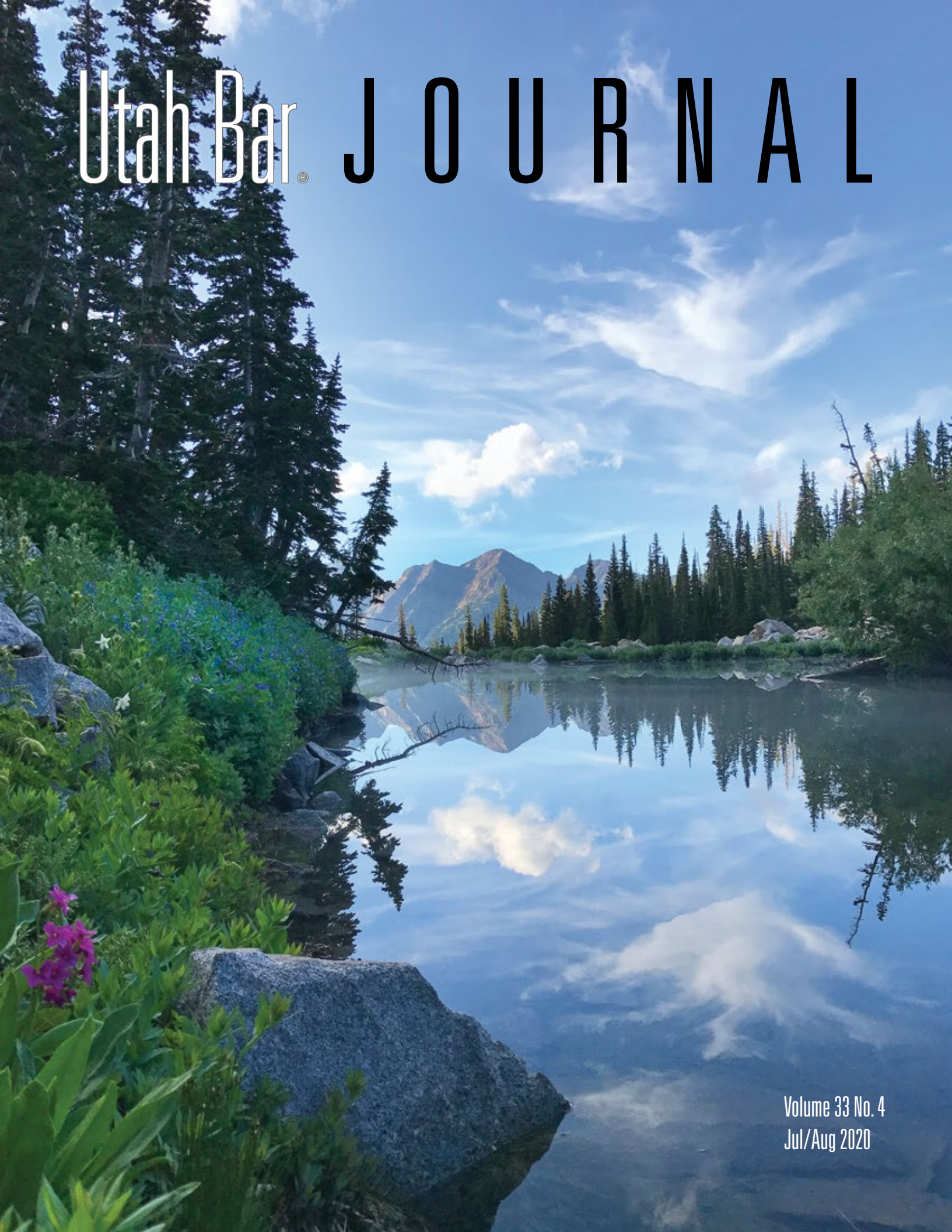

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Volume 33 No. 4
Jul/Aug 2020

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Maybird by Utah State Bar member Ryan Andrus. Regarding his photo, Ryan said, "I took this photo on an evening trail run to Maybird Gulch in July 2017."

RYAN ANDRUS is in-house counsel for WCF Insurance, where he serves as VP and assistant general counsel.

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.

Utah Bar JOURNAL

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Volume 33 No. 4
Jul/Aug 2020

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

GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

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

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

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

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

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

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

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

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

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

LETTER 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.

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A Class Act

by Herm Olsen

"Class" takes many forms. It can be the simple act of a linebacker helping up the guy he has just crushed coming up the middle. Or a woman taking a plate of cookies to a hostile neighbor.

We see and hear a stunning absence of class from Washington D.C. these days: name-calling; shaming; all manner of nastiness from the top down. This borders on a national tragedy as we are counseled to elect wise and honest women and men to office – folks who by their words and statements demonstrate a little class.

I love the account of Thomas Jefferson Randolph (President Jefferson's grandson). He and the President were out riding in a carriage one day, and a Black man gave the President a bow. President Jefferson returned an elaborate bow, taking off his hat in a wide, sweeping gesture, but his grandson ignored the bow by the Black man. Jefferson rebuked his grandson and asked:

"Would you let a slave be more of a gentleman than yourself?"

Maybe we should collectively demand that our leaders read a bit more of Ann Landers. Over thirty years ago she articulated what real class is:

> Class never makes excuses.
>
> Class knows that good manners are nothing more than a series of inconsequential sacrifices.
>
> Class bespeaks an aristocracy that has nothing to do with ancestors or money. Some wealthy "blue bloods" have no class while others who struggle to make ends meet are loaded with it.
>
> Class can't be faked.
>
> Class never tried to build itself up by tearing others down.
>
> Class…need not strive to look better by making others look worse. Everyone is comfortable with the person who has class because that person is comfortable with himself.
>
> If you have class, you've got it made.
>
> If you don't have class, no matter what else you have, it doesn't make any difference.

The Herald Journal, May 5, 1989, at 12.

Let me challenge you, as attorneys, to extend your collective long arms and reach out to the poor, the needy, the unkempt among us.

I am impressed and grateful for the class with which some have served the Bar for many years.

These include:

John Baldwin – executive director of the Bar, serving with dignity for thirty years.

Dickson Burton – last year's Bar President who successfully battled the sales tax on professional services.

Steven Waterman – who served with distinction as Chair of the Bar Admissions Committee for twenty-plus years.

Steve Burt and **Mary Kay Griffin –** who have each selflessly served as public members of the Bar Commission for fifteen-plus years.

Richard Dibblee – who has served as associate executive director to the Bar for decades with wit and humor.

Heather Farnsworth – who has the courage as one of a two-member firm to serve as President of the Bar for 2020–21.

Sydnie Kuhre – outstanding MCLE Director for thirty-six years.

Norma Olsen – my dear wife of forty-eight years – for 10,000 x 10,000 reasons.

These folks have responded over the years with class! They hear the whispers of the "better angels" in their souls – and we are all the better for their angels within.

Abe Lincoln was one of the classiest men in history. A couple reported that they were on their honeymoon in Washington D.C. and attended a church service, hoping to catch a glimpse of the President. They arrived early and sat just behind his assigned pew. The President arrived and sat sideways at the door of the pew, his custom, as the narrow space between pews cramped his long legs. Just as the service began, down the aisle within the President's vision came wandering a forlorn-looking man, poorly clad, awkwardly seeking a seat.

Instantly out shot that long arm of Abraham Lincoln and gathered him in beside him, and the couple heard him say: "Come right in here, Brother, there's plenty of room!"

THAT is a class act. Oh my, how far we have strayed. Let me challenge you, as attorneys, to extend your collective long arms and reach out to the poor, the needy, the unkempt among us. Now is the time, during our COVID-19 drama, that requires a constant consciousness of the well-being of those around us. Let us in some small measure seek the interests of our neighbor. Turning outward to others requires us to reorient ourselves a little more towards one another and the well-being of another. It is a matter of growing in our awareness of each other. Find a way to contribute. Look for a chance to help, to be kind.

Doing so will bring out the "better angels" in our communities, and in ourselves.

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Three "C's" of Admitting Persuasive Expert Testimony in the Utah State Courts

by The Honorable Keith A. Kelly

A trial involving specialized knowledge calls for persuasive expert testimony. In my ten years as a trial judge, experts have often guided me through complex issues of causation, valuation, and damages – and poked holes in their opponents' cases. In other cases, experts have mesmerized, and others have bored or bewildered juries. Experts frequently make the difference between victory and defeat.

Too often, expert testimony misses the mark or fails to persuade – or worse, never gets to the judge or jury due to failure to comply with discovery and disclosure rules. To avoid these downfalls, I suggest three "C's" for admitting persuasive expert testimony in the Utah state courts: (1) COMPLIANCE; (2) COHERENCE; and (3) CREDIBILITY.

Experts can cross over the line to become advocates when they fight with opposing counsel on cross-examination and fail to concede obvious points about their analysis.

COMPLIANCE

Compliance with Utah Rule of Civil Procedure 26(a) is critical in ensuring you are able to admit your expert's testimony. Too often, attorneys omit or delay full expert disclosure. As a result, they may lose their ability to use their expert at trial or the scope of their expert's testimony may be significantly limited. *See* Utah R. Civ. P. 26(a). The following are some key rules to consider:

a. Identify in fact discovery percipient witnesses who may also be able to offer favorable expert opinions – and then disclose those opinions under Rule 26(a)(4)(E). (The key issue is whether the witness is offering a lay opinion under Rule 701 or a Rule 702 expert opinion based upon "scientific, technical, or other specialized knowledge.")

b. Disclose your expert summary as required by Rule 26(a)(4)(C)(i); otherwise you will not likely be able to use the expert at trial.

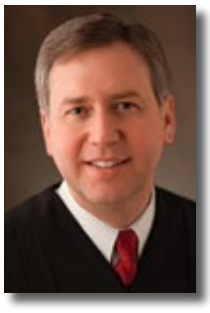
c. Ensure that your expert fully discloses his or her opinions in your Rule 26(a)(4)(B) expert report, since undisclosed opinions are likely to be excluded at trial. *See id*. 26(d)(4). The same applies in depositions: The expert should fully respond to deposition questions about the scope of his or her opinions.

COHERENCE

Coherence is central to persuasion. The opinion should be understandable and logically congruent. The best experts are adept in distilling complex concepts into a simple and logical presentation – where the conclusions flow naturally from the facts and governing principles (whether they be principles of science, economics, accounting, valuation, or other areas of specialized knowledge). The jury or judge should be able to follow and understand each step of the analysis.

Under Utah Rule of Evidence 705, you are permitted to offer an expert opinion "without prior disclosure of the underlying facts

JUDGE KEITH A. KELLY was appointed to the Third District Court in 2009 by Gov. Gary R. Herbert. He served as a member of the Utah Supreme Court's Advisory Committee on the Rules of Evidence for nineteen years.



or data." But this is rarely a good idea. Experts are most persuasive when they lay the Rule 702(b) foundation showing that their opinions are based upon principles and methods that are reliable, based upon sufficient facts or data, and are reliably applied to the facts of the case. In other words, the admissibility requirements of Rule 702(b) provide a guideline for points for you to cover in the direct examination of your own expert.

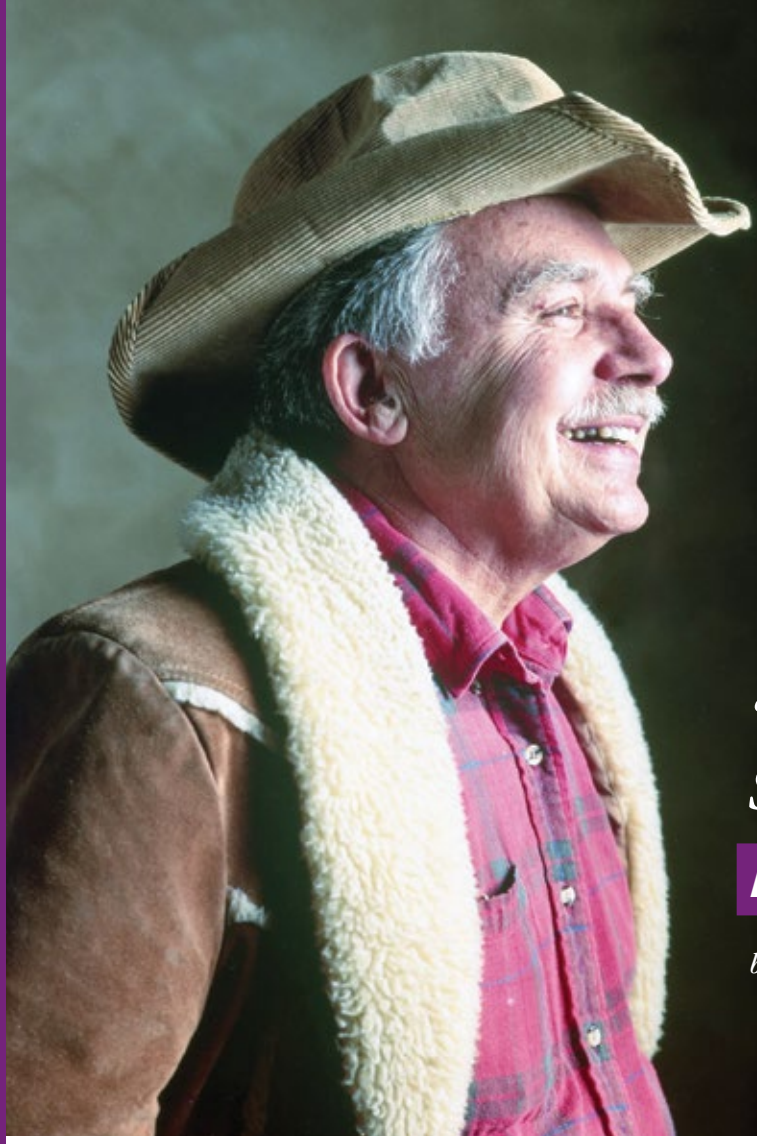
CREDIBILITY

Credibility is vital for an expert witness. Persuasive experts are educators, not advocates. If the trier of fact views the expert as an advocate, then the trier is more skeptical of the expert's opinion. By definition, advocates have an agenda to advance, while an educator simply tries to inform.

Experts can cross over the line to become advocates when they fight with opposing counsel on cross-examination and fail to concede obvious points about their analysis. Experts also cross the line when they attempt to give opinions outside the scope of their expertise or when they base their opinions on unreasonable assumptions or faulty underlying facts. Do not put your expert in the position of being forced to say at trial that he or she is using a particular approach simply because he or she was told by counsel to do so.

In preparing for trial, consider discussing with your expert the difference between being confident and informative, on the one hand, and arrogant, condescending, and dismissive, on the other hand. Persuasive experts understand their material and analysis, and they sincerely strive to explain it to the court and jury. Renowned trial lawyer Michael E. Tigar describes "what characteristics you want your own experts to have: teachers by inclination, not condescending, happy to defend their views with good humor and good examples." Michael E. Tigar, Nine Principles of Litigation and Life 252 (ABA Press 2009).

In sum, I offer the three "C's" as a checklist for trial preparation involving expert testimony. When the trier of fact wades through complex and specialized issues, there is no substitute for a coherent, credible expert.



"Raconteur, Bon Vivant, Senior Judge":

A TRIBUTE TO MONROE McKAY

by Clifford B. Parkinson and The Honorable Dee V. Benson

Photo by John Snyder/*BYU Magazine*

Introduction:

In an interview some thirty years ago, Judge Monroe G. McKay of the Tenth Circuit Court of Appeals said, "I hope to serve my full term as a judge – they are appointed for life, you know." On March 28, 2020, at the age of 91, Judge McKay realized that hope, passing away peacefully while still active as a senior judge for the circuit. Just two weeks before his death, he had heard an important Kansas voting rights case in Denver. *See Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020). Judge McKay died "a legend on our court," who according to Chief Judge Timothy Tymkovich "epitomized the qualities of a great judge – patience, learnedness, open mindedness, and a strong work ethic." Another admirer, who worked as Judge McKay's associate in private practice, went on the record during Judge McKay's lifetime to say he hoped the United States would adopt the Japanese custom of declaring living persons national monuments "because he embodies the highest of our profession's and nation's aspirations." Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. Rev. 449, 449.

CLIFFORD B. PARKINSON is an attorney at Lear & Lear, PLLC. He was formerly a clerk to both Judge McKay and Judge Benson.

THE HONORABLE DEE V. BENSON is a Senior United States District Judge for the District of Utah. As a member of the charter class of the J. Reuben Clark Law School, he was a student of Judge McKay.

If you were to ask the judge himself about the many appellations he was given, he might say he was most fond of "raconteur," – a gifted and amusing storyteller. Numerous colleagues and friends remember his warm and magnetic personality. He loved people, and he loved spending time with people. One of his favorite pastimes was trading stories with colleagues and friends. When he assumed senior status, one of his colleagues gave him a box of customized business cards. In addition to bearing the seal of the Tenth Circuit, each card was inscribed with Judge McKay's name, along with the words, "Raconteur, Bon Vivant, Senior Circuit Judge." Judge McKay could not have loved the gift more.

We hope the following sketch captures the essence of Judge McKay's life, career, and jurisprudence.

Formative Years: Huntsville and Beyond

The third of eight children, Monroe was born in the family home in Huntsville, Utah. His mother, Elizabeth Catherine Peterson McKay, gave birth to him in the very room his father, James Gunn McKay, was born in some forty-seven years before. It was also the same room where Monroe's father would later die when Monroe was only thirteen. Monroe's mother, Elizabeth, would go on to raise the eight children on her own. After long days tending to her brood, she would add to the family's meager income by sewing late into the night.

As a child, Monroe threw himself into the family sheep-herding business. Later in life, he regaled his clerks with tales of the difficult work. He described bone-chilling winters when the cattle froze, dead where they stood. And he disgusted the city slickers in his chambers with graphic descriptions of how to castrate lambs with one's teeth – a common, if unsterile, technique.

