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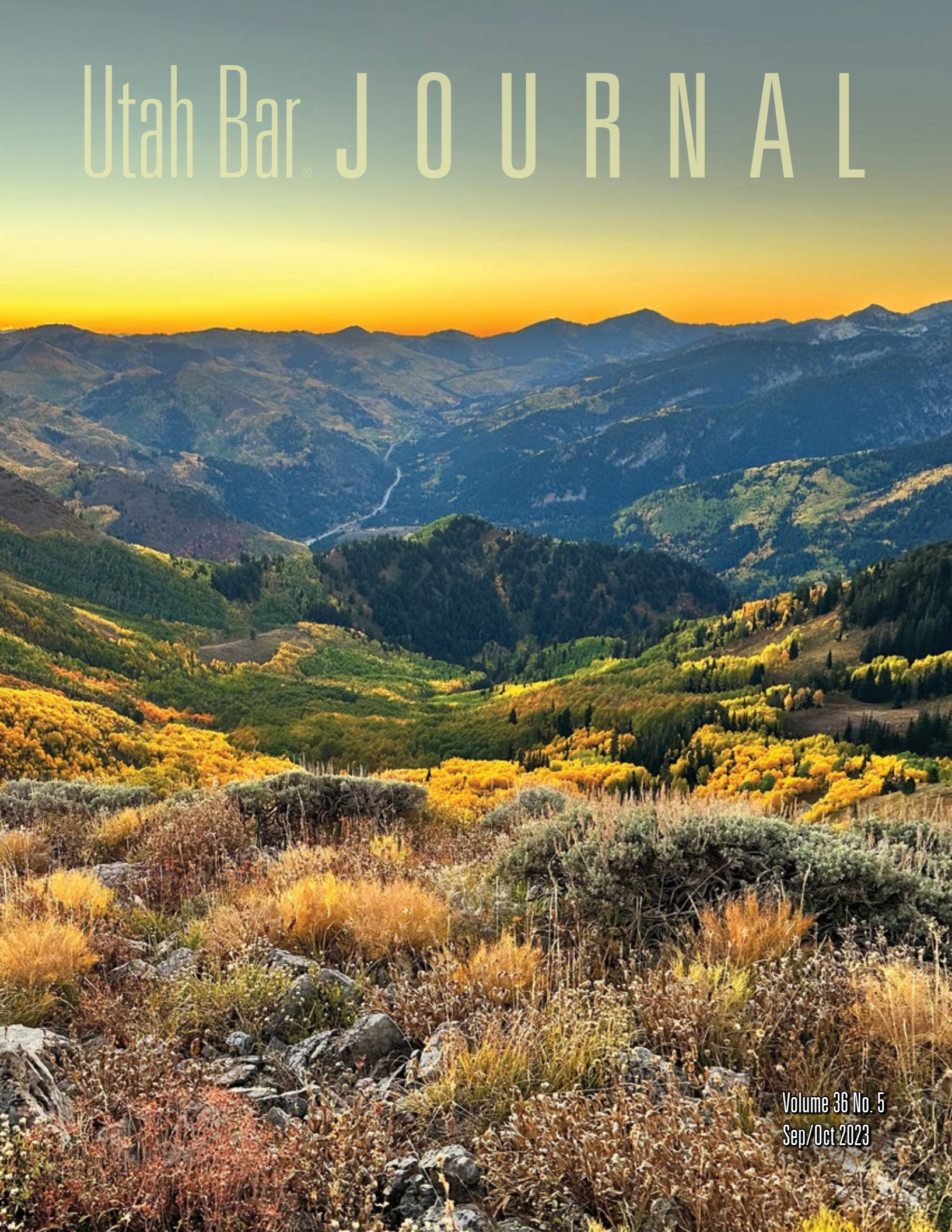

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Cover Photo

Big Cottonwood Canyon at Sunrise by Utah State Bar member Bert van Uitert.

BERT VAN UITERT currently works in-house for Syneos Health, an integrated biopharma solutions company, based in Raleigh, North Carolina, where he leads the Emerging Technologies and Innovations Legal Group. Asked how he came to take this photo, Bert said, "Last fall I hiked to the summit of Mt. Raymond, near Big Cottonwood Canyon, to watch the sunrise. It didn't disappoint."

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Utah Bar JOURNAL

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GUIDELINES FOR SUBMITTING ARTICLES TO THE UTAH BAR JOURNAL

The *Utah Bar Journal* encourages the submission of articles of practical interest to Utah attorneys, paralegals, and members of the bench for potential publication. Preference will be given to submissions by Utah legal professionals. Articles 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 email to barjournal@utahbar.org, with the article attached in Microsoft Word or WordPerfect. The subject line of the email 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. Authors may choose to use the "cleaned up" or "quotation simplified" device with citations that are otherwise *Bluebook* compliant. Any such use must be consistent with the guidance offered in *State v. Patton*, 2023 UT App 33, ¶10 n.3.

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 in doubt about the suitability of an article, an author is invited to submit it for consideration.

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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. Author(s) are encouraged to submit a headshot to be printed next to their bio. These photographs must be sent via email, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

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

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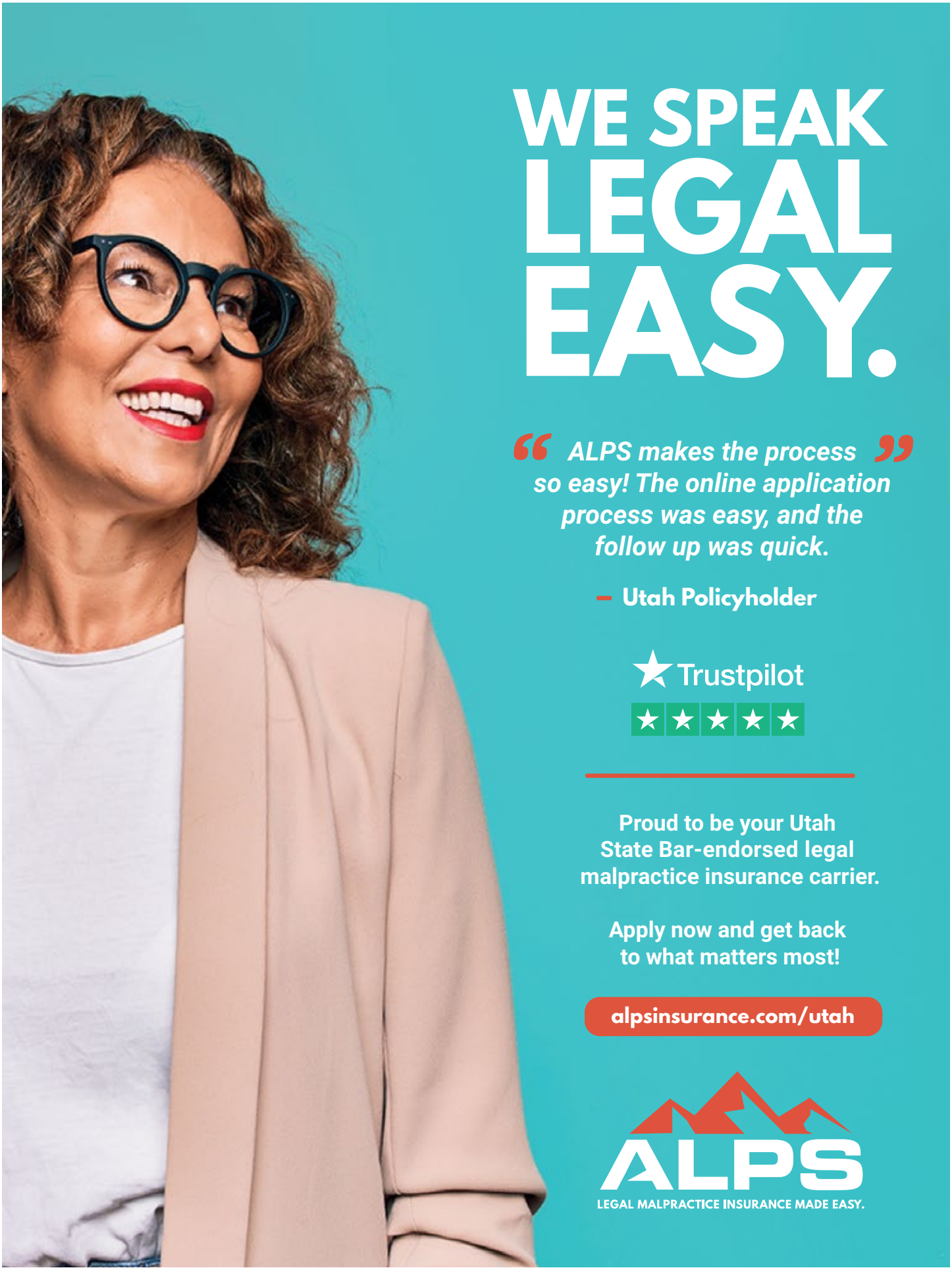
2. Letters shall not exceed 500 words in length.
3. No one person shall have more than one letter to the editor published every six months.
4. Letters shall be published in the order they are received for each publication period, except that priority shall be given to the publication of letters that 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. If and when a letter is rejected, the author will be promptly notified.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The Sandbox 2.0: Legal Reform at the Utah State Bar

by Erik A. Christiansen

I want to use this month's column to provide some overdue kudos to the Utah Supreme Court, outgoing Utah State Bar President Katie Woods, and Bar Executive Director Elizabeth Wright. While many members of the Utah State Bar might have missed it, as of July 1, 2023, the Utah Supreme Court has significantly altered, changed, and improved the Office of Legal Services Innovation (Innovation Office), which is more commonly referred to as the sandbox. The changes made by the court have greatly improved the sandbox and reflect the positive dialogue that took place between lawyers and the court earlier this year. Utah consumers will benefit from the court's changes, as will members of the Utah State Bar.

For those of you who have not been following the sandbox, a bit of history is useful. In August 2018, the Utah Supreme Court established a Work Group on Regulatory Reform, led by then-Utah Supreme Court Justice Deno Himonas and then-Utah State Bar President John Lund. In August 2019, the work group issued a report entitled "Narrowing the Access to Justice Gap by Reimagining Regulation." The report recommended implementation of a legal regulatory sandbox to permit certain new legal business structures under the supervision of the Utah Supreme Court. Subsequently, in August 2020, the Utah Supreme Court issued Standing Order No. 15, which launched the Innovation Office and created a seven-year pilot project under the supervision and control of the court. The Utah Supreme Court also created the Legal Services Innovation Committee (LSI Committee) to make recommendations to the court for approval of applicants. As of April 4, 2023, the court has authorized forty-nine sandbox entities that use various novel approaches to the business or service of law.

> *"The ability of Utah lawyers to be heard, and the openness of the court to listen, are one of the best things about practicing law in Utah…."*

After two years of operations, in late 2022 and early 2023, the court engaged in dialogue with and gathered input from the Utah State Bar, the Utah Association for Justice, and others, about potential changes and improvements to the sandbox. As a result of those discussions, beginning on July 1, 2023, a significant part of the Innovation Office moved to the Utah State Bar. The Executive Director of the Utah State Bar, Elizabeth Wright, assumed responsibility for the administrative functions of operating the sandbox, while the LSI Committee continues to be responsible for making recommendations to the court on regulatory actions, such as entity authorizations and enforcement. The court will continue to vote on all authorizations to operate in the sandbox.

Under this newly revised version of the sandbox, the Bar pays for funding a program director housed at the Bar, plus any associated administrative support and overhead costs for the Innovation Office and the LSI Committee. The court provides funding for a data analyst, and the LSI Committee continues to operate on a volunteer basis. Pursuant to this new structure, the Bar recruited Andrea Donahue to serve as the Program Director for the Innovation Office. Andrea is a Stanford Law School graduate, a former labor and employment lawyer, and a former public interest fellow with a long history of pro bono service. I am excited to have Andrea on board and look forward to working with Andrea during my term.

To help with funding, the court has authorized a fee policy, as of July 1, 2023, for sandbox entities with the intent that the sandbox will eventually become fully self-funded, just as the regulation of lawyers is self-funded. While the court recognizes that the Innovation Office's operating expenses will require some Bar resources, the court intends the Innovation Office to eventually become self-sustaining. The fee policy will consist of three parts: (1) an application

fee, (2) a fee for the costs of any required audit or prelaunch assessment, and (3) an annual fee based on revenue. All of this is great news for Utah consumers and lawyers. Utah continues to lead the nation in legal innovation without increasing licensing fees for members of the Utah State Bar.

The Bar is setting up a new online application that will have a payment processing system attached to the application and an initial application fee of $250 will be charged. Existing sandbox entities will have an annual licensing fee of $250 plus an additional fee of 0.5% of revenue resulting from authorized services. Again, the Bar is setting up an online licensing system for sandbox participants to pay the annual licensing fee.

The Bar also will be conducting background checks, including a credit history, on applicants, and will be asking for lawyer volunteers to conduct preauthorization audits of entities applying to the sandbox. The Bar will be reaching out to lawyers by practice area. For example, if an entity is applying to help Utah consumers with divorce matters, the Bar will send volunteer requests to family law practitioners.

In addition to moving the Innovation Office to the Utah State Bar, the Utah Supreme Court will be expanding the LSI Committee to include at least one elected Bar Commissioner, one member of the Bar's Access to Justice Commission, two Utah attorneys experienced in areas of law directly serving consumers, one Utah licensed paralegal practitioner, and one non-attorney member experienced in working with traditionally underserved communities. In short, the court will be expanding the voices that help shape the future of the sandbox.

Finally, the Utah Supreme Court is narrowing the scope of the sandbox to better focus on the unmet legal needs of Utah consumers. Beginning July 1, 2023, the LSI Committee will require all new applicants to demonstrate that their proposal meets an "innovation requirement," meaning that sandbox authorization will allow the entity to reach consumers currently underserved by the market. An applicant may make this showing in several ways, including but not limited to, reducing the cost of legal services, making legal services more accessible, or developing a new business or service model. Importantly, non-attorney investment or ownership arrangements that do nothing more than supply capital for advertising and/or marketing of existing legal services will not meet the innovation requirement.

These newly enacted improvements demonstrate one of the benefits of continued dialogue between members of the Utah State Bar and the Utah Supreme Court. Katie Woods, the outgoing President of the Utah State Bar, worked well with the court, and a great deal of credit goes to Katie for her hard work on this issue. Elizabeth Wright also has worked diligently to make the transition of the Innovation Office to the Bar smooth and efficient. The ability of Utah lawyers to be heard, and the openness of the court to listen, are one of the best things about practicing law in Utah, and one of the reasons Utah continues to be a national leader in legal innovation. I look forward to watching the Utah Supreme Court continue to lead the nation in meeting the unmet needs of Utah consumers.

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Magistrate Judges in Utah: Efficient Administration of Justice

by The Honorable Jared C. Bennett

AUTHOR'S NOTE: *Judge Bennett gratefully acknowledges the assistance of law clerk Luisa Gough in preparing this article.*

When you participate in a case filed in Utah's Federal District Court, interacting with a Magistrate Judge is almost inevitable. For starters, Magistrate Judges are on the assignment wheel along with the District Judges for all new cases. This means that your case could be directly assigned to a Magistrate Judge, and both parties can consent to that Magistrate Judge being the judge presiding over the case. But even when a case is directly assigned to a District Judge to begin with, the District Judge will nearly always refer all non-dispositive matters in the case to the Magistrate Judge for resolution. And even if your case has been proceeding for quite a while before the District Judge, he/she will make you aware that a Magistrate Judge can try your case more quickly than his/her felony-laden trial calendar by advising you of the Magistrate Judge's availability and asking whether you are willing to consent to the Magistrate Judge taking over the disposition of the case. A Magistrate Judge is often the first judge criminal defendants and civil litigants encounter in their proceedings. Peter G. McCabe, *A Brief History of the Federal Magistrate Judges Program*, Fed. Law., May/June 2014, at 44, 51. For this reason, the United States Supreme Court observed: "Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today's federal judicial system is nothing less than indispensable." *Peretz v. United States*, 501 U.S. 923, 928 (1991) (internal citation omitted).

Given the ubiquitous nature of Magistrate Judges in federal cases in Utah, attorneys can greatly advance the effectiveness of their advocacy by understanding the Magistrate Judge's role in the process and how to best utilize this cadre of judges to achieve the speedy, just, and inexpensive resolution of their litigation. In writing this article, I seek to better inform the Utah Bar on the Magistrate Judge referral process in Utah with the hope of encouraging counsel to rely on the six Magistrate Judges who diligently serve in the District's northern and southern regions to do justice.[1]

The Role of Magistrate Judges in the District of Utah

I frequently receive emails to my chambers stating: "I was unsure who would be ruling on this Motion, the Magistrate Judge or the District Judge, so I have prepared two proposed orders." This uncertainty is unsurprising given that, by design, Magistrate Judges' responsibilities vary across the nation. When Congress passed the Federal Magistrates Act of 1968, creating the Magistrate Judge system, district courts were granted wide latitude to allocate duties to Magistrate Judges based on the court's needs and conditions. *See* 28 U.S.C. § 636(b)(4); Philip M. Pro, *United States Magistrate Judges: Present But Unaccounted For*, 16 Nev. Law J. 783, 789 (2016).

To make the most efficient use of its "latitude" as to Magistrate Judge duties, the District of Utah adopted and continually maintains a Magistrate Judge Utilization Plan. *Magistrate Judge Utilization Plan*, District of Utah (on file with author) (*MJUP*). The plan outlines the responsibilities of Magistrate Judges within the District of Utah and implements best practices based on the authority granted Magistrate Judges through statutes and rules. According to the Administrative Office of the Courts, our District of Utah's Magistrate Judge Utilization Plan is a "model" for the

JUDGE JARED C. BENNETT has been serving as a United States Magistrate Judge in the District of Utah since January 2020. Before that, Judge Bennett worked as First Assistant United States Attorney for the United States Attorney's Office, District of Utah.

rest of the nation, but these are the views of federal bureaucrats, after all. Despite the understandable skepticism regarding the views of some beltway bureaucrats, numbers don't lie. In 2022, Utah's Magistrate Judges were the fifth most productive in all matters of the ninety-four federal judicial districts. Magistrate Judge Disposal Rates by District (on file with author).

