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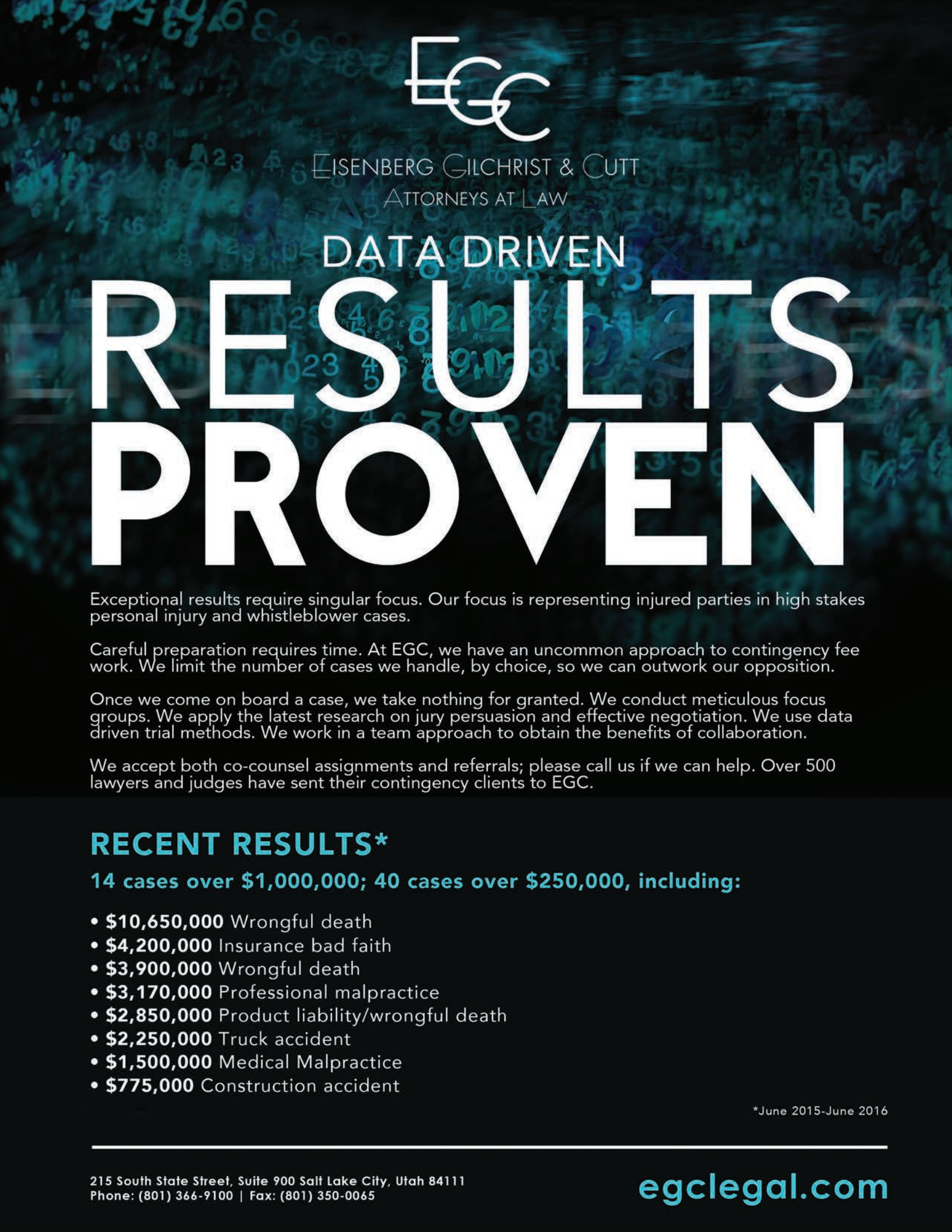

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MISSION & VISION OF THE BAR:

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

Little Cottonwood Canyon, by Utah State Bar member James Jones.

JAMES JONES is a partner at Snell & Wilmer L.L.P. He took this photo while wandering around Little Cottonwood Canyon.

SUBMIT A COVER PHOTO

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

Interested in writing an article for the Utah Bar Journal?

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

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

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

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

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

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

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

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Letter to the Editor

Dear Editor:

Justice Court Judge Paul C. Farr, in the July/Aug 2016 *Utah Bar Journal*, authored an article entitled "The Evolution Of Utah's Justice Courts." Although he put a positive spin on the system, he accurately acknowledged that justice courts are perceived negatively by the public. To allay public perception most justice judges are now required to have a law degree in "…hope that it will increase the quality, as well as the public perception, of the justice courts." In my opinion a law degree does not legitimize the predatory system.

In the March/April 2009 *Utah Bar Journal*, https://www.utahbar.org/wp-content/uploads/2014/10/2009_march_april.pdf, I wrote an article entitled "Utah's Justice Court System, A Legal Charade." After in depth historical review of Utah Justice Court records the article concluded that there is a systemic flaw in how justice courts are established which bars them from being judicious. Judge Farr exemplifies the systemic flaw. As he states, he "currently serves the cities of Sandy and Herriman." Translation, he is employed by Herriman and Sandy. All justice judges are city or county employees. As city employees judges have revenue projections which must be met. To meet the revenue mandate (called fines and forfeitures) nearly every person appearing before a justice court judge will pay a fine, or court costs, or pay to attend a city sponsored class. Judges know that failure to meet their budget projection can result in a poor performance review by city supervisors.

It's no secret that the quality of a Utah Justice Court is measured by how much revenue it generates for city coffers; by how many defendants pay a ransom. According to the quiescent Utah Judicial Council, justice judges are only doing their jobs; with conviction. Cha – Ching.

Mike Martinez

Letter Submission Guidelines

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

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

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

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

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

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

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

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

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Planning for the Future of Our Profession

by Robert O. Rice

Change is the law of life. And those who look only to the past or present are certain to miss the future. – John F. Kennedy

Perhaps because so much of what we do is governed by *stare decisis*, lawyers strain to heed John F. Kennedy's advice to look forward, not backward. Lawyers are traditionalists doing business the old-fashioned way, charging hourly rates, forming partnerships with other lawyers, working in brick-and-mortar offices, and resolving our clients' disputes in court. With the advent of online legal services like Legal Zoom and Avvo, the traditional model of doing the business of law has been seriously challenged. Query then, whether Utah lawyers are prepared for changes that are already afoot? Thanks to a forward-looking Utah Bar, an innovative Utah Administrative Office of the Courts, and to many of you, I am happy to report that our profession in Utah is not, to paraphrase President Kennedy, missing the future by dwelling on the past.

This is especially so when one compares the future of the practice of law in Utah with the findings announced in August in the American Bar Association Report on the Future of Legal Services in the United States (2016), *available at* http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf (ABA Report). While the ABA Report highlights areas where much attention is needed, its recommendations demonstrate that lawyering in Utah is ahead of the game, and indeed leading the nation, in many ways.

The ABA Report begins by lamenting the ever-widening access to justice gap that prevents thousands of Utahns and millions of Americans from obtaining badly needed legal services. This is hardly surprising. In fact, the Utah Bar's Futures Commission studied this problem in detail in 2015. Futures Commission of the Utah State Bar, Report and Recommendations on the Future of Legal Services in Utah (July 29, 2015), https://www.utahbar.org/wp-content/uploads/2015/07/2015_Futures_Report_revised.pdf. But the ABA pulls no punches when it identifies one of the main reasons the access to justice gap exists: "The traditional law practice business model constrains innovations that would provide greater access to, and enhance the delivery of legal services." ABA Report, p. 5, § 5.

Ouch! How could this be, given what Jerry Seinfeld once said about how smart we all are? *Seinfeld: The Visa*, Opening Monologue (NBC television broadcast No. 56, Jan. 27, 1993) ("To me, a lawyer is basically the person that [sic] knows the rules of the country. We're all throwing the dice, playing the game, moving our pieces around the board, but if there is a problem the lawyer is the only person who has read the inside of the top of the box.").

So let's read the inside of the top of the box. Having criticized lawyers for "constrain[ing] innovation," the ABA sets forth a series of recommendations that it hopes will "benefit the public, even if those changes cause disruption or discomfort to the profession." ABA Report, p. 1. Comparing those recommendations with what Utah lawyers are doing shows just how far Utah lawyers and the courts are looking into the future.

The ABA's first recommendation is that "[t]he legal profession should support the goal of providing some form of effective assistance for essential legal needs to all persons otherwise unable to afford a lawyer." *Id.*, p. 6, § 1. Utah is leading the nation with innovative ways to address this objective in a number of areas. Your Bar's Modest Means program and Pro Bono Commission have helped literally thousands of low- and modest-income Utahns obtain either free or low-cost legal services. Many of you have participated in these important programs, for which I sincerely thank you. Five years ago – long before the ABA made its recommendations – your Utah Bar launched these programs, and your support allows both initiatives to thrive. Today, Pro Bono Commission lawyers have provided free legal services

to approximately 3,500 Utahns, and Modest Means lawyers have assisted another approximately 2,500 clients with sliding-scale, reduced-fee legal services. These numbers are astounding, and a credit to Utah lawyers.

Utah is venturing into new territory elsewhere to close the justice gap with a program to allow Licensed Paralegal Practitioners to practice law in discrete practice areas. This program, the product of the Utah Supreme Court's Task Force to Examine Limited Legal Licensing, is designed to allow licensed legal professionals to provide legal services to unrepresented parties currently unserved by attorneys. Once this program is implemented, Licensed Paralegal Practitioners will be licensed to assist paying clients in completing court-approved forms to allow clients to represent themselves with the benefit of competent legal assistance in family law, debt collection, and landlord-tenant disputes. Family law, debt collection, and landlord-tenant disputes represent the three most common disputes where litigants do not have counsel. The Licensed Paralegal Practitioners program is a carefully-calculated, market-based response to this ever-expanding problem. Currently, Washington is the only state in the nation utilizing licensed paralegal professionals to address the justice gap. Utah is likely to be the next state to launch such an innovative solution to the challenge of providing competent legal representation to all.

The ABA Report also recommends that "[c]ourts should be accessible, user-centric, and welcoming to all litigants, while ensuring fairness, impartiality, and due process." American Bar Association Report on the Future of Legal Services in the United States, p. 6, § 5 (2016), *available at* http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf. To accomplish this, the ABA recommends, among other things, that "[c]ourt-annexed online dispute resolution systems should be piloted and, as appropriate, expanded." *Id.*, § 5.4. Once again, Utah is leading the charge in this area. Utah's Judicial Council is pursuing online dispute resolution in small claims litigation. Based on the same concept under which eBay and other online providers resolve disputes, the Administrative Office of the Courts' project aims to find ways for litigants to resolve disputes digitally. This innovative program represents "a significant opportunity for more convenient and less costly access to the court. If successful, the lessons learned can be applied in other types of litigation, including interlocutory decisions during litigation." Supreme Court Task Force to Examine Limited Legal Licensing Report, p. 40 (2015), *available at* http://www.utcourts.gov/committees/limited_legal/Supreme%20Court%20Task%20Force%20to%20Examine%20Limited%20Legal%20Licensing.pdf. Imagine the docket-clearing consequences of an efficient way for litigants to adjudicate their disputes online, instead of waiting months, and spending thousands, to resolve claims the old-fashioned way.

In further keeping with the ABA's objective of finding ways to welcome all litigants and ensure fairness, impartiality, and due process in our courts, the Utah Bar, relying on many of you, has matched hundreds of volunteer lawyers with hundreds of litigants appearing in court on debt collection, Office of Recovery Services, and other calendars. This Pro Bono Commission-sponsored program has helped otherwise unrepresented parties navigate our civil justice system while at the same time helping courts streamline their dockets that are overloaded with unrepresented parties who have a tendency to slow court proceedings. To further relieve pressures caused by hundreds of unrepresented parties who know little or nothing about legal

process, the Utah Bar's Affordable Attorneys For All Task Force has launched Courthouse Steps, a program designed to match lawyers wishing to provide unbundled legal services to litigants in Utah's Third Judicial District. Through Courthouse Steps, clients who do not qualify for free legal assistance can schedule appointments with lawyers, meeting them at the courthouse, for an hour of legal advice at an cost-efficient rate that will allow even more Utahns to obtain affordable legal services.

The ABA Report also calls for the "[t]he legal profession [to] adopt methods, policies, standards, and practices to best advance diversity and inclusion." ABA Report, p. 7, § 8. Here again, Utah lawyers are demonstrating leadership of which you and your colleagues can be proud. The Utah Center for Legal Inclusion (UCLI), the brainchild of the Utah Minority Bar Association, will announce its diversity and inclusion initiative at the Bar's Fall Forum, November 17 and 18, 2016, to be held at the Little America Hotel. UCLI's program will focus on innovative ways to reach diverse students early in their educational careers, to encourage them to consider law school and a career as a lawyer. This is only the beginning for UCLI, but this organization is poised to make dramatic contributions to the cause of expanding diversity among lawyers and, ultimately, Utah's judiciary.

"We should be proud of how Utah has already tackled issues that the rest of the nation is just beginning to recognize."

These examples are just a handful of the innovative steps that Utah lawyers and our courts are undertaking to plan for the future of our profession. There are many more, including the Bar's state-of-the-art online attorney directory at LicensedLawyer.org and the Bar's newly-created Innovations and Technology Committee. These initiatives evidence a forward-thinking Bar that is focused on the future and not dwelling on the past. We should be proud of how Utah has already tackled issues that the rest of the nation is just beginning to recognize.

But there are other ideas to be considered and explored, some of which, admittedly, may "cause disruption or discomfort to the profession." ABA Report, p. 1. As we continue our read of the "inside of the top of the box," consider some of the ABA's more controversial proposals. Chief among these is the ABA's recommendation to "continue[] exploration of alternative business structures (ABS)." ABA Report, p. 6, § 2.4. Generally speaking, ABSs are law firms owned, at least in part by non-lawyers. Currently, ABSs are prohibited under Utah's Rules of Professional Conduct. *See* Utah R. Prof'l. Conduct § 5.4(d). This model has served the profession well. Is now, however, the time to contemplate a new paradigm, when new technology companies are already intruding in territory that was once exclusively the lawyers' domain? Consider, for example, the benefits of a law firm affiliated with a technology company, with the lawyers practicing law and the technologists creating new platforms and innovations to deliver legal services to poor and middle income Americans. The risks associated with ABSs are obvious, what with concerns about profit, rather than client loyalty and independent professional judgment informing the business objectives of an ABS. On the other hand, the sky has not fallen in other countries where ABSs have been introduced. For example, ABSs are now legal in the United Kingdom. In its 2014 Consumer Impact Report, Britain's Legal Consumer Panel concluded that "the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialized." 2014 *Consumer Impact Report*, Legal Servs. Consumer Panel at 15 (2014), *available at* http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf.

In addition, the ABA proposes "[i]ncreased collaboration with other disciplines…to improve access to legal services." American Bar Association's Report on the Future of Legal Services in the United States, p. 49, § 7.1, *available at* http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf. This recommendation also refers to law firms partnering with online services to promote legal services. This means buttoned-down law firms confronting the possibility of on online rating systems and digital marketing that is, even today, anathema to many traditional law firms. Bringing Facebook and other social media inside the digest-lined walls of law firms is likely exactly the kind of "discomfort" the ABA Report asks us all to experience. But history tells us that it is disruptive change that is sometimes the clearest path to successful innovation.

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Donald J. Winder

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Don's accolades include being named CCIM's Salt Lake Commercial Real Estate Attorney of 2016, and he recently completed the legal work for the sale of the Larry H. Miller Megaplex theaters at Geneva.

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The Equal Pay Act of 1963

by Christopher B. Snow and Jane K. Snow

Explaining my career as an employment lawyer to my four children (two boys and two girls) has proved somewhat difficult over the years. I've brought each of them downtown to my office many times for a daddy workday. I recall very distinctly on one occasion my daughter, and co-author of this article, Jane Snow, comment and say something like: "So you sit here in this chair, drink Diet Coke, and stare at this computer all day? I never want to be a lawyer." As I attempted to explain how her dad did much more than meets the eye, I had a strong feeling that the illustrious nature of my career would not sink in until years into adulthood. Fortunately, Jane's thoughtful and faithful fifth grade Bonneville Elementary School teacher, Mr. Steven Little, provided Jane an opportunity to accelerate her learning and understanding of this nation's employment laws by assigning Jane to write a brief essay on the Equal Pay Act of 1963 (Equal Pay Act or the Act).

After reading Jane's essay, I was struck by her words and how strongly she felt at such a young age about the unequal pay gap between men and women. I think it came as a complete surprise to her that in America, equal work does not always mean equal pay for women. Jane knows that I defend and represent employers involving *alleged* violations of the Equal Pay Act. She still loves me, fortunately, and I suggested we use her essay as the framework in an article discussing the Equal Pay Act as it has become increasingly relevant in today's workforce.

In fact, just this year, five players from the United States Women's National Soccer Team (Carli Lloyd, Alex Morgan, Megan Rapinoe, Becky Sauerbrunn, and Hope Solo) filed a Charge of Discrimination (Complaint) with the Equal Employment Opportunity Commission (EEOC) accusing the United States Soccer Federation of wage discrimination. Specifically, the complaint alleges that members of the United States Women's National Team are paid almost four times less than the members of the United States Men's National Team. The women's team will also ask the EEOC to look at the alleged inequality in training facilities; i.e., astroturf for women and grass for the men's team, as well as alleged disparity in travel accommodations. The case is still under investigation.

