

## Getting the jump on the JOBS Act

On April 5, President Obama signed the Jumpstart Our Business Startups (JOBS) Act. The stated objective of the act is "reopening American capital markets to emerging growth companies." The act is intended to facilitate job creation by increasing access to capital for early-stage businesses. To do so, the drafters of the act attempted to reduce the regulatory burdens for early-stage businesses seeking to raise capital by modifying existing regulations that have historically limited the efforts of those businesses to raise investment capital.



**Brian Lloyd**

By loosening restrictions on capital raising that have been in place for decades, permitting a new capital-raising process known as "crowdfunding," and modifying certain features of the securities registration process, the act could potentially have a dramatic impact on the ability for early-stage companies to obtain capital financing.

The act's objectives are especially important in Utah, where the entrepreneurial spirit that drives so much of our economy is often

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## Safeguarding your business' trade secrets

One of the consequences of being in a state that has an extremely well educated population combined with a strong entrepreneurial spirit is that new opportunities frequently attract talented employees away from their current positions. Employees moving from one company to another or choosing to strike out on their own and start up their own venture creates a ripe atmosphere for trade secret violations. Because such violations can have a devastating impact on the departed company and create unfair competition, the Utah legislature has enacted the Uniform Trade Secrets Act.

This act not only helps define the

vague concept of a "trade secret," it provides victims of trade secret theft a mechanism to reap justice on the offender. Specifically, successful plaintiffs in a trade secret action may be entitled to (1) injunctive relief, barring the offending parties from using the stolen trade secret; (2) a judgment requiring the offenders to compensate the plaintiff for the damages caused by the theft; (3) an award of exemplary damages; and (4) attorney's fees.

These consequences should serve as a strong deterrent to any employee stealing trade secrets

from their former employer. However, all too frequently, employees are either ignorant of the consequences or believe that the reward outweighs the risks. In such circumstances, the victim of the trade secret theft will likely be forced to bring a lawsuit against the offending parties.

To prevail on a trade secret claim, a plaintiff must first establish that the information is indeed a trade secret. To do this, the plaintiff will need to show that the information: "(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by property means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Simply put, a trade secret is valuable information that is not known to the public and which the plaintiff has taken measure to keep secret.

Once the plaintiff has shown that the information in question is a trade secret, it must establish that there was an actual misappropriation. This occurs where the trade secret is *acquired* by improper means, including theft, bribery, fraud or electronic espionage. It also occurs through the *disclosure or use* of a trade secret that was acquired by improper means. Accordingly, not only can the disclosing party be found liable for trade secret theft, the party acquiring or using the trade secret may also be liable.

Depending on the circumstances, the victim of trade secret misappropriation should strongly consider seeking injunctive relief. Under Utah's Uniform Trade Secrets Act, actual *or* threatened misappropriation may be enjoined. In such circumstances, a victim of trade secret theft may choose to commence the action with a complaint and an application for temporary restraining order, wherein it seeks to prevent disclosure




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## Questions about RDAs often asked by local developers

The life of a city sees many cycles and changes, at times resulting in distressed buildings and areas. Redevelopment agencies (RDAs) may be used by local governments to eliminate blight in such areas and implement the development goals of a community. RDAs invest in core infrastructure, facilitate redevelopment of underutilized property, and provide incentives for private investment. RDAs work in specific neighborhoods, labeled "project areas," to spur additional growth, allowing blighted areas to be reestablished as economically productive centers for business and social activity. Improved redevelopment project areas contribute to the overall health and vitality of the city by reversing the negative effects of blight while increasing the tax base from which the taxing entities draw their funds.

The financial engine that drives an RDA's urban renewal efforts is tax increment financing. Tax increment is the increase (or "increment") in the property taxes generated within a project area over and above property taxes generated in that same project area prior to the time the project area was established. Establishment of a project area must be approved by the RDA board of directors and the local taxing entities, which typically include the city, school district, library, water district and the county. The tax increment generated in a project area is reinvested in that same project area, thus recycling the funds for a specified period of time, usually 20 to 25 years, after which



**Diane Banks**

the tax increment will again be available to the local taxing entities. During the life of the project area, the taxing entities continue to receive the same property taxes received prior to the establishment of the project area, along with any share of the increment they may have negotiated with the RDA.

DJ Baxter, executive director of the Redevelopment Agency of Salt Lake City, responds below to questions concerning RDAs that are often asked by local developers.

• *Is the Redevelopment Agency of Salt Lake City the only RDA in Salt Lake County?*

• No. While our agency is one of the largest RDAs in the state, there are many others, including agencies within most of Salt Lake County's incorporated municipalities and in Salt Lake County itself. A list of RDAs that belong to the Utah Redevelopment Association (most — but not all — RDAs in the state are members) is available at [www.utahredevelopment.org](http://www.utahredevelopment.org).

• *How does an RDA facilitate private investment and redevelopment?*

• The RDA of SLC offers several tools; these include financial assistance (such as low-interest construction and renovation loans) to property owners in designated project areas, as well as tax increment reimbursements for certain types of projects. It also may acquire property and resell it at discounted rates to accomplish particular RDA objectives.

• *What are some of the criteria that the*

*RDA uses to evaluate a project?*

• In almost all cases, a project must be geographically located within an RDA's designated project area in order to receive RDA support. Further, RDA-supported projects must meet the specific goals set for that project area. For a property owner seeking financial assistance, the RDA requires some level of financial participation from the owner and similar documentation to that used by a commercial lender. The terms of RDA loan programs may, however, be more flexible than those of a commercial lender, or the RDA may choose not to participate if the project can proceed without RDA assistance. For a project involving RDA-owned property, an RDA will use a competitive public process to select the developer that best responds to the RDA's specific needs for that property.

• *What are some of the ways the RDA resources can be used as a development tool?*

• The RDA provides lending options that might not otherwise be available. For example, when a developer is unable to fully fund a project using traditional lending sources, the RDA can fill that gap and get the project off the ground by lending funds that are earmarked for that specific project area. An RDA can also participate in funding public infrastructure that will facilitate private development in the project area.

• *How can a developer get more information about upcoming RDA projects?*

• RDAs are required by law to publicly advertise RFPs related to the development of RDA-owned property. The Redevelopment

Agency of Salt Lake City promotes projects and available programs through its website, [www.slclda.com](http://www.slclda.com), and through BidSync.com. Meeting agendas and minutes are also posted online at [www.slclda.com](http://www.slclda.com) and through the state of Utah's public meeting notice site, [www.pmn.utah.gov](http://www.pmn.utah.gov).

• *How can a developer initiate a project in an RDA project area?*

• Developers may contact the RDA to discuss a proposed development within a project area, and what programs may be applicable.

Diane Banks is a shareholder at Fabian and has practiced law for over 20 years, focusing on real estate transactions and development. She is experienced in documenting and negotiating routine transactions like sales, acquisitions, financing and leasing. She also enjoys and is experienced with the negotiation and documentation of more unusual real estate deal structures and matters. Banks can be reached at [dbanks@fabianlaw.com](mailto:dbanks@fabianlaw.com) or (801) 531-8900.



