Utah Bar® JOURNAL

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Cover Photo

Pumpkin Patch at Sunset, by Utah State Bar member Chad Grange.

CHAD GRANGE is a graduate of the J. Reuben Clark Law School at Brigham Young University. He is a member of the Utah State Bar and is a shareholder and the Chair of the International Section at Kirton McConkie in Salt Lake City. Chad lives in Holladay and began exploring photography with the birth of his youngest daughter, Tessa, over 7 years ago. The cover photo is of a family farm's pumpkin patch in Layton, Utah.

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

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Letter to the Editor

Dear Editor:

I write in contrast to Bar President Gilson's comments praising Utah's judicial appointment system (Jul/Aug *Bar Journal*, President's Message). I believe state judicial selection is rigged.

The process of appointing Supreme Court, Appellate and District (trial) judges has institutionalized Jim Crow de jure segregation. Of 71 Trial, 7 Appellate and 5 Supreme Court judges, only 3.6% are minority; two Asian, one Native American. The last minority appointed, 2012, was publically asked to affirm her belief in the Pledge of Allegiance. Women are only 19% of the bench. No Hispanic sits on any of these courts. No Hispanic male has ever been seriously considered to sit on these courts. No African American sits on any court. In 10 years only two minority attorneys have been appointed.

Judicial selectivity was implemented after pioneering and esteemed attorney Ray Uno was elected to a district court judgeship in 1984. In 1985, with minority and women attorneys on the cusp of running for judicial office, the governing elites championed a state constitutional change which mandated the uninhibited hiring perk. The constitutionally sacrosanct process of judicial anointment is blessed through exaggerated Bar and political deference.

Merit selection is a capricious employment process sans standards. Gubernatorial political appointees screen judicial applicants. The historical predilection of the unrestricted screening panels is to exclude attorneys from small or solo firms, minorities and women. Merit it seems, from judicial bios, resides almost exclusively in large law firms and government managerial positions.

After 30 years of unquestioned support the pasty selection process has resulted in a judiciary that looks nothing like the community it supposedly serves. As beneficiaries of the exclusionary system judicial branch leaders deny ability and means to integrate. Oh, how convenient. So much merit, so little compassion.

Michael N. Martinez, Attorney

Letter Submission Guidelines

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

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Interested in writing an article for the Utah Bar Journal?

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

ARTICLE LENGTH:
The *Utah Bar Journal* prefers articles of 5,000 words or less. Longer articles may be considered for publication, but if accepted such articles may 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 7 article.

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

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

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

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

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

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Building a Brighter Future

by Angelina Tsu

My first foray in politics happened at the early age of sixteen. I was running for Nevada Girls State Senate. My campaign posters were simple – just three words: Little. Brown. Different. Above the words, I added a rudimentary drawing of a brown stick figure with black hair. It was part petroglyph, part third-grade art project. If cavemen had Crayola markers, they would have made this campaign poster. The poster was a disaster because I failed to include key information – like my name and the office I was seeking. Given the competitive nature of the race and the clear deficiencies in my campaign materials, I prepared myself for defeat. You can imagine my surprise when they announced that I won the race. Looking back, I realize that the poster was not as useless as it seemed. Of the hundreds of girls in attendance, I was the only one who fit the description in the poster. It was my first lesson in how being different can have benefits.

> *"Members of the Bar deserve an organization that helps them meet the challenges of practicing law in the modern business environment. If we fail to keep up with new developments in the market, we cannot remain competitive."*

In law school, I had the opportunity to spend a year as a judicial intern with Justice Christine Durham. At the end of the year, she asked about my plans for the future. She already knew that my parents are immigrants, that I grew up in rural Nevada and that I had attended both university and law school in Utah. I told her that I was planning to move to a place where I would "fit in." By this, I meant a place that was more diverse than Utah. I do not know that I can define "fitting in" any better today than I could then, but in my mind, that place was somewhere like Seattle or Washington DC – anywhere but Elko, Nevada, or Salt Lake City. I will never forget her response.

"Do you think Salt Lake will ever change if people like you don't stay?"

This is a fair question, and one that I have thought about a lot over the past ten years. Fitting in is difficult for everyone. Being noticeably different in a place where people seem very similar can be even more difficult. I love Utah. Much to my surprise, I do feel like I fit in here. I still hope that the upcoming bar year will be different – very different – than years past. In preparing for my term, I reviewed several member surveys conducted by the Bar. I was initially discouraged by the number of comments by members who do not feel like they are getting much for their membership. Then it occurred to me. We can change this. What if we do something different? What if we shift the focus? What if we view our mission and our goals first through the lens of how we can better benefit and serve our members? I think this shift is one of the keys to making this year different. It is also an example of how working together, we can – and will – make this year stand out as one of the best years ever for the Utah State Bar.

The Utah Bar Commission remains committed to improving access to justice for the most vulnerable among us. However, we are shifting the focus of our efforts to our members. We hope to increase business opportunities for all members of the bar by increasing public awareness of the many valuable services that lawyers can provide. The Bar

must make the public more aware of how to obtain legal services. We must educate the middle class on the benefits of hiring licensed Utah attorneys. By unbundling legal services and updating the way law is practiced, we can increase our market opportunities and provide much needed services to the middle class at prices that work for attorneys and clients.

Members of the Bar deserve an organization that helps them meet the challenges of practicing law in the modern business environment. If we fail to keep up with new developments in the market, we cannot remain competitive. We need to take a different approach to technology. In the upcoming year, the Bar will present CLEs on how members can apply the latest technological innovations to increase profits and make our lives easier and more productive. We will also strengthen ties within our legal community with quarterly networking events, where members can build the relationships that form the backbone of this great profession.

It is important to me that you receive real value for your membership in this organization. Whether it comes in the form of a boost in profitability from implementing technology you discover through one of our CLEs, a referral from an attorney you meet at a Bar sponsored networking event, or a lifelong friend that you gain through your Bar service, I hope you will see the benefits of your Bar membership.

The biggest asset of this organization is its people. You make all of the Bar's projects possible – and worth doing. Thank you for being so generous with your time and in your efforts in support of the Bar. I am grateful for the opportunity to serve with you. As we journey through this year together, I hope you will reach out to me with any comments, questions, concerns, and new ideas you have on how to make this organization different and better. I look forward to your feedback and to working with you to build a brighter future for us all – because the future isn't just a place that we go – it's a place that we build. Let's build something great together!

Report and Recommendations on the Future of Legal Services in Utah

by the Futures Commission of the Utah State Bar

INTRODUCTION

George Bernard Shaw[1] said, "Progress is impossible without change, and those who cannot change their minds cannot change anything."

Fundamentally – to better meet the legal needs of individuals and small businesses in Utah – people are going to have to change their minds. The Utah State Bar will have to change its mind about how it connects lawyers with the people who need them. Lawyers will have to change their minds about how they package, price, and deliver their services. Legal educators and trainers will need to refocus their efforts on equipping their students with the basic business skills to successfully practice. And last, but certainly not least, people with legal needs will need to change their minds. They need to be shown much more convincingly that lawyers and other legal service providers are "worth it."

By any measure, progress is needed. The number of self-represented litigants in the courts is burgeoning, even as the number of case filings is dropping. People think they can and should handle a court case on their own and sometimes even think it's better to try to address their problem without taking their case to court at all. This Do-It-Yourself mentality can and often does lead to the legal equivalent of a slapdash basement remodel: It is done, but it is not done well; there might be safety issues; and it probably won't stand up to the test of time. Of course whether to do it yourself or hire it out is an individual's choice. However, in no small number, lawyers and the courts are being called upon to come in after such attempts to make repairs, often at greater expense than if they had been involved in the first place.

The Futures Commission was charged by the Utah State Bar to "gather input, study, and consider the ways current and future lawyers can provide better legal and law-related services to the public, especially to individuals and small businesses in Utah." A broad spectrum of well-qualified community and thought leaders, practicing lawyers, and Bar leaders have devoted substantial time and energy to meeting this charge. Details of how the Commission conducted its work, what it has done, and who has served on the Commission can be found below. We have concluded that to assure access to quality affordable legal services for all, there needs to be transformational change in the legal profession.[2]

The profession must adapt to the changed expectations of consumers of legal services and must meet the changing economic realities. If the profession does not adapt, lawyers will become less relevant to the day-to-day lives of ordinary citizens struggling with family issues, financial problems, routine disputes, and basic needs such as housing. If the profession does not adapt, lawyers will continue to drift away from the middle and find themselves relegated to either acting as the elite counselors of the wealthy and well-funded corporations or serving as the underpaid and underappreciated advocates of the poor and the accused, to the extent that such work is funded by government or provided by charity.

The United States of America proudly and properly proclaims itself to be a nation of laws. Lawyers are valuable and indeed critical to making that a reality for all. This Commission firmly believes that lawyers should continue to play a central role in our nation's legal system and do so for all segments of society, so that every individual truly has access to the protections and benefits of the rule of law. Toward that end, we respectfully submit our report to Utah's practicing lawyers, to Utah's law schools, to the Utah judiciary, to the Utah legislature and Governor Herbert and, most importantly, to all the people of Utah, who have every right to expect and to obtain affordable legal assistance from Utah's lawyers.

RECOMMENDATIONS

1. Make Lawyers More Available and Much More Accessible

The Bar should proactively use its resources to make lawyers more accessible to the middle class and small businesses, to connect lawyers with those who need legal help, and to communicate with the public about the availability of affordable lawyers and their value. Specific action items for the Bar include:

A. Develop and maintain a robust online lawyer referral directory that is easily available to the public. The directory should provide information about the lawyer's: contact information, geographical location and availability, practice areas, willingness to provide unbundled legal services, willingness to work on some basis other than hourly rate or to discount rates for lower income clients, and the languages in which the lawyer is competent to provide legal services. If the lawyer will help with cases involving domestic violence or debt collection, then that should be shown in the directory. The online directory should be mobile friendly and use plain English. This should be done as soon as possible.

B. Build and promote a consumer-focused website which, building on the online directory of lawyers, will become the key clearinghouse for clients in need of legal assistance. The website should function as a marketplace for those who need legal services to find appropriate and affordable help and for lawyers to present and promote the particular services they offer, pricing, payment options, and other specifics. See www.justiserv.com for such a website now serving clients in the Boston area. This website should also, in plain English, educate the public about how lawyers can help, how to select and retain a lawyer, and how to keep costs under control. To make the website succeed, the Bar should engage in "guerrilla marketing"[3] through mass advertising and proactively reach out to community and civic organizations, employers, and faith-based and other organizations. This should be done as soon as possible. It might work best to combine this marketplace project with the online referral directory described in Paragraph A.

C. Increase the use of discrete task representation and fixed fee pricing by (1) marketing the availability of "unbundling," (2) educating lawyers and courts on best practices for implementing these approaches, and (3) establishing an "unbundled" section for the Bar with lawyers who are willing to help clients on a fee-per-task, limited scope basis.

D. Promote fee-per-task delivery models in locations where lawyers can meet with clients for advice in public access points like courthouses, public libraries, and community centers. The Bar should address, internally and with the courts, adjustments to the rules of practice, administration, and professional responsibility to facilitate such models.

E. Better promote, with both lawyers and those needing lawyers, the numerous pro bono and modest means offerings and programs already in place throughout Utah. Strengthen and expand the Bar's Modest Means Lawyer Referral Program, the statewide program already in place to serve middle class clientele.

F. Investigate and promote providing incubators or other support for new lawyers who wish to establish practices, especially in the rural areas of Utah, to provide basic legal services to underserved clients. This should include seeking grants and other private funding, as well as exploring federal and state funding, for the specific purpose of helping lawyers establish viable practices.

G. Investigate and promote changes to licensing requirements to reflect the economic realities of multistate practices and to accommodate lawyers who live in Utah but do legal work for clients outside of Utah.

H. Investigate and consider the impact of changes to Rule 5.4 of the Rules of Professional Conduct to allow non-lawyers to share fees and partner with lawyers in order to increase innovation and encourage lawyers to be more client focused.

2. Better Educate and Train Lawyers and Law Students about Their Business

Utah's law schools do a good job of teaching legal principles while also offering robust practical training and clinical experience for students. Yet many new lawyers feel poorly prepared for the marketplace and for the economic realities of practicing law. And many practicing lawyers have shown little aptitude or appetite for marketplace innovation.

A. The Bar and the law schools should provide more business and entrepreneurial training. The majority of Utah lawyers are running their own small businesses. They need to become more efficient in their delivery models and more effective in their marketing. Such training is especially needed for those who want to practice in solo or small firm settings, particularly in small towns, rural areas, and linguistically and culturally isolated communities where underserved populations exist.

B. The "Third-Year Practice Rule" should be expanded and enhanced. This would permit more law students to provide limited advice and counsel in specific and innovative ways like issue spotting at legal clinics or courthouse consultations.

C. We considered whether to recommend administration of the Bar exam before graduation from law school, but the input was equivocal and the question requires more study of both the costs and benefits. While it might make the entry into practice more expedient, having students preparing for the Bar exam while still engaged in course work creates concerns. We recommend additional study and evaluation of this issue in the near future. We considered and do not recommend creating a "diploma privilege" by waiving the Bar exam for graduates of Utah law schools.

3. Keep Improving Judicial Case Management

Utah enjoys one of the finest run judiciaries in the nation. This is partly due to the effective leadership of the judiciary and to the unified court system created by Utah's Constitution. It is also due to positive collaboration among Utah's legislative, executive, and judicial branches in finding ways to make Utah courts part of the solution to problems experienced by people in Utah.

A. Because a major portion of the unmet legal need is in cases being processed by the courts, we recommend that the Bar Commission endorse and promote increased judicial case management oversight of dockets, especially in family law and debt collection cases. Such efforts are already underway by the Court's Standing Committee on Family Law, the Court's Standing Committee on Resources for Self-Represented Parties, the Legal Aid Society of Salt Lake, and the Bar's Family Law Section. Putting increased emphasis on active judge and commissioner case management, rather than attorney-driven case management, offers the potential for improved use of litigant, attorney, and court time, more productive calendars, greater predictability, and potentially reduced costs.

B. We recommend that the Bar Commission endorse and promote simplification of court processes and redesign of court rules and procedures to better enable attorneys and clients to use limited scope representation. The bulk of the need is in family, housing, and debt collection matters so that is where such efforts should focus.

C. We recommend legislation to increase the jurisdictional limit for small claims court. This change will facilitate greater access for many individuals and businesses to an efficient and low-cost dispute resolution process. We also recommend considering legislation to increase support for a companion piece to small claims – mediators. Presently, Utah Dispute Resolution, a nonprofit organization, is conducting numerous free mediations at small claims courts and could conduct more of them with additional resources and volunteers.

D. The Supreme Court's Task Force on limited legal license technicians is currently examining the potential for people other than lawyers to meet these needs. We recommend that the Bar Commission follow that effort and assist however it can to facilitate the provision of affordable legal services to the people of Utah.

4. Take Control of Technology

As with almost every other facet of life in 2015, technology continues to drive changes and to create both risk and opportunities for lawyers. Now and on an ongoing basis, the Bar should help lawyers use technology to enhance the delivery of

legal services and adapt its rules, practices, and policies to permit lawyers and clients to take the fullest possible benefit of new technologies. If lawyers don't take control of the technologies affecting the practice of law, those technologies could very well control what happens to lawyers. The list below is simply what is front and center today:

A. Promote and maintain online CLE sessions on the business of practicing of law, best uses of technology, unbundling legal services, effectively promoting services to prospective middle class and small business clients, and managing a virtual law practice.

B. Encourage lawyers to participate in established pro bono efforts that utilize remote services delivery systems so that clients in geographically isolated areas can be helped.

C. Make all of the Bar's CLE offerings available for remote attendance and participation.

D. Promote Utah's "one stop" shop for small business registration. The state provides a "one stop" online site for registering small businesses. The Bar should link to and promote this website on its own website. The Bar should partner with the Utah Division of Corporations to determine other ways to promote the use of this website, and whether there are additional services to promote. The Bar should also study ways to refer the site's users to potential lawyers if they need additional assistance.

E. Clarify who with the Bar, among both staff and lawyers, has the charge of leading and training Utah lawyers in the area of law practice technologies.

5. Support Reestablishment of the Court's Access to Justice Commission

The Bar should discuss with the Utah Supreme Court the history of the court's Access to Justice Commission (which disbanded in 2008). For a time, the Utah Supreme Court led an impressive and active stakeholders' roundtable organization and could again engage in that effort, as many state supreme courts choose to do. The court's leadership in this area is essential to achieving results across a broad spectrum of concerns, not only judicial and court-related, but also administrative, educational, market-based, and consumer-oriented, and for an array of legal service providers as well. The court's leadership of a community-wide, broad-based Access to Justice Commission could adapt best practices and solutions from other states and regions, as well as craft unique solutions for our state.

THE REASONS FOR THESE RECOMMENDATIONS

The Futures Commission studied and discussed the legal profession and its service to individuals and small businesses from three different perspectives. One subgroup considered the perspective of clients and market dynamics. A second subgroup focused on the lawyers and the delivery of legal services. The third group focused on the education and training of lawyers, both in law school and thereafter. These groups worked independently, but the entire Commission also met regularly in plenary sessions to hear and discuss reports from the subgroups. Through this collaboration, the Commission found common themes and ultimately reached consensus about recommendations to make. What follows is a summary of the reasoning developed by the Commission's three subgroups and the Commission as a whole for its recommendations.

1. There is an unmet need for legal services.

In 2014, there were 66,717 debt collection cases filed in the Utah courts. In 98% of those cases, the defendant was not represented by counsel and in 96% of the cases, the plaintiff had an attorney. That means more than 60,000 Utahns fended for themselves in court. In the 7,770 eviction cases filed that year, 97% of the people defended themselves. In the family law arena, out of the 14,088 divorce cases filed in 2014, there were attorneys for both parties in only 12% of the cases. In 29% of the cases, just one party had an attorney and in 60% of the cases, neither party had counsel. The number of people trying to represent themselves in the Utah courts is not only large, it is steadily increasing. The 2014 data mentioned above is generally higher than similar data for 2005. *See* Strategic Plan of the Committee on Resources for Self Represented Parties (see link in Resources section below).

