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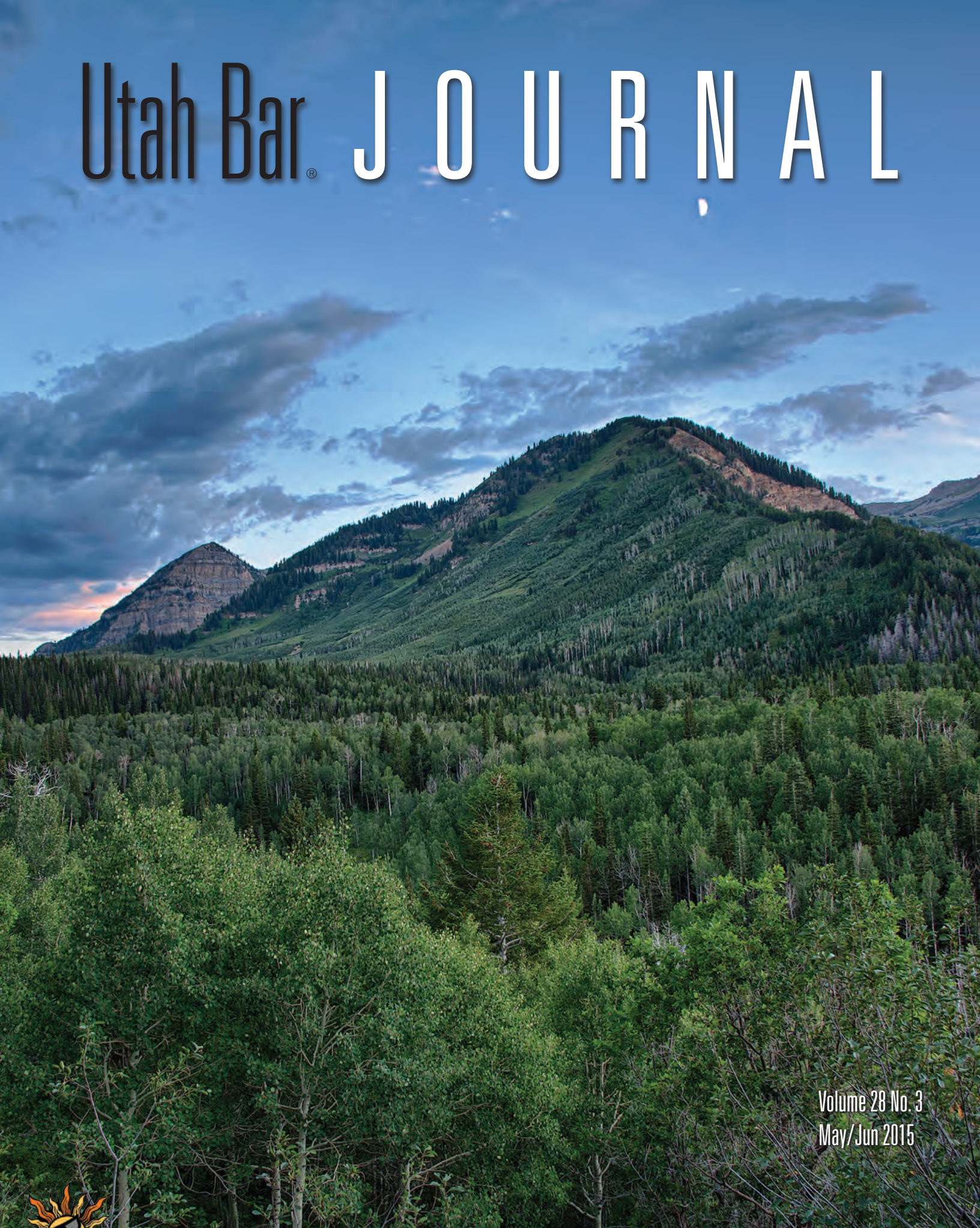

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Utah Bar JOURNAL

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Cover Photo

Alpine Summit at Dusk, by Mark Wilkey of Alpine.

MARK E. WILKEY is a member of the Utah State Bar and is General Counsel for Central Refrigerated Service, LLC – a nationwide trucking company based in Salt Lake City – and SME Industries, Inc. – a related company involved in structural steel fabrication and erection. Mark's business travels have given him the opportunity to photograph landscapes, architecture, and wildlife from Florida to Seattle. His favorite photographic subjects, however, are found in the mountains near his home in Alpine. Mark loves the color and majestic views of the Alpine Loop, which he visits several times each year to capture the changing seasons and light. The cover photo shows Mt. Timpanogas at twilight and was taken from the Summit Trailhead on the Alpine Loop on or near the Summer Solstice.

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Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs (compact disk or print), along with a description of where the photographs were taken, to Utah Bar Journal, 645 South 200 East, Salt Lake City, Utah 84111, or by e-mail .jpg attachment to 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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The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea or would be interested in writing on a particular topic, please contact us by calling (801) 297-7022 or by e-mail at barjournal@utahbar.org.

Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

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

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

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

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

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

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Letter Submission Guidelines

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

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

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

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

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

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

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

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

Parsons Behle & Latimer is pleased to announce that John R. Lund and Juli Blanch have joined the firm as shareholders in the Salt Lake City office. Tammy Georgelas has also joined the firm's Salt Lake City office as of counsel.

John Lund, with more than 30 years of experience as a trial attorney, focuses his practice on commercial litigation, trial work and other challenging cases throughout the Intermountain West. He is admitted to the Utah, Wyoming and Colorado State Bars.

Juli Blanch concentrates her practice on product liability and commercial litigation. She also handles insurance coverage disputes and catastrophic personal injury matters. She is admitted to the Utah State Bar.

Tammy Georgelas focuses her practice on complex commercial litigation with an emphasis in representing creditors' rights. She also helps clients implement cyber security policies to protect against data breaches and be prepared to respond if one happens. She is admitted to the Utah State Bar.

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Our Moral Fingerprints

by James D. Gilson

The Honorable Judge Bruce S. Jenkins has been serving our state and country as a federal judge for fifty years – and he's still going as strong and sharp as ever. He's an inspiring example of diligent public service and dedication to justice and the rule of law; truly worthy of the "honorable" title.

Many stories and sayings of Judge Jenkins were shared at the March 17 tribute night that was sponsored by the Utah Chapters of the Tenth Circuit Historical Society and the Federal Bar Association. Here are a few that I noted:

"Know what you're talking about."

"When all else fails, read the book."

"The long way is the short way."

"Trials, at their best, are an educational process…and lawyers are to be teachers."

> *"My impression is that the vast majority of Utah lawyers are professional, courteous, and ethical.…This is quite remarkable given that ours is a service profession involving high stakes, high emotions, and high stress."*

"Take time to think. Technology is not a substitute for thought."

"Judges may not be as smart as they think they are, but they also are not as stupid as lawyers may think. Judging is not a job. It is a sacred trust."

"People abide the judgment of the court by observing that due process of law has been followed."

And perhaps the most thought-provoking quote: "We leave our moral fingerprints on everything we do."

These quotes that epitomize Judge Jenkins are consistent with our highest ethical and professional goals. The Utah Rules of Professional Conduct only set a minimum standard of moral and ethical conduct in the practice of law. In 2003, the Utah Supreme Court "raised the Bar" by approving additional ethical rules to give further guidance as to how lawyers should strive to act: the Utah Standards of Professionalism and Civility. The Standards include general principles that are worth reviewing on a regular basis. For example, the Standards provide:

> A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

As earnest participants in our adversary system of justice, it can be difficult to follow all the ethical rules and standards. Lawyers love for rules to be written down. In the area of ethics, perhaps the best "rules" to remember are those that are unwritten, or at least those that don't sound like just another code provision. Reminding ourselves that "[w]e leave our moral fingerprints on everything we do" provides

motivation to leave exemplary fingerprints. How will our associates, clients, and opposing counsel feel about us and the legal system after the case is over?

At a recent ethics CLE event the presenter, Anthony Gray, suggested the following tests when faced with a moral or ethical question:

The legal test: Does the conduct violate the law?

The professional standards test: Does the conduct violate our professional standards?

The gut test: Do you feel good or bad inside about your conduct?

The front page test: Would you feel ashamed if your conduct was reported on the front page of the newspaper?

The role model test: If everyone engaged in the conduct, would that be good for society?

The mirror test: How will you feel about yourself when you look in the mirror after engaging in the conduct?

The golden rule test: Is your proposed conduct consistent with how you would like to be treated?

Would you tell your mother test? Would you tell your kids test? No explanations needed.

My impression is that the vast majority of Utah lawyers are professional, courteous, and ethical. Overall, I think we do a pretty good job at modeling ethical behavior for our colleagues and clients. This is quite remarkable, given that ours is a service profession involving high stakes, high emotions, and high stress. Of course, for each of us there is always room for improvement. Fortunately, our Bar has had longstanding good examples of lawyers and judges, like Bruce Jenkins, who live our profession's highest ideals.

Litigation, Technology & Ethics: Teaching Old Dogs New Tricks or Legal Luddites Are No Longer Welcome in Utah

by Randy L. Dryer

Technology is growing on an exponential curve and is touching every aspect of our lives. Changes that once took decades or centuries now take years. Even our judicial system, a system based on centuries-old jurisprudence and historically resistant to rapid change, is being impacted. The legal profession, viewed by some as a notoriously technophobic profession, is undergoing significant technological disruption. The litigation process, in particular, has been affected by technological advancement in ways unimaginable ten, or even five, years ago. We now do much of our Rule 11 pre-suit investigation through online search. Personal service of process through social networks is now acceptable in certain circumstances; complaints, exhibits, and other court filings are made electronically; the collection and production of discoverable evidence is aided by computer-assisted review and predictive coding; case-management software is commonplace as disputes involve vast amounts of digital information stored not only on servers, but on mobile devices and remotely in the cloud; case outcome and damage assessments are done by computers using complicated algorithms; jury selection is assisted by real-time social media research and software; and trials feature sophisticated presentation technologies, such as 3D modeling, animation, digital exhibits, and computer-generated simulations and re-creations.

All of these technological advances, of course, have potential ethical implications for the way we lawyers conduct ourselves. In August 2012, the American Bar Association recognized the impact of technology on the practice of law by amending the Model Rules of Professional Conduct after a three-year study by the Commission on Ethics 20/20. Although only a handful of states have incorporated the changes into their rules, most states are actively studying the Model Rule revisions. For a state-by-state recap of the status of the consideration of the revised Rules, see the link provided in the ABA Ethics Tip (May 2014), *available at* http://www.americanbar.org/groups/professional_responsibility/services/ethicsearch/ethicstipofthemonthmay2014.html. Numerous commentators have observed how the Model Rule changes, when adopted, will affect lawyers in every area of practice. *See* Daniel J. Siegel, *Lawyers Can No Longer Stick Their Heads in the Sand*, Litig., Vol. 41, No. 2 (Winter 2015), *available at* http://www.americanbar.org/publications/litigation_journal/2014-15/winter/lawyers_can_no_longer_stick_their_heads_the_sand.html. Most importantly for Utah lawyers is the fact that on March 4, 2015, the Utah Supreme Court adopted all the ABA changes to Rule 1.1 on Competence and Rule 1.6 on Confidentiality of Information. Despite the significance of these changes, there was not a single comment filed by any Utah lawyer when the proposed rules were posted for comment in October 2014. The changes became effective May 1, 2015, and have far-reaching implications for practitioners.

The bottom line is that being a legal Luddite[1] is no longer acceptable in Utah. The revisions to these two rules make it abundantly clear that ethical practice now requires technological competence. *See* Megan Zavieh, *Luddite Lawyers Are Ethical Violations Waiting to Happen*, Lawyerist (December 2, 2013) *available at* https://lawyerist.com/71071/luddite-lawyers-ethical-violations-waiting-happen/.

This article reviews the revisions to Rules 1.1 and 1.6 and sounds the warning on the potential ethical issues created by technological advances in four areas – communicating with clients, electronically

RANDY DRYER is a Professor of Law (Lecturer) at the S.J. Quinney College of Law and is Of Counsel to the Salt Lake City based law firm of Parsons Behle & Latimer.

stored information, social media, and data management.

RULE OF PROFESSIONAL CONDUCT 1.1

Utah Rule 1.1 is now identical to the ABA Model Rule and addresses the duty of competence that every lawyer owes to a client. That duty of competence now extends to having a working understanding of technology. Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation."

Comment 8 to Utah R. Prof'l Conduct 1.1 was amended to make clear that an understanding of technology is an expected duty of every lawyer. Comment 8 provides,

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[2]

Model R. Prof'l Conduct 1.1, cmt. 8 (emphasis added). Of course, understanding the risks and benefits of relevant technology necessarily implies that lawyers will keep abreast of new technologies and will understand how they work. Our clients are increasingly technologically competent, and the newly adopted comment requires us to be likewise. As explained in greater detail below, these seemingly simple nine new words have significantly expanded the practical scope of what today's ethical lawyer must understand and confront. *See* Carolyn Fairless, *Ethics: Attorney's Duty of Competence with Technology*, *available at* www.trial.com/cle/materials/2013/fairless.pdf.

RULE OF PROFESSIONAL CONDUCT 1.6

Utah Rule 1.6 is also now identical to the ABA Model Rule. It addresses the duty to preserve client information and requires a lawyer to act competently to safeguard against unauthorized access to information and prevent inadvertent disclosure. The rule requires a lawyer to take "reasonable efforts" to prevent unauthorized access to or disclosure of client information. New Comment 18 to the rule was written with technology in mind

and gives guidance as to what may constitute reasonable efforts:

> Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

Model R. Prof'l Conduct 1.6, cmt. 18. As discussed in greater detail below, technology has dramatically impacted the practice of law, and we are just beginning to see the interplay between technology and the revised Rules of Professional Conduct.

No Utah ethics advisory opinions address the ethical issues arising from recent technological advances.[3] As a consequence, Utah lawyers must look to other jurisdictions, which are just beginning to interpret and apply the revised ABA Model Rules or otherwise address the ethical implications of technological change.

Communicating with Clients
(New Channels and New Ethical Challenges)

The ways lawyers and clients communicate with one another have changed dramatically since the advent of the Internet. Email remains the predominant communication channel for businesses and lawyer–client communications, although new communication platforms offering text messaging, direct messaging through social networks, VOIP, and video-conferencing are growing in popularity.

The ABA has opined in Formal Opinion 99-413 that encryption is not required when communicating with clients via email, but that opinion was issued in 1999 and is based on an anlysis of obsolete technology. *See* ABA Formal Opinion No. 99-413 (March 10, 1999), *available at* http://cryptome.org/jya/fo99-413.htm. Moreover, 1999 was eons ago as far as technology is concerned. As encryption becomes more and more available in user-friendly formats, the continued reliance on Opinion 99-413 may be misplaced and risky. Model Rule 1.6 imposes a duty upon a lawyer to protect the confidentiality of client information, including communications, and Comment 19 specifically requires a lawyer to take "reasonable precautions to prevent protected communications from coming into the hands of unintended recipients." Model R. Prof'l Conduct 1.6, cmt. 19. Depending on the nature and sensitivity of the information being communicated, encryption may be appropriate and considered reasonable. In 2011, the ABA issued Formal Opinion 11-459 which imposes an ethical duty to warn clients of the privacy and confidentiality risks of communicating through email. *See* ABA Formal Opinion 11-459 (August 4, 2011), *available at* www.americanbar.org/content/dam/aba/administrative/professional_responsibility//11_459_nm_formal_opinion. Although this opinion was in the context of warning employees that employers may lawfully be entitled to access an employee's email sent from a work computer, the underlying rationale extends to non-employer–employee settings. Today, more and more law firms are adopting encryption software for their email communications, and some argue it will soon become a best practice. *See* Albert Barsocchini, *It's Time to Secure Privileged Communi-*

cations, Law Technology News (August 5, 2014), *available at* http://www.legaltechnews.com/home/id=1202665752496?slreturn=20150214182249. The ABA Legal Technology Research Center noted, after Model Rules 1.1 and 1.6 were revised, that email encryption clearly reduces the risk of a breach of the duty to preserve the confidentiality of attorney–client communications.

We are also witnessing the emergence of a fledgling industry that offers ephemeral messaging platforms to professionals such as lawyers and accountants. Relatively new services such as Privatext, Confide, Wickr, and TigerText offer varying degrees of encryption, self-deleting functions, and privacy protections. At a minimum, counsel should be aware of these platforms so they may intelligently inquire of a client or prospective client if he or she is using such platforms. Moreover, if a client wishes to communicate with counsel using a more private or secure way than traditional email, the revised rules require a lawyer to do so. It is incumbent on the lawyer to understand how such services work, what protections they actually provide, and what their limitations may be. For example, some encryption services, while protecting the contents of an email, nonetheless leave a trail of metadata as it is routed through a third-party server. Avoiding a metadata trail may or may not be important to a client, but the issue should likely be discussed. Pleading ignorance about the technology is ethically no longer a satisfactory excuse. Although beyond the scope of this article, there is a looming question about whether a lawyer may ethically advise a client to use ephemeral messaging as a way to reduce the amount of discoverable evidence and thus mitigate the high costs of e-discovery.

Encryption is not the only security issue with email. The "reply all" and "blind copy" features of email are potential ways to unintentionally send privileged communications to improper persons. The "autofill" function of most email platforms is also a potentially troublesome feature as a non-attentive lawyer may unintentionally send an email to someone other than the client. The New York Legal Ethics Reporter in March of this year identified several recommended "best practices" to mitigate the ethical risks of using email. *See* Robert Barrer, *Ethical Implications & Best Practices for Use of Email*, New York Legal Ethics Reporter (March 1, 2015), *available at* http://www.newyorklegalethics.com/ethical-implications-best-practices-for-use-of-email/.

Electronically Stored Information ("Where Angels Fear to Tread")

Countless new information systems, social media platforms, and mobile devices are generating electronic data at staggering rates. It is estimated that businesses with 1,000 or more employees produce on average a petabyte of data, or 1.04 million gigabytes, every year. This tsunami of electronic information will only grow larger as the internet of things becomes a reality and billions of internet-connected devices continuously gather information about us and our environment. This deluge of data has changed the very nature of discovery. Not only has it expanded the universe of potential evidence, it also has fundamentally altered the way evidence is collected, reviewed, and produced. Technology assisted review (TAR) of electronically stored information (ESI) is now a practical necessity in many cases due to the large volume of potentially discoverable ESI and the huge cost of manually reviewing the data. Discovery is no longer measured in the number of documents, but in the number of bytes. One particular form of TAR is predictive coding, which is the use of computer algorithms and machine learning to conduct the review of ESI. Predictive coding was initially met with skepticism by lawyers and judges alike, and it was not until 2012 that the first court approved its use. *See DaSilva Moore v. Publicis Groupe*, 287 F.R.D. 102 (S.D.N.Y. 2012). Today, it is receiving growing judicial acceptance. See *Rio Tinto, PLC v. Vale S.A.*, 2015 WL 872294 (S.D.N.Y. March 2, 2015), and cases cited therein. Some have forecast that TAR will become an ethical obligation. Others have warned about the "ethical and malpractice horrors" for any lawyer who outsources his or her duties to

machines or non-lawyers. Regardless of one's view about TAR, it cannot rationally be denied that today's discovery landscape has been dramatically altered due to ESI, and technology is playing a role in that new landscape.

