Utah Bar® JOURNAL

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NEOWISE by Utah State Bar member Joshua C. Bishop. Regarding his photo, Joshua said, "I took this photo of the NEOWISE comet at the Bonneville Salt Flats. This year has brought us some very dark times, but there are still some amazing and beautiful things that can only be truly appreciated in the darkness."

JOSHUA C. BISHOP has been a member in good standing with the Utah State Bar since 2014. He currently works as a prosecutor for the City of Pleasant Grove. He has a JD/MPA from Brigham Young University and completed a clerkship in the 4th District Court before beginning work as an assistant city attorney and prosecutor. When he is not serving the public as an attorney, he sings in the Tabernacle Choir at Temple Square and spends time hiking with his wife and three children.

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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.
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To Boldly (and Vulnerably) Go Where No Bar Has Gone Before

by Heather Farnsworth

To say that we are living in unprecedented times is both an understatement and a cliché appearing in nearly every commercial or corporate message. But, it's the truth. This year has been one of murder hornets, earthquakes, civil unrest, and a worldwide pandemic. This year has been one of those moments where we will forever look at life as before and after 2020. It is a time of transition and change both in our own legal community and in our world.

As I write this, the deadline has just passed in the comment period on the proposed changes to the regulations allowing for experimentation and innovation in the legal "sandbox." The Utah Supreme Court is now carefully considering each and every comment, including suggestions by the Utah State Bar's Reform Committee. By the time you read this, new rules will be in effect, with a goal of bridging the gap in access to justice, and with the promise of innovation within the legal profession. As President-Elect last year, I had the unique and, at times, challenging opportunity to participate on both the court's committee for reform and the Bar's committee, acting as a liaison between the two groups. This allowed me to understand the motivations of the reform implementation committee and to carefully consider potential benefits and impacts the proposed changes would have on the Bar and Utah's legal community. These changes are unprecedented, and that very fact was the largest point of criticism in many of the comments on the proposed regulations. Many asked: "Why us?" and "Why must Utah be the guinea pig?"

These reactions are normal. Humans are resistant to change, and humans that also happen to be lawyers are perhaps the most resistant. It stands to reason that we spend our lives streamlining procedures, assessing risk, and solving the problems others didn't anticipate. Psychological research suggests there may be an additional reason behind lawyers' resistance to change: Many may have a fixed mindset, instead of a growth mindset. *See Overcoming lawyers' resistance to change*, https://legal.thomsonreuters.com/en/insights/articles/overcoming-lawyers-resistance-to-change. This article explains:

> A fixed mindset is the belief that one's success is based more on inherent intelligence than on effort. According to psychologist Carol Dweck, people with this mindset work toward "performance goals," a focus on looking smart even if there's no learning in the process. She explained in Stanford Magazine, "For them, each task is a challenge to their self-image, and each setback becomes a personal threat. So they pursue only activities at which they're sure to shine – and avoid the sorts of experiences necessary to grow and flourish in any endeavor."
>
> This fosters a fear of failure, and in turn, reluctance to go outside of one's comfort zone. For lawyers, this outlook was reinforced, early on, by a school system that praised intelligence and discouraged risk-taking. It continues with the culture in law firms and legal departments. If tech startups represent one end of the culture spectrum, characterized by a "fail fast, learn faster" environment, the practice of law is on the opposite end, with lawyers unwilling to experiment with different ways to find the right answer.

Id.

This fear of failure seems to be the motivating driver for the questions "Why Us?" and "Why not Them first?" I, for one, understand this thinking. As lawyers, we aren't supposed to fail. We spend our lives fixating on and fixing mistakes and possible mistakes. We hope for the best-case

scenario but plan for the worst. Failure is not an option because it makes us vulnerable, and we are to be invincible. These traits, while incredibly useful in litigation, are not catalysts for innovation, and to the contrary often stop us in our tracks.

So, what happens if we make these changes and the results are different than expected, or worse yet, what if we try something and it fails? The nation is watching, why put ourselves in this vulnerable position? Isn't it safer to maintain the status quo? Renowned professor Brené Brown indicates, "Vulnerability is the birthplace of innovation, creativity and change." TED Ideas Worth Spreading, Brené Brown, *Listening to Shame* – Period 12 Table of Videos, TED Talks (Mar. 2012), https://www.ted.com/talks/brene_brown_listening_to_shame. Still, is it worth the risk?

In order to answer that question, we need to revisit the impetus for the regulatory reform, which is that, despite the earnest efforts of the court and local attorneys, "[a]ccess to justice in Utah remains a significant and growing problem." *See* The Utah Work Group on Reg. Reform, Narrowing the Access-to-Justice Gap by Reimagining Regulation 3 (Aug. 2019) (alteration in original), https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf. The report cites raw data from the Third District Court for the State of Utah, which shows "at least one party was unrepresented throughout the entirety of the suit in 93% of all civil and family law disputes disposed of in the Third District in 2018." *Id*. at 7. Let that sink in: in 93% of civil and family law disputes, half of the parties have zero legal guidance or representation, proving that "[t]he idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion." *Id*. at 6 (citing Civil Justice Initiative, The Landscape of Civil Litigation in State Courts, National Center for State Courts, https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf, (last visited Aug. 12, 2019)).

Our world is changing, and we as lawyers can choose to resist these changes, or to do what we do best: anticipate needs and solve problems.

The Utah State Bar's Committee on Regulatory Reform agreed, "No one can credibly oppose these aspirational objectives and the wisdom of a controlled environment that with proper oversight, regulation, and reporting, will protect the consumers of these legal services." *See* Utah State Bar Committee on Regulatory Reform, Findings and Recommendations, at 4, *available at* https://www.utahbar.org/wp-content/uploads/2020/08/Final-4815-1319-0082-v.1.pdf, which were then adopted by the Utah State Board of Bar Commissioners. And, while the Bar's Regulatory committee, and by extension and affirmation, the Board of Bar Commissioners, expressed caution at being "first" just for the sake of being first, the group opined that so long as flexibility and "the ability to alter course" remain, who better to lead than Utah? *Id*. at 5.

Some fear that by supporting reform, we are dooming our very profession, but the evidence is to the contrary. If the legal needs of the majority are unmet; lawyers are already obsolete. After all:

> it is not the most intellectual of the species that survives; it is not the strongest that survives; but the species that survives is the one that is able best to adapt and adjust to the changing environment in which it finds itself. Applying this theoretical concept to us as individuals, we can state that the civilization that is able to survive is the one that is able to adapt to the changing physical, social, political, moral, and spiritual environment in which it finds itself.

Leon C. Megginson, *Lessons From Europe for American Business*, SW. Soc. Sci. Q., Vol. 44 No. 1, 3 (June 1963).

Our world is changing, and we as lawyers can choose to resist these changes, or to do what we do best: anticipate needs and solve problems. I believe, if you'll pardon one last cliché, that Utah's pioneer roots compel us to be at the forefront of change and to set an example that the rest of the country can follow, but we have to do it together. Utahns have historically come together to solve problems, and we are still doing that to this day in our roles as attorneys dedicated to the common goal of justice for all. Just like the pioneers, we are tired and weary and might be ready to quit, but we will still level our shoulders and push forward, even if we are scared of what lies ahead, because that is what pioneers do.

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Update: Juvenile Court Probable Cause Determinations

by The Honorable Steven K. Beck

You've been arrested. Okay, you likely wouldn't be reading the *Utah Bar Journal* if you'd just been arrested. But imagine, for purposes of this article, that you've just been arrested. How long should you have to wait before a judge determines whether there is probable cause for your arrest? Should the amount of time you have to wait depend on your age?

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the United States Supreme Court held that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention." *Id.* at 126. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court held that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *Id.* at 56. Furthermore, while noting that some extraordinary circumstances may justify additional delay, the Court held,

> [T]he fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

Id. at 57.

Accordingly, Rule 9 of the Utah Rules of Criminal Procedure provides for a judicial determination of probable cause for all adults in the State of Utah within twenty-four hours of arrest. However, Rule 9 of the Utah Rules of Juvenile Procedure had no such provision. As a result, minors in the State of Utah sometimes waited more than four times that long for a judicial determination of the basis for their detention. The Advisory Committee on the Rules of Juvenile Procedure grappled with whether and how to make changes to Rule 9 in light of language contained in the Utah Juvenile Court Act that provided for a judicial determination of "reasonable grounds" within forty-eight hours of a minor's admission to detention, weekends and holidays excluded. *See* Utah Code Ann. § 78A-6-112(1)(b), *amended by* 2020 Utah Laws ch. 214, § 42; *id.* § 78A 6-113(4)(a), *amended by* 2020 Utah Laws ch. 214, § 43. As the Advisory Committee deliberated, House Bill 384 was passed unanimously by the Utah Legislature and signed into law by Governor Herbert earlier this year. It clarified that the standard applicable for minors taken into custody is probable cause, and it requires a judicial determination of probable cause within twenty-four hours. *See* 2020 Utah Laws ch. 214, §§ 42–43 (codified at Utah Code Ann. § 78A-6-112(1)); *id.* § 78A-6-113(4)(a).

Now, juvenile court judges throughout the state are making probable cause determinations within twenty-four hours of a minor's detention, including weekends and holidays. If no probable cause is found, the minor is released prior to the detention hearing. It is important to note that a judicial determination of probable cause is not an order for continued detention. Utah law requires an order for continued detention to be made upon specific findings at a detention hearing, *see id.* § 43 (codified at Utah Code Ann. § 78A-6-113(4)(f)); and further provides some avenues for release from detention prior to such a hearing, *see id.* § 42 (codified at Utah Code Ann. § 78A-6-112(5)(b)). Rather, a judicial determination of probable cause is merely a finding that there was probable cause for the minor's arrest.

While this may seem like a minor change (no pun intended), it does fix the problem where some children were held in detention centers for extensive periods of time only to then have a judge find that their arrest was not justified by probable cause. And, as Justice Abe Fortas noted in a case that Chief Justice Earl Warren called "the Magna Carta for juveniles," David S. Tanenhaus, The Constitutional Rights Of Children: In re Gault and Juvenile Justice 85 (2011), in cases involving juvenile detention, "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process,'" *In re Gault*, 387 U.S. 1, 27–28 (1967).

Rule 9 has now been amended to reflect the statutory changes, and the amendments are effective November 1, 2020.

JUDGE STEVEN K. BECK was appointed to the Third District Juvenile Court by Gov. Gary R. Herbert in 2017. Prior to his appointment, he both prosecuted and defended delinquency cases.

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The Facts and Fictions of Prosecutorial Misconduct

by Edward R. Montgomery

Corruption, deceit, and dishonor can occur in law enforcement. And when it does, it is intolerable. Law enforcement, including police officers and prosecutors, have tremendous power. That degree of power demands a heightened duty of candor and fidelity. Violating those duties is a betrayal of the public trust. The ends do not justify the means, and attempts to do so ultimately fail.

Prosecutorial misconduct is, we are told, "rampant." The wrongful prosecution of Ted Stevens and the Duke Lacrosse scandal are examples of prosecutorial misconduct cases that justifiably received national attention. Attention-grabbing headlines such as the *New York Times* Editorial, "Rampant Prosecutorial Misconduct;"[1] the American Bar Association article, "Harmless Error? New Study Claims Prosecutorial Misconduct Is Rampant in California;"[2] and the *Vanity Fair* article "Kafka in Vegas: A Murdered Circus Star, a Dubious Confession, and America's Prosecutorial Misconduct Epidemic"[3] are easy to find. In a dissenting opinion, a Ninth Circuit Court of Appeals judge proclaims, "There is an epidemic of *Brady* violations abroad in the land." *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013). Referring to that opinion, the *New York Times* editorial states, "Judge Kozinski had no trouble coming up with more than two dozen examples from federal and state courts just in the last few years, and those are surely the tip of the iceberg." *See, Rampant Prosecutorial Misconduct, supra.* The common theme: prosecutorial malfeasance is "all too common."

