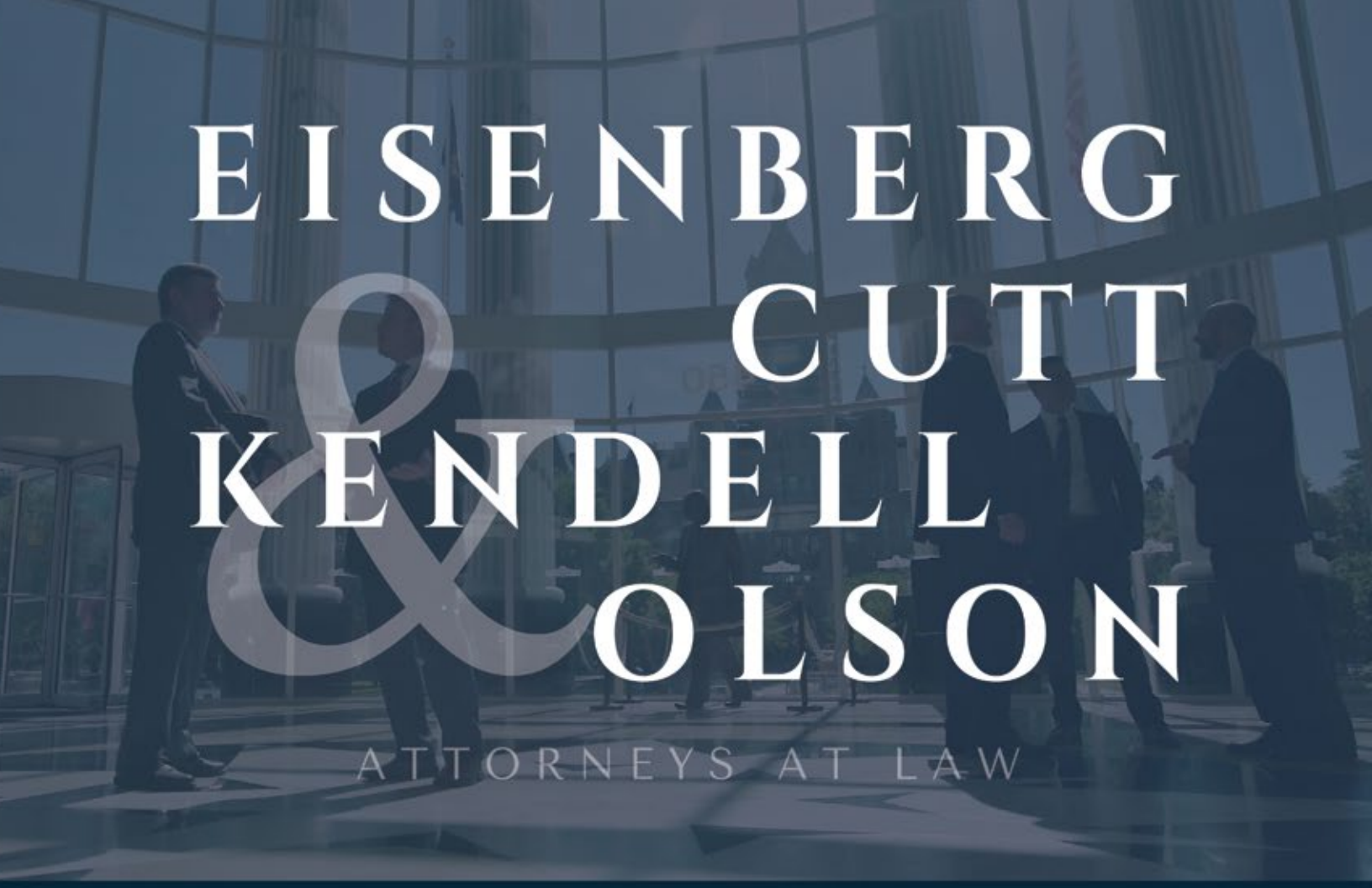
Utah Bar® JOURNAL

Volume 33 No. 1
Jan/Feb 2020

Spring Convention registration inside.



Eisenberg, Gilchrist & Cutt is now Eisenberg, Cutt, Kendell & Olson

New Name – Same Great Results

Don't just take our word for it...

"By teaming up with the lawyers at Eisenberg, Cutt, Kendell & Olson, we've been able to get results that I know are better than what I would have obtained for the clients on my own."
-Referring Attorney

Recent Recoveries Include:

$9+ M Product Liability Settlement
$4+ M Wrongful Death Settlement
$2 M Jury Verdict for a Back Injury
$2.5 M Jury Verdict for Wrongful Death
$1.7 M Dram Shop Settlement
$1.5 M Product Liability Settlement
$700K Brain Injury Settlement

eckolaw.com
801-366-9100

The Utah Bar Journal

Published by the Utah State Bar | 645 South 200 East, Salt Lake City, Utah 84111 | 801-531-9077 | www.utahbar.org

MISSION & VISION OF THE BAR:
The lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity.
We envision a just legal system that is understood, valued, and accessible to all.

Cover Photo

Hunter Canyon Ice by State Law Librarian, Jessica Van Buren.

JESSICA VAN BUREN has been the State Law Librarian since December 2004. Asked about her photo, Jessica said, "I was winter hiking in Hunter Canyon near Moab two years ago and was awed by the soaring canyon walls and contrast of white snow against the red rock. As I was crossing the frozen creek I noticed the ice pattern. I am constantly marveling at Utah's beauty, large and small."

SUBMIT A COVER PHOTO

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

Like the Utah Bar Journal on Facebook at www.facebook.com/UtahBarJournal.

Utah Bar JOURNAL

Table of Contents

President's Message | This year, 2020, is the Year of the Woman! It's About Time! 9
by Herm Olsen

Article | Basics of Nonprofit Corporation Law (The Class You Missed in Law School) 13
by Bruce L. Olson

Commentary | Some Refugees Are Lawyers, Too 26
by Michael G. Jenkins

Innovation in Law Practice | Going Virtual – Is it for You? 31
by Steve Chambers

Focus on Ethics & Civility | Can We Still Be Friends? 34
Judicial Disclosure and Recusal in Lawyer Friendship Cases
by Keith A. Call

Lawyer Well-Being | High-Quality Relationships are Vital to 36
Health, Performance, and Professional Success
by Martha Knudson, J.D., MAPP

Utah Law Developments | Appellate Highlights 40
by Rodney R. Parker, Dani Cepernich, Robert Cummings, Nathanael Mitchell, Adam Pace, and Andrew Roth

Legislative Update | 2020 Legislative Session Primer 44
by Doug Foxley, Frank Pignanelli, and Stephen Foxley

Commentary | Standback, Marvel & Pay 48
by James U. Jensen

State Bar News 49

Young Lawyers Division | Wills for Heroes Hits the Road 63
by Grant A. Miller

Paralegal Division | Fall Forum 2019 64
by Greg Wayment

CLE Calendar 65

Classified Ads 66

The *Utah Bar Journal* is published bimonthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar dues. Subscription price to others: $30; single copies, $5. For information on advertising rates and space reservations visit www.utahbarjournal.com or contact Laniece Roberts at utahbarjournal@gmail.com or 801-910-0085. For classified advertising rates and information please call Christine Critchley at 801-297-7022.

Volume 33 No. 1
Jan/Feb 2020

Edward B. Havas • Colin P. King • Peter W. Summerill

Experienced & Professional

Catastrophic Injury • Medical Malpractice • Product Liability • Aviation Disasters
Personal Injury • Wrongful Death • Oil, Gas, Mining and Construction Accidents

D K
O W

DEWSNUP · KING · OLSEN · WOREL
HAVAS · MORTENSEN
ATTORNEYS AT LAW

dkowlaw.com • 801.533.0400 • 800.404.8520

Interested in writing an article or book review for the Utah Bar Journal*?*

The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea, a particular topic that interests you, or if you would like to review one of the books we have received for review in the *Bar Journal*, please contact us by calling 801-297-7022 or by e-mail at barjournal@utahbar.org.

GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

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

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

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

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

NO FOOTNOTES: Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial endnotes to convey the author's intended message may be more suitable for another publication.

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

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

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

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

LETTER SUBMISSION GUIDELINES

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

Medical Malpractice Co-Counsel You Can Count On




- Experienced
- Creative
- Knowledgeable
- Respected




A Recent Case	
Cause:	Ruptured appendix
Injury:	Nerve damage
Litigation:	4 years
Costs:	$240,000
Experts:	10
RESULT:	$4,000,000

Give us a call to discuss how we can help you with your complex medical malpractice case!

G. ERIC NIELSON
AND ASSOCIATES
– A MEDICAL MALPRACTICE LAW FIRM –

4790 Holladay Blvd. • Salt Lake City, UT 84117

801-424-9088 • www.ericnielson.com

This year, 2020, is the Year of the Woman! It's About Time!

by Herm Olsen

When I speak to groups and ask: "Why? Why is this the Year of the Woman?," 90% of the men don't know, and 90% of the women do.[1] This alone justifies the celebration.

Please recall the incredible women who have played a role in our own history – because over the generations, men have traditionally received most of the headlines while the women do so much of the work.

ABIGAIL ADAMS

In 1777, Abigail was pregnant with her sixth child but bore the pregnancy alone because John was in Philadelphia, wrestling with the public crisis of birthing a nation. A winter storm had hit Bainbridge, Massechusetts, with howling winds and piling snow drifts higher than a man's head. She had never seen the road so obstructed, and for days not a soul passed her door.

Abigail Adams

She pled with John to return home by July to assist with her private birthing crisis. "Even the brutes of creation had the consoling company of their mates at such times," she reminded him. He insisted that he could not abandon his duties, so in early July, alone, Abigail was taken with a shaking fit. After a birthing ordeal of several days, she wrote to tell John their baby, a daughter, had been stillborn. "She appeared to be a very fine babe, and as she never opened her eyes in this world, she looked as though they were only closed for sleep."

Abigail's distress had been worse than she had ever anticipated. "Known only to my heart is the sacrifice I have made, and the conflict it has cost me. How lonely are my days. How solitary are my nights."

John was appointed Ambassador to France in 1785. He pleaded with Abigail to join him, but she had never been more than fifty miles from her home. The trip across the ocean was a terrifying prospect. Yet – she went. The ship was a mess, so she set to work "with scrapers, mops, brushes, infusions of vinegar," and made it a new ship. When she mastered the names of all the masts and sails, the captain said he was sure she could take over at the helm as well.

Rightly did she observe, "Posterity who are to reap the blessings will scarcely be able to conceive the hardships and sufferings of their ancestors."

Her son John Quincy wrote at her death in 1818:

> My mother…was a minister of blessing to all human beings within her sphere of action. She had no feelings but of kindness and beneficence. She has been to me more than a mother. Never have I known another human being, the perpetual object of whose life, was so unremittingly to do good.

ELEANOR ROOSEVELT

In 1962, shortly before she died, Eleanor Roosevelt came to Utah State University. At my mother's insistence, I heard her speak at the old George Nelson Field house. Hers was a high-pitched, upper-class New England voice, but rich in knowledge, decency, and compassion. As a young girl, her best friend said to her: "You're too plain ever to find yourself a beau, poor dear!"

Eleanor Roosevelt

How was it that this singular woman, who served as First Lady of the United States for fifteen years, came to speak to this young boy in the seventy-ninth year of her life?

Eleanor defied segregation laws, as when black opera singer Marian Anderson was not allowed to sing in Constitution Hall in 1939 Eleanor arranged a performance on the steps of the Lincoln Memorial. An audience of 70,000 watched the recital, which was also broadcast to millions on nationwide radio.

Eleanor tormented her husband by opposing internment laws against the Japanese during WWII and fought vigorously for equal rights for all women and international humanitarianism.

"At all times, day by day, we have to continue fighting for freedom of religion, freedom of speech, and freedom from want – for these are things that must be gained in peace as well as in war."

ROSA PARKS

Born in 1913 in Tuskegee, Alabama, Rosa was the granddaughter of slaves and lived in a world of separate drinking fountains, separate restrooms, separate elevators, and separate schools. I have personally seen the Coca Cola machines used in the South which charged blacks fifteen cents a bottle while whites paid ten cents.

Rosa Parks

Rosa tried to register to vote in 1943 but was denied. She tried again the next year and was again denied. Then one evening in 1955, after a tiring day's work at a department store in Montgomery, Alabama, Rosa found a vacant seat in a bus behind the "Colored" sign. Three other black people were also seated on that row while several "Whites Only" seats were empty in front.

As the bus continued its route, white people filled the front seats and left a white man standing. The bus driver ordered the four black people to vacate their seats so the white man could sit. According to the law, no black person could sit in the same row as a white person. The three others moved; Rosa refused.

"Y'all better make it light on yourself and let me have those seats," warned the bus driver. She again refused and was arrested by two white officers and taken to jail. While at jail, she attempted to get a drink of water from the fountain, but an officer intervened, shouting: "You can't drink no water. It's for whites only!" Her arrest incited the Montgomery bus boycott, which ultimately forced the city to eliminate its hateful seating policy.

"People always say that I didn't give up my seat because I was tired, but that isn't true. The only tired I was, was tired of giving

in," she said. Speaking in her behalf, Martin Luther King, who had only six months before received his doctorate, observed:

> There comes a time that people get tired – tired of being segregated and humiliated, tired of being kicked out by the brutal feet of oppression. But we come here tonight to be saved from that patience that makes us patient with anything less than freedom and justice. If you will protest courageously and yet with dignity and Christian love, when the history books are written in future generations the historians will pause and say, "There lived a great people – a black people – who injected new meaning and dignity into the veins of civilization."

MARTHA HUGHES CANNON

It would be difficult to find a woman more influential in Utah's history than Martha Hughes Cannon. Martha was born in Wales in 1857 and was four years old when she crossed the plains by wagon in 1861.

Martha Hughes Cannon. Courtesy Utah State Historical Society.

Her mother, widowed shortly after arriving in the Salt Lake Valley, married James Patten Paul in 1863, and it was Paul who encouraged Martha to chase her dream of becoming a medical doctor.

Martha graduated from what is now the University of Utah with a degree in chemistry in 1878 and, encouraged by a conference address of Brigham Young, she was one of four women set apart for medical studies and practice.

In the autumn of 1878, Cannon began studying medicine at the University of Michigan. Following her graduation, she earned a Bachelor's of Science from the University of Pennsylvania and a further Bachelor's in Oratory from the National School of Elocution and Oratory. At the age of twenty-five, she had earned four degrees.

She returned to Salt Lake City and began practicing medicine. While working as the resident physician at the Deseret Hospital she met and married Angus Munn Cannon, becoming his fourth wife. Angus was jailed for polygamy, and Cannon fled to Europe.

When the Edmunds-Tucker act disenfranchised women of the Utah Territory, Cannon became a leader in the Utah Women's Suffrage Association and was a speaker at the Woman's Conference at the World's Columbian Exposition of 1893. Later that year she testified before a congressional committee on her woman's suffrage work in Utah.

Cannon felt that education and freedom were vital to women. "Somehow I know that women who stay home all the time have the most unpleasant homes there are," she is reported to have said. "You give me a woman who thinks about something besides cook stoves and wash tubs and baby flannels and I'll show you, nine times out of ten, a successful mother."

Cannon was the first women elected as a state senator in the United States, defeating her own husband in the election of 1896. She was a strong proponent of childhood vaccinations and served on the Utah Board of Health and the Board of the Utah State School for the Deaf. She moved to California in 1904 for health reasons and died in Los Angeles in 1932.

Cannon was a pioneer in every meaning of the word.

Thank you, Abigail; thank you, Eleanor; thank you, Rosa; thank you, Martha.

2020 is more than a celebration. It's an open acknowledgement of gratitude for the genius of women, for the contribution made to the heart and soul of our country, and for the collective commitment to the honor, bravery, and sacrifice made (and yet to be made) by the women of America.

To our own progenitor grandmothers, we say THANK YOU! To our descendant-daughters we say: Keep it coming!

1. Men, 2020 is the 100th anniversary of ratification of the 19th Amendment, finally enfranchising the womens' right to vote.

PHILLIPS
LAW GROUP
ARIZONA'S LAW FIRM

Arizona Referral & Co-Counsel Relationships

ONE OF ARIZONA'S LARGEST CONSUMER LAW FIRMS

Kurt Maahs
Attorney
Phillips Law Group, P.C.
kurtm@phillipslaw.com

Jeffrey Phillips
Attorney
Phillips Law Group, P.C.
jeffrey@phillipslaw.com
Text Jeffrey with any Arizona Law questions.
(619) 252-4829

Timothy Tonkin
Attorney
Phillips Law Group, P.C.
timt@phillipslaw.com

"For a partner in Arizona, I recommend you call Jeffrey"
Brian Panish, Panish, Shea & Boyle, LLP Los Angeles

PHILLIPS
LAW GROUP
ARIZONA'S LAW FIRM

Since **1993**. Over **145,000** Clients Served.
Phoenix, Tucson and all of Arizona.
Generous Referral Fees Paid.

(800) 706-3000

3101 N Central Avenue, Suite 1500, Phoenix, AZ 85012
www.phillipslaw.com

Basics of Nonprofit Corporation Law
(The Class You Missed in Law School)

by Bruce Olson

Introduction

Most Utah lawyers at some point have a "nonprofit" practice – their clients don't always pay them. This article, however, is not about collection frustrations but rather summarizes selected state law and tax features of nonprofit corporations, an area of law that every Utah lawyer will experience, even if it is not a part of daily practice. We will examine certain concerns for practitioners who represent or sit on boards of nonprofit corporations. A supplementary review of additional features of Utah nonprofit corporations, including definitions, state law, tax incidents, and matters of organization and operation can be found at the end of this article.

State laws and tax exemptions relating to nonprofit corporations can be complex. Attorneys who hold themselves out in this area of law must be conversant with a vast number of statutory, regulatory, and administrative rules. This article is intended to assist attorneys who do not routinely practice in this area but who, for example, may be asked by a client to advise a favorite charity or who sit on a nonprofit board. For ease, "NPC" means "nonprofit corporation" and "Act" means the Utah Revised Nonprofit Corporation Act.

Critical Purposes of NPCs

NPCs, often referred to as NGOs or nongovernmental organizations, form a "third sector" of society in addition to for profit and governmental organizations, and include corporations, trusts, pass-through entities, and unincorporated associations, although most are formed as corporations (emphasized in this article). The law of NPCs includes both corporate and tax principles integral to formation, operation, and dissolution. Nonprofit practice in the Utah State Bar is associated with the Nonprofit, Tax, Estate Planning, and Business Sections.

NPCs serve as a foundation for virtually all societal needs from arts to zoos and every purpose and condition in between. They are the principal vehicle to receive and deploy charitable contributions, provide opportunities for altruistic service, and administer voluntary care. While the names of community NPCs are familiar to most, their functions and limitations are often misunderstood. For example, nonprofit corporations can operate businesses and make a profit (although the destination of net income is limited), not all NPCs are tax-exempt, and not all tax-exempt NPCs are public charities. (What seems to be universally understood, however, is the expectation that attorneys should give NPCs free or reduced fee legal advice!)

Caution in Attorneys' Multiple Roles

Attorneys are often appointed to NPC boards, where they can receive fulfillment through service and giving back. However, some cautions are in order. First, lay board members may naively look to the attorney board member for legal advice on almost any subject, a condition requiring attorneys to know their limitations and avoid providing more advice than they are competent to dispense.

More fundamentally, an attorney serving on a board must make clear in what capacity he or she serves and the effect of statements he or she makes. Thus, if an attorney serves only as a board member and not legal adviser, the board should be made aware and refrain from seeking legal advice. That attorney's statements should not be viewed as *legal* advice, nor would the attorney-client privilege likely attach to those expressions.

On the other hand, if the attorney is acting both as board member (or officer) and legal adviser, the attorney should recognize what "hat" the attorney is wearing when he or she speaks. For example, if the attorney is giving legal advice, the minutes and notes of board meetings should specifically reflect that those statements constitute legal advice, protected by the attorney-client privilege. Any writings containing legal advice (including emails) similarly

BRUCE L. OLSON is a tax attorney with Ray Quinney & Nebeker, was principal draftsman of the Utah Revised Nonprofit Corporation Act, and periodically assists in revising its provisions.

should be so classified. Attorneys should instruct boards about these principles.

Essential Governmental Filings

Double check the following:

Corporate Registration

Utah's NPCs obtain and renew their "charter" by registering with the Division of Corporations. Utah Code Ann. §§ 16-6a-203(1), -1410(2). A suspension for failure to file an annual report can be remedied by reinstatement within two years, while a suspension exceeding two years results in complete termination of the charter, loss of the corporate veil, and potential loss of tax exemption. *Id.* § 16-6a-1412(1).

