

Utah Bar[®] JOURNAL



Volume 32 No. 6
Nov/Dec 2019



EISENBERG & CUTT KENDELL OLSON

ATTORNEYS AT LAW

Eisenberg, Gilchrist & Cutt is now Eisenberg, Cutt, Kendell & Olson

New Name – Same Great Results

Don't just take our word for it...

"By teaming up with the lawyers at Eisenberg, Cutt, Kendell & Olson, we've been able to get results that I know are better than what I would have obtained for the clients on my own."

-Referring Attorney

Recent Recoveries Include:

- \$9+ M Product Liability Settlement
- \$4+ M Wrongful Death Settlement
- \$2 M Jury Verdict for a Back Injury
- \$2.5 M Jury Verdict for Wrongful Death
- \$1.7 M Dram Shop Settlement
- \$1.5 M Product Liability Settlement
- \$700K Brain Injury Settlement

eckolaw.com
801-366-9100

The Utah Bar Journal

Published by the Utah State Bar | 645 South 200 East, Salt Lake City, Utah 84111 | 801-531-9077 | www.utahbar.org

BAR JOURNAL EDITORIAL BOARD

Editor-in-Chief

Alisha Giles

Utah Law Developments Editor

LaShel Shaw

Editor at Large

Todd Zagorec

Managing Editor

Andrea Valenti Arthur

Judicial Advisor

Judge Gregory K. Orme

Young Lawyer Representative

Ryan Beckstrom

Articles Editors

Nicole G. Farrell

Lee Killian

Victoria Luman

Jacqueline Carlton

Copy Editors

Hal Armstrong

Paul Justensen

Paralegal Representative

Greg Wayment

Bar Staff Liaison

Christine Critchley

Departments Editor

Judge Catherine E. Roberts (Ret.)

Advertising/Design Manager

Laniece Roberts

MISSION & VISION OF THE BAR:

*The lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity.
We envision a just legal system that is understood, valued, and accessible to all.*

Cover Photo

Changing of the Guard by Utah State Bar member Adam C. Buck.

ADAM C. BUCK is an attorney at Dorsey & Whitney LLP in Salt Lake City, Utah. About his photo Adam said, "This photograph was the result of a surprise overnight trip to BSA Camp Tracy in Millcreek Canyon. As a group of scouts attempted to "Escape Camp Tracy" (a mystery escape room type event), I stood by the lake in the rain taking photographs. This photograph was one of those."



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.



Like the Utah Bar Journal on Facebook at www.facebook.com/UtahBarJournal.

Table of Contents

President's Message The Rule of Law by Herm Olsen	9
Views from the Bench Observations of a Relatively New Appellate Judge by The Honorable Ryan M. Harris	12
Article Water Rights General Adjudications: What's Going on and Where Are We Now? by Emily E. Lewis and Timothy R. Pack	20
Article The "Anchor Effect" on Price Negotiations by Richard A. Kaplan	24
Utah Law Developments The New Utah Uniform Directed Trust Act by Langdon T. Owen, Jr.	28
Utah Law Developments Appellate Highlights by Rodney R. Parker, Dani Cepernich, Robert Cummings, Nathanael Mitchell, Adam Pace, and Andrew Roth	34
Innovation in Law Practice Second Annual Innovation in Law Practice Committee Practice Management Symposium – Review by Christine Hashimoto	40
Article Judicial Review of Agency Decisions Lifting Stays of Contract Negotiations and Awards During Bid Protests by Christopher R. Hogle and Christopher D. Mack	42
Focus on Ethics & Civility Can We Define "Frivolous"? by Keith A. Call	48
State Bar News	51
Young Lawyers Division Veterans Legal Clinic – An Integrated Approach to Pro Bono Legal Consultation by Joseph E. Rupp	63
Paralegal Division Message from the Paralegal Division by Greg Wayment	66
CLE Calendar	68
Classified Ads	69

The *Utah Bar Journal* is published bimonthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar dues. Subscription price to others: \$30; single copies, \$5. For information on advertising rates and space reservations visit www.utahbarjournal.com or contact Laniece Roberts at utahbarjournal@gmail.com or 801-910-0085. For classified advertising rates and information please call Christine Critchley at 801-297-7022.

Statements or opinions expressed by contributors are those of the authors and are not necessarily those of the *Utah Bar Journal* or the Utah State Bar. Publication of advertisements is not to be considered an endorsement of the product or service advertised.

Copyright © 2019 by the Utah State Bar. All rights reserved.



Edward B. Havas • Colin P. King • Peter W. Summerill

Experienced & Professional

*Catastrophic Injury • Medical Malpractice • Product Liability • Aviation Disasters
Personal Injury • Wrongful Death • Oil, Gas, Mining and Construction Accidents*



DEWSNUP • KING • OLSEN • WOREL
HAVAS • MORTENSEN
ATTORNEYS AT LAW

dkowlaw.com • 801.533.0400 • 800.404.8520

Interested in writing an article or book review for the Utah Bar Journal?

The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea, a particular topic that interests you, or if you would like to review one of the books we have received for review in the *Bar Journal*, please contact us by calling 801-297-7022 or by e-mail at barjournal@utahbar.org.

GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

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

ARTICLE LENGTH

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

SUBMISSION FORMAT

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

CITATION FORMAT

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

NO FOOTNOTES

Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial endnotes to convey the author's intended message may be more suitable for another publication.

ARTICLE CONTENT

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

EDITING

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

AUTHORS

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

PUBLICATION

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

LETTER SUBMISSION GUIDELINES

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to BarJournal@UtahBar.org or delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor-in-Chief, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

PROTECT YOUR FIRM. HELP MORE PEOPLE. BE THE LAWYER YOU WANT TO BE.

Find out more about your endorsed carrier at
www.alpsnet.com/utah-state-bar

MALPRACTICE INSURANCE FOR THE

LAW FIRM

WORTH PROTECTING

Endorsed by more state bars
(including yours) than any other carrier.



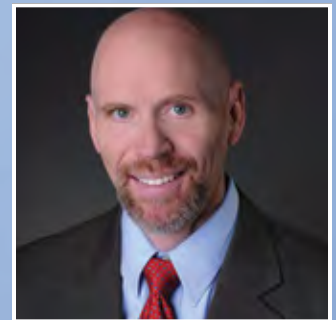
**THE NATION'S LARGEST DIRECT WRITER
OF LAWYERS' MALPRACTICE INSURANCE.**

(800) 367-2577 • www.alpsnet.com • learnmore@alpsnet.com

Medical Malpractice Co-Counsel You Can Count On



- Experienced
- Creative
- Knowledgeable
- Respected



A Recent Case

Cause: Ruptured appendix

Injury: Nerve damage

Litigation: 4 years

Costs: \$240,000

Experts: 10

RESULT: \$4,000,000

Give us a call to discuss
how we can help you
with your complex
medical malpractice case!



4790 Holladay Blvd. • Salt Lake City, UT 84117

801-424-9088 • www.ericnielson.com

The Rule of Law

by Herm Olsen

In the heart of central London lies Lincoln's Inn. The Inn occupies most of the eleven-acre rectangle formed by High Holborn on the north, the Royal Courts of Justice on the south, Chancery Lane on the east, and Lincoln's Inn Fields on the west. The Inn is the oldest of England's four Inns of Court, which control all barristers and solicitors in the realm.



Lincoln's Inn, London.

I visited Lincoln's Inn in 1996 – and was awed at the ancient tradition to the rule of law that the Inns work so diligently to protect. Sir Thomas More attended Lincoln's Inn in 1502 – but lost his head thirty-three years later in a failure of the English rule of law.

Shift scenes now to a ten-acre office complex in the heart of Washington D.C. The Foggy Bottom neighborhood is home to the Watergate building that five burglars entered in the wee hours of June 17, 1972. I was an intern to a congressman and was working on Capitol Hill the morning of the break-in. I turned to a friend and pronounced: "You watch – this will lead right to the White House!" Indeed, these men were hired by C.R.E.E.P. [Committee to Re-elect the President], and the

cover-up that followed led to the first and only resignation of a president in U.S. history.

Nixon's drama was a severe test as to whether the chief executive, the top law enforcement officer in the land, was above the rule of law. It appears we are now embarking on another such query



Watergate Hotel, Washington D.C.

even as you read this. Regardless of your position on the current drama, or how it plays out, it is essential that we confirm that in our rule of American law, we maintain and insist that no one – not even the sovereign government or its leader – is above the rule of law.

Most of us vaguely remember William Seward. As Secretary of State under Abraham Lincoln, he engineered the purchase of Alaska from Russia – then derisively called "Seward's Folly." But before he was secretary of state, before he was governor of New York and upset loser on the third ballot to Lincoln at the 1860 Republican



convention – before all that, he was an attorney.

In March of 1846, John VanNest, a respected local farmer in Auburn, N.Y., was viciously attacked and stabbed to death, along with his pregnant wife, his sleeping child, and his elderly mother. The assailant was promptly apprehended, readily confessed, and swore he'd kill others if he could. William Freeman had a few other problems besides his murder charges: he was black, deaf, and brain damaged.

Turns out Freeman had been a hardworking, bright young man when he was arrested for stealing a horse. He was tried and convicted upon the testimony of another young black man (who afterwards turned out to be the actual thief). Freeman spent five years in prison where he was flogged and beaten repeatedly for protesting his innocence. During one attack, his head was split open by a board – which left him forever deaf. And the repeated beatings also left him severely brain damaged.

When Freeman was arraigned, there was no public defender system, and he was unable to hear or understand the proceedings. The judge inquired of the bar: “Will anyone defend this man?” A prolonged silence ensued – until finally William Seward arose and said: “May it please the Court, I shall remain counsel for this prisoner until his death.”

It was a short trial. But when Seward arose in 1846 to address the angry, all-white jury in closing arguments, he said:

The color of the prisoner's skin...is not impressed upon the spiritual, immortal mind which works beneath. In spite of human pride, he is still your brother and mine, in form and color accepted and approved by his Father, and yours, and mine; and bears equally with us the proudest inheritance of our race – the image of our Maker.

Hold him, then, to be a man...and make for him all the allowance, and deal with him with all the tenderness which, under like circumstances, you would expect for yourselves.

Seward knew there was no chance for an acquittal¹ – but he was determined to pronounce truth to the jury, whether they would hear it or not. He argued that Freeman's life should be in God's hands because of his mental state, and the jury should recognize that:

I am not [just] the prisoner's lawyer. I am the lawyer for society, for mankind; I am shocked, beyond the power of expression, at the scene I have witnessed here, of trying a maniac as a malefactor.

I remember that it is the harvest moon, and that every hour is precious while you are detained from your yellow fields. But if you shall...in the end have discharged your duties in the fear of God and in the love of truth, you will have laid up a store of blessed recollection for all your future days, imperishable and inexhaustible.

Don't you LOVE the courage of the bar?! Each one of us at one point or another during our career has an opportunity to step up and pronounce to the judge: “May it please the Court, I shall remain counselor for the prisoner until his death.”

That is the rule of law. Protect it; guard it; reverence it. For once lost, it may prove impossible to recapture.

1. The jury promptly returned a verdict of guilty, and the next morning the judge sentenced Freeman to be hanged, but Freeman died in his cell in chains before the sentence could be enforced.



FESTIVE SAVINGS JUST FOR YOU!

Holiday shopping doesn't have to be stressful. With offers on computers, gourmet treats, and more, your Group Benefits program makes it a breeze.

Visit utahbar.savings.beneplace.com to get started.








Arizona Referral & Co-Counsel Relationships

ONE OF ARIZONA'S LARGEST CONSUMER LAW FIRMS



Kurt Maahs
Attorney
Phillips Law Group, P.C.
kurtm@phillipslaw.com



Jeffrey Phillips
Attorney
Phillips Law Group, P.C.
jeffrey@phillipslaw.com
Text Jeffrey with any
Arizona Law questions.
(619) 252-4829



Timothy Tonkin
Attorney
Phillips Law Group, P.C.
timt@phillipslaw.com



"For a partner in Arizona, I recommend you call Jeffrey"
Brian Panish, Panish, Shea & Boyle, LLP Los Angeles



Since **1993**. Over **145,000** Clients Served.
Phoenix, Tucson and all of Arizona.
Generous Referral Fees Paid.

(800) 706-3000

3101 N Central Avenue, Suite 1500, Phoenix, AZ 85012

www.phillipslaw.com



Observations of a Relatively New Appellate Judge

by The Honorable Ryan M. Harris

It has been a little more than two years now since Judge Hagen and I joined the Utah Court of Appeals. Prior to that, through six years as a trial judge and thirteen years in private practice, I had enjoyed quite a bit of involvement in the appellate process, if only as something of an outsider: I had written briefs filed before the Utah appellate courts, I had argued cases in front of them, and my rulings as a trial judge had been affirmed and reversed and sometimes both at once. But despite this experience, the appellate process always remained somewhat mysterious, and there were things I wondered about. What do appellate judges do all day, given that they spend relatively little time in court? Why do appeals always seem to take so long? Is there really any rhyme or reason to the granting of permission to file interlocutory appeals? What is the jurisdictional relationship between Utah's two appellate courts? Why do the appellate courts have staff attorneys working for them, in addition to law clerks? And is appellate judging really a better job than trial judging?

Even after two years on the (very quiet) fifth floor of the Matheson courthouse, I do not profess to have definitive answers to all of these questions. But I know more about these subjects than I did two years ago, and I pass along my thoughts to bench and Bar, for whatever usefulness they might provide, with one caveat: the answers to these questions differ, at least to some extent, depending on whether one is a member of the Utah Supreme Court or the Utah Court of Appeals, and my perspective, of course, comes from the court of appeals.

What Do Appellate Judges Do All Day?

From my time as a practitioner and as a trial judge, I am aware that there exists a perception, at least in some circles, that appellate judges don't work as hard as lawyers or trial judges. I now know that this perception is categorically false. I think the inaccurate picture stems, at least in part, from the fact that most people just don't know what appellate judges do all day. It is easy to understand what trial judges do all day: they are scheduled to be in court on most days for most of the day, and anyone can walk into a trial judge's courtroom and see firsthand what kind of work that judge is doing.

The same cannot be said for appellate judges. On the court of appeals, each judge sits for oral argument no more than four times each month (usually only three), and each scheduled session of oral argument usually lasts no more than a couple of hours. In total, then, each of us spends no more than about six hours each month in court. The public has every opportunity to witness our work during those six hours – not only are our oral arguments almost always open to the public, but they are also livestreamed online so that anyone can listen in from the comfort of his or her home or office. But the vast majority of our work, at least until our opinions are published, takes place out of the public eye, and I suppose there exists some level of mystery about how we spend the rest of our time.

The first thing you need to know about an appellate judge's workload is that appellate judges read – a lot. In a typical month, each judge on the court of appeals is assigned to be a part of twelve cases, four of which that judge will be (at least initially) assigned to author. So, for starters, that's twelve sets of appellate briefs that need to be read, digested, and combed through each month. I do not ask my clerks to prepare bench memos or summaries of the briefs, and as far as I am aware neither do my colleagues; we read them ourselves, usually at least twice, cover to cover, prior to oral argument. In addition, we pull and read the primary reported cases that control each appeal; in some cases this is a fairly straightforward exercise, but in others this requires us to read and digest quite a number of cases. I can state with confidence that each one of the judges on the court of appeals puts in substantial preparation time on each case before each oral argument and comes prepared to engage counsel with questions about the case.

JUDGE RYAN M. HARRIS served as a trial judge in the Third District Court for nearly six years before being appointed to the Utah Court of Appeals by Governor Gary R. Herbert in 2017.



After argument, we meet together for an hour or two to discuss the cases on the day's docket. These conferences are, for me, the best part of my job: I get to discuss and debate cutting-edge legal issues with two other really smart legal minds, and I am constantly surprised and invigorated by how much sharper legal thinking can get when multiple people meaningfully engage together in it. There is a reason American appellate courts are multi-judge courts, and you can be sure each appellate decision you read has been made better by having multiple judges review and examine the issues presented.

After conference, it is back to chambers for discussions with our clerks about how the conference came out, what direction the initial draft of the opinions are going to take, and so forth. In my chambers, one of my clerks almost always takes first crack at drafting the opinion, but (as my clerks are weary of hearing) I spend a lot of time editing and re-writing those drafts before circulation not only to make sure they are legally sound but also to make sure they flow well and are written in something resembling my voice. In a typical case, we will go through four or five drafts prior to circulation, and in some cases a lot more than that. As you can imagine, doing a substantive redline edit of a draft opinion can take a long time, more than a full day in some cases, depending on its length and condition.

In addition to editing and re-drafting opinions that our own chambers is working on (which, again, is typically four majority opinions per month), each of us spends a lot of time reviewing and commenting on draft opinions in cases on which we are members of the panel but not assigned to write the majority opinion. In a typical month, we are involved in eight so-called "panel" cases, so this means we review and edit an average of about eight such draft opinions each month. Some of these draft opinions are short, involve fairly clear issues, and take only an hour or two to review. But others are lengthy multi-part opinions on trickier issues, and reviewing and commenting on some of these opinions can take a day or more. I cannot stress enough how important a part of the process this is. I value the input of my colleagues very highly, and they almost always find things in my draft opinions that deserve additional analysis or re-drafting. I like to think my input on their draft opinions has the same effect: it makes our written work much better and more thorough than if we were simply composing the opinions on our own.

Sometimes, issues we raise with each other during our review of circulated draft opinions require additional discussion with the author or with the entire panel. Such post-argument consultation sometimes requires just a relatively brief chat, but on other occasions it evolves into a more lengthy discussion or even a

full-blown re-conference. Our court is extremely collegial and open to such discussions, and we are usually able to resolve the issues through amendments, deletions, or other edits. In some instances, however, the differences we have with our colleagues over a particular issue cannot be edited away, and in most of those instances, we then need to spend time drafting a separate opinion concurring in or dissenting from the majority opinion. Most of us end up issuing a published separate opinion a handful of times each year, and there are a number of other separate opinions that end up being drafted but ultimately never published. Sometimes, a draft separate opinion will persuade a colleague or at least sharpen the majority's analysis enough to obviate the need for the separate opinion.

The court of appeals also has a final review editing process that is fairly extensive. Before each opinion issues, it gets reviewed and edited not only by the author judge and his or her clerks, as well as the other judges on the panel, but also by every clerk working for any of the judges on the court. In addition, judges who are not on the panel may take a look at the opinions that are about to issue, mostly for consistency reasons – for instance, in case that judge is working on another case with similar issues that is itself about to be published, or to call to the panel's attention authority that might have been overlooked.

CRAIG COBURN

Mediation–Arbitration Services

KNOWLEDGE

Construction
Commercial
Complex Civil
Public Policy

EXPERIENCE

Litigator since 1980
ADR Neutral since 1985

COMMON SENSE

Cuts to the Chase
Resolves Disputes



Richards Brandt

801.531.2000

www.rbm.com

Lenora-Spencer@rbmn.com

Utah ADR Services

801.865.7622

www.utahadrservices.com

mbstrassberg@msn.com

In addition to the opinions we are working on each month, we also spend a fair amount of time working on ancillary matters, including petitions for rehearing, petitions for interlocutory appeal, and motions of all kinds (motions to continue, motions for rule 23B remand, etc.). In many instances, this part of our work involves us reviewing the recommendations of our four able staff attorneys, who (as discussed below) help us draft per curiam opinions and unpublished orders in certain cases, and make recommendations for us with regard to petitions and motions. All of this review – of petitions, motions, and staff attorney work – is handled by rotating panels of judges on a monthly basis, and in some months can constitute a lot of work. Some of these petitions and motions are quite complex and require significant time to dig into and digest.

Also, appellate work is by nature a lot more portable than trial court work, a substantial portion of which must by definition occur in the courtroom. We can always take briefs home (or on long car rides or airplane trips) to read. We can compose and edit draft opinions from home offices or laptop computers. Our electronic workspace is web-based; I have logged on and voted on motions or proposed orders while on vacation, even abroad. All of this portability has its benefits, certainly, but the downside is that, if we are not careful, our work can become less of a 9-to-5 job and more of a round-the-clock thing. I and many of my colleagues often spend time in the evenings or on weekends, working from home or elsewhere.

And unlike at the district court, there is no calendar-based stop-loss if we start getting behind. At the trial court level, the calendar itself creates a ceiling on how busy a trial judge can be: if it gets crazy, the judge just starts setting hearings and trials further and further out on the calendar, because there are only so many days in a month. At the appellate level, however, this is not a thing: if an appellate judge gets behind, the cases just keep on coming, month after month, year after year, at the same rate. Getting behind is extremely inefficient; there is nothing less efficient than taking half a day to get the details of a case back into my head, after those details – which were right there in my head a few months ago – have faded due to the passage of time. After two years on the job, I have already discovered that the key to staying sane is to keep on top of one's caseload, and to get opinions drafted and out the door with reasonable dispatch. (This also has the added benefit of providing quicker resolution to parties' disputes, which is valuable in and of itself.)

None of this is to say that the caseload at the appellate court level is unmanageable: it isn't. The court of appeals is a wonderful place to work, a place at which a work-life balance is certainly achievable.

But any notion that appellate judging is some sort of part- or three-quarter-time job needs to be put to rest once and for all.

Why Do Appeals Take So Long?

At the trial court level, even the burliest motion for summary judgment in the most complex case can usually be briefed, argued, and decided in about six months. According to popular belief, appeals seem to take a lot longer than that. Is that even true? And if it is, what causes appeals to take so long?

Along these lines, the first point that I think bears making is that appeals, on average, might not take as long as you think. According to data from the last three years, the average appeal pending in the Utah Court of Appeals takes less than nine months to completely adjudicate, measured from the filing of the notice of appeal to the issuance of the decision. Granted, these figures include all appeals, including appeals that are resolved by summary disposition or other unpublished orders. But the public should not labor under the illusion that all appeals take a long time; many are resolved quickly and efficiently.

But wait, you say: what about appeals that are not summarily decided? Don't those appeals take a long time? Unfortunately, there is no way to answer that question other than affirmatively. It causes me some discomfort to report to you that, for each of the last three years, court of appeals cases that proceeded to full briefing and written opinion took about two years to resolve, on average, when measured from the filing of the notice of appeal to the issuance of the opinion. I am of the view that this is too long, and I want to take the opportunity to explain why appeals have been taking this long, and to note that we on the court of appeals are cognizant of these issues and are making every effort to reasonably shorten the time frames.

Appeals are triggered by the filing of a notice of appeal, and the first phase of any appeal runs from the time the notice is filed to the time a briefing schedule is issued. On average, this phase is currently taking about five months, and a lot of important things happen during this time. Attorneys must file a docketing statement, setting forth basic information about the appeal, and our team of staff attorneys (whose duties are discussed in more detail below) take the information submitted and screen the cases for jurisdictional infirmities and other issues. Also, the appellant must order and pay for transcripts of the lower court proceedings from a court transcriber; once payment arrangements are made, the transcriber has thirty days to file the transcripts. Once the transcripts are filed, the clerk of the lower court compiles the record of proceedings and submits it to the appellate court. After the record is certified as complete, and the case has passed through our internal staff

attorney screening process, the case can then be set for briefing.