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## The unique legal issues of women: how to be prepared

Men and women face many of the same legal problems, but there are unique areas in which women may be particularly prone to difficulties. There are approaches that work well for many women, and being prepared is paramount. Although some surprises may be inevitable, with information and planning, you can be ready to deal with many matters which might otherwise catch you off guard.

Preparing ahead of time is key to successfully facing legal challenges with minimal stress. Assembling a compassionate and competent team of advisors who help you feel safe and with whom you can form solid relationships is equally as important. One member of this team should be a trusted legal advisor; the team might also include



**Marianne Sorensen**

a financial consultant and an accountant. It is important to establish relationships with an attorney and other advisors *before* the need for their services arises.

Three of the most likely categories for which you will need strategies are:

- Practicing preventive law — being a savvy consumer and wise woman; having a mindset that says, “Don’t mess with ME.”
- Dealing with changes in marital status, particularly divorce.
- Health care decisions and estate planning.

### Preventive Law

**Conduct Research:** The best preparation is to be informed. Conduct online research about health care and other consumer issues, and stay up-to-date on news regarding popular scams being perpetrated on the unsuspecting.

**Privacy and Security:** Guard against identify theft by keeping your personal records secure. Use caller ID and do not answer calls from unfamiliar numbers; place your phone number on the Do Not Call Register; just say “no” to door to door solicitors; and don’t open suspicious e-mails. Make photocopies of your current credit cards and keep them on file, along with information on how to report lost or stolen cards.

**Consumer Transactions:** Maintain good records of your transactions; read the fine print; get all promises in writing. Do not be afraid to investigate the credentials of anyone unfamiliar.

**Dealing with Family Members.** One of the biggest mistakes women make is to loan money to family and friends. Loaning money to relatives, whether by giving them cash or co-signing a loan, is *risky business*. Sometimes it’s best to simply muster up the courage to say “no” rather than risk serious damage to the relationship.

**Use Small Claims Court:** This is one of the most effective things you can do to resolve a debt. In Utah, the small claims courts can hear claims for up to \$10,000. The process is much simpler, faster and less expensive than in District Court. You can prepare and file the forms yourself; they are available online at [utahcourts.gov](http://utahcourts.gov).

### Learn to Spot Common Scams:

- Investment fraud (close friends and relatives, as well as strangers, may be look-

ing for a victim!)

- Sweepstakes and prizes where you have to pay for something in order to claim the prize. This is illegal and can lead to victimization.

- Phony business opportunities, such as ads that claim you can get rich while working from home. Check with the Better Business Bureau (BBB), research whether the company has been in trouble, and do not sign anything or provide any form of payment without an outside opinion.

- Phone solicitations that promise something that sounds too good to be true, or that sound like they are solicitations for charity. If you feel inclined to make a contribution, obtain materials in writing before parting with your money.

- Unsolicited reverse mortgage offers.

- “Free lunch” financial seminars. These typically involve high-pressure sales tactics.

- Living trust kits and seminars. These may promote products that are not right for you.

- *Never sign legal documents before your lawyer reviews them.*

### Divorce

#### Prior to filing for divorce:

- **Save up liquid funds.** There are many reasons why you could need cash leading up to and during your divorce. You will need to save money in order to hire a lawyer and pay litigation expenses. Also, you may have living expenses that you need to pay in the event that you and your spouse end up needing to separate.

- **Retain a good divorce lawyer.** There is a lot at stake in a divorce case. If you are considering divorce, hire a good divorce lawyer, a professional trained to understand the process, know the obstacles and guide you as smoothly as possible through the divorce process.

- **Open individual accounts for savings, checking, and credit.**

- **Evaluate joint bank accounts.** Be aware of the fact that if all of your money is in joint account, your spouse might simply take it all, leaving you with no cash. This can be a real problem because even if you have a lot of assets, they will not be in liquid form. You may wish to take some or all of the money in the bank account and put it in a separate bank account for yourself, depending on your personal situation and the likelihood that your spouse will empty the account. However, normally taking all the money in the bank account will not be to your advantage, as it immediately escalates the conflict and stress of divorce. It also will not likely be well received by the divorce judge. The main point is to consider the issue carefully and to consult with your lawyer about it. If you do take money from a joint account, maintain careful records of your use of the funds.

- **Evaluate joint credit cards, lines of credit and other liabilities:** If a divorce is imminent you do not want to be liable on any accounts on which your spouse

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# Keep it legal: three mistakes to avoid in your advertisements

All-night brainstorming sessions; focus group studies; last-minute decisions to add, then remove, and then add again a period at the end of a word. A lot of time and effort go into your company's advertisements, but while you are considering everything down to the kerning of the text, don't forget to consider the legal regulations of your advertisement. This article provides an overview of three common legal problems related to advertising that businesses should take care to avoid failing to identify and protect your intellectual property, infringing someone else's intellectual property and using false or misleading advertisements.



David Pacheco

through use of the mark in commerce. The trademark owner can register the trademark with the state or federal government (federal registration being the most common), which confers certain rights to the trademark owner, such as additional remedies for infringement. Trademarks should be properly marked to let consumers and competitors know that the owner is using the mark to distinguish and identify the source of the products or services. The ® symbol is reserved for use with federally registered trademarks. Unregistered trademarks should use TM (or SM for "service mark" for marks used in connection with services).

Before launching a new brand or logo, make sure no one else can claim prior rights to the mark by conducting a clearance search. Many companies have learned a tough lesson by investing considerable time and money into a new brand only to abandon the brand and start from scratch after losing a fight with someone who had prior rights to the same or similar mark.

**b. Patents.** A patent protects certain types of innovations by granting the holder the right to exclude others from making, using or selling the innovation described in the patent, thereby giving the holder a legal monopoly on the innovation. Patents are granted for useful innovations that are novel and non-obvious. In some instances, inventors can lose their right to patent an innovation by disclosing it to the public prior to seeking patent protection. Prior to advertising a product or business method

that may incorporate a patentable innovation, you should consult with a patent attorney to ensure the patentable material is properly protected.

**c. Copyrights.** A copyright is a bundle of rights granted to the author of a creative work as soon as the work is fixed in a tangible medium. Creative works can include photographs, illustrations, videos, audio recordings, sheet music and software code. Unlike patents, copyrights are granted automatically. Registration of the copyrighted work is advisable, however, because protecting the work from infringement is much easier if the work is registered. Companies should register at least the key creative works used or referenced in an advertisement.

**d. Trade secrets.** Trade secrets include any information or knowledge not publicly known or readily ascertainable that gives a company a competitive edge in the market. Trade secrets are typically protected with employment agreements, nondisclosure agreements and noncompete agreements. Companies should ensure that any person with access to trade secrets is bound by a written agreement to keep the trade secrets confidential. Companies must carefully balance the desire to market their goods and services by showcasing their innovative processes or knowledge with the need to protect their trade secrets.

**e. Publicity rights.** An individual appearing in an advertisement may have rights to his or her image and likeness. Companies should be sure to have a written agreement with any person featured in an advertisement, especially when it is

a celebrity or other public figure, which explicitly grants the company the right to use the person's image and likeness. Using celebrity impersonators may also violate the celebrity's rights, as was the case when a video store used a photograph of a Woody Allen look-a-like in an advertisement.