To further the efficiency that has led to our Magistrate Judges' current success in handling their workload, there are several key components to this Magistrate Judge Utilization Plan with which attorneys practicing in this court should be familiar. Nearly all civil cases are referred to Magistrate Judges through random assignments, regardless of consent (discussed more in detail below). *See MJUP* at 4–5; DUCivR 72-4(b) (listing cases assigned to Magistrate Judges and identifying excluded cases in subsection (2)). Upon filing, parties are notified of the Magistrate Judge's availability to preside over the entire case through trial so long as the parties consent. *See* DUCivR 72-4(c). While consent is pending, the case is handled entirely by the Magistrate Judge who is authorized to handle certain pretrial matters. *See MJUP* at 4–5; DUCivR 72-2(a). The national trend is that if you do not affirmatively opt out of the Magistrate Judge presiding, you will be deemed to have irrevocably consented to the Magistrate Judge presiding over your case. *See Washington v. Kijakazi*, No. 22-35320, 2023 WL 4308948, at *6 (9th Cir. July 3, 2023) (holding that parties that did not opt out of Magistrate Judge presiding over the case impliedly opted into Magistrate Judge). But if the parties consent to the Magistrate Judge, the Magistrate Judge can dispositively decide that particular case as would a District Judge.

In Utah, if any party does not consent to the jurisdiction of the Magistrate Judge, the case is randomly assigned to a District Judge. *See* DUCivR 72-4(d)(2). Do not worry, however; the Magistrate Judges do not know which party refused consent and, in any event, none of us would take such a thing personally anyway. On any given case, an attorney may have a different pairing of District Judge and Magistrate Judge. This approach is intended to facilitate uniformity across chambers and to prevent judge shopping. Once the court receives notification of nonconsent, the responsibilities of the assigned Magistrate Judge vary depending upon whether the District Judge orders referral on an "A" basis or "B" basis.

A Referral Cases

An "A referral" – which is the euphemistic way of saying that the referral occurred under 28 U.S.C. § 636(b)(1)(A) and Federal Rule of Civil Procedure 72(a) – authorizes a Magistrate Judge "to hear and determine any procedural motion, discovery motion, or other non-dispositive motion." DUCivR 72-2(b).

Absent consent, most civil cases proceed on an A referral. The types of motions Magistrate Judges handle in an A referral case can vary but the rule of thumb is that the District Judge handles all claim-implicating matters and issues intimately related to trial. The chart below gives a general idea of which judge decides various motions in an A referral case.

Although this chart is intended as a general reference, it is not set in stone. Likewise, just because CM/ECF shows a motion is referred to the Magistrate Judge, it can always be unreferred if it is better handled by the District Judge. Law clerks from both judges' chambers frequently confer on the most efficient way to resolve pending motions.

In adopting this approach, the District Court of Utah attempts to honor both the parties' desires and expectations, and their right to a "just, speedy, and inexpensive determination" of the case. Fed. R. Civ. P. 1; *see MJUP* at 6 (assuming that, without consent, the "parties expect that certain matters will be decided by the Article

MOTION MANAGEMENT IN AN A REFERRAL CIVIL CASE

Magistrate Judge	Variable depending upon the issues, timing, and chambers' preferences	District Judge
Motion for Scheduling Conference	Motion to Remand to State Court, Agency	Motion to Consolidate
Motion to Add Parties	Motion for Joinder	Motion to Dismiss
Motion to Unseal	Motion to Stay	Motion for Judgment on the Pleadings
Motion to Substitute Party	Motion for ADR	Motion for Markman Hearing/Claim Construction
Motion for Service of Process	Motion to Compel Arbitration	Motion to Certify Class
Motion for a More Definite Statement	Motion for Pro Hac Vice Admission	Motion to Change Venue
Motion to Compel	*If not pertaining to, or close to, trial or a dispositive motion hearing, the Magistrate Judge will usually handle these motions:*	Motion to Exclude Expert or Strike Expert Report
Motion for Sanctions (discovery)	Motion for Extension of Time	Motion for Daubert Hearing
Motion to Enforce Discovery Order	Motion to Continue	Motion Under Rule 56(d)
Motion to Appoint Counsel	Motion to Strike	Motion for Summary Judgment
	Motion to Amend Complaint	Motion to Sever
	Motion to Withdraw	Motion to Bifurcate Trial
	Motion to Disqualify Counsel	Motion in Limine
		Motion to Amend Judgment
		Motion to Enforce Settlement
		Motion for Attorney Fees
		Motion for Emergency Relief

III judge presiding over their case" and the court "generally honors the parties' expectations . . . except in unusual circumstances").

But if the Magistrate Judge makes a decision under an A referral that one litigating party dislikes, then the Magistrate Judge's decision may be appealed to the District Judge assigned to the case within fourteen days. *See* Fed. R. Civ. P. 72(a). The District Judge will determine whether the opposing party should file a response and, if so, review the Magistrate Judge's decision to determine whether it was "clearly erroneous" or "contrary to law." *Id.*

B Referral Cases

Similar to an A referral, the term "B Referral" arises from 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). On a B referral, a Magistrate Judge is authorized to evaluate but not decide dispositive motions by issuing to the assigned District Judge a report and recommendation "containing proposed findings of fact and recommendations for disposition." DUCivR 72-2(c) (allowing Magistrate Judges to decide some of the following on B referral: emergency motions, motions to dismiss, motions for summary judgment, default judgment, review of agency decisions); *see* Fed. R. Civ. P. 72(b). After a report and recommendation is issued, the parties have the option of objecting to any portion by filing "specific written objections to the proposed findings and recommendations . . . within 14 days after being served with a copy." Fed. R. Civ. P. 72(b)(2). The opposing party then has fourteen days to respond to those objections, if it so desires. *Id.*

The District Judge may "accept, reject, or modify the recommended disposition." *Id.* R. 72(b)(3). If the report and recommendation has been properly objected to, the district court must review the objections de novo. *Id.* Unobjected to portions of the report and recommendation are generally reviewed for clear error. *See, e.g., Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999).

For several reasons, the District Court of Utah discourages B referrals on most civil cases. *See MJUP* at 7. The process is inefficient because it potentially requires two judges to review the same motion. This unnecessarily increases time and expense for the parties. Additionally, it places a strain on the court's resources. With District Judges having to try and sentence the many felony cases brought in this District in addition to having numerous civil cases to decide, battles over a report and recommendation before a District Judge may take a while to resolve. Consequently, the court only uses B referrals in specific cases where the Magistrate Judges have expertise. These include social security appeals and non-prisoner pro se cases. *See* DUCivR 72-4(d)(2)(A).

In providing this explanation, which may seem overly technical and long-winded, I seek to give counsel a clearer picture of what Magistrate Judges do. Also, knowing which judge will be deciding a particular type of motion can help you focus your advocacy and can help you better advise your client about the process governing how the motion will be decided.

Why You Should Consent to the Magistrate Judge

Although you certainly do not have to consent to a Magistrate Judge presiding over your case, I respectfully suggest that you should. From its inception, the Magistrate Judge system has reflected Congress's desire to improve the federal judiciary by increasing access to the courts, promoting efficiency, and conserving resources. *See* Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 Am. U. L. Rev. 1503, 1526 (1995). "Flexibility has been the hallmark of the Magistrate Judges system throughout its development." *Id.* at 1527. To that end, in 1990, as part of the Judicial Improvements

Act, Congress allowed District Judges and Magistrate Judges to remind parties of the option to consent to resolution before a Magistrate Judge even if the parties did not initially consent to a Magistrate Judge presiding over their case. *See* 28 U.S.C. § 636(c); *see* Fed. R. Civ. P. 73(b)(2). This effort to promote civil case consent is "perhaps one of the best illustrations of innovative utilization of Magistrate Judges." Pro & Hnatowski, *supra* at 1527. To realize the time-saving and efficiency benefits of Magistrate Judge presiders, the District Court of Utah sends notice of availability to consent to a Magistrate Judge in every eligible civil case even if you have already said "no" at the beginning of a case. DUCivR 72-4(c).

Consent makes sense for many reasons. First, a Magistrate Judge will likely be able to schedule a firm trial date much sooner than a District Judge. Collectively, Magistrate Judges in Utah are ready, willing, and able to do trials. After all, we were all trial attorneys before taking the bench. Because we do not try or sentence felony cases, which are subject to strict time limitations under the Speedy Trial Act, our dockets can more easily accommodate your civil trial whether of the jury or bench variety.

Second, where discovery matters may end up being key in litigating the case, consenting to a Magistrate Judge eliminates any duplication of effort it may take for the District Judge to become familiar with prior proceedings. In other words, you only have to educate one judge.

Third, the quality of the Magistrate Judges at this court ensures your case will be tried by an experienced, well-trained, high-caliber neutral. By statute, Magistrate Judges are selected through a merit selection process, rather than a political process. *See* 28 U.S.C. § 631(b). Congress deliberately chose to include "judge" as part of the title to emphasize the judicial role and prestige the position carries. *See* McCabe, *supra* at 50. In this district, a Magistrate Judge opening attracts truly the some of the best of the Bar. Candidates are evaluated based on scholarship, legal practice, knowledge of the court system, temperament, and other criteria. *See* Morton Denlow, Should *You Consent to the Magistrate Judge? Absolutely, and Here's Why*, LITIGATION, Winter 2011, at 3, 5. I speak from experience when I say the process is daunting and not for the faint of heart. Appearing for an interview before every District Judge in Utah and members of the public would intimidate even the most hardened litigator. I, like many of you, remain shocked that I actually made it through successfully. Nevertheless, the Magistrate Judges in this district are some of the best and brightest, and they bring a wealth of litigation experience to the bench that can help you resolve your case more quickly. *See MJUP* at 2.

Finally, a determination on the merits in a consent case is immediately appealable and subject to the same standard of review as any other appeal from a District Judge. *See* Fed. R. Civ. P. 73(c); *Grimsley v. MacKay*, 93 F.3d 676, 679 (10th Cir. 1996) (reviewing a Magistrate Judge decision under "the same standard applied to a judgment rendered by a District Judge"). Because Magistrate Judges can more quickly resolve your case, litigants can have their claims heard by an appellate court much sooner. This may be a driving factor for many parties.

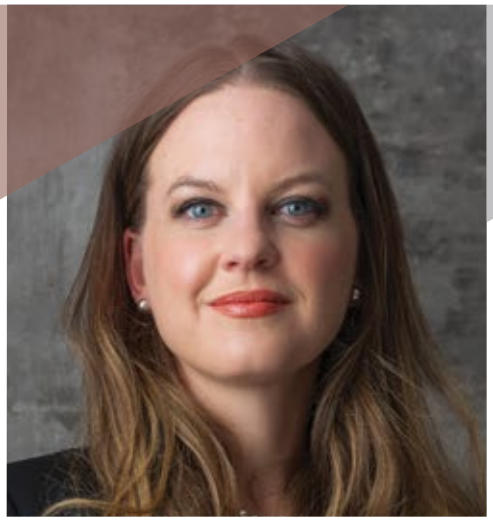
This court encourages consent as part of its commitment to help parties obtain resolution in a fair, thoughtful, and efficient manner. *See MJUP* at 5. Nevertheless, there are, admittedly, many factors driving litigation. Parties should evaluate consent based on what will be most beneficial to their case, with the understanding they are "free to withhold consent without adverse substantive consequences." Fed. R. Civ. P. 73(b)(2). Seriously. We get it.

In sum, we Magistrate Judges are public servants. We seek to improve public access to the federal courts by helping to manage the court's ever-increasing caseloads and diminishing resources while still furthering a litigant's right to secure a "just, speedy, and inexpensive determination" of their case. Fed. R. Civ. P. 1. Members of the Bar and the public are encouraged to make suggestions on how the District Court of Utah can improve the Magistrate Judge referral process by sending an email to Utd_public_comments@utd.uscourts.gov. Together we can ensure the Magistrate Judge system lives up to its twin purposes of reforming "the Federal judiciary into an effective component of a modem scheme of justice and providing district courts with an efficient supplement judicial resource to assist in expediting their workload." McCabe, *supra* at 52 (internal citation and quotation omitted).

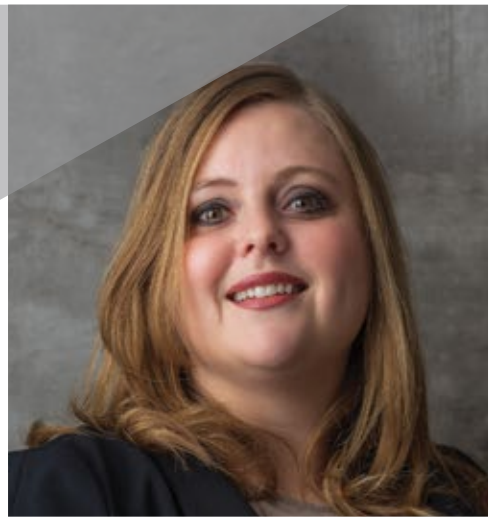
1. The other Magistrate Judges currently serving the District of Utah are: Chief Judge Dustin B. Pead, Judge Daphne A. Oberg, Judge Cecilia M. Romero, Judge Paul Kohler, and Recalled Judge Brooke C. Wells.

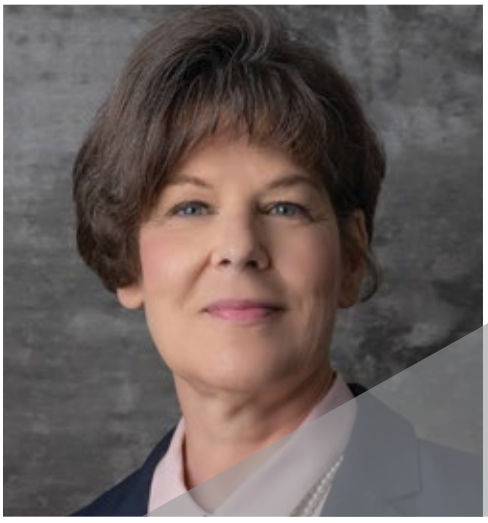
Emily Adams

Cherise Bacalski



Freyja Johnson





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Artificial Intelligence Applications and the Rules of Professional Conduct

by Romaine C. Marshall and Gregory Cohen

Last November's arrival of generative artificial intelligence (AI) via ChatGPT and the multiple chatbots that followed has ushered in a global tidal wave of proposed laws and regulations focused on safety, reliability, and other risks. In addition, endless blueprints, white papers, and "studies" from the private sector have ensued, many predicting the myriad ways AI will accelerate digital transformation for industries that collect, maintain, and store data, especially personally identifiable and sensitive information.

Readiness for AI's promise or peril will be challenging. Utah is more ready than the majority of other states given its progressive stance on data innovation, privacy, and security legislation. Within the last five years, Utah has enacted the Electronic Information or Data Privacy Act (2019), the Cybersecurity Affirmative Defense Act (2021), the Consumer Privacy Act (2022), and Decentralized Autonomous Organization Act (2023). It stands to reason that AI legislation is on Utah's horizon.

The Utah State Bar has issued guidance for the use of AI. *See* Beth Kennedy, *Using ChatGPT in Our Practices: Ethical Considerations*, UtahBar, https://www.utahbar.org/bar-issues-ethics-guidance-on-chatgpt-and-artificial-intelligence/ (May 31, 2023). Indeed, we have a responsibility to adhere to the Utah Rules of Professional Conduct (Rules) that govern the practice of law and interaction with clients. The burgeoning use of AI intersects with and implicates the Rules in a variety of ways. This article will discuss several issues that attorneys need to be cognizant of as they consider integrating AI applications into their practice.

A Cautionary Tale

Attorney Steven Schwartz was handling a tort claim on behalf of a passenger allegedly injured on an Avianca Airlines flight to Kennedy Airport in New York. Schwartz initially filed the complaint in state court, and Avianca removed it to federal court and sought dismissal based on the statute of limitations. Because Avianca had previously filed for bankruptcy, Schwartz attempted to demonstrate that under the Montreal Convention, which governs international flights, the bankruptcy stayed the running of the statute of limitations.

Schwartz used ChatGPT to draft his brief in opposition to Avianca's motion to dismiss. Unbeknownst to Schwartz at the time, ChatGPT fabricated fictitious cases that it cited in the draft brief that it had written for Schwartz. Schwartz filed the brief without verifying the case law or the citations. Avianca's counsel responded that it was unable to locate the cases and expressed concern that the cited case law was not real. Instead of verifying the previously cited case law using more traditional methods, Schwartz went back to ChatGPT and asked it if the cases were real and to provide copies of them and ChatGPT obliged with fictitious snippets of the purported cases that it had previously cited.

Ultimately, following an Order to Show Cause, Schwartz was forced to admit to the court that he used ChatGPT to draft the brief, that he hadn't verified the case law cited in the brief, that the cases cited in the brief did not actually exist, and that he was unable to cite any case law that supported his motion to oppose dismissal.

ROMAINE C. MARSHALL is a cybersecurity and business litigation partner with Polsinelli. He has represented clients in response to hundreds of cybersecurity incidents, including litigation and regulatory investigations.

GREG COHEN is a shareholder in the Phoenix, AZ office of Polsinelli. Mr. Cohen's practice includes technology transactions and related issues, commercial contracts, and supply chain agreements, all with a focus on large health care systems and providers.

Schwartz initially acknowledged that he had "consulted" with ChatGPT for research without acknowledging that it was his only source of research but he later admitted that it was his sole source of "research" and that he was completely unaware that ChatGPT could completely make up and fabricate the content that it generates.

Schwartz and his firm were fined $5,000 by the judge handling the case. As their situation unfolded, it made national news and they were the subject of much derision in the legal press and on social media. The significant professional and personal embarrassment that Schwartz, his colleagues, and his firm experienced over the matter was likely significantly worse than the sanctions imposed by the court.

What Are Generative AI Applications?

Generative AI applications are a type of artificial intelligence system designed to generate new content, such as text, images, audio, or video, in response to prompts submitted by the user. Unlike other AI systems that may focus on pattern recognition or classification, generative AI applications have the capability to create new and original content that closely resembles human-created content remarkably closely.