We heard many reports from members of the bench and bar about how this not only impacts the litigants but also the courts and the lawyers opposing unrepresented parties. The litigants are in an unfamiliar system without an advocate, without a trained professional, and without someone they can trust. They use the forms that are available from the court's website, www.utcourts.gov/selfhelp, as well as its Online Court Assistance Program, https://www.utcourts.gov/ocap/, but they often don't know how to use the forms or have complications that require special treatment. The judges and court staff must remain impartial and cannot provide legal advice to a party. Maintaining that impartiality can be difficult when it is clear one of the parties has a lot of questions and really needs legal advice. This often results in many patient efforts to explain the process and to try to guide the party towards legal counsel who can advise them.

We learned that the price of legal services is not necessarily the determining factor in whether or not an individual or small business will engage a lawyer. While some may perceive legal services as too expensive or unaffordable, many individuals and businesses simply do not sense the need to involve a lawyer or do not understand that using lawyers early in their problem solving would benefit them. This increase in self-representation comes as legal issues are becoming more, not less, complex. The forms required to complete a divorce can be a challenge when there are children, real property, retirement plans, or foreign citizenship to consider.

Many potential clients do not know how to access lawyers, are not sure the lawyer will help matters or make matters worse, and are concerned about the cost, especially when quoted as an open-ended hourly rate. While some potential clients perceive lawyers as inaccessible, they know information online is immediately accessible and turn to it. Doing so is the legal equivalent of diagnosing one's medical condition based on a review of the WebMD website or other online information. Often, these individuals will perceive lawyers as unnecessary and, thus, will attempt to "go it alone." Or they will be convinced that a form for a will, deed, or contract that can be purchased or even accessed for free online will be adequate.

There are also language barriers for the growing number of Utahns who have limited proficiency in the English language. While the courts provide interpreters for court hearings and processes, that service does not extend to the private consultations that clients need to have with their counsel. There is an increasing need for lawyers who can offer services in Spanish and other languages.

For victims of domestic violence in particular, there continues to be an acute need for legal services in these areas: family law (especially divorce and child custody issues), criminal law, and immigration. Also, in Utah's rural areas, there are overloaded attorneys, few pro bono services, and frequent conflicts of interest.

2. Enough lawyers are being educated and licensed in Utah to meet the needs.

One of the more confounding aspects of this issue is that at the same time that there are clearly unmet legal needs and people who can and would pay something for some legal help, there is

also a large number of under-employed lawyers, especially new lawyers. Utah currently has 9,148 active licensed lawyers, over 35% of who are in private practice on their own or in a firm with five or fewer lawyers. With a population approaching three million, that means there are about thirty lawyers for every 10,000 Utahns, placing Utah in the middle of the pack and slightly below average compared to other states. *See* http://www.americanbar.org/resources_for_lawyers/profession_statistics.html.

Roughly 350 new lawyers are admitted to the Bar each year. These bright, ambitious people are coming out of law school with somewhat compromised dreams of working full time in the legal profession in what has turned out to be a very difficult employment market (and at the same time being saddled with large amounts of student loan debt). This particular group can help solve the unmet legal needs in our communities. Indeed, we hope they will remain engaged in finding solutions. One example of this is Open Legal Services, an innovative non-profit law firm founded by two 2013 graduates of the University of Utah S.J. Quinney College of Law: Shantelle Argyle and Dan Spencer. http://openlegalservices.org/.

If there are many underemployed lawyers and much unmet legal need, then why doesn't the market work to bring them together? Basic economic theory teaches that, in a competitive market, price should move to the point where the demand equals supply. But that theory also assumes the participants in the market have perfect information about the price as well as perfect information about the usefulness and quality of the service in question. That is not a valid assumption in the legal market. The total price is not often provided, just the hourly rate for an indeterminate number of hours. And the value proposition is not well understood by consumers. Our recommendations for making lawyers more accessible and creating an online marketplace are intended to address these issues.

3. People need a much better way to find lawyers who will help them.

People expect to find useful information quickly and easily on their mobile devices and computers. If information about finding lawyers, what they do, and what they cost is not readily available through the Bar's website, then people will search elsewhere. Their searches might find lawyers who pay for more advertising on Google or other search engines. Or people may simply decide to forego lawyers completely. The Bar can and should be a

reliable source for the information people need about lawyers.

Little is currently known about how people try to find information about lawyers and how they try to connect with them. However, we do know the following: Two major focal points of information and referral in our state's legal landscape are Utah Legal Services (ULS) and the Self-Help Center of the Utah State Courts (SHC). In their 2014 fiscal year, ULS provided legal advice and representation to 8,658 clients who met its income and other eligibility criteria. In free legal clinics staffed by ULS and based on the agency's eligibility criteria, another 145 people received brief advice. Pro bono lawyers handled 596 cases. While these numbers demonstrate the wide reach of services ULS provides, the agency also had to refer 6,498 people to other legal resources (including private attorneys) because they did not meet ULS's eligibility criteria for any number of reasons including they were over income, they were financially eligible but not within ULS case priorities, or they were non-citizens.

The SHC provides legal and procedural information and help with forms, but not advice, in all Utah state courts. Services are virtual, provided by telephone, email, text, and the court's website. In fiscal year 2015 (July 2014 through June 2015), the SHC responded to 18,173 contacts. A staff survey is completed for each contact and, since November 2014, that survey has tracked whether the person contacting the SHC was referred to other legal resources. Such referrals are made after SHC staff assesses the person's situation and determines that the person needs legal advice or representation. Referrals to other legal resources are made in around 33% of all contacts. In only eight months of tracking referrals, the SHC made 3,883 referrals. Projecting for a full year, the SHC expects to make at least 6,000 referrals. So, from just ULS and the SHC, we can safely say that at least 12,000 referrals to legal resources are made each year. Many other non-profit agencies and government agencies, as well as libraries, schools, senior centers, churches, unions, and community centers need to have good referral sources available as well. Additionally, the courts and other agencies cannot make referrals to individual lawyers; they can only point to a list of potential lawyers or to a lawyer directory.

For all these thousands of potential referrals each year, there is not a good referral source or a simple source of contact information to connect a potential client with a lawyer. A reliable source – the Utah State Bar – can be that point of contact to the benefit of the public and lawyers alike.

4. Technology is constantly changing things.

A thread running through all of our discussions was technology. Whether it is using social media for referrals, video-conferencing for court hearings, or online legal forms and services, the internet and other technologies are integral to the discussion. In this respect, it is important to realize that a consumer's decision process for purchasing legal services is not altogether different from how he or she might select an accountant or make a major purchase.

Further, people are increasingly comfortable with searching for and getting answers – for better or worse – to legal questions online. Individuals are willing to pay online vendors discrete sums if they perceive it might resolve their legal needs. This is the LegalZoom model. Social media is also providing access to information as people share their experiences and own advice, further reducing the perceived need to consult with lawyers. For example, Avvo offers clients both the opportunity to review and rate their lawyer and the opportunity to submit a question online and get it answered by a lawyer licensed in the jurisdiction in question. Such technological tools certainly appear to be more accessible ways for consumers to get information from and about lawyers.

Researchers, entrepreneurs, and innovators are exploring ever more creative ways to use sophisticated software to deliver legal services more cheaply and more quickly wherever there is a need. Some rely heavily on technology to sell legal forms or help customers find lawyers. There are online mediation and settlement services for simple disputes. And there are even models for using artificial intelligence to conduct legal reasoning and make rulings.

It is simply not possible to catalog all of these new technologies and the changes they bring. And by the time that catalog is finished, it would be out of date. Suffice it to say that the legal profession will continue to be profoundly altered by technology and the Bar must be working to not only stay abreast of those technologies but to help Utah lawyers implement them for the benefit of their clients.

5. The marketplace for legal services is evolving.

Due in no small measure to the technologies discussed above, the traditional ways for lawyers and clients to find each other are becoming less the norm. Certainly it is still common for people with legal problems to go to their community and religious leaders or family and friends for suggestions about a lawyer to hire. Word of mouth still counts and so does reputation. However, word of mouth now also includes what a former client is willing to say in an online client review. And reputation could include how high someone lands on a Google

search for "best Utah divorce lawyer in Utah," which likely has more to do with search algorithms and Google AdWords than with anything else.

Another aspect of the market is that lawyers in general have a perception problem. They are perceived as expensive, even by themselves. Many a lawyer has noted that he or she wouldn't be able to afford him- or herself. And, instead of perceiving lawyers as the problem solvers and peacemakers that they often are, the public worries that the lawyer will be confrontational and drag things out, possibly due to a self interest in charging more fees. While this is certainly not accurate as to most lawyers, the perception does exist.

So if lawyers are going to be expensive and possibly not helpful, then where else might someone with a legal problem turn? The data for the SHC shows that many try to do it on their own. Others will turn to commercial online services. Latinos often will turn to "notarios" or "immigration consultants" who provide services that often become the practice of law without a license and at no true saving or benefit to the client. Similarly, in the bankruptcy courts, a market has developed for "bankruptcy petition preparers" who, under the guise of filling out forms, end up giving bad non-legal advice.

The Bar's response to this should be not only to work to protect consumers from illicit services, but to recognize that this is a symptom of the substantial unmet need for those in the middle class. If lawyers do not meet the demand for help with services that clients can afford, then others will continue to seek to fill the void. With their dignity and ethics preserved, lawyers need to be available for hire online where consumers are shopping for them.

6. Law schools and traditional legal education model face specific challenges.

Nearly four out of every ten lawyers seeking admission to practice in Utah have attended law school out of state. So, the condition of legal education across the nation affects Utah, even though the BYU and U of U law schools have remained strong and economical.

Nationally, law schools in the United States face numerous

challenges. According to the American Bar Association Task Force on the Future of the Legal Profession, these include declining number of applicants, declining enrollments for minority and diverse candidates, increases in the cost of tuition and associated expenses, the high cost of clinical education, limited salary expectations post-graduation, inadequate training of lawyers in the business of law practice, including the business of client development and retention, and quite simply, too few traditional jobs for law graduates. The Task Force concluded that, at a national level, the current means of financing legal education contributes to the steadily increasing price of legal education and tends to impede the growth of diversity in legal education and in the profession.

The Task Force further concluded that the current system of pricing and funding demands serious re-engineering. It also concluded that (1) the accreditation system should seek to facilitate innovation in law schools and programs and legal education, (2) the core purpose of all law schools is to prepare individuals to provide legal and related services in a professionally reasonable fashion, and (3) that fact should lead to more attention being given to skills training, experiential learning, and the development of practice-related competencies.

The Futures Commission's subgroup on education and training surveyed Utah lawyers concerning their experiences in this regard. One survey was administered to lawyers who entered the profession within the last ten years and the other survey targeted lawyers practicing longer than that. The combined number of responses exceeded 900. There was strong agreement that attorneys and firms need to innovate to respond to changing markets and indeed many attorneys already have begun changing their billing and hiring practices. There was also strong agreement from lawyers practicing more than ten years, and in a position to employ younger lawyers, that they value the clinical experiences, substantive specialization, legal employment during law school, and skills courses that prepare students for practical application of legal concepts. Lastly, there was a consensus that law students are not well trained in practical legal skills and are not prepared for the business side of the legal profession. See link to survey in Resources below.

Many law schools have expanded practice preparation opportunities for students and also now offer courses about the business of law practice. The two law schools in Utah have already made significant efforts, especially in recent years, to innovate their curricular offerings and to better train students for law practice. Both schools offer extensive clinical programs, which afford students important opportunities for practical legal training. Both schools also have begun to offer more business-oriented courses; BYU offers two very popular courses in the first year of law school in this regard, for instance, and the U of U has for the last several years offered a course to train students how to run a solo or small practice. Further, both schools have initiated mentoring programs in which experienced lawyers can advise new lawyers during and immediately following law school. Compared to national averages, the cost of legal education at both of Utah's schools also is quite affordable.

Nonetheless, given the changes in the national and local legal markets, both Utah and BYU should continue to explore innovative ways to offer practical training to students and to respond to the evolving legal industry and market. Throughout the legal education system, more can be done to prepare students to represent middle class and low-income clients in innovative and cost-effective ways and also to help students interested in that kind of career keep the cost of their education manageable.

7. Geographic barriers to the practice of law are fading.

Throughout the history of this country, as decisions were handed down by courts and statutes were passed by legislatures, those laws were printed in books. For decades, if information about the law of a certain state was needed, a person would invariably work with a lawyer in that state who had a library of the laws applicable in that state. And to this day lawyers often give media interviews with a backdrop of such dusty volumes of reported cases. But, that is no longer where lawyers go to find the law. They go to the internet, using online services or state-sponsored sites to access case decisions, court rules, and statutes. And there is no state boundary to such information. A lawyer, or for that matter anyone with an internet connection can instantly access the local rules of practice for the District of Guam, for example. *See* http://www.gud.uscourts.gov/?q=local_rules.

Likewise, lawyers now work extensively with their clients, with each other, and even with the courts via email, telephone, and videoconferencing. Substantial practices can be conducted without being physically present at the courthouse, in the office or even in the state. Transactional lawyers edit in real time or shoot redlined drafts of complex agreements back and forth across the country as readily as teenagers text selfies to each other.

The regulatory lines have become less distinct as well. Since 2013, the Utah Supreme Court has adopted the Uniform Bar Exam for admission to the Utah State Bar. This uniform exam is now used in sixteen states, including several other Western states, and scores are generally transferable from one state to the next. https://www.ncbex.org/exams/ube/. In other words, applicants in all of these states are being tested on the same legal concepts and may be able to gain admission to various other states based on their performance on the test in their home state.

There is also common use, in state and federal courts in Utah and throughout the nation, of pro hac vice admissions that allow a lawyer licensed elsewhere to be admitted for a specific case. And Utah has a reciprocity rule that generally allows lawyers from other states to be admitted to the Utah Bar if their state allows Utah-licensed lawyers to be admitted in their state. *See* Utah Code of Judicial Administration, Rule 14-705.

We are at a point where there are lawyers living in Utah who exclusively represent non-Utah clients and there are no doubt lawyers living and licensed elsewhere who are providing legal services to clients based in Utah. The Bar should study these dynamics and address them in a way that facilitates both good service to Utah clients and good opportunities for Utah lawyers, while not unduly regulating lawyers not actually serving Utah clients.

CONCLUSION

Mahatma Gandhi[4] said, "The future depends on what you do today." If access to legal services in Utah for individuals and small businesses is to be improved, it depends not on this report but rather on what actions flow from it. As such, we certainly hope the Bar's Affordable Attorneys for All (Triple A) Task Force, the courts, the law schools, our legislators and governor, and practicing lawyers will find value in our recommendations and work to implement them. We would also note and acknowledge that many other bar organizations are working on these same issues. We have relied in part on those efforts in doing our work. No doubt new and better ideas will come to the fore as the discussion continues.

For now, we believe we have identified specific steps that should be pursued to assure legal services be provided more efficiently and affordably to Utahns, by better connecting those who need lawyers with lawyers to serve them. While there is momentum toward moving some elements of the practice of law to other licensed professionals, we would note much of the work can, and should, be performed only by lawyers. The practice of law is much more than filling out forms and citing rules. A good lawyer is a problem solver who has been trained to look deeply at the facts presented and then to help the client avoid more problems later. It is critical for clients seeking legal services to have access to lawyers who are qualified, thoughtful and ethical in how they serve their clients. And it is essential for Utah lawyers to make themselves available to serve those clients. Critically, more can be done to bring them together. The Futures Commission of the Utah State Bar hopes its recommendations will contribute to this effort. In the words of Mother Teresa,[5] who accomplished more than a few things in her life, "Yesterday is gone. Tomorrow has not yet come. We have only today. Let us begin."

1. Irish playwright, noted essayist, co-founder of the London School of Economics and ardent advocate for the working class.
2. This Report reflects the collective views and recommendations of the majority of the Commission members. Not every Commission member necessarily agrees with everything in the Report.
3. This is not meant to imply combative, just creative. https://en.wikipedia.org/wiki/Guerrilla_marketing.
4. Lawyer and practitioner of non-violence.
5. Missionary and servant to the poorest of the poor.

FUTURES COMMISSION MEMBERS

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John Lund, practicing lawyer, Bar Commissioner, and member of the Utah Judicial Council

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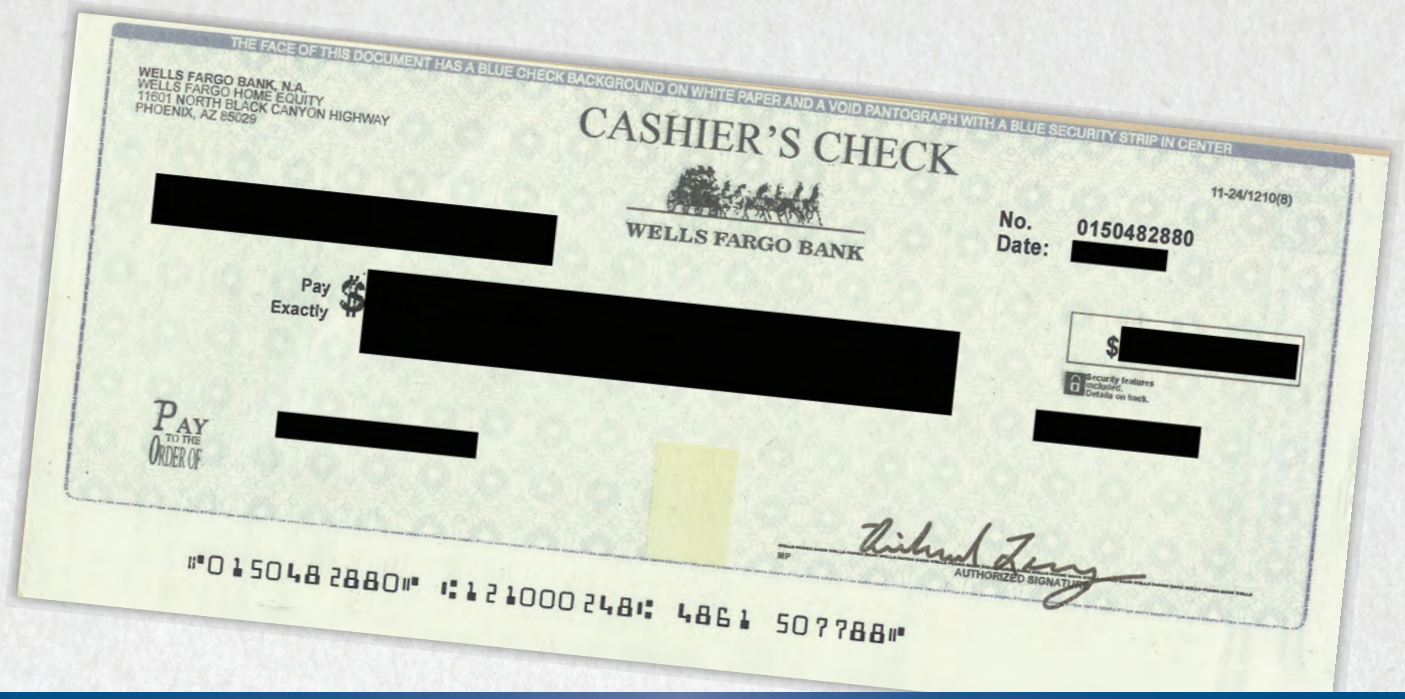
Heather M. Farnsworth, Match & Farnsworth, Bar Commissioner

John C. Baldwin, Executive Director, Utah State Bar

RESOURCES, SOURCES, MATERIALS & FURTHER INFORMATION

Sources, materials, and additional resources can be found online at: www.utahbar.org/futures. We recommend continued dialogue with community, business and thought leaders, clients and client organizations, government, judicial and legislative leaders, as well as attorneys working on these issues.