Charitable Solicitation Permit

Utah law requires NPCs that solicit charitable contributions to obtain a permit, initially and annually thereafter, from the Utah Division of Consumer Protection and imposes potentially significant civil and even criminal penalties for failure to do so. Utah Code Ann. §§ 13-22-1 to -23. If this requirement has been overlooked, resolve the delinquency with the division. Penalties may be waived in the absence of bad faith or intent to harm the public. *Id.* § 13-22-3(5)(b).

Tax Filings

Determine through tax advisors the organization's eligibility for exemptions from income, sales, property, and other taxes and ensure that exemptions have been received and requirements satisfied, including the filing of income tax or information returns where required. Failures to file or pay (if due) can lead to sizeable, penalties (an amount per day!) and interest, and eventual loss of income tax exemption. Be absolutely sure that the NPC is withholding employee income taxes where due, as willful failure in this regard can lead to personal liability of persons with the duty, status, and authority to withhold and pay. Personal liability also arises for failure to collect and pay state withholding and sales taxes (among others). Utah Code Ann. § 59-1-302. Note also that § 501(c)(3) organizations are not subject to the Federal Unemployment Tax Act. 26 U.S.C. § 3306(c)(8).

Ex Officio Directors

Bylaws of many NPCs provide for the appointment of "Ex Officio Directors," a widely misunderstood term. In some cases, the term describes a director whose status relates to an officerial or leadership position held inside or outside of the NPC. The position may or may not come with voting rights, and the bylaws typically do not specify. Such a person with voting rights would be considered a regular director, whose presence is counted in determining a quorum. In other cases, the NPC confers the title to honor or recognize a person, who usually does not have voting rights and is not counted in determining a quorum. The presence of such a person in a board meeting or email thread, a non-director in substance, could jeopardize the attorney-client privilege if that person receives confidential communications or documents. It is essential that bylaws clearly define the rights and duties of ex officio directors with these cautions in mind.

Size and Involvement of Board

The size of an NPC board should consider the needs and circumstances of the NPC. Often, that determination may have been made in the distant past and not recently reviewed. For example, a board should be large enough and have members with sufficient expertise to adequately address the needs of the organization. A board of three for a multinational NPC is probably too small. On the other hand, fifteen board members for a small NPC is likely unwieldy, inefficient, and detrimental to proper management of the organization.

Related to this concern is whether board members are actively engaged in their duties. For example, if the board is very large and there are members who only occasionally attend a meeting, a quorum may be difficult to achieve, and the business of the NPC may be thwarted (not to mention the ire of directors who traveled far). A large board can also act through written consent, discussed below.

Update Articles and Bylaws

Many NPCs operate with organizational documents that have not been updated (or sometimes read) for months or years. You should examine both documents, including amendments, and be alert for the following, which may warrant action.

Articles of Incorporation

Some older articles of incorporation have an expiration date, so be sure that date has not passed. Also, note that the requirement to include "Inc.," "Co.," or similar abbreviations in the name of for profit corporations, Utah Code Ann. § 16-10a-401(1), does not apply to an NPC, and those references can be deleted to minimize the name's commercial hue. *Id*. Further, because the articles must contain only the minimal information set forth in section 16-6a-202, eliminating unnecessary paragraphs such as principal office, duration, powers, and board governance matters usually addressed in the bylaws will help simplify them. On the other hand, the articles should contain additional provisions if required by the Act (e.g., delegating board duties to non-directors, *id*. § 16-6a-801(2)(b), or where longevity or direction is desired, such as restrictions in appointment of directors, procedures to amend the articles, or director liability limitations, (*see, e.g., id*. § 16-6a-823(1)(a)(i)(A).

Bylaws

NPC bylaws are the "workhorse" for corporate governance and management provisions. The content and length should be adequate for the size and scope of the NPC's purpose and operations. You can find boilerplate bylaws provisions from many sources, but they should be customized for the needs of the NPC. Most importantly, bylaws should be read, understood, and followed by the board of directors (in far too many cases they are seldom referred to).

Deadlines for Governmental NPCs

Be aware of requirements imposed on NPCs by the 2017 Governmental Nonprofit Corporations Act, Utah Code Ann. §§ 11-13a-101 to -106. NPCs that are owned, controlled, or receive requisite support from a governmental entity are classified as "Governmental Nonprofit Corporations" and are subject to Utah's Open and Public Meetings Act, Utah Code Ann. §§ 52-4-101 to -305, Fiscal Procedures for Interlocal Entities, *id*. §§ 11-13-501 to -532, and the Government Records Access and Management Act, *id*. §§ 63G-2-101 to -901. In addition, board members of such entities must complete certain training by the state auditor. New board members must undergo the training within six months of appointment or re-appointment. *Id*. § 11-13a-106. Failure to complete the training potentially could result in a board member's disqualification.

On or before July 1, 2019, "limited purpose entities," which include the above governmental NPCs, must register and annually provide certain information to the office of the Utah Lieutenant Governor, tasked to compile a registry of such entities (and provide information about certain changes within thirty days of occurrence). Utah Code Ann. § 67-1a-15. Also, beginning July 1, 2019, counties are required to include on their websites information from the registry about such entities operating within their boundaries. Utah Code Ann. § 17-15-32(2).

Failure to meet the foregoing requirements can result in sanctions and disqualifications enumerated in the respective code sections. Practitioners should be aware of these provisions and counsel their governmental NPC clients accordingly.

Minimizing Liability

You should educate your clients about risks that could jeopardize an NPC's ability to fulfill its nonprofit purposes and should help the NPC minimize, avoid, transfer, or eliminate those risks.

Liability to Third Parties

As a general rule, the directors, officers, employees, and members of an NPC are not personally liable in such capacities for the acts, debts, liabilities, or obligations of the NPC. Utah Code Ann. § 16-6a-115.

Exceptions include circumstances where a party assumes liability, such as a guaranty; fails to properly collect and withhold certain federal or state taxes; or, in other circumstances, is personally culpable for an act or omission from which liability may rest, such as motor vehicle negligence. Moreover, a director who votes for or agrees to a distribution of property in violation of the Act or the NPC's articles of incorporation can be personally liable to the NPC for the amount of the distribution that exceeds what could have been distributed without the violation. *Id.* § 16-6a-824(1)(a). Also, a director or officer who agrees to or participates in a loan by the NPC to a director, officer, related person, or entity is quite appropriately liable to the NPC until the loan is repaid. *Id.* § 16-6a-825(3)(b).

Liability to the NPC

Directors or officers are not liable to the NPC, its members, any conservator, receiver, assignee, or successor in interest for any action or failure to act unless the director or officer breaches or fails to perform the duties of office through gross negligence, willful misconduct, or an intentional infliction of harm on the NPC or its members. In effect, this provision limits action against a director or officer unless the conduct arises to the level of gross negligence. *Id.* § 16-6a-822(6). Even further, an NPC may eliminate or limit the liability of a director to the NPC or its members for any action or failure to act if there is a provision in the articles of incorporation, bylaws, or a resolution to that effect. This protection does not reach circumstances where the director receives an improper financial benefit, intentionally inflicts harm on the NPC or its members, intentionally violates criminal law, or receives an unlawful distribution. *Id.* § 16-6a-823. Every NPC would be prudent to include this provision in one of the specified documents.

Liability Protection for Acts of Volunteers

Utah law provides generally that NPCs described under 26 U.S.C. § 501(c) are not liable for the torts of their volunteers in certain circumstances. For example, unless the NPC was reckless or wanton in allowing the volunteer to provide services, it is not liable if the volunteer intentionally acts in a way that constitutes illegal, willful, or wanton misconduct. Moreover, an NPC is not liable for the torts of a volunteer if a business employer, in the same circumstances, would not be liable for the torts of an employee. Utah Code Ann. §§ 78B-4-102, -103; *see Glover ex rel. Dyson v. Boy Scouts of Am.*, 923 P.2d 1383, 1389 (Utah 1996) (requiring establishment of vicarious liability under doctrine of respondeat superior); *see also* Alex G. Peterson, *Recent Development, Liability Protection for Volunteers and Nonprofit Organizations*, 119 Utah L. Rev. 273 (1991).

Liability Protection for Volunteers

An NPC can encourage volunteer service (including directors) and increase volunteers' comfort level through indemnification provisions that include "agents" of the NPC. Further, Utah Code Sections 78B-4-101 to -103 provide immunity to volunteers of tax-exempt section 501(c) NPCs if certain conditions are satisfied, including that the organization has "provide[d] a financially secure source of recovery for individuals who suffer injuries as a result of actions taken by the volunteer on behalf of the nonprofit organization." Utah Code Ann. § 78B-4-102(2)(c). The source of recovery is typically "an insurance policy in effect that covers the activities of the volunteer and has an insurance limit of not less than the limits established under the Utah Governmental Immunity Act in Section 63G-7-604." *Id.* § 78B-4-101(1)(a).[1] Boards of NPCs, especially NPCs with limited assets to satisfy potential claims, would be wise to consider securing insurance coverage that meets the required limits.

Insurance

Every NPC should have adequate insurance for all potential risks that may be incurred. Before accepting service as a board member for an NPC, an attorney is well advised to ensure that the NPC has liability insurance covering directors (typically known as "errors and omissions" or "directors and officers" insurance). Also, a review of other coverage applicable to the activities and needs of the NPC should be made and acted upon. Attorneys should also review their malpractice insurance policies to determine whether service on an NPC board is permitted, and if so, whether disclosure of that appointment is required by the carrier.

Committees

NPCs often have one or more committees of the board that perform duties for the board and are accountable to the board. It is important that the bylaws of the NPC carefully describe the rights and duties of committees. These committees possess whatever authority the board may grant to them, other than for major corporate actions, but only if the committee has two or more members and each voting member of the committee is a director. *Id.* § 16-6a-817. NPCs sometimes overlook this rule, especially with an executive committee, and discover that certain actions taken may be subject to a challenge, or later require unanticipated board ratification.

Simplified Written Consent

Board informality and distance sometimes encourage approval of board actions through casual email exchanges. Attorneys should ensure that their clients follow the requisite formalities that will make board action immune from legal challenge. The Act was modified in 2015 to simplify approval of resolutions by consent outside of a meeting. Under section 16-6a-813, action is taken when all board members (i) receive appropriate notice,[2] (ii) timely sign a writing approving the action or sign a writing against the action, abstain in writing from voting, or fail to respond or vote; and (iii) fail to demand in writing that action not be taken without a meeting. Writings include electronic transmissions. This provision is as liberal as most all other nonprofit acts in the nation and will assist attorneys to streamline actions by their NPC boards.

Minutes and Records

It is essential for NPCs to keep accurate minutes of board meetings, and even committee meetings. Leading in most discovery requests and tax agency examinations are requests for NPC minutes, often a trove of useful information, which may include unfiltered attorney-client communications, harmful admissions, and fragmentary statements inviting scrutiny. Casual expressions or jokes can also be taken the wrong way and harm an NPC.

At a minimum, board meeting minutes should note directors and other persons who attend a meeting, the outcome of each vote taken (noting those for or against an action and abstentions), conflicts of interest and substantiation when approved (including establishing a "rebuttable presumption of reasonableness" in approving salaries and certain payments to avoid "excess benefit transaction[s]" under Internal Revenue Service regulation, 26 C.F.R. § 53.4958-6), and directors that did not vote or were absent for a discussion or vote. Minutes also should block disclosure of attorney protected communications, note convening of "executive sessions," and should be approved by the board.

Federal Tax Requirements

Supplementary material at the end of this article addresses several requirements to secure and maintain an NPC's federal tax exemption, including requirements under 26 U.S.C. § 501(c)(3). Space prohibits a more detailed discussion of those imperatives, but a few general reminders may be useful. First, attorneys unfamiliar with the tax area should advise the NPC board to seek assistance from others versed in tax compliance matters, whether inside or outside of the NPC. Second, all national, state, and local tax filings should be accurate, complete, and timely filed. Third, the board should be taught minimal tax requirements, review annual tax or information returns, and ask questions for understanding.

Fourth, to minimize noncompliance, the NPC should promote preventative measures by, for example, periodically conducting tax compliance reviews and managing tax checklists, similar to the example checklist at the end of this article.

NPCs that file IRS Forms 990 should be aware of best practices relating to that form. Over a decade ago, the IRS began asking questions on Form 990 about state law governance matters (and has been criticized among quarters of the professional community for its delving into those matters). Although NPCs that do not respond in the affirmative to state law-related questions on Form 990 are not likely subject to a higher risk of tax audits, they should strive to meet best practices addressed by the questions on Form 990. For example, question 11 in Part VI, Section B of Form 990 asks if the organization's board was provided a copy of Form 990, a wise step even if the IRS did not recommend it. Section B of Part VI asks if the organization has the following written policies: (i) conflict of interest; (ii) whistle blower; and (iii) document retention and destruction, and inquires if the organization has a process to determine compensation for management officials (e.g., executive director). As their attorney or board member, you should ask about these questions and their answers, and if policies are desired, assist the NPC in adopting them.

Conclusion

NPCs and the hosts of their directors, officers and volunteers are an integral component of society and make essential contributions to the welfare of Utah citizens. As a favored class, NPCs deserve the exemptions, benefits and support given them. Although this area of law is somewhat complex and unfamiliar to many, Utah attorneys should be informed about basic concepts of state law and federal taxation so that they can make their NPC clients and friends aware of duties, help them understand legal limitations, and steer them from potential risks.

1. As of July 1, 2018, the maximum amount of liability to which a government agency is subject, and thus the minimum amount of insurance coverage required by an NPC (or alternatively the value of a "qualified trust" set aside for these purposes) to take advantage of this immunity provision, must be at least $745,200 for injury to one person in a single occurrence, $2,552,000 for aggregate amount of individual awards in a single occurrence, and $295,000 property damage in any one occurrence, all adjusted for inflation in even years. Utah Code Ann. § 63G-7-604; Utah Admin. Code R37-4-2.
2. The notice must contain required elements including (i) the action to be taken; (ii) the time by which a director must respond to the notice; and (iii) that failure to respond by the time stated will have the same effect as abstaining in writing and failing to demand in writing that action not be taken without a meeting. A defective notice could later give a board member a reason to invalidate that member's vote and possibly the action altogether, with damage or other detriment to the NPC. Utah Code Ann. § 16-6a-813(2)(b).

Basic Features of Utah Nonprofit Corporations

The terms "nonprofit," "exempt," "foundation," and "§ 501(c)(3)" are used interchangeably in common parlance. Thus, a better understanding of these and related terms is essential.

TERMINOLOGY

Nonprofit – Relating to an organization in which the earnings and profits, if any, cannot be distributed to private individuals or organizations, with certain exceptions (e.g., water companies, cooperatives, Mutual Benefit Corporations), but must be used to further the organization's purposes. Not all nonprofit organizations are tax-exempt, although virtually all tax-exempt organizations are nonprofit.

Exempt – An organization upon which federal and some or all types of state taxes (income, sales, property, etc.) are not imposed and contributions to which may or may not be deductible for income tax purposes.

§ 501(c)(3) – Public Charity or Private Foundation – The section from the Internal Revenue Code that describes organizations whose purposes are charitable, educational, scientific, religious, etc. and contributions to which are deductible for income, estate and gift tax purposes, subject to certain limitations.[1] Section 501(c)(3) organizations are classified as "private foundations" unless they meet certain governance and support tests representative of the general public and qualify as "public charities." Private foundations generally are managed and supported by a family or small group and are subject to more limitations and reporting obligations than public charities, a discussion of which is beyond the scope of this article.

As of the end of 2018, there were 1,682,091 exempt organizations registered with the IRS, of which 1,327,714, or about 79%, were described under § 501(c)(3). *Tax-Exempt Organizations and Nonexempt Charitable Trusts – IRS Data Book Table 25*, https://www.irs.gov/statistics/soi-tax-stats-tax-exempt-organizations-and-nonexempt-charitable-trusts-irs-data-book-table-25 (last visited Sept. 15, 2019). Classification as a public charity yields other benefits besides donors' ability to deduct contributions, including lower postal rates and the ability to receive in-kind goods and services from governments and commercial businesses.

Sections 501(c)(1) – (c)(29) other than § 501(c)(3) – Organizations formed under these code sections differ from one another in purpose and scope but generally are exempt from income taxation. Contributions to these organizations in most cases are not deductible. Section 501(c)(4) organizations have received a great deal of press recently because of their use as recipients of funds to support or oppose political candidates. (Note that retirement plans are exempt from taxation under other provisions of 26 U.S.C.).

Foundation – A term often used in the name of an NPC that typically qualifies under § 501(c)(3). Use of this word in a name does not render an NPC a private foundation under federal tax law.

Governmental Organization – Organizations exempt from federal income taxation (and in some cases contributions to which are deductible) because of their governmental status.[2] Taxation and exemption law in this area is complex and not well settled. In 2017, the Utah Legislature created a class of "governmental nonprofit corporations," which because of their control

by or support from "governmental entities" (e.g., state, counties, municipalities, etc.) are subject to certain public oversight provisions normally imposed on governmental units. Utah Code Ann. §§ 11-13a-101 to -106.

Donor Advised Fund or "DAF" – A fund set up by a donor in a public charity known as a "sponsoring organization" and that functions like a checking account, permitting the founder of the DAF to direct contributions for charitable purposes, flexible in amount and time, subject to the sponsoring organization's ultimate legal right of control.

Corporation Sole – Of ancient origin, a legal nonprofit entity whose single incorporated office is occupied by a natural person, typically a governmental or religious leader in a designated position, whose successor automatically assumes the same powers and duties, e.g., "The Corporation of the Archbishop, President, Presiding Bishop, Rector," etc. Because of promoter abuses, no new corporations sole could be formed in Utah after May 3, 2004. Utah Code Ann. § 16-7-5.

STATE NONPROFIT LAW

Background: The Utah Revised Nonprofit Corporation Act (Act) governs NPCs and is found in Utah Code Sections 16-6a-101 to -1705. Passed in 2000 through the foresight of Senator Lyle Hillyard, it replaced an archaic statutory framework. The Act shares some provisions with the Utah Revised Corporation Act but possesses many distinctive features including, for example, a more flexible option to conduct meetings by consent through electronic means. *Id.* § 16-6a-813. A principal goal in drafting the Act was to provide a workable and user-friendly regime in organization, governance, and operation, balanced with the need for transparency and public accountability.

Oversight of NPCs: NPCs are governed by state law. NPCs that operate in Utah typically incorporate here but may choose to form in another state and qualify to do business in Utah. *Id.* §§ 16-6a-1501 to -1518. Activities such as formation, amendment, and dissolution are documented through the Utah Division of Corporations, which has broad powers related to these administrative functions. *Id.* § 16-6a-104 ("The Division has the power reasonably necessary to perform the duties required of the division under this chapter."). The powers of the attorney general are generally

limited to those enumerated in the Act, and include, for example, initiating a proceeding to dissolve an NPC for certain abuses, *Id.* § 16-6a-1414(1), although the attorney general has plenary authority to restrain and enjoin corporations from acting illegally, in excess of their corporate powers or contrary to public policy, Utah Code Ann. § 67-5-1(13), and generally to oversee nonprofit organizations and institute legal proceedings to protect the public's interest where other parties lack standing. When a nonprofit organization is structured as a charitable trust, the role of the attorney general is even greater, as that office has common law powers under the doctrine of *parens patriae* to represent an indefinite class of beneficiaries and enforce the terms of the trust for their benefit. *See id.* §§ 59-18-101 to -113 (the Utah Charitable Trust Act).

Directors and Officers: The Act designates directors as the governing body (the board) in an NPC and confers upon them substantial flexibility to oversee and exercise the powers of the NPC, conduct meetings, make resolutions, and amend organizational documents and other matters, but also imposes upon them fiduciary duties and standards of accountability. A minimum of three directors (which optionally can be referred to as "trustees," "regents," or any other name) are required.[3] *Id.* §§ 16-6a-801(4), -803(1). Directors and officers are subject to the duties of care and loyalty but can rely on professionals and others in carrying out those duties. Directors also must avoid conflicting interest transactions that could impose personal liability upon them. *Id.* §§ 16-6a-822, -825. If provided in the articles of incorporation, a non-director may be delegated prerogatives and duties of a director(s) and thereby relieve the directors of the authority and duty so delegated. *Id.* § 16-6a-801(2)(b). The directors may, and are highly encouraged to, adopt bylaws, and must do so for certain IRS exemption filings. *Id.* § 16-6a-206 (as used in this article, "bylaws" includes articles of incorporation unless otherwise indicated).

A board may be self-perpetuating or selected in other ways. There is no requirement for the length or number of directors' terms, which may also be staggered. Directors may resign and be removed for cause or no cause as the bylaws may provide. *Id.* §§ 16-6a-805 to -810.

As guided by the bylaws, the board may organize committees, which must consist of at least two directors and no non-directors for the committee to exercise the authority of the board. Committees have the authority granted them by the bylaws or board but may not take action to authorize distributions, make proposals required to be approved by members, appoint directors, amend the articles of incorporation, adopt, amend, or repeal bylaws, or approve major corporate actions, such as mergers, major property sales, etc. *Id.* § 16-6a-817.