Generative AI applications utilize deep learning models to generate content that closely matches the patterns and styles observed in the vast pools of training data on which they've been trained. These applications have remarkable abilities to generate content that appears authentic, authoritative, and accurate. Generative AI models, however, lack actual cognitive understanding and the ability to accurately assess the accuracy of their content. As a result, the content may not be correct or even factual. They can also produce content that is biased or inappropriate.

Companies have begun introducing AI applications to be used by attorneys. While these applications may perform many of the same functions and have similar features as generative AI applications, these products are specifically geared towards attorneys' needs and are outside of the scope of this article.

Utah Rules of Professional Conduct

While the Rules do not specifically address, restrict, or prohibit the use of any specific technology in the practice of law, the use of generative AI applications intersects and implicates several attorney obligations under the Rules in ways that attorneys may not expect.

Client Confidentiality

Attorneys have an obligation to maintain client confidentiality under Rule 1.6 of the Rules. Rule 1.6 emphasizes the duty of attorneys to protect client confidences and secrets, which encompasses any information related to the representation, regardless of the source or nature of the information.

Generative AI applications require users to submit prompts that the application responds to in order to generate content. Generative AI applications generally store and retain the prompts entered by users and utilize those prompts to further refine their algorithms and for potential use in generating future content. This raises several issues for attorneys related to client confidentiality such as:

Inappropriate Disclosure

Attorneys should never provide details about a client or the firm when crafting and submitting prompts in order to avoid inadvertently disclosing confidential client information. There is no privilege or other confidentiality that arises between the attorney and the generative AI application, so there is no protection provided to or for client information disclosed as part of a prompt. The generative AI application has no further duty to protect the information disclosed to it in the prompts it receives, so any information disclosed to it may constitute in inappropriate disclosure under Rule 1.6.

Data Breaches

Generative AI applications are at risk of data breaches to the same extent as any other software. Any information submitted to a generative AI application is subject to such risks, including the risk that any confidential client information submitted as a prompt could potentially be disclosed in a data breach.

With these concerns in mind, attorneys should never include any sensitive, privileged, or client confidential information as a prompt submitted to a generative AI application.

Competence

Attorneys have an obligation under Rule 1.1 of the Rules to provide competent representation with the "knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." While generative AI applications can provide valuable assistance with research and drafting, an attorney's obligation under Rule 1.1 requires that attorneys be aware of the following issues and concerns:

Familiarity with AI Limitations

Attorneys should have a clear understanding of the capabilities and limitations of generative AI applications. For instance, AI models are trained on large datasets, which may not be current. As a result, the content generated by a generative AI application may not be up-to-date or accurate. Additionally, lacking true cognition or comprehension, a generative AI application may not generate a complete or comprehensive response that addresses all of the salient issues. Finally, as the story above demonstrates, a generative AI application has a propensity to manufacture information in responding to the prompt it receives, especially if it does not have any authentic or accurate data to include in the response. Called "hallucinations," the fabricated information is often responsive to the question that was asked and authoritative sounding, so it may be difficult to recognize that the information in the response may be entirely made up without understanding that this is a recognized and acknowledged limitation of generative AI applications generally.

Verification and Research

Attorneys have a duty to verify the accuracy and relevancy of the generative AI application generated content. This includes conducting additional research using creditible and reliable legal sources to verify the accuracy of all cited cases, that the cited cases support the proposition for which they've been cited, and that the cited cases remain good law. While attorneys may use a generative AI application as a tool to expedite or enhance their drafting, they should never exclusively rely on the drafting generated by a generative AI application for any purpose.

Technical Knowledge

Attorneys must be knowledgeable about and remain current on the technical capabilities of all technology that they employ in their practice, including generative AI applications. Attorneys have a fundamental duty to ensure that the technology they are using can competently perform the functions for which they are using it.

Client Communication

Under Rule 1.4, an attorney is obligated to reasonably consult with their client about the means by which the objectives of the representation are to be accomplished. While the Rules do not specifically mention generative AI applications or any other technology or tool, they establish the framework for the attorney-client relationship and provide guidance when client consent should be obtained.

Fulfilling Client Expectations

The attorney's obligation under Rule 1.4 includes reasonably consulting with the client about the means to be used to accomplish the client's objectives. Some clients may be completely comfortable with the use of AI as a means or tool that the attorney uses to

provide the representation. Other clients may have mistrust or discomfort with AI as a tool. Rule 1.4 requires that an attorney provide sufficient information regarding the representation to fulfill reasonable client expectations for information.

Supervising Other Attorneys

Rule 5.1 states that supervising attorneys have a responsibility to adequately supervise attorneys and non-lawyer personnel for which they are responsible to ensure their compliance with the Rules and other ethical obligations. This duty extends to the use of generative AI applications in the practice of law. Supervising attorneys must exercise reasonable measures to monitor and oversee the use of generative AI applications by attorneys and staff under their supervision and ensure that it is used in a manner consistent with the Rules and their obligations to their clients.

Sufficient Supervision

To fulfill their supervisory duty, attorneys should provide guidance and training to the attorneys and staff under their supervision regarding the appropriate and responsible use of generative AI applications. This includes providing training regarding the limitations, potential risks, and ethical considerations surrounding the use of generative AI applications. Supervising attorneys should also establish internal procedures and protocols to review and verify the accuracy, relevance, and reliability of the content from generative AI applications to ensure that it is accurate, appropriate, and comprehensive.

Remaining Current with Technology

Supervising attorneys should stay informed regarding the advancements and developments in AI technology and its impact on the practice of law including both generative AI applications and specialized AI applications developed specifically for attorneys. This will enable attorneys to effectively supervise and provide necessary guidance to the attorneys and non-attorney staff under their supervision and properly manage the use of generative AI applications within their office.

Conclusion

AI already shows tremendous promise for use in research, drafting, and performing other tasks that attorneys engage in while practicing law. It is important, however, that attorneys understand the technology they are using, its implications, and its limitations to comply with, and avoid violating, the Rules and their ethical obligations to their clients. Just as ethics and professionalism are valued and emphasized as continuing legal education requirements, one can foresee these expanding to ensure attorneys understand the implications and duties associated with generative AI applications.

AUTHOR'S NOTE: *The material provided in this article is general in nature and is not intended to be legal advice. Nothing herein should be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, rules and regulations and other legal issues. This article does not establish an attorney-client relationship.*

Utah Gets Major Boost in Funding to Address Access to Justice Challenges in Debt Collection and Eviction Cases

by Pamela Beatse and Danielle Stevens

The concept of access to justice encompasses both access to law and access to lawyers. When people do not participate because they are too afraid or overwhelmed by the legal process or the courts, this is problematic. However, when people want to engage in the system and address their legal issue, there are often financial barriers to hiring an attorney or there are no attorneys available to hire. Pro bono programs and services are crucial for overcoming these barriers. The Access to Justice (ATJ) Office provides volunteer opportunities for attorneys and ensures quality pro bono services for people with lower incomes who do not have the resources to pay for traditional legal services. Utah also has a variety of legal service providers and nonprofit organizations available to give legal services for people needing assistance. People's Legal Aid (PLA) is one of these organizations.

PLA is a nonprofit law firm providing free education and legal advice to Utah tenants with housing issues and low- or no-cost eviction and debt defense. PLA has been delivering programs for tenants since May 2020 and is the only legal services provider available to help tenants who have an undocumented status. The consequences of eviction in Utah are profound and can financially cripple tenants who are already struggling to survive. The general lack of legal services for tenants in Utah has contributed to persistent housing instability, homelessness, and poverty. PLA's clients are our most vulnerable neighbors – they are unable to afford rent, are at risk of homelessness, and struggle to find housing following an eviction lawsuit. In 2023, 35% of PLA's clients identify as non-white (the majority of whom are Hispanic / Latinx), and 6% identify as having a mix- or undocumented status. An astounding 88% of PLA's clients this year are extremely to very low-income earners. PLA's legal services focus on providing tenants with legal advice, document preparation/review, and limited scope representation to help them (1) understand their options and rights as tenants; (2) navigate complex legal systems; (3) avoid eviction lawsuits; and (4) mitigate the fallout of an eviction when necessary.

The ATJ Office and PLA recently partnered to develop a new pro bono program called the Pro Se Community Clinic (Clinic). This Clinic is an offshoot of the Pro Se Calendar Volunteer Program and is designed to assist people without lawyers dealing with debt collection and immediate occupancy proceedings who are preparing to submit exhibits or filings, as well as those preparing for their hearing on a pro se calendar. The Pro Bono Commission approved this program, and the ATJ Office and PLA launched it in April 2023. Running these programs requires time and financial support. Consequently, the ATJ Office and PLA are eager to announce separate funding awards for two projects that, in part, will help support this Clinic.

The ATJ Office received a thirty-six-month grant from the Utah Bar Foundation to collect and use data to develop debt collection strategies and solutions. In conjunction with the Utah State Court and the ATJ Office, PLA obtained a two-year grant from the National Center for State Courts to support eviction diversion in Utah.

PAMELA BEATSE is the Utah State Bar's Access to Justice Director.

DANIELLE STEVENS has been the Executive Director of People's Legal Aid since 2021.

The Troubling Landscape of Debt Collection and Eviction Actions in Utah

Unrepresented defendants can create challenges to legal procedure and fairness in court proceedings. In Utah, debt collection and eviction represent "some of the highest unmet legal needs" where "the majority of plaintiffs have attorney representation…while less than 5% of defendants (renters and/or debtors) had attorney representation." Utah Bar Foundation, Utah Bar Foundation Report on Debt Collection and Utah's Courts 4 (Apr. 2022), https://www.utahbarfoundation.org/static/media/UBF2022.912d30c10e5681bf5f8c.pdf. Twenty-one percent of Utahns have debt in collections, and Utah has one of the highest debt-to-income ratios in the country. *See id.* at 6. Between 2013–2020, property owners filed more than 56,000 eviction cases against Utah tenants. *See id.* at 7. Most of these evictions subsequently result in significant housing debt. Moreover, debt and eviction actions disproportionately affect people of color. *See id.* at 6–8. Forty-one percent of consumers in communities of color have debt in collections compared to 21% in the total population. *Id.* at 6. And over 80% of eviction in Utah take place in zip codes where most residents are people of color. *See* Utah Division of Multicultural Affairs, Racial Disparities in Eviction Rates During Covid-19 (Nov. 2020), https://multicultural.utah.gov/race-eviction-rates/.

To combat these challenges, the Third Judicial District implemented a consolidated pro se calendar for debt collection and eviction cases over a decade ago. In the past, the court heard these case types on the same day, this changed to two separate calendars during the COVID-19 pandemic.

Overview of the Pro Se Programming in the Third Judicial District

The purpose of a pro se calendar is to ensure that the law respects a party's rights, as attorneys work collaboratively to reach a more manageable settlement or present arguments in a well-represented manner. This allows clients to feel supported by the justice system and ensures the court hears everyone's voice. The ATJ Office relies on recruitment, staffing and training to keep courts apprised, to support volunteers, and to inform and advise clients. Attorneys have the opportunity to volunteer and people in need who cannot afford a lawyer receive quality legal representation.

The ATJ Office continuously provided attorneys to give limited-scope pro se representation to people on both the debt collection and immediate occupancy (eviction) calendars. In 2019, PLA also began serving on these calendars with attorneys, law students, and a licensed paralegal practitioner (LPP). Now, other LPPs participate in the program as well. In 2022, seventy-one attorneys and LPPs served over 1,070 clients at 612 debt collection and 498 immediate occupancy hearings. *See generally* Utah State Bar's Access to Justice Office, 2021–22 Pro Se Calendars Volunteer Program Report Debt Collection and Immediate Occupancy (Dec. 2022), https://uploads-ssl.webflow.com/5d0a70f56c1bd5798b364f72/64cc3545788051c0edf98770_Pro%20Se%20Calendar%20Report%202021-22%20FN.pdf. These volunteers give their time and expertise to help people and to make the process fairer and more efficient.

However, while the Pro Se Calendar Volunteer Program provides vital representation to people in need, outcome data that the ATJ Office collected suggests earlier intervention and access to legal services have an even greater impact on achieving meaningful access to justice. For example, when comparing debt collection and immediate occupancy outcomes on the consolidated calendars, 22.5% of debt collection cases are satisfied and dismissed within six months, while only 8.4% of eviction cases get dismissed. *Id*. Pro se defendants have a much higher likelihood of breaching an eviction than a debt collection settlement. Over time, continued comparison of these outcomes reflects still greater divergence between the effectiveness of debt collection representation and struggles with eviction defense.

Shift in Services for Tenants from Limited Representation to Housing Mediation

Starting in February 2023, services on the consolidated calendars shifted help to tenants from volunteer limited-scope representation to housing mediation services. Based on data showing the limited ability for legal professionals to obtain significant relief for tenants at their immediate occupancy hearings, the Pro Bono Commission suspended providing limited scope representation on the consolidated immediate occupancy calendar in the Third District Court. The Access to Justice Commission supported this action. This does not mean that pro se tenants are without resources, information, or assistance. Utah Community Action has a Landlord-Tenant Mediation program that "acts as a bridge to navigate conflicts between landlords and tenants." Utah Community Action, *Case Management & Housing*, https://www.utahca.org/housing/. Their housing mediator, Heather Lester, and her team participate weekly at the immediate occupancy calendar to talk with litigants and attorneys, give information, and initiate mediation services. While they do not provide legal services or representation, their services may help tenants maintain their housing or avoid an eviction.

Launching the New Pro Se Community Clinic

In addition to mediation services on the day of the hearing, pro se litigants can choose to participate in the Clinic prior to their hearing. Pro se litigants have a limited understanding of how to respond to pleadings and motions or how to file disclosures. By the time a volunteer reaches them, it is often past the deadline for them to file disclosures with the court and shared with opposing counsel. This strongly disadvantages them even when they have a colorable claim or defense. Therefore, the ATJ Office developed a Bar signature program in partnership with PLA to reach pro se litigants further upstream before their hearing occurs. Volunteer lawyers, LPPs, and students provide legal information and brief advice regarding claims and defenses, documents, evidence, and trial preparations during the weekly clinic.

People with a hearing in the Third District Court on the consolidated pro se debt collection or immediate occupancy calendar will receive notice of the Clinic directly from the court with their notice of the hearing. The ATJ Office also sends information packets by email letting pro se litigants know their next steps and inviting them to the Clinic. There are three different packets, a version for (1) debt collection defendants, (2) tenants, and (3) pro se landlords, and each contains information about their hearing, links to explanatory YouTube videos, and additional free and reduced cost resources.

The Clinic happens weekly during a virtual meeting; Thursdays from 11:00 a.m. to 1:00 p.m. on Zoom. Participants sign up in advance by completing an intake form, which an intake worker reviews prior to the Clinic. The intake worker triages their case before the Clinic. Based on their response, the participant may receive (a) information on how to sign up for community assistance, (b) a consult with a volunteer attorney or LPP, or (c) a consult with a community partner representative from Utah Legal Services, the Disability Law Center, Utah Community Action, or the Utah State Court Self-Help Center.

The ATJ Office and PLA are recruiting volunteer lawyers, LPPs, and students to serve at the Clinic. You can sign up now to volunteer through the Utah Pro Bono Opportunity Portal. *See* Utah State Bar, *Pro Se Community Clinic*, https://app.joinpaladin.com/utahprobono/opportunities/pro-se-community-clinic/. Clinic managers inform all Clinic participants that attorney-client privilege exists but that the volunteer is not establishing a relationship or ongoing representation. Advice and counsel provided to pro se

participants does not constitute representation. The Utah State Bar covers volunteer lawyers, LPPs, and students with professional liability insurance. The volunteers do not need to give additional services beyond the Clinic consult, but volunteers may choose to provide additional services to the person using other Bar programs. Whenever possible, participation in the Clinic is meant to provide diversion for qualifying participants to avoid court.

State and National Funding for Access to Justice Initiatives

The Pro Se Community Clinic is just one mechanism for meeting the needs of people struggling with debt or eviction issues. The ATJ Office needs more data to strategically plan and develop ways to address the access disparity in legal services for people with lower incomes. These types of targeted solutions will continue to allow better opportunities for people navigating through court.

Utah Bar Foundation 36-Month Grant Supports Debt Collection Study and Solutions

The ATJ Office relies on data-driven solutions to support the Utah State Courts, community partners, and program development for its volunteers. In April 2023, the Utah Bar Foundation awarded a grant to the ATJ Office to use data-based research to study the debt collection consolidated pro se calendar with the goal of improving the system for the Utah State Courts and all parties. The ATJ Office is best situated to conduct this debt collection program because of its current relationships with key partners, current data collection systems with the courts and because of the experience with debt collection law by the two ATJ Office attorneys.

This ATJ project is vital to evaluating the effectiveness of the current pro se debt collection calendars. The project includes reporting on debt trends in Utah, evaluating the effectiveness of brief legal advice and limited scope representation, providing better training and mentorship for volunteers, and exploring the benefits of expanding the Pro Se Calendar Volunteer Program into other judicial districts. The pilot project aims to broaden the scope of the underlying legal landscape provided by the Utah Bar Foundation report. This can be a crucial part of providing equal access to justice for all Utahns.

National Center for State Courts Gives Major Grant for Eviction Diversion in Utah

Earlier this year, the National Center for State Courts (NCSC) announced an opportunity for state courts to apply for eviction diversion funding, and they were eager to fund an initiative in Utah. The Utah State Courts, PLA, and ATJ collaborated to apply for funding that will support the Clinic. The NCSC will provide two years of funding to PLA to hire a coordinator who will manage the daily operations of the Clinic, as well as evaluate the impact of the Clinic as Utah's first eviction diversion program. This funding will provide the capacity needed to develop partnerships, recruit volunteers, and collect and analyze data – all of which are vital for building a program that can successfully divert tenants from court and receiving an eviction order. PLA and ATJ are committed to data-driven programming and solutions that respond to people's needs, and better integrate legal services into our community. PLA and ATJ are grateful for the Utah State Courts' support of the Clinic and collaboration to receive NCSC funding.

