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Sep/Oct 2018

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

Utah State Capitol by Utah State Bar member Jason H. Robinson.

JASON H. ROBINSON is a shareholder at Babcock Scott & Babcock, P.C. He took this photo on a beautiful fall afternoon while visiting the State Office Building.

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

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Utah Bar JOURNAL

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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, a particular topic that interests you, or if you would like to review one of the books we have received for review in the *Bar Journal*, please contact us by calling 801-297-7022 or by e-mail at barjournal@utahbar.org.

GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

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

ARTICLE LENGTH

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

SUBMISSION FORMAT

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

CITATION FORMAT

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

NO FOOTNOTES

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

ARTICLE CONTENT

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

EDITING

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

AUTHORS

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

PUBLICATION

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

Letter to the Editor

Editor:

The May/June issue of the *Utah Bar Journal* included two interesting discussions of conflicts of interest under the Rules of Professional Conduct and government lawyers, in particular for the Office of Attorney General. ("Legislative Update" and "Focus on Ethics & Civility.") Neither mentions Rule of Professional Conduct 1.10(f) which says that "[a]n office of government lawyers who serve as counsel to a governmental entity such as the office of the Attorney General, the United States Attorney, or a district, county, or city attorney does not constitute a 'firm' for purposes of Rule 1.10 imputation." If the office of the Attorney General is not a firm, then the only conflicts that can arise are those attaching to the work performed by each individual attorney in the office, which suggests that the "conflict" provisions of H.B. 198 were unnecessary, and the Bar Leadership's concern that legislation "held the attorney general to a different, and arguably lower, standard than what is required of lawyers generally under the Utah Rules of Professional Conduct" may have been misdirected. Rule 1.10(f) appears to exempt government lawyers from possible conflicts arising by imputation (at least for circumstances such as those that prompted H.B. 198), unlike all private practice lawyers. But perhaps the Rule does not mean what it says.

John H. Bogart

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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Facing the Future and Taking on Our Challenges Together

by H. Dickson Burton

According to one Internet blogger, when actor Harrison Ford's son Malcolm was a little five-year old, he was asked to tell his school class what his father did for a living. He responded, "My daddy is a movie actor. Sometimes he plays the good guy and sometimes he plays the lawyer."[1]

This makes for a humorous anecdote but also leads one to consider what it means to be a lawyer. Coincidentally, my own son Will was about the same age, five years old, when he was asked, like Malcolm, to tell his own classroom full of kids what his father did for a living. I don't know exactly what Will told his classroom, but he did come home that night and ask me, "Daddy, what do you do for work?" I responded with some surprise that I thought he knew I was a lawyer. After looking at me quizzically for a moment, he followed up with the obvious question from one not yet exposed to lawyer dramas on TV: "I know that, but what do lawyers do?"

I stopped for a moment. What could I say that would allow my young son to understand what it was I did every day after I left home? Or when I was sometimes away late at night, or sometimes out of town for a few weeks for an out-of-state trial? I could tell Will I spent a lot of time meeting with people, a lot of time working on a computer, or a lot of time talking on the phone. I could also try to explain what it means to go to court and argue a case. I decided to keep it simple for a five-year-old. So, I said to my son, "Will, to put it simply, lawyers help people solve problems. Especially when they are in trouble."

I could see Will thinking about what I had said for a minute. Then a big grin slowly come across his face as he exclaimed, "So lawyers are the good guys!"

As illustrated by Harrison Ford's son's response, not everyone thinks of lawyers as the "good guys." But I am proud to say that the Utah lawyers I know actually do want to help people – most especially people in trouble. Utah attorneys are staying up late at night, tirelessly working to help people threatened with jail time, with losing their home, or with losing custody of a child. Sometimes Utah lawyers may work hard to save a small business, or a larger business with scores, or even hundreds, of people's jobs at stake. Or they may work at preparing a contract that will help a business succeed – sometimes along with hundreds of people's jobs. The fact is, Utah lawyers are helping people solve their problems. And some of those problems are serious and a lawyer's help is desperately needed. Utah lawyers should feel good about what they do.

In an *ABA Journal* article some attorneys were asked why do they love what they do. Responses varied, but many optimistically reflected the sentiment of these two particular statements: "I love being a lawyer because I can make a difference in someone's life" and "I love being a lawyer because it gives me the opportunity to use the law to make someone's life better."[2] For those of you who wonder about your own job, or who may not be finding the same job satisfaction reflected in these statements, I offer this from Charles Dickens: "No one is useless in this world who lightens the burdens of another."[3]

We, of course, know that the profession is not without its serious challenges. I will take a moment in this brief article to mention two challenges that will receive Bar Commission attention this coming year.

First is lawyer and judge well-being. The ABA recently sponsored a National Task Force on Lawyer Well-Being. That Task Force released its report late last year and can be found at http://lawyerwellbeing.net. Among other things, the report cites a study which found that between twenty-one and thirty-six percent qualify as problem drinkers, and that approximately twenty-eight percent, nineteen percent, and twenty-three percent are struggling with some level of depression, anxiety, and stress, respectively. The "parade of difficulties" also includes suicide, social

alienation, work addiction, sleep deprivation, job dissatisfaction, work-life conflict, and incivility.[4] I invite you to review the Task Force Report and to consider its recommendations.

Our own Chief Justice Matthew Durrant, for one, has taken this report very seriously and has organized a Committee on Well-Being to consider the Task Force Report, and other resources, and to make recommendations for addressing the serious well-being challenges facing many judges and lawyers in Utah. The Committee is made up of various stakeholders on these issues including representatives of the bar, the courts, the law schools, attorneys from various types of law practices and backgrounds, and lawyer support organizations, including Blomquist Hale and Lawyers Helping Lawyers. Chief Justice Durrant has asked Justice Paige Petersen of the Utah Supreme Court to chair the Committee and me, as Bar President, to serve with her as co-chair. I am grateful for Justice Durrant's leadership on this issue and am looking forward to participating with Justice Petersen and the other members of the Committee to explore specific steps that we as a bar and legal community can take to better address lawyer well-being.

Second is the need for attorneys and law firms to innovate, even more, in their approach to both offering and delivering legal services. This was a principal takeaway of the Lighthouse Research survey commissioned this past year by the Bar Commission, under the leadership of John Lund, to study the reasons why individuals and small businesses do or do not hire attorneys. Much of what we learned from that survey confirms what we might suspect – that individuals and small businesses are reluctant to hire lawyers because much of what we do is a mystery to them – including how much we charge and, perhaps especially *how* we charge, for our services.[5]

Innovation in law practice is especially important in an age where there are increasing pressures from rapid change in technology and client expectations. One notable law practice guru, Robert Millard, said earlier this year that the disruptive change to our profession *yet to come*, from things like artificial intelligence, big data, blockchain, and quantum computing, will transform client needs over the coming decade on a scale that is unprecedented. Indeed, he says by 2025 the practice of law will be unrecognizable compared to practice in 2018. But Mr. Millard goes on to explain that while the change that is coming may be unprecedented, so are the opportunities to those who make an effort to understand and adapt to change; to thrive in spite of, or even because of, that change.[6]

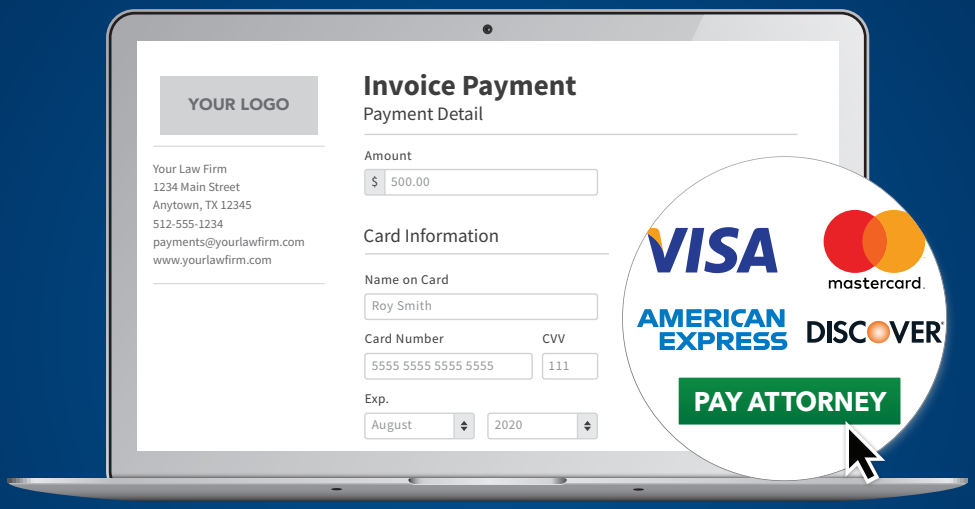
One of the things the Bar Commission has done in an effort to assist Utah attorneys adapt to and thrive in a changing legal environment is establish the Innovation in Law Practice Committee, the Bar's 2018 Committee of the Year, chaired by Heather White and now Greg Hoole (who just recently replaced outgoing co-chair John Rees). The Innovation Committee is looking at how Utah attorneys can better take advantage of technology and changing client expectations through informative CLEs, lunches, and other programs. In May the Innovation Committee held its first one-day symposium and received rave reviews. The Committee is also looking at whether some of our rules of professional conduct need to be clarified or even modified to address changing client needs.

I am looking forward to the upcoming Bar year and to addressing these and other issues and challenges that are before us. I can say that I have completely enjoyed my several years of service on the Bar Commission and this past year as President-elect, primarily because of the outstanding people I get to work and interact with, including attorneys and judges who volunteer so selflessly of so much of their time, and our outstanding and professional Bar staff. I am also very grateful to have worked this past year with our now immediate Past-President, John Lund, one of Utah's best Bar Presidents ever.

And speaking of best ever, in closing I want to acknowledge the marvelous Summer Convention which just concluded in Sun Valley. We are particularly grateful to the entire Utah Supreme Court and to Senators Mike Lee and Cory Booker, who presented remarkable discussions on collegiality on the Utah Supreme Court and in the United States Senate, respectively. One bar member commented at the end of the last day that it was "the most inspiring and uplifting convention ever." Many thanks to the co-chairs of that convention, Justice Thomas R. Lee of the Utah Supreme Court and Jen Tomchak, to the vision and leadership of outgoing President John Lund and, of course, to the always professional bar staff who make things go smoothly and professionally.

My only regret concerning the Summer Convention is that just a small percentage of our bar was in attendance, as is the case most every year. So many of our members missed out on superb CLE, inspiring keynotes, fun activities for all, and a beautiful setting for our annual get-together with colleagues and families. But 2019 will present a new opportunity for more members than ever to participate in our Summer Convention because, in response to many requests over many years, we will be "coming home" by bringing the convention to Park City. There we expect the close proximity and beautiful mountain venue will make it possible for many who have missed out in the past to also enjoy the unique experience of the Utah State Bar Summer Convention. And for those who may believe that Sun Valley is the only place we should ever hold a Summer Convention, please join us too and help make next year's convention a great success for all. Under chairs Judge Evelyn Furse and Jon Hafen, who with their Committee are already planning a fabulous 2019 convention, it promises to be another tremendous success with exciting keynote speakers, lots to learn, and much to do. Make your plans and book your rooms now for July 18–20, 2019. You may do so right now by going to http://www.utahbar.org/2019-summer-convention/ or by calling 1-888-416-6195. Please join us for what will surely be another "best ever" convention.

1. http://bytesdaily.blogspot.com/2010/04/quote-malcolm-ford.html.
2. *Why I Love Being a Lawyer*, ABA Journal (Feb. 2011).
3. Charles Dickens, Bleak House.
4. Studies cited in the Task Force Report include P. R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. Addiction Med. 46 (2016); and A. M. Brafford, *Building the Positive Law Firm: The Legal Profession At Its Best* (Aug. 1, 2014) (Master's thesis, Univ. Pa., on file with U. Pa. Scholarly Commons Database), *available at* http://repository.upenn.edu/mapp_capstone/62/.
5. John R. Lund *President's Message* 26 Utah B.J. 10, 8 (May/June 2018).
6. Robert Millard, *Thriving at the Edge of Chaos*, Cambridge Strategy Group, 2018, http://www.camstrategy.com/edge-of-chaos/.



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Disqualification of a Judge – Rule 63

by Hon. Fred D. Howard (ret.), Hon. Carolyn E. Howard, and Charlotte Howard

The story that we were told by our father/grandfather, Jackson Howard, was that the case involved a young student who had sued BYU for personal injuries. It was a fairly good case as to the facts and the law but a bit of a gamble as to what damages it might bring. Discovery had been completed, and the lawyers were appearing before the district court for a pre-trial conference in preparation for a scheduled jury trial several months away. The pre-trial was before a no-nonsense judge, whom we will refer to as Judge Smith. The lawyers reported to the court that their discovery was concluded, stipulated to their exhibits, acknowledged the expected special damages, and discussed several perfunctory pre-trial motions. Then, before confirming the trial date, defense counsel took Jackson aside and suggested that to save time and expense they could shorten the trial by trying the case to the bench, if he was willing. Jackson paused for a moment and then said that he was willing to do so. Hearing the stipulation of the parties for a bench trial, the court moved up the trial date.

Both parties were well prepared at trial, and the case proceeded as Jackson had expected – but not as anticipated by the defense. Every objection of the defense was seemingly overruled, and every motion denied. The defense scrambled to deflect the mounting evidence on the record. The plaintiff's case was proceeding "swimmingly" well, and they couldn't seem to put the brakes on it. It was a well-known fact in the community, however, that Jackson's nemesis was Judge Smith. They had developed a mutual dislike for each other from trying several big cases over the years. In the end, Judge Smith awarded the plaintiff judgment for everything she had asked for. Jackson gathered up his trial files, bid defense counsel good day, and drove back to his office. At the office his staff and associates congratulated him on his great victory but asked why it was that the case had gone so well before Judge Smith. They too were perplexed given that it was Judge Smith. Jackson responded, "Well, it being a good case aside, what the defense did not know is that while it is true that Judge Smith hates me, it is also true that he hates BYU more."

The Judge should have recused himself.

Rule 63 of the Utah Rules of Civil Procedure governs the disqualification of a judge, something that can be a sensitive subject but is an established rule for good reason. When and how it should apply to a case is something that both the lawyer and the judge should understand.

Rule 63 is a procedural rule disqualifying a judge who demonstrated a "bias, [a] prejudice or a conflict of interest" from presiding over an action. Utah R. Civ. P. 63(b)(1). The premise of the rule is founded on the overarching principles of the Utah Code of Judicial Conduct, or Canons, that govern all judges. The Canons include directivest: "A judge *shall* uphold and promote the independence, integrity, and impartiality of the judiciary and *shall* avoid impropriety and the appearance of impropriety." Utah Code Jud. Conduct Canon 1 (emphasis added).

Canon 1 further provides: "A judge should act at all times in a manner that promotes – and shall not undermine – public

HON. FRED D. HOWARD is a retired Judge from the Fourth District Court.

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CHARLOTTE HOWARD is a procecutor in the Utah County Attorney's Office.

confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." *Id.* R. 1.2.

Canon 2 also emphasizes that the judicial officer is to perform "the duties of [his or her] judicial office impartially, competently, and diligently." *Id.* Canon 2. Except in rather rare instances of limitations stemming from physical health, "competence" of a judge is seemingly wrapped up in the discussion of appeal and is a subject for another day. Our focus is on disqualification stemming from "impropriety" as described from acts of impartiality and which constitutes the first procedural step to disqualify a judge. Should the tribunal display what appears to be bias, the rule provides a step-by-step process for disqualification. The attorney must first file a motion, accompanied by a certificate that the motion is filed in good faith and an affidavit stating facts sufficient to show bias, prejudice, or conflict of interest. Utah R. Civ. P. 63(b)(1). The affidavit must be filed not on appeal but at the trial level. *See Wade v. Stangl*, 869 P.2d 9 (Utah Ct. App. 1994) (citing *James v. Preston*, 746 P.2d 799, 801 (Utah Ct. App. 1987));

Christensen v. Christensen, 422 P.2d 534 (Utah 1967). The affidavit must pass scrutiny of proper foundation, not comprise generalizations, and must "'have some basis in fact and be grounded on more than mere conjecture and speculation.'" *In re M.L.*, 965 P.2d 551, 556 (Utah Ct. App. 1998) (quoting *Madsen v. Prudential Fed. Sav. & Loan*, 767 P.2d 538, 544 n. 5 (Utah 1988)). While the recital of such facts may make the assigned judge wince, nonetheless the judge should step back and breathe deep since the test is not one of showing actual bias but conduct that gives the appearance of impropriety and "create(s) in reasonable minds a perception that the judge engaged in impropriety." Utah Code Jud. Conduct R. 1.2 cmt. [5]. The judge is to set aside all concerns for his reputation out of respect for the interests of the litigant who may have a reasonable basis to question the judge's impartiality. *SCA Servs. Inc. v. Morgan*, 557 F.2d 110, 115–16 (7th Cir. 1977). The facts of the affidavit will be scrutinized for sufficiency of a bias, or the appearance of impropriety – a fact-sensitive inquiry. For that task, unless the assigned judge without further hearing grants the motion, the judge is to certify the motion to an independent judge for review. *Id.* 63(c)(1).

While it is probably natural for the moving party to be absorbed with concerns about the sufficiency of the affidavit, part (b) of Rule 63 is of equal importance. The motion must be timely filed or it will be denied. *Id.* R. 63(b).

One would think that the issue of bias and the interest of protecting the right of litigants to a proceeding free from such influence would always prevail without limitation, but the interests of justice include the balancing of judicial economy as evidenced by the fact that a timeliness component is built right into the rule. Part (b) provides that the motion "*shall*" be filed after commencement of the action, but not later than twenty-one days after the assignment to the trial judge, the appearance of the party or his attorney, or the "date on which the moving party…[learned] of the grounds upon which the motion is based." *Id.* (b)(2). Inasmuch as Rule 1 of the Utah Rules of Civil Procedure provides that the rules of procedure are to be "liberally construed and applied to achieve the just, speedy, and inexpensive determination of every action," the "timeliness" requirement of Rule 63 is an appropriate and essential requirement of such a motion. "'[D]elay imposes unnecessary disruption on both the judicial system and [the] litigants…and it necessarily results in significant additional costs to the parties.'"*Camco Constr., Inc. v. Utah Baseball Acad., Inc.*, 2010 UT 63, ¶ 16, 243 P.3d 1269 (quoting *Madsen*, 767 P.2d at 542). Even where the motion contains sufficient if not compelling facts of bias, prejudice, or conflict of interest, by rule, the reviewing judge may not reassign the case to another judge unless he finds the motion was "timely filed." *See* Utah R. Civ. P. 63(c)(2). In *Camco Construction Inc.*, the court explained that to be timely filed, a motion to disqualify "'should be filed at counsel's first opportunity after learning of the disqualifying fact'"; and the express language of part (c) of the rule provides that the reviewing judge *may* deny an untimely motion without considering its merits. 2010 UT 63, ¶ 17, 243 P.3d 1269 (quoting *Madsen*, 767 P.2d at 542); Utah R. Civ. P. 63(c)(4). However, this "*may*" language of subpart (c)(4) is seemingly eclipsed by the language of subpart (b)(2) requirement that the motion be "timely filed" as a condition to reassignment. Utah R. Civ. P. 63(b)(2). So, if discovering something that raises a suspicion of a bias or conflict, the lawyer must act expeditiously noting that by the plain language of the rule, the twenty-one-day time period begins to run from the date on which the lawyer learned or "the date on which the moving party knew or *should have known* of the grounds upon which the motion is based." *Id.* R. 63(b)(2)(C) (emphasis added); *see Siebach v. Brigham Young Univ.*, 2015 UT App 253, ¶ 43, 361 P.3d 130.

In sum, the rule of thumb for disqualification is strong facts showing an inference of bias brought up front. The same rule applies to BYU's football team – a strong offense, timely played – without which we all may begin to hate BYU.

Judge Fred Howard with daughter Judge Carolyn E. Howard at her swearing-in ceremony.

Judge Fred Howard with daughter Charlotte Howard at her swearing-in ceremony

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POINT COUNTERPOINT

The Miranda *Decision is Showing Its Age and Should Be Replaced*

And Prosecutors Now Have an Argument They Can Make to that Effect

by Paul Cassell

A little over fifty years ago, the Supreme Court handed down what may be its most controversial criminal law decision ever – *Miranda v. Arizona*. The decades since then have revealed *Miranda* to be not only bad constitutional law but also bad public policy. With the benefit of recent experience and modern technology, it is possible to design rules that not only more effectively protect legitimate interests of suspects but also insure that police are not unduly handcuffed as they investigate crimes.

Contrary to the prevailing myth that is often peddled, *Miranda*'s rules have significantly impeded law enforcement's ability to prosecute dangerous criminals. University of Utah Economics Professor Richard Fowles and I have recently assembled all the relevant data on the subject. *See* Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of* Miranda's *Harmful Effects on Law Enforcement*, 97 Bost. U.L. Rev. 685 (2017). One source of information comes from the "before-and-after" studies of confession rates in the year or two after the decision. For example, a study in Pittsburgh revealed that confession rates fell from 48% before the decision to 29% after. Similar results were reported in Manhattan, Philadelphia, Kansas City, Brooklyn, New Orleans, and Chicago. The few studies to the contrary were done almost immediately after *Miranda* in jurisdictions where police did not in fact follow all of the decision's procedural rules.