The next phase of any appeal is the briefing phase, as measured from the issuance of the briefing schedule to the filing of the appellee's brief, at which point we consider the appeal "at issue" and are then free to place it on our calendar for oral argument or for submission without oral argument. (The filing of the reply brief is not used as a trigger.) On average, across all case types combined, this phase is currently taking approximately six months to complete. Ideally, under the best case scenario, this phase should only take about two months: forty days following the briefing schedule for the blue brief to be filed, and thirty days following the filing of the blue brief for the red brief to be filed. But the rules allow one free thirty-day extension for each side, and these free extensions are often needed and taken. In addition, the rules contemplate the possibility of additional extensions, by order of the court, and a practice has sprung up in certain sectors of the bar – most notably, the criminal appellate bar, where workloads tend to be especially high – of seeking numerous additional extensions of time to file briefs. We are certainly always willing to accommodate truly exceptional situations, but the practice of seeking extensions has in some quarters unfortunately become all too routine. Some months ago, our court took steps to try to

rein in the practice and to try to limit extra extensions to truly exceptional situations, but we were met with gnashing of teeth from all stakeholders, and we therefore temporarily abandoned the effort. The appellate rules committee is currently considering whether to make changes to Utah Rule of Appellate Procedure (URAP) 26's brief-filing timing requirements, and specifically to the provisions regarding extensions, and if you have input for the committee I encourage you to provide it.

In any event, after an average of about eleven months following the filing of the notice of appeal, the blue brief and the red brief have finally been filed and, while the reply brief (if any) is in process, we then "calendar" the case. For most cases, that means placing the case on our oral argument calendar; for other cases, that means placing it on a calendar for submission without oral argument. While our staff is certainly able to perform the mechanical act of calendaring a case within a day or two, often this task must await calendar availability. Depending upon current caseload, our next few months' calendars may already be full, and a case may need to wait a couple of months before being calendared. Given that we typically set our oral argument/submission calendars about four months in advance, it is often about another six months following submission of the red brief before the case

CONYERS & NIX

CRIMINAL DEFENSE ATTORNEYS

Kate Conyers



Jesse Nix

*We welcome your referrals and
the opportunity to work with you.*

ALL FELONIES & MISDEMEANORS | DISTRICT COURTS & JUSTICE COURTS

KATE@CONYERSNIX.COM | WWW.CONYERSNIX.COM | JESSE@CONYERSNIX.COM
405 SOUTH MAIN STREET, SUITE 930, SALT LAKE CITY, UTAH 84111 | 801-839-4649

comes on for oral argument. Occasionally, cases may be calendared more quickly, when a previously-allocated calendar spot opens up due to a continuance, settlement, or bankruptcy stay. There is room for some improvement in this area, but any improvement will always be somewhat capped: we will always want to schedule oral argument about four months out in order to minimize attorney scheduling conflicts, and we are reluctant to schedule oral argument before the filing of the red brief.

Thus, after something approaching a year and a half, on average, the case finally comes on for oral argument. After that point, the pace of disposition becomes entirely the responsibility of the judges. On average, depending on the time frame you look at and how you crunch the numbers, over the last few years it has taken us somewhere between four to six months to issue final written opinions after oral argument. Notably, in the last fiscal year we improved on those numbers significantly, reducing our average time to issuance to under three months. I do not think this improvement is an accident: I can promise you that, on our court, we are sensitive to these issues and doing our best to get better in this area without sacrificing the deliberative quality of our work.

Appeals take a long time for many reasons: there is a lot of legwork involved on the front end, the briefing is inherently time-consuming, and the process is to some extent designed to be contemplative. But there is certainly truth to the maxim that, at least in some cases, justice delayed is justice denied, and my colleagues and I are committed to continually looking for ways to improve in this area so that we can continue to provide both just and speedy resolution of the appeals that come before us.

How Do Appellate Courts Decide Whether to Grant Permission for Interlocutory Appeals?

When I was in private practice, clients would sometimes ask me whether they could appeal from a non-final order, and my answer was always something similar to a shoulder shrug: “Who knows?” Utah’s rule (URAP 5) governing interlocutory appeals is somewhat unique, and elegant in its own way, but it leaves a lot of discretion in the hands of the appellate courts. As a practitioner, I filed quite a number of petitions for permission to appeal interlocutory orders, and as a trial judge I watched litigants attempt to appeal many of my interlocutory orders, and for the life of me I could never discern any rhyme or reason to the process. Petitions would be granted that I had thought had no chance, and others would be denied that I thought presented the perfect candidates for interlocutory appeal. So how does it really work? What are appellate courts really looking for when deciding to grant permission to appeal an interlocutory order?

Any answer to this question must begin with the text of URAP 5, which allows us to grant permission to appeal from a non-final order only if it appears either (a) “that the order involves substantial rights and may materially affect the final decision” or (b) “that a determination of the correctness of the order before final judgment will better serve the administration of justice.” *See* Utah R. App. P. 5(g). Some of this language is fairly opaque, though, and may not shed much light on what appellate judges are really looking for when considering petitions for permission to appeal an interlocutory order. From what I have observed over the last couple years, in most cases we will be looking for two main things: (1) a reason why it would be efficient, and result in some sort of savings in time, money, or both, to resolve the issue at the appellate level prior to entry of a final judgment, and (2) the merits of the issue. Both of these things are important, and one easy way to see your petition denied is to focus on one of these things to the exclusion of the other.

With regard to the first issue, a successful petitioner will end up persuading us that there is a really good efficiency-based reason to appeal this particular issue now, rather than at the end of the case. Conversely, if your opponent can mount a good argument that you can appeal just as effectively at the conclusion of the case, you are not likely to win permission to appeal early, even if your issue is a meritorious one. But if you can show, for instance, that the issue will become mooted if not appealed now, or that the case is in an extremely early stage and the issue presented is dispositive, then you have some chance of winning the battle on the first issue.

But don’t ignore the merits. We do take a big-picture look at the merits when reviewing these petitions, and if your opponent makes a good argument that you are almost certain to lose on the issue you want to appeal, we are less likely to grant permission to appeal early. Think about it: if your issue is a loser, all an early appeal will do is delay the case for, on average, about two years just to end up right back in the same place. Our review of the merits at this stage is not exacting; after all, we are deciding whether to allow full briefing of the merits on an issue, so our review is by definition not as comprehensive as it will be later, if full briefing is allowed. But in order to win permission to appeal early, you have to persuade us that you have some likelihood of succeeding on the merits of the issue you want to appeal.

At the court of appeals, review of rule 5 petitions is handled by a rotating panel of judges, and not every judge looks at these issues in exactly the same way. Some of us are more sympathetic toward interlocutory appeals, and some of us are quite demanding when it comes to these petitions. But no matter the panel you draw, you would do well to make a quality showing on each of the two issues I discuss.

Differences Between the Jurisdiction of the Supreme Court and the Court of Appeals, and the Concepts of Certification and Recall

As a practitioner, and even as a trial judge, I didn't pay all that much attention to the different jurisdictional mandates of our two state appellate courts. I practiced on the civil side, so I knew our cases went first to the supreme court, which typically transferred (or "poured over," in local parlance) all of our cases to the court of appeals unless we could convince them to retain one once in a while. And I had some vague notion that other types of cases – say, juvenile cases or attorney discipline cases – went straight to one court or the other, but because I didn't practice much in those areas, I didn't worry too much about it. And as a trial judge, it really doesn't matter which court reverses you: it smarts either way.

But, as it turns out, the jurisdictional differences are fairly straightforward and easy to understand. The court of appeals' jurisdiction is set forth in Utah Code section 78A-4-103, and by statute we have original appellate jurisdiction over appeals (a) from juvenile court, (b) in non-first-degree criminal cases, (c) in domestic/family law cases, and (d) from most state administrative agencies. In addition, we have non-original appellate jurisdiction over appeals poured over to us from the supreme court. All cases within our original jurisdiction do not go first to the supreme court and are not subject to pour-over; they start with us, and stay with us, and reach the supreme court only if a petition for certiorari is granted after our decision, or if we certify the case to the supreme court for review.

The supreme court's jurisdiction is set forth in section 78A-3-102, and by statute it has appellate jurisdiction over (a) certiorari-based appeals from decisions of the court of appeals, (b) attorney discipline cases, (c) judicial discipline cases, (d) appeals from five specifically-enumerated administrative agencies, (e) appeal of any decision in which a statute is held unconstitutional on its face, (f) appeals in first-degree criminal cases, and (g) any other appeal "over which the Court of Appeals does not have original appellate jurisdiction," including all civil cases not otherwise mentioned. The supreme court may, however, pour over to the court of appeals most of the cases within its original appellate jurisdiction – the cases it can't pour over are capital cases, election cases, and a few other specific cases. As I understand it, the supreme court pours over the vast majority of cases that it is statutorily allowed to pour over.

The court of appeals has two obscure tools at its disposal by which it can move cases from its docket to the supreme court's. First, if a case is within our original jurisdiction, we have statutory authorization to "certify" that case to the supreme court, and – in perhaps the only example, in statute, rule, policy, or custom, of

the court of appeals being able to command the supreme court to do something and the supreme court having to obey – they have to accept our certification. In order to accomplish certification, we need four judges of the court of appeals to agree that such a measure is appropriate. *See* Utah Code Ann. § 78A-4-103(3). Second, if a case has originated with the supreme court (is within that court's original appellate jurisdiction) and has been poured over to us, we can ask the supreme court to recall the case; such requests usually take the form of an informal memorandum from the presiding judge of the court of appeals to the chief justice of the supreme court. In recall situations, however, the supreme court does not have to accede to our requests, although we try to pick our spots and request recall only in situations in which the supreme court is likely to grant our requests. In part because of this, we have a fairly solid track record of persuading the supreme court to recall cases.

There is nothing in the rules or statutes that prevents parties from asking us to certify (or even ask for recall of) an appeal; indeed, URAP 43(b)(1) specifically authorizes parties to file a suggestion for certification. But parties hardly ever do. (I can think of only one occasion on which I have seen a party ask us to certify a case.) Having to go through two levels of appellate litigation can be expensive and extremely time-consuming. If

Mediator-Arbitrator

KENT B. SCOTT

- Commercial and Construction attorney with 45 years of experience.
- Fellow - American Bar Foundation
- 25 years of experience as an ADR Neutral
- Tier 1 ranking of U.S. News Best Lawyers/ Best Law Firms



SCHEDULE THROUGH UTAH ADR SERVICES
801-943-3730 | mbstrassberg@msn.com



BABCOCK SCOTT & BABCOCK, P.C.
ATTORNEYS & COUNSELORS AT LAW, FIVE BUILD SOLUTIONS

370 East South Temple, 4th Floor
Salt Lake City, UT 84111
801-531-7000
www.babcockscott.com

you think your case deserves first-level appellate treatment by the supreme court, you are not without options even if your case falls within our appellate jurisdiction. From my perspective, if a case raises weighty enough issues that the supreme court is likely to grant certiorari no matter what decision we reach, it will often be more efficient to get that case in front of the supreme court sooner rather than later, so that the litigants, bench, and Bar can more quickly get the final answer to the relevant legal question.

What Is the Role of Court of Appeals Staff Attorneys?

Most people know that appellate court judges are assisted by law clerks, who help the judges research legal issues and draft written opinions. I perceive it to be less widely known, however, that the court of appeals is also fortunate enough to have the additional assistance of four very capable staff attorneys. These lawyers work for the whole court, and not for any particular judge. The four positions are thought of as career positions; indeed, all four of our staff attorneys have been on the job for at least several years, and one of our staff attorneys joined the court in 1987, just a few weeks after Judge Orme did. (Between the two of them, we have the “institutional knowledge” front covered.)

Their primary role is to serve as a sort of supervised gatekeeper, generally reviewing each case as it develops, and making a number of recommendations about each case. Among other things, our staff attorneys screen each case (including the docketing statement, the lower court order appealed from, and (eventually) the briefs themselves, if the case proceeds that far) for jurisdictional infirmities and for potential summary disposition. If a staff attorney believes the case is appropriate for summary disposition, either for jurisdictional reasons or because no substantial question is presented, the attorney will draft an order seeking the parties’ input and, if their view doesn’t change after reviewing that input, will draft a recommended order of summary disposition or per curiam opinion disposing of the case.

Our staff attorneys also review all petitions and substantive motions, including suggestions of mootness, motions for rule 23B remand, motions to supplement the record, petitions for extraordinary writ, and petitions for permission to file an interlocutory appeal. With regard to most such motions and petitions, the staff attorneys will make an initial recommendation to the court regarding how they believe such motions and petitions should be resolved.

It is important to note that, while staff attorneys provide invaluable assistance in helping us sort through the immense number of petitions, motions, and briefs that are filed with our court, their word is never final. The staff attorneys’ recommendations are always reviewed by a rotating panel of court of appeals judges.

While we often find that the staff attorneys’ analysis is spot-on, our review of staff attorney work is thorough and comprehensive, and there are of course occasions where we elect not to follow the recommendations of our staff attorneys.

In short, our staff attorneys – who, by the way, are four of the smartest, most helpful, and most pleasant people you could ever meet – help us sort through, categorize, and organize the hundreds of appeals, motions, and petitions we receive every year. Without them, we would soon be hopelessly behind, and would simply not be able to decide the issues before us in anything resembling a timely fashion.

Is It Better to be a Trial Court Judge or an Appellate Court Judge?

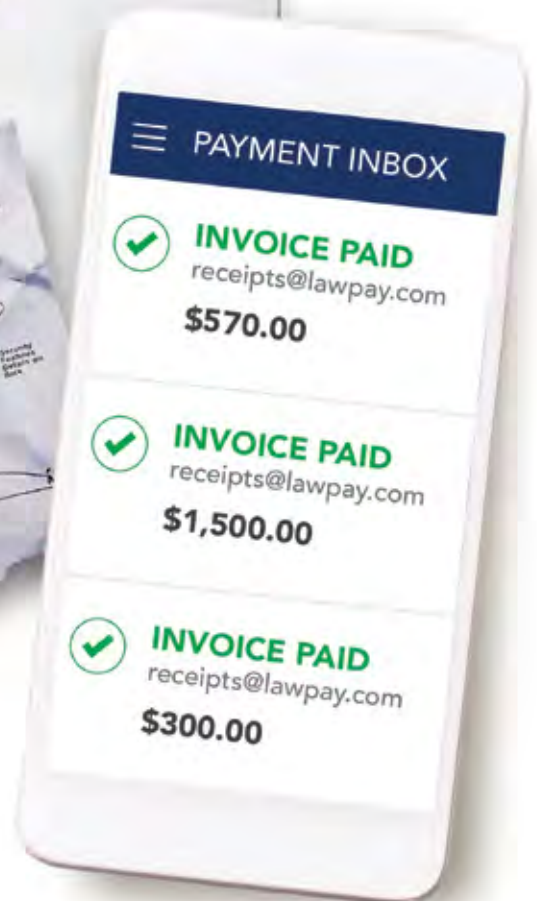
The answer to this question is in the eye of the beholder. There will be some people that are much better suited to appellate work than to trial work, and vice versa. Appellate work is not for everyone, and certainly has its downsides. It is really quiet on the fifth floor; my office phone hardly ever rings, and there are times when I can go several hours without talking to anyone. And the reading, writing, and editing can be a little much sometimes; some of my former colleagues on the trial bench – one of whom colloquially refers to the fifth floor as “The Morgue” – listen to me describe life on the appellate court and tell me that they would rather subject themselves to various forms of torture than have to work in a super quiet office in which you are required, among other things, to author the equivalent of four college term papers every month, while heavily scrutinizing eight more. They exaggerate, but I readily admit that I sometimes miss the hustle and bustle of the trial court, including the constant daily interactions with attorneys, litigants, witnesses, jurors, and bailiffs.

But this job is extremely satisfying in many meaningful ways and on balance a great fit for me. Lisa Collins is a remarkable clerk of court who, from an organizational standpoint, has this court running like a well-oiled machine, freeing us up to worry mostly about our cases and only occasionally about court organizational details. And my colleagues on the court of appeals are likewise amazing: they are really smart, extremely hard-working, and just very pleasant people to work with. The best part of appellate work is getting to engage with my colleagues on all of the various legal questions we face together. I also find it satisfying to have a voice, albeit a small one, in the development of the law in Utah. The questions we face are interesting and multi-faceted, and it is a privilege to get to try to answer them, shoulder to shoulder with some of the brightest legal minds in Utah.

Kiss paper checks goodbye

You deserve a payment solution that doesn't leave you waiting and wondering.

xoxo LawPay



Paper checks are notoriously unreliable. They get lost in the mail, they get tossed in the laundry, and they carry a lot of sensitive information around with them wherever they go.

LawPay changes all of that. Give your clients the flexibility to pay you from anywhere, anytime. Most importantly, we ensure you stay in compliance with ABA and IOLTA guidelines.

Proud Member Benefit Provider

UTAH STATE BAR®

It's easy to get started

866-261-3937 or visit lawpay.com/utahbar

LAWPAY®

AN AFFINIPAY SOLUTION

Water Rights General Adjudications: What's Going on and Where Are We Now?

by Emily E. Lewis and Timothy R. Pack

The quality of Utah's future is closely linked to our ability to understand and manage our water resources. As one of the driest states in the nation, water is vital to the economic growth, quality of life, and environmental stewardship of Utah. The Utah Supreme Court has held that "a drop of water is a drop of gold." *Carbon Canal Co. v. Sanpete Water Users Ass'n*, 425 P.2d 405, 407 (Utah 1967). Consequently, knowing where we get our water, how much water is available, and how we put it to use is critical information for state water management and growth. The Water Rights General Adjudication (General Adjudication) process is intended to provide a framework for evaluating and decreeing water rights so that the public has a contemporary record of valid water rights.

Local practitioners across the state should be paying attention as General Adjudication activity has increased significantly in the last several years. Your clients' valuable interests may be affected. This article is intended to provide a basic overview of the importance of water rights and the basics of the General Adjudication process, provide a status update on the Utah Lake Jordan River General Adjudication (ULJR), and identify key upcoming events practitioners should be watching for.

Key Water Law Concepts & General Adjudication Basics

Water in Utah is the property of the public. Water rights authorize and define how private individuals are to put the public's water to beneficial use. Water rights are in the nature of real property rights but differ in some material respects. For example, unlike traditional real property rights, water rights are usufructory, meaning your "right" is the right to use the public's water subject to

specific restrictions set by the state. At the core of this principle is that one must "use" a water right for it to remain valid or you risk "losing it" through judicial forfeiture. Similarly, water moves in a hydrologically connected system where changes in one part of the system can drastically affect use elsewhere. To ensure order in the face of dynamic conditions, water rights are hyper-defined. A water right clearly identifies what kind of use water can be applied to, the volume of water needed to fulfill that use, the water source, the specific point-of-diversion, season-of-use, and place-of-use. Water right holders can only use their water right in conformance with these limitations. Official water rights are typically evidenced by common-law pre-statutory "diligence claims" based on actual use of water prior to 1903 (1936 for groundwater), a Certificate of Beneficial Use demonstrating the holder completed that statutory Application to Appropriate process, or a court decree. Due to their usufructory nature, individual water rights are subject to constant change. For example, over time water rights can be lost to forfeiture or used in a manner different than authorized. This change makes it difficult for individuals to assess the validity and scope of a particular water right and for the state to know the aggregate status of water rights in a watershed.

To create stability, inventory the state's water rights, and resolve disputes, the Utah Legislature created a special statutory civil action process called a "water rights general adjudication." Utah Code Title 73 Chapter 4. General Adjudications are large-scale quiet title suits initiated in a local district court, and they rely on the professional services of the Utah State Engineer, the state regulatory body over water rights. General Adjudications serve multiple functions but, at

EMILY E. LEWIS is an attorney at Clyde Snow & Sessions and focuses her practice on natural resources issues, primarily water law. She also teaches water law at the S.J. Quinney College of Law at the University of Utah as an adjunct faculty member.



TIMOTHY R. PACK is a shareholder at Clyde Snow & Sessions and focuses his practice on water rights disputes, real estate matters, and complex business disputes. He has litigated a wide-range of matters before the Utah State Engineer and Utah state and federal courts.



base, are intended to solicit and compile existing claims to water, review those claims against the state engineer's records, make a contemporary recommendation to the court on how water rights should be defined, and settle the adjudication with a binding court decree defining all water rights in the area. To do this, Utah is divided into thirteen active river basin-wide General Adjudications, and numerous divisions and subdivisions dividing the state into individual watersheds. Because a watershed has no particular regard for political boundaries, a General Adjudication can span multiple counties or judicial districts. Each subdivision is given a name and numerical indicator; for example, City Creek (57-09) or Dry Creek (57-10) are subdivisions of the ULJR. Subdivisions are also commonly referred to as "books."

General Adjudications in Utah operate using a discrete series of statutorily defined steps starting with a petition in the local district court and ending with final decree. It is essential that those with a valid claim to water follow the proper procedure to retain their water rights. Failure to do so may result in the water rights being decreed abandoned, reduced, or defined in a manner differently than the water user understands. This may result in your client losing a valuable property right.

The primary steps practitioners should know about, or may receive questions about, are: (1) the summons gives notice to all water users in a subdivision to join the local General Adjudication; this may be done by letter or general publication; (2) the notice to file claim, which alerts your clients they have ninety days to file a water user's claim or forever be barred from asserting the water right; (3) the list of unclaimed rights, which should be checked to ensure a water right to which your client has a valid claim and does not inadvertently go unclaimed and therefore decreed abandoned; (4) the issuance of the proposed determination which is prepared by the state engineer and filed with the court recommending how all water rights in a subdivision be decreed – practitioners should review the proposed determination to ensure their clients' water rights are accurately depicted and not impaired by other rights in the area; and (5) the ninety-day objection period beginning the day the proposed determination is issued and providing the only opportunity to file a formal disagreement with the court over the state engineer's recommendations.

For more information on the ULJR and governing documents, please visit the Utah State Court's General Adjudication website or the state engineer's General Adjudication website.

Where Are We Today & What Should I Be Looking For?