To apply for NCSC funding, PLA had to secure match funding to support 50% of the budget for the second year of the Clinic. Thanks to PLA's Board of Directors and Salt Lake City, PLA was able to secure the funding needed to apply on a tight timeline.

Conclusion

The ATJ Office and PLA are continuing to look for additional opportunities and funding to address the access to justice obstacles in Utah. These are just some of the programs and services giving pro bono support to Utahns. If you would like to learn more or get involved, you can contact the ATJ Office by email at ATJ@utahbar.org or clinic@plautah.org. Using data-driven strategies, training, and mentorship, legal professionals and nonprofit organizations can serve the public effectively to provide meaningful access to the law and to lawyers.

Rules for Whistleblowers: A Handbook for Doing What's Right

by Stephen Kohn

Reviewed by Mark Pugsley

I began filing whistleblower tips with the Securities and Exchange Commission (SEC) about twelve years ago when Congress passed the Dodd-Frank Act, which established the SEC's whistleblower award program. I have since learned that practicing whistleblower law is a lonely business – not many people in the country do what I do – so I was interested in reading about the experiences of Stephen M. Kohn, who is a fellow member of the national whistleblower bar (The Anti-Fraud Coalition TAF.Org). His new book is titled *Rules for Whistleblowers: A Handbook for Doing What's Right*.

Stephen Kohn is an experienced whistleblower attorney who practices in Washington D.C. He is a named partner at the firm Kohn, Kohn & Colapinto LLP and has represented clients who obtained significant awards, including the largest ever Internal Revenue Service (IRS) whistleblower reward of $104 million. In this book, Kohn delves into the world of whistleblowers, shedding light on the challenges they face and providing guidance on how to navigate the complex landscape whistleblowers and their lawyers assume in exposing wrongdoing while protecting the rights of their clients.

The book begins with an overview of whistleblowing, explaining its importance in promoting transparency and accountability in both the public and private sectors. Kohn emphasizes the moral imperative for individuals to step forward and blow the whistle on corporate fraud, corruption, and other illicit activities that harm society at large, and in the process qualify for a substantial award.

Kohn offers a step-by-step guide on how to become a whistleblower – providing essential tips on gathering evidence, maintaining anonymity, and ensuring protection from retaliation. The book contains thirty-seven rules for whistleblowers, including the following nuggets:

- Don't Leave Money on the Table (Rule 4);
- Protect Yourself (Rule 7);
- Should You Tape [Your Conversations]? (Rule 9);
- Know the Limits of [Company Whistleblower] Hotlines (Rule 10);
- Don't Let the Lawyers Throw You Under the Bus (Rule 11);
- Don't Fear NDA's (Rule 14); and
- How to Afford a Lawyer (Rule 37).

The book highlights the common traps and challenges facing whistleblowers today and provides practical legal guidance to help would-be whistleblowers navigate the murky waters and bumpy roads that make it difficult and risky to do the right thing, including how to file cases anonymously through an attorney.

Kohn also provides a full-throated defense of the various governmental programs that use taxpayer money to provide significant financial incentives to people who provide information to the government.

In June of this year, the SEC announced it had issued the largest ever whistleblower award of $279 million to an anonymous whistleblower relating to an unidentified enforcement case. This historic award payment underscored the remarkable success of the SEC's whistleblower program, but it also led to some criticism

MARK PUGSLEY has been handling cases involving financial fraud, Ponzi schemes, and whistleblowers for twenty-nine years. He is a founding member of the law firm Pugsley Wood LLP.

of the program both generally and in particular about the lack of transparency surrounding these awards.

But as Kohn and others (including me) have pointed out, the success of the SEC's whistleblower program has led to significant recoveries that benefit both investors and taxpayers. To date, the program has paid approximately $1.5 billion in awards for tips that have required bad actors to disgorge more than $4 billion in ill-gotten gains and interest.

Whistleblower awards provide a weighty incentive for whistleblowers to risk their careers and reputations to come forward with previously unknown information about potential securities-law violations. As Kohn points out, the whistleblower statutes "align the interests of the whistleblower, the prosecutor, and the public, all of whom want to bring the fraudsters to justice … a perfect alliance for achieving accountability."

Kohn also covers numerous controversial issues, such as surreptitiously taping telephone calls, removing confidential documents and data from the company, and handling NDAs. These are difficult issues I deal with every day in my whistleblower practice and Kohn's guidance is valuable.

One of the key points Kohn and I agree on is that some of the best whistleblowers are insiders; individuals who are currently employed at a large company where they observe fraud or corporate financial misconduct. Instead of reporting the conduct internally and risking their employment, insiders can access documents and data about the crime and report the conduct to the SEC or other relevant agency anonymously, while in some cases continuing to work at the company. In many cases our brave whistleblower clients face extreme risks to their personal safety when they decide to become a whistleblower. This is precisely why the SEC, the Commodity Futures Trading Commission, and the IRS take whistleblower confidentiality so seriously. Whistleblowers are technically protected from retaliation by the company, but those legal protections are not easily accessed so the most effective protection is usually anonymity. In many of our cases federal agencies are not given the identity of our clients until the very end of the process to protect them from potential disclosure and retaliation.

Throughout the book, Kohn provides interesting details about cases he has handled in his long career and uses these anecdotes to highlight the impact of whistleblowers on exposing fraud and corruption. These stories underscore the significance of whistleblowing in safeguarding the public interest and upholding legal and ethical standards for public companies.

Kohn also addresses the complicated nuances of Foreign Corrupt Practices Act (FCPA) cases, highlighting the importance of whistleblower laws in helping the SEC and Department of Justice (DOJ) to enforce violations of the FCPA, which are notoriously difficult to detect:

> Corporate insiders play a critical role in enabling the government to obtain proof of a bribe, proof that a company's books are inaccurate, or proof that a company lacks internal controls over some of its business activities. This point was driven home in a joint publication authored by the DOJ and the SEC. In their *Resource Guide*, these agencies described whistleblowers as "among the most powerful weapons in the law enforcement arsenal."

(Page 159)

Finally, Kohn's book provides invaluable advice on how to work effectively with governmental regulatory bodies to report misconduct and how to navigate the complex rules of these various award programs to ensure that the whistleblower receives the reward he or she is entitled to. Whistleblowers and their counsel need to understand all the applicable rules and regulations when disclosing information to authorities, and throughout the lengthy process that follows.

"Rules for Whistleblowers: A Handbook for Doing What's Right" is a great resource for anyone considering blowing the whistle on corporate misconduct or lawyers looking to understand the process. Kohn's extensive expertise in this area makes him an authoritative resource on the subject. With its practical insights and discussion of the key legal decisions in this area, Kohn's book serves as a practical guide for those who seek to expose wrongdoing while safeguarding their rights and contributing to a more accountable and just society.

Rules for Whistleblowers: A Handbook for Doing What's Right

by Stephen Kohn

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440 pages

Available in hardcover, paperback, and e-book formats.

The Top 10 Workers' Comp Cases All Injury Attorneys Should Know

by Timothy P. Daniels

Utah attorneys sometimes have clients whose medical conditions are partially or totally caused by an industrial accident. A short review of the top ten Utah workers' comp cases will help us identify potentially valid workers' comp claims for our clients and advise them properly.

Some of the primary issues in a workers' comp case are medical causation (whether the injury was somehow related to the claimant's work); legal causation (whether a pre-existing condition made the injury just as likely to happen at work as at home); whether the employer offered light duty during the employee's period of recovery; and whether the claim is barred by a statute of limitations. These issues and others are addressed in the following Top 10.

1. *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986).

Pre-existing Conditions and Legal Causation.

Facts: Mr. Allen worked in a grocery store and suffered a herniated disc while lifting crates of milk. He had suffered several prior back injuries. Since prior court decisions were mixed on the issue of legal causation, the *Allen* case is a restatement of Utah workers' comp law, now seemingly cited in every labor commission decision.

Rule: The Workers' Compensation Act requires an injured worker to prove the worker was injured "by accident arising out of and in the course of the employee's employment." Utah Code Ann. § 34A-2-401. Injured workers must prove (1) medical causation and (2) legal causation. Legal causation is the main issue in *Allen*. Many injured workers have some pre-existing condition, often simply due to age (i.e., mild degenerative disc disease in the lumbar spine).

Holding on Legal Causation:

> Just because a person suffers a preexisting condition, he or she is not [necessarily] disqualified from obtaining compensation. However, [t]o meet the legal causation requirement, a claimant with a preexisting condition must show that the employment contributed *something substantial* to increase the risk he already faced in everyday life because of his condition. This additional element of risk in the workplace is usually supplied by *an exertion greater than that undertaken in normal, everyday life.* This extra exertion serves to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a personal risk rather than exertions at work. Thus, where the claimant suffers from a preexisting condition which contributes to the injury, an unusual or extraordinary exertion is required to prove legal causation.

Allen, 729 P.2d at 25.

Importance: The court looks at whether the work injury "involved some unusual and extraordinary exertion over and above the usual wear and tear exertions of nonemployment life." This is the key issue in many, many cases. Lifting more than fifty pounds is unusual, but taking a full garbage can to the

TIM DANIELS serves as a Reservist in the Air Force JAG Corps and manages a private practice, focusing on workers compensation litigation and adoptions.

street, changing a flat car tire, lifting a small child to chest height, and climbing the stairs in buildings are not unusual activities per the court. *Id*. at 26.

Legal Contours: The legal-causation issue is very fact-specific. Here are some examples of work activities or "exertions" that failed to meet the *Allen* standard for employees with a pre-existing medical condition:

(a) Ms. Rizzo, who had a pre-existing knee problem, tripped over the edge of a paver, started to fall forward, twisted her knee, but did not hit the ground because someone caught her. The labor commission wrote:

> Ms. Rizzo's work activity in this case was merely stumbling, but not falling, as she walked across the plaza. The Commission finds that stumbling is a common activity typical of regular nonemployment life. Therefore, … Ms. Rizzo has not met the more stringent standard of legal causation required under *Allen*, and is not entitled to benefits for her left-knee injury." *Rizzo v. Utah Dep't of Commerce*, Utah Labor Commission Case No. 09-0452. This case has been followed and upheld: "Tripping without falling, and being startled in the process, can reasonably be considered a part of ordinary nonemployment life.

Schreiber v. Labor Comm'n, 1999 UT App. 376.

(b) Mr. Wardle was a coal miner who had a pre-existing lumbar condition.

> He stepped up eight to ten inches on to the surface of a slab of coal that had 'sloughed' from the mine wall. As he was standing with both feet on the slab, the section that he was on broke off and dropped to the floor. Mr. Wardle dropped with it. He landed solidly on his feet. The drop did not cause his knees to buckle or cause him to fall or lurch. However, he felt immediate pain in his back.

Industrial, right? No. The Labor Commission said dropping eight to ten inches unexpectedly is not "unusual or extraordinary" because it is "similar to missing a step at the bottom of a flight of stairs, or stepping from a high curb."

Wardle v. Energy West Mining, Utah Labor Comm'n Case No. 03-1191.

(c) Other cases that were denied due to failure to meet the *Allen* standard (meaning, the Labor Commission determined the exertions were usual or ordinary) include the following:

- Slipping and hitting your knee on a hard object like a metal track. "It is not uncommon for a person to slip and strike a knee against the edge of a hard material such as a piece of furniture or a stair." *Monroy v. Schreiber Foods, Inc.*, Utah Labor Comm'n Case No. 09-0861.

- Twisting knee while stepping down and later tripping on floor mat. The fact that the mat was greasy is irrelevant to the worker's exertion. "Tripping over such surfaces frequently occurs in nonemployment life." *Stennett v. Red Rock Restaurant*, Utah Labor Comm'n Case No. 99-1024.

- Unexpected impact from behind, sufficient to cause startled response and lurch forward. "This type of movement does not appear to be different from the everyday event of tripping on a rug or an uneven sidewalk." *Schreiber v. Jordan Sch. Dist.*, Utah Labor Comm'n Case No. 97-0608.

- Squatting off and on for about an hour before having a twisting-knee injury. "It is not uncommon for a person to squat to put things away at home for a few minutes and then stand up suddenly to attend to a child, a ringing telephone, or other exigent circumstances." *Jimison v. Intermountain Golf Cars*, Utah Labor Comm'n Case No. 13-0037.

- Slipping on a wet floor while carrying a thirty-eight-pound box, resulting in a back injury. This "exertion is similar to slipping while carrying luggage, a full garbage bag or a small child." *Withers v. Wal-Mart Distribution Ctr.*, Utah Labor Comm'n Case No. 12-0071.

- Climbing a ladder and striking his head on an unseen box overhead. This is "similar to the common exertion of stepping onto a stool and striking one's head on an overhead object." *Quintana v. Premier Grp. Staffing*, Utah Labor Comm'n Case No. 14-0582.

- Crouching down and lifting thirty-five-pound bag from shelf four inches off the floor and twisting while lifting. *Jensen v. Rockin E Country Store*, Utah Labor Comm'n Case No. 07-0005.

- Lifting and twisting with a forty-seven-pound box. *Dahl v. Linens and Things*, Utah Labor Comm'n Case No. 08-1282.

- Stepping backward off a cement riser about eight to twelve inches high after retrieving a twenty-pound box, miscalculating the distance and coming down hard on one leg, resulting in back pain. *Stone v. Warehouse Demo Services*, Utah Labor Comm'n Case No. 04-0602.

- Carrying a fifteen to twenty-pound box on shoulder in a narrow space, getting bumped by a coworker, then trying to catch a falling box resulting in a torn rotator cuff.

> The Appeals Board notes that the exertion involved in Ms. Robles-Vasquez's work activity is comparable to bumping into another person in a crowded store while removing an item from a shelf or losing one's balance while lifting a bag into an overhead bin on a bus or airplane and then attempting to catch it.

Claim denied. *Robles-Vasquez v. EmployBridge 01196 Sephora*, Utah Labor Comm'n Case No. 17-0832.

(d) In conclusion, it can be difficult to predict how the Labor Commission will rule on legal causation. "The devil's in the details."

2. *Acosta v Labor Commission*, 2002 UT App 67, 44 P.3d 819

Non-symptomatic Pre-existing Conditions.

Facts: Ms. Acosta was a maternity nurse at a hospital. One night she leaned over a crib, picked up an eight-pound baby and felt lower back pain. She had never had back pain before, but her MRI revealed a degenerative condition (stenosis), and she required surgery.

Rule: The *Allen* standard for legal causation: If the injured worker suffered a pre-existing condition, then she "must show that the employment contributed *something substantial* to increase the risk."

Holding: A pre-existing condition *need not be known or symptomatic*. The MRI revealed that Ms. Acosta had pre-existing spinal stenosis. Since bending over and lifting an eight-pound baby is not an unusual or extraordinary exertion, Ms. Acosta's claim failed. She could have just as easily hurt her back lifting an eight-pound object at home.

Importance: Look at the client's imaging for evidence of some unknown, pre-existing condition such as spinal stenosis or degeneration.

3. Fred Meyer v. Industrial Commission, 800 P.2d 825 (Utah Ct. App. 1990)

Multiple Accidents in Same Workplace.

Facts: Claimant worked for Fred Meyer and its predecessor Grand Central Stores, as a warehouse worker over thirteen years. Claimant was injured while "pulling" merchandise from a warehouse shelf. After lifting and twisting with some thirty-five-pound boxes, Claimant felt back pain. She had incurred prior back injuries while working for this same employer. Initially, the ALJ denied the claim because claimant had prior back injuries, and lifting thirty-five-pounds did not meet the *Allen* standard.

Rule: "[T]o facilitate the purposes of the legislation, the Workers' Compensation Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the applicant." *Id.* (citing *USX Corp. v. Ind. Comm'n.*, 781 P.2d 883 (Utah App. 1989)).

Holding: The higher legal standard of *Allen* does *not* apply when a pre-existing condition is caused by prior work-related injuries incurred in the same workplace.

Importance: Find out if the worker's medical problems started from a prior injury with the same employer. If the pre-existing condition was incurred working for a different employer, then find out whether the injured worker got hurt doing "an unusual and extraordinary exertion."

4. *Maurice Brown v. Plateau Mining,* Utah Labor Commission Case No. 93-0666

Timely Reporting.

Facts: Mr. Brown had worked in a coal mine for many years. While skiing, he noticed he was out of breath and went to the doctor, who said the x-rays showed "possible silicosis." Mr. Brown continued working but later was put on disability, though another doctor said he likely did not have pneumoconiosis. Finally, a biopsy revealed acute silicosis, and he filed an occupational disease claim within 180 days of that revelation. Of course, the insurance company argued the 180-day clock started upon receiving the first x-rays and the statute of limitations barred the claim.

Rule: Injured workers must notify the employer or the Labor Commission of the industrial injury within 180 days or the claim is barred. U.C.A. § 34A-2-407(3).

Holding: Before receiving a definitive diagnosis, Mr. Brown did not know, and reasonably could not have known, that his disease was caused by his work. The 180-day clock did not start ticking until he received a definitive diagnosis.

Importance: It is important to make a timeline of the injured worker's accident and relevant medical history.

Practice Tip: About reporting industrial injuries, two mistakes are all too common:

- First, an injured worker cannot simply tell his supervisor, "My back hurts." Such a statement does not report an industrial injury. Likewise, it is insufficient to notify a coworker; notice must be given to a supervisor, manager or human resources clerk. The statute requires "notification to the employee's employer." U.C.A. § 34A-2-407(2)(a).

- Second, telling a treating doctor or chiropractor that you got hurt at work does not necessarily fulfill the statutory requirement because there is no guarantee the doctor will actually file the Form 123, *Physician's Initial Report of Work Injury*, with the Labor Commission. Unless the doctor is a WorkMed doctor or unusually familiar with Labor Commission rules, the treating doctor will likely fail to file the Form 123, and the 180-day clock keeps ticking.

- The best practice is for the injured worker to report to the employee's supervisor, manager, and/or human resources office and then follow up with the Utah Labor Commission to ensure the labor commission creates a record of the incident. We want to avoid she-said-she-said situations in court where the injured worker testifies she notified her supervisor verbally and the supervisor says, "No, she did not."

5. *Washington County School District v. Labor Commission and Steven H. Brown,* 358 P.3d 1091, 2013 UT App 205

Industrial Accident Followed by Non-industrial Accident.

