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*June 2015-June 2016

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Cover Photo

Utah Lake Sunset, by Utah State Bar member Ross Martin.

ROSS MARTIN, a graduate of Utah State University, received his J.D. from Santa Clara University School of Law. He is a licensed attorney in California and Utah and works for Nu Skin Enterprises, Inc. as an international tax manager. Ross took this photo while exploring the south shores of Utah Lake with his wife and two boys.



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

Guidelines for Submission of Articles to the Utah Bar Journal

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

ARTICLE LENGTH:

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

SUBMISSION FORMAT:

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

CITATION FORMAT:

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

NO FOOTNOTES:

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

intended message may be more suitable for another publication.

ARTICLE CONTENT:

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

EDITING:

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

AUTHORS:

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

PUBLICATION:

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

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

Letter Submission Guidelines

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

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Considering the Practice of Law in Utah

by Robert O. Rice

As I assume my new position as President of the Utah State Bar, let me say that we Utah lawyers have a good thing going. Yes, lawyering has its downside, including, *inter alia*, overuse of archaic Latin phrases, billable hours, the occasional obstreperous counsel, bad facts, and tough deadlines. But please allow me to take you on a short tour around the practice of law in Utah, and let us see if you agree that, in the very least, the glass is half full.

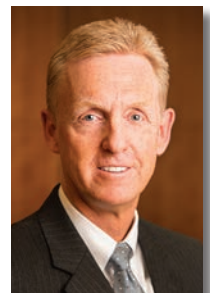
First, consider your colleagues. I suspect if you look around your firm, your government office, the courtroom, and even among your opponents in litigation, you see fast friends and good people. Perhaps this explains why many of you responded favorably in a Utah State Bar survey that asked you to score your colleagues' professional and personal traits. Eighty-three percent of you found that your fellow lawyers were almost always or usually professional. Eighty-one percent of you found your colleagues were almost always or usually ethical. And seventy-eight percent of you found your opponents to be almost always or usually courteous. See Dan Jones & Associates, Utah State Bar 2011 survey of Members, compiled on December 21, 2011, http://www.utahbar.org/wp-content/uploads/2012/06/2011-DanJones_SurveyOfAttorneys.pdf. Granted, these survey results don't reveal perfection. But in a profession that is in large part founded on the principle of zealous representation, the adversarial process, and hard-fought negotiations, these results show that we tend to get along with one another very well, thank you.

Second, we have an excellent judiciary that is a model of efficiency, service, and fairness. In this day and age, clients demand efficient use of their resources, including their litigation budgets. Utah lawyers can tell their clients that in the last five years, the average age of cases pending in our state district courts has dropped from 337 to 183 days. Chief Justice Matthew Durrant, State of the Judiciary (January 25, 2016) at 10, <https://www.utcourts.gov/resources/reports/statejudiciary/2016-StateOfTheJudiciary.pdf>. Those are gigantic steps forward.

Stakeholders surveyed recently about their experiences in our state court system nearly unanimously reported that they are treated with courtesy and respect and that they are satisfied with their experiences in court. See *id.* at 11. This is not surprising; during about this same period, Governor Gary Herbert has made sixty-two judicial appointments. Hearing reports from my colleagues, and having appeared before many of those judges myself, it's clear that Utah's new judges are making significant contributions to a judicial system that is growing faster, better, and stronger.

There's no doubt, then, that our courts take the business of administering justice very seriously. But, thankfully, our judges don't take themselves too seriously. Dig deep into the citations of recent and historic decisions, and you'll find Utah judges relying not only on *stare decisis* but favorite authors and common sense. See, e.g., *AmericanWest Bank v. Kellin*, 2015 UT App 300, ¶ 3, 364 P.3d 1055 ("But as Robert Burns observed, 'The best-laid schemes o' mice an' men gang aft agley an' lea's us nought but grief an' pain for promis'd joy.'" (quoting Robert Burns, *Tae a Moose*, in *The Best Laid Schemes: Selected Poetry & Prose of Robert Burns* 48 (Robert Crawford & Christopher MacLachlan eds., 2009))); *Brough v. Ute Stampede Ass'n*, 142 P.2d 670, 674 (Utah 1943) (Larson, J. concurring) (writing, in response to the majority's decision that a rodeo carnival was a public nuisance, that "[t]hough they may involve some individual inconveniences and irritations, I opine that the right of the public generally to innocent amusement and relaxation, even with some hilarity, is an incident of community life to which all must submit. Such right is a substantial one, and when reasonably exercised, must not be curtailed by whim, caprice, irritant dispositions, or for temporary annoyances.").

Next, Utah lawyers pay it forward. You and your colleagues in the Bar provide thousands and thousands of hours of pro



bono services to needy Utahns every year. If you are a Bar Commission policy wonk, you call this “access to justice.” Your Bar’s Access to Justice Department is among the leaders in the nation when it comes to providing needed legal services to low- and middle-income Utahns. Through the Bar’s Pro Bono Commission, Utah lawyers have served nearly 900 clients in full representation cases and more than 3,000 others who required unbundled legal representation in debt collection, family law, and other proceedings. The Bar’s Modest Means program has connected nearly 2,000 clients with lawyers who provide unbundled, reduced-fee services that not only serve clients well, but give new lawyers the chance to establish and grow a practice. Innovative Utah lawyers like Shantelle Argyle, co-founder and Executive Director of Open Legal Services, are developing new

nonprofit law firms that are able to provide affordable legal services on a sliding-fee basis to clients who might otherwise go without representation. And the Utah Supreme Court is implementing a task force recommendation to allow Licensed Paralegal Practitioners to provide legal services in the areas of family, debt collection, and landlord-tenant law. Together, Utah lawyers, the Bar, and the courts are partnering to expand free and low-cost legal services throughout the state. While there is a vast amount of more work to be done, Utah lawyers can be proud of their efforts to improve access to justice in Utah.

Utah’s legal market is making solid advances as well. The nation’s legal job market suffered a substantial post-2008 decline, to which Utah was not immune. But Utah’s legal market is now among the leaders in the nation when it comes to jobs

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for young lawyers, thanks in large measure to the herculean efforts of our two law schools. The most recent data from the American Bar Association shows that the S.J. Quinney College of Law and the J. Reuben Clark Law School are well above the national average when it comes to placing their graduates in law firms, clerkships, government offices, in-house positions, and other law-related fields. New lawyers from the University of Utah and Brigham Young University are hitting the ground running, ready to continue the effort to keep our profession on solid footing. Utah's Young Lawyers Division, for example, makes huge contributions to the practice of law through its award-winning programs, including Wills For Heroes and Tuesday Night Bar.

But no one is taking all of this progress for granted. I'm excited about my plans for the coming year and the continued success of the innovative programs launched by my predecessor, Angelina Tsu, along with the progress made by an exceptionally dedicated Bar Commission. This year, look for an increased presence of the Bar on multiple fronts. First and foremost, you'll be hearing a great deal about LicensedLawyer.org, the Bar's new attorney directory, designed to help you promote and build your practice. LicensedLawyer.org is one-of-a-kind in the nation, providing an effective, user-friendly online tool for clients to locate you. Log on to LicensedLawyer.org now (I mean today!) and create and update your profile. Already more than 600 Utah lawyers have activated their accounts on LicensedLawyer.org. In the last thirty days, potential clients have made nearly 3,500 searches. That's more than 100 searches for lawyers every day – and we're only just getting started! You can customize your profile to target exactly the kind of client you hope to attract. Link your account on LicensedLawyer.org to your other social media tools to broaden your marketing footprint further. Likewise, the Bar is expanding its social media program to direct client traffic to LicensedLawyer.org. Critically, LicensedLawyer.org is free and right now available only to Utah lawyers. In short, LicensedLawyer.org is the next wave for Utah lawyers to strengthen their presence on the internet. We're thrilled for the Bar to be a part of this innovative program and excited for all of you to participate to the fullest extent possible.

This year look for other innovations at the Bar. I'm excited to propose to the Bar Commission a new member-centric website design for the Bar's website that will provide new membership services and provide increased access to information about our Bar. In conjunction with improvements to our website, the Bar is expanding its social media presence – like us on Facebook

already! We will be blogging, tweeting, and posting about LicensedLawyer.org, ongoing Bar events and programming, and exciting news about you. Don't be shy; tell us on Facebook about your latest pro bono experience, congratulate a colleague on an unusual case victory, or share a good story about the practice of law or the fun you had at a Bar event.

Apart from our work in the digital world, I am excited about opportunities elsewhere, including with diversity and access to justice issues. The Bar Commission will be considering new unconscious bias and diversity training for the New Lawyer Training Program. Speaking of diversity, I'm thrilled to have been asked to serve on the Board of the Utah Center for Legal Inclusion and look forward to supporting this new nonprofit's efforts to promote diversity in our ranks. We will also be focusing on the programming managed by the Affordable Attorneys For All Task Force, fondly called the AAA Task Force. The AAA Task Force will be focusing on several key initiatives, including ensuring the success of LicensedLawyer.org, growing the exciting Courthouse Steps program, which is an initiative designed to bring low-cost legal services inside the courthouse, and funding for incubator programs designed to bridge the gap between law school and a career in rural and urban practices.

I will also be asking the Bar Commission to complete fulfillment of the recommendations made by our Futures Commission in its 2015 report. Most of the Futures Commission objectives have been achieved, and we will be focusing on the balance of those recommendations to ensure that excellent body of work is complete.

We will continue several new offerings at the Bar, including Bar Review gatherings in northern and southern Utah so that you and your colleagues have opportunities to commune and network with friends, lawyers, and judges. Breakfast of Champions, an annual breakfast event first held this year to honor mentors who have improved our lives and our profession, will convene again in 2017. Of course, our traditional Fall Forum and Spring Convention are on the docket. And I'm pleased to advise you that next year's Summer Convention is returning to Sun Valley. Summer Convention Co-Chairs Amy Sorenson and the Honorable Judge Robert Shelby are already making grand plans for that event.

Having considered with me the state of our Bar, I hope you will join me in concluding that we Utah lawyers do indeed have a good thing going. Here's to improving conditions even more in the next year.

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Lookin' for Law (in all the wrong places)

by Robert H. Hughes

One afternoon last summer I returned home from work to find my two sons engaged in a brawl. Each was breathlessly accusing the other of violating their “agreement.” As I began to settle them down and referee the dispute, I slowly realized they were talking about an actual written agreement, which they promptly confirmed and produced for my inspection.

Sure enough, it had the hallmarks of a binding contract: their signatures manifested offer and acceptance, and mutual promises served as consideration. It was short – only a few provisions – and focused on what you might expect from a twelve and nine-year-old. One clause prohibited snitching to mom and dad, with sensible exceptions for dangerous activities. Another clause incorporated the common law of “shotgun” with respect to seating in the family car.

But one clause in particular caught my eye. It read simply: “T.V., first grabs first haves then three episodes.”

I had never seen the phrase “first grabs, first haves” before, and at first I was stumped. Then it hit me. They had independently invented the doctrine underlying all of western water law: first in time is first in right.

Just like the prospectors in 19th century mining camps – who realized that riparian water law of the east was ill-suited to the arid conditions of the west and created their own system of water law based on what seemed fair to them – my sons had fashioned their own law to address what to them is an equally scarce resource: access to the television.

Now, as innovation goes, this doesn't rank up there with the independent invention of calculus or natural selection. But still, it was striking that two boys would, without any knowledge of property law, independently come up with such a similar articulation of a basic principle.

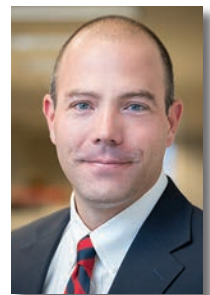
On the other hand, perhaps it's not so surprising or impressive; after all, the right of the first person in line seems so natural as

to usually go unnoticed. Could the world even operate if the second person in line got to go next? Whether it's the right to use the remote control, divert water from a stream, or sit in the next open seat at a restaurant, it seems entirely natural that the next person gets the next available right. Indeed, priority is fundamental to just about any system of allocating rights in property.

But being next in line, by itself, usually is not enough. People have to know that you are next in line. In many instances, this presents no problem: when one boy dives across the room and gets his grubby hand on the remote control first, the winner of the right of “first haves” is obvious. Likewise, the long, serpentine queue at the airport security checkpoint provides an obvious visual indicator of the order of rights.

But what if you want to dig for gold? It is not enough to just be first on the spot – the would-be miner must also let the world know he was there first. This is accomplished, of course, by “staking a claim” – posting a notice and physically marking the boundaries of the mining claim on the ground to put the next prospector on notice of the location and extent of the prior right. This form of notice becomes necessary any time a person wants to lay claim to use and occupy space larger than the human body itself and can be seen at work today at any outdoor concert or fireworks show. Or drive down the parade route on the evening of July 23 and you'll see people staking claims with blankets, chairs, and sleeping bags. They spread out their stuff, laying claim to as much real estate as possible. Interestingly, these informal methods of claim-staking lack what the mining

ROBERT H. HUGHES is of counsel at Parsons Beble & Latimer, where he advises public and private clients on land use and zoning, eminent domain, and real property matters. Rob is also an adjunct professor at the S.J. Quinney College of Law, where he has taught Contract Drafting.



laws included – an explicit limit on the size of the right one can claim. A mining claim under the 1872 mining act was limited to 600 by 1,500 feet; a stretch of curb for Pioneer Day is limited only by one's willingness to ignore the disdain of one's neighbors.

By itself, staking a physical claim creates an inefficient system, for at least two reasons. The first is that it often requires at least one person to stay with the claim to guard against encroachment. This might be okay if you have teenagers who think that sleeping on the sidewalk all night is great fun. But it doesn't work so well for a miner who has to go back to town to retrieve shovels, mules, and dynamite. Second, it leads to a lot of wasted time, with miners hiking up canyons – or minivans driving up and down Third East – only to find that the best spots are already taken. So the mining law imposed an additional requirement: filing a public notice in the local land office after staking the claim on the ground.

This form of centralized notice system is familiar to all of us today, in the form of the County Recorder's office, where all interests in land are recorded and serve as notice to the world of each claim to real property. This supports what is typically known as a "race-notice" system, where grantees protect themselves against subsequent purchasers by promptly recording their deeds with the county. But centralized recording has not completely displaced the importance of the type of actual notice of prior claims that can be seen on the ground. In a 2002 case, for instance, a landowner was stuck with an easement over his property, even though the written easement had not been properly indexed by the recorder against his property when he bought it, because "the disputed right-of-way was in open and obvious use." *Arnold Indus. v. Love*, 2002 UT 133, ¶ 30, 63 P.3d 721.

While notice is a common – perhaps even necessary – feature of priority-based systems, it is not, by itself, sufficient. If prior notice, without more, were enough to create ownership, all of us could simply file a notice with the County Recorder, asserting ownership over anything not already owned by someone else – the sun, the moon, the stars – anything. In fact, recently someone did just that, filing a "Claim to Property Ownership" over all mineral rights on Asteroid 433 Eros. Seriously. See Claim to Property Ownership, filed in Book 10314, Pages 8028-8033, as Entry No. 12030491, in the official records of Salt Lake County.

Most of us find this kind of bald assertion of rights absurd.

Children find it absurd. That's why you can't call "shotgun" for the car tomorrow, or next Tuesday, or next year. In some jurisdictions, you have to be in sight of the car before you can call shotgun, while in others, you have to be standing on the same surface. See Studio C's "I Call Shotgun" sketch, at <https://www.youtube.com/watch?v=zPBWIq9kxDQ> (last visited August 18, 2016). But everyone agrees that when yelling "shotgun" is all you have to do to claim ownership, there has to be some limit to when you can claim it.

"Calling" something (as in, "I call the last piece of cake") is a system based on prior notice alone, and it is rare. Typically, we require something more than mere notice before we will recognize ownership.

John Locke, in his Second Treatise on Government, argued for something more than notice. He asserted that rightful ownership derives from the application of one's labor to natural resources:

Though the water running in the fountain be every one's, yet who can doubt but that in the pitcher is his only who drew it out? His labour hath taken it

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out of the hands of Nature where it was common, and belonged equally to all her children, and hath thereby appropriated it to himself.

Locke: Two Treatises of Government (Cambridge Texts in the History of Political Thought), Book II § 28 (Peter Laslett ed., 1988).

Like the rest of us, Locke presumably would deny that one can obtain ownership over an asteroid simply by calling it first. Rather, under Locke's "labor theory" of property, you acquire ownership by applying your labor – something that you clearly do own – to the natural, common resource, thereby increasing its value. Until you have mixed your labor with the resource, it remains commonly owned. Thus, to own the minerals on an asteroid, one must actually go up there and mine them.

Locke is onto something here, but when tested against real-world situations, his labor theory does not always hold up. For instance, if you yelled "shotgun" before Locke did, he would totally ignore you and just muscle his way into the passenger seat, turn up his nose, and say something like "I hath taken this seat out of the hands of Nature and appropriated it unto myself." Clearly, some situations call for recognizing ownership before any labor is expended. If nothing else, a system based on prior notice alone can reduce the number of parking lot scuffles.

What the labor theory is missing, I think, is a recognition that sometimes ownership is obtained by degree. Take, for example, a trip to the grocery store. As you walk around the store, you do not "own" any of the items in your shopping cart, yet you would find it very weird indeed if other shoppers could take things out of your cart. When you take a box of Honey Nut Cheerios off the shelf and put it in your cart, you do not acquire full ownership, but you do acquire the first right to purchase that box of cereal from the store.

Likewise, miners in the old west recognized the concept of *pedis possessio*, or "the possession of the foot," or "the foothold." That doctrine held that when a prospector entered an area in search of an outcropping of ore, the prospector acquired the first right to look, as against other prospectors. The prospector could not claim to own anything yet but was first in line to acquire ownership if the prospector discovered a vein of ore.

