Utah Bar JOURNAL

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MISSION & VISION OF THE BAR:

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

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Cover Photo

Virgin River by Utah State Bar member Blaine Hofeling.

BLAINE T. HOFELING is the founder of Havenwood Academy, a residential treatment center, and its parent company, the HOPE Group, where he currently serves as President and General Counsel. About his cover photo, Blaine said, "I have always been fascinated by the magic of water in the desert. This picture was taken on a bike ride through Zion National Park."

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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The Editors of the *Utah Bar Journal* want 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. Articles that are germane to the goal of improving the quality and availability of legal services in Utah will be included in the *Bar Journal*. 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.

AUTHOR(S): Author(s) must include with all submissions a sentence identifying their place of employment. Unless otherwise expressly stated, the views expressed are understood to be those of the author(s) only. Authors are encouraged to submit a headshot to be printed next to their bio. These photographs must be sent via e-mail, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

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

LETTER SUBMISSION GUIDELINES

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 500 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to BarJournal@UtahBar.org or delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor-in-Chief, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

2022 Utah State Bar Elections

A link to the online election will be supplied in an email sent to your email address of record. You may update your email address information by using your Utah State Bar login at https://services.utahbar.org/. (If you do not have your login information please contact onlineservices@utahbar.org and our staff will respond to your request.) Online balloting will begin April 1 and conclude April 15. Upon request, the Bar will provide a traditional paper ballot by contacting Christy Abad at adminasst@utahbar.org.

Candidate for President-Elect

Erik A. Christiansen is the sole candidate for the office of President-elect. Utah State Bar bylaws provide that if there is only one candidate for the office of President-elect, the ballot shall be considered as a retention vote and a majority of those voting shall be required to reject the sole candidate.

ERIK A. CHRISTIANSEN

The one constant in the universe is change. The Utah State Bar is no different. With regulatory reform, the national law firm invasion, incredible technological disruptions, and seismic demographic shifts in Utah, the Utah Bar will have to rapidly adapt to meet the myriad of challenges we face in the coming years. Within this meta-changing legal market, I am humbled and challenged to be nominated by the Utah State Bar Commission for the opportunity to serve as your President-Elect. It has been my honor to serve as the Chair of the Utah State Bar Litigation Section, the Chair of the Utah State Bar Securities Section, as a Utah State Bar representative in the ABA's House of Delegates, and as Chair of the Utah Chapter of the Federal Bar Association. I started my service to the Bar as a member of the Executive Committee of the Young Lawyers' Division, and I believe strongly that leadership begins with our youngest lawyers. We each have a responsibility to foster diversity, stand up for the rule of law, and to provide access to justice. I am grateful for your encouragement and support. I look forward to working with each of you to advance our profession.

Erik A. Christiansen

Second Division Bar Commissioner Candidates

JOHN BRADLEY

I am seeking your vote for the Bar Commission position in the second division. I have lived and worked in this division for over thirty years. Six in private practice and over twenty-six at the Attorney General's office. I am well aware of the issues you face on a daily basis. My goal is to assist you, and to make the Utah State Bar not only relevant, but actually helpful to you. I know that in a small, solo or government practice you may feel somewhat removed from what is happening in Salt Lake. In fact, you may prefer it that way. I also know, however, that there are resources that can make your practice better and more meaningful. Recent events have caused me to rethink how the bar is operating. I hope to be able to share these ideas with you. I truly believe that the Second District is the best place to practice in the State. I believe in service to the community. I would appreciate your vote. Please feel free to reach out to me at Jbradley@AGutah.gov. Thank you.

MATT HANSEN

Dear Colleagues: I am asking you to consider my candidacy for the Utah Bar Commission. I have had the great honor to have worked with many of you throughout my career. Currently, I am a Deputy Davis County Attorney. In the past, I have worked for Salt Lake County and Weber County.

I appreciate all of those that have volunteered their time and worked so hard to help build the Utah Bar. The Bar does have several challenges. These challenges include a membership of diverse practice areas, vast geographic separation, and generational differences.

My intention is to be a voice for attorneys that feel that the Bar does not offer them value for their dues, or they feel underrepresented in services provided by the Bar. This often includes new attorneys, government attorneys, and small office practitioners. My hope is to be able build on the great services that are already provided and to start including opportunities for those that are not currently utilizing the Bar.

I humbly ask for your vote. If you have any questions for me, please do not hesitate to contact me at mhansen@co.davis.ut.us.

Third Division Bar Commissioner Candidates

BETH KENNEDY

I have been an appellate attorney for eleven years. In collaborating with trial counsel, I learned the importance of compromise and relying on each other's strengths to achieve a common goal. I believe these skills are critical in the Bar Commission.

I served for ten years on the Women Lawyers of Utah's board and am its current president. I also helped form the LGBT & Allied Lawyers of Utah and served on its board. In these roles, I listened and ensured voices were heard. I also ensured that our choices – including financial choices – reflected the organization's purpose and benefitted our members. I believe these skills also are critical in the Bar Commission.

Our Bar is changing, in what it means to practice law and what it means to be a Bar. I am committed to making sure any transitions are smooth. And we now know that many meetings – especially CLEs – are better done virtually. I believe CLEs should continue to be offered virtually, and for free.

I respect and admire our Bar and the legal community that we share. I am committed to ensuring that this continues to be a place where practicing law can be a joy.

GRANT MILLER

I promise, I'm more than a mustache. I believe in service and have dedicated my legal career to advancing the public interest. I am running for Bar Commission because I believe the Bar is uniquely postured to not only serve our profession, but also the public at large.

The Bar has done a lot to mitigate the access to justice gap, but there is still much to be done. The ABA has noted that 80% of low-income individuals cannot afford legal representation. While the Bar cannot ameliorate this issue alone, I do believe we can further focus our efforts to make the resources at our disposal more accessible to the public. As attorneys, it is our duty to ensure that the courts can be accessed by anyone, regardless of status.

I am a public defender. I currently serve as President of the Young Lawyers Division and sit on the Bar Commission in an ex-officio capacity. I represented Utah at the ABA YLD Assembly in 2020. I previously served as the director of Wills For Heroes in Utah, where we administered clinics that provided pro bono estate plans for first responders.

CARA TANGARO

My name is Cara Tangaro and I am running for re-appointment as Third District Bar Commissioner. Utah's legal community has seen monumental shifts in the past few years, from the regulatory sandbox to international firms with countless attorneys worldwide setting up offices in Salt Lake. As the average size of law firms increases, having solo and small firm representation on the Bar Commission has never been more important.

I have been practicing law for over twenty years, beginning as a prosecutor and now as a solo criminal defense attorney. I personally know the various issues small firms face. When some attorneys can call their tech department, we solos have to hit up Google or spend hundreds of hard-earned dollars to remain operational.

While law firm behemoths with billions in revenue have set up shop in Utah, regulatory and technology changes have hit solo and small firms disproportionately – yet we are the ones truly addressing access to justice issues. The Bar Commission needs a strong voice advocating for the smaller shops. I previously spent four years on the Bar Commission and then stepped aside for two years. I am asking for your vote of confidence to continue being that voice.

Fifth Division Bar Commissioner Candidate

Uncontested Election: *According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected." Tom Bayles is running uncontested in the Fifth Division and will therefore be declared elected.*

TOM BAYLES

Thomas J. Bayles is thrilled to represent the 5th Division on the Utah State Bar Commission. Tom is a long-time resident of St. George and has been there practicing law since 1998. Tom works at ProvenLaw, PLLC where his focus is estate planning, estate tax planning, real estate tax planning and business succession planning. His experience includes serving as president of the Southern Utah Estate Planning Council, the St. George Exchange Club, the Southern Utah Bar Association, and as co-chairman of the Utah State Bar Spring Convention. Tom earned an associates degree from Dixie State College, bachelor's degree in economics from Weber State University, master's in business administration from Washburn University School of Business, and a juris doctor from Washburn University School of Law along with a tax proficiency certificate. Tom enjoys connecting with his clients to identify the best planning to accomplish their goals and bring them peace of mind. In addition to his legal aspirations, he is a renowned barbeque aficionado in the St. George, Utah community with plans to become a judge certified by the Kansas City Barbeque Society.

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Justice Courts: Courts of the People

by Heather L. Thuet, Key Legal Group, LLC
President, Utah State Bar

One of the many aspects of Utah's exceptional judiciary is our network of justice courts. These courts, created under the authority of Article 8, Section I of the Utah State Constitution, handled more than 60% of all court cases in Utah in 2019. *See Bd. of Justice Ct. Judges, Recommendations to the Utah Judicial Council's Task Force on Justice Reform*, p.1 (June 30, 2020), *available at* https://www.utcourts.gov/utc/jc-reform/wp-content/uploads/sites/47/2020/08/Board-Recommendations-to-Task-Force-Final.pdf (hereinafter Task Force Report). In FY2021, of the 607,304 cases filed, 347,883 were filed in Utah's justice courts (57.2%) with a clearance rate of 99%. The justice courts are the most likely venue for most Utah residents. They are referred to by many as the "courts of the people." They handle class B and C misdemeanors, like DUI's, small claims, and traffic/parking citations.

There are two types of justice court judges in Utah. County justice court judges are appointed by county commissioners and face a retention election every six years, and city justice court judges are appointed by cities and, like their county counterparts, face retention elections every six years. Currently there are eighty-one justice court judges who serve in 115 county and municipal courts. *See* Utah Courts, *An Overview of the Utah Justice Courts*, *available at* https://www.utcourts.gov/courts/just/overview.htm (July 22, 2019).

In 2019, the Utah Judicial Council and the Board of Justice Court Judges formed a Task Force on Justice Court Reform. The Board, chaired by Judge Vernon F. Romney, included Judge Brian Brower; Judge Jon Carpenter; Judge Augustus Chin; Judge Morgan Cummings; Judge Paul Farr; Judge Mark McIff; Judge Cyndee Probert; Judge Brook Sessions; and Judge Clay Stucki. The Task Force completed their report and issued recommendations on June 30, 2020.

As the Task Force noted:

> ordinary citizens interact with justice courts more than all other courts combined, the public's trust and confidence in the judicial system as a whole may be largely based on their experience with a justice court. As the most commonly encountered face of Utah's judiciary, justice courts must reflect the integrity, transparency and accountability of other court processes and proceedings. They already do so in many respects, but there is room for systemic improvement.

See Task Force Report, at p.v.

The most significant recommendation made by the Task Force was that justice courts become courts of record. The judges wrote:

> To the extent that the current justice court system is inefficient, lacks transparency, provides no feedback to judges regarding the correctness or quality of their decisions, requires victims to testify twice, allows defendants to appeal and endure a second trial simply to get a lighter sentence, gives attorneys no precedent they can look to when formulating their arguments for court, and deprives pro se litigants, attorneys, justice court judges and the public generally of a body of law that would otherwise develop through appellate review, these issues must be addressed. Even if no other reforms were adopted, converting justice courts into courts of record would strengthen Utah's judiciary by ameliorating each of the foregoing concerns.

Id. at p.1.

Another recommendation made by the Task Force was to give justice courts jurisdiction over class A misdemeanors. Currently, justice court jurisdiction is limited to class B and C misdemeanors. Such a move would clear up confusion among the public, the Task Force believed,

"creating a clearer division of judicial responsibility," as well as providing economic benefits. *See Task Force Report*, p.5, *available at* https://www.utcourts.gov/utc/jc-reform/wp-content/uploads/sites/47/2020/08/Board-Recommendations-to-Task-Force-Final.pdf.

A third recommendation made by the Task Force was requiring justice court judges to be members of the Bar. In 2016, the legislature passed HB160, which required justice court judges in Weber, Davis, Salt Lake, Utah, and Washington Counties have a law degree that would qualify them for admission to the Bar, but a requirement that all justice court judges have such qualifications failed due to residency requirements. Thirty-two of the eighty-one justice court judges serving in Utah do not have a law degree. *Id*. at p.7.

A fourth recommendation would make it easier to ensure justice court judges have law degrees. The Task Force recommended removing the geographical restrictions for justice court judges. The Utah Constitution provides that for courts not of record, judicial qualifications are established by statute, and the current statute imposes a more restrictive residency statute than the residency statute for district court judges. A district court judge must be a resident of the district in which they sit – an attorney could apply for any district judgeship and fulfil the residency requirement by simply moving to that district. However, a justice court judge must be a resident of the county of the justice court, or an adjoining county, for six months prior to appointment. This limits justice court judges to local residents, thus limiting the pool of potential candidates. *Id*. at p.10.

The Task Force also recommended replacing part-time judges, which currently serve in fifty-three of the eighty-one positions, with full-time judges. Their report states:

> The American tradition of governance has featured separation of legislative, executive and judicial power, but justice courts present a unique challenge in this regard. Bringing the three branches of government together at the *local* level, when Utah's Constitution vests the powers of the judiciary at the state level, has generated some confusion as to who "controls" the justice courts. From a legal perspective, justice courts are essentially state courts operated at the local level. But from an operational standpoint, it is not uncommon for local government to view the justice court as a "department" of the executive branch – rather than as a subsidiary of the state's judicial branch – and manage it accordingly.

See id. at p.13 (internal citations omitted).

This concern has been expressed by others as well. A 2012 Utah Law Review article said:

> Utah's Constitution prohibits members of separate branches from exercising the powers belonging to another branch. The problem comes from the fact that Utah statutes treat municipalities as "political subdivisions of the state of Utah," which operate under a legislative and executive body. City councils hold municipal legislative power, while mayors hold executive power.
>
> While Utah law provides for judicial bodies at the state level (Supreme Court, Court of Appeals, District Court, and Juvenile Court), there is no provision for judicial bodies to exist at the municipal level. Justice courts, created and operated by municipalities, do so as a member of the executive or legislative branch. This is not by choice, but by necessity, because Utah law does not provide for another place for justice courts to operate.

Samuel P. Newton et al., *No Justice in Utah's Justice Courts: Constitutional Issues, Systemic Problems, and the Failure to*

Protect Defendants in Utah's Infamous Local Courts, 2012 Utah OnLaw 26 (2012), *available at* https://dc.law.utah.edu/onlaw/vol2012/iss1/2.

The Task Force's other reform recommendations included setting salaries for justice court judges based on a percentage of district court judges, making better use of justice court judge's magistrate capacity, codifying that justice courts are under the umbrella of the judicial branch, bringing justice courts under the administration of the Office of the Courts; standardizing budgets; consolidating clerical positions among jurisdictions; and determine the best way to implement these recommendations.

Although many of these reforms have yet to be adopted, Utah's justice courts are a cornerstone of justice in our state and continue to improve. In this legislative session, HB45 clarifies the election procedure for justice court judges, and HB107 looks to increase small claims to $15,000 until 2025, and $20,000 thereafter. Both these bills would impact the operation of justice courts in Utah. The Bar's Governmental Relations Committee is tracking each of these bills as they move through the process.

Justice courts continue to work to find ways to meet the needs of the community. Last summer, the Salt Lake Justice Court embarked on a much-publicized effort to take justice to a disadvantaged population via the "Kayak Court" along the Jordan River. Taylor Stevens, *'Kayak Court Brings the Justice System to Salt Lake City's Homeless on the Banks of the Jordan River,* Salt Lake Tribune, July 27, 2021, *available at* https://www.sltrib.com/news/politics/2021/07/27/kayak-court-brings/. Such efforts not only show the commitment of our justice court judges and court personnel to access to justice but foster improved trust among the courts and the community.

As the Bar continues to push to increase access to justice, reforming our already excellent justice court system provides an additional link in this process. Thanks to all of you as you continue to find new ways to improve the profession and provide better legal service to our community, your clients, and to all who reside in this great state. Hope to see you online at the Spring Convention, and in person at the Summer Convention in San Diego, July 7–9, 2022!

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Ensuring That the Testimony of Children Is Obtained in a Way That Promotes the Effective Determination of Truth

by Blake R. Hills

Introduction

Our society recognizes that children's brains are not fully developed and that accordingly, they should be treated differently than adults. For example, society treats children differently by not allowing them to vote, enter into contracts, work with dangerous equipment, join the military, get married, or use alcohol and tobacco. This different treatment is based on policies which recognize that children are not mature and do not understand things the same way that adults do.