Moreover, the EEOC has recently elevated pay disparity as an enforcement priority by proposing a vast expansion for employers' EEO-1 reporting requirements. The EEO-1 is a well-established annual report applicable to businesses with 100 or more employees or federal contractors. The EEOC is proposing that covered employers track and report pay data in the EEO-1 report for the purpose of providing a "much needed tool to identify discriminatory pay practices where they exist in order to ensure that fair pay practices are put in place." *See* https://www.eeoc.gov/employers/eeo1survey/2016_eeo-1_proposed_changes_qa.cfm (last visited October 4, 2016).

Below are some highlights in Jane's essay, in red, and additional fatherly and lawyerly commentary addressing key components of the Equal Pay Act.

CHRISTOPHER B. SNOW is a partner at the law firm of Clyde Snow & Sessions where he chairs the Employment Law Practice Group. He is licensed to practice law in Washington, DC and Utah, and provides employment law counsel to local and national businesses.

JANE K. SNOW is currently attending Bonneville Elementary School. She is an avid reader and aspiring writer. Jane also enjoys tennis and other sports like arguing with her siblings and parents for equal rights in the home.

EQUAL PAY FOR EQUAL WORK

On April 9, 2016 we celebrated the 53rd year that the Equal Pay Act of 1963 was passed and was to be the end of what President John F. Kennedy called "unconscionable practice of paying female employees less wages than male employees for doing the same job." However, for every dollar that a man earns a woman that is doing the exact same work is only being paid 77 cents of that dollar they SHOULD be earning. (Emphasis in original). African American women and Hispanic women are paid even less!!! (Triple emphasis in original). Some women are alone to pay for their children. How are they expected to make a living when they are being treated unfairly? This injustice needs to be stopped.

The Equal Pay Act is found in the Fair Labor Standards Act of 1938, as amended, (FLSA), under 29 U.S.C. § 206(d):

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

While the Department of Labor enforces the FLSA, Congress delegated the administration and enforcement of the Equal Pay Act to the EEOC. *See* 29 C.F.R. § 1620.30.

The Act applies to virtually all employers, large and small, and prohibits sex-based wage discrimination between men and women working in the same place of business who are performing substantially the same work. All forms of compensation are covered by this law, not just an employee's base salary. For example, if a complaint is filed, courts or the EEOC will examine a broad range of pay practices to analyze compliance, including the employer's overtime pay practices, bonus structures, stock options, profit sharing, life insurance, vacation pay, car allowances, hotel accommodations, reimbursement for travel expenses, and other fringe benefits. Importantly, if there is an inequality in wages between men and women, employers may not reduce the wages of either sex to make their pay equal. It is important to understand, however, that the Act permits employers in limited circumstances to pay different compensation to men and women who perform equal work provided the employer can demonstrate that the wage difference is legitimately based on merit, seniority, or quantity or quality of production. 29 U.S.C. § 206(d).

Unlike Title VII gender discrimination claims, an individual alleging a violation of the Equal Pay Act may proceed directly to court and is not required to exhaust administrative remedies before the EEOC (though employees may elect to do so). The time limit for filing an Equal Pay Act charge with the EEOC and the time limit for going to court are the same: within two years of the alleged unlawful compensation practice or, in the case of a willful violation, within three years.

PENALTIES UNDER THE EQUAL PAY ACT

I will tell you why women should be paid the same amount as men. If you were doing the same work as the person working beside you, but you were being paid less than them just because of your gender, how would you feel? I would feel terrible. Women need to be able to make a living as well as men do. The people that are not paying these women fairly should be ashamed of themselves.

The potential remedies, damages, and penalties available to employees under the Equal Pay Act are intended to bring much more than shame to an employer. Suits may be initiated and enforced by the EEOC, a group or class of employees in a class action, or individual plaintiffs. The statutory damages can be crippling to employers. Like the FLSA, the Act provides for recovery of two or three years (if violation is willful) of back wages, liquidated or double damages of an amount equal to the back wages, as well as reimbursement of attorney fees and costs. 29 U.S.C. § 216(b); 29 C.F.R. § 1620.27(b). More remedies are available for retaliation claims under the Act, including equitable relief, reinstatement, and promotion.

Importantly, individuals, such as owners, officers, or supervisors, may be held personally or individually liable under the Equal Pay Act if they had the capacity to exercise control over the plaintiff employee. *Riodan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987); *Donovan v. Agnew*, 712 F.2d 1509, 1510–11

(1st Cir. 1983). This is more expansive than Title VII, which only applies to entities or employers.

A successful plaintiff may recover damages under both the Equal Pay Act and Title VII for gender discrimination, as long as the plaintiff does not receive double relief for the same wrong. The court will calculate damages to give each plaintiff the maximum award to which he or she is entitled under either statute.

EQUAL PAY ACT COMPLIANCE

Lastly, I will tell you how we can put a stop to this injustice. If people realize that they need women to help their business keep going they will pay them equally. If the world were just run by men, it wouldn't be what it is today. Women can be powerful figures in the economic and political world. Women deserve to be treated fairly and paid fairly. Women are equal to men.

No argument here! Despite being the right thing to do, the Equal Pay Act is the vehicle Congress enacted to guide employers in setting compensations systems that provide equal pay for equal work, regardless of gender. The law is not black and white, and in my experience, most employers willingly work towards compliance.

However, the enforcement and interpretation of the Equal Pay Act by the EEOC may go beyond what Congress intended and at times may unreasonably punish employers. Although the risk of a sex discrimination or Equal Pay Act claims can never be fully eliminated, an employer can implement preventative measures to reduce the risk of liability:

Annual Compliance Training

Employers should conduct at least annual trainings for supervisors and managers on the Equal Pay Act, Title VII, and Wage & Hour laws.

Written Policy Prohibiting Wage Disparity

Companies should require all managers to review and sign a policy prohibiting compensation or wage discrimination based on an employee's gender.

Objective Compensation System

Employers should only implement salaries, raises, bonuses, promotions, or benefits after measuring employees' performance based on fair, objective, and measurable criteria. Salary, bonus, and compensation decisions should be supported by documentation that provides legitimate non-discriminatory business reasons in support of the decision.

Regularly Audit Wage Practices

Conduct regular audits of employees' compensation and terms and conditions of employment to ensure that differences between male and female employees' pay and other benefits are not discriminatory. The EEOC is more concerned about actual job duties than job titles when analyzing equal pay for equal work. Employers that base pay on job titles should regularly audit and review employees' actual job duties and work being performed to ensure the job titles are accurate.

Investigate Complaints

Employers should have written policies directing employees to bring all discrimination complaints to the attention of their supervisor or the human resources department. If an internal Equal Pay Act complaint is received, the employer should investigate the claim and analyze the allegations under the Act with experienced counsel to assess liability and potential remedial measures.

LOOKING FORWARD

In addition to the EEOC's proposed expansion of EEO-1 reporting requirements for the collection of pay fairness data, Democrats are pushing Congress to pass the Paycheck Fairness Act. Hillary Clinton has identified the Paycheck Fairness Act as one of her initiatives if she is elected into office. The Paycheck Fairness Act, as proposed, greatly expands the Equal Pay Act by (1) adding punitive remedies for employees subject to wage discrimination, (2) expanding the scope of plaintiffs eligible for class action status without consent, and (3) authorizing the EEOC to collect a wide range of pay data from employers to investigate wage discrimination.

In conclusion, the Equal Pay Act applies to nearly all employers and legally mandates that employee compensation systems achieve equal pay for equal work for both men and women. The EEOC's increasing focus on wage discrimination claims and enforcement of the Equal Pay Act will significantly increase the likelihood of lawsuits against and investigations of employers. Legislation intended to close the wage gap continues to be introduced in Congress, and the EEOC and Department of Labor have both elevated eliminating wage discrimination as an enforcement priority. Companies should take proactive measures to ensure their compensation and wage practices are nondiscriminatory and compliant with the Equal Pay Act.

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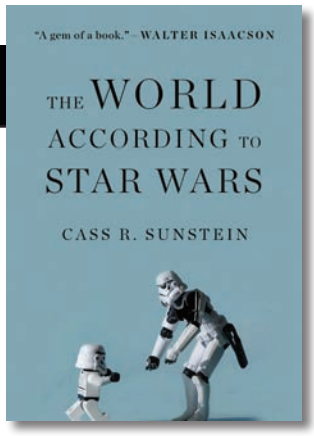
The World According to Star Wars

by Cass R. Sunstein

Reviewed by Justice John A. Pearce



Judge Orme asked me to review Cass Sunstein's *The World According to Star Wars*. I have to confess that I have spent an inordinate amount of time wondering why he asked me and whether his request should offend me. I ultimately concluded that he meant no offense, but it is a sad fact of life that when you look a certain way – obvious vitamin D deficiency and the physique of a professional Parcheesi player – people make assumptions about the things you probably like. No one asks me how much I can bench press, or which wood lathe I prefer. But people start conversations that assume more than a passing familiarity with the Lord of the Rings (for the record, I can tolerate the parts that aren't written in Elvish but am not a huge fan). At times, people have talked to me about Dungeons and Dragons as if I am a member of a fraternity centered on the twenty-sided die (I played D&D once, but I didn't inhale as it were). Did Judge Orme ask me to write this review because he profiled me as a nerd? Did I owe him a duty of candor to let him know that I am not the Star Wars fan he might perceive me to be?

Don't get me wrong; I like the Star Wars movies. When I was 14, I camped outside the old Broadway Theatre for the midnight showing of *Return of the Jedi*. I even know a couple of pieces of Star Wars trivia. For example, George Lucas cruelly gave the name Jek Porkins to the well-fed X-wing fighter pilot who dies by failure to pull up during the Battle of Yavin. But I have never owned an action figure, I have no idea why midi-chlorians make you a Jedi,[1] and I am not the sort of person who loses sleep worrying that the lightsabers in *The Force Awakens* have crossguards.

The World According to Star Wars
by Cass R. Sunstein
Publisher: Harper Collins (2016)
Pages: 240
List Price: $21.99 USD
Available in hardcover, e-book, and Audio CD formats.

Cass Sunstein does not reveal how he spent his high school weekends, but it appears that he is precisely the sort of person who wonders how adding crossguards might change the dynamics of lightsaber dueling. And he has written a book dedicated to reflecting upon questions not entirely unlike that. According to Sunstein, the study of Star Wars is more than just fan-boy geekdom; rather, Star Wars can teach us about "culture, psychology, freedom, history, economics, rebellion, human behavior, and law."

The best parts of the book are those that illuminate Lucas's creative process and describe how the series and characters evolved. Sunstein recounts how Lucas wanted to create a contemporary Flash Gordon series but could not afford to license the rights. Not wanting to abandon the Flash Gordon sensibility, Lucas began to create his own universe and eventually produced the "Journal of the Whills" – a synopsis of the "story of Mace Windy, a revered Jedi Bendu of Ophuchi who was related to us by C.J. Thape, padawaan learner to the famed Jedi." Lucas revised and reworked the ideas in the "Journal of the Whills" until it became *A New Hope*.

JUSTICE JOHN A. PEARCE currently serves on the Utah Supreme Court. Prior to joining the Supreme Court, Justice Pearce was privileged to be a judge on the Utah Court of Appeals.

The question of when Lucas decided that {spoiler alert} Darth Vader was Luke's father intrigues Sunstein. Justifiably so. We, at least I, would like to believe that one of the most iconic moments in popular culture was present at the beginning and that Lucas wrote his story around that crucial reveal. But according to Sunstein, the actual history is not quite so clean. Lucas has at times claimed, "When I wrote the original Star Wars screenplay, I knew that Darth Vader was Luke Skywalker's father; the audience did not. I always felt that this revelation, when and if I got the chance to make it, would be startling." Sunstein reports that Lucas has also occasionally suggested the relationship between Luke and Vader was invented later. In an interview after episode IV was released, Lucas predicted a movie "about Ben and Luke's father and Vader when they are young Jedi knights. But Vader kills Luke's father." Lucas also sent a note to the writers of the television show *Lost* saying, "Don't tell anyone…but when 'Star Wars' first came out, I didn't know where it was going either. The trick is to pretend you've planned the whole thing from the beginning."[2]

The book also soars when Sunstein contemplates Star Wars's success and why it became a phenomenon. He offers and considers three explanations: (1) "that intrinsic quality is what determines success"; (2) "while intrinsic quality is necessary, it really isn't enough; a successful movie, book, or work of art requires social influences and echo chambers to get people excited"; and (3) "what matters is the relationship between the product and the culture at the particular time that it is released."

Sunstein ultimately concludes that "Star Wars is a bit like the *Mona Lisa* – really famous, and more than good, but the beneficiary of a cultural norm ('this you have to see') that was far from inevitable." On the path to that conclusion, Sunstein considers theories of consumer behavior such as network effects, informational cascades, and reputational cascades. This interesting and informative theorizing justifies the time spent reading the book.

The book sags, however, in those parts where it begins to resemble Larry King's *USA Today* columns. For those too young to have read *USA Today* in hotel conference rooms while waiting for depositions to start, King would string together a number of thoughts, like "I get a good feeling when I see a police officer on a horse"; "Doesn't pink grapefruit taste better than yellow standard grapefruit"; and "Milk cartons are not easy to open,"[3] and call it a newspaper column.[4]

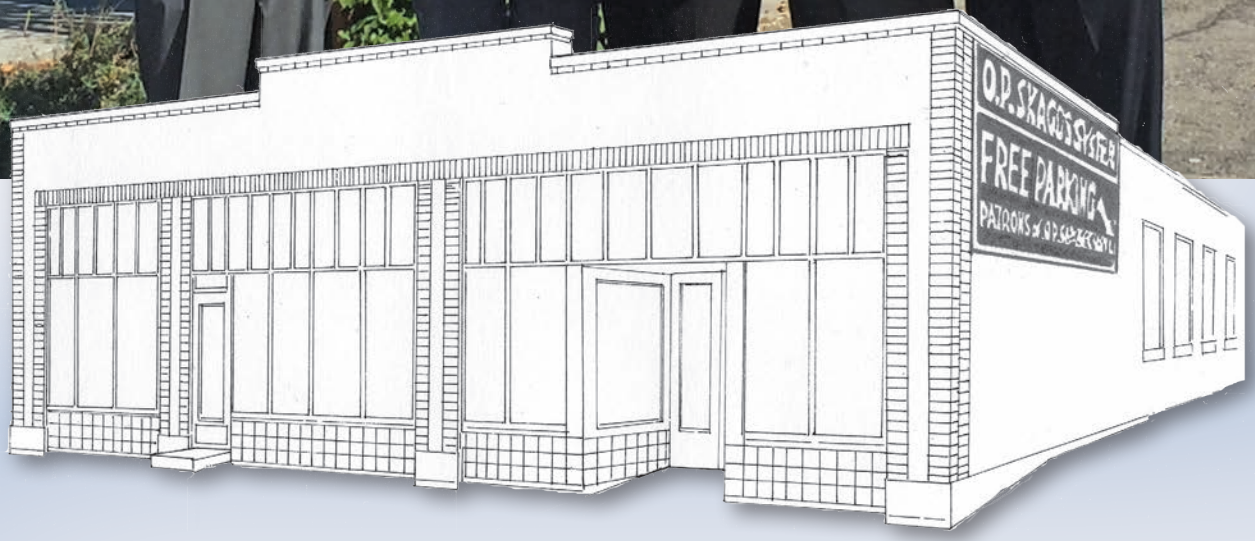
Sunstein has a number of thoughts that cannot support an extended discussion but sound sufficiently interesting that the thought of discarding them must have been painful to him. For example, Sunstein opines "Martin Luther King was a rebel, unquestionably a Skywalker with a little Han and more than a little Obi-Wan."[5] Sunstein defends that statement with the observation that King "sought fundamental change, but well knew the power of the intergenerational link" and quotes from Dr. King's speech about the Montgomery Bus Boycott. After several readings, I am still not sure how that makes Dr. King a Skywalker imbued with more Kenobi than Solo, but it's a nifty line meant as a compliment. Sunstein also believes that "[a] lot of people disparage the Star Wars prequels, and understandably so; they're not as good as the original trilogy. But in their own way; they're not just beautiful; they're also awfully clever." Jar-Jar begs to differ.

Judge Orme likely asked me to review this book because of the episode[6] discussing Star Wars and constitutional law. Reading this episode, I felt for Sunstein. I imagine that when you are "the most cited law professor in the United States and probably the world,"[7] and you are pitching a book on Star Wars, the publisher probably insists that you say something about the law. Sunstein admits that Star Wars "does not have all that much to say about constitutions, at least not directly." (Penumbra, perhaps?) Nevertheless, he gives it a shot, and briefly touches upon theories of constitutional interpretation and does his best to tie them to the movies. Along the way, he claims, "Like Lucas and Abrams, the most powerful judges are creators and they make choices against the backdrop set of previous Episodes, also known as precedents." He also, in an attempt to explain strict constructions of the United States Constitution, opines, "On this view, the Constitution is very much like the Journal of the Whills, except that it is real."[8] My guess is that most attorneys and judges will find this chapter less than satisfying. But, in fairness, Sunstein did not write that episode for *us*; Sunstein is attempting to introduce legal concepts to non-lawyers.