Discovery of a valuable mineral is just the first stage of acquiring ownership to a mining claim. As discussed earlier, once a prospector located a place to mine, the prospector

staked his or her claim on the ground and filed a paper notice in a centralized office. But that only got the prospector an "unpatented mining claim." To secure full title to a mining claim, the claimant was required to demonstrate diligence in actually developing the mine, by performing "not less than one hundred dollars' worth of labor" every year. 30 U.S.C. § 28. A patent conveying ownership of the claim was only available once the claimant had expended \$500 in labor or improvements on the site. A similar requirement was imposed on homesteaders, who only received title to their claim after building a home, making improvements, and farming the land for five years.

These so-called "diligence" requirements resonate nicely with Locke's labor theory of property and are commonplace in the law of public resources. Locke arrived at his theory through *a priori* reasoning, but the requirement also makes sense from an economic point of view, as it serves to ensure that valuable resources are fully exploited. But the diligence requirement also seems to stem from some deeper sense of simple fairness – it just seems wrong for someone to claim a precious property right and then not use it.

Consider a hotel pool, where lounge chairs closest to the water are the coveted resource. You have probably seen, as I have, a towel or a magazine left on a chair to provide notice of someone's prior claim. Fair enough. But how do you feel when a copy of *Us Weekly* enjoys the front row for hours with no owner in sight?

Or what about "cyber-squatters," those guys who register common domain names with no intent to actually use them? In the early days of the internet, they laid claim to names like "Intel.com" and waited for Intel to come along and pay them an exorbitant fee for it. Though perfectly legal (at the time), it just never seemed right – at the very least, it seems like bad form to call dibs on something and then take no steps to actually use it.

Thus, we can explain the diligence requirement – well-established in mining and homestead law but enforced not at all around swimming pools – from a logical standpoint, as Locke did, or as sensible public policy designed to maximize the full utilization of scarce resources. But the frustration we feel when it is lacking suggests that the diligence requirement is also an expression of a deep-seated sense of justice.

We have examined the importance of priority, notice, and diligence, but what exactly do those things get you? What is the

scope of the right created? The answer, naturally, depends on a number of factors.

Imagine, for instance, that you are standing in line for a ride at Lagoon. This is a pure priority system, in which the next guy in line owns the right to the next available seat. Now imagine that the guy in front of you steps out of line and gives his spot to someone else. No problem, right? Your right is not diminished at all – you were eighty-third in line before, and you are still eighty-third in line. So we can see that the right to stand in line is fully transferable.

But is it expandable? Imagine that the guy in front of you lets his two kids join him in the line. Your priority just dropped from eighty-third to eighty-fifth. That stinks, but you probably won't mind much, perhaps because it seems natural and reasonable for a father to stand in line as a proxy for his whole family. You might imagine yourself doing the same, in order to save your kids the misery of shuffling along the hot tarmac. But what if the guy in front of you has six kids? Does that seem like an unreasonable expansion of his right? What if, instead of his children, the guy is joined by three friends? Which is more irksome: six children or three friends? Would your reaction change if you have already

been waiting in line for an hour? If you are just about to step on the ride? What if the guy warned you when he got in line that his friends would be joining him? I suspect that your reactions to these hypothetical situations vary depending in large part on the amount of diligence you have expended and whether you had notice that your priority might drop before you got on the ride.

Let's consider a different setting – an outdoor concert at a park. You have arrived early and laid out a couple of blankets for you and your family to spread out on. Your spatial right is clear: you “own” the exclusive right to occupy the space above the outside borders of your blankets. According to universally accepted custom, no one will interfere with that right. Now imagine that another family sets up in front of you, not with blankets, but with lawn chairs. Is it fair for them to obstruct your view? Did you acquire a right to an unobstructed view to the stage?

Here again, we find an instance where mining law is more advanced than our everyday law of the park. Miners recognized “extralateral rights,” the idea that once a claim was located, the miner's rights were not limited to the actual rectangle staked on the ground. Rather, since the whole purpose of the endeavor



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was to extract valuable ore, the miner's rights followed the vein of ore as it traveled underground past the boundaries of the claim as staked on the surface.

That same instinct is triggered when someone sets up a chair in front of your blanket because the whole reason you arrived at the park early was to secure a good view of the stage. You are not interested in rights up to the heavens – you want the extralateral right of an unobstructed view. Thus, we see that the purpose behind your efforts to obtain priority can influence your sense of ownership as much as the amount of diligence you have expended. Other factors, like notice and priority, still matter. You would probably react much differently if the family with chairs arrived first, or if there were a sign at the edge of the park expressly stating that “coolers and camp chairs are permitted.”

The point of tweaking these hypotheticals is to explore how one's sense of the scope of the property right changes depending on the variables of purpose, priority, notice, and diligence. A small loss of priority looms larger when a great deal of diligence has been expended. A large loss of priority, in contrast, can be minimized simply by providing notice of the

impending loss.

Even after ownership has been fully established through whatever combination of priority, notice, and diligence is required, there are often limits on it. Recall the contractual provision that provided our starting point: “first grabs first haves then three episodes.” The import of the limitation to three episodes is obvious – my sons recognized that a remote control is far too scarce and precious a resource to be reducible to full fee simple absolute ownership. Neither one could accept the risk that he would be second to grab, and forever be at the mercy of the other's viewing choices. So their contract included a limitation on use: three shows, then the other guy gets it.

We see some version of this basic limitation on ownership in other everyday contexts. Spend any time at a playground, and you are bound to hear a parent say, “You've been using it long enough, give someone else a turn.” And it is considered bad form, both in the eyes of the restaurateur and other would-be diners, to monopolize a restaurant table all evening.

An express limitation on the time of use – a mandatory taking of turns – is just one way to compel the equitable allocation of a scarce usufruct. More common, perhaps, is the implicit restriction on taking more than your fair share in the first place. New Yorkers, for instance, coined the term “manspreading” to describe the boorish way some men take up more than their allotted seat on the subway. *See* Emma G. Fitzsimmons, *A Scourge Is Spreading. M.T.A.'s Cure? Dude, Close Your Legs.*, N.Y. TIMES, Dec. 21, 2014, www.nytimes.com/2014/12/21/nyregion/MTA-targets-manspreading-on-new-york-city-subways.html (last visited July 30, 2016). Just the other day at La Costa Vida, I attacked my wife's surplus burrito as soon as she pushed it away. My son immediately admonished me: “Don't bogart the common burrito, man!” Well said.

John Locke advanced his own version of the anti-bogarting rule. After laying out his idea that ownership derives from labor, he articulated and addressed a counterargument:

It will, perhaps, be objected to this, that if gathering the acorns or other fruits of the earth, etc., makes a right to them, then any one may engross as much as he will. To which I answer, Not so.

...

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advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to others.

Locke: Two Treatises of Government (Cambridge Texts in the History of Political Thought), Book II § 28 (Peter Laslett ed., 1988).

So under Locke's view, if you get there first and apply labor to it, you can take whatever you can actually use. If that limitation applies, my wife's leftover burrito was all mine because I had ample room left for another half a burrito. My son was implicitly arguing for a stricter limitation: that we all had equal rights to the leftover burrito and that I needed to leave some for him, even if I was physically able to cram the whole thing down my throat. Given that he was still working on his own burrito, he was arguing from self-interest. But his position finds support in the law – at least in some jurisdictions.

In the eastern United States, the right to use water from a stream is governed by the "riparian doctrine." This approach basically holds that property owners along the watercourse all enjoy an equal right to the "reasonable use" of the water. This effectively requires upstream owners to leave a reasonable amount of water in the river for downstream users, even if the upstream user could put the entire stream to use.

As noted earlier, miners and pioneers in the west invented a different water law regime: the doctrine of prior appropriation.

Under our system, "beneficial use" is "the basis, the measure and the limit of all rights to the use of water." Utah Code Ann. § 73-1-3. In other words, the prior appropriator may take as much water as he can use, without regard to what later appropriators might want to use. This hews more closely to Locke's view, where the only limitation to your rights is your ability to use what you take. The prior appropriation doctrine explicitly incorporates this prohibition on waste – anyone who takes something as precious as water from a stream darn well better use it, and use it wisely.

Interestingly, the impetus for the fight between my boys had been their failure to address this issue in their contract. As it happened, the "first grabber" of the TV that afternoon did not really want to watch TV right away and asserted the right to delay the consumption of his allotted three episodes until it suited him. Yet he was unwilling to turn over the remote to the second grabber in the interim. When it comes to precious resources like water and TV time, the law will simply not tolerate that kind of waste.

As a practical matter, waste is hard to prove in water litigation. More commonly, water rights are lost through non-use, or forfeiture: water unused for seven years is lost, and everyone in line gets to move up a step. *See id.*

The issue of forfeiture comes up in more familiar household usufructs, like the right to sit in a certain place on the couch:

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"Hey, I was sitting there."

"You left."

"I went to the bathroom!"

"You *left*."

It only takes one or two infuriating episodes like this for every family to develop a solution. In ours, one must proclaim, "Quack quack, spot back" before vacating a preferred position. (I wish I could say we invented this colorful phrasing, but as with most culture, we adopted it from others – in this case, our cousins, the Russells. I don't know where they got it.) This serves to negate any inference of an intent to abandon when one gets up to retrieve a fourth popsicle. An analogous procedure is found in Utah water law, which allows water users to file non-use applications as a way to toll the running of the seven-year forfeiture period. That seems an effective solution, but saying, "Quack quack, water right back" would be more fun.

So, what's the point here?

Why go to the trouble of examining these organic notions of ownership that bubble up in everyday settings? Well, perhaps by studying our spontaneous

feelings of ownership, we gain some insight into the way property law plays out in more formal settings. For instance, why do people often feel something like ownership over property they don't own? Why do suburbanites – who love to look out their back windows at alfalfa fields or horse pastures – get so exercised when the owner of those fields liquidates his investment and sells to a home builder?

The answer, perhaps, lies in the hypotheticals we considered: the longer you stand in line for an amusement park ride, the more frustration you feel when someone steps in front of you. If you sit for a long time on a blanket with a great view of the stage, you feel especially put out by the guy who sets up in a chair in front of you. Those hypotheticals suggest, I think, that there is an organizing principle at work more fundamental than any particular rule of property law: expectation. When our expectations are not fulfilled, we feel a sense of disappointment, even injustice.

But the hypotheticals also tell us that only the violation of reasonable expectations should be deemed unjust. Recall that your reaction

to the outdoor concert hypothetical changes if you walked past a sign putting you on notice that chairs are allowed. That sign eliminates expectations for everyone who sees it, and everyone who does not see it will likely acknowledge that their expectations were not reasonable, once the sign is pointed out to them. How many planning commission meetings, packed with incensed neighbors, might be avoided if property owners (or the city itself) posted notices on undeveloped lands simply stating: "This field is zoned for quarter-acre residential lots. (Just like yours)."

In other words, if neighbors had no expectation that they would continue to enjoy the pastoral view over their back fence, they might feel less disappointment when it went away.

The hypotheticals offer other insights. Consider again the common experience of waiting in line. How angered are you when someone butts in line to get into an outdoor concert with festival seating? Probably not very. What if they jump the line to get into an indoor concert with finite seats? What about a line to buy the next iPhone?

"[B]y examining how our instincts change depending on scarcity, we might be able to predict how the law will react to changes in scarcity."

Clearly, our reaction – our sense of injustice – varies depending on the situation, and specifically depending on our perception of scarcity. This is important because scarcity is not fixed. In an era of

increasing drought, for instance, water is ever more precious. If water becomes more scarce, our attitudes about the reasonable use of water may shift. And if attitudes shift, perhaps the law should follow. In short, by examining how our instincts change depending on scarcity, we might be able to predict how the law will react to changes in scarcity.

But the main reason to explore the informal property law that arises all around us is that it is fun. Most of us become blinded to the things that are around us every day. They become so familiar that they escape notice. So it can be fun and interesting to stop and examine them more closely, and realize that wherever you find both people and stuff, you are likely to find some form of property law. In fact, once you start looking for law, you'll find it almost everywhere.¹

1. I must give a hat tip to Professor John Martinez, who first sparked my interest in this type of spontaneous property law when he shared with my 1L Property class a newspaper article about people in some big eastern city laying claim to parking spots on the street after they had spent hours clearing them of snow.

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The Case for Expanding the Utah False Claims Act

by Robert D. Sherlock, Jeffrey D. Eisenberg, and Sarah M. Wade

Government spending in Utah will exceed \$14 billion for fiscal year 2016.¹ Unfortunately, it is estimated that up to 10% of government outlays are lost to fraud.² This means that, in one year alone, around \$1.4 billion tax dollars will go to people and entities that provide no benefit to Utahns. The primary tool by which the federal government recovers taxpayer dollars lost to fraud is the Federal False Claims Act (the Federal Act), and the vast majority of cases brought under the Federal Act are initiated by private whistleblowers. The unmatched success of the modern Federal Act, which has led to over \$40 billion in recoveries to the United States since 1986, has prompted a growing majority of states, including Texas, North Carolina, and Oklahoma, to enact their own laws, which closely track the Federal Act. State false claims acts have led to substantial recoveries. For example, in Texas, one settlement netted the state almost \$45 million, while California recovered more than \$187 million in a single settlement. In addition, Florida has collected over \$30 million in Medicaid fraud recoveries alone.

Although a Utah False Claims Act exists, its reach is limited to state healthcare dollars and it does not contain the whistleblower provisions that make the Federal Act and other states' false claims acts so successful. To better root out fraud against taxpayer dollars, the legislature should amend the Utah False Claims Act to mirror the Federal Act. A Utah False Claims Act that mirrors the Federal Act would create liability for any person who knowingly submits a false claim or causes another to submit a false claim to the state of Utah or knowingly makes a

false record or statement to get a false claim paid by the state. It would also impose liability where a person improperly avoids having to pay money to the state and would create liability for those who conspire to violate the Utah False Claims Act.

Further, a whistleblower would be permitted to initiate suit by providing the state Attorney General with all material evidence and information the whistleblower possesses and by filing a complaint under seal. During the seal period, the government would be empowered to investigate the whistleblower's allegations to determine their validity and to assess whether to intervene in the case and to take primary responsibility for the litigation. If the government decided not to intervene, the whistleblower would still have the right to continue the action on behalf of the government via private counsel. A successful whistleblower would receive between 15% and 30% of the government's recovery as well as reasonable attorney fees and costs to be paid by the defendant. The exact amount of the whistleblower's recovery would depend upon the whistleblower's contribution to the case.

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ROBERT D. SHERLOCK heads the False Claims Act practice group at Eisenberg, Gilchrist & Cutt. He is an experienced health care attorney who has also served as General Counsel, Chief Financial Officer, and Chief Operating Officer for hospitals and health care entities.



SARAH M. WADE is an attorney at Eisenberg, Gilchrist & Cutt where her practice focuses mainly on representing whistleblowers under the False Claims Act.



The proposed changes would also provide protections for whistleblowers by barring an employer from retaliating against any employee because of that employee's efforts to stop or prevent violations of the Utah False Claims Act. These changes would strengthen fraud enforcement in Utah by expanding the scope of the Utah False Claims Act to reach all government outlays, not just those public dollars spent on healthcare. Further, the whistleblower provisions would provide a way for the state to get comprehensive, high-level inside information about wrongdoing that may be difficult or impossible to discover without the assistance of an insider.

The Federal False Claims Act

Congress passed the Federal False Claims Act in the 1860s at the urging of President Abraham Lincoln in an attempt to combat pervasive fraud by contractors who were providing the Union Army with defective supplies. The central feature of the original Federal False Claims Act was a *qui tam* provision that allowed individuals, known as relators or whistleblowers, to file suit alleging fraud against the public fisc on behalf of and in cooperation with the federal government. Following its enactment, Congress amended the Federal Act a number of times in ways that gutted *qui tam* actions so that the act was seldom used.

By the late 1980s, fraud against the government was rampant and efforts to curtail it had proven ineffective. Prompted by the

prevalence of fraud, Congress overhauled the Federal Act with the goal of recruiting more whistleblowers to assist in the government's efforts. In 1986, Congress substantially amended the Federal Act, invigorating whistleblower actions. Republican Senator Charley Grassley sponsored these amendments, and President Ronald Reagan signed them into law.

Before the 1986 amendments, whistleblowers brought very few false claims cases. Following passage of the amendments, whistleblowers have initiated thousands of cases and the federal government has recovered more than \$40 billion under the modern Federal Act.³ If all costs and benefits are accounted for, the cost-to-benefit ratio of false claims act law enforcement in the healthcare industry – the largest area of false claim act enforcement activity – exceeds \$20 recovered for each dollar expended in the effort.⁴ This number does not even account for tax dollars saved through the deterrent effect of false claims act law enforcement.

Today, the most common whistleblower cases target fraud in connection with federally funded healthcare programs under Medicare, Medicaid, and Tricare. Other common allegations involve defense procurement, underpayment of oil and gas royalties, frauds in connection with federally insured education and housing loans, federal research grants, federally funded construction projects, disaster relief, and unpaid customs duties.

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Creating a More Effective Tool in the Fight Against Fraud in Utah

Utah cannot afford to lose significant sums to fraud, particularly given Utah's longstanding struggle to fund public education. Under present law, the state Attorney General has exclusive responsibility for fighting fraud against taxpayer dollars. With estimates indicating that fraud costs the state of Utah substantial sums each year, the Attorney General needs the assistance of whistleblowers to protect the public fisc. Utah is clearly not immune to fraud against the government. In fact, in June of this year, the Inspector General of the United States Department of Health and Human Services identified Provo as a "hotspot" for home health fraud.⁵

Changes to the Utah False Claims Act to mirror the Federal Act are attractive for a number of reasons. First, the proposed changes would enhance the state's ability to recover losses sustained as a result of fraud because the scope of the law would reach far more fraudulent activity. Further, the proposed changes would entitle Utah to recover an additional 10% of the state's share of Medicaid recoveries pursuant to a provision of the Deficit Reduction Act of 2005, 42 U.S.C.A. § 1396h, which Congress enacted as an incentive for states to adopt their own false claims legislation that tracks the Federal Act and contains effective whistleblower rewards and protections. Without amending the Utah False Claims Act, Utah taxpayers are leaving this money on the table.