**2. Infringing third-party intellectual property.** At times your company may benefit from comparing your products or services with those of a competitor. While comparative advertising is a great way to show consumers the superiority of your product or service, it can also create legal problems. The most common claims arising from comparative advertising are claims of trademark and copyright infringement.

Trademark infringement occurs when two marks are used in a way that is likely to confuse consumers as to the source of the goods or services on which the marks are used. Trademarks need not be identical to infringe. You should be cautious when using another entity's trademark and be sure that your advertisement cannot be interpreted in a way that suggests that you are in some way affiliated with the entity or its products and services. If you are not careful, the trademark owner may sue for infringement and potentially win an injunction and/or damages.

Using a third party's copyrighted material in an advertisement is more problematic, as unauthorized use of another's copyright for commercial use is generally prohibited. It is usually best to get a license to use the work from the copyright owner. Damages for copyright infringement can

see ADS page 14



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## Free basic copyright and trademark protection for business owners

If you ever plan to sell your company, want to get investors or plan to leave a legacy, protecting your intellectual property (IP) is key to that success. But, it takes money to make money, right? Or, does it? The first two forms of intellectual property (IP) in virtually any business are:

**Content** — Includes websites, pamphlets, instruction manuals, art, books, music, videos, etc.

**Brand** — includes trademark, company name, product name, slogan, etc.

These can both be protected under the law. They can also be transferred (read that as “sold”). To really nail down protection in either of these areas, you need an IP lawyer, plain and simple. But, you don’t always need to nail down protection all the way; sometimes you just need a “covering,” especially in the beginning.

Here are the best FREE ways to protect the IP value of your content and brand that everybody should be doing that provide basic protection for your business:

### Free Copyright Protection

The lowest level of copyright protection is automatic and completely free as soon as you have a tangible form of your creative work. This can be a written book, a Web page, an audio recording of you playing an instrument or a video you make to

post on the Web. To strengthen this free protection, *put a copyright notice on anything that you create that you don’t want other people copying.* The copyright notice can have the following format:

©[space]First Year of Publication[space]Owner

Example:

© 2010 Webb IP Law Group

The © symbol can also be replaced with “Copr.” or with (c). The date can be a date range or list if you have published multiple times. For

example, some websites are updated over a period of years. In that case the date would cover a range of the years where there were updates. Examples:

© 2006 – 2012 Webb IP Law Group

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You can use the © mark even if you have not applied for federal registration of your copyright. Make it a habit of putting this mark on all of your content. It shows that you know you have rights and that they should be taken seriously.

**Warning:** *If you pay someone to create content for you, they often own it instead of you. Make sure that your agreements are clear about ownership of content. If possible and appropriate, make sure that the written agreement states that you own it.*

### Free Trademark Protection

see FREE page 18



Jason Webb

## M&A requires a team effort

By Thomas Taylor

Selling a company is often the largest, most complex and important transaction of an entrepreneur’s career, and the sale process can be one of the most stressful events in her or his life. One complicating factor in many sales of privately held companies is that, when it comes to selling a company, the leverage usually resides on the buyer’s side of the table. Although for many sellers, selling their company is a one time, once-in-a-lifetime event, most buyers are experienced M&A professionals who routinely do M&A transactions.

Private equity firms or other financial buyers are highly sophisticated and well-funded, and have top tier legal, accounting and financial advisors to assist with investigating, structuring, negotiating and documenting transactions. Similarly, many strategic buyers have experienced dealmakers on their executive teams, and generally will retain very experienced and capable outside advisors as well. By contrast, many sellers are entrepreneurs and businesspeople with little or no experience with M&A transactions. Because of this disparity, it is critical that a seller assemble the “right” M&A deal team as early in the process as possible in order to protect the seller’s interests and maximize value while minimizing the risk of the deal not closing.

### Timing is Critical

Many well-intentioned business owners erroneously believe they can assemble their advisory teams after they have been approached by a buyer and commenced negotiations. Frequently, business owners

will assume they can work out the business terms in a letter of intent (LOI), then turn it over to the lawyers to draft the deal documents and work out the details. Such people fail to understand three critical things:

- Although most LOIs are, for the most part, legally not binding, once basic business and deal terms are agreed to and an LOI signed, it is very difficult to negotiate different terms without being accused of going back on one’s word or trying to renegotiate the deal.

- The seller’s leverage in an M&A transaction will be at its all-time high during the negotiation of the LOI. Therefore, sellers should try to solidify the most important deal points in the transaction at the LOI stage. Sophisticated buyers often prefer to negotiate many of the critical deal terms later in the transaction, when the buyer’s leverage is higher.

- In order to effectively negotiate important sell-side points in the LOI, the seller needs to know (i) what the important points will be in the deal, (ii) what is “market” or the customary range for those points, and (iii) what the seller will insist on in the transaction and whether or not it is consistent with customary market practices.

As a consequence of many sellers’ failure to understand these three things, frequently sellers will try to negotiate on their own with buyers, thus allowing themselves to be “locked” into adverse provisions or “off-market” terms and conditions, and failing to take advantage of their leverage

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## JOBS

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hindered by a lack of external capital to take businesses to the next level. In particular, the act provides exemptions relating to:

- The initial public offering (IPO) process.
- General solicitation and general advertising.
- Smaller securities offerings and registration requirements under the Securities Exchange Act of 1934.
- Ability for small businesses to access capital through crowdfunding.

The Act targets small businesses that qualify as Emerging Growth Companies (EGCs). EGCs are defined as companies with less than \$1 billion in total annual gross revenues in the most recently completed fiscal year, so long as the company's IPO was not completed on or before Dec. 8, 2011. Many Utah businesses will be impacted by the act, because the vast majority of Utah businesses will qualify as EGCs. As a result, many Utah companies will enjoy reduced disclosure, registration and reporting requirements.

### Relaxed Registration Requirements

The act would ease many registration requirements currently imposed by federal securities regulations. The Securities and Exchange Commission (SEC) is required to develop new rules permitting general solicitation and advertising for companies exempted from certain registration requirements under Regulation D of the Securities Act of 1933, provided that all purchasers of the

securities qualify as "accredited investors."

Similarly, the act also requires the SEC to develop rules permitting securities to be offered — including by general solicitation or general advertising — to persons other than qualified institutional buyers, so long as they are only sold to qualified institutional buyers. The act requires the SEC to develop these new rules within 90 days of the act's adoption; however, the SEC recently announced that it will not meet the timeline contemplated by the act. Additionally, although the act does not provide a timeline, the SEC is required to promulgate rules exempting the registration requirements for certain equity securities, debt securities, debt convertible into equity, and guarantees of these securities that do not exceed a total of \$50 million within a 12-month period.

Under the act, the SEC is also obligated to develop rules that would exempt individuals from the current requirement to register as a broker for maintaining a platform that permits securities transactions, co-investing or providing certain services that are ancillary to capital-raising activities.

### Capital Through the Crowd

A key feature of the act is the provision that allows businesses to participate in crowdfunding. Subject to the rules to be adopted by the SEC, this new funding mechanism will offer new capital-raising opportunities for Utah businesses. As proposed, crowdfunding would enable businesses to obtain capital through a large number of small investors. Traditionally, such funding was

not allowed without expensive and time-consuming registration with the SEC or a state securities agency. As drafted, the act would exempt companies from registration if those companies do not sell more than \$1 million of securities within a 12-month period.

