idaho. The Supreme Court of Idaho issued a Disciplinary Order suspending Mr. Vietz for nine months with the nine month suspension stayed and probation with conditions imposed for Mr. Vietz's conduct in violation of Rules 8.4(b) (Conviction of a Criminal Act) and 8.4(d) (Conduct Prejudicial to the Administration of Justice) of the Idaho Rules of Professional Conduct. An Order was entered in Utah based upon the discipline order in Idaho.

In summary, the disciplinary authority in Idaho made the following factual findings:

Mr. Vietz was charged in Ada County, Idaho, with two felonies: aggravated assault with a deadly weapon and felony use of a deadly weapon in a commission of a felony; and four misdemeanors: battery, resisting or obstructing officers, discharge of a firearm within city limits and assault on a police dog. Mr. Vietz entered Alford pleas to two misdemeanors: discharge of a firearm within city limits and assault on a police dog. The court entered judgment imposing a sentence of

twenty-eight days incarceration, a fine, public service and placed Mr. Vietz on supervised probation for two years.

RECIPROCAL DISCIPLINE

On November 30, 2015, the Honorable Ryan Harris, Third Judicial District Court, entered a Default Judgment and Order of Reciprocal Discipline: Disbarment against Leslieann Haacke, for violation of Rules 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.3 (Diligence), 1.4 (Communication), 1.5(a) (Fees), 1.7(a) (Conflict of Interest: Current Clients), 1.8(a) (Conflict of Interest: Current Clients: Specific Rules), 1.15 (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

Ms. Haacke is a member of the Utah State Bar and is also licensed to practice law in Arizona. The Presiding Disciplinary Judge of the Supreme Court of Arizona issued a Report and Order Imposing Sanctions disbarring Ms. Haacke from the practice of law for Ms. Haacke's violation of the Arizona Rules of Professional Conduct. An Order was entered in Utah based upon the discipline Order in Arizona.

In summary the disciplinary authority in Arizona found: Ms. Haacke failed to adequately communicate with clients, failed to abide by the clients' decisions concerning the objectives of representation and failed to consult with clients regarding the means by which their legal objectives were to be pursued. Ms. Haacke failed to act with reasonable diligence and promptness in her representation of her clients. Ms. Haacke delayed getting client issues resolved, thereby engaging in conduct prejudicial to the administration of justice.

Ms. Haacke charged unreasonable fees for the work she performed. Ms. Haacke represented parties with conflicts and entered into a business transaction with a client. Ms. Haacke failed to take steps to the extent reasonably practical to protect her clients' interests at the termination of her legal representation.

Ms. Haacke failed to hold client funds in her trust account until earned, failed to keep accurate records of her trust account and failed to promptly deliver client funds. Ms. Haacke committed theft by failing to safeguard or to hold third party funds in her trust account. Ms. Haacke committed a criminal act (theft A.R.S. §13-1802(A), a class 2 felony) that reflects adversely on her honesty, trustworthiness or fitness as a lawyer in other respects when she disbursed to herself funds that did not belong to her, without authorization.

Ms. Haacke made false statements to and in representing clients. Ms. Haacke's conduct was knowing and intentional.

The Arizona disciplinary authority found the following aggravating factors:
Dishonest or selfish motive.

PUBLIC REPRIMAND

On December 10, 2015, Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Jeffery N. Aldous for violating Rules 1.4 (Communication) and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
Mr. Aldous was retained by a company and was paid a retainer for the representation. Another attorney working for Mr. Aldous's client the company tried to contact Mr. Aldous to obtain a status on the progress of the work Mr. Aldous was hired to perform. The other attorney initially exchanged some information with Mr. Aldous about the progress of the case, but thereafter was unable to communicate with Mr. Aldous.

The client terminated Mr. Aldous's representation and requested an accounting of the work performed by Mr. Aldous. Mr. Aldous failed to comply with the client's requests for an accounting.

The OPC sent a letter to Mr. Aldous asking him to respond to these allegations and Mr. Aldous did not respond. The OPC emailed Mr. Aldous asking for a reply and Mr. Aldous did not reply. The OPC served Mr. Aldous with a Notice of Informal Complaint ("NOIC") requiring his written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Aldous did not timely respond in writing to the NOIC. Mr. Aldous's conduct was generally negligent and there was injury to the legal system as a result of his failure to cooperate with the OPC's investigation.

Aggravating factors:
Ignored numerous requests for information from the OPC

Mitigating factors:
Accepted responsibility and family issues.