Unfortunately, one of the situations where society most often forgets to treat children differently than adults is when they appear as witnesses in the courtroom. Far too often, attorneys use the same language, phrasing, and sentence structure to question children that attorneys use to question adults. This practice ignores the "growing international concern as to whether justice can be reliably achieved when witnesses are questioned in ways that exploit their immaturity and may thus elicit unreliable evidence." Samantha J. Andrews, Michael E. Lamb & Thomas D. Lyon, *Question Types, Responsiveness and Self-contradictions when Prosecutors and Defense Attorneys Question Alleged Victims of Child Sexual Abuse*, 29 Appl. Cognit. Psychol. 253, 253 (2015).

So, what can a judge do about this problem? Rule 611 of the Utah Rules of Evidence provides a solution. Specifically, Rule 611 provides that judges "should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to make those procedures effective for determining the truth." Utah R. Evid. 611(a)(1). Judges can exercise reasonable control required by Rule 611 by ensuring that questions presented to child witnesses are stated in a form which is appropriate to the age and cognitive level of the child. As one expert stated about the failure of the system to use age-appropriate questioning of children in court: "I am deeply concerned by the fact that children in our courts today are being denied a right that should belong to everyone who enters the legal system: to have an equal opportunity not only to understand the language of the proceedings, but to be understood." Anne Graffam Walker, Ph.D., *Handbook on Questioning Children, a Linguistic Perspective* 1 (2013).

Fortunately judges have not been left on their own to determine how children should be questioned "so as to make those procedures effective for determining the truth." *See* Utah R. Evid. 611(a)(1). Research has shown which techniques are effective for questioning children and which are not. This article will address the most important topics highlighted by relevant research into child psychology and tesimony.

Facts About Competency

To start, it is helpful to remember that there is no minimum age for competency to testify in court. In fact, Utah law expressly states that: "A child victim of sexual abuse under the age of 10 is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding" and "[t]he trier of fact shall determine the weight and credibility of the testimony." Utah Code Ann. § 76-5-410.

Even children as young as two and three years old may be capable of recalling and reporting their past experiences

BLAKE R. HILLS is a member of the Utah Board of Pardons and Parole. Before joining the Board, he prosecuted special victims, domestic violence, and child abuse cases for over twenty years.

accurately. *See* Walker, *supra*, at 2. Indeed, there is a long history of very young children testifying competently and credibly in court proceedings all across the country. *See State v. Burke*, 2011 UT App 168, 256 P.3d 1102 (five-year-old testified about sexual abuse that occurred when she was four); *Strickland v. State*, 550 So. 2d 1042 (Ala. Crim. App. 1988) (three-year-old victim testified in a deposition); *Macias v. State*, 776 S.W. 2d 255 (Tex. Ct. App. 1989) (five-year-old testified about sexual abuse that occurred when she was three); *State v. Ward*, 619 N.E.2d1119 (Ohio Ct. App. 1992) (children ages three and four testified about domestic violence).

Indeed, "[e]ven though younger children may produce shorter and less detailed accounts of experienced events in response to open-ended questions than older children and adults, their reports are no less accurate." Andrews et al., *supra*, at 253–54. As long as children are asked questions in the right format, they may be able to testify truthfully and accurately.

Oath

One of the first questions a child witness will be asked to answer in court is that of the oath. Rule 603 of the Utah Rules of Evidence states that all witnesses must be given an "oath or affirmation to testify truthfully" and "[i]t must be in a form designed to impress that duty on the witness's conscience." Utah R. Evid. 603. Nothing in this rule requires a child to be given an oath in the same form that an adult is given. Rather, a child should be given an oath in child appropriate language. A child who is asked, "Do you swear to tell the truth, the whole truth, and nothing but the truth subject to pains and penalties of perjury?" will focus on the words "pain" and "penalties" and will quite likely answer, "No." Few people would answer "Yes" to a question when they don't understand any part of it other than an apparent offer of "pain" and "penalties."

The best approach to the oath that is child friendly is to simply ask: "do you promise that you will tell the truth?" Anne Graffam Walker, Ph.D., *Handbook on Questioning Children, a Linguistic Perspective* 1, 112 (2013). This approach allows the child to actually understand what is being asked. In addition, research has shown that children are most honest when they promise to tell the truth. Angela D. Evans & Kang Lee, *Promising to Tell the Truth Makes 8- to 16-year-olds More Honest*, 28 Behav. Sci. Law 801, 801–11 (2010). Studies show that young children know the difference between the truth and a lie even though they cannot explain the difference or provide definitions of the terms. Walker, *supra*, at 68.

Short and Simple

Consider the following question that was asked of a five-year-old witness in a murder trial: "Do you recall talking to her on the Sunday after they found – discovered something had happened to Doug, and asking her, 'Do you know Mark?' and then saying, 'That is who did it?' Do you remember telling her that?" *See id.* at 16. This question is incomprehensible. Unfortunately, it is not unusual for child witnesses to be asked questions like this.

The purpose of examining children in court is to find out what they saw, heard, or experienced. The problem with questions such as the one above is that they do not elicit what the child saw, heard, or experienced. Instead, these questions simply test a child's ability to memorize a list of somewhat related concepts and hold that list in working memory while searching long term memory for multiple answers. *See id.* Young children do not have the ability to do this. Thus, questions must be kept short and simple. *Id.*

Questions must be kept short and simple because "[c]hildren's attention tends to wander when the questions are too dense, too long, and too complicated for them to comprehend." *Id.* at 91. In addition, children rarely ask for clarification when a question is too complex for them to understand. Cathleen A. Carter, Bette L. Bottoms, & Murray Levine, *Linguistic and Socioeconomic Influences on the Accuracy of Children's Reports*, 20 L. & Human Behav. 335, 335–58 (1996).

Even a simple question can be problematic when combined with another simple question to make a compound question. For example, one study has shown that over 60% of children's responses to multi-part questions "could not be tied accurately to the 'question.'" Walker, *supra*, at 52. Children do not have the cognitive skills to process even shorter compound questions such as "And you saw this knife for the first time when and where?" or "But do you recall going to the hospital and will you tell us why you went to the hospital?" *Id.* at 53. In order for children to answer a question accurately, the question must be simple enough for them to remember it from beginning to end. *See id.*

No Lawyerese or Legalese

"The goal of evidentiary questions should be to obtain accurate answers, but that goal is unlikely to be reached if the questions can't be understood." Anne Graffam Walker, Ph.D., *Handbook on Questioning Children, a Linguistic Perspective* 1, 31 (2013). Studies show that this goal is especially unlikely to be achieved when the questions contain "lawyerese," or difficult vocabulary. *Id.*

It can be hard for attorneys and judges to realize that the words they use every day at work are seldom used by the general public, and never used by children. Many adults do not understand "legalese" and the vast majority of children certainly do not. The following words that have specific legal meanings should be avoided when questioning children: appear (meaning attend), court (meaning the judge), counsel, defendant, hearing (meaning court event), minor, motion, testify, and witness. *Id.* at 46. Children also do not understand Latinate words, and the following words should be avoided as well: allegedly, apprehend, consequences, deny, depict, differentiate, engage, exaggerate, incident, identify, indicate, locate, matter, occurrence, recollect, reference, regards, sequence, and subsequent. *Id.* All of these words could be simplified or eliminated when questioning children, and should be so children can understand the questions.

Other types of legalese are also problematic. Questions during cross-examination that begin with: "I submit to you," "I suggest to you," or "Isn't it a fact" are especially problematic and are not appropriate for children. *Id.* at 57. Because children tend to believe that adults in authority positions know everything and intend to be honest and cooperative, "it becomes extremely difficult if not impossible for children – even 11- and 12-year-olds – to know how to disagree if necessary and hold on, verbally, to what they know to be true." *Id.* Child witnesses should not be placed in this position that they do not have the maturity or cognitive ability for.

Conclusion

In *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), the Supreme Court recognized that because of their age and development, children perceive things differently than adults. Significantly, the Court stated: "A child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any … judge." *Id.* at 2403 (citations and internal quotation marks omitted).

As a further admonishment, the Court stated:

> [J]udges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. *They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.*

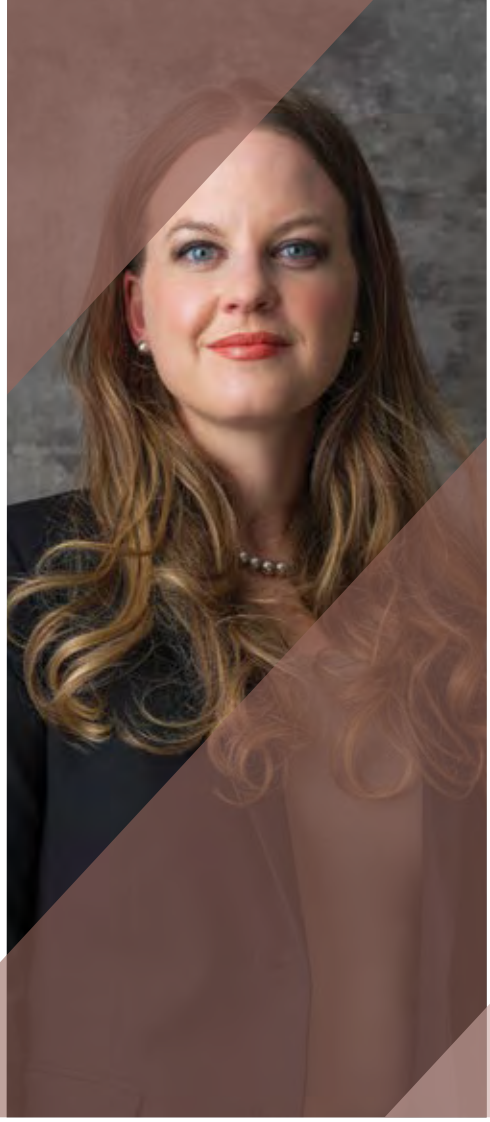
Id. at 2407 (emphasis added).

While this common sense generally prevails when it comes to the way children are treated when they are charged or punished for their own conduct, it often vanishes when children are witnesses in the trial of someone else. Judges should exercise control over the manner of questioning children by requiring the questions to be stated in a form that is appropriate for their age and cognitive ability. As one commentator has stated:

> [I]t is preposterous to allow lawyers to ask children questions they do not, and cannot, understand. We do not allow adult witnesses to be questioned in a language they do not comprehend. Just because a question is in a child's native tongue does not mean the child understands. Incomprehensible questions should be outlawed.

John E. B. Meyers, *Cross-Examination: A Defense*, 23 Psychol. Pub. Pol'y & L. 472, 475 (2017).

Emily Adams



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The Appellate Group

Appellate Highlights

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

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

UTAH SUPREME COURT

In re Estate of Heater
2021 UT 66 (Nov. 12, 2021)

In this probate dispute, the district court permitted a biological son to intervene and establish himself as an additional heir, based upon genetic testing and statutory provisions of the Probate Code. The supreme court further clarified that **the statutory and civil rules governing nonfinal orders applied with equal force to probate cases,** thereby abrogating a prior line of cases applying a pragmatic case-by-case approach.

Boynton v. Kennecott Utah Copper, LLC
2021 UT 67 (Nov. 18, 2021)

The plaintiff in this case was exposed to asbestos as part of his work as a laborer at various smelting and construction sites in the 1960's and 1970's. When his wife died from mesothelioma, the plaintiff sued the site operators under theories of strict premises liability and negligence. He alleged that each operator had caused him to come into contact with asbestos on the job, indirectly exposing his wife to so-called "take-home" asbestos dust on his clothing. **As a matter of first impression, the Utah Supreme Court held that premises operators owe a duty of reasonable care to prevent take-home exposure to asbestos.** The court reasoned that, by affirmatively causing employees to come into contact with asbestos, the site operators "create[d] a foreseeable risk that employees will carry asbestos into their homes" and that the risk was foreseeable as early as 1961.

State v. Sevastopolous
2021 UT 70 (Dec. 23, 2021)

On certiorari, the court reversed in part and affirmed in part a restitution order entered by the district court in connection with the defendant's conviction of theft and theft by deception. The court held that **litigation expenses incurred in collateral litigation to recover the stolen funds were an appropriate element of restitution under the Crime Victims Act,** but reversed and remanded to allow the district court to enter an amended restitution order excluding four transactions which the State conceded were authorized.

Rosser v. Rosser
2021 UT 71 (Dec. 23, 2021)

As a matter of first impression, the supreme court clarified the standard for contemptuous deceit under Utah Code § 78B-6-301. In doing so, the court concluded that **contemptuous conduct not only includes deceit directed at the court, but also deceit in respect to the proceedings that "undermines the authority of the court, misuses the authority or proceedings of the court, or hampers the administration of justice in some way."**

UTAH COURT OF APPEALS

State v. Paule
2021 UT App 120 (Nov. 12, 2021)

The defendant shot and killed his friend in his apartment and threw the shotgun he used off the balcony, which the police later discovered. The jury acquitted the defendant of murder but found him guilty of obstruction. Defendant appealed asserting the acquittal prevented the obstruction verdict. In affirming, **the Court of Appeals held that the statute's use of "would be punishable as a crime" in defining what conduct constitutes obstruction "indicates that the underlying conduct need not necessarily result in a criminal conviction."**

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

Downham v. Arbuckle
2021 UT App 121 (Nov. 12, 2021)

In this negligence suit brought by a tenant, the district court granted summary judgment in favor of the landlord based upon the open and obvious danger rule. Reversing, the court of appeals clarified that **application of the rule involves a two-step inquiry – whether an open and obvious condition exists and whether the possessor should have anticipated harm – and that both steps in the analysis commonly present factual questions.** Although no reasonable juror could have disagreed that a wobbly wooden pallet serving as a step was an open and obvious danger, the court reversed because a reasonable jury could find that the landlord should have anticipated the harm.

Sanders v. Sanders
2021 UT App 122 (Nov. 12, 2021)

The defendant filed a Rule 60(b)(4) motion to set aside a renewed judgment as void over a year after it had been entered, arguing that the court lacked jurisdiction under the Renewal of Judgment Act to renew the judgment for a second time. The district court denied the motion, holding that it was procedurally improper because the arguments raised in the motion could and should have been raised in a prior Rule 60(b) motion. The court of appeals reversed and remanded with instructions to the district court to consider the motion on its merits, holding that **Rule 12(h) did not bar the defendant from bringing a subject matter jurisdiction argument under Rule 60(b)(4).**

State v. Goddard
2021 UT App 124 (Nov. 12, 2021)

Citing "the weight of authority from other jurisdictions," the Utah Court of Appeals held that **a police officer initiating a *Terry* stop need not have a particularized suspicion of a particular crime; rather, the officer must have a reasonable suspicion that the target of the stop is engaged in general criminal activity.**

Peterson v. Hyundai Motor Co.
2021 UT App 128 (Nov. 18, 2021)

The plaintiffs' home burned down from a fire that was allegedly started by a hybrid electric car while it was charging in their carport. The case was tried to a jury, which awarded a verdict for over $750,000 to the plaintiffs. The district court denied the defendant's motion for a directed verdict, but it granted its motion for a new trial. The plaintiff filed a direct appeal and interlocutory appeal challenging this ruling, and the defendant filed a direct cross-appeal challenging the denial of its directed verdict motion. The court of appeals initially concluded that it had jurisdiction over the direct appeal and cross appeal, but on reconsideration after briefing the court **held that it lacked jurisdiction to consider a direct appeal from an order granting a new trial in a civil case, and therefore dismissed the direct appeal and cross-appeal.** On the interlocutory appeal, the court affirmed the trial court's order granting a new trial and remanded for further proceedings.