Crowdfunding transactions would be required to be completed through an intermediary registered with the SEC as a broker or "funding portal." This means entrepreneurs could not promote nor sell securities through their own websites, but they would be allowed to solicit prospective investors through approved funding portals (websites). These portals would not be allowed to provide investment advice, and they would be required to comply with SEC regulations.

As businesses approach us at Parr Brown with questions about crowdfunding, we make sure they understand they will still be subject to significant disclosure requirements. This includes the obligation to provide detailed descriptions of the securities to be sold through the intermediary, as well as disclosure of extensive business, financial and management information. For instance, a company utilizing crowdfunding would be required to file with the SEC and provide to prospective investors a discussion of the financial state of the company, a business plan, a description of the intended use of the funding proceeds, and a summary of the company's ownership structure.

Additionally, companies that pursue crowdfunding would be required to determine and disclose what their target offering amount

will be, as well as the deadline to reach their target. From there, companies would need to provide regular updates regarding their progress in meeting the target offering amount.

The maximum offering amount issuers would be allowed to raise through crowdfunding would be \$1 million in funding during a 12-month period, which is intended to be a reasonable range of start-up funding for many early-stage companies. Companies looking to grow more aggressively could still seek additional sources of capital from institutional investors and other accredited investors using more traditional methods of financing.

Failure to comply with the crowdfunding regulations, when adopted, would subject violators to potentially severe regulatory sanctions, including rescission claims (claims for refunds) against the company, actions against the company's directors and officers, and sanctions against individuals who offer or sell securities in the offering.

The SEC is currently developing the rules to implement crowdfunding, and under the act, the SEC is charged with the obligation to complete those rules in early 2013. The ultimate effect of crowdfunding on start-up companies will be determined largely by the SEC's final rules. Crowdfunding may represent a new opportunity for many early-stage companies; however, companies intending to engage in crowdfunding will need to carefully consult the final rules and consult with an experienced legal team to avoid potential legal liability.

### Removing Burdens on Going Public

The act provides for a reduction in the regulatory requirements for EGCs relating to the disclosures, reports and communications that are typically associated with the process of public registration, frequently accomplished through an IPO. For example, during the IPO registration process, EGCs would only be required to disclose two years of financial information, which may be submitted confidentially to the SEC. Brokers and dealers would be permitted to pub-

lish and distribute research reports on EGCs, and such reports would not constitute offers to purchase or sell securities.

The act would also expand the scope of permissible communications during the IPO process. Contrary to historical practices, the act would permit EGCs that are undertaking an IPO to engage in certain communications with potential investors that are qualified institutional buyers or institutions that are accredited investors. The act would also relax certain existing restrictions on communications between early-stage companies and securities analysts.

Most of the act's provisions will be implemented through rule-making by the SEC according to deadlines established by the act. Until the SEC promulgates rules, the details of many of the key provisions remain uncertain. In the meantime, many have expressed concerns about the potential for fraud or abuse under the new rules. With the loosening of regulations, investors also need to understand the changes and conduct careful due diligence before investing in any enterprise.

The act represents Congress' effort to open up the capital markets and stimulate the economy. It will likely produce new opportunities but will also create new pitfalls for companies and investors. Companies hoping to take advantage of these new rules should maximize their opportunities and be cautious to avoid the potential minefields by consulting with trusted legal and financial advisors.

Brian Lloyd is a shareholder and a member of the business transactions group at Parr Brown Gee & Loveless ([www.parrbrown.com](http://www.parrbrown.com)). He specializes in corporate and securities law and has advised public and private companies, as well as investors, on formation, securities regulation, mergers, acquisitions, corporate governance and financial transactions. He is regularly recognized by his peers as one of the top lawyers in Utah as noted by Mountain States Super Lawyers, Chambers USA — America's Leading Business Lawyers, and Best Lawyers in America.

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## WOMEN

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has charging privileges. It is not unheard of for an angry spouse, upon learning of a divorce, to go on a shopping spree. Some lawyers may advise their clients to take out cash advances on joint cards to provide a cushion while the divorce is pending or to charge lawyer's fees to jointly owned cards. Consider canceling such joint accounts or at least reducing the spending limits. If your spouse is an authorized user on charge cards in your name, see what steps the credit card companies require to terminate the authorization. Also consider home equity lines of credit. You may need to close lines of credit or restrict access to further loans pending the resolution of the divorce. Discuss these issues with your lawyer before making a final decision.

• **Pay off as much joint debt as you can with joint funds:** In particular, try to pay off credit card balances, store card balances, and small loans. These accounts cannot be canceled until the debt has been paid.

**While the divorce is pending:**

• Change the beneficiary on life insurance policies, retirement plans and bank accounts.

• Update your will, and change the terms and beneficiaries as necessary.

• Obtain a credit report to verify that your ex-spouse is not charging debt in your name with a forgotten account.

• Understand Social Security benefits that may be available based on your former spouse's employment credits.

**Caution: A bifurcated divorce may not be in your best interests.** In a bifurcated divorce, the parties can get a quick decision ending the marriage, while child support and other financial obligations are left unsettled for a time. Once the divorce is granted, there may be incentive for one spouse to delay the final judgment at the expense of the other by dissipating marital assets and leaving the innocent spouse with little bargaining power. Think very carefully before agreeing to a bifurcated divorce.

**Estate Planning**

Everyone has an estate, and everyone needs a plan. You need to have the following documents in order — and tell people about them. For example, post a note on your refrigerator with directions on how to locate important documents.

• **Living Trust:** You can title your assets in your own trust in which you designate how they should be controlled and distributed. A trust can protect your family's privacy because it does not go through probate (probate documents become public record). A trust can address complicated family dynamics, such as a second or third marriage, siblings who do not get along, special needs, etc.

• **Power of Attorney.** This allows you to give a trusted person the right to act as if they were you. It can be limited to a specific transaction or it can give full power to handle all financial affairs. Be careful who you choose as your agent. Talk to them first, making sure they know that their duty is to act in your best interests. This is a position of trust, and the law will hold the agent to the standards of a fiduciary.

• **Living Will:** This allows you to make

your wishes known regarding life prolonging medical treatments (also referred to as an Advance Directive or Health Care Directive).

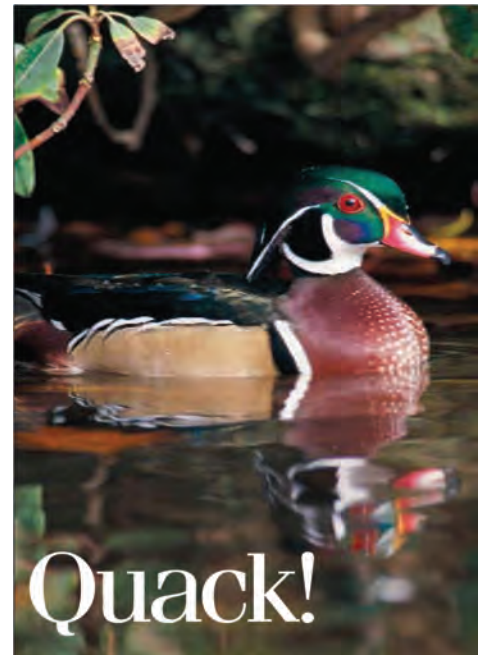
• **Health Care Power of Attorney:** This allows you to appoint someone to make health care decisions for you if you are incapacitated. (It is also good to have in place for your children over 18, so that if they are hospitalized and unable to communicate, you can make decisions for them.)

