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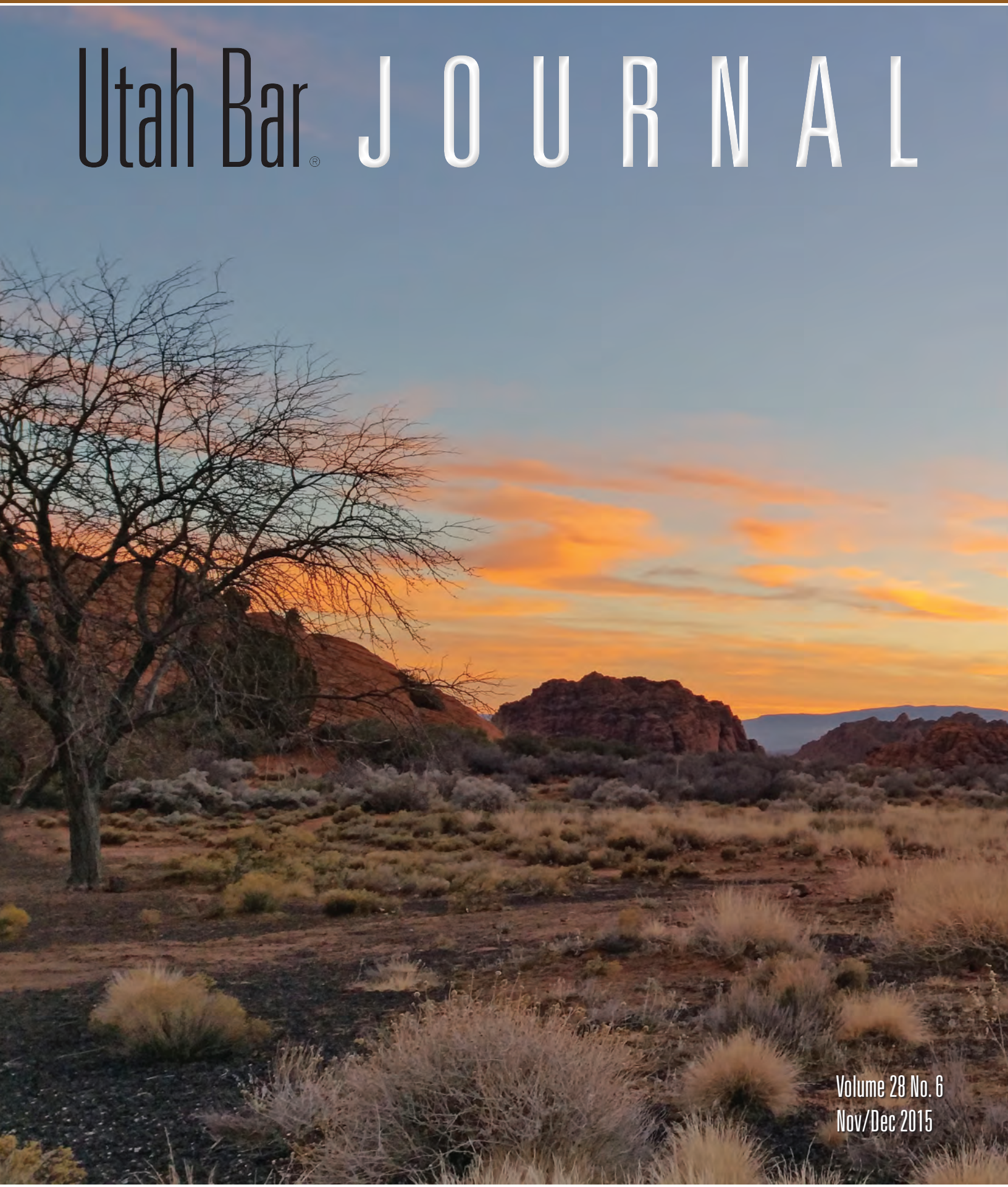

Volume 28 No. 6
Nov/Dec 2015

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Cover Photo

Desert Light Show, by Utah State Bar member Cathleen C. Gilbert.

CATHLEEN C. GILBERT is a graduate of the S.J. Quinney College of Law at the University of Utah. She is a member of the Utah State Bar and served as past Chair (2012–13) of the Solo, Small Firm & Rural Practice Section. She practices business, estate & trust and family law at Gilbert Law Office in Bountiful. She captured the beautiful light show as dusk came on suddenly in Snow Canyon where she had been hiking with her husband and three boys.

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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.

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

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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.

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

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

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

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

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

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

An Accidental Lawyer

by Angelina Tsu

By every account, I am an accidental lawyer. I wanted to be an astronaut and when it became clear that was not going to happen, being a lawyer seemed like a reasonable backup plan. But my legal career almost ended before it began and it all started with one sentence.

"I have spent the last 20 years of my life breaking down barriers for women in the law – every time a woman like you walks into a courtroom, you set us back 10 years," she said with a look that was part disappointment and part disdain.

I was a second-year associate attending a National Trial Skills CLE where I (mistakenly) thought I was going to improve my trial skills. Instead, I found myself standing in what appeared to be a supply closet in the Salt Palace being berated by an out-of-state judge who had recently joined the Trial Skills faculty.

> *"Practicing law is difficult – even on a good day. But with the right support we can all be our best."*

I tried to respond but managed only to ask how it was possible that a single person could undo the progress made by an entire generation of women lawyers. Without hesitation she told me: starting with my hair and ending with my shoes she pointed out – in great detail – everything that was wrong with me. I will spare you the details except to say that not one of the comments was a critique of my legal skills. Instead they focused solely on my physical appearance.

To ensure I was not confused, she ended the conversation with: "You should not be representing clients – ever." Devastated, but still (barely) able to maintain my composure, I thanked her for her time and walked out the door. I did not return for the remaining days of the CLE. I went home – and I did not leave my house for five days. In that time, I concluded that if the judge's comments were true (and as a very junior lawyer, I assumed they were) the only responsible thing for me to do would be to resign from my firm.

Eventually, I found myself in the office of my mentor, Annette Jarvis. Annette was also the chair of my practice group and a member of the firm's Executive Committee. I began recounting my conversation with the judge. Before I could resign, Annette stopped me and said, "I have spent the last 20 years of my life breaking down barriers for women in the law so *you* can be the kind of lawyer that *you* want to be." Then she picked up her phone and called the head of the organization sponsoring the National Trial Skills program. Before the end of the week, my Trial Skills tuition was refunded and the out-of-state judge was banned from future participation with the organization. Annette stopped by my office to tell me the news. As she walked out, she told me that I should expect a personal apology from the judge. On cue, my phone rang.

I picked up the receiver and heard, "I want you to know that I really regret saying those things to you last week. About half way through our conversation I could tell that you are a tattletale and that you were going to say something to someone. I will not make that mistake again." –Click–

This time, I moved past her intrusion into my workday unphased and never looked back. It was a pivotal moment in my life when the attention and support of my mentor saved my career.

This story came full circle earlier this year. I was in Phoenix, Arizona at a conference for the National Asian Pacific Bar Association (NAPBA). In a breakout section about mentoring, a brilliant

California judge introduced herself and asked if I had an NAPBA mentor. When I told her that I was from Utah and that I did not even have an NAPBA chapter her eyes lit up and she said, "I heard that an Asian attorney from Utah is receiving an award here tomorrow. She is the first female attorney of color to be elected as state bar president there. I think we should find her and ask her to be your mentor."

It took me about five seconds to realize she was talking about me. It took less time to realize neither of us would learn much if I were my own mentor. But when the import of what she was saying sunk in, I asked myself: "Is it possible that I actually have enough experience to mentor someone?" The jury is still out on that, but I decided to accept the challenge. For the past year, I have been actively engaged in opportunities to mentor and help those around me. As the beneficiary of so many great mentors, I am thoroughly enjoying it.

I hope you will consider joining me on this journey of becoming a mentor. There is a range of mentoring opportunities from formal programs like the Utah State Bar's New Lawyer Training Program to spontaneously generated informal mentoring relationships. And there are all types of mentors. Young lawyers are mentoring their more seasoned colleagues in how to better utilize technology. More seasoned attorneys are mentoring their younger colleagues on how to better utilize their paralegals. The possibilities are endless. Practicing law is difficult – even on a good day. But with the right support we can all be our best.

Please join us at our upcoming Bar Review where we will share food, drinks, and updates on the latest Bar activities. It will be an excellent opportunity to connect with old friends, meet some new ones, and perhaps to find a mentor or mentee of your own. Details on the Bar Review location and time will appear in the next e-Bulletin. If you are fortunate enough to have a fabulous mentor, please nominate her or him for one of our new mentoring awards. Winners will be announced at the *Breakfast of Champions* in February. If you have any questions about participating in these activities, please do not hesitate to contact me.

Giving Mental Culpability the Bird: How State v. Bird Secures the Presumption that Traffic Offenses are Strict Liability

by Jonathan R. Hornok & Mariah L. Hornok

The Utah Supreme Court, in its recent opinion in *State v. Bird* (*Bird II*), 2015 UT 7, 345 P.3d 1141, has put to rest a decade's long error in Utah Traffic Code case law. Overturning prior Utah Court of Appeals precedent in *State v. Vialpando*, 2004 UT App 95, 89 P.3d 209, and *State v. Bird* (*Bird I*), 2012 UT App 239, 286 P.3d 11, the high court declared that traffic offenses are presumed to be strict liability.

Although issued without fanfare, *Bird II* is likely to be one of the most relevant supreme court opinions for the average Utahn this year. This opinion impacts all traffic cases, which constitute a large number of the cases filed in this state. Last year, there were 416,778 traffic cases filed in Utah district and justice courts. *See* Administrative Office of the Courts, *2015 Annual Report to the Community* 24–25 (2015). Traffic cases constituted 78.95% of the total 548,092 criminal cases filed and 42.84% of all cases filed in 2014. *See id*. In terms of population, about one traffic case is filed for every seven people. *See id*.; *State & County QuickFacts: Utah*, United States Census Bureau (Mar. 31, 2015, 3:14 PM), http://quickfacts.census.gov/qfd/states/49000.html. Accordingly, the supreme court's opinion in this area is worth an extra degree of consideration. But in order to appreciate the significance of the supreme court's holding in *Bird II*, it is helpful to review the background statutory framework and case law surrounding this issue.

Dueling Presumptions of Mental Culpability in Traffic Offenses

In 1973, the Utah Legislature enacted section 76-2-101 of the Utah Code, which set out the general requirement that crimes include a culpable mental state. As originally enacted, that section provided,

> No person is guilty of an offense unless his conduct is prohibited by law and:
>
> (1) He acts intentionally, knowingly, recklessly or with criminal negligence with respect to each element of the offense as the definition of the offense requires; or
>
> (2) His acts constitute an offense involving strict liability.

1973 Utah Laws 592. But not every statute in the criminal law provides a culpable mental state. Some of these silent offenses are intended to be strict liability – requiring no mental culpability – but most are not. So at the same time, the legislature also enacted section 76-2-102. That section provided a gap-filler mental-state requirement for silent statutes and created a strong presumption against strict liability. It provided,

> Every offense not involving strict liability shall require

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> a culpable mental state, and when the definition of the offense does not specify a culpable mental state, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability only when a statute defining the offense clearly indicates a legislative purpose to impose strict liability for the conduct by use of the phrase "strict liability" or other terms of similar import.

Id. Then, in 1974, the Utah Supreme Court held, on the basis of these statutes, that traffic offenses, like driving under the influence (DUI), require proof of a culpable mental state. *Greaves v. State*, 528 P.2d 805, 807 & n.5 (Utah 1974). And in construing the DUI statute, which was silent with regard to mental state, the supreme court applied the presumption and gap filler provided in section 76-2-102. *Id*.

But in 1983, the legislature superseded *Greaves* by explicitly excluding traffic offenses from the mental-state requirements upon which the supreme court had based its opinion. *See* 1983 Utah Laws 441–42; *Greaves*, 528 P.2d at 807 & n.5 (citing Utah Code Ann. §§ 76-2-101, -102 (1974)). The 1983 amendments added the Traffic Code exception to section 76-2-101. As amended, that section provided,

> No person is guilty of an offense unless his conduct is prohibited by law and:
>
> > (1) He acts intentionally, knowingly, recklessly or with criminal negligence with respect to each element of the offense as the definition of the offense requires; or
> >
> > (2) His acts constitute an offense involving strict liability.
>
> These standards of criminal responsibility shall not apply to the violations set forth in Title 41, Chapter 6, [Traffic Code,] unless specifically provided by law.

1983 Utah Laws 441–42 (legislative format in original).[1] In the context of the supreme court's holding in *Greaves*, the legislative intent is powerfully clear: traffic offenses are different from mainstream criminal offenses; they are presumptively strict liability. The plain language of this exception is strong. "These standards…*shall not* apply…unless *specifically* provided by law." *Id*. (emphasis added). Thus, the legislature jettisoned the old presumption – that a mental state is required unless the words "strict liability," or something similar, appear – and adopted a new presumption that a traffic offense is strict liability "unless specifically provided by law." *Id*.

Twenty years later, in a case similar to *Greaves*, the Utah Court of Appeals considered the mental state required by the "actual physical control" element of the DUI statute in the Traffic Code. *State v. Vialpando*, 2004 UT App 95, ¶¶ 20–27, 89 P.3d 209. But despite the 1983 amendment, the court applied the same presumption that had been applied by the supreme court in *Greaves* – that traffic offenses require a culpable mental state under section 76-2-102.

In *Vialpando*, the court of appeals affirmed Mr. Vialpando's conviction for driving under the influence. *Id.* ¶ 1. On appeal, Mr. Vialpando alleged that the trial court improperly instructed the jury with respect to the "actual physical control" element of the offense of DUI. *Id*. ¶ 20. The DUI statute at the time provided,

> "A person may not operate or be in actual physical control of a vehicle within this state if the person: (i) has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test

> given within two hours after the alleged operation or physical control."

Id. ¶ 21 (emphasis omitted) (quoting Utah Code Ann. § 41-6-44(2)(a)–(2)(a)(i) (1998)). Specifically, Mr. Vialpando argued that the State was required to prove the culpable mental state of intent to "be in actual physical control of a vehicle" in order to secure a conviction. *Id.* ¶ 24. The court rejected that contention. *Id.*¶ 26.

But having rejected intent as the required mental state, the court proceeded to identify what mental state the DUI statute required. *Id.* The court held that "because both [*State v. Bugger*, 483 P.2d 442 (Utah 1971), a supreme court case interpreting the DUI statute prior to the 1983 amendment,] and [the DUI statute] are silent concerning culpable mental state, a violation of the statute occurs when a person 'intentionally, knowingly, [or] recklessly' takes 'actual physical control' of a vehicle, while intoxicated." *Id.* (quoting Utah Code Ann. §§ 76–2–101(1), –102 (1999) (last alteration in original)). Thus, instead of beginning with the presumption that DUI is a strict liability offense pursuant to the Traffic Code exception in section 76-2-101, the court presumed that DUI requires a culpable mental state and filled in the missing mental state pursuant to section 76-2-102. The court's reasoning is found in footnote five, which states,

> Utah Code Annotated section 76–2–102 establishes that: "Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility." Utah Code Annotated section 41–6–44(2) prohibits a person with a blood alcohol concentration of .08 grams or more from operating or being "in actual physical control of a vehicle." Utah Code Ann. § 41–6–44(2) (1998). It does not, however, specify any culpable mental state; thus, the State is not required to prove that Vialpando intended to be in "actual physical control" of the vehicle.

Id. ¶ 26 n.5. Absent from the court's reasoning or citation is any reference to the Traffic Code exception. *See id.* Indeed, the court specifically cited subsection (1) of section 76-2-101 to the exclusion of the expressly applicable language that followed in the same section. Thus, without elaboration, the court failed to consider or apply the statutory presumption enacted by the legislature in 1983 and instead reverted to the presumption applied in *Greaves*. The court's failure in this regard was not an aberration.

Eight years later, in *Bird I*, the State cited the Traffic Code exception and argued to the Utah Court of Appeals that no mental state is required for conviction of a traffic offense. *State v. Bird*, 2012 UT App 239, ¶ 14, 286 P.3d 11. The court again rejected this presumption, reasoning that

> [d]espite the plain language of section 76–2–101, we do not necessarily agree with the State that section 76–2–101(2) [, the Traffic Code exception,] automatically removes the concept of mens rea from the entire Utah Traffic Code. We note that Utah Code section 76–2–102 contains the seemingly contradictory language, "Every offense not involving strict liability shall require a culpable mental state," Utah Code Ann. § 76–2–102 (2008), with no exception for offenses found in the Traffic Code.

Id. ¶ 15 n.4. But the court made no attempt to reconcile the apparent conflict it saw. The supreme court has held that in construing a statute, courts should "seek to render all parts thereof relevant and meaningful, and…accordingly avoid interpretations that will render portions of a statute superfluous or inoperative." *Hall v. Utah State Dept. of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958 (citation and internal quotation marks omitted). Indeed, the supreme court has dictated that "when two statutory provisions conflict in their operation, the provision more specific in application governs over the more general provision." *Id.* In this case, the Traffic Code exception is certainly "more specific" to a traffic offense than the general notion that criminal offenses require a culpable mental state. Thus, the court of appeals did not apply long-standing supreme court precedent to what it perceived to be a statutory conflict and instead maintained the presumption that a traffic offense must include a culpable mental state.

Bird II Corrects the Presumption

The Utah Supreme Court's recent opinion in *Bird II* has righted the course of case law on this issue, declaring that "[v]iolations of the Utah Traffic Code . . . are strict liability offenses 'unless specifically provided by law.'" *State v. Bird*, 2015 UT 7, ¶ 18, 345 P.3d 1141 (quoting Utah Code Ann. § 76-2-101(2)).

In *Bird II*, the supreme court considered whether the trial court should have given an additional jury instruction regarding the mental-culpability implications of the words *receive* and *attempt*, as used in the failure-to-respond statute. *Id.* ¶ 13. Importantly, the supreme court began with the proposition that all traffic offenses

are presumed to be strict liability. *Id.* ¶ 18. But, because the State conceded that the words receive and attempt specifically provide a mental state requirement, the supreme court did not address why these terms rise to the level required to rebut the statutory presumption. The remainder of the supreme court's reasoning is directed to whether the mental states implicated by the words *attempt* and *receive* are clear enough for a jury to comprehend without additional instruction *Id.* ¶¶ 19–24.

