

The background of the cover is a photograph of a natural rock arch made of red sandstone. The arch is large and spans a gap in the cliff. Below the arch, there are several green trees and bushes. At the bottom of the image, a river with brown, muddy water flows. The sky is overcast and grey.

Utah Bar JOURNAL

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*The lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity.
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Cover Photo

Escalante Natural Bridge on the Escalante River in the Escalante Grand Staircase National Monument by Utah State Bar member Robert J. Church.

ROBERT J. CHURCH is the Director of the Utah Prosecution Council. Bob's family owns property in Boulder, UT where they spend a week every summer. One of their favorite hikes is along, and in, the Escalante River. The Escalante Natural Bridge is a favorite stopping point for lunch and exploring. It's an incredibly beautiful and serene spot.



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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45

Verdicts
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Interested in writing an article or book review 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, a particular topic that interests you, or if you would like to review one of the books we have received for review in the *Bar Journal*, please contact us by calling 801-297-7022 or by e-mail at barjournal@utahbar.org.

GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

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

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

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

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

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

intended message may be more suitable for another publication.

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

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

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

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

LETTER SUBMISSION GUIDELINES

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to BarJournal@UtahBar.org 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.



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President-Elect & Bar Commission Candidates

Candidate for President-Elect

Herm Olsen is the sole candidate for the office of President-elect. No other nominations were made to the Bar Commission. Utah State Bar bylaws state: In the event that there is only one candidate for the office of President-elect, the ballot shall be considered as a retention vote and a majority of those voting shall be required to accept or reject the sole candidate.



HERM OLSEN

I have served on the Bar Commission for several years, and have been amazed at the remarkable service offered by dedicated attorneys throughout the entire state. I have enjoyed working as a mentor, and continue to be awed by the competency and decency of new lawyers anxious to

serve our residents.

I can say without hesitation that we have had superlative leadership from John Baldwin and his team, as well as the prior Bar Presidents who have dedicated so much effort and labor on our behalf. But the practice is changing, and we must evolve with the new realities of life or become irrelevant to the clients we serve.

Even as we, as a profession, reinvent ourselves, there are some constants which must not change: civility, integrity, basic human decency. We may not be able to control the hurtful words and mean-spirited accusations which come from various quarters of our great nation but we can control the words which come from our computers, from our correspondence, and from our personal conversations. I hope we can strive to remain decent, honorable practitioners of the noble profession of law. Feel free to contact me at 435-752-2610 to offer thoughts and suggestions.

Third Division Bar Commissioner Candidates



DWIGHT EPPERSON

As attorneys, we carry other people's problems, in addition to some of our own. According to the 2011 bar survey, most of us still find time each month to devote several hours to pro bono efforts. The courtesies we've extended to one another in our brief associations, even as adversaries, certainly lighten these burdens. Thank you for that.

Some of the most rewarding times I've enjoyed as a member of the bar have come from serving on the client security fund committee for several years; chairing the franchise section; and attending CLE of bar sections. I have found time in recent years to teach law for a few weeks in both Ukraine and Poland. I have been in-house litigation and franchise counsel, and currently have a solo law practice. I've been an officer or board member of several business, professional and charitable organizations. If elected, you can count on my contributing to the accountability and fiscal responsibility of the bar. The bar needs to be relevant

and responsive to every Utah lawyer. I am anxious to fulfill assignments, and implement improvements using a common sense approach, to lighten your burden as you practice law.



CHRYSTAL MANCUSO-SMITH

My name is Chrystal Mancuso-Smith and I would appreciate your endorsement for a Third Division Bar Commissioner position.

Since joining the Bar in 2006, I have devoted a significant amount of time and energy in service to the Bar specifically, and the legal community in general. As past President of the Utah Minority Bar Association, I worked with our membership to develop strong ties among members of the legal community, our state law schools, and the law students through fundraising, scholarships, CLEs, and networking opportunities. With the help of our group, I spearheaded the creation of a 501(c)(3) non-profit foundation to maximize the impact of our scholarship program.

In addition, I have served as the State Bar's Representative to the Deception Detection Examiner's Board of DOPL since 2012 and am presently on the State Bar's MCLE Board. Having participated as an *ex officio* Bar Commissioner in 2009, I appreciate the time and energy the position requires and look forward to again serving.

For those of you who do not know me personally, I am the proud mother of a curly-headed 5 year old. We enjoy spending our family time traveling locally and abroad, including a recent humanitarian trip to Cuba.



MARK PUGSLEY

This year marks the 20th anniversary of my admission to the Utah State Bar.

Over the past twenty years I have benefitted greatly from the services the Bar provides to its members, and so I have decided to seek election as a Bar Commissioner in an effort to contribute to, and help improve, this organization. I previously served on the Salt Lake County Bar Association's executive committee and on the Young Lawyers Division's board, so I am familiar with many of the issues the Bar Commission deals with and will be able to hit the ground running.

I have been practicing at the law firm of Ray, Quinney & Nebeker for the entirety of my time here in Utah, but before moving here I practiced at a multi-national firm with over 2,000 attorneys, and at a small boutique firm of 10 attorneys, so I am aware of the issues faced by both large and small law firms. I am interested in working on legislative issues impacting attorneys, and am

committed to supporting the judiciary, protecting the integrity of the bar, and equal access to justice.

I would be honored to receive your support.



MICHAEL STAHLER

My mentor, a lawyer, inspired me to try and bring out the best in people and to collaborate for mutual success. In our Bar, we have many examples of such excellence. During my six years on the Litigation Section Executive Committee, I have been moved by tireless volunteers who promote professionalism. I

have been honored to lead the Section as Chair this past year. As Commissioner, I want to continue with that same energy. I want to:

- Support a judiciary that faces fiscal limitations and is asked to do more with less;
- Encourage, lead, and inspire our volunteers to continue to make our Bar a professional community;
- Engage in improving the public perception of our profession.

Over the last six years, I have served on many Bar committees and gained an understanding of the many functions of the Bar and how to improve it. I have also come to know many attorneys – in every employment setting – and have received feedback as to what we should do. I will be deeply interested in your input and will continue to collaborate for success.

In April, I ask that you vote for me for Third Division Commissioner.



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Fourth 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.” Tom Seiler is running uncontested in the Fourth Division and will therefore be declared elected.



TOM SEILER

I am a candidate for the Utah State Bar Commission, Fourth Division. If elected, I will be available to all lawyers in Utah, Wasatch, Juab and Millard Counties to represent your ideas, concerns and issues with the Bar. You deserve a strong voice at the Bar Commission. There are changes

needed. Our Division deserves another Commissioner, more local Bar-sponsored CLE and additional interaction with our Judiciary.

You have great ideas that should be implemented. Share them with me and I will work to get your idea adopted. The Bar can be responsive to your needs. One of my goals is to make that a reality. Not long ago, the Legislature was close to making Utah lawyers subject to DOPL. In response, I met with Legislative Committee members, explaining why this was bad for Utah. My work, and the work of others, defeated that bill. I then participated in the Bar’s Office of Professional Conduct Review Committee where changes were made. More changes are needed. I have experience in improving local and specialty Bar Associations.

Election ballots will be mailed April 1st. Voting ends April 15th. I ask for your vote.

Fifth 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.” Kristin “Katie” Woods is running uncontested in the Fifth Division and will therefore be declared elected.



KRISTIN “KATIE” WOODS

It has been my pleasure to serve as the Bar Commissioner for the Fifth Division during the last three years, and it is my desire to be re-elected to serve another term. My goal as commissioner has been to fight for the Fifth Division to have representation and a voice in bar decisions, committees,

and programs. Because of my efforts, we now have mandatory Fifth Division seats in bar programs like the Leadership Academy, and the bar has amended its policies to specifically include “geographical diversity” as a mandatory requirement for the formation of committees and CLE programs and panels. I have been able to push for things such as CLE reform, including the amending of the MCLE rules to allow “Live” CLE credit for certain remotely transmitted CLEs. I recently spearheaded an effort to begin a CLE series called “The Courthouse Series”, wherein once a month a CLE program will be broadcasted from the Utah Law and Justice Center to courthouses across the state, making CLE available to every member of the bar without regard to their geographical location. I am proud of my efforts over the last three years, but I can do more. I ask for your vote in the upcoming election.

Notice of Electronic Balloting

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



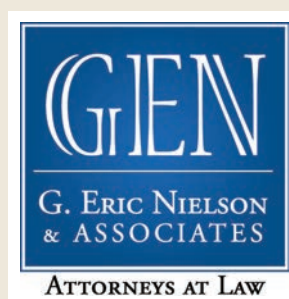
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On Training Lawyers

by John R. Lund

"A man who carries a cat by the tail learns something he can learn in no other way."

— Mark Twain

I'd like to pose some questions to the 238 Utah lawyers who first became licensed during the past year: Do you feel like you know what you are doing? Did the training you received during law school equip you to actually practice? Where are you turning for more information about the nuts and bolts of the legal work you are taking on? Or are you mostly learning by doing, i.e. simply grabbing those cats by their tails?

Although I've directed these questions to our newly licensed colleagues, they raise important issues for us all. If incoming lawyers don't get good training and develop strong skills, it degrades our collective reputation. Indeed, regardless of the lawyer's vintage, when a member of the bar does shoddy work, fails to stay abreast of legal and technological changes or mishandles a client's case, it reflects poorly on us all. More positively, by improving our training and our skills, we can provide better value to Utah's people, businesses and institutions. And that will make us a stronger profession.

The legal profession makes a rather bold claim about the scope of a license to practice law. We say that someone with the requisite law school diploma who has passed the Bar exam and character and fitness review is licensed to do any sort of legal work. Of course we must fully comply with the very first Rule of Professional Conduct, Rule 1.1, which requires "competent representation." And the rule says competent representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." So no, you cannot just take on any matter without being prepared to handle it competently. Subject to that, if an estate planning lawyer decides to start doing criminal defense work, that is her prerogative and her current license permits it. Indeed, Comment 2 to Rule 1.1 states:

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study.

Perhaps consistent with this structure, our profession also does not have a requirement for a period of learning by doing. By contrast, aspiring doctors need to plan on at least three years of residency, during which they will learn from actively diagnosing and treating patients.

Beyond that, claims of specialization in medicine are validated through the various boards doing certification. It's common to check to see if an obstetrician, oncologist or orthopedic surgeon is board-certified before getting treatment from them. But I don't think any of us would consider "Best Lawyers" recognition in a practice specialty to have quite the same import. Whatever proficiency a lawyer develops in their chosen area of specialty is demonstrated only by the results they obtain and the reputation they build.

Against this backdrop, at its January meeting the Bar Commission focused on how Utah lawyers are currently trained. The law schools reported on their clinical and experiential learning programs. And the New Lawyer Training Committee, led by Lesley Manley, reported on the mentor-mentee model used by Utah's mandatory New Lawyer



Training Program. Based on these reports, it seems there are plenty of opportunities during law school for practical experience and also a decent structure for the on-the-job learning that new lawyers do in their first two years of practice. The open question is whether or not these programs are delivering enough actual know how to new lawyers to provide them with Rule 1.1 competency in their chosen practice areas.

While law schools have been operating clinics for decades, nowadays they have much more going on. At the S.J. Quinney School of Law the emphasis on practical training means that 92% of students participate in a clinic. The 2017 graduating class logged 39,866 clinical hours, which translates into 373 hours of legal services per student. For those of you on a billable hour regime, that is about ten solid weeks of work. The school operates three clinics in-house, including the Innocence Clinic which is closely affiliated with the Rocky Mountain Innocence Center. Plus, there are nineteen other external clinical programs covering everything from Tax and Environment to New Ventures and Judicial. In addition to these clinical offerings, there are more than two dozen practice-oriented courses, such as Contract Drafting, an Immigration Law Practice

Lab and a class on Law Practice Management.

Meanwhile, the J. Reuben Clark School of Law offers a wide and innovative set of opportunities for students in its clinics and courses, in numbers similar to those at S.J. Quinney. They mediate small claims cases in Provo Justice Court. They advise start-up companies and entrepreneurs in the Law and Entrepreneurship Clinic. If someone wants to learn how to handle immigration matters, the Refugee and Immigration Initiative immerses them for an entire week at an immigration detention facility in south Texas. And, tapping the fresh energy and perspective of millennials, Law X is a legal design lab that creates products and other solutions to address pressing access to justice issues. Its first product, Solosuit, <http://www.solosuit.com/about>, is a web-based tool for pro se debtors in the Utah courts.

So, how useful to students are such clinics and courses, in preparing for law practice? Or at least, how useful do the students believe they are? In 2010, the National Association for Law Placement asked 930 law firm associates that question. Here are the results, showing the relative value the associates placed on different types of experiences:

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HOW USEFUL WAS EXPERIENCE IN PREPARING YOU FOR THE PRACTICE OF LAW?

Simulations	36% "very useful"
Externships & Field Placements	60% "very useful"
Clinics	63% "very useful"
Pro Bono	17% "very useful"

NALP Survey on Experiential Learning, https://www.nalp.org/may2011research_exp_learning

So both our educators and their students appear to believe that clinics and externships have value in preparing people to actually practice law.

What about employers? Do they see today's new lawyers coming to work with more practical know-how than in the past? Based not on a survey, but rather on some recent visits we've have with law firm leaders, the answer seems to be: "Not really." Law firms are generally approaching the training of their new associates just like they have for decades. They use in-house mentors, lists of certain tasks to perform for hands-on experience, in-house lectures, and outside CLEs to ingrain their procedures and approaches into associates.

Of course, that larger law firms do their own training does not necessarily mean the law school training is for naught. In point of fact, most new graduates are striking out on their own, or in small offices or in government positions, not in larger law firms. For them, perhaps the practical training they've received through law school clinics is both more pertinent and more important.

To a degree, that is where the bar's New Lawyer Training Program, (NLTP) fills the bill. Through development and completion of a Mentoring Plan, each new lawyer should end up with at least some guidance on ethics and civility as well as some skills development. By way of example, a new lawyer learning litigation skills could plan to participate in drafting a fee agreement for a client or participate in a deposition of a witness or adverse party in a civil action and must do ten such things to complete the program. <http://www.utahbar.org/wp-content/uploads/2017/11/2017-Mentoring-Plan-Final-1.pdf>

The design of the NLTP is that the mentor then works with the mentee to find these sorts of opportunities. In this respect, and many others, the success of the New Lawyer Training Program depends heavily on a regular supply of dedicated mentors. And to those of you who serve as mentors, I extend heartfelt thanks

for your contribution, with a special thanks to those of you who mentor people outside of your firms. It shows real dedication to work with a new lawyer who isn't in your firm; yet, those may be the people who need it the most. The NLTP can provide a good structure for new lawyers; but only if they can find a good mentor who will spend time working and talking with them about their professional development.

Looking forward, the Commission is concerned with making sure the NLTP program continues to be both strong and relevant. Also, with addition of Michele Oldroyd as the Bar's new Director of Professional Education, we are seeking to "up our game" when it comes to both the quality and the content of CLE offerings provided through the Bar. And we are considering how people's learning habits have changed. According to one expert:

The day of the in-person monologue lecture is over. No one has the time or inclination to sit through these presentations. . . . Learning is a participatory activity. Great learning comes when people can ask questions of experts, observe, try things out and receive constructive feedback, so they can get better when they try again. If it's just information that people need, then the increasingly sophisticated array of online offerings can fill that demand.

Innovating Talent Management in Law Firms, Terri Mottershead
www.lawpracticetoday.org/article/innovating-talent-management-law-firms/

Similarly, the Bar's Innovation in Practice Committee is working hard to provide good information about staying abreast of technology. One reason for that is to help us all stay in compliance with subsection (8) of Rule 1.1, which requires that we maintain our competence even as technology changes the practice of law. Another equally good reason is that innovation in our practices is important to keeping lawyers relevant to the public.

In that regard, the input from our young lawyers has included the suggestion that lawyers should be getting trained on skills like project management and product design and development. While it is still important to know how to get your evidence admitted, it may also be important to know how to build and use a website to deliver an affordable fixed fee service.

I welcome any and all input you may have about training lawyers. As Michaelangelo reportedly wrote on one of his sketches at the age of eighty-seven: "Ancora imparo." (I'm still learning.)

IN MEMORIAM

ELDER VON G. KEETCH

..... ♦
March 17, 1960 – January 26, 2018



Kirton McConkie offers our heartfelt condolences to the family and associates of our former colleague and friend, who practiced law at our firm from 1990 to 2015.

Elder Keetch loved Kirton McConkie and everyone in it. We are profoundly grateful for his time, his dedication, and his brilliant legal career.

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Updating Social Media Policies in Light of Recent Sports Headlines

by Jeff D. Holdsworth

Sports may not be everyone's cup of tea, but recent sports headlines should grab the attention of employers and their lawyers. This article highlights how the recent sporting news should encourage employers, and those who represent employers, to update their social media policies.

In August 2016, Colin Kaepernick (former quarterback of the San Francisco 49ers) made headlines by protesting what he believed were wrongdoings against African Americans by kneeling rather than standing during the national anthem played before football games. Kaepernick's protests ignited a movement that has spread across the NFL and into other sports – even amateur sports. Debate about these protests has dominated media coverage and has even spilled over into the workplace. President Donald Trump has also been vocal about these anthem protests, calling for players who protest the national anthem to be suspended or fired.

On September 25, 2017, Jerry Jones (owner of the Dallas Cowboys) and the entire Dallas Cowboys football team took a knee together on the field prior to the national anthem, and then stood together as a team during the national anthem. On October 8, 2017, Jones said that if one of his players did not respect the flag, that player would not play. Then, on October 9, 2017, ESPN suspended one of its anchors and popular personalities, Jemele Hill, for controversial tweets calling for fans to boycott Jerry Jones and the Dallas Cowboys. ESPN stated that the tweets constituted a violation of its social media guidelines.

These recent issues are concerning for employers and should encourage employers, and counsel, to ensure that employers' social media policies are up-to-date and that employers have a clear understanding of employees' rights to engage in lawful expressive activity both in and out of the workplace.