It might be argued that this data about *Miranda*'s harmful effects comes in the immediate wake of the decision and that, since then, police have learned to "live with" *Miranda*. But surprisingly little hard data has been collected on *Miranda*'s effects. One of the rare exceptions is a study that Bret Hayman and I conducted in the mid-1990s of confession rates in Salt Lake County. Relying on data collected at the Salt Lake District Attorney's Office, we concluded that police collected incriminating statements from suspects in only about 33.3% of criminal cases in Salt Lake County – a rate well below confession rates generally reported in the country before *Miranda*. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. Rev. 839, 871 (1996).

Some have argued that this individual study might be an outlier because it would be impossible to say whether Salt Lake County's experience was typical of the nation's. Unfortunately, data on confession rates is not routinely collected in this country to confirm or dispel this argument. But a surrogate measure for confession rates can be found in clearance rates – the rate at which police officers solve or "clear" crimes. The FBI collects clearance rate data from around the country. And defenders of *Miranda* have argued that clearance rate data shows that police were quickly able to develop new techniques that allowed them to investigate crimes as successfully after the decision as before.

Unfortunately, the FBI's clearance rate data depict a different pattern. As shown in the accompanying graph, crime clearance rates fell immediately after *Miranda* and have remained substantially below pre-*Miranda* levels ever since.

Professor Fowles and I have extensively analyzed what factors might have been responsible for this decline in clearance rates. In our article, we report the results of multiple regression equations on crime clearance rates from 1950 to 2012, controlling for factors apart from *Miranda* that might be responsible for changes in clearance rates. Even controlling for potentially competing factors, we find statistically significant reductions in crime clearance rates after *Miranda* for violent and property crimes, as well as for robbery, larceny, and vehicle theft – crimes that most likely involved "professional" criminals who were most likely to have

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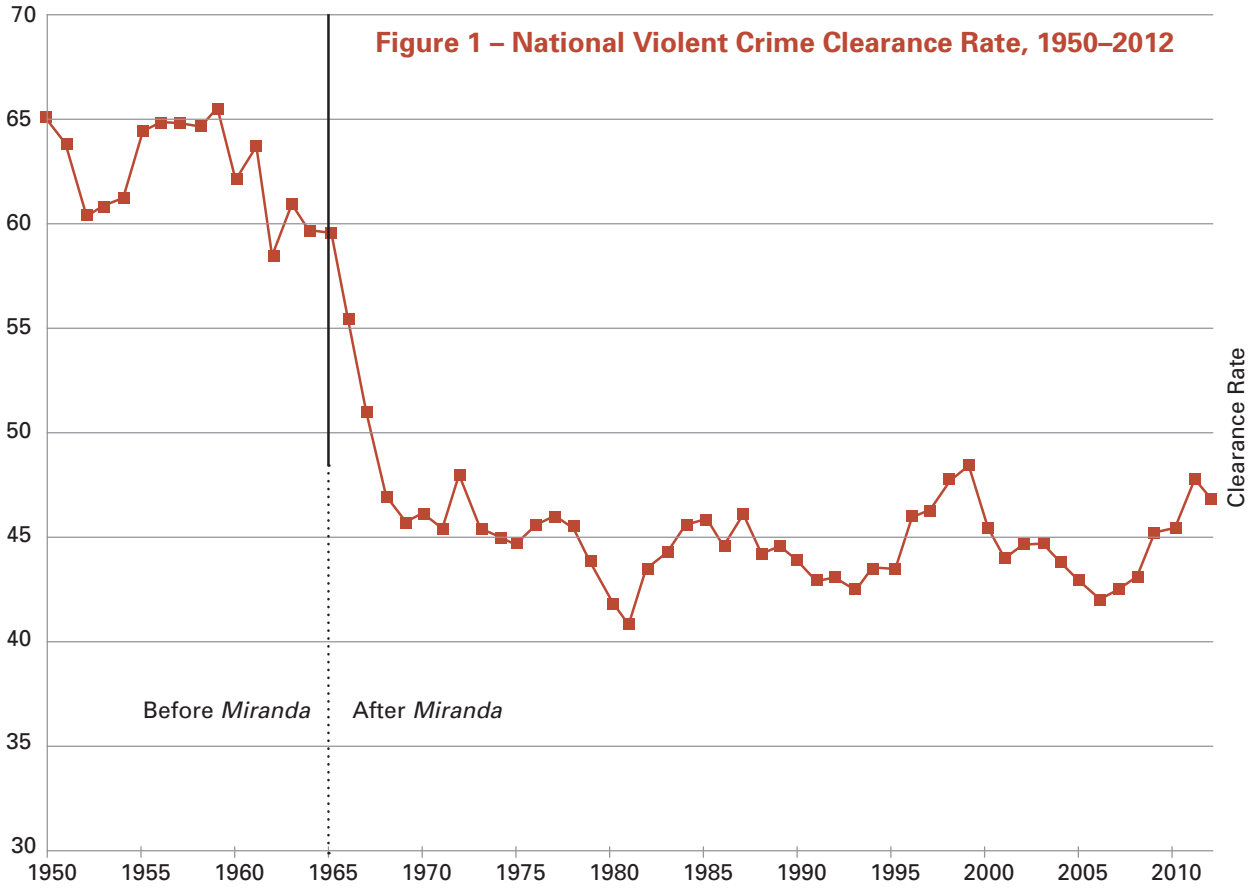

learned how to take advantage of the *Miranda* rules. We also quantify the number of lost clearances that appear to be due to *Miranda*, concluding that about 200,000 violent crimes and about 900,000 property crimes might be cleared each year without the *Miranda* requirements. Cassell & Fowles, *supra*, at 732.

My friend and colleague at the S.J. Quinney College of Law, Professor Amos N. Guiora, has recently written a very interesting book discussing the legacy of the *Miranda* decision. In *Earl Warren, Ernesto Miranda, and Terrorism* (Twelve Tables Press 2018), Guiora argues that Chief Justice Warren would pay scant attention to such empirical evidence of the calamitous effects that his narrowly divided (5–4) decision had on the nation. In this historical assessment, Guiora is likely correct. When he authored the decision, Chief Justice Warren blithely minimized the warnings of his dissenting colleagues. For example, Justice Harlan warned, "I believe the decision of the Court…entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell.…The social costs of crime are too great to call the new rules anything but a hazardous experimentation." *Miranda*, 384 U.S. at 504, 517 (1966) (Harlan, J., dissenting).

In reviewing *Miranda*'s legacy, Professor Guiora gamely attempts to credit *Miranda* with reducing police brutality. But the available data do not support any such linkage. For example, Professor Gerald Rosenberg has comprehensively reviewed the issue,

concluding that "[e]vidence is hard to come by but what evidence there is suggests that any reductions that have been achieved in police brutality are independent of the Court and started before *Miranda*." Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 326 (1991).

Professor Guiora also refers to *Miranda* as a "necessary evil." But the *Miranda* rules are not the only way to approach issues concerning police questioning. Indeed, in the *Miranda* opinion itself, Chief Justice Warren (at the suggestion of Justice Brennan) stated that the decision "in no way creates a constitutional straitjacket which will handicap sound efforts at reform" and that the Court "encourage[d] Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." *Id.* at 467. Just as in other endeavors of modern life, we have learned a great deal over the last fifty years that could be used to effectively reform the *Miranda* rules.

One thing that we have learned is that *Miranda*, if anything, exacerbates the problem of false confessions. *Miranda* offers essentially no protection to vulnerable innocent persons who erroneously fall under police suspicion, such as intellectually disabled suspects. Such persons typically eagerly waive their *Miranda* rights and may ultimately, in some rare cases, be induced to offer false confessions. On the other hand, as the clearance rate data above suggest, professional criminals are the most likely to invoke *Miranda* questioning cut-off rules, blocking any questioning whatsoever. As many academics who have closely studied *Miranda* have concluded, the upshot is that *Miranda*'s rules "shielded some savvy, guilty recidivists while doing little to protect the [intellectually disabled], juveniles, and other innocent defendants most likely to confess." Stephanos Bibas, *The Right to Remain Silent*, 158 U. PA. L. REV. PENUMBRA 69, 77 (2010). Indeed, it seems likely that by diverting judicial attention towards procedural issues of *Miranda* compliance and away from underlying "voluntariness" questions, *Miranda* has affirmatively harmed vulnerable persons who have given false confessions.

One solution to such problems is to videotape police interrogations, as many commentators have recognized. Electronic recording of interrogations allows later judicial review to more powerfully detect false confessions and inappropriate police techniques that are sometimes hard to review without an objective record. Interestingly, many police agencies (including Utah agencies) currently electronically record interrogations, subject to certain limited exceptions. Videorecording provides far more protection against coercive tactics and "false" confessions than the *Miranda* rules ever did.

In a case where police interrogation has been recorded, prosecutors in Utah and elsewhere should consider advancing parallel arguments to trial courts. In addition to the standard arguments about *Miranda* compliance or inapplicability, prosecutors should also argue that the *Miranda* regime is no longer necessary to satisfy the requirements of the Fifth Amendment. As noted above, *Miranda* itself encouraged the states to explore other ways to protect suspects' rights. Electronic recording is such a means. And, since 1966, a whole host of changes have occurred in American policing, such as greater training and professionalization, that means that any arguable need for such rules is much weaker today.

Excluding reliable evidence should always be a last resort. As Justice Lee recently explained in connection with the search and seizure exclusionary rule, "[I]ts bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *State v. Rowan*, 2017 UT 88, ¶ 52, 416 P.3d 566 (Lee, J., concurring). Where a defendant seeks to exclude his or her voluntary confession under *Miranda*, suppressing the confession can similarly lead to a miscarriage of justice. Contrary to Professor Guiora's suggestion, a court rule like *Miranda* that automatically and often arbitrarily excludes a confession, without regard to its reliability or voluntariness, by definition favors criminals over victims.

With its historical focus, Professor Guiora's article harkens back to the turmoil of the 1960s, when Chief Justice Warren engaged in what has to be regarded as the paradigm example of judicial legislation. But in the decades since Warren penned *Miranda*, the Supreme Court has repeatedly held that the *Miranda* rules are

not themselves constitutional rights but are mere "prophylactic safeguards" – presumably subject to appropriate modification by Congress or the states. To be sure, in one post-*Miranda* case, the Supreme Court rejected an argument that a sufficient alternative had been put in place of the *Miranda* rules. That was *Dickerson v. United States*, 530 U.S. 428 (2000), a case I argued to the Supreme Court. But in that case, the alternative to *Miranda* was, according to the *Dickerson* majority, nothing other than a federal statute authorizing a return to the pre-*Miranda* voluntariness rules. Videotaping, of course, is not something that was mandated (or even readily available) before *Miranda*. Thus, a prosecutor could make a very strong alternative argument that videotaping (along with other safeguards) serves as a legitimate substitute for the prophylactic *Miranda* requirements under the U.S. Constitution. And in Utah (as in many other states), the state constitution has never been interpreted as imposing the novel *Miranda* requirements as a matter of state constitutional law. *See State v. Leyva*, 951 P.2d 738, 743 (Utah 1997) ("'[T]his Court has never specifically held that *Miranda*-type warnings are required under the Utah Constitution'".) (citation omitted).

Videotaping deters genuine police misconduct more effectively than *Miranda* by creating a clear record of police and suspect demeanor during questioning. To be sure, police can turn off videocameras or deploy force off-camera. But if you were facing a police officer with a rubber hose, would you prefer a world in which he was required to mumble the *Miranda* warnings and have you give some form of waiver of rights (all proven by his later testimony)? Or a world in which the interrogation is videorecorded, where your physical appearance and demeanor during any "confession" are permanently recorded, where date and time are electronically stamped on the tape? Videotaping is the clear winner.

In closing, I agree with Professor Guiora that protecting constitutional rights is as important in 2018 as it was in 1966. But it is folly to think that the unprecedented rules Chief Justice Warren thought would best serve the country at the time should remain frozen in time as the only way to address constitutional issues involved in police questioning. More than fifty years later, prosecutors in Utah and elsewhere can now argue that, with more modern tools like videotaping often available and more professional police training for law enforcement officers, a different world exists. This legal regime still requires that police refrain from coercive tactics that obtain involuntary statements. But when police have obtained a clearly voluntary statement from a suspect as documented by videorecorded evidence, the technical *Miranda* rules should be regarded as superseded relics of an outmoded and harmful prophylactic regime.

POINT COUNTERPOINT

Miranda v. Arizona:
Pain Management: Protecting the Vulnerable

by Amos N. Guiora

Interrogations reflect an imbalance between the interrogator and suspect, a nitty-gritty confluence of fear, anxiety, and control.

My "counter-point" to Professor Cassell's thoughtful and well argued "point" reflecting path-breaking empirical research that has drawn, justifiably, wide commentary, focuses on interrogations from the suspect's perspective. That is in accordance with the essence of the holding in *Miranda v. Arizona*.

Chief Justice Earl Warren emphasized the vulnerability of the individual in the inherently coercive environment of an interrogation. For Warren, as for me, the power, importance, and centrality of *Miranda* is the focus on protecting the constitutional rights of the vulnerable individual. That is the theme of this counterpoint; I believe this approach most accurately represents what J Warren believed and wrote in as clear a language as possible. Warren's holding guaranteed the protection of a right guaranteed in the Constitution to an individual.

Any proposed weakening of *Miranda*, beyond the *Quarles* exception, would represent unwarranted evisceration; while body cams or any other technological tools are doubtlessly valuable, they must not come in the place of the interrogator's clear articulation to the suspect of his/her *Miranda* rights.

I am of the opinion that these words are amongst the most important ever penned in a Supreme Court decision. As simple as they are, they are majestic.

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?

Introduction:

To solve a crime, the interrogator needs information. The essence of police work is gathering information, collecting evidence, connecting various dots, and then determining who is responsible for violating the law. There is nothing magical about this. While contemporary methods are more sophisticated, more scientifically based and, hopefully, more objective than in years past, the critical interaction is between the two individuals.

As Earl Warren fully understood, that relationship is at the epicenter of criminal law and procedure. The interrogator wants the truth. That is the purest form of law enforcement in the ideal. What Warren feared was an interrogator who wants a confession and for the suspect to incriminate himself or herself and say, "I did it" regardless of the truth. That is an interrogator who coerces a confession from the suspect.

If there is one word that captures the interrogation paradigm it is "coercive." While the environment is not intended to resemble comfort and leisure, the question is to what degree does the suspect have to be coerced before confessing. The environment – in its totality – is coercive. Coercion is inherent to interrogation. The physicality is obvious and telling. The suspect is handcuffed. The suspect is accused of having committed a crime.

Miranda v. Arizona

Chief Justice Earl Warren *sought to protect the vulnerable*; he clearly understood the realities of the interrogation paradigm. Warren, based on his experiences as a District Attorney, was fully cognizant of the inherent imbalance between the interrogator and the suspect. As the opinion made clear, Warren recognized interrogations are inherently coercive.

His motivations were simultaneously simple and profound; simple in that he wanted to protect suspects, profound in that he imposed

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limits on how the nation state interacted with vulnerable individuals. That is, in protecting those suspected of criminal activity, Warren sent a clear message to law enforcement and society. That message, while focusing on the specific individual, also had powerful consequences regarding the larger society.

The opinion was not written in a vacuum; America in 1966 was in turmoil. The Harlem and Watts riots of 1964 and 1965 dramatically and violently highlighted profound anger, resentment, and social injustice. The Detroit and Newark riots in 1967 and the riots that followed the assassination of Dr. King in 1968 were extremely violent, resulting in significant loss of life, requiring intervention by the U.S. military. In between those two "book-ends," Earl Warren's Supreme Court imposed limits on law enforcement.

While law enforcement loudly complained that the decision "handcuffed" police officers, Earl Warren believed protecting the individual was paramount. The tension between these two perspectives must be acknowledged. It would not be an exaggeration to use the phrase "necessary evil" in describing how *Miranda* is perceived in certain quarters.

There is no indication Detective Carroll Cooley pressured or coerced Ernesto Miranda during the course of the interrogation. Arguably, that was a strategic decision by Warren: there was nothing unusual or extraordinary in how Miranda was interrogated; it was a run-of-the-mill interrogation conducted in the aftermath of a crime with nothing to indicate its uniqueness. Miranda was not subject to a violent, physical interrogation conjured up in images of sheriff deputies beating African-American suspects in the back seat.

Viewing the case in that context increases the power of the holding; were Miranda the victim of a back-seat beating then it would be possible to dismiss the opinion suggesting, "of course the suspect has to be protected; otherwise, he'll come within a whisker of a brutal death." That dismissiveness cannot be applied given how Cooley interrogated Miranda. The facts of Miranda's interrogation lent themselves to Warren's decision to "use" *Miranda* as the platform to extend *Escobedo*.

It is not by chance that Warren penned the opinion himself. Unlike his fellow justices, Warren had been elected to serve as district attorney and had intimate knowledge of the interrogation paradigm.[1] The opinion is neither complex nor sophisticated; it is written in a manner that any member of the public and law enforcement can easily understand. There is no hidden ball and no "between the lines" analysis required to comprehend its full import. This was a clear directive; this was not the time or place for nuance. The message was unequivocal.

For Warren, the most effective way to protect the suspect was to inform the suspects that they had the right to remain silent and that, if need be, an attorney would be provided. The obligation imposed on the interrogator was two-fold: to read the suspect the warning and to ensure that the suspect understood the rights granted. Whether the suspect chose to exercise the right or to "waive" was a personal decision. To be made by the suspect.

The decision represents recognition of the mistreatment of suspects throughout history. That is an extraordinarily important acknowledgment both for the specific suspect and for the relationship between the state and the individual. The decision is powerful on a micro and macro scale alike.

Protecting the suspect was essential.

There is no doubt Warren was fully aware of the injustices that had been visited upon suspects over the years. In establishing a rights-based interrogation regime, Warren was also protecting larger society from the consequences of confessions elicited from mistreated suspects. Warren was concerned about the lack of professionalism amongst police departments; he believed coerced confessions reflected laziness amongst police officers. In addition, coerced confessions resulted in wrongful convictions. The consequences from all perspectives were, for Warren, deeply troubling.

In establishing the *Miranda* warnings, Warren and the four justices who joined him took a clear and bold stand regarding interrogations. Admittedly long, the opinion explains the core issue in a manner that left no doubt as to the writer's intention. The language is neither soaring nor particularly elegant. The prose is not of a poet; Warren was neither bard nor man of letters. The directness conveys a powerful message to interrogators: ENOUGH.

Emphasizing the suspect's Fifth Amendment privilege against self-incrimination was the cornerstone of the decision; the "right to remain silent" is the practical, jurisprudential, and existential core of the opinion. For Warren, protecting that constitutionally guaranteed privilege was of the essence. It is not an exaggeration to suggest that, for Warren, it was sacrosanct. The opinion must be read accordingly.

The centerpiece of the decision was ensuring the suspect be protected from state agents.

That does not mean, as some have suggested, that Warren minimized harm caused to the victim of a crime. I believe that to be a spurious charge. One must not forget that Warren well understood victims' pain; his own father had been murdered. Warren was sympathetic to the victim; however, he differentiated between the victim's unquestioned harm and suffering and the individual suspected of having committed the crime in question. The difference is significant: the victim was clearly identified, the suspect but a suspect. Protecting the rights of the latter does not, in any way, trivialize or disrespect the suffering of the former. To suggest that Warren preferred one over the other or was more sympathetic to suspects than to victims is erroneous. It also significantly misses the point of the opinion and what was of grave concern to the majority. The opinion was neither victim "unfriendly" nor suspect "friendly." That is to miss the point. Rather, Earl Warren, as Chief Justice of the U.S. Supreme Court, sought to ensure that *basic constitutional rights* were protected in the interrogation setting and that law enforcement respected the rights of the suspect.

Below are excerpts from the opinion which Warren read in its entirety on June 13, 1966.

> The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.
>
> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
>
> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

> The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way.

Who is in Control: What Needs Protection?

Control is critical to understanding interrogation. Who controls, who is controlled. The struggle is intense, intensive, high-stakes, and constant. That is fair enough and not surprising. The question is whether the "game" is played within acceptable rules and boundaries.

As Warren wrote, interrogations were inherently coercive, and suspects had to be protected. Warren did not say "all" detectives violated suspect rights for that would be an unjustified exaggeration, casting unwarranted aspersions on the law enforcement community; he did, however, make it crystal clear that how interrogations were conducted had to change. And the change that was required had one intention: to protect the suspect whose rights, according to Warren, *must be protected*.

Did Warren anger detectives? Safe to assume. Were "clean" detectives made to feel "guilty"? Probably. Was the public angry? Certainly, a segment. No doubt about that.

In describing interrogations as coercive, Warren threw the gauntlet down.

For all the seeming fairness, protection, and process that appear to be in place, the reality is the following: The suspect exercises little, if any control, in the interrogation setting. That's just the way it is.[2]

That lack of control, the dependence on the interrogator, the inability to withstand pressure – whether real or imagined – is what defines the interrogation setting.

Protecting constitutional rights is as important in 2018 as in 1966.

Protecting a suspect's rights is as important in 2018 as it was in 1966.

Based on my research, I am convinced CJ Warren would wholeheartedly concur with both conclusions.

1. Justice Tom Clark served as an assistant district attorney, https://www.oyez.org/justices/tom_c_clark.
2. For more on interrogations, *see: Wrongful Convictions, Rights Violated During Police Interrogation*, YouTube (Nov. 16, 2014), https://www.youtube.com/watch?v=rM1bVvPTL6g; https://www.youtube.com/watch?v=Z-VW8Ldw6YI.