Second, the proposed whistleblower provisions would encourage knowledgeable individuals to inform the government about fraud. Convincing people to blow the whistle on their employers and colleagues is not a simple task. Whistleblowers are often retaliated against and blacklisted within their industries. The proposed changes to the Utah False Claims Act would bring out insider information by coupling a monetary incentive with protections for whistleblowers against whom an employer retaliates. It is basic good sense to reward and protect whistleblowers who sacrifice their own livelihoods to report fraud against the government.

Finally, the changes would provide a way for whistleblowers to supplement the strained resources of the state. A knowledgeable whistleblower can simplify the government's investigation and reduce the time and costs associated with prosecuting fraud. Evidence of complex fraud is often concealed within an organization. The compartmentalized structure of corporate environments often hinders outside detection of fraud. Effective detection, therefore, requires assistance from insiders who are familiar with an illegal scheme. A whistleblower can also

identify key documents and witnesses, decode technical and industry information, and explain the practices of the businesses to the state, saving the government time and money.

Critics argue that whistleblower provisions would encourage frivolous lawsuits and cause individuals to orchestrate fraud in order to become whistleblowers for a reward. However, whistleblower rewards and protections modeled after the Federal Act would deter such suits. The first major check on frivolous claims is the enormous expense and time commitment that naturally attends litigation under the Federal Act. The risk of floating this staggering expense on a contingency fee basis is not financially appealing unless a whistleblower's lawyer believes there is a strong and well-documented case.

Additionally, the proposed whistleblower provisions provide for sanctions against an overzealous whistleblower who pursues a case that utterly lacks merit. Also, the state Attorney General would maintain control over the whistleblower's suit and would be empowered to dismiss frivolous claims. The proposed changes to the Utah False Claims Act would also disqualify anyone who brings the state information it already has from serving as a relator and would bar a whistleblower who was the architect of a fraudulent scheme from receiving any share of the government's recovery.

The success of the Federal Act provides a roadmap for changes that should be made to the Utah False Claims Act to better recover taxpayer dollars lost to fraud and to deter future fraud. Changes that mirror the Federal Act would establish a self-executing, revenue-generating partnership between the state and its citizens to protect the people of Utah against fraud. Therefore, the proposed changes to the Utah False Claims Act should be strongly supported.

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3. U.S. Department of Justice, Civil Division, *Fraud Statistics – Overview: October 1, 1987 – September 30, 2015*, available at <https://www.justice.gov/opa/file/796866/download>.
4. Jack A. Meyer, *Fighting Medicare & Medicaid Fraud: The Return on Investment from False Claims Act Partnerships*, p. 1 (Oct. 2013), available at <https://www.taf.org/TAF-ROI-report-October-2013.pdf>.
5. Joshua Berlinger, *Justice Department Files Record \$900 Million Healthcare Fraud Case*, CNN (June 23, 2016), <http://www.cnn.com/2016/06/23/health/health-care-fraud-takedown>.

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Utah Series LLC – The Risk of Use Continues to be Uncertain

by Bruce H. White

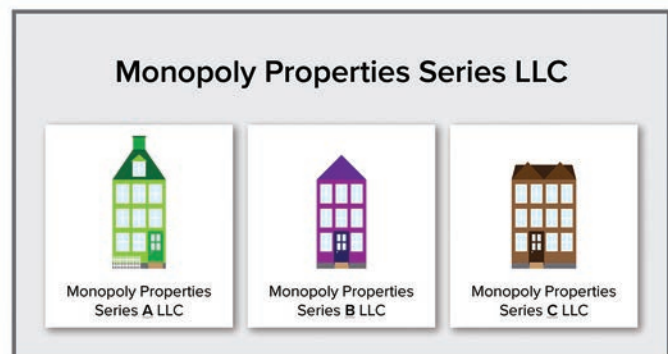
A few months ago a colleague came into my office asking about the bankruptcy risks of using a Utah series limited liability company in the formation of a new company that would hold several different property interests. He said the client wanted to keep the risk of default separate on each property because each series would hold property that would likely have different lenders and investors, so that if one property were to have problems, it wouldn't drag the others down. I admitted I was not familiar with a series limited liability company structure, so I dug into the books to advise him on the possible bankruptcy risks in using such an entity.

The series limited liability company (Series LLC) has actually been in existence since 1996, when Delaware enacted the first Series LLC statute. Since that time, only eleven other states (including Utah), the District of Columbia, and Puerto Rico have authorized Series LLCs. These jurisdictions are Alabama (Ala. Code §§ 10A-5A-11.01 to 16), Delaware (Del. Code Ann. tit. 6, § 18-215), District of Columbia (D.C. Code § 29-802.06), Illinois (805 Ill. Comp. Stat. 180/37-40), Iowa (Iowa Code § 489.1201), Kansas (Kan. Stat. Ann. § 17-76.143), Missouri (Mo. Rev. Stat. § 347.186), Montana (Mont. Code Ann. § 35-8-304), Nevada (Nev. Rev. Stat. § 86.296), Oklahoma (Okla. Stat. tit. 18, § 2054.4), Tennessee (Tenn. Code Ann. § 48-249-309), Texas (Tex. Bus. Org. Code § 101.610-622), Utah (Utah Code Ann. § 48-3a-1201), and Puerto Rico (P.R. Laws Ann. tit. 14, § 3967). Several other jurisdictions authorize the establishment of separate series-of-membership interests within an LLC, but the resulting series do not have the attributes of separate entities that give rise to similar bankruptcy risks.

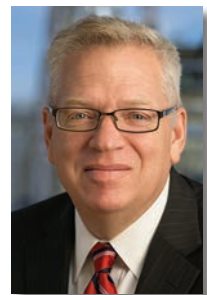
What is a Series LLC?

Under Utah law, a Series LLC is a single entity with different cells, divisions, or series (hereinafter, we will simply refer to as series) within the company and each series is provided statutory limited liability from the other series in the company.

Assume that Donald Stump, a large real estate tycoon that is new in town from New York, wants to purchase several properties through a newly formed Series LLC entity that he calls Monopoly Properties Series LLC (MPS LLC) (he always puts his name on his properties and really wanted Stump as the name of the new entity, but it was taken by a local stump removal service that would not authorize him to use the name). Mr. Stump wants each series to hold property that would likely have a different lender and different investors. Mr. Stump has had to file bankruptcy in the past on four unrelated projects in New Jersey, so he is extremely concerned about making sure that liability on one property, if it defaults, will not impact the other properties in the other series. Initially, MPS LLC will buy three properties as illustrated below:



BRUCE H. WHITE is a shareholder with the law firm of Parsons Beble & Latimer. He has more than 25 years of experience handling complex Chapter 11 bankruptcy cases and out-of-court restructurings. Bruce routinely represents debtors, lenders, committees, and other constituents in insolvency matters across the country, as well as buyers and sellers of distressed companies.



Under Utah law, a single series of the Series LLC may, separate and apart from the limited liability company, hold or have associated assets, incur or have associated liabilities, and have separate management associated with that specific series. Utah LLC law also shields the assets of each individual series from the liabilities of the other series and the limited liability company itself.

A series within a Series LLC can hold property in its own name separate from the property of the Series LLC and the other series in the LLC. Utah Code Ann. § 48-3a-1201(1). A series may incur liabilities independently of other series or the Series LLC itself, and, if appropriate corporate formalities are observed, creditors may look, pursuant to Utah law, only to the series incurring the liability to satisfy their debts. *Id.* § 48-3a-1201(2).

Under Utah law, series within a Series LLC are not subsidiaries of the Series LLC, as they have no existence independent of the Series LLC and will dissolve upon the dissolution of the Series LLC under which they are organized. *See id.* § 48-3a-1208(3). In addition, the membership interests in each series need not be owned by the Series LLC itself and may be owned by any combination of persons or entities irrespective of whether they are the holders of membership interests in other series or the Series LLC. *See id.*

One benefit of using the Series LLC would be to minimize the cost and administrative burden of separate corporate filings and to limit liabilities associated with separate asset holdings or lines of business. *See Shannon L. Dawson, Series LLC and Bankruptcy: When the Series Finds Itself in Trouble, Will It Need Its Parent to Bail It Out?* 35 DEL. J. CORP. LAW 515, 516–17 (2010).

In the scenario described above, Mr. Stump can set up MPS LLC and have the safeguards he is looking for under Utah law. However, despite the benefits of the Series LLC structure under Utah law, there are critical issues concerning Series LLCs and their treatment under federal bankruptcy law that remain almost completely unanswered and raise the following important questions:

First, can a single series of a Series LLC file for bankruptcy by itself?

Second, if a single series can file for bankruptcy, are the assets of the other non-filing series part of the bankruptcy estate?

Finally, will creditors' claims against the single series bankrupt estate be limited to creditors of the specific debtor series or include all of the Series LLC debt?

As of now, there is no bankruptcy court decision that answers these critical questions.

Can a Series LLC File for Bankruptcy?

Other than the Chapter 11 cases of three related series (*In re Crush Real Estate Series LLC, sole beneficiary of 427 E. Sixth St. Realty Tr.*, No. 15-bk-10237 (Bankr. D. Mass 2015); *In re Crush Real Estate Series LLC, sole beneficiary of 917 E. Broadway Realty Tr.*, No. 15-bk-12105 (Bankr. D. Mass 2015); and *In re Crush Real Estate Series LLC, sole beneficiary of 305 K St. Realty Tr.*, No. 15-bk-12106 (Bankr. D. Mass 2015)), where the issue of eligibility was neither litigated nor decided, the author has been unable to locate any bankruptcy cases in which a single series of a Series LLC was the debtor. If fact, all three of the mentioned cases have been subsequently dismissed by the court.

There is one recent case that considered issues relating to a series entity, although not in the bankruptcy context. The matter involves a Delaware statutory trust. In *Hartsel v. Vanguard Group, Inc.*, 2011 WL 2421003, at *18 (Del. Ch. June 15, 2011) (No. 5394-VCP), the Delaware Court of Chancery acknowledged the independent nature of a series and held that

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owners of an equity interest in one series did not have standing to bring claims on behalf of all other series.

On the other hand, again not in the bankruptcy context, in *GxG Management LLC v. Young Brothers & Co.*, 2007 WL 1702872 (D. Me. June 11, 2007) C.A. No. 05-162-B-K, which involved a Delaware Series LLC, the U.S. District Court for the District of Maine held that the relationship between a Series LLC and its series “does not create a truly separate legal entity capable of independently pursuing its own legal claims.” *Id.* at *1; *see also GxG Mgmt. LLC v. Young Bros. & Co.*, 2007 WL 551761 (D. Me. Feb. 21, 2007) (C.A. No. 05-162-B-K). In its findings, the district court observed that the Delaware LLC Act did not indicate in what capacity a series of a Series LLC had to pursue litigation on its own behalf.

In the same year the *GxG Management* case was decided, the Delaware LLC Act was amended to provide specifically that a series of a limited liability Series LLC has the power and capacity to, in its own name, sue and be sued, unless limited by its LLC agreement. This language appears in the Utah Series LLC statute as well. Utah Code Ann. § 48-3a-1201(3)(b).

Section 109 of the Bankruptcy Code, provides that “only a person . . . may be a debtor under this title,” 11 U.S.C. § 109(a), and a “person” is defined to include an “individual, partnership, and corporation,” *Id.* § 101(41). A “corporation” includes an “association having a power or privilege that a private corporation, but not an individual or partnership, possesses.” *Id.* § 101(9)(A)(i). Therefore, whether the Bankruptcy Code permits a single series of a Series LLC to be a debtor depends on whether a series possesses a “power or privilege” that is unique to corporations.

It is important to understand that in bankruptcy court, federal law controls the meaning of the term “corporation” as used in section 101(9), and the powers and privileges of an association are granted by state law. *See Sherron Assocs. Loan Funds XXI LLC v. Thomas*, 503 B.R. 820, 828 (Bankr. W.D. Wash 2013) (“[F]ederal law controls the interpretation of the definitional statutes [11 U.S.C. § 101] at issue. . . .”); *In re Prism Props. Inc.*, 200 B.R. 43, 45 (Bankr. D. Ariz. 1996) (“Whether a debtor has such a power or privilege, and therefore a debtor’s status as a corporation, is a matter of state law.”). Therefore, the determination of whether a single series of a Series LLC is eligible to be a debtor depends on the powers and privileges afforded to the series under Utah law. *See In re Prism Props.*

Inc., 200 B.R. at 45. For example, a single series of a Series LLC, under Utah law,

may carry on any lawful business, purpose or activity, whether or not for profit with the exception of the business of banking . . . [and] shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.

Utah Code Ann. § 48-3a-1201(3)(b). Like members of ordinary LLCs, members of a single series are not personally liable for the debts of the series by virtue of their membership interests in that specific series. *Id.* § 48-3a-1201(2).

The majority of bankruptcy courts have agreed that ordinary LLCs fit within the Bankruptcy Code’s definition of “corporation” due to the “powers and privileges” enjoyed by LLCs that are not enjoyed by partnerships or individuals. *See* 11 U.S.C. § 101(9)(A)(i); *Redmond v. CJD & Assocs. LLC (In re Brooke Corp.)*, 506 B.R. 560, 567 (Bankr. D. Kan. 2014); *In re Parks*, 503 B.R. at 829. In these decisions, the limited liability of members seems to be central to the classification of an LLC as a corporation. *See In re Brooke Corp.*, 506 B.R. at 567; *In re Parks*, 503 B.R. at 829.

Because members of a single series of the Series LLCs generally enjoy the same limited liability as members of an ordinary LLC, it is reasonable to conclude that a series would similarly fit within the definition of “corporation” set forth in section 101(9)(A)(i) of the Bankruptcy Code. While this conclusion seems supportable based on judicial interpretation of the definition of “corporation,” one commentator has fairly questioned whether a single series of a Delaware Series LLC can be a debtor given the fact that it cannot exist separately from the Series LLC within which it is organized and lacks other attributes of a separate entity. *See* Norman M. Powell, *Series LLCs, the UCC and the Bankruptcy Code: A Series of Unfortunate Events*, 41 U.C.C. L&J. 103, 108 (2008). Therefore, a series of a Series LLC is seemingly eligible to be a debtor under the code, but state law may preclude a series from being an eligible debtor when the series cannot exist separately from the Series LLC. However, note that there is no bankruptcy case law on point, and no case law limiting the exposure of the other series in the Series LLC.

Back to our example above, if Mr. Stump were in default on MPS Series B LLC and were to file bankruptcy for Series B, would the filing of Series B impact Series A and C due to the fact that they are all within the MPS LLC entity? Utah law would seem to protect A and C from the creditors of B, *but* under federal bankruptcy law, it is unclear whether Series B, alone, is even an eligible debtor. Given the ambiguity surrounding this critical question, Mr. Stump must decide if taking the risk of the ambiguity is worth the benefits of the Series LLC structure.

Property of the Estate: What are the Assets of a Single Series?

If you assume that a single series of a Series LLC is eligible to be a debtor in bankruptcy, the second critical question is: What property is included within the single series' bankruptcy estate?

Under the Bankruptcy Code, property of the estate is defined very broadly. 11 U.S.C. § 541. Without reciting for you the definition of "property of the estate" under section 541(a) of the Bankruptcy Code, it is broad enough to suggest that even a debtor's nonpossessory and contingent property interests constitute property of the estate. The existence and scope of a debtor's interest in property typically are defined by state law. The bankruptcy estate generally includes all "legal and equitable interests of the debtor in property as of the commencement of the case," and the question of whether a debtor holds an interest in property is determined by reference to state law. 11 U.S.C. § 541(a)(1); *Butner v. United States*, 440 U.S. 48, 55 (1979).

Under Utah law, a single series of a Series LLC is expressly granted the power to hold property in its own name, but the assets associated with an individual series may also be held in the name of the Series LLC of which it is a part, by a nominee or otherwise. Utah Code Ann. § 48-3a-1201(1). Irrespective of the nominal state of title, Utah law permits assets associated with an individual series to be insulated from the liabilities of other series, and the Series LLC of which it is a part, if five conditions are satisfied: (1) the series is established by or in accordance with the operating agreement; (2) separate and distinct records are maintained for the series; (3) the assets must be accounted for separately from the assets of other series and the Series LLC itself; (4) the operating agreement provides for the limitation on liabilities of the series; and (5) notice of the limitation on liability of the series is set forth in the limited liability company's certificate of organization. *Id.* § 48-3a-1201(2)(a)–(e).

In those instances where a series holds title to assets in its own name, identifying property of a series' estate should be no more

complicated than it would be had the debtor been a more common type of entity. Assuming that accurate and consistent accountings are maintained by each series holding an interest in an asset, the process of allocation should therefore be noncontroversial. The problem is typically that a debtor's books and records are not always properly maintained. In the event of inter-series inconsistencies and creditor overlap between series, it is easy to envision creditors of one series making claims to the assets of another or a non-debtor series contesting the validity of a debtor series' accounting of assets.

Creditor Claims Against the Single Series

The failure of a series to accurately account for its assets not only casts uncertainty over what property is included within a series-debtor's estate, it also exposes a series' bankruptcy estate to claims of creditors of other series. This results from the fact that a series' limited liability depends on, among other things, the separate accounting of its assets. *Id.* § 48-3a-1201(2)(c). The failure to properly maintain such an accounting can lead to the exposure of claims against a series-debtor by the creditors of another series or the substantive consolidation of estates should the Series LLC or more than one series become a debtor.