The board may (and should) hold regular and special meetings and, unless the bylaws eliminate the requirement, must hold an annual meeting, although the failure to do so does not affect the validity of any corporate action or work a forfeiture on the corporate charter. *Id.* § 16-6a-812. The Act has very flexible provisions for the board to take action without a meeting, the details of which are set forth in section 16-6a-813. Proxies are allowed as set forth in section 16-6a-816(4). A quorum may consist of no fewer than one-third of the number of directors and no fewer than two directors. *Id.* § 16-6a-816(2). Minutes should be kept of each member, director, and committee meeting.

There is a misunderstanding among many, including some who serve and lead in the nonprofit sector, that directors (and sometimes even officers) cannot be

compensated. As a general matter, there is no federal tax or state law prohibition on compensating directors (as independent contractors for tax purposes) and officers (as employees) for services rendered or reimbursement for costs incurred, so long as that remuneration is fair and reasonable. *See, e.g.*, Utah Code Ann. § 16-6a-811. Whether and how much to pay (subject to reasonableness) is more a matter of corporate tradition, preference, strategy, public perception, and available resources (e.g., some NPCs impose a "pay to play" constraint where board service is conditioned on an annual contribution). Nonpayment of directors and officers is more accurately characterized as "typical practice" than "best practice." This issue is a matter for the board's resolution based on the considerations above.

The bylaws, and if not included therein, the board, may establish selection criteria for the appointment of a chair and any suite of officers, designated by whatever names may be desired, and the same individual may simultaneously hold more than one office. *Id.* § 16-6a-818(4).

Members: In contrast to its for-profit sister, an NPC generally does not have shareholders (with exceptions such as water companies and cooperatives). Rather, it optionally may have either or both of voting and nonvoting members. Voting members are cousins to shareholders and typically have the right to elect directors and approve major corporate actions and decisions, although in most cases voting members do not own the property of the nonprofit corporation. Nonvoting members are persons who can pay dues, receive newsletters, be listed as supporters, etc. but typically do not govern or vote on major decisions. Articles of incorporation must disclose whether an NPC has voting members. *Id.* § 16-6a-202(1)(e). The rights and duties of members including member meetings, notice provisions, action by written ballot, proxies, voting groups, quorum requirements, etc. generally are set forth in the bylaws.

Mutual Benefit Corporations and Water Companies: "Mutual Benefit Corporations" are nonprofit corporations whose assets are contributed by and for the members, such as, for example, a neighborhood park or a houseboat on Lake Powell. *Id.* § 16-6a-102(34). Members could contribute the capital for such a park, enjoy protection of the corporate shield and the aura of nonprofit status. Upon sale of the park, the members would be entitled to the net proceeds, if any. *Id.* § 16-6a-1302(1)(a)(ii).

Water companies are specifically addressed in the Act, although their governance by the Act can be viewed as somewhat awkward.[4] For example, because water companies typically issue stock to their shareholders, the Act authorizes issuance of stock, *id.* § 16-6a-202(1)(f), but provisions for the management and governance of stock are not found in the Act but in the Utah Revised Business Corporation Act, *id.* §§ 16-10a-101 to -1902. As stated above, the Act provides for voting members and has robust provisions for that optional class of participation, obviating the need for most NPCs, other than water companies and certain others, to issue stock or shares. *See generally Dansie v. City of Herriman*, 2006 UT 23, 134 P.3d 1139 (construing property rights of water company stockholder under the Act and predecessor); *Okelberry v. West Daniels Land Ass'n*, 2005 UT App 327, 120 P.3d 34 (construing rights of shareholders in Livestock grazing NPC).

Liability Matters: The practice of nonprofit law is not a paradise for litigators, judging from very sparse case law. NPCs can sue and be sued and are liable to third parties in the same manner as their for-profit counterparts. As more fully addressed above, members, directors, officers, and employees of NPCs are not personally liable in their capacity as such for the debts and liabilities of the NPC. Utah Code Ann. § 16-6a-115. Moreover, directors and officers are not liable to the NPC, its members, receivers, or assignees unless they have breached the duties of office and the breach constitutes willful misconduct, intentional infliction of harm, or gross negligence. *Id.* § 16-6a-822(6). Additional protection can be afforded directors if the NPC includes a provision in its articles, bylaws or a resolution eliminating or limiting directors' liability other than for unauthorized financial benefit, intentional infliction of harm, criminal conduct, or receipt of unlawful distributions. *Id.* § 16-6a-824.

OTHER SELECTED LAWS

Utah Tax Law

Utah law exempts certain organizations exempt from federal tax from imposition of one or more types of taxes, including income tax, *id.* § 59-7-102(1)(a); sales tax, *id.* § 59-12-104(8); and property tax, Utah Const. art. XIII, § 3, and Utah Code Ann. § 59-2-1101.

Securities Laws

Federal securities laws remove most exempt organizations from the registration and reporting requirements that

otherwise could apply to the fundraising activities of exempt organizations.[5] Utah also exempts from registration, and filing of sales literature, securities issued by organizations exclusively organized and operated for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association. Utah Code Ann. § 61-1-14(1)(f)(i).

Federal Tax Law

A nonprofit corporation that does not qualify for tax exemption is taxed as a standard "C" corporation under federal tax law. NPCs that qualify under one of the subsections of § 501(c) avoid imposition of federal income tax as provided in section 501(a), except for unrelated business income tax described below. The following discussion applies mainly to public charities, but often similar provisions apply to other exempt organizations.

Organized and Operated: Public charities must be both organized (required provisions in organizational documents) and operated exclusively for one or more exempt purposes. This requirement includes avoidance of private inurement to directors and officers, an analog to the state law limitations imposed on NPC insiders. Thus, for example, like state law, directors and officers cannot receive more than reasonable compensation for services rendered (and they and potentially the board can be penalized if they do). Moreover, under what is known as the private benefit doctrine, an NPC cannot provide benefits to insiders or any other persons, even if otherwise reasonable, unless the benefit is both *quantitatively and qualitatively incidental*.

Political and Lobbying Intervention: Public charities may not support or oppose a candidate for public office[6] and, subject to a liberalizing election, 26 U.S.C. § 501(h), may not devote more than an "insubstantial part" of their activities to influence legislation. These limitations are generally more relaxed for other § 501(c) organizations.

Operating a Business: There are no restrictions for NPCs to operate a trade or business, although the prohibition of profit distribution to insiders renders the nonprofit form unattractive for those wanting to maximize personal wealth. Tax-exempt NPCs likewise can operate a trade or business, although limitations exist depending on the class of exemption involved. For example, a public charity can operate a trade or business as a substantial part of its activities only if in furtherance of its exempt purpose(s) and if its primary purpose is not the operation of an unrelated trade or business. 26 C.F.R. § 1.501(c)(3)–1(e)(1).

Unrelated Business Taxable Income: An exception to both federal and state tax exemption is "unrelated business taxable income" (UBTI), a regime conceived by Congress in 1950 in response to exempt organizations conducting business operations in unfair competition with non-exempt enterprises (the poster child was a spaghetti factory owned by New York University). Thus, if an exempt organization regularly carries on a trade or business that does not "contribute importantly" to its exempt purpose (and solely raising money is not such a purpose), or if debt is used to finance capital acquisition or operations that do not further an exempt purpose, net income is taxable under ordinary corporate (or trust) tax rates and is reported on a separate tax return, which is available to the public. "Too much" UBTI can have the effect of jeopardizing an organization's tax exemption. Exceptions and planning opportunities (e.g., taxable subsidiaries) can minimize this risk. *See generally*, 26 U.S.C. §§ 511–514.

Application for Public Charity Status: An NPC cannot qualify under § 501(c)(3) unless it gives "notice" to the IRS by applying for and receiving that status (generally using Form 1023 or 1023 EZ for certain smaller applicants), with limited exceptions.[7] Many of the other types of exempt organizations can "self-declare" their exempt status, although they proceed at their own risk without IRS confirmation of the desired status. In most cases, Utah automatically confers exempt status upon organizations that are federally exempt and taxes income recognized as UBTI under federal law. *See, e.g.*, Utah Code Ann. §§ 59-7-102(1)(a), -801.

Tax Returns: Exempt organizations must file information tax returns, which are available to the public. Exempt organizations generally file Forms 990, 990-EZ (smaller organizations) and 990-N (electronically filed "post cards" if annual gross income is "normally" $50,000 or less). If not exempt, an NPC must file the return typically required (e.g., Form 1120). Some organizations, such as certain religious organizations, are exempted from filing returns.

1. The popularity of 26 U.S.C. section 501(c)(3) rests principally on the ability of donors to deduct their contributions, subject to limits set forth in 26 U.S.C. section 170.
2. Income earned by a state, its political subdivisions, or "integral parts," is not taxable to the federal government generally because of implied statutory immunity. Moreover, 26 U.S.C. section 115(1) excludes gross income from taxation if (i) derived from an essential government function and (ii) accrues to a State or its political subdivisions.
3. When the Act was proposed in 2000, the only change requested by anyone was to require a minimum of three directors, contrary to the Act's first draft permitting one or two directors, philosophically consistent with nonprofit trusts which require only one trustee. Note also that the Act changed the name of board members from "trustees" to "directors."
4. There has been a call for a separate statutory regime in Utah addressing the needs of water companies.
5. *See generally* the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. The Philanthropy Protection Act of 1995 (codified in scattered sections of 15 U.S.C.) added additional protections and securities exemptions in behalf of nonprofit organizations. A discussion of the specific exemptions under each of the foregoing acts is beyond the scope of this article.
6. This limitation is referred to as the "Johnson Amendment," often referred to by President Trump and others. It became law in 1954 by the introduction, without objection, in the U.S. Senate by then Senator Lyndon B. Johnson.
7. Very small organizations, many religious organizations, and members of "group rulings" are exempt in whole or part from this requirement. Also, if an application is timely filed, a subsequent IRS determination of exempt status relates back to the organization's date of formation.

SAMPLE TAX COMPLIANCE CHECKLIST

The following are points that should be periodically reviewed for tax compliance:

1. Representations in IRS application followed.
2. Public charity or other exempt status managed and maintained with Board involvement.
3. No private inurement to insiders or private benefit to anyone.
4. Compensation to insiders reasonable.
5. No loans to directors or officers.
6. No support of or opposition to political campaigns except as permitted by law.
7. Influencing legislation limited as permitted by law.
8. Material changes reported to IRS.
9. IRS recommended policies enacted.
10. Trades or businesses of NPC further NPCs exempt purposes.
11. Unrelated trade or business income not excessive.
12. Estimated taxes paid for unrelated trade or business income.
13. Information (tax) returns prepared accurately and filed timely.
14. Joint ventures with non-exempt parties comply with IRS requirements.
15. Gifts and dispositions of non-cash properties properly reported.
16. Compliance with donor instructions but avoidance of excessive donor control.
17. Required receipts for gifts provided to donors.
18. Activities of for profit subsidiaries not attributed to NPC.
19. Access to tax returns and IRS application materials made publicly available.
20. Employees and independent contractors appropriately distinguished.
21. NPC website maintained consistent with exempt purposes and applicable tax rules.
22. Excise taxes for private foundations avoided.
23. Applications for exemption from State income, sales, and property taxes as needed.
24. Charitable solicitation laws followed in affected States.
25. Corporate registrations maintained.

When you hire one of our appellate experts, you get the whole team.

At Zimmerman Booher, you get more than an appellate specialist handling your appeal or drafting your important motions. You get a team of seasoned appellate specialists and former appellate judges. Our combined expertise is unparalleled in the market. Our attorneys have briefed, argued, or authored opinions in over 2,000 appeals. But don't wait for a ruling. The sooner you engage us, the more we can help you. **801.924.0200** | **zbappeals.com**

ZIMMERMAN BOOHER

APPELLATE ATTORNEYS

Some Refugees Are Lawyers, Too

by Michael G. Jenkins

As Utah lawyers, we are acutely aware that unfair laws and unjust circumstances force millions of refugees around the world to flee their home countries. Today more than 60,000 people who are refugees make their home in Utah, according to data gathered by the Kem C. Gardner Policy Institute.[1] Most people who are refugees not only survive in Utah, but they thrive – aided by Utahns and Utah institutions who generously give their time, money, and other resources to help refugee populations. And many Utah employers hire people who are refugees so they can earn their own way in their new home country.

Of particular interest to Utah lawyers, however, is a certain group of refugees who can be overlooked when it comes to meaningful employment. This group includes refugees who were lawyers in their home country but who do not qualify to practice law in Utah.[2] So, what do foreign lawyers who are refugees do for jobs in Utah when they cannot work in their chosen legal profession? The answer, of course, is any job they can find – which typically is far removed from their specialized legal training and experience. And that is something members of the Utah State Bar should help change.

Bar Admission Rules

Anyone accepted for admission by the Utah State Bar first must complete certain requirements, including graduating from an approved law school in the United States and passing the bar exam. *See* R. Governing Utah State Bar 14-704(a). Refugee lawyers who have graduated from a law school outside of the United States, however, must meet other admission requirements. For example, Rule 14-704(d)(1) of the Rules Governing the Utah State Bar states that, to be admitted to the Utah State Bar, a foreign lawyer applicant must have "*graduated from a Foreign Law School in a country where principles of English common law form the predominant basis for that country's system of jurisprudence.*" Even if an applicant studied the common law in law school, provisions 14-704(d)(3) and (4) also require that the applicant be "*admitted to practice law in an English common law jurisdiction*" and "*Actively and lawfully engaged in the Full-Time Practice of Law in an English common law jurisdiction for more than two years.*"

Refugee Lawyers

Unfortunately, the above requirements become an almost impossible hurdle for refugee lawyers in Utah. Refugees come from countries like Somalia, Afghanistan, Syria, Iraq, South Sudan, Venezuela, and Bosnia. None of these countries would be considered an "English common law jurisdiction," so lawyers who were educated or practiced in these countries cannot even hope for admission in Utah as a graduate of a foreign law school.

In addition, there are practical barriers to foreign lawyers who are refugees ever qualifying to practice law in Utah. These barriers are inherent in the application process established under Rule 14-704(a), which states that the "*burden of proof is on the Applicant to establish by clear and convincing evidence*" that he or she meets the requirements for admission. By definition, refugees have been forced to flee their home countries because of war, government changes, threats to themselves or their families, and other persecution. Many times, refugees escape with only the clothes on their back. And in the chaos of escaping, refugee lawyers typically do not have the luxury to gather educational or professional information in order to meet the burden of proof for admission stated in the Rules Governing the Utah State Bar. Also, the countries from which these refugee lawyers flee often have no incentive to assist in providing that information. Indeed, many countries have every incentive to sabotage any effort by a refugee lawyer to re-establish himself or herself as a lawyer in the United States.

MICHAEL G. JENKINS retired in 2017 as Assistant General Counsel for Rocky Mountain Power and now spends part of his time assisting people who are refugees. If you would like to consider hiring or providing other support for Napoleon, Suleman, or other refugee lawyers in a law-related capacity, please contact michael.g.jenkins@me.com.

There are no statistics available about how many refugee lawyers live in Utah, but the experiences of two such refugee lawyers are particularly poignant for Utah State Bar members.

Napoleon Ramos; Venezuelan Lawyer

Napoleon graduated from one of the top law schools in Venezuela, which teaches the principles of civil law that are followed in that country. He also received a master's degree in administrative law and worked as a law professor for five years. He practiced law for more than twenty-five years, first as a lawyer for the government and later in private practice representing people and companies impacted by government regulations. If he were a United States lawyer, his experience level likely would land him a partnership or senior attorney position at a law firm or corporate legal department. In the face of growing government corruption in Venezuela, Napoleon brought a lawsuit a few years ago against the government on behalf of a client who owned a factory. Although Napoleon prevailed for his client before the highest Venezuelan court, the ultimate result was his client receiving increased persecution from the government (which eventually confiscated the factory) and Napoleon being jailed and then threatened with long-term prison confinement. Rather than face such severe consequences simply for doing what lawyers in the United States do every day without threat or reprisal, Napoleon and his family had no choice but to escape their home in Venezuela. Later, they settled in Utah, where they are seeking political asylum.

Suleman; Afghanistan Lawyer

Suleman is a pseudonym to protect him and his family from continuing persecution that often can reach even to the relative safety of the United States. Suleman graduated from law school in Malaysia, earning a bachelor's, master's, and doctorate degree in legal studies. His level of legal education far surpasses most law school graduates in the United States. He also taught law school courses as part of his doctorate program. Malaysia is an English common law country, and Suleman's law school taught common law principles. After graduation, however, Suleman returned to his home in Afghanistan. There, he began working for United States' contractors who, as part of the war effort, were tasked with overhauling the Afghanistan system of justice. For fifteen years in that role, Suleman trained local judges, prosecutors, police,

and other lawyers to implement a fairer legal system. He received many honors and awards from the United States government for this work. But because applying for admission to practice law in Afghanistan is a mere technicality and is not required to work as a lawyer, Suleman never applied. Then, because of threats arising from his work in support of the United States, Suleman and his family immigrated to Utah under a special immigration visa made possible by the United States Congress.

Ironically and sadly, it is precisely because Suleman spent his legal career supporting the United States government that he was forced to immigrate to the United States; and it is because he lives in the United States that he no longer qualifies to pursue a legal career. And neither Suleman nor Napoleon may be able to demonstrate "*by clear and convincing evidence*" the extent to which they were educated in or practiced law because much of that evidence was left behind when they were forced to flee their countries. Both refugee lawyers are bright, energetic, and experienced in many legal matters that would be familiar to any member of the Utah State Bar. And both anxiously want to find some kind of work in their chosen legal profession in Utah, even if that means in a law-related, non-lawyer role.

How to Help

So, what can Utah State Bar members do to help refugee lawyers who are living in Utah?

First, bar members should be aware that there are refugee lawyers among us who have high levels of legal education and who share many of the same legal experiences that we do. In other words, they have legal skills that would be valuable in almost any law-related job, even in non-lawyer roles. Such jobs might include court clerks, court or law office support staff, legal assistants or research clerks, corporate purchasing, real estate or contracting staff, etc.

Next, the Utah State Bar should consider changing the Rules Governing the Utah State Bar to allow refugee lawyers to meet certain admission requirements under an "or equivalent" standard. In other words, the admission rules could allow refugee lawyers the opportunity to provide equivalent information and personal explanations. As it is, the "clear and convincing evidence" standard disqualifies refugee lawyers from admission before they can even get started. And even if they are not granted admission based on an evaluation of available evidence, just having the chance to make their case in person can be an important step along their path for reestablishing law-related careers.

Also, bar members should be aware that Utah's admission rules are not just a barrier to refugee lawyers but also provide limited opportunities. For example, Rule 14-718 allows refugee lawyers to qualify as "Foreign Legal Consultants" in narrow circumstances. A foreign legal consultant, once approved by the Utah State Bar, essentially advises Utah lawyers about laws in the country where a refugee lawyer has trained or worked. Thus, Utah lawyers who need expertise about laws in foreign countries have a potential pool of resources in refugee lawyers. Unfortunately, Utah lawyers don't often have a need to understand the laws of Afghanistan, Venezuela, or a host of other countries from which refugees typically flee. Also, this rule contains the same "clear and convincing evidence" standard for refugee lawyers to be approved as Foreign Legal Consultants, so few will be able to meet this requirement.

In addition, Utah State Bar members should know that attending law school again in the United States is not always a realistic option for refugee lawyers. Indeed, Napoleon and Suleman have families to support now. They don't have the luxury of stopping work to attend law school again. And even if they were to apply to Utah law schools and are not accepted, they lack the resources to attend law school in another state.

The potential for attending law school all over again, however, raises one helpful avenue for lawyers who graduated from foreign law schools. That is, Rule 14-704(d)(5) allows refugee lawyers a fast-track way to complete law school again. This rule applies to foreign lawyers who have "*completed with a minimum grade of 'C' or its passing equivalent no less than 24 semester hours… at an Approved Law School, within 24 consecutive months. The 24 semester hours must include no less than one course each in a core or survey course of constitutional law, civil procedure, criminal procedure or criminal law, legal ethics and evidence*…." R. Governing Utah State Bar 14-704(d)(5). In other words, refugee lawyers have the potential to graduate from a United States law school in only two years, which can be a helpful option for them. In fact, the University of Utah S.J. Quinney College of Law provides what it calls the Global J.D. program, "*which offers foreign lawyers the opportunity to complete a J.D. in two years.*"[3] But, without also being able to meet the other requirements for admission for foreign lawyer applicants as described above, the potential for a shortened law school track rings hollow.[4]

Finally, Utah State Bar members can act as mentors and potential employers of refugee lawyers, even in law-related, non-lawyer jobs. Just like anyone else seeking a law-related job, these refugee lawyers simply need Utah lawyers to get to know them, understand their legal backgrounds and skills, and give them a chance to demonstrate those skills through work.[5]

Conclusion

Who knew? Some of our refugee neighbors are lawyers, too. By becoming aware of the plight of refugee lawyers, Utah State Bar members have the chance to rethink bar admission and hiring practices with these refugee lawyers in mind. Further, as employers, Utah State Bar members can help refugee lawyers secure meaningful, law-related employment, even if they cannot qualify for admission to the Utah State Bar. When that happens, everyone wins and these unique refugees with legal backgrounds can begin to contribute their distinctive talents and skills as valued residents of a state where the rest of us have chosen to live, raise our families, and practice law.