Employers can reap many benefits from employees' use of social media; however, employers can also suffer consequences such as damage to reputation both in terms of what employees post on social media and in how the employer disciplines the

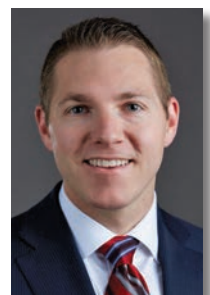
employee for violating the employer's social media policy. Therefore, employers and their counsel must consider what expectations and limits the employer wants to place on the use of social media by employees. But, an employer must be careful not to limit certain employee rights in its efforts to implement and enforce social media guidelines. The following is a non-exhaustive list of just a few considerations that employers and counsel should have in mind when updating the employer's social media policies:

National Labor Relations Act

The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–69, covers most private sector employers. Section 7 of the Act specifically protects employees when they engage in protected concerted activity for mutual aid and protection. *See id.* § 157. For example, the NLRA protects employees' rights to discuss with other employees, issues concerning their wages, hours, and other working conditions. Section 8 of the Act imposes restrictions on employers' ability to interfere with those rights. *See id.* § 158. Thus, policies restricting employees from discussing these matters, including complaining about the company or its supervisors and managers on social media sites, may risk violating the NLRA.

In light of the NFL players kneeling during the national anthem, which is widely viewed as a platform for protesting broad societal issues, there is a current debate about whether the NFL can, in fact, discipline its players for kneeling. This debate focuses on whether these issues relate to the players' working conditions, or to broader societal issues. Some have argued that it does not appear that the players' protests constitute protected

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concerted activity under Section 7 of the NLRA. *See* Vin Gurrieri, *3 Takeaways from NLRB Charge Over Cowboys Protest Policy*, <http://www.law360.com/employment/articles/973227/3-takeaways-from-nlr-b-charge-over-cowboys-protest-policy> (last visited October 18, 2017). However, proponents of this argument have also acknowledged that whether such activity is protected is a fine line. Proponents have recognized that the players' protests could be protected concerted activity if they kneel to support other players' rights to kneel. *See id.* Similarly, such protests may be concerted protected activity if kneeling during the anthem is aimed at protesting the treatment of African American NFL players and coaches.

First Amendment Considerations

Have you ever overheard a layperson say, "I can say whatever I want, it's a free country?" Many employees misunderstand the freedom of speech protections under the First Amendment to the Constitution; they don't understand that such protections apply to restrictions on speech by government actors, but have no application in private employment. As a general rule, private employers may establish rules of conduct policies and may prohibit certain types of speech. But, employers and counsel should be aware that state law may also provide protection to employee speech and activity.

Utah Antidiscrimination Act

During the 2015 Utah legislative session, the legislature passed a law providing employees with protection for expressing certain beliefs and commitments in the workplace, and for lawful expressive activity outside the workplace. Under these protections, an employee may express the employee's religious or moral beliefs and commitments in the workplace in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression of beliefs and commitments in the workplace. *See* Utah Code Ann. § 34A-5-112(1). Employees enjoy such protections unless the expression is in direct conflict with the essential business-related interests of the employer. *See id.* Additionally, an employer may not discharge, demote, terminate, refuse to hire any person, or retaliate against, harass, or discriminate against any person for lawful expression or expressive activity outside of the workplace regarding the person's religious, political, or personal convictions, including convictions about marriage, family, or sexuality. *Id.* § 34A-5-112(2). Again, employees enjoy such protections unless the expression or expressive activity is in direct conflict with the essential business-related interests of the employer. *See id.* While these concepts have not yet been interpreted by judicial opinion, one thing is certain: some expression that employers used to be able to prohibit is now protected.

Incorporating Social Media in Employers' Anti-Harassment Policies

Social media is rapidly changing the traditional landscape of the workplace. Social media provides employees a new way to continue interacting and socializing after they've punched the clock and gone home for the day. By its very nature, social media invites individuals to share personal information beyond what individuals may feel comfortable sharing inside the workplace. This has a tendency to accelerate the development of office relationships and friendships, but in turn may blur the distinctions of what is considered appropriate behavior, thereby increasing the potential for social media harassment.

In a similar manner, employees' comments and opinions regarding hot-button issues, such as the recent sports headlines and protests, provide a vehicle for co-workers who are offended to claim a hostile work environment. Therefore, employers and their counsel should include social media in the employer's anti-harassment policy, and clearly notify and instruct their employees that employees' comments shared on social media may create an actionable harassment claim.

In short, the walls separating the workplace and private life are being torn down, and sports and political headlines and debates are increasingly entering the workplace. Therefore, employers and counsel who represent employers should take time to ensure that employers' social media policies and practices are carefully drafted and regularly updated.



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Severance for Defendants in Utah Criminal Cases

by Blake R. Hills

It will come as no surprise to experienced prosecutors and criminal defense attorneys that people involved in criminal activity often associate with each other, and they often commit crimes together. When these people are subsequently charged with committing criminal offenses, the question arises: Should they be tried together, or should they be tried separately?

Governing Law

The issue of joinder and severance of co-defendants is governed by Utah Code section 77-8a-1, which states in pertinent part:

- (2) (b) Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or conduct or in the same criminal episode.
- (c) The defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.
- (d) When two or more defendants are jointly charged with any offense, they shall be tried jointly unless the court in its discretion on motion or otherwise orders separate trials consistent with the interests of justice.
- (3) (a) The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants, if there is more than one, could have been joined in a single indictment or information.
- (b) The procedure shall be the same as if the prosecution were under a single indictment or information.
- (4) (a) If the court finds a defendant or the

prosecution is prejudiced by a joinder of offenses or defendants in an indictment or information or by a joinder for trial together, the court shall order an election of separate trials of separate counts, grant a severance of defendants, or provide other relief as justice requires.

Utah Code Ann. § 77-8a-1(2)(b)–(4)(a).

The Utah Supreme Court has explained that “severance is not available as a matter of right.” *State v. Velarde*, 734 P.2d 440, 444 (Utah 1986). “Instead, whether severance is granted depends upon whether the trial court determines that prejudice to the defendant outweighs considerations of economy and practicalities of judicial administration, with doubts being resolved in favor of severance.” *Id.* at 444–45. However, “the trial court must be accorded some discretion in denying a motion for severance.” *State v. Collins*, 612 P.2d 775, 777 (Utah 1980).

The Utah Supreme Court has given additional guidance for a trial court tasked with deciding if there really are any doubts about whether prejudice to a defendant outweighs considerations of economy and practicalities of judicial administration. In *State v. Velarde*, the court stated: “Antagonistic defenses alone are not sufficient to require a separate trial. The test of whether antagonistic defenses by two defendants require severance is whether the defenses conflict to

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the point of being irreconcilable and mutually exclusive.” 734 P.2d at 445. Finally, “a trial judge’s denial of severance will be reversed on appeal only if the conflict in the co-defendants’ respective positions at trial was of such a nature that, considering all the evidence in the case, the defendants were denied a fair trial.” *Id.*

Irreconcilable and Mutually Exclusive Defenses

It is clear that the inquiry into whether the trials of co-defendants should be severed comes down to whether the co-defendants will be pursuing defenses that are “irreconcilable and mutually exclusive.” However, this is not always a concept that is easy to apply in practice. When determining what “irreconcilable and mutually exclusive” really means, one should look at examples from case law.

State v. Velarde, 734 P.2d 440 (Utah 1986)

The victim was attacked from behind by the defendant and two co-defendants, each of whom was armed with a two-by-four or an axe handle. The victim sustained at least six head injuries, and he died as a result of these injuries three days later. One of the co-defendants agreed to cooperate with the State as part of a plea agreement, and the defendant filed a motion to sever his trial from that of the remaining co-defendant. The trial judge denied the motion. At trial, the co-defendant testified that he and the defendant both participated in the assault, and the defendant was the one who struck the first blow. The defendant did not testify or call witnesses.

The supreme court held that severance was not required simply because the defenses of the defendant and co-defendant were



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antagonistic. *Velarde*, 734 P.2d at 445. The court focused on the fact that two witnesses besides the co-defendant testified that the defendant was the assailant who struck the first blow. The court indicated that it was important to the analysis that the testimony of the co-defendant was “merely duplicative of other testimony that would have been available irrespective of severance.” *Id.*

***State v. O'Brien*, 721 P.2d 896 (Utah 1986)**

The two co-defendants broke into a cabin and subsequently kidnapped and robbed the victims. Both co-defendants moved to sever their trials, arguing that their defenses were inconsistent. The motions to sever were denied. At trial, the first co-defendant asserted the defense that his actions were the direct result of threats, coercion, and intimidation by the second co-defendant. The second co-defendant asserted the defense of diminished mental capacity.

The supreme court upheld the denial of severance. The court noted that the evidence regarding the sequence of events and the events relating to the charges was relevant to both defendants. The court stated that antagonistic defenses alone are not enough to require separate trials. *Id.* at 898.

Rather, “the defendants must prove that their defenses [are] irreconcilable.” *Id.* at 899. The court further explained that “hostility between co-defendants or the fact that one defendant attempts to cast blame on his co-defendant” does not mean that the defenses are irreconcilable. *Id.*

***State v. Collins*, 612 P.2d 775 (Utah 1980)**

The defendant and his co-defendants picked up two fourteen-year-old hitchhikers and engaged in sexual activity with them in the car. The hitchhikers alleged that the sexual activity was not consensual. One of the co-defendants pleaded guilty to a lesser charge, while the defendant and the remaining co-defendant were tried together. The defendant made a pretrial motion to sever and the motion was denied.

The supreme court upheld the denial of severance. The court stated that the trial court “must, when defendants are charged jointly, weigh possible prejudice to any defendant with considerations of economy and practicalities of judicial administration.” *Id.* at

777. The court noted that the crimes the defendant and co-defendant were charged with took place in the same car during the same period of time, and a substantial part of the evidence was relevant to both defendants. Significantly, the defenses offered by the defendant and co-defendant were not antagonistic to the interests of the other. *Id.*

***State v. Telford*, 940 P.2d 522 (Utah Ct. App. 1997)**

The body of the victim was found in a ditch, and the defendant and co-defendant were charged with murder. The defendant moved to sever his trial from that of his co-defendant, but the trial court denied the motion.

The court of appeals held that the trial court erred when it denied the motion to sever. The court focused on the fact that

“If the defendant and co-defendant are charged with crimes that took place at the same place, at the same time...the defendant seeking severance must assert that the defenses will be irreconcilable and mutually exclusive or the trials will likely be joined.”

the defendant argued at trial that the co-defendant was the actual shooter who had forced the defendant to retrieve ammunition, while the co-defendant presented an alibi defense. The court held that these defenses were “mutually exclusive [because] the jury had to reject one defense to believe the other.” *Id.* at 526.

However, it is worth noting that the court of appeals held that the failure to sever the trials was harmless error. *Id.*

CONCLUSION

It is clear that under Utah law, a defendant who seeks to have his or her trial severed from that of his or her co-defendant must assert more than a possibility that the defenses will be different. If the defendant and co-defendant are charged with crimes that took place at the same place, at the same time, and the evidence against one will largely be admissible against the other, the defendant seeking severance must assert that the defenses will be irreconcilable and mutually exclusive or the trials will likely be joined. It will not be enough that the defenses of the defendant and co-defendant will be hostile to each other, or that the defendant and co-defendant will seek to cast blame on each other. The defenses must be such that the jury must reject one defense in order to accept another, such as when it would be a physical impossibility for both defenses to be true.



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The Art of Using Trusts to Avoid Utah Income Tax

by Edwin P. Morrow III, Geoff N. Germane, and David J. Bowen

Utah residents are patriotic and willing to pay taxes as a necessary price of living in such a great state, but most would feel just as proud paying half as much. This article will focus on how Utah residents can legitimately avoid Utah income tax using trusts during their lifetime by using either incomplete and/or completed gift non-grantor trusts, and how such trusts can, at the same time, lead to charitable deductions superior to those produced by gifts made outside of trust. Due to sharply increased applicable exclusion amounts and dozens of recent private letter rulings from the IRS, the benefits of these trusts are more appealing than ever.¹ In addition, Utah has unique savings features for resident trusts administered in Utah by an in-state corporate trustee. We will explore when this exemption should be used and when non-resident trusts may still be a better alternative.

First, we will briefly summarize how trusts are taxed at the federal level before explaining Utah's trust income tax scheme and the importance of being classified as a "resident" or "non-resident" trust. Then, we will address "source income" and situations where Utah may tax even non-residents and non-resident trusts that own Utah-situated real estate, income, and businesses. More importantly, we'll discuss how this may often be avoided. Once we've determined Utah income tax savings, we'll revisit the two federal tax options available and distinguish between completed gift and incomplete gift options (a.k.a. DING trusts).² Finally, we'll explore when these same trusts may save federal income tax, despite the common wisdom that trusts pay higher rates of income tax.

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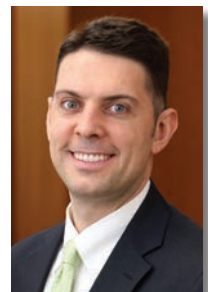
Federal Trust Income Tax Scheme

Many trusts, including all revocable trusts and even many irrevocable ones, are "grantor trusts" for income tax purposes, meaning they are not considered separate taxpayers, and all gains, income, losses, and deductions in the trust are attributable to the grantor. *See* 26 U.S.C. § 671 (general rules); *see also* 26 U.S.C. §§ 672–769. Utah follows the federal grantor trust scheme. Utah Code Ann. §§ 59-10-103(1)(a), (w); -104(1).

Trusts and estates have similarities to pass-through entities, but are taxed quite differently from S corporations and partnerships. To sum up a complex subject: usually, capital gains are trapped and taxed to the trust and other income is taxed to the beneficiaries to the extent distributed and to the trust to the extent not distributed.

Federal trust income tax rates hit the higher income tax brackets at much lower levels to the extent that income is trapped in trust and not passed out to beneficiaries on a K-1. The top 39.6% federal income tax bracket is reached at only \$12,500 for tax year 2017. 26 U.S.C. § 1; *see also* Rev. Proc. 2014-61 available at <http://www.irs.gov/>

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pub/irs-drop/rp-14-61.pdf (inflation adjusted brackets). The 3.8% net investment income tax is triggered by investment income over this same low threshold. 26 U.S.C. § 1411(a)(2).

Utah's Trust Income Tax Scheme: Differentiating Utah Resident and Non-Resident Trusts

Utah follows the lead of the federal scheme of trust taxation: if the trustee has to file a federal trust income tax return, it has to file a Utah trust income tax return. Utah Code Ann. § 59-10-504. Utah resident beneficiaries must report the income from the trust included in the beneficiary's federal adjusted gross income via K-1 as though the beneficiary received the income directly. UT Instructions Form TC-41 at 3 (2017), *available at* <http://tax.utah.gov/forms/current/tc-41inst.pdf>. The Utah fiduciary income tax has the same top tax rate as the individual income tax (5%). Utah Code Ann. § 59-10-201(1) (referencing § 59-10-104(2)(b)). Avoiding Utah trust income tax is essentially a two-step process: either (1) avoid being a resident trust or avoid appointment of disqualifying trustees of a resident trust, and (2) avoid Utah source income.

Let's take the first step. Like most states, Utah tax law differentiates

between resident trusts and nonresident trusts. *See* UT Form TC-41 (2017). Utah's definition of a resident trust is extremely taxpayer-friendly and much narrower than in many other states. Utah statute defines a "Resident Trust" in part as a "trust administered in this state," which in turn means that "the fiduciary transacts a major portion of its administration" in Utah.³ Utah Code Ann. § 75-7-103(1)(iii). *See* UT Instructions Form TC-41 at 3 (2014).

Thus, unlike many states, the "residency" of a Utah trust is not triggered by the in-state residency of the settlor and/or beneficiaries, the state law that applies under the terms of the trust instrument, or even the location of trust assets (although the latter may matter for "source income," which is explained later).

Nonresident trusts are defined as those that are not resident trusts. *See id.* Accordingly, to form a nonresident trust, Utah residents merely need to find an out-of-state trustee who will transact less than a major portion of the trust administration inside of Utah and whose usual place of business is outside Utah. Local trust companies with single purpose out-of-state sister companies, such as KeyBank and Key National Trust Company

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of Delaware, have an edge because there can still be some local contact and incidental functions and meetings in Utah, while the major part of the trust administration is done out of state.

The taxable income of a resident trust is simply its gross federal income, modified by certain fiduciary adjustments. Utah Code Ann. § 59-10-201.1. Utah adjustments that are similar to those of other states, include adding back income from municipal bonds issued by other states (unless there is reciprocity) and subtracting U.S. savings bond income. *Id.* § 59-10-202(1), (2). Surprisingly, Utah does *not* start with federal *taxable income* (e.g. after charitable deductions), while most states with a separate trust income tax do. Thus, Utah is one of the least friendly states when it comes to encouraging charitable donations from trusts. Additionally, most states permit attorney, accountant, and tax preparer fees. Utah does not.⁴

There are a few subtractions from income that are truly unique to Utah law. Most notably, income of an irrevocable resident trust is subtracted from federal total income if:

- (i) the income would *not* be treated as state taxable income derived from *Utah sources* under Section 59-10-204 if received by a nonresident trust;

(ii) *the trust first became a resident trust on or after January 1, 2004;*

(iii) no assets of the trust were held, at any time after January 1, 2003, in another resident irrevocable trust created by the same settlor or the spouse of the same settlor;

(iv) *the trustee of the trust is a trust company as defined in Subsection 7-5-1(1)(d).*

Id. § 59-10-202(2)(b)(i)–(iv) (emphasis added).

This provides a significant tax incentive for Utah residents to either (1) name eligible trust companies as trustees for trusts, including garden-variety “AB” trusts, to enable the generous deduction noted above, or (2) use out-of-state trustees and avoid performing administration in state to avoid being a resident trust in the first place. Although this article primarily discusses inter-vivos planning, the concepts herein also apply to the administration of a testamentary trusts or irrevocable grantor trust after the death of the settlor. Under either scenario (lifetime or post-death trusts), naming a non-qualifying Utah resident individual trustee or co-trustee is the worst of all worlds tax-wise, because it would fail to qualify for either exemption from Utah income tax.

This does not mean just any trust company or out-of-state trustee should be used. It would be unwise to name a California resident as trustee to simply exchange a 5% tax for a 13.3% tax. However, many states, such as Wyoming, Washington, Alaska, Texas, Nevada, and Florida, have no income tax. Many other states that are considered leading jurisdictions for trusts, such as Delaware or Ohio, have an income tax for their own residents, but would not impose a state income tax on an out-of-state trust merely because the trust’s choice of law, trustees, advisors, or primary administration is in state. *See, e.g.*, Ohio Department of Taxation Information Release, TRUST 2003-02: Trust Residency (Feb. 2003), *available at*, http://www.tax.ohio.gov/ohio_individual/individual/information_releases/trust200302.aspx.

Understanding Utah Source Income – When Can and Cannot Be Avoided

As noted above, certain Utah “source” income cannot be avoided regardless of whether a nonresident individual taxpayer, nonresident trust or resident trust meeting the corporate trustee exception receives the income. *See* Utah Code Ann. §59-10-117 (definitions).