The legal and ethical risks associated with the improper preservation, assessment, and production of electronically stored information have never been greater. Today's lawyers must become conversant with a new lexicon – filtering, deduplication, machine learning, predictive coding, metadata, and seed sets – and adept at utilizing the related technologies or associating with someone who does. The California State Bar has issued an ethics opinion that says an attorney lacking the required competence for e-discovery issues in a case must either acquire the necessary expertise, associate with or consult with others who do, or decline the representation. *See* Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 11-0004, *available at* www.calbar.ca.gov/Portals/0ldocuments/publiccomment//2014_11-0004ESI03-21-14.pdf.

Social Media
(A Communications Revolution and an Ethical Quagmire)

Every litigator knows how social media has become a goldmine of discovery for impeachment, admissions, and inconsistent statements. During my thirty years as a civil litigator, I increasingly observed the "smoking gun" document being replaced by the smoking gun Facebook post, tweet, or Instagram photo. Ten years ago, the word Facebook or Twitter would never have appeared in a court opinion. Today, there are literally thousands of published opinions where social media is referenced. There are 1.4 billion Facebook accounts in the world and hundreds of other social networks. Enterprise social media platforms (internal Facebook-like platforms used by companies to facilitate communication between employees) are growing in popularity and exponentially expand the volume of discoverable information. Sometimes, even lawyers cannot resist the allure of social media in representing their client and make ill-advised use of social media platforms in advancing their litigation. A Louisiana lawyer was recently recommended for suspension for being complicit with her client in a "social media blitz" aimed at influencing two judges in a child custody case. *See* Debra Cassens Weiss, *Social Media Blitz in Custody Case Yields Possible Suspension for Louisiana Lawyer*, ABA Journal (Feb. 17, 2015), *available at* http://www.abajournal.com/news/article/social_media_blitz_in_custody_case_brings_possible_suspension_for_louisiana.

Lawyers are adopting social media for marketing and other purposes but are just now beginning to think through the potential ethical issues. Much has already been written on the ethical pitfalls when lawyers use social media for professional purposes, and this article does not address this issue. However, lawyers must address numerous ethical issues when clients or opposing parties use social media during litigation. The New Hampshire Bar Association in Opinion 2012-13/05 has noted that lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation." Some state bars are also imposing an ethical duty to advise a client about the potential impact of social media posts on their lawsuit. Another potential issue is whether a lawyer has an ethical duty to investigate a juror's response on *voir dire* or to monitor the public posts of jurors during trial to *see* if jurors are following the court's admonition to not discuss the case until they retire to deliberate. For a listing (as of December 1, 2014) of links to state bar opinions addressing social media ethical concerns, see the Library Guide prepared by the University of Georgia Law School Library, *available at* http://libguides.law.uga.edu/content.php?pid=551040&sid=4540186. Technology in general, and social media in particular, has become such an integral part of our lives that the day is not far off where the failure to "Google" the opposing party or key witness prior to their deposition or the failure to review a client's social media posts and advise them what they may or may not delete, will fall below the standard of care expected of a prudent lawyer and thus constitute legal malpractice.

One of the first things a technologically competent lawyer should do in an initial client interview is dispel several online "myths" that many clients believe.

The first is the great "delete" myth. "Don't worry," says your client, "I deleted that incriminating email, that social media rant, that intimate photo." In cyberspace, there is no such thing as deletion in an absolute sense. A post, even if removed from the site on which it was originally posted, will be cached somewhere, or it will appear on the "Wayback Machine" website.[4] It may still be on the original website's server, or it was automatically uploaded to a cloud account or was downloaded by a third party. A good forensic expert can almost always retrieve or find a deleted piece of online content. Snapchat, the popular app that many teens use for sexting, was recently fined several hundred thousands of dollars by the Federal Trade Commission for false advertising and deceptive business practices for falsely stating that "snaps" disappear and are deleted. Snaps may not be deleted from Snapchat servers, and a recipient may take a screenshot of the photo or message before it is erased from the recipient's phone. Moreover, there are third-party apps that make it possible to save Snapchat

images without the sender knowing and before they disappear. Lawyers need to inform clients that all their social media posts, even those they think have been deleted, are likely discoverable and that you, as a lawyer, have an ethical duty to preserve any evidence that potentially may be relevant to the litigation.

With respect to the ethical discovery and management of information on social networks, there is little guidance in Utah, but the consensus in other states is that a lawyer *can* (a) review any public social network of a witness or party, (b) conduct a Google search of a party, and (c) engage in formal discovery to gain access to private social network accounts and to discover any past social media posts or surreptitious surveillance activities. Most courts will allow access to social media posts by an adverse party upon a showing of potential relevance to the proceeding and that counsel is not simply engaging in a fishing expedition. This is a very low threshold, as virtually everything may have impeachment value. Note, however, that in all jurisdictions that have addressed the issue, an attorney cannot ethically "friend" a witness or opposing party to gain access to non-public account information. For a compilation of materials relating to the ethical issues for lawyers and social media, see Susan Carle, *Materials for Legal Ethics in the Age of Social Media*, American University Washington College of Law, *available at* https://ecf.vid.uscourts.gov/.../Materials_for_Legal_Ethics_in_the_Age_.

Every litigator knows he or she has both a legal and an ethical obligation to preserve relevant evidence when litigation is filed or reasonably anticipated. This duty, however, is particularly challenging when it comes to social media because it is often so easily detected. We are seeing more and more cases where sanctions are being imposed on clients and counsel for not taking steps to prevent spoliation of social media posts. The most infamous case involved a wrongful death claim in Virginia where an experienced personal injury lawyer told his client to "clean up" his Facebook page before filing of the complaint. As a result, the client deleted sixteen photographs from his account, including a photo of him shortly after his wife's death while at a party wearing an "I love hot moms" T-shirt with a drink in his hand. The court considered the deletions to constitute spoliation and fined the lawyer $542,000 dollars and the client $180,000. The lawyer ended up agreeing to a five-year suspension from the practice of law. *See* Patzakis and Murphy, *Facebook spoliation Costs Lawyer $522,000; Ends His Legal Career*, eDiscovery blog, (Nov. 11, 2011), *available at* http://blog.x1discovery.com/2011/11/15/facebook-spoliation-costs-lawyer-522000-ends-his-legal-career/.

Two related questions may arise for the lawyer who is confronted with troublesome social media posted by their client. First, may a lawyer ethically advise a client to change the privacy settings to a more restricted setting so as to remove the social media posts from public view? Second, may a lawyer ethically advise a client to remove certain posts if doing so does not constitute spoliation under the governing substantive law? These are unanswered questions in Utah, but the most recent ethics opinions elsewhere to address these questions answer both questions in the affirmative with one important caveat, i.e., the lawyer must make an appropriate record of the social media information that is removed. *See, e.g.*, New York County Lawyers Association Ethics Opinions 745 (2013); North Carolina Formal Ethics Opinion 5; Florida Ethics Advisory Opinion 14-1 (Jan. 23, 2015); Pennsylvania Bar Association Opinion 2014-300.

The second online myth is "My privacy settings are limited to my 'friends,' so the opposing party cannot access what I post." Nothing on the internet is truly private regardless of one's privacy settings. Social media may be found on computers, mobile devices, networks, and in the cloud. For example, depending on one's settings, photos taken on your mobile phone may automatically be synched to a cloud account and may remain there even if deleted from the device. Some celebrities recently found out how secure the cloud is when their explicit photos were hacked and posted on the internet.

The third online myth has to do with anonymity and ephemeral messaging. Interest in ephemeral messaging apps and services has grown in light of the revelations that the NSA has been monitoring the electronic communications of tens of millions of Americans without their knowledge. Despite their promises of deletion and anonymity, there are too many ways that ephemeral messaging may be retrieved or reconstructed. Moreover, if your client sends an ephemeral message to someone, the contents of the information is still discoverable the old fashioned way by questioning the sender and the recipient in a deposition.

Data Management
(A New Frontier Fraught with Ethical Risk)

The year 2014 has been called the "Year of the Data Breach," and data security has been deemed one of the major risks for law firms. *See generally* ABA Cybersecurity Legal Task Force Report, *available at* http://mntech.typepad.com/msba/2013/10/aba-cybersecurity-legal-task-force-issues-report-and-resolution-118.html. Indeed, many large corporations are insisting that their outside law firms implement specific safeguards to protect data. Some financial institutions are requiring outside counsel to answer lengthy questionnaires about their firm's cybersecurity measures, while others are doing on-site inspections. The professional liability insurance industry now offers cyberinsurance to protect against data breaches, and law firms would be well advised to consider adding it to their standard malpractice coverages. The potential legal liability and reputational damage when a law firm mishandles client information is obvious and often catastrophic. In light of the revisions to Model Rules 1.1 and 1.6, lawyers should now add potential ethical discipline to the list of risks flowing from a data breach.

The ethical issues (and potential legal liability) surrounding data management may arise in countless ways but usually occur in one of the following four situations: (1) information stored in the cloud; (2) the disclosure or receipt of metadata; (3) the negligent or unintentional release of client information; or (4) a data breach by outside parties.

Cloud storage: Storage of files in remote online servers is becoming increasingly common in the business world due to its low cost, ease of use, and flexibility. Lawyers, however, have been hesitant to embrace cloud storage due to concerns about its acceptability under applicable ethics rules. A 2014 ABA survey showed that only 30% of lawyers responding reported they used cloud-based services in their practice with one-fourth

noting a lack of ethical guidance as a reason. Fewer than half of the state bars have issued ethics opinions addressing cloud services (Utah is not one of them), but all have held that they are ethically permissible if the lawyer/vendor takes reasonable precautions to ensure that client data is protected. Importantly, many opinions impose a duty on the lawyer to exercise due diligence in selecting a cloud service provider. Each state reflects slightly different views on what constitutes reasonable precautions. Some states impose a generally worded duty to ensure client data is secure and accessible (*e.g.*, Vermont), while others list specific safeguards that should be considered (*e.g.*, Pennsylvania, which identifies fifteen possible safeguards). For a listing and a link to each state's opinions, see the chart and accompanying analysis prepared and posted by the ABA Legal Technology Resource Center, *available at* http://www.lawtechnologytoday.org/2014/05/cloud-ethics-opinion-chart-updated/. Given the dramatic rise in the number of data breaches involving the cloud over the past few years, a prudent practitioner would be wise to monitor this area closely and obtain consent from a client or at least give notice of the use of cloud services in a retainer agreement, particularly if the client is sensitive.

Because of the growing number of cloud providers, industry trade groups have developed prescriptive guidelines and best practices on how to prevent and remediate the risk and impact of data breaches. In February 2015, the Online Trust Alliance issued a "Data Protection and Breach Readiness Guide," which, among other things, identifies twelve questions to ask a cloud service provider before entrusting your data to them. The guide is available at https://otalliance.org.

Given the new obligations imposed by Rules 1.1 and 1.6, it would be ethically risky for lawyers to not conduct reasonable due diligence before engaging a cloud service provider.

Disclosure or receipt of metadata. The ethical dangers in this area are numerous, and what ethical duties exist depend on the jurisdiction. The ABA has not issued any ethical opinion imposing a duty on lawyers to strip documents of metadata, but several states require reasonable care to be taken to avoid transmitting metadata. As one commentator recently noted, "metadata is the smoking gun in court, and e-discovery is the ballistics test that uncovers it." Shelley Powers, *Don't Mess with One of the E-Discovery Triumvirate* (Feb. 11, 2014), *available at* http://burningbird.net/dont-mess-one-e-discovery-triumvirate. Widely available software can scrub metadata, and every lawyer should consider utilizing this software to avoid potential ethical problems. The ABA has issued an opinion regarding lawyer receipt of metadata. Formal Opinion 06-442 holds that there is no ethical prohibition against lawyers mining the metadata of documents they receive, even from opposing counsel. *See* ABA Formal Opinion 06-442, Aug. 5, 2006, *available at* www.americanbar.org/.../aba/.../YourABA/06_442.authcheckdam.pdf. This position has been criticized, however, and a majority of state bars have taken the contrary position that metadata is confidential information and cannot be mined. For a listing of states that have addressed the ethical issues of metadata, see the chart and accompanying opinion links prepared by the ABA Legal Technology Resource Center, *available at* http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html. Utah has issued no ethnical opinions in this area.

Unintentional release of data. One of the greatest risks of data breaches comes not from malicious outside hackers, but from the inadvertent disclosure or loss due to internal lax controls. The increased prevalence of lawyers and other staff using personal devices to practice law and the widespread use of flash drives and other portable storage devices dramatically raises the likelihood of an unintentional breach. There are numerous examples of lawyers losing laptops or flash drives containing client information. Everyone knows you need to take care to delete information from old computers and tablets, but

many copy machines and printers have hard drives that capture the data copied. Proper disposal of any device that stores data is essential to protecting client and other confidential information. Regular employee training on the importance of data protection is essential, and many clients are requiring their lawyers to have acceptable data protection safeguards in place. Where lawyers use personal devices in their practice, having a BYOD (Bring Your Own Device) policy with appropriate data protection provisions is of vital importance.

Data breach by outside parties. Law firms reportedly have become ripe targets for hackers and thieves since many firms handle sensitive client information but do not employ the same level of cyber security their clients do. *See* Andrew Conte, *Unprepared Law Firms Vulnerable to Hackers*, TribLive News (Sept. 13, 2014), *available at* http://triblive.com/news/allegheny/6721544-74/law-firms-information#axzz3T5U5g3W4. In 2012, Bloomberg News reported that Chinese-based hackers deliberately targeted specific Canadian firms in Toronto to seek confidential business information. In 2014, federal prosecutors charged Chinese military hackers with stealing attorney–client communications from SolarWorld, an Oregon-based solar panel manufacturer. In January of this year, a California-based personal injury firm reported the theft of a laptop computer with personal identifying client information. Security experts report there is a lively trade in stolen legal data, and 14% of lawyers responding to a recent ABA survey experienced a data theft or breach in 2014.

In sum, sound data management is arguably an ethical obligation in light of the revisions to Rules 1.1 and 1.6. These revisions dictate that lawyers (a) make appropriate disclosures to their clients about their use of technology; (b) obtain consent to use that technology; (c) make sure vendor and expert contracts include provisions for security and confidentiality; (d) exercise due diligence in selecting any vendor of cloud services; (e) implement appropriate employee training on security to guard against unintentional data loss; and (f) develop a comprehensive security and data breach plan. The online Trust Alliance recently completed a review of more than 1,000 data breaches from 2014 and concluded that more than 90% of them could have been avoided. *See 2015 Data Protection & Breach Readiness Guide*, Online Trust Alliance (Feb. 13, 2015), *available at* https://otalliance.org/news-events/press-releases/

online-trust-alliance-releases-2015-data-protection-breach-readiness.

CONCLUSION

Substantive law often lags behind technology and the updating of legal ethical standards is no different. However, on May 1, 2015, the gap between technology and ethics in Utah was dramatically reduced. Utah lawyers must now accept the new digital reality in which they practice and, if not welcome technology with open arms, at least understand how technology has irretrievably impacted the practice of law. Legal Luddites are soon to become a dying breed.

1. The Luddites were 19th Century English artisan workers who protested against the use of machinery in the industrial revolution because technology threatened their jobs. They organized themselves into groups and went on rampages in factories physically destroying machines. They were led by a John Ludd and referred to as "Luddites." *See* http://en.wikipedia.org/wiki/Luddite. The term has since been used to describe people who are incompetent when using new technology.
2. Although the drafters of the revised Comment 8 noted that the revised comment "does not impose any new obligation on lawyers," they nonetheless believed it important to make explicit that the duty of competence includes the duty to understand technology.

> Lawyers must understand technology in order to provide clients with the competent and cost-effective services that they expect and deserve.… Because of the sometimes bewildering pace of technological change, the Commission believes that it is important to make explicit that a lawyer's duty of competence, which requires the lawyer to stay abreast of changes in the law and its practice, includes understanding relevant technology's benefits and risks. Comment [6] of Model Rule 1.1 (Competence) implicitly encompasses that obligation, but *it is important to make this duty explicit because technology is such an integral – and yet at times invisible – aspect of contemporary law practice*. The phrase "including the benefits and risks associated with relevant technology" would offer greater clarity regarding this duty and emphasize the growing importance of technology to modern law practice.
>
> ABA Commission on Ethics 20/20 Report, at 8 (2012) (emphasis added).

3. According to the listing of ethics advisory opinions maintained on the state bar's web site, the last advisory opinion to address Utah's Rule 1.1 was in January of 2008 and dealt with whether an attorney may provide legal assistance to a pro se litigant (Opinion No. 08-01) *available at* http://www.utahbar.org/category/ethics-advisory-opinions/1-1-competence/.
4. The Wayback Machine is a digital archive of the World Wide Web and other information on the internet created by the Internet Archive, a non-profit organization based in San Francisco, California. Established in 1996, the non-profit archives cached pages of web pages. The name Wayback Machine is drawn from the animated cartoon series, The Rocky & Bullwinkle Show, where the two main characters, Mr. Peabody and Sherman, used a time machine to witness and participate in famous events in history. *See* Wikipedia, Wayback Machine, *available at* http://en.wikipedia.org/wiki/Wayback_Machine.

The Constitutionality of Judgments by Confession: Some Practical Considerations

by Joshua L. Lee

Judgments by confession are authorized under Utah Code Section 78B-5-205, and the procedure for obtaining a judgment by confession is set forth in Rule 58A(f) of the Utah Rules of Civil Procedure. A judgment by confession was a recognized procedure in Utah even before Utah achieved statehood in 1896, *Bacon v. Raybould*, 4 Utah 357, 10 P. 481, 511 (Utah 1886), being historically referred to as a "cognovit judgment" or a "judgment on warrant of attorney." *Utah Nat. Bank v. Sears*, 44 P. 832, 832 (Utah 1896). Judgments by confession have traditionally been viewed by the judiciary with a great degree of skepticism, being characterized by one court as "the loosest way of binding a man's property that ever was devised in any civilized country." *Alderman v. Diament*, 7 N.J.L. 197, 198 (Sup. Ct. 1824).