PUBLIC REPRIMAND

On December 1, 2015, the Honorable Michael G. Allphin, Second Judicial District Court, entered an Order of Discipline: Public Reprimand against Matthew T. Johnson for violating Rules 3.4(a) (Fairness to Opposing Party and Counsel) and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Johnson was a deputy county attorney during the criminal prosecution of a defendant for aggravated assault. During the trial, Mr. Johnson asked a witness to verify a hearsay statement as being the witness' own statement. Mr. Johnson made a statement about the testimony which mischaracterized the witness' written statement. The court determined that a curative instruction to the jury could not adequately remedy the inflammatory nature of the Mr. Johnson's statement and declared a mistrial. Mr. Johnson also failed to turnover evidence that had potential evidentiary value.

Mitigating circumstances:
Absence of a prior record of discipline.

INTERIM SUSPENSION

On December 28, 2015, the Honorable Ryan M. Harris, Third Judicial District Court, entered an Order of Interim Suspension pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability against Jeremy D. Eveland pending resolution of the disciplinary matter against him.

In summary:
Mr. Eveland was placed on interim suspension based upon his criminal conviction for communications fraud, a third degree felony.

PUBLIC REPRIMAND

On December 10, 2015, Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Kerry F. Willets for violating Rules 1.3 (Diligence), 1.4(b) (Communication) and 1.16(d) (Declining or Terminating Representation) of the Rules of Professional Conduct.

In summary:
Mr. Willets was retained for representation in a bankruptcy matter. Mr. Willets failed to include his client's real estate asset

on the necessary Schedules. At the 341 meeting of creditors, the bankruptcy Trustee verbally instructed Mr. Willets to amend the Schedules to include the real property but Mr. Willets failed to amend the Schedules as the Trustee instructed.

After the bankruptcy was closed, when the client attempted to sell the property, the title company noted that the property had not been listed in the bankruptcy and had not been formally disclosed to the Trustee. The client tried to contact Mr. Willets numerous times to discuss the issue with the property and the bankruptcy. When the client was able to inform Mr. Willets about the cloud on the title of the property, Mr. Willets indicated that he would straighten it out. Mr. Willets failed to timely petition to reopen the bankruptcy and failed to timely communicate with his client about the matter.

The client retained new counsel in an effort to have the bankruptcy reopened and requested the file materials from Mr. Willets. Mr. Willets did not timely provide the file to the client. Due to the cloud on the property created by the bankruptcy, the sale of the property was delayed and the first buyers withdrew their bid on the property, forcing the client to make additional mortgage payments until the sale was ultimately closed.

Aggravating factors:
Prior record of discipline.

Mitigating factors:
Personal and family issues.

SUSPENSION

On December 28, 2015, the Honorable Ryan M. Harris, Third Judicial District Court, entered an Order of Discipline: Suspension, against David A. Anderson for violating rules 8.4(b) (Misconduct) and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Anderson was charged in the Third Judicial District Court with assault against a police officer, interference with an arresting officer, criminal trespass, and disturbing the peace. Mr. Anderson signed a plea in abeyance agreement regarding the charge of assault against a police officer. Pursuant to the agreement, Mr. Anderson's plea was held in abeyance for eighteen months.

During the time Mr. Anderson's plea was being held in abeyance, Mr. Anderson was charged in the United States District Court with attempting to or carrying a weapon onboard an aircraft and two counts of assault/threat to assault a federal official or their family. Mr. Anderson ultimately pled guilty to one count of carrying a concealed weapon on an aircraft and was sentenced to thirty-six months probation. As a result of Mr. Anderson's guilty plea, the Third Judicial District Court found that Mr. Anderson had violated his probation and entered a plea of guilty against him for assault against a police officer.

Mitigating circumstances:
Absence of a prior record of discipline and emotional problems/mental disability.

Discipline Process Information Office Update

During its initial year, from January through December 2015, the Discipline Process Information Office helped eighty attorneys who contacted the office for information regarding Bar complaints that had been filed against them. Jeannine P. Timothy is available to address concerns attorneys may have about their individual matters with the Office of Professional Conduct (OPC).

Please contact Jeannine with all of your questions regarding the disciplinary process.

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

A Lawyer's Manifesto

by Robert B. Cummings

My name is Robert, and I am a "big law" survivor. I began my legal career working for a large, international law firm with almost 2,000 attorneys world-wide. Under most metrics, my former firm was and is considered one of the best. But with that prestige comes pressure. Insane "soft deadlines," all-nighters, missed birthdays, Blackberries on honeymoons, all with little praise or thanks. I, however, would never trade my time at my old firm. It taught me how to practice law at a very high level. And, in that time, I learned a lot about myself, including my physical, psychological, and emotional limits. But, after years of working in that environment, I found myself not wanting to be a lawyer.