But while the supreme court's analysis of the Traffic Code exception is cursory at best, it has important ramifications in the context of the court of appeals' analysis of that provision in *Bird I*. Where the court of appeals rejected the presumption dictated by the Traffic Code exception, the supreme court flatly accepted it. In so doing, the supreme court silently rejected the contrary ruling of the court of appeals in footnote 4. *Compare Bird II*, 2015 UT 7, ¶ 18, *with Bird I*, 2012 UT App 239, ¶¶ 14–15 & n.4. Similarly, the supreme court's application of the Traffic Code exception overrules the inconsistent reasoning in paragraph twenty-six and footnote five of the court of appeals' opinion in *Vialpando*, which applied the gap-filler mental-state requirement in section 76-2-102 to a silent DUI statute. *State v. Vialpando*, 2004 UT App 95, ¶ 26 & n.5, 89 P.3d 209. Thus, the supreme court's seemingly innocuous introduction to a discussion of a traffic offense's culpable mental state in fact has a substantial effect on traffic offenses because it changes the foundational presumption.

On the basis of the supreme court's pronouncement in *Bird II*, a court considering whether a traffic offense requires a culpable mental state must begin with the presumption that the offense is strict liability. *Bird II*, 2015 UT 7, ¶ 18. Then the court must determine whether the traffic offense at issue is one of those cases where a culpable mental state is "specifically provided by law." *Id.* (quoting Utah Code Ann. § 76-2-101(2)). And in making that determination, courts must look to the text of the statute defining the traffic offense because statutory law alone has the power to delineate the boundaries of an offense in this state. *State v. Gardiner*, 814 P.2d 568, 573–74 (Utah 1991) (citing Utah Code Ann. § 76-1-105).[2]

But *Bird II* leaves a critical question unanswered: What words in a traffic offense are sufficient indicia of legislative intent to trigger the "specifically provided by law" exclusion? Certainly the traditional language used to describe a culpable mental state

will suffice, including the terms *intentional, knowing, reckless, criminally negligent, willful, wanton,* and *malice*. *See* Utah Code Ann. § 76-2-103 (defining mental states for the Utah Criminal Code); Joshua Dressler, *Understanding Criminal Law* 121–36 (5th ed. 2009). But these terms appear relatively infrequently in the Traffic Code. *See* Utah Code Ann. § 41-6a-210 (criminalizing "willful or wanton disregard of [an officer's] signal"); *id.* § 41-6a-404 (criminalizing the act of giving information in an accident report that the person "know[s] or ha[s] reason to believe" is false); *id.* § 41-6a-503 (enhancing a DUI conviction if the driver "operated the vehicle in a negligent manner"); *id.* § 41-6a-528 (criminalizing "willful or wanton disregard for the safety of persons or property"); *id.* § 41-6a-1106 (criminalizing the "negligent" operation of a bicycle). The more interesting issue going forward is what other terms add a mental-state requirement to a traffic offense. Because the State in its reply brief conceded that the terms *attempt* and *receive* added a mental-state requirement, the supreme court has not adopted any analysis for resolving this issue. *Bird II*, 2015 UT 7, ¶ 18.

The State's concession that the words *attempt* and *receive* carry mental-state implications led the supreme court to skip a critical threshold issue. The State could have made a persuasive argument that no mental state was required for a conviction under the failure-to-respond statute on the basis of the plain language of Traffic Code exception. Indeed, the State made that argument to the court of appeals. *State v. Bird*, 2012 UT App 239, ¶ 14, 286 P.3d 11; Brief of Appellee at 25–27, *State v. Bird*, 2012 UT App 239, 286 P.3d 11 (No. 20100538-CA). Pursuant to the Traffic Code exception, a mental state is not required "unless *specifically* provided by law." Utah Code Ann. § 76-2-101(2) (LexisNexis 2012) (emphasis added). The inclusion of the word *specifically* dictates that the language of an offense statute must do more than "supply" a mental-state requirement; it must do so in a manner that is "free from ambiguity." *Merriam-Webster's Collegiate Dictionary* 1001, 1198 (11th ed. 2012). Under the Traffic Code exception, the supreme court should have first considered whether the words *attempt* and *receive* unambiguously supplied a mental-state requirement. Then, it could determine whether that requirement was clear enough for the jury. Mr. Bird's thorough treatment of the threshold issue – ten out of twenty-four pages of his legal analysis – indicates that Mr. Bird thought the State had a viable argument on this point. *See* Brief of Respondent at 12–22, *State v. Bird*, 2015 UT 7, 345 P.3d 1141 (No. 20120906). But the supreme court never had – or at least never took – the opportunity to consider the threshold question because the State conceded the issue.

Going forward, a court determining whether a traffic offense has "specifically provided" a mental-state requirement must reconcile the tension between the language of the Traffic Code exception and the incomplete analysis of *Bird II*. Defendants will no doubt urge a broad reading of *Bird II* – effectively reading out the Traffic Code exception by finding that almost any traffic offense has "specifically provided" a required mental state. That would be a mistake. *Bird II* must be applied for what it specifically requires: that when a defendant is on trial for failure to respond, the "trial court [must] instruct the jury that [the defendant] must have knowingly 'received a visual or audible signal from a police officer' and must have intended 'to flee or elude a peace officer.'" *Bird II*, 2015 UT 7, ¶ 26. But *Bird II* is silent on the threshold issue – what language in a traffic offense is sufficient to "specifically provide[]" a mental state. *See id.* ¶ 18; Utah Code Ann. § 76-2-101(2). Accordingly, a court should first conduct statutory analysis of the traffic offense at issue, asking whether the language of the offense statute unambiguously supplies a mental-state requirement.

CONCLUSION

For the last decade, the Utah Court of Appeals has presumed that traffic offenses require a culpable mental state under section 76-2-102 of the Utah Code despite the explicit exclusion of Traffic Code offenses from the mental-state requirements in section 76-2-101(2). Paragraph eighteen of the Utah Supreme Court's recent opinion in *Bird II* has overruled this presumption. 2015 UT 7, ¶ 18. Pursuant to this pronouncement, a court must begin with the presumption that Utah traffic offenses are strict liability. But the supreme court failed to analyze the next question: What is required for a traffic offense to "specifically provide[]" a culpable mental state? Utah Code Ann. § 76-2-101(2). Courts and litigants will no doubt wrestle with this question. But the best answer is that it must do so unambiguously.

1. Subsection (1) of section 76-2-101 had already been amended that year. 1983 Utah Laws 431. Those changes are silently reflected in the later adoption of the Traffic Code exception. The whole section was subsequently amended in 2005 to its current form. 2005 Utah Laws 155. The 2005 amendments include removal of the personal pronoun *he* and an updated reference to the renumbered traffic code in Title 41, Chapter 6a of the Utah Code. *Id.*

2. Courts in this state have in the past applied the traditional *malum prohibitum* versus *malum in se* analysis to identify what crimes are strict liability. *See, e.g., State v. Larsen*, 2000 UT App 106, ¶ 25, 999 P.2d 1252 (citing *Peck v. Dunn*, 574 P.2d 367, 370 (Utah 1978)); *see also Black's Law Dictionary* 1045 (9th ed. 2009) (defining the term *malum in se* as "[a] crime or an act that is inherently immoral" and the term *malum prohibitum* as "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral"); *Staples v. United States*, 511 U.S. 600, 604–19 (1994) (concluding that an offense was not strict liability on the basis of the severe punishment); Joshua Dressler, *Understanding Criminal Law* 145–51 (5th ed. 2009) (describing the traditional analysis). But where criminal statutory law has expressly preempted common law, this analysis must take a back seat. *See State v. Gardiner*, 814 P.2d 568, 573–74 (Utah 1991) (citing Utah Code Ann. § 76-1-105).

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From the Trial Bench to the Appellate Bench

by Judge Kate A. Toomey

A treasured colleague once likened the difference between being a trial court judge and an appellate court judge to the difference between attending an exciting event and merely reading about it. There is some truth to this, and I suspect that a strong preference for one over the other reveals a great deal. As for me, I am deeply grateful to have had both opportunities, first as a District Court judge for a little less than eight years, and now as a Court of Appeals judge for a little over a year. Here, I offer some observations about my experiences in each position, with special emphasis on the things that are perhaps not so obvious.

In some respects, although the daily routines are very different, shifting from one assignment to the other presented fewer difficulties than one might expect. Having a trial court docket crammed mostly with civil cases, I had gained at least some experience in many more substantive areas of the law than I had encountered as a litigator. Judges are among the last of the legal generalists, so although I had no experience in family law before taking the bench, it suddenly became an important part of my job to make decisions in those types of cases: our District Courts handled over 20,000 domestic cases last year. Here at the Court of Appeals, domestic cases constitute 7% of the filings, and so although the numbers are not so staggering as in District Court, they nevertheless continue to be a significant part of the work I do now. There are many other examples, but my point is that I had learned a lot of substantive family law before I began doing appellate work, and this existing base of knowledge allowed me to address those cases with a greater wealth of knowledge.

At the same time, I had little idea how a modern appellate court operates: how cases are assigned, calendared, managed, and tracked; how decisions are circulated, voted on, checked, double checked, then checked again before publication; how staff attorneys assist the business of the court; how case flow is measured and monitored; how statistics are generated and what they mean. Of course I had come to understand the inner workings of the District Court, but this was almost useless when I switched jobs. When it comes to moving an appellate case from briefing to decision, the process is significantly more complex with more people involved than I had imagined. Indeed, at times it has seemed as though the horizon of complete understanding is always a little beyond reach, especially as the court continues to improve its new electronic opinion circulation and voting system.

As a trial court judge, my days were less predictable than they are now. Although my docket was always heavily scheduled, I might arrive at work only to find that a case had been settled at the last minute and the time I had set aside for trial was no longer needed. These last-minute openings gave me welcome opportunities to work on writing projects which otherwise had to be fit in around my other responsibilities. Most of the time, however, I was constantly circulating between courtroom and office, and rare was the hour without some form of direct human interaction.

By contrast, my in-court hours at the Court of Appeals are limited and predictable, and spending the day quietly working in chambers is most of what I do. This means reading hundreds of pages of briefs and cases and draft opinions – far more reading than I did as a District Court judge – and devoting a great deal more time to writing and editing. Although I am fortunate to be supported in this endeavor by two excellent law clerks, many of the week's hours are spent in solitary engagement.

People sometimes ask whether the quality of advocacy is higher in one domain than another, but the truth is that it's different in some

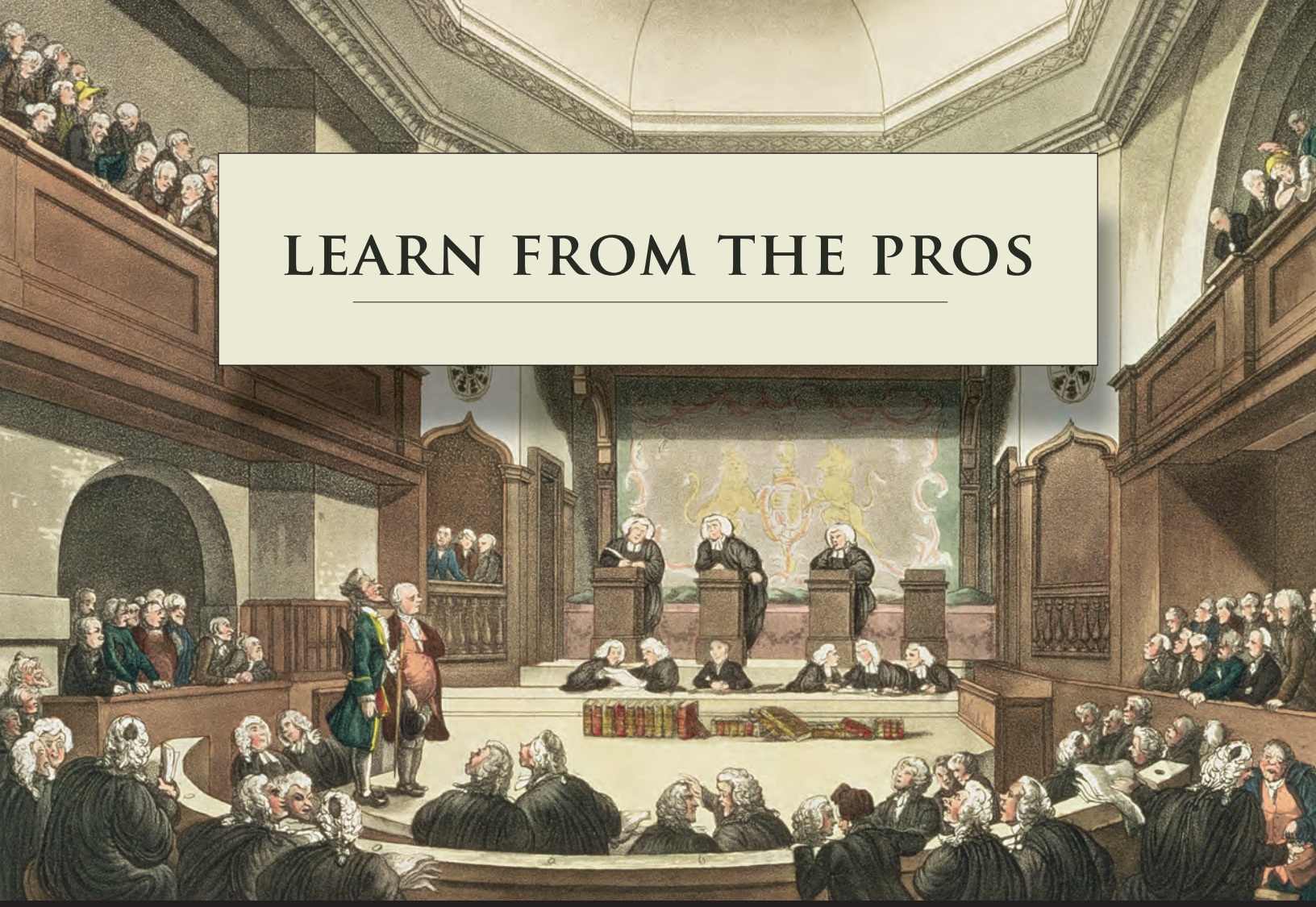
JUDGE KATE A. TOOMEY was appointed to the Utah Court of Appeals in 2014, having served previously as a Third District Court Judge.

respects and similar in others. Trial counsel and appellate counsel are most effective if their written submissions are well-written, clear and accurate on the facts, and supported by the law. The best oral advocates in either court are well-prepared and think quickly on their feet. They welcome engagement with the bench as an opportunity to clarify matters that may have eluded the judge in the written materials. Excellent litigators anticipate and prepare to meet complex logistical and strategic challenges that inspire analogies of war and battle. Appellate counsel advocate for individual clients but prepare to address in broader terms the implications of their legal position. In either arena, thoughtful preparation carries the day.

One thing I loved best about trial court work was the hands-on sense of helping people solve problems, and I wondered whether the appellate world, where we have less contact with the public and see fewer litigants, would leave me feeling somewhat disconnected. It is certainly true that the judges on the fifth floor of the Matheson Courthouse experience a great deal less drama than our hardworking colleagues in every other courthouse in the State. At the same time, I continue to be acutely aware, as are my colleagues, that the disposition of each case is significant for the individuals involved and may have broader implications for many others. In either setting it is a tremendous, and often times humbling, responsibility.

What I miss most about the trial court is, happily, what I like most about the Court of Appeals, and that is the terrific people with whom I work: the clerical staff, the bailiffs, the administrative staff, the law clerks and staff attorneys, and the judges. It's a collegial group, and I feel fortunate to work with highly skilled, hard-working professionals, dedicated to the public good. I would add to that list the excellent attorneys with whom I have been so fortunate to engage over the years.

In the end, when it comes to attending the exciting event or merely reading about it, I see the advantages in each. That said, after all these years of attending the events, I find that "just" reading about them is surprisingly interesting, and very satisfying.



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Questions and Answers from the Clerk's Office at the Utah Court of Appeals

Interview with Lisa Collins

by Julie J. Nelson

The appellate clerk's office plays a critical role in the appellate process. Questions often arise regarding transcripts, docketing statements, oral arguments, and the rules of appellate procedure. Lisa Collins, Clerk of the Utah Court of Appeals, answers questions about the most common issues she sees, and some things she wishes all attorneys knew.

When is it appropriate for an attorney to call the clerk's office and ask a question?

It is always appropriate. We may not always be able to answer, but my staff and I are here to assist you. We would rather receive a phone call than have to reject something you file.

What are the most common questions you get?

"A document is missing from the record. What is my next step?" If a document is missing from the record, you may contact me and I will try to quickly remedy the deficiency. Otherwise, please file a motion to supplement the record and attach copies of the documents you believe are missing.

"I thought the record was complete, but now I realize I didn't order all the necessary transcripts. What can I do?" If the briefing schedule has been set, you should file a motion to supplement the record.

"How much time do I get for oral argument?" Fifteen minutes per side in the Utah Court of Appeals.

"How much time should I reserve for rebuttal?" You get to choose, but the most common amount of time is three minutes.

"Can I move for more time?" Yes, you can file a motion for more time. The panel of judges hearing oral argument on that day will decide how much more time, if any, will be granted.

"When will my case be decided?" My standard response is two to eight months after the court considers the case on its calendar. The time could be shorter, or longer. The judges work diligently to issue the decisions as soon as possible.

"How do I order and pay for a transcript?" Access the online transcript request form found on the state courts website: https://pubapps.utcourts.gov/TranscriptWEB/TranscriptRequestServlet.

If your case is already on appeal, you must serve the transcript request on opposing counsel. The court will generate an automatic acknowledgment of the request. A second email will advise when the request has been assigned to a court reporter and will provide the reporter's name. Payment arrangements should be made directly with the court reporter.

You can ask additional questions by email to the statewide transcript coordinator, Crystal Cragun, crystalc@utcourts.gov.

What are the most common mistakes you see?

Problems with briefing. The Utah Rules of Appellate Procedure are very specific about what a brief should include, in particular Rule 24. If your brief is missing citations to the record, for

JULIE J. NELSON is an appellate attorney at Zimmerman Jones Booher LLC.

Lisa Collins, Clerk, Utah Court of Appeals, with the court's judges.

instance, it will be lodged but not filed. Then you will have five business days to correct the deficiency. Returning a brief for correction is time consuming and costly for you and your client. The record cites are important because they guide the parties and the court to the support for the fact or argument presented. Fortunately, the rules tell you exactly what to do. If you have any questions, always feel free to call the clerk's office.

FILING

How do I enter an appearance in the Utah Court of Appeals?

You may file a notice of appearance. Also, when you file a document in a case with your name on it, it is considered an appearance.

What documents can be filed by email?

You may email any document; however, if copies are required, you must follow up with the hard copies. Copies are not needed for extensions of time, voluntary dismissals, or oral argument notices. The rules tell you whether multiple copies are required. But feel free to call if you are not sure.

Rule 9, regarding docketing statements, just changed. What is the purpose of the docketing statement, and who sees it?