• **HIPAA Release:** This allows others, whom you designate, to have access to your medical records and information and it allows physicians to discuss such information with them. (Again, this is good to have in place for your children over 18, so that their medical providers can discuss their medical information with you.)

Please do not wait until your loved one is in the hospital on life support or facing life-threatening illness or surgery to have these documents in order. There's no time like now to take care of these things.

As an attorney and a trusted advisor, I know my clients may become isolated and vulnerable. People will try to steal from them, wield undue influence over them, or otherwise try to take advantage of them. It is important to me that I form solid relationships with my clients in order to provide the best services, protections and ongoing support for each particular situation.

Marianne Gardner Sorensen is a shareholder in the Salt Lake City law firm of Jones Waldo. Her practice focuses on real estate law, promotions and marketing law and international law.



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## ADS

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be substantial — up to \$150,000 per work infringed.

Before you decide to use another entity's intellectual property, you should consult with an experienced intellectual property attorney to be sure you understand the risks involved.

**3. False advertising.** Federal law requires that advertisements be truthful and avoid misleading consumers. False advertising laws are enforced by the Federal Trade Commission (FTC) and by competitors and consumers.

**a. FTC enforcement.** The FTC is the sole enforcer of the Truth-in-Advertising provisions of the Federal Trade Commission Act, which require that the advertiser have a reasonable basis for all its claims and that the advertisement be truthful, not deceptive, and fair. The FTC pays the closest attention to advertisements that make claims regarding consumers' safety and health. The FTC can enforce the law by issuing injunctions, imposing fines and requiring correc-

tive advertising. FTC enforcement actions can cost a company millions of dollars, as was the case when the makers of Airborne effervescent tablets settled a case brought by the FTC alleging false and misleading health claims in advertisements. A company should carefully evaluate the messages communicated to consumers and thoroughly document any evidence on which it bases a claim, especially if the claim involves the health and safety of the consumer.

The FTC has provided specific guidance to certain industries and companies utilizing certain types of advertising. For example, the FTC has provided specific guidance for companies making claims regarding the environmental friendliness of their products or services. This guidance, commonly referred to as the "Green Guides," helps to identify specific practices that the FTC believes are in violation of advertising laws. The FTC also has specific guidance for dietary supplement companies, including guidance on the type and degree of substantiation required for health claims.

**b. Competitor and consumer enforcement.** Consumers and competitors can sue a

company for false advertising under Section 43 of the Lanham Act. Under the Act, any person that "misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities [in commercial advertising or promotion]" is subject to civil liability. Note that not only is a company required to truthfully advertise its products and services, but it must also avoid misrepresenting another entity's goods and services. Class action lawsuits by consumers who feel that an advertisement is false or misleading can cost millions of dollars and substantially harm a company's brand and reputation.

In conclusion, there are a number of legal considerations to take into account when advertising your products or services. While this is not a thorough list of all legal aspects of advertising, it should provide some initial guidance for advertisers. The bottom line is that advertisers should make sure all intellectual property referenced in an advertisement is protected, that the advertisement does not in some way infringe another person's intellectual

property, and that all claims made in the advertisement are truthful, not deceptive or misleading, and backed up with legitimate evidence. Taking these steps with the assistance of experienced legal counsel should help your company avoid the most common legal mistakes in advertising.

David Pacheco is an attorney in the Stael Rives Technology and Intellectual Property practice group helping clients register, maintain and protect trademarks, copyrights and trade secrets. Pacheco has experience protecting clients' intellectual property through proceedings in federal court, the Trademark Trial and Appeal Board and through other enforcement and protection avenues including arbitration under the Uniform Domain Name Resolution Policy. He can be reached at [djpacheco@stoel.com](mailto:djpacheco@stoel.com) and (801) 578-6936.

*This column is not to be considered legal advice or a legal opinion on specific facts or circumstances. The contents are intended for informational purposes only. If you need legal advice or a legal opinion, please consult with your attorney.*

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BOOK of  
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2012

# Law Firms in Utah

Listed Alphabetically

page 1

Firm Name Address	Phone Fax Web	# of Utah Attorneys # of Utah Partners	# of Utah Paralegals # of Full Time Utah Employees	Total # of Attorneys Nationwide Year Established	Locations in Utah Locations Nationwide	Major Areas of Practice	Managing Partners
<b>Ballard Spahr LLP</b> 201 S Main St, Ste 800 Salt Lake City	801-531-3000 801-531-3001 ballardspahr.com	39 18	11 68	508 1885	Salt Lake City Atlanta, GA; Baltimore, MD; Bethesda, MD; Denver, CO; Las Vegas, NV; Los Angeles, CA; New Jersey, Philadelphia, PA; Phoenix, AZ; San Diego, CA; Washington D.C., Wilmington, DE	Business & Finance, Commercial Litigation, Communications, International, Labor & Employment, Life Sciences/Technology, M&A, Mortgage Banking, Patents, Public Finance, Real Estate, Resort & Hotel, Securities, Tax	Blake K. Wade
<b>Callister Nebeker &amp; McCullough, P.C.</b> 10 E South Temple, Ste 900 Salt Lake City	801-530-7300 801-364-9127 cnmlaw.com	51 32	11 41	51 1974	Salt Lake City, Sugar House DND	Banking, corporate, Estate Planning, Tax, Litigation	T. Richard Davis
<b>Christensen &amp; Jensen</b> 15 W South Temple, Ste 800 Salt Lake City	801-323-5000 801-355-3472 chrisjen.com	27 19	7 54	DND 1949	Salt Lake City DND	Appeals, commercial Litigation, construction, Crisis Management, Employment & Labor, Fire, Government Defense, Insurance Bad Faith & coverage, Mediation & Arbitration, Personal Injury & Property Damage, Products Liability, Real Estate & Land Use, Recreational, Dram Shop, & Hospitality, Tort Defense, Transportation Law, Water Law	Scott T. Evans
<b>Clyde Snow &amp; Sessions</b> 201 S Main Street, Ste 1300 Salt Lake City	801-322-2516 801-521-6280 clydesnow.com	29 19	4 40	29 1951	Salt Lake City DND	White Collar Criminal Defense & Government Investigations, Family Law & Domestic Relations, Estate & Tax, Business & Transactions, Employment Law, Real Property & Eminent Domain, Natural Resources and Water Law, Intellectual Property & Trade Secrets Litigation, Securities, Professional Malpractice	Walter A. Romney, Jr.
<b>Cohne, Rappaport &amp; Segal, P.C.</b> 257 E 200 S, Ste 700 Salt Lake City	801-532-2666 801-355-1813 crslaw.com	17 14	2 10	17 1975	Salt Lake City DND	Civil Litigation, Real Estate, Business, Family Law, Bankruptcy, Wills & Estates, Contracts, Securities, Mergers & Acquisitions	Jeffrey L. Silvestrini
<b>Dorsey &amp; Whitney LLP</b> 136 S Main St, Ste 1000 Salt Lake City	801-933-7360 801-933-7373 dorsey.com	24 13	4 38	561 1912	Salt Lake City Anchorage, AK; Wilmington, DE; Denver, CO; Des Moines, IA; Fargo, ND; Minneapolis, MN; Missoula, MT; New York, NY; Palo Alto, CA; Seattle, WA; Costa Mesa, CA; Washington D.C.	Bankruptcy & Financial Restructuring, Corporate, Trial, Energy & Natural resources	Annette Jaruis, Marianne Short
<b>Fabian Law</b> 215 S State St Salt Lake City	801-531-8900 801-596-2814 fabianlaw.com	45 26	2 85	46 1919	Salt Lake City Columbus, OH; Las Vegas, NV; Washington D.C.	Bankruptcy, business & corporate, complex Litigation, Employment, Energy & Utilities, Environment Natural Resources, Real Property, Tax & Estate Planning	John E. S. Robson
<b>Holland &amp; Hart LLP</b> 222 S Main St, Ste 2200 Salt Lake City	801-799-5800 801-799-5700 hollandhart.com	76 41	10 138	450 1947	Salt Lake City Aspen, CO; Billings, MT; Boise, ID; Boulder, CO; Carson City, NV; Cheyenne, WY; Colorado Spring, CO; Denver, CO; Denver Tech Center, CO; Jackson Hole, WY; Reno, NV' Santa Fe, NM; Washington D.C.	Business & Finance, Bankruptcy, Emerging Growth & Venture Capital, Environmental & natural Resources, Employment & Immigration, Intellectual Property, Litigation, Real Estate & Construction, Tax	Greg Lindley
<b>Jones Waldo</b> 170 s Main St, Ste 1500 Salt Lake City	801-521-3200 801-328-0527 joneswaldo.com	78 56	14 DND	DND 1875	Provo, Salt Lake City, St. George, Park City Naperville, IL	Commercial Real Estate, Business Law Litigation	Keven Rowe
<b>Kirton McConkie</b> 50 E South Temple Salt Lake City	801-328-3600 801-321-4893 kmclaw.com	130 83	18 234	130 1964	Salt Lake City DND	Real Estate, Intellectual Property, Litigation, Business, Employment, Healthcare, Tax and Estate Planning, Immigration, Construction	Lorin Barker