Ethical Considerations When Using Cloud-based Services

by the Utah State Bar Innovation in Practice Committee

Lawyers have used remote, third party services for many years to support their practices. For many years, law firms and in-house legal departments have routinely contracted with (1) "brick-and-mortar" warehouses to store work product, client files, and other documents, (2) third party delivery and courier services to deliver similar information internally and to third parties, and (3) financial printers and investment bankers to create documents, provide data rooms for due diligence, and otherwise assist in the creation, transmission, and storage of confidential legal documents. In all cases, lawyers have depended on these third parties to maintain the confidentiality and security of client information and other confidential legal information these service providers have access to or possess.

Over the past two decades, electronic and internet-based platforms and services have significantly expanded the role third parties play in the creation, transmission, and storage of legal documents and confidential client files. Early examples include email service providers and remote access services, such as Citrix, that have access to or temporarily possess client information but generally did not store or maintain such information for a extended period. In recent years, cloud-based services have proliferated. For this article, the term "cloud-based services" means the storage, retrieval, management, processing, or transmission of information by a third party with such services being provided remotely over the Internet, often in a shared infrastructure, multi-tenant environment. Current examples include services provided by DropBox, Amazon Web Services, the Microsoft Azure Cloud Platform, Gmail and Google Docs, DocuSign, and other companies that provide online billing functions, data rooms, e-discovery services, and document or case management services. The data stored, managed, or transmitted through these services include client information, opposing party documents, and other confidential information relevant to the delivery of legal services.

Cloud-based services offer meaningful benefits such as increased flexibility and ease of access to data, lower facility and overhead expenses, and enhanced security and data protection compared to the lawyer's in-house capabilities. However, there are risks associated with using these services that implicate the lawyer's ethical duties. For example, the terms of use governing cloud-based services may require the lawyer to grant the service provider a broad license to use all information provided in the service, including client information. Additionally, the lawyer is outsourcing the protection and security of confidential information to the service provider.

While the expansive embrace and adoption of cloud-based services and products within the legal community has arguably made moot the question of whether a lawyer is ethically permitted to operate her or his practice in this manner, lawyers still need to consider their ethical duties when using such services and products.

Confidentiality and Using Non-Lawyer Assistants

The use of cloud-based services directly implicates Rule 1.6 of the Utah Rules of Professional Conduct (Confidentiality of information), which states:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation ….A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.…

Comment 18 to Rule 1.6 provides that a lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties" but "unauthorized access to" or "unauthorized disclosure of" such information does not constitute a violation of Rule 1.6 if the lawyer "made reasonable efforts to prevent the access or disclosure."

The use of cloud-based services also directly implicates Rule 5.3 of the Utah Rules of Professional Conduct (Responsibilities

Regarding Nonlawyer Assistance), which states that with "respect to a non-lawyer employed or retained by or associated with a lawyer," the lawyer must "make reasonable efforts" to ensure that the non-lawyer's "conduct is compatible with the professional obligations of the lawyer."

Comment 3 to Rule 5.3 states that a lawyer may use third parties to assist the lawyer, including "hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information." However, the lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations.

> The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the non-lawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.… When retaining or directing a non-lawyer outside of the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the non-lawyer's conduct is compatible with the professional obligations of the lawyer.

Guidance for Use of Cloud-Based Services

Historically, the consideration charged by many cloud-based service providers consisted, either entirely or in part, of the customer granting the service provider a broad license to all the data created, transmitted, or stored by the service provider. The service provider could then aggregate, analyze, and ultimately monetize all the data it collected, including selling this data to third parties. Cloud-based service providers also have to deal with a higher risk of breaches and threats to confidentiality, from both hackers and insiders, when compared to the storage of tangible documents. In these regards, cloud-based services differed from traditional brick-and-mortar services.

Early on, thoughtful lawyers who read the user agreement or terms of use governing access to cloud-based services would not use such services because they would be licensing (or arguably selling) client information to the service provider, a clear violation of their ethical duties. Lawyers could also lose access to this data in the event of a breach by the lawyer or the bankruptcy of the service provider. Finally, lawyers would be entirely dependent on the third party for the security of its confidential information, which is especially troubling when many cloud-based service providers were newer companies with limited resources to prevent outside breaches by hackers or unauthorized access by insiders to its systems.

Over time, some sophisticated and mature service providers have addressed these issues. User agreement or terms of service were revised to provide license terms and access to customer data terms that are consistent with legal ethical duties. The security and protection of customer data by these companies is often now more robust than the lawyer's internal systems. However, not all companies have made these changes or investments, and as technology continues to develop at a rapid pace, the scope and types of cloud-based services and products continues to expand at a rapid pace. Lawyers need to be aware of their ethical duties when considering adopting or using cloud-based services.

The Utah State Bar has not provided any formal guidance or opinions for Utah lawyers regarding the use of cloud-based services. Bar Associations, Professional Ethics Committees, or Commissions, and analogous organizations of some states have reviewed and issued opinions on the use of cloud-based services

by lawyers.[1] The Committee on Small Law Firms of the New York City Bar prepared a detailed analysis of this issue in its *The Cloud and the Small Law Firm: Business, Ethics and Privilege Considerations*, published in November 2013. In all cases, the opinion or other ethical guidance approved the use of cloud-based services as long as the lawyer used reasonable care when doing so. While specific guidance varied from state to state, the guidance provided by states is generally consistent with the guidance provided by this article.[2]

Specific guidance in this area is consistently built on the foundation that a lawyer use "reasonable care" when using a cloud-based service or product. This standard is consistent with the comments to the Utah Rules of Professional Conduct referenced above. Because technology changes rapidly, it is impossible to provide universal and specific requirements for lawyers to consider when choosing and utilizing an outside provider for cloud-based services. To use "reasonable care," lawyers must invest time and resources to perform due diligence before using cloud-based services providers.

At a minimum, a lawyer should review the provider's terms of service, customer agreement, and/or usage policies and consider whether such agreement (i) complies with the lawyer's duty of confidentiality, (ii) provides that the license and ownership of all information provided to, stored by, or transmitted by the provider are consistent with the lawyer's ethical obligations, (iii) grants the lawyer appropriate rights in the event of a security breach or outside request for client information held by the provider, and (iv) grants the lawyer unlimited access to client information, even in the event of a dispute, termination of the relationship, or shut down of the provider's business. Additionally, a lawyer should consider the following when considering a cloud-based service provider in order to fulfill his or her ethical duties to exercise reasonable care. A lawyer could:

- Investigate whether the provider has implemented reasonable security measures to prevent or mitigate unauthorized or inadvertent disclosures (both internal and external), such as using firewalls, password protections, and encryption.
- Understand how the provider will handle the storage, security, and retrieval of client information.
- Require that the license to client information granted to the provider be limited to allowing the provider access to client information solely to provide the services the lawyer has contracted to receive.
- Require appropriate obligations of the provider governing confidentiality, security and notification of security breaches, recoverability methods, and the handling of subpoenas and access by third parties in relation to other legal processes.
- Seek to have access to client information in all circumstances (even in the event of a breach or termination of the relationship or the provider's business), and require that the provider must return and destroy all client information upon termination of the relationship in accordance with the lawyer's instructions.
- Use reasonable efforts to use reputable, established providers and investigate the provider's history and reputation, and its history in dealing with prior security breaches.
- Stay abreast of security safeguards both the lawyer and the provider should use that are designed to prevent unauthorized access to the client information or protect confidential information in the event of an unauthorized disclosure (considering both internal and external risks).

Conclusion

As technologies continue to evolve and advance, lawyers should conduct periodic reviews and regularly monitor existing practices to determine if the client information they are providing cloud-based service providers is adequately secured and protected, and provided in a manner that is consistent with legal ethical duties. The steps a lawyer should take in order to exercise reasonable care when using a cloud-based service will also evolve and develop. Individual lawyers and law firms will have unique circumstances and factors that should be considered when they balance the risks and benefits of using a particular cloud-based service in their practices and therefore, a "one-size-fits-all" set of guiding principles cannot be provided. Every lawyer should, however, approach this issue carefully and thoughtfully, and be able to demonstrate that he or she exercised reasonable care when using a cloud-based service.

1. *See* Ala. State Bar Office of General Counsel, Op. No. 2010-02 (2010); State Bar of Ariz. Ethics Comm., Op. No. 09-04 (2009); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Op. No 2010-179 (2010); Conn. Bar Ass'n Prof'l Ethics Comm., Informal Op. No. 2013-07 (2013); Fla. Bar, Op No. 12-3 (2013); Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines, Op. No. 11-01 (2011); Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Op. No. 207 (2013); Mass. Bar Ass'n, Op. No. 12-03 (2012); N. H. Bar Ass'n Ethics Comm., Op. No. 2012-13/4 (2012); N. J. Advisory Comm. on Prof'l Ethics, Op. No. 701 (2006); N. Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 842 (2010); State Bar of Nev. Standing Comm. on Ethics & Prof'l Responsibility, Op. No. 33 (2006); N. C. State Bar, 2011 Op. No. 6 (2012); Ohio State Bar Ass'n, Informal Advisory Op. No. 2013-03 (2013); Or. State Bar, Op. No. 2011-188 (2015); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Op. No. 2011-200 (2011); Vt. Bar Ass'n, Op. No. 2010-6 (2010); Va. State Bar, Legal Ethics Op. No. 1872 (2013); Wash. State Bar Ass'n, Op. No. 2215 (2012); State Bar of Wis., Op. No. EF-15-01 (2012).
2. *See* www.americanbar.org/groups/departments_offices/legal_technology_resources/resources_fyis/cloud-ethics-chart.html.

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The Transfer on Death (TOD) Deed: Utah's New Real Property Transfer Mechanism

by Rustin Diehl

FRAMEWORK, PRACTICALITIES, AND PITFALLS

Utah estate planning practitioners, real property practitioners, and business practitioners must consider the now available nontestamentary transfer on death (TOD) deed, a nonprobate transfer mechanism for real property transfers to designated beneficiaries. Previously, nonprobate transfers of real property could only be effected in Utah by funding the real estate to trust, by funding the real estate to other entities, or by unrecorded deed.

During the 2018 General Session, the Utah State Legislature passed H.B. 94, the Uniform Real Property Transfer on Death Act, embodied in Utah Code sections 75-6-401 to -419. The act is designed to provide a will substitute, similar to other beneficiary designation instruments, which allows an owner of real property to designate one or more beneficiaries who will automatically, and without probate, receive the property effective at the owner's death. *Id.* § 75-6-405. A TOD deed has retroactive effect, applying to any deed made before, on, or after May 8, 2018.

The Uniform Real Property Transfer on Death Act was enacted in fourteen jurisdictions prior to 2018 and was enacted in six additional states during 2018. NCCUSL Real Property Transfer on Death Act Enactment Status Map, *available at* http://www.uniformlaws.org/Act.aspx?title=Real%20Property%20Transfer%20on%20Death%20Act. Several other states also have non-uniform statutes for transfer of death deeds or different types of beneficiary deeds. The uniform act passed in Utah only after three attempts to reconcile concerns from attorneys, title companies, and recorders.

Attorneys who consider using a TOD deed as an estate planning tool should be familiar with (1) the rationale behind TOD deeds, (2) creation and revocation requirements, (3) limits and cautions in using TOD deeds, and (4) best practices in using TOD deeds. This article covers the first two of these and introduces a matrix of select issues; a subsequent article will cover the limits of, cautions for, and best practices with TOD deeds.

Rationale Behind the Transfer on Death Deed

TOD deeds mark an entirely new way for Utahns to transfer real property upon their death. Previously, Utah real property titled in the name of a decedent without a joint tenant required probate in order to convey the decedent's interest – even if the decedent made a bequest of the real property under a last will and testament. *Id.* § 75-3-102. Although Utah's probate process is simple in comparison to many jurisdictions, most people prefer to stay out of court to avoid potential conflicts, prevent delays, and maintain privacy. To get around Utah's probate requirement, many practitioners assisting real property owners counsel clients to transfer their real property into trusts because trusts do not require court authorization or probate in order to convey real property to a new owner. *Id.* § 75-7-813. Some unwary property owners use deeds as remedies to avoid probate and avoid hiring an attorney to form a trust.

In one such strategy, a property owner executes a notarized deed in favor of a loved one, often their spouse or children. The property owner does not record the deed, instead leaving the executed deed unfiled but kept "safe and tight" in a proverbial desk drawer, back pocket, or sugar bowl. Several risks make an unfiled, desk drawer deed a less-than-air-tight technique for testamentary transfer. The worst of these is the negating effect of a subsequently filed deed – and there are many reasons for which intervening deeds could be needed. Any deed could negate the potential effect of the unfiled, desk drawer deed to a loved one. This would make the subsequent recordation of the earlier-executed, but unfiled, deed ineffective under Utah's race-notice deed priority statute. *Id.* § 57-3-103.

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In another deed strategy rife with issues, property owners add a person onto the deed as a joint tenant with rights of survivorship. While this technique can successfully transfer the home while avoiding the probate process, property owners who file joint tenancy inter vivos deeds do so in the face of several serious risks and ongoing tax problems.

The risks of adding a non-spouse joint tenant to a deed include (1) increasing the potential for loss of the real estate at the hands of the joint-owner's creditors, (2) violation of a due-on-sale clause pursuant to a mortgage or trust deed note, (3) frequent failure to file federal gift tax returns, and (4) impairment of the transferees' ability to qualify for federal aid programs such as Medicaid or federal student aid. Potentially more serious, a lifetime gift causes the recipient to lose the benefit under Internal Revenue Code section 1014 of a step-up in basis of property acquired from a decedent, potentially increasing the taxable gains taxes due when the property is eventually sold. 26 U.S.C. § 1015. In summation, adding a non-spouse joint tenant to a property to avoid probate creates risks and typically generates a higher tax burden.

If a TOD deed is filed during the life of the property owner, no probate of the deed is required upon the death of the transferor under many circumstances. Because TOD deeds avoid the aforementioned pitfalls of inter vivos deeds, they are a superior technique for nontestamentary transfer of real property upon death.

At a higher level, TOD deeds can be seen as one part of a greater trend in the US and around the globe for the expansion of self-help procedures in legal matters. This trend is reflected in Uniform Probate Code section 6-101, which promotes enactment of statutes providing an asset-specific mechanism for the nonprobate transfer of land. In many low- or middle-income families, the family home is the most valuable asset. For some of these families, undertaking probate or forming a trust appear complicated and expensive. In these cases, TOD deeds may be an option to avoid probate.

During each of the previous three attempts to enact the Uniform Real Property Transfer on Death Act, various potential issues with the bill were raised. Many of the concerns centered around pitfalls that might cause clouded title or the potential for abuse in execution of the TOD deeds, such as coercion, undue influence, or lack of capacity. Others focused on the complications and issues with the automatic transfer of real property compared to other types of automatic property transfers. Because real property is subject to liens and encumbrances, deeds, and sometimes bespoke documentation, automatic transfers may not occur and it could become necessary to appoint a personal representative in any case.

As additional counterpoint to the rationale of providing simple, self-help legal remedies to low-income families, some practitioners suggest that many property owners will execute TOD deeds to avoid using a lawyer, unknowingly setting themselves up for title marketability problems or beneficiary disputes.

Those who hold the view that professional assistance is best also suggest that TOD deeds are a specious solution to a non-problem. They point out that Utah is already a Uniform Probate Law jurisdiction, so the perceived difficulty of probate here is a polemicized but false perception. Further, Utah law already permits other types of real property transfer techniques that can accomplish the same effect as a TOD deed.

While it remains to be seen how the benefits of TOD deeds or the concerns with these deeds will materialize in Utah over time, practitioners from Oregon and Washington, early-adopting jurisdictions of the TOD deed, have not reported seeing many problems yet. However, use of the TOD deed in estate planning provides a markedly different real property transfer regime and features than were previously available in Utah. Utah could experience a mix of benefits and issues from TOD deeds.

As a beneficial practice in estate planning, TOD deeds could be used to fund revocable trusts. Because TOD deeds survive the

recording of creditor interests in real property, they are a safeguard to avoid subsequent trust failure due to an inadvertent defunding of a revocable trust. A common scenario for the inadvertent defunding of revocable trusts happens during remortgage transfers out-of-trust. Additionally, where a non-owner-occupied property is subject to a mortgage, the TOD deed avoids uncertainties in federal statutes concerning due on sale clauses in the mortgage and/or mortgage note because the TOD deed is not effective until recorded. Garn-St. Germain Depository Institutions Act, 12 U.S. Code Ann. § 1701j-3. Utilizing a TOD deeds to fund non-owner-occupied real properties subject to mortgages into trusts or other entities, it is unlikely the bank will exercise the due on sale clause because no transfer is made under the TOD deed until the transferor's death. Utah Code Ann. § 75-6-413(2). The efficacy of using a TOD deed for delayed but durable trust funding is in trade-off with the advantages of using inter vivos deeds for currently effective trust funding during the disability of the property owner to avoid potential conservatorship.

Creation and Revocation of a TOD Deed

To make a TOD deed, a property owner need only name beneficiaries on a deed containing the essential required elements of a TOD deed. A property owner can also name an alternate beneficiary on a TOD deed to take the property if a designated beneficiary does not survive. *Id.* § 75-6-416. The uniform and Utah acts provide both a standard for forms of the TOD deed, as well as a standard for forms of TOD deed revocation to facilitate ease of use and make the TOD deed readily disseminate as an available remedy. *Id.* §§ 75-6-416, -417. In the preface to each form is a notice to the owner suggesting that the owner consult with a lawyer, and following each form is a list of common questions and answers about the form.

No sleeping TOD deeds are allowed. To make a TOD deed effective, the transferor must record the deed before the transferor's death in the county recorder's office of the county where the property is located. *Id.* § 75-6-409. However, the recording of the TOD deed is considered to have occurred at the transferor's death. *Id.* § 75-6-413(2).

The new act is careful to limit the effect of a recorded TOD deed so that no legal or equitable interest is created until after the transferor's life. *Id.* § 75-6-412(5). During the transferor's lifetime, the deed will not impair the property owner's rights, creditor's rights, or impair the transferee's or the designated beneficiaries' eligibility for any form of public assistance. *Id.* § 75-6-412. As with inter vivos deeds, a beneficiary of a TOD deed also takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. *Id.* § 75-6-413(2). It is also worth noting that a TOD deed transfers a property without covenant or warranty of title even if the deed contains a contrary provision. *Id.* § 75-6-413(4).

TOD deeds transfer the property in equal and undivided shares with no rights of survivorship among beneficiaries, unless a right of survivorship is expressly included. Utah Code Ann. § 75-6-413(1)(c). Where concurrent interests are specified, such as joint tenancy with rights of survivorship, but the concurrent interest lapses, the share of a designated beneficiary that lapses or fails is transferred proportionately to the other beneficiaries. *Id.* § 75-6-413(1)(d). These limitations on TOD deeds are in marked contrast with inter vivos deeds, where the descendants of a designated beneficiary can claim their share. The TOD deed statutory default is at odds with the will and trust default, embodied in Utah's probate code as per capita at each generation. *Id.* § 75-2-106(2).

A TOD deed must be acknowledged like an ordinary deed, and the capacity required for a real property owner to make or revoke a TOD deed is the same as that required to make a will. *Id.* § 75-6-408; *Id.* § 75-2-502. However, unlike a will, a TOD deed does not require a witness. *Id.* § 75-2-502. As the Comment to Uniform Probate Code section 6-101 explains, because the mode of transfer is declared to be nontestamentary, the instrument of transfer is not a will and does not have to be

executed in compliance with the formalities for wills, nor does the instrument need to be probated. The National Conference of Commissioners on Uniform State Laws states that in the context of TOD deeds, the requirement of acknowledgment fulfills at least four functions. First, it cautions a transferor that he or she is performing an act with legal consequences. Such caution is important where, as here, the transferor does not experience the wrench of delivery because the transfer occurs at death. Second, acknowledgment helps to prevent fraud. Third, acknowledgment facilitates the recording of the deed. Fourth, acknowledgment enables the rule that a later-acknowledged deed prevails over an earlier-acknowledged deed.

After making and recording a TOD deed, should the transferor or transferors later wish to revoke the TOD deed, they can do so in part or totality, and expressly or incidentally under subsections 75-6-411(1)–(2). The revocation can be made by a subsequently recorded TOD deed, inter vivos deed, or by other recorded instrument. In departure from the uniform act, Utah added that a TOD deed can be revoked by inconsistency of later deed. *Id.* § 75-6-411. Joint transferors should further note that a TOD deed of joint owners requires revocation by all owners, and revocation by one owner does not affect the interest or TOD deed as pertains to another joint owner. *Id.* § 75-6-411(2). Also, unlike a will, once recorded, the deed itself cannot be revoked by a "revocatory" act such as tearing up the deed or crossing it out. *Id.* § 75-6-411(3).

Upon death, a TOD deed will be effective unless an intervening Utah statute allows the deed to be set aside. Some of the situations in which a TOD deed could be set aside include: (1) a surviving spouse claimed the elective share (*Id.* § 75-2-205); (2) the designated beneficiary does not survive the transferor by 120 hours (*Id.* § 75-2-702); (3) the beneficiary kills the transferor (*Id.* § 75-2-803); or (4) the transfer is revoked by subsequent divorce (*Id.* § 75-2-804). In addition to the uniform statute, Utah requires that when recording a deed to transfer the property based on the TOD deed, an affidavit be recorded in in the office of the recorder referencing the TOD deed. *Id.* § 75-6-413(5).