In what is perhaps a nod to one of the best things Bill Murray has ever said on screen (a very long list),[9] Sunstein believes the "human race can be divided into three kinds of people: those who love Star Wars, those who like Star Wars, and those who neither love nor like Star Wars." Although his stated goal is to write a book that will appeal to all three groups, I wager that only those who consider themselves members of the first group will be enthusiastic readers. But anyone interested in the creative process and popular culture should enjoy learning how Star Wars came to be and then became a cultural force. If you seek a book that will help you better understand the law and theories of constitutional interpretation, *The World According to Star Wars* is not the droid you're looking for.

1. I am sure many factors contributed to Anakin's submission to the Dark Side. But the fact that when Anakin was nine, some bearded stranger with a British accent told him that he had tens of thousands of living creatures in his blood and that if he listened carefully he could hear them speaking to him had to have played some role in Anakin's conversion to evil.
2. For those of us who didn't realize we had wasted a chunk of our lives watching *Lost* until midway through the series finale, Lucas's advice has to rank with some of the worst advice ever given. In retrospect, a little more advanced planning from the Bad Robot folks would have been nice.
3. I borrowed these examples from a poem Sam Johnson and Chris Marcil composed entirely of lines taken from King's column. It is worth reading and can be found here: https://newrepublic.com/article/80127/larry-king-poem-usa-today. Other lines include, "Don't you believe Kermit and Miss Piggy are real?," "Jell-O is still one of the all-time great desserts," and "You want a clean city, my friend, you want Salt Lake City."
4. I am far from the first to make this connection, but King's column functioned as a type of proto-Twitter. For those who miss the column, King tweets regularly @kingsthings and sometimes uses the hashtag #ItsMy2Cents. Recent tweets include, "I would never want to sell women's shoes" and "Why can't September have 31 days?" I follow King's twitter feed with a religious fervor.
5. Maybe it turns on the precise amount of Obi-Wan, but isn't "unquestionably a Skywalker with a little Han" the recipe for Kylo Ren?
6. Sunstein calls his chapters "episodes" and sequences them with Roman numerals.
7. At least according to the biographical note on the book jacket. I assume someone tracks these things, but there was no citation.
8. He does pause to wonder, "Do you think you could explain satellite dishes to Thomas Jefferson?" Wait, no. Sunstein didn't do that. That was Larry King.
9. For the uninitiated, in *What About Bob*, Murray's character Bob Wiley explains the reason his marriage ended in divorce by observing, "There are two types of people in this world. Those who like Neil Diamond and those who don't. My ex-wife loves him."

New location, same attitude.



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Collaborative Law 101

by Farrah L. Spencer and Monica J. Vozakis

As attorneys, we constantly evaluate and analyze, not just the law but the processes associated with the law. We also constantly look for ways to improve our clients' experiences. Because no two clients are the same, it is important to have a variety of options available in the hopes of selecting an option that will work best for our client and our client's needs.

For example, a client seeking a divorce may have his or her needs best served by litigating a divorce and allowing a commissioner or judge to decide the distribution of property or child custody. For another client, the typical contentious litigation simply would not accomplish the client's goals. Litigation would be too time consuming and would dissipate too many of the client's assets. Especially with child custody matters, contentious litigation can lead to a further degrading of the parents' relationship, which can be detrimental to children and to parents who have to continue to work together to parent their children. In such cases, the client may be better served by using an alternative dispute resolution method such as mediation.

Mediation offers a less contentious alternative to litigation and has been increasingly used to allow the parties to agree to a resolution of their case. Utah has consistently recognized the importance of alternative dispute resolution and requires that it be completed in civil cases unless good cause exists not to participate. *See* Utah R. Jud. Admin. 4-510.05(1)(A). However, one disadvantage of mediation is that it is often used in conjunction with litigation. Mediation often occurs after litigation has started and can occur after significant costs of litigation have occurred, such as filing and discovery costs.

Because of the timing of mediation, there is often an underlying and ever-looming threat that if either party, or his or her attorney, does not like any aspect of the mediation process that the dispute will be taken to the court. This very threat sometimes creates self-preservation attitudes that can be counterproductive and harmful in the mediation process and may prevent the parties from effectively using mediation.

Collaborative law is another form of alternative dispute resolution that is available for parties to use to resolve their disputes. Collaborative law is a voluntary process in which the parties agree to use the collaborative law process to attempt to resolve their dispute without court intervention. Typically, this is done before any litigation is filed, but it can also be used after litigation by asking the court to stay the proceeding until the collaborative law process concludes. *See* Utah Code Ann. § 78B-19-106(1)–(2).

Collaborative law began as an alternative to family law litigation and has been used for over twenty-five years. *See* Brian Florence, *A Different Divorce – Collaborative Lawyering*, 13 Utah Bar Journal 18 (2000). Collaborative law continues to gain recognition and acceptance. The American Bar Association supports collaborative law and has a Collaborative Law Committee, which worked to have the Uniform Collaborative Law Act (UCLA) approved by the ABA in 2009 and 2010. *See* Homer La Rue *et al.*, *Uniform Collaborative Law Act*, 2009 Memorandum to ABA House of Delegates, http://apps.americanbar.org/dch/committee.cfm?com=DR035000 (follow "UCLA Memorandum to ABA Sections Members, Delegates," pdf).

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In 2010, Utah codified the Utah Uniform Collaborative Law Act (UUCLA). *See* Utah Code Ann. §§ 78B-19-101 to -116. Utah was among the first states to pass the Uniform Collaborative Law Act, which has now been passed in approximately fifteen states.

While having its roots in family law, neither the UCLA nor the UUCLA limit the collaborative law process to family law. In fact, leading commentators have recognized that this process may be helpful in solving other disputes such as business, estates, personal injury, and contract disputes. *See* Norman Solovay and Lawrence R. Maxwell, Jr., *Why a Uniform Collaborative Law Act?*, New York Dispute Resolution Lawyer, Spring 2009, at 36. Additionally, studies indicate high levels of success when using the collaborative law process and high client satisfaction. *See* Homer La Rue, *supra*, at 3.

The collaborative law process begins when the parties memorialize their intentions to participate in the collaborative law process by signing a collaborative law participation agreement. *See* Utah Code Ann. §§ 78B-19-104(1), -105(1). The participation agreement must set forth the nature and scope of the subject matter of the parties' disagreement and the parties' intention to resolve the disagreement using the collaborative law process instead of using litigation. *See id*. § 78B-19-104(1). The participation agreement also identifies the collaborative lawyers that represent each party and confirms the scope of those lawyers' representation, which is limited to representing the party in the collaborative law process. *See id*. The collaborative lawyer must evaluate whether his or her client has a history of a coercive or violent relationship with the other party and evaluate if the client's safety can be protected during the process. *See id*. § 78B-19-112. A party must give informed consent to participation in the process after his or her lawyer has explained the process to the party. *See id*. § 78B-19-111. The lawyers and parties agree that if the collaborative law process is not successful in resolving the dispute then the collaborative lawyers will not represent the parties in any subsequent litigation. *See id*. § 78B-19-111(c).

Based on contract theory, the participation agreement can include any other provision that the parties agree to as long as those provisions are not inconsistent with the UUCLA. *See id*. § 78B-19-104(2). Some common provisions that are included in a participation agreement include a provision that the clients will participate, that the parties will exercise good faith in negotiating and will share relevant information, that the parties may use joint experts, that communications will be respectful, and that the negotiation process will be confidential. *See* Homer La Rue, *supra*, at 2. The participation agreement confirms the voluntary collaborative law process in which the process does not occur unless both parties agree to participate. Because the voluntariness of the process is important to its success, the UUCLA specifically prohibits a court from ordering participation if either party objects. *See* Utah Code Ann. § 78B-19-105(2).

Pursuant to the participation agreement, the parties along with their lawyers negotiate for a resolution of the dispute. Unless the

parties agree otherwise, a neutral third party is not present during negotiations, and the parties stay in the same room to negotiate. *See* Unif. Collaborative Law Act, Prefatory Note, Overview (2010), Michael A. Zeytoonian, *One Key Difference Between Mediation and Collaborative Law Is Often Over Overlooked*, Feb. 2012, http://www.mediate.com/articles/ZeytoonianMbl20120228.cfm. From the beginning, the parties focus their attention on settlement. This singular focus often produces a greater likelihood that the parties will negotiate a settlement that each party agrees to. Collaborative law focuses on interest-based negotiations and allows the parties to craft an agreement that may include creative options or agreements that are unique to the parties and the dispute.

Additionally, the collaborative law process has a requirement that, upon request, the party make a timely, full, candid, and informal disclosure of information related to the matter. *See* Utah Code Ann. § 78B-19-109. This informal discovery mechanism allows for a timely and cost-efficient exchange of information compared to litigation and formal discovery. Additionally, because the information is exchanged earlier in the process, the parties are able to make an informed settlement earlier.

The process ends when all or part of the matter is resolved or when either party terminates the process. *See id.* § 78B-19-105(3)-(4). If the process results in an agreement, the court may approve such agreement. *See id.* § 78B-19-108; *see, e.g.*, *Cantrell v. Cantrell*, 2013 UT App 296, ¶ 2, 323 P.3d 586. Additionally, a court has the authority to enter an emergency order at any time during the collaborative law process "to protect the health, safety, welfare or interest of a party or member of the party's household." *See* Utah Code Ann. § 78B-19-107. If the parties do not reach an agreement and start litigation, they will not be required to participate in mediation ordered by the court in any subsequent litigation. *See* Utah R. Jud. Admin. 4–510.05(1)(A).

Association of Collaborative Professionals of Utah

In 2008, the Association of Collaborative Professionals of Utah was formed. This Association allows collaborative professionals to network and support one another. It includes not only lawyers but also mental health and financial practitioners.

To become a general member, each professional must have a certain license specific to his or her profession and complete a specific amount of training on the collaborative law process. For example, at a minimum, a lawyer must (1) be in good standing in the bar association in the lawyer's jurisdiction, (2) complete twelve hours of basic collaborative training, (3) complete thirty hours of training in client centered, facilitative conflict resolution, of the kind typically taught in meditation training, and (4) complete fifteen hours of training in interest-based negotiation training, communication skills training, collaborative training, advanced mediation training, or basic professional coaching training. Both mental health and financial professionals have similar requirements related to their fields. If a professional does not meet the training requirements, he or she can still participate in the association as a provisional member so long as the training requirements are met within twenty-four months of acceptance of the provisional membership.

If you would like more information about the Association of Collaborative Professionals of Utah, please see the website at http://www.utahacp.org/.

In conclusion, the collaborative law process is a viable alternative available to clients who are willing to focus on negotiation and settlement early. Professionals, including lawyers, mental health practitioners and financial practitioners, aid the clients in reaching a solution to the specific dispute. The collaborative law process often produces results that are less expensive, more timely and more satisfactory to the clients.

Collaborative law is a legal process where the collaborative professionals for the parties in a family dispute agree to assist them in resolving the conflict by using cooperative strategies rather than adversarial techniques and litigation.

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For more information regarding the Utah Association of Collaborative Professionals of Utah, please contact Farrah Spencer at (435) 214-5048 or via email at fspencer@lrw-law.com.

Visit our website at: www.utahacp.org

Distinguishing "No Insurance" and "No Proof of Insurance" Violations

by Judge Paul C. Farr

INTRODUCTION

Insurance violations come in two types in Utah: violations of Utah Code Section 41-12a-302 for "no insurance" and violations of Section 41-12a-303.2 for "no proof of insurance." Legislative changes over the past two years have changed the classification of these offenses, making it more important than ever for both judges and lawyers to understand the differences between the two. This article is meant to provide some clarification as to these differences and to pose some questions for further thought.

Nature and Number of Offenses

In simple terms, a "no proof of insurance" violation occurs when an individual does not have proof of insurance with him or her at the time of the stop. In some cases the individual may actually have insurance in place but simply did not have the proof. While the person may still be charged with "no proof of insurance," subsection (3) of that particular statute states, "It is an affirmative defense to a charge under this section that the person had owner's or operator's security in effect for the vehicle the person was operating at the time of the person's citation or arrest." Utah Code Ann. § 41-12a-303.2(3). As a result, if the person brings in the appropriate proof of insurance, the charge will be dismissed.

A "no insurance" violation occurs when an individual operates a vehicle and does not have insurance in place at the time. While this statute does not have the same language regarding an affirmative defense, having insurance at the time of the violation would negate an element of the offense. If a person brings in the appropriate proof of insurance, this charge will also be dismissed.

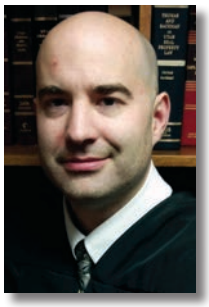
When a person is stopped and is unable to provide proof of insurance to the officer, and the officer is unable to verify coverage through the officer's computer system, the person could be charged with either violation. According to court records, "no proof of insurance" violations are charged slightly more frequently than "no insurance."

During fiscal year 2016 there were a total of 26,589 insurance violation cases filed in Utah's courts. 24,718 of these were filed in justice courts, and 1,871 were filed in district courts. Of those charges, 11,808 were of the "no insurance" variety, while 14,784, or 56%, were for "no proof of insurance." Justice courts received a total of 333,519 traffic/parking case filings in FY2016, while district courts received a total of 18,528, for a statewide total of 352,047. Based on these numbers, insurance violations accounted for 7 ½ % of all traffic/parking related case filings in the state.

Classification of Offenses

As of two years ago, a violation of either of the insurance statutes was classified as a class B misdemeanor. In 2015, the legislature passed House Bill 348, which made sweeping changes to the classification of many offenses. That bill amended both of the insurance statutes making a violation of either a class C misdemeanor.

In 2016, the legislature again made a change, but this time only to the "no proof of insurance" statute. Senate Bill 187 amended "no proof of insurance" to an infraction. However, "no insurance" remains a class C misdemeanor.



JUDGE PAUL C. FARR is a graduate of the J. Reuben Clark Law School at BYU. He has been a justice court judge since 2010 and currently serves the cities of Sandy and Herriman. Judge Farr is currently a member of the Utah Judicial Council. The views expressed by Judge Farr are his own and do not necessarily reflect the views of the Council or the municipalities in which he serves.

Because of this distinction, an individual charged with "no insurance" has a right to court-appointed counsel, whereas an individual charged with "no proof of insurance" does not. Similarly, an individual charged with "no insurance" has the right to a jury trial, whereas the individual charged with "no proof of insurance" does not. Both offenses are still classified as mandatory appearance charges by the Uniform Fine and Bail Schedule. As a result, unless changed by local court practice, an individual charged with "no proof of insurance" is required to appear in court to answer the charge even though it is now an infraction.

Different Elements

In most no-insurance situations, an individual could be charged under either statute. In 56% of those instances, the individual is being charged with "no proof of insurance." The reason for this has been explained by some as being a result of the differing elements and the burden of proof. Under the "no proof of insurance" statute, the prosecution must prove that the operator did not have proof of insurance with him or her at the time of the stop. However, with a "no insurance" charge, the prosecutor must prove that the individual did not actually have insurance, not just that the individual did not have proof with him or her. Considering that these charges are criminal and that the prosecution must prove the charge beyond a reasonable doubt, a "no insurance" charge can be more difficult to prove that a "no proof of insurance" charge.

Where these charges were basically interchangeable in the past, some law enforcement and prosecuting agencies may now re-evaluate their charging practices based upon the differences.

Fine Amount Set Forth by Statute

Both insurance statutes provide that the fine on a first violation shall be $400. They also provide that the fine for a second violation shall be $1,000. Some have questioned whether this exceeds the maximum fine for a class C misdemeanor or infraction, which is generally $750.

Utah Code Section 76-3-301 provides, "A person convicted of an offense may be sentenced to pay a fine, not exceeding: … (e) $750 for a class C misdemeanor conviction or infraction conviction; and **(f) any greater amounts specifically authorized by statute.**" Utah Code Ann. § 76-3-301(1) (emphasis added).

Under subsection (1)(f) a fine may exceed the general limits if specifically authorized by statute. Both insurance statutes specifically authorize a higher fine amount on a second offense. As a result, a $1,000 fine on a second violation would not appear to violate Section 76-3-301.

Enhanceable Fine

As indicated above, both insurance statutes provide for a $400 fine on a first offense and a $1,000 fine on a second offense. What constitutes a second offense? If the first conviction is for "no insurance" and the second conviction is for "no proof of

insurance," is a judge required to impose, or prohibited from imposing, the enhanced fine consistent with a second offense? If the judge does impose the enhanced fine in such circumstances, has the judge violated Section 76-3-301, by exceeding the maximum allowable fine for a class C misdemeanor or infraction?