On one dark day in the fall of 2012, deep in a doc review on a large case with little personal satisfaction or growth, I realized that the practice of law did not need to be so arduous. The practice of law did not need to be so dissatisfying. The practice of law could be done better, with personal satisfaction and happiness, the same amount of success, and comparable prestige. But how? And that was the genesis for this Lawyer's Manifesto.

On January 1, 2014, my partners and I created our law firm. Each of us came from different legal backgrounds, but we had a unified vision for our law firm: to create a place where our team loved to work, where we loved to work, and where others wanted to work. Before forming our firm, I shared my Lawyer's Manifesto with my partners, and they agreed with the principles.

It is my belief that a law firm, in order to assist young lawyers and staff in growing and maturing as professionals, and to provide the best client service possible, needs to implement and follow the following principles:

Deliberate

The practice of law should, at its core, be deliberate. When possible, attorneys in a firm need to meet, discuss, plan, coordinate, strategize, and ultimately delegate to achieve the maximum efficiency while striving for overall quality client service. The practice of law devoid of deliberateness is arduous, stressful, and draining. An attorney that is stressed and drained is an attorney providing sub-par legal service. More importantly, the lack of deliberateness subjects those that work for the attorney to increased stress and dissatisfaction.

Compassionate

A firm, through its attorneys, should at all times be compassionate. First, an attorney should be compassionate for his or her client. The client is the reason the attorney has a job. An attorney should strive to understand his or her client's position and needs, while also maintaining objectivity in order to provide the best legal service possible. Second, an attorney should be compassionate for his or her colleagues and co-workers. Those attorneys in management roles need to understand that junior attorneys and staff have lives, families, commitments, and other responsibilities. Be compassionate towards those who help you and be as deliberate as possible to avoid needlessly and unduly impeding upon their lives outside the firm. Third, be compassionate towards your adversary or opposing counsel. The practice of law is contentious, and sometimes down-right dirty. Don't get bogged down in the mudslinging, pettiness, and game-playing. Understand your opponent has a client with needs, goals, and desires. If you understand your opponent, and his or her client's motivation, you will be able to better plan and prepare your strategy, ultimately providing your client with better service.

ROBERT B. CUMMINGS is a partner at The Salt Lake Lawyers, a boutique law firm focusing on criminal, family, and general civil law. He previously worked for the New York-based Skadden, Arps, Slate, Meagher & Flom LLP out of its Los Angeles office.

Passion

A firm needs to ensure that its attorneys and staff are passionate. An attorney without passion is an automaton merely going through the actions. The downside of a lack of passion is that an attorney that doesn't care is ripe for malpractice or, at a minimum, will not be successful. To the upside, an attorney that practices with passion will achieve better results for his or her client, be better received by judges or other fact-finders, and will ultimately be happier in his or her career pursuits. People gravitate towards passionate people.

Communication

Proper, clear, and concise communication is imperative to the practice of law. A lawyer's success, and therefore the firm's success, is predicated almost exclusively on his or her ability to communicate complex and intricate concepts in a concise, understandable, and clear manner. But a lawyer needs more than the mere ability to communicate clearly and effectively. A lawyer needs to know when, how, and by what means to communicate. For example, there is a time and place for emails. An email should be used to schedule a meeting, summarize a discussion, or convey a non-complex and simple idea. Emails should not, however, be used to carry on a discussion or convey complex thoughts and ideas. For those situations, an in-person or telephone conversation is better. Moreover, the importance of personally interacting with other members of the firm, and its staff, at the beginning and throughout everyday cannot be overstated. Finally, it should go without saying, but in responding to emails, answer completely and thoroughly all questions posed. Single word emails should never be used other than: "Thanks."

Dedication

A law firm needs to focus on cultivating dedication from its attorneys and staff. If the members of a firm are not dedicated to the practice of law, in a general sense, and the practice of law at the specific firm, the firm and its clients will suffer. To cultivate dedication, a firm needs to be deliberate and compassionate (see above) in the way the firm conducts business. The firm needs to also be dedicated to its attorneys and staff. The firm needs to realize that it is nothing more than a shell business entity without a dedicated group of attorneys and staff. By dedicating itself to its employees – through deliberate actions and compassionate managing – the firm will cultivate the best possible organization to provide top-notch client service

Fun

Most importantly, the firm should strive to make the practice of law, client service, and career development fun for everyone within the firm. Your chosen career should not be drudgery and mundane; rather, it should be exciting and invigorating. If the practice of law is no longer fun, then we, as a profession, have fundamentally missed the mark.