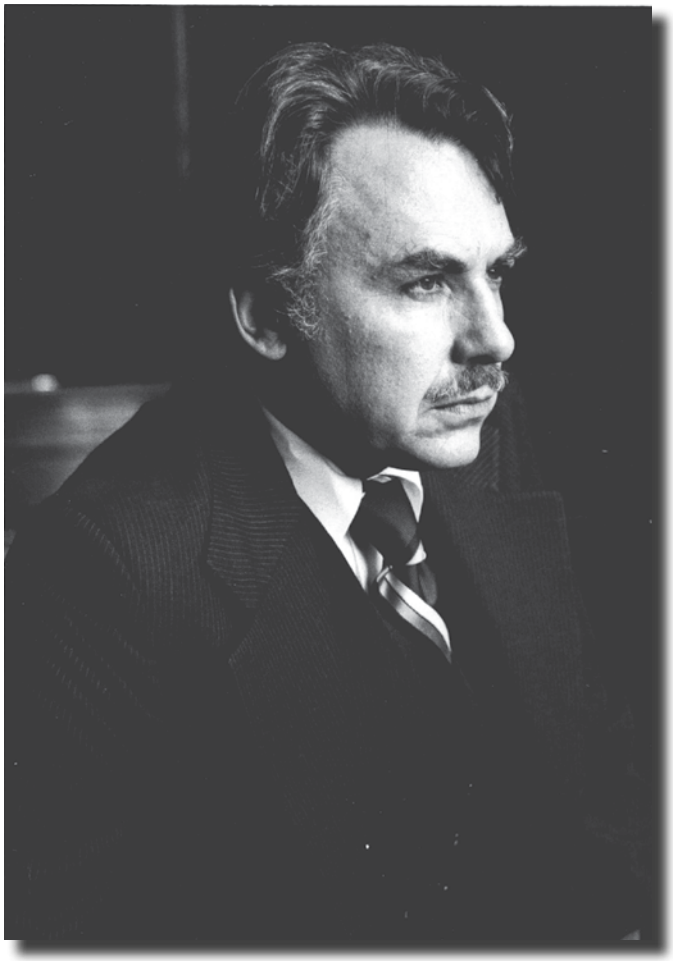
To take a break from this grueling work, Monroe enlisted in the Marine Corps at the age of eighteen, where he served from 1946 until 1948. Although proud of his service, Monroe would often downplay his contributions. He was quick to distinguish himself from his fellow veterans who had served in wartime. He appreciated the additional sacrifices they made so he could serve in a time of peace. After a few years at Camp Pendleton, Monroe was honorably discharged and returned to Huntsville.

In 1950, he surprised his family (and the whole town of Huntsville) when he accepted a call to serve a mission for the Church of Jesus Christ of Latter-day Saints. He had not previously been known for his piety. Monroe's mission call took him to South Africa from 1950–1952, where he served in the same region where his father proselytized four decades earlier. His time in apartheid South Africa became a touchstone in Monroe's life. The injustices he witnessed under apartheid motivated what would become his lifelong sympathy for the oppressed. He would return to the African continent many times in his life; its cultures shaped his philosophies and character.

An Unlikely Student

After returning from his missionary service, Monroe traveled the country as a teletype mechanic. He had no plans for formal education. After a few years of watching Monroe wander, his academically inclined brother Quinn convinced him to give education a try. In his recounting of events, Monroe enrolled at Brigham Young University as a "twenty-five-year-old semi-literate." In a remedial English course, he was assigned his first essay. Unfortunately, he did not know what the word "essay" meant. When another student suggested he look it up in the dictionary, he was embarrassed to realize that he didn't know how to use a dictionary. It was then he knew he was in for an uphill battle. Notwithstanding these initial setbacks, he completed the essay and got a passing grade… barely. The professor affixed a note to his D- that said, "Monroe, you didn't earn this but I didn't want you to get discouraged."

And he didn't get discouraged. Monroe went on to thrive as an undergraduate. During his time at BYU, he met and married his lifelong sweetheart, Lucile Ann Kinnison. An introductory course in geology ignited in him a lifelong fascination with the natural sciences and the world around him. He also began to articulate relatively progressive political ideologies. In his final year, he became student body president, and a thorn in the side of the University's conservative president, Ernest L. Wilkinson. Monroe's politics chaffed Wilkinson. Wilkinson was so unnerved by Monroe's "liberalism" that when Monroe landed a job at a prestigious Phoenix law firm, Wilkinson called the firm expressing his dismay they would stoop to hiring "that liberal Monroe McKay."



Monroe at his swearing in ceremony.

An Arizona Lawyer

After graduating from BYU with a Bachelor's in Science in 1957, Monroe studied law at the University of Chicago, graduating Order of the Coif. He then clerked for Justice Jesse Udall of the Arizona Supreme Court before taking a position at the law firm Lewis & Roca in 1961. There he worked with such legal luminaries as John Frank and John Flynn, the duo who famously secured a victory in *Miranda v. Arizona*, forever changing Fifth Amendment jurisprudence and the scripts of police procedurals. In 1966, when the firm's partners informed Monroe that they had elected to make him a partner, he informed them that *he* had elected to move to Malawi with his family to serve as director of the Peace Corps.

Monroe and Lucy packed up their young family and traveled to Africa, where he spent three years managing volunteers in and around Malawi. This was not the first time that the McKays decided to disrupt their lives to pursue an adventure, nor would it be the last. Years later, he explained how he and Lucy so often found themselves in these situations. "We made a habit of doing interesting things when the opportunities presented themselves rather than when they were propitious." Monroe was always more interested in doing what was right than what was convenient.

Upon his return to Phoenix in 1968, Monroe became a partner at Lewis & Roca. His commitment to doing the right thing informed his approach to law firm administration as well as his legal practice. For instance, even though the passage of the Civil Rights Act in 1964 made it illegal for employers to discriminate on the basis of sex, the Phoenix bar remained hostile to female job applicants at the end of the 1960s. Seeing this injustice, the newly minted partner pushed the firm to hire a female attorney. His first attempt failed, but only after it nearly brought the firm's partners to blows. Undeterred, Monroe and his ally, John Frank, restructured the hiring system to improve women's chances of being hired. In the older culture, the firm allowed any one partner to "blackball" a candidate. The woman Monroe tried to hire before had been blackballed by several of his partners. So Monroe and John Frank implemented a formal hiring committee,

eliminating the ability of a single partner to veto a hire.

With the committee in place, Monroe and John Frank recruited a young graduate of the University of Chicago's law school named Mary Schroeder. Monroe shepherded Mary through the interview process, and she ultimately accepted an offer from the firm. But not long after the offer was made, Mary learned that she was eight weeks pregnant. She recounts calling Monroe to break the news: "My recollection was that there was a very long silence at the other end of the line before he said, 'How wonderful,' (another pause) 'for you.'" Mary Schroeder, *No One Knew What to Expect: Breaking the Phoenix Gender Barrier in 1969*, 49 Ariz. St. L.J. 537, 545 (2017). Monroe, Mary, and John ultimately conspired to keep the pregnancy a secret as long as possible, giving Mary a chance to prove herself at the firm. When the news of her pregnancy broke firmwide, one of the firm's partners was particularly furious. Spotting Monroe shooting pool at a local lunch spot, this partner chased him "around a pool table with a pool cue shouting, over and over, 'You knew she was pregnant!'" *Id*.

Ultimately, like so many of Monroe's efforts to do the right thing, the decision to recruit and hire Mary Schroeder paid dividends. Mary was the first woman to become a mother while remaining a practicing associate in a major Phoenix law firm. Within three years, Lewis & Roca made her a partner, just a few years before she was tapped to be a judge on the Ninth Circuit Court of Appeals. She would ultimately serve as the first female Chief Judge of the Ninth Circuit.

A Professor

A few years later, Monroe was approached by his good friend and fellow Phoenix-based attorney, Rex Lee, to join the faculty of the fledgling law school at Brigham Young University. He was initially hesitant to join the faculty, fearing that BYU, a conservative institution, might not embrace his liberal ideologies. His concern was warranted. Several administrators at BYU expressed their reservations regarding Monroe's politics to Rex Lee, who had just been named dean of the new law school. Rex responded to these concerns by stating that if BYU wanted its law school to be taken seriously, it needed to hire someone like Monroe McKay. Rex ultimately prevailed, persuading Monroe to come to BYU and persuading BYU to welcome him.

Monroe became a popular professor. He was known for his sense of humor and hijinks. One Halloween, he arrived in class dressed as the Great Pumpkin from the old Charlie Brown special. He held forth on contract theory the entire hour in full costume. But Monroe was even better known for his conviction that the Constitution, and particularly the Bill of Rights, was a necessary check against the tendency of those in power to abuse their authority. For Monroe, the Bill of Rights was vital for the protection of the constitutional rights of the individual and the minority against the tyranny of the majority. In later years, he would tell an audience that he feared "the Bill of Rights has never enjoyed real, widespread support, though verbally it is almost adored." Monroe G. McKay, *Hysteria and the Bill of Rights*, Life in the Law: Volume 3 Religious Conviction (eds. Jane Wise, Scott Cameron, Galen Fletcher) (2013). This was, he was convinced, because "[t]he problem is that in the very setting in which the Bill of Rights has its validity – the protection of the obnoxious, the strange, and the unusual – it gets a negative response." *Id*. One student characterized Monroe's approach to the Constitution as "showing what the law could do for the little guy."

Though his time at the law school was short, he had a knack for scholarship. Shortly after taking the bench, he published an article in the *Washburn Law Journal* entitled "Double Jeopardy:

Are the Pieces the Puzzle?" 23 WASHBURN L.J. 1 (1983). This article would be cited dozens of times in the next decade and is still cited in articles on double jeopardy today.

A Judge

On November 2, 1977, Monroe was nominated by President Jimmy Carter to fill a seat on the United States Court of Appeals for the Tenth Circuit. The initial nomination inspired criticism because Monroe's brother, Gunn McKay, was a sitting U.S. congressman. Additionally, the Utah bar had another attorney in mind for the position, one whose career had been in Utah, not Arizona. However, allies like Rex Lee defended the nomination publicly. And Monroe put his magnanimous and charming personality to work, meeting personally with his critics to change their minds. By November 28, Monroe's nomination was confirmed. He received his commission and went to work on December 1, 1977, as Judge McKay.

Judge McKay quickly became a force to be reckoned with on the court, filing seven dissents in his first month on the bench, and then thirteen *more* in the next year. *See* Erik M. Jensen, *Monroe G. McKay and American Indian Law: In Honor of Judge McKay's Tenth Anniversary on the Federal Bench*, 1987 BYU L. REV. 1103, 1103 n.1. This was no small feat in a circuit in which only sixteen dissents had been filed by *all* the judges in the term prior to Judge McKay's arrival. *Id*.

As a jurist, Judge McKay never lost sight of the Constitution and

its purpose. The constitutional ideals he espoused to his law students were on display in his judicial writings, and his concern for the constitutional rights of the minority are evident throughout his jurisprudence. Illustrative of this are his writings in Indian Law cases; the Tenth Circuit, encompassing Utah, New Mexico, Wyoming, Kansas, Colorado, and Oklahoma, is home to a large number of Indian reservations compared to other U.S. Appeals courts and hears many Indian law cases. Judge McKay authored many important Indian Law opinions, demonstrating his tendency to rely on fundamental constitutional rights to support the rights of the minority.

For instance, in *Mescalero Apache Tribe v. New M*exico, the State of New Mexico sought to enforce its own hunting and fishing regulations on the Mescalero Apache Reservation. 630 F.2d 724 (10th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *decision on remand*, 677 F.2d 55 (10th Cir. 1982). In its brief, the State of New Mexico argued against the existence of inherent tribal powers over the traditional tribal territory. The State reasoned that no inherent powers could exist because no traditional territory remained as "the Mescaleros [had been] swept from their lands by a tide of white settlers." *Id*. at 730 (quoting appellants' brief). Predictably, Judge McKay found no support for this argument in constitutional principles. He dismissed the State's reasoning with the following passage:

> If we were to accept the State's argument, we would be enshrining the rather perverse notion that traditional rights are not to be protected in precisely those instances when protection is essential, i.e., when a dominant group has succeeded in temporarily frustrating exercise of those rights. We prefer a view more compatible with the theory of the nation's founding: rights do not cease to exist because a government fails to secure them. *See* The Declaration of Independence (1776).

Id. at 730.

In a similar case, a group of oil producers sued the Jicarrilla Apache Tribe for implementing a severance tax (i.e., a tax to be paid by parties who remove – or sever – natural resources from an owner's land). *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980). One of the issues in the case was whether "the Tribe may impose a tax upon nonmembers of the Tribe doing business within the Tribe's territorial jurisdiction." *Id*. at 541. Considering the case *en banc*, the majority held that the Tribe did have the authority to tax and explained that "chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation." *Id*. at 544. While the majority ruled in favor of the tribes, Judge McKay understood the case would be appealed to the Supreme Court and feared that his dissenting colleague's historical analysis might persuade the Supreme Court to reverse. In his dissent, then-Chief Judge Seth's argument hinged on an analysis of the 1848 Treaty of Guadalupe Hidalgo with Mexico, maintaining the Indians lacked sovereignty entirely, being a people incorporated by the treaties' signatories. Doing his part to see that the Supreme Court affirmed the Tenth Circuit Majority, Judge McKay relied upon fundamental constitutional principles to rebut his colleague's version of history:

> As the dissenting opinion of the Chief Judge suggests, the time in history at which one begins his analysis certainly does affect the outcome. For the most complete examination, we should begin in pristine times, or at the very latest with 1788 and the ratification of our fundamental law. At that moment there were at least four, not three, entities recognized by the Constitution. There was, of

> course, the federal government. There were, of course, the states. There were, of course, foreign nations. And there were the "Indian Tribes."

Id. 549 (citing U.S. Const. art. 1, §8, ("The Congress shall have Power…To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.") (McKay, J., concurring)).

Judge McKay's concern for the constitutional rights of the individual are also evident in the body of his judicial work. For instance, he once wrote a dissent to an order dismissing without oral argument the pro se appeal of a Native American prisoner who had been denied access to a religious sweat lodge. Because of a Tenth Circuit rule that required all appeals dismissed on the briefs to be agreed on unanimously, the appeal was reconsidered. On reconsideration, the court ultimately appointed counsel for the appellant, heard the case, and determined that his constitutional religious rights may, in fact, have been violated. Now Justice Gorsuch, writing the majority opinion in the case, remanded the matter to the lower court for further development of a factual record to determine whether the appellant's religious rights had been unconstitutionally infringed. *See Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014).

The above cases are only a few of many that demonstrate Judge McKay's unflagging commitment to the rule of law and the protections provided by the Constitution. But lest he be considered an activist, he always reminded his clerks that he did not pretend to be without bias. Rather, he acknowledged his biases and actively guarded his judicial activity from them. Judge McKay's distinguished service on the court spanned nearly forty-three years, two of which he spent as Chief Judge of the circuit.

A Raconteur and Bon Vivant

While Judge McKay will certainly be remembered for his jurisprudence and his professional accomplishments, those who knew him will remember him for his other, equally amazing, achievements.

He will be remembered for how he loved his family. He was the proud father of nine children and adored his many grandchildren and great-grandchildren. He loved his sweet Lucy fiercely. In her later years, Lucy suffered from Alzheimer's disease. Judge McKay insisted on caring for her himself at home, until, in his eighties, he was no longer physically able to do so. Even after he was forced to move his wife into an assisted living facility, he visited her at least once a day, spending countless hours by her side long after she stopped recognizing him.

He will be remembered as the judge who hired women who were pregnant or women who were already mothers at a time when discrimination against women in the workplace was common. When a clerk had a baby, he would keep a playpen or a crib in chambers. He and his clerks would take shifts caring for the "little clerk" so that the mother could continue to work along with her colleagues. Being an equal opportunity employer, he also allowed his male clerks to care for their children in chambers.

He will be remembered as the collegial judge who ensured that his colleagues were not just co-workers, but also friends. During his time on the court, he organized social outings, including concert attendance and dancing, with his fellow judges and their spouses. As Chief Judge, he would take his fellow judges to visit the McKay family home in Huntsville and delight them with stories from his colorful past and tidbits about the local culture.

He will be remembered as a lover of nature. He often looked out at the view of the Wasatch Range from his chambers window in Salt Lake City's Wallace F. Bennett Federal Building. He would give impromptu lectures to visitors about the geological phenomena he felt blessed to see every day. He was an avid birder well into his eighties. He chased hard-to-spot species around the world, from the frozen Lake Superior to the wilderness of Brazil.

He will be remembered as a dear friend and mentor. He most often showed his love for people through conversation. Fortunately, he rarely heeded his wife's advice to spare his breath to cool his tea. Instead, he spent countless hours with those of us lucky enough to count him as a friend, regaling us with stories from his long and full life, and humbly passing on bits of wisdom acquired during his ninety-one years. These often took the form of proverbs he had picked up during his sojourns on the African continent. Some were humorous. When he felt his presence somewhere was unnecessary, he sympathized with the nose hairs in the Tumbuka proverb: "I feel useless – but as long as I am here – I will just hang around." Another Tumbuka proverb inspired Judge McKay: "Even if you are so poor that you are reduced to eating pumpkin seeds, you should always share some with a neighbor." Judge McKay lived by such wisdom.

Monroe McKay was not just a legend in the court. He was a legend in our lives. We will miss him.

Emily Adams | Freyja Johnson | Cherise Bacalski

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The Appellate Group

New Federal Local Rule Addresses Rule 30(b)(6) Issues

by Gregory D. Phillips

Imagine receiving a 30(b)(6) Notice in a lawsuit involving your largest client that has nearly 100,000 employees and has been in existence since the early 1900s. *See* Fed. R. Civ. P. 30(b)(6). The 30(b)(6) Notice is served by the plaintiff to your defendant client just twenty days before the court ordered discovery cutoff and has ninety-eight "topics," including topics such as (1) "the factual and legal basis for each and every of the twenty-one affirmative defenses set forth in Defendant's answer," (2) the "terms of every product liability settlement entered into by Defendant since 1960 including Defendant's strategy in deciding upon the terms for the settlement agreement," and (3) the "factual and legal basis for every claim of privilege set forth in Defendant's privilege log."