WE CAN'T TELL YOU ABOUT OUR LATEST SETTLEMENT.

We can tell you about the case. Catastrophic birth injury; eight-year-old plaintiff with severe cerebral palsy. The referring attorneys had neither the resources nor the expertise to dedicate years of effort to a single case. We consulted with 19 different experts and retained 11 of them. Nine were deposed. The case required over 4,000 hours of partner and associate time, more than 2,000 hours of paralegal time, over $250,000 in costs and 3 mediations. According to the third and final mediator, the result was one of the largest birth injury settlements in Utah history.

While we can't tell you about the defendants or the amount, we can tell you that our clients are very happy that we represented them. A profoundly handicapped child will now grow up with the care and support he deserves. His parents will not have to worry about having the resources to take care of him. They can go back to being parents.

The defense wants you to go it alone. Don't give them the upper hand. G. Eric Nielson and Associates co-counsels with referring attorneys on all types of medical negligence cases. In fact, medical malpractice is all we do. We'll work with you as a dedicated partner, adding our decades of experience to your expertise.

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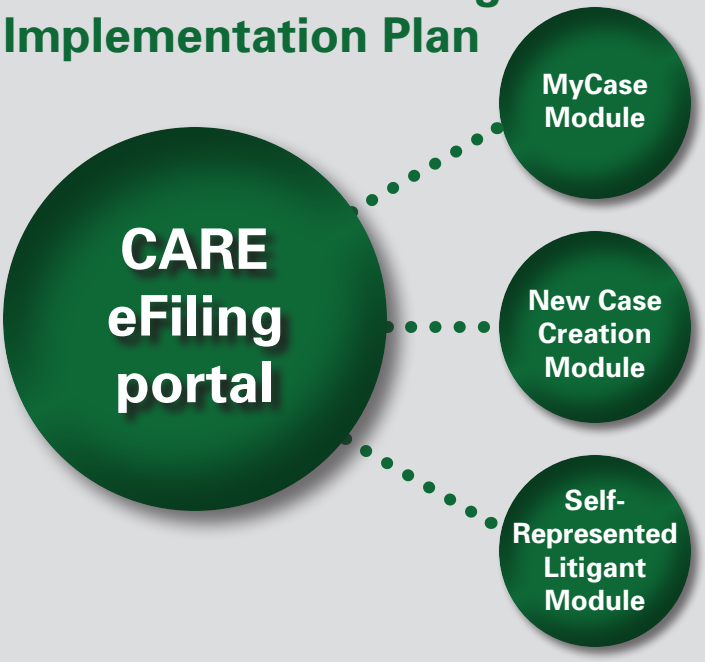
eFiling, Coming to Juvenile Court

by Judge Jeffrey J. Noland

Imagine a day when the juvenile court attorney will come to court with only a laptop computer – no paper exhibits or filings and no legal pads. As of December 1, 2015, mandatory eFiling (that is electronic filing for those persons who may be a little older) shall be the rule in juvenile courts as to existing cases before the court, with a mandatory eFiling implementation date of August 1, 2016, for all new cases before the courts. The juvenile courts are following the district and federal courts in the eFiling system.

Juvenile Court eFiling Implementation Plan



Phase I

- Programming complete by 08/31/2015
- Pilot Testing 09/01/2015 to 11/30/2015
- Mandatory by 12/01/2015

Phase II

- Programming complete by 05/31/2016
- Pilot Testing 06/01/2016 to 07/31/2016
- Mandatory by 08/01/2016

Phase III

- Date TBD

Why should the juvenile courts require and implement an eFiling system for all attorneys practicing in juvenile court? EFiling achieves more precision and efficiency of practice in the juvenile courts, which includes the attorneys, parties, and court staff. The mission of the Utah Courts is "to provide the people an open, fair, efficient and independent system for the advancement of justice under the law." Mission statement of the Utah Courts. EFiling will assist in furthering this mission. The advantages of eFiling for the practicing attorney include twenty-four-hour access to case files; immediate filing and timely receipt of all documents filed in a case; and a case management feature within the program itself.

The juvenile courts have the CARE system through which attorneys will access and file pleadings into the court. All attorneys may request their specific CARE access login and password by contacting their local CARE specialist at the juvenile court. This user login will allow the attorney to file pleadings and any other document in any case in which the attorney is recognized as an attorney of record. Pursuant to Rule 53 of the Utah Rules of Juvenile Procedure, attorneys will be required to file an electronic Notice of Appearance, with the accompanying electronic signature. These attorneys will then have access to all documents filed in the pending matter, and they

JUDGE JEFFREY J. NOLAND was appointed to the Second District Juvenile Court by Gov. Gary R. Herbert in July 2010. Judge Noland was among the first of Utah's Juvenile Court Judges to conduct court electronically and now serves as an active member of the Juvenile Court Electronic Conversion Steering Committee.

will be able to see with an indicator when they log into CARE if any additional documents or pleadings have been filed on that pending matter. Attorneys will give notice of service by filing the document and providing notice via email to the attorneys on the case of the new filing. The electronic filing system in the juvenile court differs from the district and federal court systems in that the attorney files directly in the CARE system, not through an independent provider. Self-represented litigants will continue to be able to file paper pleadings in the juvenile courts.

If the thought of eFiling and the technological "know how" to make it work concerns you, there is training and assistance available. There will be local CARE specialists at the juvenile court to assist you in obtaining your CARE login. EFiling will be presented, along with training, at an upcoming summer training conference and there will be further training at conferences. Frequently asked questions and answers (see side box) will be available on the Utah Juvenile Courts' website: www.utcourts.gov/efiling/juvenile. There will also be online training provided through the Utah Juvenile Courts' website in the online training program. The online training will provide "how to" videos on various topics, including "How to process documents in eFiling through CARE." Finally, when you just simply need some immediate assistance, there will be access to a local CARE specialist in your district once mandatory eFiling takes effect.

In conclusion, eFiling will allow attorneys, parties, and court staff to practice more precisely and efficiently.

CARE Frequently Asked Questions

Q: Is CARE compatible with MAC computers?

A: Yes, CARE is compatible with MAC computers.

Q: Is CARE compatible with all versions of Internet Explorer or with Mozilla Firefox, Safari, and Google Chrome?

A: CARE is compatible with all versions of Internet Explorer and Google Chrome on PCs only. (CARE is not yet available for Chrome on iPads and other tablets.) CARE is not available on Safari or Mozilla Firefox.

Q: How will I get access to CARE in order to electronically file a document?

A: Contact the local district Trial Court Executive or the Clerk of Court.

Utah's Drug Court

by Greg G. Skordas

The year 2015 marks a milestone in Utah: It's the twentieth anniversary of the implementation of drug court. As a criminal defense attorney and former prosecutor, I have seen what drug addiction has done to defendants who are facing years in jail because of crimes committed due to the need to feed their addiction. Their lives fall apart at the seams and crumble around them because they are unable to break a vicious cycle. We may have lost the war on drugs, but we can help break the cycle of addiction. Drug courts brought a new approach to how we treat addicts in the criminal justice system. Drug courts provide hope, treatment, and resources for change and support. As we approach the twentieth anniversary of drug courts in Utah, I want to acknowledge and applaud the judges and lawyers who have helped make the drug court system successful.

How It All Began

"One of the biggest misconceptions that [is] out there is that people never really truly recover from having a substance abuse problem and being in the criminal justice system."

–Ali Shelley, 2009 drug court graduate

The concept of drug court was developed by a group of judicial professionals in Miami-Dade County, Florida, who grew tired of seeing the same faces appear in their court. This group observed that a large percentage of repeat offenders were landing back in the courtroom – and inevitably behind bars – because of drugs. Their criminal activity was fueled by the urgency to feed their drug addiction. Time spent in jail served as a temporary solution to keeping these offenders away from criminal activity and drug usage. Unfortunately, for both the offenders and the Miami-Dade County taxpayers, once the offenders were back on the streets, they would return to their old habits.

The group of judicial professionals sought to change the revolving door of drug-related crime and arrests through drug court: a specialty court that would use the legal system to inspire positive transformation. Treatment would be offered in lieu of jail time. Their concept would provide drug treatment through the structure of a court and the authority of a judge. Instead of walking into the courtroom as adversaries, the attorneys on both sides would endeavor to work with the judge toward a common goal: the individual's successful sobriety. The first drug court was launched in 1989. Ten years after the first drug court was founded, 439 more drug courts were opened, and by June 30, 2012, 2,734 drug courts operated throughout the country. *See* National Association of Drug Court Professionals, www.nadcp.org.

In the spring of 1995, Scott Reed, Craig Bunker, and I were asked to attend a drug court conference in Las Vegas. It was there that we were introduced to the concept of the drug court system. Once we understood how effectively it reduced the level of recidivism and improved the lives of those facing addiction, we knew something had to be done in Utah. My colleagues and I returned from the conference inspired to initiate a change in our state's system.

Though we faced a great deal of initial skepticism and reluctance, we were granted permission to launch a pilot project. We were pleasantly surprised – and certainly relieved – when Judge Dennis Fuchs came out of the blue and offered to be the judge.

"I grew up in the '60s, a time when the drug culture was pretty prevalent. I saw the damage it did to other people. I decided to implement [drug court] to find an alternative to locking up individuals who used drugs and to look for a long-range treatment

GREG SKORDAS is a shareholder with the firm of Skordas, Caston and Hyde. He and his wife Rebecca sponsor a non-profit corporation dedicated to supporting the clients, graduates, and alumni of Utah's drug courts.

for those who were involved in drugs," recalls Judge Fuchs.

He reflects on growing up during a time when he would encounter men who would go off to fight in Vietnam and return with a severe drug addiction. Additionally, Judge Fuchs watched the deterioration of a family member who suffered from a severe addiction to alcohol and cocaine. His experiences led to a perception that disagreed with what had been the norm for dealing with drug-related crimes – and ultimately made him the perfect person to serve as judge in the pilot project.

"Even back then I thought that drugs and alcoholism were more of a disease than they were a crime. I thought that treating those individuals as criminals was the wrong approach," says Fuchs.

Within a year, Salt Lake opened its first drug court. Two years after the pilot project, more drug courts had been established in Utah. In 1998, the University of Utah's School of Social Work revealed that recidivism rates for local drug court graduates one year after graduation remained at a steady 7%. In contrast, the United States Department of Justice estimates that approximately 45% of offenders convicted of similar charges but who have not participated in drug court, will relapse and commit another crime. *See* www.utcourts.gov. Three to five years after their first year out from drug court, 75%–85% of drug court graduates are not rearrested.

Today, twenty years later, Utah is home to more than 2,000 drug court graduates. That means more than 2,000 Utah citizens were given the choice to either face serious criminal charges or face their addiction head on and win. These graduates are our sons, daughters, mothers, and fathers. They are our neighbors, friends, and colleagues. They made unlawful choices not, because they were inherently criminals but because they saw no other way to live their life in happiness. Drug court presented them with an alternative, and it continues to help people every single day.

How It Works

"It's court-ordered and sponsored treatment. The court is the one praising them for doing the correct thing, and the court is the one punishing them if they don't do the correct thing."

– Judge Dennis Fuchs

When we began our pilot drug court project, those involved decided that because we had one shot at this, we might as well aim high.

"We were one of the few drug courts who were working with felons," explains Judge Fuchs. "If we could be successful with hardcore drug addicts, then we could be successful to get state money."

The classification of high-risk, high-need is placed on those who have been doing drugs for many, many years. Their lives are completely controlled by their addiction. They have often been in and out of both treatment and jail and have failed at their attempts to become clean and sober. They are at a higher risk of relapsing and have a higher need for treatment and attention. These individuals are among those who face the most serious charges.

Judge Fuchs says that when the first drug court launched, those involved took a chance at proving the courts worked. "We knew that it would be a challenge to work with high-risk, high-need individuals, but it was the best way to really prove to the state that this system works," he says.

And worked it did. Those who graduated from that first drug court did so through a regulated treatment process that left little room for error. Drug court was – and still is – run through steps in which participants must show through their actions (and clean UAs) that they are remaining drug free.

Drug court begins with an individual who is facing jail time for drug-related crimes (alcohol- and marijuana-related incidents do not count) often electing to plead guilty to the most serious crime charged. Typically, the plea is held in abeyance pursuant to Utah Code sections 77-2a-1 through 77-2a-4. The plea is not entered, and a sentence is not imposed. If the individual successfully completes probation through the drug court, the plea will be withdrawn and the charges dismissed. Recent legislative changes to section 77-40-105 provide additional avenues for expunging drug-related offenses. *Id.* § 77-40-105. The drug court client has the opportunity to essentially walk away with no conviction, clean up his or her record, and start a new life. If the individual does not successfully complete the program, the guilty plea is entered and the case proceeds to sentencing. In most cases, the consequences are severe.

The first few months or so of drug court are comprised of regular meetings with therapists, drug counselors, a peer group, and the judge. There is no shortage of activity for an individual going through drug court. For many, there is first a detox process that occurs in a treatment bed rather than a jail cell.

The judge meets regularly with a class of drug court participants who must interact with one another. They are supported by the judge, prosecutor, defense attorney, drug court counselors, and, of course, one another. The individuals must appear before their judge and peers to report on how they are doing in the program. Each new stride of achievement made is celebrated by applause and hugs during a drug court meeting. It is a vulnerable experience, but one that inspires a desire to succeed.

"They do things at first to satisfy the judge and drug court time but eventually they have learned that a clean life is one they can deal with," says Judge Fuchs, who has spent years learning about behavior modification, and credits this approach to the success of drug courts.

After spending nearly ten years presiding over drug court, he is familiar with the pattern of those involved in the treatment program. What begins as attendance due to legal mandate evolves into a desire to succeed, which stems from confidence gained through support, encouragement, and a lack of fear.

> There has been so much research done on the effectiveness of drug courts, and what we have seen is that drug addicts have eight traumatic events in their lives before they become drug addicts. Drug court is allowing us to focus on the issue that led to addiction and force individuals into treatment long enough to start dealing with those issues. Hopefully, they come out of drug court having dealt with the issues that led to drug addiction in the first place.

– Judge Dennis Fuchs

Finding Strength

"I believe drug court gives you the ability to accept your future and the tools to succeed. Thank God I got busted, if that wouldn't have happened to me, I don't know where I would be today."

–2003 drug court graduate

The support offered through the drug court system enables relationships built through trust to exist and lasting friendships to be formed. For some participants, the drug courts have inspired a lifelong dedication to helping others transform their lives through the drug court system.

"The biggest thing with addiction is being able to surrender your will to someone else who wants to help," says Ali Shelley, a 2009

drug court graduate who now volunteers as a drug counseling peer mentor, serves on the board for the Friends of Drug Court, and volunteers as a mentor for incarcerated women at the Draper prison.

Though drug court typically takes about one-and-a-half to two years to complete, it took Ali several years and, at one point, treatment eight hours a day to finally be able to complete the program and conquer her addiction. She credits Judge Randall Skanchy for never giving up on her in addition to the life skills she learned in the program.

> When you are in drug court you're held to a higher standard than the everyday person on the street is. Drug court covers so many different facets. It's about how to be a functional member of society in a contributory way. Later on down the road I have always leaned on those skills to get through. You can always go back. I can go into the courtroom and tell the judge how I am doing.

– Ali

Nearly seven years after her graduation, Ali is not only offering her support to others working to conquer their addiction through the drug court system, she is also working her way toward becoming a licensed clinical social worker through the University of Utah's College of Social Work.

> I love being able to tell people both in recovery and in the community that I have literally walked out of lockup with nothing but the clothes on my back and dreams for a future. I have been able to do all of those things in recovery regardless of the choices that I made in the past.

– Ali

One of the things that make drug court unique is the way in which it is changing the courtroom process. Drug court requires conversation between a participant and the judge, so much so that a relationship is developed. Many of my former clients who completed the program think of their judge as a friend, someone who truly wants them to succeed. This creates a dynamic within the courtroom that is drastically different than the traditional adversarial criminal justice system. Drug court eliminates the differentiation between client and attorney, prosecutor and defense attorney, client and judge. Individuals with different perspectives and from different walks of life are united in one single priority: the success of the participant. This level of support is part of what enables drug courts to work so efficiently.

> When you live in the drug world, it's hard to make decisions on your own. I had proven to myself that I couldn't make the right decisions. I tried numerous times at rehab. In drug court, all of my decision-making opportunities were taken away from me. I had to abide by the judge's decisions and instructions. Once I started following his instructions, I started getting some length of sobriety ahead of me

– Chrystina Ross, a 2012 drug court graduate.

Like Ali, Chrystina continues to be involved with the drug court system. This level of activism and involvement is not uncommon for drug court graduates. Chrystina points to the lessons she learned through drug court as the reason behind the relationships she has formed and maintained since going through the program. These relationships are part of why she continues to stay involved.

"It's a progressive program that taught me how to build healthy relationships. In return I have this beautiful life because of the relationships I learned in drug court," says Chrystina.

The Future of Drug Courts

"If I can just help one person get clean and sober – and stay that way – that's what it's all about."

– Kenny Rosenbaum, 1999 drug court graduate

Proponents for the drug court system in Utah are celebrating not only the approaching twentieth anniversary, but also what has been referred to by Community Resources for Justice as "epic criminal reform" legislation: House Bill 348, which looks at alternatives to incarceration. Problem-solving courts such as drug courts are one of the main responses to these alternatives.