While there are multiple active general adjudications across the state, the ULJR General Adjudication is the most dynamic. The ULJR spans all of Salt Lake County, areas adjacent to Utah Lake in Utah

County and Juab County, and major sub-drainages extending east into the Heber Valley in Wasatch County, and south into Spanish Fork Canyon and Nephi area. The ULJR was commenced in 1944 as *Salt Lake City Municipal Corp. v. Tamar Anderson*, and is the oldest pending court case in the Third District Court. Until several years ago, the ULJR was primarily stalled with more than 180 unresolved objection proceedings, a few interlocutory decrees finalizing the adjudication for specific subdivisions, and little activity in initiating new adjudication subdivisions. Underscoring its importance, several years ago the legislature allocated almost \$1.9 million dollars to speed the pace of the ULJR and passed several new bills intended to streamline the General Adjudication process. The ULJR is presided over by Judge Laura Scott who has appointed a special master to assist in facilitating components of the complex proceeding.

The result of these recent efforts has been an explosion of activity and several years of tremendous progress.

ULJR Historic Objection Resolution

In general, all but a few of the historic pending objections have been resolved allowing the court to move forward with decreeing and finalizing subdivisions commenced decades ago. Most of these objections were filed in the late 1970s and early 1980s in the Spanish Fork Subdivision of ULJR. To orderly resolve these objections, the special master adopted a number of standing orders establishing a process for identifying objectors and successors, allowing objectors to assert their interest in pursuing the objection, notifying affected parties, and moving forward with litigation. Resolving these objections has settled long-standing controversies and allowed water users in the area to move forward with certainty in their

ANNE CAMERON MEDIATION

ATTORNEY | MEDIATOR | COLLABORATIVE PROFESSIONAL



EXPERIENCED
COLLABORATOR

FOCUSING ON FAMILY LAW

RESOLUTIONS FOR ALL OF
UTAH

MEDIATION AND
COLLABORATIVE SOLUTIONS
TO LEGAL ISSUES

1526 UTE BLVD., SUITE 206, PARK CITY, UT 84098
1945 S 1100 E., SUITE 200, SALT LAKE CITY, UT 84106
435-640-2158 | 435-659-8732

WWW.AACLAWUTAH.ORG
WWW.UTAHCOLLABDIVORCE.COM

affairs. The special master's standing orders not only give experienced practitioners much needed guidance to navigate this complex adjudication process but also assist pro se parties in understanding the process and protecting their water rights.

Salt Lake County East Division

Since 2013, the state engineer has initiated twenty-six new subdivisions along the Salt Lake County East Division, most of which were initiated in the last three years. These subdivisions cover all of the Salt Lake Valley east of the Jordan River and require a review of thousands of water rights. Being “the place” where settlement of Utah first began, the Salt County East Division includes some of the oldest water rights in the state. The history and origin of these water rights are documented in numerous historic decrees allocating the water of the Wasatch Canyons between early users and historic irrigation companies. Many of these original decreed water rights are still active today and make up a substantial portion of the municipal water supply of the central Wasatch Front. The court has issued interlocutory decrees finalizing the adjudication for seven of the twenty-six east division subdivisions, four books are in the objection resolution stage where a proposed determination has been issued and the parties are resolving pending objections (this could take two to three years), and for the remaining fifteen books, the time to file a water user claim has ended and the parties are waiting for the State engineer to issue proposed determinations.

Primarily to account for the complexity of the fourteen Wasatch Canyons books and underlying historic decree rights, in 2018 Judge Scott issued an amended claims order allowing the parties, under certain circumstances, to submit amended water user's claims and postponed the publishing of all fourteen proposed determinations until after January 31, 2020. This is a key moment in the ULJR as these proposed determinations will cover arguably some of the most complex and contentious water rights in the state. Moreover, it is quite possible the state engineer will issue numerous proposed determinations within short order of another, making it imperative water users follow the proceedings very closely.

Provo River Division

The state engineer is also initiating new subdivisions in the Provo River Division of the ULJR in Utah County. The eleven new subdivision areas generally cover the northeastern corner of Utah County down to Provo and the Heber Valley and reach into the Upper Provo River far into the High Uinta Mountains. The state engineer has been commencing a new book on the Provo River Division every six to eight weeks. Once a subdivision book is commenced, local water users must pay particular attention so as not to miss the notice to file claims filing, which triggers the ninety-day period to file a water user claim. The state engineer has already collected

water user's claims and issued a list of unclaimed rights in the Lehi (55-4) subdivision. Notice to file claims have been issued in the American Fork South (55-5), Provo City South (55-6), and Provo City North (55-7) subdivisions. Water user's claims for these books will be due throughout late fall and early winter of 2019; check each subdivision area for specific dates. If water users do not timely file a water user claim asserting their water right, they will be forever barred from asserting that right again. Based on recent state engineer statements, the state engineer intends to next move to commencing adjudication subdivisions in Provo River Canyon and then leading into the Heber Valley throughout the winter of 2019–2020. Adjudication efforts for the Upper Provo River will begin in the spring of 2020.

Other Areas of the State

In addition to the ULJR, there are other General Adjudication efforts across the state practitioners should be aware of. For example, the state engineer recently resumed activity in the Ash Creek Subdivision of the Virgin River Adjudication (83-1). Additionally, the state engineer has filed a pending motion appointing the same special master overseeing the ULJR for the Virgin River General Adjudication. If appointed, the processes for objection resolution adopted in the ULJR will most likely be adopted in some form for the Virgin River General Adjudication. Practitioners in the southwestern corner of the state should be watching for activities aimed at solving pending historic objections, compiling and issuing proposed determinations based on previously filed water user's claims, and new summons and notice to file claims initiating new adjudication subdivisions.

In the Moab area, two forthcoming proposed determinations will soon be issued for the Moab North (05-2) and Moab South (05-5) adjudication subdivisions. Water users should be watching for these proposed determinations to review whether the state engineer's recommendations are accurate and that your water right is not impaired. Moab South (05-5) is also expecting the list of unclaimed rights to be issued in early November 2019, with objections to the list of unclaimed rights due in early February 2020.

Conclusion

The General Adjudication process is extremely important for both water users and the state at large. Knowing the extent and form of water rights not only helps create order and certainty for individuals, but allows the state to move forward with long-range planning. While the General Adjudication process is particularly relevant for those owning water rights, the General Adjudication also presents an opportunity for citizens of the state to pause and contemplate the importance and role of water in maintaining a “life elevated.” Keep your eyes peeled, and good luck!



It's hard to argue against our expertise.

What does it take to achieve success with an appeal? Our team of former appellate judges and law clerks has a pretty good idea. Together we've participated in thousands of appeals and know the rules inside and out. As Utah's only appellate law firm, we'll put our unmatched expertise to work for you. **801.924.0200** | **zbappeals.com**



ZIMMERMAN BOOHER
APPELLATE ATTORNEYS

The “Anchor Effect” on Price Negotiations

by Richard A. Kaplan

In a talk he gave several years ago at Columbia Law School, Carl Lobell, principal outside counsel for GE Capital for more than thirty years, told the audience about conventional wisdom on negotiating price: “When you get to the issue of price, don’t be the first to talk about it. You can only lose. If you’re the seller, the price you suggest can only go down. If you’re the buyer, the price you offer can only go up.” He added that everyone at the table knows these dynamics. The buyer is well aware that the typical seller starts by proposing an inflated price the seller knows he or she will never get. The seller knows that the typical buyer starts by offering a lot less than he or she is prepared to pay. If they do reach a deal, the price will end up somewhere between these extremes, depending on the negotiating skills of the parties and the alternatives available to them, including whether one of them makes clear he or she is content simply to walk away.

Mr. Lobell’s comments were in the context of mergers and acquisitions, where price is certainly a significant consideration to both sides but is only one of many terms to be negotiated. Does it follow from his observations that the parties should avoid making the first move on price in a single-issue negotiation? Many lawsuits ultimately boil down to a single question: how much the defendant will pay? In that context, does going first make a difference? Or will the outcome be essentially the same regardless of who starts the discussion or at what amount? Worse, is it an economic mistake to go first? Or can going first actually improve the economic outcome in the asking party’s favor? The answer to these questions is, of course, it depends.

This article begins with a discussion of how ordinary transactions occur and then turns to negotiated lawsuit settlements. In many common transactions, the seller begins negotiations.

“One-Off” Negotiations Over Sale Price

Suppose, for example, you are an individual looking to sell something you own – a “one-off” transaction. It could be a house, a used car, artwork, a table, a lamp, or any one of the thousands of consumer items we have in our homes or in storage. In that situation, you are participating in a competitive marketplace where

it is customary that the seller sets the starting or list price. While there are certainly other significant factors not relevant here, buyers shop in such marketplaces based in large measure on knowledge of the price. If the seller didn’t publish his or her price, it would be nearly impossible to attract a potential buyer.

The sale of unique, rare, or one-of-a-kind items may constitute an exception to the norm that sellers begin the negotiation. Certainly, silence as to price might generate buyer interest and eventually offers from collectors or other persons with the gusto to purchase such an item. But these types of luxury items tend to be listed with galleries or auction houses, and typically these institutions list an expected price range for an item, rather than leaving it open to the buyer to name his or her price. Galleries and auction houses generally announce an estimated low and an estimated high for an item, and they do not disclose the seller’s “Reservation Price” (i.e., his or her floor). Accordingly, transactions involving luxury items don’t deviate much from the typical pattern – a seller initiating negotiations by disclosing the price of the item for sale.

By setting a listing price, and thus making the first move, conventional wisdom suggests the seller is at a disadvantage. However, this may not be true unless buyers for similar items can readily determine that the listing price is unreasonable – for example, if the seller priced the item significantly above the price others offer in the same or similar marketplaces for essentially the same item. In this scenario, the seller “priced him or herself out of the market,” to borrow a phrase. To avoid pricing out of the market, the seller must conduct research in the relevant market. Setting a listing price that is neither too high nor too low is not simple and cannot be done quickly, except perhaps by the most experienced sellers.

RICHARD A. KAPLAN is a shareholder at Anderson & Karrenberg. His practice focuses on complex civil litigation and mediation, as well as independent investigations and risk assessment at the outset of commercial litigation.



Available research and data strongly suggests that sellers who set the initial price tend to be advantaged in price negotiations for two reasons. First, the seller’s price tends to influence the buyer’s counter in an upward direction. Second, the bottom line – the negotiated sales price – tends also to be higher than it would have been otherwise. See Adam D. Galinsky, & Thomas Mussweiler, *First Offers As Anchors: The Role of Perspective-Taking & Negotiator Focus*, 81 J. PERSONALITY AND SOCIAL PSYCH., no. 4, 2001, at 657, 657-69.

This behavioral phenomenon is called the “anchor effect” in negotiations. The reason it tends to work is that the price the seller sets is the first dollar amount the buyer sees. “The anchoring effect is a cognitive bias that describes the common human tendency to rely too heavily on the first piece of information offered (the ‘anchor’) when making decisions.” Staff, Program on Negotiation at Harvard Law School, *The Anchoring Effect and How it Can Impact Your Negotiation*, (July 23, 2019), available at <https://www.pon.harvard.edu/daily/negotiation-skills-daily/the-drawbacks-of-goals/>.

Further, the data shows that the anchor effect works regardless of whether the seller or buyer initiates discussions about price. In controlled experiments with student and business negotiators and in studies of real-life negotiations, “buyers who use the anchoring tactic will reach better (lower) . . . [negotiated] prices than buyers” who don’t. Yossi Maaravi, *et al.*, *Winning a Battle But Losing the War: On the Drawbacks of Using the Anchoring Tactic in Distributive Negotiations*, 9 JUDGMENT & DECISION MAKING, no. 6, 2014, at 548, 549. I’ll come back to the “drawbacks” referenced in the title of that article toward the end.

Settlement Negotiations

As lawyers, we tend to be acutely aware of the conventional wisdom not to go first during settlement negotiations. Regardless of whether making the first move would be economically wise for our clients, we have anxiety about biting that bullet in a settlement negotiation. We may try to avoid it if we can for many reasons. Among others, we don’t want to be made to look the fool. If our adversary accepts our initial proposal, we are left to wonder how much more he or she would have offered or paid as the case may be. If an adversary rejects our initial proposal and counters with less than we expected, we still second-guess ourselves about whether we have conceded too much or revealed too much about where our clients want to end up. Some of us doubtless think incorrectly that there is a “right answer” and correctly that the price we advise our client to set won’t be “the” right one. There is obviously no such thing.

Making the first “move” gives pause also because of the natural sequence of negotiations. If I propose a dollar amount and the other

side counters, I will be placed in the position of walking away or making the third move – the one that generally signals most clearly where we want the negotiations to head. Lawyers preparing for negotiations may not want to come to grips with the significance of the third move and thus see it as a reason for not initiating price discussions in the first place. They may ask themselves, “What’s the harm in waiting to see what the other side has in mind? Maybe we’ll like it. We can always counter on the high side, and then the other side would have to make the third move.”

Despite these reasons for hesitation, the norm in most lawsuits involving only the issue of how much the defendant will pay is for the plaintiff’s attorney to make a demand. Perhaps the fact that this norm has existed for years eases some of the pressures and anxieties about being the first to discuss price – the cost to the defendant of settlement. Perhaps that norm allows plaintiffs’ lawyers to make demands based simply on what they see as the best possible outcome. Regardless, if defense counsel perceives such a demand as high but within the range of reasonableness, the demand has the greatest chance of anchoring subsequent negotiations and settlement. The extent to which the plaintiff’s lawyer can exploit that advantage depends of course on his or her negotiating skills, those of his or her adversary, and many other factors, including his or her trial skills, confidence, and reputation.

MEDIATOR & ARBITRATOR

Greg Hoole

- Trained in mediation at the Straus Institute for Dispute Resolution at Pepperdine School of Law;
- Trained in advanced negotiations at the U.S. Dept. of Justice National Advocacy Center;
- Adept at bringing parties together to resolve even the most complex of disputes.



Schedule through Utah ADR Services:
801-943-3730 | miriamstrassberg@yahoo.com

greg@hooleking.com | www.SMARTERresolutions.com

Defense lawyers too can sometimes employ anchoring as a tactic. Nowhere is it written that a defense lawyer (perhaps inside counsel) who knows a lawsuit is coming must sit patiently and await the demand. To the contrary, a defense lawyer or corporate counsel may want to make an offer before he or she receives a demand. While not the norm, at least at present, there are understandings and expectations at play that would likely ease some of the pressures and anxieties discussed above. Plaintiff’s counsel would likely respect such a move because it demonstrates recognition of a problem and willingness to solve it. Both sides would expect such an offer to be on the low side because presumably, neither party has invested much in the expensive aspects of litigation. Provided the proposal was nevertheless perceived by plaintiff’s counsel as within reason, defense counsel would thus have created an anchor for subsequent negotiations. Here, again, exploiting that advantage isn’t automatic. It depends on the dynamics of the negotiation and how they unfold.

I’ve emphasized reasonableness because it matters. The research shows that the first offer will “anchor” the negotiation most favorably for the lawyer who has “a good sense of the bargaining range” (a/k/a zone of possible agreement or ZOPA), especially when opposing counsel does not. Staff, Program on Negotiations at Harvard Law School, *Negotiation Techniques: The First Offer Dilemma in Negotiations* (September 3, 2019) available at <https://www.pon.harvard.edu/daily/dealmaking-daily/resolving-the-first-offer-dilemma-in-business-negotiations/>. The ZOPA’s outer boundaries are the bounds of reason.

The relevant context for these findings is when money, or price, is the single issue to be negotiated. This is the “I win/you lose” category of settlement negotiations, sometimes known as “distributive negotiations.”

Let me return briefly to the beginning. When Mr. Lobell alluded to the “conventional wisdom” not to initiate discussions about price, he was speaking specifically about M & A. He did not speak to the question whether the same conventional wisdom guides lawyers handling typical lawsuits where price is the only issue. For what it’s worth, my guess is that apart from experienced plaintiffs’ lawyers, many lawyers try to avoid going first if they can. That’s the safe course in light of all the uncertainties and potential pitfalls in deciding what figure to propose.

The anchor effect presents an opportunity to deviate from conventional wisdom. But be wary. Boiled down to its essence, the literature supporting its use as a tactic assumes you are able to identify the so-called zone of possible agreement about price. With that ability, you can use the anchor effect to your advantage by suggesting a price just inside the outer bounds of that zone. Without that ability,

you would probably be better off relying on conventional wisdom. Indeed, there is a growing body of research showing that negotiators using the anchoring tactic tend to have a lot of anxiety about doing so, even when they know it worked. See University of Michigan Ross School of Business, *Negotiating: Making the First Move Pays, But Be Ready for Anxiety* (May 21, 2013) available at <https://michiganross.umich.edu/rtia-articles/negotiating-making-first-move-pays-be-ready-anxiety>. From what appears in that story and other study results, using the anchor tactic is no cure for the “first mover” anxiety discussed earlier. It seems sometimes even to make it worse.

Somebody Has to Go First. How to Do It.

In settlement negotiations, someone has to go first. Here’s how Mr. Lobell suggests that either side in a negotiation can most effectively go about that. First, of course, the lawyers on each side have to roll up their sleeves and decide the true “value” of the case and the likelihood that the other side will see it the same way or differently. Second, determine a reasonable “cushion” to add to or subtract from that amount depending on whether you represent plaintiff or defendant. Third, at the table, start a conversation something like this: “Look, I understand the dogma that he who talks price first always loses. The plaintiff’s demand can only go down. The defendant’s number can only go up. But somebody has to do it. So I will. This is what we want.” If you were working with a mediator, I’m sure Mr. Lobell would advise you to tell the mediator essentially the same thing and to pass that message on to the other side.

The thinking behind this approach is that its conversational style builds a measure of rapport while taking some of the sting out of going first. The substance of the conversation sounds reasonable to the other side – even more basically, it conveys the impression that you are a reasonable and trustworthy person. What’s more, it tends to cloak your suggested price in the garb of reasonableness. That seems to me to resemble the anchor tactic, although it’s not the same. It is similar in that your price is the first number the other side hears. Thus, this approach also seems calculated to capture the cognitive bias discussed earlier and thus to result in a higher counter and better ultimate deal. What’s different is that the price you announce may or may not be at the upper end of the so-called ZOPA, as the anchor literature suggests it should be. At least you haven’t thought about it that way. But since you’ve done your homework, the odds are that a sum that seems fair and reasonable to you will likely look the same way to the other side (or to the mediator if the parties are using one) and will serve as a strong place to start. After that, whether you are in a mediation or sitting directly across the table from the other side, it’s essentially up to you to keep the process moving toward your desired price.

ST. GEORGE OFFICE *Officially Open*

KIRTON | McCONKIE

KIRTON | McCONKIE

Successful businesses count on Kirton McConkie.

We're pleased to open our doors with ten attorneys based in our newest location. These attorneys successfully represent clients in Intellectual Property, Corporate, Real Estate, International, Healthcare, Litigation, and Estate Planning.

SALT LAKE CITY, UT | LEHI, UT | ST. GEORGE, UT | 801.328.3600 | KMCLAW.COM

The New Utah Uniform Directed Trust Act

by Langdon T. Owen, Jr.

The Uniform Directed Trust Act (the Act) is now in effect in Utah, having been adopted in 2019. Utah Code Ann. §§ 75-12-101 to -18. Many practitioners have been using trust protectors for some time. A trust protector is one type of “trust director” under this Act, which also covers “trust advisors” and the holders of certain powers of direction however labelled. The Act provides useful and needed guidance as to these positions, while allowing for these positions to be important tools for providing flexibility for trusts. Trust directors, including trust protectors, can often provide quicker and more economical ways to adjust trust terms and solve administrative issues or disputes, particularly in very long-term trusts that can run for several lifetimes or generations, than the traditional methods of providing flexibility.

The traditional methods start with robust trustee discretion, which may include establishing new trusts with other terms where the trustee has strong discretion over when and how to distribute principal, a process known as trust decanting. For common law decanting, *see Phipps v. Palm Beach Trust Co.*, 196 S. 299 (Fla. 1949); *In re Estate of Spencer*, 232 N.W.2d 491 (Iowa 1975); *Wiedenmayer v. Johnson*, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969); *Morse v. Kraft*, 992 N.E.2d 1021 (Mass. 2013); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § § 11.1, 19.4 (1988); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 17.1 (2011). Trustee oversight and removal provisions are useful traditional methods. Trust modification under the trust code, Utah Code Sections 75-7-410 through 417, may be effective but such modification requires an agreement or court order. Actions on certain matters by beneficiaries may be allowed under an instrument. Powers of appointment can be a particularly powerful tool where they apply but can come with tax consequences that may not be acceptable and may not be able to deal with administrative issues. Utah Code Ann. §§ 75-10-101 to -18.

Each of those traditional methods has its place and value, but many practitioners have desired more, and have thus crafted trust protector provisions relying on general authorizations

such as Utah Code Section 75-7-105 or common law principles (the grantor can condition the gift as desired) including Restatement (Third) of Trusts section 64 (2002), or, in some states, on section 808 “Powers to Direct” of the Uniform Trust Code (a provision not adopted in Utah). The nature and extent of the powers and authority of trust protectors, and the uncertain liability that might be incurred by a trust protector or other sort of trust director, *see, e.g., Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*, 283 S.W.3d 786 (Mo. Ct. App. 2009), led to the development of broader statutes that authorize and define trust protectors and more generally trust directors, in order to provide clarity. Special state legislation has been adopted in a few states, and recently the Uniform Directed Trust Act was promulgated in 2017 by the Commissioners for Uniform State Laws. The Uniform Act has, as of this writing, been adopted in ten states, including Utah.

What a Power of Direction is Not

The first thing to note about a power of direction granted to a trust director under the terms of a trust is what the power is not, because the Act does not apply to such matters. *See* Utah Code Ann. § 75-12-105(2). It is not a power of appointment (which is a non-fiduciary power) to designate a recipient of, or another power of appointment over, trust property, *see also id.* § 75-12-105(3); it is not a power to remove a fiduciary (trustee or trust director); it is not a settlor’s power of revocation; it is not the power of a beneficiary to affect the beneficiary’s interest or the interests of other beneficiaries where the beneficiary virtually represents the other beneficiaries, *see id.* § 75-7-301; and it is not a power required by the U.S. tax code to be a non-fiduciary power.

LANGDON T. OWEN, JR. is a member of the law firm of Cobne Kinghorn, P.C. in Salt Lake City, Utah. Mr. Owen is a transactional lawyer who practices in such areas as estate and tax planning, business and commercial transactions, health care law, nonprofit organizations, probate, and real estate.



Application

The Act applies to any trust whenever created with its principal place of administration in Utah, but for trusts existing before May 14, 2019, it only applies to actions after that date. Also, if administration is changed to Utah after that date, it applies only to actions and decisions after the change. Utah Code Ann. § 75-12-103(1). The trust may designate its principal place of administration if the trustee's principal place of business, the trust director's principal place of business (note: this expands the trust code provision on the point; *see id.* § 75-7-108(1)), or all or part of the administration of the trust occurs in the designated jurisdiction. *See id.* § 75-12-103(2). The Act provides that common law and principles of equity supplement the Act except to the extent modified by the Act or other law. *See id.* § 75-12-104.