In addition to the 30(b)(6) Notice, the propounding party's counsel reminds you in the cover email serving the notice of your obligations set forth in cases such as *Great American Insurance Co. of New York v. Vegas Construction Co*., that the responding party is obligated

> to educate an appropriate Rule 30(b)(6) designee to provide knowledgeable answers reasonably available to the corporation, which include information ascertainable from project files and documents in the repository, information from past employees, witness testimony and exhibits, or any other sources available to the corporation, including factual information learned through or from its counsel.

251 F.R.D. 534, 541 (D. Nev. 2008). The cover email ends with the reminder that your client may be barred from testifying at trial on any matters on which the company's selected deponent had been unable or unwilling testify. *See QBE Ins. Corp. v. Jorda Enters*., 277 F.R.D. 676, 700 (S.D. Fla 2012).

Not being familiar with case law interpreting Rule 30(b)(6), you prepare written objections to several of the topics set forth in the 30(b)(6) Notice that you serve ten days before the deposition. In addition, rather than prepare a single corporate representative to testify and in an effort to avoid being barred at trial from providing testimony on claims and defenses, you decide to prepare three witnesses with different backgrounds, knowledge, and expertise to address the numerous topics to be discussed at the 30(b)(6) deposition believing that the presumptive seven-hour deposition limit will cumulatively apply to the deposition of all three corporate representatives.

You then show up at the deposition and opposing counsel informs you that your written objections are invalid because you failed to seek a protective order before the depositions, citing such case law as *New England Carpenters Health Benefits Fund v. First DataBank, Inc*., 242 F.R.D. 164, 165–66 (D. Mass. 2007) ("Unlike the procedure with respect to interrogatories, requests for production of documents and requests for admissions, there is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued."); *Robinson v. Quicken Loans, Inc*., No 3:12-CV-00981, 2013 WL 1776100, at *3 (S.D. W.Va. Apr. 25, 2013) ("When a corporation objects to a notice of Rule 30(b)(6) deposition, the proper procedure is to file a motion for protective order…[O]nce a Rule 30(b)(6) deposition notice is served, the corporation bears the burden of demonstrating to the court that the notice is objectionable or insufficient. Otherwise, the corporation must produce an appropriate

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representative prepared to address the subject matter described in the notice."); *Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc*., No. 11-CV-02007-MSK-KLM, 2013 WL 627149, at *6 (D. Colo. Feb. 19, 2013) ("[F]iling a pre-deposition motion is the appropriate course of action."); *New England Carpenters*, 242 F.R.D. at 166 ("What is not proper procedure is to refuse to comply with the notice, put the burden on the party noticing the deposition to file a motion to compel, and then seek to justify noncompliance in opposition to the motion to compel."). Opposing counsel then threatens to seek sanctions against you and your client unless your witnesses provide meaningful answers for each of the ninety-eight topics.

In addition, you learn that your attempt to provide meaningful and comprehensive information by educating three separate witnesses who have the requisite background and expertise on the different topics backfired because of your erroneous belief that Rule 30(d) sets forth what appears to be a universally applicable rule: a deposition is limited to seven hours absent leave of court. Opposing counsel then informs you that Rule 30(b)(6) depositions are treated differently, citing the Advisory Committee Notes: "For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." In addition, opposing counsel cites case law where courts have required multiple 30(b)(6) depositions for each designated witness, each for the presumptive limit of seven hours, on the basis that the clock "resets" each time a different corporate designee is deposed on different topics. *Am. Home Assur. Co. v. Greater Omaha Packing Co*., No. 8:11CV270, 2013 WL 4875997, at *1 (D. Neb. Sept. 11, 2013); *Patterson v. N. Cent. Tel. Co-op. Corp*., No. 2:11-0115, 2013 WL 5236645, at *4 (M.D. Tenn. Sept. 17, 2013).

Your client is extremely unhappy with your failure to understand the traps and minefield that is 30(b)(6) case law and fires you after the depositions.

Because 30(b)(6) depositions are not discussed in Rule 26(f) conferences or addressed in Rule 16, as shown by the scenario above, Rule 30(b)(6) has become abused and has been used as a catch-all for the kinds of disproportional demands, sudden deadlines, and "gotcha" games that have been prohibited by other discovery rules. Because there is no procedure for objections, 30(b)(6) notices force a Hobson's choice between attempting to comply despite overbroad topics, vaguely written descriptions, and duplicative requests, or filing a motion for protective order, which could result in an even worse outcome including sanctions.

In an attempt to avoid such nightmare scenarios described above and to ameliorate the potential abuse and gamesmanship, the Local Rules Committee drafted, and the court approved, Local Rule 30-2 set forth below:

DUCivR 30-2 NOTICES REQUIRED FOR DEPOSITIONS UNDER FED. R. CIV. P. 30(b)(6)

> The 30(b)(6) notice must be served at least 28 days prior to the scheduled deposition and at least 45 days before the discovery cutoff date. Within 7 days of being served with the notice, the noticed entity may serve written objections. If the parties are unable to resolve the objections within 7 days of service of the objections, either party may seek resolution from the court in accordance with DUCivR 37-1. If the motion is not resolved before the set date of the deposition, the deposition may proceed on subject matters not addressed by the motion.
>
> Unless otherwise agreed to by the parties or ordered by the Court upon a showing of good cause, the notice shall not exceed more than twenty topics, including subparts, the deposition of all corporate representatives produced in response to the notice must not exceed 7 hours in length, and a party may not serve more than one notice on any particular party or non-party. If a request for documents accompanies the notice, it will be subject to the provisions of Rule 34 of the Federal Rules of Civil

Procedure. If a subpoena duces tecum accompanies the notice, it will be subject to the applicable Federal Rules of Civil Procedure and Local Rules.

In the author's opinion, the newly enacted DUCivR 30-2 has the following salutary benefits for both sides:

1. DUCivR 30-2 creates a much-needed basic procedure for deposition notices under Rule 30(b)(6), which is unique among discovery rules because it requires organization representatives to be "adequately prepared" to testify on the subject matters relevant to the action. DUCivR 30-2 addresses both sides of the recurring complaint about organizational depositions: witnesses are inadequately prepared, and deposition notices are overlong and ambiguously worded.

2. DUCivR 30-2 will maximize the benefits of the upcoming amendment to Rule 30(b)(6), expected to take effect December 1, 2020, which will require a meet-and-confer between the parties to discuss the matters for examination.

3. DUCivR 30-2's twenty-eight-day notice requirement addresses the main deficiency responsible for friction between parties and allegations of lack of preparation: it provides a clear and sensible timeframe for conferral about the matters for examination and preparation for productive depositions. Many of the current problems with practice under the rule stem from the absence of such structure because responding to a notice can be a scramble when the time is insufficient or unknowable. Rule 30(b)(6) does not set forth how much notice a party must give an organization's designee prior to the deposition. A productive Rule 30(b)(6) deposition requires the receiving party to complete a substantial amount of work between the notice and the deposition. Sufficient time is required, and knowing the timeframe is often more than a convenience – it can be critical to executing the work in a timely fashion. DUCivR 30-2 eliminates the confusion caused by the current rule by providing basic deadlines for serving and responding to notices.

4. DUCivR 30-2's procedure for raising and resolving objections makes it easier for practitioners to plan their cases and focus on key issues. Preparing a witness to testify regarding the full extent of information reasonably available to an organization can be an enormous burden on the responding party, and although that burden is justified where the information is important to the case, it is not when the noticed topics have no relevance to the claims or defenses or when the discovery is disproportionate to the needs of the case. Enabling parties to proceed with the deposition while preserving objections achieves the right balance.

5. DUCivR 30-2's presumptive limit of twenty topics addresses the fact that overly wide-ranging 30(b)(6) notices hinder rather than help the parties and the discovery process. A presumptive limit on the number of topics is consistent with other limitations in the Federal Rules of Civil Procedure, which have been successful in promoting proportionality, including the presumptive limits on interrogatories and depositions. As with these other limitations on discovery, presumptive limits on the number of topics to be addressed in 30(b)(6) depositions help focus both the requesting and producing parties on the claims and defenses in the case.

6. By clarifying that organizational depositions last no longer than seven hours, DUCivR 30-2 resolves a common dispute that causes tension among parties and puts an end to gamesmanship relating to the number of witnesses. In many instances, both parties benefit from the designation of different representatives to address different topics based on their experience and expertise with the organization, but the prospect of numerous seven-hour depositions can cause organizations to prefer a single witness. DUCivR 30-2 equalizes the application of the presumptive seven-hour limit regardless of whether more than one witness is designated, likely resulting in more and better-prepared witnesses.

7. DUCivR 30-2 clarifies that, if a request for documents accompanies the deposition notice, it will be subject to the provisions of Rule 34 of the Federal Rules of Civil Procedure, and similarly, if a subpoena duces tecum accompanies the notice, it will be subject to the applicable federal and local rules. Expressly setting forth these procedures will preclude back-and-forth arguments and allow parties to focus on the merits.

8. The changes brought about by DUCivR 30-2, soon to be combined with a new meet-and-confer requirement in Rule 30(b)(6), will mitigate, if not eliminate, unnecessary motion practice with these basic procedural requirements and therefore allow parties and their counsel to focus on the merits of the case.

Unlike the current Federal Rules of Civil Procedure Committee, Utah's Local Rules Committee believed that Rule 30(b)(6) needed to be clarified to avoid unnecessary disputes and gamesmanship. The author has received only positive comments about the new rule from Utah lawyers.

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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

State v. Gallegos
2020 UT 19 (Apr. 29, 2020)

A divided panel of the court of appeals denied the defendant's rule 23B request to investigate the extent to which he was prejudiced by his counsel's failure to call witnesses and lack of preparation. Affirming, the supreme court held **the defendant failed to establish sufficient facts that, if true, would likely change the outcome of the ineffective assistance of counsel inquiry, because the evidence against the defendant was substantial, and the missing evidence was not likely to change the prejudice analysis under *Strickland***. In doing so, the court emphasized that the Strickland inquiry was objective, rather than subjective, and that the deficient performance and prejudice inquiries were separate and distinct.

Davis County v. Purdue Pharma
2020 UT 17 (Apr. 23, 2020)

In this interlocutory appeal, the supreme court held that district courts have the inherent authority to transfer cases to a different jurisdiction for pretrial proceedings, and § 78B-3-309 does not limit that authority. In granting in part and denying in part a motion filed by various opioid-manufacturer-defendants to consolidate the fifteen opioid cases filed in the state in the Third District for pretrial proceedings, the Third District declined to order transfer and consolidation of cases pending in other districts. It, however, invited those districts to consider transferring the cases in those districts to the Third District. Upon a motion from a manufacturer-defendant, the Second District did so. The supreme court affirmed, holding that while neither Rule 42 nor § 78B-3-309 grants the authority to transfer cases to another district for pretrial proceedings, doing so is within district courts' inherent authority. The Second District was well within its discretion in granting the defendant's motion in this case.

Blanke v. Utah Bd. of Pardons & Parole
2020 UT 16 (Apr. 16, 2020)

This appeal arose from a petition for extraordinary relief filed by a prisoner who alleged that the Board of Pardons and Parole violated due process by determining that he is a sex offender, and conditioning his parole on sex offender treatment, without affording him the additional procedural protections discussed in *Neese v. Utah Board of Pardons and Parole*, 2017 UT 89, 416 P.3d 633. The prisoner had pled guilty to attempted child kidnapping, and had admitted to having sex with a minor in his presentence report. In affirming summary judgment to the Parole Board, the court held that **due process does not require the procedures discussed in *Neese* when a prisoner has been convicted of, or admitted to, a crime that requires him to register as a sex or kidnap offender.**

Graham v. Albertson's LLC
2020 UT 15, 426 P.3d 367 (Mar. 31, 2020)

A plaintiff sued her former employer under a theory of common law wrongful termination. Applying the test laid out in *Retherford v. AT&T Communications of Mountain States, Inc.*, 844 P.2d 949 (Utah 1992), the district court concluded that the Utah Occupational Safety and Health Act (UOSHA) preempted the plaintiff's common law wrongful termination claim and granted partial summary judgment in favor of her employer. On interlocutory appeal, **the supreme court reversed, holding**

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

that the trial court failed to account for specific language in UOSHA suggesting the legislature did not intend to preempt common law remedies. The court also noted that the two-part *Retherford* test "appears to skip a step" and clarified that a plaintiff must establish that she in fact has a valid common law claim before the court may apply *Retherford* to determine legislative intent to preempt.

Cochegrus v. Herriman City
2020 UT 14, 462 P.3d 357 (Mar. 26, 2020)

The supreme court **identified variables bearing on a claim of constructive notice for temporary unsafe conditions in a premises liability case**, including "the number of people using the premises, the frequency of use, the nature and prominence of the defect, its location on the premises, and its probable origin," along with "the condition's noticeability, such as its prominence, visibility, and location." Reversing summary judgment, the court held a jury could reasonably infer constructive notice, based on evidence that the durable metal rod had been installed in 2006, rust or oxidation suggested it had been exposed to the elements for some time, and it was a "prominent condition in a residential, regularly maintained park strip."

State v. Ray
2020 UT 12 (Mar. 9, 2020)

On a petition for writ of certiorari, the supreme court reversed the court of appeals' ruling that the criminal defendant received ineffective assistance of counsel when his trial counsel did not object to the use of the undefined term "indecent liberties" in a jury instruction regarding the charge of forcible sexual abuse. Although the court agreed with the court of appeals that a jury instruction on forcible sexual abuse should define the term "indecent liberties," it held defense counsel's failure to object to this error is not necessarily ineffective. "**Defense counsel did not have a Sixth Amendment obligation to correct every error that might have occurred at trial, regardless of whether it affected the defendant. Counsel could pick his battles.**" The court noted that "*Strickland* demands reasonable assistance, not strategic assistance," and even then a "reviewing court must always base its deficiency determination on the ultimate question of whether counsel's act or omission fell below an objective standard of reasonableness." After clarifying the standard, the court held that counsel's decision not to object to the jury instruction could have been sound strategy.

UTAH COURT OF APPEALS

In re Estate of Heater
2020 UT App 70 (Apr. 30, 2020)

An unacknowledged biological son of the deceased sought leave to intervene as an heir in probate proceedings. Over the objection of the deceased's biological daughter, the district court permitted the son's intervention. The court of appeals affirmed, holding that **the son could establish a parent-child relationship with the deceased, irrespective of the fact that he already had a presumed father under the terms of the Utah Uniform Parentage Act (UUPA)**. The court reasoned that the UUPA is expressly subordinate to other statues that provide their own definition of a parent-child relationship, including the Probate Code. Additionally, the appellate court held that the Probate Code's "one-set-of-parents" rule, which prohibits an adopted child from inheriting from both natural and adoptive parents through intestate succession, does not apply outside of the adoption context and could not bar the son from inheriting as an heir.

Issertell v. Issertel
2020 UT App 62 (Apr. 16, 2020)

In this divorce proceeding, the court of appeals affirmed the district court's order modifying the husband's child support and alimony obligations. Approximately a year after the initial divorce decree was entered, the husband lost his job at which he had been earning $8,607 per month. Unable to find new employment, husband filed a petition to modify. The court of appeals held that in granting that petition, the district court did not abuse its discretion in finding the husband was not voluntarily unemployed based on the evidence presented, including that he had unsuccessfully applied to over 800 jobs. The court additionally **rejected the wife's argument that equalization of poverty was inappropriate because, taking into account the income of husband's new wife, there was money available to husband to pay the alimony and child support obligations.** In concluding money from the husband's new wife was not a gift, the district court properly considered evidence regarding the new wife's contribution to the couple's household expenses as well as evidence they had drained both of their savings accounts and borrowed money from the wife's retirement to meet the current obligations to the wife, and that the husband had an agreement to pay his new wife back.

State v. Sisneros
2020 UT App 60 (Apr. 9, 2020)

The court of appeals **reversed denial of a motion to dismiss and held that two cases – one in Weber County and one in Utah County – were part of the same criminal episode**. Sisneros stole a car in Weber County and while driving away, hit the car owner's father, and ultimately abandoned the car in Utah County. He was charged in Utah County for theft by receiving stolen property, and Weber County charged him with aggravated robbery. Following a plea in Utah County, Sisneros moved to dismiss the Weber County case, which the district court denied. In reversing, the court of appeals held, "there was not a distinct difference in time between the two offenses at issue" with Sisneros committing both the aggravated robbery and theft by receiving in Weber County.

Scott Anderson Trucking v. Nielson Construction
2020 UT App 43, 462 P.3d 822 (Mar. 19, 2020)

The appellee argued that the appellant had waived its right to appeal because it had fully satisfied the district court's monetary judgment against it. Applying the exception articulated in *Utah Resources International, Inc. v. Mark Technologies Corp.*, 2014 UT 59, 342 P.3d 761, the court held **the appellant had not waived its appeal rights by paying the judgment:** "Buyer tendered payment to Seller with letters stating that the payments were for the purpose of 'abating interest' and that '[i]n making such a partial payment, [Buyer] fully and completely reserves its right of appeal.'" This was sufficient to make the appellant's intention of preserving its right to appeal clear in the record.

V.M. v. Division of Child & Family Servs.
2020 UT App 35, 461 P.3d 326 (Mar. 5, 2020)

The appellant argued the juvenile court committed legal error by relying on transcripts from a separate criminal proceeding when substantiating a DCFS finding of sexual abuse. In addition to noting that the juvenile court relied on other evidence besides paper transcripts – including an audio recording, witness testimony, and video of the forensic interview – **the court of appeals rejected the argument that black letter law prohibited fact-finders from considering transcripts in making credibility determinations in all circumstances.**

Gukeisen v. Dep't of Pub. Safety, Driver License Div.
2020 UT App 32, 461 P.3d 1146 (Mar. 5, 2020)

Affirming revocation of a driver's license, the court held that **withholding consent to take a breathalyzer test until the driver's lawyer is present constituted conditional consent, which is considered a refusal to test** under applicable statutes and case law.