One of the accomplishments in the bill is the reduction of all first-offense drug possession crimes from felonies to misdemeanors. House Bill 348 reduces the imposition of severe sentencing enhancements through the reduction of drug-free zones from 1,000 feet to 100 feet and the elimination of locations that are not children-centered. House Bill 348 requires the creation of graduated sanctions to guide supervision officers in their response to probation and parole violations, and treatment standards and a certification process for treatment providers serving people released from prison, on probation or parole in jails. *See* Community Resources for Justice, available at www.crj.org.

This is a historic moment in state history, one that is worthy of celebration from all who reside in Utah. Judge Katie Bernards-Goodman, who currently serves as one of four judges presiding over district court drug courts, says that everyone from prosecutors and state legislators to judges and Utah residents should understand why drug courts matter.

"If they want to reduce crime, they have to fix the drug users. Drugs fuel so much crime," explains Judge Bernards-Goodman, who adds that drug courts are also an effective way to save taxpayers money, something that jail is not.

> [Taxpayers] can pay to put that person in jail, or they can pay a third of that price to put that person in treatment. The jail is not going to change that person or fix them. The treatment is. They're throwing away three times the tax dollar to incarcerate them.

– Judge Katie Bernards-Goodman.

Drug court graduates who have shared their stories for this article all agree on the importance of drug court, and they are also quick to point out how much money taxpayers spend to keep drug addicts in jail versus what the individuals in drug court must pay out of their own pockets to get clean and sober. Salt Lake County Criminal Justice Services estimates that the cost of treatment for a Drug Court Client is approximately $4,300 a year where incarceration costs $31,025.

"If [drug court participants] have the opportunity to stop and get some tools, it's much better for the community – and it's cheaper. Drug court gives them hope," says one drug court graduate.

Kenny Rosenbaum, a drug court graduate who battled a methamphetamine addiction for thirty-six years, says that in his opinion, drug court is the only thing that works. He recently celebrated sixteen years of sobriety and reflects on the way in which the drug court system prepares individuals to give back to their community.

"It's keeping people off the streets and out of crime," explains Rosenbaum. "All the people in drug court and who have graduated drug court – and are still clean and sober today – are productive. They are giving back to the same system that they took from for so many years."

Drug court holds individuals responsible for their own future by giving them the tools and support that they need to make it on their own – without drugs. Drug court participants are responsible for paying for their own drug tests, for the fees to get a valid driver license, and for their legal and counseling services. They must get a job and prove to not only their judge and lawyer but to themselves that they can succeed.

Helping Fight the War on Addiction

> I see people who come in looking their worst. They somehow lost many skills they learned in life about functioning in society. I see them go from families who disowned them, having no job – nothing, to people who have a job. Their families welcome them back; they have good relationships, and success in life. It's good to watch because they can be fixed and they can be changed.

–Judge Katie Bernards-Goodman

Drug court works because of the dedication of the judges, prosecutors, and legal defenders working side by side with therapists, case managers, peer mentors, and alumni. When everyone in the courtroom works together to help people recover, clients want to do well for their judges, lawyers, and the drug court team. At the twentieth anniversary of drug court, these professionals in our legal community deserve our admiration and thanks.

Ghostbusting Experts

by Keith A. Call

Some of you may recall the ghost problems at my house – missing food, clogged toilets, and a host of other problems for which no one admits responsibility. Keith A Call, *A Ghost Story*, 26 Utah B.J. 24 (Nov./Dec. 2013). It's gotten worse. Now the ghosts in my house have driver licenses. I'm having to deal with unexplained dents in and scratches on the family cars. One time, the police came to my house because someone had reported suspicious activity involving a vehicle of the same type that was parked in my driveway. Remarkably, the only candidate-driver in my family had a perfect alibi, and the engine on the car was cold. Either the police got the wrong car, or the ghosts have really become expert.

Which brings me to the topic of ghostwriting expert reports.

> *"Given that the Federal and Utah State rules on expert reports are different, it is possible that the rules on ghostwriting expert reports in state court are more lenient."*

Can Counsel Ghostwrite an Expert's Report?

A Federal District Court in Michigan recently excluded an expert report and criticized the practice of counsel drafting expert reports as a "remarkable breach of ethics and protocol." *Numatics, Inc. v. Balluff, Inc.*, 66 F. Supp. 3d 934, 941 (E.D. Mich. 2014). In doing so, the court strictly enforced Federal Rule of Civil Procedure 26(a)(2)(b), which requires an expert's report to be "prepared and signed by the witness." *Id.* at 942 (emphasis omitted). In contrast, Utah Rule of Civil Procedure 26(a)(4)(B) requires that the report shall be "signed by the expert"; it does not include the word "prepared." *See* Utah R. Civ. P. 26(a)(4)(B).

In *Numatics*, defense counsel in a patent dispute retained a technical expert to opine that the patents at issue were invalid. The expert submitted a sixty-four page report, asserting that the claims in the patent were obvious in light of prior art references. During his deposition, the expert admitted that he did not author his report. During oral argument on a motion to exclude the report, defense counsel admitted she had authored a first draft of the report, and the expert had made only minor changes. 66 F. Supp. 3d at 944. The court acknowledged that counsel can assist an expert in the drafting process but strongly rejected "abject ghostwriting, which is not allowed under any circumstances." *Id.* at 943. Identifying the line between permissible assistance and improper participation requires a "fact-specific inquiry." *Id.* at 942. The court offered the following guidance:

> The key question is "whether counsel's participation so exceeds the bounds of legitimate assistance as to negate the possibility that the expert actually prepared his own report." [A]ssistance in the fine-tuning of an expert report in order to ensure compliance with [Rule 26(a)(2)(B)] is permissible, while "preparing the expert's opinion from whole cloth and then asking

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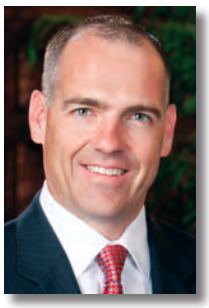


the expert to sign it if he or she wishes to adopt it" is not.

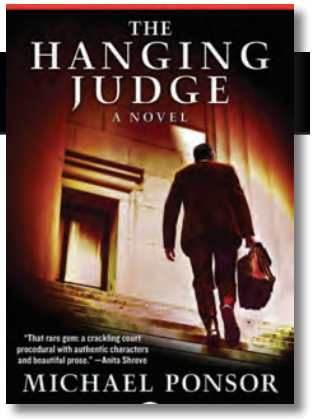
Id. at 942–43 (alteration in original) (citations omitted).

An Ethical Issue

The motion to exclude the expert in *Numatics* was brought – and decided – under the Federal Rules of Civil Procedure and Federal Rules of Evidence. The court, however, clearly viewed the issue as an ethical one and sharply called the offending lawyer out. *See, e.g., id.* at 941 (calling the lawyer's conduct "a remarkable breach of ethics and protocol," which the lawyer "brazenly" attempted to justify). The court cited no rule of professional conduct. But it referred to the expert as the "lawyer's avatar" who surrendered his role to defense counsel "and that is not how the adversary process works." *Id.* at 941–42. The court's description is hauntingly similar to the ethical rules' prohibition on "conduct that is prejudicial to the administration of justice." Utah R. Prof'l Conduct 8.4(d).

Conclusion

As I have pointed out previously, the same rules of professional conduct govern in both state and federal courts, but the application of those rules in the ghostwriting context differs. *See, A Ghost Story, supra*. Given that the Federal and Utah State rules on expert reports are different, it is possible that the rules on ghostwriting expert reports in state court are more lenient. But after reading the sharp rebuke the court handed down to the lawyer in *Numatics*, I'm going to leave it to someone else to test the limits in our courts.



The Hanging Judge

Reviewed by Linda M. Jones

This legal thriller brings together three elements for a riveting story: the unique perspective of author and U.S. District Court Judge Michael A. Ponsor, who in 2000 presided over the first capital case in Massachusetts in fifty years; a true and tragic story of capital punishment in that state that dates back to 1806; and the town of Holyoke where fictitious federal judge and protagonist, The Honorable David S. Norcross, holds court.

The present day story begins with a morning drive-by shooting that outrages a community and takes the lives of two Holyoke, Massachusetts citizens: Peach Delgado, the intended target and a local gang member, and Ginger Daley O'Connor, a hockey mom and local volunteer caught in the line of fire. A quick-acting patrolman chases down the car involved in the shooting and nabs the driver but loses the gunman. The driver gives a name to the officer in exchange for leniency: Moon Hudson. Moon has an early history with law enforcement and is a former rival gang member. But he has managed to turn his life around and is a family man and father. Armed with Moon's history and the driver's statement, a team of officers crashes into Moon's home in the middle of the night to arrest him, and the U.S. Attorney's Office assigns an ambitious and competent AUSA to prosecute him on RICO and capital homicide charges with a brilliant veteran defense lawyer on the other side of the case.

The Hanging Judge
by Michael Ponsor
Publisher:
Open Road Media Mystery & Thriller
Available in paperback and e-book formats

The story takes twists and turns into the lives of the key players and how they view their role in a death-penalty case. Moon maintains his innocence but seems to accept the inevitable because of a terrible secret in his past; the prosecution's witnesses are under pressure to identify Moon as the killer; the judicial clerks oppose the death penalty but then react to unfolding events in unexpected ways when faced with the issues on a more personal level; and the AUSA's family and friends disapprove of her involvement in a capital case.

Through it all, we are reminded that Judge Norcross is always balancing the human side with the objectivity that embraces blind justice. Lady Justice's symbol of the blindfold is a powerful image for him. In one scene, we encounter Judge Norcross at a sentencing hearing. The judge is concerned about a young offender and believes he may actually be innocent. But Judge Norcross's hands are tied because of the jury's guilty verdict. He waits until the offender makes eye contact and exchanges nods with him before he issues a sentence for a term of life without the possibility of parole. Along that same theme, Judge Norcross has reason at times to believe that Moon Hudson is innocent, but how he faces that prospect at the end is surprising even to him.

Judge Ponsor humanizes Holyoke's Judge Norcross. He is a young widower, emotionally and physically vulnerable but never persuaded by improper means. He is approachable but at the same time detached. In contrast to the vast experience of the real Judge Ponsor, the fictitious Judge Norcross is fairly new to the bench with no prior experience in criminal law. Notwithstanding, Judge Norcross understands that a guilty verdict in a capital case will be appealed, and he is careful and meticulous in his rulings and in maintaining a complete record.

The book weaves into the narrative a true account dating back two centuries of a miscarriage of justice against Dominic Daley and James Halligan, both convicted and hanged for murder in Massachusetts and both pardoned in recent times because their case was infected by "religious and ethnic prejudice." Their painful story is told in some of the chapters, and Judge Ponsor makes them relevant here: Ginger Daley O'Connor, the victim in the case before Judge Norcross, is a descendant of one of the hanged men.

The Hanging Judge is Judge Ponsor's debut novel, and he is the named recipient of the 2015 Golden Pen Award from the Legal Writing Institute.

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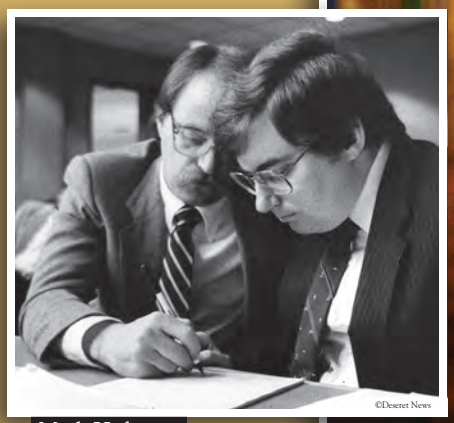
State v. Lovato
Not guilty, capital murder case.

U.S. v. Tim DeChristopher
Charged with interrupting oil lease auction on BLM land.

*Ron Yengich, founding member of the UACDL and 1997 UACDL President



Mark Hofmann

Sam Kastanis


Tim DeChristopher


Photo by Chris Detrick/The Salt Lake Tribune.

Appellate Highlights

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

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

Ortiz v. United States ex rel. Evans Army Cmty. Hosp.
786 F.3d 817 (10th Cir. May 15, 2015)

The plaintiff, the husband of an active-duty service member in the Air Force, filed suit against the United States seeking compensation for their child's injuries resulting from an in utero deprivation of oxygen during a Caesarean section. The Tenth Circuit held that it lacked jurisdiction over the plaintiff's claim under the *Feres* doctrine, which represents a limited judicial exception to the federal government's broad waiver of sovereign immunity under the Federal Tort Claims Act for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 820 (emphasis omitted). The *Feres* doctrine had previously been applied broadly to preclude suits by third parties that derive, directly or indirectly, from injuries to service members incident to military duty. **As a matter of first impression, the Tenth Circuit held that it was bound to apply the "genesis test," and specifically the injury-focused approach to that test, as opposed to the treatment-focused approach, for in utero cases.** Applying the appropriate test, the Tenth Circuit held that the child's injury was derivative of an injury to the mother.

Pre-Paid Legal Servs., Inc. v. Cahill
786 F.3d 1287 (10th Cir. May 26, 2015)

Section 16 of the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(A), confers jurisdiction over an appeal from an order *lifting* a stay of litigation, not simply "refusing a stay" as stated in the statute.

Browder v. City of Albuquerque,
787 F.3d 1076 (10th Cir. June 2, 2015)

Plaintiff's complaint alleged that off-duty police officer inexplicably "used his official squad car and activated its emergency lights and proceeded to speed through surface city streets at more than 60 miles per hour over 8.8 miles through eleven city intersections and at least one red light – all for his personal pleasure, on no governmental business of any kind[,]" eventually colliding with and killing plaintiff. *Id.* at [9]. Defendant moved to dismiss plaintiff's 42 U.S.C. § 1983 claim on grounds of qualified immunity. The court held that **a § 1983 claim survives a motion to dismiss for qualified immunity where the officer exhibits a conscience-shocking deliberate indifference to the lives around him, and this constitutes a deprivation of substantive due process.**

Mathis v. Huff & Puff Trucking, Inc.
787 F.3d 1297 (10th Cir. June 2, 2015)

Following a bench trial, a personal injury plaintiff appealed the denial of his motion for a new trial. Among other things, the plaintiff argued a new trial was warranted because the district judge's law clerk had a conflict of interest and the judge failed to adequately screen the law clerk. The Tenth Circuit disagreed. Acknowledging that provisions of the Code of Judicial Conduct applied to law clerks, the Tenth Circuit held that no actual conflict of interest existed where the clerk's husband attended the trial as an informal observer on behalf of a non-party insurer. The Tenth Circuit then analyzed whether the judge should have recused under 28 U.S.C. § 455(a), which governs judicial

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disqualification. **The Tenth Circuit acknowledged that a clerk's relationships or conflict of interest may be imputed to the judge and jeopardize the appearance of impartiality if the clerk is allowed to continue substantively working on the case.** Analogizing to similar cases in other jurisdictions, the Tenth Circuit held that the trial court did not abuse its discretion in denying the motion for a new trial where the law clerk's husband had limited involvement in the proceeding, the clerk promptly notified the court of her husband's involvement, and the judge screened the clerk from any additional substantive work.

Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 2015 U.S. App. LEXIS 10625 (10th Cir. June 23, 2015)

The Price-Anderson Act does not preempt state law claims for alleged releases of plutonium and other hazardous releases. The court "consider[ed] how far Congress went in reshaping state tort claims involving what the act delicately refers to as nuclear 'incidents' and 'occurrences.'" *Id.* at [2]. The court found that a nuclear "incident" was defined plainly enough in the statutory language as an "occurrence" that causes "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property." *Id.* at [16].

United States v. Zar 790 F.3d 1036, 2015 2015 U.S. App. LEXIS 10629 (10th Cir. June 23, 2015)

In this complex wire fraud and money laundering case, the Tenth Circuit affirmed the convictions of two individuals who had created or participated in a fraudulent real estate scheme. On appeal, the defendants argued that the district court incorrectly instructed the jury on the elements of wire fraud, because the court removed the phrase "defraud or" from its instructions. The Tenth Circuit disagreed and held **the instruction did not omit an essential element of the crime of wire fraud, because the remaining language, which required the jury to find the defendants "devised, intended to devise, or joined a scheme to obtain money or property," *id.* at [26], described a specific type of fraudulent scheme within the statute.**

Pueblo of Jemez v. United States
790 F.3d 1143, 2015 U.S. App. LEXIS 10955 (10th Cir. June 26, 2015)

In a detailed opinion on the nature and history of aboriginal rights, the Tenth Circuit concluded that the district court erred in dismissing quiet title claims brought by an Indian tribe. In doing so, the Tenth Circuit reiterated that, absent a clear and unequivocal intent to extinguish pre-existing aboriginal rights, the Jemez Pueblo's aboriginal right of occupancy survived a grant to a private landowner. The Tenth Circuit further held that **a private landowner's occupation, standing alone, may not be sufficient to extinguish aboriginal title, because fee title and aboriginal title could exist simultaneously.** The Tenth Circuit remanded for consideration of whether the Jemez Pueblo had exercised its right of aboriginal occupancy and clarified that the test was whether Jemez Pueblo had **"actual, exclusive, and continuous use and occupancy."** *Id*. at [54]–[55]. For an Indian tribe, this factual determination depends on proof that (a) the tribe occupied the land exclusive of other tribes and (b) the tribe used the land consistent with its traditional purposes, which may include "hunting, grazing of livestock, gathering of medicine and of food for subsistence, and the like." *Id*. at [55]–[56].

***United States v. Cordova*,**
— F.3d —, 2015 U.S. App. LEXIS 11596 (10th Cir. July 6, 2015)

Defendant was convicted of various drug offenses and appealed the denial of his motion to suppress. The district court had found that the affidavit that had formed the basis of the warrant failed to show probable cause but applied the good faith exception to the warrant requirement. The Tenth Circuit **reversed, finding that the information in the affidavit was so tenuously linked to the Defendant and his home at the time of the search that no reasonable officer could have relied on it.** The fact that the only relevant information in the affidavit was stale and only incidentally related to the Defendant overcame even the "deferential" good faith standard.