The new Rule 9 clarifies the limited nature of the docketing statement. The docketing statement is used to screen for jurisdictional problems, such as the untimely filing of the notice of appeal. It is not a rough draft of your brief.

After review of the docketing statement and confirmation that jurisdiction is appropriate, the docketing statement may be used in considering whether a case might be suitable for mediation. The court determines whether a case might be suitable for mediation. Some cases, such as criminal or adoption cases, are less likely to be set for mediation.

What happens if an attorney doesn't file a docketing statement on time?

As explained by Rule 9(b), a docketing statement is due twenty-one days after the notice of appeal is filed. If an attorney does not file a docketing statement by the deadline, a default dismissal is issued, giving seven days to file one. If the attorney does not file a docketing statement within that correction period in a civil case, the case is dismissed. In a criminal case, the appeal will not be dismissed, but the attorney may be held in contempt.

EXTENSIONS & REQUESTS FOR OVERLENGTH BRIEFS

Rule 26(a) allows the parties to stipulate to one extension of thirty days. Is that ever denied?

No.

Why does the court discourage further or ongoing extensions?

The court of appeals strives to give expediency to the appellate process. Court patrons often wait a long time between the filing in the lower court and the issuing of an appellate decision. Discouraging extensions helps bring litigation to a more timely final result.

How are extensions handled?

Generally, extensions are handled by the clerk's office. The judges set forth the policy on extensions for the clerk to follow. Judges will see the extensions that are opposed. They are also alerted if the extension process is abused.

What is the court's view of requests for permission to file an overlength brief?

Brevity is the soul of wit. The court prefers brevity and clarity – more words often do not result in a better argument. Requests for additional words are often denied. Sometimes, the court will deny the number of words requested but grant a portion of the request.

ASSIGNMENT OF CASES

How and when are cases assigned?

Cases are assigned to judges randomly, four months in advance of the oral argument or other court consideration date. The names of the judges assigned to a case are not released until the first day of the month of oral argument.

Who decides whether a case gets oral argument? At what point is that decision made?

In the court of appeals, oral argument will be scheduled if the court determines that it will help in the decision process. Before a case is assigned to a panel for decision, the briefs are reviewed to determine the general nature and complexity of the case. A staff attorney will do the initial review and make a recommendation to the screening judge. But ultimately, the screening judge reviews the briefs, considers if oral argument is requested, and decides whether a case will be set for oral argument. The screening judge is one of the court of appeals judges, and the screening responsibility rotates.

BRIEFS

When should a minor's name be redacted or abbreviated to their initials?

The best practice is to use the victim or minor's initials. Divorce cases, for example, frequently involve minors and in those cases, their names should be abbreviated to initials.

Also be careful about the addenda. The minor's name might be lurking in the district court judgment or some other document that is attached as an addendum. For example, the minor's names, dates of birth, and social security numbers would be on their parents' tax returns.

It is acceptable to provide one redacted version for the public and one not-redacted version for the judges, but both versions should be filed on the same day. It also good practice to use terms like "birthmother" or "birthfather" in filing briefs where the party may be concerned about their privacy.

The courtesy briefs (also known as brief on disk) take a long time to prepare. Are they used enough to justify it?

Yes. The judges have a new operating system for viewing their briefs and voting. Every courtesy brief is uploaded into the system, and judges do use them.

ELECTRONIC BRIEFING

When will the court be moving to electronic briefing?

Hopefully, we will have an electronic filing system sometime in 2016 or early 2017. We have begun the process, but designing a user-friendly, time-saving, sound filing system takes painstaking effort and detail.

When will you have an electronic record?

The electronic record is here. As of September 21, 2015, we have an electronic record in most cases, with the exception of agency cases.

You will see the following statement when you receive your briefing schedule:

> In an effort to further streamline processes and create additional efficiencies, as we work our way toward e-filing, the Utah Court of Appeals will replace the paper copy of the record on appeal with a CD. The CD will include the record index, the paginated trial court record, the transcript if it was electronically filed, and an exhibit list. Transcripts not electronically filed will be in hard copy format. If you need an exhibit that is not scanned into the record, you may make the request by emailing courtofappeals@utcourts.gov. The record (CD) may be checked out at no charge and returned when your brief is filed. If you would like to keep a copy of the record, you may purchase the CD for $10.00. The file must be viewed in Adobe. The current citation rules will apply. This is a first step on our way to electronic filing. Please let me know if you have any questions or comments.
>
> This new process is a work in progress, but I am confident that it will be beneficial to the trial court, attorneys, and the parties.

What else would you like to tell us?

We are developing an appellate training program: a series of informational CLE's on the appellate process. Please contact us if you are interested. We can design a training program for your specific division or create a training program based on your needs.

In the clerk's office, we are truly proud public servants. We understand the appellate process is complicated, and we are happy to assist you in any way that we can.

ClydeSnow

Clyde Snow & Sessions is pleased to welcome attorneys **Lisa A. Marcy** and **Jonathan D. Bletzacker** to the firm's Salt Lake City office.

Ms. Marcy has enjoyed over 25 years of practicing law in the public and private sectors. She represents many different clients, from individuals to businesses, who seek her help with commercial litigation, insurance defense, labor and employment, including human resources, and creditors' rights. She actively participates in the Defense Research Institute, and is a Program Director for the National Institute for Trial Advocacy.

Mr. Bletzacker practices primarily in the areas of real property and commercial litigation, including title insurance defense. Jon also has represented clients in bankruptcy proceedings, estate planning matters, business formations, and family law. He received a Juris Doctor from the University of Utah College of Law, and a Bachelor of Science in political science also from the University of Utah.

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The Oil Tycoon of Sanpete County or Do Not Insult the Potato Salad

by Learned Ham

Do you realize how hard it is to get free legal advice in this state?

There I am, minding my own business, when the phone rings. I find myself talking to Larry. Larry says he's a landman (although SpellCheck is convinced Larry is a sandman). Larry says he works for an oil company and that I own some mineral rights they'd like to lease. Larry insists that my great Uncle Bud left me the mineral rights to a piece of Sanpete County many years ago. This is news to me. My day is brightening up considerably. I am about to become an oil and gas tycoon. One of the idle rich. I knew my ship would come in eventually, but I didn't imagine it would be docking in Moroni.

My new best friend is going to send me the lease, which I am to sign and return. He does, but I don't.

"Larry, it says here in paragraph 17 that 'Lessor hereby warrants and agrees to defend the title to the Leased Rights.' Larry, I have no idea whether I have title to the Leased Rights and I don't think I'm going to warrant or agree to defend it. I'm curious, though, would you please send me your title work?" (I actually spent the first year of my legal career, or a long and dull part of it anyway, doing oil and gas title opinions, but that was a few, or maybe thirty, years ago and I'm unlikely to be able to make sense of anything Larry might send me.)

"I'm sorry, I can't do that. It's confidential."

"The company expects me to warrant and defend your title work, but won't let me see it?"

"Oh, don't worry about that, it's just a standard form. The company would never make you do that."

"Oh, OK. It says here I get a royalty, but it doesn't say when or how often it's paid. Shouldn't it spell that out?"

"If there's any oil there we'll pay monthly, don't sweat that."

"Fair enough. What if there's a spill or the company pumps the well full of toxic goo and somebody has to clean it up? Where's the part that says the company will hold me harmless?"

"The lease probably doesn't say anything about that, but I'm sure the company would take care of you." (Larry may be an oil company litigator's nightmare, but I'm starting to warm up to him.)

The closer I look at the lease, the more I realize that I am not going to be an oil and gas tycoon after all, even if they agree to modify all the unconscionable parts of it. I sincerely hope you didn't draft it. I apparently own 1/144 of the mineral rights associated with a couple of acres that used to be my great Uncle Bud's turkey farm in Moroni. If it's a gusher, I'm looking at fifty or sixty bucks a month, tops. And that's if oil prices ever recover enough to convince Larry's company that it's worth the trouble. 1/144. Larry reluctantly agrees with my estimates.

I now have a problem. I know nothing about oil and gas law, and could use some advice, but I am not about to spend real money on mineral rights that are probably worth zero dollars, and – best case – will net me $50 a month several years from now.

My cousins, and they are legion, also hear from Larry. I am tempted to say there must be 143 of them, but I suspect we're talking *per stirpes* distribution here rather than *per capita*. I haven't really understood the difference since the bar review course. To be honest, my grasp even then was slippery. There was a touch of polygamy on that side of the family, too, and I'm

a little curious about how Larry dealt with that in the title work. Which he won't show me. Did I mention that?

Less of a mystery is how my great grandfather's first wife, Hannah, dealt with it. Great-grandpa married his second wife, Sina, on the seventeenth anniversary of his wedding with Hannah – thoughtfully and conveniently avoiding the necessity of remembering two different anniversaries. Sina was barely sixteen. Hannah was in her thirties and had borne six children. Hannah packed up her children and re-traced the old Mormon Trail back through Wyoming and Nebraska. But I digress.

You probably think the cousins should all chip in to pay for an hour or two with a real oil and gas lawyer. You haven't met my cousins, have you? I'll see that you're invited to the next reunion. Bring your own kevlar. We often run short. Negotiating an oil and gas lease with my cousins would be harder than that debt-for-equity swap we pulled off with 317 public bondholders. More dangerous, too. Family lore, unreliable though it may be, has it that Aunt Ellen's first husband, Bill (a Sanpete County sheriff), was gunned down by an aging Butch Cassidy. I know, this is unlikely. Ellen wasn't *that* old, and Butch was probably buried in Argentina by then, anyway, which is a pretty solid alibi. Personally, I think that, at one of the early reunions, Bill might have said something disparaging about the potato salad. Someone took offense, and Butch got framed.

So I do a little of my own research (about mineral rights, not Butch Cassidy, Bill, or sub-par potato salad recipes – all of which would probably be more interesting, truth be told). The results scare me, which I guess they're supposed to do. My favorite is a law review article titled: *CERCLA Liability of Mineral Rights Owners – Another Pocket to Pick?*, Rachel H. Blumenfeld, *CERCLA Liability of Mineral Rights Owners – Another Pocket to Pick?*, (19 MEM. ST. U. L. Rev. 77 (1988–1989)). Thanks, great Uncle Bud.

I need some free legal advice. I'm entitled to it, too. I read *Gideon v. Wainwright*, (372 U.S. 335 (1963)), in law school. I also watched *Gideon's Trumpet*, a made-for-TV movie that was

quite a lot more entertaining than Justice Black's opinion. It's a good thing he found that legal career because he was never going to hack it as a screenwriter. Henry Fonda, John Houseman, Jose Ferrer, and Fay Wray – *The Hallmark Hall of Fame* – back when CBS was a real network. Fay Wray, I tell you! I know my rights.

If there's one thing in-house lawyers are good at (and I know that's debatable in and of itself), it's getting free legal advice. Dial up a few lawyers around town you've never hired before and tell them you're looking for some help with…whatever. You'll soon have lots of free legal advice, along with a nice selection of golf hats and fleece jackets emblazoned with firm names and logos. I'm running out of hooks and hangers in the closet. Nobody ever said in-house work would be easy. But the old ruse of dangling the promise of future billables wasn't going to work in this case. My employer has nothing to do with the oil and gas industry. This called for a different approach.

I twisted the name of a retired oil and gas lawyer out of another lawyer in my department who owed me a favor.

I called her up. She was quick to mention that she is retired, has no license to practice law, and recommends that I talk to a real oil and gas lawyer. She gives me three names. If there is an instruction manual for retired lawyers, she is probably reading from chapter one. My eyes light up when she mentions she has no license, though. Now I know she can't charge me.

She was quite helpful. She's a big Henry Fonda fan, too. And I learned about something called force-pooling. Force-pooling apparently means the oil company can pump my oil and gas even if I don't want them to and won't sign a lease. It's more complicated than that, of course, but that's sort of what it boils down to – like eminent domain, or the third grade bully who took your lunch money in the playground.

The key is that if the oil company force-pools me, they still have to pay my royalty. I still get my fifty bucks, even without signing a lease. This is perfect. It allows me to take a principled stand against fracking and still collect my royalty. "No way, Larry, I absolutely will not be complicit in despoiling the pristine natural state of great Uncle Bud's old turkey farm. But you have my address in case you need to send me a check from time to time."

It might sound hypocritical – taking a loud, public stand against something that you really don't oppose, or from which you'll benefit later – or maybe it's just simple dishonesty, but it is the very principle by which Congress functions, at least to the extent it functions at all. Congressional Republicans are only too eager to denounce raising the debt ceiling, so long as they know it's going to happen anyway. And you can be sure the only reason Chuck Schumer and other Democrats opposed the nuclear treaty with Iran was because they knew there were enough votes to keep it alive. Sorry, I know, it's not a treaty, I meant to say "executive agreement." Words matter, that's the moral of the story.

I share my thoughts, misgivings, markup of the lease, and potato salad recipe with the cousins. I offer them my mineral rights. I tell them I am not an oil and gas lawyer. I give them three names. I tell them I don't plan to sign the lease. Most of them sign theirs anyway.

I kind of wish great Uncle Bud had just left me a couple of turkeys.

Christensen & Jensen is pleased to announce that Mary Corporon has joined the firm as a shareholder. Mary has been practicing for more than 30 years in criminal and family law.

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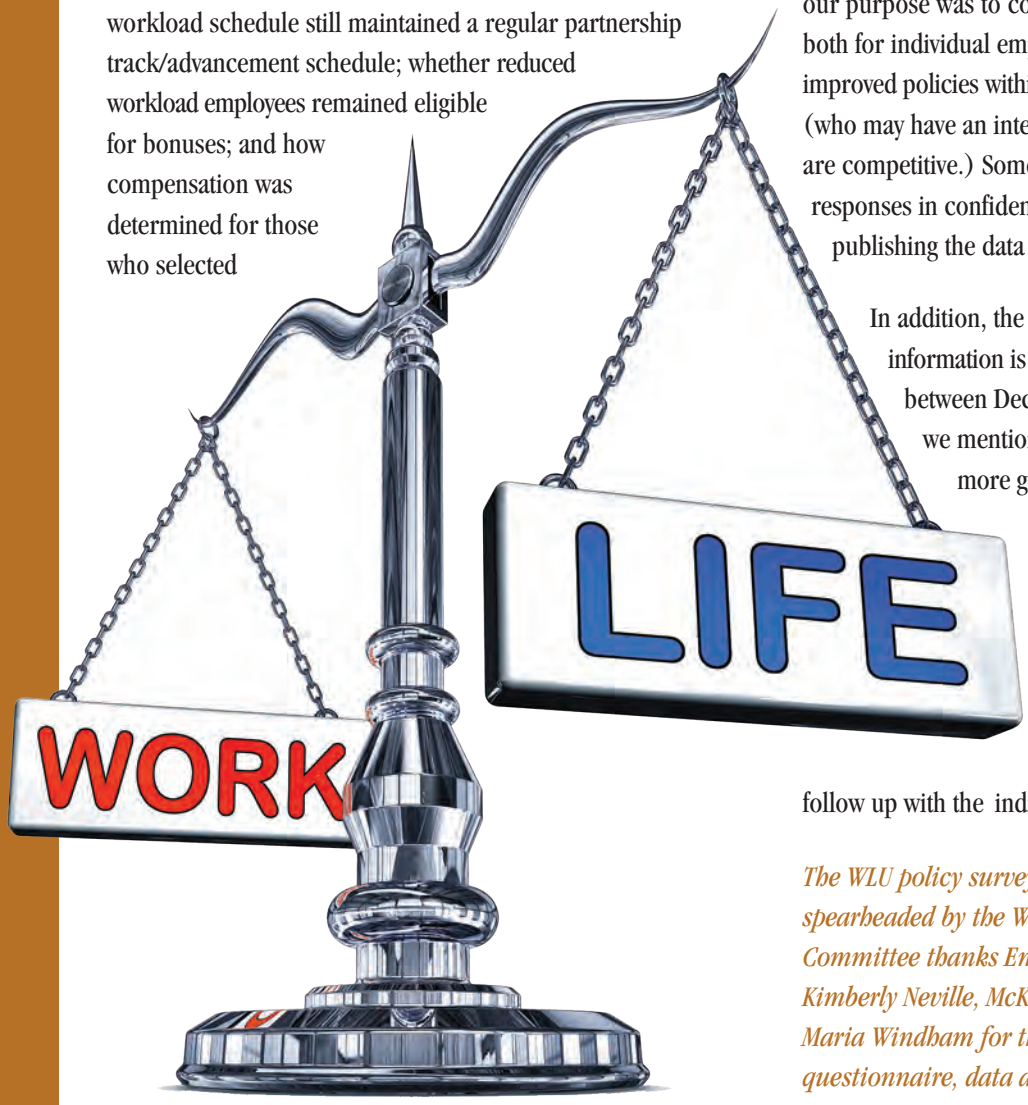
Workplace Trends: Women Lawyers of Utah 2015 Workplace Policy Survey

In early 2015, Women Lawyers of Utah (WLU) conducted a survey regarding several employment policies that are of interest to women within the legal profession. The primary purpose of the survey was to assist WLU in tracking current market trends and policies that influence our constituency's interest in entering or remaining in the legal profession. In particular, the survey asked respondents questions relating to paid parental leave for the birth or adoption of a child; reduced workload options; flexible schedule or alternative work arrangement options; whether those who utilized a reduced workload schedule still maintained a regular partnership track/advancement schedule; whether reduced workload employees remained eligible for bonuses; and how compensation was determined for those who selected reduced workload, flexible, or alternative work schedules.



The survey was disseminated to law firms, corporate law departments, and government legal employers in Salt Lake City, Utah. WLU received twenty-four responses to the survey: nineteen from law firms of various sizes, two from corporate law departments, and three from government legal employers.

The survey's sample size and methods were not scientific in nature and are not intended to be perceived in that manner. Rather, our purpose was to collect data for informational purposes both for individual employees (who may be advocating for improved policies within the workplace) and for legal employers (who may have an interest in knowing whether their policies are competitive.) Some participants also submitted their responses in confidence, which prevents us from fully publishing the data here.

In addition, the WLU survey committee notes that our information is based upon responses that were provided between December 2014 and February 2015. While we mention examples from firms with some of the more generous policies as part of this article, our list is not intended to be all-inclusive. We acknowledge that other employers may have similar policies, and we also understand that many employers may have made improvements to their policies after the survey was administered. We would encourage interested readers to follow up with the individual employers listed in this article if

The WLU policy survey was a collaborative effort spearheaded by the WLU's Work-Life Balance Committee. The Committee thanks Emily Adams, Nicole Griffin Farrell, Kimberly Neville, McKinzie Peterson, Karina Sargsian, and Maria Windham for their contributions to the survey questionnaire, data analysis, and publication.

there are specific questions regarding the employer's policies.