Johansen v. Johansen
2021 UT App 130 (Nov. 26, 2021)

A pro se litigant petitioned for termination of alimony based on the allegation that his former wife was cohabitating with another man but failed to file initial disclosures. The court of appeals held that **failure to disclose an intent to call his former wife as a witness was not harmless, because that information likely would have shaped discovery and informed strategic decisions the former wife made in defending herself. The court also held that the evidence and witnesses offered to impeach the former wife's testimony should have been disclosed under Utah R. Civ. P. 26(a)(1)(A)(ii) or (a)(1)(B), because the "solely for impeachment" exception to the initial disclosure requirement does not apply to witnesses or evidence offered in a litigant's case-in-chief.**

Vashisht-Rota v. Howell Mgmt. Servs.
2021 UT App 133 (Dec. 2, 2021)

The pro se plaintiff in this case appealed the district court's entry of an order determining that she is a vexatious litigant. In this per curiam opinion, the court of appeals considered

whether the district court had jurisdiction to enter the order given the plaintiff had filed a Rule 41(a) notice of dismissal prior to entry of the order. The court held, as a matter of first impression, that **the vexatious litigant order was a collateral matter that the district court retained authority to consider even after the voluntary dismissal, similar to a request for Rule 11 sanctions.**

State v. Hoffman
2021 UT App 143 (Dec. 23, 2021)

The criminal defendant appealed his conviction for attempted exploitation of a minor. Among the issues raised on appeal was a challenge that any probable cause that may have initially supported the issuance of a first search warrant had dissipated by the time a second warrant was executed. This challenge raised the issue of whether new information, rather than the passage of time, nullifies the probable cause articulated in the warrant. The court held, **"The touchstone of the reviewing court's inquiry is whether the new information would have been material to the probable cause determination – that is, whether probable cause still existed to support the warrant at the time of its execution, even taking the new information into account."**

Vineyard Properties of Utah, LLC v. RLS Construction LLC
2021 UT App 133 (Dec. 30, 2021)

When a commercial tenant skipped out on paying for improvements to its leased space, the contractor filed a construction lien against the property under Utah Code §§ 38-1a-101 et seq. The property owner sued to remove the lien, arguing the lien could attach to the tenant's leasehold interest but not to the owner's fee interest because the owner did not initiate or authorize the work. The court affirmed judgment in favor of the contractor, concluding that the construction lien statute no longer "link[s] a lien's efficacy against a property owner to whether the contractor was retained 'at the instance of' any particular person." Instead, **the plain language of the current statute permits a contractor to file a lien against a property owner's interest even if the property owner did not initiate or authorize the contractor's work.**

Fischer v. Fischer
2021 UT App 145 (Dec. 30, 2021)

In this divorce case, the district court used the date of separation to value a savings account wife opened after separation. The account was initially funded with wife's share of sums from marital accounts, and she had subsequently deposited post-separation funds that she had saved. The court of appeals affirmed. **Although the presumptive valuation date is generally the date of the divorce, a district court can, in its discretion, find "that property acquired post-separation, but before [the] divorce decree, is separate property."** Such a result requires "sufficiently detailed findings" to justify the deviation, which the district court did, noting that the husband had spent significant money and incurred substantial debt following filing of the petition, while wife had saved money, and the separation had lasted for 14 months.

10TH CIRCUIT

United States v. Wilson
17 F.4th 994 (10th Cir. Nov. 9, 2021)

The defendant pled guilty to selling 1.54 grams of meth but had confessed to a confidential informant that he had purchased 113 grams of meth. The district court sentenced the defendant based on the entire quantity. On appeal, the defendant argued that he personally consumed most of the 113 grams of meth, so that quantity shouldn't be considered for sentencing. The Tenth Circuit held that **the defendant has the burden to present evidence of personal use pertaining to the quantities of meth charged against him for selling,** but because this burden of proof was unclear prior to the opinion, the court reversed and remanded to allow the defendant to present that evidence before resentencing.

Reznik v. inContact, Inc.
18 F.4th 1257 (10th Cir. Dec. 1, 2021)

The plaintiff appealed the district court's dismissal of her Title VII retaliation claims against her former employer for failure to state a claim. The Tenth Circuit reversed. The only issue before the court was whether the plaintiff had sufficiently pled the first element of a Title VII retaliation claim: that she engaged in protected opposition to discrimination when she reported her belief that certain aliens were being racially harassed. Although Title VII's protections did not extend to the aliens, the court **adopted an objective reasonableness inquiry. That inquiry "considers the law against what a reasonable employee would believe, not what a reasonable labor and employment attorney would believe."** Applying that standard, the Tenth Circuit held the plaintiff's belief that she was opposing conduct unlawful under Title VII was objectively reasonable because that conduct would be unlawful discrimination but for the statutory exceptions which represent specialized legal knowledge that a reasonable employee should not be charged.

Tarango-Delgado v. Garland
19 F.4th 1233 (10th Cir. Dec. 2, 2021)

The plaintiff, a lawful permanent resident who was removed to Mexico following his guilty plea to aggravated animal cruelty, appealed the Board of Immigration Appeals' denial of his two motions to reopen his removal proceedings. The Tenth Circuit affirmed on the basis that 8 U.S.C. § 1231(a)(5) bars the reopening. As a matter of first impression, the Tenth Circuit held that **under the plain language of § 1231(a)(5), once plaintiff illegally reentered the United States, the BIA lacked authority to reopen the removal order. The court also joined the Sixth Circuit in refusing to recognize a "gross miscarriage of justice" exception to § 1231(a)(5), as "§ 1231(a)'s language leaves no room for one."**

Hood v. American Auto Care, LLC
21 F.4th 1216 (10th Cir. Dec. 28, 2021)

The Tenth Circuit reversed the district court's dismissal of a putative class action complaint on personal jurisdiction grounds. Applying the United States Supreme Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), the court held that **a causal connection is not required between the plaintiff's claims and the defendant's contact with the forum state in order to support the exercise of specific jurisdiction. Rather, specific jurisdiction is proper when a resident of the forum state is injured by the very type of activity that a nonresident directs at residents of the forum state, even if the activity that gave rise to the claim was not itself directed at the forum state.** The Colorado district court could exercise specific jurisdiction over the defendant's telemarketing company even though its' calls to the plaintiff were not a result of its' telemarketing efforts directed at Colorado.

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Access to Justice Update: No More Surprise Medical Bills

by Pamela Beatse

The Utah State Bar Access to Justice Commission has been focusing on debt collection issues over the past year. It chose this emphasis after learning that in 2019, 62,000 out of the 100,000 civil cases filed in Utah courts were debt collection cases. Nearly 100% of plaintiffs had legal representation, while only 2% of defendants were represented. Utah Foundation, *The Justice Gap: Addressing the Unmet Legal Needs of Lower-Income Utahns* 1, 4 (Apr. 2020), *available at* https://utahbarfoundation.org/images/pdfs-doc/UBF_Justice_Gap_-_Full_Report.pdf. Each year, more than 30,000 Utah residents are called to court and expected to defend themselves. *See id*. David McNeill, Presentation on the Access to Justice Commission Summary and Action Plan (June 23, 2020). The Access to Justice Commission is working to reduce this number. In 2021, it established a subcommittee to identify problems, conduct research, and suggest potential actions to improve access to representation. As part of this research, the Commission learned about federal efforts to extend protections to medical consumers through passage of the No Surprises Act.

Balance billing or "surprise bills" in healthcare come in many forms with the overall effect of damaging the financial well-being of people who often did not have other options for care. Now, the "No Surprises Act" offers protections to people across the country, which Congress passed as part of the Consolidated Appropriations Act, 2021 and became effective on January 1, 2022. No Surprises Act, Pub. L. No. 116-260, div. BB, 134 Stat. 1182 (2020). After years of patient advocacy groups lobbying for these protections, both houses of Congress passed this bill with support from large bipartisan majorities.

Defining "Surprise Bills"

Surprise bills arise from many situations. Countless emergency services result in surprise bills when an urgent need for care, travel, ambulance transport, or other circumstances lead patients to obtain care at an out-of-network facility. Other times, non-emergency services also create surprise bills when patients are treated by out-of-network providers at in-network facilities. Once insurance coverage pays its portion, facilities then charged patients for the difference between what the provider claimed was market value and the amount covered by insurance.

Utahns burdened with surprise bills brought forward their stories to lawmakers. For example, consider Lisa Ray from Centerville who received a surprise bill from the hospital for about $41,000 after her son broke his jaw playing rugby. Ben Lockhart, *Utah Patients Upset at Surprise Medical Bills; Hospitals, Insurers at Odds Over Who Is to Blame*, Deseret News (Dec. 11, 2018), *available at* https://www.deseret.com/2018/12/11/20660948/utah-patients-upset-at-surprise-medical-bills-hospitals-insurers-at-odds-over-who-is-to-blame. Ray initially went to an in-network facility, but it was at capacity and could not schedule her son for surgery. The operation could not wait so she admitted her son to an out-of-network hospital. Yet "[a]fter a strenuous and time-consuming effort to reduce her bill," Ray still owed more than $25,000. *Id*. Even more troubling, many of these consumers did not understand that they were responsible for paying the difference until the bill was turned over to a collection agency or they received notice of legal action against them.

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There is strong evidence that the consumer protections in the No Surprises Act are necessary and important. More than 50% of U.S. consumers reported getting unexpectedly large bills, and nearly one in five patients who go to the emergency room, have an elective surgery, or give birth in a hospital received surprise bills. Office of Health Policy, ASPE Issue Brief, Evidence on Surprise Billing: Protecting Consumers with the No Surprises Act (Nov. 22, 2021), *available at* https://aspe.hhs.gov/sites/default/files/documents/acfa063998d25b3b4eb82ae159163575/no-surprises-act-brief.pdf.

No Surprises Act Provides Strong Protections for Consumers

Passage of the No Surprises Act will provide much greater protections for consumers. The Act applies to physicians, hospitals, and air ambulances, but does not apply to ground ambulances. For people who have health insurance coverage from an employer, a Health Insurance Marketplace, or a direct individual health plan, this Act prohibits surprise bills any time a person receives emergency care. Press Release, U.S. Dep't of Health & Human Services, HHS Kicks Off New Year with New Protections from Surprise Medical Bills (Jan. 3, 2022), *available at* https://www.hhs.gov/about/news/2022/01/03/hhs-kicks-off-new-year-with-new-protections-from-surprise-medical-bills.html. Any cost sharing for services (e.g., co-payments) must be based on in-network rates without the need for prior authorization. *Id*. In addition, it also prevents surprise bills from certain out-of-network providers if you go to an in-network hospital for a procedure. *Id*. Uninsured people also have greater protections under the Act. Now, most providers must give a "good faith estimate" of costs before providing non-emergency care to ensure self-payors have advance notice of the likely costs of treatment. *Id*. Finally, the Act also requires providers and facilities to share easy-to-understand notices explaining these billing protections and, as importantly, who to contact and notify if the patient or consumer has concerns that the provider or facility violated the No Surprises Act. *Id*.

As Xavier Becerra, Health and Human Services Secretary, explains:

> The No Surprises Act is the most critical consumer protection law since the Affordable Care Act. . . . After years of bipartisan effort, we are finally providing hardworking Americans with the federal guardrails needed to shield them from surprise medical bills. We are taking patients out of the middle of the food fight between insurers and providers and ensuring they aren't met with eye-popping, bankruptcy-inducing medical bills. This is the right thing to do, and it supports President Biden's vision of creating a more transparent, competitive and fair health care system.

Id.

Instead of surprising people with medical bills, often long after services were received, out-of-network providers will need to negotiate directly with insurers to obtain compensation. Consequently, the No Surprises Act is a tremendous win for consumers and will greatly increase the protections available for all Americans. This is especially true for those who were most vulnerable to being devastated by unexpected medical bills including seniors, people with disabilities, and families.

Parsons Behle & Latimer continues to grow in 2022. Welcome, to our eight new attorneys, and congratulations to Jason D. Steiert and Challis Allen McNally, newly-elected shareholders of the firm. **parsonsbehle.com**

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Utah Incapacity Law and Powers of Attorney

by Craig E. Hughes

The Importance of Mental Capacity

Questions regarding mental capacity or incapacity are often central issues in probate litigation involving the validity of wills and trusts, application of general durable powers of attorney, and appointment of guardians and conservators. A person may engage in a thousand transactions affecting their assets. In almost every one of those transactions, there is an assumption that the person is in fact mentally competent. But at certain times the accuracy of this assumption often becomes a significant question.

For example, when old and susceptible, a woman who deeply loves cats decides to gift her entire estate to the local pet shelter, but was she mentally competent when making the gift? Or after a husband's wife dies, the husband remarries and three weeks later signs a will completely disinheriting his children from his first marriage, giving everything to his second spouse. Was he mentally competent when executing the will? Most of the time, the answer depends on how mental incapacity is defined.

Defining what constitutes mental incapacity is perhaps the most important foundational legal requirement in validating how a person's assets will ultimately be managed and distributed. This article provides an overview of mental incapacity and the practical aspects of defining mental incapacity in a power of attorney.

Two Types of Mental Capacity

Utah courts have recognized two types of mental capacity: contractual capacity and testamentary capacity. As the Utah Supreme Court pointed out, "[c]ontractual capacity and testamentary capacity involve two separate standards. A person may lack sufficient [contractual] capacity to transact his ordinary business affairs and yet have [testamentary] capacity to make a will." *In re Estate of Ioupe*, 878 P.2d 1168, 1172 (Utah 1994) (citations and ellipses omitted).

Contractual Capacity

Contractual capacity involves a person's capacity to manage his ordinary business affairs, including the person's bank, investment, and retirement accounts, life insurance policies, and real estate. *See In re Estate of Kesler*, 702 P.2d 88, 98 (Utah 1985). Simply put, contractual incapacity means a person is incapable of managing their financial affairs, and therefore, (1) an agent is appointed in a power of attorney to take over the management of the person's financial affairs; or (2) the court appoints a conservator to take over the management of the person's financial affairs.

When a person is contractually incapacitated, an agent representing the person takes control of the person's business or financial affairs through a general durable power of attorney, which document allows the agent to manage the incapacitated person's business or financial affairs. For that reason, the critical question is what constitutes contractual incapacity? And to what extent does a person need to lack contractual capacity for an agent to be appointed under a power of attorney?

In 2016, the Utah Uniform Power of Attorney Act (Act) granted the authority to define mental incapacity to the person implementing the power of attorney. This authority arguably counts as one of the most critical paradigm shifts in Utah law governing conservators and powers of attorney. First, the Act provides a default definition of incapacity. *See* Utah Code Ann. §75-9-102(5). Second, Utah courts have the authority to determine a person's contractual incapacity. *See id.* § 75-1-201(22); *Ioupe*, 878 P.2d at 1172; *Kesler*, 702 P.2d at 98. Third, and most importantly, the Act authorizes a principal to define what constitutes their own incapacity.

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The Act states that the principal may: (1) "provide in the power of attorney that it becomes effective upon the occurrence of a future event or contingency"; (2) "authorize one or more persons to determine in a writing or other record that the event or contingency has occurred"; and (3) "authorize a person to determine whether the principal is incapacitated." Utah Code Ann. § 75-9-109(1)–(3). Therefore, the Act allows the principal to authorize a person of their own choosing to determine whether the principal is incapacitated. And the principal may define an event or contingency that triggers the effective beginning date of their power of attorney. For example, the principal may state that certain indicators mark the principal as being incapacitated, and thus, trigger application of their power of attorney. And the person (usually the agent) chosen by the principal determines whether these indicators have occurred.

Importantly, while the Act allows a person to appoint an agent who is authorized to determine whether the person is incapacitated (pursuant to the person's own definitions of incapacity in their power of attorney) the Act expressly states that said appointed agent does *not* have to be *a physician, attorney, or judge*. *See id.* § 75-9-109(3)(a)–(b). The Act departs from previous law that arguably emphasized the primary (and seemingly exclusive) authority of physicians and judges in determining contractual incapacity.

The Act further endows a general durable power of attorney a privileged place among estate planning documents. The Act confirms that "if a person has a general durable power of attorney in place, that power of attorney is not necessarily null and void, even if a court appoints a conservator" In fact, a person's general durable power of attorney may be deemed by a court to stand on equal or even superior footing to a conservatorship." *Id.* § 75-9-108(2) (as recently amended).

Testamentary Capacity

In contrast to contractual capacity, testamentary capacity addresses a person's capacity to create wills and trusts (testamentary documents). While a person may lack contractual capacity – the capacity to manage their own business or financial affairs (for example, because they are suffering delusions) – the person may still possess the capacity to create testamentary documents; that is, the delusional person may be perfectly competent to sign a will or trust. *See Ioupe*, 878 P.2d at 1172; *Kesler*, 702 P.2d at 88. If a person does not possess testamentary capacity, that means that a person is incapable of dictating how their assets will be distributed at their death, which of course means that the person cannot create a new will or trust, the person is prohibited from amending or revoking an existing will or trust, and if there is no will or trust in place, Utah law will dictate how the person's assets are divided and distributed.

Utah law emphasizes that testamentary documents cannot be created unless the creator is of *sound mind*, stating that "[a]n individual eighteen or more years of age who is of *sound mind* may make a will." Utah Code Ann. § 75-2-501. And a trust can only be created if "the settlor has capacity to create a trust, which standard of capacity shall be the same as for a person to create a will." *Id.* § 75-7-402(1). To revoke or amend a trust, the capacity required "is the same as that required to make a will." *Id.* § 75-7-604.