As a result of these "rampant" and "epidemic" abuses, the State of New York commissioned a blue-chip panel (the Lippman Commission) to study wrongful convictions in New York and to make recommendations. One of the issues leading to these injustices, the Lippman Commission surmised, was prosecutorial misconduct. The Lippman Commission set up a task force, took comments in numerous public and private meetings, and received input from the ACLU, various members of the defense bar, and current and former judges. Remarkably, the commission concluded, "One final point re prosecutorial misconduct: It is abundantly clear from the public hearings and comments received by the Lippman Commission that there is a perception of rampant prosecutorial misconduct which is ignored by the disciplinary committees. As stated earlier, *the commission finds no support for that contention*." NYS Comm'n on Statewide Att'y Discipline, Enhancing Fairness and Consistency Fostering Efficiency and Transparency, 78 (Sept. 2015), *available at* http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/AttyDiscFINAL9-24.pdf (emphases added).

Despite the headlines and articles suggesting otherwise, the Lippman Commission was correct; prosecutorial misconduct is not "rampant." Far from it. According to the *New York Times* editorial, "Judge Kozinski had no trouble coming up with more than two dozen examples from federal and state courts just in the last few years…." *See id*. If "a few years" only means two then Judge Kozinski was able to find, on average, twelve cases of misconduct per year. Judge Kozinski sat on the Ninth Circuit Court of Appeals. In 2018, there were 15,759 criminal filings in the district courts in the Ninth Circuit. U.S. Court for the Ninth Circuit, 2018 Annual Report 48, *available at* https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2018.pdf. Stated another way, if only taking into account cases originating in the Ninth Circuit districts, misconduct occurred in only 0.15% of the cases. Keep in mind, however, that Judge Kosinski's reference

EDWARD R. MONTGOMERY has been a member of the Bar since 1996. He served as criminal defense counsel for the first twelve years of practice, then as South Jordan City Prosecutor for the second twelve years of practice.

included state courts. The Ninth Circuit includes fifteen districts from Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, the U.S. Territory of Guam, and the Commonwealth of Northern Mariana Islands. In the 2016–2017 fiscal year, there were approximately 4,500,000 criminal filings in the state of California alone. *See* JUDICIAL COUNCIL OF CALIFORNIA, 2018 COURT STATISTICS REPORT xv, *available at* courts.ca.gov/documents/2018-Court-Statistics-Report.pdf. Add to that number the criminal filings in the other states that make up the Ninth Circuit and you have a prosecutorial misconduct occurrence rate of twenty-four out of 5,000,000; or 0.0000048. Clearly the twenty-four cases cited by Judge Kozinski does not represent every misconduct case. However, increase that number by ten, twenty, or even a hundred-fold, and the occurrence rate is 0.00048. Similarly, in New York between 2010 and 2015, the courts of review reversed convictions in fifty-four out of 2,661,316 cases for an occurrence rate of 0.00002. Daniel R. Alonso, *A commission on prosecutor misconduct: Unnecessary, redundant and dangerous*, N.Y. DAILY NEWS (July 31, 2018), https://www.nydailynews.com/opinion/ny-oped-we-dont-need-a-prosecutor-misconduct-commission-20180731. In Utah between 2015 and 2019, there were approximately 206,000 criminal cases filed in the Utah District Courts. *See* Utah State Courts Annual Reports to the Community, *available at* https://www.utcourts.gov/resources/reports/#annual. During that time period, four convictions were vacated due to misconduct for an occurrence rate of 0.00002. *State v. Magness*, 2017 UT App 130, 402 P.3d 105; *State v. Draper-Roberts*, 2016 UT App 151, 378 P.3d 1261; *State v. Jok*, 2015 UT App 90, 348 P.3d 385; *State v. Akok*, 2015 UT App 89, 348 P.3d 377. It is worth noting that of those four Utah cases in which the convictions were vacated on remand, the defendants ultimately pled guilty to the same charge (two cases), *Magness*, 2017 UT App 130; *Draper-Roberts*, 2016 UT App 151; the same degree of charge (one case), *Akok*, 2015 UT App 89; or substantially related charges (one case), *Jok*, 2015 UT App 90.

Considering the one-fifth of one-hundredth of one-percent of cases that are reversed due to prosecutorial misconduct, it is important to understand that only a very small percent of those

cases involve intentional and malicious intent on the part of the prosecutor. "Prosecutorial misconduct" sounds ominous. Rightfully so because misconduct is defined as "intentional wrongdoing" and "deliberate violation of law or standard especially by a government official: MALFEASANCE." *Misconduct*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/misconduct (last visited Aug. 6, 2020). Headlines alleging "rampant" and "epidemic" misconduct evoke images of prosecutors regularly, systematically, and systemically colluding to secure the convictions of the innocent. While there are certainly cases in which prosecutors intentionally abuse their authority, cases of intentional misconduct are extraordinarily rare. NYS COMM'N ON STATEWIDE ATT'Y DISCIPLINE, ENHANCING FAIRNESS AND CONSISTENCY FOSTERING EFFICIENCY AND TRANSPARENCY, 77–78 (Sept. 2015), *available at* http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/AttyDiscFINAL9-24.pdf.

Prosecutorial misconduct is a phrase that is used to cover essentially any instance in which a prosecutor intentionally, negligently, or even unknowingly violates a rule, law, or duty. Conduct that is "substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result" constitutes reversible error. *State v. Allgood*, 2017 UT App 92, ¶ 24, 400 P.3d 1088. It is when a prosecutor purposefully fails to disclose, doctors, or offers false or fraudulent evidence that would clearly be considered misconduct. However, according to the Lippman Commission the "vast majority" of cases involving prosecutorial misconduct are cases in which prosecutor makes a good faith mistake. For example, asking leading questions, making an improper statement during closing argument, offering a legally incorrect jury instruction, or even forgetting to inform a witness of the exclusionary rule could all be considered forms of prosecutorial misconduct. These are not instances of prosecutors conspiring in dark backrooms to "win at all costs." To the contrary, these are almost invariably good and fair-minded attorneys who are making good faith arguments in open court in front of a judge and in the presence of the defendant and defense counsel. Contrary to the headlines and hype, cases of intentional and malicious misconduct are literally one-in-a-million propositions.

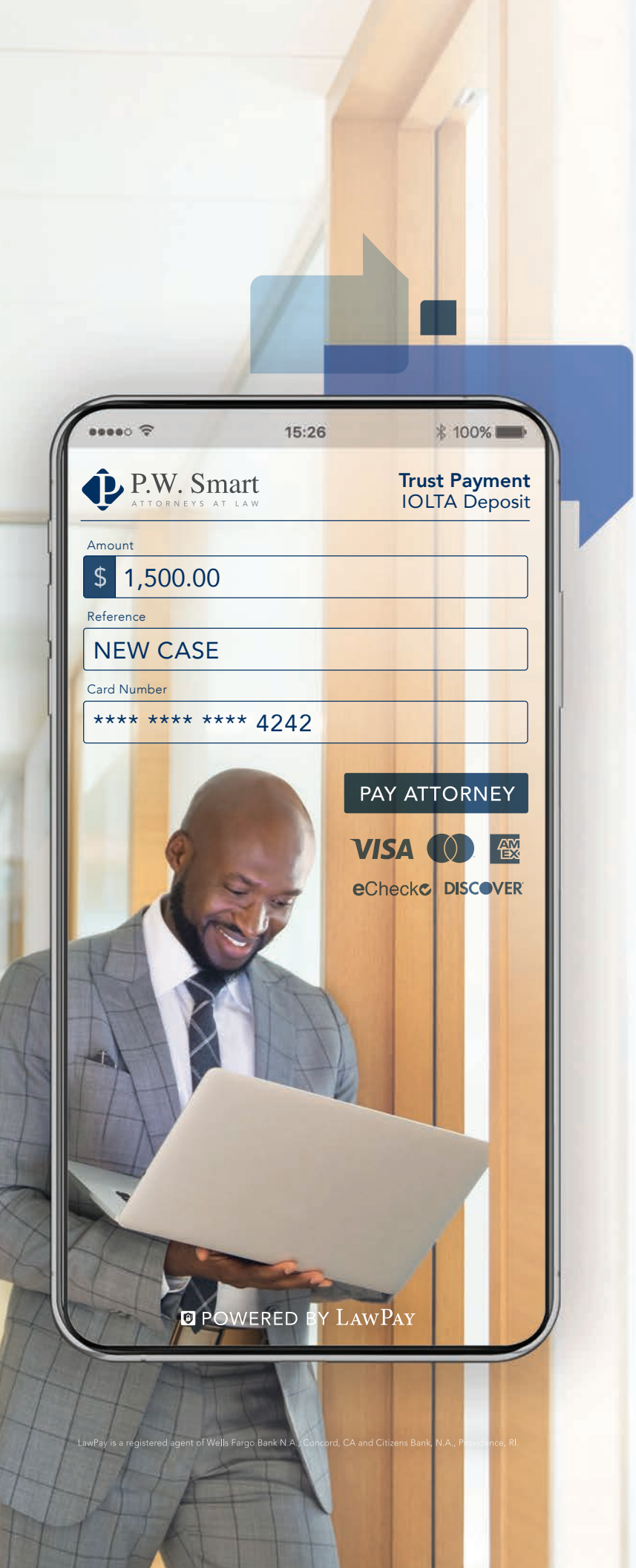
Prosecutors make mistakes but very rarely are those mistakes intentional and malicious. Prosecutorial misconduct is not now, nor has it ever been, rampant or epidemic…;

Prosecutors are also subject to heightened ethical standards. Unlike other attorneys, prosecutors are required to affirmatively protect the rights of their adversaries. Specifically, prosecutors must (1) make sure defendants are advised of the right to and procedure for obtaining counsel, (2) assure that unrepresented defendants don't waive important pretrial rights, and (3) turn over to the defendant all exculpatory and mitigating evidence. *See* Utah R. Prof. Conduct 3.8. Prosecutors who breach these standards are subject to discipline. In the past decade, the Bar has not disciplined a single prosecutor for violating Rule 3.8.

In addition to prosecutorial misconduct, an individual can be wrongfully convicted when there is what is called the ineffective assistance of counsel; cases in which the defense counsel commits misconduct. The correlation between wrongful convictions, defense attorney misconduct, and the ratio of ineffective assistance to prosecutorial misconduct are all topics for another article.

Prosecutors are not perfect. Prosecutors are fallible and subject to the same challenges and frailties as everyone else. By and large, prosecutors care deeply and personally about keeping individuals and communities safe and holding offenders to account. Prosecutors honor and hold close the trust that others have placed in them. Prosecutors aspire to be just and to do justice in each case they touch. Prosecutors make mistakes but very rarely are those mistakes intentional and malicious. Prosecutorial misconduct is not now, nor has it ever been, rampant or epidemic, and efforts to convince otherwise will not withstand scrutiny.

1. Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), https://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html.
2. Mark Curridan, *Harmless Error? New Study Claims Prosecutorial Misconduct Is Rampant in California*, ABA J. (Dec. 1, 2010), http://www.abajournal.com/magazine/article/harmlesss error new study claims prosecutorial misconduct rampant/news article/do you volunteer on a regular basis/?utm campaign=sidebar.
3. Megan Rose, *Kafka in Vegas: A Murdered Circus Star, a Dubious Confession, and America's Prosecutorial Misconduct Epidemic*, VANITY FAIR (May 26, 2017), https://www.vanityfair.com/news/2017/05/kafka-in-vegas-murder.



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The Odds are Never In Your Favor:
Exceptions to the American Rule Against Attorney Fee Awards

by Aaron S. Bartholomew and Sharon Yamen

It is one of the most common threats in litigation – a motion or request for an award of attorney fees upon prevailing in the case. We have seen it in nearly every type of case – tort, business disputes and dissolutions, family law, and even challenging the disposition of an estate.

But as we all know by experience, an actual attorney fee award at the end of successful litigation is uncommon to rare in many types of cases. So much so that when we see it in a request for relief by an opposing party, much of the time we consider it an empty threat and a remote risk.

However, there are cases where awards of attorney fees are not uncommon but are the rule.

The American Rule

The "American rule" provides that "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). The American rule is nearly unique in this approach to attorney fees and stands in stark contrast with the English rule, which routinely permits fee-shifting to the losing party and creates a presumption that the losing litigant pays all parties' attorney fees.