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It was anticipated that one pending Delaware bankruptcy case involving a series LLC structure, *In re Dominion Ventures, LLC*, No. 11-bk-12282 (Bankr. D. Del. Jul. 19, 2011), would shed some light on the extent of the liability issue. The case was filed as a Chapter 11 case on July 19, 2011. *Id.* Its filing with the bankruptcy court states, “The Debtor serves as a management company and holds varying degrees of interest in five (5) other series LLCs (collectively, the ‘Series LLCs’). The Series LLCs each own and operate (or once owned and operated) a single property.” Debtor’s Motion for Extension of the Deadline to File Reports of Fin. Info. Pursuant to Bankr. Rule 2015.3(a) ¶ 6, *In re Dominion Ventures, LLC*, No. 22-bk-12282 (Bankr. D. Del. Jul. 19, 2011), ECF No. 23. Although the bankruptcy petition seeks only to name the management company LLC as a debtor, several equity holders and members contested the debtor’s activities in the bankruptcy case. In their pleadings, these parties argue, among other things, that the debtor seeks “to sell Dumont Creek Estates Series, LLC, and Northwood Series LLC, to pay the ‘debts’ of ‘Dominion Venture, LLC’ in clear violation of the provisions of the Dominion Ventures, LLC and each separate and distinct Dominion Venture LLC Series LLC operating agreement.” Motion by the Equity Holders of Dominion Ventures, LLC to Appoint a Chapter 11 Trustee at 7, *In re Dominion Ventures, LLC*, No. 11-bk-12282 (Bankr. D. Del. Jul. 19, 2011), ECF No. 87. The bankruptcy court, at the request of the equity holders and creditors and with the consent of the debtor, appointed a Chapter 11 trustee in the Dominion Ventures case. The case was subsequently converted to a chapter 7, the trustee abandoned assets that were formerly owned by some series and sold the assets that were formerly owned by another. While the claims-reconciliation process has not been completed, the register of claims reflects that creditors whose claims were explicitly limited to a single series of the Series LLC are now seeking payment from the bankruptcy estate of the Series LLC itself. It appears that the matter was settled without any ruling from the court.

Regardless of whether a series can file bankruptcy on an independent basis or whether it is deemed part of the Series LLC’s bankruptcy case, the more important question may be what happens to the assets and liabilities of each series. Will the bankruptcy court enforce the contractual limitations on liability? This question is at the heart of the disputes in the *Dominion Ventures* case, and it likely will be the focus of other cases, as well as in planning discussions in entity choice matters.

Risk of Lending to Series LLC

Lenders to a Series LLC have the same concerns, if not more, as do lenders to traditional borrowers. Liability shields and certainty are very important to lenders. Lenders will be very reluctant to lend to a Series LLC where there is the uncertainty of whether the internal liability shields will be respected or not in states that don’t offer shielded series. See *Alphonse v. Arch Bay Holdings, LLC*, 548 F. App’x 979 (5th Cir. 2013).

The *Alphonse* dispute arose in a residential foreclosure setting. Plaintiff was a series of a Delaware series LLC. The homeowner did not defend but later brought an action against the Series LLC alleging robo-signing and fraud. The trial court dismissed the case stating the series and the Series LLC were separate from each other. On appeal, the appellate court acknowledged that the law of the state of formation normally determines issues relating to internal affairs of the entity, but different conflict-of-laws principles apply where the rights of third parties (i.e., strangers to the LLC agreement) are involved. The court went on to state the internal affairs do not apply to disputes that include people or entities that are not part of the Series LLC.

Mr. Stump’s lenders will be very reluctant to lend on a property that may be located in a jurisdiction that may not respect internal liability shields. This reluctance is compounded by the uncertainty of a series defaulting and possibly dragging all of the other series and the Series LLC assets into bankruptcy.

Conclusion

Back to the example above, your advice to Mr. Stump should be that Series LLCs are unproven in the bankruptcy courts and that you do not recommend their use until the courts have fully vetted the open questions. The author could not recommend a Series LLC under the Stump scenario because a bankruptcy court has not determined debtor eligibility of a single series; whether all Series LLC property, including each individual series, is subject to the bankruptcy; or whether creditors can run to the other series and the LLC for collection of their debt. For Mr. Stump too much risk and ambiguity surround the Series LLC, especially considering that there are proven methods of layering and separating assets and debts without such risks.

The reason the Utah Series LLC is not widely known or used is that the Utah Series LLC, and similar statutes across the country, have not yet been vetted by the legal system. A lack of case law, particularly under the Bankruptcy Code, should be reason enough for one to not take the risk of using the Series LLC form. Once case law has been developed, its use may very well become the norm.

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The Document Speaks for Itself: “A Pox Upon These Words”

by Josh Sundloff

“A pox upon these words”; that is how one judge described his disdain for the phrase “the document speaks for itself.” *FDIC v. Stovall*, 2014 WL 8251465, at *11 (N.D. Ga. 2014) (No. 2:14-CV-00029-WCO). Why such contempt? Simply put, the phrase is neither a proper response to an allegation in a pleading nor is it an acceptable discovery objection, and it only serves to unnecessarily prolong discovery. For the sake of our clients, the judicial system, and the Bar in general, attorneys should avoid this and other folklore responses and objections.

But let me back up a moment. At this year’s Spring Convention held by the Bar in St. George, I attended a panel discussion regarding the evolution of the practice of law in Utah. In that discussion, the panelists (Judge Royal Hansen, Juli Blanch, and Richard Burbidge) lamented what they see as the vanishing jury trial. Among the reasons I heard for this vanishing act is that attorneys now too often become mired in discovery. That is, rather than a means to an end, discovery has become the end itself. Seemingly endless discovery disputes, multitudinous and improper objections to discovery requests, unconvincing claims of privilege, hypertechnical readings of discovery requests, and unfounded requests for extensions have become the rule. As the panelists in that discussion pointed out, this discovery-as-an-end issue deserves a broader discussion not only to save the jury trial but also to save the monetary and time costs imposed on the judicial system and litigants. My purpose in this article however is not to answer those broader questions; rather, my purpose is to discuss one symptom of that broader malady and to suggest a small measure of change to the members of the Bar.

The symptom I refer to is the tendency of attorneys, when faced with carefully crafted allegations or discovery requests, to give meaningless responses or assert a litany of objections, often to avoid answering tough questions. To be sure, I am not saying that proper objections and claims of privilege do not have a place in responsive pleadings or during discovery. They do and

should. However, certain ubiquitous responses (e.g., “states a legal conclusion to which no response is required,” “within plaintiff’s own knowledge,” “invades the province of the jury,” or “presents a genuine issue for trial,” *House v. Giant of Maryland LLC*, 232 F.R.D. 257, 262 (E.D. Va. 2005)) not only do not advance the litigation process, they arguably avoid an attorney’s duty of candor and subject the attorney to adverse rulings, to say nothing of the drain those responses place on the system. (I pause here to ask a rhetorical question: those who have used one or more of those phrases I just listed, did you verify the validity or permissibility of using the phrase, or did you just use it because you had seen other attorneys use it? If you’re being honest, I suspect it was the latter.) As one judge grumbled in the midst of a discovery dispute:

The practical implication of these pseudo-responses is that a party must request much broader discovery because the opposing party did not really admit anything. Not only does this needlessly increase the costs of litigation...but the discovery process may devolve into a battle royale of broad requests against worthless responses.

Stovall, 2014 WL 8251465, at *12. Perhaps the quintessential example of these responses, and the focus of this article, is the oft-used objection that a “document speaks for itself.”

With that archetypal example and the broader discovery malady

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in mind, in this article I am going to discuss the following: the likely origins of the document-speaks-for-itself response, why that phrase is not a proper objection, the possible consequences of using the phrase, and the suggestions I have for alternatives to the phrase. Although I will be narrowly focusing on this one objection, I believe the principles I will discuss also apply to the broader problem. In this discussion, of necessity, I will be relying heavily on federal case law because Utah state courts have not addressed the issue – at least not at the appellate level; nevertheless, I suspect the federal courts’ opinions I will reference are likely shared by many Utah state court judges. Further, Utah state courts often look to decisions under the federal rules for guidance in interpreting similar Utah rules. *See, e.g., 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 64, 99 P.3d 801. In the end, I hope the members of the Bar will not only stop saying or using the phrase the “document speaks for itself,” but I generally hope we can also move toward a model of using limited and proper objections. I believe doing so will foster a small but needed improvement to the ever-increasing burdens of litigation.

“The document speaks for itself”: Origins

The phrase “the document speaks for itself” had to originate somewhere, and, in fact, it likely started out innocently enough. However, its usage has gone well beyond its likely origins. There is no rule of evidence that says a document speaks for itself, but there are some rules that may invite lawyers to use the phrase. Among those are the “Best Evidence Rule.” While it may be difficult to pinpoint the phrase’s exact origin, the perpetuation of the phrase may also be attributable to the legal profession’s tendency to continue a practice because “it’s always been done that way” – despite the practice’s error.

Such a tendency is illustrated when lawyers use the phrase under the guise of the Best Evidence Rule. That rule (generally found in Federal Rules of Evidence 1001–1008 and Utah Rules of Evidence 1001–1008) prohibits the use of secondary evidence to prove the contents of a document unless the original document is accounted for. *See* James W. McElhaney, *McElhaney’s Trial Notebook* 283 (American Bar Association, 4th ed. 2005). The Best Evidence Rule often gives rise to the document-speaks-for-itself objection in the context of a trial. In



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that setting, when a witness is asked to read the contents of a document before it is introduced into evidence opposing counsel objects that the document speaks for itself. The justification for that objection is in the Best Evidence Rule because the witness's testimony is secondary to what is actually shown on the document; further, the witness may be unable to relate the contents word for word but instead is asked to characterize the contents. *See* Paul Bosanac, *Litigation Logic* 148 (American Bar Association, 1st ed. 2009). Characterizing the document is not the best evidence of its contents; the document is. *Id.* However, objecting that the document speaks for itself reflects a misunderstanding of the Best Evidence Rule because once a document is admitted into evidence the judge has discretion to allow a witness or an attorney to quote verbatim from the document. As one court explained (in justifying its refusal to recognize “the document speaks for itself” as a valid objection):

If, for example, a document has been admitted into evidence and a witness is asked to read from it, that the same information can be secured from the fact finder reading the document is certainly not grounds for objection to the witness reading from it. There is no difference whatsoever between the jury reading it for itself or the witness reading it to them.

Miller v. Holzmänn, 240 F.R.D. 1, 4 (D.D.C. 2006).

That court's opinion notwithstanding, I suppose it is up for debate whether the document-speaks-for-itself phrase is advisable, or even permissible, in the trial setting where a witness is being asked to read a document. Yet, it is unclear how the phrase made it into other forums – such as responsive pleadings and discovery – where it has little defensible basis. Perhaps the phrase has crept into those areas because the same lawyer who employs the phrase at trial also sees an avenue to use the phrase in pleadings or discovery to avoid answering a difficult question.

Aside from possibly originating with the Best Evidence Rule, it is likely the phrase found favor in the profession because as lawyers we are often resistant to change. Or at least the structure of our profession is not necessarily modeled for innovation. And by that I mean when entering the profession – whether into the ranks of a law firm, an in-house position, or working for a public entity – many of us are faced with one or more supervising attorneys whom we would very much like to

impress. That desire often translates into practicing law the way our supervising attorneys practice law, even if that means using legalese in contracts, writing in passive voice, or using improper objections or responses to discovery (pick up any current book on legal writing or litigation practice, and you'll find those practices are frowned upon). We say, “Who am I to question an attorney who has decades more experience?” In many circumstances that sentiment is obviously valid. But in many others it only perpetuates incorrect, ambiguous, or inefficient practices. *See e.g.*, Bryan A. Garner, *Bryan Garner on Words: Shall We Abandon Shall?*, 98 ABA J. (Aug. 1, 2012) (discussing the legal profession's continued use of the word “shall” in spite of the word frequently being one of the most heavily litigated words in the English language due to its “chameleon-hued” nature.). More to the point of this article, when a new attorney sees a more seasoned attorney habitually use the phrase “the document speaks for itself,” that new attorney is likely to start his or her own career with the same habit. And the cycle repeats itself. The cycle can change when more experienced attorneys are open and willing to change, and less experienced attorneys are open and willing to learn and ask “why.” In doing so, we can recognize troublesome phrases such as “the document speaks for itself,” and we can collectively improve.

“The document speaks for itself”: Improper

If the phrase started out innocently enough, and in fact may have been founded in evidentiary rules, why do some courts have contempt for the phrase? Perhaps the reason is the phrase can imply a lack of candor or that it is often used as a tool to avoid answering troublesome questions. Or it may be that the phrase is in fact unfounded in the rules of civil procedure. I will attempt to discuss each of those reasons in turn, but suffice it to say that it is becoming clear a growing number of judges are realizing lawyers' penchant for the phrase, and those judges are not happy with it.

Before I jump into case law that comments on the impropriety of the document-speaks-for-itself phrase, I need to point out the similarities between the applicable Federal Rules of Civil Procedure (FRCP) and the Utah Rules of Civil Procedure (URCP) – lest any naysayers attempt to refute my reliance on federal cases to justify their continued use of the ill-founded phrase. To begin, let us compare URCP 8 (which outlines the permissible responses to pleadings) with FRCP 8 (which similarly describes the allowed responses to allegations in

pleadings). In responding to an allegation in a pleading, Utah's rule states:

A party must state in simple, short and plain terms any defenses to each claim asserted and must admit or deny the statements in the claim. A party without knowledge or information sufficient to form a belief about the truth of a statement must so state, and this has the effect of a denial.

Utah R. Civ. P. 8(b).

The corresponding federal rule states that:

In responding to a pleading, a party must: state in short and plain terms its defenses to each claim asserted against it; and admit or deny the allegations asserted against it by an opposing party. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

Fed. R. Civ. P. 8(b)(1), (5).

Even a cursory reading of these rules seems to show that, although they are not identical, both rules contain much the same language, and Utah's rule certainly appears to be modeled after the federal rule. In a similar vein, the language in URCP 36 is comparable to FRCP 36. (You will recall that rule 36 governs requests for admission.)

With those rules in mind, it is important to note that in responding to a pleading, there are only three appropriate responses: admit, deny, or state a lack of knowledge or information sufficient to form a belief about the truth of the allegation. (A point I will cover in more detail.) Similarly, there are few permissible responses to a request for admission under Rule 36: admit, deny, or state in detail the reasons why the party cannot truthfully admit or deny the request. Any other response may bring the ire of the court.

For example, in one case a judge was annoyed (to say the least) when more than half of a defendant's responses to the plaintiff's complaint began with the statement that the documents referenced in the plaintiff's allegations "speak for themselves." *FDIC v. Stovall*, 2014 WL 8251465, *12 (N.D. Ga., 2014) No. 2:14-CV-00029-WCO. After referencing the only three

appropriate responses to pleadings, the judge went on to say that the document-speaks-for-itself phrase is "completely contrary to the Federal Rules of Civil Procedure," is "nonsensical," is "an amorphous nothing," is a "pseudo-response," is a "faux answer," and contributes to the "waste of the parties' money and scarce judicial resources." *Id.* at **11–12. The judge in that case is not alone. See also *Valley Forge Ins. Co. v. Hartford Iron & Metal, Inc.*, 2015 WL 5730662, at *2 (N.D. Ind. 2015) (No. 1:14-CV-00006-RLM) ("[A] response indicating that a document 'speaks for itself' is insufficient under the Federal Rules."); *Indiana Reg'l Council of Carpenters Pension Trust Fund v. Fid. & Deposit Co. of Maryland*, 2006 WL 3302642, at *2 (N.D. Ind. 2006) (No. 2:06-CV-32-PPS-PRC) ("Courts have expressly held that a response indicating that a document 'speaks for itself' is insufficient under the Federal Rules."); *Donnelly v. Frank Shirey Cadillac, Inc.*, 2005 WL 2445902, at *1 (N.D. Ill. 2005) (No. 05C3520) (noting that the phrase is an "unacceptable device" in responsive pleadings); *Miller v. Holzmahn*, 240 F.R.D. 1, 4 (D.D.C. 2006) ("It is astonishing that the objection that a document speaks for itself, repeated every day in courtrooms across America, has no support whatsoever in the

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law of evidence.”); *House v. Giant of Maryland LLC*, 232 F.R.D. 257, 262 (E.D. Va. 2005) (calling the phrase “folklore” and stating that “[a] favorite excuse for not answering requests for admission in a contract case is that ‘the document speaks for itself’”). No matter the origins of the phrase, the mounting quantity of judges who recognize the impropriety of the phrase should cause attorneys to reconsider the phrase. And even more so, the specter of encountering such a judge should at least scare some attorneys into submission.

“The document speaks for itself”: Consequences

Not only can the phrase bring a judge’s scorn, it can create unforeseen burdens on litigants, such as requirements to amend responses and allegations being deemed admitted, to say nothing of the potential harm to an attorney’s reputation.

Some courts have found the phrase to create ambiguity in the response, which required amending. This circumstance can arise when an attorney, faced with an allegation quoting a document, responds that the document speaks for itself but then, as a failsafe, also denies the allegation. For example, in one case a defendant urged a court not to strike its responses in an answer, in spite of its use of the document-speaks-for-itself phrase, because the defendant also included in its answers a general denial of the allegations. *Valley Forge*, 2015 WL 5730662, at **3–4. In denying the defendant’s request, the court stated that the defendant’s general denial “cannot remedy the insufficient response that a document ‘speaks for itself.’” *Id.* at *3. The court reasoned that in using the phrase along with a general denial the defendant “could be denying none, some, or all of the [allegation. The plaintiff] and the Court are left to wonder which it is.” *Id.* Mercifully, rather than requiring the allegations be admitted, the court granted the defendant leave to amend its answers. *Id.* at *4. No doubt an uncomfortable conversation between attorney and client followed.