The Utah Supreme Court has put forth a simple three-prong test to determine whether a person possesses a *sound mind* (i.e. testamentary capacity). A person possesses a sound mind (testamentary capacity) if the person, without any prompting or influence: (1) can identify the people to whom they want to distribute their assets; (2) can describe the nature and extent of their assets; and (3) can formulate and explain a plan of how their assets should be distributed at their death. *See Ioupe*, 878 P.2d at 1168, *Kesler*; 702 P.2d at 88.

Coordinating the Two Incapacity Standards

Because there are two distinct capacity standards, contractual capacity and testamentary capacity, Utah law authorizes a person to coordinate these two standards in carefully-drafted documents.

Utah Code section 75-5-605 states, "A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney … to the extent expressly authorized by the terms of the trust or the power [of attorney]." Utah Code Ann. § 75-7-605(5).

This statute is as significant as a principal's authority to define what constitutes their own incapacity. Here, a person is expressly authorized to include terms in their *power of attorney* authorizing the appointed agent to control the amendment or revocation of the person's *trust*. This statute opens a door between the laws governing powers of attorney and the laws governing trusts – allowing a person to coordinate definitions of contractual incapacity and testamentary incapacity.

First, the Utah Trust Code allows a person to provide their own unique method for amending or revoking a trust, which must be followed in the future and may exclude other methods for amending or revoking the trust. *See id.* § 75-7-605(3). Second, the Utah Uniform Power of Attorney allows for a person to provide their own unique method for amending or revoking a power of attorney, which also must be followed in the future and may expressly exclude other methods for amending or revoking the power of attorney. *See* Utah Code Ann. § 75-9-110(7).

The take away here is that a person is empowered under Utah law to create unique provisions in both their power of attorney and their trust that define incapacity in relation to: (1) the management of the person's financial affairs and (2) the authority to amend or revoke the person's trust.

Defining Mental Incapacity in a Power of Attorney

However, under the Power of Attorney Act, the authority that a person possesses to define incapacity may create potential problems with (1) the appointed agent's interpretation of the definitions for incapacity, (2) with an interested person's opinion of the definitions, or (3) with the opinion of Adult Protective Services or another entity's definition of incapacity. In such conflicts, a court may be required to adjudicate whether one or more of the person's definitions defining their incapacity has been satisfied and is reasonable. *See* Utah Code Ann. § 75-1-201(22). Conflicts may ultimately require appeal to a court to interpret and honor the terms of the person's power of attorney that define incapacity.

For that reason, it would always be wise to ensure that a person's own definitions and conditions of incapacity do not weaken or undermine Utah's statutory definitions of incapacity, but rather confirm in specified detail those definitions. For example, the power of attorney could simply define incapacity in line with statutory definitions of incapacity:

I am incapacitated if I cannot physically and financially protect myself, due to the fact that I am incapable (even with technological assistance) to:

(1) receive and evaluate information;

(2) make and communicate decisions; or

(3) provide for necessities such as food, shelter, clothing, health care, or safety.

See Utah Code Ann. §§ 75-1-201(22), 75-9-102(5). With this in mind, a person may then include in the person's power of attorney, other examples of events or contingencies that would result in a finding of incapacity. For example:

Specified Medical or Health Care:
(1) The person is suffering a medical emergency; or

(2) The person is in a hospital or clinic to receive care; or

(3) The person is subject to certain medically-prescribed drug regimens; or

(4) The person is a resident in a mental-health or memory-care facility; or

Inability to Engage in Certain Mental Processes:
(5) The person lacks the ability to understand their finances; or

(6) The person lacks the ability to express their estate planning wishes (testamentary incapacity); or

(7) The person is unable to understand the consequences of their decisions (informed consent); or

(8) The person lacks the ability to independently retain an attorney; or

Physical Inability to Manage Affairs:
(9) The person lacks the ability to use technology to control their affairs; or

(10) The person cannot perform activities of daily living; or

Emotional Pressures:
(11) The person is under particular or defined conditions of stress or duress; or

(12) The person is subject to defined conditions of undue influence; or

Diagnosed Incapacity:
(13) The person is diagnosed by a medical professional to be incapacitated.

Each of these events or contingencies would need to be carefully defined, ensuring that the definitions are reasonable and understandable. For instance, what reasonably constitutes a person's inability to independently retain an attorney, thus indicating that the person is incapacitated? The person or their attorney must think carefully about this type of question. The practical goal is to ensure that answers defining incapacity are understandable and ultimately enforceable by a court as reasonable.

In sum, Utah's Uniform Power of Attorney Act confirms the significant, privileged place a general durable power of attorney has among estate planning documents. Further, the Act empowers persons to define events or contingencies that will indicate their own incapacity. It is no longer necessary to rely initially or solely on physicians or judges to make determinations of incapacity. The Act also, with other Utah statutes, strengthens the enforcement of powers of attorney and other estate documents, by allowing a person to control amendments to those documents. Finally, the Act empowers persons to draft thoughtful general durable powers of attorney that must be considered by courts as being equally effective as conservatorships in protecting a vulnerable person's assets from waste.

Jennifer L. Falk joins Strong & Hanni

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Strong & Hanni Law Firm is pleased to announce that Jennifer L. Falk has chosen to join the firm as an attorney and shareholder in the family law group.

Jennifer's practice is devoted exclusively to family law. With over thirty years of experience, Jennifer has the knowledge and the ability to reach favorable resolutions for her clients in even the most complex and sophisticated cases. She represents a number of individuals with high-net-worth estates. Jennifer is also skilled in child custody cases and helps her clients with their goal of protecting their children from conflict.

Since 1888, Strong & Hanni has provided comprehensive legal services for our diverse clientele. Strong & Hanni is known as a premier business and litigation firm. Strong & Hanni provides a wide range of expertise in business and personal legal services in the areas of commercial litigation, business, securities and tax matters, employment law, construction law, government liability, family law, product liability, professional liability, bankruptcy law, creditor and debtor law, and aviation law.

STRONG & HANNI
LAW FIRM

The Meet and Confer

by Bryan Pattison

Walt sat down at his desk and began skimming through the opposition's discovery responses. "Objection.... Objection.... Objection...." Irate, he immediately started hammering away on an email:

> Re: meet and confer
>
> Gustavo:
>
> This email serves as my effort to meet and confer under the rules. I have received and reviewed your objections to my discovery. They are frivolous and without merit. Please respond by providing all documents and interrogatory answers by tomorrow at 3:52 p.m. or I will file a motion to compel.
>
> Walt

Moments later, Gus was closing out Instagram only to then see the annoying red badge in the corner of his email app icon. Walt's "meet and confer" email was not well received. Gus was quick to respond:

> Your discovery requests were frivolous. My objections were proper. And in Utah it's not a motion to compel, it's called a statement of discovery issues. See you in court.
>
> Sent from my iPhone

It was on. Back at his keyboard, Walt set to drafting his statement of discovery issues. Careful to follow Rule 37(a)(2), he started with his request for relief. Leaning back in his chair, he admired his magnificent array of demands. Next, the meet and confer certification. Easy, he thought. He sent an email; he got a response. Done. Next up, proportionality. Not so fast, Walt. Before he can get to proportionality, has he met and conferred in good faith? Surely not. To meet and confer in good faith takes more than a single email demanding production by a drop-dead date.

The Standard: Let's Talk This Over.

By rule, a good-faith meet and confer requires the requesting party at least attempt to confer in person or by phone to resolve the dispute without court action. *See* Utah R. Civ. P. 37(a)(2)(B). Any sampling of court decisions addressing the subject will show that this has long been the meet-and-confer standard:

- *Nunes v. Rushton*, No. 2:14-cv-627, 2015 WL 4921292, at *2 (D. Utah Aug. 18, 2015) ("Here, although Plaintiff's motion to compel 'certifies' that the parties met in good faith, references to emails demanding discovery responses do not satisfy meet and confer requirements.")

- *Shuffle Master, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 172 (D. Nev. 1996) (reasoning that a single demand letter was insufficient as there was no effort at "personal or telephonic consultation during which the parties engage in meaningful negotiations or otherwise provide legal support for their position")

- *Compass Bank v. Shamgochian*, 287 F.R.D. 397, 400 (S.D. Tex. 2012) ("Plaintiff's single letter unilaterally identifying flaws in Defendant's discovery responses and setting an arbitrary response deadline for Defendant would seem to be inadequate, as it does not equate to a good faith conferral or attempt to confer.")

- *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D. Kan. 1999) (explaining that "parties do not satisfy the conference requirements simply by requesting or demanding compliance with the requests for discovery"

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by an arbitrary deadline, because the parties need to "deliberate, confer, converse, [and] compare views").

This standard is also set out in Utah's local federal rule. *See* DUCivR 37-1(a). The rule requires, at a minimum, "prompt written communication" to the opposing party which identifies the discovery request, specifies the inadequacies in the objection or response, requests to meet and confer by phone or in person, and gives alternative dates and times to do so.

Rule Compliance: The Framework for Meaningful Discussion.

Of course, the meet and confer should not be the first time that lawyers try to explain what their discovery requests, responses, and objections really mean. By rule, the objections themselves should educate the requesting party as to the specific reasons for the objection. *See* Utah R. Civ. P. 33(b) ("If an interrogatory is objected to, the party shall state the reasons for the objection."); Utah R. Civ. P. 34(b)(2) ("If the party objects to a request, the party must state the reasons for the objection with specificity.").

For example, are you withholding documents from production in connection with the objection? Then you must say so. *See* Utah R. Civ. 34(b)(2). Asserting a privilege? Provide a privilege log that explains the basis for the privilege in sufficient detail. *See* Utah R. Civ. P. 26(b)(8)(A). Do you believe the discovery is not proportional? Why? There are multiple categories to choose from, *see* Utah R. Civ. P. 26(b)(2)(A)–(F), but a generalized statement such as "Objection, proportionality," tells the requesting party nothing.

If the responding party follows the rules and tailors its objections to meet the request, the meet and confer becomes a solution-based discussion. Confronted with specific objections, the requesting party now has the tools to evaluate the request against the objection and propose solutions: reframing an interrogatory, narrowing the scope of a request for production, or cost-shifting proposals, to name a few. Even if the meet and confer fails, at the very least the parties should succeed in focusing the specific issues for the court.

And who knows, in a moment of honest reflection, the requesting lawyer may concede that the issue lies with the discovery request, not the objection. After all, a requesting lawyer has "a correlative obligation to tailor interrogatories to suit the particular exigencies of the litigation." *Mack v. Great Atlantic & Pac. Tea Co.*, 871 F.2d 179, 187 (1st Cir. 1989). That means "[t]hey ought not to be permitted to use broadswords where scalpels will suffice, nor to undertake wholly exploratory operations in the vague hope that

something helpful will turn up." *Id.* Likewise, requests for production "must identify the items to be inspected by individual item or by category, and *describe each item and category with reasonable particularity*." Utah R. Civ. P. 34(b)(1) (emphasis added). A carefully crafted objection may cause the requesting lawyer to realize that a particular request falls short of these standards.

The possibilities are endless.

Outkicking Your Meet-and-Confer Coverage

Unfortunately, that is not how it typically works in practice. All too often lawyers responding to discovery lead off with a long list of "General Objections" followed by more boilerplate objections, expecting that if the other side really wants the information, the meet-and-confer requirement will force them to ask for it again. The responding lawyer will then get another shot at doing what should have been done in the first instance. This mindless weaponization of the meet-and-confer requirement strays from the rules and only adds to the cost and delays of litigation. What's more, it has become a risky endeavor, as a pair of Utah cases show.

Smashing traditions.

In *Smash Technology, LLC v. Smash Solutions, LLC*, 335 F.R.D. 438 (D. Utah 2020), the court condemned the use of general and boilerplate objections as a mere "odious tradition" that gives lawyers a false sense of security. *Id.* at 441. After setting fire to the tradition, the court went on to overrule and find waived all the responding party's boilerplate objections as "violative of the Federal Rules of Civil Procedure." *Id.* at 446. The court ruled that "General objections," "objections as to overbreadth, undue burden, and proportionality without further explanation," and any "objections containing the phrase 'to the extent that'" all "fail for want of specificity." *Id.*

"[T]o meet the specificity requirements of Rules 33 and 34," the court explained, "an objecting party must do more than rattle off a litany of trite phrases or make an objection 'subject to' other trite phrases located elsewhere in the discovery response." *Id.* at 447. The objecting party must instead "explain how each objection applies to each specific discovery request." *Id.* "This lack of specificity dooms these objections." *Id.*

Thus, a lawyer who churns out such mindless objections in the first instance, believing that the meet-and-confer requirement will give them a second or third crack at rule compliance, may later discover that they have outkicked their meet-and-confer coverage. By rule, absent good cause (feelin' lucky with that standard?), they have likely only managed to waive any objections. *See* Utah R. Civ. P. 34(b)(2) ("Any reason not stated is waived unless excused by the court for good cause."); Utah R. Civ. P. 33(b) ("Any reason not stated is waived unless excused by the court for good cause."); *Smash Tech.*, 335 F.R.D. at 441 ("[I]ssuing a boilerplate objection often results in the opposite of preservation: waiver of objection.").

The timeless art of shadowboxing.

In another case, the Utah Court of Appeals affirmed a privilege waiver resulting from an insufficient privilege log and rejected a belated effort to hide behind the meet-and-confer requirement to avoid production. *See Vered v. Tooele Cnty. Hosp.*, 2018 UT App 15, 414 P.3d 1004.

In *Vered*, the defendant asserted privilege in response to discovery but failed to provide a privilege log until after the briefing on the statement of discovery issues and just before the subsequent hearing on the matter. *See id.* ¶¶ 2–4. The trial court found the untimely log substantively deficient and ordered production of all documents. *See id.* ¶ 7. The defense sought reconsideration. It admitted the log was inadequate and asked for a chance to supplement it. *See id.* ¶¶ 11, 13. The trial court said no. *See id.* ¶ 13.

On appeal, (among other things) the defense argued that the discovery issues were not ripe because the plaintiff never met and conferred. *See id.* ¶ 34. On top of finding that argument essentially unpreserved, the court of appeals held that the district court did not abuse its discretion in "not enforcing the meet-and-confer requirement." *Id.* ¶ 36. It cautioned:

> We are cognizant that the practice among many lawyers in Utah is to – from time to time – engage in a months-long game of shadowboxing, essentially revealing the bare minimum in a privilege log or other discovery response and asking, "Is this good

> enough yet?" But a privilege log should be good enough in the first instance. The standard is clear. Lawyers know what is required. The game of back-and-forth can end badly if a judge determines, as it did in this instance, that the log is insufficient; there is no requirement that a district court provide unlimited bites at the apple, and lawyers should not expect there to be.

Id. ¶ 37.

"Despite these clear standards," the court continued, the defense "still produced an insufficient log" and then sought to "hid[e] behind our rules' separate meet-and-confer requirement as a way to avoid producing the documents as ordered by the district court." *Id*. ¶ 38. The court dropped a footnote stressing the importance of the meet-and-confer requirement, *see* ¶ 36 n.9, but ultimately explained that, as with most discovery issues, enforcement of that requirement is the trial court's call. *See id*. ¶ 40.

This harsh result could have been avoided had the defense produced a privilege log at the outset. From that point, the "expected process" would likely have followed: the parties would meet and confer about any issues with the log and if they could not agree on how to resolve those issues, it would fall to the trial court to do so. *See id*. ¶ 41 n.11. But the defense "ignored their obligation to produce an adequate privilege log" with their initial responses and thus lost all traction in the ensuing discovery dispute. *Id*.

Though the facts in *Vered* are somewhat unique, the court's cautionary instruction is broad in application. Our rules of civil procedure are not suggestions. And don't expect the meet-and-confer requirement to provide an endless supply of chances to do what should have been done in the first instance.

* * *

Discovery is miserable enough. It's expensive for the parties and time-consuming for the lawyers. But when two lawyers make a good-faith effort to hash something out over the phone or in person it usually avoids unneeded time and expense, including the need for court intervention. That's the point. There is give and take, but there is almost always common ground. And if not, that's fine, too. Certify the effort and let the court decide. And to the self-described "bulldog" lawyer who scoffs at the idea of having a meaningful discussion with opposing counsel: DeNiro and Pacino conducted the greatest meet and confer in cinematic history before trying to off each other. *See Heat* (Warner Bros. 1995). If they can do it without sacrificing their reputations, so can you.