The committee noted several trends among local employers, including improved benefits and leave policies for working parents and attorneys seeking flexible working conditions. The observations of the survey committee are discussed below.

SURVEY RESULTS

Maternity Leave

All legal employers who participated in the survey offered some form of maternity leave to attorneys for the birth of a child. The length of leave and whether the leave was paid varied significantly among responding employers. Some employers only provide the leave that is legally mandated by the Family Medical Leave Act of 1993 (FMLA) and other various state laws, while others provide paid leave from accumulated personal time off (PTO) and accumulated sick leave. Others have specifically allocated several weeks of paid leave for maternity leave purposes.

Larger law firms that responded to the survey appear to have the most generous maternity leave policies. The average amount of paid maternity leave offered by large law firms in the Salt Lake City market is twelve weeks. However, a few law firms offer paid maternity leave beyond twelve weeks. For example, Dorsey & Whitney LLP offers its female partners and associates up to eighteen weeks of maternity leave, including six weeks of disability, eight weeks of paid parental leave, and up to four weeks of vacation. Holland & Hart, LLP was also above the market average, offering its female partners and associates up to sixteen weeks of paid maternity leave.

For smaller law firms, maternity leave policies ranged from no policy to an average of six weeks paid leave. For those law firms that have no maternity leave policy, the amount of leave appears to be generally determined on a case-by-case basis. Other legal employers, such as government entities and corporations, generally require employees to use PTO or sick leave towards maternity leave. The Office of the United States Attorney, for example, allows employees to use their available sick leave and PTO, and also provides employees the opportunity to receive an advance of sick leave up to 240 additional hours that must eventually be paid back.

Paternity Leave and Adoption Leave

Another emerging concept is paid leave for fathers. Although the majority of the respondents do not appear to offer paid paternal leave at this time, at least some firms are now offering this benefit to male attorneys. Examples within this market included Zimmerman Jones & Booher, LLC (twelve weeks to all attorneys); Stoel Rives LLP (eight paid weeks of parental leave, plus vacation); Dorsey & Whitney (eight paid weeks of parental leave, plus vacation); and Holland & Hart (seven weeks). Both of the two responding corporate employers also offered paternity leave to their male attorneys.

There also appears to be a growing trend towards parental leave for adoptive parents, although the amount of leave available tends to be much less than that offered to birth parents. The average paid leave for non-birth parents was four to eight weeks among those who identified this as a benefit in their survey response. However, several encouraging exceptions exist. The law firms of Ray Quinney & Nebeker, P.C., and Zimmerman Jones Booher, for example, each provide twelve weeks paid leave for adoptive/non-birth parents.

Reduced Workload Option

The survey committee also noted a growing trend with respect to reduced work-load options, with almost all respondents

indicating that their employer offers some form of reduced-time schedule. Within law firms, reduced workload arrangements differed depending on whether the option was requested by a partner or by an associate. Generally, partners may set their own schedule. As for associates, some employers have an official reduced workload policy, where other employers allow such arrangements on a case-by-case basis.

Examples of firms with reduced workload policies include Parsons Behle & Latimer, which offers a Reduced Load Policy for associates after one year of employment with the firm. The firm's policy requires associates to bill a minimum of 75% of the usual 1850 billable hours. Another example is Ray Quinney & Nebeker, whose Reduced Time Work Option allows associates to reduce their billable hours to 1600 (with the possibility of further reduction on a case-by-case basis). Another firm, Snell & Wilmer, LLP, reported that it offers a ramp-up period to attorneys returning from family leave, recognizing that associates may have difficulty immediately returning to full-time status in the three months following leave.

> *"[A]lthough all responding employers provided some form of paid, job-guaranteed leave to female attorneys following the birth of a child, the same benefits were not as widely available for adoptive parents or male attorneys."*

Respondents were asked several follow-up questions regarding reduced workload schedules. The survey asked whether those electing a reduced workload still maintain their partnership advancement track. Survey results show that some firms, such as Stoel Rives and Dorsey & Whitney, allow associates to work a reduced workload without their partnership track being affected. At other firms, electing to work a reduced workload adds additional time to one's partnership advancement schedule. Respondents were also asked whether those electing to work a reduced schedule remained eligible for bonuses. Responses were evenly split on this question, with some firms allowing bonuses for those working a reduced schedule.

Finally, respondents were asked how compensation is determined for those who elect a reduced workload. Most respondents indicated that compensation for those working a reduced workload is adjusted proportionally from the full-time base salary. A few law firms take a different approach toward determining compensation. For example, at Ray Quinney & Nebeker, associates are allowed to reduce their hours from 1850 to 1600 per year. Based on the 1600 hours, first- and second-year associates receive 70% of the salary of their full-time counterparts, third- and fourth-year associates receive 75% of the salary of their full-time counterparts, and fifth-year and more senior associates receive 80% of the salary of their full-time counterparts. Another respondent, Holland & Hart, indicated that if an associate working a reduced workload materially exceeds his or her required billable hours, that associate is eligible for a salary adjustment based on the excess billable hours.

Changes Observed Since the 2007 BYU Alumni Women's Law Forum Survey

A second purpose of WLU's 2015 policy survey was to follow up on the work conducted by the BYU Alumni Women's Law Forum in its 2007 survey of maternity/paternity and flex-time policies in the Salt Lake City legal market. *See BYU Alumni Women's Law Forum Survey on Maternity/Paternity Leave and Flexible Schedule Policies for Lawyers*, 20 UTAH B.J. 16 (May/June 2007). In particular, WLU was interested in evaluating whether any material changes had occurred within this market since the time of the BYU publication. Thus, WLU's survey asked many of the same questions that had been posed by the BYU Alumni Women's Law Forum in its 2007 survey.

The results of the BYU survey had been published in the May/June 2007 issue of the Utah Bar Journal as a chart summarizing the policies of each of nineteen Salt Lake City legal organizations, all but one of them law firms. *Id*. The firms identified in the 2007 survey were primarily the largest Salt Lake City law firms. *Id*.

Despite the similarities between the 2007 and 2015 surveys sent to Salt Lake City legal organizations, only seven of the nineteen firms whose policies were described in the 2007 survey submitted a response to WLU's 2015 survey. WLU's 2015 survey attracted far more first-time participants (seventeen of them), including in-house legal groups, lawyers working for governmental entities, and lawyers working for firms of just a few attorneys. The lack of a common set of responding legal organizations complicates

WLU's attempt to identify how or if legal organizations' approaches to these issues have changed in the intervening eight years. Nonetheless, a few imprecise observations can be made from a general comparison of the 2007 and 2015 survey responses.

First, parental leave policies, flex-time, and reduced billable hour policies continue to be issues of significant interest and concern to legal organizations and attorneys in the Salt Lake City market. Among the seven law firms that responded to both the 2007 and 2015 surveys, several added to the benefits they previously provided in earlier years. For example, Holland & Hart adopted a new policy that provides associates up to sixteen weeks of paid maternity leave and up to seven weeks of paid paternity leave depending upon years of service worked, which is significantly higher than the eight weeks of paid maternity leave and two weeks of paid paternity leave previously reported in 2007. Ballard Spahr increased paid paternity leave to a maximum of four weeks. Snell & Wilmer and Parsons Behle & Latimer also reported formalized new policies that allow associates to elect reduced billable hour requirements.

Second, it appears there have likely been slight increases in the provision of formal parental leave, schedule flexibility, and reduced-hours policies. As in 2007, most of the legal organizations responding in 2015 offer some paid maternity leave to lawyers. Many now offer formal maternity leave policies providing twelve weeks or more of paid leave to associates, including Dorsey & Whitney, Parr Brown Gee & Loveless, Parsons Behle & Latimer, Ray Quinney & Nebeker, Stoel Rives, and Zimmerman Jones Booher. A number of the 2015 participants now offer at least some paternity leave benefits, including Adobe Systems, Inc., Ballard Spahr, Dorsey & Whitney, Stoel Rives, and Zimmerman Jones & Booher. Firms responding to the 2015 survey that offer associates an option to elect a reduced-hour track include Dorsey & Whitney, Parr Brown Gee & Loveless, Parsons Behle & Latimer, Ray Quinney & Nebeker, and Snell & Wilmer.

Further evidence of increases in the provision of parental leave by law firms were provided to WLU after the conclusion of the survey. For example, WLU recently received reports that a few law firms have adopted or are in the process of adopting policies to assist women anticipating maternity leave to maintain and then return to their caseloads. It has also been reported that one law firm is adjusting its formal policy to provide pro rata compensation. Because these reports occurred after the snapshot provided by the survey, these post-survey reports cannot be adequately included in this report. However, WLU takes these reports as a hopeful sign that law firm policies are continuing to evolve to better support working parents.

Parental Leave Policies in the National Scene

Similar to the discussions taking place in Utah, a national conversation is under way about why parental leave policies are important and what the essential components of a successful policy should be. It is generally recognized that employers with strong parental leave policies benefit through greater employee loyalty and productivity, more successful recruitment efforts (especially among women applicants), increased employee retention, and enhanced client satisfaction through continuity. *See* Committee on Women in the Profession of the New York City Bar, *Parental Leave Policies and Practices for Attorneys*, at 4 (Aug. 2007), http://www.nycbar.org/pdf/report/Parental_Leave_Report.pdf. Although it does not appear that there is any model parental leave or maternity leave policy set forth by the American Bar Association or any other national legal association, the issue has been discussed in several different ways.

Working Mother Magazine and Flex Time Lawyers LLC recently published "The 2015 Working Mother & Flex-time Lawyers 50 Best Law Firms for Women." *See* http://www.workingmother.com/content/2015-working-mother-flex-time-lawyers-50-best-law-firms-women. Not surprisingly, it is the large national law firms that provide the most generous leave policies that are highlighted as warranting inclusion on the list. The Executive Summary of the publication notes that all of the law firms on the "50 Best" list offer paid maternity leave, paternity leave, and adoption leave, with an average of fifteen weeks of maternity leave offered, an average of six weeks paid paternity leave, and an average of twelve weeks paid adoption leave. *See* http://eblasts.workingmothermediainc.com/2015WorkingMother_and_Flex-Time_Lawyers_Best_Law_Firms_for_Women_ExecutiveSummary.pdf. Interestingly, the average number of weeks *offered* was not the same as the average number of weeks taken at these "50 Best" firms, with the average number of weeks of paid maternity leave taken at fourteen weeks, paternity leave at three weeks, and adoption leave at seven weeks. *See id*. Some of the most generous leave policies nationally include:

- **Chapman & Cutler, Chicago, Illinois:** New mothers earn sixteen fully paid weeks of leave and may phase back into work for six months after the leave ends.
- **Davis Wright Tremaine, Washington, D.C.:** In 2014, primary caregivers began taking fifteen fully paid weeks off after birth or adoption (up from the previous twelve weeks) and reducing billable hour requirements afterward.
- **Kaye Scholer, New York, New York:** Attorneys receive eighteen weeks of fully paid primary caregiver leave.

From "50 Best Firms" list compiled in 2014, the following firms' leave policies were noted:

- **Baker & McKenzie, Chicago, Illinois:** Attorneys may take advantage of eighteen fully paid weeks of maternity leave, scheduling flexibility, and $10,000 in adoption assistance.
- **DLA Piper, Baltimore, Maryland:** Paid parental leave was recently increased from ninety days to eighteen weeks.
- **Foley & Lardner, Milwaukee, Wisconsin:** Paid maternity leave was recently increased from twelve weeks to eighteen weeks and adoption leave was increased from four weeks to ten weeks.
- **Goodwin Procter, Boston Massachusetts:** Attorneys may take eighteen paid weeks off to adopt or give birth and can also access transition coaching for new parents.
- **Latham & Watkins, Global:** Expectant mothers get eighteen fully paid weeks of leave.
- **WilmerHale, Washington, D.C.:** This firm allows attorneys to take a year off to welcome a new child, at least twelve weeks of which is fully paid.

See http://www.workingmother.com/content/2014-working-mother-amp-flex-time-lawyers-50-best-law-firms-women.

The most generous of policies was noted by the Above the Law website, in an article titled "Which Biglaw Firm Has the Best Parental Leave Policy," stated that Orrick Herrington & Sutcliffe, originally founded in San Francisco but now with global offices, offers twenty-two weeks of paid primary caregiver leave (for new mothers and new fathers) to its attorneys in the United States, and the option of taking up to nine months of total leave before returning to work full-time. *See* http://abovethelaw.com/2015/05/which-biglaw-firm-has-the-best-parental-leave-policy/ (last visited October 1, 2015).

Conclusion

Overall, our survey results indicate a growing trend among local legal employers to offer more generous parental leave policies and flex-time policies. There is, however, still a discrepancy among legal employers regarding specific leave policies; this may be attributed to many factors, including the type of organization, the number of employees, and management's perspective on parental leave policies. The survey revealed that although all responding employers provided some form of paid, job-guaranteed leave to female attorneys following the birth of a child, the same benefits were not as widely available for adoptive parents or male attorneys.

The WLU continues to monitor workplace trends and will be updating its website this year to include examples of sample maternity leave, paternity leave, and flex-time work policies for employers who are interested in exploring these options. If you are interested in contributing to WLU's work on this topic, please reach out to the WLU's Work-Life Balance Committee through womenlawyersofutah@gmail.com.

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Uncovering the Potential of an Irrevocable Trust

by Scott M. McCullough

Traditionally, the irrevocable trust was most commonly used to hold life insurance proceeds out of a client's taxable estate. However, if properly drafted, an irrevocable trust can be used to effectively meet many of your client's additional estate and asset-protection planning goals. The intent of this article is to briefly outline the diversity of the irrevocable trust and explain how one irrevocable trust may be used to accomplish a broad array of estate and asset-protection planning strategies, each of which could be the subject of an article all on its own.

The primary concept of an irrevocable trust is a permanent transfer of assets by the client (grantor) to an independent trustee – so that the grantor no longer owns or has any legal rights or control over the assets. Furthermore, per the definition of irrevocable, and with few exceptions and creative tools, the trust cannot be changed or altered once established.

An irrevocable trust can be established for gift and estate-tax purposes in one of two ways: (1) a completed gift trust, where the assets are considered outside of a client's taxable estate, where gift and estate taxes have to be considered, and where all future appreciation of the assets are held outside of the client's taxable estate; or (2) an incomplete gift trust, where the trust provides asset protection but where no gift and estate issues need to be considered and the assets are still included in the client's taxable estate upon death.

An irrevocable trust can also be established in a variety of ways for income-tax planning. A trust can be: (1) a grantor trust, where all income is taxed back to the client (the trust is ignored for income tax purposes); (2) a simple trust, where all income must be distributed to the beneficiaries and they pay the income tax; or (3) a complex trust, where the trustee can determine how much of the income to distribute out to the beneficiaries and therefore determine who pays the tax (the trust or the beneficiaries who receive the income). There are advantages and disadvantages of each option so the taxation selection must match the client's goals and objectives.

Transferring assets to the irrevocable trust or funding the trust appropriately depends on the tax treatment of the trust. If an incomplete gift trust, assets can be transferred without consideration of gift or estate-tax issues. If a completed gift trust, assets can be transferred by either gift or sale (or both). If done by gift during life, the client must either use his or her annual gift exclusions with proper *Crummey* notices, making sure such gifts qualify for the annual gift exclusion as a present interest gift, or he or she must use part or all of the lifetime gift exemptions and file a 709 gift tax return. If selling assets to the irrevocable trust, the transaction must occur at arms-length, with full fair market value, a promissory note with interest must be executed, and payments must be made. One major consideration in transferring assets to an irrevocable trust are the fraudulent conveyance rules. Simply put, transfers made well in advance of any adverse legal issues and done without any intent to hinder, delay, or defraud creditors or Medicaid, are the only transfers that will withstand challenge. Below is a simple explanation of twelve ways to use a properly drafted irrevocable trust:

Hold Insurance Proceeds Outside of Client's Taxable Estate. The most common use of the irrevocable trust is to hold life insurance. The client establishes a completed gift, grantor irrevocable trust and has the trustee apply for life insurance. If the client already has the life insurance in place, the trustee can receive the life insurance as a gift from the client, subject to a three-year look back period (which means that if the insured dies within the three-year period, the proceeds of the life insurance policy will be pulled back into the client's taxable

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estate). Conversely, the client can sell the existing policy to the trustee of the irrevocable trust for the value of the policy and in exchange for a promissory note, thus avoiding the three-year look back period. The client could use his or her annual gift exclusion to forgive the annual note payments and make the annual premium payments (using *Crummey* notices). The value used to sell the policy is the annual premium amount for term policies and the interpolated terminal reserve value for permanent policies. The purpose of this type of planning is to keep the death benefit proceeds of the insurance policy out of the client's taxable estate.

Asset Protection

An irrevocable trust can provide great asset protection for a client. As stated above, the client transfers assets to the trustee of the trust and therefore does not own or control the assets any longer (even if the trust is a grantor trust and the client "owns" the assets for income-tax purposes). Therefore, provided the transfer to the trust was not a fraudulent transfer, a creditor should be unsuccessful when seeking to attach to those assets.

- When asset protection is the only objective, the trust document can give the client a general power of appointment and/or a veto power over distributions by the independent trustee. These powers would make the trust an incomplete gift trust, thus including all the assets of the trust in the client's taxable estate for estate tax purposes but making the transfer to the trust much easier as all issues with gift and estate tax issues are eliminated.

- Another option is to draft the trust with two parts. Part I is an incomplete gift trust, where the client holds a general power of appointment and/or a veto power, and the trust is used purely for asset protection. Part II is a completed gift, which excludes the assets from the client's taxable estate. The advantage of this two-part trust is that as soon as it is established,assets can be transferred to Part I for asset protection and when valuations and other necessary gifting issues have been resolved, all or a portion of the assets can be transferred by gift or sale to Part II.

- Trust statutes in Alaska, Nevada, and other states, now including Utah, allow the trust to be a self-settled trust wherein the client may also be a discretionary beneficiary and receive distributions from the trustee. This option gives clients peace of mind when making transfers to an irrevocable trust, out of their control, because they could, if needed, receive distributions from the trust.

- Many clients own assets in a corporation or an LLC and transfer the stock or membership interest to an irrevocable trust so they can retain some level of control over the assets as a manager of the LLC, but all value in ownership is held and protected in the irrevocable trust.

Medicaid Planning

An irrevocable trust could be used for avoiding the Medicaid nursing home spend-down provisions wherein one must spend down most of his or her money to qualify for Medicaid benefits. One way the irrevocable trust works in Medicaid planning is commonly known as the income-only approach. The client sets up the irrevocable trust, transfers assets to the trust, and the terms of the trust state that the trustee shall pay to the client the income produced by the trust each year. The principal, however, cannot be paid to the client but is reserved for the remaining beneficiaries, typically the children. The principal of the trust is not considered an asset for Medicaid qualification purposes. If the client moves to a nursing home, the income from the trust will need to be paid to the nursing home. Essentially, this type of planning freezes the parents' ability to reach the principal of their assets, while reserving those assets for the children. Many believe that the better option is to let mom and dad have access to and spend their money on care (which is often much better than that available from Medicaid facilities), and the children would receive anything left upon death. Of course, no trust is needed for this type of planning.