In a 2017 article in the *Utah Bar Journal*, we traced the lineage of the American rule against attorney fee awards and the near-spontaneous generation of that rule in a 1796 case before the U.S. Supreme Court, *Arcambel v. Wiseman*, 3 U.S. 306 (1796). Aaron Bartholomew & Sharon Yamen, *The American Rule: The Genesis and Policy of the Enduring Legacy on Attorney Fee Awards*, 30 Utah B.J. 14, 14 (Sept./Oct. 2017).

Referring to the *Arcambel* decision, we said, "The rule has applied in nearly every case brought before the bar of American courts for 220 years, and yet has humble beginnings as a 53-word, almost-afterthought in one of the earliest decisions that came before the U.S. Supreme Court in 1796":

> By the Court: We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it, and even if that practice were not strictly correct in principle, it is entitled to respect of the Court, till it is changed or modified, by statute.

Id. The American rule, however, is not without its limits, and this article discusses the specific circumstances in which the American rule does not apply, and attorney fee awards are permitted, if not routine. This article is not intended to be an exhaustive examination of every situation in which the American rule is inapplicable, but rather the most common exceptions.

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Rejecting the American Rule

While generally adhering to the American rule, courts have long since recognized its flexibility and exceptions. Indeed, there are instances where fee-shifting is appropriate to both encourage meritorious suits and defenses and discourage unmeritorious or frivolous claims and defenses. For decades, legislation has been proposed to codify that proposition, which efforts have generally failed. For instance, in "The Common Sense Legal Reforms Act" proposed in the mid-90s, the "loser pays" rule was included in the proposed federal tort reform legislation in order to discourage unmeritorious claims and defenses in product liability cases and encourage speedy resolution of those that are meritorious. That legislation did not pass.

For the most part, attorney fee awards result from one of three postures in a case. "Generally, attorney fees are awarded only when authorized by contract or by statute." *Fericks v. Lucy Ann Soffe Trust*, 2004 UT 85, ¶ 23, 100 P.3d 1200. Additionally, the courts recognize common law exceptions to the American rule.

Contract

Contemporary contracts of all kinds provide that the defaulting party in a contract would be required to pay the attorney fees associated with the enforcement of the contract. These provisions are routinely and regularly enforced by the courts, as written.

"If the legal right to attorney fees is established by contract, Utah law clearly requires the court to apply the contractual attorney fee provision and to do so strictly in accordance with the contract's terms." *Jones v Riche*, 2009 UT App 196, ¶ 2, 216 P.3d 357. When applying contractual attorney fees provisions, a court does not have and cannot act with the same equitable discretion to deny awards of attorney fees as it can when considering equitable remedies or statutory rights. *Gusti v. Sterling Wentworth Corp*., 2009 UT 2, ¶ 73, 201 P. 3d 966.

If the attorney-fee clause in the contract does not provide for a bilateral, mutually enforceable attorney fee provision, but rather a unilateral, one-sided attorney fee provision, the Utah Code provides a remedy to ameliorate the situation for the party on the wrong side of that provision. Utah Code Section 78B-5-826 stipulates that a

> court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

Even when the underlying contract is found to be unenforceable, a successful litigant may recover attorney fees if that contract contained an attorney fee award provision. *Bilanzich v. Lonetti*, 2007 UT 26, ¶ 16, 160 P.3d 1042.

Statutes

The *Arcambel* decision itself contemplates statutory deviations from the American rule in its final phrase: "till it is changed or modified, by statute." *Arcambel v. Wiseman*, 3 U.S. 306, 3 Dall. 306, 306 (1796).

Federal and Utah state law provide a total of roughly two hundred statutory exceptions to the American rule to encourage private litigation and implement public policy. A primary purpose of these statutes is to "equalize contests between private individual plaintiffs and corporate or governmental defendants." Henry Cohen, *Awards of Attorney Fees by Federal Courts and Federal Agencies*, Cong. Res. Serv. (June 20, 2008).

It is impossible in this forum to have a meaningful exposition of all of these numerous statutory exceptions to the American rule.

Rather, we will focus on several that are of interest and note to a large segment of the Bar:

Family Law
Utah Code Section 30-3-3 provides that in a divorce or

> any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

Additionally, the code section further provides for attorney fee awards in enforcement actions and temporary support proceedings.

Utah Consumer Sales Practices Act (UCSPA)
Codified under Title 13, Chapter 11 of the Utah Code, USCPA prohibits all kinds of unconscionable and deceptive practices in commerce (false or misleading advertising, bait-and-switch sales practices, and others), with the explicit authorization of class actions to enforce the provisions of the Act. Utah Code Section 13-11-17.5 stipulates that any "judgment granted in favor of the enforcing authority in connection with the enforcement of this chapter shall include, in addition to any other monetary award or injunctive relief, an award of reasonable attorney's fees, court costs, and costs of investigation."

Federally Protected Rights
In litigation concerning all kinds of rights protected under federal law, the U.S. Code permits attorney fee awards to the prevailing party, often including suits against governmental entities that generally enjoy sovereign immunity. Notably, the Civil Rights Act of 1964 roundly grants a court discretion to award attorney fees to the prevailing party in litigation regarding Public Accommodations and Facilities, 42 U.S.C. § 2000a, 2000b(a); Equal Employment Opportunities, 42 U.S.C. § 2000e-5k; Fair Housing, 42 U.S.C. § 3613(c); Fair Labor Standards, 29 U.S.C. § 216(b); Age Discrimination, 29 U.S.C. § 626(b); Equal Credit Opportunity, 15 U.S.C. § 1691e(d); Voting Rights, 42 U.S.C. § 1973ee-4(c); Americans with Disabilities, 42 U.S.C. § 12205; Civil Rights, 42 U.S.C. § 1988, and a myriad of others. Broadly, the Equal Access to Justice Act passed in 1980 waives some sovereign immunity and permits attorney fee awards in specific agency adjudications and all civil actions (except in tort and tax cases) brought by or against the United States. *See* 28 U.S.C. § 2412(b), (d); 5 U.S.C. § 504. While there is no theoretical maximum attorney fee award under the applicable statutes, the awards are calculated on an hourly basis at the rate of $125 per hour. *See* 28 U.S.C. § 2412(d)(2)(A)(ii); 5 U.S.C. § 504(b)(1)(A).

Parenthetically, the Internal Revenue Code, 26 U.S.C. § 7430, permits the IRS and federal courts to grant an award of attorney fees in cases in which the government fails to establish that its case was substantially justified, up to a statutory hourly amount ($125 per hour).

Industry-Specific Statutory Provisions: Utah law provides several industry-specific attorney fee statutes. If a contractor fails to pay for work performed by subcontractors or suppliers, "reasonable costs and attorney's fees" incurred in the collection of such sums are also due to the subcontractor. *See* Utah Code Ann. § 58-55-603. Attorney fees and costs are also available in actions to abate or enjoin nuisances, like known drug, gambling, or prostitution houses. *See* Utah Code Ann. § 78B-6-1114. There are more than a few of these riddled throughout the Utah Code, and it is wise to become familiar with them in the areas you practice.

On the federal side, over the years Congress has passed laws to protect certain industries and penalize litigants who, despite those protections, sue manufacturers and suppliers anyway. Recently and in light of several mass shootings, the Protection of Lawful Commerce in Arms Act (PLCAA) has received considerable headlines. The law is intended to protect firearm manufacturers and dealers from liability when crimes are committed with their products. *See* 15 U.S.C. §§ 7901–7903. In *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015), the Federal District Court ruled that federal and state immunity statutes prohibit the claims of liability of a retailer on the sale of ammunition. The lawsuit was brought on behalf of the decedent Jessica Ghawi by her parents against several web-based businesses (two web-based ammunition venders, Lucky Gunner, LLC and The Sportsman's Guide, as well as suppliers of various tactical gear) from whom James Holmes purchased materials. *Id*. at 1220. In 2015, Holmes was convicted for the mass murder committed in a movie theater in Aurora, Colorado, during the showing of the movie *The Dark Night*, which resulted in the death of Jessica and eleven other victims. Brady Center lawyers representing the family members alleged that the internet business practices of the Federal Firearm Licenses did not include "reasonable safeguards" to prevent persons such as Holmes from purchasing their products. *Id*. The judge dismissed the case as web-based businesses have special

immunity from the general duty to use reasonable care under the PLCAA, which generally prohibits claims against firearms and ammunition manufacturers, distributors, dealers, and importers for damages and injunctive relief arising from the criminal or unlawful misuse of firearms and ammunition, unless the suit falls within one of six enumerated exceptions. *Id*. at 1226–28. Plaintiffs attacked the constitutionality of the PLCAA and failed as "[e]very federal and state appellate court to address the constitutionality of the PLCAA has found it constitutional." *Id*. at 1222; *see also Ileto v. Glock*, 565 F.3d 1126, 1138–42 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 3320 (2010); *City of New York v. Beretta*, 524 F.3d 384, 392–98 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 3320 (2009); *Dist. of Columbia v. Beretta*, 940 A.2d 163, 172–82 (D.C. 2008), *cert. denied*, 129 S. Ct. 1579 (2009); *Estate of Kim ex rel v. Coxe*, 295 P.3d 380, 382–92 (Alaska 2013); *Adames v. Sheahan*, 909 N.E.2d 742, 764–65 (Ill. 2009), *cert. denied*, 130 S.Ct. 6. The judge ordered that plaintiffs' claims as to all defendants and the civil action be dismissed. *Phillips*, 84 F. Supp. 3d at 1228. Pursuant to separate state-law protections, Colorado Revised Statutes section 13-21-504.5, the defendants Lucky Gunner and the Sportsman's Guide were entitled to an award of reasonable attorney fees of over $200,000.

Bad faith litigation

Utah Code Section 78B-5-825 is a short but very potent statute:

> (1) In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).
>
> (2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:
>
> (a) finds the party has filed an affidavit of impecuniosity in the action before the court; or
>
> (b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Utah Code Ann. § 78B-5-825(1)–(2)(b).

The applicable burden of proof is high.

> Good faith is defined as having (1) an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others. To establish a lack of good faith, or "bad faith"…, a party must prove that one or more of these factors is lacking.

In re Sonnenreich, 2004 UT 3, ¶ 48, 86 P.3d 712 (citations omitted). There are surprisingly few published cases in the last thirty years wherein this statute (or its predecessor before the code revision, Utah Code Section 78-27-56) is applied and an award of attorney fees is upheld; most of the time, any award of attorney fees under this statute is either disallowed or reversed, leaving us to conclude that attorney fee awards under this statute is disfavored and rare.

Common Law Exceptions

The courts recognize two major exceptions to the American rule based in the common law, or in other words, instances when courts may award attorney fees without statutory authorization. Those exceptions are the common benefit doctrine and the bad

faith doctrine. Indeed, the Utah Supreme Court has held that "in the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity." *Stewart v. Utah Pub. Serv. Com'n*, 885 P.2d 759, 782 (Utah 1994). In *Stewart*, the Utah Supreme Court outlined the unique circumstances where a court might exercise this inherent equitable power, including when a party acts in bad faith, vexatiously or for oppressive reasons, when a nonparty class is benefitted from the results of the successful litigants that brought the action, and "private attorney general" cases when the "vindication of a strong or socially important public policy" occurs and the costs of so doing transcend the plaintiff's own interests. *Id*. at 782–83. In that case, the court found that the plaintiffs had conferred substantial benefits on utility ratepayers they did not represent and awarded the plaintiffs a reasonable attorney fee. The application of these exceptions based in the inherent regulatory powers of the courts over themselves are admittedly rare and confined to certain types of cases where broader societal interests are at issue.

The Future of the American Rule

Notably, a few states have attempted to cast off the American rule and adopt some version of the loser pays rule.