1. Fact Sheet, Kem C. Gardner Policy Institute, University of Utah (Apr. 2017), https://gardner.utah.edu/wp-content/uploads/Refugee-Fact-Sheet-Final.pdf.

2. A rule proposed by the Utah Supreme Court on December 9, 2019, would allow non-citizen immigrants who graduated from US law schools to practice law in Utah. *See* proposed rule CJA14-0721 found at: https://www.utcourts.gov/utc/rules-comment/2019/12/09/code-of-judicial-administration-comment-period-closes-january-23-2020/. This proposed rule targets a different segment of refugee and immigrant populations than is discussed in this article, but indicates a growing trend in Utah to make room for refugee populations in our system of licensing lawyers. There are other ways of helping refugee lawyers, too. Global Talent, a non-profit job placement agency with an office in Salt Lake City, helps refugees who were lawyers and other professionals in their home country find jobs in their professions. If you are interested in reading more about this organization of volunteering to mentor refugee lawyers or other professionals, please check out this website: https://glotalent.org.

3. *See* https://law.utah.edu/admissions/college_information/degree-programs/. This program "offers foreign lawyers the opportunity to complete a J.D. in two years" as long as candidates "have a foreign law decree that makes them eligible to practice law in their home country and is at least the foreign equivalent of a U.S. baccalaureate degree." The law school admission standard for the Global J.D. Program, of course, is different than the Rules Governing the Utah State Bar for foreign lawyer admissions, which require education and experience in an English common law country. The Global J.D. program is limited to five people per year.

4. In its application materials for the Global J.D. Program, the S.J. Quinney College of Law makes clear that completing the program does not guarantee compliance with the Rules Governing the Utah State Bar - Admission of foreign lawyers. When it comes to refugee lawyers, however, the Utah State Bar and the S.J. Quinney College of Law should collaborate to make sure that completion of the Global J.D. Program and bar admission rules both lead to ultimate admission to the Utah State Bar. This may require the Utah State Bar to adjust its admission requirements for refugee lawyers to match those of the law school's admission standards (*i.e., "a foreign law decree that makes them eligible to practice law in their home country…."*)

5. Another way for Utah lawyers to help people who are refugees in general is by joining the Refugee Justice League at https://www.refugeejustice.org. This is "*a group of attorneys and legal consultants who will defend the Constitutional rights of refugees who have been discriminated against on the basis of religion, ethnicity or national origin.*"

Paper checks are notoriously unreliable. They get lost in the mail, they get tossed in the laundry, and they carry a lot of sensitive information around with them wherever they go.

LawPay changes all of that. Give your clients the flexibility to pay you from anywhere, anytime. Most importantly, we ensure you stay in compliance with ABA and IOLTA guidelines.

Proud Member Benefit Provider

UTAH STATE BAR®

It's easy to get started

866-261-3937 or visit **lawpay.com/utahbar**

LAWPAY®

AN AFFINIPAY SOLUTION

Going Virtual – Is it for You?

by Steve Chambers

Virtual law offices are the hot new thing. What are they? Are they here to stay or just a fad? Should you go virtual? If you do, how do you do it? There are lots of questions. Here are some answers about virtual law offices (VLOs).

Defining a VLO is not as easy as defining a traditional law office (TLO), and as we all know, TLOs come in many shapes and sizes. For our purposes, we'll consider a TLO to be a law office housed in a brick and mortar building where clients go to meet face to face with lawyers. According to Stephanie Kimbro, who literally wrote the book on VLOs, a virtual law practice "is a professional law practice that exists online through a secure portal and is accessible to both the client and the lawyer anywhere the parties may have access to the Internet." Stephanie Kimbro, *Virtual Law Practice: How to Deliver Legal Services Online* (A.B.A. 2010). To Ms. Kimbro, one of the essential features of a VLO is the client portal, through which essentially all contact between attorney and client takes place. Beyond that, although a VLO is a form of eCommerce, it is not a melding of technology and a TLO. A VLO is not communicating sometimes through email and Skype; it is not working from home but having a place to meet clients. It is as different from a TLO as Netflix is from movie theaters.

In the near decade since Ms. Kimbro's book was first published, the concept of a VLO has morphed into that amalgam of tradition and technology. In an article for the ABA Tech Report 2018, author Chad Burton assumes without stating that today's VLO has a physical presence somewhere, whether that be at a permanent or floating location. Chad Burton, *2018 Virtual Law Practice*, ABA TECHREPORT 2018 (Feb. 4, 2019), https://www.americanbar.org/groups/law_practice/publications/techreport/ABATECHREPORT2018/2018VLP/. That alone would disqualify his view of a VLO as a true VLO according to Ms. Kimbro.

While the Kimbro VLO might appeal to some and might be attainable by a few, it's likely that they are a small minority of VLOs. Litigators would find it nigh impossible to avoid face-to-face meetings with clients. A Kimbro VLO would only be suitable for transactional lawyers, and even then, implementing it full time is a daunting task. For our purposes, we'll consider a VLO to have some components of a TLO in that, at the very least, a VLO involves meeting in person with clients on occasion.

The main differentiation between a TLO and a VLO is the client portal. This is an entry into a client-exclusive, secure area on the VLO's server where everything the attorney wants to make available to the client can be accessed. All documents, correspondence, notes of consultations, and billing and payment records can be made available to the client through the portal. Each client can log into her client portal at any time, from anywhere she can access the Internet. It is the client's constant access to her files that sets a VLO apart. What is made available through the portal is one of the primary decisions facing a lawyer starting a VLO.

So, is a VLO right for you? Here are some considerations.

Who's Your Target Market?

Millennials are more receptive to the concept of a VLO than Baby Boomers. Who would have guessed? If you're targeting people approaching retirement for estate planning services, a VLO might not be your best choice. If you're targeting online entrepreneurs, you better have a VLO. As in all other areas of law firm management, if you don't know your target market, it doesn't matter which road you take.

What's Your Niche Service?

What are you offering that differentiates you from other lawyers? Maybe you promote yourself as the fastest gun in the west at preparing customized business formations with a same-day delivery promise. A VLO might be perfect for this type of service because the client doesn't have to make an appointment, drive to your office, and wait to see you. Conversely, maybe your niche is highly personalized service that includes a lot of handholding for clients in emotional matters such as divorce or bankruptcy. A VLO for

STEVE CHAMBERS has been an attorney in Utah since 1976, nearly thirty years of that time as a sole practitioner. He currently has offices in Logan and Salt Lake City where he focuses on consumer bankruptcy and wills and trusts. He currently sits on the Innovation Practice Committee.

this type of service just won't work. You need the office with the couch or chairs where clients can feel safe and reassured.

Where Will You Meet Clients?

One of the big advantages of a VLO is the cost savings that results from not having an office. Think of how much time you spend sitting alone at your desk. You're paying rent while your conference room is empty 90% of the time. With the technology that exists today, you can do that work anywhere. But, for the occasional time that you need a conference room, what do you do? For years I've used a TLO conference room, paying by the hour when I need it. The TLO sets up a shared calendar so that I can see when the conference room is booked and schedule my time accordingly. Other VLO lawyers that I know make liberal use of conference rooms at the courthouse. Online virtual office providers such as Regus and LiquidSpace offer a choice of furnished office space. You could use one of their offices in one location for one client and a different location for another, making coming to you more convenient for the client. Don't overlook making house calls to the client. That lets the client know you value their time, and it could result in more work. As you're sitting across the client's desk, he might look down, see another matter and say, "as long as you're here, can we talk about…." In practice, you'll probably use a combination of all these options.

One objection that lawyers considering a VLO voice is that clients will not take them seriously if they don't have a permanent office. First, the client doesn't have to know. Secondly, once you explain that not having a permanent office allows you to keep your fees lower, they usually drop any concerns. Thirdly, if they're that hung up on appearances, you're probably better off without them anyway.

What Do You Need?

You probably already have it. A laptop, tablet, or smart phone, a cloud-based practice management system, and an Internet connection are all you need to work anywhere. As to which laptop, tablet, or smartphone, or which combinations of the three, that's up to you. Your choices in cloud-based practice management systems are legion, but a topic for another time. You should be keeping your virtual client files – you've gone paperless in your office, right? – somewhere they can be accessed from any location, not sitting on your desktop's hard drive or office server. Even if, like me, you still prefer a paper planner to keep track of appointments and tasks, you should also have an online calendar at your fingertips. If your laptop or tablet has a touch screen, clients can sign documents anywhere.

What About Intake?

Unless you choose a Kimbro VLO, so you're dealing only with people who want to do everything online, you must think about intake. When someone calls on the telephone, they expect to speak with a live person as soon as possible. Whether you use a virtual receptionist, like Ruby Receptionist, or an automated system, get those callers to a live person as quickly as you can. More than one transfer and you're likely to lose them. If they leave a voice mail, call back within two hours, or leave a greeting explaining why you're unavailable and when you can call back.

Time for Me.

One of the downsides to the modern practice of law is clients' expectation that we're available 24/7. VLOs exacerbate that expectation. Through the client portal, clients can have access to their files at any time. This leads them to believe that as soon as they do anything through the portal, the attorney is instantly made aware and should respond. Unless your niche service is around the clock availability, you need to manage that expectation. Start by explaining your policy for getting back to clients. Then put that policy into practice. Don't be available during non-business hours. Many email services allow you to create automated reply messages that can be set to function outside of your business hours. If a client emails you at 9:00 p.m., the client will get an instant reply that you will respond during normal business hours. If you use a phone service such as Google Voice, you can set a similar auto reply for phone calls. Turn email, text, and other notifications off during non-business hours and do whatever it takes to resist the temptation to check email. Nothing good can come of it.

To wrap up, the VLO is the future of law. VLOs are not a fad and you should consider incorporating them into your practice. The modern lawyer's slogan might as well be, "Have laptop. Will travel."

Are you...

- **Sick and tired of worrying about your practice's future because of tort reform?**
- **A new plaintiff attorney unsure of where to turn for mentoring or advice?**
- **Tired of your clients' rights being jeopardized by "the other side"?**

Join the Utah Association for Justice
– the largest plaintiff firm in Utah

We Don't Compete – We Collaborate!

The Utah Association for Justice
– the trial lawyers' association –

offers our members more than $250,000/year in member benefits, including:

- A combined 700+ hours/year in legislative efforts
- World-class listserve advice from the best legal minds in Utah
- Discounted CLE's, social events, mentoring, and much more!

Mention this ad for 30% off your first-year dues!

There is strength in numbers!

Join us!

UTAH ASSOCIATION for JUSTICE

801-531-7514
www.utaj.org

Can We Still Be Friends? Judicial Disclosure and Recusal in Lawyer Friendship Cases

by Keith A. Call

I wonder if any Utah judges can relate to these sentiments:

> "Before becoming a judge, I had no idea or warning, of how isolating it would be."
>
> "Except with very close, old friends, you cannot relax socially."
>
> "Judging is the most isolating and lonely of callings."
>
> "The isolation is gradual. Most of your friends are lawyers, and you can't carry on with them as before."

Isaiah M. Zimmerman, *Isolation in the Judicial Career*, 36 Ct. Rev. 4, 4 (2000).

Based on my experience practicing in other jurisdictions, Utah has an extremely collegial bar. We frequently see this collegiality extend to lawyer-judge relations at bar functions, in the community, and even in the courtroom.

When do lawyer-judge friendships have to be disclosed to the parties, when do they require recusal, and when can they be waived? Rule 2.11 of the Utah Code of Judicial Conduct and a recent ABA ethics opinion touch upon these issues.

Rule 2.11

The rule applicable to lawyer-judge friendships is Utah Code of Judicial Conduct Rule 2.11. It provides:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . .

Utah Code Jud. Conduct R. 2.11(A)(1). This rule, which models the ABA model rule, is general and vague. It gives little guidance. It relies on a judge's individual (and private) sense of "personal bias or prejudice."

ABA Formal Opinion 488

The ABA recently issued a formal ethics opinion that sheds some limited additional light on the subject. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 19-488 (Sept. 5, 2019) (Opinion 488). Opinion 488 attempts to provide guidance to judges on when they must disclose a personal relationship and when they must recuse.

Opinion 488 starts by emphasizing that judges should not only avoid bias and partiality but also even the appearance of impropriety. "If a judge's relationship with a lawyer or party would cause the judge's impartiality to reasonably be questioned, the judge must disqualify himself or herself form the proceeding." *Id*. at 2. This is measured objectively and depends on the facts of the case. Disqualification should be the exception rather than the rule, and judges should avoid disqualifying themselves too quickly, lest litigants be encouraged to use disqualification motions as a means to judge-shop. *See id*.

Opinion 488 also recognizes that a variety of changing factors can affect interpersonal relationships. For example, "in smaller communities and relatively sparsely-populated judicial districts, judges may have social and personal contacts with lawyers and

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

parties that are unavoidable." *Id*. The opinion acknowledges that relationships vary widely, can change over time, and are unique to the people involved. *See id*.

Opinion 488 categorizes a judge's personal relationships into three categories: (1) acquaintances, (2) friendships, and (3) close personal relationships; and evaluates each category separately.

An "acquaintance" exists when the judge's and lawyer's "interactions outside of court are coincidental or relatively superficial, such as being members of the same place of worship." *Id*. at 4. This includes attendance at bar association or other professional meetings, past representation of co-parties in litigation, meeting each other at school events involving children or spouses, neighborhood or homeowner's association events and meetings, and attendance at the same religious services. *See id*. In an "acquaintance," neither the judge nor the lawyer generally seeks contact, but they greet each other amicably when their lives intersect. *See id*. Standing alone, a judge's acquaintance with a lawyer is not a reasonable basis to question impartiality, and a judge has no obligation to disclose it. *See id*.

A "friendship" implies some degree of affinity greater than an acquaintance, but the opinion's attempted definition remains nebulous. "Some friends are closer than others," the opinion astutely acknowledges. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 19-488, at 4 (Sept. 5, 2019). The opinion discusses a judge and lawyer who may have practiced law together, may periodically meet for a meal, and may have been classmates and stay in touch through occasional calls or correspondence. *See id*. In closer friendships, the judge and lawyer may exchange gifts on holidays, regularly socialize together, coordinate activities with their families, or share a mentor-protégé relationship. *See id*. at 5–6. A judge should disclose information about friendships "that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." *Id*. at 6. If a party then objects, the judge has discretion to continue to preside over the matter or to disqualify himself or herself. *See id*.

Finally, a "close personal relationship" goes beyond common concepts of friendship. For example, a judge may be romantically involved with a lawyer, may be divorced but remain amicable or share custody of children, or may be the godparent of the lawyer's or party's child or vice versa. *See id*. A judge must recuse himself or herself when the judge has a romantic relationship with a lawyer or party in the proceeding or desires to pursue such a relationship. *See id*. A judge should disclose other intimate or close personal relationships even if the judge thinks he or she can be impartial. *See id*. If a party objects, the judge has discretion to either continue to preside over the proceeding or to disqualify himself or herself. *See id*.

Even when a judge might be subject to disqualification, waiver is still possible. Utah Code of Judicial Conduct Rule 2.11 explains how trial court and appellate court judges can make proper disclosures on the record and ask the parties to consider waiver *outside the presence of the judge and court personnel*. *See* Utah Code Jud. Conduct R. 2.11(C)–(D). Any waiver must be incorporated into the record of the proceeding. *See id*. Judges should read these rules to remind themselves of the particulars before inviting any waiver.

Conclusion

Quoting a Seventh Circuit case, Opinion 488 states:

> In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or risking disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend – even a close friend – appears as a lawyer.

ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 19-488, at 5 (Sept. 5, 2019) (quoting *United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985)).

Opinion 488, while not binding on the Utah judiciary, will hopefully provide useful guidance to judges and lawyers in understanding when it is appropriate or necessary to disclose personal relationships or even recuse oneself from a case.

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

High-Quality Relationships are Vital to Health, Performance, and Professional Success

by Martha Knudson, J.D., MAPP

I'm going to let you in on a little secret: lawyers aren't as tough as we like to think we are. Sure, we do hard things every day. We make difficult decisions and deal with complicated and weighty matters that often impact the future and livelihood of our clients. But do you know who is really tough? The life and death kind of tough? United States Army soldiers. A primary resource they rely on to stay sharp, resilient to stress, healthy, and happy is their knowledge of how to build and sustain high-quality relationships.

Solid relationships are so critical that the U.S. Army actively teaches its soldiers the skills to build and support them. Among other things, this training has translated into better stress coping, higher emotional fitness, and significantly lower rates of substance abuse and diagnosis for mental health issues, such as depression and anxiety. *See* Paula Davis-Laack, *Resilient and Ready: Tools for Adapting to Stress and and Change in the Law*, in THE BEST LAWYER YOU CAN BE: A GUIDE TO PHYSICAL, MENTAL EMOTIONAL, AND SPIRITUAL WELLNESS 59, 67 (Stewart Levine ed., 2018).

While the challenges that lawyers face might be different than those of soldiers, our need for high-quality relationships at work are not. Our brains are hardwired for connection. Overwhelming amounts of scientific research shows that high-quality relationships are critical to our happiness, health, and resilience. In fact, a study of more than 6,200 practicing lawyers showed the need to belong, feel we matter, and feel cared for by others at work to be one of the most important ingredients for lawyer well-being, motivation, and satisfaction with work. *See* Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. LAW REV. 554 (2015). High quality relationships are also linked to reduced stress, good physical and mental health, and reduced levels of burnout and depression. *See* Anne Brafford, *Positive Professionals: Creating High-Performing Profitable Firms Through the Science of Engagement* 84–85, 97 (2017).

If these things aren't enough to get you to pay attention, high-quality workplace relationships, and perceiving that you have social support, impacts many things we care about professionally. It enhances our cognitive processes and our creativity, and it boosts work engagement. *See id.* at 84–85. It also helps us to like our jobs more, so we are less likely to leave. These things translate to quantifiable performance gains for our legal organizations. Davis-Laack, *supra*, at 63. This makes sense. Much of our legal work gets done through our interactions with other people. Work environments where legal professionals feel supported, feel valued, and have a sense of belonging are far more likely to function at a higher level.

On the other hand, organizations where people perceive that they don't matter, aren't supported, or don't belong won't operate nearly as well. This is because these feelings can trigger self-defeating behaviors like procrastination, disengagement from work, burnout, and attrition. Symptoms of depression are also strongly related to an unmet need for connection and social support at work. Brafford, *supra*, at 84–85, 97. With national research showing that practicing lawyers experience depression at four times the rate of the general population, *see* Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 46 (2016), and preliminary results from Utah's 2019 lawyer study showing similarly elevated rates, this is something we all should be taking a very hard look at for ourselves and for our organizations.

MARTHA KNUDSON is the Executive Director of the Utah State Bar's Well-Being Committee for the Legal Profession. In addition to her eighteen years experience as a practicing lawyer, Ms. Knudson holds a masters in applied positive psychology from The University of Pennsylvania where she also serves as a member of the graduate program's teaching team.

Defining High-Quality Relationships

High-quality relationships at work go a long way toward satisfying our fundamental need for belonging and social connections. Being "high-quality" doesn't mean you and your co-workers need to be "besties" and brush each other's hair. The relationships we're talking about don't have to be deeply personal, just "high-quality." This means that they are characterized by four important things: (1) they are empowering; (2) they provide you with a sense of trust; (3) they are respectful; and (4) they allow you to be your authentic self. *See* Davis-Laack, *supra*, at 63.

Building High-Quality Connections

High-quality relationships start with high-quality connections (HQCs). These are relationship building blocks. Some of the positive behaviors of HQCs are overt and obvious. But others are very subtle, including the many micro-moments of interaction we have with others as we go about our work every day. *See* Brafford, *supra*, at 85–87.

Humans (yes, that includes lawyers) are sensitive creatures. Without even knowing what we're doing, we're constantly scanning for social cues on whether we belong and are valued. Surprisingly, most of the cues we pick up on are non-verbal. Research tells us that when we interpret a message only 7% of it comes from the words being spoken, 50% of it comes from body language, and 38% is from tone of voice. This means that small behaviors like eye contact, body posture, facial expressions, and tone of voice can convey far more about whether one is valued and belongs than the words coming out of our mouths. *See id.* at 91. If our micro-moments of interaction are positive and filled with genuine warmth and openness, they send a message of respect, trust, and encouragement that can be energizing and help us to enjoy our work and do it well. If they aren't, even unintentionally, they can leave us feeling on edge, disengaged, and like we don't belong.