Subsection (5) of the "no proof of insurance" statute states, "A violation **of this section** is an infraction, and the fine shall be not less than: (a) $400 for a first offense; and (b) $1,000 for a second and subsequent offense within three years of a previous conviction or bail forfeiture." *Id.* § 41-12a-303.2(5) (emphasis added). The plain language of this statute seems to say that the enhanced fine must be imposed for a second violation of **this** section.

The "no insurance" statute provides that (a) an owner that operates a motor vehicle, or permits his or her vehicle to be operated without insurance or (b) an operator that drives a vehicle knowing that the owner does not have insurance is guilty of a class C misdemeanor, "and the fine shall be not less than: (i) $400 for a first offense; and (ii) $1,000 for a second and subsequent offense within three years of a previous conviction or bail forfeiture." *Id.* § 41-12a-302(1)(a), (2)(a). The language of this statute is not as clear as to exactly what constitutes a "subsequent offense." *Id.* However, a party could make a similar argument that in order to trigger the enhanced fine the prior conviction must be for a violation of the same section.

As discussed above, generally a fine on a class C misdemeanor or infraction may not exceed $750 unless specifically authorized by statute. Going back to the two issues addressed above, and for purposes of this discussion, let us assume the position that an enhanced fine is to be imposed for a second violation of the same section only. If a person has a two-year-old conviction for "no insurance" and subsequently gets a conviction for "no proof of insurance" and the judge imposes a $1,000 fine, does that violate Section 76-3-301 because the fine exceeds $750 and is not specifically authorized by statute?

Mens Rea With Respect to No Insurance

Subsection (2)(a) of the "no insurance" statute provides that a person other than an owner that operates a vehicle "with the knowledge that the owner does not have owner's security in effect for the motor vehicle is also guilty of a class C misdemeanor." Utah Code Ann. § 41-12a-302(2)(a). This establishes an element that the prosecution must meet when dealing with a "no insurance" charge with a defendant that did not own the vehicle. In other words, when Junior receives a citation for "no insurance" and he was driving Senior's vehicle, the prosecution must prove that Junior knew Senior did not have insurance before he can be found guilty. Senior could also be charged with a violation for allowing Junior to use the vehicle without it being covered. "No proof of insurance" charges do not have the same *mens rea* requirements.

Credits for Obtaining Insurance

Subsection (1)(b) of the "no insurance" statute provides that a court "may" waive up to $300 of a fine "charged to the owner" if the owner shows that insurance was obtained on the vehicle after the citation but before sentencing. *Id.* § 41-12a-302(1)(b). In other words, if Senior is charged with "no insurance" on the vehicle that he owns, he may bring in proof that he obtained insurance and the court may waive up to $300 of the fine. What if Junior received a citation for "no insurance" while driving Senior's vehicle knowing it was not insured, and Junior brings in proof that insurance was obtained on the vehicle or that he obtained his own insurance policy? May the court still waive $300 of the non-owner's fine for showing proof that they have obtained insurance? Does the court still have inherent authority to waive a portion of the fine even though not specifically provided for in statute?

Proof of Insurance Exemptions for Rentals, Government-Owned or Leased Vehicles, and Employer-Owned or Leased Vehicles

Subsection (2)(a)(iii) of the "no proof of insurance" statute provides that a person is in compliance with the requirements of this section if he or she is operating a rental vehicle and has a copy of the rental contract in possession. *Id.* § 41-12a-303.2(2)(a)(iii). Subsection (2)(a)(ii) also provides exemptions if the person is operating a government-owned or leased vehicle, or an employer-owned or leased vehicle if the person is operating the employer-owned or leased vehicle with the owner's permission. *Id.* § 41-12a-303.2(2)(a)(ii). These exemptions do not appear in the "no insurance" statute.

CONCLUSION

Because "no insurance" charges and "no proof of insurance" charges are addressed in two separate statutes, and especially now that those offenses are classified differently, it is more important than ever to understand the differences between these two violations. Judges must be careful to apply the appropriate standards and requirements to the different types of cases. Lawyers should also understand these differences in order to counsel their clients appropriately.

Parental Defense ALLIANCE OF UTAH

For those unfamiliar with the Parental Defense Alliance of Utah, the PDA is a 501(c)3 tax exempt charitable organization that exists to provide training and assistance to attorneys who represent parents in Utah's Juvenile Courts. Since 2005, our organization has been dedicated to helping improve outcomes for Utah's families through the support of parent attorneys. This past year, the PDA has made some exciting organizational changes worth sharing with Utah's legal community.

Firstly, the PDA's Board of Directors was expanded from three members to five members, with a member designated to represent each judicial district. They newly expanded board also selected its President, President-elect, and Treasurer for the next two years. The new Board of Directors consists of the following individuals:

Judicial Districts	Current Board Member Representative	Contact Email
1 and 2	Carol Mortensen	cmortensen@ut-lawyers.com
3	Jim Smith	jsmith@l2law.com
4	Grant Dickinson	gdickinson@moodybrown.com
5 and 6	David Boyer	upbe4sunrise@hotmail.com
7 and 8	Mark Tanner	mhtattorney@gmail.com

Grant Dickinson was selected as the new President of the Board of Directors, Carol Mortensen was selected as the new President-elect, and Mark Tanner was selected as the Treasurer. Our new officers, along with directors David Boyer and Jim Smith, bring a depth of knowledge and invaluable practice experience to the PDA, as well as a passion for this often challenging area of law.

Additionally, every year at our Annual Conference, members of the PDA vote on several different awards to recognize excellence within the field of parental defense. This year's winners are as follows:

- **New Parental Defender: Liza Jones**
- **Appellate Attorney of the Year: Jacqueline Jensen**
- **Trial Attorney of the Year: Jason Richards**
- **Lifetime Achievement, Attorney of the Year: Don Redd**

Finally, the PDA recently appointed a new Executive Director. Kate Hansen has served tirelessly for the last three years in that position, and recently left to pursue some exciting opportunities in her private practice. The PDA would like to recognize and thank Ms. Hansen for the excellent work she has done for the PDA. Kirstin Norman is the new Executive Director; any questions pertaining to the PDA can be directed to her at kirstin@parentaldefense.org.

Appellate Highlights

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

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

***Federated Capital Corp. v. Libby*, 2016 UT 41 (Sept. 6, 2016)**

In this consolidated case, the Utah Supreme Court held that **an enforceable forum selection clause does not preclude application of Utah's borrowing statute**. The forum selection clause required that the case be governed by all of Utah's law, both procedural and substantive. The court rejected the plaintiff's argument that the borrowing statute applies only when the claim is not actionable in the foreign jurisdiction solely because of the lapse of time.

***Craig v. Provo City*, 2016 UT 40 (Aug. 26, 2016)**

The plaintiffs' suit against Provo City was timely when initially filed, but the complaint was dismissed without prejudice because the plaintiffs failed to submit an "undertaking" or bond as required by statute. By the time the plaintiffs refiled, it was beyond the one-year filing requirement of the Governmental Immunity Act. The supreme court held that **Utah Code Section 78B-2-111 (the Savings Statute) could not sustain the timeliness of a re-filed suit against a governmental entity because the Governmental Immunity Act speaks comprehensively to the timing of such a suit** in a manner precluding operation of the Savings Statute.

***Nevares v. Adoptive Couple*, 2016 UT 39 (Aug. 26, 2016)**

In this appeal of a paternity dispute, the supreme court held the **district court lacked jurisdiction to determine paternity under the Utah Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),** where the child lived in Utah for eight days after being born within the state, relocated to Illinois with the adoptive parents before the filing of the petition, the adoptive parents resided in Illinois for longer than five years, neither of the biological parents lived in Utah, and an Illinois court was capable of exercising jurisdiction under the uniform act.

***Benda v. Roman Catholic Bishop of Salt Lake City*, 2016 UT 37 (Aug. 25, 2016)**

In this case, **the Utah Supreme Court adopted a cause of action for parents' right of filial consortium due to tortious injury to their minor child.** The cause of action is derivative of the child's cause of action. To recover under such a claim, the injury to the child must meet the requirements of Utah Code Section 30-2-11(5).

***Gailey v. State*, 2016 UT 35 (Aug. 1, 2016)**

The court rejected a constitutional challenge and reaffirmed its case law holding that **Utah's Plea Withdrawal Statute, Utah Code Section 77-13-6, procedurally cuts off a defendant's right to a direct appeal post-sentencing.** The supreme court explained that a defendant may pursue claims challenging an invalid plea collaterally through post-conviction proceedings.

***Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 2016 UT 34 (July 28, 2016)**

This case centered on the Public Service Commission's position on pricing methodologies. The Utah Supreme Court held that **judicial review of an agency decision, in contrast to federal courts, would apply a non-deferential, correctness standard to an appeal based on a pure question of law,** which includes an agency's interpretation of its own orders and regulatory enactments.

***State v. Sanchez*, 2016 UT App 189 (Sept. 1, 2016)**

In an appeal from convictions for murder and obstruction of justice, defendant argued the lower court erred in excluding portions of a police interview in which defendant stated he fought with the victim based on victim's statements about an affair with his brother. Affirming, the court of appeals held, as a matter of first impression, that **Utah Rule of Evidence 106 permits admission of hearsay statements that do not otherwise**

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

qualify for exception to the hearsay rule, so long as the hearsay statement satisfies Rule 106's fairness standard.

***Go Invest Wisely LLC v. Murphy*, 2016 UT App 185 (Sept. 1, 2016)**

The Utah Court of Appeals **rejected defendant's argument that exhibits submitted by an opposing party in the context of Utah Rule of Civil Procedure Rule 60(b) must be accompanied by a sworn affidavit.** At the same time, however, the court of appeals reiterated that the district court could consider evidence only if the evidence had been properly authenticated under Utah Rule of Evidence 901 and qualified for a hearsay exception.

***Stenquist v. JMG Holdings LLC*, 2016 UT App 180 (Aug. 25, 2016)**

In an action to decide whether a trust deed survived when the trustee accepted title to the subject property in lieu of foreclosure, the Utah Court of Appeals held that **once the trust deed has been released, the ancillary obligations of the trust deed cannot be enforced, as the trust deed ceases to exist.** The trust deed cannot survive without the debt obligations, even though other obligations, such as the duty to defend against other interests, have not been met.

***Mower v. Nibley*, 2016 UT App 174 (Aug. 18, 2016)**

The court of appeals affirmed the dismissal of this lawsuit against a resident of Japan for lack of general personal jurisdiction. The court held that **the defendant's *pro se* response to the complaint was not a responsive pleading, and therefore, the defendant did not waive his objection to personal jurisdiction by failing to raise it in the response.** The court further held that, although the defendant owned property in Utah, he was domiciled in Japan, and the property was unrelated to the plaintiff's cause of action, so the defendant lacked sufficient contacts with the State of Utah to support the exercise of general personal jurisdiction over him.

***Utah Dep't of Transp. v. Coalt Inc.*, 2016 UT App 169 (Aug. 4, 2016)**

The Utah Department of Transportation's condemnation of sixty-five acres of land in order to resolve litigation by private litigants challenging the Legacy Parkway environmental assessment was upheld as fulfilling a state transportation purpose, but because the land was being banked for "future mitigation credits" for non-Legacy projects, the court held that **the trial court should have considered the enhancive value attributable to the completion of the Legacy Highway in determining just compensation for the taking.** The court also addressed the effect of an appellee's failure to brief an issue, holding that while failure to brief does not result in a technical default, it nevertheless may be treated as an acknowledgement of the correctness of the appellant's arguments.

***State v. Legg*, 2016 UT App 168 (Aug. 4, 2016)**

Defendant appealed the district court's decision to revoke his probation. At issue was whether the appeal was moot, as defendant had already served his sentence. The court of appeals

held that **the presumption in criminal convictions of collateral legal consequences, which allows an otherwise moot case to be appealed, does not apply to the revocation of probation.** Defendant must demonstrate actual and adverse collateral legal consequences to survive mootness.

Marziale v. Spanish Fork City, 2016 UT App 166 (July 29, 2016)

The plaintiffs e-filed their complaint approximately one month before the statute of limitations governing their claims expired. They did not notice that the filing was rejected because of a credit card error until three days after the statute expired, at which time they refiled the complaint. The district court granted summary judgment dismissing the case, finding that it was time barred. The court of appeals reversed, holding that **the court's electronic receipt of the complaint when it was first e-filed was an "acceptance" of it, under Utah Rule of Civil Procedure 5, and that the complaint was timely filed because nothing in the rules allows a court clerk to reject a filing for lack of payment.**

Baumann v. the Kroger Co., 2016 UT App 165 (July 29, 2016)

District court granted summary judgment in favor of defendants after pro se plaintiff failed to designate expert witnesses in Utah Rule of Civil Procedure Rule 26 disclosures. On appeal, plaintiff argued the district court should have applied Rule 16(d), as opposed to Rule 26(d), when evaluating whether to exclude a late-designated expert. Discussing the supreme court's decision in *Coroles v. State*, 2015 UT 48, 349 P.3d 739, the court of appeals held that **Rule 26 governed the question of sanctions, where a party failed to disclose the expert until the date of the summary judgment hearing.**

Smith v. Hruby-Mills, 2016 UT App 159 (July 29, 2016)

A criminal defendant appealed the denial of a motion to suppress made during an appeal of his conviction to the district court under Rule 65B of the Utah Rules of Civil Procedure. On appeal, the Utah Court of Appeals addressed what preclusive weight, if any, a district court order reversing the justice court's grant of the motion issued in a de novo review of that interlocutory order brought by the state had in the subsequent de novo review of the criminal conviction. **The court held that res judicata does not apply because the earlier ruling was made in part of the same proceedings. It then considered the doctrine of law of the case and held that the second branch applies, such that the district court was not required to or precluded from reconsidering the prior ruling, but rather had discretion to reconsider the prior ruling on the motion to suppress.**

MacFarlane v. Applebee's Rest., 2016 UT App 158 (July 29, 2016)

The court of appeals affirmed summary judgment granted to Applebee's Restaurant in this slip and fall case, **holding that Applebee's did not owe the plaintiff a duty of care as possessor of the parking lot, where it was a lessee in a multi-tenant shopping center, and the common area parking lot was owned and maintained by the landlord.**

State v. Bell, 2016 UT App 157 (July 21, 2016)

Defendant was convicted of two counts of aggravated robbery involving a vehicle and a purse located inside the vehicle. The court of appeals reversed the conviction for theft of the purse, holding **defense counsel rendered ineffective assistance by failing to file a motion to merge two counts of robbery arising out of same set of events pursuant to the single larceny rule.**

Penunuri & Siegwart v. Sundance Partners, Ltd., 2016 UT App 154 (July 21, 2016)

The plaintiff argued that summary judgment was inappropriate in this negligence case because the standard of care was not "fixed by law." The court of appeals held that **summary judgment in negligence cases is appropriate if (1) the applicable standard of care is fixed by law or (2) reasonable minds could not reach but one conclusion as to the defendant's negligence under the circumstances.**

HEAL Utah v. Kane Cnty. Water Conservancy Dist., 2016 UT App 153 (July 21, 2016)

On appeal from a de novo review of the State Engineer's approval of two change applications, the court of appeals affirmed the district's court approval of both applications. In doing so, it provided an in-depth discussion of water rights and the change application process. **"[T]o determine whether there is unappropriated water in a water source, the State Engineer does not simply add up all approved users' appropriation limits (the most water a particular holder is authorized to use); rather, he considers the amount of water from the source being put to beneficial use."** *Id.* ¶ 24 (emphasis added).

Thayer v. Thayer, 2016 UT App 146 (July 14, 2016)

In the divorce proceedings underlying this appeal, Husband and Wife agreed to divide Husband's military retirement pay equally according to *Johnson v. Johnson*, 2012 UT App 22, 270 P.3d 556, and the Uniformed Services Former Spouses' Protection

Act (USFSPA). The district court interpreted these authorities as requiring the retirement pay to be divided on a net basis, after deducting taxes. The court of appeals reversed and remanded this determination, holding that **the USFSPA's definition of "disposable retired pay," in effect at the time of the parties' divorce, did not authorize taxes as deductions.**

***State v. Irwin*, 2016 UT App 144 (July 14, 2016)**

Defendant appealed a restitution order arising out of theft of watches from a retail store. Vacating the restitution order, the court of appeals reiterated that restitution was limited to compensation of actual losses to the victim. **Although market or retail value may be an appropriate measure of restitution in some cases, purchase price or wholesale cost will typically be the measure of loss where the victim is a retailer,** unless the retailer can demonstrate lost profit or the absence of a substitute.

***State v. Knaras*, 2016 UT App 143 (July 8, 2016)**

On appeal from a conviction for one count of criminal nonsupport, the Utah Court of Appeals upheld a jury instruction that "the offense of **Criminal Non-Support is committed not only where there is a complete failure to support the child, but also where there is a partial failure to provide for the children, so long as the support furnished is not adequate under the circumstances.**" *Id.* ¶ 15 (emphasis added) (emphasis omitted). The court explained, "To allow a parent to escape criminal liability by providing nominal support would defeat this purpose." *Id.* ¶ 19.