Texas law establishes that motions to dismiss may be filed in civil actions and adopts a loser pays rule for these motions. The prevailing party, whether a motion to dismiss is granted or denied in part or in full, is entitled to "costs and reasonable and necessary attorney's fees." Robert Willmore, *Is The US Looking Across The Pond?; Texas Enacts Tort Reform Law With "Loser Pays" Provision*, Crowell Moring (July 20, 2011), *available at* www.crowell.com/NewsEvents/AlertsNewsletters/all/Is-The-US-Looking-Across-The-Pond-Texas-Enacts-Tort-Reform-Law-With-Loser-Pays-Provision/pdf. The original version of the law differs to that of the version we see today. The original version contained a true loser pays provision that would have allowed prevailing parties in lawsuits to recover costs and attorney fees from losing parties, but at committee this practice was modified to the narrow view of only on motions to dismiss. *See id*. According to Walker Friedman, chairman of the State Bar of Texas Litigation Section, "The way the bill was initially written was a different matter. But the way that ultimately the issues were resolved – I don't think there's going to be a tremendous, overwhelming effect on lawyers." *Id*.

Florida adopted loser pays in 1980, but by 1985 it was completely done away with. Marie Gryphon, *Other Contingencies: Reconsidering "Loser Pays,"* 2010 Mo. Med. 107(1), 10–15, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6192797/#b24-ms107_p0010. In 1980, to rectify what was seen as abusive litigation against the medical professionals, the Florida state legislature adopted a loser-pays rule solely for medical malpractice lawsuits with the intention to combat the rise in medical-malpractice insurance rates. Their hopes were to reduce the rates of this type of litigation and in turn lower the insurance premiums paid by the doctors and hospitals in defending against such claims. Quickly issues arose with this new system. *See id*. Consider for a moment that an averagely-situated plaintiff brings a lawsuit against a doctor for malpractice, the plaintiff loses and is ordered under this law to pay all the defendant's attorney fees (perhaps tens or hundreds and thousands of dollars); could the plaintiff pay them? On the other hand, could the doctor or his insurer pay a successful plaintiff's attorney fees, in addition to a damage award? Unfortunately, the frequency of the inability to pay for either side was too common and too great, and all sides lobbied for repeal of the loser-pays law. By 1985 this experiment was nothing but a blip on the radar and a cautionary tale to all those seeking to do the same. *See id*.

Alaska has long been considered the only state in the U.S. that follows a broader "loser pays" rule, "but it actually follows a limited version of the system that permits only modest recovery of fees and is riddled with exceptions." Victory Schwartz, Cary Silverman, *Who Pays When the "Loser Pays"? Considering Practical Issues, Misperceptions and Options*, Am. Legis. Exch. Council (Apr. 22, 2012), *available at* https://www.alec.org/article/who-pays-when-the-loser-pays-considering-practical-issues-misperceptions-and-options/. Depending on a variety of factors, a prevailing party is limited to seek recovery ranging from one percent to thirty percent, a relatively small portion to the overall expenditures. *See id*. A judge has discretion to invoke any one of ten exceptions on a case-by-case basis in order not to award fees; however, the final and most impactful statutory exception to the loser pays rule is a "catch-all" that allows the court to reduce or not award attorneys' fees due to "other equitable factors deemed relevant." *Id*. (citation omitted). Even though touted as the only state that follows the loser pays system, an empirical study of the law conducted by the Alaska Judicial Council concluded that loser pays "seldom plays a significant role in civil litigation." *Id*.

Although some states have tried to adopt variations of the loser pays rule mostly within narrow constraints, the United Supreme Court confirms the American rule "remains the norm, unless a statutory or contractual exception applies." Rod Maier, *Recent*

Takes From the Supreme Court and Federal Circuit on Attorney Fees Awards in Patent Cases, Law.com (Jan. 21, 2020), *available at* www.law.com/newyorklawjournal/2020/01/21/recent-takes-from-the-supreme-court-and-federal-circuit-on-attorney-fees-awards-in-patent-cases/?slreturn=20200312130227. In December 2019, three critical cases were decided: *Peter v. NantKwest*, 140 S. Ct. 365 (2019); *Blackbird Tech LLC v. Health In Motion LLC*, 944 F.3d 910 (Fed. Cir. 2019), *Intellectual Ventures I LLC v. Trend Micro Inc*., 944 F.3d 1380 (Fed. Cir. 2019), each based on the Patent Act, 35 U.S.C. § 145 and 35 U.S.C. § 285. These cases solidfied that the American rule still rules the day, appellate courts will continue to ensure that awards of fees properly fall within a statutory exception to the presumption against fee awards, an attorney fee award will be upheld when warranted by the totality of the circumstances. *See Octane Fitness, LLC v. ICON Health & Fitness*, 572 U.S. 545, 554 (2014) (holding that an exceptional case "is simply one that stands out from others with respect to the substantive strength of a party's litigating position… or the unreasonable manner in which the case was litigated")

On the chance that a case merits an award of attorney fees, the formalities of Rule 73, Utah Rules of Civil Procedure, must still be observed and additional thorny issues must be addressed, including the necessity of the work described, adequacy of such descriptions, privilege and potential for waiver, and the effect of contingency agreements, among others. *See also* Andre Regard & Ivey Workman, *Collecting Attorney Fees a Verdict in Your Favor is Not the Final Obstacle Between You, Your Client, and Collection*, ABA Practice Points (July 31, 2019), *available at* https://www.americanbar.org/groups/litigation/committees/consumer/practice/2019/collecting-attorney-fees/. If you are awarded attorney fees by statute, contract, or other authority that provides for such an award, you are still on your journey and not at your destination. Florida was not just a cautionary tale but an outdated roadmap to collection, a destination that rarely manifests.

Where do we go now, if anywhere?

We see from the origins, development, evolution, and endless tinkering with laws concerning the American rule that we are not wholly satisfied with it as it is. It took fifty-three words to change the face of American litigation and over 200 years later we are still not at our destination and continue to ask ourselves the same questions: Is the American rule fair? Is the loser-pays system any fairer? We have so many carve-outs of and exceptions to the American rule, why do we have it at all? What, if any, improvements can be made to additionally discourage frivolous claims and defenses that perhaps should result in an attorney fee award, while at the same time encourage meritorious (but not certain) litigation but not snuffing it out with the risk of paying the other side's fees? Or is the law as good as it is going to get?

Unless you are in one of the special carve-out exceptions from the American rule, some of which we have covered here, the odds are never in your favor in obtaining an award of attorney fees after successful litigation. Going forward, the adequacy, effectiveness and purpose of the American rule will be the subject of continued debate and discussion by legislatures, the Bar, and the judiciary, and that is a debate we should welcome.

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

Pinney v. Carrera
2020 UT 43 (July 6, 2020)

This appeal arose from the district court's denial of post-trial motions in an automobile accident case where the jury awarded $300,000 in general damages to the plaintiff, but no special damages. The defendant argued that the general damage award was excessive, and that the plaintiff had not made a threshold showing that she had a permanent disability or impairment *based upon objective findings* because the treating physician who testified at trial was tainted by personal bias. The court affirmed the district court's rulings, holding that **the "based upon objective findings" requirement of Utah Code Section 31A-22-309 does not require findings untainted by bias; rather it requires only findings based on externally verifiable phenomena.** The court also rejected the argument that the award of general damages must be reversed because of lack of evidence of economic harm.

State v. Bell
2020 UT 38 (June 23, 2020)

The court affirmed the court of appeals' ruling that **a criminal defendant was not entitled to a limited review of the victim's privileged mental health therapy records, because he failed to establish that the victim had a condition that was an element of his defense,** which is necessary to qualify for an exception to the mental health therapist-patient privilege contained in Utah R. Evid. 506. Although the court did not reach the defendant's constitutional arguments, it instructed the criminal rules committee to review Rule 506 to ensure that it appropriately balances patients' privacy rights with criminal defendants' constitutional rights.

In Interest of B.T.B.
2020 UT 36 (June 22, 2020)

In this termination of parental rights case, the supreme court held that the court of appeals properly disavowed prior case law that suggested that termination almost automatically followed a determination that the statutory grounds had been met. The court also **clarified the standard for applying the "strictly necessary" language in the Termination of Parental Rights Act.**

Utah Dep't of Transportation v. Boggess-Draper Co., LLC
2020 UT 35 (June 11, 2020)

In this condemnation proceeding, the supreme court held that **there is no categorical bar precluding admission of evidence of a post-valuation-date sale or development of property.** The admissibility of such evidence depends on the circumstances of the case and is to be determined under the Rules of Evidence. The court also **rejected the condemnee's argument that "just compensation" includes the condemnee's costs and attorney fees incurred in seeking fair market value.**

Mitchell v. Roberts
2020 UT 34 (June 11, 2020)

Utah Code Section 78B-2308(7) provides that, even if claims for sexual abuse of minors were "time barred as of July 1, 2016," the claims were nonetheless revived if they were "brought within 35 years of the victim's 18th birthday, or within three years of the effective date of this subsection (7), whichever is longer." On certified question from the federal district court, the supreme court held that the statute is unconstitutional because **"the Utah Legislature is constitutionally prohibited from retroactively reviving a time-barred claim in a manner depriving the defendant of a vested statute of limitations defense."**

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

Griffin v. Snow Christensen & Martineau
2020 UT 33 (June 10, 2020)

The court held the plaintiff's post-trial motions were timely because **the district court's order granting a motion to dismiss plaintiff's complaint with prejudice was not a separate Rule 58(a) judgment, and therefore did not trigger the 28-day deadline for plaintiff to file post-trial motions.** Although the order was separate from the court's oral ruling and accompanying minute entry, it was not separate from the court's decision on the relevant motion, clearly identified as a judgment, and limited only to information relevant to a judgment. The court further held that plaintiff's acknowledgment of the order as a Rule 58(a) judgment in his pleadings before the district court did not constitute a waiver of the issue, because Rule 58(a) must be applied mechanically to determine the issue of timeliness.

State v. Bridgewaters
2020 UT 32, 466 P.3d 204 (May 28, 2020)

As a matter of first impression, the supreme court held that **the "properly served" requirement of Utah Code Section 76-5-108(1), which criminalizes violation of a protective order, requires that the protective order be served in accordance with Utah R. Civ. P. 4.** Although the protective order in this case was not properly served under this interpretation, the prior *ex parte* protective order remained in effect under Section 78B-7-107(1)(d), which provides, "[i]f at [the] hearing the court issues a protective order, the ex parte protective order remains in effect until service of process of the protective order is completed." Utah Code Ann. § 78B-7-107(1)(d).

Ipsen v. Diamond Tree Experts, Inc.
2020 UT 30 , 466 P.3d 190 (May 20, 2020)

Injured while battling a mulch fire, a firefighter sued the owner of the property where the fire started for gross negligence, intentional harm, and negligent infliction of emotional distress. On appeal from entry of summary judgment in favor of the property owner, the supreme court clarified the "professional rescuer rule" announced in *Fordham v. Oldroyd*, 2007 UT 74, 171 P.3d 411, which holds that a person owes no duty of care to a professional rescuer for injuries resulting from the very negligence that occasioned the rescuer's presence. The majority opinion held that the *Fordham* rule is limited to simple

negligence, and that **a person *does* owe a duty of care to a professional rescuer for injuries resulting from the gross negligence or intentional tort that occasioned the rescuer's presence.**

Cougar Canyon Loan, LLC v. Cypress Fund, LLC
2020 UT 28, 466 P.3d 171 (May 18, 2020)

The district court granted a writ of execution allowing Cougar Canyon Loan, LLC to foreclose on a malpractice claim owned by Cypress Fund, LLC. On appeal, Cougar Canyon argued that a party that benefits from malpractice should not be able to execute on the claim as a matter of public policy. The supreme court rejected the argument, **holding that the plain language of Utah R. Civ. P. 64 and 64E allowed foreclosure of legal claims through writs of execution.**

Taylorsville City v. Mitchell
2020 UT 26, 466 P.3d 148 (May 14, 2020)

On certiorari, the supreme court **rejected the appellant's constitutional challenges to Utah Code Section 78A-7-118(8), which provides for a hearing de novo in the district court on justice court convictions, but forecloses further appeal unless the district court rules on the constitutionality of a statute or ordinance.** The court exercised its discretion to reach the merits of the appellant's arguments even though they were not preserved, because the appellee briefed the merits and failed to object to the lack of preservation.