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Utah taxes a nonresident trust in large part in the same manner as if the beneficiary had received the income directly if the income resulted from the ownership or disposition of tangible property (real or personal) in Utah or from the operation of a trade or business in Utah, including pass-through entities taxed as partnerships and S-corporations. *See id.* Proration occurs when portions of a business are outside of state and portions inside of state.

This article will not discuss wages and compensation, but will focus on sales of intangible personal property (e.g., stock and LLC interests), which is the most likely corpus of a trust, the most likely candidate for large capital gain-triggering events and the most desirable candidate for tax avoidance. It is also the part of the source income concept that is most difficult to understand.

C corporations are not pass-through entities, so the more complex sourcing rules will not apply. *See id.* § 59-10-117(2)(a). A Florida or Ohio resident (or trust) will not necessarily pay Utah income tax on Huntsman Corporation stock (a C corporation) when it is sold, or pay Utah income tax on dividends received, but any C corporation has its own separate taxes to address. Most closely held businesses (even large ones), however, prefer to avoid the double tax system of C corporations, which can be much more onerous overall, especially upon sale, distribution, or termination.

So let's assume for the remainder of this article that we are dealing with a pass-through entity (an LLC, LP, or corporation taxed either as a sole proprietorship, partnership or S corporation). The ongoing income of a Utah pass-through entity with ongoing operations or real estate in Utah is clearly taxed. *See id.* § 59-10-117(2)(d), (f), and (g). This is proportionate to its Utah activities – income of a business operated solely in Utah will be taxed 100% in Utah; if half the business were in Idaho, only the 50% sourced to Utah would be taxed in Utah.

But, the sale of the stock (or LLC membership interest) of such entities is not necessarily taxed in Utah if the owners are out of state. Capital gain income from the sale of intangibles is traditionally allocated to the state of the taxpayer's domicile through the doctrine of *mobilia sequuntur personam*.⁵ This is generally confirmed through Utah's adoption of the Uniform Division of Income for Tax Purposes Act (UDITPA). *See* Utah Code Ann. §59-10-118. *See also* Uniform Division of Income Tax Purposes Act (UDITPA), available at, <http://www.uniformlaws.org/shared/docs/uditpa/uditpa66.pdf>.

Thus, the sale of S corporation stock, even if the business has real estate or operations in Utah, is not Utah source income, unless the stock itself has acquired a business situs in the state. *See* Utah Code Ann. § 59-10-118(1)–(3) (explaining business versus nonbusiness income and commercial domicile). This might occur if the stock is pledged for indebtedness used to carry on business in state, or if the stock itself is not a mere investment but used to further the business of the owner, or if the owner is in the business of buying and selling such stock. For most individual or nonresident trusts, the stock will be a mere investment, and not used to further the business of the owner.⁶

An Example of Possible Savings

Let's start with a basic example that we will use throughout this article: John Doe makes over \$500,000 in annual taxable income (39.6% bracket, plus 3.8% or 0.9% Medicare surtax, a 23.8% capital gains rate, and the 5% Utah tax rate). John is married to Jane and both are Utah residents. He has \$11 million in assets that he anticipates selling soon for a capital gain of \$10 million. This might be a sale of depreciated real estate, a sale of closely held or publicly traded stock or limited partnership interests, or perhaps even a forced recognition of gain. John would like to

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explore options that might get around the \$500,000 of Utah income tax. Let's assume that John is not in the business of buying and selling such assets; they are instead held for investment. Can he use a trust to get around Utah income tax if the asset is a pass-through entity? Perhaps – the answer depends on the type of business, the structure of the deal, and whether a § 338(h)(10) election is made (described below).

Let's first examine the nature of the deal and why it matters for source income determination. If the sale will potentially create source income, then an inquiry into the nature of the operations may matter: how much of the property/sales/operations are in Utah? The design of the trust will be discussed in the next section.

Structure of the Sale –

Asset Deal v. Stock Deal and §338(h)(10)

The structure of the deal matters – is John selling his stock or LLC interests in a “stock deal,” or is the firm selling in an “asset deal” whereby the buyers are purchasing all the assets of the company? Most buyers prefer to buy the assets of a company rather than stock so they can depreciate assets with a new cost basis and avoid latent liabilities of the selling entity. However,

certain contractual obligations and benefits may require a stock deal to properly transfer; the pros and cons vary depending on the nature of the business, contracts, depreciable assets, and whether it is an S or C corporation, etc. – issues beyond the scope of this article. Some buyers may be amenable to structuring a buyout as a stock deal and some may not even consider it, but often it is simply a matter of negotiation.

Let's bypass that debate and summarize the asset deal for Utah income tax purposes. If all gains pass through to the owner of an LLC/LP/S corporation in an asset deal, we are left with the conclusions noted above. That is, all of the gains and income attributable and apportioned to Utah will pass through and be taxed to the owner, even if the owner is a nonresident individual or nonresident trust. For a small to mid-size business with operations and employees only in Utah, that is 100%. There would typically be no Utah income tax avoided by transferring assets to a nonresident trust prior to an “asset sale,” unless a significant percentage could be apportioned elsewhere, as would be the case with a truly interstate business.

If it is a “stock deal,” the analysis is quite different and as noted above, the gain can largely be avoided. Let's say that John and his wife Jane have \$11 million of \$1 million basis real estate assets in an LLC or S corporation. They transfer the company interests to trusts, and the trusts sell the LLC membership interests (not the assets) to the buyer. The income from January 1 to the date of sale will pass through via K-1, and will not avoid any Utah tax. But the \$10 million capital gains can avoid Utah tax, and the savings would be approximately \$500,000.

There is a hybrid of the two types of deals, however, where the parties elect to treat a stock deal, which might be preferred for state law/contractual reasons, as an asset deal for tax purposes, pursuant to § 338(h)(10) of the Internal Revenue Code. Like an asset deal, this would likely lead to Utah source income. Thus, when we speak of stock deals that can effectively avoid Utah source income categorization, we are speaking more specifically of stock deals wherein the § 338(h)(10) election is not made.

Note that buyers receive a new cost basis for their outside basis in the stock or LLC membership interest, but that may not necessarily change the inside basis of the entity's assets, which is still relevant to ongoing operations. An LLC (or LP, LLP) taxed as a partnership, however, may elect to adjust its basis upwards to more accurately reflect the sale. *See* 26 U.S.C. §§ 743(b), 754. Most estate planning

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attorneys are familiar with this election in the context of the death of a partner, but it is also applicable to sales and exchanges.

Special Issues for S Corporations and Non-Grantor Trusts

In addition to the messy Utah tax issues for businesses, transferring an S corporation to a non-grantor trust has the added complications of forcing the trustee to make an Electing Small Business Trust (ESBT) election to ensure continued qualification as an S corporation. *See id.* § 1361(e).

Special Issues for 3.8% Net Investment Income Tax

If a trustee of a non-grantor trust owns a pass-through entity, there are special considerations as regards to the 3.8% net investment income tax (at least, until Congress repeals it). As a general rule, this new surtax does not apply to business income if the investor is sufficiently active in an ongoing active business. By contrast, passive shareholders not involved in the business do pay the 3.8% tax on S corporation income. When and how is a non-grantor trust active or passive?

If the settlor is a passive owner, this may be an opportunity to

avoid the surtax. If the trust appoints a co-trustee who is sufficiently active in the business, the 3.8% tax may be avoidable, but if the co-trustee chosen is an individual Utah resident, this may then trigger residency trust status. Whether and when nongrantor trusts and ESBTs can be “active” business investors and avoid the 3.8% surtax on business income is a complicated and still unsettled issue, but there is a high profile recent taxpayer victory in Tax Court.⁷ So, while the precedent is promising, the issue is still open to IRS challenge and practitioners should not overpromise in this regard.

Protecting the Trustee from Having to Diversify While Avoiding Residency Status

Typically when corporate trustees hold custody of or manage special assets such as closely held entities, special accommodations must be made. This is because the Prudent Investor Act would otherwise require a trustee to diversify assets and neither the settlor nor the trustee may want the trustee to have to actively manage such assets prior to sale. Utah’s Uniform Prudent Investor Act, Utah Code Ann. § 75-7-901 to 907; *see id.*, § 75-7-903 (diversification). This requirement can be avoided in a number of ways.



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Notably, an investment advisor or committee might be named to direct the trustee to hold or sell the stock, LLC interest, or other asset. Sometimes the settlor or immediate family is the investment advisor, at least for traditional domestic asset protection trusts. But, if the settlor/family were Utah residents fully managing the trust investments, this could lead to a finding that fiduciary decisions are made in Utah, that the advisor is a quasi-trustee, or that the trust is a Utah resident trust. *See* Instructions to UT Form TC-41 at 3 (2014). Thus, this design should usually be avoided.

The practitioner should use other methods, such as restricting sale and/or waiving the duty to diversify and gifting non-voting stock or LLC/LP interests, or ensuring that an out-of-state resident has the role of investment advisor. Using an out-of-state LLC as investment advisor may offer a solution, but remember that LLCs may be “residents” where they do business, and if the managers/members are all in state and make pertinent decisions while in state, residency of the LLC would still be in question. Collectively, a variety of measures can preserve for the settlor the benefits of nonresident trust treatment while still using a Utah corporate trustee.

Structuring the Trust as an Incomplete or Completed Gift Non-Grantor Trust

Revisiting our example, let’s say John has assets that would otherwise be able to avoid Utah source income upon sale if he were to change residency or if the assets were owned by a non-grantor, non-Utah resident trust prior to sale.

There are two basic trust designs that can be used: a trust structured as an incomplete gift, or one structured as a completed gift for federal gift tax purposes. A gratuitous transfer to a completed gift trust would count against the donor’s \$14,000 annual gift tax exclusion and the \$5.49 million lifetime gift tax exclusion. If the value were beyond that, the excess would be subject to a 40% gift tax.⁸ Note that if John’s wife agrees to “gift split,” the above exclusion amounts would be doubled.⁹ By contrast, establishing an incomplete gift trust only causes a taxable gift to the extent that later distributions are made to individuals other than the settlor or spouse.

Let’s tackle the more complicated first – the *incomplete gift*, non-grantor trust. These types of trusts are colloquially known as DING trusts (Delaware Incomplete Gift Non-Grantor Trusts), based on the original private letter rulings, which used Delaware trusts, and subsequently written articles. *See e.g.*, early PLRs

2001-48028, 2002-47013, 2005-02014, 2006-12002, 2006-37025, 2006-47001, 2007-15005, 2007-29025, 2007-31019. PLRs with such structures have also considered Alaska and Nevada law, and there is no reason that the laws of other states such as Ohio or Wyoming might not also be appropriate, though Delaware is still probably the most commonly used.

The design of these trusts is slightly more complicated than most due to the conflicting goals of (1) making the gift incomplete; (2) making the trust a non-grantor trust; and (3) enabling the settlor to have access to the trust as a potential beneficiary. Either goal by itself is rather easy for any experienced practitioner to accomplish. All three at once requires some agility.

This article will not go through the DING design in depth, but as it has been patterned after the dozens of PLRs released in recent years, it is a trust with several unique features to enable the above characteristics.¹⁰

So how does this DING trust function? The management and reporting work like with any trust, but the distribution provisions are unique. During the settlor’s lifetime, a distribution committee uses a jointly held limited power of appointment to appoint cash or property, in lieu of a traditional trustee spray power or direction from the settlor. In addition, the settlor retains a limited power. Together, there is ample flexibility to make distributions – indeed, more flexibility than most trusts.

The settlor and/or spouse or children would only be entitled to funds during the settlor’s lifetime as a result of a lifetime limited power of appointment, rather than via the trustee’s discretion. This is necessary to prevent grantor trust status.

Thus, Utah income tax can be avoided to the extent income is trapped in trust and distributable net income is not distributed via the power of appointment to Utah resident beneficiaries in the year in which the income is earned. Importantly, Utah does not have throwback rules similar to California and New York that might otherwise try to tax income accumulated and taxed to the trust in prior tax years, nor does it have a specific rule regarding incomplete gift trusts like the one recently passed in New York. N.Y. Tax Law § 612(b)(41).

To illustrate the tremendous importance of the lack of a throwback rule, let’s say John’s trust sold \$11 million of assets in 2016 for a \$10 million gain. It would incur and pay approximately \$2.38

million in federal capital gains tax (23.8%, ignoring exemption, deduction and meager lower brackets), if it makes no further distributions in 2016, and avoids the \$500,000 in Utah tax assuming it is not otherwise a Utah resident trust with disqualifying Utah resident fiduciary or administration, as discussed above.¹¹ In 2017, there is a “clean slate.” If the trust makes \$30,000 in dividends and interest from January 1 to July 1, 2017, and on that date – to take an extreme and not necessarily recommended case – distributes the entire amount of the trust to Utah resident beneficiaries, the only amount on the K-1 for the beneficiaries subject to Utah tax is the \$30,000 of 2017 income.

If large distributions were made in 2016, the same year of the large capital gain, Utah income tax on the gain may be avoided anyway. Recall the general rule discussed above for non-grantor trusts: capital gains are generally trapped in trust, unless one of the three exceptions to the general rule applies.¹² As a result, if in 2016 the trust incurred \$10 million of capital gain along with \$45,000 of interest, dividends, and rents, and the trustee distributed \$2 million, the amount of the beneficiaries’ K-1 income may well be limited to \$45,000.

In this example, John keeps just enough control via lifetime and testamentary powers of appointment to make the gift incomplete and keep the ultimate beneficiaries in line, but not so much as to cause grantor trust status. Retaining a veto/consent power, lifetime limited powers of appointment, and allowing the children to act without settlor consent only unanimously gives just as much if not more access to the trust as if John and Jane were named beneficiaries. Therefore, with a modicum of creativity, we can use an incomplete gift nongrantor trust (ING) to legitimately avoid Utah taxation of trust income except to the extent a current year’s income is part of distributable net income distributed via K-1 to a Utah resident beneficiary or to the extent it is Utah source income.

While there are dozens of DING PLRs on the books now, some practitioners may be nervous about drafting such trusts. After all, if the tax laws were obvious, some would argue, there would not be so many people seeking PLRs. While many attorneys are comfortable drafting such trusts based on the reasoning and statutes/regulations cited in the PLRs, some may not be. Are there other options?

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assists these clients with the full spectrum of legal issues. Adam also represents landowners, developers, and several local districts.



Richard graduated Order of the Coif from the University of Utah’s S.J. Quinney College of Law. Richard represents individuals involved in family and domestic disputes, including divorce and separation, child custody, support, protection, adoption,

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Completed Gift, Non-Grantor Trusts

With \$5.49 million of gift tax applicable exclusion, potentially \$10.98 million for married couples (adjusting annually for inflation), some clients may not care about using up some of their estate/gift exclusion. Using completed gift trusts may have the double benefit of leveraging estate tax exclusion, removing growth from the federal estate tax base, and potentially saving state estate tax if the assets comprising trust corpus are located in a state with a separate estate tax (e.g., a Utah resident has a vacation home in Oregon or Maine).

To create a completed gift non-grantor trust, you simply use a DING without the features that make the gift incomplete (or alternatively, remove or add the provisions in your standard irrevocable grantor trust that make it a grantor trust). This would mean removing settlor limited powers of appointment and veto powers, and keeping the adverse party distribution structure for any distributions to the settlor and/or spouse to avoid grantor trust status.

Some practitioners may feel more comfortable with such trusts being less “cutting edge” or susceptible to adverse ruling. And they would certainly provide additional estate tax benefits in

some cases. However, completed gifts trusts would potentially be wasteful of estate/gift exclusion to the extent funds were eventually returned to the settlor’s/spouse’s estate tax base, and funding by gift would of course be limited to the amount of exclusion available. There are ways to leverage such amounts, but that discussion is beyond the scope of this article. Suffice it to say that the incomplete gift trust is more palatable for wealthier clients, but the completed gift trust may also be part of the solution, or potentially the only solution needed for those with estates well under \$10.98 million.

Practitioners should be cautious about the income tax effect of *Crummey* powers. A *Crummey* power is a withdrawal right that typically lapses after 30–60 days.¹³ If a settlor gifts to what would otherwise be a non-grantor trust, but the trust contains *Crummey* powers, the trust will be either a fully or partially beneficiary-deemed owner trust (aka beneficiary-grantor trust), pursuant to the grantor trust rules. 26 U.S.C. § 678(a), (b). To the extent it is a beneficiary-deemed owner trust, this would trigger state income tax based on the residency of the various beneficiaries whether they took any money or not, similar to a pass-through corporate entity. *See id.* § 671 (general rules). This structure could be much more complicated, and lead to problematic phantom income to the beneficiaries if the trust does not distribute enough to pay the beneficiary’s tax.

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When Non-Grantor Trusts Are More Efficient for Federal Income Tax Regardless of State Income Tax Treatment

Although trusts reach the highest 39.6% bracket and 3.8% surtax bracket at only \$12,500, if settlors are otherwise in that same bracket, there are features that make non-grantor trust taxation more attractive. Despite the Supreme Court’s decision in *Knight v. Comm’r*, 552 U.S. 181 (2008), the opportunity still exists for trusts to claim better above-the-line deductions than individuals. *See, e.g.*, 26 U.S.C. § 67(e).

For those charitably minded, the benefit is even more pronounced. Deductions to charity from a trust’s gross income are not limited to U.S. domestic charities, are not subject to any AGI limitation, and are not subject to “Pease” limitations. Pease limitations do not apply to non-grantor trusts and estates. 26 U.S.C. § 68(e). Furthermore, they are eligible for a one-year lookback. *See* 26 C.F.R. § 1.642(c)–1. Imagine if one could make a donation in December 2017 and make it count against their 2016 income! Furthermore, trust provisions can enable

deductions to offset categories of income subject to higher income tax rates, provided the provision has an economic effect on the amount the charity could receive.

More importantly, there is a far superior opportunity to shift income to beneficiaries in lower tax brackets (e.g., if a distribution is made that carries out capital gains or qualified dividends to a beneficiary in one of the lower tax brackets, their federal tax rate on this income is 0%). This threshold is higher than many people think. For a married beneficiary filing jointly, this bracket is up to \$75,900 of taxable income (which is after deductions, so this may be a much higher AGI or gross income). Thus, if the trust makes distributions of \$28,000 to three children in such lower brackets, the \$84,000 passes free of gift tax, due to the annual exclusion (assuming the settlor and spouse gift split), and shifts \$84,000 to children in a 0% tax bracket. In practical effect, this generates an income tax deduction for annual exclusion gifts to the kids.