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# Law Firms in Utah

Listed Alphabetically

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Firm Name Address	Phone Fax Web	# of Utah Attorneys  # of Utah Partners	# of Utah Paralegals  # of Full Time Utah Employees	Total # of Attorneys Nationwide  Year Established	Locations in Utah  Locations Nationwide	Major Areas of Practice	Managing Partners
<b>Parr Brown Gee &amp; Loveless</b> 185 S State St Salt Lake City	801-532-7840 801-532-7750 parrbrown.com	73 54	10 36	73 1975	Salt Lake City DND	Corporate Law, M&A, Securities Regulation & Public Offerings, Real Estate Development & Finance, Commercial Litigation, Employment Law, Natural Resources Law	Heidi E. C. Leithead
<b>Parsons Behle &amp; Latimer</b> 201 S Main St, Ste 1800 Salt Lake City	801-532-1234 801-536-6111 parsonbehle.com	106 75	9 185	133 1882	Salt Lake City Boise, ID; Reno, NV; Las Vegas, NV; Spokane, WA	Antitrust & competition, Banking & Finance, Corporate Restructuring & Chapter 11 Bankruptcy, Corporate Transactions, Securities & Tax, Divorce & Family, Employment & Labor, Energy & Utilities, Environmental & Natural Resources, Government Relations & Lobbying, Health Care, Intellectual Property Law & Litigation, Litigation, Trials & Appeals, Mining, Real Estate, Trusts & Estate Planning	Raymond J. Etcheverry
<b>Price Yeates &amp; Geldzahler</b> 15 W South Temple, St 1700 Salt Lake City	801-524-1000 801-524-1098 princeyeates.com	36 25	3 51	36 1971	Salt Lake City DND	Alcoholic Beverage Licensing & Compliance, Bankruptcy, Commercial Business, Employment Labor, Estate Probate Trust Administration, Family Law, Financial Institutions, Government Relations, International Law, Litigation, Natural Resources, Personal Injury, Real Estate, Tax, Trademark & Unfair Business Practices	John S. Chindlund
<b>Snell &amp; Wilmer</b> 15 W South Temple, Ste 200 Salt Lake City	801-257-1900 801-257-1800 swlaw.com	47 25	4 50	415 1938	Salt Lake City Phoenix, AZ; Tucson, AZ; Los Angeles, CA; Orange County, CA; Denver, CO; Las Vegas, NV; Reno, NV	Commercial Litigation, Products Liability, commercial Finance, Real Estate, Corporate Finance, Mergers & Acquisitions, Bankruptcy, Environment, Oil, Gas and Mining, Intellectual Property, Employment	Brian Hulse
<b>Snow Christensen &amp; Martineau</b> 10 Exchange Place Salt Lake City	801-521-9000 801-363-0400 scmlaw.com	52 43	17 53	DND 1886	Salt Lake City, St George DND	Business Organizations, Commercial Litigation, Insurance Defense, Bankruptcy, Trucking & Transportation, Appeals	Andrew Morse
<b>Stoel Rivers LLP</b> 201 S Main St Salt Lake City	801-328-3131 801-578-6999 stoel.com	73 43	7 133	390 1907	Salt Lake City Anchorage, AK; Boise, ID; Lake Tahoe, CA; Minneapolis, MN; Portland, OR; Sacramento, CA; San Diego, CA; San Francisco, CA; Seattle, WA; Vancouver, WA	Corporate, Litigation, Energy, Labor & Employment, Intellectual Property, Real Estate, Estate Planning	Richard H. Johnson II
<b>Strong &amp; Hanni Law Firm</b> 3 Triad Center, Ste 500 Salt Lake City	801-532-7080 801-596-1503 strongandhanni.com	52 34	15 104	52 1888	Salt Lake City, Sandy DND	Business, Insurance Defense, commercial Litigation, Employment, Family, Medical Malpractice Defense, Real Estate	Catherine M. Larson
<b>Thorpe North &amp; Western, LLP</b> 8180 S 700 E, Ste 350 Sandy	801-566-6633 801-566-0750 tnw.com	21 8	2 14	21 1979	Sandy DND	Intellectual Property, Patents, Trademarks, copyrights, trade Secrets	Garron M. Hobson & Peter M. de Jonge
<b>Van Cott Bagley Cornwall &amp; McCarthy, P.C.</b> 36 S State St, Ste 1900 Salt Lake City	801-532-3333 801-534-0058 vancott.com	57 28	5 107	57 1874	Salt Lake City, Ogden, Park City Las Vegas, NV	Banking & Financial Service, Construction, Corporate, M&A, Business Transactions, Eminent Domain, Employment & Employee Benefits, Energy, Government Relations, Insolvency & Creditor Rights, Intellectual Property, Natural Resources & Environmental Law, Litigation, Real Estate, Wealth Management	Stephen D. Swindle
<b>Workman Nydegger</b> 60 E South Temple, Ste 1000 Salt Lake City	801-533-9800 801-328-1707 wnlaw.com	53 35	7 DND	55 1984	Salt Lake City Irvine, CA	Intellectual Property (IP) Prosecution, IP & Complex Litigation, Mediation, Licensing, IP Counseling	Brent P. Lorimer