Leaving a Legacy Through Volunteer Service

by Diane McDermaid and Tamara Green

Are you that person who raises a hand or takes that step forward when asked to volunteer? If not, why not? There are many reasons to volunteer. It may seem that volunteering only benefits the recipient of your services – not true! Although that is the initial reason many people volunteer, the personal benefits of volunteering become evident very quickly. After reviewing the list below of reasons to volunteer, it appears to be almost selfish to volunteer.

Instead of finding reasons to NOT volunteer here a few reasons TO volunteer:

- Make new friends
- Learn new life skills
- Experience different cultures
- Relieve stress
- Feel like you are contributing to your community
- Demonstrate your commitment to a cause or belief
- Build your professional or educational resume
- Become familiar with local, national, and worldwide organizations
- Have fun!
- Keep active
- Because you are needed
- Be an example to others
- Gain an awareness of people and/or organizations in need
- Feel the satisfaction of helping
- Avoid being isolated

Bottom line is that it's good for you to volunteer. And, it's okay to take away a feeling of self-satisfaction. There is a perception that volunteering should be selfless and an act of charity – which it is! But it's okay to look at it as more of an exchange of services. Someone benefits from your service and you benefit from the satisfaction of service. A 2007 report from The Corporation for National & Community Service found "a strong relationship between volunteering and health: those who volunteer have lower mortality rates, greater functional ability and lower rates of depression" than those who do not volunteer.

Another attractive benefit to donating your time and resources is economic. Not only does the community receive valuable resources at no cost to them but the volunteer may be eligible for a tax deduction, although there is no deduction for time put in. Even a highly skilled professional, i.e., lawyer or accountant, cannot deduct the value of time spent volunteering. Eligible expenses that may be claimed are car and transportation, travel, meals, out-of-pocket expenses, and any uniforms you may have to purchase. All expenses should be closely tracked and documented. A tax professional should be consulted to identify expenses that may be eligible for a tax deduction.

Now that you are aware of the benefits of volunteerism here are some tips to get started.

Define a cause or issue that matters to you.
It's easier to commit your time to an issue if it is personal. Perhaps a family member received end-of-life care from hospice, or you

DIANE McDERMAID, ACP is a Director at Large for the Paralegal Division and serves as chair of Community Service. She has been a paralegal for over 25 years and is employed with IHC.

TAMARA GREEN, CP is a founding member of the Utah State Bar Paralegal Division and currently serves as a Director at Large. She is a paralegal at Parson Behle & Latimer where she has been employed for 27 years.

love animals or you have concerns about the environment. Pick what is meaningful to you. Check out slco.org/volunteer for local organizations or www.volunteermatch.org for national organizations who need volunteers.

Identify skills you have to offer.

Something as basic as reading can be used to teach illiterate adults, tutor children or entertain the visually impaired. Creative talents such as singing, acting, dancing and drawing can be shared through performance and teaching. Work skills including carpentry, painting, financial, computers, medical, legal, hair stylists, mechanics, etc. are invaluable.

What skill would you like to acquire?

In the course of your volunteer work you will learn something. Plan upfront if you have a specific goal in mind. If you are volunteering as an intern or to expand your professional resume, make certain the tasks you are performing contribute the necessary skills.

Know what you do NOT want to do.

If your goal is to get more exercise and enjoy the outdoors, make that your first criteria in selecting a cause.

Length of your commitment

Consider what amount of time you can reasonably give. Don't take on too much and then feel overwhelmed. Start small, but make that commitment. Even it is one project this year, select the cause and follow through. You may be surprised about the positive impact it has and how quickly you say yes to the next project. There are many organizations who need volunteers for on-going projects.

Do you want to volunteer alone or in a group?

A group experience can be a good way to build relationships and network with others in the community. A one-on-one experience demands a more personal commitment.

A group with an ongoing need for your skills is Wills for Heroes. This program launched following the 9/11 terrorist attacks, where more than 400 first responders gave their lives. It became apparent that the first responder community had a glaring need for estate planning. Wills for Heroes programs provide free wills and other estate planning documents to first responders and their spouse or domestic partner.