Like most civil litigation attorneys in Utah, I regularly negotiate judgments by confession as part of settlement agreements, and I have had occasion to seek their entry in courts. A recent experience prompted me to research and evaluate the due process concerns inherent in such a procedure. As discussed below, Utah's procedure for obtaining judgments by confession is generally a proper vehicle for enforcing a debt and does not violate a defendant's constitutional right to due process of law.

My client sought to recover under contracts with two different defendants. The contracts, which contained provisions for judgments by confession, were virtually identical. Likewise, the affidavits and proposed judgments that I prepared were virtually identical. I filed the paperwork in the same courthouse on the same day and at nearly the same time. Being separate cases, each was assigned to a different judge.

In one case, judgment was promptly entered. In the other case, the court issued a ruling entitled "Ruling Denying Judgment by Confession." That ruling stated, in relevant part,

> Rule 58A, URCP, authorizes the Court to enter judgment based upon confession of the Defendant where authorized by statute. Judgment by confession is authorized by U.C.A. § 78B-5-205….
>
> The judgment requested, based upon default in the terms and conditions of an agreement, determined solely by the Plaintiff without any mechanism for recourse or review, would be entered without any mechanism for review or even objection. Even with the stipulation language, this Court is of the view that such a one-sided arrangement without even the possibility of notice and opportunity to be heard on the critical questions of whether the Defendant has failed to comply with the terms and conditions of the agreement of the parties violates the fundamental notion of due process….
>
> The Court recognizes that the parties may have made a contract which may be enforceable. However, in this case a request for judgment is an implicit assertion that the Defendant has violated the contract in some unspecified way without any mechanism for the Defendant to be given notice

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and opportunity to disagree and be heard.

> In order to preserve due process and ensure that the authority of the Court is not arbitrarily imposed, the Court will require that adequate notice of the Plaintiff's intent to seek judgment [be given].

While I appreciated the court's concern, I was somewhat puzzled in trying to reconcile its decision with the fact that both the legislature and the courts of Utah appear to have wholeheartedly endorsed the concept of judgment by confession. I therefore undertook to determine whether the Constitution in fact mandates "notice and opportunity to disagree" where a judgment by confession is otherwise authorized by statute and submitted in accordance with applicable rules.

The constitutionality of judgments by confession has been the subject of frequent discussion. The leading authority on the subject is *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), a case in which the Supreme Court of the United States granted certiorari to address the question of whether a judgment by confession is, per se, prohibited by the Fourteenth Amendment. The Court answered that question in the negative, holding that the facts before it "amply demonstrate[d] that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack." *Id.* at 187–88. However, there are a few important points from this opinion, and decisions following it, to be considered.

First, the doctrinal basis for the Court's holding was the well-settled principal that due process rights may be waived. *Id.* at 185. From a practical standpoint, this raises the question of what exactly will constitute waiver sufficient to uphold a judgment by confession. The *D.H. Overmyer* Court assumed – without firmly deciding – that waiver in the civil context requires the same degree of intent as waiver in the context of a criminal proceeding; i.e., "that it be voluntary, knowing, and intelligently

made, or an intentional relinquishment of a known right or privilege," without any presumption of "acquiescence in the loss of fundamental rights." *Id*. at 185–86 (internal quotation marks and citations omitted). Despite the lack of a firm holding, cases following this decision typically apply a "voluntary, knowing, and intelligent" standard. *See, e.g*., *Underwood Farmers Elevator v. Leidholm*, 460 N.W.2d 711, 714 (N.D. 1990). Given the elements of waiver articulated by Utah courts – i.e., (1) an existing right, benefit, or advantage; (2) knowledge of its existence; and (3) an intention to relinquish the right – it does not seem that it really matters whether the criminal standard applies or not. *Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d 935, 940 (Utah 1993).

In applying the voluntary, knowing, and intelligent standard, the *D.H. Overmyer* opinion found that the mere execution and delivery of the judgment by confession, by a sophisticated corporate entity, satisfied this standard. 405 U.S. at 187. However, the Court issued this holding with the caveat that proper waiver might not be found "where the contract is one of adhesion, where there is great disparity in bargaining power, [or] where the debtor receives nothing for the cognovit provision." *Id*. at 188. Notably, federal courts following *D.H. Overmyer* have held that to satisfy the knowing and intelligent standard, the debtor need not be aware of all the procedural intricacies of a judgment by confession but "need only know that if he does not comply with the terms he has agreed to for payment of the debt, the creditor may confess judgment against him and forthwith seize his property to satisfy the debt it says is owed." *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1273 (3d Cir. 1994).

The question that the *D.H. Overmyer* opinion did not overtly answer is who has the burden of producing facts relative to waiver and when. The Court did note that if the judgment is entered improperly, the debtor has the option of challenging the judgment through a motion to vacate. 405 U.S. at 188. Following this line of reasoning, courts have held that a creditor seeking judgment by confession need not request an evidentiary hearing on waiver before obtaining judgment; "Rather, the burden is on [the] defendant in its motion to vacate and in any hearing thereon to set forth fully the evidence showing either that the alleged amount owed had no basis in fact (e.g., was miscalculated) or that the agreement was not knowingly and voluntarily entered." *Atlantic Leasing & Fin., Inc. v. IPM Tech., Inc.*, 885 F.2d 188, 193 (4th Cir. 1989) (citation omitted).

The upshot of all of this is that judgments by confession, entered without notice and an opportunity to be heard, do not in themselves offend due process. The Utah Legislature has specifically authorized judgments by confession, and the Utah Rules of Civil Procedure define the process by which they are to be submitted. The Rules "[are] designed to provide a pattern of regularity of procedure which the parties and the courts [can] follow and rely upon." *Brigham Young Univ. v. Tremco Consultants, Inc.*, 2007 UT 17, ¶ 29, 156 P.3d 782 (alterations in original) (citation and internal quotation marks omitted). Neither practitioners nor courts should insist upon procedures not specified in the Rules. To impose ad hoc procedural burdens on a creditor seeking to enforce a judgment by confession would undermine the utility of such provision and would deprive the creditor of the benefit of its bargain and the "pattern of regularity" set forth by the Rules of Civil Procedure. While they seem somewhat drastic, judgments by confession are a valuable tool in facilitating the resolution of disputes that might not otherwise be settled.

Laurie Susan Hart

1956–2015

It is with tremendous sadness and gratitude that we pause to remember the life of our friend and colleague Laurie S. Hart. She had been undergoing treatment for recently diagnosed pancreatic cancer, but a ravaging infection cut short her fight against that disease. Her passing is an enormous loss for her family, friends, clients and colleagues at Callister Nebeker & McCullough.

Laurie graduated from Brigham Young University, J. Reuben Clark Law School in 1986. She began her legal career as an associate at Jardine Linebaugh Brown & Dunn. In 1995 she joined CNM, working mainly in corporate transactions and estate planning. She served on the CNM Board of Directors from 2004 through 2012, acting as Secretary and Treasurer of the Firm.

Laurie was a Fellow of The American College of Trust and Estate Counsel (ACTEC), a past Chair of the Estate Planning Section of the Utah State Bar Association, and a past member of the Board of Directors of the Salt Lake Estate Planning Council. Laurie was a founding member of the United Way of Salt Lake Women's Philanthropic Network and a member of the Elder Law/Elder Care & Estate Planning Group. She served on boards of numerous charities and supported many local charities with financial donations. She performed volunteer legal counseling for the elderly through the Utah Needs of the Elderly Committee.

Laurie was a loyal advocate and counselor, fully engaged in the needs of her clients and the matters they entrusted to her. Many of her clients became lifelong friends. During her career Laurie's legal expertise was sought out by some of the State's leading businesses and she provided estate planning services for generations of the wealthiest families in Utah. Laurie also found time to provide pro bono estate planning for the elderly and for first responders. She performed untold hours of legal work for people that just needed help. She mentored many young lawyers. She loved and supported her extended family of nieces, nephews and their children too. Although it was far too brief, Laurie lived a life that truly mattered and she made a difference in the lives of many. We will miss her.

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Attorneys at Law

Contemporary Trends in Qualified Immunity Jurisprudence: Are Circuit Courts Misapplying Graham v. Connor*?*

by Jay Gold

Recently, headlines involving the use of force by police officers have flooded the news and sparked strong reactions. Despite these headlines' prevalence, there are likely many people, lawyers included, who do not fully understand the legal standards that govern whether officers are subject to civil damages liability for the force they apply. It will thus be useful to step back and look at these standards and the principles underlying them.

Qualified immunity shields officers exercising discretionary functions from liability for civil damages unless they "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, to overcome qualified immunity, a plaintiff must show (1) the violation of a constitutional right and (2) that this right "was clearly established." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citation and internal quotation marks omitted). This article will focus on the first prong, which, in the excessive force context, requires a plaintiff to show that the officer violated the prohibition against "unreasonable searches and seizures." U.S. Const. amend. IV.

The force used to effectuate "an arrest, investigatory stop, or other 'seizure' of a free citizen" must be "objectively reasonable." *Graham v. Connor*, 490 U.S. 386, 395–97 (1989) (citation and internal quotation marks omitted). In assessing whether force is reasonable, courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against" the importance of the governmental interests alleged to justify the intrusion. *Id.* at 396 (citation and internal quotation marks omitted). The ultimate question is whether the "totality of the circumstances" justifies the force applied. *Id.* (citation and internal quotation marks omitted).

However, rather than grappling with the totality of the circumstances, circuit courts have analyzed reasonableness under rigid, factor-based tests. Conversely, the United States Supreme Court has reaffirmed that *Graham v. Connor* demands a malleable, case-specific inquiry. This article will provide further background on the required inquiry before contrasting circuit courts' approach to reasonableness with the Supreme Court's.

Graham's Insistence on a Malleable, Case-Specific Inquiry

In *Graham*, the Court did not prescribe a one-size-fits-all-cases test for reasonableness. "[T]he right to make an arrest or investigatory stop," the Court explained, "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* But determining whether force is reasonable in a particular case requires an inquiry that is incapable "of precise definition or mechanical application." *Id.* (citation and internal quotation marks omitted). This inquiry "*requires careful attention to the facts and circumstances of each particular case*, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (emphasis added) (citing *Tennessee v. Garner*, 471 U.S.1, 8–9 (1985)).

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While *Graham* pointed to factors that may often be relevant to this inquiry, *id*., it did not suggest that these factors are dispositive or that courts must analyze them. It merely suggested that they could be part of the "totality of the circumstances." *Id*. (citation and internal quotation marks omitted). Thus, on the whole, *Graham* established a malleable, case-specific inquiry based on the totality of the circumstances rather than a mechanical test based on specific factors.

The "*Graham* Factors" vs. The "Factbound Morass of 'Reasonableness'"

Despite *Graham*'s guidance, circuit courts have analyzed reasonableness under tests that hinge almost exclusively on weighing the so-called *Graham* factors: "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to flee." *Morris v. Noe*, 672 F.3d 1185, 1195 (10th Cir. 2012); *see Cavanaugh v. Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010) (finding force unreasonable because it "was not justified by any of the *Graham* factors"); *see also Ramirez v. Martinez*, 716 F.3d 369, 377–78 (5th Cir. 2013) (weighing these factors); *Morris*, 672 F.3d at 1195–96 (same); *Vinyard v. Wilson*, 311 F.3d 1340, 1347–48 (11th Cir. 2002) (same). This approach is problematic because officers must decide whether to use force under a wide range of facts and circumstances, some of which are not subsumed by these factors. *See Saucier v. Katz*, 533 U.S. 194, 205 (2001) (stating that the reasonableness inquiry "must accommodate limitless factual circumstances"), *receded from by Pearson v. Callahan*, 555 U.S. 223 (2009). Further, an officer deciding whether to use force likely will not mechanically weigh three discrete factors and may not even have time to do so. Rather, the officer will likely reach a decision based on a holistic assessment of the facts and circumstances with which he or she is confronted.

The Supreme Court has stated that courts "must slosh…through the factbound morass of 'reasonableness,'" rather than applying a mechanical test. *Scott v. Harris*, 550 U.S. 372, 383 (2007). This approach is more reflective of the realities of law enforcement. The following cases will highlight these two approaches and the gap between them.

Morris v. Noe, 672 F.3d 1185 (10th Cir. 2012):

This case arose when Officer Jamie Noe and two other officers responded to a domestic disturbance call. 672 F.3d at 1189. William Morris III arrived roughly twenty minutes after the officers did. *Id*. Morris then approached and began talking to Quinton Bell, who was involved in the initial disturbance. *Id*. at 1190. When Morris began backing away from Bell and towards the officers, two of the officers tackled him. *Id*. As a result, Morris suffered injuries that hospitalized him for thirty days. *Id*. He died several years later. *Id*. Subsequently, his widow brought action, alleging excessive force. *Id*. at 1188, 1190.

The circuit found the force Officer Noe applied unreasonable because "two of the *Graham* factors weigh[ed] strongly in Plaintiff's favor, while one weigh[ed] slightly in [Noe's] favor." *Id*. at 1195–96. The circuit recited the objective reasonableness test but promptly turned to the "*Graham* factors." *Id*. at 1195.

The first factor weighed in Officer Noe's favor because assault, the crime Officer Noe alleged he "had probable cause to arrest

Morris for," may justify a tackle. *Id*. However, the second factor weighed in Morris's favor because Morris "posed little threat to officer or bystander safety." *Id*. at 1196. Morris was not armed, "made no overt threats," and was not "within reach of Bell." *Id*. Further, "Morris was backing away from Bell in apparent attempt to deescalate the encounter." *Id*. Finally, the third factor weighed in Morris's favor because he was not "resisting arrest" or "attempting to flee." *Id*. After weighing these three factors, the circuit found a sufficient showing of a constitutional violation. *Id*. at 1196–98.

Thus, the Tenth Circuit tried to precisely define and mechanically apply a test that is incapable "of precise definition or mechanical application," *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citation and internal quotation marks omitted). Rather than assessing the reasonableness of an officer's conduct under the totality of the circumstances in the case at hand, the circuit superimposed a rigid three-factor balancing test over these circumstances. This approach stands in contrast to the approach the Supreme Court took in *Scott*, a more recent excessive force case.

Scott v. Harris, 550 U.S. 372 (2007):

In this case, Deputy Timothy Scott bumped a fleeing motorist – who had driven well over the speed limit on a two-lane road, crossed the double yellow line, run red lights, and forced cars off the road – with his police cruiser. 550 U.S. at 375, 379. The motorist lost control of his car and crashed. *Id*.

When the case reached the Supreme Court, the motorist argued that deadly force is unreasonable in the absence of three preconditions: "(1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect some warning." *Id*. at 382 (footnote omitted).

However, the Court rejected this argument because "[*Tennessee v.*] *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Id*. Rather, "*Garner* was simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation." *Id*. (citing *Graham*, 490 U.S. at 388). That case merely "held that it was unreasonable to kill a 'young, slight, and unarmed' burglary suspect" who was fleeing the police "on foot." *Id*. (quoting *Garner*, 471 U.S. at 21). Moreover, the factors that "*might have* justified shooting the suspect" in *Garner* were inapplicable here. *Id*. at 383. Unlike the officer in Garner, Deputy Scott bumped a fleeing motorist who had severely endangered human lives. *Id*. Thus, the Court explained, "[a]lthough respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Id*.

In this morass, the Court did not discuss specific preconditions for deadly force or weigh the "*Graham* factors." Rather, it looked to the facts, weighed the risk the motorist posed against the risk Deputy Scott's conduct posed, and held that Deputy Scott acted reasonably when he bumped the motorist, who had "intentionally placed himself and the public in danger." *Id*. at 384. The Court thus approached reasonableness more flexibly than circuit courts have. This approach, while perhaps less convenient than the "*Graham* factors," is more reflective of the practical exigencies of law enforcement and more faithful to *Graham*.

Conclusion

As this article has shown, numerous circuit courts have misapplied *Graham* by applying factor-based tests to officers' conduct rather than grappling with the totality of the circumstances. This approach does not invariably lead to incorrect results, but it can produce such results in some cases. In any event, it does not reflect the practical exigencies of law enforcement as *Graham* contemplated.

Not all circuit court decisions have misapplied *Graham*. Some have attempted to heed its guidance. In the process, one such decision nicely outlined the problems implicit in failing to so.

> [U]nder *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992).

It is understandable why courts wish to sanitize the objective reasonableness test by applying tidy, factor-based tests to officers' conduct. This approach is more convenient than sloshing through "the factbound morass of 'reasonableness.'" *Scott v. Harris*, 550 U.S. 372, 383 (2007). But it is not sufficiently reflective of the complex and varied circumstances officers face or the complex decisions officers must make. Courts should thus remain cognizant of *Graham*, which sought to reflect these realities. This is not meant to suggest that police brutality is not an issue or that officers who overstep their bounds should not be held responsible. Nor is it meant to express any opinion on recent grand jury proceedings, which are beyond this article's scope. Rather, it is merely meant to suggest that, even now, courts should not disregard the realities of police work or cease to protect officers reasonably attempting to perform this work.

The Corporate Miranda Warning: Maintaining Loyalty (and Privilege) During Internal Investigations

by William R. Knowlton

At the time of arrest, criminal suspects are told that they have the right to an attorney and that anything they say can be used against them. This is commonly known as the *Miranda* warning. *Miranda v. Arizona*, 384 U.S. 436 (1966). To bolster the attorney–client privilege with corporate clients during internal investigations, evolving case law admonishes the investigating lawyer to deliver certain disclosures to the company's employees. *See, e.g., United States v. Nicholas*, Case No. 8:08-00139 (Dkt. 338) (C.D. Cal. 2009); *In re Broadcom Corp. Derivative Litig.*, Case No. 2:06-cv- 03252 (Dkt. 272) (C.D. Cal. 2009). This warning is sometimes referred to as the "Corporate *Miranda* Warning."

In 1981, the U.S. Supreme Court held that the attorney–client privilege could be maintained between a company and its attorneys, even though communications had occurred between the company's legal counsel and its third-party employees. *See Upjohn Co. v. United States*, 449 U.S. 383, 386–96 (1981). Chief Justice William Rehnquist, writing for the *Upjohn* majority, reasoned, "the [attorney–client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id.* at 389.

In response to the *Upjohn* ruling and its subsequent progeny, the Utah Advisory Committee on the Rules of Evidence broadened the definition of "client" to allow for a "representative of the client." Utah R. Evid. 504(a)(4). This definition protects disclosures not only of the corporate client to legal counsel, but also corporate employees "who are specifically authorized to communicate to the lawyer concerning a legal matter." *Id.* advisory committee's note.