***Owens v. Trammell*,**
— F.3d —, 2015 U.S. App. LEXIS 11687 (10th Cir. July 7, 2015)

In a trial for felony murder, a jury returned a verdict with the box for felony murder marked as guilty but the box for the predicate robbery charge marked as not guilty. The state appeals court reversed and remanded for a new trial, but on retrial the defendant was convicted again of felony murder. He then argued that acquittal of the lesser-included offense precluded retrial of the greater included charge because they were the same charge for the purposes of double jeopardy. Focusing on the apparent inconsistency of the verdicts, the court observed that a jury may be convinced of guilt but arrive at a logically inconsistent verdict "through mistake, compromise, or lenity." *Id*. at [20]. **The test for identifying a "truly inconsistent verdict" is whether there is any conceivable path by which to reconcile the verdicts.**

State v. Houston
2015 UT 40 (March 13, 2015)

The defendant, who was seventeen-year-old boy at the time of the crime, pled guilty to aggravated murder in exchange for the prosecution dropping other charges and agreed to a sentencing hearing by jury to determine his sentence that would range between twenty years and life. The jury returned a life sentence without the possibility of parole. The boy made a number of constitutional challenges to his sentence. The prosecution countered that he failed to preserve those challenges. The Utah Supreme Court held that **Rule 22(e) of the Utah Rules of Criminal Procedure can be used to challenge the sentence regardless of whether the challenge was properly preserved for appeal, because "an illegal sentence is void and, like issues of jurisdiction [may be raised] at any time."** *Id*. ¶ 20 (citation and internal quotation marks omitted). The court denied his constitutional challenges on other grounds.

Barneck v. Utah Dep't of Transp.
2015 UT 50 (June 12, 2015)

Plaintiff brought claims for negligence and wrongful death. The plaintiff argued that that the Utah Department of Transportation fix to resolve an obstructed culvert following a sudden rainstorm and flooding led to the collapse of the road and a tragic motor vehicle accident. The district court concluded the department was entitled to immunity under Utah's Governmental Immunity Act. Reversing, the Utah Supreme Court devoted significant attention to interpreting statutory language relating to defective culverts and governmental management of flood waters. The court further held that **governmental entities may invoke a statutory exception to the waiver of immunity only if the condition articulated in the statutory exception is the proximate cause of a plaintiff's injuries.** In doing so, the court repudiated prior decisions where it had applied a "but for" causation analysis.

Willis v. DeWitt

2015 UT App 123, 350 P.3d 250 (May 14, 2015)

In this construction defect case, the district court dismissed the homeowners' contractual claims against a construction company after finding the homeowners had knowledge of their claims and were not entitled to equitable tolling. The Utah Court of Appeals affirmed on alternative grounds. It concluded that Utah Code section 78B-2-225(3)(a), which provides that contractual and warranty claims against certain providers of construction services "shall be commenced within six years of the date of completion of the improvement or abandonment," is a statute of repose. *Id.* ¶ 9. As a result, **a homeowner seeking to recover against a construction company under a theory of contract or warranty outside the six-year time limit cannot invoke equitable tolling.**

Federated Capital Corp. v. Haner

2015 UT App 132, 351 P.3d 816 (May 29, 2015)

A trial court refused to award attorney fees to a debtor who successfully raised a statute of limitations defense in a collection action. Importing the standard used to determine whether attorney fees are warranted under the terms of a contract, the Utah Court of Appeals held that **attorneys fees under the reciprocal fee statute "'should ordinarily be honored' unless 'compelling reasons appear otherwise.'"** *Id.* ¶ 14 (emphasis added) (citation omitted). On appeal, the creditor argued that attorney fees would create a windfall for the debtor. Because the trial court failed to make factual findings in support of its conclusion that attorney fees would unjustly enrich the debtor, the court of appeals reversed and remanded.

State v. Wadsworth

2015 UT App 138, 351 P.3d 826 (May 29, 2015)

The defendant appealed from a restitution order entered following his conviction for sexual exploitation of a minor. The crimes occurred in 2003, and the defendant was convicted but failed to appear at sentencing in 2005. He was finally apprehended in 2009, after which the district court held a sentencing and restitution hearing. The district court ordered the defendant to pay restitution for the victim's counseling costs and for the victim's lost wages. On appeal, the defendant argued that the restitution award to the victim for lost wages was

inappropriate because the causal connection between his conduct in 2003 and the victim's lost wages in 2009 and 2010 is too attenuated and because the lost wages are more appropriately classified as pain and suffering damages, which are not awardable under the restitution statute. **The Utah Court of Appeals affirmed the restitution order, holding the causal connection was sufficiently established and that the victim's lost wages are pecuniary damages recoverable by statute.**

Tillotson v. Meerkerk
2015 UT App 142 (June 4, 2015)

The Salt Lake Tribune appealed the district court's denial of its motion to intervene to challenge classification of court records as private in a defamation case. The plaintiff argued that the motion to intervene was moot because the underlying action was dismissed during the pendency of the appeal. The court held **the motion to intervene was not rendered moot by the dismissal because the disposition of the motion to intervene would dictate whether the Tribune may challenge the district court's classification order on appeal, and therefore the requested relief of intervention continued to affect the legal rights of the Tribune.** This issue was not resolved or extinguished by the dismissal.

Craig v. Provo City
2015 UT App 145, 352 P.3d 139 (June 4, 2015)

The Utah Court of Appeals held that **the savings statute, Utah Code section 78B-2-111, which allows commencement of a second action within one year, applies to claims filed against governmental entities under Utah's Governmental Immunity Act.**

State v. Ludlow
2015 UT App 146 (June 11, 2015)

Defendant, convicted of theft, appealed the amount of restitution required by the court. The prosecution had introduced only evidence of the purchase price of the stolen items, and the Defendant presented no alternative evidence of fair market value. The lower court awarded the purchase price of the items as restitution. The Utah Court of Appeals reversed, holding that it was the prosecutor's burden to demonstrate an appropriate amount of restitution, and that if the State fails to meet that burden, **the court should calculate the value of the items for which purchase price provides a fair estimate of value, and then grant nominal value for any item whose value is not reasonably reflected in the purchase price.** The court further included discussion of the circumstances in which purchase price is or isn't an appropriate approximation of fair market value.

Koerber v. Mishmash
2015 UT App 151 (June 18, 2015)

The Utah Court of Appeals confirmed that **the requirement of Utah Code section 78B-6-807(3) that "'[a] judge, court clerk, or plaintiff's counsel shall endorse on the summons the number of days within which the defendant is required to appear and defend the action,'" *id.* ¶ 28 (quoting Utah Code Ann. § 78B-6-807(3)) (emphasis added), requires the number of days for response to be written in handwriting, not typed.** *Id.* This is true even though, as the court had explained in a prior case, strict adherence to the requirement "may seem somewhat silly." *Id.* Because in the present case the number of days was typed rather than handwritten, the district court's authority under the unlawful detainer claim was never invoked.

Simons v. Park City RV Resort, LLC
2015 UT App 168 (July 9, 2015)

Confirming the two-part test for alter ego analysis (formalities test and fairness test), the court held that **the second part of the alter ego test is not a self-fulfilling inquiry dependent upon the first part, but a consideration under the court's equitable powers.** The court found that even where defendant corporation's only owner took a loan from defendant corporation which he had not paid back, and where accounting records were substantially incomplete, plaintiff had not carried her burden, and defendants were entitled to summary judgment on the issue of alter ego.

Highlands at Jordanelle, LLC v. Wasatch Cnty.
2015 UT App 173 (July 9, 2015)

Landowners sued Wasatch County and the Wasatch County Fire Protection Special Service District for collecting service fees. The Utah Court of Appeals **upheld a service fee that bore a reasonable relationship to services provided by a special use district, where the fee, while partly arbitrary and inexactly apportioned, conferred economic and unquantifiable benefits, such as "increased safety and peace of mind."** *Id.* ¶ 17 (emphasis added). At the same time, the court concluded that the district could not collect lump-sum fees that had never been approved or passed by the County.

"Growth is never by mere chance; it is the result of forces working together."- James Cash Penney

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Rethinking Asset Protection Trusts

by Earl D. Tanner, Jr.

In 2003, the Utah Legislature passed two bills that created domestic asset protection trusts (DAPTs) in Utah. *See* HB0299S01 in the 2003 General Session and HB2003 in the Second Special Session. The central provisions were placed in Utah Code section 25-6-14, but important supplementary provisions were placed in other code sections. In 2004, the legislature passed a customized version of the Uniform Trust Act that preserved the 2003 DAPT enactments by including unique provisions accommodating asset protection trusts. *See* SB0047S02 in the 2004 General Session. In 2013, the legislature repealed and re-enacted section 25-6-14, making substantial amendments. *See* HB0222S01 in the 2013 General Session. This article examines those 2013 changes, argues that important public policy mistakes were made, and suggests a new approach to asset protection trusts.

What Is an Asset Protection Trust?

Asset protection trusts are, on one level, quite simple. Start with a "settlor" who has property (any sort) that he or she wants to keep away from creditors. The settlor conveys this property to a "trustee" who contracts with the settlor to hold this property in trust for purposes that include benefitting the settlor. This agreement creates a "self-settled trust." Thereafter, the trustee tells creditors of the settlor that they cannot have the property because it belongs to the trust, not the settlor. The trustee then gives some or all of the property and/or its proceeds back to the settlor in ways that avoid the settlor's creditors.

Professionally drafted asset protection trusts are complicated documents that typically cost the client around $5,000 in Utah. They set up irrevocable trusts and can be part of the settlor's estate plan. In Utah, trusts, including DAPTs, are not registered.

A Brief History of Asset Protection Trusts

The history of asset protection trusts starts at least as far back as the Fraudulent Conveyances Act of 1571 (13 Eliz 1, c 5), also known as the Statute of 13 Elizabeth. *See* Fradulent Conveyances Act of 1571, available at http://en.wikipedia.org/wiki/Fraudulent_Conveyances_Act_1571 (last visited July 24, 2015). "Feigned, covinous, and fraudulent" transfers were declared "to be clearly and utterly void, frustrate, and of none effect, any pretence, color feigned consideration, expressing of use or any other matter or thing to the contrary notwithstanding." *Id*. The language may be archaic, but the policy was clear. Fraudulent

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conveyances are proscribed because they permit "the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued." *Id*.

English and American jurisprudence extended this public policy to facts in which a debtor transferred assets to a trust but retained some beneficial interest in the trust. These self-settled trusts were ignored, and creditors of the settlor were permitted to reach all transferred assets. This traditional rule was modified with regard to irrevocable trusts in the 2000 Uniform Trust Code, which states that a creditor or assignee of the settlor may only reach the maximum amount that can be distributed to or for the settlor's benefit. This revised rule still prohibits DAPTs. When Utah adopted the Uniform Trust Code in 2004, it had to modify this rule to permit its 2003 DAPTs. *See* Utah Code Ann. § 75-7-505.

The Fraudulent Conveyances Act of 1571, courts, and the Uniform Trust Code have not changed human nature. Many and varied are the circumstances in which men and women would rather not pay their just debts. This demand established an offshore industry in jurisdictions that were willing to make a profit from protecting assets from creditors. The vehicle used was sometimes the offshore asset protection trust.

Offshore asset protection trusts eventually came onshore and became known as Domestic Asset Protection Trusts or DAPTs. The honor of beginning this practice is usually given to Alaska, although a case may be made for Missouri and Colorado. Comparison of the Domestic Asset Protection Trust Statutes Updated through April 2014, edited by David G. Shaftel, *available at* http://www.actec.org/public/Documents/Studies/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes-Updated-through -April-2014.pdf and Adkisson, "A Short History of Asset Protection Trust Law," http://www.forbes.com/sites/jayadkisson/2015/01/26/a-short-hostiry-of-asset-protection-trust-law/. Today a distinct minority of about sixteen states, including Utah, permit them.

Until 2013, all of the states permitting DAPTs carved out some exceptions for creditors representing important public policies and made some allowance for fraudulent transfer actions. *See* Shaftel, *supra*. Utah broke that mold, as will be discussed later.

Federal bankruptcy law addresses DAPTs in 11 U.S.C. § 548(e). Under § 548(e), the trustee is given the power to avoid transfers to DAPTs made within ten years before the bankruptcy filing date but must prove "actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted." The trustee's burden of proof is a preponderance and circumstantial evidence (badges of fraud) is admissible. *In re Huber*, 493 B.R. 798 (Bkrtcy.W.D.Wash. 2013).

The 2013 Changes to Utah's DAPT

HB0222S01 was presented to the 2013 legislature as a matter of increasing the Utah DAPTs' competitiveness with Nevada and Alaska. The rhetoric did not explain just how Utah was about to take the lead in the race to the bottom.

From a public policy perspective, the two worst changes were (1) eliminating most remedies for fraudulent transfers from settlors to DAPTs and (2) eliminating all creditor remedies against DAPTs for the settlor's just debts, including those just debts that represent strong public policies.

Eviscerating Utah's Fraudulent Transfer Remedies

Utah's Uniform Fraudulent Transfer Act, *see* Utah Code section 25-6-1 *et seq*., generally bars actions to recover fraudulent transfers four years after the transfer. *Id*. § 25-6-10.

Transfers made either before or after a creditor's claim arises are fraudulent if the debtor made the transfer:

> (a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:
>
> > (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> >
> > (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Id. § 25-6-5(1).

In addition, transfers made after a creditor's claim arises are fraudulent if the debtor was insolvent at the time or became insolvent as a result of the transfer. *See id.* § 25-6-6.

Utah's 2013 DAPT statute changes those rules substantially for transfers to a DAPT. A transfer that violates certain conditions is not protected by the DAPT:

> (h) At the time that the settlor transfers any assets to the trust, the settlor may not be in default of making a payment due under any child support judgment or order.
>
> (i) A transfer of assets to the trust may not render the settlor insolvent. [Note this does not address a settlor who is already insolvent. *Compare with* Utah Code Ann. § 25-6-6.]
>
> (j) At the time the settlor transfers any assets to the trust, the settlor may not intend to hinder, delay, or defraud a known creditor by transferring the assets to the trust. A settlor's expressed intention to protect trust assets from the settlor's potential future creditors is not evidence of an intent to hinder, delay, or defraud a known creditor. [Note this only protects known creditors.]
>
> (k) At the time that the settlor transfers any assets to the trust, the settlor may not be contemplating filing for relief under the provisions of the Bankruptcy Code.
>
> (l) Assets transferred to the trust may not be derived from unlawful activities.

Id. § 25-6-14(5).

If the transfer meets the above requirements, then all claims against the settlor arising after the transfer are barred whether or not the settlor had actual intent to defraud or plans to engage in activities that could leave future creditors unpaid. *See id.* § 25-6-14(3).

A claim that the settlor intended to hinder, delay, or defraud a known or unknown creditor must be brought no later than 120 days after the settlor publishes notice that a DAPT has been set up and sends notice to known creditors. *See id.* § 25-6-14(9).

In summary, under Utah law, a settlor who is reasonably careful can become judgment proof 120 days after publishing and sending notice to known creditors. All future creditors and those existing creditors (known and unknown) who do not sue immediately are barred from bringing fraudulent transfer actions against the DAPT under Utah law even if the debtor had every intention of hindering, delaying, and defrauding them. Best of all, the settlor can retain all the benefit of the property transferred to the DAPT.

Thwarting Claims Representing Utah's Strong Public Policies

Astonishingly, all unsecured claims against the settlor are barred from recovering against assets in the DAPT. Claims for child support, alimony, property division in divorce, murder, rape, taxes, fines, every claim against the settlor is barred from reaching the assets that the settlor transferred just 120 days earlier. There is one tiny concession: if the trustee knows of a claim for child support, the claimant must be given prior notice of a distribution. Note that the child support claimant has no power to reach the assets before distribution or to force distributions to the settlor/debtor.

A good example of the problems this causes is *Dahl v. Dahl*, 2015 UT 23, 345 P.3d 566. Dr. Dahl apparently persuaded his wife to transfer marital assets, including their home, into what he claimed was a DAPT in order to protect them from malpractice

claims. He then informed her that he was divorcing her and the trust only benefitted whomever happened to be his wife. She disagreed. The Utah Supreme Court found that the supposed DAPT was not actually a DAPT because Dr. Dahl could change it at will. However, it noted in footnote 13:

> Were we to construe the Trust as irrevocable, it would create a serious conflict between trust law and divorce law in Utah. The question of whether a spouse could create an irrevocable trust in which he or she placed marital property, thereby frustrating the equitable distribution of property in the event of a divorce, is not before us in this case. Accordingly, we take no position on a likely outcome of such conflict. *Rather, we bring the potential pitfalls to the Legislature's attention*.

Id. ¶ 39 n.13 (emphasis added).

Shortcomings of the Bankruptcy Remedy

While it is true that an involuntary bankruptcy action against the settlor can be brought in some circumstances and the bankruptcy trustee can avoid certain transfers to a DAPT under 11 U.S.C. 548(e), this is not an adequate remedy for several reasons:

- It is prohibitively expensive for creditors having smaller claims.
- Involuntary bankruptcy requires much more than proof the settlor did not pay the creditor. 11 U.S.C. 303 has substantial requirements and includes the possibility of posting a bond and paying settlor's attorney fees. Involuntary bankruptcy is not available against a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation.
- The trustee must prove "actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted." This is a narrower remedy than what is available under the Utah Fraudulent Transfer Act, which permits a creditor to also recover by proving the settlor:

> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Utah Code Ann. § 25-6-5(1)(b).

The Myth of Settlor's Lost Control

Although the logic is hard to follow, proponents of DAPTs justify thwarting public policy by asserting the settlor has relinquished control over his or her assets by transferring them to an irrevocable trust, the DAPT. The argument leaps over the provisions in the DAPT that make the settlor a beneficiary but also ignores the following powers enjoyed by a DAPT settlor:

- Trust protectors. These trust officers can be hired and fired by the settlor and have the power to remove and appoint trustees and direct, consent to, or disapprove distributions. *See id*. § 25-6-14(7)(b) (provision also in 2003 DAPT).
- Settlor can be a co-trustee and participate in all trust business except distributions. *See id*. § 25-6-14(7)(a) (added in 2013).
- Settlor can veto distributions, for example when the settler owes child support. *See id*. § 25-6-14(7)(d) (provision also in 2003 DAPT).

- Settlor can act as the investment director over the DAPT's assets. *See id.* § 25-6-14(7)(c) (added in 2013).

- Settlor can have a testamentary non-general power of appointment over the trust corpus. *See id.* § 25-6-14(7)(e) (provision also in 2003 DAPT).