Jones v. Mackey Price Thompson & Ostler
2020 UT 25 (May 14, 2020)

After nearly ten years of litigation between a law firm and a former partner over distribution of litigation proceeds, the district court entered a directed a verdict against the partner on several claims, including a claim for fraudulent transfer. On appeal from this order, the supreme court held that **a "mixed motive" is sufficient to establish an "actual intent" to hinder, delay, or defraud under the Fraudulent Transfer Act.** Accordingly, the fact that the law firm may have shifted assets to avoid a tax liability did not preclude the possibility that it also acted with the intent to hinder, delay, or defraud the partner in his collection efforts.

State v. Newton
2020 UT 24, 466 P.3d 135 (May 14, 2020)

In this appeal of a conviction for aggravated sexual assault and aggravated assault, the defendant argued that the State violated his constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to conduct a forensic evaluation of the victim's cell phone. Affirming, the supreme court held the defendant's *Brady* claim failed, because (a) **the State did not have a duty to conduct a forensic evaluation of the victim's cell phone in the absence of indicia that the prosecutor knew that favorable, material evidence would be found through a forensic review,** and (b) the defendant failed to show that the examination of the victim's cell phone would contain material evidence.

SRB Investment Co., Ltd. v. Spencer
2020 UT 23, 463 P.3d 654 (May 8, 2020)

The supreme court reversed the district court's judgment restricting SRB Investment Company's use of a prescriptive easement, explaining that the district court focused on the purposes for which SRB would use its land rather than on the purpose for which the servient estate's relevant portion would be used. On remand, the Supreme Court instructed that **"the court should take a flexible approach to determining the scope of the prescriptive easement – an approach that permits changes in the use of the parties' respective property rights so long as those changes do not *materially* increase the burden imposed on either party."**

Harrison v. SPAH Family Ltd.
2020 UT 22, 466 P.3d 107 (May 8, 2020)

In affirming summary judgment in this prescriptive easement case, the supreme court clarified what is required to satisfy the "continuous" element of a prescriptive easement. Acquiescence by the underlying landowner is *not* required. Thus, **"a landowner's grant of permission to the prescriptive user will not work an interruption unless the user submits to the title of the landowner by accepting the license offered. [I]t is the prescriptive user's submission to the landowner that interrupts the prescriptive period – not the owner's grant of permission."**

Taylor v. University of Utah
2020 UT 21, 466 P.3d 124 (May 8, 2020)

On certiorari, the supreme court held that **expert testimony in a medical malpractice case was inadmissible under Rule 702, where the expert relied on "logical deduction" as the method for opining on medical causation, and where the opinion was based upon "broad attenuated facts" that suffered from the fallacy of equivocation.**

UTAH COURT OF APPEALS

Young v. Hagel
2020 UT App 100 (June 25, 2020)

In this custody case, the court of appeals held that **the district court abused its discretion in denying a motion under Rule 60(b)(1) to set aside a default order** that had been entered because the mother failed to appear within 21 days of her counsel's withdrawal after four years of litigation. Counsel should not automatically treat a pro se litigant whose counsel has withdrawn as if in default after the 21 days provided for in Rule 74(c) has expired, but instead should continue to serve copies of filings on the litigant, but may, in appropriate cases, seek sanctions from the court if the litigant continues to fail to appear.

State v. Buttars
2020 UT App 87 (June 4, 2020)

The court of appeals reversed and remanded for a new trial a conviction for securities fraud based upon the district court's reliance on the residual exception under Utah R. Evid. 807 to admit certain necessary bank records rather than relying on the business records exception found in Utah R. Evid. 803(6). The court of appeals held that **"it was error to admit the bank records under the residual rule without a more compelling explanation for why the business records exception would not suffice."**

TENTH CIRCUIT

United States v. Young
964 F.3d 938 (10th Cir. July 7, 2020)

Reversing the district court's denial of a motion to suppress, **the Tenth Circuit held that the defendant's statements during interrogation were involuntary and inadmissible,** where the law enforcement agent made misrepresentations about potential penalties, stated that the length of the sentence depended on his cooperation, claimed to have spoken to the federal judge, emphasized that he would tell the judge that the defendant had cooperated, and represented that truthful responses would "buy down" his prison time.

Hinkle v. Beckham Cty. Bd. of Cty. Commissioners
962 F.3d 1204 (10th Cir. June 22, 2020)

In this civil rights appeal, the Tenth Circuit applied *Florence v. Board of Chosen Freeholders*, 566 U.S. 318 (2012), to determine whether the challenged jail body-cavity strip-search policy was unconstitutional.

It held that ***Florence*** **does not sanction body-cavity strip-searching all detainees before deciding whether a particular detainee will be housed in the jail's general population.**

United States v. Hamett
961 F.3d 1249 (10th Cir. June 15, 2020)

In the middle of his trial on kidnapping and weapons charges, the defendant elected to waive his right to counsel. Appealing his subsequent conviction, the defendant argued that the waiver was invalid because it was not made knowingly and intelligently. The Tenth Circuit agreed, holding that **the district court's colloquy with the defendant regarding the waiver was constitutionally inadequate under *Faretta v. California*, 422 U.S. 806 (1975), because the court mistakenly understated the maximum penalty and failed to inform the defendant of the elements of the charged crimes or possible defenses.**

United States v. Arterbury
961 F.3d 1095 (10th Cir. June 9, 2020)

Reversing a denial of a motion to suppress, **the Tenth Circuit applied the doctrine of collateral estoppel to criminal proceedings,** clarified that the doctrine remains available under the federal common law independent of the Due Process Clause, and held that the district court was bound by a prior order in a separate proceeding suppressing the evidence.

United States v. Trujillo
960 F.3d 1196 (10th Cir. May 27, 2020)

On appeal from his conviction for being a felon in possession of a firearm, the defendant argued that his guilty plea was constitutionally invalid because the district court failed to inform him that a necessary element of the charged crime was his own knowledge of his status as a felon. The Tenth Circuit agreed that the district court erred in failing to inform the defendant of this intent element and that the error was plain, but concluded that **the failure was not a structural error warranting plain error review, even if it rendered the plea unknowing and involuntary.** This conclusion creates a split in authority with the Fourth Circuit, which held that a similar error was structural and necessitated plain error review in *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020).

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Response to Narrowing the Access-to-Justice Gap by Reimagining Regulation

by Mark Woodbury

In 2018, the Utah Supreme Court commissioned a work group (Work Group) to make recommendations regarding possible reforms to the regulatory structure for legal services, with a focus on increasing the access to and affordability of legal services.

In August 2019, the Work Group issued its report. *See The Utah Work Group on Regulatory Reform, Narrowing the Access-to-Justice Gap by Reimagining Regulation* (Aug. 2019), *available at* https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf. The supreme court subsequently incorporated most of the recommendations from the Work Group into proposed changes to the Utah Rules of Civil Procedure.

In this article, I'd like to take a closer look at some of the data and assumptions underlying the report from the Work Group. The bottom line is that, while I support the proposed reforms regarding advertising, referrals, solicitation, and sharing of fees, I don't think that it's a good idea to allow non-lawyers to own law firms or practice law, even in the limited "regulatory sandbox" model on offer. Or, at the very least, it's not a good idea yet.

The sandbox proposal can be described in this way: Under the proposed rules, the Utah Supreme Court would create a new regulatory body, parallel to the Utah Bar. The Utah Bar would continue to have jurisdiction over licensed attorneys, but this new regulatory body would have the authority to grant permission for non-licensed persons or entities to engage in the practice of law, including allowing non-attorney ownership stakes in law firms and allowing non-lawyers to offer legal services. The exact parameters of these dispensations would be determined on a case-by-case basis and would be granted and monitored according to principles set out in the regulations governing the body. I hope the authors of the proposal find this summary fair, and I encourage members of the Bar and bench to read the proposal for themselves.

The primary critique I want to raise in this article is three-fold:

1. The so-called "justice gap" is undefined, leading to confusion and faulty analysis;
2. That this "justice gap" is large is assumed, rather than shown; and
3. That the primary driver of this gap is cost is assumed, rather than shown.

Put simply, the data sets cited by the report do not support the conclusion that we have an access-to-justice problem. In fact, in most cases, the data cited by the Work Group tend to show the opposite: The "justice gap," when reasonably defined, is relatively small, and what gap does exist is not likely to be driven primarily by cost.

Below are some direct quotations from the Work Group's report, with citations omitted. I selected these passages because they make the most straightforward factual claims about the issue. I encourage everyone to read the full report. *See The Utah Work Group on Regulatory Reform, Narrowing the Access-to-Justice Gap by Reimagining Regulation* (Aug. 2019), *available at* https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf.

The Work Group cites several sources. Foremost among them are a survey from the Legal Services Corporation, a federally

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funded entity that distributes grant money to state level legal aid organizations (the LSC Survey), and a study commissioned by the National Center for State Courts (the Landscape Study). The Work Group also relies on some statistics supplied by the Third District Court.

All the reports are valuable, but none of them show an urgent, crisis level justice-access problem in our state. Certainly, they don't support the contention that immediate and drastic action is the only way to address the problem.

Neither the Work Group nor the reports they rely on provide a helpful definition of "justice gap," or a clear way of measuring it, even if we could define it. And assuming we could define and measure it, we have no frame of reference to judge what sort of justice gap would be acceptable. And even if we knew what the justice gap was, if we had measured it accurately, and if we had collectively made a decision that it was too large, there is no evidence to support that cost is the primary driver of the gap. And since the sandbox concept is conceived of primarily as a way to provide lower cost legal services, there is no reason to believe that the sandbox reforms will have any effect on the problem, no matter how it is defined, measured, and judged. The best way to illustrate this is to look at a few specifics from each study.

The Landscape Study's conclusion that we are denying access to justice is bound up with its absurdly broad definition of the "justice gap."

The Landscape Study is a granular look at details of case dispositions in a handful of judicial districts in the eastern United States; the authors of the report then extrapolate nation-wide conclusions from the results in those districts. The study excludes domestic cases.

Although the Landscape Study does draw the bottom-line conclusion that "many litigants…are effectively denied access to justice," a quick look at how that report defines "access to justice" ought to raise eyebrows. The authors of the study, for example, treat both settlements and default judgments as a denial of "access to justice." In fact, the study is explicit that it considers a full trial on the merits, preferably in front of a jury, to be the optimal case outcome.

While this is certainly a defensible intellectual position, it is diametrically opposed to the actual, stated policy of the Utah Supreme Court, which is that settlements are to be encouraged in all civil cases. In pursuit of this policy, we have already enacted a number of reforms designed to increase the number of settlements. In domestic cases, mediation has been mandatory since I entered practice in 2012. Small claims court now has an ADR program, and, after a lengthy pilot period in Third District Court, mediation is now mandatory statewide in contested probate cases.

Judicial policy favoring stipulation and settlement has been the stated position of the court literally since before I was born. *See Utah Dept. of Admin. Serv. v. Pub. Serv. Com'n*, 658 P.2d 601 (Utah 1983). After a veritable lifetime of pushing settlements, we are now suddenly being told that there are too many settlements, that settlements are actually a denial of access to justice, and that the only possible solution is to immediately undertake a radical and far-reaching experiment in allowing non-lawyers to practice law. If there is a "justice gap," I don't think it is too much to ask that it be defined and measured in ways that are not contradicted by decades of jurisprudence on the desirability of settlements.

A similar point holds true for default judgments. True, the Utah judiciary explicitly disfavors default judgments and explicitly favors settlements, but I have trouble seeing how either ought to

factor into our definition of the "justice gap." Default judgments generally happen when one party fails to appear to contest a lawsuit. While there may be good reason to disfavor such judgments and prefer litigation on the merits, it can hardly be characterized as a "denial of access" to default a party who fails to show up. A prerequisite to denying access to justice would seem to be an attempt to access justice. When a party doesn't even show up, how can we say they were denied access?

The Landscape Study also shows that approximately 62% of all cases settle. While the study treats this as a problem, it seems to me like something to celebrate. I would look at that number and assume that we're actually doing a lot better than I thought on access to justice issues. The majority of cases are settling. Keep in mind as well that the study excludes domestic cases, which, in my experience, settle at a much higher rate than others; we can safely assume that, including domestic cases, the settlement rate is actually higher. How is that not a success?