It must be noted that Medicaid has a five-year look-back period for gifts made to such a trust and when Medicaid is applied for, all assets gifted or transferred during the look-back period will be considered assets owned by the client even if in the trust.

Veterans Benefits

The aid and attendance benefits offered to veterans is limited by the veteran's assets. To qualify for such benefits, an irrevocable trust may be established to receive and hold the veteran's assets in much the same way the irrevocable trust is used for Medicaid planning outlined in paragraph three above. However, unlike the Medicaid rules, there is no look-back period to deal with when making gifts or contributions to the irrevocable trust to qualify for the veteran's aid and attendance benefits, so assets can be gifted to the irrevocable trust without any look-back issues.

Probate Avoidance

As with a revocable trust, when the trustee of an irrevocable trust owns assets, rather than such assets being held in the name of the deceased, probate is avoided and the administration of the client's estate can be done privately within the family and without court supervision or intervention.

Gifting to Future Generations

An irrevocable trust can be used as a vehicle to facilitate gifts from a client to their children, grandchildren, or great grandchildren (using applicable gifting and generation-skipping tax exemptions). Many clients use their annual gift exclusion (currently $14,000 per recipient) to fund an irrevocable trust. A *Crummey* notice given to the beneficiaries of such a gift makes the gift a present interest gift and qualifies it for the annual gift exclusion. Gifts to the irrevocable trust reduce a client's taxable estate, while not giving the money directly to the posterity but holding it in trust to be used only for the specific purposes outlined by the clients in the trust document. If a client wants to establish a fund to pay for a down payment on a first home for posterity, and he or she gives the money outright to his or her posterity, the posterity may choose to spend the money on cars, boats, or vacations and have nothing left when they are ready to purchase a home; wherein if the money was used to fund an irrevocable trust for the specific purpose of providing a down payment, the posterity have no access to the funds for their personal use, but only for the expenses outlined in the trust.

Avoiding the K-1 Problem

Many families have historically used family limited partnerships or limited liability companies to fund annual gifts as outlined above. The downside to a family partnership or LLC is that the children have to get a K-1 each year as a partner, and such income may limit their ability to get educational grants or loans, wherein if the gifts are made to a trust for all the descendants, no reporting of income is necessary.

Educational Planning (personal 529 plan)

An alternative or companion to the Educational Savings Plan or 529 Plan is to use an irrevocable trust to hold gifts from parents. Such gifts, made using the annual exclusion as outlined in Paragraph six above, can be held only for the education expenses of the client's posterity. Unlike a 529 plan, the growth will not occur on a tax-free basis (unless invested to do so), but if the irrevocable trust is established as a grantor trust, the income taxes will pass through to the client, thus reducing his or her taxable estate. Additionally, the funds in the irrevocable trust may be used for anything allowed under the document, such as medical care, missionary service, charitable giving, and educational expenses, where within the 529 plan, education is the only option. Another often overlooked advantage of the irrevocable trust over a 529 plan is the ability to manage and

direct the funds privately, without the intervention of governmental rules and regulations, especially avoiding potential congressional changes when using a governmental program.

Charitable Giving

An irrevocable trust can be established as a source of philanthropy for a family. For example, if the irrevocable trust allows the trustee to make charitable contributions, the client's posterity could use the funds of the trust to further their parents' charitable objectives, including payment directly for missionary service or other charitable objectives.

Estate Freeze/Estate Tax Planning

A completed gift intentionally defective grantor irrevocable trust is perhaps the best method of estate-tax planning being used by sophisticated planners today. The process is described below:

- Client obtains an independent qualified discount valuation of the assets to be transferred to the trust.
- Client establishes the irrevocable trust with an independent trustee.
- Client transfers by gift (using lifetime gift exclusion) approximately 10% of the value of the assets to the trust and files a 709 gift tax return.
- Client then sells the remainder of the value of the assets to the trustee of the irrevocable trust in exchange for a promissory note with interest at the applicable federal rate. The sale does not trigger an income tax to the client because this is a grantor trust, ignored for income tax purposes.
- Client's estate, for estate-tax purposes, is now frozen at the value of the note owed to the client.
- All future appreciation of the asset transferred to the irrevocable trust occurs inside the trust and is not included in the taxable estate of the client. As an example of this, if a client who has stock worth $3 million today employed this strategy and the value of the stock grew to $15 million, the value of the client's taxable estate is still $3 million.
- An estate tax savings, assuming a 40% rate, of nearly $4.8 million (not taking into account any applicable estate tax exemption amount).

Income Tax Planning

Establishing the irrevocable trust in a state with no income tax may allow the client to defer the income tax on the assets transferred to the trust until such time as the assets are brought back, by way of a distribution from the trustee to the beneficiary, to his or her state, thus subjecting them to that state's income tax. For example, if the properly drafted irrevocable trust was established in Nevada and funded by gift with client's stock in his or her business, and the stock was sold, all proceeds from the sale may be retained in the irrevocable trust in Nevada, and could be free from state income tax. Upon distribution to the client, the income tax to the state in which the client resides would then be due.

A Family Dynasty

An irrevocable trust can be drafted to last forever, providing funds to a client's posterity for the specific purposes outlined in the trust. Irrevocable trusts drafted in states where the Rule Against Perpetuities has been abolished can literally last in perpetuity, providing funds and opportunities to a client's posterity for as long as the money lasts.

Is it Okay to Pay Fact Witnesses?

by Keith A. Call

One of my mothers (I claim two of them) is a proud United States Marine and veteran of WWII. Because women were not allowed to be combat Marines, she was assigned to an office job in Washington, D.C. under a 1940s' slogan, "Be a Marine, Free a Marine to Fight."

In addition to being part of the Greatest Generation, she is also a child of the Great Depression. She wastes nothing, lives almost richly on social security, and would consider an $18 witness fee to represent a sinfully extravagant lunch. To her, the thought of paying a witness anything more might conjure up thoughts of bribery.

> *"[C]ontingent fees, bonuses, and excessive fees for fact witnesses are clear 'no-nos' and can result in professional sanctions."*

To the modern witness, however, an $18 dollar witness fee and a day off work could present an extreme financial hardship, or at least an inconvenience. Do the ethical rules allow you to pay fact witnesses more than the standard $18 witness fee? When would such compensation be unlawful bribery? These questions arise in varying contexts, the most common being a situation where a critical fact witness is a former employee of a corporate litigant. Should such a witness be expected to spend numerous hours assisting with the case without remuneration?

The Rule

The governing rule is 3.4(b) of the Utah Rules of Professional Conduct. It says, "A lawyer shall not…offer an inducement to a witness that is prohibited by law." Utah R. Prof'l Conduct 3.4(b). Comment [3] adds this guidance: "[I]t is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law." *Id.* R. 3.4, cmt. [3].

Interpretation and Application

Utah cases addressing this issue are sparse or non-existent. The Utah Court of Appeals has ruled that payments over and above the standard witness fee are not recoverable as "costs." *Stevensen 3rd E., LC v. Watts*, 2009 UT App 137, ¶¶ 63–64, 210 P.3d 977. Beyond this (at least to this author's knowledge), no other Utah Court has touched upon the ethics of compensating fact witnesses.

Utah's Rule 3.4 is identical to the ABA's Model Rule. Comment [3] to the Model Rule includes a sentence that was omitted from Comment [3] to Utah's version of the Rule: "The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying…." ABA Model R. of Prof'l Conduct 3.4, cmt. [3]. The omission of this sentence from Utah's rule seems to indicate that Utah's drafters did not find anything in Utah's common law that prohibits paying an occurrence witness an appropriate fee.

The ABA Standing Committee on Ethics and Professional Responsibility has opined that a lawyer may compensate a fact witness for time spent attending deposition and trial and for

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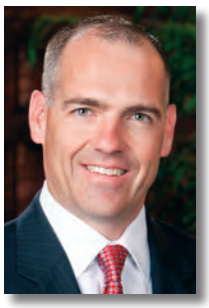

time spent preparing to testify. The opinion warns, however, that the payment cannot be conditioned on the content of testimony and the amount of compensation must be reasonable. The opinion wisely advises the lawyer to make it clear to the witness that payment is not being made for the substance or efficacy of the testimony and that truth is expected notwithstanding any payment. ABA Commission on Ethics and Professional Responsibility, Formal Op. 96-402 (1996).

Many jurisdictions allow lawyers to pay fact witnesses for expenses and time according to these principles. The amount that is considered "reasonable" will depend on the facts of the case. A New York court held it was reasonable to pay an orthopedic surgeon $10,000 for time spent at the courthouse as a fact witness in a personal injury case, although it noted that the jury should have been given specific instructions regarding possibility of bias. *Caldwell v. Cablevision Sys. Corp.*, 925 N.Y.S.2d 103,109–10 (N.Y. App. Div. 2011), *aff'd*, 984 N.E.2d 909 (N.Y. 2013). A Michigan court allowed payments of $85 per hour, plus expenses, for a retired "general manager[of] contracts" pursuant to an agreement to assist with regulatory and other litigation. *Consolidated Rail Corp. v. CSX Transp., Inc.*, No. 09-cv-10179, 2012 WL 511572, at **3, 7, 13 (E.D. Mich. Feb. 16, 2012).

On the other hand, a $1 million "bonus" for a fact witness, depending on the usefulness of the testimony, is over the line, and resulted in professional sanctions against the lawyer. *Florida Bar v. Wohl*, 842 So.2d 811, 812–15 (Fla. 2003) (per curiam); *see also Comm. on Legal Ethics v. Sheatsley*, 452 S.E.2d 75, 77–80 (W.Va. 1994) (lawyer disciplined for participating in or acquiescing to improper payments by client to fact witness). Cases like *Wohl* demonstrate that contingent fees, bonuses, and excessive fees for fact witnesses are clear "no-nos" and can result in professional sanctions. Other courts have excluded testimony as a sanction for improper witness payments. *See, e.g., Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1526 (S.D. Fla. 1994), *aff'd in part*, 117 F.3d 1328 (11th Cir. 1997). Practitioners will also want to become familiar with federal and state bribery statutes and steer far clear of those. *See, e.g.*, 18 U.S.C. § 201 (bribery of public officials and witnesses); Utah Code Ann. § 76-8-508 (tampering with witnesses-receiving or soliciting a bribe).

Conclusion

Without binding Utah precedent, these are uncharted waters. But it appears that some forms of fact witness compensation are allowed, provided you make it clear the payment is to compensate for time (not testimony) and provided you use some measure of Mom's frugality.

Appellate Highlights

by Rodney R. Parker, Dani Cepernich, Nathanael Mitchell, Adam Pace, and Taymour Semnani

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

***United States v. Spaulding*,**
— F.3d —, 2015 WL 5105472 (10th Cir. September 1, 2015)
The Tenth Circuit held, as a matter of first impression, that **Federal Rule of Criminal Procedure 11(e) is jurisdictional.** Because the lower court lacked jurisdiction to entertain a motion to withdraw the defendant's guilty plea after the imposition of a sentence, the Tenth Circuit vacated the judgment and remanded with instructions to reinstate the original sentence.

***Harvey v. UTE Indian Tribe of the Uintah & Ouray Reservation*, 797 F.3d 800 (10th Cir. August 13, 2015)**
The Tenth Circuit held that **a district court order remanding a case to state court on the basis that the defendants did not unanimously join or consent to removal is patently unreviewable.**

***In re C.W. Min. Co.*,**
— F.3d —, 2015 WL 4717709 (10th Cir. August 10, 2015)
A first-time transaction between debtor and creditor can still meet the ordinary course of business exception, when viewed in the context of other, similarly-situated entities.

***Cressman v. Thompson*,**
798 F.3d 938 (10th Cir. August 4, 2015)
The court rejected a First Amendment compelled speech claim over the Oklahoma standard license plate, which depicts a Native American shooting an arrow towards the sky. After a bench trial, the district court concluded that **a reasonable person would not understand the license plate image to convey the pantheistic message to which appellant objected and therefore that appellant was not compelled to speak.** The Tenth Circuit affirmed, reasoning that appellant's lack of objection to the only message that a reasonable observer of the license plate would discern (relating to Oklahoma's Native American History) was fatal to his claim.

***Sharp v. Rohling*,**
793 F.3d 1216 (10th Cir. July 15, 2015)
Petitioner's statements obtained during an interview in which a detective made representations about leniency and promised to find shelter for the petitioner and her two children, who **were homeless at the time, were involuntary and the state court's admission of those statements was not harmless error.**

***Little Sisters of the Poor Home for the Aged, Denver Colo. v. Burwell*, 794 F.3d 1151 (10th Cir. July 14, 2015)**
The Tenth Circuit affirmed the district court's denial of a preliminary injunction to the plaintiffs, concluding that the **mandate and accommodation scheme of the Affordable Care Act do not substantially burden the plaintiffs' religious exercise under the Religious Freedom Restoration Act or infringe upon their First Amendment rights.**

***Bonidy v. United States Postal Service*,**
790 F.3d 1121 (10th Cir. June 26, 2015)
The court rejected a postal worker's challenge to a federal regulation that prohibited him from carrying his firearm onto

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USPS property. First, the court held that **the parking lot should be considered a single unit with the federal building, for which prohibition of firearms is clearly allowed.** As an alternative ground, the court upheld the regulation under an intermediate scrutiny analysis, which it held was appropriate in the context of Second Amendment challenges.

***Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. June 16, 2015)**

In this latest episode in a nearly forty-year long battle between the Ute tribe and the State of Utah over local governments displacing tribal authority on tribal lands, the Tenth Circuit **enjoined Uintah County officials from pursuing criminal convictions for offenses in areas declared to be Indian Country** and also ordered dismissal of the State's counterclaims against the Tribe on the grounds of sovereign immunity.

***Helf v. Chevron U.S.A. Inc.*, 2015 UT 81 (September 4, 2015)**

Granting summary judgment, the district court excluded deposition testimony because it lacked foundation and was nonresponsive to the question posed by the employer's counsel during the deposition. The Utah Supreme Court concluded that it was error to exclude the testimony on this basis. The court held that **counsel who was asking a question in a deposition had an obligation to object to the deponent's non-responsive answer in order to avoid waiver of the objection.**

***InnoSys, Inc. v. Mercer*, 2015 UT 80 (August 28, 2015)**

The Utah Supreme Court held, as a matter of first impression, that **a presumption of harm attaches when a party makes a prima facie showing of misappropriation of trade secret,** even if the party opposing summary judgment fails to submit proof of actual monetary damages.

***Dahl v. Dahl*, 2015 UT 23 (January 30, 2015)**

This lengthy opinion addresses multiple substantive and procedural rules arising from a complicated divorce. Among other things, the court held **"it is improper to allow one spouse access to marital funds to pay for reasonable and ordinary living expenses while the divorce is pending, while denying the other spouse the same access."** *Id.* ¶ 126 (emphasis added).

***Washington Cnty. Sch. Dist. v. Labor Comm'n*, 2015 UT 78 (August 25, 2015)**

In this workers' compensation case, a bus driver suffered two injuries, approximately four-and-a-half years apart, both of which required spinal surgery. To show a causal connection between an industrial accident and subsequent injury, **the claimant must show that the workplace injury was a "significant contributing cause of the subsequent non-workplace injury, not merely a cause or a minor cause."** *Id.* ¶ 37 (emphasis added).

***Utley v. Mill Man Steel, Inc.*, 2015 UT 75 (August 20, 2015)**

Defendant fired plaintiff, a salesman, on account of missing inventory, and withheld payment of commissions. The Supreme Court held that withholding is permissible if there is enough evidence to warrant an offset and that such a finding of a

hearing officer can occur after the fact. The court cautioned that **employers withhold unilaterally at their own peril; if a hearing officer finds against the employer, the employer would then be subject to statutory penalties.**

State v. Rasabout, 2015 UT 72 (August 14, 2015)

This case arose out of the severe sexual assault of plaintiff by an inmate participating in a work-release program operated by Utah County. The Utah Supreme Court held that the Governmental Immunity Act barred the claim because **the operation of a non-traditional rehabilitation program was essential to the core governmental activity of maintaining a state prison system,** even if the program generated revenue for Utah County.

Meza v. State, 2015 UT 70 (August 14, 2015)

A criminal defendant sought to withdraw his plea in abeyance under the Post-Conviction Relief Act based on his counsel's alleged ineffective assistance in advising him that the abeyance plea had no immigration consequences. **The Utah Supreme Court affirmed, holding that both a conviction and a sentence are prerequisites to relief under the Post-conviction Remedies Act and the defendant's plea in abeyance was not a conviction.** The court also declined to exercise its authority to issue an extraordinary writ because the defendant had an adequate remedy for his claim of ineffective assistance of counsel: **the defendant's claim, which involved the Sixth Amendment right to counsel and the serious consequence of deportation, qualifies as sufficiently unusual and exceptional circumstances allowing for relief under Rule 60(b)(6).**

Robinson v. Taylor, 2015 UT 69 (August 11, 2015)

The court held, as a matter of first impression, that **conduct resulting in a criminal conviction is inadmissible as impeachment evidence under Utah Rule of Evidence 608(b). Rather, the admissibility of that evidence is governed solely by Rule 609.**

Smith v. United States, 2015 UT 68 (August 11, 2015)

This case arose out of allegations of medical malpractice and wrongful death. The federal district court certified two questions relating to the applicability and constitutionality of a cap on non-economic damages contained in Utah's Malpractice Act. Addressing the constitutional question at the outset, the supreme court concluded that Article XVI, Section 5 of the Utah Constitution protected economic damages and certain noneconomic damages available at the time of statehood, a time in which parties could not recover for mental anguish or suffering of survivors but could recover other non-economic damages, such as loss of assistance or support of the deceased. The Supreme Court narrowly construed the "compensation" exception to the constitutional provision, holding that it referred to a system akin to workers' compensation. Turning to its Malpractice Act analysis, the Utah Court held that **a statutory cap on that amount of non-economic damages was unconstitutional as applied in a wrongful-death case.**

***State v. Schmidt*,**
2015 UT 65 (August 10, 2015)

The Utah Supreme Court reversed a magistrate's decision refusal to bind over the defendant for trial. The court found that the magistrate abused her discretion by disregarding the victim's testimony, even if it appeared facially implausible. **At a preliminary hearing, the state need only produce evidence sufficient to support a reasonable belief that the defendant committed the crime charged, not evidence that would support a conviction beyond a reasonable doubt.**

***Pang v. Int'l Document Servs.*,**
2015 UT 63 (August 5, 2015)

Plaintiff, who was in-house counsel, sued his employer alleging he was terminated for refusing to ignore the company's violation of several states' usury laws. The trial court dismissed his complaint without hearing on the basis that plaintiff was an at-will employee and had failed to demonstrate a substantial public policy exception to at-will employment. The Supreme Court affirmed, holding that **Rule of Professional Conduct 1.13(b) "does not constitute a clear and substantial public policy that prevents the termination of an at-will employee."** *Id.* ¶ 1 (emphasis added). It further reasoned, **"other rules of professional conduct evince strong policy choices that favor allowing clients to terminate the attorney-client relationship at any time, including firing an in-house lawyer with whom an organizational client disagrees."** *Id.* ¶ 1 (emphasis added).