Walt is now hip to the meet and confer standards:

> Gus:
>
> I am writing to bring an issue to you regarding your responses to my discovery requests. You objected to all requests for production claiming that they are "unduly burdensome," but you did not offer an explanation as to the nature of the burden in terms of time, money, or procedure required to produce the requested documents. I would be happy to discuss narrowing the scope of the requests but need additional information to understand the specific concerns. Also, you made a general privilege claim in response to each request for production, but I did not see a privilege log with your response, nor did you advise as to whether you are withholding any documents based on these privilege assertions. Without that information, I think you have waived privilege, but I welcome the opportunity to hear your views on it.
>
> Please consider these matters and let's have a call to discuss. I am available on Monday and Tuesday of next week between 9:00 a.m. and 3:30 p.m. either day. Just let me know what time works for you. Thanks.
>
> Walt

The ball is now in Gus's court. If he flat rejects the offer, he knows that Walt has made the attempt and can certify his statement of discovery issues. Gus has also read the caselaw. He doesn't want the court deciding this:

> Walt,
>
> You make some good points. Let's do it at 10:15 Monday morning … You call me. Talk to you then.
>
> Gus

AFTER 43 YEARS OF SERVICE

LEN MCGEE

ANNOUNCES RETIREMENT

Len attended the University of Utah on a debate scholarship, where he served as student body president and graduated with a Bachelor's Degree in history and political science in 1975. He then earned his Juris Doctorate from the University of Utah in 1978, where he wrote for the Journal of Contemporary Law.

After joining the U.S. Navy while in law school, Len served in the Navy Judge Advocate General's Corp for four years, as a prosecutor and as team leader of the Atlantic Fleet Drug Interdiction Team. After, he transferred to Naval Intelligence in the Reserves. He was recalled to active duty in 1991 as an intelligence analyst and mission briefer during the First Gulf War and awarded the Navy Commendation Medal. He was again recalled to active duty in 2002 for nine months, serving at the Pentagon as a targeting analyst and briefer to the CNO and at the Office of Naval Intelligence as a Homeland Security analyst during the Second Gulf War. He was awarded the Navy Achievement Medal. Len retired from the U.S. Navy (reserves) as a Commander (O-5) in 2004.

A Utah native, Len worked as an Assistant Attorney General in the Utah AG's office for four years after 1984. Len then co-founded the law firm of Bertch and Birch where he worked for ten years, doing plaintiff's personal injury work. After leaving Bertch and Birch, Len worked as house counsel for Allstate Insurance for six years and then joined Robert J. Debry & Associates in 2006, operating as a managing attorney and team lead over the years.

During his legal career, Len tried more than 100 jury trials– both civil and criminal– on both the defense and plaintiff's side. He has been admitted to the Court of Military Appeals, the 10th Circuit Court of Appeals and the Utah Supreme Court. He is a member of the Utah Bar Association and the Federal Bar Association.

Len has been an active presenter in legal seminars, having taught other attorneys in personal injury matters and trial techniques for the last fifteen years.

He is also a graduate of the Pepperdine School of Law, "Mediating the Litigated Case" program. Len would like to continue to work as a mediator and arbitrator.

Len is committed to the role of ADR in the personal injury arena. He has been in the role of advocate (on both the defense and plaintiff's side) or neutral in hundreds of mediations and arbitrations during his career. His experience on both sides of the issues makes him uniquely qualified to help parties understand the legal and personal issues in resolving their disputes through the mediation process or through arbitration.

Len, we wish you the best in your adventures ahead!

- Your friends and colleagues at Robert J. DeBry and Associates.

Twenty Million Angry Men:
The Case for Including Convicted Felons in Our Jury System

by James M. Binnall

Reviewed by Nicholas C. Mills

James M. Binnall's new book *Twenty Million Angry Men* provides a compelling and masterful argument that explains why convicted felons should be allowed to serve on juries. Binnall is a masterful writer and researcher who has crafted a thought-provoking and reflective book that is a "must read" for criminal justice scholars and practitioners. His own status as a convicted felon, practicing attorney, and criminal-justice faculty member further enhances his writing. Indeed, Binnall is uniquely qualified to bring together these various paradigms and explain the importance of this topic.

This review will begin by describing several persuasive arguments that Binnall advances. Specifically, this review will describe how Binnall systematically tackles many of the arguments that have been used to exclude convicted felons from jury pools. Second, the review will address some of the weaknesses in Binnall's argument. Specifically, Binnall implicitly attacks the validity of the retributive theory of criminal justice sanctions, but never gives enough attention to fully conquer retribution. Next, the review will explain several aspects that make *Twenty Million Angry Men* a "must-read" for those in the criminal justice field. Throughout this review, Binnall's incredible critical reasoning skills will be highlighted because of the value that this thought process can bring to the criminal justice system.

The biggest strength of this book is how Binnall has systematically examined each of the arguments against allowing convicted felons to sit on juries. Binnall methodically debunks each of these arguments by exposing their shortcomings. To his credit though, Binnall never seems to shortchange the opposition's argument. He presents the opposition's argument in an unbiased and objective fashion before explaining its problems. He discusses, at length, the probity argument which states that the character of convicted felons are forever marred to an extent that only categorically excluding them maintains the purity of the jury process. Next, he discusses the inherent bias rationale which argues that convicted felons' prior dealings with the criminal justice system creates a universal bias against the government in nearly every situation. He also addresses and discredits several other lesser-used arguments that opponents of felons serving on juries may posit. *Twenty Million Angry Men* succeeds by empirically examining and debunking each of these arguments. One of the most surprising aspects of this discussion was how proactively felon jurors participated in the process. Binnall explains how he has set up mock juries to study the claims surrounding felon jury participation. Binnall notes that many felons volunteered to be the foreperson of the mock juries, that mock juries with felons deliberated longer, and recalled more facts. He argued that this showed that felons were invested in the process and took it seriously. These findings also demonstrated that including felons

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by James M. Binnall

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helped diversify juries and make their decision-making process more meaningful, thoughtful, and accurate. Observations like these really demonstrated how thoroughly *Twenty Million Angry Men* has been researched and written.

Another powerful argument that Binnall makes is the broad disparity in how jurisdictions treat jury service for convicted felons compared with other consequences. For example, Binnall notes that Maine has no felon juror exclusion while other states have a lifetime blanket ban. He compares and contrasts these approaches to the ability of felons to become lawyers or police officers. In most states, felons can, at least theoretically, pass the character and fitness portion of the bar application and become attorneys. Said another way, felon lawyers face only a presumption that they are disqualified, but that presumption can be rebutted. This individualized consideration is often done similarly to voir dire. Felon attorney applicants present themselves before small panels and discuss their prior bad acts. Similarly, lawyers and judges examine jurors with questionable qualifications. He draws this comparison and hammers home its utility by explaining that a convicted felon lawyer could pass the character portion of the bar and represent a client in a capital case, but that same person would be forever barred from serving as a juror in the smallest of civil lawsuits. To take another example, a felon is excluded forever from jury service, but that same felon could be a certified peace officer and arrest hundreds of felons throughout their career.

Finally, Binnall spends a considerable portion of the book detailing Maine's experience in allowing felon jurors to serve. *Twenty Million Angry Men* does this expertly. This section demonstrated that felons can appreciate the need for the rule of law, they can follow judicial instructions, and they can objectively apply the law. The book does a masterful job of attacking the per se disqualification. This strengthens the argument incredibly because *Twenty Million Angry Men* does not argue that every felon will be an objective juror discharging their duty with fidelity. Instead, the book argues that every felon should, at some point, be able to redeem themselves and that they may be an outstanding juror.

One theme that appears repeatedly throughout the book is an appeal to a more compassionate and less stigmatizing approach to the way we treat felons. *Twenty Million Angry Men* argues that a felon juror exclusion has a disparate and disenfranchising impact on African-Americans. For example, Wheelock, *A jury of one's "peers": The racial impact of felon jury exclusion in Georgia*, Justice Sys. J. (2011), notes that African-Americans' overrepresentation in felony convictions means that felon jury exclusion has reduced the African-American jury pool in some jurisdictions by a third. This is especially sobering when one considers that projections indicate that one in three black males are expected to serve prison time. *See* King & Mauer, *The vanishing black electorate: Felony disenfranchisement in Atlanta, Georgia*, The Sentencing Project (2004), *available at* https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=2032&context=honorstheses#:~:text=The%20positive%20retributivist%20holds%20that,who%20have%20committed%20wrongful%20acts. Binnall also argues that including felons as potential jurors will help to reintegrate and provide prosocial opportunities for these offenders. He argues that including felons on juries could be an agent of community change.

The biggest shortcoming of this book is the lack of attention that it devotes to discussing the retributive arguments for penal sanctions. Historically, the validity of criminal justice sanctions has rested on the theory that sentences should do at least one of the following: deter future criminal offending, rehabilitate the offender so they do not commit future offenses, incapacitate the offender from committing future crimes, and punish the offender out of a sense of vengeance, *see* Cochrane, *Prison on appeal: The idea of communicative incarceration*, Criminal Law and Philosophy 11, 295–312 (2017). This vengeance aspect is also called retribution. Binnall's book thoroughly addresses how banning convicted felons could negatively impact deterrence; and the crux of his book appeals to those looking to rehabilitate offenders. Indeed, *Twenty Million Angry Men* persuasively demonstrates that lifting the felon ban on jury service could help rehabilitate offenders. Further, Binnall addresses, albeit tangentially, the incapacitation argument by noting that many other sanctions for felons have some expiration date. For example, almost all felons are released from incarceration, pay off their fines, and complete the terms of their parole. Even sex offender registries – a sanction that is frequently viewed as draconian by many experts – have expiration periods in some instances.

In this book's defense, this shortcoming – giving retribution short shrift – is almost endemic to punishment research. This is unfortunate. Scholars should work to bridge the gap between academia's best practices and the sentiment of a substantial portion of the citizenry. It seemed that *Twenty Million Angry Men* would benefit from acknowledging this shortcoming and addressing it. This critique begs the question, "Is there a good argument against retribution?" Arguably, yes. While it may not satisfy everyone the book could have explored in greater detail that the sanction was overly vindictive. Binnall is clearly an inventive and creative researcher and writer. He could have designed experiments that showed that the retributive nature of these sanctions fails to accomplish their goal. To his credit, he does passingly argue that many non-felons would happily accept a jury service exclusion. Sadly, this section is too brief to bear the weight of rebutting the retributive argument. Binnall could have also explored a number of other reasons to avoid retribution. Unfortunately, *Twenty Million Angry Men* instead ignores what scholars have argued is the "central aim of punishment," *see* Bradley, *Retribution: The central aim of punishment*, Harvard J. of Law and Pub. Policy 27 (1), 19–31, (2003), and undergraduates have defended on a variety of grounds, *see* Kim, *A defense of retributivism as a theory of punishment*, Undergraduate Honors Theses Paper 1108 (2017), *available at* https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=

2032&context=honorstheses#:~:text=The%20positive%20retributivist%20holds%20that,who%20have%20committed%20wrongful%20acts. This argument deserved greater treatment in the book because the retributive arguments seems to be the main argument supporting convicted felons lifetime jury bans. Further, the retributive argument carries incredible political weight and cannot be dismissed out-of-hand.

Scholars and practitioners of criminal justice and the law should read this book for at least three reasons. First, the book challenges many pre-conceived and foundational elements that support the system. Binnall is able to masterfully craft an argument that both challenges the system without employing the "scorched-earth" theory that has come to dominate many discussions of the criminal justice system. Sadly, the tone of many political topics in America has devolved into tribal "winner take all" discussions. This blanket approach ignores the nuance and the value that both sides bring to this complex issue. Binnall is able to avoid this pit-fall and present a balanced and reasonable argument. His respectful and objective tone conveys a deep respect for the system and an implicit acknowledgment that the system has value even as it exists in its present state. Meanwhile, he challenges many of the commonly held beliefs regarding felons and jury service. His approach makes the book introspective and his arguments persuasive.

Second, the book provides an incredible explanation of why felons have been excluded from jury service. This vantage point

would be beneficial for legislators, judges, lawyers, and other court staff because it allows the reader a chance to crystalize their own reasoning for felon exclusion or inclusion. The book is simultaneously succinct and comprehensive. *Twenty Million Angry Men* will leave the reader better informed and with a better understanding of this important issue. The book also shines a light on this often overlooked collateral consequence of a felony conviction. Further, it illustrates the incredibly broad discriminatory effect of this sanction and the irony of refusing to allow felons to participate in this pro-social activity. The book also does a good job of pointing out the unintended consequences of broad reaching policies and the devastating effect they can have on segments of the population.

Finally, the book concisely summarizes many of the valuable empirical studies that Binnall and others have conducted in regards to jury selection and dynamics. These studies may suffer from having been conducted with relatively small sample sizes and in a single state – California. But these shortcomings do not entirely invalidate the incredible insights that these studies provide. In fact, Binnall would likely concede the shortcomings in his studies. These studies clearly debunked many of the myths surrounding felons serving on juries. Further, these studies help to demonstrate that creative researchers can design studies that will explore very complex issues. Any practicing attorney would be well-served by taking the time to read this book because of Binnall's treatment of jury dynamics, decision-making, and processes. Trial lawyers can glean powerful lessons about jury selection and will be better informed when they select their next jury. Combining the powerful insights that Binnall has unearthed with the outstanding appendices and careful notations makes *Twenty Million Angry Men* an incredible resource.

While there are many policy and scholarly reasons to read this book, stakeholders will also benefit from reading this book for a number of related, but slightly tangential reasons. As discussed above, James Binnall brings a unique – in the literal sense of the word – perspective to this issue. He is a convicted felon, a practicing lawyer, and a faculty member of a prestigious criminal justice school. He holds both a Ph.D. in Criminology, Law, and Society and a Juris Doctor. This makes his opinion both pragmatic and theoretical. He has both the personal experience and the academic credentials to support his argument. This infuses his book with a personal and professional tone that readers will appreciate. In fact, the book begins with Binnall recounting a powerful and compelling account of his felony conviction and later dismissal from jury service. *Twenty Million Angry Men* is also a very enjoyable book to read. Binnall's writing style is a pleasure to read. His book is filled with interesting anecdotes that powerfully drive home his points. He simultaneously explains his empirical studies and the theories that he espouses in a relatable and approachable way. This makes the book feel less like a textbook and more like a novel. But despite this "down-home" writing style, the book maintains its solid academic foundation and tone. This book is an ideal introduction to this topic and because of its robust citations, it is the perfect springboard for those that want to take a deeper dive. The last ethereal benefit of this book is that it causes the reader to pause and check the pulse of their humanity. Regardless of whether a reader agrees with *Twenty Million Angry Men* or not, the reader is left contemplating the sanctions and stigmas that we impose on felons and if they are necessary.

Twenty Million Angry Men is a "must read" for criminal justice stakeholders. The book is an incredible example of critical reasoning skills in action. Binnall takes a position opposite long-held social beliefs about convicted felons serving as jurors. Not only does the book challenge those beliefs in a logical, thoughtful, and objective way, it prophetically illustrates the approach to law enforcement, prosecution, sentencing, corrections, and judicial philosophy that practitioners need to employ. Currently, the criminal justice system is under fire; Binnall's approach of bringing critical reasoning skills to bear on all aspects of the system will benefit everyone. As mentioned earlier, even if a reader disagrees wholeheartedly with *Twenty Million Angry Men*'s arguments, the reader will gain incredible insight into the challenges that convicted felons face and ponder on how we can positively affect their situation.

Optimizing Pessimism

by Keith A. Call

Does anyone else out there get accused by their loved ones of having an "initial negative reaction" to everything? It doesn't matter what it is, I have a bad habit of reacting negatively to a lot of ideas, even good ones.

As lawyers, we are skilled at being skeptical about anything anyone says. We are experts a exploring the worst possible outcome of any situation so we can take steps to protect against that outcome.

This might be okay at the office, but at home I often find it helpful to adopt the strategy of saying the exact *opposite* of what I am thinking, a strategy that worked famously well for the *Seinfeld* character George Costanza. *See* TBS, *Seinfeld: The Opposite (Clip)*, YouTube (July 2, 2014), https://www.youtube.com/watch?v=1Y_6fZGSOQI.

The Case for Pessimism

If you are a lawyer, it's highly likely that you are also a pessimist. *See* Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 10 Deakin L. Rev. 49, 52, 55–56 (2005), *available at* http://www5.austlii.edu.au/au/journals/DeakinLawRw/2005/4.html. In fact, some research suggests that law school and law practice select for "pessimistic perfectionists," and encourage and reward pessimism as an attribute. *See* Elizabeth Raymer, *Is It Best to Hire a Pessimistic Lawyer?*, Canadian Lawyer (June 11, 2021), *available at* https://www.canadianlawyermag.com/resources/practice-management/is-it-best-to-hire-a-pessimistic-lawyer/357090.