Petrzelka v. Goodwin
2020 UT App 34, 461 P.3d 1134 (Mar. 5, 2020)

In this divorce action, the district court, among other things, declined to award the husband (Goodwin) alimony. During the marriage, the parties lived in a home the wife (Petrzelka) had purchased previously and they kept their finances separate sharing in only some "very limited" joint expenses. In denying alimony, the district court found that the parties "essentially maintained separate standards of living," with husband always living beyond his means. In affirming, the court of appeals **found no abuse of discretion noting that husband did not challenge the district court's finding that he "was capable of meeting his needs through his own income and that the parties' deliberate separation of their finances during marriage was germane to the equities surrounding the alimony request."**

TENTH CIRCUIT

United States v. Neugin
958 F.3d 924 (May 1, 2020)

Responding to a domestic argument in a restaurant parking lot, police lifted the camper lid on the back of the defendant's truck to help his girlfriend retrieve her belongings. When police discovered a gun under the lid, the defendant was charged with being a felon in possession of a firearm. The district court denied the defendant's motion to suppress the gun, citing the "community caretaker" exception to the warrant requirement. On appeal, **the Tenth Circuit reversed and vacated the defendant's conviction, holding that there was no articulable concern for public safety justifying a warrantless search of defendant's truck under the community caretaker exception.** By the time the police arrived, the couple was no longer fighting and there was no reason for the police, rather than the defendant or his girlfriend, to access the truck.

United States v. Ramon
958 F.3d 919 (10th Cir. May 1, 2020)

At a probation revocation hearing based on possession of a firearm, the government asserted it may indict Ramon on a new charge resulting from the subsequent possession. The district court, therefore, revoked probation, imposed the maximum 24-month sentence, and ordered it to run consecutive to any future sentence imposed on the new charge. Ramon did not

object. On appeal, he argued that district court had plainly erred by exceeding its sentencing authority under 18 U.S.C. § 3584(a) by running the sentence consecutively to a future federal sentence. **The Tenth Circuit agreed, holding "that § 3584(a)'s text disallows a district court from a preemptive strike dictating how its sentence will run in relation to later federal sentences."** The error, however, was not plain to the district court as there was no prior Tenth Circuit opinion on point and the court had to engage in extensive statutory interpretation, so the sentence was affirmed.

United Gov't Sec. Officers of Am. Int'l Union v. Am. Eagle Protective Serv. Corp.

956 F.3d 1242 (10th Cir. Apr. 21, 2020)

As a matter of first impression, the Tenth Circuit held that a **six-month statute of limitations applies to an action to compel arbitration under Section 301 of the Labor Management Relations Act, rather than the six-year statute of limitations applicable to state-law claims for breach of contract.** Applying this holding, the Court affirmed the district court's order granting summary judgment to employers, which dismissed the employees' claim to compel arbitration of a union labor dispute as time-barred.

Mid Atlantic Capital Corp. v. Bien

956 F.3d 1182 (10th Cir. Apr. 14, 2020)

Asserting claims against a brokerage firm, the plaintiffs presented two alternative calculations of damages. The arbitration panel awarded recovery under both theories. The defendant argued that this resulted in double recovery. The Tenth Circuit concluded, **as a matter of first impression, that a provision in the Federal Arbitration Act that allows modification if the award contains "an evident material miscalculation of figures" applied only to miscalculations that appear on the face of the award.** Because the purported error – double counting – did not appear on the face of the award, the district court did not err in denying the request for modification.

XMission, L.C. v. Fluent LLC

955 F.3d 833 (10th Cir. Apr. 9, 2020)

The Tenth Circuit affirmed the district court's dismissal of claims brought by a Utah internet service provider against a New York-based digital marketing company for lack of personal jurisdiction. The claims were based on tens of thousands of spam emails sent to the ISP's Utah-based customers. The marketing company submitted an affidavit from its general counsel stating that it did not send the emails; that it had a contract with third-parties who sent the emails; that it had no involvement with or control over the origination, approval, or delivery of the emails; and that it had no other activity connecting it to Utah. The ISP did not present any specific evidence contradicting these statements and did not conduct any jurisdictional discovery. Based upon this record, the Tenth Circuit concluded that **there were insufficient facts to establish personal jurisdiction over the marketing company in Utah under either the "harmful effects" or the "market exploitation" tests the ISP had argued.**

United States v. Samora

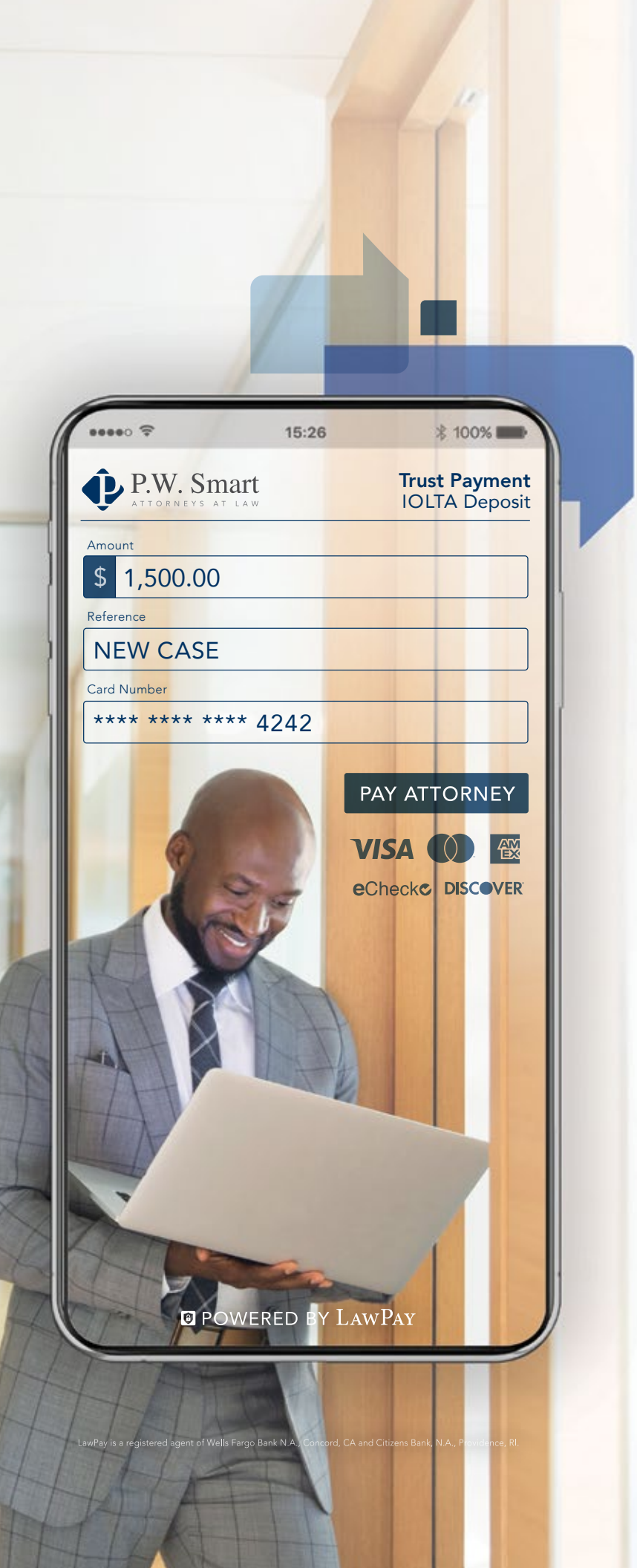
954 F.3d 1286 (10th Cir. Apr. 8, 2020)

After police discovered a loaded gun in the center console of the car he was driving, the defendant in this case was charged with being a convicted felon in possession of a firearm. At trial, the district court erroneously omitted a necessary intent element when instructing the jury on constructive possession. On appeal, the Tenth Circuit held that this misstep constituted plain error and reversed the defendant's conviction. Although the government presented sufficient evidence to convict the defendant, that evidence was not overwhelming. **As a result, the district court's erroneous instruction on constructive possession likely affected the fundamental fairness of the proceedings, requiring a new trial. Judge Baldock noted that this particular erroneous instruction "appears to be a reoccurring problem in the District of Utah[.]"**

Banuelos v. Barr

953 F.3d 1176 (10th Cir. Mar. 25, 2020)

This case discusses application of the "stop-time" rule when determining qualification for a remedy known as "cancellation of removal," which allows noncitizens to avoid removal under certain circumstances. As a matter of first impression, **the Tenth Circuit held that the stop-time rule does not apply when a non-citizen receives an incomplete notice to appear (one missing the time of a hearing) that is followed by a notice of hearing that supplies the previously omitted information.**



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Seizure Orders Under the Defend Trade Secrets Act

by Phillip J. Favro and The Honorable David Nuffer

Counsel have litigated trade secret claims under the Utah Uniform Trade Secret Act and other state law versions of the Uniform Trade Secrets Act (UTSA) for many years. State UTSA statutes have provided useful remedies and defenses regarding issues arising from trade secret misappropriation claims.

State UTSA statutes nonetheless have their limitations, particularly their varying definitions for what information constitutes a "trade secret" and what conduct falls within the scope of "misappropriation." Another drawback to UTSA claims is that they must be brought in state court unless federal diversity jurisdiction requirements are satisfied. The limitation on state court jurisdiction presents a variety of challenges for the parties, particularly for plaintiffs. For example, state courts may not offer sufficiently robust remedies – like nationwide injunctive relief – that would enable plaintiffs to effectively redress misappropriation across state or international boundaries.

In response to these and other concerns, Congress passed the Defend Trade Secrets Act of 2016 (DTSA) with much fanfare. Proponents of the law touted its potential for curtailing domestic and cross-border theft of American ingenuity and technology by offering original jurisdiction for trade secret claims in federal court. Backers also point to the opportunity the DTSA provides to develop a consistent body of case law by standardizing the definitions for "trade secret" and "misappropriation." *See* 18 U.S.C. §1839(3), (5). The law also includes provisions regarding whistleblower immunity, along with the recovery of attorney fees and punitive damages in certain instances.

While these provisions are noteworthy, what truly distinguishes the DTSA from its state UTSA counterparts is a unique and powerful remedy designed to address trade secret misappropriation: *ex parte* seizure of defendants' property. Unavailable to aggrieved parties in UTSA litigation, this extraordinary provision allows plaintiffs in DTSA matters to obtain a court order seizing computers, phones, email and cloud accounts, papers, and other information belonging to defendants that contain plaintiffs' trade secrets.

Seizure orders can have a dramatic impact on a case. Depriving defendants of their computers, smartphones, or critical business information can quickly push them into a settlement posture. In contrast, questionable seizures can lead to court sanctions against DTSA plaintiffs and other remedies such as claims by defendants for wrongful seizure. These factors, together with the provisional nature of a seizure order granted without notice, will likely make courts reluctant to issue such orders.

Given the stakes involved with seizure orders, it is essential that both courts and counsel for trade secret plaintiffs and defendants have an understanding of the key issues in play. In this article, we provide an overview of these issues. This article describes the basic requirements for obtaining seizure orders, examines needed provisions in seizure orders, spotlights the importance of technical experts and special masters, and discusses how to handle seized information during the discovery process.

PHILIP FAVRO is a Chambers-ranked lawyer who consults for Driven, Inc. on issues relating to electronic discovery and information governance. Based in Alpine, Utah, Phil also serves as a special master and an expert witness on electronic discovery issues.

JUDGE DAVID NUFFER is a United States District Judge of the United States District Court for the District of Utah.

SEIZURE ORDERS: BASIC REQUIREMENTS

For a court to issue a seizure order, plaintiffs must satisfy eight separate requirements. Memorialized in 18 U.S.C. §1836(b)(2)(A)(ii), the prerequisites include those that must be established for a Federal Rule of Civil Procedure (FRCP) 65 order. This includes showing the existence of immediate and irreparable harm and the likelihood of success on the merits of plaintiffs' claims.

FRCP 65 Relief Inadequate for Plaintiffs

More significantly, however, plaintiffs must demonstrate that relief under FRCP 65 would be inadequate because defendants would evade compliance with a temporary restraining order or a preliminary injunction. *Id.* § 1836(2)(A)(ii)(I). In addition, plaintiffs must show that if provided notice of the proceedings, defendants would move, hide, or destroy plaintiffs' trade secret information. *See AVX Corp. v. Kim*, No. 6:17-00624-MGL, 2017 WL 11316598, at *3 (D.S.C. Mar. 13, 2017). Unless these requirements are satisfied, a court will not issue a seizure order. *See Hayes Healthcare Servs., LLC v. Meacham*, No. 19-cv-60113, 2019 WL 2637053, at *6 (S.D. Fla. Feb. 1, 2019) ("Because Defendant has indicated his willingness to turn over his devices and Google cloud account to be inspected by an independent digital forensics expert, these are not exceptional circumstances warranting a civil seizure").

Balancing the Respective Harms

Plaintiffs also need to show that the harm they would suffer if the court did not issue the seizure order will be greater than the harm to defendants if their information containing plaintiffs' trade secrets were seized. 18 U.S.C. § 1863(b)(2)(A)(ii)(III). This is a particularly tricky proposition, as courts are often left to speculate regarding the degree of harm defendants will suffer given the *ex parte* nature of the proceedings. While plaintiffs may downplay the severity of the injury defendants would suffer if a seizure order were issued, defendants' business operations will almost certainly be adversely affected by a seizure. This is particularly the case for companies operating with software exclusively behind their respective firewalls. Removing computer equipment and smartphones – and accordingly the data required to operate the enterprise – could cause defendants significant damage. Against this backdrop, plaintiffs carry a weighty burden to establish that their anticipated harm would exceed that of defendants.

Additional Requirements

Plaintiffs must fulfill three additional elements before a court will issue a seizure order. First, plaintiffs must show that defendants actually possess the trade secret information at issue and the property sought to be seized. *Id.* § 1863(b)(2)(A)(ii)(V). Plaintiffs must also delineate a reasonably particular description of the items to be seized, along with the location of those items. *Id.* § 1836(b)(2)(A)(ii)(VI). *See Ruby Slipper Café, LLC v. Belou*, No. 2:18-cv-01548-BWA-KWR (E.D. La. Sept. 30, 2019) (limiting seizure to paper copies of plaintiffs' recipes and denying their request to seize defendants' computers).

Finally, plaintiffs must demonstrate that they have "not publicized the requested seizure." 18 U.S.C. § 1836(b)(2)(A)(ii)(VIII). While publicizing the seizure request may not obviate the need for an evidence preservation mandate or an order requiring forensic imaging of devices, it does preclude any basis for an ex parte proceeding against defendants. *See Int'l Auto. Technicians' Network Inc. v. Winzig*, 18-cv-4208 FMO (MRWx) (C.D. Cal. May 21, 2018) (denying plaintiffs' application for a seizure order because "plaintiffs' counsel has already threatened defendants Solar and Cedeno with litigation regarding the issues in this case.").

SEIZURE ORDERS: KEY PROVISIONS

If plaintiffs have demonstrated compliance with the underlying requirements, the court may then issue a seizure order authorizing law enforcement officials to take possession of defendants' "property" containing plaintiffs' trade secret information. 18 U.S.C. §1836(b)(2)(A)(i). The seizure order must provide specific findings indicating that all eight preliminary requirements are satisfied.

Clear Description of Items to be Seized

In addition, the order should clearly describe the items to be seized. This is an important requirement on multiple levels. The DTSA bars plaintiffs from having any involvement in the act of seizure. *Id.* §1836(b)(2)(E). As a result, law enforcement will not have in-person guidance on the nature of the property to be seized. Knowing that law enforcement will operate exclusively from the instructions the court provides in the seizure order should emphasize the importance of unequivocally specifying the nature of the information to be seized. Those instructions will also likely facilitate an appointed technical expert's ability to help identify and copy seized information. *See* Role of Technical Experts, *infra*.

Narrow vs. Broad Seizures of Defendants' "Property"

The order should also provide for "the narrowest seizure of property necessary to achieve" the objectives of the seizure directive. *Id.* § 1836(b)(2)(B)(ii). For some courts, that means limiting the seizure of property to specifically delineated paper documents or electronic devices. For example, in *Ruby Slipper Café, LLC v. Belou*, the court circumscribed the authorized seizure to paper copies of plaintiffs' trade secret recipes and denied their request to seize defendants' computers. No. 2:18-cv-01548 (E.D. La. Sept. 30, 2019). Similarly in *Thoroughbred Ventures, LLC v. Disman*, the authorized seizure was limited to a single laptop computer. No. 4:18-cv-00318, 2018 WL 8786664, at *1–2 (E.D. Tex. May 1, 2018).

Despite the statute's express mandate for a narrow seizure, orders often need to be broad enough to encompass the instrumentalities that defendants could reasonably use to evade, avoid, or otherwise prevent compliance with the seizure order. As the court in *Shumway v. Wright* observed, "electronic data may easily be copied and may be stored in many devices and places. Backups and cloud storage make an effective 'seizure' difficult to achieve." No. 4:19-cv-0058, 2019 WL 8137119, at *3 (D. Utah Aug. 26, 2019); Philip Favro, *Addressing Employee Use of Personal Clouds*, 22 Rich. J. L. & Tech 6 (2016) (describing how personal cloud accounts like Dropbox and Google Drive provide a turnkey environment for trade secret misappropriation and discussing pertinent cases).

Accordingly, several courts have issued broad orders seizing various electronic computer devices, communication and storage accounts, and paper repositories in order to effectuate the seizure mandate. The seizure order in *Blue Star Land Services v. Coleman*, exemplifies this trend.

In *Blue Star,* the seizure included "smart phones, tablets, desktop computers, laptop computers, and disks, memory files, flash drives, hard drives, thumb drives, and the like," along with login credentials for email accounts and personal cloud accounts like Dropbox. No. 17-cv-0931, 2017 WL 11309528, at *2 (W.D. Okla. Aug. 31, 2017). Likewise in *Solar Connect, LLC v. Endicott*, the court authorized a broad seizure of defendants' property such as smartphones, tablets, computers, networks, emails, and personal cloud accounts including iCloud, OneDrive, Dropbox, and Google Drive. No.: 2:17-cv-1235, 2018 WL 2386066, at *4 (D. Utah Apr. 6, 2018).