Here's an example from my own experience. Years ago, something frustrating happened with one of my cases. It's been so long I can't remember the details. What I do remember is venting about it to my legal assistant. Nothing about the situation had anything to do with her, but I needed to rant, and she was available. As I was carrying on about whatever it was that had sent me off the rails, she burst into tears. I was so confused. Why was she crying? It turns out that to her, my angry tone and body language were communicating that I thought everything was her fault and that she wasn't cutting it. This couldn't have been further from the truth. She was awesome. My life and practice didn't function without her. I thought I was just venting to someone I trusted. But she read the situation quite differently.

Thankfully, because she was visibly upset, we were able to quickly get to the bottom of it. I reassured her that my freak out had zero to do with her and apologized profusely for my behavior. But, had she been more stoic during that exchange, she might have walked away feeling unvalued, unappreciated, and like she didn't belong. She would also have been more likely to interpret future messages as confirming this belief. And, if she had carried this belief over time, research tells us it would have likely negatively impacted her productivity, attendance, and commitment to working for me. Me? I would have been none the wiser. Left scratching my head about what happened to my awesome assistant and why she didn't want to work with me any longer.

This was a powerful lesson for me on how important it is to slow down and consider how I'm coming across to those with whom I work. Frankly, this is something we should all stop and consider. Are we seeing our colleagues and co-workers as people first and not just a means to get our work done? Are we inadvertently communicating things we don't intend? Could our behavior be negatively impacting the well-being of others? And, can we make even small changes during our micro-moments of interaction to actually support the well-being of those we work with?

Engaging in this kind of reflection is good for all of us, but the stakes are even higher for organizational leaders. Research tells us we are particularly sensitive to messages from those perceived to carry more power. Not only this, but we often contribute the conduct of our leaders to the entire organization. *See* Brafford, *supra*, at 93. This means that leaders who engage in high-quality connections have great influence on building cultures where lawyers feel valued and supported. And, their positive style can also encourage others to model similar behavior. Unfortunately, the opposite is also true.

Remember how we are sensitive creatures? This means that the behaviors that can defeat our perceptions of belonging and support can also be very subtle. It's things like failing to provide information or explain goals, giving unfair criticism, taking others for granted, not giving credit where credit is due, being rude, having a condescending tone, ignoring an individual, not making eye contact, failing to listen to others, interrupting individuals, using sarcasm (unfortunately), and even simply failing to say please and thank you. *See id*. at 85–86.

How we treat each other matters. It matters to the health, well-being, and performance of our co-workers. It matters to the functioning of our organizations. By making high-quality relationships a priority, our own well-being improves as it makes others want to treat us well in return, sparking a positive sense of reciprocity. And support from others reduces our physiological responses to the stress of practicing law. *See id*. at 89. Not only that, substantial evidence shows that the more we are consistent about enabling the success of our colleagues, the more motivated and successful we will be ourselves. Adam Grant, *Give and Take: Why Helping Others Drives Our Success* (2012).

We can start to make important changes today. A few evidence-based strategies you can use to help build high-quality connections and relationships for yourself and your organization include the following:

Strategies for Lawyers

- Use an appropriate and respectful tone;
- Avoid sarcasm;
- Make eye contact;
- Stop typing and look up from your computer when someone enters your office;
- Say please and thank you;
- Let people know you value them;
- Greet people by name;
- Keep people informed;
- Use inclusive language;
- Ask rather than demand;
- See co-workers as people first;
- Listen and don't interrupt;
- Pay attention to the people around you;
- Communicate support, encouragement, and belonging;
- Provide access to resources and information;
- Give advice;
- Help remove obstacles; and
- Schedule five minutes every day to offer gratitude or lend a hand to others.

See Brafford, *supra*, at 85–86, 88.

Strategies for Organizations

The behaviors that support high-quality relationships can be learned. Remember our U.S. Army soldiers? They receive resilience training that includes learning proper communication, listening skills, and relationship building. *See U.S. Army, Army Sharp, Ready & Resilient (SR2) Directorate*, https://readyandresilient.army.mil/ (last updated Jan. 28, 2019). This kind of training is an evidence-based area of opportunity for legal employers that can pay-off with quantifiable performance gains.

Another recommendation is for organizations to take a hard look at their policies, practices, and culture to determine if they could be negatively impacting healthy workplace relationships and whether people feel that they matter. Culture plays an enormous role in influencing workplace relationships and employee morale as it shapes shared beliefs, values, behaviors, social patterns, and group norms. The Utah Bar's Well-Being Committee for the Legal Profession has prepared an audit checklist for legal employers that can help measure the well-being of the organization. *See* The Utah State Bar's Well-Being Committee for the Legal Profession, *Best Practices for Legal Employers*, at app. D (Feb. 2019) *available at* https://www.utahbar.org/wp-content/uploads/2019/11/BP1employers.pdf.

We may not choose to have certain colleagues or co-workers in our lives, but we all have the opportunity to choose how we interact with our colleagues and co-workers. Legal work requires social interaction. The choice to consciously learn and support behaviors that support high-quality relationships can make a difference. It matters. Not only to our own success and well-being, but to that of our colleagues, co-workers, and organizations.

YOUNG MINDS, BRILLIANT ATTORNEYS

Eli W. McCann, Litigation; Jackie Bosshardt Wang, Risk Management; Brad Lowe, Tax and Estate Planning; Whitney Blair, Intellectual Property and Jansen Gunther, Real Estate (Not Pictured)

When your business is on the forefront of technology and growth, you need a modern, forward-thinking, innovative approach. Kirton McConkie warmly welcomes our newest shareholders.

KIRTON | McCONKIE

SALT LAKE CITY, UT | LEHI, UT | ST. GEORGE | 801.328.3600 | KMCLAW.COM

Appellate Highlights

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

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

UTAH SUPREME COURT

Intercontinental Hotels Grp. v. Utah Labor Comm'n, 2019 UT 55 (Sept. 4, 2019)

For workers' compensation purposes, "**a slip-and-fall accident arises out of employment where the employee slips and falls in a place, and at a time, in which the employee would not otherwise have been but for the employee's employment obligations.**" *Id.* ¶ 18. The claimant was entitled to benefits, where she tripped and fell for an unexplained reason in the parking lot adjacent to her office while on the way to work.

Burningham v. Wright Medical Tech., Inc., 2019 UT 56 (Sept. 5, 2019)

The federal district court certified four questions regarding whether and to what extent implanted medical devices should be immune from strict liability design defect claims under Utah law because they are "unavoidably unsafe." Among other things, the supreme court held that **a party may invoke the unavoidably unsafe exception, as an affirmative defense, where a device enters the market through the Food and Drug Administration's 510(k) process on a case-by-case basis.** The decision contains a discussion of when and what jury instructions will be appropriate under different theories of liability.

South Salt Lake City v. Maese, 2019 UT 58 (Sept. 20, 2019)

Affirming the appellant's conviction for traffic infractions, the supreme court held that **the right to a jury trial in criminal cases under the Utah Constitution does not extend to cases where the sanction would be limited to incarceration for thirty days or less and/or a minor financial penalty.** The court's in-depth review of the plain language and historical context of the provision at issue will likely provide a useful framework for interpreting other provisions of the Utah Constitution.

Vander Veur v. Groove Entertainment Technologies, 2019 UT 64 (Oct. 29, 2019)

The court of appeals previously held that an implied covenant may preclude an employer from firing an at-will employee to avoid paying commissions owed under a separate compensation agreement. In a split decision, the supreme court reversed, holding that **applying the covenant of good faith and fair dealing to require payment of post-termination commissions contradicted the express terms of the compensation agreement at issue.** Concurring in part and dissenting in part, Justice Pearce, joined by Justice Himonas, argued that the majority's reasoning virtually eliminated application of the covenant of good faith and fair dealing in the at-will employment context and invited "unchecked mischief" by employers.

State v. Sosa-Hurtado, 2019 UT 65 (Oct. 31, 2019)

Defendant shot and killed a shopkeeper's son within a few feet of the shopkeeper – close enough that the shopkeeper "felt the air displaced by the bullets." A jury convicted defendant of aggravated murder based on the "great risk of death" aggravator. Affirming, the supreme court clarified that "the risk of death need not result directly from the precise act that caused the victim's death" for the aggravator to apply, but instead "**may be satisfied if the great risk of death was created within a 'brief span of time' of the act causing the murder and the acts together 'formed a concatenating series of events.**'" *Id.* ¶ 2.

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

UTAH COURT OF APPEALS

***State v. Frederick*, 2019 UT App 152 (Sept. 19, 2019)**

Affirming a conviction for aggravated sexual abuse of a child, the court of appeals rejected the defendant's argument that propensity evidence was improperly admitted under Utah R. Evid. 404(c). The court emphasized that **evidence admitted under rule 404(c) is relevant and admissible precisely because it shows a propensity to commit child molestation, and, thus, such evidence cannot be unfairly prejudicial based solely on its tendency to show such a propensity.** Judge Mortensen's concurring opinion singled out language in the advisory committee notes that suggested the court should consider the *Shickles* factors, directing trial courts to "ignore this misdirection."

***State v. Granados*, 2019 UT App 158 (Sept. 26, 2019)**

Defendant appealed convictions stemming from a shooting and subsequent police chase. Among other challenges, the defendant argued that the trial court erred in dismissing a juror caught sleeping through significant portions of a trial without questioning the juror. Affirming, the court of appeals held "**district courts have considerable discretion in determining how best to resolve" sleeping juror issues under Utah R. Crim. P. 17(g)**. *Id.* ¶ 39.

***Timber Lakes Property Owners Assoc. v. Cowan*, 2019 UT App 160 (Sept. 26, 2019)**

A homeowners association sued the defendants for permanent injunctive relief related to the construction of a garage, which encroached on the association's right-of-way to maintain, improve, or use a 60-foot-wide road in that area. **Because the association failed to submit evidence that it actually intended to construct the road, the court of appeals held that the association failed to prove that "irreparable harm would result" and affirmed the denial of the permanent injunction.** In doing so, the court rejected the association's argument that the availability of monetary compensation was based upon conjecture.

***State v. Martinez*, 2019 UT App 166 (Oct. 18, 2019)**

***State v. Bowden*, 2019 UT App 167 (Oct. 18, 2019)**

In these two criminal appeals, issued the same day, the court of appeals considered the defendants' arguments that their convictions for felony discharge of a firearm should have merged with their convictions for attempted murder (*Martinez*) or attempted aggravated murder (*Bowden*). Because Utah Code § 76-5-203 and Utah Code § 76-5-202 employ different language, the court of appeals **affirmed the district court's refusal to merge the felony discharge conviction with attempted murder in *Martinez*, but held the felony discharge conviction should have been merged with the attempted aggravated murder conviction in *Bowden*.**

***Wood v. United Parcel Service*, 2019 UT App 168 (Oct. 18, 2019)**

A driver had backed into a loading dock at the plaintiff's employer, damaging the dock and a vinyl curtain mounted at the dock. One week to a month later, the plaintiff was injured when a bracket from the vinyl curtain fell and knocked him down. The district court granted summary judgment to the driver's employer on the basis it did not owe a duty to the plaintiff. Applying *B.R. ex rel. Jeffs v. West*, 2012 UT 11, 275 P.3d 228 and referencing Restatement (Second) of Torts § 452(b), **the court of appeals held that the duty had shifted to the owner of the loading dock facility and, as a result, defendant had no duty to plaintiff at the time of the accident.**

10TH CIRCUIT

***Watts v. Watts*, 935 F.3d 1138 (10th Cir. Sept. 5, 2019)**

This case arose out of an international custody dispute under the Hague Convention on Civil Aspects of International Child Abduction. The district court denied the petitioner's request to return the children to Australia, because he failed to prove that Australia was the children's habitual residence. Affirming, the Tenth Circuit reiterated that **permanency is not necessary to establish habitual residency under the Hague Convention, and the district court applied the correct standard when it considered and weighed parental intent and acclimatization as independent factors.**

***United States v. Elliott*, 937 F.3d 1310 (10th Cir. Sept. 9, 2019)**

The Tenth Circuit concluded that 18 U.S.C. § 2251(a) is ambiguous as to whether the unit of prosecution for possession of child pornography is a single device or simultaneous possession of multiple devices. **Applying the rule of lenity, the Court held that the defendant's simultaneous possession of multiple devices in a single location constituted a single offense and vacated three of the defendant's four convictions.**

***United States v. Malone*, 937 F.3d 1325 (10th Cir. Sept. 11, 2019)**

The district court imposed a stock condition of supervised release requiring the defendant to "take prescribed medications as directed" by his mental health providers. On appeal, the Tenth Circuit held that **imposition of a blanket medication requirement without particularized findings was plain error, which warranted reversal.** On remand, the district court was instructed to strike the offending language without a resentencing.

***C5 Med. Werks, LLC v. CeramTec GMBH*, 937 F.3d 1319 (10th Cir. Sept. 11, 2019)**

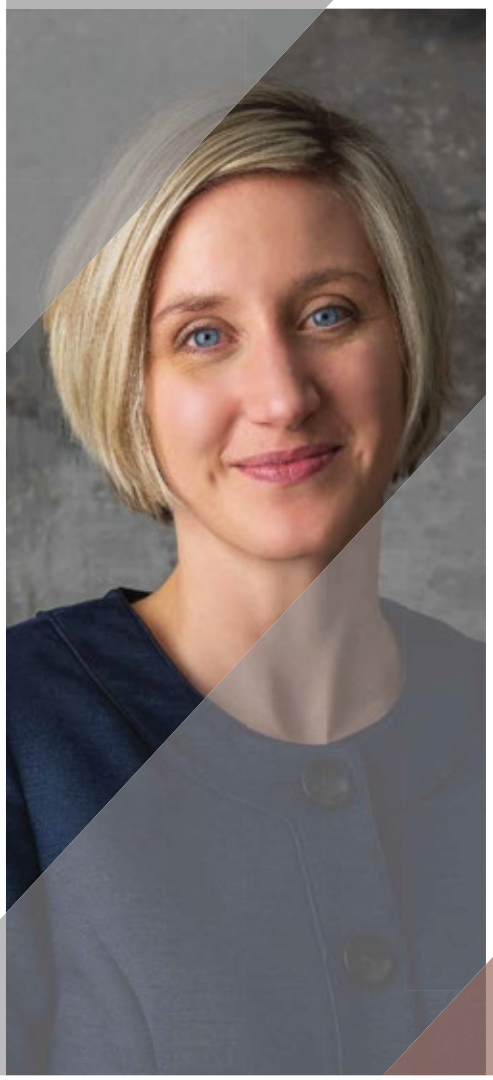
In this trademark dispute, the Tenth Circuit reversed the denial of a motion to dismiss for lack of personal jurisdiction. In doing so, the court held that **defendant did not purposefully avail itself of the jurisdiction of the forum state, even though it attended tradeshows there, because other parties selected the location of the tradeshows.** The court also rejected the plaintiff's argument that jurisdiction was proper, because the defendant engaged in enforcement activities in another country which affected the plaintiff's bottom line, and sent a single cease-and-desist letter to the plaintiff in the forum state.

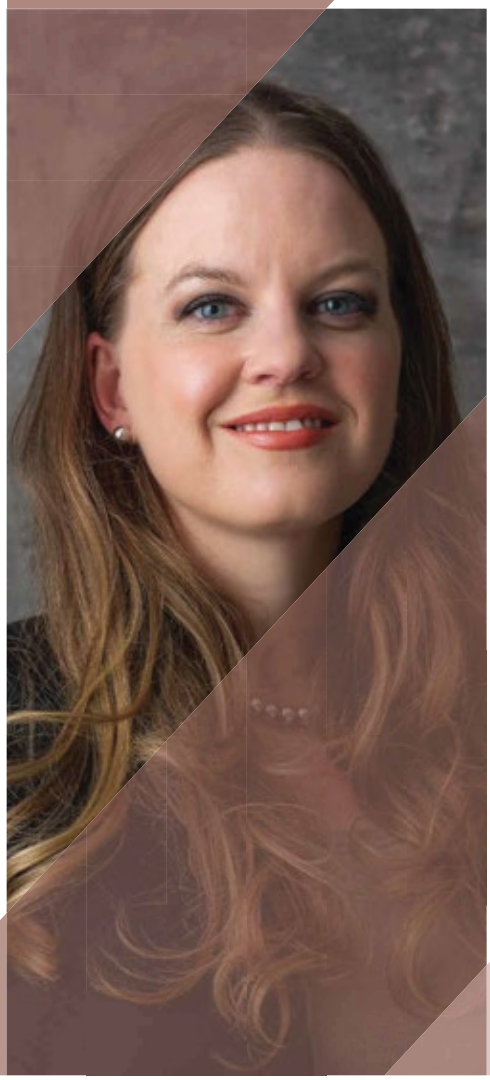
***Harte v. Bd. of Comm'rs of Cnty. of Johnson, Kan.*, 940 F.3d 498 (10th Cir. Oct. 4, 2019)**

This section 1983 case arose out of an early-morning SWAT-style raid of a suburban home based on finding loose-leaf tea in their garbage. The district court granted qualified immunity to some of the defendants. In the first appeal, the panel split – two of the three judges shared a common rationale, yet reached different outcomes, and a different combination of judges reached a common outcome using different rationales. After remand, the parties disagreed on which claims remained under the prior panel's decision. In the second appeal the Tenth Circuit held, **when applying a fractured panel's holding, the district court need only look to and adopt the result the panel reached – not the common rationale.**

***United States v. Anthony*, 942 F.3d 955 (10th Cir. Oct. 31, 2019)**

In this appeal from a restitution order, the Tenth Circuit held that **the district court erred in ordering restitution for a broad conspiracy, where there was a variance between the conspiracy charged in the indictment and the smaller conspiracy actually proven at trial.**





We're with you till the end.

An appeal can feel like uncharted territory. We can help you navigate your way. With six judicial clerkships and over 100 appeals under our belts, we know what we're doing. The trial is just the beginning. We're with you till the end. **theappellategroup.com**

Services

Appeals
Amicus Briefs
Post-trial Motions
Post-conviction Petitions
Sentence Reductions
Expungements

The Appellate Group

2020 Legislative Session Primer

by Doug Foxley, Frank Pignanelli, and Stephen Foxley

With the 2020 Utah General Legislative Session right around the corner, your lobbyists thought this a good time to remind you of our advocacy for the profession and the various legal and administrative guardrails in place to ensure our activities are appropriate and germane to the profession.

The Utah State Bar is an organization we are proud to represent for its role in regulating Utah attorneys, who are the best in the country. The Bar maintains rigorous admission standards, ensures high-quality continuing education, enables social and service opportunities for its members, helps the profession operate at the highest ethical standards, and supports efforts to improve access to legal services throughout the state. It is also mindful of technological advances and the need to adapt the legal profession to meet the needs of consumers in the state. In our experience, the Utah State Bar's legislative activities always complement these broad objectives.

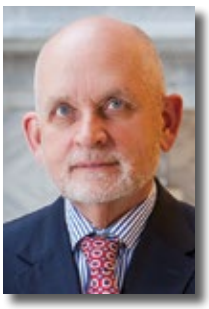
Our legislative activities are limited by design. When the Utah Supreme Court adopted rules that directed the Utah State Bar to engage in legislative activities, it identified specific public policy areas where the Bar can participate. These are matters concerning the courts, rules of evidence and procedure, administration of justice, the practice of law, and access to the legal system.

Public policy positions are determined by the Bar commissioners after receiving input from the Government Relations Committee (GRC). The GRC meets weekly during the legislative session to vet and recommend public policy positions. Last year the group reviewed more than ninety bills and determined positions of support or opposition on nineteen measures. These positions are available to the public on the Bar's website so members may enjoy additional clarity. Bar sections may be granted the authority from the Bar commissioners to advocate for a particular issue. The GRC includes a representative from each section of the Bar. Please contact your section leaders if you are interested in pursuing involvement with the committee. We also plan to examine other ways to measure the sentiment of Utah lawyers and to ensure their positions are accurately reflected to lawmakers and other policymakers.

As counselors to the Bar, we are also mindful of the United States Supreme Court decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990). This case places limits on an integrated bar's ability to require its members fund certain ideological activities that fall outside of the practice of law. The public policy areas outlined by the Utah Supreme Court help ensure compliance with the limits outlined in *Keller*. Additionally, the Bar has a policy that allows lawyers to receive a rebate of the proportion of their annual Bar license fee that was expended for lobbying and other legislative-related expenses.[1]

This past year, legislative leaders considered a bill that would have taxed legal and other professional services. The Bar vigorously opposed this measure because of the adverse impact it would have on access to justice, on availability of legal

Doug Foxley, Frank Pignanelli, and Stephen Foxley are licensed attorneys and lobbyists for the Utah State Bar. They can be reached at foxpig@fputah.com.



services in the state, and for constitutional reasons. We suggested individual members reach out to their legislators to provide input on how such a tax would impact their ability to provide legal services in the state or create potential problems to clients. Further, members were advised as to the rationale behind the legislation (readjustment of tax system) and to provide thoughtful alternatives to resolve the problem.