Before I bash too much on pessimism and its negative impacts, let me pause to point out that some forms of pessimism have actually been shown to have positive benefits. Using a less pejorative word for "pessimism" highlights its actual virtue. That word is "prudence." *See* Seligman, *supra*, at 55. Your "prudence" has helped you make a living. Clients pay you to anticipate a full range of problems and then find ways to avoid them.

Research has also identified a particular type of pessimism, known as "defensive pessimism," with other positive benefits. Pessimists can often channel defensive pessimism to help them reach their goals. It can motivate you to work hard to avoid catastrophes, filling up that half-empty glass. Defensive pessimism can also be used as a strategy to manage anxiety. By setting low expectations and envisioning everything that might go wrong, pessimists can channel energy toward avoiding those bad outcomes, better face the anxiety of pursuing a goal, and lessen disappointment. *See* Fuschia Sirois, *The Surprising Benefits of Being a Pessimist*, The Conversation (Feb. 23, 2018), *available at* https://theconversation.com/the-surprising-benefits-of-being-a-pessimist-91851.

Now that's an optimistic view of pessimism!

Impact of Pessimism on Lawyer Well-Being

While these are great skills to have as a lawyer, they can also make us miserable if not kept in check. The negative impacts of pessimism on lawyer well-being cannot be ignored. As Martin Seligman and his co-authors write,

> The qualities that make for a good lawyer, however, may not make for a happy human being. Pessimism is well-documented as a major risk factor for unhappiness and depression. Lawyers cannot easily turn off their pessimism (i.e. prudence) when they leave the office. . . . In this manner, pessimism that might be adaptive in the profession also carries the risk of depression and anxiety in the lawyer's personal life.

Seligman, *supra*, at 56.

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

Published statistics are staggering. This one about law students in Australia particularly caught my eye: "Depression among law students is 8–9% prior to matriculation, 27% after one semester, 34% after 2 semesters, and 40% after 3 years." *See* Dave Nee Foundation, *Lawyers & Depression*, *available at* http://www.daveneefoundation.org/scholarship/lawyers-and-depression/ (last visited Feb. 1, 2022) (citation omitted).

That's staggering!

Closer to home in Utah, a recent survey suggests that 44.4% of responding Utah lawyers experience feelings of depression, and are 8.5 times more likely to report thoughts of being "better off dead or hurting themselves" compared to the general working population. *See* Matthew S. Thiese, *The Utah Lawyer Well-Being Study: Preliminary Results Show Utah Lawyers at Risk*, 33 Utah B.J. 29, 30 (Mar./Apr. 2020) (quotation marks omitted); *see also* Utah Task Force on Lawyer and Judge Well-Being, *Creating a Well-Being Movement in the Utah Legal Community* 3, 6 (Feb. 2019), *available at* https://www.utahbar.org/wp-content/uploads/2019/07/Task-Force-Report-2.pdf. I'm sure this is the result of a lot more than just lawyer pessimism, but our natural pessimism can't be helping with these problems.

Our pessimism can also negatively impact those around us. Exhibit A is my own "initial-negative-reaction" habit and the negativity it can create for those around me.

Strategies for Being More Optimistic

An unhappy lawyer is at risk of making mistakes, including mistakes that can land you in ethical hot water. However, studies have shown that optimism is a choice, and it can be learned and improved, even over short periods of time. *See, e.g.*, Yvo M.C. Meevissen et al., *Become More Optimistic by Imagining a Best Possible Self: Effects of a Two Week Intervention*, 42 J. Behav. Therapy and Experimental Psychiatry 371 (Sept. 2011), *available at* https://www.sciencedirect.com/science/article/abs/pii/S0005791611000358?via%3Dihub.

Lists of how to develop and improve an optimistic outlook abound on the internet. Here is a short list I like, adapted mostly from Amy Morin, *Being Optimistic When the World Around You Isn't*, Verywell Mind (Apr. 4, 2020), *available at* https://www.verywellmind.com/how-to-be-optimistic-4164832:

1. **Recognize Negative Thinking.**
   Most of our negative thinking is exaggerated. Reframing negative thoughts and emotions into more realistic statements can help maintain a better outlook on whatever situation you face.

2. **Avoid Negativity.**
   Other people's negativity can bring us down. Establish healthy boundaries with people whose negativity unduly hurts you. (Of course, if you stay too negative yourself, you could end up a very lonely person.) Don't hesitate to turn off the news and other media influences when you feel their downward pull.

3. **Cultivate Positivity.**
   "Making other people feel positive has lasting effects on your own life." *Id.* Look for ways, every day, to spread compliments and other forms of positivity to those around you. And don't forget to do that for yourself by taking time at the end of each day to recognize some positive event or influence in your life.

4. **Imagine a Positive Future.**
   Consider serious challenges you face in your life and think about possible positive outcomes. Write them down if it helps.

5. **Practice Gratitude.**
   Thinking about all the things you have to be grateful for can give you an instant boost of optimism. Some people have found that keeping a gratitude journal can have a profound positive influence. Taking time to express gratitude to others is another great way to cultivate more optimism.

6. **Find Purpose in Your Practice.**
   Focusing on billable hours and dollar signs usually leads to burnout. Finding a greater purpose in your work, such as helping people in need, addressing a social issue, or mentoring others will help you have a more positive outlook on your own practice and our profession as a whole.

Conclusion

So, what will you choose, pessimism or optimism? As for me, I'm not planning a wholesale abandonment of all "prudence" just yet. But I need to manage it better for sure. I'm going to try to lose my initial negative reactions, cultivate positivity with those around me, and express more gratitude. If you see me slip up, please help me out!

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

Need Ethics Help?

The Utah State Bar General Counsel's office can help you identify applicable disciplinary rules, provide relevant formal ethics opinions and other resource material, and offer you guidance about your ethics question.

Utah attorneys and LPPs with questions regarding their professional responsibilities can contact the Utah State Bar General Counsel's office for informal guidance during any business day by sending inquiries to ethicshotline@utahbar.org.

The Ethics Hotline advises only on the inquiring lawyer's or LPP's own prospective conduct and cannot address issues of law, past conduct, or advice about the conduct of anyone other than the inquiring lawyer or LPP. The Ethics Hotline cannot convey advice through a paralegal or other assistant. No attorney-client relationship is established between lawyers or LPPs seeking ethics advice and the lawyers employed by the Utah State Bar.

UTAH STATE BAR®
ETHICS HOTLINE

ethicshotline@utahbar.org

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the January 28, 2022, meeting held on Zoom.

1. The Commission nominated Erik Christiansen as a candidate for the office of President-elect.
2. The Commission approved initiating formal action against David Zaplana for the unauthorized practice of law.
3. The Commission approved Jessica Andrew as the recipient of the Dorathy Merrill Brothers Award.
4. The Commission approved Ross Romero as the recipient of the Raymond Uno Award.
5. The Commission approved the appointments of Judge Patrick Corum and Judge Anne Marie McIff Allen as the co-chairs of the Modest Means Committee.
6. The Commission approved the 2022 Leadership Class presented in the materials.
7. The Commission approved by consent the minutes of the November 18, 2021 Commission Meeting; and the minutes of the December 29, 2021 Commission Meeting.

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

Notice of Petition for Reinstatement to the Utah State Bar by Kerry F. Willets

Pursuant to Rule 11-591(d), Rules of Discipline, Disability, and Sanctions, the Office of Professional Conduct hereby publishes notice of the Petition for Reinstatement (Petition) filed by Kerry F. Willets, in *In the Matter of the Discipline of Kerry F. Willets*, Fifth Judicial District Court, Civil No. 170500375. Any individuals wishing to oppose or concur with the Petition are requested to do so within twenty-eight days of the date of this publication by filing notice with the District Court.

2022 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2022 Summer Convention Awards. These awards have a long history of publicly honoring 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 2022 Summer Convention Award no later than Friday, May 20, 2022, using the Award Form located at www.utahbar.org/nomination-for-utah-state-bar-awards/.

Propose your candidate in the following categories:

1. Judge of the Year
2. Lawyer of the Year
3. Section of the Year
4. Committee of the Year

Distinguished Paralegal of the Year Award

The Distinguished Paralegal of the Year Award is presented by the Paralegal Division of the Utah State Bar and the Utah Paralegal Association to a paralegal who has met a standard of excellence through their work and service in this profession.

We invite you to submit nominations of those individuals who have met this standard. Please consider taking the time to recognize an outstanding paralegal. Nominating a paralegal is the perfect way to ensure that their hard work is recognized, not only by a professional organization, but by the legal community.

Nomination forms and additional information are available by contacting Greg Wayment at wayment@mcg.law.

The deadline for nominations is April 22, 2022, at 5:00 pm. The award will be presented at the Paralegal Day Celebration held Friday, May 20, 2022.

Utah State Bar Licensee Benefits

Put Law Practice Tools at Your Fingertips

Your Utah State Bar license comes with a wide range of special offers and discounts on products and services that make running your law practice easier, more efficient, and affordable. Our benefit partners include:

ALPS

Clio

fastcase

LawPay
AN AFFINIPAY SOLUTION

medchart

mycase

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SimpleLaw.com

To access your Utah State Bar Benefits, visit:

utahbar.org/licensee-benefits

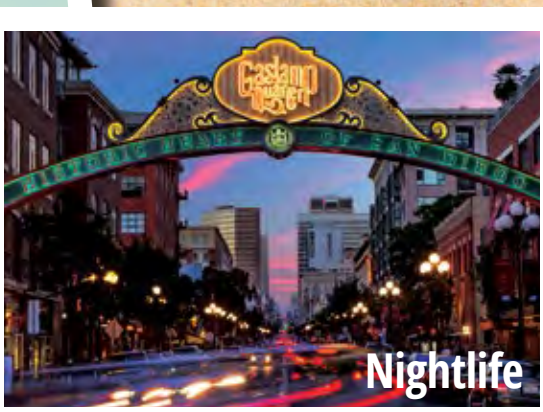
Utah State Bar®

Summer Convention

July 6–9 2022

San Diego

Loews Coronado Bay Resort



Approximately **10** CLE Credits Available.*

*Agenda pending.

For the latest information, visit:
utahbar.org/summerconvention

Utah State Bar®

Summer Convention Accommodations

Loews Coronado Bay Resort July 6–9, 2022

THE RESORT

The Loews Coronado Bay is situated on a private 15-acre peninsula surrounded by the Pacific Ocean and Coronado Bay. It is located minutes from downtown Coronado, a charming resort village, and a short drive to San Diego's world-famous attractions.

Resort Amenities

- Guest rooms including with bay, marina, pool or resort views
- Direct access to the Silver Strand State Beach
- Five restaurants and lounges
- Excursion dock and marina
- Three bayside tennis courts
- Three outdoor heated swimming pools
- Complimentary Wi-Fi in guest rooms
- Full service spa and salon

Resort Fee Waived

10% Discount off Spa Treatments

$15 Discounted Overnight Self-Parking

RESERVATIONS

Group room rates starting at $249 + tax.

Reservation can be made by calling the Loews Reservations Center at 800-815-6397. Refer to the Utah State Bar Summer Convention to receive the discounted rate.

Online reservations can also be made using the following reservations link.

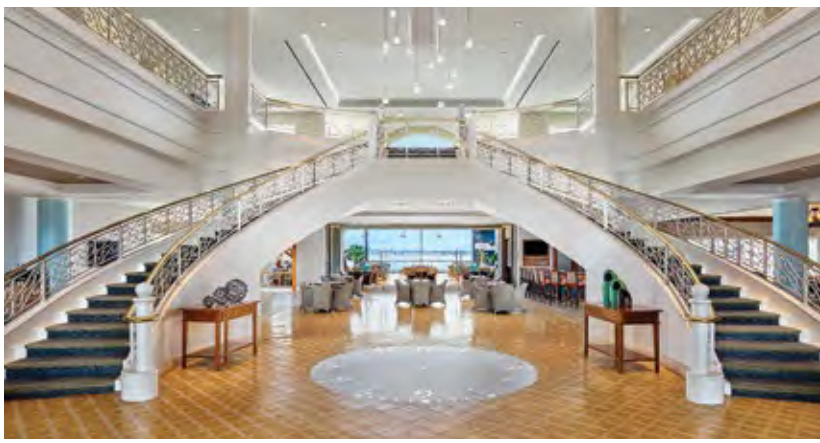
www.loewshotels.com/coronado-bay-resort/group-2022-utah-state-bar-summer-convention

Reservations need to be made on or before June 1, 2022 to receive the discounted rate.

Group rates are available:

June 29–July 15, 2022

based upon availability.



Notice of Legislative Positions Taken by Bar and Availability of Rebate

Positions taken by the Bar during the 2022 Utah Legislative Session and funds expended on public policy issues related to the regulation of the practice of law and the administration of justice are available at www.utahbar.org/legislative. The Bar is authorized by the Utah Supreme Court to engage in legislative and public policies activities related to the regulation of the practice of law and the administration of justice by Supreme Court Rule 14-106, which may be found at https://www.utcourts.gov/rules/view.php?type=UCJA&rule=14-106. Lawyers and LPPs may receive a rebate of the proportion of their annual Bar license fee expended for such activities during April 1, 2021, through March 31, 2022, by notifying Financial Director Lauren Stout at lauren.stout@utahbar.org.

The proportional amount of fees provided in the rebate include funds spent for lobbyists and staff time spent lobbying; travel for a Bar delegate to the American Bar Association House of Delegates; and Utah legislative lobbyist registration fees for the Bar's Executive Director and Assistant Executive Director. Prior year rebates have averaged approximately $7.67. The rebate amount will be calculated April 1, 2022, and we expect the amount to be consistent with prior years.

Tax Notice

Pursuant to Internal Revenue Code 6033(e)(1), no income tax deduction shall be allowed for that portion of the annual license fees allocable to lobbying or legislative-related expenditures. For the tax year 2021, that amount is 1.59% of the mandatory license fee.

For All Paralegals and Their Supervising Attorneys

Speaker TBA

Friday, May 20, 2022
Noon to 1:30 pm

Salt Lake City
Marriott City Center
(220 South State Street)

Mandatory Online Licensing

The annual online licensing renewal process will begin the week of June 6, 2022, at which time you will receive an email outlining renewal instructions. This email will be sent to your email address of record. Utah Supreme Court Rule 14-107 requires lawyers to provide their current e-mail address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org.

Renewing your license online is simple and efficient, taking only about five minutes. With the online system you will be able to verify and update your unique licensure information, join sections and specialty bars, answer a few questions, and pay all fees.

No separate licensing form will be sent in the mail. You will be asked to certify that you are the licensee identified in this renewal system. Therefore, this process should only be completed by the individual licensee, not by a secretary, office manager, or other representative. Upon completion of the renewal process, you will receive a licensing confirmation email. If you do not receive the confirmation email in a timely manner, please contact licensing@utahbar.org.

License renewal and fees are due July 1 and will be late August 1. If renewal is not complete and payment received by September 1, your license will be suspended.

Utah State Bar Request for 2022–2023 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more Bar committees which participate in regulating admissions and discipline and in fostering competency, public service and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name _____ Bar No. _____

Office Address _____

Phone #_____ Email _____ Fax #_____

Committee Request:

1st Choice _____ 2nd Choice _____

Please list current or prior service on Utah State Bar committees, boards or panels or other organizations:

_____

_____

_____

Please list any Utah State Bar sections of which you are a member:

_____

_____

_____

Please list pro bono activities, including organizations and approximate pro bono hours:

_____

_____

_____

Please list the fields in which you practice law:

_____

_____

_____

Please include a brief statement indicating why you wish to serve on this Utah State Bar committee and what you can contribute. You may also attach a resume or biography.

_____

_____

_____

_____

_____

Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday.

Date_____ Signature _____

Utah State Bar Committees

Admissions
Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.

Bar Examiner
Drafts, reviews, and grades questions and model answers for the Bar Examination.

Character & Fitness
Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.

CLE Advisory
Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality, and conformance.

Disaster Legal Response
The Utah State Bar Disaster Legal Response Committee is responsible for organizing pro bono legal assistance to victims of disaster in Utah.

Ethics Advisory Opinion
Prepares formal written opinions concerning the ethical issues that face Utah lawyers.

Fall Forum
Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

Fee Dispute Resolution
Holds mediation and arbitration hearings to voluntarily resolve fee disputes between members of the Bar and clients regarding fees.