Indeed, being allowed leave to amend an offending response may be getting off easy – even with the uncomfortable attorney-client conversation. In other words, it could be worse. In *State Farm Mutual Automobile Insurance Co. v. Riley*, 199 F.R.D. 276 (N.D. Ill. 2001), the judge gave an attorney leave to amend the responsive pleadings to remove the document-speaks-for-itself phrase, but the judge additionally required the attorney to write a letter to the client – with a copy to the court – explaining why the attorney had to correct the pleading. It likely goes without saying, but the judge also required the attorney to perform the additional work on his own dime. *Id.* at 278–80.

Perhaps an even worse consequence is that rather than allow an attorney to amend a response, the judge simply deems an allegation or request admitted. For example, a defendant denied allegations about the contents of documents because the plaintiffs had summarized the documents’ contents; in denying the allegations, the defendant referred to the terms of an insurance policy as its sole response (i.e., the defendant implied the insurance policy spoke for itself). *Rudzinski v. Metropolitan Life Ins. Co.*, 2007 WL 2973830 at *4 n.1 (N.D. Ill. 2007) No. 05C0474; see also Erika Birg, *Documents Don’t Talk*, 17 PRETRIAL PRACTICE & DISCOVERY 1 (Fall 2008). Surprisingly, even though the defendant never actually used the phrase “the document speaks for itself,” the court determined that the defendant failed to properly deny the allegations. *Rudzinski*, 2007 WL 2973830, at *4. As a result, and even more surprisingly, the court struck the responses and deemed the allegations admitted. *Id.* The judge explained that the document-speaks-for-itself “device is frequently, and improperly, employed by lawyers who would prefer not to admit something that is alleged about a document in a complaint.” *Id.* It seems the judge was sending a message. No doubt that attorney received it.

Message received or not, certainly that attorney’s reputation suffered a blow, which provides yet another potential consequence of using the phrase. In fact, the judge in the *State Farm* case illustrates this point: he called attorneys that use the phrase “careless” and “lazy.” 199 F.R.D. at 278. It seems reputational harm should alone be a sufficient deterrent.

Ultimately, consequences, such as being required to amend responses, allegations being admitted, and suffering reputational harms (both with your client and the court), should again give attorneys pause before they employ the phrase.

“The document speaks for itself”: Alternatives

It is hopefully becoming clear that attorneys should stop using the phrase “the document speaks for itself.” As one judge puts it, the attorney to whom requests for admissions are propounded or who is responding to allegations “acts at his own peril when answering or objecting.” *House v. Giant of Maryland LLC*, 232 F.R.D. 257, 262 (E.D. Va. 2005). And more to the point of the broader discovery-as-an-end malady I mentioned in the beginning of this article, the *House* court went on to say that “[g]amesmanship in the form of non-responsive answers, vague promises of a future response, or quibbling objections can result in the request being deemed admitted or

in a post-trial award of monetary sanctions *without* prior opportunity to correct the deficiency.” *Id.*

Considering that, what is the safe course? Attorneys tempted to utilize the phrase should only use the permissible responses under the rules: we should answer the allegation or request directly (troublesome or not) by admitting what can be admitted, denying what can be denied, or specifying when there is insufficient information to respond. *See* Erika Birg, *Documents Don’t Talk*, 17 PRETRIAL PRACTICE & DISCOVERY 1 (Fall 2008). When responding to requests for admission that ask for a party to admit the contents of a document – presuming the text of the document is stated verbatim in the request – then the appropriate response is to admit the request. *Id.* If the text of the document and the text quoted in the request for admission do not match, then it is perfectly acceptable to deny the request. If the requesting party is seeking an interpretation of the contract, resist the urge to say “the document speaks for itself” and simply deny the request. *Id.*

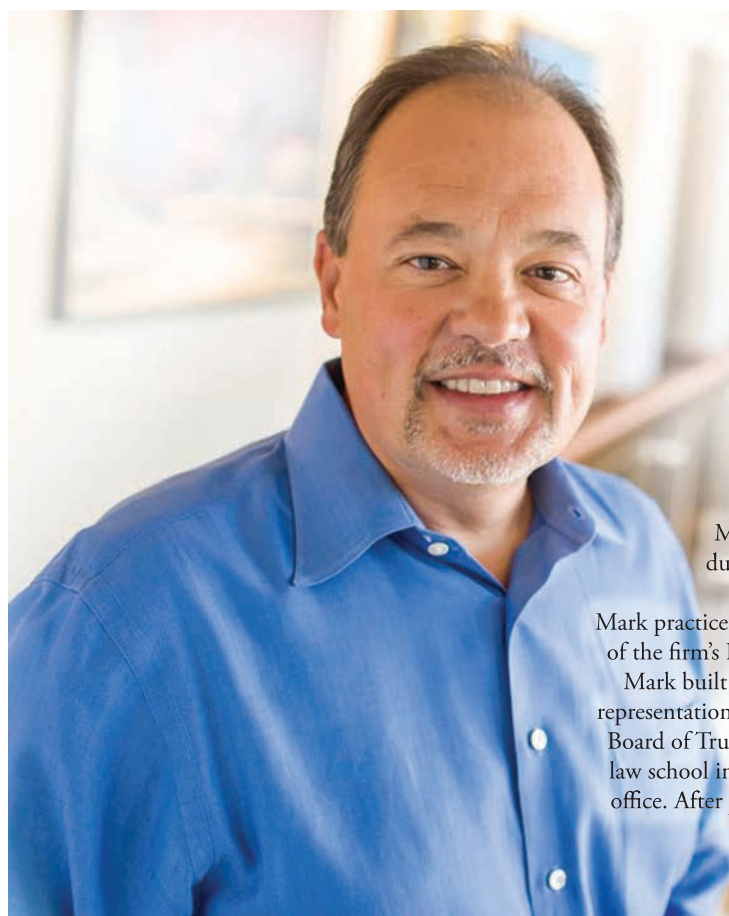
By adhering to the permissible responses under the rules we can

systematically begin to eradicate nonsensical, pseudo-responses, such as “the document speaks for itself,” which waste litigants’ money and scarce judicial resources.

“The document speaks for itself”: Conclusion

Is the jury trial vanishing? Perhaps it is and perhaps the discovery-as-an-end mindset is to blame. But my purpose in this article was to attempt to stem the tide by suggesting one change that can lend a small measure of improvement to streamlining the discovery process in today’s civil litigation. Avoiding the phrase “the document speaks for itself” in our responsive pleadings and in our discovery responses will help eliminate needless discovery disputes, which will save our clients’ money and conserve limited resources of the court. Further, eliminating the phrase will save attorneys from the risk of incurring needless fees to amend responses and will avoid unnecessary reputational harm.

A pox upon these words. Let them be extinct.



IN MEMORIAM
Mark L. McCarty
1963-2016

So Mark we’ll miss you
 Sly satirist
 Our proud partner, friend
 and anarchist

—Richards Brandt Miller Nelson

Mark L. McCarty passed away June 20, 2016 due to complications from the H1N1 flu virus.

Mark practiced law at Richards Brandt for 20 years. He was a member of the firm’s Board and Chair of the firm’s Business Practice Section. Mark built RBMN’s practice groups in employment law and the representation of religious groups and organizations. He served on the Board of Trustees for Catholic Community Services. Mark attended law school in Michigan and later worked for the Attorney General’s office. After joining the law firm of Richards Brandt Miller Nelson, Mark made friendships as close as family.

Appellate Highlights

by Rodney R. Parker, Dani N. Cepernich, Nathanael J. Mitchell, Adam M. Pace, Tyler Bugden, Kylie Orme, and Rachel Phillips

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

***James v. D.Q. (In re Adoption of Baby Q.),*
2016 UT 29 (July 1, 2016)**

A biological father appealed the denial of his motion to intervene in the adoption proceedings for his baby daughter. The Utah Supreme Court held that the **pre-birth notice that the mother intended to place the baby up for adoption was inadequate because it provided that the father *may* lose certain rights rather than informing him that certain rights, including the right to contest the adoption, would be irrevocably lost.**

***SIRQ, Inc. v. Layton Cos., Inc.,*
2016 UT 30 (July 1, 2016)**

While the appeal was pending in this case, the Utah Supreme Court revised the common law requirements of intentional interference with economic relations in the case of *Eldridge v. Jobndrow*, 2015 UT 21. The new standard is that “[i]n the absence of any improper means, an improper purpose is not grounds for tortious interference liability.” Although the jury instruction incorporating the improper purpose standard was correct when given, this case was pending on appeal when *Eldridge* was decided. The Supreme Court applied *Eldridge* retroactively on the basis that “**parties to other cases pending on appeal are also entitled to the benefit of such a change in the law.**” *Id.* ¶ 6 (emphasis added).

***Fort Pierce Indus. Park Phases II, III & IV Owners Ass’n v. Shakespeare*, 2016 UT 28 (June 22, 2016)**

The board of an owners’ association for an industrial park sued some of its members for breach of the governing CC&Rs after they built a cell phone tower on their lot, despite having been denied permission from the board to do so. The district court applied a presumption that restrictive covenants are not favored in the law and are strictly construed in favor of the free and

unrestricted use of property and held that the association did not have the right to limit the number of cell phone towers in the park. Reversing, the court held that **the district court erred in strictly construing the CC&Rs rather than applying neutral principles of contract construction.**

***Trans-W. Petroleum, Inc. v. U.S. Gypsum Co.,*
2016 UT 27 (June 16, 2016)**

On a certified question from the Tenth Circuit, the Utah Supreme Court clarified the measure of damages for breach of an oil and gas lease. The court held **expectation damages for breach of an oil or gas lease should be treated the same as any other lease.** The court also concluded that trial courts may, in their discretion, allow parties to submit post-breach evidence for the purpose of establishing and measuring expectation damages arising out of the breach of an oil and gas lease.

***Simler v. Chilel,*
2016 UT 23 (June 1, 2016)**

As a matter of first impression, the Utah Supreme Court held **Article I, Section 10 of the Utah Constitution guaranteed a party the right to a jury in a *de novo* trial at the district court on appeal from a small claims judgment**, so long as the party seeking the jury makes a timely demand under Utah Rule of Civil Procedure 38(b).

***Anderson v. Fautin,*
2016 UT 22 (May 31, 2016)**

In this boundary dispute case, the Utah Supreme Court held that **Utah’s boundary by acquiescence doctrine does not require a claimant to prove occupancy on both sides of a visible line, so the non-claimant’s occupancy is “immaterial to the occupation element.”** The doctrine

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

requires a claimant to show:

- (1) a visible line marked by monuments, fences, buildings, or natural features treated as a boundary;
- (2) the claimant's occupation of his or her property up to the visible line such that it would give a reasonable landowner notice that the claimant is using the line as a boundary;
- (3) mutual acquiescence in the line as a boundary by adjoining landowners;
- (4) for a period of at least 20 years.

Id. ¶ 31.

***Injured Workers Ass'n of Utah v. State,*
2016 UT 21 (May 18, 2016)**

The Injured Workers Association of Utah and several of its member attorneys challenged the constitutionality of a statute delegating authority to the Utah Labor Commission to regulate attorney fees awarded in workers' compensation cases. **The Utah Supreme Court held that both the statute and the fee schedule adopted by the Utah Labor Commission are unconstitutional because the regulation of attorney fees falls within the power to regulate the practice of law, which belongs exclusively to the Utah Supreme Court and cannot be delegated.**

***USA Power, LLC v. PacifiCorp,*
2016 UT 20, 372 P.3d 629 (May 16, 2016)**

After first assisting USA Power in obtaining water rights for its bid for a contract to build a power plant, a lawyer later assisted PacifiCorp in obtaining different water rights for its own bid. PacifiCorp was ultimately awarded the contract. USA Power sued the lawyer for malpractice, alleging she had breached her fiduciary duties and damaged USA Power by helping PacifiCorp obtain water rights that were critical to PacifiCorp's proposal winning out over USA Power's. The court applied a high standard of causation, **requiring USA Power to not only show that the lawyer disadvantaged it in the bidding process but also that it would have benefitted in the specific way it claimed.** This included requiring proof that, had the lawyer declined to assist PacifiCorp, PacifiCorp would either not have hired another lawyer or that another reasonably skilled and diligent lawyer would not have been able to duplicate the lawyer's work in locating water.

***State v. Mikkelson,*
2016 UT App 136 (June 30, 2016)**


After observing a probationer enter the defendant's car in violation of her 11:00 p.m. curfew, two police officers called the probation officer. The probation officer asked the officers to approach the probationer to "find out what's going on," which they did by pulling over the defendant. Incident to the officer's investigation of the probationer's probation violation, the officers discovered the defendant had drug paraphernalia on her person. The Utah Court of Appeals held **(1) "police officers may investigate, search, and seize probationers under the direction of probation officers," and (2) "a driver may be lawfully detained incident to a traffic stop initiated for the purpose of investigating a passenger's parole or probation violation."** *Id.* ¶ 12 (emphasis added).

***Taft v. Taft,*
2016 UT App 135 (June 30, 2016)**

In this divorce case, the Utah Court of Appeals **reversed the temporary support order and alimony award because the district court failed to make specific, detailed findings regarding expenses.** The court also held **a property division**

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- Fellow, American College of Trial Lawyers
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order which set no minimum monthly payment, contained a “meager” interest rate, and allowed the judgment creditor to wait a significant period before beginning substantive payments, was inequitably structured.

***McTee v. Weber Ctr. Condo. Ass’n*,
2016 UT App 134 (June 30, 2016)**

This appeal centered on a notice of claim provision contained in the Governmental Immunity Act of Utah. The district court held that “it is not unreasonable that [the plaintiff] might take a month or more to identify the entity responsible for maintaining the parking structure,” *id.* ¶ 10, and highlighted the importance of reasonable diligence in searching out the parties. The Utah Court of Appeals affirmed, stating that “**the statute affords some limited latitude where the identity of the responsible party as a governmental entity is in question.**” *Id.* ¶ 12 (emphasis added.) **The claimant must know (1) that they had a claim against the governmental entity and (2) the identity of the governmental entity.**

***Stellia Ltd. v. Yknot Global Ltd.*,
2016 UT App 133 (June 23 2016)**

This case serves as a warning and reminder to litigants about the effect of the two-dismissal rule under Utah Rule of Civil Procedure 41(a). Yknot voluntarily dismissed claims that it filed against Stellia twice – once in federal district court, and the second time in state court. Stellia then sued Yknot in a new state court action, and Yknot attempted to assert as counterclaims the claims it had previously dismissed. The Utah Court of Appeals affirmed dismissal of the counterclaims based on Rule 41(a), which provides that “a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court. . . an action based on or including the same claim.” *Id.* ¶ 17 (emphasis, citation, and internal quotation marks omitted).

***Clifford P.D. Redekop Family LLC v. Utah Cty. Real Estate LLC*, 2016 UT App 121 (June 3, 2016)**

In this commercial real estate dispute, the Utah Court of Appeals held the **district court did not abuse its discretion when it excluded an expert as a Rule 37 sanction for willful non-compliance with a prior scheduling order and Rule 26’s expert-designation requirements.** The court of appeals then held, as a matter of first impression, that the district court correctly concluded expert testimony was necessary for the calculation of square footage of commercial real property.

***Boyle v. Clyde Snow & Sessions PC*,
2016 UT App 114 (May 26, 2016)**

The plaintiff was represented by a lawyer who worked for two different law firms while the case was pending. After the lawyer switched firms, the first firm asserted a lien on a portion of the settlement funds by filing a notice of lien. However, the firm never moved to intervene in the action. After the case settled, the firm objected to dismissal until its lien issues were resolved. The court entertained motions from both firms and the lawyer and ultimately awarded a portion of the funds to the original firm. **The Utah Court of Appeals reversed, concluding that the district court lacked jurisdiction to make orders with regard to these post-judgment motions brought by non-parties in the underlying case.**

***Wood v. Salt Lake City Corp.*,
2016 UT App 112 (May 26, 2016)**

The Utah Court of Appeals held that Salt Lake City did not have the necessary notice to be liable for a pothole in a residential city-owned street that the plaintiff tripped over. Despite evidence that the pothole had existed for four months, city street sweepers had passed the pothole five times, and city sanitation workers collected garbage sixteen times before the plaintiff’s accident, the court found that the city employees and the city did not have actual or constructive notice of the pothole. Specifically, the court held that **an employee’s notice will not be imputed to the city “without evidence that an employee had actual or constructive notice of the pothole.”** *Id.* ¶ 11 (emphasis added). **To impute constructive notice on the city’s employees and therefore the city, the plaintiff had to do more than merely demonstrate that the pothole existed long enough that the city should have discovered it.**

***Lebrecht v. Deep Blue Pools & Spas Inc.*,
2016 UT App 110 (May 26, 2016)**

The Utah Court of Appeals held that **it was clear error for the trial court to determine that the parties’ negotiations created an enforceable settlement agreement based on a signed term sheet, where a recording of the meeting evidenced that the parties understood a settlement would not be entered into until the agreement was put into writing at some point in the future.**

*State v. Pham,***2016 UT App 105, 372 P.3d 734 (May 19, 2016)**

Defendant appealed his conviction for discharging a firearm causing serious bodily injury. The victim of the gunshot wound testified at a preliminary hearing but left the country prior to trial. The Utah Court of Appeals held the **admission of victim's preliminary hearing testimony at trial did not result in a violation of the Confrontation Clause because defendant failed to show that the structure of the preliminary hearing limited his opportunity to cross-examine the victim.** The court of appeals acknowledged that a preliminary hearing may not afford an adequate opportunity for cross-examination in every case.