But how does the attorney–client privilege change when the client is a business entity? This query becomes even more acute for in-house counsel and outside corporate lawyers, especially those attorneys who regularly interact with high-ranking corporate executives.

As attorneys, we have an express duty of loyalty toward our current clients, which prohibits our undertaking concurrent representation that is directly adverse to our client. Utah Rules of Professional Conduct 1.7 cmt. 6 ("Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.").

However, in the representation of corporate clients, potential conflicts may arise from the dual representation of both the company and its employees, such as corporate executives. *Id.*; *see also* Kara Scannell, *For Corporate Lawyers, There's Just One Client*, Wall St. J. (Apr. 13, 2009), *available at* http://www.wsj.com/articles/SB123957668346611921. Prior to undertaking an internal investigation for a corporate client, lawyers should conduct the appropriate internal conflict check to determine

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whether the representation is permissible.

Attorneys representing a corporate client should make the appropriate *Upjohn* warnings to company employees and create contemporaneous evidence that the warning was provided, prior to meeting with the corporate client's employees. This disclosure is even more critical when the attorney has been engaged by the company to perform an internal investigation of potential misconduct by corporate employees.

The purpose of the *Upjohn* warning is to remove any doubt that the lawyer (or lawyers) speaking to the employee represents the company, and not the employee, and that any privilege that attaches to the discussion that ensues is controlled by the company.

In most instances, where the attorney is conducting internal investigations on behalf of the corporate client, the attorney should provide the *Upjohn* warning to a company's employee at the outset of an interview – and then again during any subsequent interviews. At the very least, the *Upjohn* disclosure should inform the employee that:

- the company's attorney represents the company and not the employee;
- communications between the employee and the company's attorney will be privileged;
- however, this privilege belongs to the company, and the company alone can decide whether to maintain the privilege or to waive it; and
- if the company decides to waive the privilege, the contents of the employee interview may be disclosed to third parties.

In an abundance of caution and to help minimize any potential ambiguity, it is prudent for corporate counsel to obtain a written confirmation of the *Upjohn* warning – signed and dated by the individual employee at the time of the interview. Specifically, the written, signed and dated document should confirm: (1) the *Upjohn* warning was delivered by legal counsel to the employee prior to the beginning of the interview; and (2) the exact wording of the *Upjohn* warning that was given by legal counsel to the employee.

Further, when providing a written summary of the employee interview to the corporate client, the lawyer should note: (1) that the delivery of *Upjohn* warning was given to the employee (with the signed employee confirmation attached); (2) any questions posed by the employee to the company's attorney and the response provided; and (3) the attorney's closing remarks to the employee, along with the attorney's mental impressions about the employee. This written summary should be marked as being subject to the attorney–client privilege and the work product doctrine.

New ABLE Act Eases Financial Planning for Families of Individuals with Disabilities

by Michelle Mumford

In December 2014, Congress passed and the President signed the Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014. This new law allows for tax-advantaged savings accounts for people with disabilities. Balances in these accounts will not affect eligibility for means-tested government programs like Social Security and Medicaid. Funds accrued in the account can be used to pay for education, health and dental care, transportation, housing, employment training, and other expenses related to living with a disability. The legislation also includes protection against Medicaid fraud abuse and a state Medicaid pay-back provision.

Interest income earned on the savings accounts is tax-free. Unlike 529 accounts, contributions to ABLE accounts by any individual are made with after-tax monies and are not deductible against federal taxes. So in a typical scenario, a grandparent could deposit $5,000 into a ABLE account on behalf of an individual with a disability. That $5,000 will not reduce the grandparent's taxable income. The $5,000 will accumulate interest tax-free and be available for withdrawals (tax free) for disability-related expenses. The $5,000 will not affect the beneficiary's eligibility for federal assistance, which is usually limited to individuals with assets totaling not more than $2,000, who do not earn more than $700 a month.

The Act is effective in 2015; however, each state must adopt the program by statute. Utah Senator Todd Weiler and Representative Rebecca P. Edwards sponsored Senate Bill 292 during the 2015 legislative session to incorporate the ABLE Account program into Utah statute. Having passed the Utah Legislature, the bill was signed into law by the Governor and takes effect on May 12, 2015. The Utah version of the ABLE Act *includes a state tax credit* of 5% of contributions.

The following are important details from the text of the federal ABLE Act:

- To be eligible, individuals must have a qualifying disability occurring before the age of twenty-six. If the individual is currently receiving benefits under SSI and/or SSDI, the individual automatically qualifies as having a qualifying disability. For those individuals not yet receiving SSI benefits (and therefore not automatically eligible), regulations to be written in 2015 will clarify the standard of proof and documentation required to be eligible as an individual with a qualifying disability.

- The total annual contribution by *all* participating individuals per year is $14,000 (the current gift tax exclusion). If the account reaches more than $100,000 (including interest income), the beneficiary would no longer receive SSI benefits but would still be eligible for Medicaid and other federal programs, despite the means-test requirement. The total contribution limit over time will likely be subject to the individual's state's limit for education-related 529 savings accounts. Utah 529 accounts accept contributions until the account balance reaches $416,000.

- A "qualified disability expense" means any expense related to the beneficiary as a result of living a life with a disability, including "education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary under regulations." Stephen Beck, Jr., ABLE Act of 2014,

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House Resolution 5771, Div. B, §101 (2013-2014).

- The ABLE Act is subject to state implementation. Like 529 plans, states will likely develop ABLE accounts with varied investment strategies or contract with other states to allow individuals to open accounts. Investment changes in the accounts are limited to twice a year.
- Each eligible individual may only have one ABLE account. ABLE accounts must be opened in the beneficiary's state of residence.
- Accounts may not be used as security for a loan.
- Accounts may be rolled into a different ABLE account or beneficiaries changed, if the new beneficiary is an eligible family member.
- The Act amends section 529 of the Internal Revenue Code, and therefore, accounts may be called 529A accounts.
- The Act contains a pay-back provision wherein the state acts as a creditor of the ABLE account and, upon the death of the beneficiary, may file a claim for payment equal to the total medical assistance paid on the beneficiary's behalf, minus any premiums paid. This payment is made *after* any payments due for the beneficiary's qualified disability expenses. Any excess balance in the account belongs to the beneficiary's estate.
- Regulations created in 2015 will further define:
  - information required to open an account;
  - qualified disability expenses; and
  - determinations of disability, including eligible conditions.
- The effective date of the Act is 2015, and the Secretary of the Treasury shall promulgate regulations in 2015.

Generally, the most common method used for life planning for individuals with disabilities has been a Special Needs Trust. The costs associated with opening a Special Needs Trust are sometimes prohibitive for families. Many families will be able to meet their planning needs with an ABLE account and save money in the process. However, for most families, Special Needs Trusts are still recommended, and ABLE accounts will be an *additional* tool used to plan for future life costs and help enable their loved-one to live an independent and full life.

Order from Chaos: The Rule of Art

by Courtney R. Davis

Art law is becoming more visible in the legal domain, from cases of art looting and smuggling to copyright infringement, forgeries, and tax assessment. As art and technology develop, legal theories likewise expand to address new concerns related to digital licensing, resale rights, street art, art investment funds, and even rights over the ubiquitous selfie. But unless one practices intellectual property law or follows the arts page of the *New York Times*, the connection between law and the visual arts might go overlooked. Yet, there is much to be learned by lawyers through the language of art, outside of numerical figures on insurance and estate-planning documents.

Interestingly, art history has been named by some admissions experts as one of the best preparatory undergraduate degrees for law school. Why? Far from simply focusing on aesthetics or subjective reactions, the study of art helps one make visual, theoretical, and historical connections. Art historians are trained to isolate patterns, spot narratives, and interpret facts – skills paramount to the practice of law. Indeed, artworks can be construed as texts of visual language. Whether Renaissance masters or postmodern innovators, artists create visual works wherein the sum equals more than the parts, much like a lawyer crafting a written document or an oral argument.

Interestingly, many of the most noted and influential early twentieth centuries artists were trained as lawyers. Wassily Kandinsky (1866–1944), celebrated for his abstract paintings based on musical symphonies and expressive color harmonies, first studied law and economics at the University of Moscow. At the age of thirty, he refused a professorship in law at the University of Durpat, endeavoring to become an artist instead. Henri Matisse (1869–1954), a contemporary of Kandinsky, also studied the law in Paris, even working as a court administer in Le Cateau-Cambrésis before turning his attention to the creation of vibrant, harmonious, and abstracted images of women and interiors that would characterize the fauve style. While it isn't difficult to imagine the lure of an artist's studio as an escape from the law office, even pre-billable hours and e-filing, the relevant query is not why these artists changed career paths but what the connection is between their legal training and their artistic work.

We often discount the power of visual art to do more than ornament the world around us. While we are aware of the power of art to inspire, to soothe, and even to annoy, we are less conscious of the function of art as a visual record, a transcription of events, or a cultural document. Likewise, we might overlook the power of art to teach, to lead, and even to heal. Our Utah courthouses, for example, boast many rich, inspiring works of art, from paintings to sculptures, stained glass to photography. Although, with our busy schedules and cluttered minds, we might rush past these works without more than a sideward glance. But none of these artworks were intended simply to be pleasant additions to courthouse décor.

The Third District Court in Tooele, for example, features the inspiring *Parhelia* (2006), a glass installation measuring five by twenty-eight feet. The artwork is comprised of narrow bands of color juxtaposed like an imperfect spectrum. Located near the security checkpoint, the backlit work is not only visible to those inside the courthouse but also to those outside, as it is illuminated at night. The title, *Parhelia*, gives us a clue as to the subject of the work, which is more than just a study in color theory. A parhelion is a mock sun or "sun dog," a type of halo created by light reflecting from ice crystals in the atmosphere, which usually creates the appearance of two mirrored sun-like shapes. The reflection of light: the ideal symbol for both the illumination of justice and the gift of enlightenment. In the words of Thomas Jefferson, "He who receives ideas from me,

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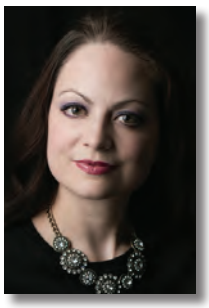

Parhelia by Paul Housberg, courtesy State of Utah Arts & Museums Public Art Collection.

receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me." Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html.

Commissioned by the state of Utah for the Percent-for-Art Program, *Parhelia* was created by Paul Housberg, an artist of international acclaim. Housberg received a Bachelors of Art from the celebrated Rhode Island School of Design and, as a Fulbright Scholar, continued at the International Center of Glass Research in Marseilles, France. In his artist's statement featured on his website, www.glassproject.com, Housberg explains; "My work explores the juxtaposition of order and randomness, as well as the natural human tendency to seek pattern in chaos, our persistent desire to find meaning in disorder." Housberg, Artist Statement, *available at* www.glassproject.com/glass-artist-statement/. This statement could very aptly be applied to our legal work – sorting through accumulations of facts and statements, developing theories, and applying rules of law to create order from disarray.

Parhelia is a non-objective work of art, meaning that its subject matter does not directly draw from the natural world. Often described as being contemplative or meditative, non-objective works allow our minds to rest, to explore, and to reboot while our eyes ponder visual qualities such as color striations, surface textures, and the interplay of light and show. This type of art helps us to think abstractly, freeing our minds from endless chatter, similar to listening to classical music. Works like *Parhelia* create opportunities for thoughts to surface and new ideas to emerge.

The next time you find yourself at court, pause to contemplate the poetry of the visual environment around you, be it in the form of a painting, a sculpture, or an architectural vignette. Ask yourself what you see. You might just discover the answers that you have been seeking, or perhaps even questions you had not yet thought to ask. To browse the 125 repositories of public art across the state, including courthouses and judicial centers, visit the State of Utah Art Collections at the Utah Divisions of Arts & Museums: http://utahdcc.force.com/public/PtlRepositories.

Appellate Highlights

by Rodney R. Parker

EDITOR'S NOTE: We apologize for the length of our column this issue. The Supreme Court cleaned out its closets in anticipation of Justice Nehring's retirement, issuing thirty-nine opinions in the first two months of the year. For comparison, the Court's 39th opinion of 2014 was issued September 19, 2014.

United States v. Cassius, 777 F.3d 1093 (10th Cir. Jan. 27, 2015)

Defendant was convicted of various drug-trafficking offenses. For the purposes of sentencing, the trial court found defendant's offenses included a higher quantity than the jury convicted him for and increased his sentence within the statutory range for the offenses the jury convicted him of. The Tenth Circuit affirmed the sentence based on the trial court's finding, holding that **as long as it does not alter the statutory sentencing range, the finding is not subject to the jury's standard of beyond a reasonable doubt, and therefore, there is no error.**

Monfore v. Phillips, 778 F.3d 849 (10th Cir. Feb. 10, 2015)

This medical malpractice appeal serves as a cautionary tale to co-defendants who plan a joint defense. A widow pursued negligence claims against the doctors and hospital that allegedly failed to diagnose her husband's throat cancer. The defendants maintained a unified front all the way up to pre-trial, denying negligence by anyone. Then, on the eve of trial, some of the defendants settled, leaving one doctor to stand trial by himself. The Tenth Circuit held that **the district court did not abuse its discretion in refusing to allow the doctor to amend his pre-trial order to revamp his trial strategy with new witnesses and exhibits to pin the blame on the absent settling defendants.**

United States v. Dunn, 777 F.3d 1171 (10th Cir. Feb. 10, 2015)

Defendant used peer-to-peer file-sharing software Limewire to download child pornography. The software's default settings make the user's files available for search and download by other Limewire users. Defendant argued that making files available as a result of the software's default settings does not support a conviction for distribution of child pornography. The Tenth Circuit rejected that assertion and affirmed his conviction, reasoning that **passively making files available on the Internet satisfies intent requirement of the crime of distribution of child pornography.**

Seifert v. Unified Gov't of Wyandotte Cnty./ Kansas City, 2015 U.S. App. Lexis 3223, 779 F.3d 1141 (10th Cir. 2015)

A former reserve deputy sued the county sheriff's department under 42 U.S.C. §§ 1983 and 1985 for violation of his First Amendment rights to free speech. The deputy alleged that the department retaliated against him for testifying in support of a criminal defendant in a civil rights trial about mistreatment by federal law enforcement officers. The district court granted summary judgment to the City, supported in part by the conclusion that the deputy's testimony was part of his official duty as a public employee and therefore was not legally protected speech. The Tenth Circuit reversed, holding that **the deputy's courtroom testimony was protected by the First Amendment because it involved the "very kind of speech necessary to prosecute corruption by public officials."** *Id.* [21] (emphasis added).

State v. Strieff, 2015 UT 2 (Jan. 16, 2015)

The Utah Supreme Court analyzed the applicability of the "attenuation doctrine" exception to the exclusionary rule in this case where the police's unlawful detention of the defendant led to the

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discovery of an arrest warrant and was followed by a search incident to arrest. The court noted the lack of controlling authority from the United States Supreme Court, analyzed how other lower courts have handled the issue, **and ultimately adopted its own new approach limiting application of the attenuation doctrine to factual scenarios involving intervening acts of a defendant's free will, such as a confession or consent to a search.** Applying this new standard, the court found that the attenuation doctrine was not implicated and therefore reversed the court of appeals' decision upholding the district court's denial of the defendant's motion to suppress.

McGibbon v. Farmers Ins. Exch., 2015 UT 3 (Jan. 23, 2015)

The Utah Supreme Court held that it lacked jurisdiction over an appeal taken from an order compelling arbitration. Such an order is a final order, so the notice of appeal procedure applies. Here, the appellant filed a petition for interlocutory appeal directly with the appellate court and did not file anything with the district court. The only notice that the district court received of the appeal was a routine letter sent from the Utah Supreme Court. **The Utah Supreme Court held that this form letter could not substitute as the "notice of appeal" that is required under Rule 3** and that it could not treat the interlocutory appeal as sufficient notice because the appellant had not filed a copy of it in the district court.

Migliore v. Livingston Fin., LLC, 2015 UT 9 (Jan. 27, 2015)

The Utah Supreme Court changed the standard for determining when an order is final for purposes of filing an appeal when a Rule 11 motion is pending. In *Clark v. Booth*, 821 P.2d 1146 (Utah 1991), the Utah Supreme Court had held that Rule 11 sanctions were collateral and did not affect the finality of a court's order. Subsequently, in *ProMax Development Corp. v. Raile*, 2000 UT 4, 998 P.2d 254, the Utah Supreme Court adopted a rule that a judgment is not final until resolution of any outstanding requests for attorney's fees. Reversing the Utah Court of Appeals, the Utah Supreme Court repudiated *Clark* and held that **requests for Rule 11 sanctions raised before or contemporaneously with the entry of a final, appealable judgment must be resolved in order for the judgment to be final and appealable.**

State v. Perez, 2015 UT 13 (Jan. 27, 2015)

In the context of legislative amendments to the Indigent Defense Act, **the Utah Supreme Court rejected the government's argument that there is a "clarification" exception to the general rule against retroactivity.** Although prior cases alluded to such an exception, the Utah Supreme Court had never applied it as a freestanding exception, and more recent cases had repudiated it as such. As a result, the law that applied to the defendant's conduct was the law as written at the time of his offense, not as later amended by the legislature.

Riggs v. Ga.-Pac. LLC, 2015 UT 17 (Jan. 30, 2015)

Thirteen days after a jury awarded her $5.26 million in damages for mesothelioma, the plaintiff died. Her estate then brought wrongful death claims under the same theories of negligence, strict product liability, and failure to warn. Defendants moved to dismiss on the grounds that plaintiff's personal injury verdict precluded her estate's wrongful death claim. In this interlocutory appeal from the denial of the motion, the Utah Supreme Court

held **the personal injury judgment does not preclude a wrongful death suit based on clear statutory language that a personal injury claim and a wrongful death claim aim to compensate for two distinct types of losses.** The court was careful to "emphasize that double recovery is impermissible."

Heaps v. Nuriche, LLC, 2015 UT 26 (Jan. 30, 2015)

The Utah Supreme Court held that the Utah Payment of Wages Act does not impose personal liability on the managers of a limited liability company for unpaid wages, reasoning that the act's definition of "employer" does not include managers of limited liability companies.