Fund for Client Protection
Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.

Spring Convention
Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

Summer Convention
Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

Unauthorized Practice of Law
Reviews and investigates complaints made regarding unauthorized practice of law and takes informal actions as well as recommends formal civil actions.

Detach & Mail by June 3, 2022 to: Utah State Bar, Attn: Christy Abad
Committee Appointment Request | 645 South 200 East | SLC, UT 84111-3834

Pro Bono Honor Roll

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a recent free legal clinic. To volunteer, call the Utah State Bar Access to Justice Department at (801) 297-7049.

Family Justice Center

Rob Allen
Steve Averett
Teryn Bird
Dave Duncan
Rebekah-Anne Gebler
Michael Harrison
Brandon Merrill
Kim Sherwin
Linda F. Smith
Babata Sonnenberg
Brittany Urness
Nancy VanSlooten
Rachel Whipple

Private Guardian ad Litem

Tyler Ayres
Michelle Christensen
Rebekah-Anne Gebler
Chase Kimball
Amy Williamson

Pro Bono Appointments

Leslie Francis
Kent Scott
Gregory Taggart

Pro Se Debt Collection Calendar

Greg Anjewierden
Mark Baer
Pamela Beatse
Keenan Carrol
Ted Cundick
Spencer Eastwood
John Francis
Leslie Francis
Annemarie Garrett
Aro Han
Carla Haslam
Zach Lindley
Amy McDonald
Chase Nielson
Jazmynn Pok
Brian Rothschild
Chris Sanders
Zachary Shields
George Sutton
Austin Westerberg
*with special thanks to Kirton McConkie and Parsons Behle & Latimer for their pro bono efforts on this calendar.

Pro Se Family Law Calendar

Jacob Arijanto
Brent Chipman
Jill Coil
Elenia Cozean
Michael Ferguson
Kaitlyn Gibbs
Danielle Hawkes
Jim Hunicutt
Gabrielle Jones
John Kunkler III
Allison Librett
Chris Martinez
David Pope
Stewart Ralphs
Spencer Ricks
Linda Smith
Virginia Sudbury
Sheri Throop
Staci Visser
Orson West
Adrienne Wiseman

Pro Se Immediate Occupancy Calendar

Pamela Beatse
Keenan Carroll
Marcus Degen
Leslie Francis
Aro Han
Brent Huff
Keil Myers
Matthew Nepute, Student Practitioner
Lauren Scholnick

SUBA Talk to a Lawyer Legal Clinic

N. Adam Caldwell
Len Carson
Travis Christiansen
William "Bill" Frazier
Lewis Reece
Greg Walker
Lane Wood

Timpanogos Legal Center

Geidy Achecar
Ali Barker
Bryan Baron
Margo Blair
Dave Duncan
Marca Tanner Brewington

Utah Legal Services

Tyler Ayres
Michael Branum
Cleve Burns
Brent Chipman
Brian Craig
Victoria Cramer
R. Jesse Davis
Donna Drown
Angela Elmore
Russell Evans
Robert Falck
Jonathan Felt
Sierra Hansen
Heather Hess-Lindquist
Barry Huntington
Jeremy Kanahele
Shirl LeBaron
Malone Molgard
William Morrison
Keli Myers
Jacob Ong
Brian Porter
Tamara Rasch
Llian Reedy
Jason Richards

Ryan Simpson
Noella Sudbury
Megan Sybor
Steven E. Tyler
Wendy Vawdrey
Marshall Witt

Utah Bar's Virtual Legal Clinic

Nathan Anderson
Dan Black
Mike Black
Anna Christiansen
Adam Clark
Jill Coil
John Cooper
Robert Coursey
Jessica Couser
Matthew Earl
Jonathan Ence
Rebecca Evans
Thom Gover
Sierra Hansen
Robert Harrison
Aaron Hart
Rosemary Hollinger
Tyson Horrocks
Robert Hughes
Michael Hutchings
Gabrielle Jones
Justin Jones
Suzanne Marelius
Travis Marker
Gabriela Mena
Tyler Needham
Nathan Nielson
Sterling Olander
Chase Olsen
Jacob Ong
Ellen Ostrow
McKay Ozuna
Steven Park
Clifford Parkinson
Katherine Pepin
Cecilee Price-Huish
Jessica Read
Brian Rothschild
Chris Sanders
Alison Satterlee
Kent Scott
Thomas Seiler
Luke Shaw
Kimberly Sherwin
Farrah Spencer
Liana Spendlove
Brandon Stone
Charles Stormont
Mike Studebaker
George Sutton
Jeff Tuttle
Alex Vandiver
Jason Velez
Kregg Wallace

Ethics Advisory Opinion Committee Seeks Applicants

The Utah State Bar is currently accepting applications to fill vacancies on the Ethics Advisory Opinion Committee. Lawyers who have an interest in the Bar's ongoing efforts to resolve ethical issues are encouraged to apply.

The charge of the Committee is to prepare and issue formal written opinions concerning the ethical issues that face Utah lawyers. Because the written opinions of the Committee have major and enduring significance to members of the Bar and the general public, the Bar solicits the participation of lawyers who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in résumé or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.) and substantive areas of practice, and
- a brief description of your interest in the Committee, including relevant experience, ability, and commitment to contribute to well-written, well-researched opinions.

Appointments will be made to maintain a Committee that:

- Is dedicated to carrying out its responsibility to consider ethical questions in a timely manner and issue well-reasoned and articulate opinions, and
- includes lawyers with diverse views, experience, and background.

If you want to contribute to this important function of the Bar, please submit a letter and résumé indicating your interest by **April 10, 2022**, to:

Ethics Advisory Opinion Committee
C/O Christy J. Abad, Executive Secretary
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

Notice of Utah Bar Foundation Annual Meeting and Open Board of Director Position

The Utah Bar Foundation is a non-profit organization that administers the Utah Supreme Court IOLTA (Interest on Lawyers Trust Accounts) Program. Funds from this program are collected and donated to nonprofit organizations in our State that provide law related education and legal services for lower income Utahns and Utahns with disabilities.

The Utah Bar Foundation is governed by a seven-member Board of Directors. The Utah Bar Foundation is a separate organization from the Utah State Bar. The Utah Bar Foundation will have a vacancy on the Board of Directors beginning in July 2022. If you are interested in being considered for this open Board position, please email a copy of your resume along with a brief statement of why you are interested in serving on the Board of Directors. This information can be emailed to kim@utahbarfoundation.org. Applications should be received by April 15, 2022.

The Utah Bar Foundation will be holding the Annual Meeting of the Foundation on May 25, 2022, at 12:00 noon. Due to COVID, the meeting location is yet to be determined. If you wish to join the Foundation's Annual Meeting, please email kim@utahbarfoundation.org for up-to-date meeting location information as May 2022 approaches.

For additional information on the Utah Bar Foundation or the IOLTA Program, please visit our website at www.utahbarfoundation.org.

Understanding the CLE Cycle

CLE Compliance is Currently Changing from a Two-Year Reporting Period to an Annual Reporting Period

Two Year CLE Reporting Period – These lawyers will comply with the old MCLE Rules and their final two-year CLE reporting period.

July 1, 2020 – June 30, 2022 CLE Reporting Period – the CLE requirement is 24 hours of accredited CLE, to include 2 hours of legal ethics and 1 hour of professionalism and civility. **The traditional live credit requirement has been suspended for this reporting period.** Lawyers will have through June 30, 2022 to complete required CLE hours without paying late filing fees and through July 31, 2022 to file Certificate of Compliance reports without paying late filing fees.

PLEASE NOTE: Lawyers that comply with the July 1, 2020 – June 30, 2022 reporting period will be required to change from a two-year CLE reporting period to an annual CLE reporting period.

Your next CLE Reporting Period will be: July 1, 2022 – June 30, 2023 – the CLE requirement is 12 hours of accredited CLE, to include 1 hour of legal ethics and 1 hour of professionalism and civility. At least 6 hours must be live, which may include in-person, remote group CLE or verified e-CLE. The remaining hours may include self-study or live CLE.

Annual CLE Reporting Period – These lawyers will comply with the new MCLE Rules and the annual CLE reporting period.

July 1, 2021– June 30, 2022 CLE Reporting Period – the CLE requirement is 12 hours of accredited CLE, to include 1 hour of legal ethics and 1 hour of professionalism and civility. **The traditional live credit requirement has been suspended for this reporting period.** Lawyers will have through June 30, 2022 to complete required CLE hours without paying late filing fees and through July 31, 2022 to file Certificate of Compliance reports without paying late filing fees.

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LAW DAY 2022

TOWARD A MORE PERFECT UNION

THE CONSTITUTION IN TIMES OF CHANGE

Utah State Bar

Law Day Celebrations & CLE

MAY 2022 – Details to Come

The Following Awards Will Be Given:

- ☆ Liberty Bell Award (Young Lawyers Division)
- ☆ Pro Bono Publico Awards
- ☆ Scott M. Matheson Award (Law-Related Education Project)
- ☆ Utah's Junior & Senior High School Student Mock Trial Competition
- ☆ Young Lawyer of the Year (Young Lawyers Division)

For further information or to RSVP for the luncheon, contact:

Matthew Page: 801-297-7059 | Michelle Oldroyd: 801-297-7033
or email: lawday@utahbar.org

PLEASE NOTE: All listed events may be cancelled or made virtual depending on COVID-19 conditions. For the latest information on these and other Law Day related activities visit the Bar's website:

lawday.utahbar.org

Sponsored by the Young Lawyers Division

Law Day

The year was 1957. The Suez Canal crisis precipitated an invasion of Egypt by Israel. Wham-O introduced the Frisbee, and the Russians launched Sputnik II into orbit, and Laika the space dog became the first living being to orbit the earth. In Little Rock, the National Guard prevented nine African-American students from entering Central High.

Observing the chaos, Charles S. Ryne, then the president of the American Bar Association, envisioned a special day celebrating the legal system of the United States. Ryne picked May 1 as Law Day, deliberately choosing the day Communist governments celebrate their rise to power. *See* https://www.nytimes.com/2003/08/03/us/charles-s-rhyne-91-lawyer-in-a-landmark-case-drowns.html.

In 1958, President Dwight D. Eisenhower established Law Day as a day of "national dedication to the principles of government under law." *See* https://www.americanbar.org/groups/public_education/law-day/history-of-law-day/. In 1961, Congress established May 1 as Law Day, and the program has grown to include communities around the world.

Each year the ABA choses a theme for the event. The 2022 theme is "Toward a More Perfect Union – the Constitution in Times of Change."

"The Constitution is a dynamic document, as it not only outlines a blueprint for government, but also delegates power, articulates rights, and offers mechanisms for change," the ABA noted in its annual Law Day statement. "It is neither perfect, nor exhaustive, as our nation's history makes clear. Legislation, court rulings, amendments, lawyers, and 'we the people' have built upon those original words across generations to attempt to make the 'more perfect Union' more real."

Utah's Law Day Celebration generally includes a Law Day Luncheon, which celebrates the Pro Bono Publico Law Student of the Year, Pro Bono Publico Young Lawyer of the Year, and Pro Bono Publico Law Firm of the Year. The Bar also presents the Liberty Bell Award, which recognizes a person or organization that contributes to the better understanding and appreciation of the American Justice System.

Additionally, Law Day features the Law Day Run, sponsored by "and Justice for all," a 5k to celebrate the day and raise funds to increase access to civil legal services for the disadvantaged. This year, the Law Day Run committee is chaired by Kim Blackburn of Ray Quinney & Nebeker. More information can be found at https://andjusticeforall.org/law-day-5k-run-walk/.

Another feature of the day is the Utah State Court student essay contest. The court invites students to submit essays to participate in the "Judge for a Day Program," and the winner spends the day with a district court judge.

The luncheon also honors the winners of the Law Related Education's Mock Trial program, a competition established in 1980 to teach students more about their rights and responsibilities as citizens. Each year, students from schools throughout the state compete in teams that fulfil all positions in a trial, from the judge to the prosecutor and even the media channels covering the trial. The case is judge by volunteer attorneys.

Local and affinity Bars are also involved in Law Day. Each year, the Salt Lake County Bar sponsors an "Art and the Law" contest, in which students from schools around the state compete in creating art that is related to the year's Law Day theme. Many of the contest winners can be found in judge's chambers throughout the state.

The ABA provides lesson plans for students of elementary, middle school and high school age, including activities and materials that are appropriate to each age group.

"Contemporary leaders and everyday citizens should continue to raise their voices as loud as ever to fulfill the promise of the Constitution," the ABA said. "Defining and refining those words of the Constitution might be our oldest national tradition, and how each of us works – together – toward a more perfect Union."

The pandemic forced Law Day to move online in 2020 and 2021, but organizers are hopeful the event can take place in-person this year. Mock Court competitions are beginning now. Watch the Bar's website and social media feeds for additional details.

Call for Nominations for the 2021–2022 Pro Bono Publico Awards

The deadline for nominations is March 15, 2022.

The following Pro Bono Publico awards will be presented at the Law Day Celebration in May 2022:

- **Young Lawyer of the Year**
- **Law Firm of the Year**
- **Law Student or Law School Group of the Year**

To access and submit the online nomination form please go to: http://www.utahbar.org/award-nominations/. If you have questions please contact the Access to Justice Director, Pamela Beatse, at: probono@utahbar.org or 801-297-7027.

Law Day 5K Run & Walk

Run for Justice – May 7, 2022

REGISTRATION FEES

Before April 25: $30 | After April 25 — $35
All proceeds will go to support free and low cost civil legal aid programs in Utah.

TIME

Day of race registration from 7:00 a.m. to 7:45 a.m. Race starts at 8:00 with a gavel start.

LOCATION

Race begins and ends in front of the S.J. Quinney College of Law at the University of Utah, 383 South University Street, Salt Lake City, Utah.

PARKING

Parking available in Rice Eccles Stadium (451 S. 1400 E.). Or take TRAX!

CHIP TIMING

Each runner will be given a bib with a timing chip to measure their exact start and finish time. Results will be posted on our website following the race.

RACE AWARDS

Prizes will be awarded to the top male and female winners of the race, the top male and female attorney winners of the race, and the top two winning speed teams. Medals will be awarded to the top three winners in every division.

COMPETITIONS

- Recruiter Competition
- Speed Team Competition
- Speed Individual Attorney Competition

SPECIALTY DIVISIONS

- Baby Stroller Division
- Wheelchair Division
- "In Absentia" Runner Division
- Chaise Lounge Division

JOIN AS A SPONSOR

Want to reach the legal community and help with a great cause? Download our information packet at the link below.

"and Justice for all"

For registration & more information visit:
andjusticeforall.org/law-day-5k-run-walk/

The Third Annual Well-Being Week in Law is Happening May 2-6, 2022, What's Your Plan?

Well-Being Week in Law is happening May 2-6, 2022, and all individuals and organizations are invited to participate. This event originated in 2020 to educate the legal profession about the importance of paying proactive attention to our individual and organizational well-being, and to help combat the mental health challenges too many of our colleagues face. Since then, participation across the country has skyrocketed, involving many bar associations, law firms, governmental agencies, and thousands of individuals.

Participation is designed to be easy. The national Institute for Well-Being in Law (IWIL) will offer free, bite-size, evidence-based and do-able ideas, resources, and activities to help individuals and groups participate on each day of the week. These can be found at www.lawyerwellbeing.net along with materials to help you publicize this event internally, on your website, and in your social media feeds. The Utah State Bar will also be offering local Well-Being Week events, so stay tuned for updates through the Bar's website.

Become a well-being champion and start making your plans for Well-Being Week in Law today!

2022 Spring Convention Awards Recipients

During the 2022 Utah State Bar Spring Convention, the following awards will be presented:

JESSICA ANDREW
Dorathy Merrill Brothers Award for the Advancement of Women in the legal profession

ROSS ROMERO
Raymond S. Uno Award for the Advancement of Minorities in the legal profession

Spring Convention

IN MEMORIAM

After the publication deadline for our last issue, we received the following names to add to our list of attorneys, paralegals, judges, and other members of the Utah legal community who passed away during 2021.

Earl M. Wunderli Dan Wilson Amy Naté Dearden

Ethics Advisory Opinion Committee Opinion No. 21-02

Issued June 8, 2021

ISSUES

Rule 7.1 of the Utah Rules of Professional Conduct was recently amended. What firm names are appropriate under the amended Rule 7.1?