***Forney Indus., Inc. v. Daco of Missouri, Inc.*,**
— F.3d —, 2016 WL 4501941 (10th Cir. Aug. 29, 2016)

This appeal arose from a trademark dispute over whether a manufacturer's use of colors in its product packaging is a protected mark under section 43(a) of the Lanham Act. The Tenth Circuit held that **the use of color in product packaging can be inherently distinctive only if specific colors are used in combination with a well-defined shape, pattern, or other distinctive design.**

***Paros Props. LLC v. Colorado Cas. Ins. Co.*,**
— F.3d —, 2016 WL 4502286 (10th Cir. Aug. 29, 2016)

Evaluating whether notice of removal was timely, the Tenth Circuit held, as a matter of first impression, that **a pre-suit communication referencing the amount of purported damages does not trigger the notice period for seeking removal from state to federal court, unless the communication is clearly incorporated into the complaint.** At the same time, however, the Tenth Circuit held a state civil cover sheet indicating damages exceeded $100,000 triggered the time for filing a notice of removal.

***Vasquez v. Lewis*,**
— F.3d —, 2016 WL 4436144 (10th Cir. Aug. 23, 2016)

The Tenth Circuit rejected the defense of qualified immunity in this case brought under 42 U.S.C. § 1983, involving the search of a vehicle following a traffic stop. **The officers' reliance on the fact the plaintiff was from Aurora, Colorado, a "drug source" and "home to medical marijuana dispensaries," was impermissible.** *Id.* at *3 (emphasis added).

***United States v. Lustyik*,**
— F.3d —, 2016 WL 4275592 (10th Cir. Aug. 15, 2016)

Defense counsel argued that his client was denied his Sixth Amendment right to effective assistance of counsel because counsel was not allowed to review classified documents prior to his client's sentencing. The Tenth Circuit held that **where defense counsel's conduct has only been partially restricted by the trial court there is no presumptive Sixth Amendment violation.** Because there was no presumption, the burden was on counsel to demonstrate the prejudice caused by his inability to review the classified documents.

***In re Aramark Sports & Entm't Servs., LLC*,**
831 F.3d 1264 (10th Cir. 2016)

This appeal arose from the district court's denial of a petition under admiralty jurisdiction to limit a boat rental company's liability for a recreational boating accident under the Limitation of Liability Act, 46 U.S.C. §§ 30501-12. The Tenth Circuit held that **the boat rental company owed no duty to its customers to monitor and report weather forecasts, or to monitor the weather and make the decision for its customers as to whether it is advisable to venture onto the lake.**

***Levorsen v. Octapharma Plasma, Inc.*,**
828 F.3d 1227 (10th Cir. 2016)

In this case brought **under the Americans with Disabilities Act, the Tenth Circuit held that a plasma donation center qualifies as a "service establishment"** for "two exceedingly simple reasons: It's an establishment. And, it provides a service." *Id.* at 1229 (emphasis added). In doing so, it rejected the distinction drawn by the district court: that because plasma donation centers do not offer a service to the public for a fee like Section 12181(7)(F)'s enumerated examples, they do not fall within the meaning of the statute.

The Broader U-niverse: A Response

by The Utah Chapter of the American Immigration Lawyers Association

The July/August 2016 issue of the *Utah Bar Journal* contains an article written by Mr. Timothy L. Taylor, Chief Deputy of the Utah County District Attorney, titled "The U Visa: Why Are State Prosecutors Involved in Federal Immigration Issues?" 29 Utah B.J. 11 (July/Aug. 2016). As the title suggests, Mr. Taylor asks several questions and raises a few issues related to federal U Visas, a state official's role in the process, and whether the U Visa program has outlived its usefulness.

Mr. Taylor begins with some basic legislative history, including two quotes: one from the preamble of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464 (2000) (VTVPA), and a second from Illinois Representative Jan Schakowsky's proposed 1999 Battered Immigrant Women Protection Act. Battered Immigrant Women Protection Act of 1999, H.R. 3083, 106th Cong. (1999). It is worth noting that despite consideration by nearly a dozen house committees and subcommittees, Representative Schakowsky's bill never passed Congress. Nevertheless, in typical "sausage making" fashion, sections of her proposed legislation did make it into the VTVPA. Mr. Taylor correctly notes that the genesis of the U Visa was her legislative proposal.

But as interesting as they are, neither of Mr. Taylor's quotes actually cite Congress's own explicit description of its purposes for creating the U Visa. This is not a minor omission, as the Congressional statement of purpose mentions human trafficking only in a list of crimes, and it makes clear that support for law enforcement was only one of three primary motives. We cite in full Congress's specific legislative findings and purpose for the U Visa, included as preamble to the section of the VTVPA that created the visa, § 1513:

> (a) FINDINGS AND PURPOSE. –
>
> (1) FINDINGS. – Congress makes the following findings:
>
> (A) Immigrant women and children are often targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained.
>
> (B) All women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.
>
> (2) PURPOSE. –
>
> (A) The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.
>
> (B) Creating a new nonimmigrant visa classification will facilitate the reporting

> of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.
>
> (C) Finally, this section gives the Attorney General discretion to convert the status of such nonimmigrants to that of permanent residents when doing so is justified on humanitarian grounds, for family unity, or is otherwise in the public interest.

VTVPA, § 1513(a). Congress makes clear in § 1513(a)(2) that the U Visa was created for several specific purposes. One reason was to aid law enforcement; another reason was to "encourage law enforcement officials to better serve immigrant crime victims." *Id.* § 1513(a)(2). A third reason was to offer protection to the victims of such offenses, in keeping with the humanitarian interests of the United States. *Id.*

It can be difficult, with the passage of time, to remember how things used to be. But some of us remember the early 1990s, and the frustration of not being able to help clients who had suffered severe domestic violence, beatings that in some cases left the women hospitalized. Few practitioners thought to ask about marital rape in that era, although it undoubtedly occurred. Abusive U.S. citizens and legal residents married to immigrants routinely held out their legal status and ability to petition for their spouse as the carrot, with the threat of deportation and the loss of their U.S.-citizen children as the stick, to keep their victims living with them in the United States, bearing them children and enduring their abuse, sometimes for decades. When they finally had enough and left, sure enough, the U.S. citizen or legal resident spouse was often the prevailing party in a custody battle, merely because he had legal status and she did not.

More than fifty years ago, our current U.S. immigration system was set up on the principle of the introduction. That system, still in effect today, requires that a foreign-born individual seeking a visa first be introduced to the government by an individual or organization with legal status in the United States. Before 1995, only a U.S. employer or a family member who was a U.S. citizen or legal resident could perform that crucial introduction for an intending immigrant. Without the introduction from the abusive spouse, an immigrant victim of domestic violence quite literally had no remedy – there was no way for her to obtain legal status or challenge her husband's legal custody of their children. Those barriers only began to fall with the passage of the very first Violence Against Women Act in 1995.

In 2000, Congress specifically expanded the limited class of relationships authorized to introduce an intending immigrant and added to that class the special relationship between law enforcement agencies and the victims of the crimes they investigate. By legally recognizing this interdependent relationship, Congress hoped to promote the three purposes laid out in § 1513(a). Like many of our U.S.-citizen clients, Mr. Taylor equates the introduction with the final outcome, completely failing to realize that an introduction, by itself, will never get anyone legal immigration status. Yes, the introduction plays a critical role – it opens the door! Without it, the U.S. government will dismiss nearly all visa applications. But as countless U.S.-citizen spouses of immigrants will testify, even the closest of relationships with a U.S. citizen is no guarantee that the government will actually approve the visa application.

> *"It takes time…for foreigners to learn that in the United States, crime victims are usually able to trust law enforcement officers to act to protect them."*

For a U Visa applicant, Form I-918 Supplement B, also called the "law enforcement certification," introduces the visa applicant to the U.S. government. By law, it must be signed by the head of a certifying agency, meaning a federal, state, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation *or* prosecution of a qualifying crime or criminal activity. 8 C.F.R. § 214.14(2)–(5) (2013).

Form I-918 Supplement B was deliberately designed to be as expansive and comprehensive as possible. It authorizes a law enforcement agency to sign the certification in as many scenarios as possible, as long as the victim/petitioner *has been* helpful, *is being* helpful, or *is likely to be helpful* in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim. *Id.* § 214.14(12) (emphasis added). But we repeat – the certification serves merely to introduce the visa applicant. Signing the certification does not grant any visa or status in the United States. At no point is the law enforcement agency asked to decide the individual's immigration status. Rather, the law enforcement agent is simply asked to confirm his or her relationship with the applicant: was the applicant really a victim of a crime; if so, what crime; and was the applicant helpful (or could the applicant be helpful) to the community by assisting in the investigation or prosecution of that crime?

For over twenty-five years, fear of law enforcement has been a virtually constant refrain in our work with immigrant victims of violence. In contrast to Mr. Taylor's personal experience, many of our chapter members have direct personal experience of clients being reported by law enforcement to immigration authorities when they have sought to report a crime against them. Most of our experiences are a few years old because current enforcement priorities do not emphasize the arrest and detention of every undocumented immigrant. Nevertheless, it takes time for changes in policy to be felt in immigrant communities.

For those of us who have worked with immigrant victims of rape, incest, sexual assault, and domestic violence, it has been less than a decade since we have been able to advise our clients that partnering with law enforcement, supporting and assisting law enforcement, not only carries no risk, but offers the potential stability of legal status. This is the case because while the U Visa was created by Congress in October 2000, it took the United States Citizenship and Immigration Services another seven years – until September 2007 – to publish the implementing regulations and application forms. 72 Fed. Reg. 53014 (September 17, 2007).

The agency's seven-year delay in publishing the implementing regulations should also be considered as an important factor contributing to the current case backlog. Had the agency actually issued 10,000 U Visas each year during that intervening seven years, the 85,000 cases Mr. Taylor cites might have been 70,000

lower. And when one takes into account the high level of social and economic marginalization that makes our undocumented population such vulnerable targets for violence, it is frankly astonishing that of the estimated 11,000,0000 undocumented immigrants in the Unites States, less than 1% of them have pending U Visa applications.

Mr. Taylor also expressed incredulity that he has received requests for certifications stemming from cases nearly two decades old. These two facts are due at least in part to the reality that the U Visa remains a comparatively new form of legal relief for immigrant victims of violence. In our collective experience, nearly all of the individuals seeking law enforcement certifications for closed cases have only recently learned that they might qualify for this "new" form of immigration relief. In this regard it is worth noting that the Congressional choice to make the U Visa available both retroactively and prospectively was made deliberately. It may be reasonably assumed that Congress made this generous choice due to its explicit recognition in VTVPA § 1513(a)(2)(A) that one purpose of the U Visa was to offer humanitarian protection to immigrant victims of crime in the United States. When a crime victim's abuser has been deported, failing to protect her from the potentially drastic consequences of the same fate would defeat that humanitarian purpose. Even when the criminal remains in the United States, there are good reasons for trusting the protective capacity of U.S. law enforcement and our supportive network of shelters and therapists over those of most foreign countries.

While the surging number of requests is both frustrating and time consuming, a policy of turning people away in all but the most restricted circumstances fails to recognize and respect the opportunity Congress has provided our nation's law enforcement agencies to improve their relationship with the population they serve and bring criminals to justice. It is notable that the Utah County District Attorney's office policy is now the minority approach. Nationally, California, the state with the most immigrants, has adopted the most comprehensive policy, California Penal Code § 679.10, which requires certifying officials to fully complete and sign the Form I-918 Supplement B. Cal. Penal Code § 679.10. In that law, California adopts a rebuttable presumption of victim helpfulness and requires that certifiers respond to certification requests within ninety days. *Id*. Here in Utah, West Valley City has chosen to facilitate its police department's ability to respond to these requests by passing an ordinance allowing the police department to charge a $15.00 fee for each application for an I-918B certification.

It is a sociopolitical reality that we are struggling with our immigration law and policy as a nation; the recurring nature of this dissatisfaction is a historical fact. Mr. Taylor correctly notes that assisting law enforcement is a civic duty and that rewarding immigrants for behaving in accordance with this civic duty runs contrary to our social norms. But another way to look at this situation is to view it through the lens of social integration. Many, if not most, of the immigrants to our nation come from countries where law enforcement is corrupt, where the cultural norm is to avoid the predations of law enforcement at all costs, and where self-help remedies are much preferred. It takes time and practical experience to overcome that type of cultural upbringing. It takes time and their own experience for foreigners in our country to learn that in the United States, service to the public is a primary purpose and goal of all law enforcement activity. It takes time and experience for foreigners to learn that in the United States, crime victims are usually able to trust law enforcement officers to act to protect them. In that larger endeavor of social and cultural integration, it is the rare community that can afford to discard any tool, especially one as constructive of positive social and community integration as the I-918B law enforcement certification for immigrant victims of crime.

What are the Legal Ramifications of Utah's Resolution Against Pornography?

by Tyler Ahlstrom

Utah's Pornography Resolution

On March 29, 2016, Utah Governor Gary Herbert signed a concurrent resolution put forth by a unanimous state legislature that declared pornography a public health crisis. The action was historic as Utah is the first state to make such a resolution. Camila Domonoske, *Utah Declares Porn A Public Health Hazard*, NPR (April 20, 2016, 11:37 AM), http://www.npr.org/sections/thetwo-way/2016/04/20/474943913/utah-declares-porn-a-public-health-hazard. The resolution attracted national and international attention for its bold declarations but was not without its detractors as incredulous and outspoken critics decried the action. Many individuals and journalists took the opportunity to mock Utah, Mormons, and all anti-pornography proponents. Hustler magazine founder Larry Flynt even sent pornographic magazines to Utah lawmakers and Mormon leaders. Robert Gehrke, *Hustler Magazine Hits the Mailboxes of Utah Lawmakers*, The Salt Lake Tribune (June 7, 2016, 10:49 AM), http://www.sltrib.com/home/3975230-155/hustler-magazine-hits-the-mailboxes-of.

Taking a cue from Utah's resolution, in July 2016, the Republican Party amended their platform to declare pornography a public health crisis. Steve Benen, *Republican Platform Labels Pornography 'a Public Health Crisis'*, MSNBC (July 12, 2016, 8:41 AM), http://www.msnbc.com/rachel-maddow-show/republican-platform-labels-pornography-public-health-crisis. This amendment went further in its condemnation of pornography than the 2012 GOP platform, which condemned child pornography and encouraged the enforcement of obscenity laws. *Id*.

This platform amendment also caused much derision. *Id*. However, that same month, McDonald's, Starbucks, and the Librarian of Congress announced they would install pornography filters on their WiFi. Haley Halverson, *McDonald's, Starbucks, and Librarian of Congress Recognize Pornography Filters*, KCSGtelvision.com, (July 19, 2016, 10:50 AM), http://kcsg.com/bookmark/27232375-McDonald-s-Starbucks-and-Librarian-of-Congress-recognize-pornography-filters.

Resolution Meaning

Behind the commotion surrounding Utah's resolution, the question remains what the resolution means, what it has accomplished, and what it will change going forward. Many wonder what its potential effects will be on current laws and what changes to those laws its proponents have in mind.

The resolution's stated purpose is to make "the Legislature and the Governor recognize the need for education, prevention, research, and policy change at the community and societal level in order to address the pornography epidemic that is harming the people of the state and nation." S. Con. Res. 9, 61st Leg., 2016 Gen. Sess. (Utah 2016). In justifying the purpose, the resolution lists eighteen different harms that stem from pornography, including biological addiction that can lead to risky sexual behaviors and the detrimental effects on marriages and family units. *Id*.

The nonbinding resolution does not ban pornography or earmark money to combat it. Domonoske, *supra*. It has no practical impact as it does not change any laws or criminalize any behavior. However, supporters declared the resolution a symbolic victory. They found it has the potential to influence further actions and laws. Pamela Atkinson, the chair of the Utah Coalition Against Pornography board, stated that the "'resolution makes way for a multifaceted approach to solving [the] crisis.'" *Id*. What might a multifaceted approach include?

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Obscenity Law Enforcement

One facet is to enforce obscenity laws that are already on the books. Obscenity laws prohibit the production and distribution of obscene content. The Supreme Court of the United States has repeatedly held that obscenity is not protected free speech under the First Amendment of the United States Constitution. Federal lawmakers and many state lawmakers have thus made the production and dissemination of obscenity a crime.

In common parlance, many individuals casually use the words "obscenity" and "pornography" interchangeably. However, under legal definitions these are not the same. The current legal definition of obscenity is found in the 1973 Supreme Court decision *Miller v. California*, 413 U.S. 15 (1973), which defines obscenity in the following three prong analysis:

> [1] whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> [2] whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> [3] whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (internal quotation marks and citation omitted).

Although this definition is better than the conflicting definitions of obscenity that preceded it, it is still very vague. What are "contemporary community standards?" What does "prurient interest" mean? What is "patently offensive?" These terms vary according to each person's interpretation.

Illustrating how difficult it is to define, Supreme Court Justice Stewart famously stated, "I shall not today attempt further to define the kinds of material I understand to be [obscene]…. But I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The Supreme Court has not provided much further insight into what this definition entails; however, it did state that mere nudity was not obscenity. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974). The Court also stated that obscenity was "'hard core' sexual conduct specifically defined by the regulating state law." *Miller*, 413 U.S. at 27.