Select Issues with Using a TOD Deed as a Stand-Alone Estate Plan

The following matrix of select issues with TOD deeds outlines some differences between trusts and TOD deeds as nontestamentary transfer devices. This visual model could serve as a resource for practitioners assisting clients to evaluate the relative efficacy of

Transfer on Death Deed vs. Revocable Trust

Matrix of Issues

Issue	Revocable Trust	Transfer on Death Deed
Need to sell property without 1-year delay after death?	Yes can sell immediately without probate	1 year delay unless file probate and Personal Representative waives estate claims
Lapse – Beneficiary deceased or potentially deceased?	Deceased beneficiary's descendants can receive beneficiary's share.	Designated beneficiary's share lapses and benefiary's descendants disinherited and cut-off.
Potential Contest against deed validity?	Trust with Pour-over will has greater protection from claims with formality of witness.	Less formality in execution could leave open to incapacity or undue influence claims.
Need full fiduciary authority to resolve property issues?	Trustee has the same authority to resolve property issues as an owner.	Designated beneficiary does not have authority to resolve real property issues until after transfer.
Ademption by Extinction	Subject to anti-ademption rules and beneficiaries can make up for gifts with other property	Not subject to anti-ademption; no make-up gifts if sold before
Conservatorship	Trustees can exercise ownership rights over property, avoiding the need for some conservatorships.	Conservatorship could be required if the real property owner becomes incapacitated.
No Warrantees	Trustees can convey property with prior warrrants and title insurance in effect.	Property passes with no warranties.
Encumbered Property	Trustee can deal with encumbered trust property	Resolving encumbrances may require probate to appoint a PR
Undesignated Property	All real and personal property can be assigned to trust to avoid probate	Personal property is not subject to TOD Deed.
Pretermission by Failure to Mention Beneficiary	Grantor can prevent pretermission by naming disinherited parties in the trust document.	There is no precedent for naming disinherited parties in TOD Deeds.
Large Numbers of Beneficiaries (5 or more)?	Simple, one-signature transfer by trustee.	Requires each beneficiary to sign for transfer.
Beneficiary may have creditors?	Can protect inheritance in spendthrift trust.	Beneficiary's creditor can take away the inherited property.
Beneficiary disabled or potentially disabled?	Can protect beneficiary's inheritance in trust without disqualifying from government disability program.	Inherited property may disqualify beneficiary from government disability and/or be spent down.
Underage Beneficiary?	Can protect property in trust.	May violate Transfers to Minors Laws or require guardian.

using TOD deeds compared to revocable trusts in estate planning. Some of the issues that are encountered when using a TOD deed are also dealt with when using a simple will for testamentary transfers of real property. Others of the issues are unique to TOD deeds. Part Two of this article will expand upon these select issues, to discuss considerations, problems, and palliatives arising from TOD deeds.

TRANSFER ON DEATH DEED CONSIDERATIONS, PROBLEMS, AND PALLIATIVES

Considerations under TOD Deeds

Utah's new Uniform Real Property Transfer on Death Act, embodied in Utah Code sections 75-6-401 to -419, creates a new real property transfer mechanism for potential use by Utah property owners. Part One of this article discussed the rationale for TOD deeds, as well as the process of formation and revocation of a TOD deed. At the conclusion of Part One, a table of issues associated with TOD deeds was introduced. This article will outline the issues associated with TOD deeds and suggest a few best practices for practitioners.

One-Year Disposition Delay Under TOD Deeds

To effect transfer under a Utah TOD deed, a probate proceeding to enforce liability can be commenced within one year after the transferor's death. Utah Code Ann. § 75-6-415(3). While the estate may expressly waive the estate's claim against the property, this would require filing a probate – thus negating one of the ostensible advantages of the TOD deed. *Id.* § 75-6-415(4). Beneficiaries who wish to sell property pursuant to a TOD deed within the one year probationary period face problems obtaining title insurance, a cause of marketable title problems, making it all but impossible for a third-party buyer to obtain a mortgage. The inconvenience from this delay and the need to file probate to reduce the delay under a TOD deed can both be avoided if the property owner instead transfers the property into a trust before death.

The Utah version of the Uniform Act adds further clarification that if outstanding debts are not satisfied during the one year period under subsection 75-6-415(3), liability for transfer falls on the estate alone. If property subject to creditors had been distributed before the one year period had run, a personal representative (PR) could be appointed and seek to recover the property for the estate (including for the benefit of the creditors). The PR would be responsible to try to recover the distributed property or its value, but if unable to do so it would not have breached its fiduciary duty and should not be liable. If multiple beneficiaries have priority to serve as the PR, all but one could waive the priority, or else the court will be required to pick one or more in a formal proceeding. *Id.* § 75-3-203(3).

Considerations with Joint Tenancy and Tenancy in Common Under TOD Deeds

If a transferor owns the property jointly (as a joint tenant) with one or more other owners who survive the transferor, then the property belongs to the surviving joint owner or owners with right of survivorship. *Id.* § 75-6-413(3). Practitioners should note that under the act, the definition of joint owners does not include a tenant in common. *Id.* § 75-6-402(5)(b). In the case of a TOD deed made by multiple joint owners (joint tenants), only all of the living joint owners can revoke the deed. *Id.* § 75-6-411(2)(b). However, when a joint owner passes away, the TOD deed can be set aside by a transfer made by the surviving joint tenant. In the common case of blended families where the spouses have concern about the surviving spouse cutting off the deceased spouse's children, joint tenancies within TOD deeds could be a problem if the surviving spouse decided to unilaterally sell the property or revoke the prior TOD deed.

Some trusts contain restrictions so that the surviving spouse cannot spend down the estate or give it away to the proverbial tennis pro, particularly where either spouse expresses concerns about surviving spouse's discretion over the remaining trust

assets. However, a downside to such restrictive trusts is the inability of the final devisees to receive an additional step-up-in basis when the second spouse passes away. Under a general power of appointment, the surviving spouse's unilateral ability to appoint the estate to their creditors or leave the estate under the will allows for a step-up in basis when the second spouse dies. 26 U.S.C. § 2041. However, the limits imposed on the surviving spouse under a more restrictive trust do not allow the surviving spouse to qualify for a step-up in basis. Thus, the basis at the time of the first spouse's death is carried over to the beneficiaries upon the second spouse's death without additional step-up. Under some circumstances, TOD deeds can trigger a similar basis issue.

Because the TOD deed provides for transfer to the joint owner upon the death of another joint owner under Utah Code subsection 75-4-413(4), the successor owner has the full powers over the property as required under Internal Revenue Code section 2041 to qualify for step-up in basis. However, a partial basis step-up issue could be brought about by several conditions of non-joint ownership in the TOD deed, such as (a) different beneficiaries between spouses, (b) revocation by only one spouse, or (c) the spouses failing to preserve tenancy in common when executing the TOD deed.

Because tenancy in common is the default in Utah, most practitioners have found that unwitting and unintentional tenancy in common between spouses is a common situation. Utah Code Ann. § 57-1-5. Spouses who are unknowingly tenants in common might unintentionally pass their separate interest to their beneficiaries upon their death under a TOD deed, subjecting the surviving spouse and the beneficiaries to locked-in basis, as well as a host of issues brought about by adding the burdens and liability regimes of multiple owners to the property. Where an unintentional tenancy in common exists between spouses or other parties pursuant to a TOD deed, property owners considering TOD deeds should take care to create and maintain a joint tenancy between themselves.

Although the TOD deed may be used as an alternative to joint tenancy with right of survivorship, maintaining a joint tenancy under a TOD deed could cause issues where creditors are concerned. Under a joint tenancy, the unsecured creditors of a deceased joint tenant have no recourse against the property or against the other joint tenant. Instead, the property passes automatically to the survivor, free of the decedent's debts. *See* Comment 5 to Uniform Probate Code § 6-102. If the debts cannot be paid from the probate estate, the creditor is out of luck. In contrast, under a Utah TOD deed, the property transferred under the deed is liable to the probate estate for properly allowed claims and statutory allowances to the extent the estate is insufficient.

Lapse under a TOD Deed can Cut-off Descendants of a Predeceased Beneficiary

The Transfer on Death Deed Act addresses issues of beneficiary failure by providing for automatic lapse. Gifts under TOD deeds are subject to lapse because the act provides that the interest of a beneficiary is contingent on the beneficiary surviving the transferor. Utah Code Ann. § 75-4-413(1)(b). Thus, if the beneficiary of the transferor were to predecease the transferor, the beneficiary's surviving descendants would not be entitled to a share of the property, in contrast to the per capita at each generation regime allowed in other transfer-on-death instruments under section 75-2-706. Instead, the other surviving beneficiaries would take the decedent's share. In the common case of a parent leaving the family home to their children, the automatic lapse provisions under a TOD deed would cut off the children of a deceased beneficiary, leaving the grandchildren of the transferor without a share of the family home. Effectively disinheriting the descendants of a beneficiary who predecease the transferor may be an undesirable effect for some people using a TOD deed.

Disallowed Class Gifts to After-born Children or Grandchildren Under a TOD Deed

It is a common feature in estate plans to make gifts to classes of individuals, including those born into the class after the gift is made. However, the act prohibits class gifts to people, instead requiring that each beneficiary be specifically named under a TOD deed. The National Conference of Commissioners on Uniform State Law Commission notes on section 5 of the act, which contains the class gift provisions of the statute, suggests that "dispositions containing conditions or class gifts, for example, may require a court proceeding to sort out the beneficiaries' interests." Utah's disallowance of this option would help to prevent some issues. Apropos, a transferor is not allowed to leave a gift "to all of my children" or to "all of my grandchildren." *Id.* § 75-6-405. For this reason, transferors who want to benefit unborn children or grandchildren, TOD deeds may not be an appropriate planning technique.

Ademption by Extinction Under a TOD Deed

Utah's default rule in regard to specific devises which are unavailable at the time of distribution is nonademption. *Id.* § 75-2-606. Unless the facts and circumstances indicate that ademption was intended, the specific devisee basically has a right to compensation equal to the value of the devise. *Id.* In contrast to this default, and in contrast to the Uniform Real

Property Transfer on Death Act, Utah's new TOD law provides that property subject to revocation of a TOD deed shall adeem. *Id.* § 75-6-411(5). Where ademption of a gift is often desired in the event that the property is sold before the transferor dies, the TOD deed's departure from the default rule could be desirable. However, practitioners should be careful to counsel clients using TOD deeds that if the property is transferred, the gift will adeem and fail so that the beneficiary receives nothing.

Powers of Attorney and TOD Deeds

The power of an agent to make or revoke a TOD deed on behalf of a principal is determined by the Uniform Power of Attorney Act, as indicated in the Comments on Sections 9 and 11 of the act in the Uniform Law Commissions Comments on the Act. As Utah is a Uniform Power of Attorney Act state, the agent would have the ability to make a TOD deed for a disabled person via the power of attorney. This is a marked departure from the court-guarded authority a conservator would wield to modify a will or make a trust for a disabled person. Clients uncomfortable with this authority should consider modifying their power of attorney to specifically eliminate this authority and prohibit agents from executing TOD deeds on their behalf.

A different, but important power of attorney consideration can arise with respect to TOD deeds and witnessing Advanced Healthcare Directives. Practitioners should note that being listed as a designated beneficiary on a TOD deed is sufficient to eliminate the potential transferee from being a witness of a health directive. *Id.* § 75-2a-117 (statutory form Part IV).

Use of TOD Deeds Could Increase the Chance for Conservatorships

After the incapacity of a TOD deed maker, a court-appointed conservator or a power of attorney would need to resolve all property issues as an agent for the incapacitated property owner. However, an agent under the power of attorney may not be able resolve some types of disputes with eminent domain, CERCLA, or tax disputes. Because the authority of an agent under a power of attorney is determined by the terms of the power of attorney document, the agent may or may not have sufficient authority to deal with certain matters. The authority of the agent may not be as clear as the authority of someone who holds actual title. A court may have to determine the scope of authority if the other party to the transaction has doubts. This could mean that the agent may need to file for a conservatorship

to step into the shoes of the property owner and resolve serious problems with the property. This issue could make the TOD deed more vulnerable than a trust with respect to resolving issues with real property.

TOD Deed Passes with No Warranties

The lack of warranties under a TOD deed under subsection 75-6-413(4) is a deficit in comparison to other transfers of property made by trustees or personal representatives after the death of the owner. Under the American Land Title Association (ALTA) policies, the term "Insured" generally also includes (a) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin; (b) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization; (c) successors to an Insured by its conversion to another kind of Entity; (d) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title: (1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured, (2) if the grantee wholly owns the named Insured, (3) if the grantee is wholly-owned by an affiliated entity of the named Insured, provided the affiliated entity and the named Insured are both wholly-owned by the same person or entity, or (4) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the insured for estate planning purposes. Excerpted policy language from ALTA® Owner's Policy (6-17-06), *available at* www.alta.org/policy-forms/. While it would seem that a beneficiary under a TOD deed is similar to an heir or next of kin under the ALTA policy, the act is specific that a TOD deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.

Property Issues Under TOD deeds

In most of my appointments with clients, when I ask whether they have designated beneficiaries with their retirement accounts or bank accounts, they are unable to remember. It is likely that TOD deeds will incur similar results. Because a later will to the contrary would not revoke a TOD deed, practitioners should take care to check clients' deeds prior to making a will with provisions for real estate disposition that will be set aside for ademption by extinction due to the TOD deed's priority over a later will. The rule in this act against revocation by will is also consistent with the uniform acts governing multiple-party bank accounts. *See* Uniform Probate Code § 6-213(b). Practitioners should advise clients that unless revoked or if the property is later sold or transferred out of the TOD deed-maker's name, the TOD deed will remain in force.

On the other hand, under the new act, "Property" means an interest in real property located in Utah that is transferable on the death of the owner. Utah Code Ann. § 75-6-402(8). Owners of real property should be aware that any deeded property can and should have a TOD deed recorded over it before the property owner's death or else probate may become necessary. It is common for property owners to omit dealing with some deeded properties. Whether the deeded property is a mineral right, water right, or even a timeshare with 1/54 deeded interest in a property, a deeded property in the name of a decedent could necessitate a probate to effectuate a transfer of the property to the heirs after death.

Additionally, a PR may be needed to deal with encumbrances or debts on property subject to TOD deeds. Because testator creditor resolution takes place independent of real property disposition, property inherited under a TOD deed could be inherited subject to encumbrances, debts, reservations, conditions, servitudes, loans, and mortgages. *Id.* § 75-6-413(2). If an inherited property is subject to such an encumbrance, who will represent the beneficiaries in resolving them? In some instances, it may be necessary to appoint a PR to negotiate issues and settlements with third parties.

Issues regarding priority of claims against beneficiaries and creditors may arise that are not clearly answered in the statute. The priority between the competing creditors is not clear where a TOD deed is made to transfer property to a beneficiary, but the estate has insufficient assets to pay debts and beneficiary also has a judgment or tax lien against them. In such an instance, does the beneficiary's creditors or the estate's creditors have priority to attach the property subject to the TOD deed upon death of the TOD deed maker? Or is the attachment of the lien subject to the right of the estate to recover in such a circumstance? It is possible that an unjust enrichment and constructive trust theory could be used to protect the ability of the estate to claim against the property first. In addition, the situation contemplated might possibly involve a voidable transfer, i.e., in constructive fraud of creditors, where the transferor is insolvent or rendered insolvent. If so, perhaps the transfer would be voided to the extent needed to pay estate creditors, who generally (some exceptions for exempt assets and family allowance) come first before beneficiaries anyway.

Other issues with TOD deeds can arise for underaged beneficiaries named on a TOD deed due to their lack of legal capacity to accept and hold the property. It could become necessary to appoint a PR to record property into the name of a custodian who will take title to and look after the minor's interests in the TOD deed property under Utah's Uniform Transfers to Minors Act. *Id.* § 75-5a-10.

Lastly, practitioners should also note that TOD deeds do not

dispose of personal property inside of a home or building. If the value of the personal property is less than $100,000, a small estate affidavit can be employed. *Id.* § 75-3-1201. Where property of the estate is valued more than $100,000, however, the use of a TOD deed in place of a fully-funded revocable trust could necessitate probate filings in order to dispose of the estate property.

Issues Particular to Naming Large Numbers of Beneficiaries Under TOD Deeds

Listing many beneficiaries on the deed could create disagreements about whether, when, or for how much to sell the property – this is simply the law of large numbers at play. Some beneficiaries may wish to sell, while others may want to hold the property as an investment though unable to purchase the interests of those who want to sell. Gathering beneficiaries into an escrow to amicably consummate the sale of the property is also made more difficult by large numbers of beneficiaries.

A TOD deed can name a broad array of beneficiaries. Under the act, a landowner may name any individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity. Utah Code Ann. § 75-6-402. As with charitable bequests, the Attorney General may have standing to step in and act for charitable beneficiary named on a TOD deed. *See id.* § 16-6a-1414. If the divergent interests of diverse beneficiaries under a deed become conflicts, probate or litigation may be required to resolve the issues.

Pretermission by Failure to Mention a Descendant on a TOD Deed Could Create a Rebuttable Presumption Against Disinheritance

As noted earlier, making a TOD deed requires the same capacity that is required to make a will. In any case where a beneficiary will be disinherited or left off of a TOD deed, or if the capacity of the TOD deed maker could be called into question, a transferor should take extra care to have a neutral third-party verify her capacity. As with a will, the transferor under a TOD deed "must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property." Restatement (Third) of Property (Wills and Other Donative Transfers), § 8.1(b).

A disposition under a TOD deed with a will in conflict could be brought to challenge for pretermission (inadvertently leaving off a descendant beneficiary). This could make a devise pursuant to a TOD deed a rebuttable assumption if a beneficiary were left off of the deed but provided for in the will. *See Estate of Jones v. Jones*, 759 P.2d 345 (Utah Ct. App. 1988).

Additional Precaution with TOD Acknowledgements

Where it is suspected that a beneficiary might contest a TOD deed's validity, enhanced acknowledgements to evidence care in execution of the deed should be taken. The TOD deed form in Utah Code section 75-6-416 does not include an acknowledgement for the signor of the deed, so appending an enhanced acknowledgement could be helpful. The enhanced acknowledgement might include language adopted from the acknowledgement of a will as follows:

> We, _____(Witness 1) and _____ (Witness 2), the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that _____ (Transferor) signs and executes this instrument with intent to transfer the real property referenced herein, and that they sign it willingly (or willingly directs another to sign for them) and that each of us, in the presence and hearing of the Transferor, hereby signs

> this deed as witness to the Transferor's signing, and that to the best of our knowledge the Transferor is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

While using this language in the deed acknowledgement is not an absolutely certain way to avoid contests against a TOD deed, it may be helpful in establishing capacity and intent.

Disclaimer of a TOD Deed Interest by a Designated Beneficiary

In a situation where receipt of real property by a designated beneficiary under a TOD deed is undesirable, the beneficiary could disclaim all or part of his interest in the property. *Id.* § 75-6-414. The disclaimer does not need to be recorded as a condition to be effective, though the disclaimer or something giving it effect will need to be recorded at some point. *Id.* § 75-2-801.

However, there is a question regarding whether a disclaimer or renunciation is a fraudulent transfer by the disclaiming person in cases where the transfer has retroactive effect relating back to inheritance under a TOD deed. *See* Utah Code Ann. § 75-2-801. Most states have found no transfer where the statutory requirements for disclaimer have been met. David B. Young, *The Intersection of Bankruptcy and Probate*, 49 So. Tex. L. Rev. 351, n. 254 (2007); *Dyer v. Eckols*, 808 S.W. 2d 531 (Tex. App. 1991); *Tomkins St. Bank v. Niles*, 537 N.E.2d 274 (Ill. 1989). However, some states treat disclaimers as transfers subject to fraudulent transfer law either by statute or case law. *See, e.g., Stein v. Brown*, 480 N.E.2d 1121 (Ohio 1985) (actual intent to defraud a present or future creditor); *Succession of Neuhauser*, 579 So.2d. 437 (La. 1991) (same); *Kalt v. Youngworth (In re Kalt's Estate)*, 108 P.2d 401 (Cal. 1940) (superseded by subsequent statute) (same).

Once the beneficiary can receive the property under a TOD deed, an issue exists as to whether a disclaimer otherwise allowable should be allowed in such circumstances. The problem is that if an intervening lien or levy were filed prior to disclaimer, the disclaimer would constitute the retroactive dispossession of a creditor's property right if the disclaimer were given effect. Additionally, whether a disclaimer will be effective under the Bankruptcy Code fraudulent transfer provisions at 11 U.S. Code § 548, or the strong-arm provisions at 11 U.S. Code § 544, turns on applicable state law. *See In re Sanford*, 369 B.R. 609 (Bankr. 10th Cir. 2007) (under 11 U.S. Code § 548 there would be no transfer for fraudulent conveyance purposes where state law disclaimer relation back applied). Practitioners should note that an effective TOD deed or beneficiary deed has, in at least Colorado, been treated as a transfer for less than fair market value, thus triggering the period of ineligibility where it is in favor of someone to whom transfers are not allowable. *See* Colo. Rev. Stat. § 15-15-403. While the TOD deed is not effective until death of the transferor under Utah's act, Utah Code subsection § 75-6-412(4), it is not clear whether the beneficiary could lose eligibility for government disability benefits because of disclaiming the TOD deed property interest after death of the transferor.

Foreign Property Owner Issues

The home jurisdiction of the TOD deed makers is an important consideration. Federal and possibly state transfer rules and regulations still apply to real property transfers under TOD deeds – especially rules and regulations involving the treasury department and taxing authorities. The estate of foreign persons attempting to dispose of US property under a TOD deed will find that buyers report the disposition to the Internal Revenue Service pursuant to the US Foreign Interest in Real Property Tax Act (FIRPTA). It might also be necessary to file an income tax return with the IRS to report any transfer tax obligation. Although estate taxes seem distant for most taxpayers with the sunsetting higher exemption rates under the Tax Cuts and Jobs Act, estate taxes apply heavily to nonresident aliens. The US estates of nonresident aliens face estate taxation on property in excess of $60,000. If a foreign national, non-US-domiciliary passes away, it may be necessary to open an estate to deal with these reporting and taxation issues.