Preparing a will is an uncomfortable reminder of our mortality and surrendering to the inevitable. Despite the inherently dangerous nature of their jobs, an overwhelmingly large number of first responders – approximately 80–90% do not

have even simple wills. This figure is based only on experiential data and feedback from state and national first responder organizations. We are unaware of any agency or organization that does or can track this type of information.

First responders selflessly devote their lives to serving their communities and are prepared to pay the ultimate price in the line of duty. The relatively low number of first responders with wills also speaks to the selflessness of first responders; the very nature of their profession is to think of others first, to put the good of the community before themselves. Avoiding the thought of 'what happens if I die' is, for many first responders, an occupational necessity.

There are upcoming opportunities to serve our grateful Utah heroes in the south and north regions of Utah, and we request your help to identify locals who will serve alongside us. Cedar City Police Department will host the event on Saturday, March 19th, and the Cache Valley Sheriff's Office will host the event on Saturday, May 21st.

Serving Our Seniors is another volunteer opportunity, where pro bono Health Care Directives and Power of Attorneys are prepared for and with senior citizens. We request your help to get the word out, via your own networks, about this *FREE* opportunity for our older friends and family. We need more avenues to circulate this information and opportunity to a lot more eligible folks. The next event is scheduled for Thursday, April 14th, from 3:00 to 5:00 pm, at the Utah State Bar building.

The Cinderella Project is another volunteer project that continues to expand each year in popularity and growth. It provides lots of varied opportunities for volunteering. Local high school students who normally could not afford prom are now able to attend - in dazzling attire, free of charge. New and gently used prom dresses, shoes, jewelry, make-up, and other sparkly accessories have been donated to give every girl the opportunity to dress up and go to a ball. You remember how important these events were to you; nothing has changed. This is a travelling show that goes to approximately three high schools each prom season. It really is so much fun to help a girl find the perfect (free) dress, shoes, and jewelry. If working one-on-one with the girls is not your thing, the set up and take down processes, or getting the dresses to and from storage, might be more up your alley. Are you a seamstress? There is also a need for dress repair in the off-season. Do you have dresses, shoes, and other accessories to donate? The Cinderella Boutique is always in need of more donations. Please contact either author with questions about getting involved in one or more of the opportunities mentioned herein.

The social, health and economic benefits of volunteering as well as the self-satisfaction of helping others, are all valid reasons to step up. Once you experience the benefits to both yourself and the recipient of your efforts, don't be surprised if it creates a lifelong commitment to volunteer service.

20th ANNIVERSARY

Please join us in celebrating the Paralegal Division's 20th Anniversary. The event will be held on Friday, April 22, 2016 in the Grand Hall at the Gateway. The festivities begin at 6:00 pm with pre-dinner entertainment, a photo booth, drinks, and socializing. There will be a plated dinner and live music show.

We are gathering photos and information from past Paralegal Division Chairs and invite past Chairs to contact us at the email below so that we make sure you have a part in celebrating the success of the Division!

We are inviting sponsors to support the event and Platinum Anniversary Sponsors will be recognized at the event, in the event program, and in the promotional materials. For information about sponsorship levels and to purchase tickets please see the Division Website, http://paralegals.utahbar.org/; email the Division's event committee at 20thanniversary2016@gmail.com; or contact any our Board members. We can't wait to see you there!

CLE Calendar

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

March 9, 2016 | 4:00 pm–6:00 pm — **2 hrs. CLE**

Litigation 101 Series – Ethics & Civility. Sponsored by the Young Lawyers Division. Cost is $25 for YLD section members, $50 for all others. Please note: this session topic has moved from the original April 13th date.

March 10–12, 2016 — **up to 10 hrs. CLE, incl. 2 Ethics, 1 Prof./Civ.**

2016 Spring Convention in St. George. Dixie Center, 1835 S Convention Center Dr, St. George, UT. See the brochure in the center of this *Bar Journal* for more information and registration.

March 16, 2016 | 9:00 am–3:45 pm — **6 hrs. CLE, incl. 5 Ethics, 1 Prof./Civ.**

OPC Ethics School. Cost: On or before March 4th – $245, after March 4th – $270.

March 21, 2016 | 12:00 pm–1:30 pm — **1 hr. CLE**

2016 Legislative Update. $25, including lunch.

April 7, 2016 — **4 hrs. CLE, incl. 1 Ethics**

Spring Corporate Counsel seminar. Topics include: Negotiation, eDiscovery, How to Be a Civil Jerk, Employment Law Developments, and more. $25 for Corporate Counsel Section members, $120 for others.