The Landscape study also estimates that 14% of cases resolve by default judgment. So, settlements and defaults combine to resolve 76% of all cases (probably more, since so many domestic cases, which are excluded from the Landscape Study, resolve either by settlement or default). This is hardly a picture of a system in crisis.

The LSC Survey's "justice gap" is a poor fit for the current discussion, is smaller than a casual reader might assume, and is not in any meaningful way driven by the costs of legal services.

Just like the Landscape Study, the headline takeaway from the LSC Survey is striking, and is something that the Work Group relies on heavily to argue that there is a deep-seated crisis requiring immediate drastic action. But, also like the Landscape Study, a closer look at the LSC Survey paints a more complicated picture, and one that is potentially more positive than the conventional wisdom. Here is the Work Group's primary takeaway from the LSC Survey: "An astonishing '86% of the civil legal problems reported by low-income Americans in [2016–17] received inadequate or no legal help.'" *See The Utah Work Group on Regulatory Reform, Narrowing the Access-to-Justice Gap by Reimagining Regulation* 1 (Aug. 2019) (citation omitted), *available at* https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf.

That is the third sentence of the Work Group's report, and it is both a theme and a number that they return to repeatedly throughout. It's a number that deserves to be unpacked a little further. First, we ought to examine this number, and all the numbers from the LSC Survey, with the limitations of survey data in mind. Survey respondents suffer from all the same biases, memory lapses, and motivated reasoning that any witness suffers. We should also keep in mind that the survey examined only the limited sub-group of low-income Americans. There's no way of knowing how the numbers it provides hold across the rest of the population. All that being said, it seems to be the best we've got, so from here on out, I'll treat it as a given.

That 86% number certainly is eye-catching. However, it should be read in conjunction with the further finding of the LSC Survey regarding why so many low-income Americans don't get legal help. According to the LSC Survey, they are mostly not getting it because they don't really want it. Only 20% of those surveyed reported that they had even looked for help for their legal problems. So while it is true that 86% of people received "inadequate or no" legal help, this is in large measure a function of the fact that 80% of people didn't even try to find legal help. Only 20% of the population even looked for help, and 14% of the population received help after looking for it. Another way of saying this is that 70% of those who looked for help got it. This leaves only 6% of the population that wanted legal help but didn't get it.

The group of people that it seems we ought to be most worried about – those who wanted legal help but did not receive it – represent only 6% of the population. Now, 6% of the population is still a lot of people in absolute numbers, and they deserve our concern, and I have no problem trying to think up ways to help them. But 6% doesn't really sound like a crisis requiring radical, immediate, and experimental action.

It's also an interesting quirk of the study that it divides those needing legal assistance into two categories: those who received "adequate" legal assistance, and those who received "inadequate or no" legal assistance. It seems that receiving "no" legal assistance is self-explanatory. "Adequate" legal assistance is not defined, but if it was "adequate" I guess I won't ask too many questions. But what does "inadequate" mean? And what portion of people received "inadequate" as opposed to "no" legal assistance? Does inadequate mean partial? Is that like going to a clinic to help fill out your paperwork, but not having an attorney at your hearing? Does it mean you met with an attorney for a consult, but the attorney declined the representation? Does it mean that you found some self-help resources online? Or does

it just mean that your case didn't turn out the way you wanted, even if you had a lawyer?

The LSC Survey also shows that the cost of legal services barely even registers as a reason that people forgo legal help. Keep in mind that the overwhelming majority of people who didn't receive legal services didn't receive them because they didn't look for them. And the reasons they didn't look for legal services have very little to do with cost. The LSC Survey says that the most common reasons are: Decided to deal with it alone (24%); didn't know where to look (22%); and wasn't sure if it was a legal issue (20%). "[w]orried about cost" comes in fourth place, with 14%. And remember, these are reasons that people gave for not seeking help. It's not that legal services were too expensive; it's that people thought they might be too expensive, so they didn't bother to look. If they had looked for available resources, it is likely (70% likely) that they would have found "adequate" legal help, and an unknown but greater than zero chance that they would have found partial assistance.

If we look at how the LSC Survey defines "legal issue," it is even less surprising that nearly a quarter of respondents decided to deal with their issues by themselves. The survey's definition of "legal issue" is extremely broad. In the area of "education," for example, a legal issue includes being denied access to special education services, problems with learning accommodations, problems with school safety and bullying, and being suspended from school. While we can certainly imagine a scenario in which a school suspension would benefit from having an attorney involved, isn't it far more likely that most parents can resolve the situation by talking directly with school administration? I am happy to admit that some parents may need additional legal help, and they should be able to get it, but that would be the exception, not the rule. Given the breadth of the definition of "legal issue," it is to be expected that many people didn't look for legal help. Many of them probably didn't really need it.

Taken as a whole, the LSC survey says that we don't have a cost problem, we have an *information* problem. It's not that legal services cost too much; it's that people don't know where to find them, or people don't know if they are necessary, or they'd just rather take care of it themselves. We don't need to drive down costs; we need to increase access to information. And some of the reforms are in fact targeted to meet that need. The changes

to attorney advertising, solicitation, referral fees, and fee splitting all seem directly targeted at increasing the odds that someone who needs an attorney will be able to find one. Once they've found an attorney, most people, including low-income Americans, seem to be able to navigate the financial aspect just fine using existing resources. At least, that's what the cited data suggest.

Data from Utah courts is extremely limited, and again suggest that our definition of "justice gap" is faulty.

Finally, we have a few local data points. Here are the numbers provided in the report and recommendation, reproduced verbatim, omitting citations.

> Raw data from the Third District Court for the State of Utah suggest that its caseload tracks the caseloads studied in the Landscape report. In 2018, 54,664 civil and family law matters were filed in the Third District. Of these cases, 51% were debt collection, 7% were landlord/tenant, and approximately 19% were family law cases. Moreover, the data show that the idealized adversarial system in which both parties are represented by competent attorneys is not flourishing in Utah: At least one party was unrepresented throughout the entirety of the suit in 93% of all civil and family law disputes disposed of in the Third District in 2018.

Id. (emphases omitted).

The most arresting statistic here is that 93% of all cases in the Third District didn't involve an attorney for at least one party. But, like the 86% statistic from the LSC Survey, it deserves further attention. If you look at footnote twenty-seven, you can see that this number includes "all adult courts, including justice courts, in Salt Lake, Summit, and Tooele Counties." Accordingly, this number must include small claims court. And small claims court is where I believe many if not most debt collection cases (which, remember, make up 51% of the case load) get filed. And a large part of the purpose of small claims court is to provide a forum with simplified rules and procedures so that lawyers are not necessary.

What I see here is a situation where we create a system that, by design, will reduce the number of lawyers involved. We then use the fact that we have successfully reduced the number of attorneys involved as evidence of a problem that needs to be solved by taking drastic, immediate, and unprecedented action. And, having defined the problem as one of too few attorneys, the proposed reform is to not to increase the supply of attorneys, but to allow more non-attorneys to practice law, the most likely effect of which will be to *increase* the number parties without attorneys, not decrease it.

Based on the other data sets, I think we can also make some reasonable inferences about the cases in the Third District Court. Based on the Landscape Study, for example, we would expect that about 62% of those cases settle, and about 14% of them end in default. And, with or without a lawyer, it's not clear to me that parties who settle or default have been denied access to justice.

In fact, given the emphasis on settlements by the Utah judiciary, I would think that a 62% settlement rate would count as a success, whether or not both sides had an attorney. So, if I were defining the justice gap, I would immediately exclude at least 62% of new cases from the problem, because those are going to settle. And I would probably exclude the 14% of cases that default as well. So what we're really talking about here is only about 24% of cases where there even might be a "justice gap." In absolute numbers, this is about 12,000 cases. And we also know from the Landscape Survey that probably only 20% of people involved in those 12,000 cases will look for help, and that 70% of those who look will get help. Since every case has two sides, we can call this 24,000 instances of people needing legal help. Only 4,800 of those will look for help, and only 1,440 will look and be unable to find help. So what we're talking about is upending a system that seems to be working pretty well for 106,560 people (54,000 cases times 2 parties per case, minus the 1,440 who looked but didn't get legal help) on the off chance that we'll be able to help the 1,440 for whom it is not working. And, apart from conventional wisdom, we have no reason to believe that the cost of legal services is what prevented those 1,440 from being helped.

Now, there are obvious problems with simply applying the percentages from different studies to the absolute number of cases filed in Utah and assuming that there are no intervening variables that will confound our conclusions. But you go to court with the evidence you have, not with the evidence you wish you had, and without a good definition of what "justice gap" means, a good way to measure it, and a baseline measurement to work from, this is probably the best we can do. The evidence that we have suggests that the justice gap, whatever it is, is probably smaller than we think, and is unrelated to the cost or availability of legal services.

And, to illustrate the broader point that we have a demand/information problem, not a supply/cost problem, let's play with these numbers a little further. We've got about 54,000 new cases per year in Third District. Salt Lake, Summit, and Tooele Counties (which comprise Third District) contain approximately 40% of the population of the State of Utah. Assuming broadly similar per capita case filings across the state, we can estimate the number of new cases per year at about 135,000. This does sound like a lot. But we also have about 8,000 lawyers in the state. If we just divide 135,000 cases by 8,000 lawyers, we've got about seventeen cases per lawyer per year, or fewer than 1.5 new cases per month for each lawyer in the state.

And before Justice Himonas can say it again, I am not suggesting that we can "pro bono" our way out of the problem, whatever that problem may be. Obviously not all those attorneys are practicing, not all of them are litigating, and not all of them would take a small claims case. All I am suggesting is that it is not obvious that we have a shortage of legal providers. It would seem that what we need is a better way of leveraging the existing providers to connect them with people who may not realize that they need legal services or may not know where to look for legal services. And the reforms most likely to produce that result are not the most radical ones, allowing non-attorneys to practice law. Rather, they are the more modest reforms regarding solicitation, advertising, and referral fees. All of those reforms seem directly targeted at allowing legal providers to educate, inform, and connect with potential consumers of legal services.

Conclusion

To me, the most important takeaways from the reports are the following:

- Most people are unrepresented by attorneys.
- Most people are unrepresented by choice, not necessity.
- With or without attorney help, most cases settle or default.
- Most people who want legal help receive it (70% or more).

These conclusions do not coincide with my preconceived notions. Prior to reading the report from the Work Group and looking at its data sources, I would have simply nodded my head at the assertion that many, many people are going without necessary legal services because they cannot afford them. But the data presented paint a very different, very complicated, much less compelling picture. Perhaps there are other reports and studies with different results, and I make no pretensions to omniscience, or even expertise. All I know is that the evidence presented so far is unconvincing.

Now, I want to be clear, I do not think that this is the end of the discussion. All of the reports and data sets point to many different lines of thought that could prove fruitful. For example, most low-income Americans face legal needs clustered in a few areas, including eviction, small-dollar debt collection, and government benefits. It seems like we could get more bang for our reforming buck if we target reforms at problem areas. The LPP program, simultaneously lauded as an important step and dismissed as a "minor tweak," deserves its own careful study and examination. And I'd like to know why the Work Group is so dismissive of incrementalism. Personally, I don't see anything wrong with a more modest scope for the sandbox. Why go straight to allowing non-lawyers to provide legal services? Why not start just with allowing non-attorney minority interests in firm ownership?

I am all for finding ways to improve our system, and, as I said, I think that the less radical reforms probably will improve the system and should be passed and implemented immediately. But if we are going to have a data-driven model of reform, then I think we have to admit that the data are saying that we don't really know how to define the problem; whatever the problem is, it is probably not as big as we thought; and however big the undefined problem is, it is not likely related to the cost of legal services.

I suggest the following as the bare minimum intellectual and empirical framework necessary to proceed with this sort of experiment. First, that the proponents of reform provide a single, coherent, reasonable definition of "justice gap." Second, that they identify an accurate way to measure it. Third, that they provide a baseline measurement for what the current justice gap is. Fourth, that they tell us what sort of improvement in the measured justice gap is necessary to consider the experiment a success. None of these are a part of the current proposal.