Powers That May Be Granted

The Act allows a settlor a great deal of ability to grant powers to a trust director under the terms of a trust, and, unless limited by the terms of the trust, such granted powers include any further power appropriate to the exercise or non-exercise of the granted power of direction. *See id.* § 75-12-106(1), (2)(a). Power of direction “means a power over a trust granted by the terms of the

trust to the extent the power is exercisable while the person is not serving as a trustee.” *Id.* 75-12-102(5). It includes power over investment, management, or distribution of trust property or other matters of trust administration but is subject to the exclusions under Utah Code Section § 75-12-105 already described above. *See id.* The Official Comment to Uniform Act Section 6 contains a long list of the sorts of powers that might be granted:

acquire, dispose of, exchange, or retain an investment; make or take loans; vote proxies for securities held in trust; adopt a particular valuation of trust property or determine the frequency or methodology of valuation; adjust between principal and income or convert to a unitrust; manage a business held in the trust; select a custodian for trust assets; modify, reform, terminate, or decant a trust; direct a trustee's or another director's delegation of the trustee's or other director's powers; change the principal place of administration, situs, or governing law of the trust; ascertain the happening of an event that affects the administration of the trust; determine the capacity of a trustee, settlor, director, or beneficiary



Be prepared with data and knowledge. Eide Bailly's experienced and certified professionals can help you with economic damage calculations, forensic accounting and fraud investigations, computer forensics and eDiscovery management.

What inspires you, inspires us.

801.456.5957 | eidebailly.com/forensics



of the trust; determine the compensation to be paid to a trustee or trust director; prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust; grant permission before a trustee or another director may exercise a power of the trustee or other director; or release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director. This subsection does not, however, override the background law that regulates the formation of a trust, such as the requirements that a trust be lawful, not contrary to public policy, and possible to achieve.

See, e.g., Uniform Trust Code § 404 (2000), *see* Utah Code Ann. § 75-7-404; RESTATEMENT (THIRD) OF TRUSTS §§ 29–30 (2003).

Further, the Official Comments to Uniform Act Section 6 describe what may be included in further appropriate powers:

Examples of further powers that might be appropriate include a power to: (1) incur reasonable costs and direct indemnification for those costs; (2) make a report or accounting to a beneficiary or other interested party; (3) direct a trustee to issue a certification of trust under Uniform Trust Code § 1013 (2000) [*see* Utah Code § 75-7-1013]; (4) prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust; or (5) employ a professional to assist or advise the director in the exercise or nonexercise of the director's powers.

The Act provides some limits on trust directors under Utah Code Section 75-7-107 by making them as responsible as a trustee under like circumstances in dealing with payback provisions of a first-party special needs trust or with a charitable interest in the trust.

Who May Be a Trust Director

A “trust director” is a person other than a person serving as trustee who has been granted such a power, regardless of the term by which the person is called, e.g., “trust protector,” “trust advisor,” and even if the terms of the trust purport to disclaim trust director status. Utah Code Ann. § 75-12-102(9); *see also* Official Comment (9) to Uniform Act § 2. A settlor or beneficiary may be a trust director (other than for the excluded powers described above, such as powers of appointment, power of revocation, etc.).

A beneficiary may be a trust director although not labeled as such, for example where the trust allows a majority of beneficiaries to release a trustee from liability since they would not be exercising authority through virtual representation; this could lead to the

majority beneficiaries being responsible to the minority for an abusive release. Official Comment (4) to Uniform Act § 5.

Relief From Co-Trustee and Co-Director Liability

A serving co-trustee cannot be a trust director; however, a co-trustee may be relieved of liability concerning another co-trustee's exercise or non-exercise of a trust power to the same extent a directed trustee may be relieved from duty or liability with respect to a trust director's power of direction. Utah Code Ann. § 75-12-112. This co-trustee provision allows a trust to provide for specialized trustees acting without imposing co-trustee obligations on other co-trustees; for example, there could be an investment trustee, a benefits trustee, and an administrative trustee who may be separately responsible for their respective functions. Such co-trustees would not, however, be trust directors.

If there are trust directors with joint powers, the action is made by a majority, unless the terms of the trust provide otherwise. *See id.* § 75-12-106(2)(b). This could make the joint trust directors jointly responsible as if they were co-trustees with co-trustee responsibility. Official Comment to Uniform Act § 6(b)(2). This co-responsibility can, however, be avoided if desired because the fiduciary duty of a director closely tracks the duty of a trustee. Thus, separating out areas of independent responsibility appears to be allowable. Similarly, a directed director should also be allowable. Official Comments to Uniform Act § 8.

Fiduciary Duty

As to the exercise or non-exercise of a granted power of direction, the Act provides that the trust director will have the same fiduciary duty and liability as to that power as a trustee or co-trustee holding the power in a like position and under similar circumstances. *See id.* § 75-12-108(1). The trust may, however, vary the director's duty and liability to the extent the trust could vary the duty or liability of a trustee in a like position under similar circumstances, *see id.* § 75-7-1008 (providing that there is no exculpation for acts in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries); the trust may also impose additional duties and liabilities, *see id.* § 75-12-108(1), (3).

The Act also excludes duties and liabilities under the Act for a health care provider acting in that capacity, unless the trust provides otherwise. *See id.* § 75-12-108(2). This could protect the provider in determining capacity or sobriety of someone such as a settlor or beneficiary. The provider would still be subject to rules applicable to his or her profession. The trustee would need to take reasonable action to comply with the provider's direction even if the provider cannot be liable under the Act. Official Comment to Uniform Act § 8(b).

The Official Comments to Uniform Act Section 8 provide some guidance to applying the trustee-like duties of the trust director. First they encourage the courts to “make use of the flexibility built into fiduciary law” and to apply fiduciary principles “in a context-specific manner that is sensitive to the particular circumstances and structure of each directed trust.” Official Comment to Uniform Act § 8. The comments also state that a trust director will have a trustee’s duty of advance disclosure where a non-routine transaction is contemplated, citing RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. d (2007), subject, however, to the limitations under the Act, *see* Utah Code Ann. § 75-12-111(2), that eliminate duties to monitor, inform, or advise. *Id.* The comments go on to note that “springing duties” are contemplated so that the trust director need not act unless requested by a beneficiary to do so. *See id.*

Also, the trust could, as with a trustee, waive applicable duties of a trust director other than the duty “to act in good faith and in accordance with the purposes of the trust” and could exculpate the director except for acting in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries. *See* Utah Code Ann. §§ 75-7-105(2)(b), -108. Where extended discretion is granted, such as by use of such

terms as “sole,” “absolute,” or “uncontrolled,” this would be applied as it would be for a trustee so that the fiduciary may not “act in bad faith or for some purpose or motive other than to accomplish the purposes of the discretionary power.” RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. c (2003). The comments also state that the Act contemplates directed directors so that the directing director would have responsibility, but the directed director would be relieved to the same extent as a directed trustee, leaving only the willful misconduct standard that would apply to a directed trustee. Official Comment to Uniform Act § 8; *see also* Utah Code Ann. § 75-12-109.

Acting Under Direction

The directed trustee is required to take reasonable action to comply with the direction and is not liable in doing so. However, the directed trustee may not comply to the extent that by complying the trustee would engage in willful misconduct. *See id.* § 75-12-109(1), (2). The willful misconduct standard is a minimum mandatory standard that the terms of the trust may not reduce. Official Comment to Uniform Act § 9. An exercise by a director of a power to release a trustee or another director is not effective where the breach involved the trustee’s or the other director’s willful misconduct,

ClydeSnow

Clyde Snow Welcomes Two Associates to its Salt Lake City Office



Taymour B. Semnani

Mr. Semnani’s practice focuses on civil litigation, insurance defense, and transactional matters including real estate and contract negotiations. He advises corporate and individual clients on matters regarding leasing, lending, partnership, acquisition, and development transactions.



Kody L. Condos

Ms. Condos received her J.D. in 2019 from the S.J. Quinney College of Law where she graduated with High Honors. Prior to joining the firm as an attorney, she clerked for Clyde Snow and was a judicial intern for the Utah Supreme Court Justice John A. Pearce.

ClydeSnow
ATTORNEYS AT LAW
CLYDE SNOW & SESSIONS
A PROFESSIONAL CORPORATION
SALT LAKE CITY | BEND | NEWPORT BEACH

ONE UTAH CENTER
201 SOUTH MAIN, SUITE 1300
SALT LAKE CITY, UTAH 84111
TEL 801.322.2516
clydesnow.com

WATER & NATURAL RESOURCES • COMPLEX LITIGATION
FAMILY LAW • BUSINESS & TRANSACTIONS • SECURITIES
WHITE COLLAR CRIMINAL DEFENSE & INVESTIGATION
LABOR & EMPLOYMENT LAW • TRUSTS & ESTATES
BANKRUPTCY & CREDITORS’ RIGHTS • BANKING LAW

the release was induced by improper conduct of the trustee or the other director, or at the time of the release the releasing director did not know the material facts relating to the breach. *See id.* § 75-12-109(3). When in doubt, the trustee may petition the court for instruction. *See id.* § 75-12-109(3). Also, the trust could impose additional duties and liabilities on the trustee. *See id.* § 75-12-109(5).

If a trustee and a trust director share a power, the trustee would have its normal fiduciary duty in voting on the exercise or non-exercise of the power but would have a reduced duty in executing the joint decision. The Official Comment to Uniform Act Section 9 gives the example of a trustee serving on a committee with others including the trust director. The trustee would vote as a normal trustee but reasonably comply as a directed trustee unless compliance would be willful misconduct. Also, where a trustee's action is subject to a veto or approval power of a trust director, the trustee would act under its normal fiduciary duty in proposing the action, but if vetoed, the trustee would only be subject to the reduced willful misconduct standard in choosing whether to comply with the veto.

Duty to Inform; No Duty to Monitor

A trustee is required to inform the trust director, and a trust director is required to inform a trustee or other director, of information reasonably related to the powers and duties of the person to be informed, and that person may rely on that information without breaching the trust, unless the person engages in willful misconduct. *See id.* § 75-12-110.

Further, a trustee or trust director has no duty to monitor the other or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning instances the trustee or director may have acted differently than the other did, unless the trust provides otherwise. *See id.* § 75-12-111. If such monitoring, informing, or advising occurs, it does not mean the trustee or director doing so has assumed a duty to do so.

Limitations of Actions, etc.

In keeping with the theme of the Act to apply trustee rules with respect to trust directors, the Act provides limitations of actions against directors the same as for trustees, including the effect on limitations periods of reports or accountings provided, Utah Code § 75-12-113, provides defenses for directors like those for a trustee, *see id.* § 75-12-114, provides for jurisdiction over a director of a trust subject to the Act, *see id.* § 75-12-115, and applies other trustee provisions to directors relating to acceptance, bond, compensation, resignation, removal, and replacement, *see id.* § 75-12-116.

Duty to Whom?

To whom is the trust protector's duty owed? Could the duty run to the trust itself for assuring the intention of the settlor even if the burden of enforcement falls to the beneficiaries? A possible duty to the trust itself was suggested but not decided by a case cited above, *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*, 283 S.W.3d 786 (Mo. Ct. App. 2009).

A difference in to whom duties are owed could provide some basis for a difference in the standard of conduct applicable to, or in the protections available for, or in the persons who may enforce the duty against, a trust protector accused of some form of breach of duty, compared to a trustee similarly accused. Under the Uniform Act as adopted in Utah, the choice has been made: the duty of a trust director (trust protector, however called) is to the beneficiaries, and although the duty may be modified by the trust instrument, a minimal fiduciary duty remains and it runs to the beneficiaries.

The suggestion in the *McLean* case of a duty to the trust itself was, however, plausible. Particularly given the quasi-corporate nature of estates and trusts under modern statutes (like the Uniform Probate Code; *see* Utah Code Ann. § 75-3-808), a duty to the trust itself might be a realistic possibility. This possibility would apply to a trust protector rather than to a trustee, because the trust protector is a new and distinct position while the trustee has traditionally been viewed as owing its duties to the beneficiaries in implementing the settlor's intent under the trust instrument. The trust instrument creates a relationship (an organizational relationship of authority and benefit) but not a separate entity. The Uniform Probate Code rule is designed to make the estate a quasi-corporation so as to protect the personal representative's personal assets from estate liabilities. Uniform Law Comments to Uniform Probate Code § 3-808. This principle applies as well under the Uniform Trust Code even though a trust is not a separate entity. *See* Utah Code Ann. § 75-7-1010. Note that attorneys and others can have fiduciary duties to organizations not treated as separate entities, for example, unincorporated associations. While such a locus of the duty was plausible, the Act did not go in this direction.

Conclusion

Trust protector and trust director provisions can help solve issues for trusts that are difficult to deal with otherwise, and they have proven their worth despite a lack of statutory guidance. With the adoption of the Act and the clarity it brings, the use of these sorts of provisions will likely expand and benefit even more trusts.

INNOVATION COMES STANDARD

FASTCASE IS ONE OF THE PLANET'S MOST
INNOVATIVE LEGAL RESEARCH SERVICES,
AND IT'S AVAILABLE FREE TO MEMBERS OF
THE UTAH STATE BAR.

LEARN MORE AT
WWW.UTAHBAR.ORG



Appellate Highlights

by Rodney R. Parker, Dani Cepernich, Robert Cummings, Nathanael Mitchell, Adam Pace, and Andrew Roth

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. The following summaries have been prepared by the authoring attorneys listed above, who are solely responsible for their content.

UTAH SUPREME COURT

Thomas v. Hillyard

2019 UT 29 (July 2, 2019)

As a matter of first impression, the court held that **the statute of limitations for a legal malpractice claim arising from a criminal case begins to run when the underlying action has concluded and there is no appeal of right available.**

Bieselev. Mattena

2019 UT 30 (July 10, 2019)

In this appeal from a jury verdict involving tort claims arising out of an inheritance, the court held that, **absent a request for apportionment of fault by a party, the Liability Reform Act does not preclude the district court from imposing joint and several liability.** The court also held that the bifurcation of punitive damages is not required in a case in which no party sought to introduce evidence of wealth or financial condition.

Rocky Ford v. Kents Lake

2019 UT 31 (July 11, 2019)

Rocky Ford is a downstream user of water rights from the Bear River. Kents Lake is an upstream user. The two entities had entered into various agreements over several decades. With the advent of sprinkler irrigation, as compared to traditional irrigation, Kents Lake was using less of its upstream flow rights and therefore could store more of its water shares in a reservoir, which deprived Rocky Ford of downstream flow. The supreme court held that Kents Lake was entitled to use its water in the most efficient manner within the bounds of its rights, and that **downstream users, even with senior water rights, only have a right to water run-off to the extent it returns to the source; upstream users can benefit from efficiency gains and capture their own seepage.**

Nixon v. Clay

2019 UT 32 (July 11, 2019)

Adopting a new framework for assessing liability for sport injuries, the supreme court held that **“participants in sports generally have no duty to avoid conduct that is inherent in the sport.”** Because the plaintiff’s injuries arose out of contact that occurred while the defendant was reaching in and swiping for the ball – common moves in basketball – the district court did not err in granting summary judgment in the defendant’s favor.

Bradburn v. Alarm Protection Technology, LLC

2019 UT 33 (July 17, 2019)

Plaintiff took an advance on his sales commissions and signed a confession of judgment which included his choses in action against the company. When he quit, he sued the company for unpaid commissions, among other things. The company, meanwhile, executed on the confession of judgment, held a constable sale, purchased plaintiff’s choses in action against itself, moved to substitute itself as plaintiff, and dismissed the case. On appeal from the order granting substitution, the Utah Supreme Court affirmed, concluding that **plaintiff’s failure to appeal either the underlying judgment or the constable sale meant the court could not address his argument that the confession of judgment was against public policy.** Instead, the court was jurisdictionally limited to evaluation of the substitution order, which was proper.

Vega v. Jordan Valley Medical Center

2019 UT 35 (July 19, 2019)

The Utah Health Care Malpractice Act requires a plaintiff to obtain a certificate of compliance from the Division of Occupational and Professional Licensing (DOPL) before filing suit. The court held that **this requirement of the Malpractice Act is unconstitutional because it violates the judicial power provision, by allowing DOPL to exercise the core judicial function of ordering the final disposition of claims without judicial review.** Accordingly, the court reversed and remanded the case to be tried on its merits.

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

State v. Silva**2019 UT 36 (July 23, 2019)**

In this direct appeal from a criminal conviction, the court **repudiated language in prior case law limiting the review of an attorney's performance to the law in effect at the time of trial, and held that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."**

In re Gestational Agreement**2019 UT 40 (August 1, 2019)**

As a matter of first impression, the court held that **a provision of the Uniform Parentage Act, Utah Code § 78B-15-803, that a gestational agreement is unenforceable unless at least one of the intended parents is female, is unconstitutional under the Fourteenth Amendment's Equal Protection and Due Process Clauses, and that it is severable from the remainder of the Act.** Accordingly, the court reversed and remanded the district court denial of a petition for court approval of a gestational agreement where both of the intended parents were male.

Fauchaux v. Provo City**2019 UT 41 (Aug. 6, 2019)**

On a petition for writ of certiorari, the supreme court affirmed the court of appeals' reversal of a dismissal of a case against Provo City, but on alternative grounds. The court of appeals had held that although a wrongful death claim brought by the estate of a decedent is void, an objection to the capacity of the estate

to bring suit is an affirmative defense that can be waived. The supreme court held this case does not actually present a capacity issue, because the substance of the complaint revealed the claims were asserted by the personal representative of the estate for the benefit of the heirs of the decedent. The court noted that **a true capacity challenge may present a question of standing, which would not be subject to waiver.** Without resolving this issue, the court offered a second basis for affirming the court of appeals' reversal. It held, "A mere lack of capacity makes a case voidable, not void. And when faced with this defect, the proper remedy is substitution under rule 17(a) of the Utah Rules of Civil Procedure."

Raser Techs., Inc. ex rel. Houston Phoenix Grp., LLC v. Morgan Stanley & Co., LLC, 2019 UT 44 (Aug. 13, 2019)

The district court declined to assert personal jurisdiction over multiple defendants for alleged violations of the Utah Pattern of Unlawful Activity Act. Reversing, the supreme court held that **the district court should have separately analyzed the elements of personal jurisdiction for each plaintiff, defendant, and claim.** The court also adopted a conspiracy theory of jurisdiction and identified the elements that a party must plead with particularity to establish personal jurisdiction under such a theory: "(1) the defendant is a member of a conspiracy, (2) the acts of the defendant's co-conspirators create minimum contacts with the forum, and (3) the defendant could have reasonably anticipated that her co-conspirator's actions would connect the conspiracy to the forum state in a meaningful way, such that she could expect to defend herself in that forum."

WELCOME BACK
CAMILLE N. JOHNSON
 EMPLOYMENT COUNSELING AND LITIGATION
 PRODUCT LIABILITY DEFENSE

With extensive experience successfully defending complex employment and pharmaceutical claims, Camille's return ensures our clients the outstanding representation upon which they rely.

SNOW
 CHRISTENSEN
 & MARTINEAU

cnj@scmlaw.com
 801.322.9119
 www.scmlaw.com



WDIS v. Hi-Country Estates**2019 UT 45 (Aug. 13, 2019)**

In this dispute between homeowners and an HOA, the homeowners asserted a quiet title claim. The district court dismissed the quiet title claim on statute of limitation grounds. The court of appeals addressed whether the homeowners' quiet title claim was a "true quiet title claim" thereby having no applicable statute of limitation. Ultimately, the court clarified two prior cases – *In re Hoopiaina Trust*, 2006 UT 53 and *Bangerter v. Petty*, 2009 UT 67 – and held that **"a plaintiff's quiet title claim is not barred by a statute of limitations if the plaintiff is able to establish a prima facie quiet title case without first receiving some other relief from the court."**

Moshier v. Fisher**2019 UT 46 (Aug. 13, 2019)**

In this legal malpractice case, the district court concluded the claims were barred by the statute of limitations. The supreme court reiterated that **a malpractice claim, if informed by an ongoing proceeding, does not accrue until the other proceeding has concluded.** Reversing the dismissal, the court held that the malpractice claim accrued when the bankruptcy court, in the related proceeding, confirmed the final bankruptcy plan, which

made the damages and harm sufficiently final for the plaintiffs to understand that their attorney's failure to timely pursue the claim in that case had prejudiced them.

Ross v. State**2019 UT 48 (Aug. 15, 2019)**

The district court initially granted summary judgment to the State dismissing this PCRA petition, but that ruling was reversed and remanded for an evidentiary hearing to determine whether appellate counsel was ineffective for not raising the argument that trial counsel was ineffective for not raising an extreme emotional distress defense at trial. After this hearing, the district court concluded that appellate counsel was ineffective, but that defendant had not suffered any prejudice. The district court based its ruling on rebuttal evidence the State contended it would have presented at trial had the defense of emotional distress been raised. On appeal, the petitioner argued that it was improper for the district court to consider evidence outside of the direct record on appeal in determining whether he suffered prejudice from appellate counsel's ineffective representation. The court rejected this argument, holding that **the Strickland inquiry into ineffective assistance of counsel requires that court to consider all relevant evidence that the jury would have had before it if trial counsel had pursued a different path, including evidence not in the original appellate record.**

Amundsen v. University of Utah**2019 UT 49 (Aug. 15, 2019)**

The supreme court affirmed the district court's dismissal of the plaintiff's medical malpractice claim against the University of Utah based on the plaintiff's failure to timely file a notice of claim as required by Utah's Governmental Immunity Act. The Court held **the plaintiff's notice of claim, filed nearly three years after she received the medical services, was untimely because she knew or should have known at the time of her services that her doctor was a governmental employee.**

Cheek v. Iron County**2019 UT 50 (Aug. 16, 2019)**

Plaintiff filed a civil rights lawsuit in federal court against Iron County and Iron County's attorney in his official capacity. On a motion to dismiss, the federal court dismissed the federal claims with prejudice and the state claims without prejudice. Plaintiff refiled her case in state court against Iron County's attorney, and the district court dismissed the claims on res judicata grounds. The supreme court held that **a dismissal is presumptively on the merits, with limited exceptions which apply when the dismissal addresses an "initial bar" to the court's**



Digital Forensics • eDiscovery • Expert Testimony



Scott Tucker
 Certified Digital Forensic Expert
 Call for a free case assessment.

Digital Forensics
 Analysis of forensic artifacts can reveal the who, what, when, where, how, and sometimes even why.

Electronic Discovery
 Data surrounds us: documents, messages, photos, GPS, and more in computers, mobile devices, and the cloud.

Expert Testimony
 Get written and oral testimony from an industry veteran, or for sensitive matters, a confidential consulting expert.