We want to thank you for your continued outreach to lawmakers. At the time this article was submitted, the legislature and governor had not yet agreed on a final tax proposal. Thus, we continue to encourage you to engage with lawmakers on this issue and other that might impact you.

In recent years we encountered other significant public policy debates. Most recently those included whether the supreme court should continue to regulate the practice of law and what criteria should be considered when filling judicial vacancies. As our state continues to grow and change, we anticipate there will be other major issues that will require the Bar's input.

The *Keller* decision will continue to guide the Bar's direct involvement in the legislative process. Controversial and significant issues that are important to individual members will erupt, and the *Keller* analysis will be utilized in developing the appropriate response and strategy.

Thank you for your continued interest in promoting good public policy through your practice of the law. Through zealous advocacy on behalf of your clients and continued involvement in the legislative process, we can continue to advance the legal profession in Utah in the year to come.

1. Notify Utah State Bar Executive Director John C. Baldwin, 645 South 200 East, Salt Lake City, Utah 84111, or at jbaldwin@utahbar.org.

2020 Utah State Lawyer Legislative Directory

THE UTAH STATE SENATE

Lyle W. Hillyard (R) – District 25
lhillyard@le.utah.gov

Education: B.S., Utah State University; J.D., University of Utah S.J. Quinney College of Law

Practice Areas: Family Law and Mediation.

Kirk Cullimore, Jr. (R) – District 9
kcullimore@le.utah.gov

Education: B.A., Brigham Young University; J.D., University of Oklahoma School of Law

Practice Areas: Property Rights, Fair Housing, and Property Management.

Daniel Hemmert (R) – District 14
dhemmert@le.utah.gov

Education: B.A., Economics, Brigham Young University; M.B.A., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Jani Iwamoto (D) – District 4
jiwamoto@le.utah.gov

Education: B.S., University of Utah, Magna Cum Laude; J.D., University of California Davis School of Law

Daniel McCay (R) – District 11
dmccay@le.utah.gov

Education: Bachelors and Masters, Utah State University; J.D., Willamette University College of Law

Practice Areas: Real Estate Transactions, Land Use, and Civil Litigation.

Todd Weiler (R) – District 23
tweiler@le.utah.gov

Education: Business Degree, Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Civil Litigation and Business Law.

THE UTAH STATE HOUSE OF REPRESENTATIVES

Patrice Arent (D) – District 36
parent@le.utah.gov

Education: B.S., University of Utah; J.D., Cornell Law School

Practice Areas: Adjunct Professor, S.J. Quinney College of Law – University of Utah. Past experience: Division Chief – Utah Attorney General's Office, Associate General Counsel to the Utah Legislature, and private practice.

Brady Brammer (R) – District 27
bbrammer@le.utah.gov

Education: B.A., Brigham Young University; MPA, Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Commercial, Real Estate, and Government Entity Litigation.

Craig Hall (R) – District 33
chall@le.utah.gov

Education: B.A., Utah State University; J.D., Baylor University

Practice Areas: Litigation and Health Care Law.

Timothy D. Hawkes (R) – District 18
thawkes@le.utah.gov

Education: B.A., Brigham Young University; J.D., Columbia University School of Law

Practice Areas: Current: General Counsel, Water Law. Past: Civil Litigation, Mediation, and Appellate.

Brian King (D) – District 28
briansking@le.utah.gov

Education: B.S., University of Utah; J.D., University of Utah S.J. Quinney College of Law

Practice Areas: Representing claimants with life, health, and disability claims; class actions; and ERISA.

Mike McKell (R) – District 66
mmckell@le.utah.gov

Education: B.A., Southern Utah University; J.D., University of Idaho

Practice Areas: Personal Injury, Insurance Disputes, and Real Estate.

Kelly Miles (R) – District 11
kmiles@le.utah.gov

Education: B.S., Weber State University; J.D., University of Utah S.J. Quinney College of Law; MBA, University of Utah Eccles School of Business

Practice Areas: Estate Planning, Elder Law, and Probate and Estate Settlement.

Merrill Nelson (R) – District 68
mnelson@le.utah.gov

Education: B.S., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Kirton McConkie – Appellate and Constitution, Risk Management, Child Protection, Adoption, Health Care, and Education.

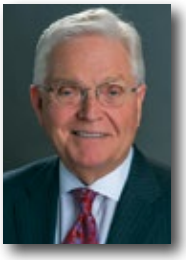
Stephanie Pitcher (D) – District 40
spitcher@le.utah.gov

Education: J.D., University of Utah S.J. Quinney College of Law

Practice Areas: Deputy District Attorney.

Travis Seegmiller (R) – District 62
tseegmiller@le.utah.gov

Education: B.A., Yale University, cum laude; J.D., Georgetown University, cum laude



Lowry Snow (R) – District 74
vlsnow@le.utah.gov

Education: B.S., Brigham Young University; J.D., Gonzaga University School of Law

Practice Areas: Snow Jensen & Reece, St. George – Real Estate, Civil Litigation, Business, and Land Use Planning.

Andrew Stoddard (D) – District 44
astoddard@le.utah.gov

Education: B.S., University of Utah; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Murray City Prosecutor.

Keven J. Stratton (R) – District 48
kstratton@le.utah.gov

Education: B.S., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Stratton Law Group PLLC – Business, Real Estate, and Estate Planning.

Steve Waldrip (R) – District 8
swaldrip@le.utah.gov

Education: B.A., Brigham Young University; J.D., University of Utah S.J. Quinney College of Law; LL.M., Taxation, University of Washington School of Law

Standback, Marvel & Pay

by James U. Jensen

POET'S NOTE: *We were at the Cowboy Poetry Gathering in Elko. Across from the English meat pie place I saw a small cottage-like House. The sign read, Marvel & Marvel: Attorneys at Law. I quoted the sign to a lawyer friend who quoted back to me the name of the law firm that found its way into this poem, Standback, Marvel & Pay.*

I went to see my lawyer the other day.
I needed some help on a few bales of hay.
The sign over the door read, "Standback, Marvel & Pay."
It seems that Standback had passed away;
And Marvel was out. So I got Pay.

Come in he said. I'll hear what you have to say.
Don't worry about any delay;
When I'm on the case you'll,
Standback, Marvel and Pay.

He chuckled to break the ice and that was fine with me;
But I wanted a cattle savvy fighter; that's what I wanted to see.
A little young I thought – I wonder if he knows
The law of hay sales and cattle shows.

I said, You know ol' Johnny Knot?
He lives in the place behind Mavis Shot.
It's a nice place if a little small:
A barn, some feed lots and a de-worming stall.

Well, I dropped off some feed in back of his lot.
But now he says that he's forgot.
It was for that prize bull he was feeding out.
Can you make him remember what we agreed about?

Knot says that Shot claimed that he owed her some hay:
For some work she did the other day.
So she thought that my hay was for her;
And she's fed it to her prize heifer.

We'll sue for replevin, said Pay.
That's the way to recover your hay.
We'll sue Knott and we'll sue Shot.
We'll sue them both for all they've got.

But it's not the hay I'm worried about.
It's not where it went; but where it came out.
I've got to know which one ate the feed.
That's the only thing I really need.

What difference should that make?
Either Knott or Shot has made a mistake.
We'll make 'em pay for their ill-got hay;
Now you're with Standback, Marvel & Pay.

You see my wife and I were in that hay;
We were celebrating her birthday;
And got a little carried away.
She placed her ring where it was meant to stay.
Now I'm in trouble without that hay.

Mavis says the heifer's been sold;
And Knott says the Bull's gone to his reward.
But it's not the heifer or bull I need access to;
It's their stalls I need to sort thru.

We'll sue for disgorgement of ill got gain.
They'll never want to feed your hay again.
We'll allege a major environmental infraction.
And settle for rights of surface extraction.

But next time you want connubial bliss,
Promise your lawyer, yes promise me this:
Stay away from an old fashioned roll in the hay;
So you don't need Standback, Marvel & Pay.

JAMES U. JENSEN served as Special Master to the Utah Third District Court in the failed thrifts litigation and was the Distribution Agent for the SEC in a securities fraud recovery.

Notice of Bar Commission Election – Third Division

Nominations to the office of Bar Commissioner are hereby solicited for three members from the Third Division, each to serve a three-year term. Terms will begin in July 2020. To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar. Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Nominating petitions are available at http://www.utahbar.org/bar-operations/leadership/. Completed petitions must be submitted to John C. Baldwin, Executive Director, no later than February 3, 2020, by 5:00 p.m.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1st with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15th.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1. space for up to a 200-word campaign message plus a color photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions and two photographs no later than February 1st;

2. space for up to a 500-word campaign message plus a photograph on the Utah Bar Website due February 1st;

3. a set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division who are eligible to vote; and

4. a one-time email campaign message to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate.

If you have any questions concerning this procedure, please contact John C. Baldwin at (801) 531-9077 or at director@utahbar.org.

Nominations Sought

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2020 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession.

Please submit your nomination for a 2020 Spring Convention Award no later than Monday, January 18, 2020. Use the Award Form located at utahbar.org/nomination-for-utah-state-bar-awards/ to propose your candidate in the following categories:

1. **Dorathy Merrill Brothers Award –** For the Advancement of Women in the Legal Profession.
2. **Raymond S. Uno Award –** For the Advancement of Minorities in the Legal Profession.

The Utah State Bar strives to recognize those who have had singular impact on the profession and the public. We appreciate your thoughtful nominations.

Women Lawyers of Utah 2019 Mentoring Award Recipient U.S. District Court Magistrate Judge Evelyn J. Furse

Women Lawyers of Utah (WLU) awarded its 2019 Mentoring Award to U.S. Magistrate Judge Eve Furse at its annual retreat at Stein Eriksen Lodge, Deer Valley, Utah, November 1–2, 2019.

In 2009, WLU began the tradition of honoring, at its annual retreat, an individual who has demonstrated an exceptional commitment to mentoring women lawyers in the Utah legal community. The Mentoring Award recipient is selected by the WLU Board of Directors based on nominations from WLU's members (which currently total more than 700 members of the Utah State Bar). The criteria for the award are: (1) service as a role model to women lawyers in the community; (2) fostering the development and advancement of women lawyers; and (3) significantly contributing to the profession and/or the community through those efforts.

"We received several nomination letters for Judge Furse this year and cannot think of a more deserving recipient," said WLU President Ashley A. Peck. "WLU specifically chose Judge Furse because she has served as an exceptional role model for women lawyers and judges in our community, across the state and around the country by working tirelessly to foster the development and advancement of women in the legal profession."

After graduating from NYU Law School in 1996, Judge Furse served a prestigious clerkship with Utah Supreme Court Justice Christine M. Durham, then worked in private practice in Washington, D.C. and Salt Lake City, served as Special Assistant Corporation Counsel for the District of Columbia, and served as Senior Salt Lake City Attorney for six years before being appointed United States Magistrate Judge for the District of Utah, where she has served with distinction for almost eight years, and recently received the strong endorsement of the federal court's merit selection and advisory commission for reappointment to a new eight-year term.

Judge Furse enjoys a superb professional reputation both locally and nationally. She chairs the Federal Judicial Center's Magistrate Judge Education Advisory Committee, which is responsible for coordinating the training of United States magistrate judges and court staff across the country; and she is the co-author of the Federal Bail and Detention Handbook for the United States Courts. She is a frequent speaker, locally and nationally, on a wide variety of topics; and she has provided countless hours of pro bono service to the legal profession in Utah as a Utah State Bar Commissioner, a member of a screening panel for the Utah State Bar's Ethics & Discipline Committee, and as co-chair of the 2019 Utah State Bar Convention.

A past president of WLU, Judge Furse was a driving force behind WLU's 2010 Initiative on the Advancement and Retention of Women Lawyers – a project that entailed hundreds of hours of volunteer service preparing and conducting surveys of Utah practitioners, analyzing the data collected, drafting and editing reports, planning and conducting two symposia, and conducting difficult conversations with the managing partners of Utah's law firms, in an effort to sensitize them to the unique issues confronting women lawyers in Utah. She has provided thoughtful training to younger practitioners, is a tangible example of a talented and successful woman lawyer, and has sparked countless beneficial changes for women in the profession.

Asked for a comment, Judge Furse's former law clerk, Brit Merrill, said, "Judge Furse was an incredible role model. She is whip smart, hardworking, diligent, measured, strong and caring – truly, she is the embodiment of professionalism." But Justice Durham summed it up best for all of us, saying:

> Some people are the whole package. They have intellect, ethical standards, problem-solving skills, industry and a desire to make the world a better place. Along with all that, they have a generosity of spirit and compassion for others that motivate them to step out of themselves. Eve Furse is such a person. I have watched with awe her willingness to serve in arenas that call, sometimes, for her legal skills, but more often for her human capacity to connect, to support, to go beyond anything ordinary in the effort to enable another's life to improve. She richly deserves this award.

Past WLU Mentoring Award recipients are as follows:

- 2009 Margaret Plane
- 2010 Joan Watt
- 2011 Pat Christensen
- 2012 Judge Sandra N. Peuler
- 2013 Judge Brooke C. Wells
- 2014 Annette W. Jarvis
- 2016 Judge Vernice S. Trease
- 2017 Catherine S. Conklin
- 2018 Kristin K. Woods

MCLE Reminder – Even Year Reporting Cycle

July 1, 2018 – June 30, 2020

Active Status Lawyers complying in 2020 are required to complete a minimum of twenty-four hours of Utah approved CLE, which must include a minimum of three hours of accredited ethics. **One of the ethics hours must be in the area of professionalism and civility.** At least twelve hours must be completed by attending live in-person CLE.

Please remember that your MCLE hours must be completed by June 30 and your report must be filed by July 31.

Fees:

- $15.00 filing fee – Certificate of Compliance (July 1, 2018 – June 30, 2020)
- $100.00 late filing fee will be added for CLE hours completed after June 30, 2020 OR
- Certificate of Compliance filed after July 31, 2020

Rule 14-405. MCLE requirements for lawyers on inactive status

A lawyer who has been on inactive status for less than twelve months may not elect active status until completing the MCLE requirements that were incomplete at the time the lawyer elected to be enrolled as an inactive member.

Effective May 1, 2017.

For more information and to obtain a Certificate of Compliance, please visit our website at: www.utahbar.org/mcle.

Thank You to Bar Members!

Thank you to all the members of the Utah State Bar and their personnel who participated in the 30th Annual Food and Clothing Drive! We continue to enjoy strong and wonderful support from the entire Utah legal community. We had a very successful year, and that does not take into account the coordinated donations of 150 hams and all the trimmings for 150 families to prepare for their holiday feast. We also received a number of cash donations totaling $4,115. Those not designated to a particular charity were apportioned among those that our drive supported and the purchase of $50 gift cards at Smith's Foods for approximately fifty Veterans at the First Step House, which is adjacent to Smith's Foods on 500 South and 500 East in Salt Lake City.

We don't know how many semi-trucks your donations have filled over these thirty years, but we believe it would be a very large number and we know that the donations have helped thousands of people. In complete turkey and ham dinners for families who had facilities to prepare them, over 9,000 turkeys and hams with all of the trimming!

We believe we were very successful in our efforts for the charities that we annually support, all through your continued generosity and efforts. We look forward to seeing you next year!

Ethics Hotline

Utah attorneys and LPPs with questions regarding their professional responsibilities can contact the Utah State Bar General Counsel's office for informal guidance during any business day. The email is ethicshotline@utahbar.org. The Ethics Hotline is a resource for Utah lawyers and LPPs only. All ethics advice is non-binding and intended only to be informational.

The Utah State Bar General Counsel's Office can help you identify applicable disciplinary rules, point out relevant formal ethics opinions and other resource material, and give you a reaction to your ethics question. No attorney-client relationship is established between lawyers or LPPs seeking ethics advice and the lawyers employed by the Utah State Bar.

UTAH STATE BAR ETHICS HOTLINE

Ethics Advisory Opinion Committee – Opinion No. 19-04

ISSUED: OCTOBER 4, 2019

ISSUE

When does a representation of appointed criminal defense counsel end for purposes of Rule 4.2's prohibition on a lawyer speaking with a represented party about the subject of the representation?

BACKGROUND

Client A is appointed counsel (Attorney A) to represent Client A in a criminal case brought by the state. Client B is charged in the same matter and is appointed a different lawyer (Attorney B) from a different law firm. The request provides no information on the terms of the appointment from the court as to either client, but, consistent with the Sixth Amendment right, we assume that neither the appointing court nor Lawyer B ever limited the scope of representation.

Client B eventually agrees to plead and cooperate and is eventually sentenced on Client B's charges. Client A does not plead and is proceeding to trial. After Client B has pled, but before the trial of Client A, Lawyer A wishes to contact Client B. It is apparent from the request – though not clearly stated in the request – that Lawyer A wants to bypass Lawyer B and speak with Client B without counsel.

OPINION

For purposes of Rule 4.2, a lawyer should assume, absent actual knowledge of contrary information, that a criminal defendant's representation encompasses all aspects of the criminal process, including any cooperation the defendant commits to in a plea agreement. Lawyer A may not ethically contact Client B about any aspect of Client B's criminal charges, plea agreement, or cooperation without the consent of Lawyer B.

ANALYSIS

Rule 4.2 provides that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by a legal professional in the matter, unless the lawyer has the consent of the legal professional." Thus, a straightforward application of the Rule would ask merely whether the matter about which Client B is set to testify is the subject of the representation; if it is, the lawyer may not contact Client B without permission of Client B's counsel. The request provides no basis to conclude that the matter about which Lawyer A wishes to talk to Client B is not within the scope of Lawyer B's representation of Client B. Thus, under Rule 4.2 Lawyer A must seek Lawyer B's permission.

Although Utah has recently amended Rule 4.2 and now has a unique version of Rule 4.2 that applies in cases of limited scope representations and unbundled legal services, the question posed does not implicate those provisions. Rule 4.2(b)– the section dealing with unbundled legal services– provides that "A lawyer may consider a person **whose representation by a legal professional in a matter does not encompass all aspects of the matter** to be unrepresented for purposes of this Rule and Rule 4.3." However, the question posed to this Committee does not suggest that Lawyer A has any reason to believe that the scope of representation is limited and indeed any competent criminal defense attorney would have to know that a representation must encompass all critical aspects of the criminal process – i.e. all aspects of the matter– to pass Constitutional muster.

Although we do not opine on the law, since the Sixth Amendment law in this area is well settled and since there is some interplay between the Constitution and the Rules we address it briefly here. Representation, to be adequate under the Sixth Amendment of the United States Constitution (incorporated as to the states through the Fourteenth Amendment, *see Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, (1963)) must encompass "all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80–81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004). Thus, the scope of representation of appointed counsel in a criminal case is necessarily broad and must encompass all aspects of the criminal matter.

Further, the Sixth Amendment right also extends beyond a plea and through the resolution of a direct appeal. *Douglas v. California*, 372 U.S. 353, 357–58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Courts that have addressed the issue also find that the Sixth Amendment right includes the right to representation between the resolution of trial and sentencing and the beginning of any appeal. *See, e.g. United States v. Williamson*, 706 F.3d 405, 416 (4th Cir. 2013) (collecting cases).

In other words, given the limited facts presented to us, a reasonable attorney in Lawyer A's position would have no basis to believe that the testimony Client B would give at Client A's trial was not within the scope of Lawyer B's representation, nor that the representation of Client B had ended.

Further, the Sixth Amendment sets only the floor, and not the ceiling of a representation. And, as the commentary to Rule 4.2 acknowledges, the scope of a representation is defined by the agreement between client and counsel, to which there is no reason to believe that Lawyer A would be privy. As such, Lawyer A has no basis that we can see to believe that Lawyer B's representation of Client B is limited in scope or time in any way that would implicate Lawyer A's requirement to obtain Lawyer B's consent in these facts. We further note that if there is any doubt about the scope of representation, the doubt can be resolved by simply calling Client B's lawyer and asking if Lawyer B still represents Client B.

Under the limited facts presented to the Committee, Lawyer A may not ethically contact Client B without Lawyer B's consent.


INNOVATION
COMES STANDARD
FASTCASE IS ONE OF THE PLANET'S MOST INNOVATIVE LEGAL RESEARCH SERVICES, AND IT'S AVAILABLE FREE TO MEMBERS OF THE UTAH STATE BAR.
LEARN MORE AT
WWW.UTAHBAR.ORG
fastcase
Smarter legal research.
Get it on iTunes
GET IT ON Google Play
UTAH STATE BAR
ORGANIZED 1931

The Need for Pro Bono Volunteers

by George Sutton

Volunteering for pro bono services can be interesting and rewarding. The need is substantial. I help mostly on debt collection matters. The amounts are usually small but still quite important to the clients. If you would like to deal with people who will be truly grateful for your help, this is the place. Several attorneys volunteer. One of those, my former partner Rick Davis, got me involved a few months ago. He and the rest of his entourage from Prince Yeates have been doing it much longer. For those who have a couple of hours to spare I think you would find it time well spent.