Divorce Division

The question may arise as to whether the real property subject to a TOD deed should be divisible between spouses under the general equitable division rules in divorce. The answer is yes, provided that the property is marital property and not the separate property of one of the spouses. Since the transfer to the designated beneficiaries only occurs on death, the property remains in the name of the spouse and thus is subject to potential division under the divorce rules.

Conclusion

The transfer on death or TOD deed is Utah's new nontestamentary technique for nonprobate transfers of real property. The property owner chooses beneficiaries, and the property will pass to them upon the owner's death – unless certain subsequent events prevent the property from passing. While the TOD deed was developed as a means of reducing reliance on attorneys for real property transfers, the use of a TOD deed includes many pitfalls that may cause the transfer to fail to meet the property owner's intent.

In Memoriam

Ronald C. Barker
September 28, 1927 – July 10, 2018

It is with heavy hearts that we announce the passing of a colleague, mentor and friend, Ronald C. Barker. Ron started college when he was 16 years old and was drafted near the end of World War II. He became a CPA in 1950 and was admitted to the Utah State Bar in 1955.

For 63 years Ron was a sole practitioner of Barker Law Office, LLC and worked until the day before he died at the age of 90. Upon his death at the VA hospital, staff called out "fallen soldier" and all who were there thanked him for his service.

He was truly devoted to his many clients over the years and loved the law. Ron had many landmark cases. He was tenacious but a gentleman with his colleagues. He always told opposing counsel "we can fight about the issues but not with each other." He was professional and respectful in all aspects of his life.

What an honor and a privilege to have been able to work with such a brilliant man and learn from him. Ron was one of the great legal minds of Utah and will be deeply missed.

Thank you Ron for your service in the military and in the legal profession.

Maria Clifford
Ronald C. Barker's Paralegal for 20 years

Appellate Highlights

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

Editor's Note: *The following appellate cases of interest were recently decided by the Utah Supreme Court, Utah Court of Appeals, and United States Tenth Circuit Court of Appeals. The following summaries have been prepared by the authoring attorneys listed above, who are solely responsible for their content.*

UTAH SUPREME COURT

State v. Wilder, 2018 UT 17 (May 15, 2018)

The defendant in the underlying criminal case was convicted of one count of aggravated sexual assault and one count of aggravated kidnapping. He argued on appeal that these two convictions should have merged pursuant to *State v. Finlayson*, 2010 UT 10, 994 P.2d 1243. The Utah Supreme Court **repudiated the common-law merger test set forth in Finlayson, and held that the controlling test for merger is set forth in Utah Code subsection 76-1-402(1).**

Potter v. South Salt Lake City, 2018 UT 21 (June 5, 2018)

In this appeal from a summary judgment order dismissing residents' claims challenging South Salt Lake City Council's decision to close a portion of two streets, the Utah Supreme Court **clarified and revised the standard for establishing prejudice when challenging a land use decision.** "[A] party challenging a land use decision is not required to prove that the city's decision 'would have been different' absent the violation of city law." "Instead, it is enough for the challenging party to show that there is a reasonable likelihood that the legal defect in the city's process changed the outcome of the proceeding."

Mounteer v. HOA for the Colony, 2018 UT 23 (June 5, 2018)

In a dispute over a snow removal contract, Mounteer argued that the HOA had waived an insurance requirement by making payments. The HOA countered and pointed to an anti-waiver provision. At trial, the jury found the HOA had breached the contract and had implicitly waived the anti-waiver provision. In reversing the Utah Supreme Court held that **a party may implicitly waive an anti-waiver provision through its conduct, but there must be clear intent to waive both the underlying provision and the anti-waiver provision.**

State v. Stewart, 2018 UT 24 (June 12, 2018)

The defendant was charged with participating in a pattern of unlawful activity in violation of Utah Code §§ 76-10-1601 to -1609. The district court granted defendant's motion to dismiss this charge, concluding that it could not be based on crimes that the State could not separately charge because the statute of limitations on them had run. On interlocutory appeal, the Utah Supreme Court reversed, concluding that **the Pattern of Unlawful Activity Act does not prevent the State from using evidence of acts on which the statute of limitations has expired to prove a pattern of unlawful activity.**

Rodriguez v. Kroger, 2018 UT 25 (June 12, 2018)

In this appeal from a final judgment following a jury trial in a slip and fall case, the Utah Supreme Court evaluated the effect of the Liability Reform Act on liability based on a nondelegable duty. The jury had allocated 5% of fault to Smith's, no fault to the company Smith's contracted with to clean its floors, 75% to the individual that company contracted with to perform the cleaning, and 20% to the plaintiff. The district court refused to enter the plaintiff's proposed judgment, which included judgment against Smith's for 80% of the damages claim on the basis Smith's had a nondelegable duty to keep its premises in a reasonably safe condition for business invitees, and thus should bear the independent contractor's 75% of fault. On appeal, the supreme court reversed this ruling, holding **the LRA does not preclude a judgment against one defendant that incorporates another defendant's fault as a result of a breach of a non-delegable duty, a form of vicarious liability.**

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

Colosimo v. Gateway Community Church, 2018 UT 26 (June 26, 2018)

In a wrongful death suit brought by the parents of a young man electrocuted while trespassing on a church's roof due to the negligent installation of an electric sign, the supreme court clarified a distinction between a property owner's knowledge requirement to establish a duty to trespassers versus a duty to children. **While the court held that two instances over a decade of known trespass were insufficient to put the church on notice of constant or regular trespass as required by the dangerous activity doctrine, those two instances may be sufficient to show that the church had notice that children would be likely to trespass on its roof under the attractive nuisance doctrine.**

Jensen v. Intermountain Healthcare, Inc., 2018 UT 27 (June 26, 2018)

In this malpractice action, the Utah Supreme Court held that **the four-year limitations period in the Utah Healthcare Malpractice Act operated as a statute of repose,** but that a separate provision tolling the statute of limitations during the pre-litigation review process applied to the four-year statute of repose.

Gables v. Castlewood, 2018 UT 28 (June 29, 2018)

The plaintiff filed a motion for leave to amend its complaint in this construction defect case to add a new party as a defendant. By the time the plaintiff filed the complaint the 6-year statute of repose had run on the claim. Plaintiff conceded that its amended complaint did not relate back under Utah R. Civ. P. 15(c), but it argued that it was timely because the motion for leave to amend was filed within the statutory period. The district court agreed with that argument and denied the new party's motion for summary judgment. The Utah Supreme Court reversed, holding that **the claims against the new party were time-barred because an action is "commenced" only by the actual filing of the complaint, not by filing a motion for leave to file it.**

UTAH COURT OF APPEALS

True v. Utah Department of Transportation, 2018 UT App 86 (May 10, 2018)

Despite recognizing a significant change in case law that had occurred after the district court's grant of summary judgment, the Utah Court of Appeals held that the Trues had an opportunity to raise the argument in a post-trial motion,

and by failing to do so, could not raise the argument on appeal. This case also provides a thorough description of the preservation requirement and the policies behind it.

Palmer v. St. George City Council, 2018 UT App 94 (May 24, 2018)

Palmer, a St. George police sergeant, was suspended without pay for violation of a city policy. The appeals board upheld the suspension, but failed to make any findings of fact or otherwise explain the basis for affirming. The Utah Court of Appeals held that the appeals board exceeded its discretion by failing to make findings of fact supporting Palmer's suspension for violating city policies. Notably, it also held that **the failure to provide discovery relating to other suspensions was a violation of Palmer's due process rights because it denied her the ability to establish her prima facie case that the city had acted inconsistently in imposing sanctions.**

State v. Williams, 2018 UT App 96 (May 24, 2018)

The court of appeals reversed the defendant's criminal convictions and remanded for a new trial based on irregularities that occurred in the State's juror examination. The court concluded that it was plain error for the district court to allow the State to use juror examination to preview and argue its case, explaining how child sex abuse cases are reported, investigated, and proven at trial and coaching the potential jury members on how they should evaluate the evidence. The court held that **the true purpose of juror examination is to determine whether biases and prejudices will interfere with a fair trial if a particular juror serves in it, and that it is improper to use juror examination as a tool to indoctrinate the jury on a party's argument or bolster anticipated witness testimony.**

Young Resources Limited Partnership v. Promontory Landfill LLC, 2018 UT App 99 (June 1, 2018)

In this real property dispute, the plaintiff argued that the district court erred in concluding that the statute of limitations applied to claims to quiet title and for specific performance. Affirming, **the court of appeals rejected the plaintiff's characterization of its claims as true quiet title actions,** because the party seeking relief did not claim to hold existing title to or possession of the property, but instead sought affirmative relief in the form of voiding a prior transfer to a third party.

Kirkham v. McConkie, 2018 UT App 100 (June 1, 2018)

Affirming the district court's grant of summary judgment in favor of the defendants, the court of appeals held that **expert testimony was required to prove liability on a legal malpractice claim arising out of a petition to modify child support,** when the average juror would not know the standard of care expected of a family law attorney in that particular context.

Moshier v. Fisher, 2018 UT App 104 (June 7, 2018)

The court of appeals held that **the four-year statute of limitations applied to the plaintiff's claim for breach of contract because he had not alleged any misconduct specific to the contract and the substance of his claim was professional negligence.** The court also affirmed the district court's ruling that plaintiff did not establish circumstances warranting application of the discovery rule to delay triggering the statute of limitations.

Simons v. Sanpete County, 2018 UT App 106 (June 7, 2018)

In an analysis of the public duty doctrine, the court of appeals held that Sanpete County was immune from liability for a car

accident resulting from a deer carcass being left in the road. **Because Sanpete County's liability was allegedly based on its failure to notify the Highway Patrol after it had been notified of the deer, and the county had neither created nor increased the danger that previously existed, the county had not acted affirmatively and could not be found liable under the public duty doctrine.**

Federated Capital Corp. v. Abraham, 2018 UT App 117 (June 21, 2018)

The district court entered summary judgment in favor of the defendant in this breach of contract case on the basis the claims were barred by Pennsylvania's four-year statute of limitations, which applied under the borrowing statute. On appeal, the plaintiff argued that the defendant failed to properly plead her statute-of-limitations defense, and thereby lost the right to pursue that defense because the defendant did not specify the statute on which the defense was based. The court of appeals held the plaintiff had waived this argument by failing to raise it in the district court. However, **even if plain error review was available for the plaintiff, the defendant was entitled to rely on the statute of limitations defense because she identified the specific statute she was relying on in her motion for summary judgment and the plaintiff had the chance to respond to that argument,** which is "all that is required."

State v. Apodaca, 2018 UT App 131 (June 28, 2018)

In this appeal of convictions for aggravated kidnapping and robbery, the defendant argued that incriminating statements made to detectives were coerced and obtained in violation of Miranda. The decision contains a detailed summary of different arguments and standards applicable to cases involving claims of involuntary confessions. **Although the detectives violated *Miranda*, the district court did not err in allowing the statements to be used for impeachment purposes, where the totality of the circumstances demonstrated that the statements were voluntary.**

10TH CIRCUIT

United States v. Kahn, 890 F.3d 937 (May 17, 2018)

Kahn challenged the seizure of his assets, arguing he was unable to retain an attorney of his choice with the remaining funds. The Tenth Circuit **clarified a prior decision and held that in order to have access to frozen assets for representation, the defendant must (1) show that he has insufficient unseized funds to afford reasonable representation by an attorney of his choice and (2) make a prima facie showing that the grand jury erred in its determination that the frozen assets arose out of the commission of the alleged offense.**

Perry v. Durborow, 892 F.3d 1116 (June 12, 2018)

This § 1983 case involved a claim that the sheriff was responsible for the detainee–plaintiff's rape under a theory of supervisory liability. The Tenth Circuit reversed a denial of qualified immunity, holding the district court had erred in concluding the law was clearly established "without first identifying in its order a case where an officer acting under similar circumstances was held to have violated the Eighth or Fourteenth Amendments." **Although the plaintiff had identified a case involving similar claims against a sheriff, there were key factual differences that precluded relying on that case for the clearly-established-law prong of qualified immunity.**

Family
LAW

Don't Forget the Parenting Plan

When parties file for divorce or paternity actions which involve minor children, the statutes indicate that the filing parent shall submit a proposed Parenting Plan, which Plan essentially serves as a guide to a proposed custody and parent-time arrangement between separating parents.

The statutes regarding Parenting Plans set the parameters for the litigation. While the filing of a proposed Parenting Plan is mandated, it is often forgotten by practicing family law attorneys, generally as an oversight, but can be highly damaging to one's case.

What is a proposed Parenting Plan? U.C.A. §30-3-10.7(2) states that a "Parenting Plan" means a plan for parenting a child, including allocation of parenting functions, which is incorporated in any final decree or divorce.…"

In addition, U.C.A. §30-3-10.7(3) indicates that a Parenting Plan is to help maintain a loving relationship between parent and child, attend to the daily needs of the child, assist the child in his educational endeavors, and provide financial support for the child.

For all Divorce matters, Petitions for Paternity, custody disputes, and all other claims that involve custody and parent-time of minor children, a party shall file a *Parenting Plan* at the onset of his or her pleadings. *See* U.C.A. §30-3-10.8. The statute indicates that if a party is requesting either joint legal custody of minor children and/or joint physical custody of minor children, a proposed Parenting Plan shall be filed with the original pleadings. *See* U.C.A. §30-3-10.8.

Utah Code Annotated 30-3-10.8(1) states that "In any proceeding under this chapter, including actions for paternity, a party requesting joint custody, joint legal or physical custody, or any other type of shared parenting arrangement, shall file and serve a proposed Parenting Plan at the time of the filing of their original petition or at the time of filing their answer or counterclaim."

Given the express term that a party "shall" file a proposed Parenting Plan with his or her original pleadings, the remedy to later cure the failure to file a Parenting Plan is slim to none. Should a party request to amend his pleadings to include a Parenting Plan is governed by Rule 15(a)(2) of the Utah Rules of Civil Procedure.

Rule 15(a)(2) of the Utah Rules of Civil Procedure states that "(A) party may amend its pleading only with the Court's permission or the opposing party's written consent. The party must attach its proposed amended pleading to the Motion to permit an amended pleading. The Court should freely give permission when justice requires."

A highly disputed custody case often can be prolonged for more than one year. As such, if a party fails to file a proposed Parenting Plan and certifies the case to Trial, the litigant has a decreased chance of being allowed to amend his pleadings, given the closeness to Trial. While the Court has authority to grant a party relief to amend his pleadings under Rule 15(2) U.R.C.P., many Courts deny a party the right to amend his pleadings due to untimeliness.

In sum, filing a proposed Parenting Plan at the onset of legal proceedings is vital when seeking an award of joint physical and/or joint legal custody of minor children.

U.C.A. §30-3-10.8(1) requires that a party file a proposed Parenting Plan at the onset of custody cases. In addition, U.C.A. §30-3-10.8(5) requires that the proposing party file a Verified Statement that the proposed Parenting Plan is filed in good faith. Furthermore, U.C.A. §30-3-10.9 indicates that the objectives of the Parenting Plan are as follows:

- Provide for the child's physical care
- Maintain the child's emotional stability
- Provide for the child's changing needs as the child grows and matures in a way that minimizes the need for future modifications to the Parenting Plan
- Set forth the responsibilities of each parent
- Minimize the child's exposure to harmful parental conflict
- Protect the best interests of the child.

Next, what are the required provisions that are mandated to be included in the Parenting Plan?

Pursuant to U.C.A. §30-3-10.9(2), the Parenting Plan should include provisions for resolution of disputes between parents. The Parenting Plan should also include allocation of decision-making-authority between parents. In regards to decision making, many final Orders indicate that the parties should consult with one another regarding important decisions for the children relating to education, medical, religion, extracurricular activities, and the like.

In summary, don't forget the guide to the wilderness, as the Parenting Plan is the guide to family law litigation.

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Utah Rule 702, the Scientific Method and the Search for Court Room Truth

by Kenneth Lougee

In *State v. Clopten*, 2015 UT 82, 362 P.3d 1216, the Utah Supreme Court reviewed the admissibility of expert eyewitness testimony. *Id.* ¶¶ 46–56. The court made an important distinction between the procedure of admitting reliable scientific testimony under Rule 702 of the Utah Rules of Evidence and the scientific evidence itself. "Even our lengthy discussion of eyewitness memory science in *Clopten I* is five years old and we expect that some of the scientific findings on which *Clopten I* relied have already been called into question by subsequent research. We would not have expected otherwise when *Clopten I* was decided." *Id.* ¶ 53; *Clopten I*, 2009 UT 84, 223 P.3d 1103.

The court's conclusion recognizes that we live in an era of ever increasing scientific knowledge. Under Rule 702(c), evidence meets the threshold showing of reliability if the evidence is "generally accepted by the relevant expert community." Utah R. Evid. 702(c). What is generally accepted science yesterday may not be accepted science today. The court expressed the conviction that today's accepted scientific evidence will not be sufficient tomorrow. And recognition of scientific change is a good thing. Otherwise, we would still be burdened by scientific racism, eugenics, and social Darwinism. All of them were considered good science in the courts of the past century.

Consider the seminal federal case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The minor children and their parents claimed that a drug, Bendectin, caused birth defects known as "reduced limb syndrome." *Id.* at 582. Bendectin reduced maternal nausea in the first trimester of pregnancy. *Id.* There never was a study of side effects in a controlled population. *Id.* Plaintiffs argued that Bendectin was chemically similar to an earlier anti-nausea drug, Thalidomide. *Id.* at 583. Thalidomide was known to cause reduced limb syndrome. *Id.* This Supreme Court decision stressed the now familiar criteria of peer review, publication, the known or potential rate of error, and submission to the scrutiny of the scientific community as the framework of admissibility of scientific evidence. *Id.* at 593–94.

Merrell Dow decided the costs of defending its drug outweighed the expected sales. The drug was withdrawn from the market. The removal resulted in conclusive proof that Bendictin did not cause reduced limb syndrome. There were as many reduced limb cases after the drug was removed as there were when it was on the market. In exonerating Bendictin, science provided a definitive answer to causation.

Repressed memories of sexual abuse show the same scientific change. The Utah Supreme Court held that repressed memories of sexual abuse could toll the statute of limitations until such time as the victim recovered memory of the events. *Olsen v. Hooley*, 865 P.2d 1345, 1348 (Utah 1993) "Memory repression is a psychological process that actively prevents a memory from being recalled." *Id.*

Shortly after this decision, there was a legal counter attack. Accused sexual abuse perpetrators sued the psychologists and therapists who had aided individuals in recovering false memories. By the turn of the twenty-first century, the phenomena of repressed memories disappeared entirely from therapeutic literature. *See* Kenneth S. Pope, *Pseudoscience, Cross-examination, and Scientific Evidence in the Recovered Memory Controversy*, 4 PSYCHOL. PUB. POL'Y & L. 1160 (1998).

Where does scientific uncertainty leave lawyer and judges? The problem is that lawyers and judges must make decisions in the here and now. They can not wait for a decade to allow future science to sort out all of the issues. Therefore, there is inherent risk that the evidence presented to a fact finder will turn out to be wrong.

Judges could deny admissibility of any theory that sounds fishy. The commentary to Utah Rule 702 warns against such sloppy thinking.

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Judges are to apply "rational skepticism" to scientific claims. This does not mean that a judge should admit only scientific evidence that is free of controversy. There will be controversy, contradictory expert claims, and claims that a court would not think possible. For example, our court of appeals upheld statistical evidence of the reduction in milk production caused by stray electrical currents. *Gunn Hills Dairy Props., LLC v. Los Angeles Dept. of Water & Power*, 2012 UT App 20, ¶¶ 49–50, 269 P.3d 980.

Rational skepticism requires an open mind comfortable with the scientific and technological changes of the age. This is difficult for lawyers. We are trained to look to the analogous past. However, the scientific past is an inadequate guide to the scientific future. When I went to university in the late 1970s, computer science students would punch holes in cards and wait until two in the morning to get computer time to run their elementary programs. Forty years later, I have cases involving computer forensics and the mysteries of cloud computing. Lawyers and judges must not be intimidated by the new and unusual. How, then, do we evaluate scientific evidence? There are some criteria that are helpful to the bar and bench.

First, there really is junk science that should not be admitted. For example, there is the discredited claim that vaccines cause childhood autism. There has never been epidemiological evidence to support this notion. It was invented by a discredited British doctor who has lost his medical credentials. The medical journal that originally published it, *The Lancet*, has disclaimed the autism article. The theory is kept alive by celebrity anecdote, but it does come to court. When the theory was subjected to the rules of evidence, it was found wanting. The United States Court of Federal Claims in an extensive trial rejected this claimed cause of autism. *Cedillo v. Sec'y of Health & Human Servs.*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010). Without epidemiological support, these claims should have been dismissed earlier.

For evidence to be helpful to the jury, the scientific evidence must be reliably applied to the facts of the case. This is demonstrated by a recent Utah Supreme Court opinion. In *State v. Lopez*, 2018 UT 50, 417 P.3d 116, the question was whether the victim was murdered or committed suicide. In order to bolster the evidence of murder, the prosecutor called a qualified psychologist to testify that the victim was not suicidal. *Id.* ¶ 1. In preparing his testimony, the witness used a widely available scientific tool which allows for the prediction of suicidality. *Id.* ¶ 10. The problem, however, is that the method was used to diagnose live patients and not forensically evaluate deceased individuals. *Id.* ¶ 24. "Dr. Bryan never discussed whether he could accurately identify those factors in someone he had never interviewed, let alone someone who was incapable of being interviewed." *Id.* ¶ 26.