***Jones v. Mackey Price Thompson & Ostler*,**
2015 UT 60 (July 28, 2015)

The Supreme Court held that the plaintiff was entitled to a jury trial of a quantum meruit claim involving payment of attorney fees. The court also held, as a matter of first impression, that **the appropriate measure of damages for quantum meruit is the benefit to the defendant, rather than the value of professional services.**

***Zeller v. Nixon*,**
2015 UT 57, 355 P.3d 991 (July 21, 2015)

The plaintiffs' **claims were irretrievably subject to arbitration because the election to arbitrate was not rescinded within ninety days.**

***Utah Transit Auth. v. Greyhound Lines, Inc.*,**
2015 UT 53, 355 P.3d 947 (July 10, 2015)

The Utah Supreme Court rejected Greyhound's argument that contractual provisions requiring one party to procure insurance for the benefit of another must be strictly construed in the same manner as contracts for indemnification. The court affirmed the district court's holding that **traditional principles of contractual interpretation should be used in assessing agreements to procure insurance.**

***State v. Poole*,**
2015 UT App 220 (August 27, 2015)

The court of appeals held, based on the language of the Restitution Act, that **an order of restitution must be entered at the time of sentencing or within one year of sentencing.** Concluding that the statutory provision was mandatory and therefore jurisdictional, the court of appeals vacated a restitution order entered fifteen months after conviction.

***Lindsay v. Walker*,**
2015 UT App 184, 356 P.3d 195 (July 30, 2015)

Grandmother brought an action seeking grandparent visitation after her son passed away and the maternal grandparents adopted the child. The Utah Court of Appeals concluded that **grandparent visitation rights survive adoption only when a stepparent adopts the child or a court has ordered grandparent visitation before the adoption.**

***Favero Farms, LC v. Baugh*,**
2015 UT App 182, 356 P.3d 188 (July 30, 2015)

The Utah Court of Appeals held, as a matter of first impression, that **a violation of a government regulation on land constitutes an encumbrance if it exists at the time of the conveyance and the seller either is aware or should be aware of it.**

***Reeve & Assocs. Inc. v. Tanner*,**
2015 UT App 166, 355 P.3d 232 (July 2, 2015)

The court of appeals held that **an award of attorney fees to the prevailing party is mandatory under the mechanics' lien attorney fee statute, Utah Code section 38-1-18.**

Recent Developments in Handbook Law, Required Reading for All Utah Employers

by Jeff Holdsworth

The NLRB Issues a Memorandum Relating to Handbooks

One misconception about the National Labor Relations Act (NLRA or the Act) is that the Act applies only to unions. Operating under this misconception, and because the State of Utah lacks a strong union influence, many Utah employers pay little to no attention to the NLRA, or the National Labor Relations Board's (NLRB) guidance. Section 7 of the NLRA (dealing with concerted activity) covers both unionized and non-unionized employers. On March 18, 2015, in an effort to respond to problems arising in the increasingly non-unionized workforce, Richard F. Griffin, Jr., General Counsel for the NLRB issued Memorandum GC 15-04.

Memorandum GC 15-04 provides guidance for employers with regard to their handbooks and policy manuals. Employers should pay special attention to the NLRB's new guidance – as many of the stock phrases and provisions found in employer handbooks today, may be considered unlawful under sections 7 and 8(a)(1) of the NLRA.

Memorandum GC 15-04 announced to employers that policies which may have the effect, or even the appearance, of "chilling" an employee's rights under section 7 of the NLRA (rights to engage in concerted activity) will likely violate section 8(a)(1) of the NLRA. In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the NLRB announced that "the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity." *Id*. The NLRB has also held that even if employees could reasonably construe the rules in their employer's handbooks to prohibit section 7 activity, the rules will be found unlawful. *See id; see also* Memorandum GC 15-04, at 2. The NLRB's Memorandum GC 15-04 draws several conclusions that, unless carefully addressed, have the potential to cause employers – and their counsel, much heartburn.

The NLRB's decisions have demonstrated that there is a fine line between which handbook provisions may be considered lawful and unlawful. For example, the handbook provision: "Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors," was considered to be lawful, Memorandum GC 15-04, at 9 (citing *Copper River of Boiling Springs, LLC*, 360 NLRB No.6, Slip Op. at 1 (Feb. 28, 2014)); whereas a handbook provision expecting employees to "be respectful of others and the company" was considered to be unlawful. *Id*. at 7.

With regard to a company's confidentiality policy, the provision: "Never publish or disclose [the employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal" was found to be unlawful because an employee could reasonably interpret the broad reference to "another's information" without further clarification, to include such things as coworkers' wages or other terms and conditions of employment in violation of sections 7 and 8(a)(1) of the NLRA. *Id*. at 5. However, an employer's handbook provision: "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers" was found not to violate the Act because the provision: (1) "does not reference information regarding employees or employee terms and conditions of employment"; (2) the term "confidential" although general is not defined over-broadly; and (3) the provision does "not otherwise contain

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language that would reasonably be construed to prohibit Section 7 communications." *Id*. at 6.

Employers are encouraged to read the memorandum as it focuses on rules that are frequently at issue, such as rules relating to: confidentiality, wages, hours, and other terms and conditions of employment, professionalism in the workplace, anti-harassment rules, and the use of social media.

If employers and their counsel are unfamiliar with the developments in this area, seemingly innocuous provisions such as those prohibiting the use of "threatening, intimidating, foul or inappropriate language," which the Board has repeatedly held to be unlawful, could end up costing the employer. *See id*. at 25.

Preserving the At-Will Relationship

In a recent decision, the Utah Supreme Court addressed the importance of clearly understood and conspicuous disclaimers in employee handbooks. Although in Utah there is a presumption of an at-will employment relationship, employees "may overcome this presumption by showing that the parties created an implied-in-fact contract, modifying the employee's at-will status." *Tomlinson v. NCR Corporation*, 2014 UT 55, ¶ 11, 345 P.3d 523; *see also Hodgson v. Bunzl Utah, Inc*., 844 P.2d 331, 333 (Utah 1992). Whether the parties have modified the at-will status "is a question of fact which turns on the objective manifestations of the parties' intent." *Tomlinson*, 2014 UT 55, ¶ 12; *see also Hodgson*, 844 P.2d at 333. "[E]vidence of the parties' intent may include announced personal policies, employment manuals, the course of conduct between the parties, and relevant oral representations." *Tomlinson*, 2014 UT 55, ¶ 12; *see also Hodgson*, 844 P.2d at 333.

In *Tomlinson*, the plaintiff, a former customer engineer for NCR Corporation, "argued that NCR's Corporate Management Policy Manual created an implied contract that rebutted the presumption of at-will employment." 2014 UT 55, ¶ 7. The Utah Supreme Court made several things clear for Utah employers seeking to preserve the employment-at-will status. First, the court re-affirmed that "a clear and conspicuous disclaimer prevents employee manuals or other like materials from being considered as implied-in-fact contract terms." *Id*. ¶ 25 (internal quotations omitted); *see also Johnson v. Morton Thiokol, Inc*., 818 P.2d 997, 1003 (Utah 1991). Secondly, employers need not "employ the magic words 'at-will'" to evidence the employer's intent to establish an at-will employment relationship. *Tomlinson*, 2014 UT 55, ¶ 30. However, the key inquiry is whether the employer expressly intended that the handbook, policy or manual would not create an enforceable contract. Lastly, the court stated that although the disclaimer need not be in any particular location in a handbook or manual, "the disclaimer [should be] sufficiently prominent to place a reasonable employee on notice that the employer [is] disclaiming any contractual relationship." *Id*. ¶ 28.

The key issue for a court adjudicating challenges to the at-will presumption, just as in *Tomlinson*, will likely be whether the employer "has convey[ed] an express intent that [its employment policies] do not give rise to an enforceable contract." *Id*. ¶ 30.

Although in *Tomlinson*, the Utah Supreme Court ultimately held that NCR's policy manual did not create an implied-in-fact contract overcoming the at-will presumption, employers would do well to use a "clear and conspicuous disclaimer" in their handbooks and manuals, setting forth in express terms the employer's intent, and review and update their handbooks and manuals on a regular basis.

Constitution Day Teach-in

One hundred fifty-three judges, lawyers, law students, and law school staff celebrated the 226th anniversary of the U.S. Constitution by teaching over 170 classes throughout Utah on and around Constitution Day, September 17.

This was the fourth year of the teach-in, sponsored by the Utah State Bar's Civics Education Committee, which was responding to an ABA sponsored survey that indicated that only 38% of Americans could name all three branches of our government (33% couldn't name any branch). The Bar created the Civics Education Committee to develop and promote a one-hour course to be taught in Utah schools. In 2005, Congress designated September 17 as a day "to hold educational programs for students" on the Constitution.

Volunteers used lesson plans developed by the committee, which included mock trials. Many volunteer teachers employed their own creativity. One attorney administered the test required for Citizenship.

Attorney volunteer Colin Winchester had this to say:

> The students were actively engaged, enjoyed themselves, participated, asked good questions, enjoyed the Cinderella trial and the paper clip game, and were well-behaved, bright and enthusiastic. This is my second year of participation, and it has become an annual highlight for me. My wife works in education full-time, and for this one day a year, she has to listen to me tell her how exciting teaching is. As if she didn't already know.

The Bar Commission and the Civics Education Committee extend their thanks to the outstanding judges, lawyers, law students, law school staff, and Bar staff who volunteered their valuable time making the Constitution come alive for Utah students.

Teachers or volunteers who wish to participate in the teach-in for Constitution Day 2016 should write to ConstitutionDay@utahbar.org.

Twenty-Sixth Annual

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for the Less Fortunate

Look for an e-mail from us regarding where you can purchase one or more meals for families in need this holiday season.

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The Rescue Mission

Women & Children in Jeopardy Program

Jennie Dudley's Eagle Ranch Ministry
(She serves the homeless under the freeway on Sundays and Holidays and has for many years)

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Volunteers will meet you as you drive up. If you are unable to drop your donations prior to 6:00 p.m., please leave them on the dock, near the building, as we will be checking again later in the evening and early Saturday morning.

Volunteers Needed

Volunteers are needed at each firm to coordinate the distribution of e-mails and flyers to the firm members as a reminder of the drop date and to coordinate the collection for the drop; names and telephone numbers of persons you may call if you are interested in helping are as follows:

Leonard W. Burningham, Branden T. Burningham, Bradley C. Burningham, or April Burningham . . . . . (801) 363-7411
Lincoln Mead . . . . . (801) 297-7050

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Thank You!

What is Needed?

All Types of Food

- oranges, apples & grapefruit
- baby food & formula
- canned juices, meats & vegetables
- crackers
- dry rice, beans & pasta
- peanut butter
- powdered milk
- tuna

Please note that all donated food must be commercially packaged and should be non-perishable.

New & Used Winter & Other Clothing

- boots
- gloves
- coats
- sweaters
- trousers
- hats
- scarves
- suits
- shirts

New or Used Misc. for Children

- bunkbeds & mattresses
- cribs, blankets & sheets
- children's videos
- books
- stuffed animals

Personal Care Kits

- toothpaste
- toothbrush
- combs
- soap
- shampoo
- conditioner
- lotion
- tissue
- barrettes
- ponytail holders
- towels
- washcloths

Pro Bono Honor Roll

Adult Guardianship
Johns, Brent

Bankruptcy Case
Alisa, Joe
Curtis, Andrew
Larsen, Tim
McCullough, Jeremy
Shell, Phillip

Community Legal Clinic
Adams, John
Anderson, Skyler
Becker, Heath
Benson, John
Black, Dan
Irvine, Joshua
McKay, Chad
Navarro, Carlos
Roman, Francisco
Rothschid, Brian M.
Schultz, Lauren
Sink, Jeremy
Tanner, Brian
Thomas, Ryan
Wang, Ian
Yauney, Russell
Young, Elaine

Contract Case
Babcock, Bob

Debt Collection Calendar
Amann, Paul
Billings, David P.
Gillmore, Grant
Harmon, Ben
Rasmussen, Kasey
Stormont, Charles A.
Stringham, Reed

Debtors Legal Clinic
Rothschid, Brian M.
Wang, Ian

Estate Planning Case
Cohen, Dara

Expungement Clinic
Miya, Stephanie
Scarber, Bill

Family Law Case
Begay, Autumn
Cottam, Cory
Doan, Thinh
Dodd, Aaron
Gayler, Brianna
Good, Jonathan
Hansen, Elicia
Hansen, Justen
Harden, Darren
Huntington, Barry
McCabe, Kenneth
Latham, Robert
Marelius, Suzanne
McAuliffe, Jessica
McCabe, Kenneth
Morgan, Chris
Morrow, Carloyn
Norris, Graham
Olsen, Jordan & Watkins, Rex
Oviedo-Stewart, Shauna
Raleigh, Trent
Rasch, Tamara
Richins, Peter
Hendrix, Rori
Sessions, Todd
Teasdale, Lindsey
Trease, Jory
Utzinger, Todd
Voss, Brad
White, Micah
Williams, Camille
Wong, Crystal
Yauney, Russell

Family Law Clinic
Ashworth, Justin T.
Morrow, Carolyn
Ralphs, Stewart
Smith, Linda F.
So, Simon
Teasdale, Lindsey
Throop, Sheri

Landlord/Tenant Case
Blakesley, James R.

Medical-Legal Case
Miya, Stephanie
Morrison, Jacqueline

Military Service Case
Terry, Rachel George
Canning, Celeste

OSC Calendar
Erickson, Michael
McConkie, Bryant
Rice, Rob
Rose, Rick

Post Conviction Case
Thompson, Marshall

Probate Case
Canning, Celeste
Kesselring, Christian
Shumway, Dan
Roberts, Kathie Brown
Gray, Laura

Rainbow Law Clinic
Evans, Russell
Marx, Shane
Ralphs, Stewart

Senior Center Legal Clinic
Barrick, Kyle
Bertelsen, Sharon
Collins, Kent
Conley, Elizabeth
Ferguson, Phillip S.
Fox, Richard
Hart, Laurie
Jensen, Michael A.
Kessler, Jay
Lee, Terrell R.
Maughan, Joyce
McCoy II, Harry
Neeleman, Stanley D
Parker, Kristie
Roberts, Kathie Brown
Semmel, Jane
Thorpe, Scott
Timothy, Jeannine
Williams, Timothy G.

Street Law Clinic
Caldwell, Debbie
Conyers, Kate
Coombs, Brett
Gittins, Jeff
Harrison, Matt
Harstad, Kass
Hastings, Brett
Henriod, Stephen
Long, Adam S.
Preece, Clayton
Scruggs, Elliot
Smith, J. Craig
Thorne, Jonathan

Tax Case
Kuhn, Tim

Tuesday Night Bar
Amann, Paul
Anderson, Jason
Black, Mike
Bradshaw, Lyndon
Brereton, Elizabeth
Buswell. Tyler
Chandler, Josh
Conyers, Kate
Dalton, Denise
Degraffenried, Scott D.
DePaulis, Megan
Figueira, Joshua
Finlinson, Victoria
Fonnesbeck, Jacob
Frandsen, Nicholas
Frei. Tanner
Hackford-Peer, Ruth
Harris, Carlyle
Hill, Melinda
Houdeshel, Megan
Jan, Annette
Johnson, Brent
Lau, Dan
Macfarlane, John
Masters, Eugene
McDonald, Michael
Munson, Ed
Noda, Laurie
Petersen, Eric
Peterson, Natalia
Randell, Josh
Reber, Lauren
Rinaldi, Leslie
Skinner, Dayne
Stevenson, Tamara
Sutton, George
Turner, Jenette
Tuttle, Jeff
Vogt, Colby
Wertheimer, Rachel
Winzeler, Zach
Wycoff, Bruce
Zidow, John

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

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March 10–12

2016

DIXIE CENTER AT ST. GEORGE

1835 Convention Center Drive, St. George, Utah

APPROVED FOR UP TO **10** HRS. CLE CREDIT*

*Credit-type subject to change.

Full online Brochure/Registration will be available on January 11 and in the Jan/Feb 2016 edition of the *Utah Bar Journal*.

2016 "Spring Convention in St. George" Accommodations

Room blocks at the following hotels have been reserved.
You must indicate that you are with the Utah State Bar to receive the Bar rate.
After "release date" room blocks will revert back to the hotel general inventory.

Hotel	Rate (Does not include 11.6% tax)	Block Size	Release Date	Miles from Dixie Center to Hotel
Ambassador Inn (435) 673-7900 / ambassadorinn.net	$100 Including Tax!	10–Q	2/10/16	0.4
Best Western Abbey Inn (435) 652-1234 / bwabbeyinn.com	$134.99	15	2/10/16	1
Clarion Suites (fka Comfort Suites) (435) 673-7000 / stgeorgeclarionsuites.com	$100	10	2/10/16	1
Comfort Inn (435) 628-8544 / comfortinn.com/	$129.99	15–2Q 7–K	3/13/16	0.4
Courtyard by Marriott (435) 986-0555 / marriott.com/courtyard/travel.mi	$149	10–K	2/10/16	4
Crystal Inn Hotel & Suites (fka Hilton) (435) 688-7477 / crystalinns.com	$102	5–2Q	2/18/16	1
Fairfield Inn (435) 673-6066 / marriott.com	$109	5–DBL 15–K	2/13/16	0.2
Green Valley Spa & Resort (435) 628-8060 / greenvalleyspa.com	$99–$221* *10% discount for a 3 night minimum stay Tax:12%	10 1–3 bdrm condos	2/10/16	5
Hampton Inn (435) 652-1200 / hampton.com	$174	10–DQ	2/10/16	3
Hilton Garden Inn (435) 634-4100 / stgeorge.hgi.com	$132–K $142–2Q's	20	02/08/16	0.1
LaQuinta Inns & Suites (435) 674-2664 / lq.com	$99	5–K	2/18/16	3
Ramada Inn (800) 713-9435 / ramadainn.net	$104	10–DQ 5–K	2/10/16	3
Red Lion (fka Lexington Hotel) (435) 628-4235	$95	10	2/20/16	3
St. George Inn & Suites (fka Budget Inn & Suites) (435) 673-6661 / www.stgeorgeinnhotel.com	$95	10–DQ	2/10/16	1

Notice of Bar Commission Election

Second and Third Divisions

Nominations to the office of Bar Commissioner are hereby solicited for two members from the Third Division and one member from the Second Division, each to serve a three-year term. Terms will begin in July 2016. To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar. Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Nominating petitions are available at http://www.utahbar.org/bar-operations/leadership/. Completed petitions must be submitted to John Baldwin, Executive Director, no later than February 2, 2016, by 5:00 p.m.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1st with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15th.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1. space for up to a 200-word campaign message plus a color photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions and two photographs no later than February 1st;

2. space for up to a 500-word campaign message plus a photograph on the Utah Bar Website due February 1st;

3. a set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division who are eligible to vote; and

4. a one-time email campaign message to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate.