OPINION

A firm can use a trade name, including the names of departed lawyers, provided the name is not false or misleading as defined in Rule 7.1 and the Comments to it.[1]

DISCUSSION

In December 2020, the Utah Supreme Court amended the Utah Rules of Professional Conduct regarding communications concerning a lawyer's services. The court deleted previous Rules 7.2 through 7.5 and then incorporated communications concerning a lawyer's services into a new and single Rule 7.1.

The key concept in the amended Rule 7.1 is that communications regarding a lawyer's services must not be false or misleading.

With respect to the questions posed, a communication is false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Utah R. Pro. Conduct 7.1(a)(1).

The name of a firm is a communication to the public. Utah R. Pro. Conduct 7.1. Comment [7] to Rule 7.1 provides:

> Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased or retired members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

Further, Rule 7.1 precludes lawyers from representing that they are practicing together when they are not in a firm. Utah R. Pro. Conduct 7.1 cmt. [9].

The requestor asks under what conditions a firm may use the name of a deceased or departing member. Rule 7.1 treats using the name of a deceased member of a firm and a departing member of a firm somewhat differently. However, in both cases the underlying presumption is that a succession of law practice by members of the same firm continues. Utah R. Pro. Conduct 7.1 cmt. [7].

The use of a continuous name by Firm One may become a misrepresentation if the member departing from Firm One returns to the practice of law in Firm Two. In such a case, Firm One would be required to change names so as to avoid misrepresenting to the public that the departed member continues to practice law there rather than at Firm Two.

Specifically, the requestor posits a situation where a sole proprietor (Jane Doe) practices with associates under the name "Jane Doe and Associates." Jane wishes to retire and sell the firm to her associates. The name "Jane Doe and Associates" has acquired a positive reputation in the community. Both Jane Doe and the purchasing lawyers wish to retain the name "Jane Doe and Associates" in order to increase the value of the firm and capitalize on the goodwill the firm has acquired over the years.

The purchasing lawyers may properly use "Jane Doe and Associates" as a trade name. Rule 7.1 allows the use of trade names that are not misleading. Utah R. Pro. Conduct 7.1 cmt. [7]. In the context of the question posed, the continued use of the trade name would not be misleading because it contains the name of a former member. Rule 7.1 specifically allows this practice. Utah R. Pro. Conduct 7.1 cmt. [7].

If, however, Jane Doe returned to the practice of law in the same geographic area or in the same subject matter, then the name "Jane Doe and Associates" would become misleading.

A purchaser with no prior relationship with the firm could also

use the trade name. Rule 1.17 allows the sale of the firm including "good will." Rule 1.17 requires the selling lawyer to cease practicing in the same geographic area or in the same area of practice. This comports with the requirement under Rule 7.1 that the continuation name not be false or misleading. Utah R. Pro. Conduct 7.1 cmt. [4].

However, a trade name could be false or misleading under Rule 7.1. A solo practitioner may not use the name "Doe & Associates" if there are no longer any associates at the firm. Utah State Bar Ethics Op. No. 138 (1994). However, a firm may use the moniker "& Associates" if there are attorneys "of counsel" or working on a contractual basis, provided the other lawyers regularly spend the majority of their working time on matters for the firm. Utah State Bar Ethics Op. No. 04-03, 2004 WL 1304775 (2004). Similarly, a firm may use a trade name such as "Legal Center for the Wrongfully Accused" or "…for Victims of Domestic Violence" provided the firm does represent clients who claim to be in the categories referenced. Utah State Bar Ethics Op. No. 01-07, 2001 WL 1018895 (2001). *See also* Hazard, Hodes & Jarvis, 2019-1 Supplement at 59-12.2.

A trade name may also be deceptive if it contains the name of a political subdivision without a disclaimer that the law firm is not associated with the government. In such cases, a disclaimer of political connections would be appropriate. "The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public." Utah R. Pro. Conduct 7.1 cmt. [3].

The requestor asks a number of questions concerning ethical use of a lawyer's name under the new "Sandbox" provisions of Rule 5.4(b). Utah R. Pro. Conduct 5.4(b). The Utah Supreme Court controls access to the Sandbox. We express no opinion as to the names of entities approved by the supreme court for access to the Sandbox.

1. This request for an ethics advisory opinion was submitted anonymously. The Ethics Advisory Opinion Committee (EAOC) is charged with answering questions concerning the requesting attorney's conduct. The EAOC has chosen to answer this request because it appears to be a question that would assist the Bar as a whole. The fact that the EAOC has chosen to answer this request should not be interpreted as practice it will follow for future anonymous requests. Attorneys need to identify themselves when submitting requests.

Brown Law

Utah's Recommended Divorce Attorneys

Thank you for your referrals!

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801-685-9999

Attorney Discipline

Visit opcutah.org for information about the OPC, the disciplinary system, and links to court rules governing attorneys and licensed paralegal practitioners in Utah. You will also find information about how to file a complaint with the OPC, the forms necessary to obtain your discipline history records, or to request an OPC attorney presenter at your next CLE event. **Contact us – Phone: 801-531-9110 | Fax: 801-531-9912 | Email:** opc@opcutah.org

Effective December 15, 2020, the Utah Supreme Court re-numbered and made changes to the Rules of Lawyer and LPP Discipline and Disability and the Standards for Imposing Sanctions. The new rules will be in Chapter 11, Article 5 of the Supreme Court Rules of Professional Practice. The final rule changes reflect the recommended reforms to lawyer discipline and disability proceedings and sanctions contained in the American Bar Association/Office of Professional Conduct Committee's Summary of Recommendations (October 2018).

SUSPENSION

On October 25, 2021, the Honorable Su J. Chon, Third Judicial District, entered an Order of Suspension against Hunt W. Garner, suspending his license to practice law for a period of three years. The court determined that Mr. Garner violated Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.4(b) (Communication), Rule 1.5(a) (Fees), Rule 1.15(a) (Safekeeping Property), Rule 1.15(c) (Safekeeping Property), Rule 1.15(d) (Safekeeping Property), and Rule 1.16(d) (Declining or Terminating Representation) of the Rules of Professional Conduct.

In summary:

A woman (Older Sister) retained Mr. Garner to represent her two younger siblings (Brother and Sister) to provide asylum services in immigration law. A disbarred attorney (Paralegal) worked with Mr. Garner providing interpreter and translation services. Both siblings believed that Older Sister acted like a mother to help them navigate the legal process because she spoke English and understood the immigration process better than they did. Older Sister wanted her siblings to obtain asylum status because of the political persecution of their family.

Older Sister signed an agreement for Mr. Garner to provide services for petitions for asylee or refugee status for Brother and Sister and paid a retainer in two separate checks. Mr. Garner did not endorse the checks but the checks were deposited into his bank account that was not a trust account but was a business account. According to the bank records, Mr. Garner spent the retainer money prior to it being earned. Mr. Garner did not keep any billing records.

Paralegal sent to the siblings a questionnaire requesting information regarding their entry dates and other things related to filing an application for asylum. The siblings completed the questionnaires and returned them to Paralegal. Mr. Garner did not review the questionnaires or the 1-94s that were sent to him. Older Sister sent text messages and emails to Paralegal but many of them remained unanswered. There were constant delays on Mr. Garner's part or communications that went unanswered. Sister became

Adam C. Bevis Memorial Ethics School

March 16, 2022 or September 21, 2022
6 hrs. CLE Credit, including at least 5 hrs. Ethics
(The remaining hour will be either Prof/Civ or Lawyer Wellness.)

Cost: $100 on or before March 7, $120 thereafter.

Sign up at: opcutah.org

TRUST ACCOUNTING/ PRACTICE MANAGEMENT SCHOOL

Save the Date! January 25, 2023
6 hrs. CLE Credit, including 3 hrs. Ethics

Sign up at: opcutah.org

DISCIPLINE PROCESS INFORMATION OFFICE

The Disciplinary 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. Jeannine will answer all your questions about the disciplinary process, reinstatement, and relicensure. Jeannine is happy to be of service to you.

801-257-5518 • DisciplineInfo@UtahBar.org

concerned as it was getting closer to the expiration of her visa and she was adamant that she wanted to maintain her legal status. Mr. Garner did not explain the matter to Sister so that she could make informed decisions regarding the representation. Mr. Garner did not diligently pursue asylum petitions or timely address Sister's concerns about the expiring tourist visa.

Older Sister and siblings retained an attorney to check the status of the immigration matter. When Mr. Garner did not respond, the attorney requested an accounting and a copy of the file. Mr. Garner did not provide an accounting or the file, nor did he refund any fees that were unearned pursuant to the terms of the fee agreement.

DELICENSURE/DISBARMENT

On December 23, 2021, the Honorable Todd M. Shaughnessy, Third Judicial District, entered an Order of Discipline: Delicensure/Disbarment of Calvin C. Curtis for violation of Rule 8.4(b) (Misconduct) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Curtis pled guilty to one count of Wire Fraud, a violation of 18 U.S.C. § 1343 and one count of Money Laundering, a violation of 18 U.S.C. § 1957.

Mr. Curtis specialized in special needs trusts. He devised and intended to devise a scheme to defraud clients to obtain money and property by means of materially false and fraudulent pretenses, representations and promises. In doing so, Mr. Curtis used interstate wires.

Mr. Curtis transferred money intended for the care of his client and converted it to his own personal use to make mortgage payments on his home and office, to support a lavish lifestyle with frequent travel, to purchase tickets to basketball and football games, to give lavish gifts to others, and to support the operations of his law firm. He then created fake and fraudulent financial statements that he provided to the conservator in order to conceal the fraud.

The OPC received several other complaints from other individuals that contain similar allegations to the conduct described above. In two other matters, Mr. Curtis caused funds to be transferred by wire transfer from trusts to his bank account. Mr. Curtis used the funds for his own personal benefit knowing the funds were derived from unlawful activity. Mr. Curtis also sent doctored investment statements to interested parties to cover up the scheme.

Virtual Legal Clinic Brings "Tuesday Night Bar" to the Community

by Christopher Bond & Alex Vandiver

The pandemic has changed our lives in many ways. For some of us, it has even changed how we provide pro bono services to our community. The Utah Bar's Virtual Legal Clinic is a prime example of how we, as lawyers, have adapted our practices to continue to provide – and, in this case, improve – legal services to others, and pro bono work is no different.

Formally known as "Tuesday Night Bar," the Virtual Legal Clinic is a free service created by the Access to Justice Commission that connects community members with a volunteer attorney for a free thirty-minute virtual consultation. The five most requested consultation areas are for family law, landlord tenant, criminal law, employment law, and debt collection issues. In addition to these core areas, the Virtual Legal Clinic provides pro bono advice in over twenty additional fields, including consumer rights, LGBTQ rights, name changes, personal injury, small claims, and advice for social and employment benefit issues. Thanks to the twenty-one multi-lingual attorneys that volunteered this past year, the Virtual Legal Clinic has been able to provide consultations in eleven different languages, including Spanish, French, Portuguese, Russian, and Mandarin. Consultations are offered to all community members, regardless of individual circumstances, and the consultation is always free.

Unlike Tuesday Night Bar – the longstanding program which has been held (you guessed it) on Tuesday Nights at the Bar building for years – the Virtual Legal Clinic has brought these same legal services online. Today, the Virtual Legal Clinic matches community participants *from all over Utah* (not just those who can travel downtown on Tuesday evenings) with an attorney practicing *in their specific area of need* (rather than the practice areas of the volunteer attorneys that happen to be staffing that particular evening). Since switching to the virtual format, the clinic has been able to expand its reach and provide pro bono legal services to more clients than ever before.

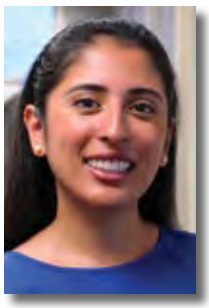
In 2021, 1,087 participants were matched with a lawyer, a nearly 25% increase from Tuesday Night Bar's pre-pandemic numbers. An *additional* 119 individuals seeking aid were referred directly to other legal clinics better suited to serve their needs (including BYU's Community Legal Clinic, the University of Utah's Pro Bono Initiative, Timpanogos Legal Center, and People's Legal Aid).

In addition to the increased flexibility for participants (particularly those whose reside outside of Salt Lake County), moving the clinic online has increased attorney staffing levels by allowing attorneys to volunteer on their own schedule. Alex Vandiver, one of the most active volunteers for the Virtual Legal Clinic, described her experience as follows:

> Once or twice a month, I get an email from the Utah State Bar assigning me a client. The email will include some information about the client's contact information and the client's legal question. The client may include the best timeframe to contact

CHRISTOPHER BOND, Young Lawyers Division VLC Coordinator, is an attorney at Manning Curtis Bradshaw & Bednar.

ALEX VANDIVER is an attorney at Parsons Behle & Latimer.



them. It is then up to me to contact the client to provide a one-time brief legal advice, for about 20-30 minutes, within the next three business days. It is an incredibly easy way to volunteer!

Most of the time, the call with the client does not take the full 30 minutes. The questions tend to be short and easy (and this is coming from a new attorney!). Once in a blue moon, a call can take a little longer than 30 minutes, but I have never gone over an hour with a client. My longest call was, in fact, an hour long with a very pleasant gentleman who wanted to understand basic elements of a contractual agreement. Throughout the call, the gentleman (unnecessarily but persistently) apologized for taking so much of my time and thanked me for the help that I was providing him.

Regardless of how long the call is, the clients are always very appreciative of the advice that I provide them. Many are in a bind and do not know what their options are. So, giving them the advice and/or pointing them to the right resources is a huge help and relief to them. This is also an incredibly rewarding experience for me as it provides me an opportunity to practice my lawyering skills, network with other attorneys, and decompress from my daily workload.

The Virtual Legal Clinic is made possible through the diligent efforts of Pamela Beatse, the Utah Bar Access to Justice Director; Nicole Dumas, the Access to Justice Manager; the Access to Justice Commission; and the more than seventy attorney volunteers who donated their time to this worthy cause last year. The service provided by each of these hard-working attorneys is recognized in each edition of the *Utah Bar Journal*. The Virtual Legal Clinic is always looking for more attorneys to volunteer their time and expertise. If you were looking for a sign to volunteer, let this article be it! "The Virtual Legal Clinic is a great resource for community members as well as for us as attorneys," said Alex Vandiver, noting that the clinic has allowed her to network with other attorneys while counseling on subject areas she might not be well-versed in as a new attorney, allowing her to gain greater perspective and appreciation for her legal studies.

For those who would like to get involved, please sign up using the Virtual Legal Clinic Sign Up Form at www.utahlegalhelp.org/VLC. The clinic has a particular need for Spanish speaking volunteers as well as attorneys versed in general civil litigation, civil rights, criminal law, family law, and landlord tenant issues.

CLE Calendar

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

March 10–12, 2022

2022 Spring Convention – A Virtual Event.
For the latest information and registration visit: www.utahbar.org/springconvention.

March 16, 2022 — **6 hrs. CLE Credit, including 5 hrs. Ethics**

Adam C. Bevis Memorial Ethics School.
Cost: $100 before March 7, $120 thereafter. Sign up at: opcutah.org.

April 12, 2022

Business Law Section Annual Meeting.
Business Law Section of the Utah State Bar. For the most recent information and registration, visit: utahbar.org/cle/#calendar. Please direct any questions to: CLE@utahbar.org.

April 21, 2022

Legislative Updates Impacting Construction Law Practice.
The Construction Law Section of the Utah State Bar. For the most recent information and registration, visit: utahbar.org/cle/#calendar. Please direct any questions to: CLE@utahbar.org.

May 16–17, 2022

2022 iSymposium.
The Cyberlaw Section of the Utah State Bar. For the most recent information and registration, visit: utahbar.org/cle/#calendar. Please direct any questions to: CLE@utahbar.org.

July 6–9, 2022 — **TBA**

Utah State Bar Summer Convention in San Diego!
Loews Coronado Bay Resort. For the latest information, visit: utahbar.org/summerconvention.

All content is subject to change. For the most current CLE information, please visit: utahbar.org/cle/#calendar

Unless otherwise indicated, registration information for all CLE events is located at https://www.utahbar.org/cle/ in the box at the top left corner of the website or via the Practice Portal.

TO ACCESS ONLINE CLE EVENTS:

Go to utahbar.org and select the "Practice Portal." Once you are logged into the Practice Portal, scroll down to the "CLE Management" card. On the top of the card select the "Online Events" tab. From there select "Register for Online Courses." This will bring you to the Bar's catalog of CLE courses. From there select the course you wish to view and follow the prompts. **Questions? Contact us at 801-297-7036 or cle@utahbar.org.**

Classified Ads

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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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