801.999.8171

www.aptegra.com

scott.tucker@aptegra.com

authority, such as lack of jurisdiction, improper venue, or failure to join an indispensable party. Because the federal court dismissal was “not driven by limitations on the court’s authority,” res judicata barred the plaintiff’s state lawsuit.

Latham v. Office of Recovery Servs.
2019 UT 51 (Aug. 22, 2019)

As a matter of first impression, the supreme court held that the **Office of Recovery Services could assert a lien only on the portion of a personal injury settlement that reflected past medical expenses.** In doing so, the court observed that the assessment of funds allocable to past medical expenses was a fact-intensive inquiry, and it left to the discretion of the district court the determination of “the appropriate methodology, based on the information at the court’s disposal.”

UTAH COURT OF APPEALS

Williamson v. Farrell
2019 UT App 123 (July 18, 2019)

The plaintiffs filed this action seeking a judicial declaration they had not committed elder abuse or breached any fiduciary duties to the husband’s elderly mother, as his siblings had publicly accused them of doing. The district court dismissed the case on the basis there was litigation pending between the parties elsewhere, and the dispute could more effectively be litigated there. The court of appeals reversed, holding that **under the Declaratory Judgments Act, a court may only decline to hear an otherwise proper declaratory judgment action where entry of the sought-after declaration would not end the controversy giving rise to the specific lawsuit pending before them.** In this case, the district court had taken an overly broad view of this exception, reading it as applying if the declaratory judgment action would not terminate all the underlying disputes encircling the parties.

AGTC Inc. v. CoBon Energy
2019 UT App 124 (July 18, 2019)

CoBon Energy entered into a consulting agreement with Appellants regarding pursuing certain tax credits related to the manufacture of synthetic fuels from coal. Appellants’ principals had significant training and education in mining engineering but were not licensed as professional engineers. CoBon’s principals, however, were licensed professional engineers. Appellants sued for unpaid fees pursuant to the consulting agreement. CoBon asserted Appellants could not recover under the consulting agreement because Utah’s “non-recovery rule” bars unlicensed professionals from seeking enforcement of contracts for professional services where the licensing requirements have been enacted with the

purpose of protecting the public. The court of appeals held that **CoBon could not invoke the non-recovery rule because its principals were engineers, and “professional engineers of any type may be classified within the same trade or profession,” removing CoBon from the class of individuals intended to be protected by licensing requirements.**

Bridge BLOQ NAC LLC v. Sorf
2019 UT App 132 (Aug. 1, 2019)

As a matter of first impression, the court adopted a test for defining the scope of an implied easement, holding that **it is based on the parties’ probable expectations at the time of severance.** Applying this approach, the court affirmed the district court’s ruling (based on factual findings by the jury at trial) that the plaintiff had an implied easement to continue using an alleyway for parking.

McGraw v. University of Utah
2019 UT App 144 (August 22, 2019)

A former employee seeking to sue the University of Utah delivered a putative notice of claim to the University’s general counsel and, two months later, delivered another to the Attorney General’s authorized agent as required by the Utah Governmental Immunity

Mediator-Arbitrator HARRY TRUEHEART

Attorney with over 30 years’ experience as Neutral and Advocate in U.S. and International Business Disputes including Corporate, Commercial, Finance, Energy Projects, Construction, Distribution, Private Equity, IP, Professional, Employment

- Distinguished Neutral – CPR International
- Fellow – College of Commercial Arbitrators
- Fellow – Chartered Institute of Arbitrators
- Neutral – American Arbitration Association
- Business Experience as Director, Trustee and Executive



www.trueheartadr.com

Schedule through Utah ADR Services
801-943-3730 | mbstrassberg@msn.com

Act. The employee then filed suit against the University two weeks later. **On interlocutory appeal from denial of the University's motion to dismiss, the Utah Court of Appeals emphasized that the Governmental Immunity Act's claim-initiation procedures require strict compliance and reversed.** The first notice of claim was not properly filed with the Attorney General as required by the Act, and the employee failed to allow sixty days to lapse from the time the second notice was delivered before filing her complaint, necessitating dismissal of her suit for lack of jurisdiction.

McQuarrie v. McQuarrie

2019 UT App 147 (Aug. 29, 2019)

Applying principles of contract interpretation, the court of appeals held that **the presumption of automatic termination of alimony upon remarriage did not apply, because the decree not only omitted remarriage as a terminating event, but also contained a series of provisions that contemplated its occurrence.** These provisions included termination of other types of payments upon remarriage, a prohibition on providing information to future spouses, a limitation on designating a future spouse as beneficiary on an annuity, and continued payoff of a mortgage, even in the event that a party remarried.

10TH CIRCUIT

Evans v. Sandy City

928 F.3d 1171 (10th Cir. July 5, 2019)

The court held that **a panhandling ordinance prohibiting standing or sitting on unpaved medians was not an unconstitutional restriction on free speech because it was a content-neutral restriction, narrowly tailored to the City's interest in protecting pedestrian safety.**

A.N. v. Syling

928 F.3d 1191 (10th Cir. July 8, 2019)

Police officer defendants appealed the district court's denial of their motion to dismiss the plaintiff's class-of-one equal protection claim on the basis of qualified immunity. The Tenth Circuit **rejected the defendants' argument that the plaintiff had failed to establish a violation of clearly established law because, even though there was no factually similar precedent, the claim fell within the category of cases for which the United States Supreme Court has held that general rules of clearly established law can suffice.** Specifically, "the clearly established rule prohibiting intentional, arbitrary and unequal treatment of similarly situated individuals under the law

applies with obvious clarity to Defendants' alleged actions and policy of discriminating between [the plaintiff] and other "similarly situated individuals."

United States v. Hansen

929 F.3d 1238 (10th Cir. July 15, 2019)

Hansen appealed his conviction for tax evasion and obstruction asserting his waiver of his right to counsel was not made knowingly and intelligently. The district court asked Hansen, among other things, if he understood that he would need to follow the rules of evidence and procedure if he proceeded to trial without counsel. "Hansen's response was at best ambiguous and unclear; at one juncture, he specifically told the court that he did not understand that he would be required to abide by these rules." Nonetheless, the district court accepted the waiver. The court held that **the district court failed to engage in a sufficiently thorough colloquy to "properly warn him under the circumstances of this case that – if he proceeded pro se – he would be obliged to adhere to federal procedural and evidentiary rules."**

Burke v. Regalado

935 F.3d 960 (10th Cir. Aug. 20, 2019)

Defendants appealed a multi-million dollar verdict based on violations of 42 U.S.C. § 1983. The court reversed and remanded for a determination of the appropriate setoff based on settlement amount paid by a former co-defendant. In doing so, the court held that **the district court abused its discretion when it (a) denied the defendants' setoff request without knowing the terms of the settlement and (b) denied the defendant's request for discovery of a settlement agreement with a co-defendant necessary to resolving the setoff issue.**

United States v. Garcia

936 F.3d 1128 (10th Cir. September 4, 2019)

Defendant moved to withdraw his guilty plea after it was accepted by a federal magistrate judge on the grounds that the Federal Magistrates Act of 1968 did not permit a magistrate judge to accept a felony guilty plea if the plea is considered a "dispositive matter" under Fed. R. Crim. P. 59. On appeal from denial of his motion, the Tenth Circuit called Mr. Garcia's arguments "persuasive" and noted that at least three other circuits have embraced similar interpretations of Rule 59's limitations on magistrate judges as to felony guilty pleas. Though "sympathetic" to such reasoning, **the Tenth Circuit nevertheless held that it was bound by prior precedent which "squarely held that magistrate judges can accept guilty pleas."**

Become a Mentor



Show a New Lawyer the Ropes

Help them build a successful career



UTAH STATE BAR[®]
NEW LAWYER
Training Program
The first steps to success!

Search for "Mentoring" at:
utahbar.org

Second Annual Innovation in Law Practice Committee Practice Management Symposium – Review

by Christine Hashimoto

What does it mean to be innovative? This question was posed in the opening session of the Second Annual Innovation in Law Practice Committee Practice Management Symposium hosted by the Innovation in Law Practice Committee. Ultimately it was decided that innovation can be anything that increases our ability to practice law.

Innovation comes in many different forms and this symposium addressed several of them with broad strokes. While the symposium did not give us all the answers, it asked the important questions and certainly began the conversation.

Technology

Technology is often the first thing we think of when it comes to innovation. It has changed the legal profession in profound and lasting ways. From online legal libraries, to e-filing and how we engage with our clients, technology is continually changing the way we practice law. The ABA has taken note of this and added to the comment of the ABA Model Rule of Professional Conduct 1.1 that in order to maintain competence “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”

Legal research is one of the areas that seems to change on an almost daily basis. I remember the single day in law school they took us to the library to show us how to look up a case in a book and then told us that we would never need to do that again. At the conference we were introduced to the new online legal research platform Fastcase, which is available to all members of the Bar, for free, through the Bar’s online portal. This new program replaces Casemaker. Fastcase will enable all members of the Utah State Bar to ensure that the research they are presenting to clients, opposing counsel, and the courts is up to date and relevant. There will be additional training on this tool available online and at the Fall Forum in November.

In addition to the technology we use to become more efficient in our practice, we discussed the need to understand the technology our clients are using. How does your client use technology? Could you explain to the court the relevance of that technology to your case? From employment to divorce and criminal to commercial, technology is playing an increasing role in our substantive practices, and if we don’t understand it, we could find ourselves running afoul of it.

Data Security

Data and privacy have also become a big concern in the legal profession. As we handle more and more sensitive information digitally, the risks associated with a data breach are tremendous. Romaine C. Marshall of the committee addressed the changing legal landscape of laws by which attorneys must abide. Very few of us in the room were familiar with any of the laws and guidelines Mr. Marshall mentioned: ISO 2700, CCPA, GDPR, etc. While they might not each apply to all of us today, the trend towards increased regulation in cyber and data security suggests that additional demands will be made of us and our clients in the near future.

Mr. Marshall also discussed the many threats that law firms and individuals face from malicious outside sources. Malicious attacks can be extremely costly and compromise untold amounts of data. Fortunately, according to Mr. Marshall, there are steps we can all take to protect ourselves and our clients, however, we must be proactive in doing so. Through collaborative discussions we were able to identify different steps one can take whether a solo

CHRISTINE HASHIMOTO is serving as an Assistant Attorney General in the Employment Litigation Division.



practitioner, an attorney at a large firm, or a government employee. The discussion remains ongoing as technology evolves and so does our duty.

Caring for Our Clients

Innovation reaches far beyond technology. When it comes to caring for our clients there are many other things we need to consider.

For example, Shantelle Argyle presented on our duty to our clients, even if something happens to us. Do you have a succession plan in place? Do you have a back-up person who could take on your clients without skipping a beat? How can you make such an arrangement? While we all want to assume that we will be able to provide our clients with everything they need, there is always the chance that we might be hit by the proverbial bus. Being innovative in planning for the worst can help us give our clients the best service.

Innovation also applies to how we communicate with our clients, not just by email but also how we listen and speak to our clients. Dr. Austin Houghtaling presented on emotional intelligence (emotional quotient or EQ) during the lunch plenary and taught us all about how we can better care for our clients and ourselves. We often only see our clients while they are going through some of the worst experiences they will ever have. Dr. Houghtaling discussed the emotional drain it can be on us as we manage these terrible times with our clients, while offering helpful instruction on how to work with our clients in a way that helps both the client and us feel better. A simple tilt of the head may change the entire course of the conversation, while how the conversation starts may allow for more information to be communicated in a shorter amount of time. Best of all, Dr. Houghtaling taught us that unlike IQ, which is fairly fixed, EQ can be learned and developed.

Caring for Ourselves

Just thinking about all the changes and innovations happening throughout the legal profession may leave you feeling overwhelmed. But fortunately, innovation is also advancing our personal well-being. The Utah State Bar recognized the need to help us manage the pressures that can come from being a lawyer and this year formed the Well-Being Committee for the Legal Profession (WCLP). As a new lawyer with full-time commitments at work, a two-year old at home and another child on the way, I appreciate the innovation happening in this realm. WCLP gave two separate presentations at the conference to aid us in facing challenges related to our own wellbeing.

In one of them, panel members discussed a variety of ways that they creatively and professionally manage different work styles and work environments on a daily basis as they try to bring better balance and more humanity into the practice of law. This discussion of well-being encompassed more than just our emotional or physical state but also psychological capital (our sense of hope and resilience in challenges we face in our work environment), as well as how improved productivity, effectiveness, and profit can come from employees who have sturdy and hardy well-being. Employees can avoid absenteeism, mistakes, and even interpersonal conflict by being mindful, sensing their success, and utilizing their sense of belonging as a lens to see a bigger picture beyond just themselves.

Each of these areas and topics could constitute its own symposium. Innovation waits for no one and we must do what we can to stay abreast. Fortunately, the Innovation in Law Committee and the Utah State Bar are committed to continue asking the questions and providing the answers and tools whenever they can. We will address many of these topics further in the upcoming Fall Forum, and the conversations will be ongoing as we all strive to become more innovative.



Vial Fotheringham LLP is proud to announce our
NEWEST PARTNER
Scott Welker

VF Law Partners are an integral part of firm management & development. The existing Partners look forward to welcoming Scott to the team.



Practice:
 HOA Law
 Insurance Defense
 Labor Law
 Employment Law
 Construction
 Commercial Litigation
 Contracts

VF LAW

VIALFOTHERINGHAMLLP
 For more information visit: vf-law.com

Judicial Review of Agency Decisions Lifting Stays of Contract Negotiations and Awards During Bid Protests

by Christopher R. Hogle and Christopher D. Mack

The editorial board of the *Utah Bar Journal* indicates that proposed articles of “broad appeal and application” are favored, but this is not such an article. In fact, it’s hard to imagine a narrower topic than the reviewability of decisions by procurement units to lift stays of the procurement process during the pendency of bid protests. But this topic is important. It implicates fundamental separation of powers and due process principles and the basic purposes behind the Utah Procurement Code. Indeed, the issue of whether Utah’s appellate courts may review decisions to lift such stays is so important that the Utah Court of Appeals certified a case involving that issue to the Utah Supreme Court for its consideration. This topic is also timely. The subject of this article was recently before the Utah Supreme Court, in the case certified by the court of appeals, and it was a subject of an article published in the last issue of the *Utah Bar Journal* by Zachary Christensen, director of purchasing and contracts for the Utah State Board of Education. *Protest Actions in Public Procurement: How to Provide Value as Counsel*. Vol. 32, No. 5 UTAH B.J. (Sep./Oct. 2019). Mr. Christensen’s article suggests that decisions by agency heads to lift the automatic stay are unreviewable by any court. *Id.* at 37. This article states the case for the reviewability of such decisions.

The Automatic Stay of Contract Negotiations and Awards During the Pendency of Protests Is Critical to Protestors

As Mr. Christensen ably explains, the public procurement process is the means by which state and local governmental agencies obtain goods and services from vendors. Protests are the means by which unsuccessful vendors identify agency errors

and omissions that caused them to lose solicitations and seek to change the outcome. The solicitation referenced in Mr. Christensen’s article is a good example.

The Utah Communications Authority (UCA) issued a request for proposals (RFP) solicitation for a new, statewide radio system for use by emergency dispatchers and first responders; two vendors responded: Motorola Solutions, Inc. (Motorola) – the incumbent provider – and Harris Corporation (Harris); and UCA selected Harris’s proposal over Motorola’s. After UCA’s announcement of Harris as the RFP winner, UCA began to negotiate a contract with Harris, and based on numerous grounds, Motorola filed several protests over UCA’s handling of the solicitation, each protest filed as soon as Motorola discovered evidence of a basis to do so. Mr. Christensen sat on the three-member procurement appeals panel that affirmed the decisions of the protest officer who denied Motorola’s protests, as he points out in his article, and the authors of this article represented Motorola.

Under the Utah Procurement Code, a protest automatically stays further procurement proceedings, including negotiations between the agency and the selected vendor toward a contract. Utah Code Ann. § 63G-6a-1903. Accordingly, upon the filing of Motorola’s protests, UCA was prohibited from “proceeding further with a solicitation or with the award of a contract” to Harris “until . . . all administrative and judicial remedies are exhausted.” *Id.* § 63G-6a-1903(2) (a).

CHRISTOPHER R. HOGLE is a partner at Holland & Hart where he focuses on bid protest, government contracts, and other types of commercial litigation.



CHRISTOPHER D. MACK is an associate at Holland & Hart where he is a member of the litigation group. His practice includes handling government contract protests, commercial and healthcare disputes, and appellate litigation.



The automatic stay is critical to protestors. It protects protest rights and preserves an effective protestor remedy. If the protestor prevails on its protest during the stay, i.e., before a contract can be awarded to the vendor selected by the procurement unit, the protestor has an adequate remedy: “the procurement or proposed award shall be cancelled or revised to comply with the law.” *Id.* § 63G-6a-1909.

The code provides for an exception to the automatic stay. The stay may be lifted if one of the enumerated officials with a procurement unit, after consultation with the unit’s attorney, “makes a written determination that award of the contract without delay is in the best interest of the procurement unit or the state.” *Id.* § 63G-6a-1903(2) (b) and (c). If the stay is lifted in this manner and the procurement unit awards a contract to the selected vendor *before* a protest has been fully adjudicated, the procurement unit may ratify and affirm the contract “if it is in the best interests of the procurement unit” in the event that the protest is ultimately sustained. *See id.* § 63G-6a-1907(1) (a) (i) (A).

In that event, the protestor is left without an effective remedy. Though a protestor whose protest is sustained may recover “reasonable costs incurred in connection with the solicitation, including bid preparation and appeal costs,” *id.* § 63G-6a-1904(1) (a), the possibility of such a recovery is generally inadequate by itself to compel a protestor to incur the fees associated with advancing a protest. Plus, each protestor runs the risk that if an appeal from a denial of its protest is unsuccessful, it will become liable to the procurement unit

for all expenses that the conducting or issuing procurement unit incurred in defending the appeal, including personnel costs, attorney fees, other legal costs, the per diem and expenses paid by the conducting or issuing procurement unit to witnesses or appeals panel members, and any additional expenses incurred by the staff of the conducting or issuing procurement unit who have provided materials and administrative services to the procurement appeals panel for that case.

Id. § 63G-6a-1904(2).

One might argue that a decision to lift the stay does not necessarily mean that, if the protest is sustained, the procurement unit will ratify and affirm a previously awarded contract. Practically speaking, it does. The same “best interests” standard applies both to the decision to lift the stay and the decision to ratify a contract. The

same “best interests” that justify awarding a contract during the pendency of a protest would support ratifying and affirming the contract in the event that the protest is sustained. Plus, after a contract award, the agency will have an even greater interest in ratifying the contract. By that point, the selected vendor will have worked hard to enmesh itself with the agency, and to terminate the contract the agency would have to compensate the selected vendor “for the actual expenses reasonably incurred under the contract before the termination, plus a reasonable profit,” unless the vendor acted fraudulently or in bad faith. *Id.* § 63G-6a-1907(1) (a) (ii). The theoretical possibility that a contract enabled by a decision to lift the stay might be terminated provides little assurance to protestors, particularly considering that if stay decisions are unreviewable, logical consistency would lead to the same conclusion with respect to ratification decisions.

Thus, if the agency decides under section 63G-6a-1903 to lift the stay and awards a contract to the selected vendor, the protestor’s situation is grim. Even if the protestor is successful on its protest, the agency can deny it the contract simply by ratifying and affirming the contract with the selected vendor; the only relief it can be assured of receiving in the event of a successful protest are the “reasonable costs incurred in connection with the solicitation”; and if unsuccessful, it will be liable for all of

DEFINED BY HIGH VALUE. DRIVEN BY HIGH EXPECTATIONS.

Effective representation isn’t about unlimited resources and timelines.

It’s about the aggressive and relentless pursuit of the end result — putting real knowledge and collective expertise to work.

That’s what we do.

You can stake our reputation on it.



**ANDERSON &
KARRENBURG**

50 West Broadway, Suite 700 | Salt Lake City, Utah 84101
801.534.1700 | www.aklawfirm.com

the agency's expenses incurred in defending the protest officer's decision on appeal, including "personnel costs, attorney fees, [and] other legal costs." Protestors protest to try to win contracts; like other litigants, they generally don't pursue their claims solely to recover the costs incurred in the pursuit, especially if they run the risk of liability for an adversary's fees and costs. From the procurement unit's perspective, a decision to lift the stay not only allows the unit to proceed toward a contract award with the vendor that the unit selected, but it also would effectively kill a protest, particularly if the decision is not reviewable.

Like protestors generally, Motorola's aim was to win the UCA contract, but shortly after Motorola filed its notice of appeal from the procurement appeals panel's decision affirming the denial of Motorola's protests, UCA's director issued a written decision lifting the automatic stay. The same person who made the decision was also one of the members of the evaluation committee who scored the competing RFP proposals and selected Harris's over Motorola's, he announced Harris's selection during a UCA Governing Board meeting after touting UCA's handling of the solicitation, and he was the protest officer who denied Motorola's protests without a hearing. The decision was made without providing Motorola any notice or opportunity to be heard. UCA's director also announced that UCA would begin negotiating a contract with Harris. Motorola disputed the UCA director's grounds for lifting the stay, and it filed a declaratory and injunctive relief action in district court challenging the stay decision. Also, in its appeal to the court of appeals, Motorola moved under Rule 17 of the Utah Rules of Appellate Procedure to reinstate the stay to prevent the appeal from becoming moot. The Utah Court of Appeals imposed a temporary stay and certified the appeal to the Utah Supreme Court for its consideration of Motorola's motion.

The Case for Judicial Review of Decisions to Lift the Stay

In opposition to Motorola's Rule 17 motion, UCA and Harris argued that the UCA director's stay decision was beyond the jurisdiction of any Utah court. They argued that no statute allows for judicial review of such decisions and, they asserted, Utah Code Section 63G-6a-1902(1) prohibits challenges to "a procurement, a procurement process, the award of a contract relating to a procurement...in any other forum than the forum permitted in this chapter." They also argued that Motorola's motion was moot because UCA's director had signed a contract with Harris just prior to the filing of UCA's opposition to Motorola's motion.

Motorola presented the case for judicial review of agency decisions

to lift the stay. (As to UCA and Harris's mootness argument, Motorola argued that no contract with UCA is effective unless it's approved by UCA's governing board, which had not approved the contract with Harris.) In response to UCA and Harris's argument that no statute allows for appellate review of stay decisions, Motorola cited Utah Code Sections 78A-3-102(2) and 78A-4-103(1)(b) and Rule 17. Under sections 78A-3-102(2) and 78A-4-103(1)(b), Utah appellate courts have express authority to issue orders "in aid of [their] jurisdiction." Under section 63G-6a-1802 of the procurement code, the court of appeals has jurisdiction over procurement appeals panel decisions affirming protest denials, and to enable the court to provide complete, meaningful relief, its jurisdiction should extend to agency decisions to lift the automatic stay and proceed to a contract award, which otherwise would strip the court's decision of practical effect and make it advisory. It would be illogical to conclude that a court has the authority to review protest appeals but not procurement units' decisions to nullify the protest process by lifting the procurement code's automatic stay.