*State in Interest of Z.G.,***2016 UT App 98 (May 12, 2016)**

Juvenile court concluded previous guardian lacked standing to request reunification. The Utah Court of Appeals disagreed, concluding that **a permanent guardian possesses standing to seek reunification services under Utah Code section 78A-6-312.**

*State v. Garcia,***2016 UT App 96 (May 12, 2016)**

In this criminal case, the defendant appealed a denial of a motion to set aside an order of restitution entered by the Utah Board of Pardons and Parole. The court of appeals held that **Utah Code section 77-27-6(4) does not give the trial court jurisdiction to review a Board of Pardons' restitution order.**

*Shaw v. Patton,***— F.3d —, 2016 WL 2893713 (10th Cir. May 18, 2016)**

Upon moving to Oklahoma ten years after a conviction for sexual assault in Texas, the plaintiff became subject to the Oklahoma Sex Offender Registration Act, which requires regular reporting and limits the places that the plaintiff can live and be. **Applying the intent-effects test, the Tenth Circuit held that the plaintiff had not shown the "clearest of proof" of a punitive effect of the restrictions and obligations,** rejecting a claim that registration constituted retroactive punishment in violation of the United States Constitution's ex post facto clause.

*United States v. Von Behren,***— F.3d —, 2016 WL 2641270 (10th Cir. May 10, 2016)**

The defendant was sentenced to 121 months in prison and three years of supervised release for receipt and distribution of child pornography. The conditions of his supervised release were later modified to require that he submit to a sexual history polygraph, answering whether he had committed sexual crimes for which he was never charged. The defendant refused this condition, subjecting him to potential revocation of his supervised release. The Tenth Circuit **reversed the district court's order compelling the defendant to submit to the sexual history polygraph, holding that he faced real danger of self-incrimination if he answered the polygraph questions, and that the government had compelled him to be a witness against himself in violation of his Fifth Amendment rights.**



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Why Mentoring?

by Emily A. Sorensen

The Merriam-Webster dictionary defines mentor as “[s]omeone who teaches or gives help and advice to a less experienced and often younger person.” *Merriam-Webster.com*, <http://www.merriam-webster.com/dictionary/mentor>. Mentoring in the legal profession is not new – apprenticeships date back hundreds of years.

Mentoring is a tradition that has withstood the test of time – and today is making a comeback. Back in the 13th century, when judges had to provide for the apprenticeship of lawyers, mentoring was the only way lawyers could learn their craft. Today, although legal training is more formalized, interest in mentoring persists. Why? Because mentoring was, and continues to be, one of the most effective ways to pass on skills, knowledge and wisdom, and train the next generation of professionals.

Dan Pinnington, *Mentoring – It's Time Has Come Again*, LAW PRACTICE TODAY, August 2004, <https://apps.americanbar.org/lpm/lpt/articles/mgt08041.html>.

Formalized legal mentoring programs continue to grow across the country and mentoring is, as I heard it put, becoming a new practice area filled with opportunity and growth. We need those seasoned lawyers who have seen the reality of practicing law to go back to those first years of practice and help new lawyers transition from law school and, in turn, see what these new lawyers can offer the profession as they begin their careers.

An Allegorical Approach to Mentoring

Plato's *Allegory of the Cave* tells of a group of prisoners who, from the way they are shackled in an underground prison, can only see the shadows of people and objects projected onto the wall in front of them – they can see nothing behind or to the side. The shadows are produced from puppeteers walking along a pathway behind the prisoners but in front of a fire. “In every way, then, such prisoners would recognize as reality nothing but the shadows of those artificial objects.” Plato, *Republic*, ETHICS 56 (Oliver A. Johnson and Andrews Reath, eds. 2007). The

prisoners' reality consists of those shadows only.

Plato discusses what happens when these prisoners are released and ascend from the cave into the sunlight. If they ascend without allowing their eyes to gradually adjust, they are blinded.

And suppose someone were to drag him forcibly up the steep and rugged ascent and not let him go until he had hauled him out into the sunlight, would he not suffer pain and vexation at such treatment, and, when he had come out into the light, find his eyes so full of its radiance that he could not see a single one of the things that he was not told were real?

Id.

Such an immediate exposure to the sunlight becomes harsh and the transition from the reality of the cave below to the light above becomes overwhelming. However, Plato urges us to consider the difference if the prisoners are brought up in stages and are exposed to light and real objects gradually. “He would need, then, to grow accustomed before he could see things in that upper world.” *Id.* The adjustment to reality happens more comfortably. Mentoring in the legal profession plays a critical role in the adjustment between law school and the practice of law because it can alleviate some of the harshness that comes during the transition.

After these freed individuals have acclimated to the light, the allegory turns to a discussion of what happens if those freed prisoners return to the cave.

EMILY A. SORENSEN, ESQ. is the director of the Utah State Bar's New Lawyer Training Program.



Now imagine what would happen if he went down again to take his former seat in the Cave. Coming suddenly out of the sunlight, his eyes would be filled with darkness. He might be required once more to deliver his opinion on those shadows, in competition with the prisoners who had never been released while his eyesight was still dim and unsteady; and it might take some time to become used to the darkness.

Id.

Another transition happens when those who have grown accustomed to the sunlight return to the dark dungeon of the prison. The freed and the prisoners no longer see things the same way. Those who have been practicing for quite some time may find it difficult to remember what it was like to be a brand new lawyer. But, that last interaction between those who are accustomed to the dark and those whose eyes have acclimated to the sunlight is what makes mentoring so vital – what can new lawyers (those who have not yet ascended) and older lawyers (those who have ascended) learn from each other when their views and experiences are so different? And how does it help the profession?

In May 2016, a small contingent of Utah lawyers went to Denver for a three-day conference of the National Legal Mentoring Consortium. There, we collaborated with, brainstormed with, and were inspired by other legal mentoring programs across the country. We also came away with a renewed enthusiasm for the New Lawyer Training Program (NLTP) of the Utah State Bar. Our program is one of the premier programs in the country and is one of only a handful of mandatory programs. NATIONAL LEGAL MENTORING CONSORTIUM LIST OF STATE MENTORING PROGRAMS, <http://www.legalmentoring.org/mentoringprograms.php?id=20&q> (last visited August 1, 2016). The conference also revealed to us a few areas where mentoring transcends being simply a license requirement for new lawyers to being an influence on the entire legal community: resiliency, professionalism, leadership, and relationships.

Resiliency

Over the course of the last year, the NLTP has worked with a local attorney, Martha Knudson, who recently started a resiliency training consulting firm called Aspire. Martha has presented to participants in the NLTP on topics regarding resiliency to the stresses of the practice of law, developing a

positive mindset, and other well-being related topics. Her presentations focus not on finding enough time to work and be at home but focus on finding a balance of goals, strengths, weaknesses, and other attributes of self to craft a uniquely balanced life for each person. Using things like the VIA-120 Survey (www.viacharacter.org) to understand your unique strengths and consciously using skills and techniques to form a positive mindset despite the stresses of the profession builds resiliency. Resilient lawyers, over time, are more likely to avoid violating professional and ethical standards.

Another aspect of resiliency stems from the substance abuse epidemic of the legal profession. Elizabeth Olsen, *High Rate of Problem Drinking Among Lawyers*, THE NEW YORK TIMES, Feb. 4, 2016, <http://www.nytimes.com/2016/02/05/business/dealbook/high-rate-of-problem-drinking-reported-among-lawyers.html>. At the conference in Denver, Barbara Ezyk, the Executive Director of the Colorado Lawyer Assistance Program, stated that one of the ways a mentor can help a new lawyer who is struggling with addiction is to help him or her come up with a plan to keep busy with activities that will help rather than further burden him or her. Admittedly, some of the mentoring relationships are not suited to have these discussions. But, mentors, especially mentors in the NLTP who are engaged in a year-long relationship with the new lawyer, are poised to notice if a new lawyer is struggling.

Though we do not require new lawyers and their mentors to take the VIA-120 Survey, we do require them to discuss balance and well-being within the program. Mentoring relationships, because they provide a space to talk about aspects of the practice of law that are beyond writing briefs and learning rules, can help both new lawyers and their mentors understand themselves better. As one new lawyer put it, the mentor helps “develop my own strengths, beliefs, and personal attributes.” 2015 Outstanding Mentor Award Nomination Letter – on file in the NLTP office. Deliberately working on well-being at the beginning of their careers can help the new lawyers become more balanced and resilient throughout their careers. And involving the mentors by providing the resources to understand and become resilient, and at the same time giving them the resources to cope when the burdens and stress become too much, benefits both parties and the profession in general. They contribute to transforming, in an admittedly very small way, the legal profession from one with addiction, burnout, and depression to one with self-aware lawyers who are doing good for the community.

Professionalism

The goals of the NLTP include training new lawyers in professionalism, ethics, and civility. At the core of the program is the ability for a new lawyer to have a one-on-one CLE experience with an experienced attorney to navigate many of the professional and ethical issues that arise in the daily practice of law. As part of the NLTP, new lawyers and mentors are required to discuss the Standards of Professionalism, Rules of Professional Conduct, and common ethical issues that arise in the practice setting. There is also a required New Lawyer Ethics Course that includes discussions about ethics in social media use, ethical issues in large law firms and non-traditional settings, civility issues that arise and how to deal with them, and insights from judges about the practice of law. Professionalism is a goal of the NLTP because it is hard to learn professionalism in law school. It has to be learned on the ground while practicing.

The French author Antoine de Saint-Exupery once said,

One will weave the canvas; another will fell a tree
by the light of his ax. Yet another will forge nails,
and there will be others who observe the stars to
learn how to navigate. And yet all will be as one.
Building a boat isn't about weaving canvas, forging
nails, or reading the sky. It's about giving a shared
taste for the sea. . . .

Antoine de Saint-Exupery, *Citadelle* 687 (Gallimard 1959) (1948).

For Saint-Exupery, boat-building success comes because there is a shared passion for the sea among those who contribute in different ways. A profession requires the same vision among its members – only we replace the sea with the law. Mentoring provides a unique experience for the new lawyer to observe how a professional lawyer practices and interacts with other members of the profession and the community. Such observation, when done correctly, can instill in the new lawyer a sense of pride in being professional and can give them a glimpse into the reality of the legal profession – that we all serve different roles, but we should all be focused on the same thing. Or, as Saint-Exupery would say, we are a unified profession by having a “shared taste” for the law. It is the mentoring relationship itself that can create the vision of a professional lawyer within the youngest members of the Bar.

Leadership

The current leaders of the profession will, inevitably, leave the profession at some point – not that I am calling anyone old. Without bringing up a new generation of leaders, the professional infrastructure is at risk. As a new lawyer I struggled to understand how a millennial (an old millennial who reads actual books made of paper, just so we're clear) could fit into the traditional world of the legal profession. As I've seen more than two years worth of new lawyers come into the profession since I was admitted, I can see how their views of the world and the legal profession are coming together. As those in their afternoon and twilight years expose those who are new to the profession to people and ideas, and, in turn, remain open to the world view of younger lawyers, they each begin to learn and adapt and develop together to maintain the beautiful traditions of our profession while making sure we are serving the needs of a changing society and of changing practitioners.

Mentors can lead by example by allowing new lawyers and less experienced colleagues to observe them as they practice. Mentors can also lead by requiring the new lawyer to take charge in appropriate situations, even if it is outside of the new lawyer's comfort zone. Taking charge in the safe environment of the mentoring relationship will build communication skills, confidence, and perspective. I use my own experience being mentored.

During law school, I spent a summer at the Salt Lake City Prosecutor's Office. As an intern, we prosecuted traffic cases, helped on jury trials, observed, and researched. My mentors in the office also gave me opportunities to stretch beyond my comfort zone. The last day of my internship, I argued against a Motion to Quash a Bind-Over in Third District Court. The attorney supervising me gave me a few days to prepare the response for court and to prepare to argue. I memorized every single word of that argument. Over a few days, he firmly, yet without making me feel incompetent, helped me through the loopholes of my argument, practiced arguing with me, and then had me stand at the podium alone while I presented my argument to the judge. It was absolutely terrifying – this was dealing with a real defendant, a real defense attorney, a real judge. I was just a law student. But, I was in charge of that argument. I learned skills about communicating with opposing counsel, about communicating with a judge, and about my ability to present an argument, and I gained perspective about the legal system and my place in it – even as an intern. Experiencing leading breeds leaders.

This was not the last time I was encouraged to take charge, and it is not unlike many of the experiences new lawyers are having in mentoring relationships because of the NLTP. New lawyers have praised their mentors for helping them through times when the new lawyer was not sure he or she was cut out to be an attorney, which gives that new lawyer the confidence to lead rather than shrink in the legal community. 2015 Outstanding Mentor Award Nomination Letter – on file in the NLTP office.

Relationships

At its core, mentoring is about relationships. Relationships that build resiliency. Relationships that foster professionalism. Relationships that encourage leadership. Relationships that last long after a formal program. 2015 Outstanding Mentor Award Nomination Letter – on file in the NLTP office. We've recently heard from our immediate past-President of the Bar, Angelina Tsu, about the enduring quality of her mentoring relationships, Angelina Tsu, *Our Shared Journey*, UTAH B.J., 9, 9–10 (June/July 2016), and I enjoy professional relationships with attorneys that I met because they had a relationship with one of my family members or friends. Those relationships have exposed me to resources, insight, guidance, and encouragement that we all should strive to give to others. While working at the Bar office, I have been reminded on a number of occasions that lawyers are not anonymous, and I remind every new group of mentoring participants that they are the owners of their reputation and their relationships.

Starting with the mentor-new lawyer relationship, the NLTP encourages new lawyers and their mentors to reach out to other attorneys to help in aspects of the program. But, beyond fulfilling a requirement, we want both the young lawyer and the mentor to continue to create those relationships that will keep the Utah legal community connected. Our profession is one of service. That means that our profession is one of relationships. Learning to communicate, to collaborate, and to be known is the business of a lawyer and a mentoring relationship, especially for one just entering the profession, can create the environment to learn how to build those professional relationships.

The Future of Mentoring in Utah and the NLTP

The future of the legal profession depends on the younger generations of lawyers – those who are starting to make their mark in the legal community. Mentoring is a growing field within the legal profession that helps both the older and the younger generations of attorneys develop a greater sense of the

skills, judgment, and behavior that the profession and the public expect from a lawyer.

The mandatory Utah State Bar NLTP is entering its seventh year of existence and is thriving. As of August 2016, over 1,700 new lawyers have participated in the NLTP. Over the last seven years, 952 approved attorneys have served as mentors in the program, with many more attorneys around the state helping in other ways. The Bar is committed to encouraging mentoring throughout the state both formally and informally. The NLTP will continue to develop resources and opportunities for mentoring, leadership, resiliency, and other vital soft skills that will help Utah's new lawyers, and their mentors, become effective, professional attorneys.

Thank you to all of the mentors and other volunteers who have made the NLTP and mentoring in Utah a success. To learn more about the NLTP, visit its page: <http://www.utahbar.org/members/mentor-program/>. To become a mentor or to learn about ways to become involved, email mentoring@utahbar.org.


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UTAH STATE BAR
NEW LAWYER
Training Program
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Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the July 6, 2016 Commission Meeting held at the Summer Convention in San Diego, California.

1. The Bar Commissioners voted to approve 2016-2017 budget.
2. The Bar Commissioners voted to give \$10,000 to Utah Dispute Resolution.
3. The Bar Commissioners voted to elect **Angelina Tsu** as the Utah State Bar ABA delegate.
4. The Bar Commissioners voted to create an ex officio commission seat for the LGBT and Allied Lawyers of Utah.
5. The Bar Commissioners appointed the following ex officio members for the 2016–2017 year: the Immediate Past Bar President; the Bar's Representatives to the ABA House of Delegates; the Bar's YLD Representative to the ABA House of Delegates; Utah's ABA Members' Representative to the ABA House of Delegates; the Utah Minority Bar Association Representative; the Women Lawyers of Utah Representative; the LGBT and Allied Lawyers of Utah Representative; the Paralegal Division Representative; the J. Reuben Clark Law School Dean; the S.J. Quinney College of Law Dean; and the Young Lawyers Division Representative.
6. The Bar Commissioners voted to appoint **Rob Rice, John Lund, H. Dickson Burton, Heather Farnsworth,** and **Michelle Mumford** as members of the Executive Committee. **Angelina Tsu** will sit on the Committee as Past President.
7. The Bar Commissioners voted to approve members of the Executive Committee to serve as signatories on the Bar's checking accounts.
8. The Minutes of the May 13, 2016 Commission Meeting were approved by consent.
9. The Young Lawyers Division bylaws were approved by consent.

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

2016 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2016 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 14, 2016. 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/>.