Utah defines obscenity, or what it calls "pornographic material," in the Utah Criminal Code by using a definition similar to the three-pronged *Miller* standard. Utah Code Ann. § 76-10-1203. Prong two bans patently offensive descriptions or depictions of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion, which are further defined in Utah Code Section 76-10-1201. Distributing pornographic material is a third degree felony for an adult. *See id*. § 76-10-1204 (4)(a).

Despite the laws prohibiting obscenity, items and images that many people would deem obscene are prevalent today. This inconsistency is mainly due to the fact that obscenity laws have often been ignored by both federal and state prosecutors. Tim Wu, *American Lawbreaking*, Slate (Oct. 15, 2007, 7:29 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/features/2007/american_lawbreaking/how_laws_die.html.

The lack of enforcement is often due to widespread community acceptance of sexually explicit content by many individuals. The lack of enforcement is also due to individuals not reporting obscenity because they do not know they can report it. Enforcing obscenity laws requires citizens to speak up and law enforcement and prosecutors to respond.

Utah's resolution may encourage law enforcement and prosecutors to pursue more obscenity law cases and provide them with more evidence that Utah's community standards are opposed to obscenity. The resolution may also help educate the public on the definition of obscenity and the citizens' responsibility to report it and put pressure on law enforcement to enforce these laws.

Stricter Enforcement of Laws that Restrict Legal Indecency

Obscenity laws only apply to material that is hard core sexual conduct as defined by state laws following the *Miller* standard. *Miller v. California*, 413 U.S. 15 (1973). This leaves out material that many would deem to be indecent but is not obscene. This may be mere nudity or soft pornography. However, as a result of ignoring obscenity laws, sexually explicit material that would likely be unconstitutional obscenity is often treated as constitutionally protected free speech. Therefore, the obscene material is not banned and is merely regulated to certain areas or times using non-criminal broadcast and zoning restrictions. Utah's resolution does not define what constitutes pornography and whether it would only apply to material considered obscene or to material that is considered indecent as well.

Broadcast laws

The Federal Communications Commission (FCC) has the power to regulate material in telecasting and broadcasting. Federal Communications Commission, *Obscene, Indecent and Profane Broadcasts*, https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts (last visited Sept. 23, 2016). The FCC's authority and the content it chooses to regulate has been a continuous source of contention and litigation because it brushes up against the First Amendment. Jeremy H. Lipshultz, *Broadcast Indecency: F.C.C. Regulation and the First Amendment*, 1–3 (1997). The FCC cannot censor material before it airs, according to federal law. *See* 47 U.S.C.A. § 326. This lack of censorship is also known as "prior restraint," meaning the government cannot restrain material prior to distribution. However, the FCC does have the power to revoke a station's license, impose a monetary forfeiture, or issue a warning if a station airs obscene, indecent, or profane material. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 737 (1978).

Despite FCC oversight in this area, some groups feel that the FCC is still not doing enough to ensure indecency is not broadcast. Groups like the Parents Television Council monitor television shows and send out emails to participants encouraging them to file a complaint with show sponsors and the FCC when they see something they feel violates the obscenity, indecency, or profanity definitions. *See* Parents Television Council, http://w2.parentstv.org/main/Default.aspx (last visited Sept. 23, 2016). Utah's resolution may help garner support to put more pressure on the FCC to keep the airways free from indecency.

Zoning laws

Sexually explicit materia1 is also subject to non-criminal state laws and local ordinances that restrict the displays to certain times, locations, and manners of delivery. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The laws cannot completely ban the material due to the First Amendment. *Id*. at 63–65. In addition, when statutory laws that target sexual indecency are challenged in court as being an unconstitutional violation of the First Amendment, courts apply a strict scrutiny standard because sexually oriented laws target a specific category of speech. *Id*.

Utah regulates sexually oriented businesses and prohibits such businesses from conducting business in a county or municipality without a business license as required by the county or municipality. Utah Code Ann. § 17-50-331(3); *id*. § 10-8-41.5(3). Counties and municipalities often have further restrictions for sexually oriented businesses, such as where they can be located. Utah's resolution may help garner support for tighter zoning restrictions of indecent material.

Internet restrictions

The internet is the biggest battleground area today over sexually explicit content. The internet has revolutionized the availability and consumption of sexually explicit content. Some reports

estimate that 35% of all internet downloads are related to pornography, and 25% of all search engine queries are related to pornography. *Internet pornography by the numbers; a significant threat to society*, WebRoot, http://www.webroot.com/us/en/home/resources/tips/digital-family-life/internet-pornography-by-the-numbers (last visited Sept. 23, 2016).

Despite this radical shift in consumption mannerisms, laws regulating sexually explicit content have remained relatively unchanged. The internet arose at a time when the number of prosecutions for obscenity fell toward zero, which means a dearth of court guidance on how the *Miller* standard applies to online content. Jason Krause, *The End of the Net Porn Wars*, ABA Journal (Feb. 1, 2008, 4:01 PM), http://www.abajournal.com/magazine/article/the_end_of_the_net_porn_wars/. In addition, there is no regulatory body over the internet similar to the FCC.

The United States Congress and some states have tried to keep up with the problem of internet pornography, but it has been difficult. In the 1990s Congress became serious over protecting children from internet pornography and passed major pieces of legislation by wide majorities, such as the Communications Decency Act (CDA). Krause, *supra*. However, the Supreme Court struck down most of these laws as overly broad and encroaching on First Amendment rights. *See Reno v. ACLU*, 521 U.S. 844 (1997); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002). A lower court found internet filters were sufficient. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

The sponsor of Utah's resolution, Todd Weiler of the Utah State Senate, said he wanted the United States to follow the lead of the United Kingdom and limit easy access to online pornography. Harriet Alexander, *Utah Declares Pornography a Public Health Hazard*, The Telegraph (April 19, 2016, 8:00 PM), http://www.telegraph.co.uk/news/2016/04/19/utah-declares-pornography-a-public-health-hazard/.

In 2013, former Prime Minister David Cameron asked internet service providers to have pornography filters with an opt-in option for those who want access to pornography. *Id*. The European Union ruled in 2015 that filters were illegal and could not be introduced in the United Kingdom. *Id*. In October 2015, however, Mr. Cameron said he had secured an opt-out from the European Union ruling and would keep the "porn filters" regardless. *Id*.

Mr. Weiler stated that if they could get fifteen states to take this stand he thinks this would start putting pressure on Congress to do what the United Kingdom has done. *Id*. He said he would like the government to work with internet providers to allow pornography only on an opt-in basis. Alex Stuckey, *Utah Ceremonially Declares Porn a 'Public Health Crisis'*, The Salt Lake Tribune (April 19, 2016, 7:32 AM), http://www.sltrib.com/news/3795327-155/utah-ceremonially-declares-porn-a-public. As of this writing, it is uncertain how the "Brexit" and Mr. Cameron's resignation will affect his proposals. It is also uncertain whether the United States would, or could, follow the United Kingdom's lead given Congress's past failures of regulating internet pornography and the current makeup of the Supreme Court.

Passing a similar measure in the United States would likely require careful drafting to pass strict scrutiny standards. It also may be possible to draft a law that would fall under the obscenity definition and thus warrant no strict scrutiny standard. The difficulty with internet filters is that they may be seen as overly broad and may censor protected free speech along with unprotected obscenity. However, courts may deem that having an opt-in standard may be sufficient.

There has been some success already in passing internet filters under limited circumstances, which may indicate future success in expanding internet filter restrictions. Congress was able to pass the federal Children's Internet Protection Act in 2000 in response to its previously failed acts. This law mandates that all schools and libraries receiving federal aid for internet connections install filters on all computers, whether used by children or adults. The Supreme Court found this law to be constitutional because it is not a complete ban and was not too broad. *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003). It also did not violate the public forum doctrine because schools and libraries were not public forums. *Id*. at 205.

Many states have passed laws mandating internet censorship in schools, universities, and libraries even if they are not receiving government aid. ACLU, *State by State Internet Censorship Bills*, http://www.aclu.org/technology-and-liberty/state-state-internet-censorship-bills (last visited Sept. 23, 2016). However, according to the ACLU, this violates *Reno v. ACLU* that struck down the CDA. *Id*. It is ultimately difficult to ascertain how generally applied internet filters would be received in American courts, as this is an unsettled area of law.

Conclusion

As of this writing, no direct legal changes have been made in Utah due to the resolution. However, Utah's resolution has helped launch a national discussion of pornography's addictive nature. It remains to be seen how this resolution will affect the future adoption of laws or the application of existing laws in the state and the nation. The resolution appears to be another piece of a complex puzzle to shape the nature of laws regulating sexually explicit content.

Implementing the ABA's New Anti-Discrimination Rule

by Keith A. Call

On August 8, 2016, the American Bar Association House of Delegates adopted a rule designed to eliminate discrimination and harassment in conduct related to the practice of law. The House of Delegates vote followed months of debate, comment, and revision, culminating in a revised rule that faced very little opposition.

The Rule

The new rule adds a new paragraph (g) to Model Rule of Professional Conduct 8.4, which defines acts of professional misconduct. The new rule provides:

> It is professional misconduct for a lawyer to:
>
> . . .
>
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Model Rules of Prof'l Conduct R. 8.4(g). The ABA also added three new comments to Rule 8.4. *See id.* R. 8.4 cmts. 3–5, *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

Model Rule 8.4(g) broadly prohibits harassment and discrimination in all conduct "related to the practice of law." *Id.* R. 8.4(g). New comment 4 begins to define this to include "representing clients, interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law, operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law." *Id.* R. 8.4 cmt. 4.

Comment 3 describes the meaning of discrimination and harassment. Discrimination includes "harmful verbal or physical conduct that manifests bias or prejudice towards others." *Id.* R. 8.4 cmt. 3. Harassment includes "sexual harassment and derogatory or demeaning verbal or physical conduct," as well as "unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature." *Id.* The comment adds that substantive anti-discrimination and anti-harassment statutes and case law may guide the interpretation of these concepts under the rule. *Id.*

While there is much yet to be determined regarding the full scope and application of the new rule, it clearly leaves open the possibility for a lawyer to limit his or her representation of clients based on personal views. By expressly allowing lawyers to accept, decline, or withdraw from a representation in accordance with Rule 1.16, Rule 8.4 allows lawyers to refuse representation if the client "insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." Model Rules of Prof'l Conduct R. 1.16(b)(4). Comment 5 of Rule 8.4 also contains a "*Batson*" sentence, stating that a "trial judge's findings that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule." *Id.* R. 8.4 cmt. 5.

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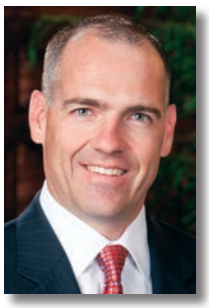


What about Utah?

The Model Rules of Professional Conduct are not, of course, legally binding in Utah. It remains to be seen whether Utah will adopt the ABA's version of Rule 8.4(g).

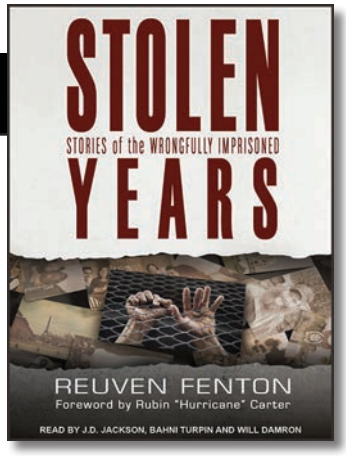
But the Utah Rules of Professional Conduct are not silent on the issue. Rule 8.4(d) already provides that it is professional misconduct to "engage in conduct that is prejudicial to the administration of justice." Utah R. Prof'l Conduct 8.4(d). And Utah's Comment 3 to that rule provides: "A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice…." *Id.* R. 8.4 cmt. 3.

Real Solutions

While appropriate legislative "fixes" to insidious issues such as discrimination and harassment are certainly valuable and needed, I maintain that issues like these cannot simply be legislated away. There is a human element to these issues that rule makers cannot fix. Complex and compelling issues such as rights to equality, privacy, free speech, and religious liberty will continue to bump into each other as we move our way forward as a society.

I believe one key to increased social harmony is better communication, understanding and respect on an *individual*, person-to-person level. Most of us commonly associate with those who look, act, and believe similar to ourselves. Social scientists refer to this as the "similarity attraction theory." Functioning as separate "groups" of mass individuals, it is much easier to ignore, misunderstand, and disrespect the views and rights of others. However, most of the time, interacting one-on-one with someone holding a different worldview or different life experience will promote understanding and respect.

As lawyers, we have unique opportunities to lead out in making our law firms, neighborhoods, communities, state, and nation socially better and stronger. We should each look for more opportunities to expand our social networks to include others not like ourselves for better understanding, social advancement, and personal enrichment.



Stolen Years: Stories of the Wrongfully Imprisoned

by Reuven Fenton

Reviewed by Andrea Garland

What do the victims in Reuven Fenton's book *Stolen Years: Stories of the Wrongfully Imprisoned* have in common with Richard Jewell, Brandon Mayfield, Gerry Conlon (of *In the Name of the Father* fame), Dr. Sam Sheppard (inspiration for *The Fugitive*), and Alfred Dreyfus? Each was wrongly accused. What do they all have in common with victims of the Salem Witch trials or, for that matter, victims of ancient Israelite, Aztec, Celtic, Egyptians, or other practitioners of human sacrifice? Each victim was selected and condemned in accordance with then-prevailing legal norms. Each tragedy, perfectly legal.

Unlike many books about the law, *Stolen Years* is well written. It's entertaining. It's passionate. All of the individuals in the book sound like the humans they are. Mr. Fenton, a graduate of Columbia University School of Journalism, who has written about crime for the New York Post since 2007, provides interesting details and thoughtful analysis. The sentences themselves are excellent. Mr. Fenton's similes are both colorful and relevant. For example, he writes on page 196, "If awaiting trial is like watching a tree sloth load a shotgun, the haul to prison happens as fast as buckshot whizzing out of the barrel."

Stolen Years chronicles the true stories of ten innocent Americans, eight convicted of murder, one of aggravated robbery, and one of raping his daughter. Mr. Fenton recounts their journeys, including the process of getting arrested, tried, imprisoned, and ultimately set free. Mr. Fenton begins by explaining how easy it is for an innocent person to get convicted, beginning with our expectations. "You look at the person's mug shot, see those bleary eyes and messed-up hair, and say to yourself, 'Guilty.' It's human intuition." He explains an "impossible to document number of wrongly convicted people are sitting in prison, and only a small fraction will ever get out." He notes, since 1989 at least 1,400 innocent people have been exonerated and released from prison, with twenty-one exonerations in 1989 and ninety-one in 2013. Then, he tells ten people's stories.

Stolen Years:
Stories of the Wrongfully Imprisoned

by Reuven Fenton

Publisher: Tantor Media Inc (2015)

Pages: 246

List Price: $19.99 USD

Available in paperback, e-book, and Audio CD formats.

Common themes emerge as reasons for wrongful convictions. Some defendants experience poor defense lawyering. More bear the burden of willful malfeasance by law enforcement or prosecutors. Most suffer from exculpatory information not being delivered to defense counsel. Utah's own Debra Brown, ultimately exonerated through the efforts of Jensie Anderson of the University of Utah, serves eighteen years after police tell a witness who reports seeing the dead victim's tenant throw a gun in a lake, "Let it go, leave it alone." Trials of four other persons in the book feature witnesses who, for their own purposes, make up facts of whole cloth and swear to them as true. Unreliable eyewitness identification procedures wrongfully convict two more. Police hold Damon

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Thibodeaux in custody nine hours, accusing him, waking him after he passes out, telling him he failed a lie detector test, until "[d]elirious with fear, exhaustion, and hunger" he signs the confession they want. James Kuppelberg is fine when arrested but is delivered to his arraignment with new bruises, urinating blood. Two more defendants are convicted on the basis of rotten science, including as Mr. Fenton called it, a "Rube Goldberg" theory by a toxicologist with a fictional academic background.

Although they're no more guilty than the police, prosecutors, and judges who convict them (and less guilty than some), the wrongfully convicted innocents' torment is harrowing. They get stabbed and witness other inmates getting hurt. The stories in this book inspire little confidence in prisons in Utah or elsewhere to renew inmates' respect for law and order. One winter, Debra Brown, recovering from a radical mastectomy in an unheated room at the Utah State Prison, asks a guard for some socks and an extra blanket. He tells her "mind over matter." He clarifies his meaning, "I don't mind and you don't matter," before walking away. One day she opens a kitchen closet and finds a guard getting a blow job from an inmate, both of whom she assures she saw nothing. Cornelius Dupree, wrongly convicted of robbery, is offered release if he will confess to a rape that DNA later rules out; his refusal to lie earns him six extra years. Kerry Porter sees guards stomp to death another inmate. A prison serves spoiled chicken soaked in vinegar and served with Worcestershire sauce. Cells are 105 degrees in the summer. Snow blows in through cracks of winter cells. Exonerees experience panic attacks and continuing health problems from bad food and trauma.