These days I volunteer for two to three hours on the third Thursday afternoon of each month in Judge Parker's court at the Matheson Courthouse. I also volunteer at a free legal clinic one Tuesday evening every third or fourth month at the Bar offices. The calendar in Judge Parker's court usually consists of forty or more contested cases against defendants proceeding pro se. The amounts are usually small enough for small claims court but all cases involving a collection agency go before a regular judge.

Nick Stiles, Rob Jepson, and Mackenzie Hirai are there from the Bar to pair volunteer attorneys with defendants that request help. I have found all of the plaintiffs' attorneys – but not all of their clients – reasonable and professional.

I usually begin by telling a new client that I am his or her attorney for the afternoon or evening but usually I can only help explain what is happening and what options there are.

Many people at the debt collection calendar say they owe the money and just want to work out a payment schedule. Sometimes the defendant is really strapped, and we also negotiate a reduced payment amount to settle the case. A few times I found out the person has paid, and we end up discussing how to get satisfactory documentation to the plaintiff's counsel. A couple of times the client owed the money but had no way to pay it so I just tell the judge the person appeared and there is no resolution. Sometimes a client has a real issue, and I will tell them how to get help from Legal Services or another source. Whenever we are ready we go into court and state for the record how the case was or was not resolved or get a continuance.

I picked the debt collection calendar because I advise banks on consumer credit matters including collections. But I learned it helps to understand landlord tenant law too. I didn't know that going in. There is a separate landlord tenant calendar to deal with evictions, but many of the debt cases are claims by landlords for damages to a rental property after the tenant left. Those can be difficult. There are frequent disputes about whether there were damages and if so what is a fair price. Both sides can be unreasonable. I am least satisfied when a client insists he or she is being extorted but agrees to pay something just because he or she doesn't want to come back for a trial.

The last time I volunteered my second client was back for the fifth time and her case was going to trial that afternoon. I had thirty minutes to meet with my client, look at some blurry photos, and prepare. We wrapped up about 6:30. There are still pending motions so I won't say more at this point. However, don't let the prospect of trying cases dissuade you from volunteering. I'm not a trial lawyer. That was my second trial in over thirty-five years. If I can be helpful in those circumstances any lawyer can.

My first trial in the past thirty-five years happened a couple of years ago and was also a pro bono case referred by Legal Services. My client was a legal immigrant with a family and only minimum wage work who figured out how to provide a good home for his wife and small son. He bought a dilapidated mobile home for $10,000 and fixed it up by himself into virtually new condition. The seller allowed him to pay over time but only gave him partial credit for payments under a theory that was not mentioned in their contract or described to the buyer until after he stopped paying. The seller tried to evict the buyer and his family when the buyer believed he had paid the full price specified in the contract and stopped paying. The seller had used that tactic to successfully evict two other buyers involving the same mobile home. Parol evidence and rules of contract interpretation were the key issues. After a bench trial the judge ruled in favor of the buyer and awarded him title free and clear of all liens.

This case illustrates how cases can present major issues for the clients even though they involve amounts that could never be justifiably tried if the parties were paying full litigation expenses.

I have been very lucky in my life and career and can afford to give back some volunteer time to help those who otherwise face a nearly insurmountable disadvantage in court against a plaintiff represented by an attorney. I'm sure my skills were less than polished in both trials. I'm amazed I remembered to object to evidence lacking a proper foundation. Still, I'm reasonably sure that the buyer of that mobile home would have not been able to present his case by himself and would have lost his home because he did not understand procedure, evidence, and contract law.

The need for legal help for pro bono, low bono, and even most middle class people is essentially bottomless. Volunteering won't solve that, but it will help a little, and other volunteers have helped a lot. It requires very little for a bounty of good will.

Pro Bono Service – Doing Good Feels Good

by Alison Satterlee

I hurled myself into service work in law school, knowing that law review and other "traditional" paths just weren't for me (I have way too many facial piercings and tattoos, though not as many tattoos as Judge Baxter.), I instead sunk over 300 hours into running legal clinics in two of my three years in law school. Then, unsurprisingly, I burned out entirely. (Turns out if you drink coffee for fourteen hours a day you get kidney stones.)

I wouldn't volunteer again for five years.

Serendipitously, it was through legal clinics that I met my future employer: Virginia Sudbury. A sense of justice (and camping) drives her, which is precisely what led to her helping to co-create the pro bono calendars for the district courts: calendars of pro se folk, staffed with volunteer attorneys to give them advice, create orders, and give commissioners the ability to have a lunch break again on pro se heavy days.

Volunteering for pro se calendars was the thing I didn't know I needed until it existed. A typical calendar can find attorneys arguing Orders to Show Cause on the fly, helping clients know what paperwork they still need to file to complete a divorce, mediating, or even obtaining writs of assistance. As a practitioner I have yet to volunteer and not learn something. I thrive on the adrenaline of not knowing what puzzles I'll solve during a calendar, what unknown fact pattersn await me. Quite frankly, it's exciting. We are in a profession that can be incredibly discouraging and heavy, especially in family law. No one calls a family lawyer because life is going swimmingly – happy adoptions notwithstanding. Everyone – the pro se clientele and the attorneys – leaves court a little better afterward, even if people don't get what they want they leave with knowledge, a plan for what to do next, or at the very least they were *heard*, often for the first time.

Want to volunteer but don't think you're qualified? Haven't argued in court for a while? Don't let that stop you. Though the calendars are adversarial by nature, the volunteer attorneys know that we're all the same team: we all help each other, learn from one another, and there's a healthy amount of humor as well. Volunteering is a bit of a pressure release valve for me. I often find myself volunteering alongside opposing counsel for my paying cases and being able to interact in a totally novel way is refreshing. I love getting to know counsel at the calendars because social butterfly, I am not. The pro se calendars have allowed me to bust out of my cynical outer-shell. I had forgotten that was precisely what I loved about legal clinics in law school: people.

If you still aren't moved to volunteer, allow me to give you the visually-appealing, bite-sized spiel:

- Help people
- Get in/get out: no getting stuck in a case for months
- Get to know extraordinary people
- Make commissioners happy
- Learn stuff
- Free parking
- Baked goods (Ask Commissioner Tack about her secret gas station cookies.)

Attorneys can now sign up online. You can also view what attorneys you'll be volunteering with that day, and most importantly you can also see which days desperately still need volunteers – perhaps giving you the chance to make a commissioner's day by signing up when help is spread thin.

Doing good feels good. What more can you ask for?

Sign up here: https://www.legalaidsocietyofsaltlake.org/prosecalendar.

Same Day Certificates of Good Standing Now Available Online!

The Bar has a new system for Certificates of Good Standing (COGS). Members can now order and receive a COGS by email the same day. A COGS ordered before 2:30 p.m. MST will be emailed directly to the requesting lawyer at 3:00 p.m. No delay, no pickup or waiting for snail mail. Log on to your Practice Portal to order and receive your COGS today.

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 free legal clinic during October and November. To volunteer call the Utah State Bar Access to Justice Department at (801) 297-7049 or go to http://www.utahbar.org/public-services/pro-bono-assistance/ to fill out our Check Yes! Pro Bono volunteer survey.

American Indian Site

Melinda Dee

Bountiful Landlord/Tenant Debt Collection Calendar

Kirk Heaton
Joseph Perkins

Community Legal – Ogden

Jonny Benson
Ali Barker
Hollee Peterson

Community Legal – Salt Lake

Jonny Benson
Craig Ebert
Orlando Luna
Gabriela Mena
Kendall Moriarty
Katey Pepin
Leonor Perretta
Brian Rothschild

Community Legal – Sugarhouse

Skyler Anderson
Brent Chipman
Orlando Luna
Mel Moeinvaziri
Brian Rothschild
Reid Tateoka

Debtor's Law Site

Tami Gadd-Willardson
Darren Neilson
Ellen Ostrow
Brian Rothschild
Nate Williams

Enhanced Services Project

Mark Emmett
David Leta

Expungement Day

Paralegal Volunteers
Dillon Beckett
Pam Brunson
Taylor Goldstein
Stewart Hall
Trina Kinyon
Leslie U. Saena
Lori Salazar
Barbara Torrens
Brooke A. Woods

Student Volunteers
Daniel Crook
Annie Edwards
Alexander Sanchez
Steffen Thomas
Candace Waters

Attorney Volunteers
Robert Adamson
Miriam Allred
Paul Amann
Rod Andreason
Cristina Andrews
Brett Andrus
Mario Arras
Mark Baer
James Baker
Jacob Barney
Joanna Bell
Franklin Bennett
Kevin Bischoff
Jacob Briggs
Jean Brummer
Keith Call
John Cooper
Emily Cross
Nicholas Daskalas
Angela Doan
Matthew Duffin
David Duncan
Jared Erickson
Leah Farrell
Thomas Greenwald
Elliot Hales
Garron Hobson
R Dennis Ickes
Freyja Johnson
Jason Jones
Gabrielle Jones
Andrea Kelly
Tricia Lake
Matthew Larsen
Brandon Mark
T.C. Maudsley
Julie McAdams
Kenneth McCabe
Daniel McCarthy
Antonio Mejia
Joanna Mull
Tyler Needham
Katherine Nichols
Aaron Nielson
Richard Pehrson
Carolyn Perkins
Dori Petersen
Hollee Petersen
Justin Pratt
Ian Quiel
Lorena Riffo-Jenson
Bradley N. Roylance
Rebecca Sandberger
Bradley Sanders
Katherine Secrest
Patrick Shea
Joann Shields
Michael Skolnick
Brian Stewart
Noella Sudbury
Cory Sumsion
Travis Terry
Scott Thorpe
Margaret Vu
Jeffery Waddell
Kathleen Weron
Monica Whalen
Charlotte Wightman
Francis Wikstrom
Valerie Wilde
Paige Williamson

Expungement Law Site

Josh Baron
Danny Diaz
Grant Miller

Family Law Site

Justin Ashworth
Orlando Luna
Stewart Ralphs
Linda Smith
Simon So
Leilani Whitmer

Family Justice Center

Geidy Achecar
Steve Averett
Linda Barclay
Tatiana Christensen
Elaine Cochran
Amy Fiene
Lisa Hancock
Brandon Merrill
Sandi Ness
Dani Palmer
Sid Sandberg
Richard Sheffield
Babata Sonnenberg
Richard Stacey
Amber Tarbox
Nancy Van Slooten
Paul Waldren

Homeless Youth Legal Clinic

Erika Larsen
Nate Mitchell
Karra Porter
Cecilee Price-Huish
Lisa Marie Schull
Nathan Williams

Private Attorney Guardian Ad Litem

Alison Bond
Laura Hansen
Elizabeth Lisonbee
Harold Mitchell

Pro Se Debt Collection Calendar – Matheson

Greg Anjiwierden
Mark Baer
Jackie Bosshardt Wang
Ryan Cadwallader
John Cooper
Douglas Crapo
Ted Cundick
Rick Davis
Jesse Davis
Lauren DiFrancesco
Chase Dowden
Kyle Harvey
William Ingram
David Jaffa
Vaughn Pederson
Wayne Petty
Karra Porter
Cami Schiel
Kent Scott
Michael Stanger
George Sutton
Fran Wikstrom

Pro Se Landlord/Tenant Calendar – Matheson

Mark Baer
Joel Ban
Brian Burn
Brent Huff
Heather Lester
Nils Lofgren
Joshua Lucherini
Orlando Luna
Katherine McKeen
Jack Nelson
Eric Skanchy
George Sutton
Mark Thornton
Matt Vanek
Gavin Wenzel

Rainbow Law Site

Jess Couser
Russell Evans
Allison Phillips Belnap
Stewart Ralphs

Street Law Site

Dara Cohen
Dave Duncan
Jeffry Gittins
Adam Long
John Macfarlane
Cameron Platt
Elliot Scruggs
Shane Smith
Katy Steffey

SUBA Talk to a Lawyer Legal Clinic

Rick Mellen
Eric Olmstead
Chantelle Petersen
James Purcell
Aaron Randall
Lewis Reece
Lane Wood

Timpanogos Legal Center

Steve Averett
Amirali Barker
Cleve Burns
Trent Cahill
Elaine Cochran
Rebekah- Anne Gebler
Jonathan Grover
Dustin Hardy
Megan Mustoe
Scott Porter
Candace Reid
Zakia Richardson
Marca Tanner- Brewington
Liz Thompson
Paul Waldron
JoHanna Williams

Tuesday Night Bar

Madeline Aller
Parker Allred
Rob Andreasen
Braden Asper
Alain Balmanno
Michael Black
Madelyn Blanchard
Lyndon Bradshaw
David Broadbent
Doug Cannon
Ian Clouse
Rita Cornish
Bret Evans
Victoria Finlinson
Dave Geary
Steve Glauser
Kerry Heard
Rosemary Hollinger
Emily Iwasaki
Annette Jan
Bryan Johansen
Patrick Johnson
Laura Jonson
Landon Laycock
Kurt London
Victoria Luman
Chris Mack
Lucia Maloy
Scott Manning
Walter Mason
Ben Onofrio
Lisa Petersen
Joshua Randall
Hal Reiser
Cami Schiel
Clark Snelson
Sarah Vaughn
Ben Welch

Utah Legal Services – Pro Bono Cases

Adoption Case
Ben Aldana

Bankruptcy Case
Brett Andrus
Christopher Beus
Kathryn Bleazard
Lorraine Brown
Kenneth Burton
Shawn McGinnis

Expungement Case
Laura Pennock
John Potter

Family Law Case
Amber Alleman
Elaine Cochran
Robert Culas
Edward Cundick, Jr.
Robert Falck
Randall Gaither
Aaron Garrett
Heather Hess-Lindquist
Alyson Johnson
Benjamin Johnston
Marsha Lang
Catherine Lay
Shirl LeBaron
Mary Manley
Chad McKay
Crystal Powell
Tamara Rasch
Robert Rice
Michael Roche
Kent Scott
Mathew Snarr
Babata Sonnenberg
Wade Taylor
Daniel Tobler
Leticia Toombs

Housing Case
Gabriela Mena

Protective Order Case
William Morrison
Bruce Nelson

Social Security Case
Chike Ogbuehi

Veterans Legal Clinic

Aaron Drake
Brent Huff
Thomas Kelley
Jonathan Rupp
Joseph Rupp
Katy Strand

YOU + DIVORCE CASES =

US + DIVORCE CASES =

YOU + REFERRING US DIVORCE CASES =

Brown Law

801-685-9999

www.UTDivorceAttorney.com

Attorney Discipline

The Office of Professional Conduct is pleased to announce the launch of its new website at **opcutah.org**. Please visit the new site 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 information with the OPC, and the forms necessary to obtain your discipline history records or request an OPC attorney presenter at your next CLE event.

ADMONITION

On October 31, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.3 (Diligence), 1.4(a) (Communication), and 8.1(b) (Bar Admission and Disciplinary Matter) of the Rules of Professional Conduct.

In summary:
A couple retained the attorney to assist them in developing an estate plan and drafting the associated documents. The attorney met with the clients and they paid a retainer for legal services. As part of the estate plan, the attorney recommended that the clients convert their small business from a sole proprietorship to a limited liability company. The attorney sent them a first draft of the estate planning documents and requested certain additional information. The client proposed a small number of changes to the documents but did not provide the requested information. The clients began having difficulty getting the attorney to respond to them. When they were able to reestablish communication, the clients asked about registering the small business as a limited liability company. The attorney stated the work would be done for an additional fee and a filing fee. The clients paid the fee. Roughly ten months later, the clients had not received the required documents for the conversion. Once the OPC contacted the attorney, work for the clients was completed. The attorney did not respond to the Notice of Informal Complaint.

ADMONITION

On September 13, 2019, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.5(a) (Fees), 1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), and 1.16(d) (Declining or Terminating Representation) of the Rules of Professional Conduct.

In summary:
A client retained the attorney to represent them in divorce proceedings. The attorney informed the client that the representation could not be accepted without a minimum, upfront, non-refundable retainer fee, filing fee, and vital statistics fee. The client paid the attorney and the attorney did not deposit the funds the client paid into the attorney trust account. The client told the attorney to put the divorce on hold and no work was performed for the client. About two years later, the client requested a refund of the retainer. The attorney informed the client that the retainer was non-refundable and that the client had eight hours of legal services in connection with a divorce proceeding that were still available. After correspondence with the OPC, the attorney refunded the client's money plus interest. The attorney apologized to the client, who told the OPC that they accepted the apology.

ADMONITION

On September 13, 2019, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.4(a) (Communication) and 1.5(a) (Fees) of the Rules of Professional Conduct.

TRUST ACCOUNTING SCHOOL

January 22, 2020

Utah Law & Justice Center
645 South 200 East, Salt Lake City

Save the date!

Join us for the OPC Ethics School

March 18, 2020

Utah Law & Justice Center
645 South 200 East, Salt Lake City

5 hrs. Ethics CLE Credit, 1 hr. Prof./Civ.

Cost $245 on or before March 6, $270 thereafter.

In summary:
The owners of a company retained the attorney to assist with tax problems for their business. There were four partners who owned the company, and one of the partners signed a power of attorney on behalf of the company so that the attorney could talk to the IRS on their behalf. The company paid a retainer and an additional fee. An IRS revenue officer assigned to the matter attempted to contact the attorney but did not receive responses from the attorney or their office. Because the revenue officer had not received a response from the attorney, they scheduled an appointment to meet with the company. One of the partners requested from the attorney a detailed printout of the hours spent on the case. The partner did not receive a response and requested the information before the meeting with the revenue officer. The attorney informed the partner that the attorney does not do hourly billing and that the agreement was project-based. The attorney informed another partner that the attorney would take care of meeting with the revenue officer. The day before the meeting, the attorney sent a fax to the revenue officer cancelling the meeting. The company's bank account was levied.

ADMONITION

On September 13, 2019, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.7(a) (Conflict of Interest: Current Clients) and 1.9(a) (Duties to Former Clients) of the Rules of Professional Conduct.

In summary:
An attorney at a firm represented a company (Company 1) for a number of years. A competitor of the company (Company 2) retained another attorney (Second Attorney) at the firm to draft a demand letter and enter into negotiations to resolve a contract dispute with a former employee after the employee left Company 1 to work for Company 2. After the employee received the demand letter on behalf of Company 2, the president of Company 1 contacted the attorney. The attorney contacted Second Attorney about the problem. The Second Attorney contacted Company 2 and explained the conflict and withdrew from representation. Company 2 retained another attorney (Third Attorney) for representation in the matter.

The day after Second Attorney terminated its representation of Company 2, the attorney consulted with Company 1 to prepare a settlement proposal for its dispute with Company 1. The attorney sought and obtained permission from Second Attorney to send the settlement proposal on behalf of Company 1 to employee and Third Attorney.

On behalf of Company 1, the attorney thereafter engaged in settlement negotiations with Third Attorney and employee. Several months after the settlement negotiations had concluded unsuccessfully, Third Attorney obtained a temporary restraining order (TRO) against employee. Third Attorney notified the attorney of the TRO in an email on the same day. In that same email, Third Attorney indicated that the client objected to the firm representing Company 1 in any action adverse to Company 2.

The attorney emailed Third Attorney indicating that had they been aware of the TRO hearing, they would have appeared on behalf of Company 1 and also proposed settlement terms on behalf of Company 1. Third Attorney wrote a letter to the

attorney and restated that the Third Attorney and Company 2 were opposed to the attorney's representation of Company 1. The attorney withdrew from representing Company 1 shortly after receiving Third Attorney's letter.

PUBLIC REPRIMAND

On October 14, 2019, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Mark H. Gould for violating Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:
An individual retained Mr. Gould to represent them in a personal injury matter. Subsequently, Mr. Gould's client instructed Mr. Gould to initiate arbitration proceedings on his behalf. In response to a request for a status update, Mr. Gould informed his client in writing that he had filed for arbitration when Mr. Could had not, in fact, done so. Mr. Gould neither corrected his misstatement nor commenced the arbitration process.

Aggravating Factor:
Substantial experience in the practice of law.

Mitigating Factors:
Timely good-faith effort to make restitution or to rectify the consequences of the misconduct involved; full and free disclosure to the client or the disciplinary authority prior to the discovery of any misconduct or cooperative attitude toward proceedings; remorse.

PUBLIC REPRIMAND

On September 26, 2019, the Honorable Patrick W. Corum, Third District Court, entered an Order of Discipline: Public Reprimand against E. Jay Sheen for violating Rules 1.3 (Diligence), 1.4(a) (Communication), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
A client retained Mr. Sheen for representation in a wrongful termination matter. Mr. Sheen provided the client with an intake questionnaire from the Utah Antidiscrimination and Labor Commission (UALD). The client completed and signed the questionnaire and Mr. Sheen filed it about three weeks later. The client received notice from the UALD that the questionnaire

was rejected because the statute of limitations dates had passed. The client sent Mr. Sheen numerous text messages and made several telephone calls requesting a status on her case. Mr. Sheen assured the client each time they spoke that the case was still on track. The client obtained a copy of the questionnaire from the UALD and learned that the questionnaire had been filed two days after the statute of limitations had passed. The OPC sent a Notice of Informal Complaint (NOIC) to Mr. Sheen. Mr. Sheen did not respond to the NOIC.