Let's go back to our example with John and Jane with the \$11 million trust incurring a \$10 million gain. Let's say the family trust distribution committee decides to contribute \$1 million of this income to their church or favorite charity or even to a donor advised fund to dole out among several charities. In addition, John and Jane have three children and seven grandchildren. The distribution committee decides to contribute \$28,000 to each of the ten descendants. The \$1 million reduces the trust's income. Unlike for individuals, it even reduces income for the 3.8% Medicare net investment income tax (a.k.a. Obamacare surtax), and it is not reduced for any "Pease" limitations. The \$280,000 is distributed free of gift tax (provided other gifts are not made) and carries out income to the beneficiaries payable at *their* tax rate. If one or more of the children is in the top tax bracket, there are still tax savings because the grandchildren's income under the "kiddie tax" is still not subject to the 3.8% surtax. These two features of non-grantor trust taxation can offer significant savings even aside from the Utah income tax savings.

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By contrast, had our hypothetical sale occurred outside of the trust and been taxed to John and Jane, their charitable deduction would be severely curtailed for both federal and Utah state income tax purposes, and would not save a dollar of 3.8% Medicare surtax. Moreover, their gift to the children and grandchildren would not reduce John's and Jane's income at all, nor would it cause any of the income to be taxed at the younger family members' lower rates.

Conclusion

To summarize, establishing a non-grantor, non-resident trust can legitimately avoid the 5% Utah income taxes on traditional portfolio income, including capital gains from sales of closely held C corporations, income from pass-through entities to the extent it can be apportioned to out-of-state property or out-of-state businesses, or capital gains from pure "stock sales" of intangible pass-through entity assets such as S corporations, LLCs, and LPs. These savings can also be realized even with a Utah resident trust if it has a qualifying corporate trustee, and in some cases this may be preferred.

The use of either completed or incomplete gift non-grantor trusts discussed above offers significant asset protection, family management, and even federal income tax benefits. Utah taxpayers for whom such a strategy is most useful are those who anticipate future income to be well over the highest income tax bracket, but it may also be useful for those intending to make large charitable contributions or who desire to shift income tax through gifts to beneficiaries.

Author's Note: After initial drafting of this article, Congress passed extensive tax reform in December 2017, commonly referred to as the Tax Cuts and Jobs Act. This legislation dramatically increases the usefulness of the non-grantor trusts discussed in this article, due to eliminations of many itemized deductions, limitations on the deductions for state and local taxes, and de facto elimination of the charitable deduction for many middle-class taxpayers due to these restrictions coupled with increased standard deductions. Non-grantor trusts, for example, have the ability to provide taxpayers with an additional \$10,000 state and local income tax deduction and in some cases an additional 20% qualified business income deduction against an additional \$157,500 of qualified business income, as well as superior tax shifting and charitable deductions. For an extensive article on how tax reform increases the efficacy of such trusts, and unique opportunities to name spouses as primary beneficiaries, email any of the authors for a copy of the article "The Use of Spousal Lifetime Access Non-Grantor Trusts in Light of Tax Reform."

1. Federal tax rules for trusts are primarily found in Subchapter J of the Internal Revenue Code, §§ 641-692. As of 2013 the top federal income tax bracket of 39.6% (20% for long-term capital gains and qualified dividends) start at \$400,000 taxable income for singles, \$450,000 married filing jointly, which annually adjust upwards for inflation, in 2015 these start at \$413,201 and \$464,851 respectively. The additional Medicare surtax on net investment income of 3.8%, which acts in many ways like an income tax, starts at \$200,000 and \$250,000 modified AGI respectively.
2. Incomplete Gift, Non-Grantor Trusts are commonly known as "DING" trusts, for Delaware Incomplete Non-Grantor Trust, though other states such as Ohio, Nevada, South Dakota, Alaska might be used, and this list seems to increase nearly every year.
3. For purposes of this provision, the term "fiduciary" means "trustee" or "any person acting in any fiduciary capacity" for the trust. See Utah Code Ann. §§ 59-10-103(1)(g); 75-1-201(16). See also UT Instructions Form TC-41 at 2 (2014).
4. There is a provision for a deduction for non-grantor charitable lead trusts in Utah Code section 59-10-202(2)(g), but this provision oddly ignores other non-grantor trusts that may have charitable provisions, which are generally honored in most other states.

5. Latin for “movables follow the person.”
6. That is, for most individuals, the sale of an LLC or S corporation would be non-business income per Utah Code section 59-10-118(1)
7. *Frank Aragona Trust v. Comm’r*, 142 T.C. 165 (2014). See also *Carter Trust ex rel. Fortson v. United States*, 256 F. Supp.2d 536 (N.D. Tex. 2003). Both were taxpayer victories, but the IRS disapproved of the outcome. See Technical Advice Memorandum 2013-17010, available at <https://www.irs.gov/pub/irs-wd/1317010.pdf>.
8. The available exclusion amount accounts for prior taxable gifts, adjusts annually for inflation, and could be increased up to double with the Deceased Spousal Unused Exclusion (DSUE), gifts split with a spouse, or a trust jointly settled with a spouse.
9. Great caution must be used with gift splitting – and indeed may not be available – when the spouse is also a beneficiary. See, e.g., Rev. Rul. 56-439 (1956); *Robertson v. Comm’r*, 26 T.C. 246 (1956).
10. See various presentations by author on this subject for more detail, such as those available at www.ultimateestateplanner.com. Recent PLRs include: PLRs 2013-10002 to 2014-10006; PLRs 2014-10001 to 2014-10010; PLRs 2014-26014; PLR 2014-27008; PLRs 2014-27010 to 2014-27015; PLRs 2014-30003 to 2014-30007; PLRs 2014-36008 to 2014-36032; PLRs 2014-40008 to 2014-40012, PLR 2015-10001 – 2015-10008, PLR 2015-50005, PLR 2016-13007, PLRs 2016-36027 to 2016-36032. General design features of an ING are:
 - 1) The settlor retains a lifetime and testamentary limited power of appointment solely exercisable by him/herself. It is designed to help make the gift incomplete yet be curtailed enough so as not to trigger grantor trust status. Lifetime distributions to appointees are limited to a standard such as health education, maintenance and support to prevent grantor trust status.
 - 2) There is a distribution committee comprised of adverse parties (beneficiaries) – this is necessary to enable distributions back to the settlor and/or spouse without triggering grantor trust treatment. The committee structure is necessary to prevent adverse estate tax effects to the powerholders or grantor trust status as to powerholders.
 - 3) There is a veto/consent power unless the distribution committee unanimously overrules the settlor – this is necessary to make the gift incomplete.
 - 4) The trust is established in a state that permits self-settled trusts (aka domestic asset protection trust) – this is designed to prevent grantor trust status via indirect settlor access and ensure asset protection for both settlor and power holders.
11. This is assuming there is not an alternative Utah “source” trigger.
12. See 26 U.S.C. § 643. See also 26 C.F.R. § 1.643(a)–3. For extensive discussion of how the trustee and family can manipulate this, or use beneficiary grantor trust status to alternatively shift, trap or toggle income between trusts and beneficiaries, see *The Optimal Basis Increase and Income Tax Efficiency Trust*, a white paper that incorporates several published articles, available at <http://ssrn.com/abstract=2436964>, or by contacting Ed Morrow at edwin.morrow3@gmail.com or edwin_p_morrow@keybank.com.
13. See Ed Morrow and Alan Gassman on *Mikel v. Commissioner: Tax Court Approves the Mother of All Crummey Trusts with 60 Beneficiaries*, LISI Estate Planning Newsletter #2309 (May 14, 2015) (discusses the concept and history as applied in the most recent tax court case).

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Health-Care Providers and the Duty to Report

by Hailey Bandy, Greg Osborne, Scott Smith, Elena Todorova, and Liz Winter

In certain circumstances, Utah statutes require health-care providers to report to legal authorities. For context, we turn to a surprising source of authority: Will Smith from *The Fresh Prince of Bel-Air*.

In the episode, “Just Say Yo,” Will accepts some pills from a friend to deal with his high school schedule. Will’s cousin, Carlton, finds the pills in Will’s locker, believes they are multivitamins, and pops a few pills from Will’s stash.

Later, unknowingly hopped-up on Will’s pills, Carlton dances at a frenetic pace until he collapses on the floor. Will, realizing that Carlton must have taken his pills, rushes him to the hospital.

At the hospital, Will faces a dilemma: should he tell his uncle (a federal judge) that the pills were his, or should he stay silent and allow Carlton to suffer the consequences? After some thought, Will tearfully reports to his family that Carlton took the pills from his locker.

As lawyers, we advise our clients that they typically do not have a “duty to warn” or report, “even if one realizes that [another person] is at risk of injury.” *Fabend v. Rosewood Hotels & Resorts*,

L.L.C., 381 F.3d 152, 155 (3d Cir. 2004); *see also Beach v. Univ. of Utah*, 726 P.2d 413, 415 (Utah 1986) (“Ordinarily, a party does not have an affirmative duty to care for another.”). This encompasses the idea that, usually, a person aware that another is “about to step into the street in front of an approaching vehicle” does not have a duty to warn the soon-to-be-injured person. RESTATEMENT OF TORTS, § 314, cmt. b, illus. 1, & cmt. c (1965).

However, several Utah statutes, which are of specific importance for health-care providers, create an affirmative duty to report. For example, a health-care provider who treats a child that “has been subjected to abuse or neglect... shall immediately notify the nearest peace officer, law enforcement agency, or office of the [Division of Child and Family Services].” Utah Code Ann. § 62A-4a-403(1)(a).

Because it’s easier to remember general rules than their specific exceptions, we crafted the below non-exhaustive table to outline some of Utah’s statutorily imposed duties to report. In reviewing this table, let us be more like Will. Let us recognize when we, and our clients, have a duty to report.

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ISSUE	STATUTE	SUMMARY
Communicable Disease Reporting	Utah Code Ann. §§ 26-6-6, 26-23b-103	<p>Various health-care providers and facilities have a duty to report to the Department of Health regarding any individual suffering from or suspected of having a communicable disease, as required by the Department of Health's rules.</p> <p>Within twenty-four hours of concluding a report is required, health-care providers must report any illness or health condition that may be caused by bioterrorism, epidemic or pandemic disease, or novel and highly fatal infectious agents or biological toxins that might pose a substantial risk of a significant number of human fatalities or incidences of permanent or long-term disability.</p>
Injury from Criminal Conduct	Utah Code Ann. § 26-23a-2	A health-care provider who treats a wound or other injury inflicted by a knife, gun, pistol, explosive, infernal device, or deadly weapon, or by violation of any criminal statute in Utah, shall immediately report the injury to law enforcement.
DOPL Requests for Information and Affirmative Reporting to DOPL	Utah Code Ann. § 58-13-5	<p>Licensed health-care providers must provide information regarding health care rendered to patients as DOPL requests.</p> <p>Health-care facilities must report any of the following events in writing to DOPL within sixty days after the event occurs: (a) terminating an employee for cause related to the employee's practice as a licensed health-care provider; (b) terminating or restricting privileges for cause to engage in any act or practice related to practice as a licensed health-care provider; (c) terminating, suspending, or restricting membership or privileges associated with membership in a professional association for acts of unprofessional, unlawful, incompetent, or negligent conduct related to practice as a licensed health-care provider; (d) subjecting a licensed health-care provider to disciplinary action for over thirty days; (e) a finding that a licensed health-care provider has violated professional standards or ethics; (f) a finding of incompetence in practice as a licensed health-care provider; (g) a finding of acts of moral turpitude by a licensed health-care provider; or (h) a finding that a licensed health-care provider is abusing alcohol or drugs.</p>
Child Abuse or Neglect	Utah Code Ann. § 62A-4a-403	<p>When a person has reason to believe that a child has been abused or neglected, or who observes a child being subjected to conditions or circumstances that would reasonably result in abuse or neglect, that person shall immediately notify law enforcement or the Division of Child and Family Services.</p> <p>(An exception exists for clergymen/priests when the confession was made directly to the clergyman/priest by the perpetrator, and the priest is bound by canon law, doctrine, or practice to maintain confidentiality).</p>
Fetal-Alcohol Syndrome and Drug Dependency	Utah Code Ann. § 62A-4a-404	When an individual attends the birth of a child or cares for a child and determines that the child, at the time of birth, has fetal-alcohol syndrome, fetal-alcohol spectrum disorder, or fetal drug dependency, the individual shall report the information to the Division of Child and Family Services as soon as possible.
Abuse of Vulnerable Adult	Utah Code Ann. §§ 76-5-111.1, 62A-3-305	A person who has reason to believe that a vulnerable adult has been abused, neglected, or exploited shall immediately notify law enforcement or Adult Protective Services.
Therapist's Duty to Warn	Utah Code Ann. § 78B-3-502	A therapist has no duty to warn, except when a client or patient has communicated to the therapist an actual threat of physical violence against a clearly identified or reasonably identifiable victim. That duty is discharged if the therapist makes reasonable efforts to communicate the threat to the victim and notifies law enforcement of the threat. <i>But see</i> § 62A-4a-403 (regarding therapist's duty to report child abuse or neglect).

Appellate Highlights

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

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

A.S. v. R.S., 2017 UT 77 (Nov. 14, 2017)

The Utah Supreme Court dismissed this appeal for lack of appellate jurisdiction. The timeliness of the notice of appeal hinged on the timeliness of a Rule 59 motion for new trial, which appellant relied on to toll the time for appeal. Appellant had filed his memorandum in support just before midnight on the deadline to do so, but the motion was not filed until just after midnight the following day. Utah's electronic filing system and its guidelines establish that the filing date and time is when a filing is received and posted in the electronic system, even if there are technical difficulties that created a delay from the actual filing. The court held that **the motion filed shortly after midnight was untimely, even though the memorandum was filed before midnight**. The memorandum did not constitute a "motion"; and Rule 6(b)(2) prohibited the district court from extending the time for father to file his Rule 59 motion.

Porenta v. Porenta, 2017 UT 78 (Nov. 15, 2017)

In the midst of divorce proceedings, Husband transferred the couple's marital home to his mother, intending to void Wife's claim to the home. Before the divorce was finalized, Husband died. At trial, the court held that the transfer was fraudulent, and awarded the home to Wife. Mother appealed, arguing there was no ongoing debtor-creditor relationship as required under the Utah Fraudulent Transfer Act (UFTA) as this relationship was extinguished upon Husband's death. Affirming the trial court's holding, the Utah Supreme Court held that although the UFTA does require an ongoing debtor-creditor relationship, **the death of a spouse during a divorce proceeding does not abate the action in regards to property rights that have been determined by the court**, and therefore the debtor-creditor relationship was not extinguished upon Husband's death, and the claim survived against Husband's estate.

In re R.G., 2017 UT 79 (Nov. 15, 2017)

Two juvenile defendants accused of aggravated sexual assault appealed the denial of a motion to suppress post-Miranda statements to detective. The supreme court held that **the juveniles knowingly, voluntarily, and intelligently waived their Miranda rights, given the totality of the circumstances, even though parents were not present during the interview**. In a footnote, the court observed that best practices might include videotaping the interview, notifying parents, inviting a parent to be present, and taking additional steps to ensure that the juvenile understood the import of the *Miranda* warning.

State v. Rettig, 2017 UT 83 (Nov. 22, 2017)

Under the Plea Withdrawal Statute, a defendant must move to withdraw his or her guilty plea prior to sentencing or pursue relief under the Post-Conviction Remedies Act. In this case, the defendant argued that **the Plea Withdrawal Statute infringed upon his right to appeal a criminal case under the Utah Constitution. The supreme court held that the Plea Withdrawal Statute does not unconstitutionally foreclose a defendant's right to appeal, because it merely set out procedural requirements for preserving a direct appeal of a motion to withdraw a guilty plea.**

Bylsma v. R.C. Willey, 2017 UT 85 (Dec. 1, 2017)

In this product liability case, the supreme court **rejected the "passive retailer" immunity doctrine of *Samms v. Butterfield Ford*, 2004 UT App 203, 94 P.3d 301, as a misreading of the Liability Reform Act**. It held that, because the Act preserves the doctrine of strict liability, all parties in the product's chain of distribution remain strictly liable for sale of a dangerously defective product. To prevent total fault from exceeding 100%, the court held that fault should be allocated on the basis

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

of duty. Since all strictly liable parties have breached the same duty, they should be treated as a single unit for purposes of fault apportionment. The passive retailer then has an implied indemnity claim against the manufacturer for any amount it might be required to pay under the strict liability claim.

***Waite v. Labor Comm'n*, 2017 UT 86 (Dec. 1, 2017)**

The Utah Worker's Compensation Act has a provision that limits the time an injured worker has to prove a claim to twelve years from the date of the accident. Petitioners, two workers who sought permanent disability benefits more than twelve years after the accident leading to their injury, argued that the provision was an unconstitutional statute of repose under the Open Courts Clause of the Utah Constitution. The Utah Supreme Court agreed that the statute acted as a statute of repose, as it was capable of cutting off a claimant's right to assert a claim. However, **the statute of repose was not unconstitutional because the statute was enacted for the valid legislative purpose of ending prolonged liability for insurance companies and employers, and the twelve-year cut-off was not arbitrary or unreasonable.**

***Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89 (Dec. 14, 2017)**

The defendant filed a petition for extraordinary relief arguing that the parole board violated his due process rights by classifying him as a sex offender and requiring that he complete sex offender treatment as a condition of his parole. The supreme court held that **before it can take the refusal of an inmate to participate in sex offender treatment into consideration in deciding whether to grant parole, the parole board must provide timely written notice of the allegations, the opportunity to call witnesses, and a written decision explaining the basis for the determination.**

***SMS Financial v. CCB, LLC*, 2017 UT 90 (Dec. 27, 2017)**

In this case, the Utah Supreme Court held **the doctrine of equitable conversion protects a buyer's interests in land when a land sale contract becomes capable of specific enforcement by the buyer, including where buyer-friendly conditions have yet to be satisfied.**

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***In re K.B.*, 2017 UT App 210, 407 P.3d 1084 (Nov. 16, 2017)**

The juvenile court granted a request for an order of protective supervision, based on its finding that the mother exhibited hatred of and disgust toward the father, which caused emotional harm to the children. Reversing in part and remanding, the court of appeals held that **insufficient evidence supported a finding of abuse, where there was no indication that a disagreement over a prom dress or purported custodial interference caused the child to suffer emotional harm** that resulted in a “serious impairment in [their] growth, development, behavior, or psychological functioning.” Utah Code Ann. § 78A-6-105(24)(b).