The court was undoubtedly right in rejecting the evidence. Dr. Kay Redfield Jamison, perhaps today's foremost psychological expert of mood disorders and accompanying suicidality, explains that

> psychological states, complex motives, and subtle biological differences are difficult enough to ascertain in the living: determining their existence, or the role they may play in those who die by suicide, is something else again. Inevitably, the research literature on suicide reflects the complexities, inconsistencies and shortcomings to our understanding.

Kay Redfield Jamison, *Night Falls Fast: Understanding Suicide* (1999).

Another tool in determining good from bad science is the purpose for which the study or test was made. Some tests have been designed specifically for litigation and thus have not been subjected to academic or industrial testing. For example, in a case predating present Utah Rule of Evidence 702, evidence was rejected because the method of study had never been applied outside of litigation. *Haupt v. Heaps*, 2005 UT App 436, ¶ 21, 131 P.3d 252.

> Indeed, Haupt's own experts confirmed that the SLR Method is novel. Randle obtained his Masters of Business Administration in 1967 and has been actively involved in the fields of economic theory and business valuation since that time. He has authored numerous articles in his field, taught at the university level, and been designated as an expert on forensic economics in numerous legal proceedings. Despite this impressive experience and training, Randle had never seen the SLR Method used as a valuation tool and did not recognize

> it as such. The trial court did not abuse its discretion in concluding that the SLR Method was novel.

Id.

Daubert also focuses upon theories that have not been scientifically accepted. While publication and peer review are not essential to admissibility in federal courts, "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Daubert v. Merrell Dow Pharms, Inc*., 509 U.S. 579, 593 (1993).

Similar distinctions remain under current Utah Rule of Evidence 702(c). There, if the method, the facts, and the application of the facts to the testimony are accepted by the relevant scientific community, the evidence is considered to have met the initial threshold showing required by the rule. The commentary provides:

> The concept of general acceptance as used in section (c) is intended to replace the novel vs. non-novel dichotomy that has served as a central analytical tool in Utah's Rule 702 jurisprudence. The failure to show general acceptance meriting admission under section (c) does not mean the evidence is inadmissible, only that the threshold showing for reliability under section (b) must be shown by other means.

Utah Rule of Evidence 702 (advisory committee note).

For example, in *State v. Griffin*, 2016 UT 33, 384 P.3d 186, analysis of mitochondrial DNA was admissible when the method used was generally accepted in the relevant scientific community. *Id*. ¶ 47. Particularly important was reliance upon two equations that had been cited in peer reviewed literature and were routinely relied upon by experts in the field. *Id*. ¶ 49. General acceptance in the scientific community is not always dispositive but in evaluating scientific testimony it is a good place to begin.

Further, an important consideration in both state and federal courts is whether the expert providing scientific testimony employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field of inquiry. *U.S. v. McPhilomey*, 270 F.3d 1302, 1313 (10th Cir. 2001). Under Utah Rule 702(b), the proponent of the expert testimony is to make the threshold showing of reliability of both method and reliable application of method to facts. This would entail the same scientific rigor found in federal law. In other words, a courtroom expert must be the same as an expert in an academic setting.

We need to remember that legitimate science follows a method. "Scientific methodology today is based upon generating hypotheses and testing them to see if they can be falsified; indeed this methodology is what distinguishes science from other fields of human inquiry." *Daubert*, 509 U.S. 579 at 593 (citation and internal quotation marks omitted). We should always ask the simple question, "Can other scientists reproduce the same result?" If other scientists cannot reproduce the result, we should view the evidence with skepticism.

Lawyers and judges can understand the arguments in published scientific literature. There are accessible tools. For example, the current issue of the "Federal Manual on Scientific Evidence" is written in language understandable to lawyers. It includes annotations to cases involving the latest scientific learning.

Reading scientific literature requires familiarity with statistics. We need to know "relative risk" with "confidence intervals." How likely is a result to fall within a calculated range of possible outcomes? If the confidence intervals are 95%, the scientist is telling us that 95 times out of 100 the true risk will fall within his confidence intervals. Is the relative risk considered statistically significant? Does the data support a conclusion that the claim result is the familiar "more likely than not?" There is also the concept of power. Did this study include enough subjects to enable the calculation of confidence intervals? Many times, small studies claim great things without the power to create confidence in the conclusion.

Hall v. Florida, 134 S.Ct. 1986 (2014), is an example of when judges properly applied statistics. Five members of the United States Supreme Court comprehended that IQ tests did not reflect a single number but rather a range of numbers which may reflect a capital defendant's IQ. *Id*. at 2001.

> Intellectual disability is a condition, not a number. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability. *See* APA Brief 17 ("Under the universally accepted clinical standards for diagnosing intellectual disability, the court's determination that Mr. Hall is not intellectually

disabled cannot be considered valid").

Id. (additional internal citations omitted).

It is commonly believed that the dissenting justices did not understand the concept of confidence intervals. Therefore, to them, Mr. Hall's IQ was seventy-one, and only seventy-one, and not a range of numbers between sixty-six and seventy-six.

Of course, the dissent was statistically and medically wrong. When statistical or epidemiological proof is offered, courts must distinguish between association and causation. Association means that events happened at the same time. For example, statistically children usually show signs of childhood autism around the time that they receive their MMR shots. The anecdotal association proves nothing. In order to move from association, the law uses a set of non-exclusive factors that allow the court to find causation from a statistical or epidemiological study. Many times, these factors are called a Bradford-Hill analysis. While the Federal Manual on Scientific Evidence does not use the term "Bradford-Hill" the concepts are the same. It is perhaps instructive to set out the factors upon which the proponent of scientific testimony should be prepared to present evidence.

- **Temporal Relationship.** If an exposure causes disease, the exposure must have occurred before the disease develops.
- **Strength of the Association.** How high is the calculated relative risk? The higher the relative risk, the greater the likelihood that the relationship is casual.
- **Is there a Dose-Response Relationship?** Generally higher exposure to the risk should result in higher incidence of disease.
- **Have the Results been Replicated?** Again, one of the scientist's greatest tools is the replication of his results by others.
- **Is the Association Biologically Plausible?** Is the result consistant with current scientific or medical knowledge?
- **Have Alternative Explanations been Considered?** Has the scientist been open in exploring other reasons for the phenomena? Are there good reasons for rejecting those explanations?
- **What is the Effect of Ceasing Exposure?** As in *Daubert*, when the exposure ceased, reduced limb syndrome did not disappear.
- **Does the Association Exhibit Specificity?** Asbestos causes Mesothelioma. On the other hand, Agent Orange (a defoliate used in the Vietnam War) is alleged to cause a wide variety of unrelated symptoms. Congress reached a political solution in spite of the lack of scientific evidence. All servicemen who were physically in the Republic of South Vietnam are deemed to have suffered harm from Agent Orange. Congress did the same with the Utah victims of downwind radiation exposure. Proof of a residence in designated counties at the right time means that the person will be compensated for a wide range of cancers which may or may not be related to radiation.
- **Are the Findings Consistent with Other Relevant Knowledge?** Lung cancer goes up and down with the rate of smoking. This is strong evidence for causation.

The expert in *Gunn Hills* properly relied upon a Bradford Hill Analysis. In any event, application of these factors should not trouble the bar or bench. They are concepts that we use in ordinary life to make our daily decisions and are completely free from jargon.

Lawyers and judges must be humble with regard to changing science. We do not know everything. Sometimes we don't know what we don't know. We are intimidated by scientific jargon. Yet, we should trust our evidentiary tools. Utah Rule of Evidence 702 and Daubert give the legal system the ability to sort out the junk science. If lawyers and judges use those Rules as evidentiary tools, the system gets current scientific evidence right. Likewise, the system will adapt to future scientific advances provided lawyers and judges remain committed to life-long learning of an ever-changing world.

Threats and Extortion: Walking the Ethical Line

by Keith A. Call and Taylor P. Kordsiemon

We both have older brothers, which means we know a thing or two about threats – especially on the receiving end. Under threats of a "knuckle sandwich" and various other forms of intimidation, we have surrendered toys, food, control of the TV, and countless other things. We have also experienced witness tampering in the court of family affairs.

As lawyers, we should not threaten opponents with "knuckle sandwiches," but it is undeniable that threats are a crucial component of litigation and negotiation. Attorneys regularly threaten to file suit, move for sanctions, take a case to trial, or request punitive damages. The art of threatening has a long and storied history in the legal profession, and it is widely regarded as one of the most effective means of negotiating.

It is possible, however, for lawyers to take the threatening tactic too far. To avoid serious consequences, such as a bar complaint, lawyers should be aware of the ethical considerations surrounding such threats.

Threatening Frivolous Litigation

Utah Rule of Professional Conduct 3.1 says that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law." Thus, attorneys are explicitly forbidden from filing non-meritorious claims. But what about threatening to file them?

While threats to instigate litigation can occur in a variety of settings, one of the most common forums is in demand letters. The primary purpose of a demand letter is to persuade an opponent into settling a dispute under threat of pending litigation. Such threats are commonplace, and an "attorney is entitled to warn the opposing party of his intention to assert colorable claims, as well as to speculate about the likely effect of those claims being brought." *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 80 (2d Cir. 2000). This holds true even when the threat is made in an offensive and uncivil manner. *Id.* at 79 (holding that a threat to subject an opponent to the "legal equivalent of a proctology exam" is not grounds for sanctions).

It is less clear, however, whether demand letters threatening frivolous litigation are permissible, but Utah courts have issued a few decisions that have some bearing on the matter. In *Avco Financial Services, Inc. v. Johnson*, 596 P.2d 658 (Utah 1979), the Utah Supreme Court held that a threat of baseless litigation can satisfy the compulsion element of a duress claim. *Id.* at 660. The court held that a jury could find duress where "plaintiffs, when they brought the action against [the defendant], knew that their allegations were unfounded; or their intent was not to pursue the action, but to force a more favorable settlement than originally agreed upon, knowing that defendants could not defend it because of economic pressure." *Id.* The court also quoted the Minnesota Supreme Court, stating, "one has no right to threaten another, in order to accomplish an ulterior purpose, with a groundless action." *Id.* (internal quotation marks omitted) (quoting *Wise v. Midtown Motors*, 42 N.W.2d 404, 408 (Minn. 1950)).

In a different case, Justice Christine Durham criticized the majority opinion for upholding "alienation of affections" as a viable tort

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in Utah. *Nelson v. Jacobsen*, 669 P.2d 1207, 1223 (Utah 1983) (Durham, J., concurring in result and dissenting). One of her many concerns was that the majority's rule would incentivize plaintiffs to extort payments from potential defendants through threats of groundless alienation of affection claims. *Id.* at 1227.

Other states seem to agree with Justice Durham that threats of frivolous litigation can constitute extortion. *See, e.g., State v. Hynes*, 978 A.2d 264, 270–71 (N.H. 2009) (upholding an attorney's extortion conviction for sending letters to beauty salons demanding $1,000 to settle baseless sex discrimination claims). The federal courts, however, have been more reluctant to treat any litigation threats as extortion. *See, e.g., United States v. Pendergraft*, 297 F.3d 1198, 1205–08 (11th Cir. 2002) (finding no wrongful conduct under the Hobbs Act where individual threatened to sue a public entity and support the lawsuit with fabricated evidence).

Given the above, attorneys should refrain from threatening suit unless they believe that their clients are entitled to the relief threatened. This is especially true when dealing with an unrepresented opposing party. *See* San Diego Cty. Bar Ass'n Ethics Op. 1978-6 (finding that attorneys cannot threaten to file frivolous counterclaims against a pro se plaintiff to induce plaintiff to drop his claims).

Threatening Criminal Prosecution

Clients engaged in bitter civil conflicts are often happy to air an opponent's dirty laundry, so it is not hard to imagine a situation where threats of criminal charges could be used to one's advantage. Landlords seeking overdue rent may desire to use their knowledge of a tenant's illicit drug use to encourage payment. A spouse may threaten to reveal incriminating secrets to get a leg up in divorce proceedings. The possibilities are endless.

While there used to be a Rule of Professional Conduct that explicitly forbade threatening criminal prosecution to gain an advantage in a civil matter, it is omitted from the current version of the Rules. *See* Kate A. Toomey, *Practice Pointer: The Rule Against Threatening Criminal Prosecution to Gain an Advantage in a Civil Matter*, 15 Utah B.J. 12 (Dec. 2002). There are, however, still several rules relevant to any threats made during negotiations. *See* Utah R. Prof. Conduct 4.1, 8.4. "[T]hese rules exhort attorneys to engage in honest, fair play in their dealings with people other than their clients." Kate A. Toomey, *supra* at 12.

The removal of the explicit rule regarding threats of criminal prosecution was cause for some confusion in the legal community. In 2003, the Utah State Bar Ethics Advisory Committee issued an opinion on the following question: "May a lawyer threaten to present criminal charges against an opposing party or witness during negotiations in a private civil matter?" Utah State Bar Ethics Adv. Op. Comm., Op. No. 03-04, ¶ 1 (2003).

Given how serious instigating criminal charges against an opponent is, the answer to whether an attorney may threaten such may surprise many: "[It] is not per se unethical for a lawyer to threaten that the client may pursue criminal charges against an adverse party. . . ." *Id.* ¶ 2. Threatening to pursue criminal charges is at least "sometimes permissible under the Utah Rules of Professional Conduct." *Id.* ¶ 8. But there is a catch. In order for such a threat to be ethical, two conditions must be satisfied: (1) the civil and criminal matters must be related, and (2) the threat must not constitute extortion. *Id.* ¶ 7.

The requirement for the threatened criminal charge to be related to the underlying civil action is easily understood. The example of a landlord threatening to reveal a tenant's drug use to induce payment of overdue rent would likely not satisfy this test. The question of what does or does not constitute extortion, however, requires some explanation.

What conduct qualifies as extortionate is "determined by the facts on a case-by-case basis." *Id.* ¶ 9. That being said, there are examples of clearly extortionate attorney behavior. For example, an extortionate threat was made when a New Hampshire civil rights lawyer publicly threatened city officials with serious criminal charges. *Id.* ¶ 10. An ethical violation also occurred when a plaintiff's lawyer sent a letter to opposing counsel threatening to send the local prosecutor documents that would incriminate the defendant unless the defendant paid overdue rent. *Id.* If the misconduct is severe enough, an attorney could even face criminal consequences. *See* Utah Code Ann. § 76-6-406 (defining "theft by extortion").

Not all threats to instigate criminal charges are extortionate though, or else it would not be "sometimes permissible." *See* Utah State Bar Ethics Adv. Op. Comm., Op. No. 03-04, ¶ 8 (2003). Before moving to permissible threats, however, a couple of points should be made. First, it is clearly unethical to threaten pursuit of frivolous criminal charges. Second, one may not threaten to file ethical complaints against opposing counsel unless certain demands are met because attorneys have a duty to report any misconduct "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness." Utah R. Prof. Conduct 8.3.

While the above examples are helpful in detailing what type of conduct is forbidden by Utah's ethical rules, they do not offer much guidance on permissible threats. The ethics opinion explicitly says that threatening criminal charges is sometimes permissible, but it is difficult to imagine how such conduct is ever not extortionate.

Such threats may be proper when a lawyer "cannot avoid addressing conduct by another party that is both criminal and tortious." Utah State Bar, Ethics Adv. Op. Comm., Op. No. 03-04, ¶ 8 (2003) (citation omitted) (internal quotation marks omitted). For example, where counsel for a corporation discovers that an employee has embezzled funds, "it is counterproductive to prohibit the lawyer from discussing with the employee the possibilities [of having the employee pay back the money without the adverse publicity that a criminal trial would bring]." *Id.* (alteration in original) (citation and internal quotation marks omitted).

Other jurisdictions have also found vague threats that "'all available legal remedies will be pursued' unless satisfactory settlement is promptly forthcoming" are not, in themselves, ethically improper. State Bar of Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 1991-124 (1991).

Finally, while threatening to instigate criminal charges may not always be proper, there is no ethical problem if a lawyer agrees to refrain from presenting criminal charges as part of a settlement. *See* Utah State Bar, Ethics Adv. Op. Comm., Op. No. 03-04, ¶ 6 (2003). Attorneys may not, however, agree to refrain from filing ethical complaints against opposing counsel, because doing so would violate the duty to report under Utah Rule of Professional Conduct 8.3. *See* Utah State Bar, Ethics, Adv. Op. Comm., Op. No. 16-02, ¶ 7 (2016).

Conclusion

Threats are a good and necessary tactic frequently employed by litigators during negotiation. If lawyers wish to threaten criminal charges against an opponent, however, they must be sure to remain on the right side of the line separating threats from extortion. To do so, attorneys should refrain from threatening frivolous litigation when making settlement demands. Furthermore, attorneys should not threaten criminal prosecution to gain an advantage in a civil matter unless the charges are directly related to the civil case and the conduct by the other party is both criminal and tortious, making it counterproductive to avoid discussion of potential criminal charges.

A Question Of Procedure: Can a Party to a Criminal Case Take Civil Depositions in That Case?

by Jeffrey G. Thomson, Jr.

Introduction

Over forty years ago, the Utah Supreme Court held that the Utah Rules of Civil Procedure could not be used to take depositions in a criminal case or, for that matter, in anything "pertaining to discovery…in criminal cases." *State v. Nielsen*, 522 P.2d 1366, 1367 (Utah 1974). To this day, that holding, at least in the context of the part addressing the taking of a civil deposition in a criminal case, has seemed fairly established, well settled, and putatively understood among most members of the Utah Bar. And this has been so even after the 2005 Utah Supreme Court decision in *State v. Gonzales*, 2005 UT 72, 125 P.3d 878, which held, in the context of addressing the other part of the holding in *Nielsen*, that the civil rules of procedure could be used in some discovery matters in criminal cases like in determining the notice requirements for the issuance of a subpoena.

However, in the author's recent practical experience, the question of whether a civil deposition can be taken in a criminal case – one part of the holding in *Nielsen* – seems to be reemerging, thus renewing the relevancy of the topic and rendering a review of the law in this area appropriate. What is more, the author has seen the *Gonzales* decision cited as the authority supporting this suggested proposition. After all, the *Gonzales* decision did say in a broad verbal stroke that "there now exists no prohibition against using the rules of civil procedure to inform discovery in a criminal matter." *Id.* ¶ 36.

So, did *Gonzales* impliedly undo and overturn *Nielsen*? More specifically, because the question of this article concerns the taking of depositions in criminal cases, because Rule 81(e) of the Utah Rules of Civil Procedure applies the rules of civil procedure to criminal cases under certain circumstances, and because Rule 30 of the Utah Rules of Civil Procedure provides for the taking of depositions, can parties to a criminal case now, under the *Gonzales* decision, take civil depositions in the criminal case?

This article concludes that a careful reading of Rule 81(e) of the Utah Rules of Civil Procedure, Rule 14(a)(8) of the Utah Rules of Criminal Procedure, and the Utah Supreme Court's decisions in *Nielsen*, *Gonzales*, and *Parsons v. Barnes*, 871 P.2d 516 (Utah 1994), answers this question in the negative. Depositions in criminal cases are permitted only under the "narrow circumstances" set forth under Rule 14(a)(8) of the Utah Rules of Criminal Procedure. *Id.* at 519. Even though the *Gonzales* decision acknowledges that the civil rules of procedure may apply in some matters pertaining to discovery in criminal cases, the civil rules still do not apply to the taking of depositions in them, leaving intact the part of *Nielsen's* holding "particularly" addressing depositions. *Nielsen*, 522 P.2d at 1366.

The Interaction Between Criminal and Civil Procedure

The lines between harmful conduct society legislatively labels as criminal and wrongful conduct a private person calls civil – that is, the divisions and distinctions between substantive criminal and civil law – are sometimes blurry. Undoubtedly, there is overlap in these two fields of law. A breach of contract, for example, can become a theft or a fraud at some indefinite point along the spectrum of the law.

In the state of Utah, rules of civil and criminal procedure have been around for a long, long time, even from Utah's territorial days. *E.g., Cast v. Cast*, 1 Utah 112, 115 (1873); *United States v. Cannon*, 7 P. 369, 376 (Utah 1885), *aff'd*, 116 U.S. 55 (1885). Unsurprisingly, just as substantive criminal and civil law intermingle from time to time, a glimpse into the kitchen sink of criminal and civil procedure reveals a similar admixture. This procedural blending, however, finds a more definite whisk in Rule 81(e) of the Utah Rules of Civil Procedure.

Rule 81(e) of the Utah Rules of Civil Procedure

Rule 81(e) states: "These [civil] rules of procedure shall also

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govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement." This interplay between the rules of procedure, however, did not always exist. The Utah Rules of Civil Procedure, which replaced the Code of Civil Procedure previously located at Title 104 of the Utah Code, were promulgated and adopted by order of the Utah Supreme Court on November 30, 1949. Utah R. Civ. P. vi (1950 ed.). They went into effect on January 1, 1950. *Id.* And they were largely "patterned after the Federal Rules of Civil Procedure " *Bichler v. DEI Systems, Inc*., 2009 UT 63, ¶ 24 n.2, 220 P.3d 1203.