As Mr. Fenton recounts, even exoneration doesn't necessarily end incarceration. Dayton Witt serves nearly two extra days in jail following his ordered release. Eventually let out in a jail-issue paper suit, the jail gives him no money and provides no phone for him to call relatives. Post-release, when his daughter is born, the state takes custody of the baby on the off-chance the vacated conviction is somehow valid. Cornelius Dupree, exonerated with a court order stating his innocence, has to continue reporting to a parole officer and pay for and attend sex offender classes because paperwork moves slowly.

Incredibly, most of the exonerated defendants are not bitter. The book recounts the happiness that can result from improved conditions and lowered expectations. Those previously on drugs or otherwise not leading exemplary lives before prison, treasure hard-won second chances. In spite of innocence and seventeen years of harsh conditions, Devon Ayers reported to Mr. Fenton, "Prison changed me into a better person," because "Pride gets your ass killed, in and out of prison."

Stolen Years, 176 years in all, makes it clear that even though each of the ten victims are eventually set free, no one in the criminal justice system should pat themselves on the back and say "the system works." Innocent defendants cannot simply stitch up decades-long gaps in their lives. All of these victims recount otherwise potential earnings vanished, difficult post-prison job searches, and worst of all, lost homes and the deterioration of family relationships, especially with children. Mr. Fenton reports few consequences for those responsible for these wrongful convictions. At the end of the book he reports optimism, discussing reforms or potential reforms in eyewitness identification, false confessions, forensic sciences, government misconduct, and the proliferation of Innocence Projects. He concludes "It's not a fair fight unless we make it fair," which may be beyond a society presently oriented to define accountability to vary inversely with socio-economic status. In the preface, Dr. Rubin "Hurricane" Carter, himself wrongfully convicted of triple murder, says "the real cause of wrongful convictions is willful blindness." Mr. Fenton, Dr. Carter, and ten innocent people hope to shine some light, to make blindness more difficult to indulge.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the September 16, 2016 Commission Meeting held at the Utah State Bar Law & Justice Center in Salt Lake City.

1. The Bar Commissioners voted to have the working committee for creating a member-centric website request proposals for bids of up to $2,500 for an organization to analyze the Bar's current website and make recommendations on how to make it more user friendly and to provide information on the cost of making changes to the website. The committee was authorized to select the group to do the work within that amount.

2. The Bar Commissioners voted to approve the proposed external media campaign budget to promote LicensedLawyer.org.

3. The Bar Commissioners voted to approve a written policy that describes the requirements and procedures for including non-profit organizations on the licensing form to which lawyers can voluntarily make a charitable donation during the licensing process.

4. The Bar Commissioners approved the Minutes of the August 26, 2016 Commission Meeting by consent.

5. The Bar Commissioners approved by consent a policy change to permit inactive lawyers to serve on Bar committees.

6. The Bar Commissioners approved by consent changes to policy for lawyers who are administratively suspended for failure to pay licensing fees and wish to reactivate license.

7. Commissioners John Bradley and Katie Woods will draft a proposed Commission policy for Bar Committee leadership training and planning to be presented at the October 21, 2016 Commission meeting.

8. Commissioner Kate Conyers will email the Pro Bono Commission and ask it to adopt the use of the freelegalanswers.org website.

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

Notice of Bar Commission Election – First & Third Divisions

Nominations to the office of Bar Commissioner are hereby solicited for one member from the First Division and two members from the Third Division, each to serve a three-year term. Terms will begin in July 2017. 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 1, 2017 by 5:00 p.m.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 3rd with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 17th.

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 3, 2017. 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 3, 2017 with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 17, 2017.

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) five minutes to address the Southern Utah Bar Association luncheon attendees and, (2) five 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.

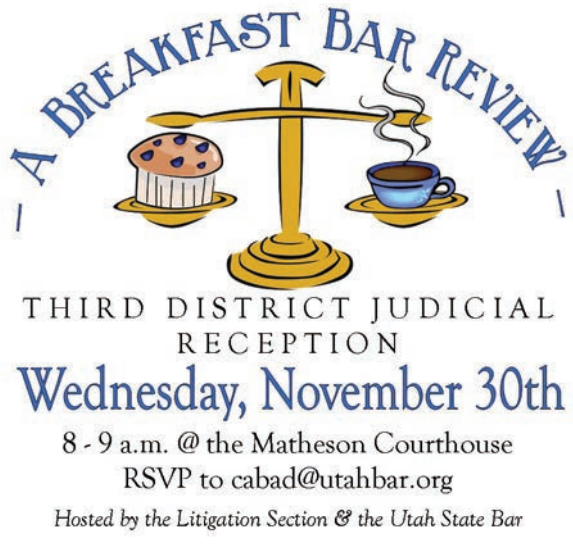
*Candidates for the office of Bar President-elect may not list the names of any current voting or ex-officio members of the Commission as supporting their candidacy in any written or electronic campaign materials, including, but not limited to, any campaign materials inserted with the actual ballot; 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.

Judges Pro Tempore Needed

The Salt Lake City Justice Court is seeking applicants to become volunteer small claims judges pro tempore. The applicant must be the following:

1. Citizen of the United States;
2. Resident of Utah;
3. Active member of the Utah State Bar; and,
4. Admitted to the practice of law in Utah for at least four years.

Interested applicants may submit an "Application for Appointment as Small Claims Judge Pro Tempore" and a current resume to melisses@utcourts.gov. Applications are found at: https://www.utcourts.gov/admin/jobs/index.htm.



Utah State Bar

Spring Convention in St. George

March 9–11

2017

DIXIE CENTER AT ST. GEORGE

1835 Convention Center Drive St. George, Utah

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

*Includes 3 hrs. Ethics and 1 hr. Prof./Civ. Credit-type subject to change.

Full Brochure/Registration will be available online in early January and in the Jan/Feb 2017 edition of the *Utah Bar Journal.*

2017 "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
Best Western Abbey Inn (435) 652-1234 / bwabbeyinn.com	$139.99	12	2/07/17	1
Clarion Suites (fka Comfort Suites) (435) 673-7000 / stgeorgeclarionsuites.com	$100	10	2/09/17	1
Comfort Inn (435) 628-8544 / comfortinn.com/	$129.99	15–2Q 7–K	3/11/17	0.4
Courtyard by Marriott (435) 986-0555 / marriott.com/courtyard/travel.mi	$159	10–K	2/09/17	4
Crystal Inn Hotel & Suites (fka Hilton) (435) 688-7477 / crystalinns.com	$112	7–2Q	2/09/17	1
Fairfield Inn (435) 673-6066 / marriott.com	$109	5–DBL 15–K	2/12/17	0.2
Green Valley Spa & Resort (435) 628-8060 / greenvalleyspa.com	$152–$307* 3 night minimum stay Tax: 12%	7 1–3 bdrm condos	2/09/17	5
Hampton Inn (435) 652-1200 / hampton.com	$169	20–2 beds 5–1 bed	2/10/17	3
Hilton Garden Inn (435) 634-4100 / stgeorge.hgi.com	$132–K $142–2Q's	20	2/06/17	0.1
Holiday Inn St. George Conv. Center (435) 628-8007 / holidayinn.com/stgeorge	$132–K $142–2Q's	10–K 2–Q	2/20/17	0.2
LaQuinta Inns & Suites (435) 674-2664 / lq.com	$99	5–K	3/01/17	3
Ramada Inn (800) 713-9435 / ramadainn.net	$119	8–DQ	2/17/17	3
Red Lion (fka Lexington Hotel) (435) 628-4235	$119	20	2/17/17	3
St. George Inn & Suites (fka Budget Inn & Suites) (435) 673-6661 / stgeorgeinnhotel.com	$100	10–DQ	2/05/17	1

Pro Bono Honor Roll

Bankruptcy Case

David M. Cook
Ted Cundick
William Morrison
Russ Skousen

Community Legal Clinic: Ogden

Jonny Benson
Jacob Kent
Chad McKay
Mike Studebaker

Community Legal Clinic: Salt Lake

Jonny Benson
Dan Black
Brent Chipman
Kelly Eccles
Bryan Pitt
Brian Rothschild
Paul Simmons
Janet Thorpe
Ian Wang
Mark Williams
Russell Yauney

Debt Collection Calendar

David P. Billings
Mark Burns
Tyler Needham
Brian Rothschild
Zachary Shields
Charles Stormont
Spencer Topham

Debtor's Legal Clinic

Robert Falck
Brian Rothschild
Paul Simmons
Brent Wamsley
Ian Wang

Expungement Case

Richard Gale

Expungement Law Clinic

Mary Boudreau
Sue Crismon
Josh Egan
Jiro Johnson
Stephanie Miya
Bill Scarber

Family Law Case

Justin Bond
Brent Chipman
Derek Conver
Zal Dez
Sandy Dolowitz
Lorie Fowlke
Jonathan Grover
Adam S. Hensley
Carolyn Morrow
Eddie Prignano
Stewart Ralphs
Jack Smart
Linda F. Smith
Sheri Throop
Tara Umipig

Guardianship Case

Marty Moore
Katie Roberts
Richard Sheffield
Ben Thomas

Guardianship Signature Project

Michael Thomas

Homeless Youth Legal Clinic

Gil Brunson
Janell Bryan
Kate Conyers
Kent Cottam
Monica D. Greene
Skye Lazaro
Andrea Martinez Griffin
Sharon McCully
Laja Thompson
Pam Vickery

Probate Case

Scott W. Hansen
Michael A. Jensen

Rainbow Law Clinic

Jessica Couser
Russell Evans
Chris Wharton

Senior Center Legal Clinics

Kyle Barrick
Sharon Bertelsen
Kent Collins
Phillip S. Ferguson
Richard Fox
Michael A. Jensen
Jay Kessler
Terrell R. Lee
Joyce Maughan
Stanley D. Neeleman
Kristie Parker
Jane Semmel
Jeannine Timothy

Social Security Case

Kathleen Bradshaw

Street Law Clinic

Jeffry Gittins
Steve Henriod
Adam S. Long
Tyler Needham
Clayton Preece
Elliot Scruggs
Kathryn Steffey
James Stewart
Jonathan Thorne

Tuesday Night Bar

Alain Balmanno
P. Bruce Badger
Lyndon Bradshaw
Matt Brahana
Elizabeth M. Brereton
David Broadbent
Allison Brown
Kate Conyers
John Davis
Scott Degraffenried
Elizabeth Dunning
Joshua Figueira
Dave Geary
Steve Gray
Carlyle Harris
Diana Huntsman
John Hurst
Annette Jan
Craig Jenson
Patrick Johnson
Scott Johnson
Jason Jones
Adam Kaas
Tammy Kapaloski
Derek Kearl
Beth Kennedy
Jordan Lee
Lucis Maloy
Eli McCann
Michael McDonald
Aaron Murphy
Ben Onofrio
Eric Petersen
Samantha Slark
Jack Smart
Clark Snelson
Jeremy Stewart
Swen Swenson
Tegan Troutner
Roger Tsai
Jeff Tuttel
Chris Wade
Analise Q. Wilson

West Jordan Pro Se Calendar

Jared Allebest
Keli Beard
Brad Blanchard
Donna Bradshaw
Robert Falck
Steven Gray
Claymore Hardman
Jessica McAuliffe
Tyler Needham
Michael Pacada
Frances M. Palacios
Vaughn Pedersen
Jessica Rancie
Jeff Rasmussen
Jess Theodore
Joe Walker
Kevin Worthy

QDRO Case

Rory Hendrix

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

Twenty-Seventh Annual

Lawyers & Court Personnel Food & Winter Clothing Drive

Selected Shelters

First Step House

Established in 1958, First Step House (FSH) has grown into a specialized substance abuse treatment center serving low-income and no-income adult men with affordable and effective treatment programs and services. In January of 2016, FSH opened a Recovery Campus dedicated to meeting the treatment and housing needs of veterans in our community. The Recovery Campus, located at 440 South 500 East, provides 32 treatment beds and 18 transitional housing units for veterans receiving treatment for substance use and behavioral health disorders. Their treatment programs include evidence-based therapy, case management, life skills classes, employment support, housing support and placement, individualized financial counseling, and long-term recovery support. They seek to utilize the latest research to continually drive the care that they provide and are distinctive in their unyielding commitment to help people and families become well.

The Rescue Mission

Women & Children in Jeopardy Program

Jennie Dudley's Eagle Ranch Ministry

Serving the homeless under the freeway on Sundays and Holidays for many years.

Drop Date

December 16, 2016 • 7:30 a.m. to 6:00 p.m.
Utah Law and Justice Center – rear dock
645 South 200 East • Salt Lake City, Utah 84111

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

Sponsored by the Utah State Bar

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

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

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

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

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

PUBLIC REPRIMAND

On June 8, 2016, Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against John A. Quinn for violating Rules 8.1(a) (Bar Admission and Disciplinary Matters), 8.4(a) (Misconduct), and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

However, following the direction of *In re Discipline of Brussow*, 2012 UT 53, the Screening Panel concluded that Mr. Quinn's violation of Rule 8.4(a) (Misconduct) did not factor into its determination of an appropriate sanction.

In summary:
Mr. Quinn was hired to defend a client in a DUI case. Mr. Quinn and the client discussed filing a motion to suppress evidence. Although Mr. Quinn discussed the potential for moving to suppress evidence with the prosecutor at a hearing, Mr. Quinn never actually filed the motion to suppress.

In his response to the Notice of Informal Complaint (NOIC) sent to Mr. Quinn by the Office of Professional Conduct (OPC), Mr. Quinn submitted documents that he purported to be the motion to suppress he prepared and filed with the court on behalf of his client. Mr. Quinn's response to the NOIC categorically denied that a motion to suppress was never filed. The motion to suppress submitted by Mr. Quinn to the OPC was not actually filed in his client's case and appeared to have been prepared for a client in another case. Mr. Quinn did not provide the Screening Panel with a clear explanation for his submission of these materials.

Aggravating factors:
Submission of false statements and evidence during the disciplinary proceeding.

Mitigating factors:
Absence of a prior record of discipline and acknowledgement of his misconduct.

Ultimately the Screening Panel concluded that there was not sufficient evidence or grounds to adjust the discipline based on aggravating and mitigating factors.

ADMONITION

On August 24, 2016, 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 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

The Office of Professional Conduct served the attorney with a Notice of Informal Complaint (NOIC) requiring the attorney's written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. The attorney did not timely respond in writing to the NOIC.

Aggravating factors:

Prior history of discipline for the same type of behavior.

Mitigating circumstances:

Significant family related health issues.

SUSPENSION

On June 28, 2016, the Honorable Todd Shaughnessy, Third Judicial District Court, entered an Order of Discipline: Suspension against Michael Moss, suspending his license to practice law for a period of eighteen months, for his violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

Mr. Moss was hired to represent a client after a default certificate had been entered against the client. Mr. Moss filed a counterclaim against the opposing party and a motion to set aside the default judgment. However, Mr. Moss knowingly failed to appear at a hearing on the motions. As a result of Mr. Moss's failure to appear at the hearing on behalf of his client, the court denied Mr. Moss's motion to set aside the default judgment, dismissed the client's counterclaim and granted the plaintiff's motion to strike the client's answer. Mr. Moss did not forward any documents to his client and the client was unaware of the hearing or the court's orders. The client made numerous attempts to contact Mr. Moss over several months. Although Mr. Moss knew his client was attempting to contact him, Mr. Moss failed to respond. The fee charged by Mr. Moss for the work was unreasonable. The client had to hire new counsel to resolve the case.

The Office of Professional Conduct (OPC) requested information from Mr. Moss in connection with his client's informal complaint. The OPC never received a response from Mr. Moss and Mr. Moss failed to appear at the Screening Panel hearing.

Aggravating circumstances:
Multiple offenses; obstruction of the disciplinary proceeding by failing to respond; refusal to acknowledge the wrongful nature of the misconduct; substantial experience in the practice of law; and lack of good faith effort to make restitution.

SUSPENSION

On April 14, 2014, the Honorable Judge Gary D. Stott, Fifth Judicial District Court, entered an Order of Sanction Disbarment against Mr. John L. Ciardi for violation of Rule 3.5(d) (Impartiality and Decorum of the Tribunal) and 8.4(d) (Misconduct) of the Rules of Professional Conduct. Notice of the disbarment was published in the July/August 2014 edition of the *Utah Bar Journal*. Mr. Ciardi appealed the order to the Utah Supreme Court.

On August 19, 2016, the Utah Supreme Court issued an opinion in the matter. The court affirmed the trial court's holdings with respect to the rule violations but vacated the Order of Disbarment and substituted an Order of Suspension for two years.

DISBARMENT

On June 20, 2016, the Honorable Robert Faust, Third Judicial District Court, entered an Order of Disbarment against Spencer M. Couch for his violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary, there are two matters:
In the first matter, Mr. Couch was hired to prepare estate documents on behalf of a client. The client paid Mr. Couch a retainer. Mr. Couch made an appointment with the client to review the estate documents, but cancelled the appointment and assured the client that he would reschedule. After not hearing back to reschedule the appointment as indicated by Mr. Couch, the client tried to contact Mr. Couch by telephone and in person at Mr. Couch's office address, but was unable to contact Mr. Couch. The client did not receive documentation of any work performed by Mr. Couch. The trial court found that Mr. Couch misappropriated his client's funds.