Cottage Capital, LLC v. Red Ledges Land Dev., 2015 UT 27 (Jan. 30, 2015)

The district court dismissed this case involving enforcement of a guarantee agreement, concluding that it should have been asserted as a compulsory counterclaim in an earlier suit between the parties. The Utah Supreme Court reversed, holding that **Rule 13(a) of the Utah Rules of Civil Procedure does not extend to a counterclaim that has not yet matured at the time of a civil proceeding.**

Graves v. N. E. Servs., Inc., 2015 UT 28 (Jan. 30, 2015)

This case involves allegations of negligence in the hiring, training, and supervision of employees at a business providing services to the disabled, which resulted in the sexual assault of a minor by one of the defendant's employees. The Utah Supreme Court's ruling on an interlocutory appeal from the denial of a defense motion for summary judgment is significant in two respects. First, **the court adopted Section 317 of the Restatement (Second) of Torts, which recognizes a "special relationship" basis for a duty of an employer to exercise reasonable care in preventing an employee from acting outside the scope of employment in "intentionally harming others."** Second, the court held that **Utah's comparative negligence regime calls for apportionment of responsibility for intentional torts.**

Herland v. Izatt, 2015 UT 30 (Jan. 30, 2015)

Party host showed his guest his gun collection. Guest was extremely intoxicated with a Blood Alcohol Content of 0.25. Guest then picked up host's handgun out of curiosity. Host warned guest to handle it with care as it was loaded. Guest shot herself in the head and died. Her estate claimed negligence, and trial court dismissed on summary judgment claiming the host owed guest no cognizable duty under Utah law. The Utah Supreme Court reversed and remanded, **creating a new duty that requires gun owners to exercise reasonable care in supplying their guns to incompetent or impaired individuals, whom they know, or should know, are likely to use the gun in a manner that creates a foreseeable risk of injury to themselves or third parties.**

Summum v. Pleasant Grove City, 2015 UT 31 (Jan. 30, 2015)

Religious organization brought suit under Utah Constitution after dismissal of federal constitutional claims by United States Supreme Court. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). The Utah Supreme Court held that the religious liberty clause of the Utah Constitution does not require Pleasant Grove City to install a proposed Summum religious monument in a park where a Ten Commandments monument is already situated. The court reasoned that even assuming that the Ten Commandments monument amounts to religious exercise or instruction, an injunction requiring Pleasant Grove to erect a second religious monument would not render the allocation of public property and money to the two monuments neutral. The court further reasoned that the neutrality test articulated in *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 935 (Utah 1993), has no application in the context of government monuments and that Summum could not rely on it to facilitate the placement of its own proposed monument.

Provo City v. Utah Labor Comm'n, 2015 UT 32 (Feb. 6, 2015)

The Utah Court of Appeals certified to the Utah Supreme Court an appeal by Provo City and the Workers' Compensation Fund of a Labor Commission's order affirming an administrative law judge's determination that a Provo City employee was permanently and totally disabled. **The Utah Supreme Court addressed the appropriate standard of review for each of the six elements required to establish permanent, total disability.** The court held that the standard for each element differs depending on whether the issue is one purely of fact or a mixed question of law and fact.

***State v. Houston*,**
2015 UT 40 (Feb. 24, 2015)

Utah Rule of Criminal Procedure 22(e) provides that the court may correct an illegal sentence. The Utah Supreme Court held the rule encompasses facial constitutional challenges to a sentence that do not arise at the trial. The court's holding creates a limited exception to the preservation doctrine to preserve appellant's right to raise constitutional issues on appeal that appellant otherwise failed to preserve. **Thus, a defendant may bring constitutional challenges that attack the sentence itself and not the underlying conviction and which do so as a facial challenge, rather than an as-applied inquiry.**

***Bagley v. Bagley*,**
2015 UT App 33, 344 P.3d 655 (Feb. 12, 2015)

The Utah Court of Appeals was called upon to interpret Utah's wrongful death statute, Utah Code Ann. § 78B-3-107 (LexisNexis Supp. 2014), and decide whether a woman could sue herself for damages that would be potentially covered under an insurance policy. The woman was the plaintiff, acting as heir and personal representative for her deceased husband's estate, and also the defendant, acting as the driver alleged to have caused the accident that killed her husband. **The Utah Court of Appeals analyzed the plain language of the statute and concluded that it did not, by its express language, bar the woman's wrongful death claim against herself.** The court commented that if this result is misaligned with public policy, it is the province of the legislature to correct it.

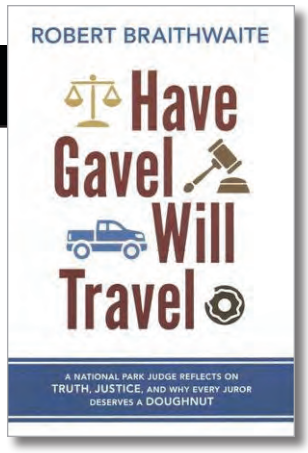
***Zagg, Inc. v. Harmer*,**
2015 UT App 52 (Feb. 26, 2015)

The plaintiff company appealed from the denial of a preliminary injunction to prevent the defendant, the company's former director, from selling shares of the company's stock. The Utah Court of Appeals held that the district court abused its discretion in denying the preliminary injunction. **Specifically, it held that the district court's narrow focus on whether the company would ultimately be able to collect on the note overlooked the value to the company of the bargained-for leverage of the prohibition on the sale of "encumbered shares."**

Dani Cepernich, Taymour Semnani, and Adam Pace assisted in the preparation of this article.

Have Gavel, Will Travel

Reviewed by Judge Catherine Roberts



Call me idealistic, but I have always loved America's national parks. Here are some of the things I enjoy: roughing it in a tent or little cabin in beautiful scenery, having adventures without putting oneself in too much danger, and experiencing a sense of limitless outdoor space. I grew up in the fifties and sixties, like Robert Braithwaite, the author of *Have Gavel, Will Travel*, and our family visited national parks at that time by driving through them. I well remember Smokey the Bear's stern face warning everyone that "only you can prevent forest fires." (National parks were perhaps the only place one could emerge from the haze of cigarette smoke that seemed to shroud everything in the '50s and '60s.) My mother abhorred even the thought of camping and preferred tennis at the club to hiking; thus, we never really went off the beaten track.

Have Gavel, Will Travel: A National Park Judge Reflects on Truth, Justice, and Why Every Juror Deserves a Donut

by Judge Robert Braithwaite
Publisher: Plain Sight (January, 2015)

Available in paperback and e-book formats

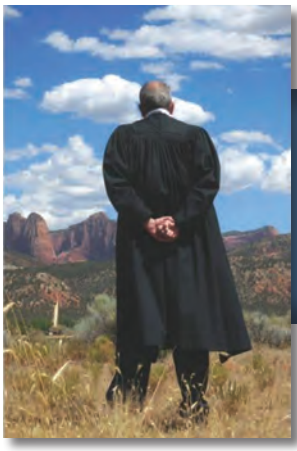
Finally, in my twenties, I met the man who would become my husband and began to explore national parks and the even more pristine wilderness areas. We hiked the Sierras, walked on glaciers, and even climbed giant granite domes, although my inherent fear of heights precluded much of that. Later, we took our children to Yellowstone, Bryce, Arches, Jackson Hole, Mesa Verde, and Zion. I remember our then three-year-old son talking incessantly about visiting "voltanoes," (Yellowstone's hot pots) and then being too frightened to leave the car to see them. We hiked and fished, canoed, and rode horses, and spent way too much time in the gift shops. We spent the tail end of several summer vacations at Mammoth, in northwestern Yellowstone Park, listening to the male elk bugling to their harems and soaking in the hot springs that are just outside the Gardner, Montana entrance. It was then that I saw my fantasy law job, being a federal magistrate in a national park. The judge had a nice house, near the Mammoth Springs Hotel, and I assumed he or she would preside over all sorts of interesting issues.

Have Gavel, Will Travel describes Braithwaite's work as such a judge, and it is as interesting as one would think. A self-described student of human nature, he is a part-time United States magistrate judge who dispenses "frontier justice" in misdemeanor criminal cases and "the front end of felonies." His cases involve issues as diverse as base-jumping, big horn sheep poaching by ultralight, and penstemon seed poaching as well as the prosecution of large-scale marijuana growers and small-scale marijuana users.

The "will travel" part of the title refers to the fact that he has four courtrooms: a quonset hut in Big Water, a state courtroom in Moab, and the federal courthouses in St. George and Salt Lake City, where he hears the "Fur, Fang and Feather" cases brought by forest service and fish and game wildlife officers. He commutes to these from his home in Cedar City.

His book is amusing and entertaining, interspersed with memories of growing up in the 1950s in small towns and advice about the courtroom. I reviewed Braithwaite's previous book *With Hope across America: a Father-Daughter Journey*, in 2008, which described road trips he and his daughter, Hope, had taken throughout the United States following his 2002 retirement. This book has the same relatable, informal, and unpretentious style, and I think Braithwaite has grown as a writer. His descriptions

JUDGE CATHERINE E. ROBERTS was appointed to the Salt Lake City Justice Court in September 2011. She also serves on the editorial board of the Utah Bar Journal.



> *"Like my boss once said: 'You have the best job in the judiciary: night court in the national parks.'"*
>
> *– from "Have Gavel Will Travel"*

of Southern Utah are as stunning as the parks are, and he also offers worthwhile advice on being a judge:

> Someone will control the courtroom, and the power to do it is given to the judge for a reason. For a fair and orderly process, it can't be delegated to an attorney with one side to represent, a litigant, and certainly not to an animated member of the audience. A judge does what he or she needs to do to maintain decorum and civility in society at large. When we do what we must given the circumstances, exercise authority with an insistence on civility (and in the case of family life, with abiding love) things generally work out for the best.

Braithwaite has done many different types of judging: circuit court, juvenile court, pro tem Utah Supreme Court, and now, federal court. He outlines the history of the parks and introduces us to park rangers and FBI agents he has encountered. His experience and wisdom come through in this book, as well as the fact that he seems like a really nice guy. If I am ever arrested for base-jumping, having overcome my fear of heights and survived the plunge, I hope he's on the bench.

President-Elect and Bar Commission Election Results

Congratulations to **Rob Rice** on his election as President-elect of the Bar. He will serve as President-elect for the 2015–2016 year and then become President for 2016–2017. Congratulations also go to **Kate Conyers,** and **Michelle Mumford** who were elected in the Third Division; **Liisa Hancock** who was elected in the Fourth Division; and **Kristin Woods** who was elected in the Fifth Division. Sincere appreciation goes to all of the candidates for their great campaigns and thoughtful involvement in the Bar and the profession.

Rob Rice, President-Elect

Kate Conyers
Third Division

Michelle Mumford
Third Division

Liisa Hancock
Fourth Division

Kristin Woods
Fifth Division

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year that begins July 1, 2015, and ends June 30, 2016. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its June 12, 2015, meeting.

The Commission is interested in assuring that the process includes as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, is available for inspection and comment at www.utahbar.org.

Please contact John Baldwin at the Bar Office with your questions or comments:

Telephone: (801) 531-9077 | Email: jbaldwin@utahbar.org

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

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

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

Utah Minority Bar Association's Community Donation Competition

Participate in the Utah Minority Bar Association's annual community donation competition, this year benefiting Family Promise, an organization celebrating its 20th year of operations! Family Promise – Salt Lake (a local affiliate of Family Promise National) is a 501(c)(3) non-profit, interfaith, non-proselytizing organization that provides shelter, case management and housing services to homeless families. The competition will take place from June 5–19, 2015, and the winner of the fundraiser will be announced at UMBA's Juneteenth event on June 19. All firms are invited to join the competition; email Kate Conyers at kconyers@sllda.com for more details.

Notice of Legislative Rebate

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

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

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the March 12, 2015 Commission Meeting held at the 2015 Spring Convention in St. George, Utah.

1. The Bar Commission approved establishing a short-term committee to develop a strategy for providing affordable legal services to the middle class and implementation of the recommendations of the Futures Commission. Commissioners have two weeks to suggest members of the committee to the Executive Committee for their consideration and proposal to the Commission. Angelina Tsu will chair the committee which will prepare a proposed strategy to be presented at the next Commission meeting.

2. The Bar Commission approved a change to the Modest Means policy to require participating lawyers to provide the first thirty minutes of the first meeting with prospective clients for free.

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

Mandatory Online Licensing

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

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

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

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

CLE on Facebook

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

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11th–12th Grade Magna Carta Grand Prize Essay

by Sha'uri Alonso

The "Great Charter"

Magna Carta was the first constitutional manuscript and one of the most significant documents on the path to democracy. Magna Carta was important to the Founding Fathers, and they incorporated many of the principles of Magna Carta as they established the United States. They analyzed and understood this document's part in guaranteeing basic rights and freedoms for the English. Before it had been created, monarchs ruled supreme. With Magna Carta, the king was not allowed to be above the law. Instead, he had to respect the rule of law and not abuse his position as king.

The Great Charter was a clear inspiration for the founders because they included several of its provisions in the Bill of Rights. A key item that the Great Charter provided was the Habeas Corpus or the right to due process. Section 39 of Magna Carta contains the law of the land provision. King John protected the people from prosecution for crimes, unless done so according to the prevailing law. This provision made arbitrary prosecution illegal. In the Fifth Amendment to the Constitution, the founders incorporated a modern version of the same idea. The American Constitution prevents the national government from taking citizens' "life, liberty or property," except when done according to due process of law. This statement, known as the due process clause, provides Americans with assurance that legal action against them has to follow a familiar and understandable pattern.

Another idea that originated from Magna Carta, and is now seen today in our constitution, is what is known as trial by jury. Criminal prosecutions are a threat to citizens because of potential loss of freedom. King John promised the people in Magna Carta that he would not abuse his power by imprisoning them unless their peers found the punishment just. This declaration became part of the American Constitution. The Sixth Amendment ensures American citizens can receive a fair trial by jury in all criminal proceedings. The jury must be impartial and made up of fellow citizens living within the same district of the alleged crime. Cruel and unusual punishment was also mentioned in the Great Charter. In section 20 it informed the English that the royalty could not inflict cruel punishment against citizens. The fear was that monarchs would punish people so severely that it would become a means of depriving individuals of freedom. King John agreed that punishment should be in harmony with the gravity of the offense. The Eighth Amendment includes the same principle. Excessive bail amounts and excessive fines are unconstitutional under this amendment.

The rights written in the Great Charter did not grant any new rights, but it did protect existing rights. It also included reasonable limits on taxes and a degree of guaranteed religious freedom. The Great Charter was a significant influence on the historical process that has resulted in the rule of constitutional law today.

My name is Sha'uri Alonso, I attend the Academy for Math, Engineering and Science and will be graduating this year. I am eighteen years old and enjoy playing soccer, I play on the varsity soccer team of Cottonwood High School and also play competitively with a club team known as Sparta United. When I'm not doing soccer, you can always find me with my nose stuck in a new book, or doodling on my sketch pad. I also enjoy listening to all types of music, new and old, and even singing along when I know I don't have the best voice. I also enjoy spending time with my family, which consists of both my parents and younger siblings. Altogether there are six children running around the house and I am the oldest of this big, loving family. As a family we love to travel and go out of the country and experience the world and different cultures around us.

8th–10th Grade Magna Carta Grand Prize Essay

by Aubrey Grasteit

The Importance of Magna Carta

On June 15th of this year, many people will join together in celebrating the 800th anniversary of Magna Carta. Magna Carta still remains one of the most imperative documents in history. It is a record that was a basis for America's freedom documents, was a solution for a nation's decreasing liberty for a time, and is a cornerstone in British history.

First of all, America's freedom documents were founded upon Magna Carta. Magna Carta listed rights of the people as well as grievances relating to King John's rule. The United States Constitution followed a similar format. H. D. Hazeltine, a Master of Arts as a Doctor of Letters, stated, "For seven centuries, Magna Carta has exerted a powerful influence upon constitutional and legal development." Some of Magna Carta's core principles are echoed in the United States Bill of Rights and numerous other constitutional documents around the world.

Likewise, this particular record was a solution for a time. King John had been angering the people by using his power for himself and not using it to protect his people. When the barons forced him to sign Magna Carta, the king's power became limited. In its sixty-three articles, Magna Carta stated the rights of the people, including that the church be free from state interference, the people should not be taxed without representation, and a fair trial should be held for every freeman by a jury of peers, according to www.theworldhistoryinstitute.com. Magna Carta required that the king recognize certain liberties of the people and accept that his rule wasn't solely based on his preference. This document uncovers the strategy of how to restore freedom to a nation in chaos.

Aside from the fact that almost a third of the text in this contract was removed or rewritten, it is still thought of as a defense against unfair rule in British history and continues to be remembered. The website www.bl.uk.com states, "Magna Carta was a peace treaty between the king and rebelling barons." It also provided new structure for the king and his subjects to follow. Many people will join together in celebrating the 800th anniversary of Magna Carta because it is a cornerstone of England's freedoms.

Unquestionably, Magna Carta still holds abundant significance, even though it was written an extensive amount of time ago. Magna Carta is great, because it was an inspiration for America's freedom documents, was a solution for a nation's lessening liberties, and it is thought of as a protection from unfair rule in British history. Magna Carta is definitely one of the most vital documents from the past.

Hi, I'm Aubrey Grasteit. My mom says I might be part fish because I spend so much time in the pool, although I still can't breathe underwater. ;) I spend a lot of time writing letters to friends and family…yes, real letters – with stamps. :) I am a major bookworm – I've read tons of novels in the past few months, including my favorite: Edenbrooke by Julianne Donaldson. Another passion I have is for genealogy work. I enjoy writing of all sorts, including stories and essays. Thank you for choosing me as a winner of The Magna Carta Essay Contest!