Rule 81(e), however, was not among the originally adopted civil rules. Rather, "Rule 81(e) was adopted by the Supreme Court on January 20, 1972." Utah Code Ann. 1953 Replace. vol. 9B, Comp. Notes, Utah R. Civ. P. 81(e), 456 (1977). This rule, moreover, did not have a federal counterpart "covering this subject matter." *Id.* And, paradoxically, the first appellate decision to even cite Rule 81(e) was the 1974 decision in *State v. Nielsen*, 522 P.2d 1366 (Utah 1974), which rendered the recently adopted "Rule 81(e) inapplicable," entirely prohibiting the use of "the Rules of Civil Procedure pertaining to discovery…in criminal cases." *Id.* at 1367.

State v. Nielsen

The Utah Supreme Court reached this conclusion not because it found some issue with Rule 81(e). Quite to the contrary, the Utah Supreme Court so decided because it correctly interpreted and applied the rule. In *Nielsen*, the criminal defendant wanted "to take depositions of various witnesses." *Id.* at 1366. In support of his position, the defendant cited the civil Rule 30(a), which then and now governs the taking of civil depositions upon oral questions, and the newly adopted Rule 81(e) of the Utah Rules of Civil Procedure. *Id.* at 1366–67. Rule 81(e) allows a rule of civil procedure, such as Utah Rule of Civil Procedure 30, to supplement the rules of criminal procedure if "there is no other applicable statute or rule" and if there is no "conflict with any statutory or constitutional requirement."

The Utah Supreme Court had been asked to address two issues in *Nielsen*: "whether or not [1] the defendant was entitled to pursue the Utah Rules of Civil Procedure relating to discovery and [2] particularly the claimed right of the defendant to take depositions of various witnesses. *Nielsen*, 522 P.2d at 1366. In applying Rule 81(e), the court first found that "[t]he taking of depositions in criminal cases [was] governed by two statutes," namely, sections 77-46-1 and 77-46-2. *Id.* at 1367. Importantly, at the time of *Nielsen*, criminal procedure was governed by the Code of Criminal Procedure located at Title 77 of the Utah Code; the Utah Rules of Criminal Procedure had not yet gone into effect. Section 77-46-1 provided: "'When a defendant has been held to answer a charge for a public offense he may, either before or after an indictment or information, have witnesses examined conditionally on his behalf as prescribed in this chapter, and not otherwise.'" *Nielsen*, 522 P.2d at 1367 (quoting Utah Code Ann. § 77-46-1 (1953)). And section 77-46-2 prescribed: "'When a material witness for the defendant is about to leave the state, or is so ill or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.'" *Id.* (quoting Utah Code Ann. § 77-46-2 (1953)).

In reviewing these provisions, the Utah Supreme Court concluded that "the wording of the[se] statutes…ma[de] Rule 81(e) inapplicable" and prohibited the use of any rules of civil procedure "pertaining to discovery…in a criminal case," thus ruling in the state's favor on both questions. *Id.* Not only did the court find that there were other applicable rules or statutes, the court further found "that the language of Rule 30(a), U.R.C.P., is so broad in scope that its application to criminal cases would present grave constitutional problems." *Id.* "An attempt to take a deposition of a defendant would violate his right against self-incrimination and his right to remain silent…." *Id.* "We are of the opinion," the court explained, "that until such time as the statutes above referred to are modified or repealed by the legislature this court would be without power to provide for discovery proceedings by court rule." *Id.* Accordingly, the defendant in *Nielsen* was prohibited from taking civil depositions in his criminal case. *Id.*

There are two parts to the holding in *Nielsen*. One part addresses the specific, or, to draw upon the court's language, the "particular[]," use of civil depositions in criminal cases. *Id.* at 1366. The court found two applicable statutes and a constitutional conflict and thus upheld the denial of the request to take civil depositions in a criminal proceeding. The other part more broadly concerns the general use of the civil rules of procedure in any discovery matter in criminal cases. *Id.* at 1367. As to that question, the court found that section 77-46-1 prohibited any use of civil rules in discovery-related matters in criminal proceedings and thus upheld the denial on this ground as well. The *Nielsen* decision seemed to settle the matter over whether the civil rules of procedure could be used in criminal cases in matters pertaining to discovery.

Legislative Changes and the Adoption of the Utah Rules of Criminal Procedure

Not long after the *Nielsen* decision, "Title 77 was repealed, reorganized, and reenacted, again as Title 77. Former chapter 46 was reenacted as Utah Code section 77-35-14 (1982)." *State v. Gonzales*, 2005 UT 72, ¶ 36 n.5, 125. P.3d 878. This significantly impacted one of the two statutes referenced in *Nielsen* because "[f]ormer section 77-46-1 did not survive the repeal and does not

appear in Utah Code section 77-35-14 (1982)." *Id.* As for the other statute, "[f]ormer section 77-46-2, on the other hand, reemerged more or less intact as Utah Code section 77-35-14(h) (1980)." *Id.*

In addition to the foregoing legislative changes, the Utah Rules of Criminal Procedure were adopted and took "effect on July 1, 1980." Utah R. Crim. P. 1(c). And among these rules, "[t]he Utah Supreme Court adopted the statutory rules of procedure…and transformed them into the current" rules of criminal procedure. *Gonzales*, 2005 UT 72, ¶ 36 n.5. This included section 77-35-14(h). Thus, what had formerly been Section 77-46-2 (1978) and then section 77-35-14(h) became Rule 14(h) of the Utah Rules of Criminal Procedure. *Id.* In 2007, Rule 14(h) was renumbered as Rule 14(a)(8) but without any substantive changes. The rule reads the same today as it did in 2007 and over twenty years ago:

> Whenever a material witness is about to leave the state, or is so ill or infirm as to afford reasonable grounds for believing that the witness will be unable to attend a trial or hearing, either party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court shall make whatever order is necessary to effect such attendance.

Compare Utah R. Crim. P. 14(a)(8) (2017), to Utah R. Crim. P. 14(h) (2006); *see also Parsons v. Barnes*, 871 P.2d 516, 519–20 (Utah 1994).

Parsons v. Barnes

Twenty years after its decision in *Nielsen*, and even *after* the above-described legislative changes to the statutory provisions discussed in *Nielsen*, the Utah Supreme Court reaffirmed the part of its holding in *Nielsen* dealing with depositions in *Parsons v. Barnes*, 871 P.2d 516 (Utah 1994), this time addressing the applicable provision in the form of a rule rather than the previous form of a statute. "Rule 14[(a)(8)] of the Utah Rules of Criminal Procedure," the court stated, "*exclusively governs the taking of depositions in criminal cases*." *Id.* at 519 (emphasis added). Furthermore, the court clarified that that part of *Nielsen's* holding stands for the proposition "that rule 30 of the Utah Rules of Civil Procedure, permitting discovery depositions, does not apply to criminal cases." *Id.*

State v. Gonzales

But then the Utah Supreme Court decision in *State v. Gonzales*, 2005 UT 72, 125 P.3d 878, came along in 2005. Now, *Gonzales* did not reference *Barnes*. However, *Barnes* did cite *Nielsen* as the precedent for its authority and *Gonzales* did discuss *Nielsen* at length. The particular passage in question from *Gonzales* is paragraph thirty-six:

> The defendant in *Nielsen* was charged with a felony and a misdemeanor. Mr. Nielsen claimed the right to take depositions of various witnesses. The State sought a court declaration as to whether or not the defendant was entitled to pursue discovery under the Utah Rules of Civil Procedure. At the time, the rules of criminal procedure were codified in the Utah Code. Utah Code section 77-46-1, which governed the taking of depositions stated that "[w]hen a defendant has been held to answer a charge for a public offense…he may, either before or after an indictment or information, have witnesses examined conditionally on his behalf as prescribed in this chapter, and *not otherwise*." Utah Code Ann. § 77-46-1 (1978) (emphasis added). We read "not otherwise" to mean that a defendant could access no other discovery tool, including the rules of civil procedure. We therefore concluded that "[i]t appears that the wording of the statutes above set forth makes Rule 81(e)

> inapplicable and that the Rules of Civil Procedure pertaining to discovery may not be used in criminal cases." *Nielsen*, 522 P.2d at 1367. We noted that "until such time as the [relevant] statutes…are modified or repealed by the legislature this court would be without power to provide for discovery proceedings by court rule." *Id*. Utah Code section 77-46-1 (1978) was repealed in 1980, and no longer exists in that form. Accordingly, there now exists no prohibition against using the rules of civil procedure to inform discovery in a criminal matter.

2005 UT 72, ¶ 36 (alterations in original) (footnote omitted).

Rather than overruling the *Nielsen* decision and, by implication, the *Barnes* decision, the *Gonzales* decision, when one reads its facts, its holding, the paragraphs surrounding paragraph thirty-six, and specifically footnote five within paragraph thirty-six, actually "distinguished" itself from *Nielsen*. *Id*. ¶ 35. Indeed, the *Gonzales* decision again recognized the same powerful policy and constitutional reasons supporting *Nielsen* in the particular context of depositions, *id*. ¶ 37, and reaffirmed and reinforced the *Nielsen* and *Barnes* decisions in the context of depositions. Thus, as discussed below, *Gonzales* left firmly intact and even buttressed *Nielsen's* and *Barnes's* holdings as specifically applied to the taking of depositions in criminal cases.

It goes without saying that a holding in a judicial opinion is shaped by the facts of the case and the question presented to the court based on those facts. The *Gonzales* decision addressed a certain factual scenario that presented a particular question to the court that is essential to understanding its holding: The defendant had issued subpoenas to the University of Utah to obtain a victim's mental health records. *Id*. ¶¶ 12–18. But in doing so he did not notify the state or the victim of this, which violated the notice requirements set forth under Rule 45 of the Utah Rules of Civil Procedure. *Id*. He further did not turn the privileged records wrongly obtained over to the court before examining them himself. *Id*. The trial court found his action to be in violation of Rule 45 of the Civil Rules of Procedure, quashed the subpoenas, and disqualified his attorney. *Id*. The Utah Supreme Court upheld the trial court's "quashing" the subpoenas. *Id*. ¶¶ 25–45.

Importantly, neither Rule 14(a)(8) nor criminal depositions were at issue in *Gonzales*. And the Utah Supreme Court in *Gonzales* did not even visit its decision in *Barnes*. Rather, the holding in *Gonzales* was limited to whether the issuance of a subpoena in a criminal case also required notice to the opposing party under the civil rules of procedure. *Id*. ¶¶ 25–41. Granted, the Utah Supreme Court made it clear that "[t]he Utah Rules of Criminal Procedure are subject to some of the requirements of the Utah Rules of Civil Procedure." *Id*. ¶ 27. The notice requirement, when a subpoena is issued, is among them. *Id*. ¶¶ 25–45. The Utah Rules of Criminal Procedure, after all, had been silent on that issue at that time (since *Gonzales*, they have been amended to expressly reference Rule 45). But neither the plain language of Rule 81(e) nor the *Gonzales* decision said all the civil rules apply, just "some of" them do. *Id*. ¶ 27. Thus, the *Gonzales* decision merely observed that there was no longer a blanket ban on the application of the civil rules of procedure because the statutory provision that absolutely precluded the application of the civil rules of procedure by the phrase "'not otherwise'" had been repealed. *Id*. ¶ 36. Furthermore, the court did not find the same policy or constitutional conflict in *Gonzales* that it found in *Nielsen*. *Id*. ¶ 37.

That is why the holding in *Nielsen* as applied to criminal depositions and as reaffirmed in *Barnes* is still good law because *Gonzales* only addressed one part of the two-part holding in *Nielsen*. In fact, the *Gonzales* decision actually reinforced *Nielsen's* holding that the civil rules would not apply if there were some other criminal rule on point, expressly footnoting that the prior statutory rules governing criminal depositions were not repealed out of existence; rather, they were "repealed, reorganized, and *reenacted*" and then "*transformed*…into the current Utah Rules of Criminal Procedure." *Id*. ¶ 36 n.5 (emphasis added). The "form" is what changed. *Id*. ¶ 36. Specifically, what had been section 77-46-2, one of the very statutes at issue in *Nielsen*, became "Section 77-35-14(h) (1980)" and was then relocated to "rule 14[]" of the Utah Rules of Criminal Procedure. *Id*. ¶ 36 n.5. Thus, even though the "form" had changed over the years, the substance of the rule remained in force from the time of *Nielsen* through *Barnes* and *Gonzales*.

Remember, the Utah Supreme Court qualified its decision in *Nielsen* by stating that it was "of the opinion that until such time as the statutes" – notice the plural use of the noun "statutes" – "are modified or repealed by the legislature this court would be without power to provide for discovery proceedings by court rule." *State v. Nielsen*, 522 P.2d 1366, 1367 (Utah 1974). Besides, *Barnes* was decided *after* the legislature had repealed one of the two statutes cited in *Nielsen*. That repeal, in other words, did not change the decision in *Barnes* as applied to the taking of a deposition in a criminal case.

Accordingly, *Gonzales* did not overturn *Nielsen* or, for that matter, *Barnes*. Quite the opposite: The holding in *Gonzales* approved of and clarified the *Nielsen* decision insofar as it prohibits civil depositions in criminal cases precisely because there is a current and "applicable" criminal rule (which was derived from a former statute) addressing depositions, Utah Rule of Civil Procedure 81(e), and because the same constitutional concerns would still exist.

Unlike the circumstances in *Nielsen*, where there had been two statutory provisions prohibiting the use of a civil rule in taking depositions or other discovery matters and where there had been a constitutional conflict as well as policy reasons counseling against such a course of action, there was no criminal rule or statutory provision on point in *Gonzales* regarding the notice requirements when issuing a subpoena and the policy favored applying the civil rules. *State v. Gonzales*, 2005 UT 72, ¶ 37, 125 P.3d 878. That is why the court "distinguished" the case in *Gonzales* from the holding in *Nielsen* rather than abrogating *Nielsen's* holding. *Id.* ¶ 35.

Because *Nielsen* and *Barnes* directly addressed the issue of the general impropriety of the taking of depositions pursuant to Rule 30 of the Utah Rules of Civil Procedure in a criminal case, there being a statute or rule on point and a constitutional conflict, and because *Gonzales* reaffirmed and reinforced *Nielsen's* and *Barnes's* holdings as applied to depositions in criminal cases, Rule 14(a)(8) of the Utah Rules of Criminal Procedure still "exclusively governs the taking of depositions in criminal cases." *Parsons v. Barnes*, 871 P.2d 516, 519 (Utah 1994). As such, Rule 30 of the Utah Rules of Civil Procedure, pursuant to Rule 81(e), does not apply in criminal proceedings.

Additional Considerations

The *Gonzales* decision was correct in observing that the *Nielsen* decision was somewhat lacking in a more thorough "analysis." *Gonzales*, 2005 UT 72, ¶ 35. It was also correct in noting that the Rule 81(e) "applicable statute or rule' analysis obliges" a comparison of "the text and purposes of the related statutes and rules." *Id.* ¶ 29. Therefore, in applying Rule 81(e) of the Utah Rules of Criminal Procedure to the question of whether Rule 30 can be used in a criminal case to take depositions, the *Nielsen* and *Barnes* decisions make good sense for a few additional reasons not articulated by these two decisions.

First, to hold otherwise would be to place the much "narrow[er]," *Barnes*, 871 P.2d at 519, and more specific Rule 14(a)(8) of the Utah Rules of Criminal Procedure in "conflict," Utah R. Civ. P. 81(e), with the much broader and more general Rule 30 of the Utah Rules of Civil Procedure. If Rule 30 could be used in criminal proceedings, it would render Rule 14(a)(8) nugatory because the broader Rule 30 would swallow up the carefully circumscribed Rule 14(a)(8). Why condition the taking of a deposition on a witness's being about to leave the state or being too infirm if no such condition exists under Rule 30? There would be no point to Rule 14(a)(8) if Rule 30 applied. The

only way to give a meaningful interpretive effect to Rule 14(a)(8), then, is to read it as *Barnes* did – as "exclusively govern[ing] the taking of depositions in criminal cases." *Barnes*, 871 P.2d at 519.

Second, to hold otherwise would be to further place Rule 26(c)(5) of the Utah Rules of Civil Procedure, which defines how many hours of deposition are allowed under Rule 30, in "conflict," Utah R. Civ. P. 81(e), with Rule 14(a)(8), which does not limit the amount of time to depose certain qualifying witnesses. Indeed, how would a court presiding over a criminal matter go about determining the correct tier and the number of deposition hours to be allowed as set forth under Rule 26(c)(5) in a case that is criminal? It could not because Rule 26(c)(5) addresses civil cases and civil remedies.

But Rule 14 of the Utah Rules of Criminal Procedure is titled "Subpoenas." It could be argued, therefore, that the issuance of subpoenas and not criminal depositions is what Rule 14 really addresses. However, as the *Gonzales* court noted,

> [t]he applicability of civil rule 81 cannot be determined merely by comparing rule titles, index entries, or the contents of the rules of criminal and civil procedure. Instead, our 'applicable statute or rule' analysis obliges us to consider the text and purpose of a rule of criminal procedure against the text and purposes of the related statutes and rules, and thereby determine whether an applicable rule of civil procedure should be grafted onto a rule of criminal procedure through civil rule 81. An inquiry central to this task is the assessment of what more a civil rule may permit or require than the criminal rule on a similar topic, and what reasons, if any, justify the differences.

2005 UT 72, ¶ 29.

Barnes, therefore, is also an important decision in the wake of *Gonzales* because, notwithstanding Rule 14's title, the Utah Supreme Court's opinion in *Barnes* casts recognition on Rule 14(a)(8) as an actual "applicable rule," Utah R. Civ. P. 81(e), to depositions in criminal proceedings and not a mere reference to depositions. In *Barnes*, the "prosecutor filed an information charging Parsons with first degree murder and aggravated robbery. The same day, the prosecutor took the statements of two witnesses under oath at his office…." *Parsons v. Barnes*, 871 P.2d 516, 518 (Utah 1994). The prosecutor did this outside Parsons's presence and "without giving notice to the defense." *Id*. Parsons argued that by doing this the prosecutor had taken a deposition and had thus violated his right to confront the witnesses against him. *Id*.

The Utah Supreme Court disagreed.

> When a prosecutor takes a statement that does not conform to the requirements of rule 14[(a)(8)], he or she has not taken a deposition even if the witness gives the statement under oath. Admittedly, the term "deposition" is sometimes "used in a broad sense to describe any written statement verified by oath." 23 Am.Jur.2d Depositions and Discovery § 108 (1983). However, according to rule 14[(a)(8)], a statement under oath is not a deposition unless the court has ordered the proceeding, the deposing party has given notice to the other party, the defendant is present, and the witness being deposed is about to leave the state or is so ill that his or her attending the trial is unlikely.

Id. at 520. Thus, the text and purpose of Rule 14(a)(8) is a substantive one that concerns the same topic of taking depositions and under what conditions they are permitted. In other words, notwithstanding its title, Rule 14(a)(8) is a "rule" and it is a "rule" that applies to the taking of depositions in criminal proceedings.

Conclusion

When it comes to most questions of discovery in criminal cases, there is an "applicable…rule," Utah R. Civ. P. 81(e), namely, "[d]iscovery in criminal cases is governed by rule 16 of the Utah Rules of Criminal Procedure," *State v. Hopkins*, 1999 UT 98, ¶ 18, 989 P.2d 1065. And when it comes specifically to taking depositions, there, too, is an "applicable…rule." Utah R. Civ. P. 81(e). That rule is Rule 14(a)(8) of the Utah Rules of Criminal Procedure.

So, can a party take civil depositions in a criminal case? No. Depositions in criminal cases can be taken only under one of the narrow and enumerated conditions delineated under Rule 14(a)(8) of the Utah Rules of Criminal Procedure. While there are areas where civil and criminal procedure mix, this is one area where the line separating criminal and civil procedure is still clearly defined.

1. That is not to say that *Nielsen* rendered Rule 81(e) inapplicable in any matter pertaining to a criminal proceeding. For example, in *Brigham City v. Valencia*, 779 P.2d 1149, 1150 (Utah Ct. App. 1989), the Utah Court of Appeals relied on Rule 81(e) as its authority to draw from Rule 9 of the Utah Rules of Civil Procedure to permit the court to take judicial notice of a city ordinance under which the defendant was convicted. Rather, the second prong of *Nielsen's* holding was focused on matters "pertaining to discovery…in criminal cases." *Nielsen*, 522 P.2d at 1367.
2. The *Barnes* decision, which preceded the 2007 renumbering of Rule 14 of the Utah Rules of Criminal Procedure, cited Rule 14(h). Because there have been no substantive changes to the rule's text, the author cites the current version of the rule for the sake of clarity.

Utah Court of Appeals Notice of Policy Change

Effective September 1, 2018

The Utah Court of Appeals is instituting a new policy in an effort to streamline the briefing process in criminal appeals and reduce the resources spent by both the parties and the court in handling multiple requests for extensions for briefing. Rule 26, which sets out the briefing schedule, is suspended under the new policy for appeals in criminal cases. The briefing schedule will be set by a briefing order issued after the record on appeal is filed. Both parties will have ninety days to file their principal briefs. Reply briefs will be due in forty-five days. Because of the substantially enlarged briefing periods under this policy, no extensions will be granted for any reason.

Motions of whatever sort will not stay the briefing schedule, even pending the resolution of the motion. This includes motions to supplement the record. Motions to supplement the record must be filed within the first thirty days of a party's briefing period. This is intended to assure a complete record in a timely fashion for the purpose of completing briefing. Additionally, if the motion to supplement is not a stipulated motion, the moving party must certify that an attempt was made to resolve the record issue before the motion was filed.

The Utah Bar Foundation is pleased to welcome Robert L. Jeffs to the Board of Directors

Robert Jeffs joins the Utah Bar Foundation Board to replace outgoing and long-time member, Adam Caldwell.