In the second matter, Mr. Couch was hired to file for bankruptcy on behalf of two clients. After Mr. Couch filed the bankruptcy, the clients tried to contact Mr. Couch by telephone and in person at Mr. Couch's office address, but received no response to those contacts. The clients hired another attorney to resolve the case for them.

In both matters, the Office of Professional Conduct (OPC) served Mr. Couch with a Notice of Informal Complaint (NOIC) requiring his written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Couch did not timely respond in writing to either of the OPC's NOIC.

Aggravating circumstances:
Dishonest or selfish motive; pattern of misconduct; multiple offenses; obstruction of the disciplinary proceedings by intentionally failing to comply with rules of the disciplinary authority; and lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved.

Discipline Process Information Office Update

From January 2016 through September, Jeannine P. Timothy assisted sixty attorneys with their questions about the discipline process. Jeannine is able to provide helpful information to attorneys who find themselves involved with the Office of Professional Conduct (OPC). Feel free to contact Jeannine with all your questions about the discipline process.

DISCIPLINE PROCESS
INFORMATION OFFICE

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

Water: The Trickle Down Effect

Pertinent Considerations for the General Practitioner

by Emily E. Lewis

Lawyers are the facilitators of enterprise. On behalf of our clients, we perform the multitudes of tasks moving society forward. We draft contracts to define parties' obligations. We establish businesses to conduct the affairs of the citizenry. We craft estates to smooth the transition between generations. Quality representation requires lawyers to know not only substantive legal doctrine but also how to apply it in a real-world context.

Today in Utah, a present reality is the availability, cost, and management of our water resources. We have a fast-growing population, more prevalent periods of drought, an aggressive economic development plan, and a physically shifting landscape from rural to dense urban environments. Water is playing a role in high-profile matters that grab headlines but is also increasingly becoming a relevant factor in more routine aspects of life. As a prudent lawyer in Utah, you should be thinking about how water might affect your clients when you advise them.

The following are several concrete examples and questions on how thinking about water might benefit your practice.

Does your practice include trusts and estates? Parts of Utah are quickly transitioning from a rural to a semi-rural or urban composition. When estate planning, are you properly accounting for water assets like independent water rights and shares in mutual water companies? Often times these water assets can be more valuable than the land on which they are used. Additionally, water rights require continued beneficial use to remain valid, and shares in mutual water companies require annual assessments. Do your estate documents include instructions on maintaining the viability of water assets so heirs receive a usable inheritance in good standing? If a client inherits a water right, how can you help him or her put it to use? Water rights are issued for very specific amounts, limited purposes, and with geographic constraints. To meet your client's needs, you may need to go through an administrative process before the Utah State Engineer to change your water rights.

In your practice, do you regularly consult with businesses on risk management? When doing so, are you considering water as a business risk that needs to be accounted for? Aside from securing water resources for production needs, if applicable, water touches the bottom line of every company. Do your clients know who their water provider is, how that entity is structured, and what the price stability is for their services? For example, if your client receives water from a publicly regulated water utility, are the utility's rates adequate or is a future rate hike something your client should account for?

Are you involved in real estate transactions? When conveying land, water rights used on a parcel are automatically transferred with the land as an appurtenant right unless specifically reserved. Have you accounted for water rights on your property so all parties know what they have at the end of the transaction? Additionally, while the County Recorder is the Office of Record for deeds and land

EMILY E. LEWIS is a lawyer at the law firm of Clyde Snow & Sessions. She primarily practices water law and assists clients with water due diligence work, administrative actions before the Utah State Engineer, water rights litigation, and general consulting in water matters. Ms. Lewis is licensed in Utah and Wyoming.

documents, the Utah State Engineer's Office is the administrative body overseeing Utah's water rights. While title to a property may be current at the County Recorder's Office, the State Engineer has a separate and distinct process for updating ownership to water rights files. New property owners sometimes discover water rights records have not been updated for decades, incurring additional unexpected expenses to bring a water right into their names.

As can be seen, water considerations are trickling down into the bread and butter of the traditional law practice. The general practitioner need not become a water law expert; however, it is prudent to begin to gain familiarity with the subject and include water on the checklist of considerations when representing clients.

Above and beyond the practical considerations of representing your clients well, we as a legal community should be thinking about water because, frankly, it is exciting. Lawyers are drawn to the practice for variety of reasons and motives, but most can be traced to the seed of curiosity. At our distilled form we are, above all, problem solvers. Satisfaction in the field comes from applying a known set of principles to changing facts and fashioning the best solution possible. In the coming decades, few other fields of law are going to be as dynamic and important as water law. We literally cannot grow our cities, our people, or our planet without water. How we choose to use this resource in the face of changing demographics, increasing and competing demands, and decreasing supply is both a challenge and an opportunity.

As a community of problem solvers, addressing present and coming water needs is an invitation to use the law as a tool to be innovative in our thinking, our technology, our practices, and our priorities.

The Litigation Paralegal's Role at Trial

by Greg Wayment

It is often said that the highest form of legal advocacy occurs during a trial. Most civil trials represent the culmination of years of effort interviewing clients, gathering information, reviewing documents, applying the facts to the law, motion practice, deposing witnesses, mediations, and settlement discussions. Usually if a conflict survives to the trial date, all parties and attorneys have invested a substantial amount of time, effort, and money and only a judgment, whether it be favorable or not, will provide a remedy.

The juror system is a thing of beauty. People are randomly selected from the community and bring with them to the courthouse a variety of backgrounds, interests, and talents. Oftentimes, they are not overly enthusiastic about the idea of devoting weeks or even months to being the trier of facts in a civil dispute. It is an incredible thing to witness how they are able to sort through mountains of evidence, often very technical in nature, listen and take insightful notes, understand the nuances of the dispute, and ultimately deliver a more accurate and fairer verdict that can be achieved from any other method.

A well-trained and engaged paralegal can be a crucial member of a trial team. Your paralegal can assist with substantive issues and tasks as well as perform the legion of ministerial tasks that accompany a trial. By having your paralegal attend to these things, it frees up your ability to focus on last-minute briefs, opening and closing statements, witness preparation and outlines, and ultimately, trial strategy.

Once you know a case is going to trial, the first step is to identify the trial team and create a plan. Ideally, those who will be part of the trial team come together to discuss what needs to be accomplished and who is going to be responsible for each task. It is important that your paralegal be involved with the process from the beginning, as it will help the flow of the preparation.

Communication is crucial as every trial is unique in its requirements, and every attorney will have different expectations. Your trial paralegal can help by creating a master task list with specific deadlines for each task. It is important to delegate duties and match tasks with the appropriate skill sets and bandwidth. In a smaller firm, everyone might have specific tasks or areas for which they are responsible. One of the preparations for trial is subpoenaing witnesses that have been identified. Your paralegal can assist you by drafting and serving subpoenas and following up as trial gets closer.

Arguably the most important paralegal responsibility with a trial is before the trial begins and involves the exhibits. Trial exhibit lists are needed to keep track of which documents have been designated as potential trial exhibits and are usually exchanged with opposing counsel and sent to the judge on the day designated by the trial scheduling order, typically a few days or a week before trial. Your paralegal can do the substantive drafting of a trial exhibit list. When there are lots of exhibits, typing in descriptions, dates, and Bates numbers can be a burdensome task, but there is also a duty to create a consistent, professional, usable tool. A well put together trial exhibit list will make the process of arguing, agreeing, and admitting exhibits into evidence a cleaner process.

The documents or exhibits propel the narrative of the trial. More often than not, the deposition exhibits become the key documents in a case and parties may stipulate to marking those or designating those as the first set of trial exhibits. This can be helpful because in a larger matter where there are hundreds of deposition exhibits, this gives the paralegal an opportunity to begin well in advance. Your paralegal's role in preparing

GREG WAYMENT is a paralegal at Magleby Cataxinos & Greenwood, a litigation firm in Salt Lake City specializing in patent prosecution and complex business disputes. Greg serves on the board of directors of the Paralegal Division and is currently the division liaison to the Utah Bar Journal.

exhibits may include creating the exhibits, adding a trial exhibit number, collating them in an electronic format, loading them into a trial presentation software, and creating binders for you, the judge, witnesses, and opposing counsel. The exhibits are usually created in PDF format and your paralegal can be responsible for creating the discs for that exchange. More often than not, the exhibits are being exchanged via an FTP or internet-based file sharing program.

Another paralegal responsibility is marshaling the deposition testimony for use at trial. A time-honored tradition while examining a witness at trial is to have the witness ceremoniously unseal his or her own deposition transcript and read what he or she said in his or her deposition. Your paralegal can ensure the sealed original transcripts have all been received from the court reporter and should create an organized system where they can be accessed during trial. A paralegal can also ensure that electronic copies of the depositions can be accessed in the trial presentation software. If there have been videotaped depositions, those video files can be synched with the transcripts and your paralegal can help by creating clips of relevant portions as outlined in the deposition designations.

Another substantial task of trial preparation is opening and closing statements and witness outlines. When you begin practicing your outlines, your paralegal can offer to help by listening, taking notes, and offering insight. The other attorneys at your firm may be good at providing input and offering a legal perspective, but may have a hard time seeing it from a jurors' perspective. Are you reiterating important themes? Are you clear? Are you staying away from unnecessarily complex words or using confusing legal terminology? Your paralegal can help by providing insight and observations in a respectful way.

Paralegals can draft the jury instructions. Oftentimes, the judge may have a set of jury instructions he or she prefers so the instructions just need to be tailored to the specific case. Part of this task is assembling a courtesy and argument binder containing the jury instructions as well as the relevant case law, authorities, or other references. If the jury instructions reference treaties, digests, or other more obscure sources, these things can take some time to put together and your paralegal can ensure that this task has been completed well in advance of the deadline.

Even as courtrooms get more electronic, another long-standing tradition is to use oversize demonstratives. A simple and concise demonstrative can have a major impact. Your paralegal can help ensure that the demonstratives are prepared in a way to highlight key points and avoid too much information or data. Demonstratives are most effective when they are colorful, bright, and persuasive. Your paralegal should be the contact with the vendor preparing them and ensure they are done on time. If done in advance, you can practice using them when running through your outlines and your paralegal can give you insight into how it looks and possible impressions that the jurors may have. Your paralegal will have a plan for how the demonstratives are going to be transported to and from the courthouse.

Another area where a paralegal can have a maximum impact during the trial process is understanding and preparing the technology. Most attorneys go to court now with a laptop and electronic copies of everything. Your paralegal can ensure the trial presentation software will run flawlessly and that the attorney tasked with running it at trial understands how the exhibits have been organized and how to run the software. A paralegal can make sure that the speakers, video files, and sound clips will work seamlessly, which includes finding out what the wireless password is that week at the courthouse and making sure the laptops are wirelessly connected for internet access. You or co-counsel may need quick access to something on the firm's network or your own email files.

A key role for the paralegal at trial is overseeing all logistics. Your paralegal can help understand the judge in advance by meeting and getting to know the court clerk and attending a hearing or part of another trial held in front of the judge. Some judges may be very formal, and some may prefer a more relaxed atmosphere. Some may prefer technology be used whenever possible; some might be irritated with attorneys relying too much on screens. Your paralegal can meet the court clerk and get to know him or her and through him or her get to know the judge. With this relationship with the court clerk, your paralegal would be the best person on the team to be the front-line communication for logistics with the court.

If at all possible, your paralegal should work with the court clerk to go to the courthouse the day before trial begins to set up any carts, binders, or demonstratives and to make sure the technology will work. A paralegal should know which side you prefer to sit on. Whether you will need an oversize pad of paper, easel and markers, and be prepared to have those things on hand. Your paralegal can also create and update a matrix with contact information for clients, witnesses, and expert witnesses. When you get busy

with trial preparation, your paralegal can be the first point of contact for scheduling and keeping witnesses informed.

On the first day of trial, hopefully any outstanding motions or issues have been decided and the court can get right into jury selection. Your paralegal can be helpful by attending, taking notes, and paying attention to the potential jurors by observing behavior. There is a lot of information coming very fast during this process, and most cases are not big enough to warrant hiring jury experts. There is a lot of pressure to get this right. Again, sometimes the non-lawyer perspective can be invaluable, and your paralegal can help by providing insight and observations in a respectful way.

Once the trial gets underway, your paralegal's role may vary. Some attorneys may want their paralegals to run the technology in the courtroom. If so, they can also assist in keeping track of the introduction and admission of exhibits. As mentioned previously, your paralegal is the point person for keeping the witnesses informed of when they are needed to be at the courthouse. Sometimes your paralegal may be a buffer between you and your clients or your clients and the opposing party. Your paralegal can be helpful by accompanying clients or witnesses in the hallway. Oftentimes he or she has been in a major dispute with the other party so a face-to-face meeting in a hallway or bathroom with no buffer can be awkward or volatile.

Some attorneys have their paralegals' duties be outside of the courtroom with such tasks as transporting clients from the airport or a hotel, delivering lunches and drinks to courthouse, or at the end of each day of trial, typing up their notes. At times there may be issues with testimony that needs to be researched, additional exhibits to be added to the exhibit binders and exhibit lists, and copies made (both electronic and hard). Sometimes, you may want transcripts of the trial as it is occurring. Your paralegal can coordinate this process. If it is a long trial, you may task your paralegal with analyzing trial testimony for inconsistencies or false statements. All of these tasks can be managed by your paralegal.

Once a trial is completed your paralegal can be helpful by calling and interviewing jurors. The court will not usually provide any contact information for jurors, but both sides will have their names and there is no rule against contacting them after a trial has concluded. Sometimes the juror will not want to discuss the case and will not welcome the intrusion. More often than not though, they will have observed the paralegal coming and going during trial and will know who they are. And they may appreciate being asked their opinion and perception of the trial and the trial team. This insight can be valuable when preparing for the next trial. The sooner after the conclusion of trial the better, as memory will fade.

Ultimately the goal of your paralegal is to assist the trial team in every way possible. A valuable member of a winning trial team is an organized and efficient paralegal. Most trials are stressful and lots of extra time is spent at work. But it can also be a rewarding time, and with the help of your paralegal, hopefully you can obtain a positive outcome for your client.

CLE Calendar

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

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

November 3, 2016 | 12:00–2:00 pm — **2 hrs. CLE**

Litigation Section Pro Bono Training. Federal District Courthouse. Free to volunteers, $20 for all others. Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=17_9271.

November 4, 2016 | 8:45 am–2:50 pm — **6.5 hrs. CLE (pending approval)**

WIPO Roving Seminar West Coast. S.J. Quinney College of Law. $50. Register at: http://aipf.com/event-2344644.

November 7, 2016 | 12:00–3:00 pm — **3 hrs. CLE**

Current Issues in Indian Law. University of Utah S.J. Quinney College of Law, 383 University St. E., Salt Lake City, UT 84112. $30 for Indian Law Section Members, $45 all others. Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=17_9268.

November 8, 2016 | 12:00–1:00 pm — **1 hr. CLE**

Bankruptcy Law Lunch: A Lunch and Learn. Federal District Courthouse. $20 Bankruptcy Law Section members, $30 all others. Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=17_37_BNKRPT.

November 15, 2016 | 4:00–6:00 pm — **2 hrs. CLE**

Litigation 101 Series: Direct and Cross Examination. $25 for YLD members, $50 all others. Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=17_9080A.

November 17 & 18, 2016 | Two Day Event — **14 hrs. CLE, incl. 1 hr. Ethics and 1 hr. Prof./Civ.**

Fall Forum: Save the dates! Speakers include Erin Brokovich, Jan Schlichtmann, Prof. Daniel S. Medwed, Justice Christine M. Durham, Lt. Governor Spencer J. Cox, and Melinda Bowen. For more information, see the brochure in the center of this *Utah Bar Journal* or visit fallforum.utahbar.org.

December 15, 2016 | 8:30 am–4:15 pm — **6.5 hrs., including 1 hr. Ethics**

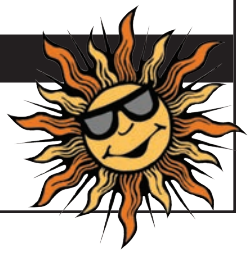
Mangrum & Benson on Utah Evidence. This is your chance to catch up on any new evidence rules and purchase the book at a substantially reduced price. Presenters and Authors: Prof. R. Collin Mangrum and Hon. Dee V. Benson.

March 9–11, 2017

2017 Spring Convention in St. George, Utah. Save these dates! Co-Chairs: Hon. Michael F. Leavitt and Melinda Bowen. Accommodation information can be found on pages 48 and 49 of this issue of the *Utah Bar Journal*. Watch for the agenda and registration information in the Jan/Feb 2017 issue of the *Journal*.

July 26–29, 2017

2017 Summer Convention in Sun Valley, Idaho. Save these dates and plan to attend! Co-Chairs: Hon. Robert J. Shelby and Amy Sorenson.



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Attorneys – Blackburn and Stoll, LC is looking for one or more attorneys with 7+ years of experience in corporate/business law, real estate, transactional work, or commercial litigation and an established client base to join our firm. We offer practitioners the opportunity to work in a collegial downtown firm with large modern offices. We also offer a uniquely objective compensation arrangement that is driven solely by personal performance. Interested attorneys with the requisite legal experience should send a resume and cover letter to resumes@blackburn-stoll.com.

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

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.

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

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

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