Initial Hearing within Seven Days

Another statutory element is the directive that the court set an initial hearing within seven days of the issuance of a seizure order. 18 U.S.C § 1836(b)(2)(B)(v). Such a requirement is essential as defendants must have an early opportunity to be heard on issues arising from the seizure. *See SFM Realty Corp. v. Lemanski*, 20-cv-0209 (S.D.N.Y. Jan. 13, 2020).

And yet, challenges may arise with the seven-day hearing rule. As a practical matter, law enforcement may not be available to execute the ordered seizure within the seven-day window. Moreover, certain defendants may have trouble engaging counsel who can effectively represent their interests under such constrained circumstances. Even if successfully retained, defendants' counsel will have difficulty becoming familiar with the evidence if it is all in the custody of the court. While the statute does allow for the initial hearing to be continued, doing so could further prejudice defendants who may be without

devices and other information that are essential to running their business enterprise.

THE ROLE OF TECHNICAL EXPERTS

If a seizure order is issued, law enforcement officials can effectuate the order's seizure directive by taking possession of smartphones, tablets, laptops, email accounts, paper documents, or other property identified in the order as containing plaintiffs' trade secret information. Nevertheless, law enforcement involved in the seizure may not have the technical ability to copy data from seized electronic devices. Similarly, law enforcement may not have the expertise to modify login credentials for or copy data from seized email accounts or other online repositories like personal clouds or messaging applications.

To address this issue, the DTSA authorizes the appointment of a neutral technical expert to facilitate the seizure of assets encompassing plaintiffs' trade secret information. 18 U.S.C. §1836(b)(2)(E). With a qualified technical expert in place, plaintiffs and the court can be reasonably certain that seized accounts will have login credentials properly modified and pertinent information from those accounts copied for subsequent analysis. Moreover, having a technical expert in place with forensics expertise will better ensure that information seized from computers, smartphones, and tablets is properly copied and placed in the custody of the court. *See id.* § 1836(b)(2)(D). Appointing a technical expert to assist law enforcement with the seizure of defendants' property is therefore nearly indispensable.

While forensics expertise is essential for an appointed technical expert, courts should also ensure the technical expert is an electronic discovery service provider. *See Axis Steel Detailing, Inc. v. Prilex Detailing LLC*, No. 2:17–cv–00428–JNP, 2017 WL 8947964, at *3 (D. Utah June 28, 2017). This is because the technical expert will likely need to run search queries at the direction of the court or a court-appointed special master to identify and locate trade secret information among the seized property. Having an electronic discovery platform to host seized data, with personnel trained to run search queries, and the ability to produce information during discovery should be essential qualifications for the appointed technical expert.

THE NEED FOR SPECIAL MASTERS

Upon taking custody of defendants' seized property, a court could conceivably review that information itself to identify the existence of plaintiffs' trade secrets. However, seizure orders have the potential to encompass hundreds of thousands of electronic documents. A court simply does not have the staff, time, or other resources needed to review massive troves of electronic data.

This is why special masters are such a key aspect of DTSA seizure order practice. The DTSA specifically contemplates the appointment of special masters both to identify trade secret information among the seized property and to facilitate the restoration of all other seized information to defendants. 18 U.S.C. §1836(b)(2)(D)(iv). Moreover, a special master can interact with and advise the court regarding any number of issues relating to the seized property. Indeed, the Federal Judicial Center has envisioned just such a role for special masters in DTSA matters and emphasized that special masters should function as a bulwark by providing the court with "a second, independent review of the seized material." Timothy Lau, *Trade Secret Seizure Best Practices Under the Defend*

Trade Secrets Act of 2016, Federal Judicial Center (June 2017), *available at* https://www.fjc.gov/sites/default/files/2017/DTSA_Best_Practices_FJC_June_2017.pdf.

To accomplish these objectives, special masters should have electronic discovery expertise. That expertise includes proficiency with electronic discovery search methodologies and analytics tools, together with the sophistication to use them to identify trade secret information. Working together with the court's technical expert, the special master should be able to quickly and efficiently sort through the corpus of seized data, isolating plaintiffs' trade secret information for erasure while separating out non-trade secret materials for return to defendants. *See, e.g., Shumway v. Wright*, 4:19-cv-0058, 2019 WL 8135310 (D. Utah Oct. 1, 2019).

HANDLING DISCOVERY OF SEIZED PROPERTY

Another consideration arising from DTSA seizures is whether seized information should be subject to discovery if a matter does not resolve before the discovery process begins. Hosted on a technical expert's electronic discovery platform, defendants' seized data would provide a corpus of potentially relevant information which the parties could search for discovery purposes. Courts have even authorized parties during discovery to supply search terms to the special master in an effort to identify relevant information. *See Blue Star Land Servs. v. Coleman*, No. 17-cv-0931 (W.D. Okla. Apr. 16, 2019).

While defendants should be allowed to review seized information for defense and discovery purposes, courts should be wary of granting plaintiffs access to the database of seized property. The seized information will likely be replete with defendants' confidential and proprietary information. Providing plaintiffs – who are frequently defendants' business competitors – with even limited access to seized information reflecting, e.g., sales and marketing data, financial records, or strategic plans, could pose significant harm to defendants.

In addition, the seized documents may include attorney-client privileged communications belonging to defendants, along with information that implicates the privacy rights of third parties. *See Carlson v. Jerousek*, 68 N.E.3d 520, 530 (Ill. App. Ct. 2d Dist. 2016) (highlighting the need for courts to safeguard the rights of third parties).

Where seizure orders – entered *ex parte* – include devices used for professional and personal purposes, the detained property will generally include vast quantities of irrelevant information; likely more irrelevant data than relevant materials. Seized assets should accordingly be returned to defendants as soon as possible rather than being a reprocessed fishing pond for plaintiffs' discovery.

While protective orders with "attorneys' eyes only" provisions are often viewed as an elixir for all such issues, those orders would not ameliorate the harm that would arise if plaintiffs or their counsel became privy to privileged documents, irrelevant information, medical or financial records, or materials affecting third party privacy rights. Given the prospect of satellite litigation to address these issues, which could cause discovery to run amok, courts would be well advised against providing plaintiffs with direct access to seized information. *Compare Blue Star Land Servs. v. Coleman*, No. 17-cv-0931 (W.D. Okla. May 16, 2018) (acknowledging that sensitive information belonging to defendants may be inadvertently shared with plaintiffs during discovery) *with Shumway* at *8 (recommending that plaintiffs be prohibited from accessing the database of defendants' seized information).

CONCLUSION

Seizure orders are more than an extraordinary remedy. They shift the status quo, *ex parte*, and unavoidably result in the detention of hardware and data that are almost entirely unrelated to the trade secrets. One wonders if Congress, when it included the seizure provision with the DTSA, realized it was going beyond centuries of traditional common law remedies. Accordingly, DTSA plaintiffs should seek seizure orders only in unique circumstances and when Federal Rule of Civil Procedure 65 relief will truly be inadequate to remedy defendants' alleged trade secret theft. Courts should issue seizure orders only after all statutory requirements are met and – considering the harm defendants will suffer – they are satisfied that such exceptional relief is warranted under the circumstances. Following the recommendations we have described in this article will likely enhance seizure order practice and should ultimately lead to a proceeding that is more in line with the tripartite mandate for all litigation memorialized in Federal Rule of Civil Procedure 1.

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Shared Stories of Innovation:
Lessons from the Innovation in Law Practice Committee from Work During Times of Restriction

by the Innovation in Law Practice Committee

This article was intended as a service to our colleagues in the Bar. We know lawyers are a creative bunch by nature and that you bring all kinds of flexibility and adaptation to your role in ordinary times. Yes, these are hardly ordinary times…so we know that your practice is likely full of resilience and opportunity for interesting workarounds. We have assembled a few stories from the members of the Innovation in Law Practice Committee to help you think of options that have yet to be considered to help you know that others are going through similar stresses and change and that our community will emerge stronger and more capable after working remotely and abiding by required restrictions. Even though we may be doing business differently, we know we can continue to serve our clients and the rule of law. And what we have learned from this extraordinary time is that change and resilience are the order of our profession, so we will bring the best of what we have learned to our industry in the future.

A Lesson from Law School by Tina Wilder

I remember being in our dedicated technology training classroom at BYU Law School when I learned the university would be temporarily closing and would reconvene exclusively online for the remainder of the semester due to COVID-19.

In order to help prepare law students for what has been an ever-changing environment, Dean Gordon Smith and the Dean for Career Services, Rebecca Van Uitert, forecasted the technology skills needed by our law students in order to succeed in this rapidly changing environment. One of those skills that they identified early on was the ability to use remote desktop software. To accomplish these goals of preparing students with adequate technology skills, our law library deputy director, Shawn Nevers, identified Pluralsight. Pluralsight offers on-demand, in-depth technology trainings. Pluralsight had one training specifically on remote desktop technology for both Mac and Windows operating systems. We utilized these trainings to help prepare students for the possibility that their summer internships may also go online and they might need to be able to remote desktop into work.

These efforts by our school's Legal Technology Initiative allowed students to take remote desktop trainings as well as other in-depth technology trainings to further develop their technology skills. Lastly, in furthering our Legal Technology Initiative, the law library has been creating, as well as expanding, its trainings on topics specific to using technology in law practice and has been making those trainings available online for students. We hope to be able to share these with attorneys and alumni in the future.

A Paperless Office by Greg Hoole

Because my office is paperless, the restrictions related to COVID-19 have had a very small impact on how my practice functions. Really, the only difference is that I am accessing our firm's server from my home instead of my office. We transitioned to a paperless office years ago, about the same time the federal court transitioned to electronic filing, and it has saved us significant time and expense. The key to a paperless office is buying very good PDF software, such as Adobe Acrobat.

We used to scan all documents we received to a PDF and then save them in electronic folders that mirrored the physical folders we used to use. Now, we receive very little paper from other firms or the courts, so the intermediate step of scanning has been almost entirely eliminated. By utilizing electronic letterhead and email, we also use very little paper letterhead, envelopes, and postage. All of this makes it possible to practice from virtually any location that has a good internet connection. My legal assistant can do likewise. We both access the server remotely,

which syncs the work we are both doing from different locations.

With the ability to use Zoom and similar programs to hold many (but not all) meetings, hearings, depositions, and mediations, the wheels of justice continue to turn.

Work-life Balance and Online Communication by Christine Hashimoto

Like so many offices, my office has long been resistant to working remotely. We are encouraged to regularly collaborate with team members and colleagues in handling each of our cases. Being in the office made this easy as we maintained an open-door policy and regularly updated the whiteboards outside our offices to let others in the office know where we will be and when throughout the day.

When we first moved to remote working, we were concerned that we would lose this collaborative environment. But slowly, as time away from the office has continued to drag on indefinitely, we have adapted. Video conferencing calls are a daily occurrence whether they be scheduled meetings or just a drop in to run an idea past someone. Collaboration continues in real time and in some ways faster than it did when we were in the office. I suspect that while this pandemic may be temporary, the effects on how my office functions will last forever.

As a mother of two young children, working from home was a challenge from day one. Not only did my three-year-old insist on participating in all of my video conferences, spread glitter on my keyboard, and insist that she was the one who needed to be on the computer, but my baby decided that if she saw me or heard my voice, she had to cry. This led to a series of innovations in my life and with my work.

I had to set up my own home "office" in our unfinished basement using an old door as a desk. This required flexibility with when and how I was going to get my hours in. An understanding boss and team allowed me to be able to move forward with much of the crucial work I had to do. Ultimately, the decision was made to rely on our social network and have my girls and I move in with my parents during this time. It is a solution that is as old as time, having grandparents care for their grandchildren, but this arrangement was innovative for me and my family. However, it has allowed me to resume working as close to my normal routine as I possibly can.

Working Online and its Future by Dave Duncan

As a former software engineer turned lawyer, I have sometimes been frustrated by the slow adoption of technology in law. One bright side of the "lock down" has been forcing the reluctant to adopt some new processes and technologies. I suspect some of these adaptations will continue past the lockdown. And it is not just law firms and tech companies that are adapting. Think of how the courts have adapted already. Continuing to allow online hearings and depositions could potentially save much time and money—partially addressing some of the access-to-justice concerns the legal field has been grappling with for years.

We hope that you found value in the exchange of ideas in this article. You would be welcome to email our Committee with your own lessons from these interesting times. Please contact us via the CLE Department at cle@utahbar.org so that we can incorporate these ideas into an upcoming CLE event. We will gladly collect innovations from throughout our community and continue to share best practices!

Article

Soldiers with Law Degrees: A Window into the JAG Corps

Photos by Gurney P. Pearsall III.

The Sun Rises After A Long Night of Combat Simulation.

by Gurney Pearsall

Earlier this year, as I was staring down the barrel of a rifle during my Army Reserve unit's annual training, it occurred to me that the U.S. Army JAG Corps' latest training initiative offered an interesting window into the world of the judge advocate. By combining legal education with military exercises, the new training initiative doubles as a microcosm of the JAG Corps as a whole.

Judge advocates are, simply put, soldiers with law degrees. As soldiers, judge advocates are expected to maintain a high level of proficiency in land navigation, physical fitness, marksmanship, and other martial skills. As attorneys, judge advocates are also expected to provide accurate legal advice and services to the U.S. Army under austere conditions. As my JAG School class put it, we must have a soldier's heart and a lawyer's mind.

Historically, the U.S. Army Reserve's training for judge advocates has resembled what most attorneys would recognize as a CLE event, consisting of several days of lectures. To deliver training that better reflects the JAG Corps' dual identity, Brigadier General Marilyn Chiafullo recently reorganized our annual training into the Total Force Readiness Exercise (TFRX).

Coincidentally, she selected my unit to take part in the first large-scale TFRX event. So, on January 9, 2020, I hopped aboard an Alaska Airlines flight and took off to Fort Lewis-McChord.

GURNEY F. PEARSALL III works with his sister at Pearsall Law Firm, P.C., where he handles appeals and personal injury cases on behalf of plaintiffs. As a captain in the U.S. Army Reserves JAG Corps, he belongs to the 87th Legal Operations Detachment, which is headquartered in Salt Lake City, Utah, and manages about fifty judge advocates and paralegals across Utah, Colorado, and Wyoming.

About an hour south of Seattle, Washington, the fort is the Army's main power projection base for the Rocky Mountain Region.

TFRX began on familiar footing, with two days of CLE-like legal education courses. The classes were taught by Active Duty judge advocates, who selected the topics based on what they believed we need to know if we are called upon to supplement their work force in the near future. In that sense, the classes were not a purely academic exercise; they were more of a pre-emptive on-the-job training. Helpfully, for those of us with a limited attention span, these classes were taught to small groups and they split their time between lectures and small group discussions.

TFRX's third day stepped into unfamiliar territory. Instead of coming back to the lecture hall, we got up at the crack of dawn and headed to a mock village, made up of dozens of war-torn buildings. There, we learned how to evaluate combat casualties, transport those casualties off the field, call in medical air support, then pick up our rifles and work together to fight back the ambush that caused these casualties. These classes were also split evenly between lectures and practical exercises.

On the next day, we grabbed our rifles one more time and headed to a weapons range, with senior officers qualifying on M9 pistols and the rest of us qualifying on M4 rifles. Hollywood would lead you to think that firing a rifle is a simple task: just point and shoot, right? Qualifying with the M4 is not so simple. Your targets are up to three hundred meters (1,000 feet) away, a distance at which they look like tiny dots. You have one bullet per target. Your targets pop up for what seems like one second, and in that brief window of time, you have to hold your breath, steady yourself under the weight of body armor and a helmet, and squeeze your trigger without causing the slightest movement in your aim. At basic training, in fact, they did not even let us step foot onto the weapons range until we could balance a penny on our rifle muzzle and squeeze the trigger without causing it to wobble off. It is tough training, but it is necessary; our adversaries are not in the habit of walking up to us and waiting to get shot at close range.

Lastly, TFRX reached a crescendo with its combat immersion exercise. For that, we again assembled outside our barracks early enough to greet the rising sun, with our breaths creating tiny clouds in the chilly air, then drove out to a grim-looking command center in a forest. We quickly assembled our

headquarters, then spent the next twenty-four hours "on call."

We were now in an active warzone, with a near-peer competitor just over the horizon. Runners dashed into the command center with urgent requests from commanders – sometimes, minutes apart; sometimes, hours apart. Whether or not this was intentional, it accurately reflected how soldiers have long experienced war: as intense bursts of action, sandwiched between long periods of waiting.

Members of the 87th LOD race towards a fallen soldier.

Each runner came with a dramatically different request. While my team was on call, around 0200, we handled questions related to lawful targeting, detainee operations, noncombatant evacuation operations, and military justice issues. Someone even came to ask for help with a will. (Military units make sure that their soldiers handle estate planning long before any boots touch ground in a war zone, but as any estate planning lawyer can confirm, it is never too late to start working on your will).

All of this took place under the backdrop of escalating international tensions. The day before TFRX began, for instance, Iranian forces had bombarded U.S. forces with a rocket attack. Our TRFX opponent was a hypothetical adversary, but the context was lost on no one. And many of the scenarios that we dealt with that night were a fascinating glimpse into the kinds of legal dilemmas we can expect to confront on the horizon.

For instance, a sophisticated hostile force may know how to hack into our targeting systems and mislabel their readings, in order to paint unlawful targets as lawful targets and vice versa. Should that change how we analyze the legality of targeting requests? As the judge advocate, the soldier entrusted with steering our armed forces clear of war crimes, should you continue giving the green light to attack targets if you cannot

A judge advocate hones her marksmanship at the range

trust what you see in the satellite imagery? Can we afford to let lack of certainty, paralyze us while our adversary operates freely and continues committing war crimes?

Similarly, we must consider the unlawfulness of our own allies. Perhaps we have captured so many militants that we are unable to properly detain them, and we must disarm and release them in order to comply with the Geneva Conventions. But if the locals are executing these militants in retaliation for their war crimes, then what do we advise our commander to do? My advice was to let detainees leave, while informing them of the

The calm before the storm at the combat exercise field.

risk and of our inability to feed and house them properly. This "voluntary detention" solution struck me as a reasonable compromise, but there is no right answer yet.