***O’Hearon v. Hansen*, 2017 UT App 214 (Nov. 24, 2017)**

Following the mother’s death, a stepfather filed a petition requesting custody of three minor children under Utah’s Custody and Visitation of Persons Other Than Parents Act, which allows a non-family member to seek custody if the biological parent “is absent” or “is found by a court to have abused or neglected the child.” Utah Code Ann. § 30-5a-103(2)(g). The district court dismissed based on its conclusion that the father alleged a pattern of visiting the children once a month. Reversing, the court of appeals concluded that the statutory language implied a present-tense inquiry. **Where the stepfather alleged sufficient facts for a factfinder to conclude that the biological father was not presently present on the exact date of the filing of the petition, the district court erred in dismissing the petition.**

***Desert Mountain Gold LLC v. Amnor Energy Corp.*, 2017 UT App 218 (Nov. 24, 2017)**

In this contractual dispute, the defendant argued that the first breach rule excused its non-performance under a royalty payment provision. Giving effect to each part of the contract, the court of appeals held that **the defendant could not invoke the first breach rule to excuse its non-performance, where the contract contained specific dispute resolution provisions, which the defendant failed to follow.**

***Larsen v. Davis Cnty. Sch. Dist.*, 2017 UT App 221 (Nov. 30, 2017)**

In this appeal, the Utah Court of Appeals was asked to interpret the interplay between the Governmental Immunity Act’s (1) waiver

of immunity for injuries proximately caused by the negligent act or omission of a governmental employee and (2) retention of immunity for injuries that arise out of or in connection with certain enumerated conduct, including assault or battery. The case involved claims by a student against his school district for negligent hiring, supervision, and retention of a former teacher who had initiated a sexual relationship with him. The court of appeals held that **if an immunity-invoking condition is at least “a proximate cause” of the claimed injury, then the government entity is immune from suit.**

***Hofheins v. Bajio Mt. W., LLC*, 2017 UT App 238 (Dec. 29, 2017)**

Bajio was required to indemnify Hofheins for lease payments pursuant to their asset purchase agreement. Bajio failed to make the lease payments, and the property owner sued Hofheins. Hofheins then brought a third party action against Bajio for indemnification. Bajio argued that the Hofheins’ failure to tender the defense precluded Bajio from being required to indemnify the Hofheins, and the third party action should have been dismissed under Rule 41(b). The court of appeals disagreed, holding that **the failure to tender a defense imposes on the indemnitee the necessity of establishing that it is entitled to indemnity from the indemnitor, but it does not release the indemnitor from its obligation.**

***State v. Jamieson*, 2017 UT App 236 (Dec. 29, 2017)**

The court vacated a restitution order against the defendant who was convicted of computer crimes for stealing and disseminating his bosses’ emails. The court held **it was plain error for the district court to include in the restitution figure some amount for time spent by the company’s employees while participating in the criminal case against the defendant – regardless of whether they appeared voluntarily or pursuant to a subpoena.**

***Old Republic Ins. Co. v. Cont’l Motors, Inc.*, 877 F.3d 895 (10 Cir. Dec. 15, 2017)**

In this appeal from the district court’s dismissal for lack of personal jurisdiction, the Tenth Circuit provides a thorough overview of specific personal jurisdiction jurisprudence, including the three means by which a plaintiff may establish the

requisite “personal direction” by the defendant. The case involved claims against the manufacturer of an aircraft’s engine parts following a crash on a flight from Colorado to Idaho. The defendant-manufacturer is a Delaware corporation with its principal place of business in Alabama. The case was brought in Colorado. The defendant-appellant’s website allowed fixed-base operators (FBOs) to obtain unlimited access to its online service manuals in exchange for an annual fee. A Colorado-based FBO who participated in the program serviced the aircraft involved in the crash. The Tenth Circuit held **the defendant-appellant’s website, its online service manuals, and the service company’s participation in the FBO program were insufficient to establish specific personal jurisdiction under any of the three “purposeful direction” tests – continuing relationships, market exploration, or harmful effects.**

***Farrell v. Montoya*, 878 F.3d 933 (10th Cir. Dec. 27, 2017)**

Farrell argued that Officer Montoya had violated her Fourth Amendment Rights by firing three shots at her minivan as she

drove away from a traffic stop. The Tenth Circuit held that the officer was entitled to qualified immunity against a claim of excessive force. Under the Fourth Amendment, a claim for excessive force requires a seizure of the suspect. A seizure can only occur if the suspect submits to police authority, and it must be more than a temporary halt. **Because the minivan was fleeing when Montoya fired the shots, no seizure occurred, and a claim for excessive force could not succeed.**

***United States v. Saulsberry*,
878 F.3d 946 (10th Cir. Dec. 28, 2017)**

The defendant conditionally pled guilty to possession of unauthorized credit cards with intent to defraud. Reversing the denial of the motion to suppress, the Tenth Circuit held that **an officer unreasonably expanded the scope of an otherwise permissible traffic stop when the officer took credit cards out of the defendant’s bag and examined them without probable cause to support a credit-card offense.**



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A New Frontier in eDiscovery Ethics: Self-Destructing Messaging Applications

by Philip J. Favro and Keith A. Call

One of the most watched lawsuits in recent memory involved a key ethical issue of which lawyers should be aware: the dangers of using self-destructing messaging applications.

In *Waymo v. Uber*, tech titans Google (Waymo) and Uber waged an epic battle over the future of self-driving vehicle technology. Waymo (Google's autonomous vehicle unit) claimed Uber stole its self-driving vehicle technology in order to develop its own fleet of autonomous vehicles.

Discovery in *Waymo* was contentious, with Waymo accusing Uber on multiple occasions of destroying information relating to the alleged trade secret theft. In response to allegations that Uber used self-destructing (or ephemeral) messages to eliminate relevant evidence, the court issued a discovery sanction against Uber. Waymo was allowed to present evidence and argument to the jury that Uber used self-destructing messages to deliberately conceal evidence that it had stolen trade secrets. In turn, Uber was permitted to present evidence and argument regarding the legitimate business uses of ephemeral messaging. *See Waymo LLC v. Uber Technologies, Inc.*, No. C 17-00939 WHA, 2018 WL 646701 (N.D. Cal. Jan. 30, 2018).

Four days into the trial, the parties settled the case, with Waymo taking a \$245 million investment stake in Uber. While the jury ultimately heard little testimony about self-destructing messages, the discovery lessons from *Waymo* have far-reaching application.

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Self-Destructing Messages

One of the practical lessons from *Waymo* is the need for lawyers to understand the nature of self-destructing messaging applications and the ethical and legal perils they present.

Self-destructing messages enable users to share and then delete content within a particular amount of time (ranging from minutes to days) after receiving the message. Different applications offer a menu of competing features. They include the ability to control distribution of messages (to a small group versus a community of users), message encryption, private messaging capability, prevention of screenshots, untraceable messages, and removal of messages from others' devices. Common self-destructing messaging applications include Wickr and Telegram (the apps Uber used), along with Snapchat and Confide.

Technology companies market self-destructing messaging apps to businesses and consumers as the digital equivalent of a water cooler discussion or a phone call. With enhanced security features, they provide a medium to discuss confidential topics without fear of interception or replication. They also reduce the amount of digital clutter that plagues so many IT systems.

And yet, because exchanged content disappears, the use of these messages may circumvent regulatory retention requirements and corporate information retention programs. They may also deprive adversaries of relevant evidence in litigation. This is

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particularly the case with apps like Confide, which obliterates message content as soon as the user closes the message. Indeed, the fact that a communication even transpired, *i.e.*, the date of the message and the parties who exchanged it, is apparently eliminated. Speculation was rife in *Waymo* that this was why Uber turned to Wickr and Telegram: to forever conceal any discussion of alleged trade secret theft.

Ethical and Legal Implications

Parties have a duty to preserve relevant information when the threat of litigation arises. The Tenth Circuit has ruled that the duty to preserve ripens when a litigant knows or should know litigation is “imminent.” *First Am. Title Ins. Co. v. Nw. Title Ins. Agency*, No. 2:15-cv-00229, 2016 WL 4548398, at *2 (D. Utah Aug. 31, 2016) (citing *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007)). Outside of the Tenth Circuit, counsel should be aware that the duty to preserve attaches when litigation is reasonably anticipated or foreseeable. FED. R. CIV. P. 37(e) advisory committee note (2015 amendments); *CAT3, LLC v. Black Lineage, Inc.*, 164 F.Supp.3d 488, 496 (S.D.N.Y. 2016) (“[C]ase law... uniformly holds that a duty to preserve information arises when litigation is reasonably anticipated.”).

A lawyer should explain the preservation obligation to the client and help the client satisfy that duty. As one court stated, “Attorneys have a duty to effectively communicate a ‘litigation hold’ that is tailored to the client and the particular lawsuit, so the client will understand exactly what actions to take or forebear, and so that the client will actually take the steps necessary to preserve evidence.” *HM Elecs., Inc. v. R.F. Techs., Inc.*, No. 12-cv-2884-BAS-MDD, 2015 U.S. Dist. LEXIS 104100, 2015 WL 4714908, at *21 (S.D. Cal. Aug. 7, 2015), vacated in part by *HM Elecs., Inc. v. R.F. Techs.*, 171 F. Supp. 3d 1020 (S.D. Cal. 2016). Many other cases have imposed on *lawyers* the duty to implement and oversee litigation holds to assure that preservation occurs.

As an officer of the court, a lawyer must exercise candor and fairness, and may not make false statements to a tribunal. UTAH R. PROF. COND. 3.3(a)(1). More specifically, a lawyer may not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having evidentiary value. A lawyer shall not counsel or assist another person to do any such act.” *Id.* R. 3.4(a).

Self-destructing messages have the potential to deprive adversaries and the court of relevant evidence. Does that make

their use inherently unlawful or unethical? Clearly not. But because these apps present new legal frontiers and could create an appearance of impropriety, lawyers should educate themselves and proceed with caution.

At least two things seem clear. First, clients should not use self-destructing messages to communicate regarding matters relevant to existing, imminent, or reasonably foreseeable litigation. A “best practice” is to make sure clients understand this and stop using these messages at the appropriate time. Second, lawyers should not advise clients to use self-destructing messages in order to hide information after a preservation duty arises. In an analogous situation, the Virginia State Bar suspended a lawyer for five years for advising a client to delete Facebook posts and de-activate his Facebook account after litigation started. *In re Murray*, Nos. 11-070-088405 and 11-070-088422 (Va. State Bar Disc. Bd. July 27, 2013), *available at* <http://www.vsb.org/docs/Murray-092513.pdf>. This could well apply, by extension, to the use of self-destructing messages.

In litigation matters, lawyers should ask clients about their use of self-destructing messages. Indeed, the lawyer’s duty to implement and oversee effective litigation holds may include the duty to inquire about self-destructing messages.

Is it okay for clients to use self-destructing messages outside of litigation? Maybe. They can certainly be effective means of communicating information – especially confidential materials – while at the same time reducing electronic clutter. But clients should understand that the use of self-destructing messages could have a strong appearance of impropriety, *i.e.*, that they had something to hide. That is certainly something Uber experienced with the *Waymo* litigation.

Conclusion

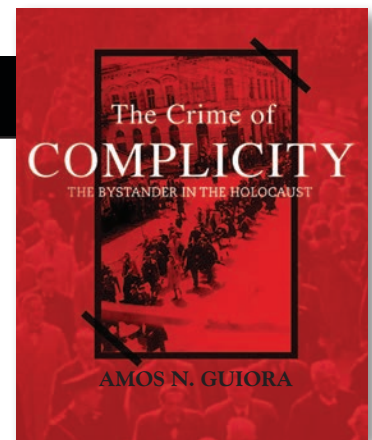
Lawyers are ethically obligated to stay abreast of the risks and benefits of relevant technology. UTAH R. PROF. COND. 1.1 cmt. [8]. Self-destructing messages present yet another developing technology that lawyers should understand in order to provide good advice and avoid legal and ethical pitfalls.

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

The Crime of Complicity: The Bystander in the Holocaust

by Amos N. Guiora

Reviewed by Neil C. Baker



Professor Amos N. Guiora frames his most recent book as a family history, personal and introspective in tone and set in the milieu of a bygone century. But in the wake of recent revelations regarding the pervasiveness of sexual assault on college campuses throughout the country, the central question in *The Crime of Complicity* has become the subject of a public controversy that is dominating contemporary headlines: if I know that a crime is being committed, and I do nothing to stop it, am I complicit in the wrongdoing? For Professor Guiora, the answer is an emphatic yes. In fact, under his proposal, I would not only be complicit; I would be a criminal.

A law professor at the University of Utah's S.J. Quinney College of Law, Professor Guiora articulates, first and foremost, a legal argument. Absent some special relationship with the victim, the usual rule in

American jurisdictions is that a witness's obligation to intervene on behalf of the victim of a crime or intentional tort is strictly a moral issue, as the law imposes no affirmative duty on bystanders to render assistance. Professor Guiora thinks this is wrongheaded. Arguing that moral obligations are too easily flouted, and that intervention will usually require nothing more from the bystander than dialing 9-1-1, he proposes that legislatures enshrine in the criminal law the bystander's duty to intervene.¹

But while his argument is at bottom a legal one, Professor Guiora utters it in the voice of an historian. Indeed, the bulk of Professor Guiora's book is dedicated to surveying research relating to the experience of European Jews during the Holocaust, including his own investigations into the experiences of his parents and grandparents. Citing several scholars who

have made the case that bystander nonintervention was essential to the implementation of the Final Solution, Professor Guiora contends that the ineffectiveness of a purely moral duty to intervene is proved by history:

I propose that nonintervention be defined a crime. It raises innumerable questions. Those questions focus on the extent to which the state can regulate individual conduct and impose the social contract on the body politic. Those concerns are understandable.

However, the primary lesson of the Holocaust is that silence in the face of evil enables and enhances its inevitable consequences. That is the direct result of complicity. Bystanders who observed my parents

— in different locations and distinct cultural and social circumstances — were complicit in the harm perpetrators imposed on them.

Guiora, *The Crime of Complicity: The Bystander in the Holocaust* p. 86 (2017).

NEIL C. BAKER, who recently completed a clerkship at the Utah Court of Appeals with Judge Gregory K. Orme, is an attorney in the Las Vegas law firm of Kamer Zucker Abbott.



*The Crime of Complicity:
The Bystander in the Holocaust*

by Amos N. Guiora

Publisher: Ankerwycke (2017)

Pages: 220

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Available in hardcover and ebook formats.

Given that so many of his relatives are Holocaust survivors, and that his paternal grandparents were among the millions who were slaughtered, it was perhaps inevitable that Professor Guiora's project would take on an emotional dimension. At times, his anger is palpable:

Without collaborators and bystanders, Hitler's Final Solution would have been a policy articulated but not implemented. The difference is the difference between life and death – between evil only imagined and evil actually carried out.

By collaborating, individuals may have saved their own lives and the lives of their families, but they surely sold their souls to the devil.

Id. p. 83.

One could quibble that standing up to the Gestapo would have been too much to ask from ordinary people, and that perhaps some additional research regarding the average individual's willingness to intervene under more normal circumstances might reveal that people are more reliably courageous than Professor Guiora gives them credit for. Nevertheless, the chilling indifference of the bystanders depicted in *The Crime of Complicity* leaves a lasting impression on the reader.

Professor Guiora may be at his most convincing when he narrows the scope of his project by applying his proposal to the limited goal of deterring sexual misconduct among college students. Near the end of his book, Professor Guiora presents two case studies in which he analyzes the conduct of bystanders to two recent incidents of campus rape under the rubric of his proposed criminal statute. In the second case study, relating to an incident that occurred in June 2013, a male student at Vanderbilt University testified that he had pretended to sleep while several students raped and otherwise abused a young woman in his dorm room for over thirty minutes. Although the male student could easily have intervened, if only by contacting campus authorities, he ignored the young woman's plight because the situation "made him uncomfortable." For Professor Guiora, "[t]he fact that Tennessee authorities chose not to prosecute him" under existing criminal statutes "reflects the failure of the legislature to protect victims." *Id.* p. 187.

As stories like this one continue to accumulate, it becomes

increasingly difficult to avoid the conclusion that a limited application of Professor Guiora's proposal would serve as a salutary corrective for some of the toxic elements of campus culture in the United States today. Indeed, given the current laissez-faire attitude of the law when it comes to the bystander's duty to intervene on behalf of victims, it should come as no surprise that sexual assault has so long gone unaddressed. As the essayist Meghan O'Rourke recently observed in connection with the related controversies surrounding sexual harassment in the workplace,

We think of our perceptions as being uniquely our own – the very stuff that makes us distinctive individuals. But perception is more dependent on a fine social web of recognition than we like to think. And when it came to sexual harassment, we were, in a sense, all guilty of participating in what social psychologists call the bystander effect, in which people are less likely to offer help to someone in distress if there are other people present, especially if the others are passive.

Meghan O'Rourke, "When the Fog Lifts," *The Reckoning: Women and Power in the Workplace*, December 13, 2017, NY TIMES, https://www.nytimes.com/interactive/2017/12/13/magazine/the-reckoning-women-and-power-in-the-workplace.html?_r=0.

In view of O'Rourke's observations, perhaps attaching even modest criminal penalties to a student's failure to report brazen sexual misconduct could serve to effect a positive change in the norms that define the limits of acceptable behavior on college campuses.

Although Professor Guiora's thesis appears to fly in the face of many well-settled principles in American law, his arguments in favor of criminalizing nonintervention are formidable and demand careful consideration. And while it remains to be seen whether his proposal will give rise to actual legislation, his work will certainly cause lawmakers to reexamine some of their most basic ideas about the criminal law.

1. He appears to have persuaded at least one lawmaker already. Rep. Brian King, Democratic Minority Leader of the Utah House of Representatives, has made use of Professor Guiora's research in drafting a bill for the 2018 Utah Legislative Session that would impose a duty on Utah citizens to come to the aid of people who are suffering. See <https://www.law.utah.edu/news/research-by-guiora-helped-with-foundation-of-proposed-duty-to-assist-in-an-emergency-bill/>.

Cloud Technology Q&A

by Utah State Bar Innovation in Practice Committee

The Utah Bar Innovation in Practice Committee (the Committee) is focused on evaluating tools and services that can help a lawyer further improve his or her practice. According to Bar staff, one common set of questions revolve around the use of cloud-based technologies. Before getting to these questions a bit of background on its growth and acceptance in the profession.