Facts: What happens when an injured worker suffers a later non-industrial injury? Mr. Brown injured his lumbar spine in 2003 while working as a bus driver. The workers' comp carrier paid for spine surgery. In 2007, Mr. Brown was still having lumbar problems as documented by an MRI. Then, in September 2007, Mr. Brown was at a party (not work related) where a child jumped on his back. Mr. Brown fell and needed further, significant medical treatment on his lumbar spine. He claimed it was industrial due, in part, to the 2003 industrial accident. The insurance defense doctor opined that the 2003 industrial accident played only a minor role in causing the need for lumbar treatment after the assault at the party in 2007.

Rule: If the industrial accident is a "contributing cause" of a later, non-industrial injury, then the later, non-industrial industry is covered by workers' comp. Stated otherwise, "a subsequent injury is compensable if it is … a natural result" of a compensable, prior industrial accident (a.k.a., the *McKean* rule).

Holding: "Proximate cause is used primarily in tort law and involves analysis of foreseeability, negligence and intervening causes. These factors are not present in the statutory workers' compensation system, which excludes consideration of fault." However, the injured employee must establish that the initial (i.e., 2003) workplace injury was *a significant contributing cause* of the subsequent non-workplace injury, not merely a cause or a minor cause.

Importance: Make a timeline of the injured worker's employment, accidents, and relevant medical history. Changes of employment duties can be important elements in a case (i.e., "Two coworkers were out sick so I had to move the all the boxes myself that day.").

6. *Specialty Cabinet v. Montoya* (and *Utah Tech College v. Marchant*), 734 p.2d 437 (Utah 1986)

Cumulative Trauma / Repetitive Use Injuries.

Facts: Many factory workers do repetitive tasks that do not involve great amounts of weight or force, but the repetition hurts them. Mr. Montoya worked in a cabinet shop, and his back began hurting at work. He regularly carried four-foot-by-eight-foot sheets of particle board weighing sixty- to eighty-pounds each. In a companion case, Mr. Marchant was a physical education instructor who taught racquetball. Upon playing all day and all night during a school tournament, he suffered a knee injury and required surgery. Each employer argued Mr. Montoya and Mr. Marchant did not suffer a "time-definite, identifiable, and unusual occurrence," and thus there was no compensable industrial accident.

Rule: A compensable accident need not be a moment-in-time event but may occur over a period hours, weeks, or even months.

Holding: A compensable accident includes "the possibility that due to exertion, stress or other repetitive cause, a climax might be reached in such manner as to properly fall within the coverage of workers' compensation."

Importance: Other Cumulative Trauma cases include:

- *Stouffer Foods v Industrial Comm'n* (Curtis Green), 801 P.2d 179 (Utah Ct. App. 1990), where Mr. Green used high-pressure hoses which required him to apply constant pressure with his hands. After a few days, he had tingling in his hands and was diagnosed with carpal tunnel syndrome. Compensable.

- *Fastenal v. Labor Comm'n*, 2020 UT App 53, 463 P.3d 90 – Repetitive clutching a semi truck over a period of fifteen months constituted a cumulative trauma as expert

testimony showed the pressure of clutching was more than that when clutching consumer vehicles and the worker drove eleven hours per day, and often pressed the clutch at a somewhat "awkward angle."

- *Miera v. Industrial Comm'n*, 728 P.2d 1023 (Utah 1986), in which our supreme court held that jumping into an eight-foot hole from a four-foot platform at thirty-minute intervals was an unusual activity that satisfied the heightened legal cause standard. This was a compensable cumulative trauma case.

Note: In Cumulative Trauma cases, the best practice is to get a medical opinion stating when the exposure or injurious repetition began and ended, e.g., 9/14/2019 through 12/21/2019, along with the diagnosis and opinion of medical causation.

7. *Gourdin v. SCERA*, 845 P.2d 242 (Utah 1992)

Whether a Worker is an Employee.

Intro: "Employees" are covered by workers' compensation. It is very tempting for employers to label their workers "independent contractors" – or even "volunteers" in some cases – and pay them with an IRS Form 1099 rather than a Form W-2. *See Barton v. Bryce Canyon Acad.*, Utah Labor Comm'n Case No. 11-0864. The *Gourdin* case provides the elements or factors for determining whether a worker is an employee and thus bound by the "exclusive remedy" of workers' compensation, or whether the worker is an independent contractor (or volunteer) and able to sue in tort in district court.

Facts: Mr. Gourdin, who worked at a theater and recreation facility named SCERA, sometimes had his seven-year old son come help him at work. The boy got hurt, and the Utah Supreme Court had to decide whether the boy was an "employee" who was limited to workers' compensation benefits or a true volunteer who could sue for negligence in district court.

Rule: The Utah Supreme Court provided a list of factors, such as compensation, direction and control, intent, and business context, borrowed from case law distinguishing between employees and independent contractors. All factors need not be present (or point to the same conclusion).

Holding: "No single factor is completely controlling." *Id.* at 244. Four years later, in the *Glover* case, the court enunciated the "right to control" test and provided more-specific factors as follows: (1) whatever covenants or agreements exist concerning the right of direction and control over the worker; (2) the right to hire and fire; (3) the method of payment (i.e., wages versus payment for a completed job or project); (4) the furnishing of equipment to the worker; (5) the intent of the parties; (6) the business of the employer; (7) compensation; and (8) direction and control. *Glover v. Boy Scouts*, 923 P.2d 1383 (Utah 1996).

Importance: Gather information and documents relevant to the *Gourdin* and *Glover* factors. Find out about the level of control and whether the worker signed any nondisclosure agreements or non-compete agreements. Pay stubs, policy memos, emails, text messages, on-boarding documentation, and training documentation can all provide important evidence.

8. *Jex v. Precision Excavating*, 2013 UT 40, 306 P.3d 799

Going and Coming Rule.

Facts: Mr. Jex used his personal vehicle to drive to a job site, do occasional errands for his boss, and transport a coworker at his boss's request. One evening, Mr. Jex was giving a coworker a ride home from work – driving down I-15 – when a wheel of his personal pickup truck came off, causing the truck to roll. Mr. Jex was injured and made a workers' comp claim.

Rule: "As a general rule, injuries sustained by an employee while traveling to and from the place of employment do not arise out of and in the course of employment and are, therefore, not covered by workers' compensation." *VanLeeuwen v. Industrial Comm'n*, 901 P.2d 281, 284 (Utah Ct. App. 1995). This is the going-and-coming rule. There are some situations, however, where a claim is compensable due to a work connection while traveling:

- The *instrumentality of business rule* allows a claim "where the employer requires the employee to use a vehicle as an instrumentality of the business." *Id.* (internal quotation marks omitted). Similarly, the going-and-coming rule "does not apply when the employee is already at work, and the travel which gives rise to the accident is an integral part of the work itself." *Aqua Massage LLC v Labor Comm'n and Higgins*, 2005 UT App 143.

- The *employer's-premises rule* allows a claim where the accident occurs on the employer's premises, even if the employee has not yet arrived at his work site or has already left the work site. For example, a worker who

slips and falls in the employer's parking lot on her way to work is not barred.

- The *special-hazards rule* allows a claim where (1) there is a close association of the access way with the employer's premises, usually meaning that it must be the only route to the workplace; (2) there must be a special hazard associated with this route; (3) the employee must be exposed to the special hazard because of his use of the route; and (4) the special hazard must be the proximate cause of the accident.

Holding: Where a worker is traveling in a rideshare for personal convenience and outside of the employer's control and not for the significant benefit of the employer, then the accident is not work related and not covered by workers' comp.

Importance: Accidents involving coming or going are often fact intensive.

9. *Employers' Reinsurance Fund and Sunnyside Coal Co. v. Labor Commission and Henningson*, 2012 UT 76, 289 P.3d 572

Continuing Jurisdiction.

Facts: In 1993, Mr. Henningson injured his back at work, and he timely notified his employer. The workers' comp carrier paid benefits from 1993 until 1995. In 1995, Mr. Henningson's application for Social Security Disability Insurance was approved. In 1997, Mr. Henningson's doctor declared him permanently and totally disabled (PTD). After the accident in 1993, Mr. Henningson never worked again nor sought employment. Then, in 2007, he filed a workers' comp claim for PTD.

Rule: The labor commission acquired original jurisdiction because Mr. Henningson properly notified the employer and the appropriate reports were made to the Labor Commission. Utah Code Section 35-1-78 (now codified at Utah Code Ann. § 34A-2-420) provided continuing jurisdiction to modify a prior workers' comp award "to ensure adequate compensation" and "to avoid overcompensation."

Holding: The Labor Commission "may exercise its continuing jurisdiction where a claimant's medical condition deviates from its anticipated course" or when there has been "a change in condition or new development." Note: Due to Mr. Henningson's unexcusable delay in filing his PTD claim, the court in equity ruled that PTD benefits were payable beginning in 2007 rather than 1997.

Importance: Many injured workers get hurt, get some medical care and workers' compensation benefits, and continue working. But their industrial injury lingers on and may degrade over time, leading to further temporary disability (lost time) and medical costs. In these situations, Utah Code Section 34A-2-420 and the *Henningson* case become important. If a worker got hurt in 1987, for example, and has complications in 2020, then the Labor Commission may hear his claim for recent developments, even after thirty-three years, because of the Labor Commission's continuing jurisdiction.

10. *Rodriguez v. Orem City*, Utah Labor Commission Case No. 06-1035

Do Not Quit.

Facts: Mr. Rodriguez was injured at work and placed on light duty. After a few months, he resigned his job because he wanted to get retirement income and he was afraid he would re-injure himself. The issue was whether he should receive workers' comp temporary total disability benefits.

Rule: If an injured worker is released to light duty during the healing period, the employer may choose to provide such work; however, if the worker rejects suitable light duty, he is no longer entitled to temporary total disability (TTD) compensation.

Holding: Where an injured worker resigns from light duty to get retirement income, TTD benefits are not due.

Importance: Injured workers should not quit their job else they risk forfeiting TTD benefits. If light duty tasks are too difficult, the worker should return to his doctor and obtain updated work restrictions and then see if the employment can accommodate. Some employers fire their injured employees, but generally the employee should not quit unless he has solid evidence of constructive termination or unavailability of appropriate light duty.

Conclusion

Being aware of these issues can help attorneys spot issues and properly advise injured workers to consult with an experienced workers' comp attorney. Most, if not all, of us workers' comp lawyers offer free case reviews. Many of us are members of the Utah Association for Justice where we consult with each other about novel or developing issues in Utah workers' compensation law.

Retaining Ethics in Our Retainer Agreements

by Beth Kennedy

Although retainer agreements might be the documents we prepare most frequently in our practices, many lawyers do not give them much thought. But they are more than the trigger that starts a representation. A good retainer agreement ensures that the client knows what they can expect from you – and often equally important, what they shouldn't expect from you. And in preventing this confusion, a good agreement can help to prevent an OPC complaint or a malpractice action.

It's therefore worth the time to make sure our agreements hit all the necessary points. But where do we look for guidance? The rules of professional conduct don't require anything in particular to be included in a retainer agreement. In fact, they don't even require our agreements to be in writing (although they do require any contingent fee arrangements to be in writing). But the rules *do* govern our relationships with our clients. The retainer agreement is a great place to set the expectations for those relationships and to make sure they comply with the rules.

Here are some tips to consider for your next retainer agreement.

Define the client.

When a single person hires you to represent them in a case, there's no confusion about who you represent. But what if it's a CEO hiring you to represent a company? What if it's an insurance company hiring you to represent its insured? Or if the client's friend is footing the bill? The person signing your contract isn't always the person whose interests you are being hired to protect, and those two sets of interests might even diverge at some point.

The Rules touch on some of this. The Rules are clear that when you represent an organization or a governmental entity, you represent the organization, not any particular person within it. Utah R. Pro. Conduct 1.13(a), (h). And the Rules require us to clean up any confusion about this if there's ever a conflict between the organization's interest and the interest of a constituent we're dealing with. *Id.* R. 1.13(f).

Your retainer agreement should therefore expressly identify who you represent (and maybe even who you don't). An agreement that clearly defines the client can help to prevent confusion. It will let everyone know whose side you'll be on if there are ever conflicting interests and will protect you if someone later claims that they thought you were their lawyer.

Clarify the payment guarantor's role.

Similar situations arise when the client is not the one who is paying you. For example, it's not uncommon to have a family member foot the bill. But does that buy them the right to know what's going on in the case?

The answer is no. Rule 1.6 forbids us from revealing any information "relating to the representation of a client." *Id.* 1.6(a). So, if your client wants you to be able to talk to someone – their mom, their spouse – about their case, they'll have to give informed consent. *Id.*

The retainer agreement is a great place to handle this. If the client wants you to be able to share the information with someone, you can include a paragraph describing their rights and the risks involved. And you can say that, by signing the agreement, they're providing their consent to share the information with a particular person. Just be sure to include enough information to satisfy the definition of "informed consent" in Rule 1.0(f). That rule defines informed consent as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

BETH E. KENNEDY is Ethics Counsel at the Utah State Bar.

While you're at it, make sure the client also is giving informed consent for the payment guarantor to pay you. *Id.* R. 1.8(f)(1). It's imperative that the client understands the situation and agrees to it. This one doesn't necessarily need to be in writing, but if you know it's the plan, why not include it in the retainer agreement?

Limit the beneficiary.

It's also a good idea to make it clear that your work is for the benefit of *only* the client (this is another reason to define the client). Doing so will reduce the possibility that someone else can later claim to be a third-party beneficiary of your contract. This is important because your advice to a client might not be right for another person, even if they're in similar situations. Get rid of the possibility that someone else can claim you owe them a duty.

Define the scope.

It's also important to identify the work you're agreeing to perform. When you're handling the entire case, defining the scope of your representation is easy. But many of us are hired to handle just a part of the case – maybe only an initial demand letter, the district court proceedings, a single motion, or only the appeal. When that happens, make sure your agreement is clear about what you're handling – and what you're not.

This is important for a couple reasons. First, the rules require us to get informed consent any time we are limiting the scope of our representation. *Id.* R. 1.2(c). While the consent doesn't necessarily need to be in writing, the retainer agreement is an easy place to do this. And second, memories sometimes change over time. A written clarification protects us if a client later mistakenly believes that we promised to do something more than we signed up for.

Keep in mind, though, that it's not always up to us. Under Rule 74, we need permission from the court to withdraw if there's a motion pending or if there's a hearing or trial scheduled. Utah R. Civ. P. 74(a). So be careful. If your part of the case is over, but you're the only counsel of record, you could be left holding the bag.

Explain your fees.

Except for contingent fee arrangements, there's no requirement that we put our fee arrangements in writing – the Rules just say it's "preferabl[e]." Utah R. Pro. Conduct 1.5(b). But we can save a lot of time, headaches, and possibly even litigation if we do. Depending on the situation, there are a few things to consider making clear upfront.

First, what costs will you charge for? Printing? Copies? Staff time? Legal research? Travel? You should be clear in your agreement about any costs that will be passed on to the client. This will reduce the possibility of a misunderstanding. *Id.* R. 1.5 cmt. 2.

Second, how will you charge your fees? Hourly fees are the simplest to describe. But many cases stretch across years. Will your rates ever increase? If that's a possibility, say so.

Flat fees also are common. But resist any temptation to call the flat fee "nonrefundable." As our Ethics Advisory Committee has put it, "there is no such thing as a nonrefundable fee." Utah Ethics Op. 12-02 (2012). Instead, we need to put the flat fee in the client trust account and withdraw it only when we've earned it. Utah R. Pro. Conduct 1.15(c). If there's any part of the fee that we didn't earn, that part of the fee is unreasonable, and must be returned to the client. Why not explain all of this in the agreement and make our obligations crystal clear?

Contingent fees are a client favorite. In these agreements, be sure to clarify the percentage you'll receive so there's no dispute about it later. Also clarify what circumstances trigger your recovery. Is it only a judgment in their favor? What about a settlement? Leave no room for confusion. And unlike other fee

structures, these must be in writing. *Id.* R. 1.5(c).

And third, will you be sharing the fees with anyone? Utah is unique when it comes to fee sharing. In 2020, in connection with the sandbox, our Rules were amended to get rid of the prohibition on fee sharing with non-lawyers. (This used to be in Rule 1.5(e).) Now, Rule 5.4 expressly allows it. The implication is that lawyers also can share fees with each other, as long as the total fee remains reasonable. The Rules committee is currently considering amendments that could make this implication express. Either way, if you're sharing fees, you need to provide written notice to the client. *Id.* R. 5.4(c). The retainer agreement is another easy place to do that.

Explain the retainer.

Speaking of fees, it's a good idea to explain how the retainer is different. Clients who don't regularly hire lawyers sometimes don't realize that the money they give us upfront will be held in trust and isn't supposed to be applied to their monthly bills. Why not make this clear in the agreement?

Another thing to keep in mind (and to consider including) is that, like flat fees, retainers can't be nonrefundable. Any unearned portion must be returned to the client at the end of the representation. *Id.* R. 1.5 cmt. 4.

Warn about electronic communications.

The Rules are clear that we have a duty to communicate with our clients. *Id.* R. 1.4. They're also clear that we need to take precautions to protect those communications to prevent inadvertent or unauthorized disclosure. *Id.* R. 1.6(c). So what does this mean for us, particularly in a world where we communicate mostly by email, but where cybersecurity is becoming more of a risk and less of a guarantee?

It means we need to be upfront with our clients and warn them about the risks. We, of course, need to make reasonable efforts to prevent unauthorized access to our emails. ABA Formal Ethics Op. 477R (2017). But we can't control everything. Clients send and receive emails on their work computers that might be monitored by their employers. They use their laptops and smartphones on unsecure networks. And who knows what else they're doing.

Because of this, where there's still a significant risk that someone else could gain access to our communications – whether on our end or the client's end – we need to warn our clients. ABA Formal Ethics Op. 11-459 (2011). The retainer agreement is a convenient place to provide this warning.