About 300 soldiers participated in this TFRX, from the Army, Reserves, and National Guard. My understanding is that observers from allied armies were present as well, watching and learning as the events unfolded in real time. It was a tough and nasty experience, but that is exactly what made it so valuable. I could tell on my way out that this TFRX exceeded all expectations, while safely and successfully accomplishing its objective of building readiness today for the battlefield of tomorrow.

Titanic Changes to Rules of Professional Conduct Under Consideration

by Keith A. Call and Kendra M. Brown

Some topics deserve more than one article. This is one of those topics.

In March, Keith wrote about the potential for significant changes to the Utah Rules of Professional Conduct. *See* Call, *Legal Industry Disruption May Be Here: A Primer on Regulatory Reform in Utah*, 33 Utah B. J. 47 (Mar./Apr. 2020). We are now one step closer to those changes. On April 24, 2020, the Utah Supreme Court formally posted for comment several proposed changes to Rules 1.5, 5.4, and 7.1 through 7.5. You can see the specific rule changes at http://www.utcourts.gov/utc/rules-comment/ (last visited May 22, 2020). Here is a brief summary.

Proposed Change to Rule 1.5

The court proposes to eliminate Rule 1.5(e) relating to the division of fees. Rule 1.5(e) currently provides:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.

This proposed rule change would eliminate restrictions on fee sharing among lawyers of different firms. Referral fees and other forms of fee sharing would apparently be permitted, even if the lawyer receiving the fee does not actively participate in the representation.

Proposed Changes to Rule 5.4

Rule 5.4 addresses professional independence of a lawyer. Among other things, Rule 5.4 currently prohibits fee sharing with non-lawyers (with very narrow exceptions) and prohibits partnerships with non-lawyers if the partnership activities will include practicing law. These specific prohibitions are designed to preserve the lawyer's professional independence from outside forces, including economic incentives. In other words, fee sharing and partnering are prohibited *in order to preserve* professional independence.

Under the proposal, Rule 5.4 will be substantially re-written and divided into two parts, Rule 5.4A and Rule 5.4B. The proposed rules would eliminate the blanket prohibitions on fee sharing and non-lawyer partnering. Instead, the new rule would allow fee sharing and partnering with non-lawyers *provided* the lawyer maintains professional independence.

Specifically, under proposed Rule 5.4A, a lawyer would be allowed to share fees with a non-lawyer if the following conditions are met:
(1) written notice to the client and any other person paying the fees;
(2) the written notice describes the fee-sharing relationship;
(3) the written notice is given before accepting the representation

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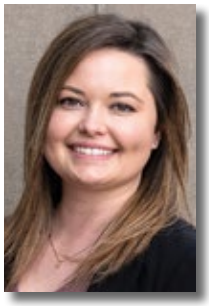
KENDRA M. BROWN is an associate a Snow, Christensen & Martineau. Her practice focuses on professional liability defense, general commercial litigation, and appeals.



or sharing fees; and (4) there will be no interference with the lawyer's independent judgment, loyalty to the client, and protection of client confidences.

Referral fees would also be permitted under proposed Rule 5.4A(c), again with the condition that there will be no interference with the lawyer's independent judgment, loyalty to the client, and protection of client confidences.

Proposed Rule 5.4A(d) maintains the same general prohibition on practicing law with non-lawyers as exists in the current version of Rule 5.4, but it would be subject to a significant new exception that appears in proposed Rule 5.4B. Proposed Rule 5.4B would allow the practice of law with non-lawyers if the following conditions are met: (1) there will be no interference with the lawyer's independent judgment, loyalty to the client, and protection of client confidences; (2) it must be permitted by Utah Supreme Court Standing Order No. 15 (see below); (3) the lawyer must provide written notice to the client; and (4) the lawyer must explain to the client in writing the financial and managerial structure of the organization. The comments to the proposed rules emphasize the lawyer's obligation to maintain professional independence under all circumstances.

Proposed Changes to Rules 7.1 through 7.5

The proposed changes are also game changers in the arena of lawyer advertising. The court is proposing to completely eliminate all of Rules 7.2 (advertising), 7.3 (solicitation of clients), 7.4 (communication of fields of practice), and 7.5 (firm names and letterheads). In place of all of these restrictions, the proposed changes would add eighteen new words to Rule 7.1: "A lawyer shall not interact with a prospective client in a manner that involves coercion, duress or harassment." Thus, the proposal would strike a long list of detailed rules and proscriptions and replace them with a more general rule to guide lawyer conduct. Proposed new comments to Rule 7.1 clarify that lawyers would be allowed to truthfully advertise pricing, use actors and dramatizations to portray the lawyer and events, and state that he or she "specializes" in a particular field.

Proposed Standing Order No. 15

The supreme court has also circulated for comment its proposed Standing Order No. 15 (order). This proposed order would "establish[] a pilot regulatory sandbox and an Office of Legal Services Innovation to assist the Utah Supreme Court with respect to overseeing and regulating the practice of law by

nontraditional legal service providers or by traditional providers offering nontraditional legal services." Utah Supreme Court Standing Order No. 15 (Draft), p. 1, available at http://www.utcourts.gov/utc/rules-comment/ (last visited May 22, 2020).

The regulatory sandbox would allow lawyers *and non-lawyers* to offer legal services in non-traditional ways, including ways not currently authorized under the Utah Rules of Professional Conduct. The Office of Legal Services Innovation, consisting of nine individuals appointed by the court, would be charged with approving and monitoring these types of legal services to assure the public is served, and not disserved. Sandbox participants, including non-lawyers, who are able to demonstrate over a period of time that their legal services are "safe" for the public may be approved to exit the sandbox and may be granted the appropriate license to practice law consistent with their sandbox experience.

Standing Order No. 15 would establish a two-year pilot period for the regulatory sandbox, after which the supreme court would determine if, and in what form, the Office of Legal Services Innovation would continue.

What Is Driving These Proposals

As stated in proposed Standing Order No. 15, "the overarching goal of this reform is to improve access to justice." Standing Order No. 15 (Draft), p. 5. The proposed Order cites formal studies showing that a high percentage of the public facing civil legal problems receives "inadequate or no legal help." *See id* p. 1.

Lawyers will certainly have differing opinions on whether these sweeping changes will actually solve or abate the access to justice problem and whether they will give rise to a host of other unintended consequences. The court expressed its view in the proposed Order: "The Utah Supreme Court's view is that adherence to this objective will improve access to justice by improving the ability of Utahns to meaningfully access solutions to their justice problems, including access to legal information, advice, and other resources, as well as access to the courts." Standing Order No. 15 (Draft), p. 5.

We are aware of three states that have enacted legislation to launch a regulatory sandbox: Utah, Arizona (https://www.azag.gov/fintech (last visited May 26, 2020)), and Wyoming (http://wyoming-bankingdivision.wyo.gov/home/areas-of-regulation/laws-and-regulation/financial-technology-sandbox (last visited May 26, 2020)). The regulatory sandboxes for Arizona and Wyoming focus primarily on allowing the financial services industry to operate within the legal market. Arizona is also considering changes to their Rules of Professional Conduct similar to those of Utah that would eliminate the prohibition of lawyers and non-lawyers jointly operating law offices, a change that is "viewed by proponents as a significant effort needed to close the Access to Justice Gap." *See* Joe Hengemuehler, *Proposed Rules Changes Affecting the Practice of Law*, Arizona Bar (Feb. 25, 2020), https://www2.azbar.org/newsevents/newsreleases/2020/02/proposedrulechange02252020/. California has also recently considered moving forward with a regulatory sandbox with a focus on increasing access to legal services. *See* Sam Skolnik, *California Bar Trustees Move Toward New Regulatory 'Sandbox'*, Bloomberg Law (May 14, 2020), https://news.bloomberglaw.com/us-law-week/california-bar-trustees-move-toward-new-regulatory-sandbox.

The model that appears to provide the most helpful data for Utah's Task Force regarding expected impacts on law firms and the legal market comes from the United Kingdom, which passed the Legal Services Act of 2007 to allow non-lawyer ownership of legal practices. See Lucy Ricca, *UK Legal Service Reforms Under the Legal Services Act (2007)* (Feb. 21, 2019), http://www.utcourts.gov/utc/rulespc/wp-content/uploads/sites/27/2019/02/Summary-of-Legal-Services-Act-and-ABS-regulation.pdf (citing sources monitoring the effect of the Legal Services Act of 2007's effect on consumers and the legal market); *Alternative Business Structures*, The Law Society (Nov. 22, 2019), https://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures/. Like Arizona and Wyoming, the Legal Services Act of 2007 was focused on opening law firms and the legal market to the financial services industry.

Comment Period Ends July 23

Lawyers and the public are encouraged to share their views on these proposed changes. The comment period expires on July 23, 2020, so there is still time for you to weigh in. You can easily submit your comments using the internet at http://www.utcourts.gov/utc/rules-comment/2020/04/24/supreme-court-regulatory-reform-proposal-comment-period-closes-july-23-2020/ (last visited May 22, 2020). I also found it by Google searching "Utah court rules published for comment." Make sure to scroll down to the bottom of the page to the "Leave a Reply" section. You can also read the numerous other comments that have been submitted, as well as the various replies and interesting debate among the lawyer "community."

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.

First: Sandra Day O'Connor

An Intimate Portrait of the First Woman Supreme Court Justice

by Evan Thomas

Reviewed by The Honorable Diana Hagen

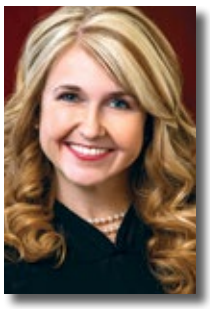
First, Evan Thomas's biography of Sandra Day O'Connor, is subtitled "An Intimate Portrait of the First Woman Supreme Court Justice." At times, the book was much too intimate for my liking. I should probably confess that I don't care for biographies generally and abhor tell-all books about famous people. While *First* is certainly not an exposé, the author's recounting of O'Connor's childhood, adolescence, and young adulthood struck me as uncomfortably intrusive. In recounting her time as an undergraduate and law student at Stanford, for example, the book quotes extensively from O'Connor's letters home to her parents. The letters are deeply personal and often show a young woman processing heartbreak and disappointment in real time. During her time at Stanford, O'Connor "was proposed to four times" and "was formally engaged twice," and the author spends a significant amount of time detailing each of those relationships.

First: Sandra Day O'Connor
by Evan Thomas
Publisher: Random House (2019)
Pages: 455
Available in hardcover, paperback, e-book, and audio formats.

As has been widely reported, one of those relationships was with her law school classmate, William Rehnquist. For his part, Chief Justice Rehnquist played down the courtship, conceding only that they "dated some in the second year, and then we kind of went different ways." Given Rehnquist's reluctance to acknowledge the seriousness of the relationship, he would surely be mortified by the details revealed in the book. In fact, they began dating in the spring of 1950 and were a "steady couple" until December when O'Connor broke off the relationship. A year later, when Rehnquist graduated from law school a semester early, he took O'Connor "on one last date and blurted out that he was in love with her and had been for the past two years." The author quotes cringe-worthy passages from Rehnquist's love letters to O'Connor in which he confesses that he can't live without her and ultimately asks her to marry him – a proposal that she did not immediately turn down despite the fact that, unbeknownst to Rehnquist, she was already dating her future husband, John O'Connor. Eventually, of course, she broke the news to Rehnquist, and, to his credit, their friendship continued and they both supported each other's nominations to the Supreme Court.

Once past the more personal details of her early life, the author delves into O'Connor's professional life and how she found herself on the path to the Supreme Court. The description of O'Connor's early career gives us a fascinating glimpse into a time period when a professional career posed even greater challenges for women. Famously, despite graduating near the top of her class from Stanford, O'Connor could not land a job at a law firm. In fact, she could not even get an interview. She met with a friend's father who was a partner at Gibson Dunn and & Crutcher, who told her that she had a fine resume but that the firm had never hired a woman

DIANA HAGEN is a judge on the Utah Court of Appeals. She enjoys fantasy and science fiction novels but will endure an occasional biography if her presiding judge on the Journal's *editorial board asks her to write a book review.*



lawyer and probably never would. O'Connor later recalled that he asked her if she could type and ventured, "Well, if you type well enough we might be able to get you a job as a legal secretary."

O'Connor's first foray into public life was as a state senator at a time when the Arizona statehouse seemed more like "a fraternity house on Saturday night." A local magazine at the time quoted one Arizona lawmaker describing his colleague this way: "When you first meet Sandra you think, 'What a pretty little thing.' Next you think 'My, it's got a personality, too.'" O'Connor survived this toxic environment by being "dignified, correct, and, when it suited her, stone cold." Although O'Connor "laughed at bawdy stories told by her husband and loved dancing on the weekends," she invariably maintained a tough, no-nonsense attitude at the statehouse. Referring to a popular beer commercial in the eighties, one lawmaker observed, "With Sandy, there is no Miller Time."

During her time as a lawmaker, she walked a fine line on women's rights, often skirting more controversial issues. The author details her involvement in legislation involving discriminatory property laws, the Equal Rights Amendment, and abortion restrictions. While her ability to navigate these issues without ruffling the feathers of conservative Republicans showcases her political savvy, O'Connor faced criticism from women's groups for not taking a firmer stance on women's rights. O'Connor certainly was not a prototypical "bra-burning feminist" of the time – she once told the Rotary and Kiwanas Clubs, "I come to you with my bra and my wedding ring on." Although O'Connor was "never frontally embraced as an activist on the model of Ruth Bader Ginsberg," the author contends that women's rights became a "quiet cause for Justice O'Connor" that she "slowly but surely fostered in her judicial opinions."

In 1974, Justice O'Connor was elected to serve as a judge on the state trial court. As a legislator, she had introduced a bill to have judges appointed by the governor, choosing from candidates recommended by a non-partisan merit selection board. Although the bill failed, she led a statewide petition effort to place a referendum on the ballot to mandate merit selection of judges in urban counties. The referendum passed, making her one of the last judges to run for election in Phoenix. On the bench, she was "well regarded for the quality of her written opinions and as a fair judge" but got low marks for "courtesy to lawyers." O'Connor was "tough, terse, curt," and stood up "to lawyers who had been getting away with sloppy work for years." In 1978, she seriously considered running for governor, but reluctantly decided against it. The following year, the newly-elected governor appointed her to Arizona's intermediate appellate court. The prevailing rumor at the time was that the governor put O'Connor on the appeals court to remove her as a potential opponent when he came up for reelection in 1982. He didn't deny it.

How does an intermediate state appellate judge from Arizona end up as the first woman on the Supreme Court? If there is one take away from this book, it's that O'Connor is one of a kind. Not only did she have a truly exceptional legal mind, but she won over everyone she met with her grit, work ethic, and charm. In the summer of 1979, O'Connor and her husband were invited to join some friends who were entertaining Chief Justice Warren Burger on a visit to Arizona. The Chief Justice was so taken with O'Connor that the two talked until 2:00 am. On the way back to Washington, D.C., the Chief Justice and his staff were already speculating about O'Connor's future and working on ways "to boost her credentials" by appointing her to high-level committees. But the Chief Justice was only one of the many powerful people O'Connor impressed and who coalesced into a "formidable lobbying campaign on her behalf" to propel her to the Supreme Court.

Perhaps foremost among those lobbyists was her husband, John, who was clearly O'Connor's greatest cheerleader and supporter. When O'Connor was appointed to the Supreme Court, a friend recalled that John "knew that he was about to go from a position as one of the most powerful lawyers in Phoenix to 'second fiddle' in Washington," but he "walked away from a firm he loved, a city he loved, a practice he loved, and never gave it a second thought." The story of their marriage and how that partnership supported and nourished O'Connor's career is one of the most touching aspects of the book. And the way O'Connor skillfully integrates into the Supreme Court is nothing short of a master class on how to establish respectful, collegial working relationships under challenging conditions.

First provides a rare and intimate glimpse into both the personal and professional aspects of Justice O'Connor's life, thoroughly chronicling her journey from a young girl on her parents' cattle ranch through her time on the Supreme Court. Despite my own discomfort with the personal details, they do complete the story, painting a fuller picture of how she ascended to the Supreme Court and what made her such an acclaimed, respected, and interesting political figure. Perhaps without the intimate details about her upbringing, relationships, and struggles, we wouldn't understand the full "recipe" of her success. After all, who we become is often shaped by more than just our career path.

President-Elect and Bar Commission Election Results

Heather Thuet was successful in her retention election as President-elect of the Bar. She will serve as President-elect for the 2020–2021 year and then become President for 2021–2022. Congratulations goes to **Marty Moore** who ran unopposed in the First Division, as well as **Mark Morris**, **Andrew Morse**, and **Traci Gundersen** who were elected in the Third Division. Sincere appreciation goes to all of the candidates for their great campaigns and thoughtful involvement in the Bar and the profession.

Heather Thuet,
President-Elect

Marty Moore
First Division

Mark Morris
Third Division

Andrew Morse
Third Division

Traci Gundersen
Third Division

Mandatory Online Licensing and Extension of Late Fees

The annual Bar licensing renewal process has begun and can be done online only. An email containing the necessary steps to re-license online at https://services.utahbar.org was sent on June 5th. **Online renewals and fees must be submitted by July 1st and will be late November 1st. Your license will be suspended unless the online renewal is completed and payment received by December 1st.** Upon completion of the online renewal process, you will receive a licensing confirmation email.

To receive support for your online licensing transaction, please contact us either by email to onlinesupport@utahbar.org or, call 801-297-7021. Additional information on licensing policies, procedures, and guidelines can be found at http://www.utahbar.org/licensing.

This one-time extension by 90 days of the deadlines for the assessment of late fees and suspension for non-payment is for this licensing year only.

Check Yes for Pro Bono!

Remember to check YES during licensing to make sure you are signed up to receive occasional communication from the Pro Bono Commission about ongoing pro bono projects.

USB Pro Bono Commission
CHECK YES for Pro Bono Service

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 April and May. 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.