- According to the 2017 ABA Legal Technology Survey, 56% of law firms with solo to nine attorneys are using the cloud, which is an increase of 21% since 2014.
- Legal IT Professionals' online survey asked readers: "If your law firm's management asked for your advice regarding moving key applications to the cloud, would you be in favor of this strategy?" The 438 responses, pulled from a range of attorneys, paralegals, and IT staff split neatly down the middle, with 46% against and 45% in favor, while the remaining 9% had no opinion.
- Despite this division, the respondents were more uniform (81%) in their expectation of cloud services to drown out onsite server and applications within the next decade.

Q1: What is cloud computing?

Answer: Cloud computing is storing and accessing data and applications over the Internet instead of a local machine or network. A more technical definition is storage, retrieval, management, processing or transmission of information by a third party with such services provided remotely over the Internet, often in a shared infrastructure, multi-tenant environment.

Q2: Is cloud computing permitted under the Utah Rules of Professional Conduct?

Answer: It depends on several things, most important are preserving access, confidentiality, and the attorney-client privilege. Since the answer is not completely clear, we expect the Utah State Bar Ethics Advisory Opinion Committee (EAOC) to issue an advisory opinion on some aspects of cloud use. Currently twenty states have issued opinions with a common thread: Cloud services are ok for use but exercise "reasonable precautions."

Q3: What are some common types of cloud computing services for lawyers?

Answer: Cloud services run a range from email, to time and billing and invoicing software; electronic signing rooms, case and client management, document composition, document management, project management, virtual law office services, online document storage and backup, and remote computing.

Q4: Is it still OK to use unencrypted email for communications with clients?

Answer: Nearly all attorneys use email for some attorney-client privileged communications. The ABA has recently issued a formal opinion (477) that recognizes and encourages the use of encrypted email in certain circumstances.

Q5: Is there a difference – for ethical rules purpose – between just backing my files to the cloud, or storing all my legal practice data, files and information only on the cloud?

Answer: No, there's no practical difference for ethical purposes, but there are functional differences, including whether access to your data might be interrupted or eliminated. Data on the cloud seems like it could be accessible to you, potentially through any computer and any Internet connection, so those could be advantages. Disadvantages involve privacy and confidentiality concerns, and access when the Internet or storage provider's site is down. A key aspect of that 'reasonable care' is the understanding of the End User License Agreement (EULA) of the provider.

Q6: What could be wrong with backing my emails and practice files up to the cloud?

Answer: Two key issues are preserving the attorney-client privilege (confidentiality) and ensuring access. The EULA agreement with a provider should state how they treat the confidentiality of your stored data in all situations. With simple storage, there are tools that can encrypt the data prior to upload but for application services this may not be possible. Access in this question centers on your ability to reliably use the service

and the providers response to an outage.

Q7: Does it matter where in the world the “cloud stored” files or data are?

Answer: In an ideal situation, client data should be stored within U.S. borders. For prudent protection of confidentiality, and your rights in any agreement with a cloud storage or cloud computing provider, the geographical or physical location of servers storing and transmitting your data and SaaS computer programs should be under the full control of U.S. laws. This will best protect your agreed-to rights, and best protect the attorney-client privilege in your data.

Q8: Has the attorney-client privilege ever been jeopardized through cloud storage?

Answer: A recent fairly well publicized case is *Harleysville Ins. Co. v. Holding Funeral Home*, 2017 U.S. Dist. LEXIS 18714, 2017 WL 1041600 (W.D. Va. Feb. 9, 2017). In that case cloud storage at Box, Inc. was used for file sharing with opposing counsel. The court decided Harleysville waived the attorney-client privilege for information posted on the cloud sharing site because the site wasn’t password protected and thus “was available for viewing by anyone, anywhere who was connected to the internet and happened upon the site by use of the hyperlink or otherwise.” *Id.* at *13. The cloud sharer conceded its actions were “the cyber world equivalent of leaving its claims file on a bench in the public square and telling its counsel where they could find it.” *Id.* The court’s obiter is instructive and good advice:

The technology involved in information sharing is rapidly evolving. Whether a company chooses to use a new technology is a decision within that company’s control. If it chooses to use a new technology, however, it should be responsible for ensuring that its employees and agents understand how the technology works, and, more importantly, whether the technology allows unwanted access by others to its confidential information.

Id. at *14.

Q9: How do you control “unwarranted access” to files and data on the cloud?

Answer: You start with the reputation of the service provider and the contractual agreement you have with the cloud storage provider. Does the storage provider agree not to access what you store, and to keep it secure and confidential? Is the stored data encrypted to a reasonable level using a defined method? Do

only you have the ability to readily decrypt the data? Is the storage site password protected (with a strong password)? Lastly, how will a provider deal with a warrant demanding access to the data?

Q10: Don’t the benefits of cloud file storage, and SaaS document management software out weight the risks?

Answer: It depends.

Potential benefits of cloud storage of your files and other data include portability, and access wherever you have an internet connection. A risk associated with that benefit is you may not have an internet connection, or the service may be down the evening you need access to files to meet a critical filing or other deadline.

Conclusion

To help with these and other questions, the Committee is preparing a draft ethics opinion regarding cloud computing and plans to work with the EAOC to review and consider for adoption. The Committee hopes that reasonable guidelines can be provided, and a safe harbor standard articulated, so solo and small practices with less or no experience in technology matters have reliable guidelines for the use of cloud-based systems in their practice.



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Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the January 12, 2018 Commission Meeting held at the Law & Justice Center in Salt Lake City.

1. The Bar Commission voted to nominate **Herm Olsen** to run for Bar President-elect.
2. The Bar Commission voted to select **Ellen Maycock** to receive the Dorathy S. Merrill Brothers Award.
3. The Bar Commission voted to select **Hon. Augustus G. Chin** to receive the Raymond S. Uno Award.
4. The Bar Commission voted to approve the charge to the Access to Justice Coordinating Committee; to appoint **Retired Justice Christine Durham** as a Co-Chair of the Committee; and provisionally appoint **Amy Sorenson** as a Co-Chair.
5. The Bar Commission voted to appoint **Judge Eve Furse** as the 2019 Summer Convention Co-Chair.
6. The Bar Commission voted to appoint **Josh Player** as NLTP Committee Vice-Chair.
7. The Bar Commission voted to approve LicensedLawyer marketing plan and expenditure.
8. The Minutes of the December 8, 2017 Commission Meeting were approved by consent.
9. The Bar Commission approved the creation of the Entertainment Law Section.

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

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 1.67% of the mandatory license fees. Your rebate would total: Active Status – \$7.09; Active – Admitted Under 3 Years Status – \$4.17; Inactive with Services Status – \$2.50; and Inactive with No Services Status – \$1.75.

Notice of Petition for Reinstatement to the Utah State Bar by David B. Oliver

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice that David B. Oliver has filed an application for reinstatement in *In the Matter of the Discipline of David B. Oliver*, Third Judicial District Court, Civil No. 070909858. Any individuals wishing to oppose or concur with the application are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

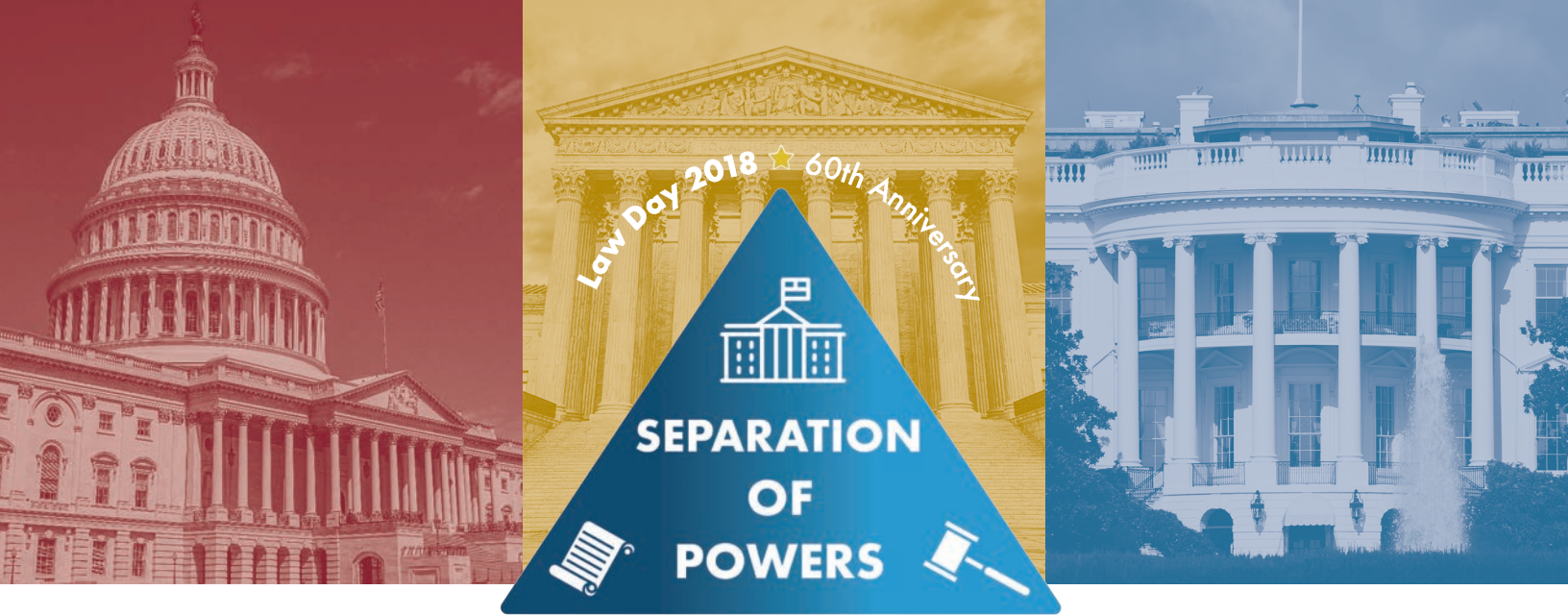
Mandatory Online Licensing

The annual online licensing renewal process will begin June 4, 2018, at which time you will receive an email outlining renewal instructions. This email will be sent to your email address of record. 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.

Renewing your license online is simple and efficient, taking only about five minutes. With the online system you will be able to verify and update your unique licensure information, join sections and specialty bars, answer a few questions, and pay all fees.

No separate licensing form will be sent in the mail. You will be asked to certify that you are the licensee identified in this renewal system. Therefore, this process should only be completed by the individual licensee, not by a secretary, office manager, or other representative. Upon completion of the renewal process, you will receive a licensing confirmation email. If you do not receive the confirmation email in a timely manner, please contact licensing@utahbar.org.

License renewal and fees are due July 1 and will be late August 1. If renewal is not complete and payment received by September 1, your license will be suspended.



Framework *for* Freedom

Utah State Bar

Law Day Luncheon

Monday, April 30, 12:00 noon

Little America Hotel | 500 South Main Street | SLC

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:**

Richard Dibblee | 801-297-7029 | richard.dibblee@utahbar.org

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

**Law Day Chair: Anthony Loubet
801-429-1091 | anthonyl@utcourts.gov**

Sponsored by the Young Lawyers Division.

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 separation of powers — the distinct and independent branches that are the framework of our government — and how each branch serves as a check on the power of the others.

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 Matthew Page at: matthew.page@utahbar.org or 801-297-7059.

Utah State Bar 2018 Spring Convention Award Recipients

The Utah State Bar presented the following awards at the 2018 'Spring Convention in St. George':



ELLEN M. MAYCOCK
Dorothy Merrill Brothers Award
Advancement of Women
in the Legal Profession



HON. AUGUSTUS G. CHIN
Raymond S. Uno Award
Advancement of Minorities
in the Legal Profession

The Utah State Bar gratefully acknowledges the continued support of our 2018 Spring Convention Sponsors & Exhibitors

SPONSORS

Babcock Scott & Babcock	JensenBayles, LLP	Snell & Wilmer
Ballard Spahr LLP	Jones, Waldo, Holbrook & McDonough	Snow Christensen & Martineau
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Christensen & Jensen	Kipp & Christian	Strong & Hanni
Clyde Snow & Sessions	Kirton McConkie	Thompson Randall & Mellen
Cohne Kinghorn	Parr Brown Gee & Loveless	TraskBritt
DeBry & Associates	Parsons Behle & Latimer	Women Lawyers of Utah
Durham, Jones & Pinegar	Randy S. Kester	Workman/Nydegger
Fabian VanCott	Ray, Quinney & Nebeker	Young Lawyers Division
Hillyard, Anderson & Olsen	Richards Brandt Miller & Nelson	

EXHIBITORS

AEI Corporation	BYU Law School	PrenticeWorx
ALPS	GreenFiling	Sage Forensic Accounting
Aptegra Consulting	Lawyers Helping Lawyers	S.J. Quinney College of Law
Attorneys Title Guaranty Fund, Inc.	The Leavitt Institute for International Development	Tybera Development Group, Inc.
Blomquist Hale Consulting – Lawyers Assistance Program	MERCER	Utah Bar Foundation

MCLE Reminder – Even Year Reporting Cycle

July 1, 2016–June 30, 2018

Active Status Lawyers complying in 2018 are required to complete a minimum of twenty-four hours of Utah approved CLE, which must include a minimum of three hours of accredited ethics. **One of the ethics hours must be in the area of professionalism and civility.** At least twelve hours must be completed by attending 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.

Fees:

- \$15.00 filing fee – Certificate of Compliance (July 1, 2016 – June 30, 2018)
- \$100.00 late filing fee will be added for CLE hours completed after June 30, 2018 OR
- Certificate of Compliance filed after July 31, 2018

Rule 14-405. MCLE requirements for lawyers on inactive status

If a lawyer elects inactive status at the end of the licensing cycle (June 1–September 30) when his or her CLE reporting is due and elects to change back to active status within the first three months of the following licensing cycle, the lawyer will be required to complete the CLE requirement for the previous CLE reporting period before returning to active status.

For more information and to obtain a Certificate of Compliance, please visit our website at www.utahbar.org/mcle.



Plan to join us for the Annual CLE Conference of the Utah Defense Lawyers Association

Friday, May 4th, 2018
Salt Lake City, Utah at the Little America Hotel

Agenda for 2018 Annual Meeting

- “Data Breach and Privacy Law” by DRI
- “Appellate Updates” by Dani Cepernich and Nate Mitchell
- “Keynote: Professionalism and Diversity” by Sean Carter, humorist at law
- “Electronic Discovery” by Megan Hutchins and Daniel Widdison
- “Liability Insurance Coverage, Past, Present and Future” by Gary Johnson
- “Juries” by Judge Kent Holmberg

7 hours of CLE credit including one Ethics credit.
Registration price \$250 for members and \$300 for nonmembers.

Check out our website for additional details,
www.udla.org



Pro Bono Honor Roll

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

Adoption Case

Allison Belnap
Todd Emerson
Kenneth McCabe

Bankruptcy Case

David Cook
Will Morrison

Bountiful Landlord Tenant/ Debt Collection Calendar

Kirk Heaton
Brooke White
Jordan White

Cache County Bar Night

Kenneth Allsop
Tony Baird
Paul Gosnell
Suzanne Marychild
Marty Moore
Herm Olsen
Ted Stokes

Community Legal Clinic: Ogden

Jonny Benson
Chad McKay
Francisco Roman
Mike Studebaker
Gary Wilkinson

Community Legal Clinic: Salt Lake City

Jonny Benson
Dan Black
Kendall Moriarty—RBMN
Women Lawyers Group
Bryan Pitt
Brian Rothschild
Paul Simmons
Mark Williams
Russell Yaune

Community Legal Clinic: Sugarhouse

Skyler Anderson
Brent Chipman
Sue Crismon
Paul King
Lynn McMurray
Mel Moeinvaziri
Brian Rothschild

Contract Case

Robert Froerer

Debt Collection Pro Se Calendar – Matheson

Matthew Ballard
Michael Barnhill
James Bergstedt
Laura Biber
Christopher Bond
Jackie Buchard
Cedar Cosner
Jesse Davis
T. Rick Davis
Chase Dowden
Michael Eixenberger
Mark Emmett
David Jaffa
Parker Jensen
Alexis Jones
Katrina Judge
Janise Macanas
Caitlin Montague
Karra Porter
Brian Rothschild
Fran Wikstrom

Debtor's Legal Clinic

Tony Grover
Rex Huang
Ellen Ostrow
Brian Rothschild
Paul Simmons
Ian Wang
Tami Gadd-Willardson

Expungement Law Clinic

Stephanie Miya
Bill Scarber

Family Justice Center

Jim Backman
Chuck Carlston
Elaine Cochran
Thomas Gilchrist
Michael Harrison
Joni McDougal
Andrea Pace
Samuel Poff
Babata Sonnenberg

Family Law Case

Brent Chipman
Joseph Dundeck
Robert Falck
Christine Giordano
Liisa Hancock
Craig Helgeson
Shirl Labaron
Jennifer Lee
Keil Myers
Rick Plehn
Oliver Whaley

Family Law Clinic

Justin Ashworth
Clinton Brimhall
Sally McMinimee
Carolyn R. Morrow
Stewart Ralphs
Linda F. Smith
Simon So
Sheri Throop

Free Legal Answers

Trevor Bradford
Marca Brewington
Joshua Egan
Robert Keller
Travis Larsen
Anthony Saunders
Simon So

Heath Waddingham
Russell Yaune

Grandparent Visitation Case

Daniel Dygert
Randall Gaither

Guardianship Case

Allison Belnap
Jason Boren
David Gibbons

Guardianship Signature Program

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

Immigration Case

Carolyn Morrow

Lawyer of the Day

Jared Allebest
Jared Anderson
Laina Arras
Ron Ball
Nicole Beringer
Justin Bond
Scott Cottingham
Chris Evans
Jonathan Grover
Roland Douglas Holt
Lorena Jenson
Robin Kirkham
John Kunkler
Ben Lawrence
Allison Librett
Ross Martin
Christopher Martinez
Suzanne Marychild
Shaunda McNeill
Keil Myers
Lori Nelson

Stewart Ralphs
Jeremy Shimada
Joshua Slade
Linda Smith
Samuel Sorensen
Laja Thompson
Paul Tsosie
Brent Wamsley
Leilani Whitmer

Protective Order Case:

Tamara Rasch
Clark Ward

Senior Center Legal Clinics

Allison Barger
Kyle Barrick
Sharon Bertelsen
Phillip Ferguson
Richard Fox
Jay Kessler
Joyce Maughan
Kate Nance
Kristie Parker
Rick Rappaport
Kathie Roberts
Jane Semmel
Lee R. Terrell
Jeanine Timothy
Tim Williams
Jon Williams
Amy Williamson

Street Law Clinic

Dara Cohen
Kate Conyers
Karma French
Jennie Garner
Brett Hastings
Cameron Platt
Jeff Simcox
Richard Snow
Jonathan Thorne

SUBA Talk to a Lawyer Clinic

William Frazier
Maureen Minson
Russell Mitchell

Third District ORS Calendar

Katherine Benson
Lisa Perry
Katherine Priest
Robert Rice
Adam Richards
Rick Rose
Liesel Stevens
Kelly Williams
Maria Windham

Timpanogos Legal Clinic

Jim Backmann
Linda Barclay
Drew Clark

Elaine Cochran
Scott Goodwin
Mike Harrison
William Leigh
Sean Peterson
Brittany Ratelle
Paul Waldron

Tuesday Night Bar

Parker Allred
Paul Amann
Courtland Astill
Matthew Ballard
Alain Balmanno
Eric Bawden
Leah Bryner
Olivia Crellin
Chase Dowden
Dave Geary
Emily Iwasaki
David Jaffa
Annette Jan
Parker Jenkins
Braden Johnson
Jon-David Jorgensen
Derek Kearl
Todd Labrum
Brad Lowe
Lucia Maloy
Mike McDonall
David McKenzie
Fred Pena

AJ Pepper
Grace Pusavat
Clark Snelson
Blake Steel
Mark Thorton
Jeff Tuttle
Adam Weinacker
Matt Wells
Nate Wolfley

Veterans Legal Clinic

Abby Brinkerhoff
Joseph Rupp
Jonathan Rupp
Katy Strand

West Jordan Pro Se Calendar

Christopher Bond
Drew Clark
William Hains
Brad Jubber
Zachary Myers
Jason Sweat

Wills/Trusts/Estate/ Probate Case

Kent Alderman
Nick Angelides

Banking & Finance Law Section Awards

The Banking & Finance Law Section of the Utah State Bar recently named Gary E. Doctorman (pictured on the left) as the section's 2017 Lawyer of the Year, stating that "Gary has been a giant in the banking industry for years. He is known for his excellent, practical legal advice and for mentoring younger lawyers both within and outside of his firm."