What about unencrypted email? In 2000, our Ethics Advisory Committee opined that lawyers could use unencrypted email to communicate with clients. Utah Ethics Op. 00-01 (2000). The committee suggested that we just tell our clients if we were doing that. *Id.* Twenty-three years later, though, it's not clear that using unencrypted email satisfies our obligation to make reasonable efforts to protect our communications (it probably doesn't). But until we have authority on that point, if you're going to use unencrypted email (please don't), at least make sure you've notified your clients. *Id.* Your retainer agreement is a good place to do this.

Retain the right to be nice.

We all strive to comply with the Utah Standards of Professionalism and Civility. But we've all had clients who want us to take a scorched earth approach – they want us to refuse extensions (or any stipulations, for that matter), and to insert all kinds of colorful adjectives and adverbs into our writing.

They don't get to do that. While clients get to decide the objectives, they don't get the final word on the means. Utah R. Pro. Conduct 1.2(a). Admittedly, the distinction between those two things is not always clear. But why not try to prevent these battles before they begin? Consider having the client agree – in the retainer agreement – that you're going to comply with the standards.

Don't limit your liability for malpractice.

Most of these tips are optional. This one's not. The Rules are clear that a client cannot agree to limit our liability for malpractice (unless they're independently represented). *Id.* R. 1.8(h). This kind of clause unfortunately shows up in retainer agreements. Make sure it's not in yours.

Conclusion

From this perspective, retainer agreements can seem like a bit of a mine field, with provisions (or their absence) waiting to explode. But we can prevent this risk by putting in the time on the front end.

My advice? Review your standard retainer agreement to make sure it includes all the points discussed here. If you handle different fee structures or are sometimes hired by people other than the client you'll represent, consider preparing different forms for each situation. Yes, it takes time. But the more careful we are, the more likely it is that we can focus our energy on our practice instead of disagreements with clients.

In Memory of Joseph A. Walkowski

September 30, 1949 - June 13, 2023

It is with profound sadness that TraskBritt announces the passing, on Tuesday, June 13, 2023, of Joe Walkowski, our esteemed partner and long-time President of the firm. Joe was not only an exceptional lawyer, long recognized as one of the best in his field anywhere in the world, he was also an extraordinary mentor and true friend to lawyers, clients, and staff alike, both inside and outside the firm.

Joe dedicated a significant portion of his life to our firm, demonstrating an unwavering commitment to our shared mission and values. Indeed, his contributions have been instrumental in shaping TraskBritt's identity and success over much of its 50-year history. As we mourn the loss of Joe, we also celebrate his life and the legacy he leaves behind. He will continue to inspire us as we strive to uphold the high standards he set in his professional and personal life.

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Disclosure Dangers – How to Lose Your Litigation Matter in One Step

by Christopher Sanders and Austin Westerberg

Litigation is changing in Utah. There is a growing emphasis on fortified and detailed disclosures pursuant to Rules 26(a)(1) (Initial Disclosures) and 26(a)(4) (Expert Disclosures) of the Utah Rules of Civil Procedure. Per Rule 26, Initial Disclosures should contain, at minimum: (a) a list of witnesses and individuals with discoverable information regarding claims or defenses and a corresponding description, (b) documentation to support a party's case-in-chief, (c) a computation of damages sought, if any, and (d) information regarding insurance or indemnification agreements. The presumptive remedy for failure to comply with these rules, absent good cause, is exclusion. *See* Utah R. Civ. P. 26(d)(4).

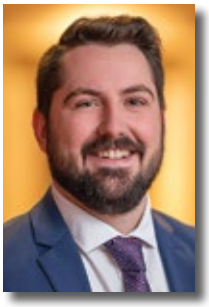
Initial Disclosures

Historically, some litigators in Utah have done a poor job of attempting to provide the required "computation" of damages, using language such as: "not yet calculated"; "still ascertaining the full extent of damages"; "requires expert testimony"; "in an amount not less than [X]"; or worst of all, no disclosure whatsoever for damages. Such a "computation" of damages, standing alone, is no longer acceptable in Utah courts. The Rule is clear; a party claiming damages must provide "a *computation* of any damages claimed and a copy of all discoverable *documents* or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered[.]" Utah R. Civ. P. 26(a)(1)(C) (emphases added).

While not the first Utah appellate opinion to reiterate the importance of sufficient disclosures, this growing emphasis is readily apparent in *Keystone Ins. Agency, LLC v. Inside Ins., LLC*, 2019 UT 20, 445 P.3d 434. There, the Utah Supreme Court considered (among other issues) whether to affirm exclusion of evidence of damages for failure to provide an adequate computation of damages in Initial Disclosures.[1] The plaintiff argued, among other points, in *Keystone* that its initial disclosure obligations were satisfied because a spreadsheet was produced from which at least part of the damages sought could arguably be calculated by extrapolation. *See id.* ¶ 22. The court rejected this argument. *Keystone* distinguished between a spreadsheet that included figures that might aid in computing part of the plaintiff's damages and written disclosures that did not disclose the *actual number* of damages. The court held that while the spreadsheet at issue might aid in computing damages, it did not constitute a "*dispositive and clear recitation of what damages Keystone was after*," leaving the defendant to "guesswork" to determine what damages were being sought. *Id.* ¶ 23; *see also id.* ¶ 23 n.10 ("Possessing all of a company's financial data does not obligate defendants to divine what matters to a plaintiff.").

In Vanlaningham v. Ryan Hart & Hart Dental LLC, 2021 UT App 95, 498 P.3d 27, the Utah Court of Appeals considered a

CHRISTOPHER SANDERS is a Litigation Associate at Kirton McConkie where he focuses his practice in commercial litigation. He works in Lehi, Utah.



AUSTIN WESTERBERG is a Litigation Associate at Kirton McConkie in Salt Lake City. His practice includes commercial litigation and medical malpractice defense.

similar question: whether to affirm exclusion of evidence of damages at trial for failure to provide a computation of damages.[2] "The court acknowledged that Vanlaningham disclosed 'a specific sum' of damages, but it deemed that disclosure inadequate because Vanlaningham did not provide 'a mathematical computation' or the 'methodology' for her damages disclosure." *Id.* ¶ 12. The court noted the "fact of damages *and the method for calculating the amount of damages* must be apparent in initial disclosures." *Id.* ¶ 14 (citation omitted). The court further stated that "it is incumbent on plaintiffs to disclose the damages information they have and, more crucially, their method and computation for damages." *Id.* ¶ 14 (cleaned up). The court affirmed exclusion of evidence of Vanlaningham's damages. *See id.* ¶ 23.

Once again in 2022, the Utah Court of Appeals was presented with a similar question in *Butler v. Mediaport Ent. Inc.*, 2022 UT App 37, 508 P.3d 619.[3] The plaintiff in *Butler* provided an "approximate" damages figure of $900,000. *Id.* ¶ 25. The court, applying the same principles from *Keystone* and *Vanlaningham*, held that although the disclosure

> included an estimated total figure, and thus indicated that Butler would be claiming damages, those disclosures lumped all of Butler's damages claims together and made no effort to either categorize Butler's damages claims or offer any method by which any of those damages might be computed. Such a disclosure falls well short of the mark set out in rule 26, and the district court did not err in so concluding.

Id. ¶ 30.

Attorneys in Utah have seen success in challenging disclosures – particularly "computations" of damages therein. In *Daybreak Townhome 1 Owners' Ass'n, Inc. v. Hamlet Homes Corp., et al.*, Case No. 150901577 (Utah 3rd Jud. Dist. Ct.), the court excluded evidence of damages. The computation at issue stated, in part:

> '[D]amages to be calculated by multiplying the number of townhome units in the Association requiring repairs by the average cost of repair for the units requiring repairs.… There are more than 390 townhome units in the Association, and the Association anticipates that all or nearly all of those units will require some form of repair.'

See Daybreak Townhome 1 Owners' Ass'n, Inc. v. Hamlet Homes Corp., et al., Case No. 150901577, Final Ruling and Order on Holmes' Motion to Exclude Evidence of Damages, Docket No. 3962, at 3 (Utah Third Jud. Dist. Ct. Feb. 3, 2022). The plaintiff in *Daybreak* then provided the following methodology: "((No. of Units Requiring Repair) x (Average Cost of Repair)) = Total Damages Claimed." *Id.* at 4. The district court described such a computation as "a purported formula for computing *eventual* damages." *Id.* at 8. The district court continued: "Without any meaningful information … the Association's initial and supplemental disclosures provided Holmes with no helpful information regarding the computation of damages prior to the close of fact discovery, falling far short of its obligations under Rule 26(a)(1)(C)." *Id.* at 9. The district court granted a motion in limine thereby excluding evidence of damages. *See id.* Unable to satisfy a critical element of plaintiff's claims (damages), the district court granted summary judgment in favor of defendants.[4]

> *"By providing incomplete disclosures, a party runs the risk of having the expert testimony excluded in its entirety."*

In *Alpine Homes, LLC v. AF* 65 Partners LLC, Case No. 210300035 (Utah Fourth Jud. Dist. Ct.), Kirton McConkie litigators prevailed on such an argument, highlighting the importance of disclosing a computation of damages at the outset of a matter, and especially not after the close of fact discovery. There, the plaintiff provided a "vague and general idea as to its approach to calculating damages." *See Alpine Homes, LLC v. AF* 65 Partners LLC, Case No. 210300035, Order Granting AF 65 Partners LLC's Motion in Limine to Exclude Evidence of Damages at Trial, Docket No. 233, at 8 (Utah Fourth Jud. Dist. Ct. July 19, 2023)). In a twelve-page order, the Fourth Judicial District Court found that "Alpine did not provide any real analysis of its damages until the expert report was produced on December 12, 2022 … [and] failed to provide the required disclosures under Rule 26 and instead waited until the close of expert discovery to disclose for the first time 6 separate damage scenarios." *Id.* at 10–11. The district court held such a computation of damages to be "inadequate and untimely," excluding the same. *Id.* at 11.

Expert Disclosures

This need for carefully drafted disclosures applies equally to expert disclosures. Rule 26(a)(4) makes clear that a party's expert disclosures must provide:

> (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years; (ii) a brief summary of the opinions to which the witness is expected to testify; (iii) the facts, data, and other information specific to the case that will be relied upon by the witness in forming those opinions; and (iv) the compensation to be paid for the witness's study and testimony.

Requirements for Rule 26(a)(4)(A)(i), (iii), and (iv) are fairly straightforward. However, the requirement for Rule 26(a)(4)(A)(ii) is less clear, as Rule 26 does not specifically state what a "brief summary" entails. The advisory committee note for disclosure requirements and timing provides additional clarification on this point:

> The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1) (e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at

> trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought.

See Utah R. Civ. P. 26, Advisory Committee Notes.

Utah case law provides some interpretation as to what is required by expert disclosures, but the exact level of detail required in the "brief summary of the opinions" is not entirely clear. In *RJW Media Inc. v. Health*, 2017 UT App 34, 392 P.3d 956, the Utah Court of Appeals explained that Rule 26's summary requirement "is not merely a matter of form. Disclosure of specific facts and opinions is required so that parties can make better informed choices about the discovery they want to undertake or, just as important, what discovery they want to forgo." *Id.* ¶ 25. The court further explained that "[m]ore complete disclosures serve the beneficial purpose of sometimes giving the opposing party the confidence to not engage in further discovery. But this is only true if the potential for surprise is reduced by at least minimum compliance with the rule 26 disclosure requirements." *Id.*

By providing incomplete disclosures, a party runs the risk of having the expert testimony excluded in its entirety. *See* Utah R. Civ. P. 26(d)(4). To avoid exclusion of undisclosed testimony, a party must demonstrate that the failure to properly disclose expert testimony was harmless or that good cause exists for the failure. *Id.* If an expert provides an opinion at deposition that was not disclosed within the expert disclosures, such an opinion may be excluded at trial. Based on recent experiences of Kirton McConkie litigators, district courts in Utah have been willing to enforce the consequences of Rule 26(d)(4) when disclosures are inadequate, including exclusion of expert testimony. In some circumstances, courts may grant an opportunity to remedy the lack of disclosure via a timely supplement or grant opportunities for additional deposition time if certain opinions were not timely disclosed. However, it is not unusual for a district court in Utah to exclude entire opinions or categories of expert testimony if they are not included in the "brief summary" of the expert disclosures. To avoid such consequence, attorneys would be wise to closely review their expert disclosures to ensure that all essential testimony is included in an expert disclosure and avoid relying on broad summaries of an expert's expected opinions.

Litigators in Utah would do well to review each of their respective matters to ensure (1) they have sufficiently disclosed their clients' claim(s) for damages or summaries of expected testimony; and (2) analyze whether the opposing party's disclosure(s) adequately complies with *Keystone* and Rule 26, and if not, consider a motion in limine to exclude evidence of damages for failure to comply with Rule 26(a)(1)(C) or to exclude witness testimony altogether.

1. The following initial disclosure statement was at issue in *Keystone*: "1. Defendant claims damages for past and future pecuniary losses resulting from Defendants [sic] unlawful actions. 2. Attorneys' fees and costs which have been and will be incurred in this matter. 3. Compensatory damages, which have yet to be calculated."
2. The following initial disclosure statement was at issue in *Vanlaningham*: "Under the heading 'Computation of Damages,' she claimed $390,000 in 'general damages for pain and suffering' and $130,000 in special damages, which 'include[d] costs for treatment and future treatment.' She also advised that she 'ha[d] not fully computed [her] damages and w[ould] supplement the computation of damages when completed.'" *Keystone*, 2019 UT App 20, ¶ 5 n. 1. *Vanlaningham*, 2021 UT App. 95, ¶ 3.
3. The following initial disclosure statement was at issue in *Butler*: The plaintiff noted that, while he could not provide "an 'exact calculation of damages,'" his damages would "approximate $900,000." *Butler*, 2022 UT App 37, ¶ 25.
4. This ruling has been appealed.

The Utah Minority Bar Association

is pleased to announce its 2023–2024 Executive Board!

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Founded in 1991, the Utah Minority Bar Association (UMBA) is an organization of Utah lawyers committed to promoting diversity and addressing issues that impact racial and ethnic minorities, especially within the legal community. UMBA membership is open to all members in good standing of the Utah State Bar who believe in the mission and purpose of our association. Our new board is committed to continuing and growing UMBA's legacy in Utah.

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Understanding Governmental Benefit Programs in Utah to Assist People with Special Needs

by Kathie Brown Roberts and Allison Barger

In our previous article in the July/August 2023 *Utah Bar Journal*, entitled "Drafting a Special Needs Trust in Utah, A Primer," we discussed both first-party and third-party special needs trusts and other planning tools available to preserve eligibility for means-based benefits for individuals with disabilities. This article focuses on the characteristics of common benefits available to individuals with disabilities from both the Social Security Administration and Utah Department of Health and Human Services, the administrator of both Medicaid and the Division of Services for People with Disabilities (DSPD). This article will also address appropriations in the 2023 legislative session for respite care and caregiver compensation, which are currently available to caregivers of individuals with disabilities in Utah, and the need for additional funding for the state Home & Communited-Based Services (HCBS) Waiver programs.

As attorneys, understanding which benefits a person is receiving (or will likely be receiving in the future) is one of first steps in planning for them. Receipt of a settlement or inheritance by individuals with disabilities who are currently receiving means-based benefits may wreak havoc on their qualification for such benefits. Also, understanding the programs available in Utah gives hope and support to those people and families who need it most. This article is organized to provide threshold questions for planning attorneys and an explanation of how those questions impact planning considerations.

In special needs planning, like other estate planning, knowing the questions to ask makes all the difference.

The following queries are threshold questions when planning for people with disabilities:

Are you planning for an individual or contingent beneficiary who is "disabled" or likely to need public benefits?

All of the benefits discussed in this article have "disability" as a condition precedent to receipt of the benefit. An estate planner should consider implementing some of the tools described in our previous article if there are beneficiaries of an estate plan who are disabled or if other contingent beneficiaries of a plan are disabled (or likely to need public benefits in the future). Nobody has a crystal ball when it comes to knowledge of future health. For that reason, it is also prudent to include contingent special needs provisions which toggle-on, in case any beneficiary becomes disabled in the future.

The definition of "disabled" according to the Social Security Administration found in 42 U.S.C. § 1382c(a)(3)(A) is when an individual is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected … to last for a continuous period of not less than twelve months." Even if there has not been a formal determination of disability by the Social Security

KATHIE BROWN ROBERTS is an elder law attorney certified by the National Elder Law Foundation. She is the only Utah member of the Special Needs Alliance, an invitation-only national alliance of Special Needs Practitioners. She practices estate planning, special needs planning, and adult guardianships.

ALLISON BARGER is an associate attorney at Kathie Brown Roberts, PC, in Sandy, Utah, and practices in the areas of estate planning, special needs planning, adult guardianship, and estate administration.

Administration, in Utah, disability may be independently established by the Medical Review Board (MRB) in cases where there has not been an application for Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) or where there has been a denial by the Social Security Administration for reasons other than "disability." According to Marcel Larsen-Jones, Policy Coordinator at the Utah Department of Health & Human Services, the MRB in Utah follows the same criteria as the Social Security Administration to make the disability determination. The procedure to obtain an MRB determination of disability in Utah can be found in the Utah Medicaid Policy Manual. *See* Utah Medicaid Policy Manual § 303-3, http://bepmanuals.health.utah.gov/medicaidpolicy/DOHMedicaid.htm.

Which benefits is the individual currently receiving or likely to need?

Is the individual with a disability receiving SSDI?

The SSDI is an example of an "entitlement benefit," which provides for payment of disability benefits to disabled individuals under Title II of the Social Security Act (Act) 42 U.S.C. Ch. 7. SSDI is an "entitlement benefit" because an individual becomes eligible to receive the benefit if "insured" under the Act by virtue of their work record. In order to qualify for SSDI, a disabled individual must have worked at least forty quarters, with twenty quarters earned in the ten years immediately preceding an application. *See* https://www.ssa.gov/benefits/disability/qualify.html#anchor3. Each element of this definition is strictly construed by the Social Security Administration (SSA). For example, the element of "substantial gainful activity" (SGA) cannot be met if the disabled individual earns more than an average of $1,470.00 per month in 2023 (SGA Cap). *Id*. If an individual qualifies for SSDI, the individual automatically becomes eligible for Medicare parts A and B in the twenty-fifth month of eligibility. *See Medicare Information*, Social Security Administration, https://www.ssa.gov/disabilityresearch/wi/medicare.htm#work (last visited Aug. 14, 2023).