Notice of Petition for Reinstatement to the Utah State Bar by Harold W. Stone III

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement ("Petition") filed by Harold W. Stone III, in *In the Matter of the Discipline of Harold Stone III*, Third Judicial District Court, Civil No. 140905074. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Pro Bono Honor Roll

2nd District ORS Calendar

Jake Cowdin
Lauren Schultz

3rd District ORS Calendar

Joshua Cannon
A.J. Green
Kristine M. Larsen
Gregory Osborne
Katherine Priest
Rick Rose
Maria E. Windham
Robert Wing

Adoption/Termination

David Blaisdell
Chase Kimball

Bankruptcy Case

Kenneth McCabe
Todd Tyler

Community Legal Clinic

Skyler Anderson
Jonny Benson
Marlene F. Gonzalez
Todd Jenson
Jacob Kent
Carlos Navarro
Leonor Perretta
Brian Pitt
Francisco Roman
Brian Rothschild
Paul Simmons
Mike Studebaker
Ian Wang
Russell Yaune

Debt Collection Calendar

David P. Billings
Mark Burns
Chris Burt
Brian Rothschild
Zach Shields
Charles A. Stormont
Reed Stringham
Steven Tingey
Spencer Topham

Debtor's Legal Clinic

Robert Falck
Tyler Needham
Brian Rothschild
Paul Simmons
Tami Gadd Willardson
Ian Wang

Expungement Case

Jeremy Shimada

Expungement Legal Clinic

Kate Conyers
Joshua Egan
Stephanie Miya
Amy Powers
Bill Scarber

Family Law Case

McKette Allred
Justin Bond
Greg Hadley
Adam Hansley
Thomas King
Jenny Lee
Kenneth McCabe
Kayla Quam

Family Law Clinic

Justin T. Ashworth
Brent Chipman
Zal Dez
Lori Nelson
Trent Nelson
Stewart Ralphs
Jeff Richards
Linda F. Smith
Simon So
Sheri Throop

Guardianship Case

Stephanie O'Brien
Jessica Tyler

Guardianship Signature Project

Kathie Brown Roberts
Steven A Christensen
Laura Gray
Elizabeth Lisonbee
Kenneth McCabe

Homeless Youth Legal Clinic

Frank Brunson
Janell Bryan
Kate Conyers
Kent Cottam
Amy Fowler
Skye Lazaro
Nicole Lowe
Andrea Martinez-Griffin
Sharon McCully
Rachel Otto
Laja Thompson

Medical-Legal Clinic

Stephanie Miya
Micah Vorwaller

PGAL Case

David Burceau
Jill Coil
Allison Librett
Cassie Medura
Michael Studebaker

Post Conviction Case

Peter Strand

Protective Order Case

Nikki Frampton

Rainbow Law Clinic

Jess Couser
Russell Evans
Stewart Ralphs
Chris Wharton

Senior Center Legal Clinics

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

Street Law Clinic

Nathan Bracken
Dara Cohen
Kate Conyers
Brett Coombs
Matt Harrison
Brett Hastings
John Macfarlane
Clayton Preece
Elliot Scruggs
J. Craig Smith
Kristen Sweeney
Jonathan Thorne
Aaron Worthen

Tuesday Night Bar

James Ahlstrom
Jared Allebest
Mike Anderson
Joan Andrews
Ryan Beckstrom
Melinda Hill Birrell
Mike Black
Jon Bletzacker
Niels Bybee
Josh Chandler
Kate Conyers
Rita Cornish
Joshua Figueira
Steve Glauser
Will Harnish
Carlyle Harris
Katie James
Craig Jenson
Mason Kjar
Jordan Lee
Sean Mosman
Benjamin Onofrio
P. Bruce Radger
Jessica Rancie
Leslie Rinaldi
Walt Romney
Ron Russell
LaShel Shaw
Jeremy Stewart
Diana Telfer
Jeff Tuttle
Ben Welch
Rachel Wertheimer
Bruce Wycoff

West Jordan Landlord Tenant Pro Se Calendar

Jared Allebest
Kathryn Bleazard
Crystal Flynn
Steve Gray
Jaelynn Jenkins
Mary Milner
Nate Mitchell
Tyler Needham
Vaughn Pedersen
Richard Rappaport
Kasey Rasmussen
Michelle Robison
Emily Sorensen
Sheri Throop
Axel Trumbo
Kevin Westwood
Chris Wharton

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

Bar Thank You

Many attorneys volunteered their time to grade essay answers from the July 2016 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Matt Adams	Bernadette Gomez	Mike Palumbo
Paul Amann	Michele Halstenrud	Clifford Payne
Mark R. Anderson	Erik Hamblin	Fred Pena
Gage Arnold	Gary Heward	Justin Pendleton
Ken Ashton	Emily Holt	Tanya Peters
Mark Astling	Charlotte Howard-Saguibo	Pete Petersen
P. Bruce Badger	Randy Hunter	J. RobRoy Platt
Justin Baer	Chris Infanger	R. Josh Player
J. Ray Barrios	Bill Jennings	Mark Rose
Brent Bartholomew	Randy Johnson	Tenley Schofield
James Bergstedt	Michael Karras	Melanie Serassio
Susan Black Dunn	Ben Kotter	Leslie Slaugh
Mike Boehm	Alyssa Lambert	James Sorenson
Matt Boley	Derek Langton	Marissa Sowards
Sara Bouley	Susan Lawrence	Michael Stahler
Elizabeth Butler	David Leta	Craig Stanger
Sarah Campbell	Greg Lindley	Alan Stewart
Jared Casper	Patrick Lindsay	Michael Swensen
Gary Chrystler	Lance Locke	W. Kevin Tanner
Kate Conyers	Kiersty Loughmiller	Lana Taylor
Victor Copeland	Colleen Magee	Mark Thornton
Nicholas Cutler	Heather McGinley	Paul Tonks
Daniel Daines	Ryan Morley	Letitia Toombs
Daniel Dansie	Nathan Morris	J. Kelly Walker
Jonathan Diaz	Jason Nelson	Thaddeus Wendt
L. Mark Ferre	Kim Neville	Judith Wolferts
J. Tyler Firmage	Steve Newton	Brent Wride
Stephen Geary	Jamie Nopper	John Zidow
Alisha Giles	Ellen Ostrow	

“BAR SHARKS FOR JUSTICE”



UTAH STATE BAR YOUNG LAWYERS DIVISION *Fourteenth Annual Pool Tournament & Social*

October 18th & 25th, 2016 | 6:00 pm
Match Times to be Announced

BIG WILLIES | 1717 South Main Street | Salt Lake City

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Justice
for all”

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Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

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

More information about the Bar's Ethics Hotline may be found at:

www.utahbar.org/opc/office-of-professional-conduct-ethics-hotline/

Information about the formal Ethics Advisory Opinion process can be found at:

www.utahbar.org/opc/bar-committee-ethics-advisory-opinions/eaoc-rules-of-governance/.



801-531-9110

RESIGNATION WITH DISCIPLINE PENDING

On May 9, 2016, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Kyle Hoskins, for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.15(a) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary, there are five matters:

In the first matter, Mr. Hoskins was hired for representation in a divorce action and filed a Petition for Divorce on behalf of his client. Several months later, the client was informed by the court that the case was going to be dismissed due to inactivity. Later, a settlement was reached at mediation; however, no settlement documents were submitted to the court and the court issued a notice of intent to dismiss.

Mr. Hoskins' failed to timely respond to his client's requests for information regarding the status of the case, failed to show up at client meetings, failed to appear at court hearings and failed to provide the client with a complete copy of the file.

Mr. Hoskins failed to notify the client when the divorce was finalized and entered by the court. The file materials finally provided to the client by Mr. Hoskins were incomplete and contained information relating to another client.

The OPC served Mr. Hoskins with a Notice of Informal Complaint ("NOIC") requiring his written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Hoskins did not timely respond in writing to the NOIC.

In the second matter, Mr. Hoskins was hired for representation

in a divorce action and was paid a retainer. After Mr. Hoskins filed a Petition for Divorce on behalf of his client, the client decided to not go forward with the divorce and asked Mr. Hoskins for an accounting and refund of the unused portion of their retainer. Mr. Hoskins failed to refund the unused balance of the retainer to the client.

The OPC served Mr. Hoskins with a NOIC requiring his written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Hoskins did not timely respond in writing to the NOIC.

In the third matter, Mr. Hoskins was hired for representation in a paternity matter and the client made payments to Mr. Hoskins for the retainer. The client subsequently requested a receipt for payments made and asked Mr. Hoskins to withdraw from the representation. The check Mr. Hoskins sent to the client refunding the unused portion of the client's retainer was returned for insufficient funds. Mr. Hoskins failed to refund to the client the unused portion of fees he was paid for the representation.

The OPC served Mr. Hoskins with a NOIC requiring his written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Hoskins did not timely respond in writing to the NOIC.

In the fourth matter, Mr. Hoskins was hired for representation in a bankruptcy proceeding. The client paid Mr. Hoskins for the representation and completed the forms provided by Mr. Hoskins' office. After several months, the client attempted to contact Mr. Hoskins regarding the status of the case. Mr. Hoskins' office provided a case number and a tentative court date to the client. The day before the court date, the client contacted Mr. Hoskins to confirm whether or not the hearing

was still taking place and was told by Mr. Hoskins that there was not a hearing yet but that he had left a message with the court clerk to get a hearing set. The client had several further communications with Mr. Hoskins but obtained no progress with the case. When Mr. Hoskins stopped responding to the client's contacts, the client made repeated requests to Mr. Hoskins for a refund so that he could hire another attorney. Mr. Hoskins agreed to refund the client's fees within thirty days but did not provide a refund to the client for over a year. The case number provided to the client by Mr. Hoskins' office did not correspond to any bankruptcy case filed on behalf of the client.

In the fifth matter, Mr. Hoskins was hired by a client to negotiate a settlement in connection with a pension. The client made partial payment to Mr. Hoskins for the representation. Mr. Hoskins indicated to the client that a complaint had been filed on his behalf and that he had received a response to the client's claim. The client made additional payments to Mr. Hoskins. When the client requested a status update from Mr. Hoskins, Mr. Hoskins told the client that he was not going to do any more work until full payment was made. The client made efforts to locate the case filing in both state and federal courts, but was unable to locate any case filed on the client's behalf. When the client informed Mr. Hoskins that they were unable to locate any court action, Mr. Hoskins admitted that he had not filed anything on the client's behalf and agreed to refund the client's retainer.

The OPC served Mr. Hoskins with a NOIC requiring his written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Hoskins did not timely respond in writing to the NOIC.

RESIGNATION WITH DISCIPLINE PENDING

On July 13, 2016, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning S. Clark Newhall, for violation of Rules 8.4(b) (Misconduct) and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Newhall was charged with one count attempted distribution of a controlled substance in violation of Utah Code section 58-37-8(1)(a)(ii), and one count attempted tampering with a witness in violation of Utah Code section 76-4-101; both 3rd Degree felonies. Mr. Newhall pled guilty to one count attempted distribution of a controlled substance and one count attempted tampering with a witness; both Class A misdemeanors.

ADMONITION

On June 3, 2016, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

The attorney was suspended from the practice of law in the State of Utah based on the attorney's failure to comply with mandatory continuing legal education requirements. During the attorney's administrative suspension, the attorney invited members of the public to attend a workshop discussing family trusts, wills and estate planning. The advertisement listed the attorney and another attorney as premier estate planning attorneys in the State of Utah. The meetings took place while the attorney's license to practice law was suspended. The attorney provided legal advice and services to existing clients during the administrative suspension.

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

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Mitigating circumstances:

Physical disability.

SUSPENSION

On May 11, 2016, the Honorable Marvin Bagley, Fourth Judicial District Court, entered an Order of Discipline: Suspension against Joann Secrist-Bess, suspending her license to practice law for a period of eighteen months, for her violation of Rules 1.1 (Competence), 3.1 (Meritorious Claims and Contentions), 3.4(c) (Fairness to Opposing Party and Counsel), 7.1 (Communications Concerning a Lawyer's Services), 8.2 (Judicial Officials), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

Ms. Secrist took on matters outside her expertise without having the requisite knowledge and experience, and without associating with any lawyers to assist her. Ms. Secrist took on numerous matters, including criminal cases, for which she did not have the requisite training. Ms. Secrist made unfounded and uncivil accusations against judges. Ms. Secrist gave the appearance that she was associated with a law firm when she was not. Ms. Secrist ignored Court orders and knowingly disobeyed an obligation under the rules of a tribunal. Ms. Secrist's false statements regarding judges both in pleadings and elsewhere displayed a serious lack of respect for the tribunal. Ms. Secrist's conduct in filing numerous nonsensical pleadings was prejudicial to the administration of justice.

Aggravating circumstances:

Pattern of misconduct; multiple offenses; obstruction of the disciplinary proceeding by failing to respond; and substantial experience in the practice of law.

DISBARMENT

On May 3, 2016, the Andrew H. Stone, Third Judicial District Court, entered an Order of Disbarment, against Mark C. Quinn for violating Rules 1.5(a) (Fees), 3.2 (Expediting Litigation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Quinn was retained by a client for representation in a dispute with her employer. Mr. Quinn's license to practice law was subsequently suspended based upon his failure to comply with mandatory continuing legal education requirements and Mr. Quinn received actual notice of his suspension. The client made additional payments of legal fees to Mr. Quinn during the time when his license to practice law was suspended.

The state administrative agency dismissed the charges in the client's case and the client instructed Mr. Quinn to file an appeal of this dismissal with the Equal Employment Opportunity Commission ("EEOC"). The EEOC office in Arizona dismissed the client's EEOC claims. Mr. Quinn misrepresented to the client on several occasions the status of the EEOC appeal, and requested additional payments from the client, which were paid.

The OPC served Mr. Quinn with a Notice of Informal Complaint ("NOIC") requiring his written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Quinn did not timely respond in writing to the NOIC.

Aggravating circumstances:

Dishonest or selfish motive; obstruction of the disciplinary proceedings by failing to respond; and multiple offenses.

RECIPROCAL DISCIPLINE

On May 19, 2016, the Honorable Charlene Barlow, Third Judicial District Court, entered a Default Judgment and Order of Reciprocal Discipline: Disbarment against Mark E. Huber for violating the ethical rules of the California Bar and thus violating corresponding Utah Rules of Professional Conduct, specifically Rule 8.4(d).

Mr. Huber is a member of the Utah State Bar and was also licensed to practice law in California. The State Bar of California ordered Mr. Huber disbarred based upon two acts of misconduct; (1) failure to obey multiple court orders, and, (2) failure to report a court ordered sanction. The disbarment in California was also based upon aggravating factors including recent prior discipline. The OPC sought equivalent discipline in Utah based upon the disbarment in California.

In summary, the State Bar of California made the following findings:

Facts

A court order was issued requiring Mr. Huber to appear before the court at a status conference. Mr. Huber received the order, was aware of its contents and failed to appear. The court issued a second order requiring Mr. Huber to appear. Mr. Huber received the order, was aware of its contents and failed to appear again. The court issued a third order requiring Mr. Huber to appear and imposed a monetary sanction against him. Mr. Huber received the order, was aware of its contents and failed to appear and failed to pay the monetary sanctions as ordered by the court. The court then issued numerous orders requiring Mr.

Huber to appear and to pay additional monetary sanctions. Mr. Huber received the orders but failed to appear. The court then ordered Mr. Huber to appear and imposed additional monetary sanctions for his failure to pay the sanctions as previously ordered by the court. The order also stated that Mr. Huber would be reported to the State Bar of California. Mr. Huber did not report the imposition of monetary sanctions to the State Bar of California, as required by the California ethical rules. (Utah does not have a corresponding Rule)

Mr. Huber finally appeared before the court but failed to pay the sanctions. The court ordered Mr. Huber to appear and make payment toward the monetary sanctions on numerous occasions thereafter, but Mr. Huber failed to pay any sanctions.

Rule Violations: California Count One – Failure to Obey Court Orders

By not complying with the November 13, 2012; November 18, 2013; December 2, 2013; December 23, 2013; February 3, 2014; April 28, 2014; and June 16, 2014 court orders requiring him to appear at status conferences and pay sanctions, respondent disobeyed or violated orders of the court requiring him to do or forbear an act or acts connected with or in the course of his profession which respondent ought in good faith to do or

forbear, in willful violation of section 6103.

California Count Two – Failure to Report Judicial Sanctions

By not reporting the January 6, 2014 judicial sanction to the State Bar, respondent failed to report a \$1,000 non-discovery sanction to the agency charged with attorney discipline, in writing, within 30 days of the time respondent had knowledge of the imposition of the sanction, in willful violation of section, 6068, subdivision (o) (3). (Utah does not have a corresponding Rule.)

California's Consideration of Prior Record of Discipline

Respondent has two prior records of discipline. Std. 1.5(a). Effective September 21, 2011, respondent was privately reprimanded with conditions in State Bar Court case nos. 11-O-10379. In this matter respondent stipulated to misconduct in two matters, including failing to perform legal services with competence, failing to respond to client inquiries, and failing to refund unearned fees. This misconduct primarily occurred between 2007 and 2010.

On February 5, 2015, the Review Department issued a decision in State Bar Court case nos. 12-O-10290, et al., recommending that respondent be suspended from the practice of law for three years, stayed,

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with four years' probation, including a minimum period of actual suspension of two years and until respondent makes restitution and demonstrates his rehabilitation, fitness to practice, and learning and ability in the general law. In this matter, the Review Department found respondent culpable of twenty-eight counts of misconduct in nine matters emanating from respondent's move from California to Utah in August 2011 without informing several clients. Respondent was found culpable of failing to perform legal services with competence, failing to communicate with clients, failing to cooperate with a disciplinary investigation, failing to disclose a conflict of interest, and disobeying court orders. Most of these acts of misconduct occurred between mid-2009 and mid-2012.

ADMONITION

On June 23, 2016, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.3 (Diligence), 1.4(a)(2)(3)(4) (Communication) and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

The attorney was retained by a client to draw up a trust. The client requested quit claims deed and other information to transfer real property and vehicles into the trust and the attorney failed to provide the information and documents. The client spoke with the attorney's assistant on several occasions requesting the information and documents without result. The client made efforts to contact the attorney and the attorney failed to reasonably communicate with the client during the time that the client had questions.

The OPC sent two letters to the attorney requesting a response and the OPC did not receive any response to these requests for information.

Mitigating circumstances:

Family health issues.

SUSPENSION

On July 8, 2014, the Honorable Andrew H. Stone, Third Judicial District Court, entered an Order of Sanction: Suspension, against Tyler J. Larsen, suspending his license to practice law for a period of six months, for his violation of Rule 3.8(d) (Special Responsibilities of a Prosecutor) of the Rules of Professional Conduct. On June 16, 2016, the Utah Supreme Court issued a Decision affirming Mr. Larsen's six month suspension for his violation of Rule 3.8(d) of the Rules of Professional Conduct.