Private Guardian ad Litem

Laura Hansen
Paul Waldron
Sherri Walton

Family Justice Center

Steve Averett
Elaine Cochran
Michael Harrison
Leilani Maldonado
Brandon Merrill
Babata Sonnenburg
Nancy Van Slooten

Bankruptcy Case – Utah Legal Services

Nelson Abbott
Paul Benson
Robert Culas
Timothy Larsen
Lillian Meredith
Nathan Reeve
Peter Richins
Michael Roche
Ryan Simpson
Theodore Stokes
Kristin K. Woods

Expungement Case – Utah Legal Services

Kathryn Bleazard
Marca Tanner Brewington
James Cannon
Diane Card
Cole Cooper
Gretchen Lee
Jojo Liu
Andres Morelli
Crystal Powell
McKinley Silvers
Ryan Snow
Jason Sweat
Aubri Thomas

Family Law Case – Utah Legal Services

Nicholas Babilis
Kathryn Bleazard
Marca Tanner Brewington
Justin Caplin
Brent Chipman
Travis Christiansen
Mary Corporon
Brian Craig
Angilee Dakic
Scott Dansie
William Fontenot
Aaron Garrett
Kaitlyn Gibbs
Michael Harrington
Barry Huntington
Eric Johnson
Jeremy Jones
Zachary Lindley
Orlando Luna
Emily Mabey
Chad McKay
Richard Mellen
Keil Myers
Tulsi Patel
James Phillips
Al Pranno
Devin Quackenbush
James Robertson
Jacolby Roemer
Babata Sonnenberg
Martin Stolz
Mark H. Tanner
Reid Tateoka
Stacey Tellus
Jacob Tuimaualuga
Samuel Woodall
Christina Zavell
David Zeidner

Guardianship Case – Utah Legal Services

Stephen Buhler

Name Change Case – Utah Legal Services

Brent Chipman

Probate Case – Utah Legal Services

Jacolby Roemer

Diploma Privilege Candidate Expungement Case – Utah Legal Services

Clark Amundson
Candace Waters

Family Law Case – Utah Legal Services

Anna Christiansen
Jonathan Ence
Grace Johnson
Amber McFee
Katie Okelberry
Seth Russell
Cory Thompson
Derek Walton
C. Chase Wilde
Jaime Wiley

Timpanogos Legal Center

Steve Averett
Cleve Burns
Marca Tanner-Brewington
Nancy Van Slooten

SUBA Talk to a Lawyer Legal Clinic

Britt Beckstrom
Len Carson
Travis Christiansen
Bill Frazier
Jake Graff
Jenny Jones
Christian Kesselring
Chantelle Petersen
Trent Seegmiller

Utah Bar's Virtual Legal Clinic

Dan Black
Mike Black
Russell Blood
Jill Coil
John Cooper
Jessica Couser
Olivia Curley
Lauren DiFrancesco
Thom Gover
Aaron Hart
Rosemary Hollinger
Tyson Horrocks
Bethany Jennings
Travis Marker
Gabriela Mena
Tyler Needham
Sterling Olander
Jacob Ong
Ellen Ostrow
Clifford Parkinson
Katherine Pepin
AJ Pepper
Jessica Rancie
Amanda Reynolds
Brian Rothschild
Chris Sanders
Alison Satterlee
Kent Scott
Thomas Seiler
Luke Shaw
Kimberly Sherwin
Farrah Spencer
Liana Spendlove
Julia Stephens
Mike Studebaker
Claire Summerhill
George Sutton
Jay Wilgus

YCC Family Crisis Center Legal Night

Michelle Lesue
Brooke Little

MCLE Compliance Update for the 2020 and 2021 Reporting Periods

2020 CLE COMPLIANCE REPORTING PERIOD

On March 12, 2020, the Supreme Court authorized the Supreme Court Board of Continuing Legal Education "the Board" to suspend the traditional live in-person credit requirement for lawyers reporting in 2020, allowing all required CLE to be fulfilled with online self-study with audio or video presentations, webcasts or computer interactive telephonic programs for the compliance period ending June 30, 2020.

On April 13, 2020, due to the ongoing COVID-19 virus, the cancellation of in-person CLE courses, and the uncertainty as to when in-person courses may resume, the Supreme Court authorized the Board to extend compliance deadlines for the compliance period ending June 30, 2020. Lawyers will have through September 1, 2020 to complete required CLE hours without paying late filing fees and will have through September 15, 2020 to file Certificate of Compliance reports without paying late filing fees.

2021 CLE COMPLIANCE REPORTING PERIOD

On April 13, 2020, the Supreme Court authorized the Board to suspend the traditional live in-person credit requirement for lawyers reporting in 2021, allowing all required CLE to be fulfilled with online self-study with audio or video presentations, webcasts or computer interactive telephonic programs for the compliance period ending June 30, 2021.

PLEASE NOTE: The 2020 Compliance Reporting Period Extension does not apply to the 2021 Compliance Reporting Period.

Should you have any questions or concerns regarding this announcement, please contact Sydnie Kuhre, MCLE Board Director, at sydnie.kuhre@utahbar.org or 801-297-7035.

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Attorney Discipline

Visit **opcutah.org** for information about the OPC, the disciplinary system, and links to court rules governing attorneys and licensed paralegal practitioners in Utah. You will also find information about how to file with the OPC, the forms necessary to obtain your discipline history records, or to request an OPC attorney presenter at your next CLE event.

PUBLIC REPRIMAND

On March 24, 2020, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against John V. Coy for violating Rules 1.3 (Diligence) and 1.4(a) (Communication) of the Rules of Professional Conduct.

In summary:
Mr. Coy was retained to represent a client in a custody and support matter. Mr. Coy did not return phone calls from the client for extended periods of time during the representation. The court held a hearing for temporary orders and Mr. Coy was instructed to prepare the order. Mr. Coy did not file the proposed order until seven months later. The court declined to sign the proposed order because it was not approved as to form by all parties, nor was a request to submit filed. Mr. Coy did not provide the client with billing statements during the representation and the first bill submitted was after the client terminated Mr. Coy's services.

PUBLIC REPRIMAND

On March 24, 2020, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against John V. Coy for violating Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
A client retained Mr. Coy to assist him in resolving custody and visitation issues. The client paid a retainer fee and an additional fee a few months later to replenish the retainer. After mediation, Mr. Coy agreed to draft the resulting agreement. In addition to the visitation issues, the parties also mediated the resolution of outstanding medical bills. The client delivered a check to Mr. Coy for the client's share of the medical expenses and understood that Mr. Coy would deliver the mediation agreement and check to opposing counsel within a week. Mr. Coy failed to prepare the mediation agreement and deliver the client's check to opposing counsel.

During the next few months, the client had difficulty communicating with Mr. Coy and the opposing party refused to follow the mediated agreement because Mr. Coy failed to deliver a draft of the mediation agreement and there was no formal agreement in place.

After contacting Mr. Coy and complaining of the delay and communication problems, Mr. Coy agreed to return the check for medical bills that was now void and prepare the mediation agreement. Mr. Coy did not produce the draft. The client asked Mr. Coy to withdraw from the case. The client was not provided with a billing statement for services until after the client terminated Mr. Coy's services.

The OPC sent a Notice of Informal Complaint (NOIC) to Mr. Coy. Mr. Coy did not respond to the NOIC.

PUBLIC REPRIMAND

On January 27, 2020, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Cleve Covert Burns for violating Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney hired Mr. Burns to work at their firm. Two months later, Mr. Burns notified the attorney that he was resigning his position. The firm discovered that Mr. Burns took electronic data from the firm without the attorney's consent, knowledge, or permission. The files Mr. Burns took were not his work product, and the majority were from cases that were several years old and/or that he had never worked on. The documents taken by Mr. Burns included, but were not limited to, medical records of certain clients, an adoption file, protective order files, the completed

Discipline Process Information Office Update

What should you do if you receive a letter from Office of Professional Conduct explaining you have become the subject of a Bar complaint? Call Jeannine Timothy! Jeannine is available to provide answers to your questions about the disciplinary process, reinstatement and readmission. She is happy to be of service to you, so please call her.

DISCIPLINE PROCESS INFORMATION OFFICE

801-257-5515
DisciplineInfo@UtahBar.org

financial declarations of ten separate clients, victim medical records and a preliminary hearing transcript that was "under seal." Mr. Burns also took client identifying information, social security numbers, birthdates, and account numbers that were part of the financial declarations, estate planning documents, and other documents. The bulk of the material was taken by Mr. Burns the day before he resigned his position with the firm.

When the attorney met with Mr. Burns after his resignation, he denied taking anything. The attorney and the firm were exposed to liability for the data breach and resulted in billable hour losses for reporting the incident to their malpractice insurer and clients.

Mitigating Factors:
Inexperience in the practice of law, remorse, absence of prior record of discipline.

SUSPENSION

On March 13, 2020, the Honorable Heather A. Brereton, Third Judicial District, entered an Order of Suspension, against Paul R. Christensen, suspending his license to practice law for a period of six months for violating Rules 1.1 (Competence), 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Lawyer), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
A plaintiff retained Mr. Christensen to represent her in a grandparent's visitation matter. After the parties conducted discovery, the defendants moved for summary judgment. Mr. Christensen filed an opposition to the motion for summary judgment but did not file any affidavits or make any reference to the record with any degree of specificity. The opposition did not restate the paragraphs verbatim as provided in the Rules of Civil Procedure and did not controvert the facts anywhere in the pleading. There was no citation to the record at all. The court issued a written decision granting summary judgment. The client filed a Rule 60(b) Motion for relief from the summary judgment order, arguing that the deficiencies in the memorandum resulted from Mr. Christensen's excusable neglect. Specifically, the client argued that Mr. Christensen suffered from a condition that impaired his ability to adequately respond to the motion for summary judgment.

The court held a hearing on the motion and noted that it had interacted with Mr. Christensen during the period of alleged impairment and found him to be a perfectly sound, able attorney. The motion was denied.

The OPC sent a Notice of Informal Complaint (NOIC) to Mr. Christensen. Mr. Christensen did not respond to the NOIC.

RECIPROCAL RESIGNATION WITH DISCIPLINE PENDING

On February 26, 2020, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning the Petition for Reciprocal Discipline filed by OPC against Richard D. Lamborn, for violation of Rules 1.15(a) (Safekeeping Property) and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

The OPC's case was based upon the facts of the New York disciplinary matter. In summary:

The New York Supreme Court Appellate Division entered an Order accepting Mr. Lamborn's resignation from the practice of law. The Order was predicated on the following facts in relevant part:

Mr. Lamborn was admitted to the practice of law in the State of New York by the Fourth Judicial Department. At all times relevant herein, Mr. Lamborn maintained an office for the practice of law within the First Judicial Department.

The Department Disciplinary Committee (Committee) sought an order, pursuant to the Rules of the Appellate Division, First Department (22 NYCRR) § 603.11, accepting Mr. Lamborn's resignation from the practice of law and striking his name from the roll of attorneys. Mr. Lamborn's affidavit of resignation complies with section 603.11.

Mr. Lamborn states that he is aware that he is the subject of disciplinary charges currently pending before a Referee alleging that he misappropriated and/or intentionally converted funds belonging to others for his own use and benefit in violation of the New York Rules of Professional Conduct (22 NYCRR 1200.00), namely, Rule 1.15(a) and Rule 8.4(c).

The New York Supreme Court Appellate Division entered an Order accepting Mr. Lamborn's resignation from the practice of law. The Order was predicated on the following facts in relevant part:

In the first matter, Mr. Lamborn represented a client in a dispute with the client's commercial landlord. Mr. Lamborn used money that belonged to the client for his own personal purposes.

In the second matter, Mr. Lamborn used money which belonged to an estate for his own personal use.

Mr. Lamborn reimbursed both the client and the estate.

BLACK LIVES MATTER

CONYERS & NIX

CRIMINAL DEFENSE ATTORNEYS

Ethics Advisory Opinion Committee – Opinion No. 20-01

ISSUED: MAY 19 2020

ISSUE

May a lawyer permissibly renegotiate the terms of a flat fee agreement if, after commencing the representation, the circumstances, scope or complexity of the matter becomes materially different and greater from what the lawyer unilaterally contemplated at the commencement of the representation?

BACKGROUND

Opinion 12-02 of the Utah Ethics Advisory Opinion Committee ("EAOC") states: "The permissibility of flat-fee agreements in Utah is well established, subject always to the requirements of the Utah Rules of Professional Conduct," including Rule 1.5(a), which requires all fees to be reasonable under the circumstances. Opinion 12-02 and the case law it cites state that a flat fee arrangement may be subject to review and alteration if circumstances arise that render the arrangement unfairly lucrative for the attorney. *See, e.g., McKenzie Const., Inc. v. Maynard*, 758 F.2d 97, 101 (3d Cir. 1985) (holding that fees paid to an attorney are subject to review to ensure they do not offend the court's sense of fundamental fairness and equity); *Long v. Ethics & Discipline Comm. of the Utah Supreme Court*, 2011 UT 32, ¶ 48 (noting that, while a flat fee agreement was reasonable when signed, it was still improper to demand payment if such fee was unreasonable given the outcome of the representation); *In re Powell*, 953 N.E.2d 1060, 1063-1064 (Ind. 2011) ("Even if a fee agreement is reasonable under the circumstances at the time entered into, subsequent developments may render collection of the fee unreasonable. . . .We do not suggest that a contingent fee must be reduced every time a case turns out to be easier or more lucrative than contemplated by the parties at the outset. But collection of a fee under the original agreement is unreasonable when it gives the attorney an unconscionable windfall under the totality of the circumstances.").

OPINION

The fact that after commencing the representation, the circumstances, scope or complexity of the matter becomes materially different and greater from what the lawyer contemplated at the time of commencement of the representation does not permit a renegotiation of the fee agreement, unless the lawyer complies with Rule 1.8(a) of the Utah Rules of Professional Conduct ("URPC") regarding a transaction with the client.

Ethics Advisory Opinion Committee – Opinion No. 20-02

ISSUED: MAY 19 2020

ISSUE

What ethical duties apply to prosecutors and defense lawyers when dealing with victims in domestic violence criminal cases?

OPINION

All counsel must be mindful of the conflicts of interest rules when dealing with victims of domestic violence cases. Representation of a criminal defendant in a criminal case precludes representation of the alleged victim in the same case. Both prosecutor and defense counsel must be mindful of the rules relating to communications with represented or with unrepresented parties. Neither prosecutors nor defense counsel may discuss the matter with a represented victim without permission of the victim's counsel. Neither prosecutor nor defense counsel may give the unrepresented victim advice, other than the advice to obtain independent counsel and referrals or information as to how to do so.

BACKGROUND

The Ethics Advisory Opinion Committee (the "EAOC") has been approached by a representative of an association of lawyers engaged in the prosecution of domestic violence cases. The association submitted a list of questions specific to the handling of domestic violence cases.[1] The EAOC chooses not to specifically respond to those questions as posed but rather reminds all lawyers of the tools available to assess proper professional conduct in a variety of settings.

CONCLUSION

Though difficulties may arise in the practice of law, all lawyers must comply with the Utah Rules of Professional Conduct. Both prosecutors and defense lawyers have equal duties to respect the rights of the alleged victim.

1. Some of the questions posed in the request require analysis of substantive law – a task not delegated to the EAOC. We only note that in domestic violence cases, like all lawyers, a lawyer has a duty of competence under Rule 1.1 of the Utah Rules of Professional Conduct.

For a complete analysis of these and other opinons of the Ethics Advisory Opinion Committee, visit: https://www.utahbar.org/eaoc-opinion-archives/

How Silicon Slopes is Innovating Legal Education

by Adam B. Balinski

You probably remember the first time you were cold-called in law school. For me, it happened on the second day of contracts class.

I had a brand-new law professor who took too many notes from Professor Kingsfield in *The Paper Chase*. When he called my name, I immediately felt a mix of excitement and terror. I had prepared – or so I thought. But what followed was more than half an hour of one-on-one grilling about cases discussing policy limitations on surrogacy agreements. I walked out feeling like charred hamburger.

Perhaps some aspects of legal education, like the Socratic method, will never change. Perhaps some aspects never should. But fifty years from now, if legal education is exactly the same, then the system will have done the rising generation of lawyers a tremendous disservice. Here in Utah, the phrase "innovative legal education" is no longer an oxymoron.

> *"[F]ifty years from now, if legal education is exactly the same, then the system will have done the rising generation of lawyers a tremendous disservice."*

As director of external relations at BYU Law School and as the founder of a local legal education company, I have seen first-hand how Silicon Slopes is innovating legal education. I graduated from law school only a few years ago, but I have already seen dramatic changes in the way legal education is administered in Utah (even before COVID-19 came and further shook things up). Here is a breakdown of some of the key innovations, institution by institution.

BYU Law

Since its inception in 1973, the J. Reuben Clark Law School at BYU has helped students become community leaders through meaningful learning opportunities. Here is a sampling of some of BYU Law's recent innovations.

Academies

When 1L BYU students have just wrapped up spring finals, exhausted and with the law review write-on competition looming, a little break is welcome. But now those students have the opportunity to hop on a plane and go to New York to attend a one-week boot camp in mergers and acquisitions at Kirkland & Ellis.

This last year, students did just that and participated in BYU Law's inaugural Deals Academy. And despite the sacrificed down time after finals, they loved the opportunity.

Academies offer law students a week-long, hard-core, sneak peek at what it means to pursue a particular path in the law. So far, the school has offered a Trial Academy and Deals Academy. In addition to those, BYU Law is also preparing to offer a Start-Up Academy and an Appellate Academy.

Alumni Allies

When we made our pitch to 104 first-year law students to join BYU's new Alumni Allies professional development coaching program, Gayla Sorenson, then assistant dean of external relations, and I knew the typically low participation rates for mentoring programs at other schools. Optional mentoring

ADAM B. BALINSKI is the director of external relations at BYU Law and the founder of Crushendo, an innovative legal education company.

programs at other schools are fortunate to have 15% of students sign up. Alumni Allies is also not mandatory. It does not offer class credit. And it is one more thing on students' already saturated to-do lists.