The section also awarded Kevin G. Glade (pictured on the right) with the 2017 Distinguished Service Award. In presenting the award, section leadership noted that "Kevin is universally respected among banking law practitioners for his skill and knowledge as well as his character and decency. He has greatly influenced the development of banking law in the state of Utah for decades. He is a true professional and gentleman."



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



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

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

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

Nomination forms must be received in the Foundation office no later than 5 pm on Friday, April 20, 2018 to be placed on the ballot.

The Utah Bar Foundation will be holding the Annual Meeting of the Foundation on Saturday, July 28th in Sun Valley, Idaho. This meeting will be held in conjunction with the Utah State Bar's Annual Meeting.

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

2018 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2018 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 4, 2018. 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/award-recipient-history/>.

Call for Nominations for the 2017 Pro Bono Publico Awards

The deadline for nominations is March 30, 2018.

The following Pro Bono Publico awards will be presented at the Law Day Celebration on Monday, April 30, 2018:

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

Tax Notice

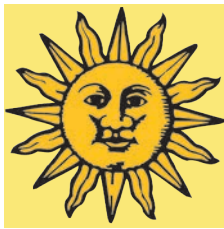
Pursuant to Internal Revenue Code 6033(e)(1), no income tax deduction shall be allowed for that portion of the annual license fees allocable to lobbying or legislative-related expenditures. For the tax year 2017, that amount is 1.67% of the mandatory license fee.

2018 SUMMER CONVENTION

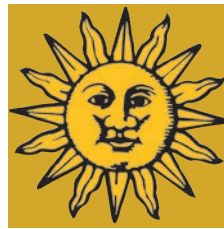
UTAH STATE BAR.



JULY
25-28



SUN
VALLEY
IDAHO



RESERVATION
REQUEST
FORM



SUN VALLEY LODGE: (single or double occupancy)

Lodge Premier King	\$345
Lodge Suite King (with sitting room)	\$408
Lodge Suite (2 Queens)	\$418
Lodge Terrace Suite (1 King with balcony)	\$605
Lodge Celebrity Suite (1 King, 1 sofa bed, 1 office)	\$749

SUN VALLEY INN: (single or double occupancy)

Inn Standard (1 Queen)	\$215
Inn Traditional (2 Doubles)	\$299
Inn Deluxe (1 King)	\$309
Inn Deluxe (2 Queens)	\$330
Junior Suite (1 King)	\$440
Family Suite (1 Queen and 2 Twins)	\$440
Inn Parlor Suite (1 King)	\$495
Three Bedroom Inn Apartment	\$649

DELUXE LODGE APARTMENTS:

Lodge Apartment Suite (up to 2 people)	\$529
Two-bedrooms (up to 4 people)	\$613
Three-bedrooms (up to 6 people)	\$712

STANDARD SUN VALLEY CONDOMINIUMS:

Atelier, Cottonwood Meadows, Snowcreek,
Villagers I & Villagers II

Studio	\$230
One Bedroom (up to 2 people)	\$283
Atelier 2-bedroom (up to 4 people)	\$335
Two Bedroom (up to 4 people)	\$367
Three Bedroom (up to 6 people)	\$408
Four Bedroom (up to 8 people)	\$460

All rates are subject to the prevailing taxes and fees.
Currently taxes total 12% (room tax) plus 6% resort fee
and are subject to change.

RESERVATION DEADLINE: This room block will be
held until June 25, 2018. After that date, reservations
will be accepted on a space available basis.

Confirmed reservations require an advance deposit equal to one night's room rental,
plus tax. **In order to expedite your reservation, simply call our Reservations
Office at 1-800-786-8259.** Or, if you wish, please complete this form and:

Mail to: Reservations Office, P.O. Box 10, Sun Valley, Idaho, 83353

Fax to: 208-622-2030, or

Email: reservations@sunvalley.com.

A confirmation of room reservations will be forwarded upon receipt of deposit.

Please make reservations early for best selection! If accommodations requested
are not available, you will be notified so that you can make an alternate selection. No
pets allowed. **Rates are guaranteed July 20–August 1, 2018.**

Name: _____

Email: _____

Address: _____

City/State/Zip: _____

Phone: (day) _____

(evening) _____

Accommodations requested: _____

Rate: _____ # in party: _____

I will need complimentary Sun Valley Airport transfer ☐ Yes ☐ No
(Hailey to Sun Valley Resort)

Airline/Airport: _____

Arrival Date/Time: _____

Departure Date/Time: _____

Please place the \$ _____ deposit on my _____ card

Card #: _____ Exp. Date: _____

Name as it reads on card: _____

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

**If you have any questions, call Reservations at 800-786-8259. Fax your
reservation to 208-622-2030 or email to: reservations@sunvalley.com.**

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

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



“and Justice for all”

36th Annual Law Day 5K Run & Walk – May 5, 2018

S. J. Quinney College of Law at the University of Utah

383 South University Street • Salt Lake City



Registration Info: Register online at <http://andjusticeforall.org/law-day-5k-run-walk/>. Registration fee: before April 27: \$30 (+ \$10 for Baby Stroller Division extra t-shirt, if applicable), after April 27: \$35. Day of race registration from 7:00–7:45 a.m. Questions? Call 801-924-3182.

Help Provide Civil Legal Aid to the Disadvantaged: All event proceeds benefit “and Justice for all,” a collaboration of Utah’s primary providers of free civil legal aid programs for individuals and families struggling with poverty, discrimination, disability and violence in the home.

Date: Saturday, May 5, 2018 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, 383 South University Street, Salt Lake City. Parking available in Rice Eccles Stadium (451 S. 1400 E.). Or take TRAX!

Race Awards: Prizes will be awarded to the top male and female winners of the race, the top male and female attorney winners of the race, 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 a top prize.

Speed Team Competition

Baby Stroller Division

Speed Individual Attorney Competition

Wheelchair Division

Recruiter Competition: The organization who recruits the most participants for the Run will be awarded possession of the Recruiter Trophy for one year and a grand prize. However, all participating recruiters are awarded a prize because the success of the Law Day Run depends upon our recruiters! To become the 2018 “Team Recruiter Champion,” recruit the most registrants under your organization’s name. Be sure the Recruiting Organization is filled in on the registration form to get competition credit.



For more information visit www.andjusticeforall.org.

Register today at – <https://andjusticeforall.redpodium.com/law-day-run>

THANK YOU TO OUR MAJOR SPONSORS



Banking & Finance Section



Bankruptcy Law Section

Utah State Bar Request for 2018–2019 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more Bar 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 _____

Phone # _____ Email _____ Fax # _____

Committee Request:

1st Choice _____ 2nd Choice _____

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

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

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

Please list the fields in which you practice law:

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Date _____ Signature _____

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Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.

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Drafts, reviews, and grades questions and model answers for the Bar Examination.

Character & Fitness

Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.

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Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality, and conformance.

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Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

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

More information about the Bar's Ethics Hotline: <http://www.utahbar.org/?s=ethics+hotline>

Information about the formal Ethics Advisory Opinion process: www.utahbar.org/opc/rules-governing-eaoc/.



PUBLIC REPRIMAND

On December 19, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Tony B. Miles for violating Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary: A client retained Mr. Miles and paid an amount for a retainer and an additional amount to the Bureau of Criminal Investigation (BCI) to initiate expungement proceedings on behalf of the client's son. Approximately two months later the client contacted Mr. Miles for a status update. Mr. Miles indicated he was still waiting for information from BCI. A few weeks later the client contacted BCI directly and was informed that the expungement request had been denied and mailed to Mr. Miles' business address (which was also his personal address) the month prior. BCI also indicated that the criminal offense at issue was "non-expungable" pursuant to state statute, and provided an appeal deadline of thirty days. Mr. Miles did not review the BCI letter until after the expiration of the appeal deadline.

Mr. Miles failed to keep the client reasonably informed about the status of the expungement proceedings. Mr. Miles failed to file a timely appeal and did not comply with the client's request for a refund of the unearned portion of the retainer. The OPC sent a Notice of Informal Complaint (NOIC) to Mr. Miles asking him to respond to the allegations. At the Screening Panel hearing, Mr. Miles admitted to receiving the NOIC and failed to respond.

Aggravating factors: Substantial experience in the practice of law. Failure to make a good faith effort to make restitution to the client or otherwise rectify the consequence of his misconduct.

Mitigating facts: Absence of prior record. Expressed remorse for his actions during the hearing.

PROBATION

On December 18, 2017, the Honorable Sandra N. Peuler, Third Judicial District Court, entered an Order of Discipline: Probation, against Warren L. Barnes, placing Mr. Barnes on probation for a period of one year, for Mr. Barnes' violation of Rule 1.8(a) (Conflict of Interest: Current Clients: Specific Rules) of the Rules of Professional Conduct.

In summary: Mr. Barnes was retained by an elderly client to represent the client's estate by assisting in preparation of a trust and associated documents. The documents Mr. Barnes prepared contained a provision designating himself as a Successor Trustee and contained a clause indicating the client was waiving all potential conflicts. The documents Mr. Barnes prepared also contained a clause stating Mr. Barnes, as an attorney, was to be held to a "higher fiduciary standard than other non-professional trustees." The client signed numerous documents prepared by Mr. Barnes, including the Trust Agreement designating him as Successor Trustee.

Mr. Barnes failed to put the terms of his role as Trustee in writing in a manner that could be reasonably understood by his client and failed to advise the client in writing that she should seek the advice of independent legal counsel.

Discipline Process Information Office Update

The Discipline Process Information Office is available to all attorneys who find themselves the subject of a Bar complaint, and Jeannine Timothy is the person to contact. Most attorneys who contact Jeannine do so in the early stages of a Bar complaint. Keep in mind, however, Jeannine is available to assist and explain the process at any stage of a Bar complaint. Call Jeannine with all your questions.



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Mitigating factors: No prior discipline, cooperative with the investigation, and an absence of dishonest motive.

SUSPENSION

On November 13, 2017, the Honorable Paige M. Petersen, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Suspension, against Angela Sampinos Gurney, suspending her license to practice law for a period of eighteen months, for Ms. Gurney's violations of Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.16(d) (Declining or Terminating Representation), Rule 8.1(b) (Bar Admission and Disciplinary Matters), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary: The case involved Ms. Gurney's handling of cases in three separate client matters. Ms. Gurney failed to provide updates concerning the status of the cases and failed to return phone calls and emails from her clients in all three matters. Ms. Gurney failed to respond to discovery in the first matter, failed to file a complaint in the second matter, and missed discovery and other court deadlines in the third matter. In the first matter, Ms. Gurney failed to inform the client of the discovery that had been propounded and the Order of the court compelling an answer, lied to the client about the case status, failed to notify the client she was no longer representing the client, and failed to protect the client's interests thereafter including failing to return the client's file to the new counsel.

In the second matter, Ms. Gurney was retained to represent the client in eviction proceedings against the tenants of the client's house. She failed to file a complaint but misled the client about the case status,

including giving the client a trial date and later telling the client the day before the alleged trial date that the trial had to be continued due to a family emergency. In the third matter, Ms. Gurney failed to keep the client apprised of the court deadlines in the client's case. Also, Ms. Gurney failed to respond to OPC's lawful requests for information in all three matters until many months later.

Aggravating factors: Dishonest or selfish motive; Pattern of misconduct; Multiple offenses; Lack of good faith effort to make restitution or rectify the consequences of the misconduct involved.

Mitigating factors: No prior record of discipline

SUSPENSION

On November 14, 2017, the Honorable Joseph M. Bean, Second Judicial District Court, entered an Order of Suspension, against Stuwert B. Johnson, suspending his license to practice law for a period of eighteen months. The court determined that Mr. Johnson violated Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.15(a) and 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(b), 8.4(c), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary: The case involved a complaint that was filed against Mr. Johnson based upon a bad check matter that resulted in a criminal conviction. Further information was received from individuals against Mr. Johnson concerning eighteen additional matters, which were joined in the Complaint and resulted in thirty-two counts of violations of the Rules of Professional Conduct, including ten counts involving criminal conduct or the administration of justice.

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In two matters, Mr. Johnson failed to prepare for the final hearing and failed to obtain the required forms and other documents necessary to finalize an adoption for a client in one matter and in the other matter, Mr. Johnson allowed personal issues to interfere with his legal representation of the client, and also failed to competently prepare for a mediation. In three matters, Mr. Johnson failed to diligently complete the work he was paid to perform by failing to submit/file documents necessary to finalize proceedings in the matters. In six matters, Mr. Johnson failed to adequately communicate and keep his clients reasonably informed regarding the status of their cases and failed to return phone calls and/or respond to the clients' reasonable requests for information.

In one matter Mr. Johnson failed to perform enough work to earn the amount of attorney fees he collected from the client, and then reimbursed the client only a portion of the fees because he had allegedly drafted, but never filed, the documents. Mr. Johnson failed to properly terminate his representation in two matters and failed to promptly refund the fees he collected. In three matters, Mr. Johnson failed to cooperate in the disciplinary process by failing to respond to the OPC's Notice of Informal Complaint (NOIC).

In two matters, Mr. Johnson breached his duties to his clients when he improperly managed the funds in his trust account and failed to

safeguard funds belonging to his clients and/or others. In two matters, Mr. Johnson breached his duty to the client by failing to act promptly to process the client's settlement check and failed to safeguard settlement funds to another client resulting in non-sufficient funds which then led to a bad check and the misappropriation of funds. Eight matters involving the bad check, an arrest, five DUIs and a justice court matter, all resulted in criminal convictions against Mr. Johnson. In three matters, Mr. Johnson failed to comply with court sentencing requirements in connection with the payment of fines in one matter, violated probation in the second matter, and failed to comply with the court's order regarding a subpoena in the third matter. Mr. Johnson was placed on Interim Suspension but was found to have violated the order of suspension by engaging in the practice of law on at least one but very probably two circumstances over the eighteen-month suspension.

Aggravating factors: Prior disciplinary sanctions; Multiple offenses; Obstruction of disciplinary proceedings; Pattern of conduct, Vulnerability of victims; Substantial experience in the practice of law; Violation of interim suspension order; Apparent relapse.

Mitigating Factors: Cooperation in his prosecution; Timely good faith effort to make restitution or to rectify the consequences of misconduct involved; Substance abuse impairment.



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Blithe Cravens former Senior Trial Counsel of the State Bar of California, for experienced and effective Attorney Discipline Defense.

Blithe Cravens is licensed in Utah, California, and Kansas. She brings nearly two decades of jury trial and litigation experience as a former prosecutor for the Los Angeles District Attorney's Office and Senior Trial Counsel for the State Bar of California. She represents attorneys in Utah and California facing State Bar complaints by assisting in initial responses that result in closed cases, attorneys before the screening panel, and attorneys that need effective representation in attorney discipline matters brought to District Court. She also advises corporations and individuals on ethical compliance issues such as work product, attorney and litigation privilege, and conflicts of interest.



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Thou Shalt Not Swear: Is an Unsworn Declaration Subscribed under Penalty of Perjury Legally Sufficient to Replace an Affidavit?

by Anthony Loubet

While I was at a lunch meeting with some fellow attorneys, the subject of the unsworn declaration in lieu of affidavit statute came up. For those unfamiliar with the statute, it reads:

(1) If the Utah Rules of Criminal Procedure, Civil Procedure, or Evidence require or permit a written declaration upon oath, an individual may, with like force and effect, provide an unsworn written declaration, subscribed and dated under penalty of this section, in substantially the following form:

“I declare (or certify, verify, or state) under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed on (date).

(Signature)”.

(2) A person who knowingly makes a false written statement as provided under Subsection (1) is guilty of a class B misdemeanor.

Utah Code Ann. § 78B-5-705.¹

Even though the statute says, “under criminal penalty,” some judges and commissioners allow the use of “under penalty of perjury” in its place. For those that find themselves similarly puzzled on why some judges and commissioners allow it and some don’t, I hope to shed some light on the reasons for this.

To start out, perjury is willfully telling an untruth after having taken an oath or affirmation. Utah’s perjury statutes range from false statements under oath in court to written statements under oath. *See* Utah Code Ann. § 76-8-502–504.5. The penalties also range from a second-degree felony to a class B misdemeanor. Utah Code section 78B-5-705 is specifically designed to allow an unsworn declaration in place of an affidavit. A person who knowingly provides a false unsworn declaration is guilty under section 78B-5-705 and not the perjury statutes. If a person tries

to sign an unsworn declaration “under penalty of perjury of the State of Utah,” that statement would be legally incorrect.