SUSPENSION

On September 30, 2019, the Honorable Elizabeth A. Hruby-Mills, Third Judicial District, entered an Order of Suspension against John A. White, suspending his license to practice law for a period of three years. The court determined that Mr. White violated Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. White plead guilty to and was convicted of two counts of Sexual Exploitation of a Minor. Mr. White's conviction was based upon his admission to having knowingly possessed child pornography in Davis County, Utah, two or more images. Mr. White was ordered to pay a fine and was sentenced to a term of 195 days, 195 days suspended for time served and placed on probation for forty-eight months.

DISBARMENT

On September 24, 2019, the Honorable Joseph M. Bean, Second Judicial District, entered an Order of Disbarment against Stuwert B. Johnson, disbarring him from the practice of law.

In summary:
The court suspended Mr. Johnson's license to practice law for a period of eighteen months.

During the period of suspension, the court found that Mr. Johnson consumed alcohol in violation of his suspension order and that Mr. Johnson wrote a letter that appeared to be undertaking representation of a new client. The letter was written on letterhead identifying himself as an "Attorney at Law" and "Licensed in Utah and Wyoming." While both letterhead statements were, on their face, accurate, it did not tell the whole story and was misleading. Nowhere in the letter did Mr. Johnson state that he was acting as a paralegal for another attorney nor did he clarify that his license to practice law in Utah had been suspended. Mr. Johnson instructed the opposing party to call him directly, not an assigned attorney. Further e-mails between Mr. Johnson and the opposing party appeared to confirm that Mr. Johnson was acting in the capacity of an attorney and negotiating terms for his client. Mr. Johnson also appeared in the small claims division of the Second District Court on behalf of his client and requested a continuance of the small claims trial while suspended. Additionally, Mr. Johnson continued to deposit client trust fund checks into his trust account after his suspension. The court found that Mr. Johnson violated his suspension order and engaged in the unauthorized practice of law while suspended.

Mr. Johnson was cited for Driving on a Suspended License, Interlock Restricted Driver violation, and No Insurance. The Court also found this to be a violation of the suspension order.

Aggravating factors:
Prior record of discipline; Wyoming disbarred respondent for exactly the same original conduct; Despite the court giving Mr. Johnson the opportunity to remedy his behavior by continuing a suspension rather than disbarring him in 2017, Mr. Johnson continued a pattern of misconduct; Mr. Johnson has substantial experience in the practice of law and should have taken greater care to strictly observe the terms of his suspension.

Mitigating factors:
Good character and reputation; Mr. Johnson had periods of abstaining from alcohol apparently using the tools he acquired through counseling.

Wills for Heroes Hits the Road

by Grant A. Miller

Wills for Heroes is a pro bono program that drafts will packages for first responders, free of charge. To better serve our firefighters and police officers across the state, Wills for Heroes is hitting the road to help rural fire and police agencies throughout 2020. It is an effort to expand the services of our program, which has been active in Utah for well over a decade.

Since 1990, Utah has seen the loss of about fifteen on-duty firefighters and thirty-six on-duty police officers. The sudden passing of a first responder is extraordinarily difficult for their families, and the absence of an estate plan can add chaos to calamity. It is a problem that Wills for Heroes is trying to tackle.

Wills for Heroes was created in the aftermath of 9/11. A South Carolina-based attorney asked a group of community firefighters how lawyers could best serve them. He discovered that the firefighters needed estate plans. This attorney began traveling to different firehouses to draft will packages. That concept grew to national scale when Wills for Heroes collaborated with the American Bar Association and various state bar organizations. Wills for Heroes now has active programs in twenty-eight states. Utah joined the program in 2006 and has been offering will packages to first responders ever since.

In Utah, Wills for Heroes is administered through the Young Lawyers Division of the state Bar. Our events are housed at a different agency every other month. Each event has the capacity to prepare up to sixty will packages. Every will package includes a will, a durable power of attorney, and an advance health care directive. These events are a true collaboration of several different organizations. The police or fire department coordinates a working space, disseminates questionnaires, and recruits first responders to participate; LexisNexis provides licenses for HotDocs to compile the will packages; the Utah State Bar staffs technical support; the Paralegal Division supplies notaries and witnesses; and both the University of Utah and Brigham Young University provide eager law students to help fill in the gaps. As for the attorneys, we rely on you, and we need your help.

Throughout 2020, Wills for Heroes is hosting events from Cache County down to St. George. Historically, Wills for Heroes has held the majority of its events around the Wasatch Front because it has been tethered to legal resources in Salt Lake. Serving rural Utah means we will have limited access to attorney volunteers. If you practice in rural counties, please consider volunteering at Wills for Heroes when events come around. It only takes a few hours on a Saturday, and Wills for Heroes provides a CLE credit hour for everyone that attends the brief training before the event. Attorneys with a background in wills drafting are strongly encouraged to attend, but you do not need to be an expert to volunteer. If you are an attorney, regardless of practice area, we can use your help. Please volunteer your time by signing up at www.younglawyers.utahbar.org/willsforheroesut.

Wills for Heroes is greatly appreciative of everyone that has helped with the program over the years. If you have not yet attended one of its events, I encourage you to do so. It is a rewarding way for attorneys to serve those who serve us.

GRANT A. MILLER is a trial attorney at the Salt Lake Legal Defender Association. He is a Board Member of the Utah Bar Young Lawyer Division and serves as Chairman of the Wills for Heroes Committee.

Fall Forum 2019

by Greg Wayment

On Friday, November 15, the Utah State Bar held its annual Fall Forum at the Little America in downtown Salt Lake. We are pleased to report that at least six paralegals were able to attend, and we wish to thank them for representing the Utah paralegal community. The Utah State Bar holds three conventions annually: Spring Convention, which is usually held in St. George in March; Summer Convention, which rotates locations but has been held in Sun Valley, Snowmass, San Diego, and most recently, Park City; and Fall Forum, which has been typically held in Salt Lake in November.

One of the features of Fall Forum that I have learned greatly from the last couple of years is the Trial Academy, hosted by Jonathan Hafen. The Trial Academy is a panel of top Utah judges and attorneys giving real-world advice on best litigation practices.

The morning plenary speaker was Karra Porter, who gave an update on recent activities of the Utah Cold Case Coalition, which she co-founded with private investigator Jason Jensen. The coalition has a very active Facebook page, and is in the trenches every day gathering new tips and chasing down leads on a host of cold cases. They are also about to open the first DNA lab owned by a non-profit organization.

Among others on the panel, it was a pleasure to hear thoughts on the cold case work from Ellis Maxwell, whose face I couldn't pick out in a crowd, but whose voice I'd recognize anywhere, from listening to the nineteen episodes of the Cold Podcast with Dave Cawley. If you haven't listened to those podcasts yet, I'd highly recommend it.

Next, the majority of our paralegal contingent attended the breakout session: A Practicum on Adobe and PDF Documents with Greg Hoole. Greg spoke in depth about how he utilizes Adobe's most current offering, Adobe DC. He also spoke about the security and universality of utilizing pdfs (as opposed to Word or some other kind of document platform). As I mentioned in an earlier bar journal article, most paralegals are very proficient in Adobe and were very excited when Adobe added a "true" Bates-numbering function to the program.

We then attended Suicide Prevention in Professionals with Ashley Donham who is a certified therapeutic recreation specialist and currently works for the Utah Division of Substance Abuse and Mental Health. Ashley had some sobering statics for the audience, including that Utah ranks sixth in the nation for number of suicides, and some of the reasons for why that is. She stressed how important it is for us to first de-stigmatize openly talking about suicide, and then find ways to help people find real purpose and passion in life. I'll take this opportunity to remind all our paralegal members that one membership benefit is free counseling with Bloomquist Hale.

The lunchtime plenary speaker was Gail Miller (whom everybody in Utah knows!), but whom I've never had the pleasure hear speak before. Gail addressed the audience about the need for civility in our community and some of the challenges the Larry H. Miller companies have faced in recent years with addressing civility issues. She also spoke about some of the lessons she learned from raising a family and how those values have helped her lead the company after losing her husband. Gail opened the session up to the audience for questions, and most of the comments included enthusiastic appreciation for what the Miller family has done for Utah and that maybe she should consider a run for governor or even president.

Next we attended a breakout session titled: Utah Prosecutors: A Panel Discussion. The panel included Jared Bennett, First Assistant United States Attorney; Marc Mathis, Salt Lake County District Attorney's Office; and Janise Macanas, Utah Attorney General's Office. The panel was moderated by Michelle Oldroyd, Director of Professional Education at the Utah State Bar. All three spoke about being motivated to do work for the public and to make our community a better place to live.

Leading up to the Fall Forum, on November 7, Eisenberg, Cutt, Kendell & Olsen graciously sponsored a Paralegal Division Fall Forum social. The social was held in the evening, and Candace Gleed and Margie Coles presented on best practices for utilizing the Health Information Technology for Economic and Clinical Health Act, otherwise known as the HITECH Act. This is essentially a quick and inexpensive way individuals (and law firms) can request copies of medical records from medical providers.

We'd like to thank the Utah State Bar and the 2019 Fall Forum Committee – Karra Porter, Michael Stahler, and Herm Olsen – for once again organizing a fantastic event.

We'd also like to recognize and thank the Bar for offering a discounted rate for Utah paralegals. The Paralegal Division (and many of the paralegals in our state) operate on a budget, so the support the Bar gives us is always appreciated. As always, we want to encourage all paralegals to attend the Bar's conventions whenever possible. Personally, I always take the information back to my firm, and it helps motivate me to be the best professional I can be.

CLE Calendar

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

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

January 10, 2020 | 1:30 pm – 4:45 pm — **3 hrs. CLE Credit (pending approval)**

How to Grow Your Firm with a 1-Page Marketing Plan. Presented by Joshua Baron and Daniel Garner. $50 for section members, $100 for others.

January 14, 2020 | 12:00 pm – 1:00 pm

Bringing in the New Year – Introduction to Recent Bankruptcy Legislation: the Haven Act and the Small Business Reorganization Act. US District Court, District of Utah, 351 S W Temple, Salt Lake City, UT. CLE and Lunch presented by the Bankruptcy Law Section. Speakers include Laurie Cayton, United States Trustee Program and Andres Diaz, Diaz & Larsen.

January 22, 2020 | 8:00 am – 12:30 pm

Ethics for Lawyers: How to Manage Your Practice, Your Money & Your Files. Save the date – more details to follow!

January 22, 2020 | 12:00 pm – 1:00 pm

Utah State Tax Reform Efforts and the New Tax Bill. Presented by Steve Young. Hosted at the Alta Club, 100 East South Temple, Salt Lake City. $30 for section members, $35 for others.

January 23, 2020 | 4:00 pm – 6:00 pm — **2 hrs. CLE Credit**

Litigation 101 Series – Pretrial Practice and Trial Strategy. Presented by Patrick Burt and Gabriel White. Pricing per session: $25 for Young Lawyers, $50 for all others.

January 28, 2020 | 12:00 pm – 1:00 pm

Blockchain 101 – An Introduction to Cryptocurrency Regulation. Presented by Eric Vogeler. $20 for section members, $30 for others. Lunch will be provided.

January 31, 2020 | 12:00 pm – 1:00 pm

Pro Bono Eviction Defense: Law, Advocacy, and Communication. Presented by Marcus Degen of Utah Legal Services. Free CLE.

February 7, 2020 | 12:00 pm – 1:00 pm

Five Books Every Small Firm Attorney Should Read. More information to come.

February 18, 2020 | 4:00 pm – 6:00 pm — **2 hrs. CLE Credit**

Litigation 101 Series – Direct and Cross Examination. Presented by Patrick Burt and Gabriel White. Pricing per session: $25 for Young Lawyers, $50 for all others.

February 21, 2020 | 8:00 am – 5:00 pm

2020 IP Summit. The Grand America Hotel, 555 Main St, Salt Lake City, UT. More information to come.

March 12–14, 2020

2020 Spring Convention in St. George. Dixie Convention Center, 1835 S Convention Center Dr., St. George, UT 84790. Save the dates and plan to attend! See the brochure in the centerfold of this issue of the *Utah Bar Journal*.

March 17, 2020 | 4:00 pm – 6:00 pm — **2 hrs. CLE Credit**

Litigation 101 Series – Opening Statements. Presented by Patrick Burt and Gabriel White. Pricing per session: $25 for Young Lawyers, $50 for all others.

April 21, 2020 | 4:00 pm – 6:00 pm — **2 hrs. CLE Credit**

Litigation 101 Series – Closing Arguments. Presented by Patrick Burt and Gabriel White. Pricing per session: $25 for Young Lawyers, $50 for all others.

April 23, 2020 | 2:30 pm – 3:30 pm

Annual Spring Corporate Counsel Seminar. Details coming soon!

May 19, 2020 | 4:00 pm – 6:00 pm — **1 hr. Ethics CLE Credit, 1 hr. Prof./Civ. Credit**

Litigation 101 Series – Ethics & Civility. Presented by Patrick Burt and Gabriel White. Pricing per session: $25 for Young Lawyers, $50 for all others.

June 5, 2020

2020 Annual Family Law Seminar. S.J. Quinney College of Law. Save the date – details coming!

July 16–18, 2020

Summer Convention in Park City. Save the dates and plan to attend!

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/June publication.) If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

FOR SALE

Utah Code Unannotated (Lexis/Nexis) complete set from 1994 to 2016. Most volumes are unopened. Free delivery from Clearfield to Lehi. Asking $900.00. Call or text Mark at 801-517-3530.

JOBS/POSITIONS AVAILABLE

AV-rated Business and Estate Planning law firm with offices in St. George, UT and Mesquite, NV seeks a Utah or Nevada licensed Attorney with 3–4 years' experience for its St. George office. Experience in sophisticated Business/Transactional Law and/or Estate Planning is preferred. Ideal candidates will have a distinguished academic background or relevant law firm experience. Firm management experience would be a plus. We offer a great working environment and competitive compensation package. This is a great place to live with an abundance of recreational, cultural and family oriented opportunities. Please submit letter, resume and references to Daren Barney at dbarney@barney-mckenna.com.

Downtown Salt Lake City firm is accepting applications for a litigation associate with 3 to 6 years of litigation experience to assist with business litigation, eminent domain, and general litigation matters. This position will work with a team of trial attorneys and will be responsible for assisting in case management and completing litigation tasks. Candidates must be licensed to practice law in Utah. Interested applicants should send a cover letter, resume, and writing sample to CThompson@mbmlawyers.com.

OFFICE SPACE/SHARING

HISTORIC MANSION: 623 East 100 South, downtown Salt Lake City. 9 spaces / 4800 sq ft. New renovated. 5–10 yr lease. Call John 208-809-6272.

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.

Expert Consultant and Expert Witness in the areas of: Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics. Charles M. Bennett, 370 East South Temple, Suite 400, Salt Lake City, Utah 84111-1255. Fellow, the American College of Trust & Estate Counsel; former Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar. Email: cmb@cmblawyer.com.

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.

UTAH STATE BAR COMMISSIONERS

Herm Olsen
President
435-752-2610

Heather Farnsworth
President-Elect/3rd Division Representative
801-532-4556

John W. Bradley
2nd Division Representative
801-626-3526

Steven R. Burt, AIA
Public Member**
801-542-8090 x100

Mary Kay Griffin, CPA
Public Member**
801-364-9300 x103

Chrystal Mancuso-Smith
3rd Division Representative
801-906-9916

Marty Moore
1st Division Representative
435-787-9700

Mark O. Morris
3rd Division Representative
801-257-1900

Mark Pugsley
3rd Division Representative
801-532-1500

Michelle Quist
3rd Division Representative
310-909-6154

Tom Seiler
4th Division Representative
801-375-1920

Cara M. Tangaro
3rd Division Representative
801-673-9984

Heather L. Thuet
3rd Division Representative
801-323-5000

Kristin "Katie" Woods
5th Division Representative
435-673-1882

***H. Dickson Burton**
Immediate Past President
801-532-1922

***Elizabeth Kronk Warner**
S.J. Quinney College of Law, University of Utah
801-581-6571

***Dean J. Gordon Smith**
J. Reuben Clark Law School, Brigham Young University
801-422-6383

***Margaret D. Plane**
State ABA Members' Delegate
435-615-5150

***Nathan D. Alder**
Utah State Bar's ABA Delegate 1
801-323-5000

***Erik Christiansen**
Utah State Bar's ABA Delegate 2
801-532-1234

***Camila Moreno**
YLD Representative to the ABA
801-524-4212

***Victoria Finlinson**
Young Lawyers Division Representative
801-322-2516

***Candace Gleed**
Paralegal Division Representative
801-366-9100

***Remington "Jiro" Johnson**
Minority Bar Association Representative
801-532-5444

***Kate Conyers**
Women Lawyers of Utah Representative
801- 304-4900

***Amy Fowler**
LGBT & Allied Lawyers of Utah Representative
801-524-9698

***Robert Rice**
Judicial Council Representative
801-532-1500

***Larissa Lee**
Utah Supreme Court Representative

*Ex Officio (non-voting) Members
**Public Members are appointed.

UTAH STATE BAR STAFF

EXECUTIVE OFFICES
801-531-9077 | Fax: 801-531-0660
www.utahbar.org

John C. Baldwin
Executive Director
801-297-7028

Richard M. Dibblee
Associate Director, Member Services
801-297-7029

Christy J. Abad
Executive Assistant, Paralegal
801-297-7031

Elizabeth Wright
General Counsel
801-297-7047

Brady Whitehead
General Counsel Assistant, Certificates of Good Standing, Pro Hac Vice
801-297-7057

Mary Misaka
Building Coordinator
801-297-7030

Edith DeCow
Receptionist
801-531-9077

ACCESS TO JUSTICE
Robert Jepson
Pro Bono, Modest Means
801-297-7049
Tue. Night Bar 801-297-7027

Jeffrey Daybell
Access to Justice Staff Attorney
801-297-7037

Mackenzie Hirai
Access to Justice Assistant, Tuesday Night Bar Coordinator
801-297-7073

ADMISSIONS
Joni Dickson Seko
Deputy Counsel in Charge of Admissions
801-297-7024

Kelsey Foster
Admissions Administrator
801-297-7025

Laura D'Agostini
Application Coordinator
801-297-7058

BAR PROGRAMS
Christine Critchley
Bar Journal, Fee Dispute Resolution, Fund for Client Protection
801-297-7022

COMMUNICATIONS
Matthew Page
Communications Director
801-297-7059

CONSUMER ASSISTANCE PROGRAM
Jeannine Timothy
Consumer Assistance Director
801-297-7056

CONTINUING LEGAL EDUCATION & MEMBER SERVICES
Michelle M. Oldroyd
Director of Professional Development
801-297-7033

Mary Lancaster-Nokes
CLE Assistant, Section Support
801-297-7032

Lydia Kane
CLE Assistant, Events
801-297-7036

ETHICS QUESTIONS
ethicshotline@utahbar.org

FINANCE & LICENSING DEPT.
Lauren Stout, CPA
Director of Finance
801-297-7020

Diana Gough
Finance Assistant, Licensing
801-297-7021

Sharon Turner
Finance Assistant
801-531-9077 ext. 7333

LIMITED PARALEGAL PRACTITIONER
Scotti Hill
Associate General Counsel
801-746-5201

NEW LAWYER TRAINING PROGRAM
Carrie Boren
801-297-7026

SUPREME COURT MCLE BOARD
Sydnie W. Kuhre
MCLE Director
801-297-7035

Laura Eldredge
MCLE Assistant
801-297-7034

Lydia Kane
MCLE Assistant
801-297-5511

TECHNOLOGY DEPARTMENT
David Clark
Information Systems Manager
801-297-7050

Lorie Koford
Information Systems Support Web Services
801-297-7051

OFFICE OF PROFESSIONAL CONDUCT

Phone: 801-531-9110 | Fax: 801-531-9912 | E-mail: opc@opcutah.org

Billy L. Walker
Chief Disciplinary Counsel
801-297-7039

Adam C. Bevis
Deputy Chief Disciplinary Counsel
801-297-7042

Diane Akiyama
Assistant Disciplinary Counsel
801-297-7038

Emily Lee
Assistant Disciplinary Counsel
801-297-7054

Sharadee Fleming
Assistant Disciplinary Counsel
801-297-7040

Barbara Townsend
Assistant Disciplinary Counsel
801-297-7041

Metra Barton
Paralegal
801-297-7044

Cynthia Schut
Paralegal
801-297-7045

Melodee Parks
Paralegal
801-297-7048

Toni Allison
Paralegal
801-257-5516

Lindsay Callejas
Intake Secretary
801-297-7043

Stephanie Boston
Investigator
801-746-5220

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111