Good Public Policy Sometimes Prefers Debtors to Creditors

Generally, good public policy requires debtors to pay their just debts. There are, however, exceptions to that rule that are also based in good public policy. A partial list includes:

- Providing support for the elderly, the disabled, and dependents. Federal and Utah law already keep creditors from reaching retirement accounts, social security payments, personal injury awards, a small homestead, and more.

- Providing a fresh start after financial failure. Federal bankruptcy law and the Utah Exemptions Act provide some debt relief, but the debtor is left with very little to start over.

- Facilitating Commerce. Business entities are routinely used to limit assets that are available to creditors in commercial transactions.

Rethinking Utah's DAPTs

2013 DAPTs are not grounded in sound public policy. That can change. They could be re-engineered to:

- Allow creditors to recover property fraudulently transferred by a settlor to his DAPT, including the full limitations period for bringing a claim.

- Protect creditors having strong public policy claims against the settlor.

- Protect all creditors by making DAPT assets available under the Uniform Trust Code rules for four years after being transferred to the DAPT, whether or not the transfer was fraudulent.

- Limit DAPT protections to natural persons and protect enough DAPT assets to permit a settlor to start fresh without needing public welfare programs.

- Protect creditors of settlors with larger DAPTs by giving those settlors a strong incentive to buy insurance or make other arrangements to protect their creditors.

- Allow DAPTs to be used to limit exposure to commercial liability where there is disclosure of both the DAPT and the assets outside the DAPT that will be available to the creditor.

- Make DAPTs affordable and practical for most of Utah's citizens by allowing revocable trusts to become DAPTs.

Proposed DAPT Amendments

The Utah Legislature's Judiciary Interim Committee studied DAPTs in 2014 and seemed ready to rein them in but not do away with them entirely. I introduced a bill in the 2015 General Session, HB0318, that proposed to repeal existing DAPT law and enact a new Utah DAPT that met the public policy objectives identified above. It was opposed by those who sell, service, and use the 2013 DAPTs and never got a committee hearing. I plan to introduce similar legislation again in the 2016 Session.

HB0318 would have eliminated the current blanket exemptions given DAPTs from the Uniform Fraudulent Transfers Act and the Uniform Trust Code rule for self-settled trusts. It limited protected settlors to individuals and identified strong public policies which cannot be thwarted by DAPTs. It gave limited protection to DAPT assets held for more than four years by creating targeted exemptions that can be claimed by any qualified settlor and trust that registers with the Utah Department of Commerce. It permitted the continued use of DAPTs to limit contract liability where there is full disclosure. Finally, it addressed existing DAPTs by allowing them to register and be protected under the new system.

Reinstating the fraudulent transfer rules returns us to the time tested law of the great majority of states. Continuing to recognize DAPTs can only be justified if it promotes sound public policies. The proposed amendments create an admittedly new approach, but DAPT laws in the other fifteen DAPT states do not focus on public policy. Registration and use of targeted exemptions allow better control over the amount being protected for a settlor, clearly identify which trusts are and are not DAPTs, and allow the use of revocable trusts which are more appropriate to the needs of the general public.

The new DAPTs would not protect settlors from strong public policy claims, identified in statute by category as follows:

103(a) a secured claim but only to the extent of the security held by the trust;

104(b) child support and alimony obligations;

105(c) property division under domestic orders;

106(d) damages caused by the intentional torts of the settlor;

107(e) court ordered fines, penalties, and criminal restitution;

108(f) taxes and associated interest and penalties;

109(g) reimbursement of social welfare programs; and

110(h) insured or bonded claims. [defined terms]

A specific provision addressing the *Dahl* problem would be added to the Uniform Trust Code at section 75-7-501:

334 (ii) If marital property has been contributed to the trust, property in the trust equal to

335 the value of the marital property and its proceeds is subject to division by a court in a

336 separation or divorce proceeding.

There would be three targeted exemptions, each of which has an identifiable public purpose:

The Median Exemption – This exemption is equal in amount to the median value of a Utah owner-occupied residence plus the median Utah annual wage. Currently, that totals about $278,000. The amount is intended to permit the settlor a fresh start without needing social welfare programs. This exemption only applies to assets that have been transferred to the DAPT more than four years ago. The four-year delay encourages good long term financial behavior by exposing recent additions to unsecured creditor claims.

The 50/50 Exemption – This exemption offers limited protection to assets in excess of the amount protected by the Median Exemption. It adds those DAPT assets to assets outside the DAPT and protects the DAPT assets up to 50% of the total. This encourages the settlor to carry liability insurance or make other non-DAPT assets available to creditors because these outside assets will protect DAPT assets. The protection is calculated at the time the claim is presented to the DAPT and thus may be reduced by prior claims.

The Contract Exemption – This exemption is an alternative to the 50/50 exemption and only applies to contract claims arising from contracts in which the settlor gives written notice of the DAPT and settlor's assets that are not in the DAPT. It protects an unlimited amount of DAPT assets without regard to the date of transfer but does not protect any asset that was identified as being outside the DAPT. This exemption permits a settlor to limit his or her exposure by disclosure and permits the potential creditor to decide if sufficient assets are available for contract claims. It is useful in business in multiple situations, including permitting a family member to guarantee another family member's obligations without jeopardizing the guarantor's entire estate.

DAPTs that were created under the old law would be given protection under the new law if they register as DAPTs but that protection is the limited protection of the new law. For exemption purposes, their existing assets would be treated as though they all had been held for four years.

Politics

Cognitive dissonance is as much a part of the legislative process as lobbyists and chicken dinners. The 2013 General Session passed the 2013 DAPT amendments, which allow an unlimited exemption from all creditor claims to anyone willing to spend $5,000 and deal with the inconveniences of an irrevocable trust. The same session saw bickering over minor expansions of the Utah Exemptions Act.

The primary supporters of the 2013 DAPTs are those that sell, service, and use them. These include but are not limited to attorneys, accountants, and legislators. Their passion makes perfect sense as long as justice for the settlor's creditors is ignored. In 2015, the supporters of the 2013 DAPTs organized and wrote about fifteen letters and emails to legislative leadership. That was enough to keep HB0318 bottled up in the Rules Committee and then placed at the bottom of a very long committee agenda where it was never heard. Here are their main arguments, as I understand them, and my responses:

Argument 1: HB0318 is unduly costly because of the trust registration requirement.

Response: The fiscal note is $7,400/year.

Argument 2: 2013 DAPTs protect Utahns' hard earned assets from frivolous and vexatious lawsuits.

Response: 2013 DAPTs protect both good and bad Utahns from all of their just debts, without any justification in public policy. Final judgments represent a process that should weed out frivolous claims. "Vexatious" is a fair description of every lawsuit, whether or not it is based on a just claim.

Argument 3: There should be no asset protection for revocable trusts, many of which have their settlors for trustees.

Response: Revocable trusts have traditionally not enjoyed any asset protection. Neither have irrevocable self-settled trusts that benefit the settlor. Asset protection should be based on sound public policy that prefers a debtor to a creditor, not distinctions between these two types of trust.

Argument 4: HB0318 would drive business out of state. No one would use the new DAPTs because there are too many openings for creditors and the protected amounts are too small.

Response: (a) Making a business out of thwarting strong public policy is not good for Utah. (b) The number of DAPTs under the new proposals should dwarf by orders of magnitude the 2013 DAPTs because they would offer asset protection to citizens of

ordinary means through revocable trusts. That is a lot of work for attorneys and accountants and long term deposits for banks.

Argument 5: HB0318 does not protect against injustice.

Response: Injustice is permitting a debtor to not pay his or her just debts when no greater public purpose is served.

Argument 6: It would be an embarrassment for Utah to change course and not support 2013 DAPTs.

Response: 2013 DAPTs are an embarrassment to Utah. It is never too late to correct a mistake.

Argument 7: The legislature carefully considered 2013 DAPTs and passed them unanimously with only Tanner objecting. Why change a law that was fully understood and embraced?

Response: Very few of the legislators understood what asset protection trusts were or the changes being made by the 2013 bill. Most trusted that it was what its sponsor said it was: a simple bill to make Utah more competitive. A year later, the Judiciary Committee recognized more study was needed.

Argument 8: Changing the law would be unfair to those who have set up 2013 DAPTs.

Response: (a) Existing DAPTs can have the public policy supported protections of the new DAPTs. Protecting them without reference to public policy would be unconscionable. (b) Existing DAPTs can be changed even though we call them irrevocable. It is a rare irrevocable trust that has no mechanism for adapting to changed circumstances.

Argument 9: HB0318 was not reviewed by the Estate Planning Section of the Bar.

Response: Fair criticism, although I have had extensive discussions with the small ad hoc group that drafted the 2013 DAPTs. The result was an impasse on the issue of whether DAPT protections should be limited by public policy. Obviously, I am now trying to reach a wider audience, including but not limited to the Estate Planning Section.

DAPTs should be servants of public policy or they should not exist. My proposals attempt to strike a compromise but are certainly debatable. Consider three common situations that would arise:

1. Debt collectors seeking to recover unsecured debts from people of modest means would be limited to collecting from a settlor's current income, assets outside the DAPT, and assets held by the DAPT for less than four years. Judgment liens for unsecured debts would not be available against real property held in a DAPT although execution would be allowed on real property not covered by an exemption. Fraudulent transfer actions and strong public policy claims could be brought in state court against all DAPT assets.

On the other hand, debtors of modest means faced with the loss of a job, bad health of a spouse, or other catastrophe would have more peace of mind concerning keeping their home and the ability to allocate their resources independently of unsecured creditor claims. The need for public welfare programs would be less likely.

2. Persons injured through negligent torts of the settlor would be similarly limited in their ability to recover against DAPT assets, provided the settlor had legally required insurance. A settlor without required insurance would be facing an "insured or bonded claim," which is not barred by any exemption.

On the other hand, personal injury claims are already usually settled based on insurance coverage. Settlors will continue to have incentives to purchase insurance to protect their income and exposed assets.

3. Elderly settlors would have broader protection from creditors through a combination of DAPT assets and income that is protected by other laws such as social security and retirement accounts.

On the other hand, creditors of a deceased settlor would be able to treat the DAPT as they would other trusts, without being stopped by DAPT exemptions.

Creditors may not find these proposals appealing but every one of them is an improvement on the 2013 DAPTs. Consider the plight of a subcontractor that spoke up in one meeting. In suing to recover from his contractor, he learned that the contractor's assets had been transferred to a 2013 DAPT; a perfectly good fraudulent transfer claim was being frustrated by bad public policy.

Get Involved

It has been alleged that I am the only person interested in amending Utah's 2013 DAPTs. From talking with others, I know that is not true, but the legislature is only influenced by those who speak up. Who should be speaking up?

Middle class – this is a rare opportunity for small business owners and working people to improve their financial security.

Young people – the new DAPTs would give them greater security as they build their families.

Elderly people – equity in their homes and investments would be more secure.

Judges and government agencies – strong public policies would no longer be subordinate to 2013 DAPTs.

Attorneys – the above are our clients in domestic relations, estate planning, intentional torts, bankruptcy, law enforcement, and recovering fraudulent transfers.

If you are interested in changing Utah's DAPTs, I invite you to get in touch with me at earltanner@le.utah.gov and to make time to participate in the 2016 legislative session. Comments and improvements on my proposals are welcome.

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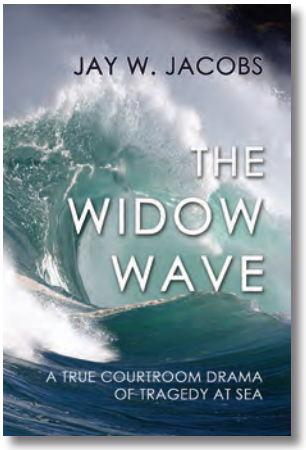
Book Review

The Widow Wave: A True Courtroom Drama of Tragedy at Sea

Reviewed by Andrea Garland



I wasn't sure why Jay W. Jacobs wrote his book *The Widow Wave*, nor why he tried the case upon which he based his story. He answers the second question in the end with humility and grace.

He begins with an effective hook.

> In the entire case, the only fact that everyone involved agreed on was this: at some point during his long flight from Manila to San Francisco, H. Tho Ang flew right over the beginnings of the storm that, a few days later, would take his life.

The Widow Wave:
A True Courtroom Drama of Tragedy at Sea

by Jay W. Jacobs

Publisher: Quid Pro, LLC (August 2014)

Available in hardcover, paperback and e-book formats

Mr. Jacobs, a California litigator for thirty-five years, wrote about the trial that stemmed from H. Tho Ang's death. Jacobs traced the storm from its birth in Siberia's Lena Basin, to its collision with a swirling tropical airmass over the Central Pacific, to thirty foot waves that sunk a sport-fishing vessel, the *Aloha*. All five men aboard died in San Francisco's worst fishing boat accident. H. Tho Ang's widow sued widow Janet Dowd in her capacity as executor of the estate of Francis Dowd, owner and captain of the *Aloha*. In 1986 Mr. Jacobs, engaged by Dowd's insurer Allstate, successfully tried the case to jury verdict against attorneys he regarded as better known and more able.

Jacobs provides a nuts-and-bolts account, mistakes and all. It's a decent how-to-try-a-tort memoir. He covers two years' investigation and discovery in just under sixty pages. He mentions he had computer print-outs of discovery materials, but it wasn't clear what they were. He says he spent hours preparing his expert witness. Showing such preparation might have been interesting and instructive. It's unclear whether fully explaining his discovery process was a writing decision or due to discovery being incomplete. I would imagine the former yet during trial Mr. Jacobs wondered what a plaintiff's witnesses might say, even as he acknowledged he didn't depose that person.

He recounts fast thinking and a breathtaking recovery. Jacobs's investigator had recorded a statement from the plaintiff's expert. The first day of trial the plaintiff's lawyers demanded a copy. Mr. Jacobs, understandably concerned that the witness reviewing the statement might then conform his testimony to his prior statement to avoid impeachment, refused to provide it claiming (correctly in my opinion) it was protected attorney work product. Over his objection, the judge ordered him to give the plaintiff's lawyers the statement. He didn't have the physical copy on him. The plaintiff's lawyers called the expert as their first witness, depriving him of the chance to use the statement. Jacobs instead neutralized the witness by cross-examination, pointing out how much the witness didn't know about the drowned captain. Then, "from what you've just learned for the first time here in court about [Francis Dowd], taking his boat through waters that look like [held up plaintiff's photo of stormy waves] doesn't sound like something he would do, does it?" to which the expert agreed the accomplished sailor and former submarine captain probably wouldn't have been so reckless. It's an admirable recovery from his inability to impeach. That said, it's hard to understand why he didn't at least request on the record a continuance to go get the statement from his office and be ready to impeach if necessary.

ANDREA GARLAND is a trial attorney at Salt Lake Legal Defender Association.

Kudos to Mr. Jacobs for honesty, he conveys the despair of realizing error. "I kept pressing the start key in my head trying to reboot my brain which had gone completely blank." He describes how, in closing, he completely forgot to address the issue of damages, leaving it to the jury to decide whether H. Tho's widow recovered all she requested or nothing. He fixed the omission as well as anyone could, pointing out to the judge he mentioned no figures for the plaintiff's lawyers to rebut.

While Mr. Jacobs says many times the personal stakes for Mrs. Janet Dowd were high, a significant flaw in the book and in his lawyering is the little-questioned-until-the-end decision to try the case. Perhaps it's a cultural difference: in my office a devout Catholic colleague said he'd personally plead guilty to buggering the pope to get a class A misdemeanor; Mr. Jacobs tried the case to defend the Dowds' honor.

At their first meeting, Mrs. Dowd had said her husband was never careless or negligent. Mr. Jacobs explained there wasn't a lot of insurance coverage and a large verdict could diminish the estate. Why didn't he point out that apparently careful Francis Dowd might have discouraged such risk? Why he didn't he mention the possible slight to Mr. Dowd's posthumous reputation from settlement might feel more bearable than destitution? Why didn't he suggest his client obtain grief counseling prior to making this decision? Later, when Mrs. Dowd asked why they needed to go to trial, wasn't this the reason her late husband carried liability insurance in the first place, Mr. Jacobs figured she would never agree her husband was negligent and advised Allstate to not settle. It's when he puts Mrs. Dowd on the witness stand that he confesses concern that despite her certainty her late husband was not responsible for the disaster, "those thoughts were dictated by her heart, not logic and facts." While awaiting verdict, he fears possible figures of three or four million dollars, well above insurance coverage. Only after verdict does anyone inform Mrs. Dowd the case should never have been tried; it's the judge who informs her. Not trying harder to coax his client to settle, agreeing to risk millions of dollars defending a dead man's reputation struck me as frivolous and irresponsible. Mr. Jacobs's candid, searching, end-of-the-book acknowledgement that he owed his victory more to chance than planning and redoubling his efforts to obtain "the skills and abilities the victory…implied I already possessed," rekindled regard for both book and lawyer.

While the writing is serviceable, Mr. Jacobs doesn't appear to have had an editor. His description of the *Aloha* probably free-falling down a wave's vertical face and then getting crushed by the same wave, is good. It stirred visions of seasickness and mortal dread. On the other hand, I can't imagine an editor would have condoned lines like, "'Call the next case,' the judge said in an instructing tone." What does an instructing tone sound like? "If Dowd had two or three drinks in his system… Houdini couldn't defend the case." Of course not: Houdini wasn't a lawyer. Could Mr. Jacobs really not think of any notable defense lawyers? The excerpt of testimony on wave creation, wave physics and wave movement should never have been followed by "[a] visible wave of relief washed over his face."

It's a good, not a great, book. It's a fine how-to for newer lawyers. Mr. Jacobs's success defending the reputation of Mrs. Dowd's late husband denied H. Tho Ang's widow the $1.1 million she might otherwise have recovered from Mr. Dowd's liability insurance. As a lawyer, Mr. Jacobs rightfully ignored this. There was likely life insurance, and Mrs. Ang wasn't left penniless. As an author, Mr. Jacobs might still have profitably explored the moral fitness of a result that rewarded "honor" and an insurance company's bottom line over resources for a widow with five children. Without suggesting the jury reached the wrong result, it could have been a more interesting discussion than, for example, recounting the vanquished rival lawyer's semi-refusal to converse later when they met in an airport. For trial lawyers, a favorable jury verdict after a hard-fought trial for a sympathetic client feels like an Olympic victory. A book should have a message beyond recounting such victory.