The justification for the sandbox proposal is that the legal system is in a crisis of access and affordability, which warrants a radical, untested, and experimental program to address it, with the consequences to be assessed later. Given that the conventional wisdom about this crisis appears to be dispelled by the data offered by the work group, I cannot see now any excuse for the headlong rush to adopt the sandbox proposal, and I urge that it be rejected.

The Justice Gap

Addressing the Unmet Legal Needs of Lower-Income Utahns

This report was commissioned by the Utah Bar Foundation.

EXECUTIVE SUMMARY

In April 2020, Utah Foundation – a nonprofit non-partisan public policy research organization – released a report focusing on the legal needs of lower-income Utahns. The purpose of the report is to inform the public of Utahns' civil legal needs and provide research to help stakeholders with informed decision-making on the future allocation of funding for legal resources. Utah Foundation undertook this project at the request of the Utah Bar Foundation.

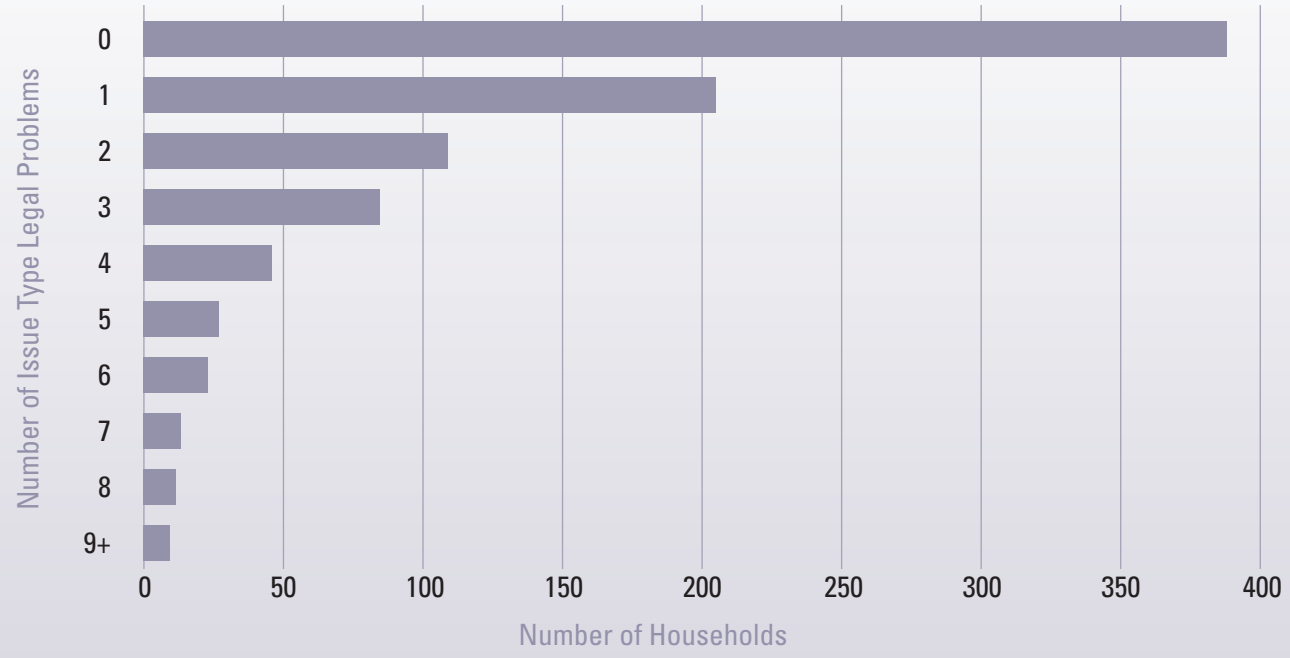
Recognizing that critical civil legal needs of low-income Utahns were left unmet, the Utah State Bar, pursuant to an order of the Utah Supreme Court, formed an Access to Justice Task Force in 1996 to make recommendations to address gaps in services. These efforts have led to significantly more Utahns receiving legal help to resolve their legal problems.

Even after much progress, however, Utah still has tremendous unmet legal needs.

The Justice Gap: Addressing the Unmet Legal Needs of Lower-Income Utahns is based on a Utah Foundation survey of approximately 1,700 lower-income Utahns – or the roughly 26% of Utah's population living at or below 200% of the federal poverty line. Utah Foundation, *The Justice Gap: Addressing the Unmet Legal Needs of Lower-Income Utahns*, *available at*

Figure 1: Number of Issue Types per Household, Random-Sample Survey

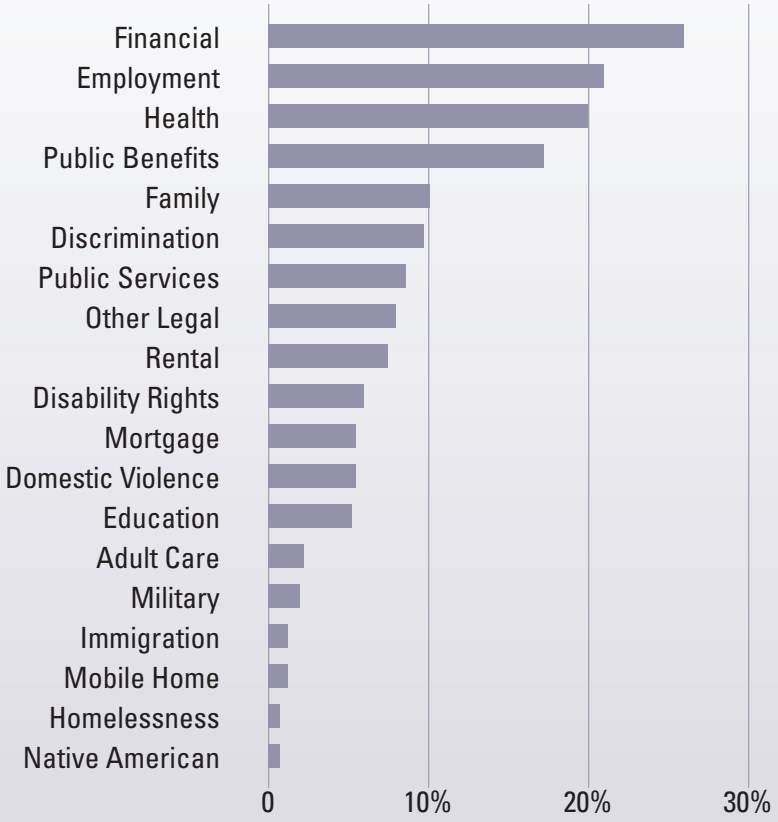
Most lower-income households have at least one civil legal needs issue type – and nearly a quarter have three or more issues.



Note: Survey questions asked about 19 issues types. Source: Utah Bar Foundation.

Figure 2: Percent of Respondents' Households with a Specific Need, all Random Sample Survey Responses

Financial legal needs are clearly the biggest issues for lower-income households, followed by employment and health care legal needs.



Note: Legal issues are divided by the total number of survey respondents, except the "Homelessness" and "Native American" bars, which are online-only responses weighted to be comparable to the other 17 issue types. Source: Utah Foundation.

https://www.utahfoundation.org/uploads/rr776.pdf. The report also relies heavily on data and analysis provided by Kai Wilson and David McNeill. In addition, the report includes short stories about the clients of legal service organizations, analysis of data from the United Way of Salt Lake's 2-1-1 information and referral service, and data from the U.S. Census Bureau's American Community Survey.

The data in this report were collected between November 2019 and February 2020. Note that as a result of the COVID-19 pandemic, certain types of the legal needs estimated in the report have or will likely become much more prevalent and more acute, such as civil legal needs issues related to finances, employment, public benefits, landlord/tenant, domestic violence, and others.

Utah Foundation's random sample survey of lower-income Utahns suggests that 57% of lower-income households have at least one civil legal needs issue – and nearly a quarter have three or more issues. See Figure 1.

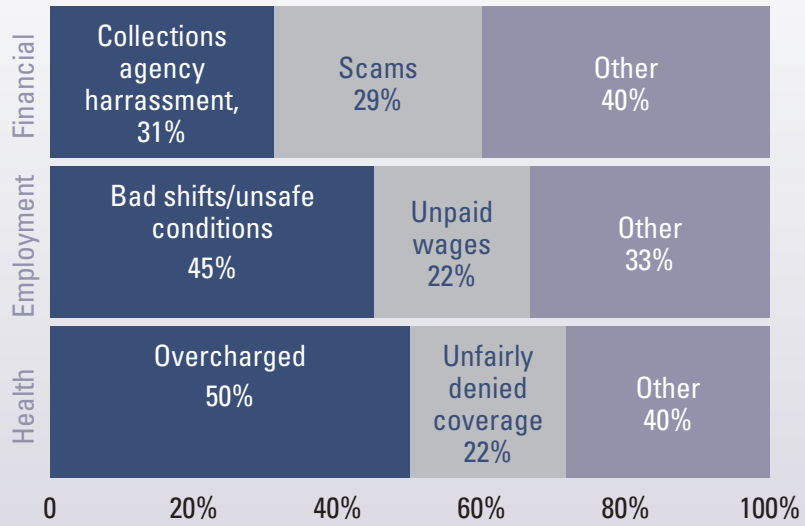
The survey found that financial legal needs topped the list of legal-need types. Over one-quarter of households had a financial legal need issue. This was followed by employment and health legal needs issues. See Figure 2.

People with financial needs are typically faced with debt collection agency harassment and scams. Employment issues have to do with working bad shifts or in unsafe conditions and not being paid. People with civil legal health problems report that they were charged too much for services and unfairly declined coverage. See Figure 3.

Some needs may be affecting households disproportionally hard. In fact, while domestic violence was the least reported

Figure 3: Percent of Respondents' Households with a Specific Need, all Random Sample Survey Responses

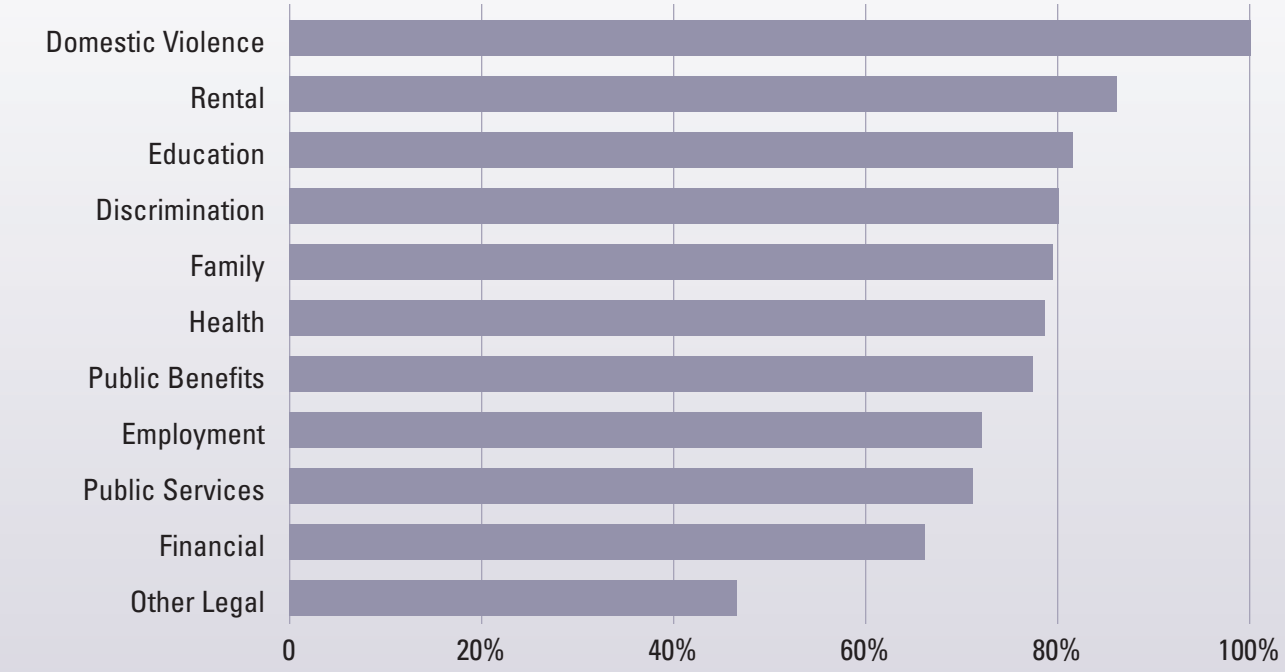
Households are grappling primarily with two types of issues in each the top three needs.