This can be a problem in (1) divorce cases where the court needs to rely on facts in an affidavit to make findings and enter a decree on those findings, and (2) civil cases where a party is required to submit an affidavit in support of its motion. Why don’t courts address this issue? There are various reasons for this.

The first is the process in which documents are reviewed before they come before a judge. In divorce cases where the parties have entered into a stipulation, someone from the judge’s staff will review the case file to make sure all the required documents are in the file. Some judges will also give instructions on additional information the court staff should look for, such as child support amounts that are below what the child support worksheet lists. Most of the time the court staff person doing the case review is not legally trained and is not aware of legal requirements. Unless a judge or supervisor has instructed the reviewing court staff member, they aren’t likely to inspect the language used in an affidavit. When the case is ready for the judge to review, the judge will focus on reviewing specific documents instead of every document in a case file before he or she signs the final decree, thus not inspecting the declarations.

In the case of a commissioner, commissioners don’t usually have the luxury of court staff reviewing documents for them. They also generally have a high case load and read through a lot of briefs before hearings.

ANTHONY LOUBET is a licensed attorney. He was a law clerk for Judge Davis, Judge McDade, and Judge Pullan at the Fourth District Court. He is now a law clerk for Judge Kate Toomey at the Utah Court of Appeals.



From time to time, a commissioner has been known to reject an unsworn declaration for listing “perjury” when they notice it. However, the major concern and priority to a commissioner, like judges, is understanding and ruling on the merit of the parties’ arguments.

With civil cases, the judge relies on the opposing party to make an objection to the legal sufficiency (and maybe even the enforceability) of the declaration in lieu of affidavit. If an opposing party does not raise the argument, then the court is not likely to address it.

The second reason involves a judge’s judicial philosophy. If a judge views their role as being a referee and being reactionary, then he or she is unlikely to address such an issue unless the opposing party raises an objection. Even if a judge is more involved in a case, he or she is generally more focused on the bigger issues being argued by the parties than seeking out procedural deficiencies in the parties’ papers (unless the deficiency is obvious or egregious – watch your page length and counter motions filed within motions, attorneys!).

The third reason is, depending on what is trying to be achieved and if the parties have representation, the court may require closer scrutiny on submitted papers. For example, a court may engage in a closer review of the papers submitted with a motion for contempt sanctions, a motion seeking a temporary restraining order, a divorce decree, or a motion for summary judgment. The rationale is these types of motions or orders can or do have a significant impact on the outcome of a case or on a person’s liberty interest, or both, and are frequently the subject of an appeal. A judge or commissioner is more likely to scrutinize the papers and be sensitive to deficiencies.

Based on that same rationale, a judge or commissioner may engage in closer scrutiny of the papers if the parties are pro se or if only one party is represented by counsel. If both parties are represented by competent counsel, the judge or commissioner tends to rely on a lawyer’s duty to his or her client and to the court to make sure the papers are in good order, thus not requiring as thorough of a review.

The fourth and final reason is in this key language: “in substantially the following form.” Currently, there is no case that addresses what would be in “substantially the following form” as it relates to this statute. In talking with some judges about this, some view “I declare under penalty of perjury of the State of Utah that the foregoing is true and correct” to be in substantially the following form to what is stated in Utah Code section 78B-5-705. There is some legal basis for this interpretation.

In *State v. Gutierrez-Perez*, 2014 UT 11, 337 P.3d 205, the Supreme Court of Utah reviewed a similar, while not directly on point, issue. A police officer signed an affidavit for a warrant with the language from section 78B-5-705. *Id.* The defendant appealed on the issue that the affirmation was “inadequate to impress upon the affiant’s

mind the solemnity of the occasion and that such can be achieved only by the threat of ‘one to fifteen years’ incarceration.” *Id.* ¶ 27. In response, the court held that “clearly either penalty would be more than sufficient to ‘impress the solemnity and importance’ of the occasion upon the mind of the affiant, thereby ensuring that he is mindful ‘of his promise to be truthful’ which... is all that the Constitution requires for a valid affirmation.” *Id.*

Since the statute says that the unsworn statement should be in substantially the following form, and signing under penalty of perjury would be more than sufficient to impress the solemnity and importance of the occasion to ensure that a person is mindful of his promise to be truthful, then the unsworn declaration in question could be argued to be sufficient to impress upon the affiant’s mind the solemnity of the occasion.

But there are still problems with this logic. Can the unsworn statement reference any criminal offense and still be valid as long as it is sufficient to impress the solemnity and importance of the occasion? Does the phrase “substantially the following form” only refer to the verbiage of the unsworn declaration, or does it allow a reference to a separate criminal law? Is reference to perjury okay because it is similar in nature to the offense of violating Utah Code section 78B-5-705?

Alternatively, it could also be argued that *State v. Gutierrez-Perez* is inapplicable because it is really only evaluating whether a declaration that comports with the statute is legally sufficient to replace an affidavit. Thus it never addresses the question, what language is in substantially the following form used in the statute?

Unfortunately, I do not have the answer to those questions. I do think that the phrase “substantially the following form” refers to the verbiage and does not allow a reference to a separate crime, even if the crime is similar in nature. For example, while *Lane Myers Construction, LLC v. Countrywide Home Loans, Inc.* was later overruled by the Utah Supreme Court, it is instructive and may help predict what the appellate courts will look at when determining if a provision is in substantially the following form. 2012 UT App 269, 287 P.3d 479, *rev’d sub nom.*, *Lane Myers Constr., LLC v. Nat’l City Bank*, 2014 UT 58, ¶ 17, 342 P.3d 749. In *Lane Myers Construction, LLC*, the court of appeals looked at whether the standard for an enforceable waiver and release was in substantially the form provided under Utah Code section 38-1-39(4)(a). The appellate court stated that:

[b]y deciding to include templates with particular language, rather than simply identifying the requisite elements of a waiver and release more generally, and by requiring that a waiver and release be “in substantially the form provided,” the legislature has

indicated its intent that a valid waiver and release at least contain each of the component parts the form includes, in substance and effect if not in the identical language. *See generally Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, ¶ 46, 164 P.3d 384 (“When interpreting statutes, we ... presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.” (citation and internal quotation marks omitted)); Random House, Inc., *Dictionary.com Unabridged*, available at <http://dictionary.reference.com/browse/form> (last visited September 7, 2012) (defining “form” as “something that gives or determines shape; a mold”).

In this regard, there is a distinction between “comply[ing] substantially with Utah law” by including “the property, names and addresses, and amounts owing,” as the trial court determined the National City draw requests did here, and being “in substantially the form provided,” that is, with all the components identified in section 38-1-39(4) as part of a valid form, *see* Utah Code Ann. § 38-1-39(4)(b)–(c).

Id. ¶ 17.

Similarly to *Lane Myers Constr., LLC v. Nat’l City Bank*, since the legislature has provided a template with particular language, a valid unsworn declaration statement should contain each of the component parts the form includes. The components of the form are (1) a statement declaring that the information provided is true and correct, (2) recognition that the declarant will be subject to criminal penalty under the statute, and (3) the date the declaration was signed. It could be argued that a subscription that references perjury does not demonstrate a recognition that the declarant would be subject to criminal penalty under the statute. Therefore, a declaration signed under penalty of perjury wouldn’t be sufficient to be used in lieu of an affidavit.

How receptive will a court be to these arguments? Unfortunately, until there is a case on point, you are likely to see inconsistency amongst judges and commissioners. But if you are worried about getting reprimanded, having a motion or response stricken, or having to go back to clients to get another unsworn declaration signed, best practice would be to stick with the form in the statute.

1. Article VIII, Section 4, of the Utah Constitution provides that “[t]he Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.” This article takes section 78B-5-705 at face value, and does not consider whether it is intended to amend the rules of procedure and evidence or whether, if it is so intended, it passed both houses by the required two-thirds vote.

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Law, OJ, and Coke

by Jason Rogers

Have you ever had a realization about something you already knew? I guess, this would be kind of like déjà vu of some sort, or maybe some kind of *Inception* thing – knowing what you already know?

A thought came to me recently while reading about the OJ Simpson Trial. With the recent burst of movies and documentaries about OJ Simpson, I wanted to read about the Trial of the Century – the media frenzy that dominated my late middle school years, and the racially tense conversations of most, well, everybody. Or, maybe this fairly new career as a paralegal has captivated my interest in all things legal. Whatever it is, I have some carbonated sugary caffeine in my belly and a few items on my agenda for this article. Yup, I got to have caffeine first (the Salt Lake City standard of non-caffeinated root beer is not for me), and then some fanfaronade should commence – cue the music!

Despite a lack of books about OJ Simpson in the university library as compared to the actual number written (at last count Judge Ito was the only person involved in that case who hasn't written a book), I found some page-turners. While reading Joseph Bosco's random, cut-and-paste, ode-to-the-tangent book about the trial, I came across the following few sentences:

and learn that – even with the popularity of LA Law, Matlock, Court TV, etc., on the tube; Grisham, Turow, etc., at the bookstores and the Cineplex's; not to mention high school civic classes – the overwhelming majority of potential jurors has not a clue about some of the most basic concepts of our constitutional liberties and responsibilities[.]

Joseph Bosco, *A Problem of Evidence; How the Prosecution Freed OJ Simpson* 12 (1 ed. 1996).

The reality of this is something I've been aware of for a long time but never quite internalized for one reason or another, like why Coca-Cola attempted to come out with the New Coke flavor in April of 1985. A very egregious and terrible idea that was. What

were they thinking? And, how come the majority of people don't really know about the law? Even something like the idea of having a few hundred years of common law, which is used to interpret the Constitution? Or, how OJ Simpson could be found not guilty at a criminal trial but liable (because of wrongful death) at a civil trial? This is a mind-blowing idea to some who want to always refer back to the Constitution when discussing societal ills, or basing their ideas about the law off how society is reflected against their confirmation bias. Like Bosco, one of the co-defense counsel for Simpson said, "I knew that the Simpson case would become the vehicle by which a generation of Americans would learn about the law." Alan M. Dershowitz, *Reasonable Doubts* 25 (1 ed. 1996). There is something to be said about this seemingly banal platitude that turned out to contain much truth. John Grisham and the OJ Trial dominate knowledge about the legal system nowadays – only to be slightly overshadowed by many taking a new interest in the Constitution after President Trump took office; not to mention, the resurgence of interest in OJ Simpson when he was recently released on parole.

The whole justice system is overburdened, unfair, and enigmatic at times. It's akin to trying to understand why there is such discord between Pepsi lovers and Coca-Cola lovers despite the only difference between the two drinks being the content of CO₂, salt, and caffeine. As Bosco similarly wrote: "The system, as developed through eight hundred years of English common law and now two centuries under the United States Constitution, works! It does break down occasionally, but then so does a Mercedes-Benz automobile – one doesn't scrap a 450 SL every

JASON ROGERS is currently a paralegal at SEB Legal, Attorneys at Law in Salt Lake City, Utah.



time it needs a mechanic.” Joseph Bosco, *A Problem of Evidence: How the Prosecution Freed OJ Simpson* 12 (1 ed. 1996). We need to be patient and slightly encouraging with the legal system.

But, I want to use a different metaphor to explain the current criminal justice system in America – something more pedantic and wishfully perceptive. Something that links this whole idea to Coca-Cola and Sam’s Cola. I’m sure you all have had both at one time or another. Now...don’t get me wrong, both of these drinks are just fine. But the preference for most it seems, is that Coca-Cola far surpasses Sam’s Cola in...well, every way possible. If you start drinking a Sam’s Cola, and you close your eyes and imagine hard enough, that Sam’s Cola could be Coca-Cola – if you really think hard enough. But deep down, you know that it is a Sam’s Cola and not Coca-Cola....

The current criminal justice system is Sam’s Cola and a perfect system for criminal justice is Coca-Cola. The current system is not Coca-Cola, but...dang it...it really wants to be. The American system is not like the Commonwealth setup that’s based on precedent. Instead, we have aimed for argument and philosophies, because...well, those philosophers need something to do other than aim for the few teaching openings in universities. Maybe these philosophers can also help with understanding the mind of those who follow the Word of Wisdom but still destructively drink Diet Coke all day, every day (hello there, can o’ worms).

And, come to think of it...there are many lawyers who have unwittingly and unknowingly mastered Existentialism. Just reading some of the motions put forth, there are lawyers who are obviously in the wrong field. They should be writing novels and giving Nobel Prize speeches. But...more on that in another article. I want to get back to the OJ Simpson trial (which the philosophers should be linking to culture, and teaching...) So, back to this: Coca-Cola and OJ.

Let’s look at a quote from one of the co-prosecutors in the OJ Simpson trial: “A criminal defendant, much like a lawyer, can forget sometimes that what is admissible in court isn’t necessarily true and what is inadmissible isn’t necessarily false, that a not guilty verdict doesn’t mean you are innocent.” Christopher A. Darden, *In Contempt* 4 (1 ed. 1996). Yes! What he said. The search for truth – the ultimate, platonic truth – and justice is something not really equitable to what the courts are searching for, even if that is the ultimate aim of the overall criminal justice system. Bosco wrote,

Everyone who is screaming for major design changes in the American criminal justice system because of the Simpson trial needs to hang out for a while where it operates routinely – the local courthouse, the jail, and the police station. Then perhaps meaningful refinements can be made to a damn good engine a bit overtaxed by an increasingly complex and fragmented environment it must operate in.

Joseph Bosco, *A Problem of Evidence: How the Prosecution Freed OJ Simpson* 20 (1 ed. 1996).

This is true. However, there shouldn’t be pessimism in the law. The whole system, as we are very aware, was not set up for nefarious purposes. There are great and honest lawyers...in fact, there are the good, the bad, and the ugly; and the stereotype of the dishonest lawyer – the butt of lawyer jokes. And, there should be a logical and viable option for making the whole American justice system better. Countless words are thrown out in discussion and through social media about various methods of correcting and improving the whole justice system, but any rightful action has been left behind. Abstractions from Stirner and his ideas of the ego to the primitivism anarchy of John Zerson, the perfect scenarios have never really left the imagination and come to something concrete in the real world.

Earlier in my career, as a part-time translator in the criminal justice system in Korea and now as a paralegal in the very arid city of Salt Lake, I can see that there are many holes in this can of Sam’s Cola I call the current criminal justice system. But Sam’s Cola is still a fine cola made by those who wanted to bring forth a good product. We aim for Coca-Cola, and hope for Pepsi. This is the world as we know it, and the criminal justice system in America is not perfect, but dang it wants to be! Utah may have weather that is never quite right (the grass is always green under the snow and everything dies in the summer), but – dang it – *The Stand* was filmed in Orem and fry sauce was invented here! And hey, at least Young got it right when favoring the grid system.

As time and the pages of the books about OJ have flown by, there is a lot that I’ve learned. Most important is that we all want Sam’s Cola to be Coca-Cola, but...well, I worry that this article contains anything that the basic lawyer and law student does not already know, which goes back to my original statement about déjà vu.

Distinguished Paralegal of the Year Award

The Distinguished Paralegal of the Year Award is presented by the Paralegal Division of the Utah State Bar and the Utah Paralegal Association to a paralegal who has met a standard of excellence through his or her work and service in this profession.

We invite you to submit nominations of those individuals who have met this standard. Please consider taking the time to recognize an outstanding paralegal. Nominating a paralegal is the perfect way to ensure that his or her hard work is recognized, not only by a professional organization, but by the legal community. This will be an opportunity to shine! Nomination forms and additional information are available by contacting Izzamar Espinoza at izamar.eh19@gmail.com.

The deadline for nominations is April 23, 2018, at 5:00 pm. The award will be presented at the Paralegal Day Celebration held on May 17, 2018.

ANNUAL PARALEGAL DAY LUNCHEON

**For all Paralegals and their
Supervising Attorneys**

Speaker: Mayor Ben McAdams

**May 17, 2018
Noon to 1:00 pm**

**Radisson Hotel Downtown
(215 West South Temple)**

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

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

March 7, 2017 | 4:00 pm – 5:00 pm

2 hrs. CLE

Litigation 101 Series: What They Didn't Teach You in Law School – Closing Arguments. This long-running CLE is hosted by Patrick Burt and Gabriel White. To register visit: https://services.utahbar.org/Events/Event-Info?sessionaltcd=18_9080D. Cost: \$25 for YLD section members, \$50 for all others.

March 8–10, 2018

10 hrs. CLE including 3 hrs. Ethics & 1 hr. Prof./Civ.

Spring Convention in St. George. Dixie Center at St. George, 1835 Convention Center Drive. Join the Bar in southern Utah for CLE, networking opportunities, and family recreation. Speakers include Justice Christine M. Durham (ret.); Gary Kennedy, general counsel of American Airlines; and Thomas Hamilton, VP Strategy and Operations at ROSS Intelligence. Eighteen breakout sessions to choose from.



March 14, 2018 | 12:00 pm – 1:00 pm

Licensed Lawyer CLE. Registration details forthcoming on CLE website and in CLE online calendar, accessible through portal.

March 21, 2018 | 9:00 am – 3:45 pm

5 hrs. Ethics Credit including 1 hr. Prof./Civ.

OPC Ethics School. Cost: \$245 on or before March 5, \$270 after March 5th. Register online at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=18_9017.

March 21–23, 2018

Litigation Section Trial Academy. S. J. Quinney College of Law.

April 4, 2018 | 4:00 pm – 6:00 pm

1 hr. Ethics, 1 hr. Prof./Civ.

Litigation 101 Series: What They Didn't Teach You in Law School – Ethics & Civility. Cost: \$25 for YLD section members, \$50 for all others. To register visit: https://services.utahbar.org/Events/Event-Info?sessionaltcd=18_9080E.

April 26, 2018 | 12:00 pm – 1:00 pm

Entertainment Law Section Inaugural CLE.

April 26, 2018

Cyber Law Symposium at Adobe.

April 27, 2018

Utah Council on Conflict Resolution Annual ADR Symposium. www.uccr.net

April 30, 2018 | 12:00 pm – 1:15 pm

YLD Law Day Luncheon. Little America Hotel.

July 25–28, 2018

2018 Summer Convention in Sun Valley. Save the date and join the Utah State Bar in Sun Valley Idaho. More details to come!

Classified Ads

RATES & DEADLINES

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

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

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

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

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Law office, has office space for an attorney or mediator. Located at 480 East 400 South, Suite 201, Salt Lake City, Utah 84111 on the 2nd floor of the First National Bank building. Secretarial help available. Please call: 801-532-5951.

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

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

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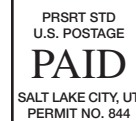
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