In summary:

Mr. Larsen was employed by a county attorney's office as a prosecutor and was assigned to prosecute a felony case for two armed robberies. The criminal trial took place several years after the robberies had occurred. Prior to the trial Mr. Larsen showed a photograph of the defendant to each of the victims from the two robberies. Mr. Larsen did not show the victims any photographs of anyone other than the defendant. Mr. Larsen failed to make timely disclosure to the defense that he had shown photographs of the defendant to the victims of the two robberies.

Aggravating circumstances:

Refusal to acknowledge the wrongful nature of the misconduct; and vulnerability of the victim.

Mitigating circumstances:

No prior record of discipline; absence of dishonest or selfish motive; and inexperience in the practice of law.

Discipline Process Information Office Update

Recently the Office of Professional Conduct (OPC) received a complaint about an attorney who has not practiced law in Utah for almost two years. The attorney contacted Jeannine P. Timothy in the Disciplinary Process Information Office. The attorney had questions about the complaint process and how the attorney can best participate in the process from afar. Jeannine is able to provide information to all who find themselves involved with the OPC. Feel free to contact Jeannine with all your questions about the discipline process.



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**Jeannine P. Timothy
(801) 257-5515**

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The site has been developed with both clients and lawyers in mind. All Bar members are included in a search-by-name option, similar to the Member Directory on UtahBar.org. Active attorneys in good standing who are accepting new clients may also choose to be included in specialized search options on the site, showing prospective clients their credentials, practice areas, and other details of interest to clients, such as the type of fee arrangements they offer.

Search results are displayed randomly, thereby providing the public with a reference that is appropriate for their problem, trustworthy, and unbiased. On your side, you will be able to track hits on your profile from within your account and adjust your profile to increase your results.

The Bar has worked closely with the Utah courts on the

directory so that it will be the "go to" reference source for court staff who need a reliable and unbiased process to use in referring unrepresented parties to a lawyer. The Bar will be aggressively promoting the site to the public directly and online, as well as to civic, religious and community groups whose members may look to them for a lawyer referral.

Use your current Bar login to update your profile at www.licensedlawyer.org/login; select "My Dashboard" then "Update Profile." Your Bar public business information is already pre-loaded for your convenience. To be included in all search options for clients looking for a new attorney, be sure to **UNCHECK** the box to "**OPT-IN**" and **CHECK** the box for "accepting new clients" when you update your profile.

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Evaluating the Benefits of Liability Insurance in Litigation

by Katy Strand

When you think of insurance, do you think of a safety net waiting to catch you or do you think of big corporate interests charging fees to clients they hope never make a claim? Lately, insurance has gotten a bad reputation. Some think insurance companies will do anything to keep from paying out. The reality is that insurance companies rarely fail to pay when the coverage is unambiguously activated.

So why does the insurance industry get such a bad rap? Perhaps it is because too often it appears to be something you buy and will never need. In economics and decision theory, loss aversion refers to people's tendency to strongly prefer avoiding losses to acquiring gains. Kahneman, D. & Tversky, A., *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, J. OF RISK AND UNCERTAINTY 5:297–323 (1992), available at http://psych.fullerton.edu/mbirnbaum/psych466/articles/tversky_kahneman_jru_92.pdf. When people consider insurance, it is this aversion to loss that makes people focus on their fear of that loss rather than seeing the insurance as a way to gain protection. It could also be that the insurance industry, like the legal industry, is closely tied to the most calamitous events of people's lives and is therefore seen in a negative light.

So, is insurance a net positive or negative? In particular, how is it beneficial to allow parties to insure against the costs of litigation? This article will discuss the arguments for the benefits provided by insurance covering only defense costs. First, it will discuss the benefits provided by society paying the costs of litigation collectively, then it will discuss the benefits to individual companies that may not be able to afford their own defense costs. Finally, it will evaluate how insurance lowers the overall cost of litigation.

There are three arguments for why society should encourage insurance of defense costs. The first and more often used is that by encouraging all people to pay the premiums, the cost to each individual should go down. Society as a whole is paying for the costs incurred by one person alone. Many people find this argument

less than convincing, particularly for liability insurance. Why should other individuals pay into a system to allow those who are sued to pay less? Why should parties not in a suit essentially pay for those who are?

Second, insurance allows companies to remain in business when they are sued. It is certainly possible for the cost of litigation to drown small companies. With insurance, these companies do not have to fear that the cost of their lawyer will end the business as a whole. This does not completely protect companies that may be creating bad products or are not concerned with the safety of their clients. Companies with repeated claims will face increased premiums, which may push companies out of the market. Further, many egregious claims may turn out not to be covered.

This response to the first argument ignores the second reason society should encourage parties to purchase liability insurance. To make a successful business, most lawyers charge high hourly rates. With years of experience and knowledge, people are getting what they pay for. Insurance companies, however, have an advantage the average litigant does not when it comes to hiring lawyers. Insurance companies are repeat players. Instead of paying to fight one suit, insurance companies are fighting hundreds at a time. As a result, they are able to negotiate lower hourly rates from the same attorneys with years of experience and particular expertise. In this way, insurance lowers the costs of litigation, allowing parties to seek justice in a more economical manner.

As for the insurance defense attorneys, they are able to lower

KATY STRAND is an experienced litigation attorney with J Joye and Associates, who practices in insurance defense, complex contract disputes, personal injury, and construction defect litigation.



their prices, despite having the particular expertise companies require, because they know they will be getting numerous cases from their clients, the insurance companies. This allows attorneys to focus their areas of expertise, as they will have enough cases to maintain this focus. It also allows both parties to negotiate a better price. While litigation remains costly, the majority of the costs come from attorney fees. In 2011, the average Utah attorney charged between \$192.31 and \$243.68 per hour, based on a weighted average from the Utah Bar 2011 Survey of Members. At this rate, the majority of litigation costs are likely to be from attorney fees. While no survey has been done, particularly of insurance defense lawyers, anecdotal evidence would suggest the average negotiated rate, particularly when taking into account years of experience, is significantly lower. Lower rates provided by insurance defense lawyers can drastically reduce that cost.

The cost effective nature of this type of litigation is certainly desirable. Attorneys have an ethical mandate to provide the best litigation possible while keeping the costs low. Given the desirability of this type of cost-effective litigation, it should be considered a good trend that the types of claims for which one can purchase insurance are increasing. The question remains,

as a practical matter, whether more claims being covered.

Moving forward, the increase in demand for policies covering the defense costs of litigation will indicate that more coverage is being accepted. Demand for products will only increase if the product remains desirable. If coverage is routinely denied, companies will choose to not buy the insurance. Conversely, if the prices for litigation insurance were to go down, or numerous additional policies were to become available, that may indicate that claims are not being covered. Insurance companies cannot afford to increase the supply if in doing so they must pay out millions of dollars in claims, unless the cost of the premiums outweighs this cost.

The benefits of litigation insurance are limited by the fact that coverage may not be available for particular types of claims. For example, exclusions often eliminate coverage for intentional torts, particular types of negligence, or certain types of damages. Even when parties believe they have purchased insurance for a type of claim, they may find that some exclusion eliminates coverage. As policies purport to cover new types of claims, further discussion on coverage and the benefits of collective bargaining in liability insurance will be valuable.

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Message from the Paralegal Division

by Greg Wayment

I would like to introduce the 2016–2017 Board of Directors of the Paralegal Division. We are pleased to announce the chair for the upcoming year is Julie Emery. We have three new members joining the Board of Directors and wish to extend a warm welcome to Candace Gleed, Carma Harper, and Laura Summers. Also, Cheryl Jeffs and I will serve another two-year term. We also wish to thank Tamara Green, Diane McDermaid, and Paula Christensen for their service. This year's Board of Directors are:

Chair – Julie Emery. Julie has twenty-six 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, 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.

Chair-Elect – 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.

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 accomplishment has 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. Chris is a civil litigation paralegal with thirteen years of experience in state and federal civil litigation with experience in appellate, business, and criminal law and estate planning. She recently joined Eisenberg Gilchrist & Cutt, a premier plaintiffs' personal injury and whistleblower firm specializing in highly complex, high stakes injury cases. Chris is an adjunct instructor for the UVU Paralegal Studies program and previously owned her own contract paralegal company, Cope Litigation Support. She is the business manager for her husband's company, Ascent IRT, Inc., providing foster/proctor care and outpatient rehabilitative services for youth in DJJS custody. Chris has a degree in Paralegal Studies from UVU. Most recently, she presented on a panel at the USB Summer Convention in San Diego and was Chair of the Paralegal Division's twentieth Anniversary Celebration. When she is not river rafting or adventuring with her family, Chris enjoys volunteering. Her volunteer service includes restoration projects for the historic WWII Wendover Airfield.

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 (CMC) and Master Municipal Clerk (MMC) 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.

Ex-Officio – Heather Allen. Heather is a paralegal and privacy officer at 1-800 CONTACTS, Inc. and had been there since November 2012. She previously was a paralegal at Ray Quinney & Nebeker (RQN) working with wonderful attorneys in the product liability group. She had the opportunity to work on large class action lawsuits in Florida, plaintiff personal injury, and corporate defense product liability cases. 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 (when it was Utah Valley State College), teaching computerized legal research. She graduated from Utah Valley University with a Bachelor's Degree in Paralegal Studies and a minor in Psychology. She enjoys reading and spending time with her family.

Director at Large and Parliamentarian – Sharon M. Andersen. Sharon graduated from the Legal Assistant/Paralegal Program at Westminster College in 1990. She has been employed as a paralegal since that time, working for several well-known local corporations and firms that were engaged in diverse areas of the law. She joined the Paralegal Division in 2004 and has served on the Paralegal Division board in several capacities since 2005, including serving as chair of the Division and Ex Officio member of the Bar Commission during 2007–2008. For the last almost four years, Sharon has worked as a civil litigation paralegal, primarily with David Cutt at Eisenberg Gilchrist & Cutt, a premier plaintiffs' personal injury and whistleblower law firm, specializing in highly complex, high-stakes injury cases. Sharon currently serves on the UPL Committee of the Utah State Bar. She has six adult children and five grandchildren, all of whom she views as her greatest accomplishment and joy in life.

Director at Large and Finance Officer – 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 Chair 2008–2009 and also served as CLE Chair of the Paralegal Division from 2007–2008. Also a member of the Utah Paralegal Association and 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 – Candace A. Gleed. Candace has been a paralegal for twenty-two years working in criminal, employment, administrative, and insurance defense law. She currently works as a litigation paralegal at the firm of Eisenberg, Gilchrist & Cutt (EGC) primarily on plaintiff's personal injury and medical malpractice cases. Prior to joining EGC, Candace worked with American Family Insurance In-House counsel, Utah Attorney General's Office, Salt

Lake County District Attorney's Office, and West Valley City. She is a current member of NALA. Candace is a mother of four beautiful children (her proudest accomplishment), two grandchildren and a pit bull named Bruce. She enjoys doing volunteer work for the disabled and youth sports organizations.

Director at Large – Carma J. Harper, CP. Carma is a paralegal at Strong and Hanni. Her team specializes in insurance defense, personal injury, construction law, real estate law, and products liability. She has been an active member of the Paralegal Division since 2005. During that time, she has served as Community Service chair, YLD Liaison, Director at Large, Region I Director, Membership committee Chair, Chair Elect, and Chair while also serving as an Ex-officio Commissioner on the Utah State Bar Commission. Carma has received several awards over the years for her excellent service including the Community Service Award, awarded by the Utah State Bar in 2011, and The Mark J. Morris & Deacon Haymond, Wills for Heroes Volunteer Service Award, awarded by the Young Lawyers Division in 2012. Carma currently serves on the Modest Means Committee, creating affordable legal services for families based on their income levels.

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 – Laura Summers. Laura is a paralegal at the firm of Dolowitz Hunnicutt, PLLC. Since 1991, she has worked as a paralegal in firms specializing in legal defense and corporate law, but her expertise and passion is in the field of family law. She graduated from Utah State University in 2015 where she earned a Bachelor's of Science in Interdisciplinary Studies. Laura graduated from the University of Utah Conflict Resolution Graduate Program 2016 and now joins the list of Utah State Court-Qualified Mediators. Laura is also a member of the Alternative Dispute Resolution Division of the Utah State Bar.

Director at Large – Greg Wayment. Greg has over twelve years of paralegal experience and has been at the firm of Magleby Cataxinos & Greenwood (MCG) for most of that time. MCG 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.

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

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

September 21, 2016 | 9:00 am–3:45 pm **6 hrs. Ethics, 1 hr. Prof./Civ.**

OPC Ethics School: What They Don't Teach You in Law School. A mandatory course for reciprocally admitted attorneys. Open to all attorneys. \$245 early registration fee (before 09/02/2016), \$270 after 09/02/2016.

September 21, 2016 | 7:30 am–2:30 pm **4 hrs. self-study CLE, 1 hr. self-study Ethics**

The 24th Annual Estate and Charitable Gift Planning Institute. \$50 for Estate Planning Section members, \$135 for all others. Webcast to be viewed at the Utah State Bar, 645 South 200 East, Salt Lake City.

September 22, 2016 **3 hrs. CLE**

Utah County Golf & CLE: Personal Injury Boot Camp – The Basics of Representing Personal Injury Plaintiffs. Hobbie Creek Golf Course, 94 Hobbie Creek Canyon Road, Springville, UT. **For CLE only:** \$65 for Litigation Section and CUBA members, \$100 for all others. **For Golf & CLE:** \$95 for Litigation Section and CUBA members, \$150 for all others.

September 23, 2016 | 8:30 am–4:00 pm (approx)

Law Practice Management: Learn what you need to know to open, manage, and prosper in your new office.

October 14, 2016 | 8:00 am–1:00 pm **4 hrs. CLE, incl. 1 hr. Ethics**

ADR Academy: The Present and Future of Alternative Dispute Resolution in Utah. Presenters include Nathan Alder, Judge Gardiner, Judge Harris, and Kathy Elton.

October 19, 2016 | 8:30 am–4:30 pm **5.5 hrs. (pending) 2 hrs. Ethics**

Cloud Computing Boot Camp: What cloud computing means to you and your office. Presenters include: Jack Newton, CEO and Founder of Clio; Lincoln Mead, Webmaster, Utah State Bar; Randy Dryer, Parsons Behle & Latimer; and Hon. Ryan M. Harris. \$150.

October 20, 2016

New Lawyer Ethics Program. The required ethics course for lawyers in the NLTP. One time attendance is required.

October 21, 2016 **3 hrs. CLE**

St. George Golf & CLE. The Ledges Golf Club, 1585 W Ledges Parkway, St. George, UT 84770. Hot breakfast 8:30–9:00 am. CLE 9:00 am–noon. Golf starting at 12:15. **For CLE only:** \$65 for Litigation Section and SUBA members, \$95 for all others. **For Golf & CLE:** \$95 for Litigation Section & SUBA members, \$135 for all others.

October 28, 2016 **2 hrs. CLE**

Mary & Myra: Join us for the play and panel discussion on legal issues regarding the involuntary commitment of Mary Todd Lincoln and her attorney Myra Bradwell, the first woman attorney in the United States. Rose Wagner Performing Arts Center, 138 West 300 South, Salt Lake City. \$50 for reception, play and discussion. +1 tickets, \$25.

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

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

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

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

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

OFFICE SPACE

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

Office Sharing Orem, Utah. Offices available in Orem for one to two attorney to office share with nine other attorneys. Great location, receptionists, two conference rooms, fax/copier/scanner/full wireless internet etc. Great opportunity for referrals and reasonable rental rates. Contact Steve or Jeff @ 801-222-9700 or srs@skabelundlaw.com.

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

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801-297-7043

Cynthia Schut
Paralegal
801-297-7045

Melodee Parks
Intake Clerk
801-297-7048

Laura Pennock
Paralegal
801-297-7044

Certificate of Compliance

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

For July 1 _____ through June 30_____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____ Email: _____

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

- 1. Active Status Lawyer** – Lawyers on active status are required to complete, during each two year fiscal period (July 1–June 30), a minimum of 24 hours of Utah accredited CLE, which shall include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of the ethics or professional responsibility shall be in the area of professionalism and civility. Please visit www.utahmcle.org for a complete explanation of Rule 14-404.
- 2. New Lawyer CLE requirement** – Lawyers newly admitted under the Bar’s full exam need to complete the following requirements during their first reporting period:
 - Complete the NLTP Program during their first year of admission to the Bar, unless NLTP exemption applies.
 - Attend one New Lawyer Ethics program during their first year of admission to the Bar. This requirement can be waived if the lawyer resides out-of-state.
 - Complete 12 hours of Utah accredited CLE.
- 3. House Counsel** – House Counsel Lawyers must file with the MCLE Board by July 31 of each year a Certificate of Compliance from the jurisdiction where House Counsel maintains an active license establishing that he or she has completed the hours of continuing legal education required of active attorneys in the jurisdiction where House Counsel is licensed.

EXPLANATION OF TYPE OF ACTIVITY

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

- 1. Self-Study CLE:** No more than 12 hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit www.utahmcle.org for a complete explanation of Rule 14-413 (a), (b), (c) and (d).
- 2. Live CLE Program:** There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at a Utah accredited CLE program. **A minimum of 12 hours must be obtained through attendance at live CLE programs during a reporting period.**

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

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

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

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

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

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

Date: _____ Signature: _____

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

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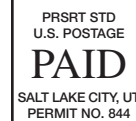
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645 South 200 East
Salt Lake City, Utah 84111

A photograph of an operating room. In the center is a surgical table covered with a blue drape. To the right is a large medical machine, possibly an anesthesia unit, also partially covered with a blue drape. The room has a sterile, clinical appearance with blue and white tones.

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