Because an individual with a disability is entitled to receive SSDI based on his/her work record, receipt of inheritance or a settlement will have no bearing on the continuation of the benefit. SSDI could, however, be jeopardized if the individual is working and the average monthly earnings of the individual exceed the SGA amount of $1,470.00/month. Even if the disabled individual is receiving SSDI, consideration should be given to the odds that the individual will need long-term care in the future and how will that care be funded. If Medicaid long-term care looks like a reality, should special needs planning be incorporated into the disabled individual's plan?

Is the individual with a disability entitled to Social Security Derivative Benefits?

Social Security derivative benefits are also entitlement benefits derived from a worker's work record and based on a worker's eligibility by working at least forty quarters and paying into the Social Security Trust Fund. Examples of derivative benefits include benefits available to a surviving disabled spouse, an adult disabled child, a disabled veteran (benefits in addition to compensation benefits through Veterans Affairs), blind or low vision individuals, and disabled children. Generally, such individuals are entitled to a portion of the worker/wage earner's primary insurance amount. *See How You Qualify: Disability Benefits*, Social Security Administration, https://www.ssa.gov/benefits/disability/qualify.html#anchor7 (last visited Aug. 14, 2023). As with SSDI, these benefits are not affected by inheritance or settlement but would be affected by exceeding the SGA cap.

Is the individual with a disability receiving Supplemental Security Income (SSI)?

In contrast to SSDI or benefits derivative from SSDI, SSI is a means-based benefit and not an entitlement benefit. Title XVI of the Social Security Act provides SSI payments to aged, blind, and disabled individuals (including children under age eighteen) who have limited income and resources. *See* https://www.ssa.gov/ssi/?tl=0. Individuals with disabilities receiving SSI will likely lose all or part of their benefits if an inheritance or settlement is not protected by a special needs trust or other planning tool.

In 2023, the maximum amount of SSI that an individual can receive is $914.00 monthly (the Federal Benefit Rate). *See* https://www.ssa.gov/oact/cola/SSI.html. Additionally, an individual's assets may not exceed $2,000.00 ($3,000.00 per couple). *See* https://www.ssa.gov/ssi/spotlights/spot-resources.htm. Slightly different rules apply if the SSI recipient has earned income. *See* https://www.ssa.gov/ssi/?tl=0. The Social Security Administration will reduce the SSI dollar for dollar if the recipient receives gifts of income directly. *See* POMS SI 00830.520.

If food or shelter is paid *indirectly* on behalf of the SSI recipient (such rent paid by a third party to an SSI recipient's landlord), the federal benefit rate will be reduced by 1/3 plus $20.00, not dollar for dollar. *See* POMS SI 00835.200. The Social Security Administration refers to such indirect gifts of as "in-kind support and maintenance" (ISM). POMS SI 00835.001. Regardless of the actual value of the food or shelter paid on behalf of the SSI recipient, 1/3 plus $20.00 of the Federal Benefit Rate is the Presumed Maximum Value (PMV) that SSA will deduct from the

SSI recipient's benefits. POMS SI 00835.300. The SSI recipient can rebut the amount of reduction, if he/she has proof that food or shelter gifted is less that the PMV. Id. If the recipient lives in some one else's home and receives both food and shelter, the value of one-third reduction (VTR) applies, not PMV. *See* POMS SI 00835.200. VTR is not rebuttable. *See* POMS SI 00835.320.

A proposed rule introducted by the Social Security Administration on Febuary 15, 2023, proposes to eliminate food from the calculation of ISM. *See* https://www.federalregister.gov/documents/2023/02/15/2023-02731/omitting-food-from-in-kind-support-and-maintenance-calculations.

Is the individual with a disability receiving Medicare?

Medicare is an entitlement program that is available to individuals age sixty-five or older and to individuals who have been receiving Social Security Disability for at least two years. It is primarily a method of health care insurance. It does not cover nursing home stays unless it is a short-term stay related to rehabilitation after discharge from a hospital. Like other entitlement benefits, Medicare is not affected by receipt of inheritance or a settlement.

Is the individual with a disability receiving Medicaid Benefits or an HCBS/1915(c) Waiver?

Overview of Medicaid Benefits

Medicaid is a means-based program that provides a variety of healthcare services to those who qualify. Receipt of the Medicaid long-term care benefit can be critically impacted by either the outright receipt of inheritance or settlement proceeds. Moreover, after the death of the Medicaid recipient, the Utah Office of Recovery Services "may recover from the [Medicaid] recipient's estate and any trust, in which the recipient is the grantor and a beneficiary, medical assistance correctly provided for the benefit of the recipient when the recipient was fifty-five years old or older." Utah Code Ann. § 26B-3-1013(1)(a). However, estate recovery is prohibited while the deceased recipient's spouse is still living or if the deceased recipient has a surviving child who is under twenty-one years old or is blind or disabled, as defined in the state plan. *Id.* § 26B-3-1013(1)(b).

As mentioned in our previous article, estate planners should be familiar with the use of a spousal third-party special needs trust arising under the pour-over will of the predeceased spouse, as a possible planning technique to preserve an surviving spouse's eligibility for benefits and avoid estate recovery on certain assets. *See* 42 U.S.C. § 1382b(e)(2). Additionally, certain types of asset protection trusts or techniques such as gifting and/or annuities may similarly be considered to seek eligibility and avoid estate recovery in Utah.

Medicaid, however, administers many programs, each with eligibility requirements that vary depending on the program and, consequently, planning may vary based on the type of program an individual is receiving. When Medicaid is referenced, most people typically think of what is referred to as ABD or Community Medicaid. "ABD" refers to Aged, Blind, or Disabled. This is a method of healthcare insurance and has strict asset and income requirements: $1,215.00 of income and $2,000.00 of assets (for a single individual). *See Utah Medical Programs Summary*, Utah Department of Health, https://medicaid.utah.gov/Documents/pdfs/medicalprograms.pdf (last visited Aug. 6, 2023).

It is important to remember that there are several types of assets that are not countable for purposes of qualifying for Medicaid, such as one vehicle and a home up to certain equity limit (currently $688,000.00). *See* Utah Medicaid Policy Manual § 521, generally. Qualifying for ABD Medicaid often is the gateway to receive services through a variety of waiver programs that provide home and community-based services.

In 2018, Utah opted into a limited Medicaid expansion program. Like ABD Medicaid, Utah's limited Medicaid expansion program is a method of healthcare insurance for people with low incomes. However, unlike ABD Medicaid, there is no asset limit.

Income limits for various family sizes can be found in the Utah Medicaid Policy Manual. https://bepmanuals.health.utah.gov/Medicaidpolicy/Tables/TABLE_VII_-_Income_Limits_for_Medical___Medicare_Cost-Sharing_Programs.htm. Money is treated as income in the month in which it is received, but the month following receipt, it is considered an asset and no longer countable toward eligibility. *See* Utah Medicaid Policy Manual § 413-1. Beneficiaries still have an obligation to report the receipt of the asset within ten days of the date of receipt, but as long as they were unaware of the asset at the time of application for benefits, there will be no penalty against the beneficiary for receipt of the asset. *See* Utah Medicaid Policy Manual §§ 107-4, 815. For example, if a beneficiary who is on Medicaid expansion receives an inheritance of $100,000 on April 10, they must report that receipt to Department of Workforce Services (DWS) within ten days of the date of receiving the inheritance. As long as it is reported, the beneficiary will not experience a disruption in their Medicaid expansion benefits. Failing to report could result in overpayments or other disruption to benefits.

Long-Term Care Medicaid

While Medicare does not provide long-term care benefits, Medicaid does cover long-term care. Long-term care Medicaid covers two types of long-term care venues: skilled nursing facilities (SNFs) and assisted living facilities (ALFs). The asset and income requirements are the same for both; however, care in an ALF is administered through Utah's New Choices Waiver program and has a separate application process and other qualification requirements. *See* Tables II and II-A of the Utah Medicaid Policy Manual.

Not all facilities accept Medicaid or New Choices Waiver. Qualification for Medicaid Long-Term Care is nuanced and many rules apply. For example, qualification for Medicaid long-term care requires a knowledge of countable and exempt assets. Additionally, part of the review process for an application for long-term care Medicaid involves a sixty month look back period. *See* Utah Medicaid Policy Manual 575. DWS will request sixty months of bank statements and information on any asset transfers from the time of application and conduct their own

review of assets to determine whether any transfers for less than fair market value have been made. *See* Utah Medicaid Policy Manual § 575-2. After determining whether an individual's income and assets are within the allowable limits, residents of a nursing facility must pay a cost-of-care contribution, unless they only receive Supplemental Security Income, or their income after allowed deductions, including the personal needs allowance, is zero. *See* Table II-A Utah Medicaid Policy Manual for income and asset limits. The cost-of-care contribution helps pay for the services they receive in the institution and, consequently, reduces the payment the Medicaid agency makes for their care. *See* Utah Medicaid Policy Manual § 463.

Home and Community Based Services (HCBS) Waivers

Section 1915(c) of the Social Security Act, 42 U.S.C. 1396a, authorizes the "waiver" of certain Medicaid statutory requirements so that Medicaid dollars may pay for services in a community setting/outside of an institutional nursing home. The federal Medicaid website summarizes the requirements for state HCBS Waiver programs must:

- Demonstrate that providing waiver services won't cost more than providing these services in an institution.
- Ensure the protection of people's health and welfare.
- Provide adequate and reasonable provider standards to meet the needs of the target population.
- Ensure that services follow an individualized and person-centered plan of care.

Home & Community-Based Serivces 1915(c), https://www.medicaid.gov/medicaid/home-community-based-services/home-community-based-services-authorities/home-community-based-services-1915c/index.html (last visited Aug. 4, 2023).

States can make an application to the Center for Medicare Services (CMS) to waive certain Medicaid program requirements under HCBS Waivers, including targeting certain geographic areas within a state, targeting certain groups within

a state, and providing Medicaid to people who would otherwise be eligible only in an institutional setting, often due to the income and resources of a spouse or parent. *Id*.

According to the Utah Department of Health and Human Services website: https://medicaid.utah.gov/ltc-2/, Utah has nine Medicaid 1915(c) HCBS Waivers, each with their own qualifications and often very lengthy waiting lists for benefits. According to Utah State Rep. Raymond Ward, the time equivalent of some program wait lists is twenty years. Most of the below waivers are administered by the Division of Services for People with Disabilities (DSPD):

- Acquired Brain Injury Waiver
- Aging Waiver (For Individuals Age Sixty-Five or Older)
- Community Supports Waiver for Individuals with Intellectual Disabilities or Other Related Conditions
- Medicaid Autism Waiver
- Medically Complex Children's Waiver
- New Choices Waiver
- Physical Disabilities Waiver
- Waiver for Technology Dependent Children
- Limited Supports Waiver

See Home and Community Based Services (HCBS) Waiver Programs, https://medicaid.utah.gov/ltc-2/ (last visited Aug. 4, 2023); Waivers – Division of Services for People with Disabilities, https://dspd.utah.gov/services/waivers/ (last visited Aug. 4, 2023).

Great Need for Funding HCBS Waivers

Recently, Utah legislators have been attempting to increase funding to DSPD and help get services to more people who are on the wait list. These attempts were recently highlighted in a KSL.com article entitled, *Here's What the Legislature Is Doing – and not Doing – to Care for Utah Caregivers*. Jenny Carpenter, *Here's What the Legislature Is Doing – and Not Doing – to Care for Utah Caregivers*, KSL (July 16, 2023, 12:17 pm), https://www.ksl.com/article/50686126/heres-what-the-legislature-is-doing--and-not-doing--to-care-for-utah-caregivers.

The authors spoke with Utah State Repesentatives Jennifer Dailey-Provost and Raymond Ward about the KSL.com article and the legislation they sponsored. In the 2023 legislative session, Rep. Jennifer Dailey-Provost sponsored SB106: Caregiver Compensation Amendments, which expanded the definition of "caregiver" to include parents or guardians and allowed them to receive compensation for caregiving for their child if they meet specific qualifications. Parent caregivers can now receive compensation for up to eight hours per week for a year. This is now part of the general budget and will continue to be funded as part of the state plan. This was added onto an existing CMS waiver under the Home and Community Based Waiver programs through Medicaid. Compensating parental caregivers can help alleviate the financial burdens they experience in caring for a loved one, particularly after already having met the strict financial requirements to receive Medicaid benefits.

Rep. Raymond Ward also sponsored HB242: Services for People with Disabilities Amendments, which was overwhelmingly supported by the legislature but ultimately was not approved for funding. The bill would have given funding to DSPD for 200 more people who are currently on the DSPD waitlist. The DSPD waitlist is ranked by need, so some people wait years for services even though they otherwise qualify. The current number of people on the waitlist for services through DSPD is approximately 4,700, which roughly equates to a twenty-year-long wait. Although this bill was ultimately not funded this year, over the prior two years, similar efforts have been able to provide funding for services to at least 350 people and remove them from the wait list. Funding these services is a long-term commitment, and it requires a long-term plan to support it.

Conclusion

Planning for individuals with disabilities requires at least a basic understanding of what benefits the individuals are receiving and the complexity of how those programs function, whether administered federally or in partnership with Utah. With that knowledge in hand, there are many planning opportunities for beneficiaries with disabilities and their families. Moreover, awareness of the demand for these services, particularly those provided by the HCBS Waiver programs in Utah, should also bring awareness to the need for funding these programs by our legislature.

Our Client Confidentiality Rules Are Stricter Than You Think

by Keith A. Call and Gregory S. Osbourne

Imagine your next-door neighbor asks you to represent them. Can you disclose to your spouse that you represent your next-door neighbor in a legal matter without disclosing any details? The answer is "no," at least not without first obtaining written consent from your neighbor after full disclosure. That is the conclusion reached by the Utah Ethics Advisory Opinion Committee (EAOC) in an April 2021 Ethics Opinion. *See* Utah State Bar Ethics Adv. Op. Comm., Op. No. 21-01 (Apr. 13, 2021) (Opinion).

When we read the Opinion for the first time, we were struck by its breadth. Sorry to put a damper on everyone's cocktail party, but by our observation there are a lot of rule violations going on out there. Let us try to help.

The Rule and the Opinion

The relevant rule is Utah Rule of Professional Conduct 1.6(a)-(b), which appears in a sidebar to this article.

The EAOC was asked two questions about this rule: (1) "May a lawyer ethically disclose the name of her client?" and (2) "When is the lawyer prohibited from revealing the source of her fee and/or the terms of her fee agreement when representing a client?" Opinion ¶¶ 1–2. The EAOC answered, "Rule 1.6 of the Utah Rules of Professional Conduct establishes the default position that the identity of a client, the source of funding for attorneys' fees, and the fee agreement are *confidential*, unless an express exception is found in either Rule 1.6(a) or 1.6(b). *Id.* ¶ 18 (emphasis added).

If even the *identity* of the client is confidential and may not be disclosed, just how far does this Rule extend? The Opinion answers this question too. "The default rule under Rule 1.6(a) of the Utah Rules of Professional Conduct is that **ALL** information relating to the representation of a client is confidential." *Id.* ¶ 7 (emphasis added).

The EAOC seems to mean it: "Wrongful disclosure of Confidential Information by an attorney is serious. 'Shall' is an imperative. It defines 'proper conduct for purposes of professional discipline.'" *Id.* ¶ 8 (citing Utah R. Pro. Conduct, Preamble: A Lawyer's Responsibilities, ¶ 14).

The Opinion discusses three exceptions: (1) informed consent of the client, confirmed in writing and never assumed; (2) implied authorization to carry out the representation; and (3) the "limited circumstances" described in Rule 1.6(b), which would be "relatively rare." *Id.* ¶¶ 9–16.

The Opinion also discusses a lawyer's duties when responding to a subpoena seeking to compel the disclosure of a client's confidential information. The lawyer must inform the client and discuss what privileges or objections could be asserted in response. The lawyer must raise nonfrivolous objections unless the client gives informed consent to waive them. If the court orders compliance, then the lawyer must consult with the client about an appeal. The lawyer must protect confidentiality unless compelled to make disclosure by a proper order of a tribunal. *Id.* ¶ 17.

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

GREGORY S. OSBORNE is General Counsel and VP of Operations at MarketDial, Inc. He also teaches legal ethics at the S.J. Quinney College of Law at the University of Utah.

Utah Rule of Professional Conduct 1.6(a)-(b), Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(b)(1) to prevent reasonably certain death or substantial bodily harm;

(b)(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(b)(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(b)(4) to secure legal advice about the lawyer's compliance with these Rules;

(b)(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(b)(6) to comply with other law or a court order; or

(b)(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

[Subsections c and d omitted.]

The American Bar Association has issued a similarly restrictive opinion in the context of lawyer blogging and other public commentary. The ABA opinion emphasizes that the confidentiality rule applies to "all" information related to the representation, whatever its source, even if the information is otherwise widely known. ABA Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018).

Observations

We have a few observations about the Opinion and the lawyer's broad duty of confidentiality.

1. Keith has already written in this column about how "the duty of confidentiality under Rule 1.6 … is broader than the attorney-client privilege." Opinion ¶ 13; *see* Keith A. Call, *What to Do When a Third Party Pays Your Fees*, 30 Utah Bar J. 36 (Mar./Apr. 2017). But the Opinion extends the rule of confidentiality much further than we suspect many lawyers realize. At face value, it applies to "all" information relating to the representation of the client. We think this means there is very little we can discuss about our jobs with anyone, absent consent.

2. It is unclear to us how the Opinion squares with Rule 1.6 Comment 4. According to Comment 4, a lawyer may use a hypothetical to discuss issues relating to the representation so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved. Does this mean that I can discuss hypotheticals about my representation of my next-door neighbor at my family dinner table (or a CLE presentation), so long as my hypothetical does not reveal the identity of my client? How does this square with the default rule that "all" information relating to the representation of the client is confidential?