Rule 17 is an expression of an appellate court's authority "in aid of its jurisdiction." The preferred approach under Rule 17 is for an application for a stay to be made "in the first instance to the agency." If "that application has been made to the agency and denied," the Rule 17 motion shall identify "the reasons given by [the agency] for denial." Thus, implicit to Rule 17 is that, preferably, there will be an agency stay decision, apart from the underlying decision from which the appeal was taken, which the court of appeals may review in connection with a Rule 17 motion to stay. A decision to lift the automatic stay of procurement proceedings is precisely that kind of decision. Essentially, such a decision denies a stay of the procurement proceedings.

In response to UCA and Harris's argument that section 63G-6a-1902(1) precludes challenges to "a procurement, a procurement process, the award of a contract relating to a procurement...in any other forum than the forum permitted in this chapter," Motorola pointed out that the court of appeals, with which Motorola filed its Rule 17 motion to reinstate the stay, is a "forum permitted in [the procurement code]." See Utah Code Ann. § 63G-6a-1802. Motorola further argued that it's less than clear that a decision to lift the stay qualifies as "a procurement, a procurement process, [or] the award of a contract relating to a procurement," and Utah courts resolve doubts in favor of judicial review. "When ensuring litigants have received due process of law, our policy is to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy." *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 41, 44 P.3d 663.

Though this issue was a matter of first impression for Utah's appellate courts the issue had been addressed by at least one Utah district court, which temporarily enjoined a procurement unit's decision to lift the stay. See *CenturyLink v. Utah Commc'ns Auth.*, Case No. 180909522. The courts that have addressed the question in reported decisions agree that decisions to lift procurement stays are reviewable. Like the Utah Procurement Code, federal procurement statutes impose an automatic stay upon the filing of a protest and allow the procurement unit to lift the stay after making a written determination that doing so is in the best interest of the United States. See 31 U.S.C. § 3553(d)(3)(C). Also, federal procurement statutes do not specifically provide for judicial review of decisions to lift the stay. Nevertheless, every federal court that has addressed the question has held that stay decisions are reviewable. See *Universal Shipping Co. v. United States*, 652 F. Supp. 668, 674 (D.D.C. 1987) ("The Court is, without question, empowered to review" the decision to lift the stay.); *Burnside-Ott Aviation Training Ctr., Inc. v. Dep't of Navy*, 1988 WL 179796, at *3 (D.D.C. Nov. 4, 1988) (following *Universal Shipping*); *DTH Mgmt. Grp. v. Kelso*, 844 F. Supp. 251, 253–54 (E.D.N.C. 1993) (citing *Universal Shipping* with approval). We found no case to the contrary, and no such case was cited by UCA or Harris.

The *Universal Shipping Co. v. United States*, 652 F.Supp. 668 (D.D.C. 1987), court emphasized "Congress's clear concern for the most scrupulous fairness in the protest and post-award process" and reasoned that the writing requirement and the "best interests" standard "implies review." *Id.* at 673. The same considerations apply to the Utah Procurement Code. By requiring a writing and imposing a "best interests" standard, the Utah Procurement Code indicates that such decisions are reviewable. A procurement unit may lift the stay during the pendency of a protest only after "mak[ing] a written determination that award of the contract without delay is in the best interest of the procurement unit or the state." Utah Code Ann. § 63G-6a-1903(2)(c)(ii). The writing requirement is indicative of an intent to preserve the rationales for later review, and a standard is provided against which the stated rationales can be measured. Courts are well equipped to review written agency decisions to ensure that "the agency considered all relevant factors and whether there has been a clear error of judgment." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574–75 (10th Cir. 1994) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Utah Procurement Code's purposes would be frustrated if

procurement units could circumvent protests simply by issuing unreviewable decisions to lift an automatic stay. Among the underlying purposes of the procurement code are "(1) to ensure transparency in the public procurement process; (2) to ensure the fair and equitable treatment of all persons who participate in the public procurement process;... [and] (4) to foster effective broad-based competition within the free enterprise system." Utah Code Ann. § 63G-6a-102. These purposes are impaired if procurement units could defeat protests through the expedient of lifting the automatic stay and rushing to a contract award.

Stay decisions that foreclose effective relief at the end of the protest process defeat transparency, fairness and equity, and competition in the procurement process. Decisions lifting the stay on contract negotiations thwart protests, which are the means by which procurement abuses come to light. "[P]rotest mechanisms enhance accountability of procurement officials and government agencies by highlighting and correcting mistakes and misconduct. This accountability helps to ensure the integrity of the procurement system." Kate M. Manuel & Moshe Schwartz, CONG. RESEARCH SERV., R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures 3* (2016). The consequences of a procurement system perceived as opaque and unfair are higher prices for, and poorer quality

YORK HOWELL & GUYMON
ATTORNEYS AT LAW
SOPHISTICATED. SIMPLICITY.

Erin's practice, covering nearly all areas of corporate and real estate law, including litigation and appeals, now encompasses advising clients from all over the country on Utah compliance and licensing matters, including liquor and industrial hemp licensing.

Karen's extensive liquor license expertise with the Utah Department of Alcoholic Beverage Control offers clients valuable assistance in obtaining liquor licenses from start to finish – including the preparation and approval of applications, and appearances before the Commissioners.

Whether your legal needs are in the liquor licensing arena or in the recently enacted field of industrial hemp ... we've got you covered!

YORK HOWELL & GUYMON
is excited to announce the formation of its
LICENSING & COMPLIANCE GROUP

joining Attorney Erin Stone and Senior Paralegal Karen Kendrick!

YORKHOWELL.COM
erin@yorkhowell.com
karendrick@yorkhowell.com

10610 South Jordan Gateway, Suite 200
Salt Lake City, UT 84095
801.527.1040

YH+BG

of, the goods and services that the government needs. “If the government’s procurement system were perceived as corrupt or ineffective, contractors might be less willing to compete for government contracts, and the price at which the government acquires goods and services could increase.” *Id.* Diminished competition among contractors might also lead to a diminution in the quality of goods and services on which important governmental functions depend.

Perhaps recognizing that the court might be more comfortable denying Motorola’s motion if decisions to lift the stay are reviewable by *some* higher authority, UCA argued that stay decisions are reviewable through the protest process. A protest, however, is not available to challenge a decision to lift the automatic stay. To lodge a protest, the protestor must have “standing” within the meaning of the procurement code. Utah Code Ann. § 63G-6a-1602(1)(a). To establish protest “standing,” a protestor must show, among other things, that “a decision on the protest in favor of the protestor . . . would give the protestor a reasonable likelihood of being awarded a contract.” *Id.* § 63G-6a-1601.5(5)(b)(ii). A decision to reinstate the stay does not give the protestor “a reasonable likelihood of being awarded a contract.” *Id.* Reinstating the stay would not address the merits of the underlying protests and, thus, it would not, in-and-of-itself, make a contract award to the protestor reasonably likely. Thus, a decision to lift the stay cannot be challenged through a protest.

Placing stay decisions beyond the jurisdiction of the courts would deprive protestors of due process. The procurement code affords aggrieved vendors the right to file a protest to challenge procurement decisions, which is a form of property, like a cause of action. *See Miller*, 2002 UT 6, ¶¶ 39–40. Like causes of action, protests are vested rights that accrue when procurement code violations injure vendors. Under the Due Process Clause, protestors may not be deprived of their vested property interests in their protests without due process of law. *See Utah Const. Art. I, § 7; Miller*, 2002 UT 6, ¶ 38. At a minimum, due process is “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *V-I Oil Co. v. Dep’t of Env’tl Quality*, 939 P.2d 1192, 1197 (Utah 1997) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Judicial review is the only opportunity for protestors to be heard in a meaningful manner on stay decisions that would leave protestors without an effective protest remedy.

The Utah Supreme Court denied Motorola’s motion and lifted the court of appeals’ stay in a brief order, with a full opinion to be later published. The next day, UCA convened a special

meeting of its governing board to approve the contract with Harris, and without a realistic prospect of winning the contract, Motorola later voluntarily dismissed its appeal and district court action, with the parties agreeing to bear their own costs and fees.

The court’s full opinion may or may not include an interpretation of Utah law that places decisions to lift the stay beyond judicial review. For example, the court might hold, as UCA argued, that a challenge to a decision to lift the stay should initially be brought in the form of a protest to the procurement unit, with appeals of a denial, first, to the Utah State Procurement Policy Board and, ultimately, to the court of appeals. Alternatively, the court may hold that a Rule 17 motion is an improper vehicle for a protestor to seek reinstatement of the stay, which would leave open the possibility of a district court challenge to stay decisions. In *Department of Environmental Quality, Division of Drinking Water v. Golden Gardens Water Co.*, 2001 UT App 173, 27 P.3d 579, the court of appeals noted that its

determination that this court [or the district court] has no jurisdiction in this case does not leave [the] parties without a remedy for arbitrary or unlawful local agency action where there is no statute specifically authorizing judicial review. [W]here there is no specific, statutorily prescribed method for judicial review of [agency] action, review is available by “traditional means” of extraordinary writ.

Id. ¶ 13 n.5 (quoting *DeBry v. Salt Lake County Bd. of Appeals*, 764 P.2d 627, 628 n.3 (Utah Ct. App. 1988)). Or, the supreme court may have concluded that Motorola’s motion was moot (because UCA’s director had already signed a contract with Harris and the court may decide that UCA Board approval was unnecessary). The supreme court may base its denial of Motorola’s motion on any of these or other grounds, leaving open the possibility for judicial review of agency decisions to lift the stay of procurement proceedings.

Conclusion

The protest process plays a critical role in realizing the Utah Procurement Code’s purposes of transparency, fairness, and competition. But those purposes cannot be fully realized if a procurement unit can circumvent the process by simply lifting the automatic stay without any concern that a court might review its decision. This is an important question, not only for Utah courts, but also for the Utah Legislature, which should reaffirm the procurement code’s purposes by clarifying the courts’ role in reviewing stay decisions.



**A free online
lawyer referral directory to
help new clients find **YOU****

A free member benefit from the Utah State Bar

Claim your free account at:

LicensedLawyer.org

Can We Define “Frivolous”?

by Keith A. Call

During a recent commute, I was thinking about what I could write for this column. Pondering the Utah Rules of Professional Conduct – sick, I know – I thought to myself, “I wonder if there’s anything good in the threes?” So when I got to the office, I cracked open the table of contents to the Rules of Professional Conduct and saw Rule 3.1, “Meritorious Claims and Contentions.” I immediately thought of an opposing party’s recent memorandum that accused my position of being frivolous, an argument that, in turn, I thought was frivolous. I wondered, “What is ‘frivolous,’ and how can we identify it?” Here is a summary of my survey of how authorities define “frivolous.”

Rule 3.1 and Comments

Rule of Professional Conduct 3.1 provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

The second comment to Rule 3.1 adds the following to help define “frivolous”:

- “The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.”
- Lawyers are required to “inform themselves about the facts of their clients’ cases and the applicable law.”
- A legal position “is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail.”
- A legal position is frivolous “if the lawyer is unable to make a good-faith argument on the merits of the action taken” or is unable to support the action “by a good-faith argument for an extension, modification, or reversal of existing law.”

Utah R. Prof’l Conduct 3.1 cmt. 2.

An Objective Standard

Most authorities agree that the test for defining “frivolous” is an objective one. Courts have generally applied one of two objective tests. The “reasonable lawyer” test asks whether a reasonable lawyer would have made such an argument in good faith. And the “rational basis” asks whether the outcome is beyond doubt under any conceivable argument. See James W. MacFarlane, *Frivolous Conduct Under Model Rule of Professional Conduct 3.1*, 21 J. LEGAL PROF. 231 (1996); Ellen J. Bennett & Helen W. Gunnarsson, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, 347–48 (9th ed. 2018).

There Are Few Rule 3.1 Prosecutions

The 2018 Annual Report of the Office of Professional Conduct identifies specific rule violations as a percentage of total violations found in all discipline orders. The report reflects that out of 191 discipline orders issued in the 2017–18 reporting year, 2.1% of those orders were based, at least in part, on violations of Rule 3.1. See Utah State Bar Office of Professional Conduct, *Annual Report* (Aug. 2018), available at <https://www.utahbar.org/wp-content/uploads/2018/10/Final-ANNUAL-REPORT-2017-2018.pdf>.

In my research, I did not find any reported appellate decisions

KEITH A. CALL is a shareholder at Snow, Christensen & Martineau. His practice includes professional liability defense, IP and technology litigation, and general commercial litigation.



where the OPC had prosecuted a violation of Rule 3.1. There is one case in which an attorney brought an original proceeding to challenge orders of the Utah Supreme Court's Ethics and Discipline Committee. See *Long v. Ethics & Discipline Comm.*, 2011 UT 32, 256 P.3d 206. In another case, the Utah Federal District Court disciplined a lawyer for violating Rule 3.1. *Committee on the Conduct of Attorneys v. Oliver*, 510 F.3d 1219, 1224–25 (10th Cir. 2007); see also Utah DUCiv 83-1.5.1 (establishing disciplinary procedures for Utah Federal District Court).

This relative paucity in reported decisions indicates that “frivolous” is difficult to define, identify, and enforce. As stated by one authority:

[D]isciplinary enforcement against frivolous litigation is rare. Most bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse. Tribunals usually sanction only extreme abuse. Administration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid overenforcement.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. b (2000).

What the Cases Say

In *Long v. Ethics & Discipline Comm.*, 2011 UT 32, 256 P.3d 206, the Utah Supreme Court upheld a Rule 3.1 sanction where a lawyer authorized a \$7,775 collection lawsuit against a former client based on six hours' work. *Id.* ¶¶ 55–58. The lawyer represented the client at an initial appearance in a DUI proceeding. *Id.* ¶ 4. After the appearance, the client signed a flat fee agreement for \$6,600, but two days later informed the lawyer's office that he decided to retain someone else. *Id.* ¶¶ 5–6. After being sued for the full fee plus interest, the client filed a complaint with the OPC. *Id.* ¶¶ 7–8. In defending himself against the ethics complaint, the lawyer “admitted that it was ‘absolutely not’ reasonable to charge \$6,600 for six hours of work. *Id.* ¶ 9. The supreme court held that “[b]ecause [the lawyer] knew that he was not entitled to the \$7,775.34 he demanded in his debt collection action, his claim was frivolous.” *Id.* ¶ 57.

In the *Committee on the Conduct of Attorneys v. Oliver*, 510 F.3d 1219 case, the Tenth Circuit did little to enlighten us on how to identify “frivolous” arguments. While affirming violations of Rule 3.1, the court did not explain what frivolous claims the lawyer had made. *Oliver* does tell us, however, that egregiously



Wheels of Justice is pleased to announce that



Goebel Anderson PC

is the winner of the 2019 King of the Mountain Competition!

The King of the Mountain Competition coincides with Wheels of Justice's annual 5 Canyons Bike Challenge. Nicknamed Ain't No Mountain High Enough, the ride ascends all five of Salt Lake City's riding canyons in a single day to show that no mountain is too high to prevent us from putting an end to childhood trauma. The King of the Mountain challenge is a way for law firms to get involved and show their support for the cause.

It is awarded to the firm that raises the most money per attorney capita.

Wheels of Justice gratefully acknowledges its other “Summit Partner” law firms that participated in the competition and donated generously to the cause:

ClydeSnow • Feller & Wendt • Gallian Welker & Beckstrom • Hoole & King
Kirton McConkie • Maschoff Brennan • Nelson Jones • Richards Brandt Miller Nelson
Snow Jensen & Reece • TraskBritt • Workman Nydegger.

frivolous arguments may keep company with other bad behavior. In that case, the lawyer had a history of failing to comply with deadlines and court orders in twenty-seven cases, had offered testimony that “was often incredible and at times outrageous . . . , antagonistic, defensive, arrogant, and combative,” and demonstrated an “inability to exercise fundamental skills of honest and timely analysis and communication.” *Id.* at 1221–23.

In *L.C. v. State*, 963 P.2d 761 (Utah Ct. App. 1998), the court of appeals discussed Rule 3.1 in the context of a terminated parent’s right to counsel on appeal, *see* Utah Code Ann. § 78A-6-1111. The court addressed the potentially conflicting responsibilities that appointed counsel for indigent parents may face when the lawyer concludes that the only possible grounds for appeal would be frivolous. *L.C.*, 963 P.2d at 766. The court did not directly adjudicate a Rule 3.1 issue, but it reaffirmed that a *meritless* argument is not necessarily *frivolous*. *Id.* at 765. It further described “frivolous” arguments as “not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law,” and “in which no justiciable question has been presented and . . . [which are] devoid of merit in that there is little prospect that it can ever succeed.” *Id.* at 765 n. 5 (citation and quotation marks omitted).

We can also look to cases interpreting Rule 3.1’s cousin, Utah Rule of Civil Procedure 11. Rule 11(b)(2) requires a lawyer to certify that “claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” But these cases further demonstrate that clearly defining “frivolous” is difficult.

For example, in *Gillmor v. Family Link, LLC*, 2010 UT App 2, 224 P.3d 741, the court of appeals upheld a sanction for violating the Rule 11(b)(2) prohibition against frivolous arguments, *even though a dissenting opinion adopted the offending lawyer’s position*. *See id.* ¶¶ 16–18 (affirming the district court’s Rule 11 sanction); *id.* ¶ 28 (Greenwood, J., dissenting and adopting the argument rejected as frivolous by the majority opinion). This had to be frustrating for that lawyer! Fortunately for him, the Utah Supreme Court reversed. *Gillmor v. Family Link, LLC*, 2012 UT 38, ¶ 17, 284 P.3d 622.

In *Archuleta v. Galetka*, 2008 UT 76, 197 P.3d 650, the Utah Supreme Court grappled with sticky issues surrounding defense lawyers’ zealous efforts to defend their client in a capital murder case. The lawyers filed an amended petition for writ of *habeas*

corpus that raised 120 claims, many of which repeated claims that had already been rejected. *See id.* ¶ 3. Apparently fed up with this tactic, the Attorney General’s Office sought sanctions under Rule 11. *See id.* ¶¶ 3–5. The supreme court declined to impose a sanction under Rule 11 but seemed vexed in attempting to demarcate the line between what is zealous and what is frivolous:

While we accept the trial court’s conclusion that the attorney conduct at issue in this case did not rise to the level demanding a rule 11 sanction, we also agree with the trial court that much of what took place in regard to Archuleta’s second amended petition was unwarranted and unjustifiable under our rules and applicable law.

Id. ¶ 17.

The Restatement of the Law Governing Lawyers

While far from perspicuous, the best guidance I have seen comes from the Restatement of the Law Governing Lawyers. It explains that contentions must rise above a “minimally plausible position.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. c (2000). It describes three elements for compliance with Rule 11 standards: (1) an inquiry about the facts and law that is reasonable under the circumstances; (2) the lawyer’s conclusions about the facts and law must meet an “objective, minimal standard of supportability”; and (3) litigation measures may not be taken for an improper purpose, even if otherwise minimally supportable. *Id.* Finally, it defines a “frivolous position” as “one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it.” *Id.* § 110 cmt. d.

Conclusion

Based on my review, a clear definition of “frivolous” remains elusive. It is no wonder there is tension in the day-to-day rigors of zealously representing clients, avoiding frivolous arguments, and avoiding frivolously arguing that an argument is frivolous. We lawyers will simply have to learn to live with this ambiguity. *See L.C. v. State*, 963 P.2d 761, 766 (Utah Ct. App. 1998) (recognizing that the process for ensuring counsel fulfills potentially conflicting duties to his or her client and the court is not flawless).

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

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 2, 2020. Applicants are given time at the January Board meeting to present their views. Secret balloting for nomination by the Board to run for the office of President-elect will then commence. Any candidate receiving the Commissioners' majority votes shall be nominated to run for the office of President-elect. Balloting shall continue until two nominees are selected.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1, 2020, with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15, 2020.

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.

Election information is available at <http://www.utahbar.org/bar-operations/leadership/>. 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.

FREE, Confidential Help is Just a Phone Call Away

BLOMQUIST HALE
LAWYER ASSISTANCE PROGRAM (LAP)

Salt Lake City: 801-262-9619
Ogden: 801-392-6833
Orem: 801-225-9222
Brigham City: 435-723-1610
Logan 435-752-3241
Other Locations: 800-926-9619
blomquist hale.com



LAWYERS HELPING LAWYERS
Lawyers Assistance Program

801-579-0404
lawyershelpinglawyers.org



STRESS
FAMILY ISSUES
DEPRESSION
ADDICTION

Utah State Bar®

Spring Convention in St. George



March 12-14

Dixie Center at St. George

1835 Convention Center Drive | St. George, Utah

APPROXIMATELY

10 HRS.

CLE CREDIT*

*Will include Ethics and
Professionalism/Civility credits.
Credit-type subject to change.

Make your plans
to attend today! →

2020 “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 12.07% tax)	Block Size	Release Date	Miles from Dixie Center to Hotel
Clarion Suites (fka Comfort Suites) (435) 673-7000 / stgeorgeclarionsuites.com	\$125	10	2/12/20	1
Comfort Inn (435) 628-8544 / comfortinn.com/	\$125	4-2Q 5-K	2/12/20	0.4
Courtyard by Marriott (435) 986-0555 / marriott.com/courtyard/travel.mi	\$159	10-K	2/12/20	4
Desert Garden Inn (fka Crystal Inn) (435) 688-6066 / crystalinns.com	\$85 \$109	5-2Q 5-K	2/01/20	1
Fairfield Inn (435) 673-6066 / marriott.com	\$129	5-DBL 10-K	2/11/20	0.2
Hampton Inn (435) 652-1200 / hampton.com	\$139	20-Q 5-K	2/12/20	3
Hilton Garden Inn (435) 634-4100 / stgeorge.hgi.com	\$132 \$142	20-K 10-2Q	2/11/20	0.1
Holiday Inn St. George Conv. Center (435) 628-8007 / holidayinn.com/stgeorge	\$132-K \$142-2Q's	5-K 10-Q	2/11/20	0.2
Hyatt Place (435) 656-8686 stgeorgeconventioncenter.place.hyatt.com	\$139-Q \$149-K	10-DQ 10-K	2/11/20	.02
Red Lion (fka Lexington Hotel) (435) 628-4235	\$119	20	2/20/20	3
St. George Inn & Suites (fka Budget Inn & Suites) (435) 673-6661 / stgeorgeinnhotel.com	\$99	10-DQ	2/12/20	1
TownePlace Suites by Marriott (435) 986-9955 / marriott.com/hotels/travel/sguts-towneplace-suites-st-george/	\$159	10-K	2/12/20	3.4

Thirtieth Annual Lawyers & Court Personnel Food & Winter Clothing Drive

Selected Shelters

First Step House



The mission of First Step House (FSH) is to help build lives of meaning, purpose, and recovery. Founded in 1958, FSH has evolved into a dual-diagnosis capable, behavioral health treatment and housing provider. We have been a consistent leader in the Salt Lake metro area delivering evidence-based interventions and achieving positive outcomes for individuals, Veterans, and families who have chronic substance use disorders, histories of homelessness, mental health conditions, criminal justice involvement, and primary health concerns. We operate two residential treatment facilities, two outpatient treatment centers, and six transitional housing facilities in Salt Lake City, Utah. We are also currently in the process of building a 75-unit Permanent Supportive Housing facility for individuals with histories of homelessness and serious mental illness. The scope of services we offer include substance use disorder and mental health assessment, residential and outpatient treatment, recovery residence services, housing, case management, employment support, primary health care and dental services, peer support services, and long-term recovery management. Through our programs, we serve over 930 individuals per year – many of who arrive at our doorstep with very little resources, lack of family support, and numerous barriers to overcome.