April 13, 2016 | 4:00 pm–6:00 pm — **2 hrs. CLE**

Litigation 101 Series – Mock Trial. Sponsored by the Young Lawyers Division. Registration is closed for this event. This session has been relocated from the Bar to the Federal District Courthouse.

April 22, 2016 — **7 hrs. CLE, incl. 1 Ethics**

An Intermediate Course in Estate Planning, Wills, Trusts and Probate. This is a workshop which will include composing critical paragraphs from fact patterns, critiquing "the worst wills you will ever see," demonstrations on client interviews and how to create and manage estate planning documents. Langdon Owen, Cohne Kinghorn and other attorneys well practiced in this area of law will present. Price TBA.

Coming in June 2016

Technology and Innovative Law Practice. Local and national speakers on new and proven methods to improve your practice and skills with technology.

July 6–9, 2016 — **TBA**

Utah State Bar Summer Convention in San Diego. Reserve your accommodations at the Loews Coronado Bay Resort today at: https://resweb.passkey.com/go/USBA2016, or by calling 800-235-6397. Use Group Code ANN727 to receive a discounted rate.

Classified Ads

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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.

LAW PRACTICE WANTED

READY TO RETIRE? WANT TO SELL YOUR LAW PRACTICE? Need to ensure that your clients will receive excellent care? We are interested in purchasing transactional law practices, including estate planning, business planning and/or general corporate work. Please call Ryan at 855-239-8015 or e-mail ryan@pharoslaw.com.

Retiring? Slowing down? I would like to purchase an estate planning/elder law practice. Your clients would continue to be treated with the greatest of care, kindness, and competence which you have provided. Contact Ben at Ben@ConnorLegal.com or 800-679-6709.

FOR SALE

Established Utah rural sole practice including office furnishings, library and some equipment for sale. Reply to tamworth255@gmail.com.

POSITIONS AVAILABLE

Local boutique tax and estate planning firm looking for associate with 3–5 years of experience. Prefer experience in planning for taxable estates. Knowledge of partnership, corporate, and personal income taxation helpful, and accounting degree or background desirable. Great opportunity for out-of-state attorney looking to return to Utah. Competitive salary and great office environment. Call Amy at 801-930-5486 with questions and to submit resume.

Associate Attorney needed for a growing law firm in St. George, Utah with a strong real estate, business, construction and litigation emphasis. Pay depends on experience. Should have three to five years of experience in real property, homeowner association law, litigation and transactional work. Please send all responses and resumes to jcs@vf-law.com. Include in your response personal references with telephone numbers, and all other information pertinent to your qualifications for the position.

Manning Curtis Bradshaw & Bednar PLLC is a litigation firm specializing in high-stakes complex business litigation of all types. MCBB is currently accepting applications for Associate positions. Applicants must have at least 2–3 years post-graduate experience doing significant, high-level complex litigation. Applicants must also have strong academic credentials (i.e., top 20% from a first-tier law school). Experience at a reputable law firm and clerkships are also preferred, as are law school distinctions (i.e., journal experience, academic awards, membership on competitive teams, etc.). For further details, including with respect to required application materials, please visit http://www.mc2b.com/careers.php.

OFFICE SPACE

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

Office room in the Judge Building, on corner of 300 S. and Main, Salt Lake City. Ideal for an attorney, with easy access to courts. $450.00 per month, single room, approx. 140 sq. feet. Contact Mark for more information. 801-747-2222.

DOWNTOWN LAW FIRM has office available for affiliation with firm on expense sharing basis. Casual and friendly group of 10 lawyers. Conveniently located in the Judge Building. General office services, furnished or unfurnished, receptionist, conference rooms, kitchen, internet. Parking available. Email receptionist@lewishansen.com for inquiry or call 801-746-6300.

Conference and Meeting Space in Downtown SLC – Conference rooms and day offices available in a professional atmosphere at the Walker Center. Great space for depositions and client meetings. Internet, projector, whiteboard, photo/copier/scanner (per copy charge), and unlimited domestic long distance are all included. Multiple locations available along the Wasatch Front. Contact Paul Kardos at 801-590-4501 or paul.kardos@officeevolution.com.

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

PRACTICE DOWNTOWN ON MAIN STREET: Nice fifth floor Executive office in a well-established firm, now available for as low as $599 per month. Enjoy great associations with experienced lawyers. Contact Richard at (801) 534-0909 or richard@tjblawyers.com.

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

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

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

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