The JOBS Act: Crowdfunding as the Latest Spin for Fraudsters in Utah

by Sharon Yamen and Aaron Bartholomew

Utahns want their own slice of Americana, some variation of the American Dream: a house with a white picket fence, 2.5 children, an SUV in the driveway, economic freedom, and the ability to invest in a company from the ground up because we believe in it. A lesson from the Great Recession is that there is a cost to that dream, especially to the middle class. We are still reeling from the aftermath of the economic crisis of 2008, and Congress is attempting to give people back that slice of Americana by loosening investing regulations previously kept under tight control by the Securities and Exchange Commission (SEC). *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SECURITIES AND EXCHANGE COMMISSION, http://www.sec.gov/about/whatwedo.shtml (last visited July 31, 2015). The Jumpstart Our Business Startups (JOBS) Act has opened the possibility for the middle class to invest in emerging growth businesses through the crowdfunding markets in the hopes of stimulating the economy. But is this the answer? While it is true that the JOBS Act opens the door of potentially lucrative ventures to the middle class, it also opens a Pandora's Box of dangers. Consequently, this new access may very well end up creating another economic bubble that will eventually burst, leaving the middle class devastated once again.

Utah is a hub of entrepreneurism and innovation and has enjoyed solid economic growth, creating jobs and improving the lives of many of its residents, despite the recent challenges of the broader national and international markets. On the other hand, many Utahns seek to find a shortcut to financial success, and so this state has the dubious distinction of also being a hub for the gullible in get-rich-quick investment schemes, including Ponzi rackets, the lofty claims of pyramid marketing, and the sale of unlicensed securities, which all too often harm those who can bear it the least in the middle and lower classes. The JOBS act, in legitimizing crowdfunding as an investment tool, can only result in increased financial victimization of these large segments of our communities, and Utah's lawyers need to understand these issues to properly advise their affected clients.

The JOBS Act creates rules regarding crowdfunding, a newer method of raising investment capital wherein a large number of individuals each invest a small amount of capital in a venture. This article examines why, despite Congress's efforts to jumpstart our economy by easing access to capital for business startups, crowdfunding as an investment device may do more harm than good. Utahns need to be properly advised against its many pitfalls as crowdfunding is nearly devoid of SEC investor protection.

Historically, various financial regulations have been created after U.S. financial crises. Consequently, small companies have difficulty in raising capital because of such regulation aimed at investment and investor protection, but the potential and promise for crowdfunding under the JOBS Act has largely reversed those protections. While the federal government has been ardently adverse towards privatizing social security – namely that they did not believe Americans should sacrifice the "safe" social security to the whims of the stock market – now it permits these same Americans to invest some of their retirement in these new companies. Dire implications of the JOBS legislation and the pitfalls of crowdfunding

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await many – if not most – of its investors, warranting a cautionary tale based on the idea of history repeating itself.

Utah's lawyers need to be attuned to these trends and understand their implications to properly advise their clients on the realities, dangers, and pitfalls of participating in crowdfunding as an investment vehicle.

Investment Fraud Pre-JOBS Act

The fact that the JOBS Act loosens expanding-growth company disclosure requirements and has no investor regulation opens the door to unaccredited middle class fraud. If the transparency of businesses is reduced, the ability to scam the unsuspecting out of their money becomes greater. Where there is a chance to make money, there is also the reality of fraud; all too often one hears stories of people getting swindled out of extremely large amounts of money because of a disastrous reliance on a fraudulent scheme. Some of the most talked about methods of fraudulent schemes include market manipulation schemes and multi-level marketing. *2011 Report of the Cost of Fraud in the United States*, Computer Evidence Specialists (Jan. 10, 2012), http://cesnb.com/index.php/2012/01/10/fraud-in-the-united-states-2/.

Multi-level marketing is a system of sales involving a company with a marketable product and a vast network of salespeople who buy and then resell the product to the public. The key to these systems is the amount of people involved. Those involved are required to recruit people to work underneath them, thus self-perpetuating the marketing and broadening its reach and market share. Multi-level marketing is a legal form of pyramid scheme, with a legitimate product being sold, whereas a pyramid-Ponzi scheme is illegal and does not have a legal purpose or end. The difficulty here is that, for the average consumer, it may be difficult to distinguish between the legitimate and the illegitimate. Bernie Madoff and Alan Stanford both ran pyramid schemes of investment products, and they both ended in widespread financial destruction for those who invested. These schemes thrive off of the idea that more people involved will mean more success for everyone. Members use word of mouth to draw in other investors and perpetuate the system. The success of multi-level marketing is almost entirely based on networking and the connections one has and the ability to persuade others to join in the venture that is almost guaranteed to never fail.

The similarities between multi-level marketing and crowdfunding begin at the core of gathering investors. Those wishing to bring investors to their projects will reach out to their circles of acquaintances. They will reach out to their religious congregations, to their social media "friends" and connections, and to those with whom they associate regularly. And those in a position of trust will be able to persuade acquaintances to invest out of loyalty and because the issuer would always have the best interest of friends at heart. While this can be a great way to get people involved in investing in the new projects and emerging-growth businesses, it makes the potential for fraud on the unsuspecting and trusting middle class grow exponentially.

In October 2013, the SEC charged and froze the assets of a scheme called "CKB" that sold education courses to the U.S. and various Asian countries. Investigations done by the SEC discovered that CKB only received revenue from each new investor and did not have a significant source of income besides that. *SEC Halts Pyramid Scheme Targeting Asian-American Community*, Securities and Exchange Commission (Oct. 17, 2013), http://www.sec.gov/

News/PressRelease/Detail/PressRelease/1370539880547. This means that the crowd that was created to "sell" education materials was actually the consumer, and there was never any intent by the executives to have any products sold.

The SEC uncovered another fraudulent scheme in August 2012, in which a company called ZeekRewards offered customers several ways to earn money, one of which involved them purchasing securities in the form of investment contracts. *SEC Shuts Down $600 Million Online Pyramid and Ponzi Scheme*, Securities and Exchange Commission (Aug. 17, 2012), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171483920#.UxI8yfldWVM. Customers were offered more bonus points by recruiting other people to the projects, and ZeekRewards members were promised up to 50% of the company's net profits through their profit share system. The SEC discovered that the income was not based on a legitimate revenue but instead on the funds from new customers. *Id*.

The state of Utah has become a hotbed for such schemes, and the fraud rate in this state is extremely high. One of the reasons for the high rate of fraud is the strong presence of religious congregations and the relationships of trust fostered among them. The interconnectedness of the church gatherings, for instance, provides the prime opportunity for fraud to thrive. Tom Harvey, *Preying on the faithful: Though Mormons often victims, LDS Church skips fraud-prevention event*, The Denver Post (May 1, 2010), http://www.denverpost.com/faith/ci_14993866?source. Often religious leaders are in a position of influence and trust and can lead people to invest large amounts in fraudulent schemes, all because the leader of this "crowd" seemed reliable. In 2010, a former LDS bishop Bill Hammons was charged with bilking tens of millions of dollars out of investors, especially those within his church. *Id*. He treated his calling in the church as validation of his trustworthiness, and many members believed him, causing devastating losses once the scheme was revealed. *Id*.

This is not just a problem in the LDS church, but in religious congregations throughout the country. As soon as any one person puts him or herself in a position of trust over another, especially in a religious atmosphere, he or she can persuade large audiences to do any number of things. For example, in 2012, Ephen Taylor, the infamous presenter of the "Wealth Tour Live" seminars, was discovered to have swindled over $20 billion out of Americans. *Fleecing the flock*, The Economist (Jan. 28, 2012), http://www.economist.com/node/21543526. He often declared that he chose potential investments based on the divine inspiration from God and could therefore guarantee extraordinary returns to all investors. *Id*. The key to his ill-gotten success, and that of those leaders of schemes in Utah, is that they find a solid connection between themselves and their audience and manipulate it until members feel comfortable and confident in giving up their wallets.

One of the most important things to consider about the fraud cases discussed is the fact that these cases all happened in the time when the SEC demanded that the investors be accredited. All those affected and financially devastated were supposed to be wise when it came to investing. With the JOBS Act's reduction in investor protections, the ability for scam artists to reach investors and take advantage of the public has become infinitely greater.

There are many examples of fraud throughout the history of big investments. All those involved were accredited investors, meaning they are assumed to have the knowledge of legitimate and safe schemes and be able to discern which schemes can be labeled as "legitimate" and which should be fraudulent.

In March 2012, the SEC reported that it had charged an investment adviser with defrauding investors. James Michael Murray raised more than $4.5 million dollars from investors. He gave these investors a bogus audit report – using an accounting firm that he made up (called Jones, Moore & Associates) and manipulating the numbers to make it seem like his fund was in better shape than it actually was. He exaggerated the investment gains of the fund by 90%, its income by 35%, its member capital by 18%, and its total assets by approximately 10%. *SEC Charges Bay Area Investment Adviser for Defrauding Investors With Bogus Audit Report*, Securities and Exchange Commission (Mar. 15, 2012), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487806#.UwwgY_ldWVM. The implications of this fraud case to our post-JOBS Act life are astronomical. The SEC stressed multiple times throughout its proposed rules that the safety net is the fact that they will require increasingly large amounts of disclosure depending on how much money the issuer requests. Crowdfunding, Securities Act Release No. 9470, Exchange Act Release No. 70741, 78 Fed. Reg. 214 (Oct. 23, 2013), http://www.sec.gov/rules/proposed/2013/33-9470.pdf. However, after looking at this case, it is now glaringly obvious that financial disclosures can be easily faked and used to dupe even sophisticated investors.

A similar case was reported less than a month later. In April 2012, another investment manager, this time in Florida, made up statements about his investment track record and provided investors with fake account statements that showed false profits. George Elia was able to get $11 million from his investors, most of which came through word-of-mouth referrals from friends and relatives. *SEC Charges South Florida Man in Investment Fraud Scheme*, Securities and Exchange Commission (Apr. 6, 2012), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488112. Not only does this case illustrate how easy it is to forge financial documents, but it also brings up the issue of what can happen with word-of-mouth references. With the SEC

suggesting that issuers can post blurbs about their investment opportunities on social media sites, these issuers will be mainly advertising to their families and friends, who then pass it on out of loyalty, rather than out of the feeling that the investment is safe.

Not only is advertising via social media dangerous because of the potential for bad word-of-mouth referrals, but those interested in scamming the public easily adapt to the ways of social media. In January 2012, the SEC charged Anthony Fields with fraud for selling more than $500 billion in fictitious securities through social media sites, including LinkedIn. He then provided fake information about the assets of his company to both the investors and to the SEC in his various filings. *SEC Charges Illinois-Based Adviser in Social Media Scam*, Securities and Exchange Commission (Jan. 4, 2012), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487332#.UwwuMfldWVM. The most frightening thing about this case is the fact that he snuck through the SEC at a time when the SEC was extremely strict in its policies. Now, with the SEC and the intermediary companies able to "rely on the representations of the issuer" in whether or not the information in the required documentation is correct, it will be easier to get past the intermediaries and provide false information.

BOTTOM LINE

While President Obama called crowdfund investing "game-changing" when he signed the JOBS Act in 2012, the promise of how those investments turn to profits has yet to be realized and unequivocally answered. Several issues still linger that lawyers need to understand as they counsel with their clients about crowdfund investing:

Unlicensed securities

Crowdfund investing typically markets unlicensed securities, with little or no SEC oversight. Consequently, the crowdfund investor bears much more risk and is largely left alone to enforce his or her own interests.

Unmitigated risk

A recent study of more than 2,000 companies that received at least $1 million in venture funding, from 2004 through 2010, finds that almost three-quarters of these companies failed. Deborah Gage, *The Venture Capital Secret: 3 Out of 4 Start-Ups Fail*, Wall St. J. (Sept. 20, 2012), http://online.wsj.com/news/articles/SB10000872396390443720204578004980476429190. The SEC acknowledged that

> these failure rates are high, despite the involvement of sophisticated investors like [Venture Capitalists]. . . . Because we expect that issuers that would engage in offerings made [through crowdfunding] would potentially be in an earlier stage of business development than the businesses included in the above studies, we believe that the issuers that engage in securities-based crowdfunding may have higher failure rates than those cited above.

Crowdfunding, Securities Act Release No. 9470, Exchange Act Release No. 70741, 78 Fed. Reg. 214 (Oct. 23, 2013), http://www.sec.gov/rules/proposed/2013/33-9470.pdf. It is interesting to see how little confidence the SEC has in the ability of investors to get any return on these investments. This means that those choosing to "invest" in these companies are effectively instead donating money to the cause of business growth.

Lacking formalities

Crowdfund investing does not require the formalities of a Private Placement Memorandum and other protections for the investor. Lack of formal documentation creates a myriad of problems, including that many investors in a crowdfund have difficulty connecting the dots of their investment to specific borrowers and ventures.

Enforcement

Just how a crowdfund investor asserts an interest in the profits of the enterprise is an open question. In fact, the SEC admits that seeing a return on one's investment may be fairly rare, saying that "it is unclear how securities offered and sold. . . would be transferred in the secondary market. . . and investors who purchased securities. . . and who seek to divest their securities would be unlikely to find a liquid market." *Id.* There is an emerging market of legitimate brokerages that monitor and manage crowdfund investments and their profits, but the lion's share of crowdfund investing leaves the investor without clear recourse to enforce his or her rights. Just how a crowdfunding investor gets the return on a successful enterprise is wholly unknown. Currently, unless the business goes public with an Initial Public Offering or the business voluntarily cashes out the investor, there does not appear to be a readily accessible method of asserting a legitimate interest in a crowdfunding investment. Without robust enforcement protections, in the end, equity crowdfunding may be less of an investment and more of a donation.

With so many unanswered questions and questions with unsatisfactory answers, attorneys should be skeptical and advise their clients accordingly. Has Congress really created a means to help the economy, infuse capital into the marketplace, and create jobs, or has it led us down a primrose path, which will only create a bubble whose inevitable end will be to hurt those it aims to please? While humanitarian-based policies are laudable, putting them ahead of proven business strategy quickly snowballs into economic devastation. The crowdfunding aspect JOBS Act easily shows good intentions from Congress; however, the long-term consequences may not be as beneficial as the government wishes them to be.

2015 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2015 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org by Friday, October 2, 2015. The award categories include:

1. Distinguished Community Member Award
2. Professionalism Award
3. Outstanding Pro Bono Service Award

View a list of past award recipients at: http://www.utahbar.org/bar-operations/history-of-utah-state-bar-award-recipients/.

Judicial Excellence in Utah

The Litigation Section honored nine judges with the Judicial Excellence Award at the Summer Convention in Sun Valley, Idaho on July 31, 2015. This prestigious award is given to recognize those District Court judges "who promote an orderly and civil litigation process and have demonstrated exemplary character and competence in performing their judicial duties." The significant contribution the following honorees make to the quality of justice in our state cannot be understated:

Presiding Judge Lyle R. Anderson (Seventh District)
Judge Glen R. Dawson (Second District)
Judge Royal I. Hansen (Third District)
Judge Thomas L. Kay (Second District)
Presiding Judge David N. Mortensen (Fourth District)
Judge Derek P. Pullan (Fourth District)
Judge Todd M. Shaughnessy (Third District)
Judge G. Michael Westfall (Fifth District)
Associate Presiding Judge Thomas L. Willmore (First District)

Bar Thank You

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

Paul Amann
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Jared Casper
Josh Chandler
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Charles Stormont
Lana Taylor
Letitia Toombs
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Ben Whisenant
Jason Wilcox
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John Zidow

Pro Bono Honor Roll

Appeal
Thompson, Marshall

Bankruptcy Case
Cook, David
Cundick, Ted
Engstrom, Jerald
Nillson, Aaron
Jorgensen, Sonja

Debtor's Clinic
O'neil, Shauna
Prignano, Eddie

Document Clinic
Hartvigsen, Dani
Peterson, Janet
Ratelle, Brittany

Expungement Clinic
Miya, Stephanie

Family Law Cases/Clinic
Allred, McKette
Ashworth, Justin
Bown, Ashley
Brimhall, Clinton
Brody Keisel
Carlston, Chuck
Chipman, Brent R.
Dez, Zal
Hancock, Liisa
Hansen, Elicia
Hansen, Justen
Hardy, Dustin
Jelsema, Sarah
Johnsen, Bart
LeBaron, Shirl Don
Lee, Jennifer
McKay, Chad
Morrow, Carolyn R.
Nielson, Nathan
Nillson, Aaron
Pena, Fredrick
Pranno, Al
Roberts, Stacy
Sheinberg, Traci
Smith, Linda F.
So, Simon
Sonnenberg, Babata
Sumsion, Grant
Throop, Sheri
Woods, Kristen
Yauney, Russell

Guardianship/GAL Case
Anderson, Fred
Christiansen, Brant
Morrison, Jess
Schmidt, Samuel

Immigration Clinic
Anderson, Sklyer
Benson, Jonny
Navarro, Carlos
Roman, Francisco

Medical–Legal Clinic
Couser, Jessica
Enquist, Jeff
Marx, Shane
Yauney, Russell

Post Conviction Case
Tejada, Engels

Street Law Clinic
Bogart, Jennifer
Cohen, Dara
Conyers, Kate
Gittins, Jeff
Harrison, Matt
Henriod, Steve
Macfarlane, John
Prignano, Eddie
Scholnick, Lauren
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Smith, Shane
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Balmanno, Alain
Throop, Sheri

Tuesday Night Bar
Allen, Kristen
Allred, Parker
Amann, Paul
Ball, Matt
Black, Mike
Bulkeley, Deb
Chandler, Josh
Conyers, Kate
Coombs, Brett
Crapo, Douglas
Figueira, Josh
Franklin, Jacob
Geary, Dave
Goodwin, Thomas
Gregson, Ashley
Hansen, Justen
Houdeshel, Megan
Hurst, John
Hyde, Ashton
Jan, Annette
Jenson, Craig
Johnasen, Bryan
Kaas, Adam
Kern, Peter
Lau, Dan
McDonald, Michael
Olsen, Rex
Pena, Fredrick
Rupp, Joshua
Shaw, LaShel
Stewart, Jeremy
Stroud, Shane
Tan, Fay
Tuttle, Jeff
Vogt, Colby
Wade, Chris
Wheeler, Lindsey
Wycoff, Bruce

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

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

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Attorney Discipline

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PUBLIC REPRIMAND

On May 25, 2015, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Gregory V. Stewart for violating Rules 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rule of Professional Conduct.