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 13, 2019 • 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 firm members, as a reminder of the drop date and to coordinate the collection for the drop.

If you are interested in helping please call (801) 363-7411 or email:

Leonard W. Burningham
lwb@burninglaw.com

Branden T. Burningham
btb@burninglaw.com

Bradley C. Burningham
bcb@burninglaw.com

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

Notice of Bar Commission Election – Third Division

Nominations to the office of Bar Commissioner are hereby solicited for three members from the Third Division, each to serve a three-year term. Terms will begin in July 2020. 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 C. Baldwin, Executive Director, no later than February 3, 2020, by 5:00 p.m.

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

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

1. space for up to a 200-word campaign message plus a color photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions and two photographs no later than February 1st;
2. space for up to a 500-word campaign message plus a photograph on the Utah Bar Website due February 1st;
3. a set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division who are eligible to vote; and
4. a one-time email campaign message to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate.

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



UCLI UTAH CENTER FOR
LEGAL INCLUSION

Your Trusted Resource for Diversity & Inclusion Needs

Trying to build a robust, diverse legal team? Attract and retain top diverse talent?
Respond to your clients' growing demand for demonstrated commitment to diversity and inclusion?

Enroll in UCLI'S 2020 CERTIFICATION PROGRAM by Dec. 15, 2019 for benefits like:

- Trainings and workshops for advancing inclusiveness in your organization
- Access to resources, strategies, and best practices for recruiting and retaining top diverse talent
- Exposure of your inclusion efforts to potential clients, employees, law students, and community organizations

PARTNER WITH UCLI TO BUILD A STRONG DIVERSE LEGAL COMMUNITY
Become a UCLI FOUNDING SPONSOR

To learn more about these opportunities and their benefits, contact us at utah.ucli@gmail.com.

Or, visit us at www.utahcli.org/getinvolved to:

- Become your firm's UCLI Representative
- Sign up to mentor students
- Volunteer on UCLI's various projects
- Join the UCLI listserv

801-746-5222

www.utahcli.org

utah.ucli@gmail.com

Pro Bono Honor Roll

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a free legal clinic during August and September. To volunteer call the Utah State Bar Access to Justice Department at (801) 297-7049 or go to <http://www.utahbar.org/public-services/pro-bono-assistance/> to fill out our Check Yes! Pro Bono volunteer survey.

5th District Guardianship Pro Se Calendar

Aaron Randall

Community Legal: Ogden

Ali Barker
Jonny Benson
Hollie Petersen
Gary Wilkinson

Community Legal: Salt Lake

Jonny Benson
Dan Black
Craig Ebert
Gabriela Mena
Katey Pepin
Brian Rothschild
Paul Simmons
Ian Wang
Russell Yauney

Community Legal: Sugarhouse

Skyler Anderson
Jonny Benson
Brent Chipman
Sue Crismon
Sergio Garcia
Mel Moeinvaziri
Reid Tateoka

Debtor's Law

Mark Andrus
Mike Brown
Tony Grover
Ellen Ostrow
Brian Rothschild
Paul Simmons

Jeff Trousdale
Brent Wamsley
Tami Gadd Willardson

Expungement Law

Joshua Baron
Brandon Dalley
Danny Diaz
Josie Hall
Shelby Hughes
Grant Miller
Stephanie Miya
Adam Saxby

Family Justice Center

Steve Averett
Kate Barber
Elaine Cochran
Navid Farzan
Thomas Gilchrest
Micheal Harrison
Brandon Merrill
Sandi Ness
Babata Sonnenberg
Nancy VanSlooten

Family Law

Justin Ashworth
Thomas Gunter
Stewart Ralphs
Linda F. Smith
Simon So
Sheri Throp
Leilani Whitmer

Homeless Youth Legal Clinic

Erika Larsen
Nate Mitchell
Cecilee Price-Huish
Lisa Marie Schull

Medical Law

Stephanie Miya
Micah Vollwallner

Private Attorney Guardians ad Litem

Jay Kessler
Allison Librett
Celia Ockey
Samuel Sorensen

Pro Se Debt Collection Calendar – Matheson

Jose Abarca
Greg Anjiwierden
Ryan Cadwallader
Ted Cundick
Rick Davis
Chase Dowden
David Jaffa
Vaughn Peterson
Wayne Petty
Cami Shiel
Gregory Sonnenberg
George Sutton
Reid Tateoka

Pro Se Landlord/Tenant Calendar – Matheson

Scott Blotter
Christopher Bond
Mona Burton

Melanie Clark
 Doug Crapo
 Don Dalton
 Brent Huff
 Margaret Krivanec
 Nils Lofgren
 Mitch Longson
 Joshua Lucherini
 Katherine McKeen
 Jack Nelson
 Wayne Petty
 Cami Shiel
 Eric Skanchy
 Michael Thomson
 Mark Thornton

Rainbow Law

Russell Evans
 Stewart Ralphs

Street Law

Dara Cohen
 Dave Duncan
 Cameron Platt
 Clayton Preece
 Adam Saxby
 Elliot Scruggs
 Shane Smith
 Jay Springer
 Jonathan Thorne

SUBA Talk to a Lawyer Legal Clinic

Bill Frazier
 Maureen Minson
 Lewis Reece
 Mike Welker
 Jonathan Wentz
 Lane Wood

Timpanogos Legal Center

Jessica Anderson
 Todd Anderson
 Ali Barker

Bryan Baron
 Cleve Burns
 Justin Caplin
 Emy Cordano
 Rebekah-Anne Gebler
 Michelle McPherson
 Megan Mustoe
 Scott Porter
 Candace Reid
 Katie Secrest
 Babata Sonnenberg
 Marca Tanner Brewington
 Liz Thompson

Tuesday Night Bar

Rob Andreasen
 Mike Black
 Madelyn Blanchard
 Robert Cummings
 Chase Dowden
 Scott Elder
 David Geary
 Steve Glauser
 Erik Hamblin
 Rosemary Hollinger
 Adrienne Jack
 Annette Jan
 Parker Jenkins
 Bryan Johansen
 Alexis Jones
 Elise Walker Jones
 Karina Landward
 Larissa Lee
 Trent Lowe
 Nathanael Mitchell
 Kait Montague
 Andres Morelli
 Ben Onofrio
 David Reymann
 Walt Romney
 Chris Sanders
 LaShel Shaw
 Cami Shiel
 Gregory Sonnenberg

Shane Stroud
 George Sutton
 Sarah Vaughn
 Margaret Vu
 Derek Williams
 Matthew Wood
 Bruce Wycoff

ULS's Enhanced Services Project

Robert Culas

Utah Legal Services – Pro Bono Cases

Nick Angelides
 Rob Denton
 Mark Emmett
 Robert Falck
 K.C. Garner
 Michael Harrington
 Carolyn Howard
 Mickell Jimenez
 Elise Jones
 Lillian Meredith
 Doug Neeley
 Kara North
 Tamara Rasch
 Kathie Roberts
 Kent Scott
 Scott Thorpe

Veterans Legal Clinic

Aaron Drake
 Thomas Gunter
 Brent Huff
 Thomas Kelley
 Jonathan Rupp
 Joseph Rupp
 Katy Strand

UTAH STATE BAR.

2019 FALL FORUM

**Congratulations to the following who will be honored
on November 15 in Salt Lake City:**



Hon. Brooke C. Wells
Lifetime Service Award



Dean Robert W. Adler
Distinguished Service Award



Hon. Evelyn J. Furse
Professionalism Award



Brian M. Rothschild
Pro Bono Attorney of the Year



George R. Sutton
Pro Bono Attorney of the Year



Detective Gregory L. Smith
Community Member Award



Brady Brammer
Outstanding Mentor Award



Kyle V. Leishman
Outstanding Mentor Award

Awards

2019 Recipients of James B. Lee, Charlotte L. Miller, and Paul T. Moxley Mentoring Awards

In 2016, the Utah State Bar instituted the James B. Lee, Charlotte L. Miller, and Paul T. Moxley Mentoring Awards to recognize exceptional mentors outside of the specific mentoring program associated with the New Lawyers Training Program. The Bar recognized the importance of mentoring relationships that take place throughout a career. James B. Lee, Charlotte L. Miller, and Paul T. Moxley were all examples of outstanding mentors in the legal community.

THIS YEAR'S AWARD RECIPIENTS:

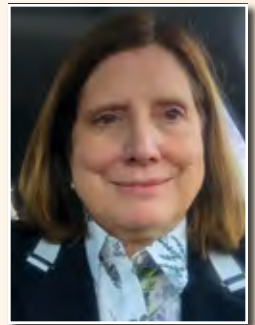


Walter A. Romney, Jr. – James B. Lee Mentoring Award

Mr. Romney currently practices at Clyde Snow, has been practicing for twenty-two years in complex litigation matters. His nominator said, “Mr. Romney’s generous open-door policy encourages other attorneys to seek him for advice and expertise.”

Kathleen McConkie – Charlotte L. Miller Mentoring Award

Ms. McConkie, at McConkie Collinwood, has been practicing family law for thirty-six years. She has spent countless hours mentoring new and mid-level associates in her own firm with excellence and a commitment to professionalism, despite challenges that arise.



Susan B. Peterson – Paul T. Moxley Mentoring Award

Ms. Peterson, at Jones Waldo, has over twenty-five years’ experience in real estate matters. Not only does Ms. Peterson spend many hours mentoring new lawyers, but she continues that mentorship beyond the first few years to help with career planning, business development, and practice growth.

The Utah State Bar would also like to recognize the other finalists nominated this year and thank them for the time they invest, enabling those they mentor to achieve or exceed their life’s goals and aspirations. Other nominees:

Dara Rosen Cohen

Ian A. Forrest

Barton Giddings

Gregory Wall

We are thankful for all the mentors in Utah’s legal community and encourage members to reach out today to mentor someone new.

Do You Hate Divorce Cases?

We **Love** Them (*Divorce Is All We Do*).

Send Divorces To Us!



 Brown Law

 (801) 685-9999



www.utdivorceattorney.com

Attorney Discipline

Discipline Process Information Office Update

What should you do if you receive a letter from Office of Professional Conduct explaining you have become the subject of a Bar complaint? Call Jeannine Timothy! Jeannine will answer all your questions about the disciplinary process. Jeannine is happy to be of service to you, so please call her.

801-257-5515 | DisciplineInfo@UtahBar.org



ADMONITION

On August 19, 2019, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.4(b) (Communication) and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

A client hired an attorney for representation in a criminal matter. The attorney appeared at the client's arraignment hearing. During that proceeding, the client accepted a plea in abeyance and a review hearing was set. The attorney failed to appear at the review hearing and the client requested a continuance. The attorney failed to appear at two more review hearings set by the court. The court clerk called the attorney's office and spoke with someone at the firm who stated that counsel would appear at the next review hearing. The attorney did not appear at the review hearing.

The attorney claimed that attending review hearings following a plea in abeyance was not within the scope of the firm's fee agreement, but acknowledged that this has to be explained to clients so they understand and know what to expect. The attorney admitted that no one explained to the client that the firm's representation did not include attending review hearings following entry of a plea in abeyance. Neither the attorney nor anyone else from the firm filed a motion to withdraw from the client's case.

PUBLIC REPRIMAND

On August 19, 2019, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Cynthia M. Gordon for violating Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a)

(Communication), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

A client retained Ms. Gordon to represent her in a civil matter and made two payments for the representation. Ms. Gordon's fee agreement indicates that the fee is non-refundable and does not contain a disgorgement provision. The client called Ms. Gordon numerous times, but Ms. Gordon never answered her phone calls. Ms. Gordon's assistant told the client that everything was fine; the client asked for clarification about what that meant but did not receive an explanation. The client did not receive a case number or any documents that had been filed with the court. Ms. Gordon sent the OPC a brief letter apologizing to the client and enclosed a copy of a letter to the client and copy of a check refunding the client's payments. The OPC sent a Notice of Informal Complaint (NOIC) requesting Ms. Gordon's response. Ms. Gordon did not respond to the NOIC.

Mitigating Factors:

Timely good faith effort to make restitution or to rectify the consequences of the misconduct involved.

TRUST ACCOUNTING SCHOOL

January 22, 2020

**Utah Law & Justice Center
645 South 200 East, Salt Lake City**

Save the date!

THE BAR CODE FOR YOUR BAR DEFENSE

(yes, scan it with your phone...)



www.utahbardefense.com

Todd Wahlquist

Former OPC Deputy Senior Counsel

801-349-5577

utahbardefense@gmail.com

4790 Holladay Blvd
Salt Lake City, Utah 84117

INTERIM SUSPENSION

On August 25, 2019, the Honorable Elizabeth A. Hruby-Mills, Third Judicial District Court, entered an Order of Interim Suspension, pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, against John A. White, pending resolution of the disciplinary matter against him.

In summary:

Mr. White was placed on interim suspension based upon his criminal convictions for two counts of Sexual Exploitation of a Minor, a second degree felony.

RESIGNATION WITH DISCIPLINE PENDING

On July 22, 2019, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Amy Davies Fortune, for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Ms. Davies Fortune was hired by a law firm. The CEO of the law firm received a complaint and request for a refund from a client. The complaint prompted an investigation by the CEO and he discovered that Ms. Davies Fortune had been billing clients for drafting documents but never actually performing the work. The CEO and another attorney met with Ms. Davies Fortune's clients and determined that she billed more than sixty-nine hours of time for clients without actually performing the work. Most of the fraudulent billing entries that Ms. Davies Fortune submitted and received compensation for were entered on the last two days of a billing period. As a result of the fraudulent billing, the law firm refunded money to twenty-two clients. It was further determined that Ms. Davies Fortune missed at least two deadlines for filing answers that could have resulted in default certificates or judgments. In addition, Ms. Davies Fortune missed several deadlines for filing responsive pleadings for motions before the courts. The OPC sent a Notice of Informal Complaint (NOIC) requesting Ms. Davies Fortune's response. Ms. Davies Fortune did not respond to the NOIC.

Veterans Legal Clinic – An Integrated Approach to Pro Bono Legal Consultation

by Joseph E. Rupp

A few months ago, one of the volunteer attorneys from the Veterans Legal Clinic received an email from a Veterans Justice Outreach (VJO) social worker with the U.S. Department of Veterans Affairs (VA). One of the veterans receiving services through the VA was having some legal troubles. The veteran had an outstanding warrant for failing to appear in district court for some criminal charges. He had failed to appear because he was completing inpatient treatment for substance abuse. Additionally, the veteran was indigent and did not have an attorney. He was now in a position where he needed to go to court to clear the warrant, be assigned an attorney, and address the criminal charges against him. Problematically, if he went to court, he would likely be placed under arrest and would not be able to bail out, resulting in the veteran losing his bed space and being dismissed from the inpatient substance-abuse treatment into which he had finally been admitted.

The second Thursday of the month was approaching. The volunteer attorney was able to contact the veteran and meet with him at the Veterans Legal Clinic that is held at the VA complex in Salt Lake City. The attorney, the veteran, and the VJO social worker, who was also at the clinic, discussed together a solution to address both the legal matter and the substance-abuse treatment. The attorney reached out to the assigned prosecutor in the criminal case and explained the situation – i.e., the outstanding warrant, need for inpatient treatment, and lack of legal representation. The VJO social worker, who regularly attends the Third District Court Veterans Court with Judge Royal Hansen, reached out to her contacts in the District Attorney's office to explain the veteran's progress in the inpatient treatment program.

With all parties involved, a court date was set and the prosecutor agreed to recall the warrant when the veteran appeared in court, with the understanding that the veteran would immediately return to his inpatient treatment. The veteran appeared in court. He was appointed counsel, returned to complete the inpatient program, and his counsel was able to resolve the criminal

matter in his absence. This is one example of many where veterans in Utah have been served by the integrated approach of the Veterans Legal Clinic.

The Veterans Legal Clinic

The Veterans Legal Clinic is a co-sponsored initiative by the Young Lawyer Division (YLD) of the Utah Bar and the S.J. Quinney College of Law Pro Bono Initiative. It is held on the second Thursday of every month (except December), from 5:30–7:00 pm at the Department of Veterans Affairs complex at 500 Foothill Drive, Salt Lake City.

While the program does not provide formal legal representation or establish an ongoing attorney-client relationship, the clinic provides a much-needed legal service and is able to connect clients with a wide range of follow-on resources. The clinic serves an average of fourteen to fifteen veterans and their families each month in a broad range of legal matters, including criminal, family, landlord-tenant, disability, and VA administrative law. The clinic is staffed each month by an all-volunteer force of three to five attorneys (ranging from new to experienced), four to six law students, one or two social workers from the VA's VJO program, an experienced paralegal, and representatives from the Utah Department of Workforce Services. In addition to the monthly clinic, the program also conducts a Wills for Veterans event twice a year on the first Saturdays of May and November.

Each month, the clinic begins with veterans signing in and filling out intake forms with VJO social workers. Amy Earle, Jessica

JOSEPH E. RUPP retired as Lieutenant Colonel in the United States Marine Corps. Following his military career, he attended law school and is now a criminal defense attorney at Collins Rupp, P.C. He serves on the board for the Young Lawyers Division and is the Program Coordinator for the Veterans Legal Clinic.



Mann, and Ryan Davidson are VJO Licensed Clinical Social Workers that continually support the clinic and are the same social workers that coordinate the various veterans courts in the Salt Lake area. They are included in all training and debriefing conducted at the clinic and provide a vital link to VA resources. VJO conducts outreach to the many departments and clinics at the Salt Lake VA to ensure veterans are aware of the legal clinic. The VJO also registers veterans for the Wills for Veterans events, scheduling times and providing forms to be filled out in advance to help the event run smoothly.

Once a veteran has completed the clinic intake form, the VJO gives the form to one of the volunteer law students. The student then sits down individually with the veteran and discusses the veteran's concerns. The clinic has been supported by law students from a variety of law schools, both in and out of Utah. Primarily though, law-student support comes from the University of Utah S.J. Quinney College of Law through the S.J.Q. Pro Bono Initiative (PBI). JoLynn Spruance, the PBI Director, has a volunteer student director assigned to the clinic. The volunteer student director works closely with the program coordinator from the Young Lawyers Division of the Utah Bar to ensure all law students and attorneys are briefed on policies and procedures at the beginning of each clinic and conduct a debrief at the conclusion of each clinic.

When the law student has sufficiently ferreted out the legal issues, the student then calls over one of the volunteer attorneys and briefs the attorney on the issues. The attorney, the law student, and the veteran then discuss the best way to move forward. The clinic has experienced exceptional support in the variety of volunteer attorneys that continually attend the clinic. Given the broad range of topics that arise at the clinic, it benefits greatly from the volunteer support of practicing attorneys with experience in criminal law, family law, civil litigation, landlord-tenant, VA administrative law, and even in-house counsel. The broader the experience base of the volunteer attorneys, the better the support to the veterans. The program coordinator and the student director strive to match the veteran's legal issue with the volunteer attorney most knowledgeable in that particular area of law. For the most part, there is enough breadth of knowledge in the volunteer attorneys each month to address the legal issues that present themselves.

An attorney need not be familiar with any particular area of law to volunteer at the clinic. The clinic does not necessarily focus on veteran-specific issues, such as disability, compensation, military retirement, or military law, and the issues addressed are usually similar to those at the Utah Bar's Tuesday Night Bar or PBI's Street Law site.

Many concerns are resolved during a typical fifteen to twenty-minute consultation. When more assistance is needed, veterans are provided information on appropriate resources. The clinic has handouts with contact information for a variety of nonprofit, pro bono, and low bono legal resources. When the issue is minor, but of a specific nature, i.e., debt, expungement, immigration, better addressed in another PBI sponsored site, the veteran is provided with information on the particular clinic that may be better suited to address the concern.

If the issue is a VA or veteran-specific issue, information is provided on the various Veteran Services Organizations (VSO), such as Disabled American Veterans, Military Order of the Purple Heart, and others that have offices in the VA Regional Office building. (These VSOs do not charge a fee and have accredited representatives who have undergone a formal application and training process and are recognized by the VA as being capable of assisting claimants with their affairs before the VA.) At times, assisting a veteran is as simple as showing them the Utah Courts Online Court Assistance Program (OCAP).

The clinic can also refer veterans to the Utah@EASE program established by the Utah Attorney General, Utah Department of Veterans and Military Affairs, and the Utah State Bar. Once screened through Utah@EASE, Larry Schmidt seeks to find volunteer attorneys who are willing to help qualified veterans and service members with Utah legal matters regarding Service-members Civil Relief Act, Uniformed Services Employment and Reemployment Rights Act, landlord, debt, consumer fraud, predatory lending, immigration, wills, and power of attorney.

The Utah Department of Workforce Services also supports the clinic. Some veterans seeking assistance have legal issues that stem from their unemployment or underemployment and their legal concerns can be resolved if the underlying employment issue is resolved. Art Fracchia or Jeffery Henry, both Veteran Outreach Program Employment Representatives, are available at the clinic for veterans to address training, education, and employment needs. Resolving underlying employment concerns contributes greatly to avoiding recurring legal troubles or recidivism. If assistance filling out forms or a notary is required, the veteran can meet with paralegal Teresa Robison. Teresa has supported the Veterans Legal Clinic for several years.

Wills for Veterans

Teresa and her husband, Judd, have been instrumental in expanding the monthly clinic to include Wills for Veterans events that are held twice a year on the first Saturdays of May and November.