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**M&A**

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to negotiate other critical issues at the LOI stage. As a result, often, by the time the LOI has been executed, substantial damage to the sell-side's position has been inflicted, and sellers and their advisors find themselves scrambling to try to regain the lost ground. The lost ground can sometimes be made up if the buyer is highly motivated and the seller's lawyer is able to take a firm negotiating position and carefully draft the deal documents. Unfortunately, in many instances sellers unwittingly agree to certain provisions or deal terms or structures that are not in their best interest and that cannot be overcome, leaving them with the difficult decision of going forward with a suboptimal deal, or terminating the transaction and walking away. Negotiating a LOI without advice of experience M&A advisors can have a substantial adverse impact on the deal, including the valuation, tax consequences and risk allocation for the seller and its owners, thereby materially impacting the economics of the transaction and the seller's post-closing legal and financial exposure.

**When to Retain M&A Advisors**

To help ensure a successful and efficient sale process, sellers should begin preparing the company for a possible M&A transaction well in advance of beginning to explore sale opportunities or approaching potential buyers. Before undertaking a sale transaction, the management team should identify experienced legal counsel, accounting and tax professionals, and an investment banker to advise the seller through the process. In addition, often times the seller is well-advised to engage a financial advisor to assist in managing the transaction proceeds after the closing. Forging these relationships well in advance of a transaction is one way to "level the playing field" and will allow a seller to quickly and appropriately respond once a potential transaction comes into view. I generally advise clients that 12 to 18 months prior to commencing an M&A transaction is not too early to assemble the team and begin planning and structuring the process.

One of the critical tasks early

on is to consult with the entire team to identify important legal, accounting, tax, financial and operational issues that need to be addressed and resolved *before* prospective buyers commence their due diligence investigations. Conducting a thorough "deal audit," or internal due diligence investigation, and completing all necessary corporate "housekeeping" prior to entering into negotiations with prospective buyers is imperative. One of the worst things that can happen in an M&A transaction is for the buyer or its advisors to learn about a previously undisclosed problem during the buyer's due diligence investigation and raise the issue after the parties have devoted substantial time, effort and attention to the transaction and incurred significant costs and expenses. At best, the seller and its management team and advisors will lose credibility, and may be placed in the untenable position of being forced to reduce the purchase price and/or having a substantial portion of the purchase price held back in an escrow account pending the resolution of those matters. At worst, the buyer may terminate negotiations and seek any remedies available to it under the transaction documents.

**Factors to Consider in Selecting M&A Counsel**

An experienced M&A lawyer will be able to anticipate issues and identify matters that must be considered and addressed in order to successfully document and close a sale transaction. Sellers should consider several factors when choosing M&A counsel, including deal experience, industry understanding, breadth of expertise, access to other professionals, fees and overall business acumen.

Often one of the first concerns for sellers is transaction costs, as it should be. It makes no sense to sell your business in order to simply pay all of the sale proceeds to the advisors. After taxes, the investment banking or brokerage fees are typically the single largest out-of-pocket expense in most M&A transactions. Legal fees are usually the next largest expense. Legal fees vary widely based upon the law firm that is retained, its size and geographical location. Inexperienced sellers often make several mistakes in engaging legal counsel, includ-

*One complicating factor in many sales of privately held companies is that, when it comes to selling a company, the leverage usually resides on the buyer's side of the table. Although for many sellers, selling their company is a one time, once-in-a-lifetime event, most buyers are experienced M&A professionals who routinely do M&A transactions.*

ing: (i) paying more than is necessary by engaging large, national or super-regional firms merely on the mistaken belief that "bigger is better," (ii) paying too little by choosing a lawyer or a law firm that lacks the required expertise and experience in mergers and acquisitions and all of the other substantive areas of the law that are involved in most M&A transactions, thus essentially paying the lawyer to try to "come up to speed" and learn how to do an M&A transaction during the course of the deal, and (iii) waiting until late in the process to retain counsel, thus requiring the correction of previous mistakes.

A generalist lawyer, or the lawyer who handled your divorce or car accident or who prepared your will and estate plan, is generally not equipped to anticipate or adequately deal with the plethora of issues that arise in most M&A transactions. Sellers need to understand that mergers and acquisitions are extremely complicated, multidisciplinary transactions, and involve numerous different substantive areas of the law, none of which can be mastered by a single lawyer. Most M&A transactions involve the following substantive areas of law: corporate, employment, employee benefits, labor, securities, real estate, environmental, state and federal tax, partnership tax, regulatory and intellectual property, among others.

All lawyers and law firms claim to be highly experienced. Based solely on their websites, every law firm in the country has the best and most experienced attorneys. Law firms tout the credentials of their lawyers and provide lists of transactions they have worked on, making it difficult to

distinguish between legitimate experience on the one hand and puffery on the other. One of the best ways for a seller to truly distinguish experience is to meet with the attorneys and talk with trusted business and financial advisors to narrow the list. Then diligently research the level of experience, breadth and background of those lawyers and law firms on the short list. Always ask the lawyer you are considering engaging for references of current or former clients who can speak to the skill, responsiveness and negotiating style of the lawyer.

Furthermore, sellers need to understand that this type of transactional work does not scale — the reality of M&A transactions is that most deals, no matter how large or small, take the same amount of time and effort to successfully complete and generally involve the same issues. In other words, it generally takes the same amount of time and effort to complete a \$500 million M&A transaction as it does to do a \$10 million transaction.

The "right" law firm is one that has current and relevant experience with deals of the size, structure and nature of your transaction, that can and will assign its best and most experienced M&A lawyers to your transaction and that charges reasonable billing rates. It is also essential to retain a law firm that has a broad practice platform and adequate bandwidth to get your deal done efficiently and on a timely basis. M&A counsel ideally should have resources and external connections to draw upon when the firm does not itself have specialized expertise that may become necessary. Of course, there should be a good fit in terms of personality, business philoso-

phy and risk appetite, as sellers will spend countless hours with their lawyers over the weeks and months it takes to get an M&A deal negotiated, documented and closed. Ultimately, the sellers will need to trust the advice of their lawyers. Finally, it is important that all members of the sell-side team — both company employees and outside advisors — are able to work with one another and "drive" the transaction to a successful closing.

Excellent M&A lawyers will have an understanding of business, finance, accounting and tax matters, and must understand the client's business and strategic goals and objectives. They need to know when to press an issue, and when not, which battles to fight and when to back off. The ability to understand and adjust to the business aspects of a transaction sets the best M&A lawyers apart from the rest of the field.