"and Justice for all"

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Utah State Bar Request for 2015–2016 Committee Assignment

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

Name _____ Bar No. _____

Office Address _____ Telephone_____

Email Address _____ Fax No. _____

Committee Request:

1st Choice _____ 2nd Choice _____

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

_____

_____

_____

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

_____

_____

_____

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

_____

_____

_____

Please list the fields in which you practice law:

_____

_____

_____

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

_____

_____

_____

_____

_____

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

Date_____ Signature _____

Utah State Bar Committees

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

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

Bar Thank You

Many attorneys volunteered their time to grade essay answers from the February 2015 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Mark Anderson
Gage Arnold
Mark Astling
Justin Baer
Wayne Bennett
David Billings
Mike Boehm
Sara Bouley
Heidi Buchi
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Elizabeth Butler
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Jared Casper
Gary Chrystler
Kate Conyers
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Pro Bono Honor Roll

Adam, Emily – Community Legal Clinic
Adamson, Mark – Family Law Case
Alba, Samuel – Post Conviction Case
Alderman, Kent – Probate Case
Allen, Kirsten – Tuesday Night Bar
Allred, Keith – Custody Case
Andrus, Mark – Bankruptcy Case
Ashworth, Justin – Family Law Clinic
Barrick, Kyle – Senior Center
Barrus, Craig – Family Law Case
Becker, Heath – Community Legal Clinic
Benson, Jonny – Immigration Clinic, Community Legal Clinic
Bertelsen, Sharon – Senior Center
Billings, David P. – Debt Collection Calendar
Blakesley, James R. – Landlord/Tenant Case
Bond, Alison – PGAL Case
Bosshardt, Jackie – Non Profit Case
Bradford, Peter – Protective Order Court
Brimhall, Clinton – Family Law Cases, Family Law Clinic
Broadbent, David – Tuesday Night Bar
Brown Roberts, Kathie – Senior Center
Buck, Adam – Contract Case
Burnett, Brian W. – Debt Collection Calendar
Caldwell, Debbie – Street Law Clinic
Card, Ryan – Tuesday Night Bar
Chandler, Josh – Tuesday Night Bar
Chipman, Brent – Debt Collection Calendar
Clark, Melanie – Senior Center
Cohen, Dara – Street Law Clinic
Conley, Elizabeth – Senior Center
Conyers, Kate – Street Law Clinic
Cook, Melanie – Protective Order Court
Couser, Jessica – Rainbow Law Clinic
Cowdin, Jake – ORS Calendar
Cueva, Isabel – Community Legal Clinic
Culas, Roberto – Family Law Case
De Jong, Skylar – Adoption Case
Depaulis, Megan – Tuesday Night Bar
Dez, Zal – Family Law Clinic
Erickson, Michael – ORS Calendar, Family Law Case
Evans, Russell – Rainbow Law Clinic
Farr-Boyer, Marianne – Family Law Case
Ferguson, Phillip S. – Senior Center
Fida, Jason – Family Law Case
Figueira, Joshua – Tuesday Night Bar
Fox, Richard – Senior Center
Fox, Tayler – Debt Collection Calendar
Frandsen, Nicholas – Tuesday Night Bar
Frei, Nicklos T. – Tuesday Night Bar
Garrabrandt, Nathaniel – Family Law Case
Gentry, Gwyndolynn – Bankruptcy Case
Gittins, Jeff – Street Law Clinic
Gray, Laura – Probate Court
Gurmankin, Jay – Post-Conviction Case
Hagen, Scott – ORS Calendar
Hansen, Don – Family Law Case
Hansen, Greg – Debt Collection Calendar
Harris, Curtis – Probate Case
Harrison, Matt – Street Law Clinic
Harstad, Kass – Street Law Clinic
Hart, Laurie – Senior Center
Harvey, Michelle – Debtor's Legal Clinic
Hatch, Dave – Tuesday Night Bar
Heckel, Maria – ORS Calendar
Hill, Melinda – Tuesday Night Bar
Holt, Emily – Tuesday Night Bar
Horne, Jennifer – Tuesday Night Bar
Jelsema, Sarah – Family Law Clinic
Jenkins, Jaelynn – Family Law Clinic
Jensen, Michael A. – Senior Center
Johnson, Stuwert B. – Family Law Case
Jones, Steve G. – Tuesday Night Bar
Kearl, Derek – Post-Conviction Case
Keisel, Brody – Family Law Cases
Kennedy, Michelle – Family Law Case
Kesselring, Christian – Rainbow Law Clinic
Kessler, Jay – Senior Center, PGAL Case
Knight, Liz – Rainbow Law Clinic
Laird, Katie – Family Law Case
Lambert, Sam – ORS Calendar
Lambson, Rebecca – Non Profit Case
Larsen, Kristy – ORS Calendar
Lee, Terrel R. – Senior Center
Lombardi, Michelle – Tuesday Night Bar
Long, Adam – Street Law Clinic
Loveridge, Michael – Probate Case
Lyons, J. D. – Debt Collection Calendar
Macfarlane, John – Tuesday Night Bar, Street Law Clinic
Malmquist, Jessie – Protective Order Court
Marshall, Romaine – Tuesday Night Bar
Mayfield, Michael – ORS Calendar
McCann, Eli – Tuesday Night Bar
McConkie, Bryant – ORS Calendar
McCoy II, Harry – Senior Center
McKay, Chad – Family Law Case
McNeil, Allen – Probate Court
Misener, Gregory – Probate Court
Miya, Stephanie – Family Law Case
Morales, Christopher – Family Law Case
Morris, M. Covey – Debt Collection Calendar
Morrow, Carolyn – Family Law Cases, Family Law Clinic
Moss, James R. – Community Legal Clinic
Murray, John – Protective Order Court
Naftz, Douglas – Tuesday Night Bar
Naugle, Mark – Community Legal Clinic
Navarro, Carlos – Immigration Clinic, Community Legal Clinic
Nelson, Trent – Family Law Clinic
Nichols, Jason – Community Legal Clinic
Nielsen, Chase – Tuesday Night Bar
Nielson, Nathan – Family Law Case
Ockey, Celia – Family Law Case
Olsen, Whittney – Tuesday Night Bar
O'neil, Shauna – Family Law Case
Ostrow, Ellen – Tuesday Night Bar
Owen, Doug – Post-Conviction Case
Parker, Kristie – Senior Center
Parkinson, Jared – Senior Center
Pena, Fred – Tuesday Night Bar
Peterson, Craig – Protective Order Court
Preece, Clayton – Street Law Clinic
Priest, Katie – ORS Calendar
Pugsley, Mark – ORS Calendar
Ralphs, Stewart – Rainbow Law Clinic, Family Law Clinic
Rasmussen, Kasey C. – Debt Collection Calendar
Rawson, Blaine – ORS Calendar
Rees, John H. – Debt Collection Calendar

Roberts, Kathie – Probate Court, Guardianship Case
Robinson, John – Tuesday Night Bar
Rogers, Christopher – Non Profit Formation
Rose, Rick – ORS Calendar
Rothschild, Brian M. – Tuesday Night Bar, Community Legal Clinic
Schmidt, Stacey – Protective Order Court
Scholnick, Lauren – Street Law Clinic
Schultz, Lauren – ORS Calendar
Scruggs, Elliot – Street Law Clinic
Semmel, Jane – Senior Center
Shaw, Jeremy – Debt Collection Calendar
Shell, Phillip – Guardianship Case
Shumway, Dan – Protective Order Court
Sitterud, Thomas – Family Law Case
Smith, Aunica – Family Law Case
Smith, Craig J. – Street Law Clinic
Smith, Linda F. – Family Law Clinic
So, Simon – Family Law Clinic
Spencer, Daniel – Family Law Clinic
Stagg, Andrew – Family Law Case
Stevens, Liesel – ORS Calendar
Stiffler, Jimmy – Family Law Case
Stormont, Charles A. – Debt Collection Calendar
Tan, Fay – Family Law Case
Tanner, Brian – Community Legal Clinic
Tarbox, Amber – Family Law Case
Thorne, Jonathan – Street Law Clinic
Thorpe, Scott – Senior Center
Throop, Sheri – Family Law Clinic, Community Legal Clinics
Timothy, Jeannine – Senior Center
Topham, Spencer – Debt Collection Calendar
Trousdale, Jeff – Tuesday Night Bar
Tyler, Jessica – Estate Planning Case
Uipi, Phil – Probate Court
Vamianakis, Artemis – Tuesday Night Bar
Voss, Brad – Family Law Case
Wang, Ian – Community Legal Clinic
Welch, Ben – Tuesday Night Bar
Wells, Matthew – Tuesday Night Bar
Wentz, Adam – ORS Calendar
Wharton, Chris – Rainbow Law Clinic
Whimpey, Lacee – Family Law Case
White, Micah – Family Law Case
Williams, Timothy – Senior Center
Wood, Lane – Family Law Case
Woods, Katie – Bankruptcy Case
Yauney, Russell – Community Legal Clinic
Yeates, Drew – Protective Order Court

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Propriety of Ex Parte Contact With Individuals Within an Organization

Utah State Bar Ethics Advisory Opinion Committee Opinion Number 15-02 / Issued February 10, 2015

ISSUE: May an attorney representing a party in pending or existing litigation contact servants, agents, and employees of an organization, which is the opposing party, to discuss issues directly related to the litigation, if the attorney is aware the organization is represented by counsel in the matter? Is it ethical for an attorney to make contact directly with in-house or corporate counsel, even if the attorney is aware that the organization is represented by outside counsel in the matter? Is it ethical for an attorney to send a copy of correspondence or email to an organization's employee where the original is directed to opposing counsel?

FACTS: The query before the Committee relates to the issue of the propriety of an attorney making contact with a servant, agent, or employee of an organization which is potentially or is in fact involved in litigation, where the contacting attorney knows or has reason to know that the organization is represented by counsel. The related question pertains to the same issue, except that the contact in question is with the organization's in-house or corporate counsel. Lastly, is it ethical for an attorney to send a copy of correspondence to an employee, the original of which is directed to opposing counsel for an organization?

OPINION: Communications, concerning the subject matter of anticipated, proposed or current litigation, are improper, if the individual being contacted is either (1) an employee of the target organization within the current "control group," or (2) the individual's acts, omissions or statements in the matter might be imputed to the opposing organization. Contact with in-house counsel may be permissible, depending on the circumstances, as discussed below.

ANALYSIS: This opinion involves what has sometimes been referred to as the "no contact without consent" rule. Utah Rules of Professional Conduct (URPC), Rule 4.2, Communication with Persons Represented by Counsel, states the general rule as follows:

> (a) General Rule. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order,[1] in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.[2]

As a general matter, subject to the exception that a lawyer may "communicate with another's client if authorized to do so by any law, rule, or court order," Rule 4.2 requires that a lawyer not communicate "about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." Rule 4.2(a) (emphasis added). The Rule "applies to communications with any person who is represented by counsel concerning the matter to which the communication relates," and "applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule." Comment (3) and (4) to Rule 4.2. Rule 4.2 is broadly consistent with the general rules set forth in § 99, A Represented Nonclient – The General Anti-Contact Rule, The Restatement (Third) of the Law Governing Lawyers; *See also* The Law of Lawyering, Hazard, Hodes & Parvis, §§ 4.01 and 41.02.

The basic underlying principle is set forth in the official comments to Rule 4.2 as follows:

> This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

Comment [2], Rule 4.2. Consistent with Comment [2], the Utah Supreme Court has stated that the "'general thrust of the rule [today] is to prevent situations in which a represented party may be taken advantage of by adverse counsel.'" *Featherstone v. Schaerrer*, 2001 UT 86, ¶ 21, 34 P.3d 194 (Utah 2001) [quoting *Wright ex rel Wright v. Group Health Hosp*, 103 Wash.2d 192, 691 P.2d 564, 567 (1984)].[3] Such no-contact without consent rules protect against overreaching and deception of nonclients, and "is universally followed in American jurisdictions." *See* reference to §§ 99-103, The Restatement (Third) of the Law Governing Lawyers, cmt. b."The (no-contact) rule covers…a non-client prior to any suit being filed and regardless of whether such suit is contemplated or eventuates." *Id*., § 99, cmt. c.

Organizations are, of course, entitled to the benefit of Rule 4.2.[4] In the context of dealing with an organization, the Rule "does not prohibit communication with a represented person or an employee or agent of such a person where the subject of the communication is outside the scope of the representation." Comment (5), Rule 4.2. "In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communication is subject to Rule 4.3."[5] Comment 10.

Subparagraph (d) concerns itself with "Organizations as Represented Persons," and the issues surrounding contacting servants, agents or employees of an opposing party in existing or pending litigation. It states the following:

> (d)(1) When the represented person is an organization, an individual is represented by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communication, and
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> (d)(1)(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or
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> (d)(1)(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be
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> > (d)(1)(B)(i) a current member of the control group of the represented organization; or
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> > (d)(1)(B)(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or
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> > (d)(1)(B)(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.
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> (d)(2) The term "control group" means the following persons: (A) the chief executive officer, chief operating officer, chief financial officer, and the chief legal officer of the organization; and (B) to the extent not encompassed by Subsection (A), the chair of the organization's governing body, president, treasurer, secretary and a vice-president or vice-chair who is in charge of a principal business unit, division or function (such as sales, administration or finance) or performs a major policy-making function for the organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.
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> (d)(3) This Rule does not apply to communications with government parties, employees or officials unless litigation about the subject of the representation is pending or imminent. Communications with elected officials on policy matters are permissible when litigation is pending or imminent after disclosure of the representation to the official.

Rule 4.2.The rule 4.2(d)(1)(B)(i), (ii), (iii) proscriptions are virtually identical to those laid down in § 100, Definition of a Represented Nonclient, Restatement (Third) of The Law Governing Lawyers.

The primary focus of the proscriptions set forth in 4.2(d)(1)(B)(i), (ii), (iii) and 4.2(d)(2) is what is "known" to the lawyer making the contact. The no-contact without consent rule pivots around whether the lawyer "knows" the non-client is represented. Consequently, that is a critical question. The general definition indicates that, "'Knowingly,' 'know' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Rule 1(g). Inferences based upon a lawyer's level of sophistication and experience in the particular area of practice, the likelihood that the entity is represented, and such other factors must be taken into account. Comment 21 to Rule 4.2 states that, "(A) person is 'known' to be represented when the lawyer has actual knowledge of the representation. Knowledge is a question of fact to be resolved by reference to the totality of the circumstances, including reference to any written notice of the representation." Inferences with respect to knowledge must be well founded in fact and not mere speculation. *See Featherstone* at ¶ 27. However, although Rule 4.2 contains no explicit requirement, nor is the Committee empowered to impose one, it does seem sensible to assume that one of the circumstances which might be considered in assessing the totality of relevant circumstances, is whether the lawyer made reasonable inquiry of the employee of the adversary organization. Before commencing investigation, one question which would be a simple matter to ask: "is your company represented by counsel?" If the attorney receives an affirmative response and the individual falls within one of the categories set forth in 4.2(d)(1)(B)(i), (ii), (iii) or (d)(2), the contact must be immediately terminated.

There are a number of possible scenarios in which contact with individual employees of the target organization may fall within the prohibition of communication set forth in Rule 4.2. For example, if the attorney knows, or under the totality of circumstances reasonably should know, that the organization is represented by counsel, it is clear that she should not communicate with persons such as the following:

> (a) a person such as a risk manager, who is very likely a person falling within the control group [Rule 4.2(d)(1)(B)(i)];
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> (b) a present employee,[6] whose acts or omissions would be attributed to the organization, such as the driver of a vehicle involved in an accident, an accountant or accounts payable person with direct knowledge of the business/payment/collection practices of the organization, or a health care provider or other such professional whose acts or omissions may be attributed to the organization; or
>
> (c) the chief executive officer, chief operating officer, chief financial officer, or chief legal officer

> of the organization [Rule 4.2(d)(2)(A)]; the chairman of the governing body, president, treasurer, secretary and a vice-president or vice-chair who is in charge of a principal business unit, division or function (such as sales, administration or finance) or performs a major policy-making function for the organization [Rule 4.2(d)(2)(B)]; any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter [Rule 4.2(d)(2)(C)]. (Emphasis added)

Attorneys often speak with non-lawyer employees such as risk managers or insurance adjusters, without seeking approval from opposing counsel. This conduct is appropriate even when the organization is known to have attorney representation in other unrelated matters. The conduct becomes inappropriate when the inquiring lawyer is informed that the matter has been referred to counsel. In such cases, contact with the risk manager or adjuster must be discontinued until and unless responsible counsel gives permission to make such contact. There is a substantial concern with such persons, who often regularly consult with counsel, that they would be unable to distinguish between properly discoverable facts and protected information. "In addition, with respect to persons in the organization…who have power to settle or compromise the matter on behalf of the organization, the anti-contact rule also seeks to prevent improvident settlements and impairment of the relationship of trust and confidence with the lawyer." § 100, Definition of a Represented Nonclient, Restatement (Third) of The Law Lawyers, cmt. c.

Circumstances where opposing counsel wished to interview an organization's employees, who were merely "fact witnesses," was previously addressed by the Committee. USB EAOC Opinion No. 04-06. There counsel for the organization took the position that he represented all of the company's employees. That Opinion took a dim view of such a broad assertion, observing as follows:

> Utah Rules of Professional Conduct 3.4, "Fairness to opposing party and counsel" must also be consulted. This rule is designed to permit both counsel to have access to relevant evidence in order that the adversary system function appropriately. Under Rule 3.4(f), a lawyer ordinarily may not ask a person who is not the lawyer's client "to refrain from voluntarily giving relevant information to another party" with one exception relevant here. There is an exception to this prohibition if "[t]he person is…an employee or other agent of a client; and (2) [t]he lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." Thus, in accordance with this rule, corporate counsel may request any current employee (including fact witnesses) whose interests will not be adversely affected to refrain from informally speaking with opposing counsel. However, corporate counsel may not direct opposing counsel not to contact corporate employees who have the right to talk or to decline to talk to opposing counsel, unless, of course, these corporate employees are actually individually represented by corporate counsel.
>
> The situation posits corporate counsel taking one further step, making all employees who have any information about the issue individual clients, and thus conclusively preventing opposing counsel from informally contacting any of them. The first question in analyzing whether this strategy is ethical is whether these employee-fact-witnesses have actually formed an individual attorney-client relationship with corporate counsel. If they have not, corporate counsel would be guilty of violating Rule 3.4 in unlawfully obstructing access to these witnesses and Rule 4.1[7] in making a false statement of material fact.

Id. See also § 100, Definition of a Nonclient, The Restatement(Third) of the Law Governing Lawyers, cmts. b & f. Generally, persons associated with an organization will be servants, agents or employees. "However, a nonagent such as an independent contractor or a member of a board of directors may also" be within the control group or otherwise within the no-contact group. *Id*.

It may not be a simple matter to determine if an employee is merely a fact witness, unrepresented by the company lawyer in a matter, or if enough of the lawyer-client relationship exists to require prior consent. Consider the example analyzed in The Law of Lawyering, § 41.08, 41-16 through 18. Lawyer L sends his investigator to interview the janitor (J) regarding certain plastic parts discarded by the janitor's employer. The parts are relevant to a controversy between L's client and the company. Several points are made. First, it makes no difference that L has not sought to personally interview J. L will have violated Rule 8.4(a) by procuring a violation of Rule 4.2 through the acts of another, as well as Rule 5.3 regarding non-lawyer assistants in L's employee. However, it is difficult to say if the contact is in fact improper. If J is not "represented" by the company's lawyer, he is represented by no one. Rule 4.3 therefore applies and L's investigator would have to inform him about the respective positions of the parties before continuing, giving J a fair opportunity to remain silent, demand a subpoena, or talk to his own or the company's lawyer. On the other hand, where the entity is represented, J may also be represented by the company's lawyer pursuant to Rule 4.2(d). In the latter case, consent must be obtained. As The Law of Lawyering points out, 41-17, *Upjohn Co. v. United States*, 449 U.S. 383 (1981) provides some, though not definitive, guidance.