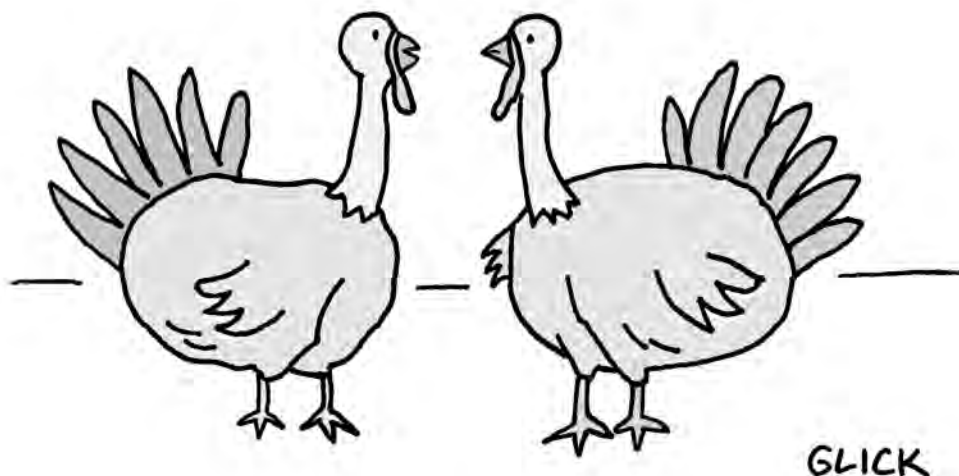
These events are supported by volunteers including attorneys, paralegals, notaries, law students, and lay volunteers. Teresa is employed by The McCullough Group in Salt Lake and has coordinated the support of the Group to hold training prior to the event for the volunteer attorneys, paralegals, law students, and other volunteers to go over the forms to be used at the Wills for Veterans event. Through Teresa's efforts, The McCullough Group also provides technical support for the Wills for Veterans events, to include the HotDocs forms used, at no charge. Teresa and Utah attorney Peter Strand also coordinated donations from nonprofit organizations, The Pi Fund and Lawyers for Veterans, to provide computers and software dedicated to Wills for Veterans.

Even though the legal matters may be the same, circumstances at the Wills for Veterans events varies widely as well. Over the last three Wills for Veterans events, the clinic has completed over 100 Wills. One of the first veterans to attend the event was a veteran in his early thirties. He was full of emotion and shed a tear or two during the signing of his documents, as he was single and on his way out for his second or third tour overseas and felt so much gratitude and relief to be able to get his affairs in order – not knowing if he was going to return or not. He was so appreciative and could not thank the clinic enough for including an advanced health care directive and financial power of attorney.

Most recently, a much older disabled veteran came in to have a codicil completed. Volunteers from the clinic were able to reach out to this veteran at his home and correct some additional discrepancies in the original will. Only weeks after executing the new documents, the veteran passed away. The veteran's surviving family members, who lived out of state, reached out to the clinic volunteer who had helped get the documents in order and the volunteer was able to direct the family to the appropriate documents and provide additional information regarding agencies that could assist with the disposition of the veteran's personal property.

Many veterans that attend the clinic come with a particular concern and simply want to know, "Is this right?" They are seeking to speak with someone who is legally trained and have an issue explained to them in a way they can understand. Some want reassurance, while others want clear guidance and direction. Some veterans are just seeking closure on something that has happened to them. For many veterans, the clinic is the only opportunity they have to visit with an attorney on an issue that is affecting their life. Thanks to the support of federal, state, and local organizations, the Veterans Legal Clinic continues to provide an integrated, team approach to serving those who served.

Jest is for all...



"My life insurance application just got rejected. They said I should apply again after Thanksgiving."



Message from the Paralegal Division

by Greg Wayment

I would like to introduce the 2019–2020 Board of Directors of the Paralegal Division. We are pleased to announce the chair for this year is Sarah Stronk. We have four new members joining the Board of Directors and wish to extend a warm welcome to them. We also wish to thank outgoing board members Erin Stauffer, Lorraine Wardle, Shaleese McPhee, and Terri Hines. This year's Board of Directors are:

Chair: Sarah Stronk. As a paralegal at Dorsey & Whitney, Sarah supports attorneys in the corporate, mergers & acquisitions, and capital markets groups with private and public business and financing transactions. Sarah was on the Dean's List at Salt Lake Community College, where she earned her Paralegal Studies degree. She also earned her bachelor of science degree in political science from the University of Utah. Sarah first began working as a paralegal in 2009 and is a strong advocate for the profession.

Chair-Elect, Region 1 Director: Tonya Wright. Tonya is a litigation paralegal at Peck Hadfield Baxter & Moore. Tonya works on a wide variety of litigation matters. She moved to Preston, Idaho, in 2006 and has traveled over the border to Logan, Utah, every day since. She worked as a Deputy Court Clerk at First District and Juvenile Courts in Logan from 2006 to 2011. Tonya is an advanced certified paralegal. She is a recent empty-nester, mother of two adult children, and she currently resides in Weston, Idaho, with her husband, two dogs, and nine horses.

Region 2 Director: Shalise McKinlay. Shalise has worked in the legal field for over twenty-five years. The majority of her career has been spent with the law firm of Richards Brandt Miller Nelson. Shalise also works as an Adjudication Officer for Park City Municipal. She attended Weber State University and obtained her paralegal certification through the University of Phoenix. Shalise has a love for golf and enjoys being outdoors.

Region 3 Director, Membership Chair: Stefanie Ray.

Stephanie graduated from Utah Valley University in 1994 and has twenty-four years of legal experience. Stefanie is the Senior Paralegal and Manager at doTERRA International. She manages their trademarks in over thirty-six countries as well as provides litigation support, contract management, and processing garnishments and liens. Prior to working at doTERRA, Stefanie was a personal injury paralegal for Abbott & Walker in Provo, Utah, for over fourteen years. She is the mother of three children and enjoys the rural life in Santaquin, Utah.

Region 4 Director, Parliamentarian: Deb Caley. Deb works in the St. George office of Durham Jones & Pinegar in the areas of real estate, litigation, and business and finance. Deb has taken an active role in her local community and in the paralegal profession over the course of her thirty-eight-year career. Deb is a charter member of the Paralegal Division and served numerous terms as a director. Deb served as chair of the Paralegal Division during 2001–2002, and in 2008 she was honored by being selected as Utah's Distinguished Paralegal of the Year.

Ex Officio: Candace Gleed. Candace is a litigation paralegal at the firm of Eisenberg, Cutt, Kendell & Olson working primarily on plaintiff's personal injury and medical malpractice cases. She graduated in 1994 from Westminster's Paralegal program. Candace is the mother of four children and two grandchildren. She enjoys volunteering especially for organizations involving the elderly, disabled, victims of domestic violence, and at-risk youth. She can often be found frequenting local concerts, visiting Broadway at the Eccles, or being exercised by her two puppies, Reggie and Rosie. Candace served as the 2018–2019 chair of the Paralegal Division.

Director at Large, Secretary: Angie Jensen. Angie is a litigation paralegal at Dewsnap, King, Olsen, Worel, Havas &

Mortensen (DKOW), working primarily on plaintiff's personal injury and medical malpractice cases. Prior to DKOW, Angie worked at Eisenberg, Gilchrist and Cutt where she worked as a legal assistant and eventually completed the paralegal program at Weber State University. Angie is a mother of three children. She enjoys cooking, doing yard work, snowmobiling, attending summer concerts, and hiking around the Utah Mountains.

Director at Large, Finance Officer: Paula Christensen.

Paula has worked in the legal field for over thirty-seven years and has been a litigation paralegal at Christensen & Jensen since 2001. She received her associate degree from BYU Idaho and attained her certified paralegal designation from NALA in 2010. She currently works in the areas of plaintiffs' personal injury, commercial and business defense litigation, and real estate. Paula was honored to be named as Utah Paralegal of the Year in 2013. Paula enjoys hiking, reading, and spending time with her family. She is the mother of four children and grandmother of six grandchildren.

Director at Large, Education Co-Chair: Julie Eriksson.

Julie has been a long-standing member of the Paralegal Division of the Utah State Bar. She served as the division's chair in 2008–2009 and in various other positions on the board and on various committees. Julie has worked as a litigation paralegal for the majority of her twenty-seven years in the legal field and nineteen years of those at the law firm of Christensen and Jensen. She recently joined The Rudd Firm as a litigation paralegal.

Director at Large: Bonnie Hamp. Bonnie is a paralegal with the Salt Lake City Attorney's Office. Bonnie has forty-plus years of paralegal experience, which has been focused primarily in civil litigation. Bonnie served ten years on the Unauthorized Practice of Law Committee for the Utah State Bar; is a member of the Board of Directors and Executive Committee for the Paralegal Division; and NALA Liaison for the Utah Paralegal Association. She received an Advanced Paralegal Certificate from the University of California and is a Certified Paralegal through the National Association of Legal Assistants.

Director at Large, Ethics & Professional Service Chair:

Cheryl Miller. Cheryl received her paralegal certificate in 1992. From 1992 to 2000 she worked as a paralegal and

underwriter for attorney's errors and omissions insurance. In 2000, she began underwriting medical malpractice and excess insurance for large hospital systems across the United States. In 2012, Cheryl joined the law firm of Eisenberg Cutt Kendell & Olson. She lives in Murray with her lab Eli and enjoys gardening, cooking, and entertaining family and friends.

Director at Large, Community Service Chair: Kristie Miller.

Kristie earned her bachelor's degree in Criminal Justice and Paralegal Studies from California State University, San Bernardino. She also has a minor in pre-law and a certificate in paralegal studies. The majority of her experience was spent with the Attorney General's Office and the Salt Lake District Attorney's Office. Kristie recently transitioned back into the civil law area when she joined the law firm of Smith Knowles. Kristie is a mother of three and enjoys spending as much time as possible with her children. Kristie also enjoys being active in the outdoors and practicing yoga.

Director at Large, Education Co-Chair: Kathryn Shelton.

Kathryn is a senior paralegal at the firm of Dorsey & Whitney, working in the corporate governance & compliance, mergers & acquisitions, and other groups. Kathryn is a leader in the Utah paralegal community, currently serving on the CLE Committee of the Paralegal Division. She has previously served as a member of the CLE committee, region II director, finance officer, executive committee member, and as chair of the Paralegal Division from 2006 to 2007. At the conclusion of her tenure as Chair of the Paralegal Division, the Paralegal Division was awarded the "Distinguished Section of the Year" by the Board of Bar Commissioners.

Director at Large, Marketing Chair: Greg Wayment. Greg has over fourteen years of paralegal experience and has been at the firm of Magleby Cataxinos & Greenwood for most of that time. He has been a member of the Paralegal Division, served on the board of directors, and currently serves as the Paralegal Division liaison to the Utah Bar Journal. He earned a bachelor of science in professional sales from Weber State University and then continued on to obtain a certificate in paralegal studies from an A.B.A. approved program at the Denver Career College. Greg was awarded the paralegal of the year award in 2018.



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 1, 2019

Expungement Day CLE & Volunteer Event. Salt Palace Convention Center, 100 South West Temple, Salt Lake City. For more details and to register go to: https://services.utahbar.org/Events/Event-Info?sessionaltcd=20_9308.

November 7, 2019 | 8:00 am – 4:30 pm

Annual Securities Law Section Seminar

Little America Hotel, 500 South Main Street, Salt Lake City. Save the date – more details will follow

November 13, 2019 | 12:00 pm – 1:00 pm

Paralegal Brown Bag: Report and Recommendations from the Utah Work Group on Regulatory Reform – Narrowing the Access-to-Justice Gap by Reimagining Regulation. Presented by John Lund, past-president of the Utah State Bar and attorney with Parsons Behle & Latimer. Registration opening soon.

November 15, 2019 | 8:30 am – 5:00 pm



Fall Forum. Little America Hotel, 500 South Main St., Salt Lake City, UT 84101. To register, go to: https://services.utahbar.org/Events/Event-Info?sessionaltcd=20FF_2019.

December 18, 2019 | 8:00 am – 5:00 pm

Mangrum & Benson on Utah Evidence. Save the date!

January 22, 2019 | 8:00 am – 12:30 pm

Ethics for Lawyers: How to Manage Your Practice, Your Money & Your Files. Save the date – more details to follow!

March 12–14, 2020

2020 Spring Convention in St. George. Dixie Convention Center, 1835 S Convention Center Dr., St. George, UT 84790. Save the dates and plan to attend!

April 23, 2020 | 2:30 pm – 3:30 pm

Annual Spring Corporate Counsel Seminar. Details coming soon!

June 5, 2020

2020 Annual Family Law Seminar. S.J. Quinney College of Law. Save the date – details coming!

July 16–18, 2020

Summer Convention in Park City. Save the dates and plan to attend!

For the latest CLE Events and information visit: <https://www.utahbar.org/cle/>

Classified Ads

RATES & DEADLINES

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

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

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

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

IN SEARCH OF...

In search of the attorney who possibly did a Will or Trust for Regina U.E. Bierwert-Monson. Please contact Stephanie Jaramillo at Jaramillo_6@msn.com or 801-309-0634.

JOBS/POSITIONS AVAILABLE

AV-rated Business and Estate Planning law firm with offices in St. George, UT and Mesquite, NV seeks a Utah or Nevada licensed Attorney with 3–4 years' experience for its St. George office. Experience in sophisticated Business/Transactional Law and/or Estate Planning is preferred. Ideal candidates will have a distinguished academic background or relevant law firm experience. Firm management experience would be a plus. We offer a great working environment and competitive compensation package. This is a great place to live with an abundance of recreational, cultural and family oriented opportunities. Please submit letter, resume and references to Daren Barney at dbarney@barney-mckenna.com.

The law firm of Olson & Hoggan, P.C. (Logan, Utah) is seeking a full-time attorney with 5+ years' experience in domestic law and general litigation. Competitive overall compensation structure and benefits are offered. To be considered for this position, please send a resume and any inquiries to Miles Jensen at mpj@oh-pc.com.

Boutique Park City estate planning, trust administration, probate, and business formation law firm seeks detail-oriented associate attorney with 0–5 years of experience preferred. Some experience in areas of firm practice preferred. Must be discreet, have excellent interpersonal skills, follow-through independently, and have a professional appearance and demeanor. Compensation DOE. Submit resume to kbc@bowmancarterlaw.com. No phone calls, please.

Downtown Salt Lake City firm is accepting applications for a litigation associate with 3 to 6 years of litigation experience to assist with business litigation, eminent domain, and general litigation matters. This position will work with a team of trial attorneys and will be responsible for assisting in case management and completing litigation tasks. Candidates must be licensed to practice law in Utah. Interested applicants should send a cover letter, resume, and writing sample to MHoole@mbmlawyers.com.

POSITION SOUGHT

Seeking Office Manager/Paralegal Position. After nearly 18 years with an attorney located in Weber County acting as his office manager/paralegal, he has announced he is retiring at the end of the year. I am seeking employment in the same realm in Northern Utah. I am a skilled and dedicated paralegal with experience in providing comprehensive support and managing all essential tasks and office management for the firm. I am familiar with many court clerks and paralegals in our area. I have assisted with many cases in many areas of the law. Please contact me if I can help with your practice. I can be reached at TarrynGalloway@aol.com or 801-668-1792.

OFFICE SPACE/SHARING

Fort Union Office Space Available For Rent to Attorney or Mediator. 7090 S. Union Park Ave, Midvale, Utah. Fully Furnished (if needed). Two Conference Rooms. Secretarial Help To Be Negotiated. 801-849-8900.

SINGLE OFFICE SPACE, 623 EAST 100 SOUTH, in Historic Victorian Bamberger Mansion. 2nd floor, 11 X 26.5 ft, 10 ft ceiling, 2 large windows, private storage closet, high speed internet. Private BUILDING, shared office spaces of 2,400 sq ft, includes 4 other offices occupied by attorneys and non-profit environmental organization. Private off street parking, Easy, convenient, downtown access. 1 YEAR LEASE, \$525 per mo. Contact: J Patrick, 801-201-2878.

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.

Hoole & King is looking for attorneys who are interested in lowering their overhead and receiving occasional referrals in a cost-sharing firm structure with some remote practice flexibility. Please email admin@hooleking.cocm if you are interested.

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.

SERVICES

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

Expert Consultant and Expert Witness in the areas of: Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics. Charles M. Bennett, 370 East South Temple, Suite 400, Salt Lake City, Utah 84111-1255. Fellow, the American College of Trust & Estate Counsel; former Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar. Email: cmb@cmblawyer.com.

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



Get the Word Out!

If you need to get your message out to the 11,000+ members of the Utah State Bar...

Advertise in the Utah Bar Journal!

For current ad rates, or to place an ad in the *Utah Bar Journal*, please contact:

For **DISPLAY** ads
Laniece Roberts
801-910-0085
UtahBarJournal@gmail.com

For **CLASSIFIED** ads:
Christine Critchley
801-297-7022
ccritchley@utahbar.org

UTAH STATE BAR COMMISSIONERS

Herm Olsen
President
435-752-9090

Heather Farnsworth
President-Elect/3rd Division
Representative
801-532-4556

John W. Bradley
2nd Division Representative
801-626-3526

Steven R. Burt, AIA
Public Member**
801-542-8090 x100

Mary Kay Griffin, CPA
Public Member**
801-364-9300 x103

Chrystal Mancuso-Smith
3rd Division Representative
801-906-9916

Marty Moore
1st Division Representative
435-787-9700

Mark O. Morris
3rd Division Representative
801-257-1900

Mark Pugsley
3rd Division Representative
801-532-1500

Michelle Quist
3rd Division Representative
310-909-6154

Tom Seiler
4th Division Representative
801-375-1920

Cara M. Tangaro
3rd Division Representative
801-673-9984

Heather L. Thuet
3rd Division Representative
801-323-5000

Kristin "Katie" Woods
5th Division Representative
435-673-1882

***H. Dickson Burton**
Immediate Past President
801-532-1922

***Elizabeth Kronk Warner**
S.J. Quinney College of Law,
University of Utah
801-581-6571

***Dean D. Gordon Smith**
J. Reuben Clark Law School,
Brigham Young University
801-422-6383

***Margaret D. Plane**
State ABA Members' Delegate
435-615-5150

***Nathan D. Alder**
Utah State Bar's ABA Delegate 1
801-323-5000

***Erik Christiansen**
Utah State Bar's ABA Delegate 2
801-532-1234

***Camila Moreno**
YLD Representative to the ABA
801-524-4212

***Victoria Finlinson**
Young Lawyers Division Representative
801-322-2516

***Candace Gleed**
Paralegal Division Representative
801-366-9100

***Remington "Jiro" Johnson**
Minority Bar Association Representative
801-532-5444

***Kate Conyers**
Women Lawyers of Utah Representative
801- 304-4900

***Amy Fowler**
LGBT & Allied Lawyers of Utah Representative
801-524-9698

***Robert Rice**
Judicial Council Representative
801-532-1500

***Larissa Lee**
Utah Supreme Court Representative

*Ex Officio (non-voting) Members
**Public Members are appointed.

UTAH STATE BAR STAFF

EXECUTIVE OFFICES
801-531-9077 | Fax: 801-531-0660
www.utahbar.org

John C. Baldwin
Executive Director
801-297-7028

Richard M. Dibblee
Associate Director, Member Services
801-297-7029

Christy J. Abad
Executive Assistant, Paralegal
801-297-7031

Elizabeth Wright
General Counsel
801-297-7047

Brady Whitehead
*General Counsel Assistant,
Certificates of Good Standing,
Pro Hac Vice*
801-297-7057

Mary Misaka
Building Coordinator
801-297-7030

Edith DeCow
Receptionist
801-531-9077

ACCESS TO JUSTICE

Robert Jepson
Pro Bono, Modest Means
801-297-7049
Tue. Night Bar 801-297-7027

Scotti Hill
Access to Justice Staff Attorney
801-746-5273

Mackenzie Hirai
*Access to Justice Assistant,
Tuesday Night Bar Coordinator*
801-297-7073

ADMISSIONS

Joni Seko
Deputy Counsel in Charge of Admissions
801-297-7024

Kelsey Foster
Admissions Administrator
801-297-7025

Application Coordinator
801-297-7058

BAR PROGRAMS

Christine Critchley
*Bar Journal, Fee Dispute Resolution,
Fund for Client Protection*
801-297-7022

COMMUNICATIONS

Matthew Page
Communications Director
801-297-7059

CONSUMER ASSISTANCE PROGRAM

Jeannine Timothy
Consumer Assistance Director
801-297-7056

CONTINUING LEGAL EDUCATION & MEMBER SERVICES

Michelle M. Oldroyd
Director of Professional Development
801-297-7033

Mary Lancaster-Nokes
CLE Assistant, Section Support
801-297-7032

CLE Assistant, Events
801-297-7036

ETHICS QUESTIONS

ethics hotline@utahbar.org

FINANCE & LICENSING DEPT.

Lauren Stout, CPA
Director of Finance
801-297-7020

Diana Gough
Finance Assistant, Licensing
801-297-7021

Sharon Turner
Finance Assistant
801-531-9077 ext. 7333

LIMITED PARALEGAL PRACTITIONER & NEW LAWYER TRAINING PROGRAM

Carrie Boren
801-297-7026

SUPREME COURT MCLE BOARD

Sydney W. Kuhre
MCLE Director
801-297-7035

Laura Eldredge
MCLE Assistant
801-297-7034

Lydia Kane
MCLE Assistant
801-297-5511

TECHNOLOGY DEPARTMENT

David Clark
Information Systems Manager
801-297-7050

Lorie Koford
*Information Systems Support
Web Services*
801-297-7051

OFFICE OF PROFESSIONAL CONDUCT

Phone: 801-531-9110 | Fax: 801-531-9912 | E-mail: opc@opc.utah.org

Billy L. Walker
Chief Disciplinary Counsel
801-297-7039

Adam C. Bevis
Deputy Chief Disciplinary Counsel
801-297-7042

Diane Akiyama
Assistant Disciplinary Counsel
801-297-7038

Emily Lee
Assistant Disciplinary Counsel
801-297-7054

Sharadee Fleming
Assistant Disciplinary Counsel
801-297-7040

Barbara Townsend
Assistant Disciplinary Counsel
801-297-7041

Metra Barton
Paralegal
801-297-7044

Cynthia Schut
Paralegal
801-297-7045

Melodee Parks
Paralegal
801-297-7048

Toni Allison
Paralegal
801-257-5516

Lindsay Callejas
Intake Secretary
801-297-7043

Stephanie Boston
Investigator
801-746-5220

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

PSRST STD
U.S. POSTAGE
PAID
SALT LAKE CITY, UT
PERMIT NO. 844



YOUNKER|HYDE|MACFARLANE

P A T I E N T I N J U R Y

257 East 200 South
Suite 1080
Salt Lake City, UT 84111

Norman J. Younker, Esq.
Ashton J. Hyde Esq.
John M. Macfarlane, Esq.

801.335.6479
yhmlaw.com
www.patientinjury.com

Let us help you prosecute a successful medical malpractice case.