In summary:

The Supreme Court of the State of Utah suspended Mr. Stewart from the practice of law in the State of Utah based upon his failure to comply with the mandatory continuing legal education requirements. During the time he was suspended from the practice of law, Mr. Stewart appeared and represented a client at a pretrial conference and subsequent jury trial in the Fourth Judicial District Court.

The Office of Professional Conduct served Mr. Stewart with a Notice of Informal Complaint requiring his written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Stewart did not timely respond in writing to the Notice of Informal Complaint.

Mitigating factors:

Absence of a prior record of discipline; absence of dishonest or selfish motive; prompt effort to rectify the misconduct.

INTERIM SUSPENSION

On July 22, 2015, the Honorable James Gardner, Third Judicial District Court, entered an Order of Interim Suspension pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability against James H. Alcala pending resolution of the disciplinary matter against him.

In summary:

Mr. Alcala was placed on interim suspension based upon his criminal convictions for conspiracy to commit fraud and alien smuggling and fraud and misuse of visas/permits/visa fraud.

PUBLIC REPRIMAND

On May 8, 2015, the Honorable Keith Kelly, Third Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Reprimand against Sean Young for violating Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) Communication, and 3.3(a) (Candor Toward the Tribunal) of the Rules of Professional Conduct.

In summary:

Mr. Young was retained to represent a family in connection with their Application for Cancellation of Removal and Adjustment of Status ("Application"). An individual hearing for Mr. Young's clients was held before the Immigration Court and at that time,

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

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

Mr. Young indicated that he did not have the required file materials to proceed and requested additional time from the Court to complete his clients' Application. The Court granted a continuance and scheduled a subsequent individual hearing for Mr. Young's clients.

Following the first individual hearing, Mr. Young failed to timely pursue his clients' Application. During that time, Mr. Young failed to inform and consult with his clients and failed to communicate to his clients the deadlines they needed to meet in order to submit a timely Application prior to the second individual hearing. Although Mr. Young took steps for the submission of the required payment to the U.S. Citizenship and Immigration Services for his clients' biometrics, he failed to provide his clients with any written notice about the need for them to submit their biometrics.

At least six months prior to the second individual hearing, Mr. Young's clients had provided to Mr. Young all of the documentation he had requested from them in order to complete their Application. Mr. Young failed to timely file his clients' Application. Mr. Young knew that because his clients had already obtained a continuance, his failure to timely prepare, file and serve his clients' Application prior to the second individual hearing could result in the deportation of his clients. At the second individual hearing held before the Immigration Court, Mr. Young falsely represented to the court that he had previously filed the Application and served it on the attorneys for the United States.

Aggravating factors:
Multiple offenses; vulnerability of victims; and substantial experience in the practice of law.

Mitigating factors:
Absence of a prior record of discipline; absence of a dishonest or selfish motive; good faith effort to rectify the consequences of the misconduct involved; good character or reputation; and remorse.

SUSPENSION

On June 1, 2015, the Honorable Todd M. Shaughnessy, Third Judicial District Court, entered Findings of Fact and Conclusions of Law suspending Abraham C. Bates from the practice of law for a period of five months, effective July 1, 2015. The OPC has filed an appeal of the court's Findings of Fact and Conclusions of Law, which is currently pending before the Utah Supreme Court.

What can YLD offer Y-O-U?

A preview of programs and events for the 2015–2016 year

by Chris Wharton

Many Utah lawyers don't realize that the Young Lawyers Division (YLD) is the largest section of the Utah State Bar. Membership in YLD is automatic for all good-standing members of the Bar who have practiced for five years or less or are under thirty-five years of age. To make the deal even sweeter, the Bar covers the membership fee for our division. YLD is also one of the most active sections of the bar, and our events and programs have earned us the Section of the Year Award more times than any other nominee.

As the YLD president for the 2015–2016 year, I want to invite all our members to take advantage of the opportunities that our division has to offer.

Career Building

One of the main benefits YLD offers is professional networking with other young practicing attorneys. While we are all relatively new to our legal careers, YLD allows members to build relationships with a diverse group of attorneys who graduated from different law schools, work for different firms, and practice in different areas of law. This year, YLD will host networking events, CLEs, and social events where you can interact with other young attorneys in both professional and social settings.

Practice Experience

Many young attorneys are focused only on advancing in their current position, which sometimes means working the same case or same area day after day. We can get tunnel vision or even feel underutilized or unchallenged. YLD exposes members to all areas and facets of legal practice. Our free monthly CLEs allow members to learn about a variety of different topics, and our community service projects allow us to sample different practice areas and client interactions.

Public Service

Every year, YLD donates thousands of hours of free legal services to the community with direct legal service programs as well as programs indirectly related to the practice of law. This year, we will continue to develop established pro bono projects, such as Wills for Heroes (providing estate planning for emergency responders), the Cinderella Boutique (providing prom dresses to underprivileged high school students), Serving Our Seniors (providing estate planning and counseling on elder law issues), Law Day (encouraging civic engagement and careers in the legal field), and more. We will also develop two new programs – Bullyproof (empowering middle school students against bullying) and, starting this year, Project Street Youth (providing criminal defense, credit defense, and tenant's rights for homeless youth).

Social Events

Finally, YLD will continue to offer the best social events for young lawyers to turn off, unwind, and party down with friends who speak legalese and will appreciate swapping "war stories" with you.

Whether you are a young lawyer, a new lawyer, or just young at heart, I hope you will join me and the rest of the YLD Board as we dive into these and other programs and activities throughout the year.

For more information and updates, like us on Facebook (www.facebook.com/UtahYLD), follow us on Twitter (@UtahYLD), and feel free to tag your experiences and feedback with #UtahYLD.

CHRISTOPHER WHARTON is the President of the Utah Young Lawyers Division for the 2015–2016 year. He is the owner of Chris Wharton Law, LLC, a solo-practice firm in Salt Lake City, focusing on family law, criminal defense, and LGBT legal advocacy.

Cinderella for a Day – Young Lawyers Help Low Income Teens Turn Their Prom Dreams Into Reality

by Deborah Bulkeley

Soledad Martinez smiled and twirled as she admired the bright teal dress she was trying on. She decided it was the perfect prom dress. And she could wear it for free, thanks to the Utah Cinderella Prom Boutique (the Boutique).

"I'm mostly excited about showing off the dress and just dancing with it," said Martinez, a student at the Utah International Charter School (UICS). Another student, Natasha Beninga, was excited to "go out with my crush."

It's no secret that prom is costly – families in Western states planned to spend an average $937 on prom this year.[1] The Boutique provides low-income teens the opportunity to go prom without worrying about a big chunk of that cost – the dress.

About 135 teenagers at four high schools wore dresses from the Boutique to prom this year. The Boutique also set up shop at Copper Hills, West Jordan, and Jordan High Schools.

Jenny Hart, volunteer coordinator for UICS, said that many of the school's students are immigrants or refugees who are excited to experience prom, a "quintessentially American high school experience." The first prom at UICS promised to be a uniquely diverse experience. More than twenty languages are spoken at the school, and many students planned to wear traditional dresses from their own cultures, Hart said. But, she added, some prefer an American-style prom dress – which is too expensive for many of the school's students.

That's where the Boutique, a project of the Young Lawyers Division, comes in. A small band of volunteer lawyers literally did some heavy lifting to make this year's Boutique happen. Storing, transporting, and setting up dozens of dresses is no easy task. The Boutique requires sorting through racks of dresses to remove damaged dresses, arranging transportation to and from the schools, setting up the dresses, and managing the Boutique.

The Boutique, inspired by a similar project in South Carolina, is now in its fifth year and recently received the American Bar Association Young Lawyers Division First Place Award of Achievement. It is a time consuming project, but seeing teenagers browse rows of dresses without worrying about the price tag when they find that perfect dress, makes it worth the effort.

This year's Boutique was made possible by co-chairs: Kate Conyers, Shaunda McNeill, Holly Nelson, Tasha M. Williams, and Deborah Bulkeley. The girls and staff at the Genesis Youth Center helped transport the dresses to and from the schools. This year, Heidi Kim generously donated much-needed new racks. And Jessica Gonzalez, introduced to the Boutique by Jaelynn Jenkins, donated her publicity skills. The Boutique's sponsors are Henries Dry Cleaning, which donates dry cleaning services, and Zions Bank, which donates storage space.

Donations of new or gently used prom dresses are always welcome. All sizes are needed, particularly plus sizes (14 and up). The Boutique also accepts donations of formal shoes, accessories, and anything else that could be worn at prom. The Boutique also needs volunteers to repair damaged dresses and to help with transportation when prom season rolls around again. Please contact Kate Conyers, kconyers@sllda.com, if you'd like to help out. You can also like the Boutique on Facebook: https://www.facebook.com/pages/Utah-Prom-Boutique/177242745674219?fref=ts.

1. That's according to a nationwide survey sponsored by Visa Inc. of 3,041 households conducted January 21–25, 2015. The price tag includes $596 on prom night and $342 on "promposal." The margin of error is 2%. The survey is available at http://www.prnewswire.com/news-releases/cost-of-high-school-promposals-hits-324-300058211.html.

Message from the Paralegal Division

by Greg Wayment

I would like to introduce the 2015–2016 Board of Directors of the Paralegal Division. Heather Allen, our Chair from last year, has graciously accepted the call to be Chair again. We look forward to her carrying forward the momentum from last year. We have two new members joining the Board of Directors and wish to extend a warm welcome to Lorraine Wardle and Paula Christensen! This year's Board of Directors are:

Chair – Heather Allen, CIPP/US. Heather has over ten years of experience as a paralegal. She is currently the paralegal and privacy officer for 1-800 CONTACTS, Inc. and has been there since November 2012. She received her certified information privacy professional certification in 2015. She previously was a paralegal at Ray Quinney & Nebeker. She has also been a paralegal at Snell & Wilmer in asbestos litigation and other product liability litigation. Heather has also been an adjunct professor at Utah Valley University, teaching computerized legal research. She graduated from Utah Valley University with a Bachelor's Degree in Paralegal Studies and a minor in Psychology. In her free time, she enjoys reading and spending time with her family.

Chair-Elect – Julie Emery. Julie has twenty-five years legal experience focused on complex litigation, trial practice, electronic discovery, and document management. After working as a paralegal for approximately ten years she started and managed a litigation support company providing paralegal and litigation support, and mock trials and trial support. Julie is now with the law firm, Parsons Behle & Latimer. Julie is a past adjunct instructor for the paralegal programs at Salt Lake Community College and Westminster College. She has served as a director on the Boards of Legal Assistants Association of Utah, Center for Family Development, PTSA Legacy Council, Community Council, and Eagle Aquatic Team. Julie is an avid supporter of the Road Home in Salt Lake City; however, her greatest passion is spending time with her family.

Region I Director – Alaina Neumeyer. Alaina is a paralegal at Farr, Rasmussen, & Farr. She has been with FRF since December 2013. Alaina currently runs the personal injury & mass tort divisions for the firm. Alaina has over fifteen years of personal injury experience. She works in all types of personal injury and products liability cases, including wrongful death, all types of accident cases, mass torts, and many more. Alaina specializes in unique insurance claims. She graduated from Stevens Henager College with her Legal Secretarial Degree with High Honors, and she has her ALS certification from the National Association of Legal Secretaries. Her greatest accomplishments have to be her fifteen-year marriage to her husband and raising her four amazing children.

Region II Director – Karen McCall, ACP. Karen has been in the legal field for fifteen years and recently achieved her CP and ACP designations from NALA. She has a B.A. in Communications and earned her Paralegal Certificate from Fullerton College in California before relocating to Utah. She is employed as a paralegal with Strong & Hanni in Salt Lake City, where her work centers on insurance defense, personal injury and construction law. Karen has been married for twenty-two years and has two children. She enjoys music, hiking, and exploring new places.

Region III Director – Christina Cope. Christina specializes in state and federal civil litigation and has eleven years of experience in appellate law, family law, business law, and estate planning. She was employed for the past four years as the lead civil litigation paralegal for Heideman & Associates in Provo. Christina is the owner of Cope Litigation Services, providing ad hoc litigation paralegal support to sole practioners and small firms. Christina graduated with a degree in Paralegal Studies from UVU and began her paralegal career at the Utah County Public Defender Association. She currently serves with Wills for Heroes and loves new volunteer opportunities. Her volunteer service includes Historic Wendover Airfield Foundation projects on the Norden Bomb Site storage vault and projects benefitting the Enola Gay hangar restoration.

Region IV Director – Kari Jimenez. Kari received her Professional Paralegal Certificate from the University of Phoenix and has over twenty-three years of experience as a Litigation Paralegal. She has a broad spectrum of experience which includes criminal defense, criminal prosecution, civil litigation, insurance defense, medical malpractice, products liability, mortgage servicing and lending, and in-house Corporate. She obtained her Real Estate license in 2005 and is currently the City Recorder and Paralegal for Ivins City. She received her Certified Municipal Clerk and Master Municipal Clerk

designations from the University of Utah and International Institute of Municipal Clerks. Kari served two terms as the Southern Region Director for the UPA and is currently serving as the Region IV Director for the Utah State Bar Paralegal Division.

Director at Large – Sharon M. Andersen. Sharon has been a paralegal for over twenty-five years. She works with David Cutt as a litigation paralegal at the Law Offices of Eisenberg Gilchrist & Cutt. Sharon graduated from the Legal Assistant Program at Westminster College in 1990. Since 2005, Sharon has served on the board of the Paralegal Division in several capacities, including serving as chair of the Division and Ex Officio member of the Bar Commission during 2007–2008. She was recently appointed to serve on the UPL Committee of the Utah State Bar. Sharon has six adult children and five grandchildren. She views her children and grandchildren as her greatest accomplishment and joy in life.

Director at Large – Julie Eriksson. Julie has been a paralegal for twenty-four years and an active participant in the Paralegal Division since its inception. She currently serves on the Board of Directors as a Director at Large and as the current Finance Officer. She is Past Chair of the Paralegal Division 2008–2009 and also served as CLE Chair of the Paralegal Division from 2007–2008. She is also a member of the Utah Paralegal Association and has served that association in many capacities including several years as its President. She has been employed at the law firm of Christensen & Jensen, P.C. for sixteen years where she works in civil litigation.

Director at Large – Tamara Green, CP. Tamara is a paralegal at Parsons Behle & Latimer where she has been employed for twenty-six years. Prior to that, she was employed by the State of Utah. She served as an Administrative Assistant to Governor Scott M. Matheson and then worked at the Division of Public Utilities as an assistant to the director. In 1988, she graduated from Westminster College with a degree in Paralegal Studies and obtained her Certified Paralegal endorsement in 1991. Tamara is a founding member of the Utah State Bar Paralegal Division and was on the *Utah Bar Journal* Editorial Board as the Paralegal Representative. In addition to the Utah State Bar Paralegal Division, she is a current member of the ABA, the National Association of Legal Assistants, and the International Paralegal Management Association.

Director at Large – Cheryl Jeffs. Cheryl is a paralegal at Stoel-Rives, where she works in the areas of litigation. Cheryl has been a paralegal for twenty-three years, having received her Paralegal Certificate from Wasatch Career Institute in 1990. She earned her CP designation from NALA in September 2005. She is the past CLE Chair of Paralegal Division 2013–2015. Cheryl has held other positions in the Paralegal Division, including UMBA liaison and Membership Task Force.

Director at Large – Diane McDermaid, ACP. Diane has been a paralegal for over twenty-five years. She earned her Advanced Certified Paralegal designation and is employed by Snow, Christensen & Martineau working in medical, civil, and commercial litigation. She is a volunteer Court Visitor with the district court. She serves as chair of the Community Service and enjoys serving at the Wills for Heroes and Serving Our Seniors events. She is also the liaison with the Utah State Bar Young Lawyer Division.

Director at Large – Lorraine Wardle. Lorraine has been in the legal field for more than twenty-five years. She is a paralegal at the firm of Trystan Smith & Associates, Claims Litigation Counsel for State Farm Insurance, and is involved in litigation defending personal injury claims against State Farm insureds. Prior to joining State Farm's CLC more than fifteen years ago, Lorraine worked at several highly esteemed insurance defense firms in Utah. She has been involved with the boards of both paralegal associations in Utah for many years. Lorraine lives in West Jordan with her husband and two golden retrievers and spends any spare time she has with her grandchildren, as well as camping, biking, and gardening.

Director at Large – Paula Christensen, CP. Paula has worked in the legal field for over thirty-five 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 for four partners, in the areas of plaintiffs' personal injury, commercial and business defense litigation, real estate, appeals, bad faith, and wrongful death. Paula was honored to be named as Utah Paralegal of the Year is 2013. Paula often volunteers for Wills for Heroes and Serving our Seniors. Paula enjoys hiking, reading, and spending time with her family. She is the mother of four children and five (soon to be six) grandchildren.

Director at Large – Greg Wayment. Greg has over ten years of paralegal experience and has been at the firm of Magleby & Greenwood for most of that time. M&G is a boutique litigation firm in Salt Lake City, specializing in trademark infringement and complex business disputes. 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 enjoys reading autobiographies, running, and being a special events volunteer at Red Butte Garden.

CLE Calendar

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

September 16, 2015 | 9:00 am–3:30 pm — **5 hrs. Ethics, 1 hr. Prof./Civ.**

OPC Ethics School. A required course for reciprocally admitted attorneys. Early registration (by September 4): $245, thereafter: $270.

September 18, 2015 | 8:00 am–5:00 pm — **7 hrs. CLE**

Patent Prosecution Bootcamp. $100 for IP Section Members, $300 all others.

September 21, 2015 | 9:30 am–3:30 pm — **5 hrs. Self-Study CLE**

23rd Annual Estate and Charitable Gift Planning Institute: Tailoring the Estate Planning Wardrobe

September 21, 2015 — **3 hrs. CLE**

Utah County CLE & Golf.
Hobble Creek Golf Course. $75 for CLE only, $95 for golf & CLE (litigation section and CUBA members). $100 for CLE only, $165 for golf & CLE (non section/non-CUBA members).

October 8, 2015 | 8:30 am–1:00 pm

Fall Corporate Counsel Seminar. Agenda pending.

October 9, 2015 | 8:30 am–1:00 pm

ADR Academy. Agenda pending.

October 23, 2015 — **3 hrs. CLE**

Golf & CLE St. George. The Ledges. $60 for CLE only, $80 for golf & CLE (litigation section and SUBA members). $100 for CLE only, $165 for golf & CLE (non section/non-SUBA members).

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