**Conclusion**

Sellers often commence M&A transactions with an unrealistic understanding of how the transaction will unfold and no appreciation of many of the issues that will be encountered. It is often disheartening for business owners to see their hopes for a successful acquisition flounder, falter and even fail because of unforeseen or unanticipated issues. A successful M&A transaction depends in large part on selecting an experienced team of advisors who understand the business issues and risks, and can assist the seller in implementing and carrying out a viable acquisition strategy.

Thomas R. Taylor is a corporate and M&A lawyer and shareholder in the Salt Lake City office of Durham, Jones & Pinegar P.C. Taylor is listed as one of the leading M&A lawyers in the United States by both Chambers & Partners and Super Lawyers, as one of the Best Lawyers in American in Corporate Law and M&A Law by Best Lawyers and as a Top Attorney in Utah, Nevada, Montana, Idaho and Wyoming in Mergers & Acquisitions by American Register LLC. He maintains an "AV" rating with MartindaleHubbell, which is the highest rating awarded to attorneys for professional competence and ethics. Taylor can be reached at (801) 2971370 or [ttaylor@djplaw.com](mailto:ttaylor@djplaw.com).

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## SAFEGUARD

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or use of the trade secret. To obtain the restraining order, the plaintiff must show that it will suffer irreparable harm if the disclosure and/or use are not restrained. The plaintiff may also be required to post a bond or other security. Because a temporary restraining order is only effective for 10 days, the plaintiff will typically apply for a preliminary injunction as well, which may restrain the offending conduct through trial and beyond if converted to a permanent injunction.

A victim of trade secret theft may also seek monetary compensatory damages for the misappropriation. Under the Uniform Trade Secrets Act, the damages may include both the actual loss caused by the misappropriation as well as the unjust enrichment caused by the misappropriation (i.e. the windfall obtained by the offending party through disclosure or use of the trade secret). Alternatively, the damages caused by the misappropriation may be measured by the imposition of a reasonable royalty for the unauthorized disclosure or use of the trade secret.

If the plaintiff can show that the trade secret misappropriation was "willful and malicious," a court may also award exemplary damages in an amount up to twice the amount of compensatory damages awarded as well as attorney's fees and costs. Conduct is considered willful if it was done voluntarily and intentionally. It is

considered malicious if it is substantially certain to cause injury.

A trade secret lawsuit is a costly endeavor for the plaintiff as well as the defendant. But whether an owner, shareholder, manager or employee, there are additional reasons why one should care to have a general understanding of trade secret law. The shareholder may care because trade secrets can provide a business with a profitable competitive advantage, which in turn may be of interest to the employee to the extent the competitive advantage results in higher compensation and/or increased job security.

Utah's Uniform Trade Secrets Act defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process." Some, but not all, of the information protectable by trade secrets may also be protectable by patents. To better understand trade secret law, one might thus consider the quandary of whether to seek patent protection for an invention or maintain it as a trade secret in relation to, among others, the following three factors: (1) whether the invention is likely to be independently developed or reverse-engineered; (2) the lifetime of the invention; and (3) the requirements and costs of maintaining the invention as a trade secret versus seeking patent protection.

Trade secret law only protects against misappropriation. Unlike patent law, trade secret law does not protect against inde-

pendent development or reverse-engineering. That is, as long as no trade secret information is used, another may freely arrive at the same result.

In terms of the lifetime of the invention, one should consider that it can take a few years to obtain a patent and that the resulting protection only lasts 20 years from the earliest filing date. Trade secrets, on the other hand, do not require any formal application process and can last indefinitely.

As a practical matter, if the lifetime of the invention is less than a few years or more than 20 years, and the invention is unlikely to be independently developed or reverse-engineered, a business should consider maintaining the invention as a trade secret.

One should also consider the requirements and costs of maintaining the invention as a trade secret versus seeking patent protection. A patent applicant must publicly disclose the best mode of the invention in sufficient detail to enable a person skilled in the art to practice the invention. If no patent is ultimately granted, the patent applicant cannot prevent another from practicing what has been disclosed. If a patent is issued, it can cost tens of thousands of dollars, not to mention maintenance fees to maintain the patent.

In contrast, a trade secret owner must make efforts that are reasonable under the circumstances to maintain the trade secret's secrecy, and undertake such efforts for so long as the protection is desired. If at any time the trade

secret is disclosed, whether intentionally or inadvertently, the protection may be irretrievably lost.

In evaluating whether to seek patent protection for an invention or maintain it as a trade secret, one may also consider that under the 2011 Leahy-Smith America Invents Act, the U.S. will become a "first to file" system, whereas it has historically operated under a "first to invent" system. In this regard, it may become increasingly desirable to seek patent protection for some inventions that may otherwise be protectable by trade secrets. Under the "first to file" system, a trade secret owner will no longer be able to challenge another's patent based on earlier inventorship. As a result, while the trade secret owner may have a prior commercial use defense to patent infringement, another could nevertheless obtain a patent covering the trade secret. On the other hand, for inventions that are unlikely to be independently developed or reverse-engineered, the expanded prior commercial use defense under the act may actually encourage trade secret protection.

No matter the nature of the trade secret information, a prudent owner should consider implementing measures to protect and limit access to information by, for example, limiting physical access via key-cards, requiring passwords for computers and mobile devices, shredding sensitive documents, limiting who has access to all of the elements of a trade secret, educating employees, identifying

trade secrets and using confidentiality agreements with third parties. In addition, each employee should enter into an employment agreement by which the employee (1) agrees that no former employer's trade secrets will be used during the employment, and (2) acknowledges that all trade secrets developed during the employment are owned by the business.

An employee should take great care in handling trade secret information and should understand that all trade secrets developed during the employment are likely owned by the business. In this regard, an employee should be cautious when departing to work for an existing competitor, or starting a competing business, recognizing that the line drawn between common industry knowledge and learned skills versus trade secret information is often difficult to distinguish.

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## FREE

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The lowest level of trademark protection is automatic and completely free as soon as you use your brand in commerce. This can be a logo, or a tag line, or a special design, or a name of a company or product. To strengthen this free protection you should *put a trademark notice on any brand you use and every place you use the brand*. The trademark notice is a "TM" next to the brand, usually to the bottom right or top right of the brand.

Example:

Webb IP Law Group <sup>TM</sup>

Also, the more you use your mark in commerce, the more ownership and protection you have. So, as long as you are clear to use your brand and are not infringing someone else's brand, then going all out on your marketing, advertising and sales is a way to establish stronger and stronger rights.

**Warning:** *Do not use the @ symbol unless you actually have a federal registration or you risk getting in trouble. Also, until you actually use your brand in com-*

*merce or have an application filed with the U.S. government, anybody can steal it. So, if you have an excellent name, keep it under wraps.*

These free techniques are used by major corporations around the world and are proven to provide at least baseline protection. They should be a part of your regular way of doing business because they provide an infinite return on investment. Be aware of the intellectual property that you create as you go about your business and set up whatever you need to manage its protection.

**Warning:** "Baseline protection" means that it is the least amount of protection that is better than nothing at all. Certainly, that level of protection is not always appropriate. Be judicious about what you protect and how you protect it. That said, if you don't at least do the free protection, don't be surprised if other people treat your property like a doormat.

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