> There the Supreme Court held that lower level employees of a corporation could be considered 'clients' for the purposes of the attorney-client privilege, if their communications to the corporation's lawyer were designed to help the lawyer and the entity client carry out their respective "consult and advise' functions. On the other hand, the Court made clear that its rulings on the privilege question would not prohibit the opposing party (the government, in that case) from either interviewing or deposing the employees. The Court did not address whether the employees could be approached without notice to Upjohn's counsel. If the relationship of (the janitor) to the company is sufficiently close that the attorney-client privilege would attach according to the Upjohn principle, L should be required to consult the company's lawyer before talking to J. L does not give up his right to take J's deposition nor does he give up the right to talk to J. The only thing he gives up is the right to catch J unaware, before the company's lawyer legitimately requests J's silence, pursuant to Rule 3.4(f).

The Law of Lawyering, 41.08, 41-17, 18.

It may be of importance to practitioners to be aware that,"the most common setting for application of the no-contact rule has been in litigation, not in disciplinary proceedings. The courts have recognized, for example, that statements obtained in violation of rules like 4.2 may be excluded as evidence. More seriously, violation of the no-contact rule can result in disqualification of the offending lawyer." The Law of Lawyering, § 41.02, 41-4.

Speaking with in house counsel even when outside counsel is known to have been retained is not improper, under normal circumstances, because the Rule is intended to prohibit a lawyer from taking advantage of an unrepresented employee of the organization. Rule 4.2 does not distinguish between outside and inside counsel. Nothing in the text of the Rule suggests a material distinction simply because the organization retains outside counsel to represent it, when it is also represented by in-house counsel. There is, however, room for disagreement. The question arises as to what exactly is meant by the term "chief legal officer." It presumably does not mean in-house counsel, or the Rule would have so indicated. General counsel, as distinguished from "in-house counsel," usually implies the common array of legal functions, e.g., drafting and reviewing contracts, dealing with a variety of employment issues, litigation, and legal counseling. Thus, general counsel may simply be an employee who functions as a lawyer representing the company in various roles traditionally associated with legal representation, but does not perform major policy-making functions or participate as a principal decision maker in the determination of the organization's legal position. Such a lawyer would be in-house counsel, but would not be deemed "chief legal officer." General counsel on the other hand is often the corporate secretary, and participates in and likely performs major policy making functions as well as participating as a principal decision maker respecting the organization's legal position, roles which are squarely within the "control group "definitions of 4.2(d). "Chief legal officer" connotes an even broader portfolio, such as compliance, risk management, ethics, lobbying and the like. The bottom line seems to be that, if in-house counsel has broad responsibilities beyond merely advocating on behalf of the organization, she may well fall within the "no contact without consent" category.

Speaking to the general question of contact with in-house counsel, it has been stated that the majority view appears to be that such communication is generally permissible. The Association of The Bar of The City Of New York Committee On Professional And Judicial Ethics, 2007, No. 2007-1(Ruling that such contact is not proscribed). *See* ABA Formal Op. 06-443 (2006) ("[contact with] an inside lawyer, unless that lawyer is in fact a party in the matter and represented by the same counsel as the organization… is not prohibited"); Washington, D.C. Bar Ass'n, Ethics Op. 331 (2005) ("a lawyer generally is not proscribed…from contacting in-house counsel even though the entity is represented by outside counsel" because "the in-house counsel is not also the 'party' within the meaning of [the Rule]"); Restatement (Third) of the Law Governing Lawyers § 100 cmt. c (2000) (contact with an in-house counsel generally not barred); Carl A. Pierce, Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part I),70 Tenn. L. Rev. 121, 184-87 (2002) (same); *In re Grievance Proceeding*, 2002 U.S. Dist. Lexis 18417, 1 (D. Conn. July 19, 2002)(same).

The Committee concludes that contact with in-house counsel regarding a matter even where outside counsel has been retained is not improper so long as the lawyer seeking to make that communication has a reasonable, good-faith belief based on objective indicia that such an individual is serving as a lawyer for the entity. Because Rule 4.2 was designed to preclude a lawyer from taking advantage of unrepresented persons, in such cases, the general purpose of the Rule is not implicated. Caution is, however, advised. As noted above, in-house or corporate counsel come in many stripes, from sole counsel to a small company or even many small companies to a medium sized law firm in a large corporation. If the in-house lawyer is a member of the control group, or wears more than one hat, i.e., is also a corporate manager or officer who may be a primary decision maker, or is the "chief legal officer" of the company, both as the lawyer for the company in the matter at hand and in some other or dual capacity, opposing counsel must obtain consent from outside counsel to make direct contact. Again, the course of prudence may well be for an attorney communicating with in-house counsel to inquire whether in-house counsel in fact represents the organization in the matter proposed to be discussed, and whether her position, as a function of what roles she really plays in the company, involves membership in the control group, thus compromising either outside counsel's or her ability to faithfully represent the company. If she is also a member of the control group or otherwise performs a major

policy-making function or participates as a principal decision maker in the determination of the organization's legal position in the matter, communications must cease.

The question also arises whether sending a copy of correspondence or email to the organization's outside counsel to an employee (or vice-versa) within the control group is prohibited. The opinions from other jurisdictions appear to be unanimous that it is improper. North Carolina State Bar, 2012 Formal Ethics Opinion 7(lawyer A may not send a copy of an email to a represented party without the express consent of that party's attorney, even if lawyer B initiated such conduct by sending lawyer A the initial email and copying lawyer B's client. The fact that an opposing lawyer sends you an email and copies her own client does not constitute implied consent to a "reply to all" response from you.).The Kentucky Bar Association concluded, under essentially the same rule as Utah's Rule 4.2, that, where the attorney proposed to send a copy to a defendant's insurance carrier a copy of a demand letter addressed to defendant's attorney, "the proposed conduct would offend the spirit of this rule. Obviously, the only purpose of sending a copy to the carrier would be to bypass defendant's attorney in relating directly to the company plaintiff's demand." KBA E-95 (1974), p.1, cited with approval *Logan v. Cooper Tire & Rubber Co*., 2011 U.S. Dist. Lexis 88622, 7, 2011 WL 3475423 (E.D. Ky. Aug. 9, 2011); *accord In re Uttermohlen*, 768 N.E.2d 449, 450 (Ind. 2002). Courts have interpreted similar rules broadly, finding a violation even where the lawyer is ignorant of the prohibition. Copying correspondence to a client known to be represented is prohibited in the absence of consent from the client's lawyer. *See* The Association Of The Bar Of The City Of New York Committee On Professional And Judicial Ethics, Formal Opinion 2009-1. For an informative discussion of this and related "no contact" rule issues, *see* Oregon State Bar Bulletin, April 2011, citing, inter alia, *In re Venn*, 235 Or 73 (1963) ("ignorance of ethical standards, is an explanation, but not a justification."); *In re McCaffrey*, 275 Or. 23, 28, 549 P.2d 666, 668 (1976)(" It is immaterial whether the direct communication is an intentional or a negligent violation of the rule."); *In re Conduct of Lewelling*, 296 Or. 702, 706, 678 P.2d 1229, 1231 (1984)(emotional upset or sudden impulse is an explanation, not a justification); *In re Complaint of Hedrick*, 312 Or. 442, 448, 822 P.2d 1187, 1191 (1991)(that the communication was brief, did not suggest taking action without consulting counsel, or caused no harm, is not a justification).

This Committee, in a somewhat related issue, determined in the governmental arena that, "It is a violation of Rule 4.2 for a government entity's attorney's office to send a litigation hold email to an adverse represented employee because the email relates to the subject of litigation and none of the exceptions listed in Rule 4.2 apply." USB EAOC, 13-01.

As a final matter of importance, the Committee has previously observed that, "A lawyer does not violate the letter or purposes of (Rule 4.2) by rendering a second opinion on a legal matter, when the lawyer is not "representing a client" on the same subject. However, the lawyer should make every effort neither to impair the first attorney-client relationship nor to use the consultation as a means of soliciting the represented party." USB EAOC Opinion No. 110, (1993).

Of course, nothing in this opinion relieves an attorney of the duty to comply with other ethical rules governing contact with unrepresented persons and potential witnesses. *See, e.g.*, Rules 3.4 (fairness to opposing party and counsel); 4.1 (truthfulness in statements to others); Rule 4.3 (dealing with unrepresented person); Rule 4.4 (respect for rights of third persons); Rule 8.4 (misconduct).

CONCLUSION: Prior to speaking with employees of a represented organization whose interests are adverse to one's client, counsel must comply with Rule 4.2(a) and Rule 4.2(d). Once counsel acquires knowledge that the individual falls within the prohibitions of Rule 4.2(d), communications with that individual must cease until and unless opposing counsel consents to such ex parte communication.

1. "A communication with a represented person is authorized by paragraph (a) if permitted by law, rule or court order. This recognizes constitutional and statutory authority as well as the well-established role of the state judiciary in regulating the practice of the legal profession. Direct communications are also permitted if they are made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal before which a matter is pending." Comment (8), Rule 4.2. "Any lawyer desiring to engage in a communication with a represented person that is not otherwise permitted under this Rule must apply in good faith to a court of competent jurisdiction, either ex parte or upon notice, for an order authorizing the communication. This means, depending on the context: (1) a district judge or magistrate judge of a United States District Court; (2) a judge or commissioner of a court of general jurisdiction of a state having jurisdiction over the matter to which the communication relates; or (3) a military judge." Comment 16, Rule 4.2. See also Comment 17.
2. Except as limited by Rule 4.2(d)(1) and (d)(2), certain exemptions for government lawyers engaged in civil and criminal law enforcement are recited in the separate provisions of Rules of Professional Conduct, Rule 4(c). See Comments 5 and 11, Rule 4.2. A discussion of some of the issues relating to communication with opposing counsel contacting government employees is contained in USB EAOC Opinion No. 115(1993).
3. "Paragraph (e) is intended to regulate a lawyer's communications with a represented person, which might otherwise be permitted under the Rule, by prohibiting any lawyer from taking unfair advantage of the absence of the represented person's counsel. The prohibition contained in paragraph (e) is limited to inquiries concerning privileged communications and lawful defense strategies. The Rule does not prohibit inquiry into unlawful litigation strategies or communications involving, for example, perjury or obstruction of justice." Comment 22, Rule 4.2.
4. "Organizational clients are entitled to the protections of this Rule. Paragraph (d) specifies which individuals will be deemed for purposes of this Rule to be represented by the lawyer who is representing the organization in a matter. Included within the control group of an organizational client, for example, would be the designated high level officials identified in subparagraph (d)(2). Whether an officer performs a major policy function is to be determined by reference to the organization's business as a whole. Therefore, a vice-president who has policy making functions in connection with only a unit or division would not be a major policy maker for that reason alone, unless that unit or division represents a substantial part of the organization's total business. A staff member who gives advice on policy but does not have authority, alone or in combination with others, to make policy does not perform a major policy making function." Comment 18, Rule 4.2.
5. "Paragraph (b) recognizes that the scope of representation of a person by counsel may, under Rule 1.2, be limited by mutual agreement. Because a lawyer for another party cannot know which of Rule 4.2 or 4.3 (Dealing with Unrepresented Persons) applies under these circumstances, the lawyer who has undertaken a limited representation must assume the responsibility for informing another party's lawyer of the limitations." Comment (7), Rule 4.2. "The scheme of the two Rules is that while Rule 4.3 prevents a lawyer from overreaching an *unrepresented* person, Rule

4.2 prevents a lawyer from nullifying the protection a *represented* person has achieved by retaining counsel." The Law of Lawyering, supra, § 41.02 (Emphasis in original), 41-3. Even when lawyer B's client initiates contact and assures the lawyer A that his lawyer does not object, Lawyer A may not continue the communication without first obtaining consent from Lawyer B. Id., citing In re Searer, 950 F. Supp. 811 (W.D. Mich. 1996).

6. The Committee has previously opined that, "The contact with the former employee is not unethical. Utah Rules of Professional Conduct 4.2 (2004) does not bar a lawyer's unauthorized contact with former employees of a represented corporate defendant except in very limited circumstances not applicable to this opinion." USB EAOC Opinion 04-04 (In litigation to enforce an oral contract allegedly made by a corporate defendant's former employee on behalf of the corporation, where the former employee was not a member of the control group, the plaintiff's attorney could contact the ex-employee without the consent of the corporate defendant's attorney.). Comment 19 to the Rule indicates: "In this context, "employee" could also encompass former employees who return to the company's payroll or are specifically retained for compensation by the organization to participate as principal decision makers for a particular matter. In general, however, a lawyer may, consistent with this Rule, interview a former employee of an organization without consent of the organization's lawyer." Comment 19, Rule 4.2; accord The Restatement (Third) of The Law Governing Lawyers, § 100, cmt. g. Lawyers should not ask questions of former employees that seek to invade the entity's privileged communications. Oregon State Bar Formal Ethics Op No 2005-80.

7. Rule 4.1(a) provides: "In the course of representing a client a lawyer shall not knowingly: (a) [m]ake a false statement of material fact or law to a third person."

Utah State Bar Ethics Advisory Opinion Committee Opinion Number 15-03 / Issued February 10, 2015

ISSUE: Does an attorney breach a duty of confidentiality to a "client" by sending information about the client's actions and their contact information to law enforcement if they appear to be using the attorney/client relationship to commit a money fraud upon the attorney which could cause substantial injury to the attorney's financial interests?

FACTS: The query before the Committee relates to the issue that individuals have sought to retain a law firm via the Internet allegedly to collect a large debt from a party in Utah. The alleged debtor sends the law firm payment which is supposed to be forwarded to the client. The scam is that the checks are counterfeit and the attorney is asked to wire the funds immediately before the checks have cleared. When the "client" is informed that the funds will not be wired until the check clears, the client disappears. The issue is whether the attorney can report this conduct to law enforcement.

OPINION: An individual whose purpose in communicating with an attorney is to defraud that attorney rather than to obtain legal services is not a client or prospective client entitled to confidentiality. Therefore, it would not violate any ethical rules for an attorney to disclose relevant information to investigators. See New York State Bar Ass'n Committee on Prof. Ethics, Ethics Op. 923 (May 18, 2012).

ANALYSIS: Under Rule 1.6(a) of the Rules of Professional Conduct, a lawyer "shall not reveal information relating to the representation of a client," subject to certain exceptions. Whether an attorney is bound by this duty of confidentiality turns on whether the purported client was an actual client and whether the information was obtained during the representation. Under the circumstances presented here, an attorney has no duty of confidentiality under Rule 1.6 because the "client" never intended to form an attorney-client relationship, but rather sought to defraud the lawyer. Thus, the attorney may report the scheme without violating any duty of confidentiality.

A handful of state authorities have agreed that there is no duty of confidentiality owed to an internet scammer posing as a "client" solely for the purpose of perpetrating a crime in which the lawyer is the victim. New York State Bar Ass'n Committee on Prof. Ethics, Ethics Op. 923 (May 18, 2012) (citing California and South Carolina authority). As discussed in the Oregon State Bar Bulletin:

> "…the duty imposed by RPC 1.6 and ORS 9.460(3) applies only to actual or prospective clients. If the person contacting the lawyer has no real intention of creating a lawyer-client relationship, but is only interested in victimizing the lawyer, then the person is not an actual client and the duty of confidentiality does not apply. In the absence of such a duty, there would seem to be no reason why lawyers who are the targets of these scams could not cooperate with law enforcement authorities in sharing whatever information they have about the perpetrator of the fraudulent scheme."

Hierschbiel, Helen, "Scammers Take Aim at Lawyers: How to Avoid Becoming the Next Victim," OSB Bulletin (May 2010).

> The ethics counsel of the Virginia State Bar has also addressed the issue:
>
> Although a formal opinion from the Standing Committee on Legal Ethics has not addressed this issue, the communications by and between the Internet scammer and lawyer are not protected as confidential. The initial uninvited e-mail communication from the scammer and the communications that follow are not for the purpose of obtaining any legal advice or legal representation. The scammer does not have any "reasonable expectation of confidentiality" in the communications used to obtain the lawyer's money under false pretenses. Therefore, reporting such information to the appropriate law enforcement authorities is not a breach of the lawyer's duty of confidentiality.

James M. McCauley, Virginia State Bar Ethics Counsel, "Internet Scams Target Lawyers", March 28, 2011 (available at http://www.vsb.org/site/news/item/internet-scams-target-lawyers).

CONCLUSION: The Committee believes you may disclose information regarding the counterfeit check scheme without violating your ethical responsibilities.

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

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

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

PUBLIC REPRIMAND

On February 4, 2015, the Honorable Scott M. Hadley, Second Judicial District Court, entered an Order of Discipline: Public Reprimand against Amy L. Bingham for violating Rule 5.5(a) (Unauthorized Practice of Law: Multijurisdictional Practice of Law) of the Rule of Professional Conduct.

In summary:
Ms. Bingham is licensed to practice law in California and is not a Utah attorney. While working as a law clerk for an attorney in Utah and leasing office space from the Utah attorney, Ms. Bingham met with a new client regarding a Utah legal matter without the Utah attorney present. Ms. Bingham informed, advised and counseled the new client regarding a divorce action and subsequently drafted a divorce petition on the client's behalf.

Mitigating factors:
Absence of a prior record of discipline; inexperience in the practice of law; interim reform; cooperative attitude toward disciplinary proceedings.

SUSPENSION STAYED WITH PROBATION

On January 30, 2015, the Honorable Richard D. McKelvie, Third Judicial District Court, entered an Order on Sanctions suspending M. Dirk Eastmond from the practice of law for two years with the suspension term stayed contingent on Mr. Eastmond's compliance with the court's probationary terms during the two years, for Mr. Eastmond's violation of Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Eastmond pled guilty to and was convicted of Attempted Stalking (Domestic Violence), a class A misdemeanor. Mr. Eastmond sent numerous vulgar and threatening text messages and telephone calls to his estranged wife. He continued to send the messages after being told to stop by police. In a separate matter, Mr. Eastmond was arrested and charged with Disorderly Conduct involving domestic violence for a physical altercation with his live-in girlfriend. Mr. Eastmond pled no contest to this charge. The court found these acts reflect adversely on his

fitness as a lawyer.

Aggravating factors:
Prior record of discipline; a pattern of misconduct; vulnerability of victim; substantial experience in the practice of law; illegal conduct, including the use of controlled substances.

Mitigating factors:
Absence of a dishonest or selfish motive; personal or emotional problems; good character or reputation; imposition of other penalties or sanctions; remorse; remoteness of prior offenses.

PUBLIC REPRIMAND

On February 10, 2015, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Thomas M. Burton for violation of Rule 4.4(a) (Respect for Rights of Third Person) and Rule 8.2 (Judicial Officials) of the Rules of Professional Conduct.