Robert Jeffs is a Shareholder with the firm Jeffs & Jeffs located in Provo, Utah. In addition to his busy law practice, Rob served as a Fourth Division Bar Commissioner from 2002–2009 and as the Utah State Bar President from 2010–2011. Rob received his law degree from the J. Reuben Clark Law School at BYU.

Robert aspired to become a lawyer from an early age while running errands, cleaning offices, and otherwise making himself a nuisance in the law office of his father and uncle. His father, M. Dayle Jeffs, has instilled in Robert a love for the law, a respect for the judicial system, and a commitment to serve his clients as well as the profession. Robert and his wife, Tracy, enjoy their four children and three grandchildren, spending as much time with them as the children will tolerate. Robert is easily distracted by running, biking, and fishing, while mostly frustrated by golf.

Robert will bring vast community knowledge and involvement to the Board of the Utah Bar Foundation. Please join us in welcoming him.

Timpanogos Legal Center Seeks Attorney Volunteers

Timpanogos Legal Center is pleased to announce two new opportunities for pro bono work that are meaningful and require a limited time commitment.

Domestic violence shelter clinics: Visit domestic violence shelters to inform victims of their rights and available services, explain the differences in court proceedings, and answer questions about protective orders and family law issues. Materials will be provided to guide your discussion and a TLC attorney will train and mentor you.

Document clinic – work from your office or home: Set your own schedule and draft documents like Temporary Orders, an Order to Show Cause, an Answer and Counterclaim, or a motion for Alternative Service for low income pro se clients.

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For more information or to volunteer, please email: brooketimplegal@gmail.com call: 801-649-8895 or sign up online at: www.timplegal.com.

Bar Thank You

Many attorneys volunteered their time to grade essay answers from the July 2018 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

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2018 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2018 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.

Please submit your nomination for a 2018 Summer Convention Award no later than Friday, October 5, 2018. Use the Award Nomination Form at utahbar.org/nomination-for-utah-state-bar-awards/ to propose your candidate in the following categories:

Distinguished Community Member Award | Professionalism Award | Outstanding Pro Bono Service Award

2018 Utah State Bar Summer Convention

Photos by Jen Tomchak and Harry Caston.

Pro Bono Honor Roll

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The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a free legal clinic in June and July of 2018. To volunteer call the Utah State Bar Access to Justice Department at (801) 297-7049 or go to http://www.utahbar.org/public-services/pro-bono-assistance/ to fill out our Check Yes! Pro Bono volunteer survey.

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: http://www.utahbar.org/?s=ethics+hotline

Information about the formal Ethics Advisory Opinion process: www.utahbar.org/opc/rules-governing-eaoc/.

RECIPROCAL DISCIPLINE

On April 19, 2018, the Honorable John J. Walton, Fifth Judicial District Court, entered an Order of Reciprocal Discipline: Suspension, against Brent A. Blanchard, suspending Mr. Blanchard for a period of three years for his violation of Rule 1.4(a) (Communication), Rule 1.8(a) (Conflict of Interest), Rule 1.15(c) (Safekeeping Property), and Rule 1.16(d) (Declining or Terminating Representation) of the Rules of Professional Conduct.

In summary:
On August 23, 2015, the State Bar of Nevada Southern Nevada Disciplinary Board issued an Order suspending Mr. Blanchard for three years.

Mr. Blanchard was Continuing Legal Education (CLE) suspended in Nevada on July 27, 2010. Despite being CLE suspended, Mr. Blanchard continued to practice law. In the fall of 2010, Mr. Blanchard's friend and former co-worker (Friend) approached Mr. Blanchard about the possibility of using certain monies belonging to a trust in Friend's mothers name to purchase a home for Friend to live in. Friend provided Mr. Blanchard with money from his mother's trust to purchase the home which was to be purchased by a certain Limited Liability Company (LLC). Mr. Blanchard established the LLC in his name alone and he was the only officer of the company. Mr. Blanchard believed that Friend would pay rent on the house which Mr. Blanchard would then use to repay Friend's mother's trust. This did not happen. Mr. Blanchard sued Friend to retake the property with the intention of selling the home. Mr. Blanchard intended to keep part of the profits from the sale and return the principal of the monies taken to the trust along with the other part of the profit from the sale of the property.

In another matter, Mr. Blanchard agreed to represent a client in a contract dispute in a Nevada court despite being CLE suspended. Opposing counsel filed a motion seeking clarification and guidance from the court on how to address the fact that Mr. Blanchard was administratively suspended from the practice of law. As a result of opposing counsel's filing, the court ordered that Mr. Blanchard was to be sanctioned for filing documents while being CLE suspended and that Mr. Blanchard did so while knowing his license was suspended. Mr. Blanchard was ordered to pay attorneys fees and costs.

Discipline Process Information Office Update

The Discipline Process Information Office is available to all attorneys who find themselves the subject of a Bar complaint, and Jeannine Timothy is the person to contact. From January to August 2018, Jeannine opened 57 files, which is an increase of 20% from last year. Jeannine is available to assist and explain all stages of the discipline process, so call Jeannine with all your questions.

DISCIPLINE PROCESS INFORMATION OFFICE

801-257-5515 | DisciplineInfo@UtahBar.org

RESIGNATION WITH DISCIPLINE PENDING

On May 10, 2018, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning S. Baird Morgan, for violation of Rules 1.5(a) (Fees), Rule 3.3(a) (Candor Toward the Tribunal), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Morgan represented the estate of a man who was killed in an automobile accident in 2009 in which the man was the "at-fault" driver. A lawsuit was filed by the insurance provider for the victim of the other vehicle. Mr. Morgan was hired by the liability insurer of the man to represent and defend the man's estate and his surviving widow. The widow was a key fact witness to the issue of whether workers compensation was liable for damages and was also a party as the personal representative of the estate. After settlement and dismissal of the claim against the man, Mr. Morgan was permitted to continue to represent the widow to prepare her for her likely testimony as a material witness to the litigation. The widow passed away in September 2014.

In or about July of 2015, Mr. Morgan accepted an Of Counsel position with a new firm and he brought his representation of the widow and the insurance provider to the new firm. A factor in the determination of Mr. Morgan's salary at the firm was the amount of client billings that he would be generating while at the firm including this matter. Mr. Morgan worked for the new firm for approximately nine months. During this time, Mr. Morgan billed the insurance provider for costs and fees for his representation of the estate and the widow. Mr. Morgan also communicated to the insurance provider regarding the status of the representation. In the billings and status letters, Mr. Morgan represented to the insurance provider that he had spoken to the widow and had traveled to meet with her to prepare for her testimony. According to the court docket, after the widow's death, there were some pending matters that justified Mr. Morgan's claimed work involving the insurance provider, but no meetings with the widow took place.

In the Spring of 2016, the court was alerted that the widow may have passed away. The court scheduled an order to show cause hearing. At the hearing Mr. Morgan offered to file a Suggestion of Death. Mr. Morgan asked his legal assistant to assist him with the preparation of the Suggestion of Death by transcribing his dictation. Mr. Morgan's assistant had done her own research and discovered that the widow had passed away in September 2014 and placed this date in the Suggestion of Death that she prepared. The date on the Suggestion of Death that was filed was September 10, 2015. The Suggestion of Death was filed with the court with the false date and Mr. Morgan did not correct the false date prior to filing. Mr. Morgan's assistant brought the matter concerning the Suggestion of Death discrepancy to the attention of an attorney at the new firm. The firm performed an investigation and sent a check to reimburse the insurance provider for all fees and costs paid during the time Mr. Morgan was associated with the firm.

During a Screening Panel hearing on this case, Mr. Morgan made certain representations to the panel that even though his time entries to the insurance carrier clearly indicated he spoke with the widow and met with her in person, it was actually a family member whom he could not name that he spoke to and met with. The day after the

Screening Panel, Mr. Morgan sent an email to the OPC admitting that he had given false testimony during the Screening Panel hearing.

PROBATION

On May 19, 2018, the Honorable Barry G. Lawrence, Third Judicial District Court, entered an Order of Discipline: Probation against David A. Reeve, placing him on probation for a period of one year for Mr. Reeve's violation of Rule 1.1 (Competence), Rule 1.2(a) (Scope of Representation), Rule 1.3 (Diligence), and Rule 1.7(a) (Conflict of Interest: Current Clients) of the Rules of Professional Conduct.

In summary:
Mr. Reeve was counsel for a company and in that capacity drafted the corporate documents for incorporation and prepared stock certificates. In addition to being corporate counsel for the company, Mr. Reeve claimed he was also its director. A party filed a lawsuit against the company, its CEO, and the wife of the CEO. Mr. Reeve signed a stipulation and verified confession of judgment without attempting to verify that many of the statements were accurate. Mr. Reeve was aware that the CEO did not agree with the stipulated facts, but he signed the documents on behalf of the company, agreeing that the company would pay a settlement amount within a certain time period. Mr. Reeve did not review the final stipulation and confession of judgment with his clients before he signed it and did not provide a copy of the document to his clients. Further, Mr. Reeve was not authorized to execute the documents and when he signed the stipulation, he served both as an officer or director of the company as well as legal counsel to the company and both individual defendants. Based on the stipulation, the Court granted judgment to the plaintiffs against the company.

Mr. Reeve filed an Answer on behalf of the CEO and the CEO's wife. Mr. Reeve was served with deposition notices for the CEO and his wife as well as discovery requests to be answered by his clients. Neither Mr. Reeve nor his clients appeared for the depositions and an order granting a motion for sanctions was entered by the Court for failure of Mr. Reeve's clients to attend their own depositions. The court entered a judgment against Mr. Reeve's clients. The CEO and his wife retained new counsel to represent them who filed a motion to set aside the judgment. The court set aside the judgment based on Mr. Reeve's gross negligence and awarded the plaintiffs attorney's fees and costs associated with obtaining and enforcing the judgment.

ADMONITION

On May 31, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.8(e) (Conflict of Interest: Current Clients) of the Rules of Professional Conduct.

In summary:
An attorney observed a hearing on Temporary Orders during a divorce action where one side had representation and the other did not. At the end of the hearing, the attorney volunteered as pro bono counsel for the unrepresented party. The attorney provided unrelated litigation costs to the client such as money, gas, food, and water and put the client up in an extended stay hotel/motel for a week. The attorney had a conscious awareness of the conduct, but did it anyway.

Mitigating factors:
The attorney self-reported the matter to the Office of Professional Conduct.

Welcome, Young Lawyers!

by Bebe Vanek

I want to tell you about the Young Lawyers Division (YLD) of the Utah State Bar and what we have coming your way this term.

Did you know that you are automatically a member of YLD? If you're thirty-five years old or younger, or have been practicing for five years or less, whichever is longer, you are a member of YLD. Being a member of YLD means you are invited to attend all of YLD's events throughout the year – and I hope you will take advantage of all that we have to offer.

From August to June, YLD provides events to meet the goals of any newly admitted lawyer. We provide a free monthly CLE addressing a diverse range of practice areas and other relevant topics. We also offer a monthly Fit2Practice event to encourage a work-life balance for young lawyers through fitness activities and presentations on mental health and wellness. We anchor a variety of pro bono committees and, with the help of the Utah State Bar, provide opportunities for young lawyers to provide legal services to veterans, homeless youth, family law clients, first responders, and senior citizens, to name a few. We also organize non-legal community service activities such as volunteering and clothing or food drives. Finally, we provide multiple social and networking events throughout the year to connect young lawyers with each other, with other young professionals, and with experienced attorneys in their practice areas. There is something for every young lawyer! If you'd like to read more about these events and programs, please check out our website at younglawyers.utahbar.org and download a copy of the 2017–2018 Annual Report.

This year, I hope to build on the incredible foundation from last year and the efforts of our past-president, Dani Cepernich, and continue all of the events we are known for providing. I also have identified two special projects that YLD will be taking on beginning this year. First, I plan to work with the Utah State Courts to designate nursing rooms for attorneys who practice in courthouses throughout the State of Utah and are nursing a child. These spaces would provide a safe and private place for nursing lawyers and enable young and experienced lawyers to return to work when they wish. Second, I hope to work with the Pro Bono Commission to encourage firms and other employers to support pro bono involvement among their associates and young lawyer employees. Giving back to our community is an important part of being an attorney, and YLD recognizes that young lawyers sometimes struggle balancing the desire to give back with obligations of heavy workloads and billable hours. We hope to encourage employers to support young lawyers by designating a certain number of pro bono hours to be credited towards their work obligations.

Finally, YLD intends to be relevant, innovative, and creative with the programs and services we provide. We want this organization to serve our members throughout Utah in the ways our members need. In the coming weeks, watch for a survey from YLD that will aim to find out what services you want YLD to provide and how you would like to be involved. We are an organization that exists for our members and I have found incredible value in the last five years of being involved with YLD. Through YLD I have built relationships with emerging and established legal leaders within our community, and nationally through involvement with the American Bar Association. These opportunities and relationships would not be possible without YLD and these are available to you as well.

Now, you must be thinking: "Bebe, how are you going to get all of this done?!" Well, I don't do this alone – I am lucky to be surrounded by many motivated and driven young lawyers who are serving currently on the YLD Board and I invite you to get involved, too. In the very least, I hope to meet you at an upcoming event or hear from you during the year with ideas or feedback – please find me listed in the Utah State Bar Directory and reach out. Here's to a great year ahead!

GET INVOLVED AND SERVE ON THE YLD BOARD!

We have a number of open positions in a variety of roles. Please contact Bebe Vanek to learn more.

Pro Bono Committees: Veteran's Clinic • Landlord Tenant Clinic • Tuesday Night Bar • Project Street Youth

Community Service Committees: Outreach and Volunteer Committee • High School Debate

Professional Development Committees: CLE Committee

BEBE VANEK is an Equal Opportunity Consultant at the University of Utah Office of Equal Opportunity and Affirmative Action. In addition to serving as the YLD President, Bebe is the Young Lawyer Delegate to the ABA House of Delegates.

2018 Paralegal Division All-Day CLE Seminar

by Greg Wayment

On Friday, June 22, 2018, the Paralegal Division held its annual meeting and all-day CLE Seminar. With almost ninety registrants, including twenty-something attorneys, the CLE exceeded attendance expectations and was on all fronts a resounding success. I'd like to personally extend my thanks to the CLE chair, Erin Stauffer, and the rest of the CLE committee for putting this event together, and congratulate them on a very successful day.

Registrants were greeted at 7:30 am and took home a "swag bag" provided by our generous supporters containing everything from pens and notepads to fidget spinners and hand sanitizer. Registrants also received a collapsible "crate" cart with the Paralegal Division logo. A special thanks is also in order to Stephen Seko, Mary Misaka, and Lexie Goates of the Utah State Bar, for their assistance with registration and for filming the event.

Registration also included bagels, coffee, and juice for breakfast, and then lunch was catered by Dasks Greek Grill. Also, throughout the day, all that registered (and were in attendance) got to participate in drawings for gift baskets, gift cards, and event tickets. My table was unlucky in the drawings, until almost the end of the day when Julie Emery won a gift card. Congratulations Julie Emery!

Attendees could get a total of seven CLE credits, including an hour of ethics credit. The day started out with a two-hour presentation by Carma Harper and Sanda Roberts on trial preparation. In conjunction with the theme of their presentation "Trial: A Song and Dance," in what is probably a Paralegal Division first, they began with singing and dancing to the song "Going to the Chapel," with original lyrics tailored for their presentation. If you'd like to see a clip of Carma and Sanda performing, please visit the Division's Facebook page, where video footage shot by Julie Emery is available.

Their presentation was highly interactive and many members of the audience shared tips and tricks for successfully supporting a trial.

The next speaker was Blakely Denny from Snell & Wilmer, who presented on pre and post collection strategies. After a quick lunch break, Gregory Saylin from Fabian Vancott presented on "Managing Sexual Harassment Risks in the #metoo Era." Following Mr. Saylin, Julie Emery, and Monte Sleight led a discussion on the status of the Limited Paralegal Practitioner program in Utah.

Next on the agenda was Sean Morris from Blomquist Hale who discussed managing stress and leading a more balanced life. His sharp and dry wit were enjoyed by all. It can't be stressed enough that one benefit members of the Paralegal Division enjoy is "life assistance," including therapy from Blomquist Hale.

And lastly, Judge Augustus Chin spoke on the importance of both being mentored and taking the opportunity to mentor. Thank you, Judge Chin, for being a friend and mentor to the Paralegal Division.

After the CLE presentation wrapped up, the annual meeting was held where new board members are seated and the baton is passed to the new chair. The Division has had strong leadership this last year with Lorraine Wardle. Lorraine has long been an active participant in both the Division and the Utah Paralegal Association. Beyond that, she's one of the hardest working and no-nonsense Paralegals in this state. We appreciate Lorraine stepping up as chair this year and for all her hard work. She will continue on as the paralegal representative to the Bar Commission.

The strong leadership continues with the announcement of Candace Gleed as the new chair and Sarah Stronk as the chair-elect. Not only is Candace a highly-experienced paralegal who has worked in a variety of paralegal jobs, I think anyone who has spent any time in her presence would agree she is absolute delight and has an infectious laugh. So, rest assured the Paralegal Division is in good hands as we head into the 2018–2019 year. And, if you didn't attend this year, make a note to attend next year… I have it on good authority that it's going to be a great event.

We'd also like to introduce the 2018–2019 Board of Directors for the Paralegal Division. We have a few new members joining the Board of Directors and wish to extend a warm welcome to them. We also wish to thank outgoing Board members Julie Emery, Laura Summers, and Cheryl Jeffs. This year's Board of Directors are:

Chair: Candace Gleed
Chair-Elect: Sarah Stronk
Finance Officer: Cheryl Miller
Secretary: Erin Stauffer
Region 1 Director: Tonya Wright
Region 2 Director: Shaleese McPhee
Region 3 Director: Stefanie Ray
Region 4 Director: Deborah Calegory
Region 5 Director: Terri Hines
Director At Large: Paula Christensen
Director At Large: Robyn Dotterer
Director At Large: Kristie Miller
Ex Officio: Lorraine Wardle

CLE Calendar

NEW BAR POLICY: Before attending a seminar/lunch your registration must be paid.

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

September 10, 2018 | 9:00 am – 1:00 pm

Trademark Selection, Prosecution & Enforcement – IP Section CLE. Cost $100 for IP Section Members, $300 for all others. Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_9318.

September 11, 2018 | 12:00 pm — **Professionalism/Civility Credit Pending**

Golden Rule & the Constitution: A Panel Discussion

September 12, 2018 | 9:00 am – 3:45 pm — **5 hrs Ethics, 1 hr Prof./Civ.**

OPC Ethics School. Cost $245 before August 29th, $270 thereafter. Register here: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_9016.

September 13, 2018 | 12:00 noon – 1:00 pm — **1 hr**

Entertainment Law Section Fall 2018 Lunch CLE. ***A Name Worth Fighting For*** with Simon Tam, via videoconference. $25 registration (includes lunch). Link to event: http://entertainmentlaw.utahbar.org/events.html.

September 14–15, 2018 — **10 hrs CLE, including 1 hr Ethics (pending approval)**

2018 Securities Section Meeting. Westgate Park City Resort & Spa, 3000 Canyons Resort Dr., Park City, UT. For pricing, a complete agenda, and hotel reservation instructions, go to: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_9006.

September 14, 2018 | 9:00–10:00 am

Cache County Golf & CLE.
Birch Creek Golf Course, 550 East 100 North, Smithfield, Utah. Save the date! Topic and details coming soon!

September 25, 2018 | 8:30 am – 4:30 pm — **6 hrs CLE (pending approval) including 1 hr Ethics and 1 hr Prof./Civ.**

New Tools for a New Era: Sexual Harrassment and the #MeToo Movement. A full-day CLE event at the S.J. Quinney College of Law. Co-sponsored by the Utah State Bar. Agenda and registration forthcoming.

September 28, 2018 | 9:00–10:00 am — **3 hrs CLE**

Terrific Trial Tactics from Jury Selection to Closing – Utah County Golf & CLE. Hobble Creek Golf Course, 94 Hobble Creek Canyon Rd., Springville, UT. Cost for CLE only: $35 for Litigation and CUBA section members, $90 for all others. Cost for CLE & Golf: $45 for Litigation and CUBA section members, $135 for all others. To register visit: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_9027.

October 19, 2018

Litigation Section Judicial Excellence Awards, CLE & Off-Road Shenanigans. For complete information, select the following link: http://litigation.utahbar.org/22S3359-Moab%20Litigation%20Section%20Flyer.pdf. To register visit: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_9092.

October 19, 2018 | 9:00–10:00 am

St. George Golf & CLE.
The Ledges Golf Club, 1585 Ledges Parkway, St. George, Utah. Save the date! Topic and details coming soon!

November 2, 2018

Fall Forum. Little America Hotel. For a complete list of topics and speakers, see the brochure in the centerfold of this *Bar Journal*.

Classified Ads

RATES & DEADLINES

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

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

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

JOBS/POSITIONS AVAILABLE

The University of Utah S.J. Quinney College of Law is seeking a visionary leader to serve as Professor and Director of Clinical Programs beginning in the academic year 2019–2020. Further information is available at: http://utah.peopleadmin.com/postings/79919. The University of Utah is an Equal Opportunity/Affirmative Action employer and educator. Minorities, women, veterans, and those with disabilities are strongly encouraged to apply. Veterans' preference is extended to qualified veterans. Reasonable disability accommodations will be provided with adequate notice. For additional information about the University's commitment to equal opportunity and access see: http://www.utah.edu/nondiscrimination/. Applications must be submitted to: http://utah.peopleadmin.com/postings/79919.

SERVICES

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

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