If you have any questions concerning this procedure, please contact John C. Baldwin at (801) 531-9077 or at director@utahbar.org.

Notice of Bar Election President-Elect

Nominations to the office of Bar President-elect are hereby solicited. Applicants for the office of President-elect must submit their notice of candidacy to the Board of Bar Commissioners by January 1, 2016. Applicants are given time at the January Board meeting to present their views. Secret balloting for nomination by the Board to run for the office of President-elect will then commence. Any candidate receiving the Commissioners' majority votes shall be nominated to run for the office of President-elect. Balloting shall continue until two nominees are selected.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1, 2016, with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15, 2016.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1. space for up to a 200-word campaign message* plus a color photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April Bar Journal publications are due along with two photographs no later than February 1st;

2. space for up to a 500-word campaign message* plus a photograph on the Utah Bar Website due February 1st;

3. a set of mailing labels for candidates who wish to send a personalized letter to Utah lawyers who are eligible to vote;

4. a one-time email campaign message* to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate; and

5. candidates will be given speaking time at the Spring Convention; (1) 5 minutes to address the Southern Utah Bar Association luncheon attendees and, (2) 5 minutes to address Spring Convention attendees at Saturday's General Session.

If you have any questions concerning this procedure, please contact John C. Baldwin at (801) 531-9077 or at director@utahbar.org.

*Candidates for the office of Bar President-elect may not list the names of any current voting or *ex-officio* members of the Commission as supporting their candidacy in any written or electronic campaign materials, including, but not limited to, any campaign materials inserted with the actual ballot; on the website; in any e-mail sent for the purposes of campaigning by the candidate or by the Bar; or in any mailings sent out by the candidate or by the Bar. Commissioners are otherwise not restricted in their rights to express opinions about President-elect candidates. This policy shall be published in the *Utah Bar Journal* and any E-bulletins announcing the election and may be referenced by the candidates.

Utah State Bar Ethics Advisory Opinion Committee Proposed EAOC 15-04, Issued September 30, 2015

ISSUE

When may a lawyer directly contact a *former* employee who had been within the control group of an adverse party such as a corporation?

OPINION

A lawyer may contact a former employee who had been within the control group of an adverse party, but may not communicate about any matters that are covered by the attorney-client privilege. The lawyer may only communicate about the former employee's observations that were not communicated to corporate counsel, and may not ask about any communications with the corporate counsel or discuss any work product that resulted from those communications.

FACTS

Lawyer represents client in employment discrimination case. The proposed witness to be interviewed is the former Human Relations Director (HRD) of the adverse corporation. The former HRD was the client contact for the adverse corporation. The former HRD tells client that he has all of the information needed to support client's case and knows of several more employment discrimination cases against the adverse corporation. Witness specifically asks the lawyer to contact him prior to his deposition. Lawyer does not have permission of opposing counsel to speak with the proposed witness and in fact was told to have no extra-judicial contact with the former HRD.

ANALYSIS

RPC 4.2(a) provides: "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."

As EAOC Opinion 04-04 explains, Rule 4.2 "does not bar a lawyer's unauthorized contact with *former* employees of a represented corporate defendant except in very limited circumstances…."(emphasis added). Comment 19 similarly provides: "In general, however, a lawyer may, consistent with this Rule, interview a former employee of an organization without the consent of the organization's lawyer." However, because the HRD was a member of the control group, any interview of the HRD must be carefully circumscribed to avoid inquiring into privileged communications or work product.

Pursuant to Rule 504(d) of the Utah Rules of Evidence, the former HRD was a representative of the client.[1] He was a person who obtained professional legal services on behalf of the client. He was expected to act on the advice of counsel and most importantly, he was the individual selected and specifically authorized to communicate with opposing counsel concerning the legal matters involved in the ongoing lawsuit.

The advice and directions of opposing counsel to former HRD are communications under Evidence Rule 504(d)(5).[2] They are also "confidential communications" pursuant to Evidence Rule 504(d)(6).[3]

It is irrelevant that HRD was a natural person seeking legal advice and representation on behalf of the now defendant corporation. The Utah Supreme Court defined the scope of corporate representation in *Moler v. CW Management Corp.*, 190 P.3d 1250 (Utah 2008):

We begin and end our analysis with a plain-language review of Utah Rule of Evidence 504:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing *confidential communications* made for the purpose of facilitating the rendition of professional legal services to the client *between the client and the client's representatives, lawyers, lawyer's representatives*, and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, in any combination.

It is irrelevant that the person who received the confidential communications is no longer within the control group of the opposing party. The 1995 Revisions of the Model Rules of Professional Conduct replaced the prohibition of lawyer contact with a "party" to contact "with a person." Rule 4.2(a).[4]

Commentators Hazard, Hodes and Jarvis provide guidance with respect to former employees covered by the attorney client privilege and work product doctrine.

> Yet it seems clear that some former employees continue to personify the organization even after they have terminated their employment relationship. An example would be a managerial level employee involved in the underlying transaction who is also conferring with the organization's lawyer in marshalling the evidence on its

> behalf. This kind of former employee is undoubtedly privy to privileged information, including work product, and an opposing lawyer is not entitled to obtain such information without a valid waiver by the organization.[5]

The corporation did not give up its attorney client privilege when the HRD left its employ. The normal attorney client privilege which attached to communications between opposing counsel and the former HRD still exist. Work product produced by the former HRD at the request of opposing counsel does not lose its protection by reason of the resignation. Lawyer may not make extra judicial inquiry into communications with counsel or work performed at the direction of counsel relevant to prospective or on-going litigation.

Conversely, the corporation has no rightful expectations of prohibiting the former HRD from sharing his observations of events not covered by the attorney client privilege or the work product doctrine. Such inquiry would be proper under Rule 4.2(d), as the former HRD is not a current member of the control group, a person whose acts or omissions could be attributed to the corporation, nor a representative of the corporation who could bind the corporation by his admissions.

It is incumbent upon the inquiring lawyer to make clear to the former control group member that the lawyer is only inquiring about matters OUTSIDE those covered by the attorney-client privilege.

Finally, while the results of receiving improper communications are not within the scope of this request, as an additional cautionary note, we reiterate what was recently observed in EAOC 15-02.

Practitioners should bear in mind that a violation of 4.2, while serious, can perhaps generate more damaging consequences than an ethics complaint. "'(T)he 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.'" *Id.* ¶ 15, quoting The Law of Lawyering, § 41.02, 41-4.

1. Evidence Rule 504(d)(4) "Representative of the client" means a person or entity having authority:

   (A) to obtain professional legal services;

   (B) to act on advice rendered pursuant to legal services on behalf of the client; or

   (C) person or entity specifically authorized to communicate with the lawyer concerning a legal matter.

2. Evidence Rule 504(d)(5) provides "Communication" includes:

   (A) advice given by the lawyer in the course of representing the client; and

   (B) disclosures of the client and the client's representatives to the lawyer or the lawyer's representatives incidental to the professional relationship.

3. Evidence Rule 504(d)(6) provides: "6) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

4. Geoffrey Hazard, W. William Hodes & Peter Jarvis, *The Law of Lawyering* (3d) Section 38.6 at 38-10.

5. The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (3d ed. 2000, § 38.7 (Supp. 2011). *See also, Polycast Technology Corporation v. Uniroyal, Inc.*, 129 F.R.D. 621, 629 (S.D.N.Y. 1990) (Ex Parte contact allowed without a showing of access to privileged information by the former employee).

Utah State Bar Ethics Advisory Opinion Committee Proposed EAOC 15-05, Issued September 30, 2015

ISSUE

May an attorney pay an internet service company a nominal fee to bid on potential legal work? May an attorney seek clients through an internet business that provides the attorney with limited client information in order to permit the attorney to bid to provide the needed legal services?

OPINION

Payment of a nominal fee to the internet forum service provider described herein, thereby enabling the attorney to offer a bid for legal services to a potential client, does not violate: (a) Rule 7.1, *Communications concerning a Lawyer's Services*; (b) Rule 7.2, *Advertising*, or (c) Rule 7.3, *Direct Contact with Prospective Clients*. Using such an internet business to seek new clients does not violate Rule 1.18 or other rules of professional conduct provided the attorney does not undertake representation for which he has a conflict of interest and the attorney protects the confidentiality of the information received from the prospective client.

BACKGROUND

A new internet service provider website has emerged for Utah business market consumers, including potential clients who need and/or seek legal services. The website is an internet forum designed to help all consumers, obtain bids or quotes on various professional services, including legal services, in the geographic area where the potential consumer or client lives or

where the potential services are needed. Professionals, including attorneys, may create a profile on the service website (free of charge both to the consumer and to the professional). These professionals may respond in writing to consumer requests for bids or quotes on proposed services. Consumers, including potential legal clients, are allowed to review the professionals/potential attorneys' submissions, such as attorney biographies, other client analysis of such attorney services, and attorney case summaries. The consumer/potential client may then leave comments or recommendations on the website for separate consumer access.

This internet forum service is akin to the popular *Angie's List* website, www.angieslist.com, which also allows consumers to find professional services the consumer either wants or requires in an identified geographic area. Yet a critical difference between *Angie's List* and the internet forum service provider described in this Opinion is that the *Angie's List* service charges consumers to become *Angie's List* "members" in order to take advantage of *Angie's List* services. In contrast, the internet service described in this Opinion is available cost-free to consumers. Instead, the internet service charges the professionals, including attorneys, for this internet service when the professionals submit bids to the consumer with respect to the consumer's requested service. In order for an attorney to submit a bid to the potential client for requested legal services, the attorney must pay a nominal fee of approximately $3.00–$5.00 per bid to the internet service provider. The attorney must pay this fee for each bid, regardless of whether the bid actually results in any work for the consumer/client.

Any Utah lawyer can register on the internet forum service provider described herein and submit a resume and/or listing of attorney qualifications for designated legal services. The internet service confirms that the Utah State Bar has in fact licensed the bidding attorney. The attorney, who has registered with the internet service, selects a category of requests he/she would like to receive, such as tax litigation, contract law, criminal law, etc. The attorney also sets a travel geographic area to specify the maximum distance the professional would limit his/her services.

To secure an attorney service bid, the consumer/potential client first completes a form application on the internet, identifying the area of law and the type of service and providing a short narrative about the issue. The potential client is essentially requesting the internet service to provide via the internet the names of attorneys capable of providing the designated professional service, such as hypothetically "attorneys" who handle "taxation" matters. Potential clients' first names and requests for legal services are instantly transmitted by email to all attorneys who have registered with the internet service, and who match the requested service category and geographic area. The internet service then provides the consumer/potential client applicant the names and bids of the first five attorneys who have submitted bids. Each attorney's bid includes a price estimate, a business profile (possibly including links to the attorney's website), a personalized message, customer reviews and contact information. A customer/potential client's request is only active for twenty-four hours or until five professionals/attorneys have submitted bids, whichever comes first.

The customer/potential client information is contractually deemed a confidential communication to the bidding professional/potential attorney. The customer/potential client information submitted to a professional/potential attorney is not public information, consistent with the internet service contract between the internet service and the potential client. Hence, such information cannot lawfully be shared with anyone but the professional/potential attorney applicant who is invited to submit a bid.

After the potential client receives the bids from up to five attorneys, it is up to the potential client to take the next step. The potential client may undertake communication with one or all of the bidding attorneys, and may at that point share his complete name, further confidential information about the matter, and additional contact information including a telephone number. Any use of this information by anyone, except for the intended recipient professional/potential attorney as the potential client deems appropriate, is contractually prohibited. The internet service provider informs the professional/potential attorney that if he/she has received the potential client transmission in error, the professional/professional attorney should

Notice of Petition for Reinstatement to the Utah State Bar by Nathan N. Jardine

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement ("Petition") filed by Nathan N. Jardine, in *In the Matter of the Discipline of Nathan N. Jardine* Third Judicial District Court, Civil No. 070913637. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

immediately reply to the sender and delete such information from the professional/potential attorney internet system.

After the bid, there may be no further communication from the potential client to the professional/potential attorney bidding for the job. Alternatively, after the potential client initiates contact with an attorney, there may be back and forth communication until the client has decided to hire the attorney.

ANALYSIS

With respect to the internet forum service provider, and the potential attorney participation therein, the most relevant provisions of the Utah Rules of Professional Conduct ("URPC") are Rules 7.1, 7.2, 7.3 and 1.18. Rule 7.1, *Communications Concerning a Lawyer's Services*, prohibits "false or misleading communication" about a lawyer or a lawyer's services. Rule 7.2(b), *Advertising*, prohibits giving "anything of value to a person for recommending the lawyer's services[,]" and Rule 7.3(a) *Direct Contact with Prospective Clients*, prohibits a lawyer "in-person" and by "real-time electronic contact," from soliciting "professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain," unless the lawyer participates "with a [separately owned] prepaid legal services plan."

The EOAC has frequently concluded in previously issued opinions that "[t]he U.S. Supreme Court has made it clear that public communication concerning a lawyer's services (including any for advertising) is commercial speech, enjoys First Amendment protection, and can be regulated only to further substantial state interests, and only in the least restrictive manner possible. The cardinal rule concerning all public communication about a lawyer and her services is that the communication not be false or misleading." Ethics Advisory Opinion No. 14-04 (also quoted in Ethics Advisory Opinion 00-02 and 09-01). Similarly, the Utah Supreme Court has found that "[t]he state obviously has a substantial and compelling interest in protecting the public from false, deceptive, or misleading advertising." *In re Utah State Bar Petition*, 647 P.2d 991, 993 (Utah 1982). Deceptive advertising in the legal profession poses a particular risk because "the public lacks sophistication concerning legal services, [and therefore] misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Bates v. State of Arizona*, 433 U.S. 350, 383 (1977).

With respect to the internet forum service provider for attorneys, as described above in detail, Rule 7.1 has application to applicant attorneys, but not to the internet forum service provider. That is because the internet forum service provider itself makes no representations to the public or to the consumer/potential clients except that "interested and available professionals" will send "custom quotes." The internet forum service simply facilitates attorney bids (including price quotes, biographies, and customer reviews) being sent to potential clients. However, if the internet service provider includes any false or misleading statements about the bidding attorneys, then Rule 7.1 will be violated by the attorney.

The potential attorney bids to a client for legal representation are not publicly available, but rather are available only to the potential client. Although Rule 7.1 "governs all communications about a lawyer's services, including advertising permitted by Rule 7.2[,]" the Rule applies only to a "lawyer's communication" and/or "An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients [that] may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case." It is theoretically possible that a potential attorney's submission to the internet forum service provider could be misleading if the attorney's submitted resume or case summary were false or misleading. Similarly, it is possible that a customer review could be false or misleading if it were "presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters." URPC Rule 7.1 cmt. 3. When that customer review is sent with the attorney's bid, the lawyer will be seen to be making that communication under Rule 7.1. Yet there is no violation of Rule 7.1 by lawyer submission of such documents, again assuming they include no attorney misrepresentation.

Rule 7.2(a) provides that "Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media." Comment 2 to Rule 7.2 explains:

> This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names and references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Accordingly, the attorney information the Utah lawyer submits to the internet forum service provider precisely complies with the

"Advertising" permissible by Rule 7.2.

Rule 7.2 further prohibits giving "anything of value to a person for recommending the lawyers' services" except to "pay the reasonable costs of advertisements or communications permitted by this Rule" or to "pay the usual charges of…a lawyer referral service." URPC Rule 7.2(b)(1) & (b)(2). Thus, if the internet service provider "recommends" a bidding attorney in any manner or indicates that the bidding attorney has been vetted or approved, then the attorney will be in violation of Rule. 7.2. Provided the internet service provider simply indicates the bidding attorney is "available" and "interested," Rule 7.2 is not violated.

Comment [5] to Rule 7.2, entitled *Paying Others to Recommend a Lawyer*, with respect to advertising, provides that "A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services], such as publicists, public-relations personnel, business-development staff and website designers." Similarly, Comment [6] to Rule 7.2 defines a "lawyer referral service" as "an organization that holds itself out to the public to provide referrals to lawyers with appropriate experience in the subject matter of the representation." Hence, the minimum fee an attorney must pay the internet forum service provider, as described above, complies with ethically permissible advertising services or lawyer referral services available to attorneys.

Rule 7.3 (a) provides that "A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted (a)(1) is a lawyer; or (a)(2) has a family, close personal, or prior professional relationship with the lawyer." This ethical prohibition against lawyer solicitation was upheld as constitutional in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, *reh'g denied*, 439 U.S. 883 (1978), where the Court stated:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response without providing an opportunity for comparison or reflection… There is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.

Ohralik at. 534.

With respect to the Utah internet forum service provider described herein, the attorney application and bid for a potential client does not violate Rule 7.3 for these reasons. First, the attorney does not communicate with the client by "in-person live telephone or real-time electronic contact" but submits a bid and other written materials that are forwarded to the client. Second, it is the client, not the lawyer, who has solicited attorney representation. Third, it is the client who initiates further conversation about the representation, including possibly by telephone, after receiving the attorneys' bids. The one caution is that the client may include a telephone number in the initial written account of the situation that is distributed to all qualified attorneys. In such a case, the attorney bidding for the client's business may not initiate a telephone call to the client without running afoul of Rule 7.3's prohibition of "real time…contact."

The attorney's relationship with this potential client is also governed by Rule 1.18 *Duties to Prospective Client*, Utah Rules of Professional Conduct. This rule defines a "prospective client" as "a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." This rule applies whether or not the prospective client ultimately retains the attorney. Because the consumer soliciting bids will be a "prospective client," the attorney bidder who learns information from that prospective client must not "use or reveal that information except as Rule 1.9 would permit with respect to a former client." URPC Rule 1.18(b).

Similarly, an attorney bidder may not represent another client "with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter" with certain limited exceptions. URPC Rule 1.18(c). Consequently, it would be wise for the attorney submitting the bid to limit the information he receives from the prospective client.