In summary:
Mr. Burton was hired by an individual in connection with the appeal of a criminal conviction. Mr. Burton filed a Reply Brief on behalf of his client and in the Brief characterized the trial Court's actions as "abusive" and "sinister." Mr. Burton made further statements in his brief about the court and judges with reckless disregard to their truth or falsity. Also in his reply brief, Mr. Burton restated his client's vulgar and pejorative statements regarding the victim and made the argument that those statements were not threatening and that the victim "may have fit any or all of his pejorative descriptions." Mr. Burton made further statements in his brief regarding his client's victim which had no substantial purpose other than to embarrass or burden the victim.

Aggravating factors:
Refusal to acknowledge the wrongful nature of the conduct involved; pattern of similar misconduct.

SUSPENSION

On February 22, 2015, the Honorable W. Brent West, Second Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Discipline suspending Lisa Hurtado McDonnell

from the practice of law for six months and one day, with all but sixty days of the suspension stayed, for Ms. McDonnell's violation of Rule 1.15(a) (Safekeeping Property) and Rule 5.5(a) (Unauthorized Practice of Law: Multijurisdictional Practice of Law) of the Rules of Professional Conduct.

In summary, there are two matters:
In the first matter, Ms. McDonnell was consulted by an individual who was not licensed to practice law regarding legal representation of a client in an administrative proceeding before the Utah Labor Commission, at which time, Ms. McDonnell's license to practice law was on inactive status with the Utah State Bar. Ms. McDonnell was aware at some point that her name and Bar number were being used by the individual not licensed to practice law in connection with their legal representation of the client in the Labor Commission proceeding. Ms. McDonnell subsequently changed her Utah State Bar membership status to active and participated in representing the client in the Labor Commission proceeding by reviewing a proposed settlement, assisting with the finalization of the settlement and collecting an attorney's fee. Ms. McDonnell did not consult directly with the client at any time during the representation.

In the second matter,
Several Notices of Insufficient Funds ("NSF") were generated from the bank where Ms. McDonnell had her IOLTA client trust account. Ms. McDonnell grossly mismanaged her attorney trust account causing her account to be overdrawn on several occasions. Ms. McDonnell's practice was to withdraw some of her earned attorney fees out of her trust account and to comingle her funds with client and third party funds. Ms. McDonnell made transfers in and out of her trust account for business expenses and did not keep accurate or complete records of her account.

Aggravating factors:
Pattern of misconduct.

Mitigating factors:
Absence of a prior record of discipline.

SUSPENSION

On October 8, 2014, the Honorable Paul G. Maughan, Third Judicial District Court, entered an Order of Discipline suspending Harold W. Stone, III, from the practice of law for two years, for Mr. Stone's violation of Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In Summary:
Mr. Stone pled guilty to and was convicted of one count of Felony Discharge of a Firearm, a Third Degree Felony, for discharging a firearm into a condominium unit.

Salary Survey 2015: Highlights and Analysis

by Karen C. McCall

From February 6 through April 3, 2015, the Paralegal Division conducted a salary survey to assess the current state of our profession. This survey encompassed not only salaries but also included benefits, billables, education, CLE opportunities, work tasks, and membership in professional organizations. The survey was open to Division members and non-members alike. The following is a reporting and analysis of some of these results.

As of this writing, we have had a total of 173 responses, more than double the number we received in our 2012 salary survey. Your participation leads to more meaningful data for everyone, and we appreciate it.

Our survey was divided into three parts. The first part focused on the participants, including their education and experience. Over 91% of respondents are employed as paralegals versus 8% as legal assistants. As expected, the overwhelming majority of respondents are employed in Salt Lake County, with just 8% in Utah County and 3.5% in Weber County. Women account for over 97% of respondents, which is up quite a bit from nearly 90% in our 2012 survey.

Nearly one-third of respondents have been employed in the field for over twenty years. As for current employment, roughly one-third have been with the same employer for over ten years, while slightly more have held their current positions for between one and five years, indicating some mobility among Utah paralegals.

Membership in paralegal organizations has remained robust, with 52% of respondents belonging to the Paralegal Division and approximately 25% enjoying membership in the Utah Paralegal Association (formerly known as the Legal Assistants Association of Utah). Roughly 20% are members of the National Association of Legal Assistants (NALA). The vast majority of respondents, over 91%, are not required to have passed a national paralegal certification exam prior to being hired. This number has held steady since our 2012 survey. Twenty-three percent of respondents have achieved a national paralegal certification.

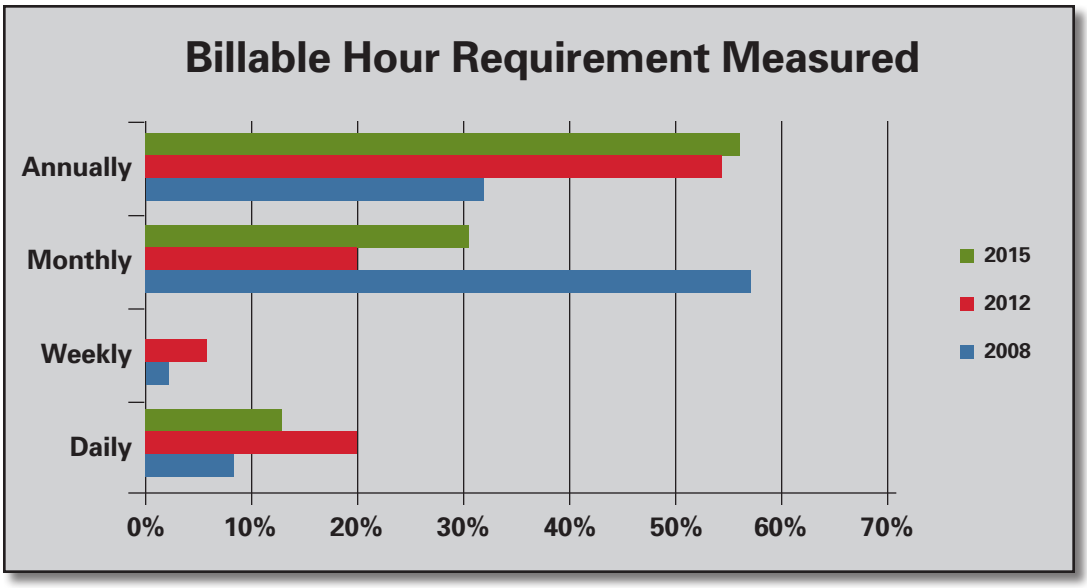
Forty percent of Utah paralegals have earned a bachelor's degree, while 39.5% have a paralegal certificate. As for employers, 60% require their paralegals to have met a minimum education level; of these, 44% require a certificate from an American Bar Association-approved paralegal program, which nearly 79% of Utah paralegals possess. Education is not often directly tied to compensation, however, as over half of respondents indicated that their employers do not consider education levels as a factor in setting compensation.

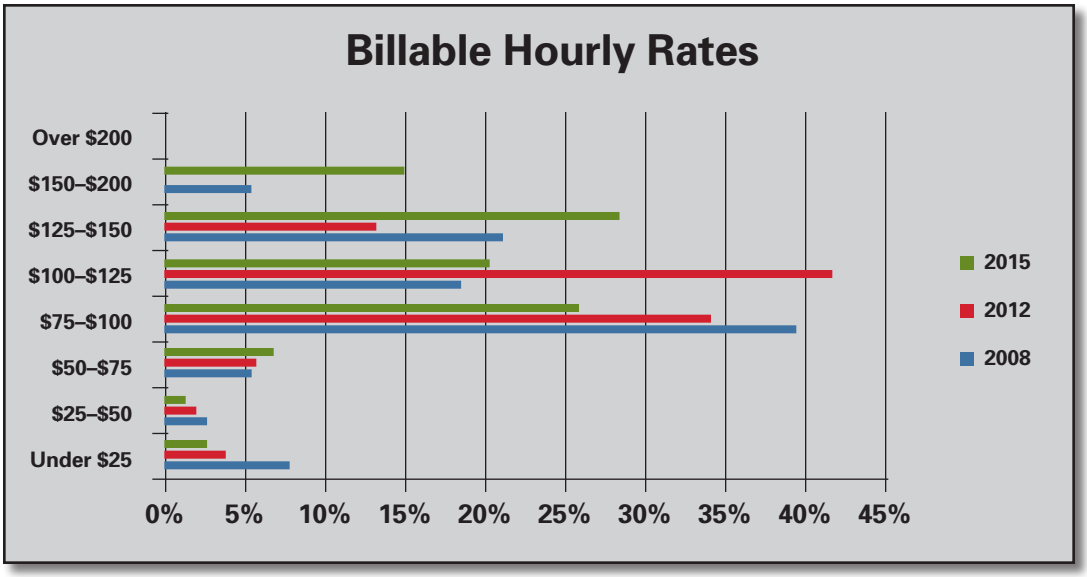
The second part of our survey addressed firm environment, duties, and responsibilities. Of respondents, nearly 60% work in private law firms, with approximately 20% working in corporations, slightly higher than the 18% working for the public sector. As for practice areas, we found that 87% of respondents practice in the litigation arena, with 44% of paralegals doing defense work and nearly 37% doing plaintiffs' work. Product liability, real estate, and intellectual property also had over twenty responses each.

A clear majority of respondents, 53%, work in organizations that employ no more than five paralegals. As for firm size, the vast majority are either quite small or quite large, with nearly 43% employing between one and ten attorneys and 37% employing over forty attorneys.

KAREN McCALL, ACP works for Strong & Hanni in the areas of insurance defense and construction defect.

Utah paralegals are near-unified in their use of Microsoft Word; however, nearly one-third still utilize WordPerfect as well. For legal research, the use of LexisNexis and Westlaw is almost evenly split. Most respondents, almost three-quarters, work very little or no overtime in the average month. The question of whether respondents bill time to clients is nearly evenly split. Of the 52.5% who do bill their time, the majority bill over 75% to clients, with under 10% of their time spent on non-billable administrative work. Nearly 64% have no billable hour requirement. In addition, nearly 70% of respondents supervise a secretary.



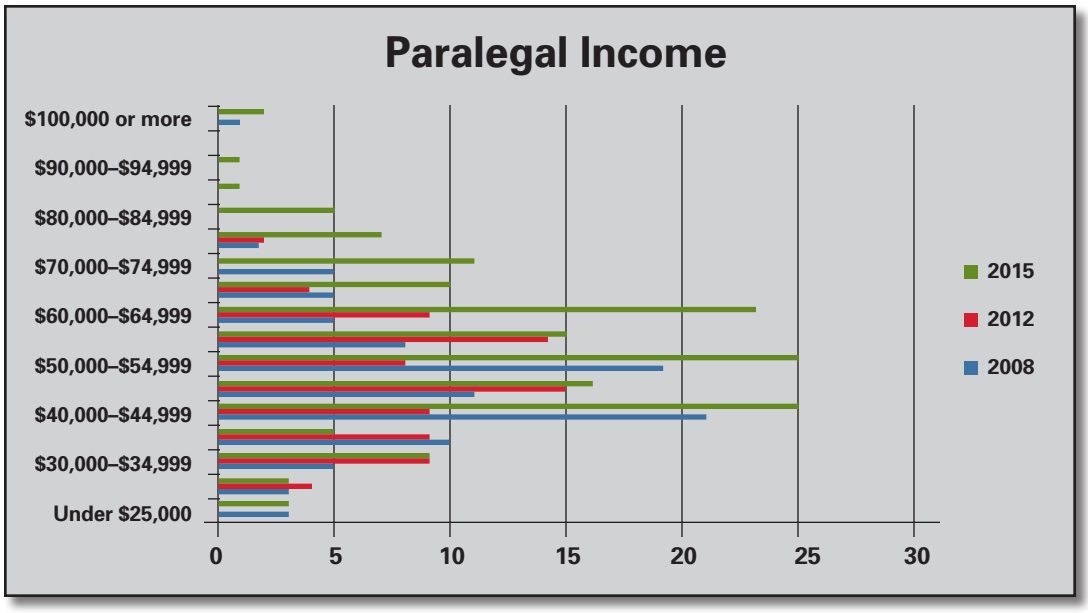


A majority of employers do not provide in-house training for paralegals. This is an unfortunate trend that we also saw in our 2012 survey. Nearly 80% of employers pay for outside CLE, however, which is a trend we are pleased to see. Of those who pay for outside CLE, 100% of respondents receive payment of registration fees, with nearly half receiving hotel accommodations and mileage as well. Nearly 28% of paralegals have annual CLE budgets, while another one-quarter have no limit for CLE that will be paid. We are also pleased to report that a majority of respondents report attending Paralegal Day and the Brown Bag CLE events.

Turning to our third section, paralegal salary, benefits, and other compensation, we found that 65% of respondents earn between $40,000 and $64,999 annually, with over 30% of those in the $40,000–$44,999 and $50,000–$54,999 ranges. Our current survey reveals that 2.5% of respondents make less than $25,000 annually, which technically is an increase from 0% in 2012; however, a direct comparison may be ill-advised due to the wide variation in the sample size. Notably, the number of respondents earning $65,000 or above annually has gone up appreciably, from approximately 7% in 2012 to roughly 23% in 2015.

Disappointingly, nearly 55% of employers do not have a bonus structure in place for their paralegals. Of those who do, only 41% tie bonuses directly to billable hours or fees collected. Nearly 82% of respondents indicated that they received a raise in the past year, largely between 1 and 3% of their income. Among the employees who reported receiving overtime, over 90% receive either time-and-a-half or compensatory time. As for benefits provided, over three-quarters of respondents have access to health insurance for themselves and their families,

with roughly 70% having access to dental insurance. Nearly 85% have a 401(k) plan with their employer, and just under 30% have profit sharing or another pension plan in place.



We would like to thank everyone who responded to this survey. Our hope is that it will provide our members with tools for professional development and a larger discussion of issues affecting our profession. Going forward, we hope to conduct similar surveys on a regular basis to assess the Division's effectiveness and identify areas where improvement is needed. You can read the full results of this survey at http://paralegals.utahbar.org or on our Facebook page, www.facebook.com/paralegaldivisionoftheutahstatebar.

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 Danielle Davis at danielle.davis@workday.com.

The deadline for nominations is April 30, 2015. The award will be presented at the Paralegal Day Celebration held on May 21, 2015.

Annual Paralegal Day Luncheon

For All Paralegals and their Supervising Attorneys

Speaker: Attorney General, Sean D. Reyes

May 21, 2015
Noon to 1:30 pm

Hilton Salt Lake City Center
255 South West Temple
SLC, UT 84101

1 Hour Ethics/Civility Credit

TO REGISTER
Email RSVP to: sections@utahbar.org

CLE Calendar

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

May 8, 2015 — **7 hrs. CLE pending**

Annual Family Law Seminar. University Guest House.

May 8, 2015 — **7 hrs. CLE pending**

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

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

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

May 27, 2015 | 8:00 am–5:00 pm

Annual Real Property Seminar. Grand America Hotel, 500 South Main Street, SLC.

June 2, 2015 | 8:00 am–5:00 pm — **6 hrs. (incl. 1 hr. Ethics)**

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

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

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

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

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

June 12–13, 2015 — **CLE pending**

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

July 17, 2015 | 8:00 am–5:00 pm — **2 hrs. Ethics, 1 hr. Prof./Civ.**

Annual DR & UCCR Joint Seminar.

June 19, 2015 | 8:30 am–1:00 pm — **4 hrs. (incl. 1.5 Civ., 2.5 hrs. Ethics)**

Utah Lawyers Helping Lawyers Bi-Annual CLE Seminar. Breakfast snacks and refreshments will be available. Cost: Early Bird (before May 1st) $130, $150 after May 1.

June 25, 2015 | 8:00 am–5:00 pm — **6 hrs.**

Annual Paralegal Division Meeting.

June 26, 2015 | 9:00 am–2:30 pm — **4 hrs. (incl. 2 hrs. Ethics)**

The Cybersleuth's Guide to the Internet: Master Google & Other Web Sites for Investigative Research.

June 30, 2015 | 8:00 am–5:00 pm

Best of Series

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.

NOTICES

Utah Valley University Business & Economic Forum. Join other business professionals on May 14, 2015 for a one-day forum featuring multiple workshops with CE credit, three keynote speakers, and engaging opportunities with fellow colleagues. Keynote speakers include best-selling author Roger Connors, Utah Valley University President Matthew S. Holland, and co-founder of Columbus Travel Larry Gelwix. All registrants will receive a free copy of Roger Connors' *The Wisdom of Oz* ($25 value). Harness the power of your own personal accountability and blow through any barriers that may have previously stood between you and success. For more information visit www.uvu.edu/beforum.

OFFICE SPACE

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

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

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

Lease – Office Space, 345 South 400 East, Salt Lake City, UT 84111. 3,230 sqft – $12/sqft. Lynn Rasmussen, Realtor, 801-231-9984. Coldwell Banker Residential Brokerage, Owned And Operated by NRT LLC.

Downtown law firm office space available for sublease. Access to four conference rooms, receptionist, phone system with conference calling and video conferencing, gym, and kitchen/breakroom. Call Jane at 801-364-8300 for further details.

Executive offices available within 2nd floor professional law firm at top of Main Street, Park City. Lease includes WIFI/Internet and conference rooms' usage and a la carte office equipment and direct phone line. Jenni 435-649-0077.

Beautiful and unique Class A office sharing space available in downtown area of Salt Lake City. Approximately 1,300 sq. ft. with two to four offices. Plenty of free parking. Conference room and reception area. Individual offices separately leasable. Call Kathryn at (801) 450-2536.

POSITIONS AVAILABLE

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

Fast paced Park City law firm seeks full time Paralegal. Interested candidates must have previous experience as a legal assistant or paralegal in the area of family law. Applicants must be detail oriented, self sufficient and possess a strong desire to learn and grow. Duties include heavy drafting of legal documents, client interaction and correspondence, office management, reception and various other responsibilities in between. Position is 40 hours per week with full benefits after 90 days. Please send a cover letter, resume and reference list to Hannah Greene at hgreene@lrw-law.com.

Stirba, P.C. is seeking to hire a dedicated litigation associate. This is a lateral position that requires at last two years of litigation experience. Send resume to jwiscomb@stirba.com. For further information about the firm, please visit our website at stirba.com.

WANTED

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

SERVICES

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

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

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

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

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

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

Certificate of Compliance

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

For July 1 _____ through June 30_____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____ Email: _____

_____

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

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

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

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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

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

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

Date: _____ Signature: _____

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

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

Account # _____ Security Code: _____

Name on Card: _____

Cardholder Signature _____

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

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Endorsed by Utah State Bar

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

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