3. The Opinion places a high burden on any lawyer who receives a subpoena or discovery request that calls for the disclosure of client information. Even though Rule 1.6(b) provides an exception "to comply with other law or court order," the Opinion states that a lawyer "must assert nonfrivolous privileges and raise nonfrivolous objections to the subpoena," and possibly even appeal an adverse ruling, unless the client consents otherwise. Opinion ¶ 17. For a representation that has terminated, this burden may fall solely on the lawyer. It will also raise very tricky issues for lawyers. For example, the Opinion concludes that the identity of a person paying attorney's fees is confidential under Rule 1.6. Contrast that with the Utah Supreme Court's holding that a letter outlining terms for retaining a law firm and describing the agreement

among defendants for allocating costs and burdens of litigation was not protected by the work-product doctrine or the attorney-client privilege. *Gold Standard, Inc. v. Am. Barrick Res. Corp*., 801 P.2d 909 (Utah 1990). Rule 1.6 may not be a proper evidentiary or discovery objection. However, since Rule 1.6 applies to "all" information relating to the representation, lawyers must be extremely wary of disclosing anything about a client in response to a subpoena or discovery request, especially without the informed, written consent from the client.

4. We wonder about the impact of this expansive rule on attorney well-being. Is it healthy for lawyers to be unable to discuss their work with anyone, including their spouses, partners, or others closest to them?

5. "The Rules of Professional Conduct are rules of reason." Utah R. Prof. Cond., Preamble: A Lawyer's Responsibilities, ¶ 14. Is it reasonable to put a blanket on all communication with anyone about our human experiences representing clients? Some have even argued that the confidentiality rule benefits the profession far more than it benefits clients or society. *E.g*., Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1 (Winter 1998). When rules are unreasonable, people do not follow them. When people don't follow the rules, it weakens the entire regulatory framework. We wonder if the Bar could do a better job of articulating a rule that protects the genuine confidentiality interests of a client without putting a complete gag order on all lawyerly communications, as the Opinion seems to do. For example, the rule could change the default so that publicized information, including client identity, is not confidential unless otherwise requested by the client, or if the lawyer knows or should know that further public dissemination may harm the client.

Conclusion

In any event, we bet the Opinion spells out a rule of confidentiality that is far broader than most of you thought. We should all be conscious of this and be more careful about what we share at cocktail parties, with friends, and even over the dinner table.

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 authors.

2023 Fall Forum Awards

Nominations will be accepted until Friday, September 15 for awards to be presented at the 2023 Fall Forum. We invite you to nominate a peer who epitomizes excellence in the work they do and sets a higher standard, making the Utah legal community and our society a better place.

"No one who achieves success does so without acknowledging the help of others. The wise and confident acknowledge this help with gratitude."

The Fall Forum Awards include:

The James Lee, Charlotte Miller, and Paul Moxley Outstanding Mentor Awards.

These awards are designed in the fashion of their namesakes; honoring special individuals who care enough to share their wisdom and guide attorneys along their personal and professional journeys. Nominate your mentor and thank them for what they have given you.

The Distinguished Community Member Award.

This award celebrates outstanding service provided by a member of our community toward the creation of a better public understanding of the legal profession and the administration of justice, the judiciary or the legislative process.

The Professionalism Award.

The Professionalism Award recognizes a lawyer or judge whose deportment in the practice of law represents the highest standards of fairness, integrity, and civility.

Please use the Award Nomination Form at https://www.utahbar.org/award-nominations to submit your entry.

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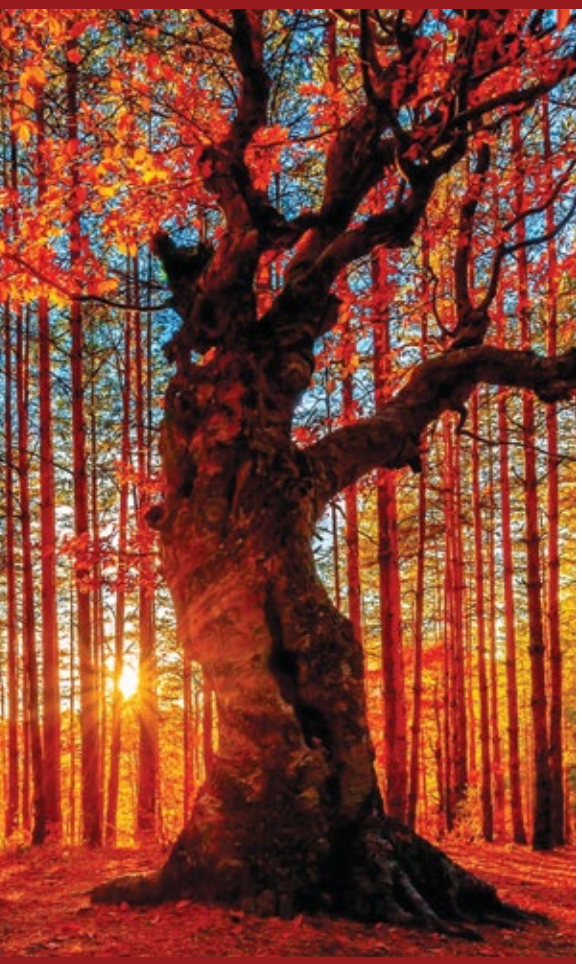

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- AI and its effects on the law and legal technology
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Registration will open by October 2, 2023

Stay tuned for more details at:

utahbar.org/FallForum

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.

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Kristen Clarke
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Adrienne Ence
Bill Frazier
Jed Harr
Ward Marshall
Chantelle Petersen
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Timpanogos Legal Center

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Steve Averett
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Josh Bates
Dan Black
Mike Black
Douglas Cannon
J. Brett Chambers
Anna Christiansen
Adam Clark
Riley Coggins
Jill Coil
Kimberly Coleman
Jessica Courser
Robert Coursey
Hayden Earl
Matthew Earl
Carig Ebert
Jonathan Ence
Rebecca Evans
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Call for Nominations for Pro Bono Publico Awards

The deadline for nominations is October 20, 2023

The Pro Bono Service of the Year award will be presented at the Fall Forum on November 17, 2023. To access and submit the online nomination form please go to: http://www.utahbar.org/award-nominations/.

If you have any questions please contact the Access to Justice Director, Pamela Beatse, at probono@utahbar.org or call 801-746-5273.

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Tracy Olson
Christopher Peterson
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Ethics Advisory Opinion Committee Ethics Opinion No. 2023-01

Issued August 10, 2023

ISSUE

May a lawyer ethically provide estate planning documents to the beneficiaries or heirs of a now-deceased client? May the lawyer ethically provide work-product to the beneficiaries as well?

OPINION

A lawyer may ethically provide to the beneficiaries or heirs of a now-deceased client estate planning documents that the lawyer prepared for the client. The lawyer may provide other work product as well, provided that such disclosure is impliedly authorized in order to carry out the representation.

BACKGROUND

This request was posed to the Ethics Advisory Opinion Committee based on the following facts. A lawyer is retained by a client to prepare a will or trust for the client. In the course of that representation, the lawyer learns the identity of the client's beneficiaries or heirs and identifies them in the relevant trust, will, and related documents. The lawyer also may have taken notes about the client and the client's intentions and retained these notes as work product in the case. After the client dies, the trustee or executor of the estate fails to provide the will, trust, or other documents to the heirs or beneficiaries. The heirs or beneficiaries approach the lawyer who drafted the documents, asking for copies. The beneficiaries or heirs also may ask for work product that relates to the decedent's capacity or intentions.

The full text of this, and all previous Ethics Advisory Opinions, are available at: https://www.utahbar.org/ethics-opinions/.

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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

Please note, the disciplinary report summaries are provided to fulfill the OPC's obligation to disseminate disciplinary outcomes pursuant to Rule 11-521(a)(11) of the Rules of Discipline Disability and Sanctions. Information contained herein is not intended to be a complete recitation of the facts or procedure in each case. Furthermore, the information is not intended to be used in other proceedings.

ADMONITION

On June 2, 2023, the Honorable James D. Gardner, Third Judicial District, entered an Order of Discipline: Admonition against a lawyer for violating Rules 1.15(a) (Safekeeping Property) and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:
A lawyer represented a client in various legal matters. Among other things, the lawyer was retained to establish a trust (Trust) for the benefit of the client's children. The lawyer also served as trustee of the Trust. The lawyer also represented the client in criminal and civil matters. The lawyer deposited funds from the Trust, funds from the lawyer's representation of the client in other matters and funds from other clients into an lawyer trust account (Account). The lawyer used software to track money that went in and out of the Account, but eventually stopped using the software before the lawyer's services were terminated. The lawyer did not print out any of the accounting records from the software, nor did he have any accounting records from the Account during the relevant time frame related to the representation of the client and/or related to the Trust. The court found that the lawyer failed to keep complete records related to their representation of the client and related to the Trust for a period of five years after the termination of the representation.

The lawyer sent the client an email stating that the lawyer would pay the client money in an attempt to settle a dispute between them. Among other things, the email states that the lawyer needs a written assurance that no Bar Complaint would be filed against them as part of the agreement.

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
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Aggravating circumstances:
Prior record of discipline, substantial experience in the practice of law, obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority.

Mitigating circumstances:
The client's actions toward the lawyer, delay in filing of bar complaint, remoteness of prior offenses.

DELICENSURE

On June 8, 2023, the Honorable Samuel P. Chiara, Eighth Judicial District, entered an Order of Delicensure against Roland F. Uresk, delicensing him from the practice of law.

In summary:
The court signed an order placing Mr. Uresk on a three-year probation for violations of the Rules of Professional Conduct. Thereafter, the court determined that Mr. Uresk violated the terms of the probation order and suspended him from the practice of law for a period of one year. A few months later, the court extended the suspension of his license to practice law for one additional year and imposed a fine for contempt of court for practicing law while on suspension.

Thereafter, Mr. Uresk attempted to file documents in two district court cases on behalf of a client during the period of suspension. Mr. Uresk met with another client during the period of suspension. Mr. Uresk agreed to complete estate planning work on behalf of the client and took several documents, including deeds and other original documents from them. The client set up two appointments with Mr. Uresk, but he failed to appear for the first appointment. During the second appointment, Mr. Uresk informed the client he had lost all their documents. Mr. Uresk did not respond to further attempts made by the client to retrieve the documents.

Mr. Uresk did not respond to the OPC's requests for information related to his representation of the two clients.

The court held a review hearing regarding Mr. Uresk's contempt. Mr. Uresk had not paid the contempt fine and did not appear at the review hearing. The court ordered Mr. Uresk to appear at an evidentiary hearing to explain his conduct regarding the two clients. Mr. Uresk did not appear at the evidentiary hearing.

The YLD Is Celebrating its Outgoing and Incoming Executive Board

by Alex Vandiver and Ashley Biehl

This year, the Young Lawyers Division of the Utah State Bar gathered at the historic Chase Mill in Tracy Aviary for its annual Spring Social on Friday, May 12, 2023. The local band Radio Retrograde played soothing jazz covers of modern songs. Joshi's Endo Grill provided delicious Japanese rice bowls from their food truck. There were also delightful cheese and dessert platters from Caputo's Market & Deli. The event was open to members and their families to enjoy the beautiful venue, live music, a food truck, and mingling.

At this event, the Young Lawyers Division, through its President-Elect Ashley Biehl, bid farewell to the outgoing Executive Board comprised of Scotti Hill as President, Grant Miller as Immediate Past President, Mike Harmond as Treasurer, Erika Larsen as Secretary, and Ashley Biehl as Publicity Manager. The Executive Board has done outstanding things for the Young Lawyers Division, including hosting regular Wills for Heroes and the annual Law School to Lawyer event.

The Young Lawyers Division, through its Diversity Equity & Inclusion Liaison Ezzy Khaosanga, also honored at the event recipients of the distinguished 2023 Bar Review Diversity and Inclusion Scholarship. The recipients were Jessica Arthurs, Esther Johnson, Nicole Johnston, Emelie Klott, Nanette Pawelek, Joseph Rivera-Delavega, and Debbie Vargas. The scholarship is offered by the Young Lawyers Division and the Utah Center for Legal Inclusion with the help of community sponsors to help offset the expense of taking and studying for the Utah State Bar Exam by reimbursing the selected students, up to their award amount, for qualifying costs associated with taking the exam.

ALEX VANDIVER is an associate attorney and member of the Litigation, Trial & Appeals and the Environmental & Natural Resources practice groups at Parsons Behle & Latimer. She is currently serving as the Chair of Social Activities Committee for the Young Lawyers Division and as a member of the Social Activities Committee for the Litigation Section.

ASHLEY BIEHL is an Assistant Attorney General, where she represents the Utah State Board of Education. She currently serves as President of the Young Lawyers Division.

The Young Lawyers Division gathered again on Saturday, July 8, 2023, at the Smith's Ballpark to enjoy a baseball game by the Salt Lake Bees. The Young Lawyers Division named and welcomed its incoming Executive Board comprised of Ashley Biehl as President, Scotti Hill as Immediate Past President, Ezzy Khaosanga as President-Elect, Mike Harmond as Treasurer, John Soares as Secretary, and Alex Vandiver as Publicity Manager. The Young Lawyers Division affirmed its goal of "re-opening" its in-person social activities and encouraging its members to come together through a variety of social activities.

Young lawyers can be added to the mailing list by emailing UtahYLD@gmail.com. Young lawyers can also keep in touch with the Young Lawyers Division by following the Young Lawyers Division on Facebook (at "Utah Young Lawyers") and/or Instagram (@UtahYLD). If you have any ideas or suggestions for a social activity, please feel free to reach out to Alex Vandiver, the Chair of Social Activities Committee, at AVandiver@parsonsbehle.com.

On November 2, 2023, the Young Lawyers Division will host its annual Opening Social at the Loveland Living Planet Aquarium. The Opening Social will be a black-tie event where young lawyers and their plus one will be treated to dinner, dancing, and networking opportunities with the breathtaking backdrop of the shark tank. The Young Lawyers Division will be celebrating its new members, rekindling old friendships, and forging new relationship between its members.

The Young Lawyers Division is planning a diverse set of smaller social events to take place in the upcoming months, including, but not limited to, cooking classes, escape rooms, a game night, and much more. These events will be advertised in the Young Lawyers Division's regular newsletters.

Classified Ads

RATES & DEADLINES

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

Classified Advertising Policy: It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For display advertising rates and information, please call 801-910-0085.

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

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

FOR SALE

Custom Professional Office Furniture for Sale.
Full matching office suite. Bourbon on Cherrywood with Ubatuba granite receptionist station. U-shaped executive desk with return, keyboard tray, black ebony inlays, drawers. Two combination work stations with full modesty panels, adjustable height keyboards, pencil drawers. Matching bookcases, various sizes. Ten sage green fabric guest chairs, rectangular conference table for eight. Eight high back leather executive chairs with knee-tilt control, adjusting headrests, carpet casters. Truly beautiful suite of solid furniture. Paid over $50K. Entire suite of furniture available for $25,000 or OBO. Call/text for details, photos, dimensions of furniture. Randy 801.400.9860. Utah County.

JOBS/POSITIONS AVAILABLE

Firm with offices in St. George, UT and Mesquite, NV is seeking a Firm Administrator. Legal or paralegal experience would be ideal, however, office management experience is the most important criteria. Responsibilities include recruiting staff, training, personnel records, employee benefits, employee relations, risk management, legal compliance, implementing policies and procedures, computer and office equipment, recordkeeping, insurance coverages, managing service contracts, marketing, responding to client inquiries and providing administrative support to the Shareholders. There is also opportunity to do paralegal work. Please send resume to Barney McKenna & Olmstead, P.C., Attn: Daren Barney, daren@bmo.law.

Administrative Law Judge Contracted Services Solicitation Notice

The Division of Purchasing for the State of Utah will be posting a solicitation for Administrative Law Judge Contracted Services. This will be posted as solicitation AS24-15 on August 11, 2023. You can find the solicitation at purchasing.utah.gov/currentbids using the solicitation number.

Any questions, please contact Ann Schliep at 801-957-7132 or aschliep@utah.gov.

This solicitation will be posted for 3 weeks, closing on October 1, 2023, at 2 pm.

Established AV-rated Business & Estate Planning Law Firm with offices in St. George, UT and Mesquite, NV is seeking a Utah-licensed attorney with 3–5+ years' of experience in business, real estate, construction, or transactional law. An active bar license in Nevada and tax experience are also preferred, but not necessary. Ideal candidates will have a distinguished academic background and relevant experience. We offer a great working environment and competitive compensation package. St. George and Mesquite are great places to live and work. Please send resume and cover letter to Barney McKenna & Olmstead, P.C., Attn: Daren Barney at daren@bmo.law.

Established AV-rated Business & Estate Planning Law Tax Controversy firm in Salt Lake is seeking a full time Associate Attorney. An active bar license in Utah and tax experience is preferred but not necessary. Candidates are those who are willing to work full time in office. Competitive compensation with short term ability to make partner. Please send resume and cover letter Attn Sandra at paralegal@taxlawsolutions.com.

OFFICE SPACE/SHARING

East Murray office space available for rent. Located near Sports Mall. $200 sq ft. Share with other attorneys. Receptionist, reception area, conference room, easy parking, internet, telephone, and copier all included. Move in ready. $800/month. Telephone 801-261-1458 email teslawyer@gmail.com.

Office sharing opportunity just one minute from the Bangerter exit off I-15 in Draper. Private office with Wi-Fi and reception staff. Access to two conference rooms. $1,000.00 a month. Limited availability. Contact Tanner Willes at tanner@cgsutahlaw.com for more information and to secure your spot.

Executive offices available in the Creekside Office Plaza located at 4764 South 900 East, Salt Lake City, Utah 84117. Office (801) 685-0552. Beautiful office space ranging from $350.00 to $650.00 per month. Our executive offices are private and offer shared receptionist, reception area, and conference room, all with utilities included. Also includes 24-hour access with security system. Parking available. If you are interested contact Michelle at 801-685-0552 for more information and to see the offices.

SERVICES

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

CALIFORNIA PROBATE? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, Farmington, (801) 721-8384. Licensed in Utah and California – over thirty-five years experience.

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