At some point the prospective client must decide whether to retain the attorney. The attorney must also decide whether representation of this client will involve a "conflict of interest" in violation of Rule 1.7, Rule 1.9, Rule 1.10 or Rule 1.11. If there is no conflict of interest, the attorney could represent the client. Typically an attorney will screen for a conflict of interest using the names of the client and the opposing parties prior to any communication about the legal matter. Here, the attorney will learn something about the prospective client's legal matter before discovering the client's or the opposing party's names. In some cases the attorney who has submitted a winning bid will be unable to accept the representation once the attorney learns the identities of the parties, as there will be an impermissible conflict of interest.

IP SUMMIT

Friday, February 26

Hilton Salt Lake City Center

PRESENTERS INCLUDE:

David J. Kappos, Partner at Cravath, Swaine & Moore LLP, Past Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office Professor

Judge N. Randy Smith, Federal Judge on the United States Court of Appeals for the Ninth Circuit

David Nimmer, Author and Editor of Nimmer on Copyright, Of Counsel at Irell & Manella LLP, and Professor at UCLA Professor

Professor David J. Franklyn, Professor and Director of the LLM Program in IP and Technology Law and Director of the McCarthy Institute for IP and Technology Law at University of San Francisco School of Law

Dennis D. Crouch, Associate Professor at the University of Missouri School of Law and the Founder and a Contributing Author of the Patently-O Blog

Judge Dee V. Benson, Federal Judge and former Chief Judge for the United States District Court for the District of Utah

Judge Clark Waddoups, Federal Judge of the United States District Court for the District of Utah

Magistrate Judge Evelyn J Furse, Federal Magistrate Judge of the United States District Court for the District of Utah

Larry J. Cohen, Adjunct Professor of Law at the Arizona State University Sandra Day O'Connor College of Law and Member of the Cohen Law Firm

David R. Todd, Shareholder and Member of the Board of Directors of Workman Nydegger and Adjunct Professor at the Brigham Young University J. Reuben Clark Law School

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INTELLECTUAL PROPERTY LAW AND COMPLEX LITIGATION

Register: https://services.utahbar.org/Events/Event-Info?sessionaltcd=16_9007

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/.

INTERIM SUSPENSION

On September 17, 2015, the Honorable Bruce Lubeck, Third Judicial District Court, entered an Order of Interim Suspension pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability against J. Wesley Robinson pending resolution of the disciplinary matter against him.

In summary:

Mr. Robinson was placed on interim suspension based upon his criminal convictions for operation of a clandestine laboratory, possession of a controlled substance with intent to distribute and possession of a firearm by a restricted person.

SUSPENSION

On June 15, 2015, the Honorable Fred D. Howard, Fourth Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Suspension, suspending Stacey Austin Johnson from the practice of law for two years for Mr. Johnson's violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 8.4(c) (Misconduct), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary, there are two matters:

In the first matter, Mr. Johnson was retained to represent a husband and wife in their personal injury claims. After filing a complaint against two defendants, Mr. Johnson failed to initiate an attorneys planning meeting or submit a proposed Case Management Order until ordered to do so. Mr. Johnson failed to timely serve Initial Disclosures; failed to designate witnesses and failed to timely answer discovery requests. Mr. Johnson also failed to timely respond to both defendants' summary judgment motions filed after the admissions were deemed admitted for failure to timely respond to admissions requests. His late response to one of the summary judgment motions was found inadequate and both motions for summary judgment were granted. Mr. Johnson essentially filed three motions for reconsideration that did not comply with court rules for multiple reasons and were denied.

Mr. Johnson moved numerous times while the case was pending

Have you received a letter from the Office of Professional Conduct (OPC)? Do you have questions about the disciplinary process? For all your questions, contact Jeannine P. Timothy at the Discipline Process Information Office. Since January, sixty-four attorneys have called Jeannine with questions about the complaints filed against them. Jeannine has provided information about the process and given updates on the progress of each attorney's individual matter with the OPC. Call Jeannine at 801-257-5515 or email her at DisciplineInfo@UtahBar.org.

DISCIPLINE PROCESS INFORMATION OFFICE

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

and did not timely notify his clients, opposing counsel or the Court about all of his address changes. Mr. Johnson did not keep his clients informed about their case. After learning of the summary judgments from the court, the client confronted Mr. Johnson and he led the client to believe it would be simple to reinstate the case and failed to clearly communicate that the case was in peril.

Mr. Johnson filed an appeal. The Utah Court of Appeals upheld the summary judgments noting that during the appellate process, Mr. Johnson failed to comply with court procedural rules, including failing to serve papers and failing to meet deadlines for the reply brief. Mr. Johnson did not timely inform his clients that the appeal had been dismissed; the clients learned of the denial from another attorney.

In the second matter:
Mr. Johnson was retained to pursue litigation against a police department on behalf of a husband and wife for their claim of excessive force. Mr. Johnson did not timely communicate with his clients about the status of the case and the work he was performing. Mr. Johnson informed his clients when he believed a four year statute of limitations would run on the case, but did little work to file a complaint for the case until shortly before that time. Shortly before the statute date, Mr. Johnson informed his clients that they needed to pay the filing fee to file a complaint. Two days prior to the statute date for his clients' case, Mr. Johnson informed the clients that he would no longer represent them but that he would give them a complaint to file pro se. When the clients did not meet Mr. Johnson at the courthouse to review, sign and file the complaint pro se late on the evening prior to the statute date, Mr. Johnson filed the unsigned complaint by placing it into the overnight drop box for the Court. Mr. Johnson did not include the required filing fee with the Complaint. Mr. Johnson called his clients and left a message for them to go to the court the next morning to sign the pro se verified complaint. The clients did not wish to proceed with the case pro se and they did not complete the filing of the complaint.

Aggravating factors:
Prior record of discipline; dishonest or selfish motive; pattern of misconduct; multiple offenses; vulnerability of victim; substantial experience in the practice of law; and lack of good faith effort to rectify the consequences of his misconduct.

ADMONITION

On July 31, 2015, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.3 (Diligence) of the Rules of Professional Conduct.

In summary:
An attorney, while acting as general counsel to a corporation, filed an Answer to a complaint on behalf of the owner of the corporation who had been named personally as a defendant in a lawsuit. After the Answer was filed on behalf of the individual, the attorney stopped serving as general counsel to the corporation. But the attorney did not withdraw as counsel for the individual the attorney was representing. Requests for Admissions were then served on the individual and the attorney did not respond to the Requests for Admissions on behalf of the individual defendant. Based on the failure to respond to the Requests for Admission, a Motion for Summary Judgment was filed and served on the attorney. The attorney did not oppose the Motion

for Summary Judgment. The court granted the Motion and entered a judgment against the individual defendant.

DISBARMENT

On August 26, 2015, the Honorable Noel S. Hyde, Second Judicial District Court, entered an Order disbarring Alvin R. Lundgren from the practice of law for Mr. Lundgren's violation of Rules 1.15(a) (Safekeeping Property) and 1.15(d) (Safekeeping Property) of the Rules of Professional Conduct.

In summary:

Mr. Lundgren was hired to pursue a worker's compensation claim. Mr. Lundgren settled the claim and retained a portion of the settlement proceeds to pay his client's outstanding medical bills. Mr. Lundgren did not remit payment to his client's medical provider and misappropriated his client's money from his client trust account.

After being notified by the medical provider that their bill had not been paid, the client made efforts to contact Mr. Lundgren by telephone, leaving messages and receiving no response. The client sent Mr. Lundgren a letter and requested an accounting of the settlement funds. Mr. Lundgren did not respond to the client's letter or provide an accounting of the settlement funds. Mr. Lundgren eventually paid the money owed to the medical provider.

Mr. Lundgren took unearned money from his client trust account to cover personal and business expenses. Mr. Lundgren transferred unearned money from his client trust account to his operating account. Mr. Lundgren transferred unearned money and wrote checks on unearned money from his client trust account to himself. Mr. Lundgren transferred money from his client trust account to his wife's checking account. No client authorized Mr. Lundgren to take their money from the trust account before it was earned. Based on these actions, Mr. Lundgren misappropriated client funds belonging to more than just one client.

Mr. Lundgren was not able to provide an accounting of the unearned money that he took from his client trust account. Mr. Lundgren was not able to verify that all unearned money that was taken was returned to his trust account.

DISBARMENT

On July 2, 2015, the Honorable Fred D. Howard, Fourth Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Disbarment disbarring Donald D. Gilbert from the practice of law. Mr. Gilbert has filed an appeal of the Court's Findings of Fact, Conclusions of Law and Order of Disbarment, which is currently pending before the Utah Supreme Court.

Emerging Lawyer Leaders

by Naziol S. Nazarinia Scott

Most Utah attorneys are familiar with AND JUSTICE FOR ALL (AJFA), the umbrella organization for Utah's nonprofit civil legal aid agencies – the Disability Law Center, Legal Aid Society of Salt Lake, and Utah Legal Services. AJFA was formed in 1998 by Utah's primary legal service providers to collaborate on their common goal of ensuring access to justice for all Utahns. The legal community has heartily embraced AJFA and has generously supported its efforts.

This year, AJFA created a new board, the Emerging Legal Leaders (ELL), to engage young attorneys in supporting AJFA. The idea was for a board of new and young attorneys to engage their peers in developing a culture of giving at the beginning of their legal careers. The ELL Executive Committee conducted its first meeting in the fall of 2014. A launch party, held on March 17, 2015, (sponsored by Dorsey & Whitney) was well attended and met with excitement.

> *"ELL seeks to do much more than encourage young attorneys to give back to their community; it also seeks to benefit these young attorneys."*

Many senior attorneys recognize that engagement in the community is an integral part of a new attorney's professional development. Additionally, supporting access to justice is expected of the legal profession under Rule 6.1 of the Utah Rules of Professional Conduct, which states, in part:

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono public legal services per year…[as well as] provide any additional services through[]… participation in activities for improving the law, the legal system or the legal profession.… In addition…, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Utah R. Prof'l Conduct 6.1.

ELL seeks to do much more than encourage young attorneys to give back to their community; it also seeks to benefit these young attorneys. The board's mission is twofold: (1) to provide opportunities for new attorneys to fulfill their professional responsibility by contributing personally and financially to access-to-justice initiatives for the most vulnerable members of our community and (2) to provide opportunities for new attorneys to develop their professional and legal skills and enhance their legal reputations while working with like-minded peers to achieve philanthropic goals. The ELL Board is not simply asking attorneys to donate their time and money; it uses the fundraising activities for AJFA as an instrument to help attorneys develop and refine other skills that can be applied to their legal careers.

NAZIOL S. NAZARINIA SCOTT is an attorney at Stoel Rives LLP and Founding Chair of the Emerging Legal Leaders.

Nonlegal skills such as developing and delivering an elevator pitch, talking with clients about their needs and learning how to make the "ask" are all relevant to developing business in the legal industry and to advancing a legal career. ELL members are given the opportunity to practice these skills while giving back to the community by fundraising for AJFA.

ELL has already shown that the desire to give back exists among new attorneys. This year, ELL hosted two tables composed entirely of new attorneys at AJFA's Justice Rising Breakfast. We also had a great turnout at the first ELL CLE event (hosted by Parsons Behle & Latimer), where attorneys learned about opportunities to provide volunteer legal services to Utah's most underserved populations.

The early success of these events shows a glimmer of the potential impact new attorneys can have in ensuring the longevity of Utah's access-to-justice programs. As ELL grows, we hope you will be a part of it. Any attorney practicing for ten years or less who donates a minimum of $35 to AJFA is eligible to be an ELL member.

Presently, the ELL Executive Committee is working toward its biggest event yet – an annual fundraising campaign driven entirely by Utah's young lawyers, which will be launched in 2016. The ELL Executive Committee has reviewed fundraising campaigns driven by new attorneys in other states but would also like input from as many of Utah's young attorneys as possible. If you are a young attorney, please complete the survey available at http://bit.ly/ELLSurvey2015.

More information about the Emerging Legal Leaders, including how to get involved is available on the AND JUSTICE FOR ALL website, http://andjusticeforall.org, or the Emerging Legal Leaders page at bit.ly/ELLBarJournal.

Paralegal Utilization

by Julie Emery and Julie Eriksson

Over the past three decades, the paralegal profession has developed to provide solutions to enable lawyers to better practice law, increase law firm profits, facilitate client relationships, improve team and client communication, increase productivity, and create more affordable access to justice. Not all work traditionally performed by lawyers is considered "the practice of law." Under the correct supervision, a paralegal can enhance your legal team by performing work at a lower rate and free up lawyers to practice law. But how do you utilize your paralegal to reap these benefits?

First, select the right person for the job. Choose a paralegal that has chosen the profession and plans to make it a career. Become familiar with the curriculum from the school where the paralegal received his or her baccalaureate degree, post-baccalaureate paralegal certificate, or master's degree. The rigor of the curriculum will help you determine the knowledge level the paralegal possesses. In lieu of degrees, become familiar with the relevant work experience the paralegal has to make sure the specific experience is in line with your needs. Also, like any team, be sure the person fits your team dynamic. You will want a paralegal with initiative, whom you won't have to micromanage.

Second, include the paralegal as part of your legal team from the beginning of the case. In a team environment you will be able to better define the role for your paralegal and then be able to make assignments to the appropriate member of the team. Effective team communication translates to productivity and accuracy. The success of your first team effort will translate to the next. The administrator of a large Salt Lake City firm said,

> One of the most important skills in practicing law is building an effective work team to serve clients in the best possible manner and generate profits. Paralegals can be a key element in that team, especially in fostering cost efficiency and providing clients increased contact with your practice through your paralegal.

Third, define substantive work for paralegals in your specific law practice. Most paralegals know the flow of a case and can manage the discovery process with minimal oversight, if allowed. They know who to subpoena records from and the procedures for obtaining them, they know how to identify and interview fact witnesses, and they know the rules of civil or criminal procedure. If you've hired someone with the right qualifications and/or work experience, trust him or her to know how to do the work. A Salt Lake City senior litigation associate explained, "The paralegal I work with has several more years of experience than I do in the litigation arena. She gives me good ideas about what to ask in depositions and how to find the correct evidence to support the legal arguments I'm assigned to write." A shareholder at a large Salt Lake City law firm describes the utilization of her paralegal in her trial practice:

JULIE EMERY is a paralegal at the law firm Parsons Behle & Latimer. She is a past adjunct instructor for the paralegal programs at Salt Lake Community College and Westminster College and has served as a director on several boards.

JULIE ERIKSSON is a paralegal at the law firm Christensen & Jensen, P.C. She is a past chair of the Paralegal Division and has been an active participant since its inception.

It is hard to imagine taking a case to trial without a paralegal. They make sure witnesses arrive on time. They line up exhibits so you aren't rifling around in boxes while the jury watches. They keep clients calm during breaks when you need to work on an upcoming witness examination. They give you helpful assessments of how things are going. In short, they make you look good.

To better understand what paralegals can do, you must first understand what paralegals are prohibited from doing:

- Establishing an attorney-client relationship
- Setting legal fees
- Giving legal advice
- Advocating on behalf of a client
- Taking depositions
- Signing legal documents

Now that you have a broad sense of what paralegals cannot do, you may be wondering what they can do. Although you, as the attorney, may be able to perform the task at a higher billing rate and meet your billable hour requirements, using your paralegals for those billable tasks will allow you to bill for more substantial work that only you can perform to more clients. Paralegals can draft pleadings and documents, interview witnesses, summarize records and depositions, prepare hearing and trial presentations, work with experts, take notes, and assist with jury selection, among other tasks.

Once attorneys understand the role of paralegals and what they can and cannot do, the proper utilization of paralegals will begin to help your law practice provide greater access to justice by providing better service to your clients at a lower cost. The Paralegal Division of the Utah State Bar website (paralegals.utahbar.org), on the "Resources" page, has the full list of what paralegals do in Bankruptcy, Business/Corporate, Collections, Family Law, Foreclosures, Immigration, Intellectual Property, Litigation, Probate and Estate Planning, Real Estate, and Securities Law.

CLE Calendar

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

November 19 & 20, 2015 | 8:00 am–5:00 pm — **9 hrs. regular CLE, 1 hr. Ethics & 2 hrs. Prof/Civ**

Fall Forum
Grand America Hotel, 555 South Main Street, Salt Lake City. Registration price: $350.

Keynote Speakers: Roger Dodd, Dodd & Kuendig Law
Joe Patrice, Above the Law
Kim Papillion, attorney, TheBetterMind.com
Dr. Lee Smith, The Center for MindBody Health

Utah Minority Bar Dinner, November 19, starting at 6:00 pm.: $75 per plate.

Meet the Judges Reception, November 20th at the U.S. Federal Courthouse beginning at 4:45 pm

Register online at: services.utahbar.org with your login and password.

November 24, 2015 | 4:00 pm–6:00 pm — **2 hrs. CLE**

Litigation 101 Series – Mediation and Negotiating
Sponsored by the Young Lawyers Division. Second in a six-part series. If you register for the five remaining sessions, you will get two sessions for free. Cost for all five sessions: $100 for YLD section members, $200 for all others.

December 18, 2015 | 8:30 am–4:30 pm — **6.5 hrs. CLE (including 1 hr. Ethics)**

Mangrum and Benson on Utah Evidence.
$195 for Litigation Section members, $355 with book – $250 for all others, $410 with book.

Register online at: services.utahbar.org with your login and password.

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

Litigation 101 Series – Trial Skills I, Opening Statements and Closing Arguments
Sponsored by the Young Lawyers Division. Third in a six-part series. Cost is $25 for YLD section members, $50 for all others.

February 11, 2016 | 4:00 pm–6:00 pm — **2 hrs. CLE**

Litigation 101 Series – Trial Skills II, Direct Examination and Cross Examination
Sponsored by the Young Lawyers Division. Fourth in a six-part series. Cost is $25 for YLD section members, $50 for all others.

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

Litigation 101 Series – Mock Trial
Sponsored by the Young Lawyers Division. Fifth in a six-part series. Cost is $25 for YLD section members, $50 for all others.

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

Litigation 101 Series – Ethics & Civility
Sponsored by the Young Lawyers Division. Sixth in a six-part series. Cost is $25 for YLD section members, $50 for all others.

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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.

WANTED

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

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Spacious, contemporary furnished office in downtown Salt Lake. View of City County Building. Full access to contemporary furnished conference room, equipped kitchen, furnished reception area and storage area. Internet and utilities provided. Free parking. Ideal for attorney or other professional. All included in price: $700 per month/own office furnished. $650 per month/own office unfurnished. Will consider month to month or longer lease. Call Jim Stewart at 801-628-3488 or email jim@jwstewartlaw.com.

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

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

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

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

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

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