However, on my way out of the classroom and back to my office, several students independently approached me to tell me how excited they were about the new program. They were looking for something like this. As thrilling as that was to hear, I did not expect that an incredible 94% of 1Ls would sign up. As word spread, we ended up expanding the program to accommodate jealous 2Ls and 3Ls.

Alumni Allies is a mentoring program that pairs alumni with students using an algorithm developed by Match.com. Though the program has nothing to do with dating, the algorithm helps match people with similar personalities, interests, and values. This increases the odds that participants will "click" and create more natural and long-lasting professional relationships.

Council of Inspiring Leaders

In 2018, BYU Law launched a one-of-a-kind leadership fellowship for select 2Ls and 3Ls. It includes colloquia, a conference, and a leadership study tour. Fellows also receive a generous stipend.

Successful leaders fund the program, including founders, presidents, general counsels, and owners of large companies. The generous donors not only give money but also time, as BYU Law invites them to participate and study leadership side-by-side with the student fellows.

One highlight for past fellows and sponsors (and lucky administrators like me who were able to tag along) was meeting with United States Supreme Court Justice Elena Kagan to hear her reflect on her days clerking for the Supreme Court's first African-American justice, Thurgood Marshall.

LawX

Created by BYU Dean Gordon Smith and Kimball D. Parker, LawX is a legal design course and idea-incubator clinic where law students partner with SixFifty, a subsidiary of Wilson Sonsini, to solve access-to-justice issues through technology.

The first product released by LawX was SoloSuit, a free online tool for Utahns who cannot afford to hire legal services but need to respond to debt-collection lawsuits. Laws regarding debt can be complex, and Utah has had over 330,000 debt collection cases in the last five years, making up 65% of the total legal cases in the state. SoloSuit provides debtors with the tools to navigate their cases.

In collaboration with the University of Arizona Law's Innovation for Justice program, LawX also recently launched HelloLandlord to help reduce the number of evictions by enhancing tenant-landlord communications.

Utah Law

Founded in 1931, the S.J. Quinney College of Law at the University of Utah has gained a reputation as a top-tier law school that utilizes engaging programs and innovative approaches.

Counter-Terrorist Simulation

For over a decade, the S.J. Quinney College of Law has hosted an annual Counter-Terrorist Simulation, where law students identify, address, and solve current legal, social, and ethical dilemmas regarding terrorism.

Created by Professor Amos Guiora, who previously served as a Legal Advisor to the Gaza Strip in the Israel Defense Force, the Counter-Terrorist Simulation allows students to role play for three hours as high-ranking government officials who have convened as a counterterrorism task force. This simulation serves as a valuable lesson in legal policy, ethics, and operational procedure.

The situations presented in the simulation, which are based on real news headlines, test students on specific, valuable skills, including advocacy and articulation, teamwork, information management and analysis, and decision-making.

Recently, the simulation was live-streamed and remains available for the world to watch on the official YouTube channel for the S.J. Quinney College of Law.

Blended Learning

Long before COVID-19 necessitated virtual instruction at law schools across the country, the S.J. Quinney College of Law had already been enhancing education through video. The prime example of this being a YouTube channel maintained by law

school, which has garnered nearly five million views and 40,000 subscribers since its launch in 2012.

The Center for Innovation for Legal Education (CILE) channel aims to help law students in their academic studies by making legal topics more digestible. The channel is loaded with animated explainer videos that are scripted by law professors. The materials serve as a boon to any law student (not just those studying at Utah Law), but especially those who are primarily visual learners.

Utah Valley University

Utah Valley University may not have a law school, but it still found an important way to bolster legal education in the Beehive State.

Licensed Paralegal Practitioner Program

Traditionally, only law school graduates who have become licensed attorneys have been permitted to practice law in Utah. However, to help alleviate access to justice issues, Utah recently created a faster path to practicing law with its Licensed Paralegal Practitioner (LPP) program.

LPPs can practice law in limited areas where access to justice concerns are most pronounced. They can give legal advice to clients pertaining to those areas and help prepare clients for negotiations and court appearances.

Utah Valley University has taken the initiative in creating courses that train students to become qualified LPPs. These courses are centered around teaching students about essential duties and specific areas of practice, such as:

- Debt Collection Law
- Family Law
- Ethical Rules
- Landlord and Tenant Law

Currently, UVU is the only Utah institution that offers an LPP program, and in that way, UVU is ahead of the curve.

Private Developments in Legal Education

Code180

A few years back, Utah attorney Derek Parry started doing CLE presentations for other attorneys on the basics of coding while working as an associate at Parr Brown Gee & Loveless. The idea was that modern lawyers could benefit from having some base-level competency in programming languages.

The CLE presentations were popular and quickly expanded to three-hour, hands-on sessions, now known as Code180. In addition to in-person trainings, Code180 now offers online courses. Though it started with a focus on training attorneys, it now offers education to other professionals as well. Code180 has conducted presentations at BYU Law, Utah iSymposium, Utah STEM Action Center, and various tech companies across the state. Over 1,000 students and professionals have participated in the trainings, and the program has been featured by Business Insider and Law.com.

Crushendo

As a father of young children, juggling jobs and extra-curriculars, law school was a bit of a balancing act for me. As a former TV reporter and corporate trainer, I decided to cobble together audio outlines to help me manage my time.

After I graduated from BYU Law and passed the Utah bar exam, I explored ways to make audio learning more effective. While practicing law part-time, I launched Crushendo, which specializes in audio outlines and audio flashcards for law school finals and bar preparation. The outlines, which have now been used by thousands of students across the country, are lush with mnemonics, a.k.a. memory hooks. Some mnemonics are acronym-based, while others are phrase-based. Still others leverage the method of loci or memory palaces. The method of loci is as old as the Socratic method, but in my opinion, much cooler. Memory palaces leverage powerful spatial memory by inviting you to visualize places and things that symbolize and cement key concepts.

The Future

From BYU Law to Utah Law and UVU, to Code180 and Crushendo, the spirit of innovation in legal education is alive and well in Silicon Slopes. And COVID-19 has only accelerated the speed of change. Though the future is always foggy, I think we can count on Silicon Slopes being a pacesetter in transforming legal education for many years to come.

2020 Paralegal of the Year: Congratulations Amber Alleman!

by Greg Wayment

On Thursday May 21, 2020, the Paralegal Division (the Division) of the Utah State Bar and the Utah Paralegal Association held the Annual Paralegal Day celebration online with a live video broadcast. The broadcast included a welcome from Sarah Baldwin, chair of the Paralegal Division, remarks from the 2020 Paralegal of the Year, and Jon M. Huntsman, Jr. as the keynote speaker who talked about the ethics of politics and service.

The Division would like to heartily thank all those who organized and hosted this event. We'd especially like to thank Lydia Kane, the CLE Events Manager at the Bar, for her support. I also want to express my thanks to all of the attorneys who took the time this year to nominate a paralegal. It truly was an occasion in which I wish there was a better way to recognize all paralegals who were nominated.

Paralegal Day is an opportunity to recognize a paralegal with the Distinguished Paralegal of the Year Award. The purpose of this award is to honor a Utah paralegal who, over a long and distinguished career, has by their ethical and personal conduct, commitment and activities, rendered extraordinary contributions and service to the paralegal profession.

This year we had a tremendous response to the request for nominations. Typically the Paralegal Division will get four or five nominations, with maybe a couple of them being complete. This year, the Bar sent out an email to all the attorneys and we received fifty to sixty requests for nominations forms. Of those requests, we ended up with twenty-three complete nominations. I personally felt like every single one of them was deserving, but seven or eight of them were very strong candidates, and I worried that our selection committee would have a hard time paring it down.

The hard-working individuals on the 2020 selection committee included Judge Shaughnessy, Christopher Von Maack, Gabriel White, Tonya Wright, and Patty Allred. By a majority of votes, they selected a recipient, and we are pleased to announce that the winner of the 2020 Distinguished Paralegal of the Year Award is Amber Alleman.

Amber obtained her paralegal degree in 1995 from Salt Lake Community College. She has worked as a paralegal in family law at several prominent law firms including Prince Yeates, Kruse Landa & Maycock, and Clyde Snow. She has been an active member of the Paralegal Division of the Utah State Bar since 2003. In July 2019, Amber received her designation as a Certified Paralegal (CP) with the National Association of Legal Assistants.

Also in 2019, Amber became one of the first four Licensed Paralegal Practitioners (LPP) in the state of Utah. She became interested in becoming an LPP when her mentor, Ellen Maycock, told her about the program. One of the primary reasons for becoming an LPP is that Amber is dedicated to providing affordable legal services to the public. She was sworn in in October 2019.

Since becoming licensed, Amber has been actively involved with Justice Himonas in the public marketing campaign of the LPP program. LPPs are able to provide limited legal representation to the public in the areas of family law, debt collection, and eviction. This innovative program was created by the Utah Supreme Court to help fill the gaps in the public's access to justice. Amber has been a champion of this program from the outset. She has written articles and appeared on television educating the public on this new program: (https://www.abc4.com/gtu/3-things-you-should-know-about-licensed-paralegal-practitioners/).

As a result of her efforts, Amber now has an active caseload of her own, representing individuals in family law matters who otherwise would be unable to afford legal representation.

Paralegal of the Year, Amber Alleman (right) with Dean Andreason and Brian Lebrecht.

Amber also serves on the Utah Court's Forms Committee and regularly volunteers for the Wills for Heroes program.

In the words of Dean Andreasen, Amber is "probably the best paralegal with whom I have worked in my 36 years of practice." Amber was nominated by Diana Telfer, Dean Andreason, Matt Steward, and Taymour Semnani of Clyde Snow.

Some of her interests include reading, movies, antique shopping, playing the piano and spending time with her husband, Jeff. She has two cats that allow her to live in "their" house.

In recognition of Amber's dedication to the paralegal profession, including earning her LPP and CP designations in the same year, we are honored to recognize her as Paralegal of the Year. Congratulations, Amber Alleman!

The Paralegal Division would also like to especially thank Judge Todd Shaughnesy, Christopher Von Maack, Gabriel White, Tonya Wright, and Patty Allred for their work on the Paralegal of the Year Selection Committee.

From Amber:

> I know there is a misconception about the LPP program that it is taking clients away from lawyers. I can tell you right now, first hand, that it absolutely is not. The people who are hiring LPPs would normally be representing themselves. Lawyers understand how difficult it is to have a pro se person on the other side of their case. I have some self-represented people on the other side of some of my LPP cases, and it is challenging.
>
> The average person doesn't know the rules of procedure or what documents to produce or to file with the court. LPPs help in two ways: first they allow people equal access to justice who otherwise wouldn't have it, and second, LPPs can help lawyers on the opposing side of a case more efficiently to conclude a family law case if everyone cooperates, exchanges the correct documents required, and gets into mediation quickly.
>
> People can move on with their lives, and lawyers aren't bogged down trying to explain the court rules or directing pro se litigants to the court website where they often struggle to figure out which documents to file. It really is a brilliant program. I've had clients in initial consultations ask me where the LPP program has been this entire time, and they are grateful it is available to them. The feedback I have received from the general public has been overwhelmingly positive.

SAVE THE DATE!

Paralegal Division Annual Meeting

Friday, June 19, 2020

Noon – 1:30 pm

Presented online through Zoom

Report of the Chair, Reports and Recommendations of the Board of Directors, Reports of Committees, Report of Finance Chair, Announcement of Newly Elected Officers. Following the Annual Meeting, there will be a free one-hour CLE Presentation.

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.

July 8, 2020 | 8:00 am – 4:00 pm

Expungement Day. Online

July 9, 2020 | 12:00 pm – 1:30 pm

ENREL Annual Meeting. Online

August 14, 2020 | 8:00 am – 4:00 pm

Mangrum & Benson on Expert Testimony.

August 20, 2020 | 8:00 am – 4:00 pm

Third Annual Innovation in Law Practice Symposium.

September 16–17, 2020 | 1:00 pm – 5:00 pm

OPC Ethics School.

September 25, 2020 | 8:00 am – 9:00 am

Annual Family Law Seminar. Little America Hotel

November 13, 2020 | 1:00 pm – 4:00 pm

Litigation Section CLE & Off-Road Shenanigans. Fairfield Inn & Suites

November 20, 2020 | 8:00 am – 5:00 pm

2020 Fall Forum. Little America Hotel

PLEASE NOTE:

Live, in person CLE events are subject to cancellation or postponement, due to COVID-19 restrictions.
For the latest information on CLE events, please visit: www.utahbar.org/cle/
or watch your email for news and updates from the Bar.

Thank you for your patience as we find our way through this difficult time.

TO ACCESS ONLINE CLE EVENTS:

Go to utahbar.org and select the "Practice Portal." Once you are logged into the Practice Portal, scroll down to the "CLE Management" card. On the top of the card select the "Online Events" tab. From there select "Register for Online Courses." This will bring you to the Bar's catalog of CLE courses. From there select the course you wish to view and follow the prompts.

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.

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.

We recently opened a Counsel role at our Goal Zero office. This position is a commercial generalist who is responsible for leading corporate strategic and tactical legal initiatives and working with Goal Zero senior management to provide effective advice on company strategies and their implementation. Please visit our posting: https://careers.nrgenergy.com/job/Bluffdale-Counsel%2C-Goal-Zero-UT-84065/651893400/.

Established multi-attorney firm with a broad practice looking to add up to two members, with some room for staff. Our sharp office space on Main Street in downtown Salt Lake City is within one block of state and federal courthouses. Excellent opportunity for an experienced attorney wanting to practice in a collegial atmosphere without the traditionally high overhead costs. If you are ready to stop sharing your profits, and start practicing with your own book of business in a friendly, mutually-helpful atmosphere, we invite you to inquire at slclawopportunity@gmail.com. We look forward to meeting you.

OFFICE SPACE/SHARING

$600 Office Space. Executive offices for lease in historical building located at 466 South 500 East, Salt Lake City. Newly renovated, exposed brick walls, window views and lots of convenient parking next to building. Google Fiber, conference room and kitchen. Contact Chanel via email: chanelroe@shapiropclaw.com.

SERVICES

Unmanned Aerial Vehicle: "Drone law." We consult with in-house counsel, corporations, police and fire departments to ensure uniform compliance with all FAA rules and regulations. Drone regulations are confusing, and the myriad of policy statements are perplexing, don't go it alone! Let us help. Clint Dunaway, Esq., 480-415-0982, clint@dunawaylg.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.

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.

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.

TAKE OVER PRACTICE

OPPORTUNITY: Thriving Estate Planning, Trust and Probate law practice in Carlsbad, California for 36 years. Qualified attorney(s) will need to obtain Certified Specialization. Five years legal experience required, ten or more preferred. Inquiries: (760)729-7162.

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UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION
Utah State Bar | 645 South 200 East | Salt Lake City, Utah 84111
Phone: 801-531-9077 | Fax: 801-531-0660 | Email: mcle@utahbar.org

For July 1 _____ through June 30_____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____ Email: _____

_____

Date of Activity	Sponsor Name/ Program Title	Activity Type	Regular Hours	Ethics Hours	Professionalism & Civility Hours	Total Hours
		Total Hrs.				

1. **Active Status Lawyer –** Lawyers on active status are required to complete, during each two year fiscal period (July 1–June 30), a minimum of 24 hours of Utah accredited CLE, which shall include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of the ethics or professional responsibility shall be in the area of professionalism and civility. Please visit www.utahmcle.org for a complete explanation of Rule 14-404.

2. **New Lawyer CLE requirement –** Lawyers newly admitted under the Bar's full exam need to complete the following requirements during their first reporting period:
   - Complete the NLTP Program during their first year of admission to the Bar, unless NLTP exemption applies.
   - Attend one New Lawyer Ethics program during their first year of admission to the Bar. This requirement can be waived if the lawyer resides out-of-state.
   - Complete 12 hours of Utah accredited CLE.

3. **House Counsel –** House Counsel Lawyers must file with the MCLE Board by July 31 of each year a Certificate of Compliance from the jurisdiction where House Counsel maintains an active license establishing that he or she has completed the hours of continuing legal education required of active attorneys in the jurisdiction where House Counsel is licensed.

EXPLANATION OF TYPE OF ACTIVITY

Rule 14-413. MCLE credit for qualified audio and video presentations; computer interactive telephonic programs; writing; lecturing; teaching; live attendance.

1. **Self-Study CLE:** No more than 12 hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit www.utahmcle.org for a complete explanation of Rule 14-413 (a), (b), (c) and (d).

2. **Live CLE Program:** There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at a Utah accredited CLE program. **A minimum of 12 hours must be obtained through attendance at live CLE programs during a reporting period.**

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION, SEE RULE 14-409 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Rule 14-414 (a) – On or before July 31 of alternate years, each lawyer subject to MCLE requirements shall file a certificate of compliance with the Board, evidencing the lawyer's completion of accredited CLE courses or activities ending the preceding 30th day of June.

Rule 14-414 (b) – Each lawyer shall pay a filing fee in the amount of $15.00 at the time of filing the certificate of compliance. Any lawyer who fails to complete the MCLE requirement by the June 30 deadline shall be assessed a $100.00 late fee. Lawyers who fail to comply with the MCLE requirements and file within a reasonable time, as determined by the Board in its discretion, and who are subject to an administrative suspension pursuant to Rule 14-415, after the late fee has been assessed shall be assessed a $200.00 reinstatement fee, plus an additional $500.00 fee if the failure to comply is a repeat violation within the past five years.

Rule 14-414 (c) – Each lawyer shall maintain proof to substantiate the information provided on the certificate of compliance filed with the Board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders, or materials related to credit. The lawyer shall retain this proof for a period of four years from the end of the period for which the Certificate of Compliance is filed. Proof shall be submitted to the Board upon written request.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Rule 14-414.

A copy of the Supreme Court Board of Continuing Education Rules and Regulation may be viewed at www.utahmcle.org.

Date: _____ Signature: _____

Make checks payable to: **Utah State Board of CLE** in the amount of ***$15*** or complete credit card information below. Returned checks will be subject to a $20 charge.

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