Source: Utah Bar Foundation.

Figure 4: Severity of the Legal Needs: "How much did the problem affect you or anyone in your household? Not at all, a little, somewhat, a lot," showing that issue affected household "somewhat" or "a lot," Online Random Survey Responses

Domestic violence is – as expected – at the top of the list of civil legal needs by how much they affect the household.



Note: Figure does not include issues with a small sample size.

legal issue of the nineteen types of legal needs, it had the highest rating for the severity of its impact on households. See Figure 4.

Resource disparities highlight the need for legal aid. With the 62,000 debt collection cases, almost none of the respondents or defendants have representation, and most respondents do not have representation for eviction cases. This is vastly unbalanced when considering that almost all of the petitioners or plaintiffs are represented. See Figure 5.

Why are respondents underrepresented? In part because two-thirds of Utah's lower-income survey respondents indicated that they could not afford a lawyer if they needed one – particularly in the face of $200 per hour legal fees. The situation is

Figure 5: Percentage of Self-Represented Litigants in Utah Court Civil Disposed Cases, FY 2019

Most defendants (respondents) in Utah are self-represented in civil cases.

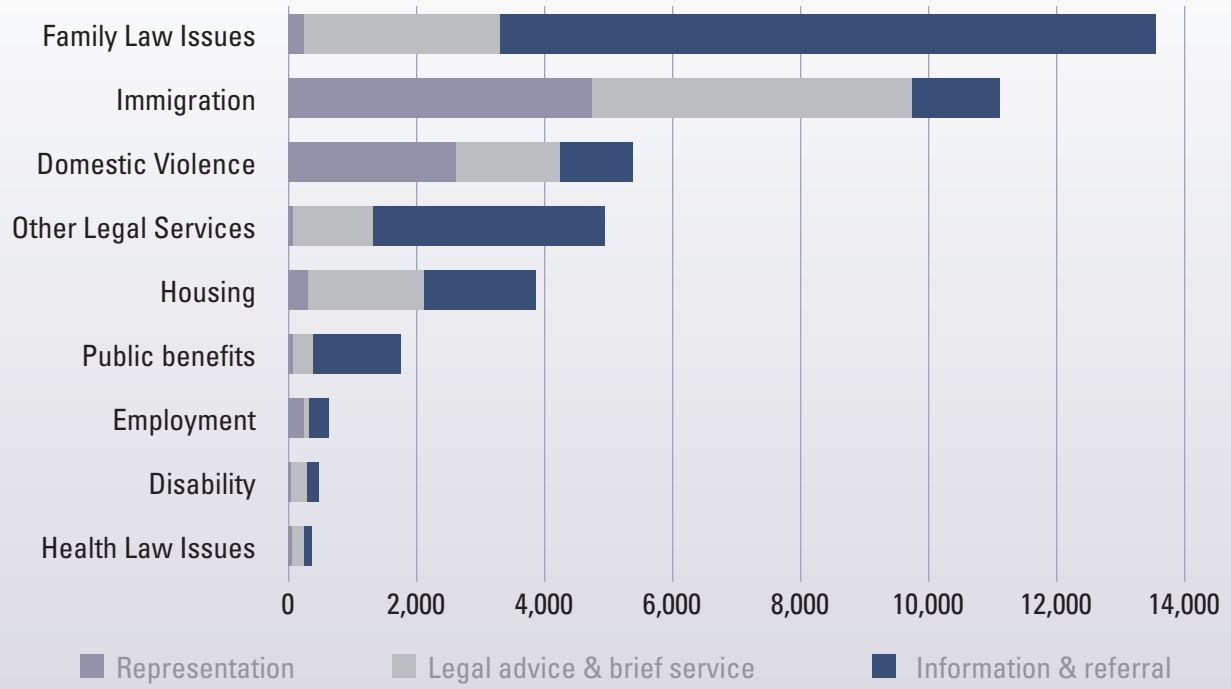
	Percentage of all civil cases	Self-represented petitioner	Self-represented respondent
Debt Collection	62%	0%	98%
Divorce/Annulment	14%	46%	81%
Eviction	6%	10%	95%
Protective Orders	5%	53%	70%

Note: Other cases are 2% or less of total cases, consisting mostly of contracts, estates, custody and support, adoption, civil stalking, name changes, and guardianships. The case is considered "disposed" upon dismissal or judgement.

Source: From the Utah Courts, Court Data Request received by David McNeill on January 9, 2020.

Figure 6: Number of Legal Services Provided in Utah, by Type of Support, 2019

Legal services vary widely by number and type of support.



Source: Kai Wilson.

even more dire in rural communities. As a result, most lower-income Utahns try to solve their legal problems on their own. This often takes the form of reaching out online. But many people also reach out to social service agencies and elsewhere, including information and referral services, particularly for landlord/tenant disputes and family law issues.

Of those lower-income households who are successful in procuring legal assistance, half are getting help for their family law and immigration issues rather than for financial issues. Domestic violence is not far behind. See Figure 6.

While existing legal services provide support for lower-income Utahns, analysis of Utah's civil legal system shows a large unmet need. In 2019, just over 40,000 lower-income Utahns received some type of legal aid. Utah Foundation's survey suggests that lower-income Utahns' legal problems might total over 240,000. This leaves an enormous legal needs gap. As a result, the 26% of Utahns living at or below 200% of the federal poverty line may find their legal needs insurmountable. See Figure 7.

Helping overcome the gap will take more funding for legal aid agencies (either from private or public sources), more social and and human service agency support, and more low-cost and pro-bono work by attorneys. While the call to close the legal needs gap has been sounded, there is still a long way to go.

Figure 7: Civil Legal Assistance (2019), Problems (2019), and Needs Gap, Households

Large legal needs gaps exist between the services provided and the number of problems households experience.

	Assistance provided to clients*	Number of problem areas, households**	Legal needs gap
Financial	n/a	42,570	42,570
Employment	694	35,145	34,451
Health Law	n/a	32,670	32,670
Public Benefits	2,171	27,060	24,889
Discrimination	247	16,005	15,758
Public Services	n/a	13,365	13,365
Housing	3,759	16,500	12,741
Disability Rights	426	7,755	7,329
Education	153	6,270	6,117
Other Legal	5,023	11,055	6,032
Adult Care	n/a	3,290	3,290
Family	13,584	16,830	3,246
Military	n/a	2,805	2,805
Native American	14	1,410	1,396
Domestic Violence	5,456	6,600	1,144**
Immigration ‡	11,193	1,980	(9,213)**
Total	42,720	241,310	198,590

* 49% of "assistance provided in 2019" was in the form of information and referral services. Please note that some assistance may be duplicated; clients may be counted more than once if referred by providers to other providers. See pages 9 and 10 in the full report for more details. Note that this is clients only, not secondary clients, which are typically in the same household as the client.

** The "number of problem areas" is an estimate of the percentage of random-sample survey respondents with a problem area type multiplied by the estimated number of households, multiplied by 66% – the survey respondents who perceived that their legal need "wasn't a big enough problem" or that they "didn't need help." See page 38 in the full report for more details.

‡ Some households may not respond that they need immigration help for fear of a lack of anonymity in the survey.

Source: Kai Wilson data and Utah Foundation random-sample survey.Utah Foundation calculations.

KEY FINDINGS OF THIS REPORT

- Most people do not have representation in civil legal cases in Utah; for the 62,000 debt collection cases, nearly 100% of petitioners (plaintiffs) have lawyers, compared with only 2% of respondents (defendants); for the 14,000 eviction cases, 90% of petitioners have lawyers, compared with only 5% of respondents.
- More than two-thirds of Utah's lower-income survey respondents indicated that they could not afford a lawyer if they needed one.
- While the median hourly fee for a Utah lawyer is between $150 and $250, fewer than one-in-five Utah lawyers offer "discounted fees and rates for persons of modest means" or a "sliding scale based on income."
- Rural counties tend to have relatively low availability of local legal representation.
- Most lower-income Utahns try to solve their legal problems on their own.
- When asked if the respondents tried to get help with the problems indicated in the survey, three-in-five said they did.
- Half of the respondents that sought help were successful; about one-in-five found assistance from a social or human service agency, one-in-five found help online, and another one-in-five hired a paid attorney. Only about one third used free legal help.
- Over half of all services provided for lower-income Utahns' legal needs are for family law and immigration issues.
- Financial legal needs topped the list of legal-need types with 26% of households, followed by employment (21%), health law (19%), and public benefits (16%).
- Domestic violence was the least reported legal issue of the nineteen types of legal needs in the survey at just 4% of households; however, it had the highest rating for severity for victims and their households.
- The most common employment law issues were that employees were forced to work overtime or "the bad shifts" and that employers "did not pay wages, overtime or benefits, or did not pay them on time."

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State v. Hunt and the Not-So-Real Lawyer of Nevada County

by Cathy Roberts

Public defenders are occasionally accused of not being "real lawyers" by some of their clients. This accusation hit me in a particularly vulnerable spot. I had graduated at age forty-four from the University of Utah Law School and had a tough time finding a job. I clerked for the Salt Lake City Attorney's Office and then did office administration for a family member. After volunteering for protective order hearings, I became a family lawyer and worked for Kipp and Christian for several years before leaving to do a year-long stint in medical malpractice defense for a different firm. Then I found myself unemployed at age fifty-two. Friends persuaded me to apply to the Salt Lake Legal Defenders Association, and miraculously, they hired me, though I had no criminal law experience. I stayed there nine fulfilling years, until I was appointed to a part-time position as a justice court judge.

As to the "not a real lawyer" accusation, I once huffed at such a client, "I am a real lawyer. I have represented Coca-Cola" (which I had, when one of their trucks hit a car). The client retorted, "Well then why can't you get me out of this third-degree felony drug charge?" Good comeback. I never bragged about my civil practice again.

After retirement from a position as a full-time justice court judge for Salt Lake City at the end of 2017, I had no plans to continue practicing law. For one thing, we moved to California where I had no interest in studying for its bar exam. In addition, as a judge in a criminal misdemeanor court and presiding over small claims cases, I had little recent experience with the actual practice of law. I wanted to spend more time with my horse, and to become part of the small rural community of Nevada County, California. I had enjoyed teaching as a judge, and so I qualified as a high school substitute teacher, where I could recount courtroom war stories to a captive audience.

However, I soon discovered that being introduced as a retired judge to my new barn friends would result in opportunities to provide legal advice. In one case, the owner of the barn where I board my horse was having a problem with the owner of two Arabian stallions. The horse owner hadn't paid board in fifteen years and owed the barn owner $37,000. Just to add context, Arabians are originally from the Arabian Peninsula, and they are a lovely breed with dish-shaped faces, delicate bones, and small compact bodies. They are favored by endurance riders for their ability to travel long distances without getting worn out, as opposed to quarter horses such as mine, whose idea of fun is lying down and rolling in sand, rather than carrying a human on their back for a hundred miles.

It was clear that the Arabians' owner, who lived hundreds of miles away and never visited them, had fallen in love with horses she could not afford to keep (a common problem with horse owners). Although the barn owner kept them fed and watered, the stallions were not regularly brushed or cared for, nor were they useful as studs, and the barn owner simply wanted them off his property.

I had the bright idea of taking the deadbeat boarder to small claims court where the owner could not collect the large amount of money she owed him but could be able to obtain ownership of the horses and do with them what he liked; i.e. geld them and send them to a nearby sanctuary.

CATHY ROBERTS, retired justice court judge and emeritus member of the Utah Bar Journal Editorial Board, with her horse M&M.

Now, the Utah connection: In *State v. Hunt*, 2018 UT App 222, 438 P.3d 1, Confetti Magic, a "free-range stallion," was on Hunt's land in Iron County, doing what stallions do; i.e. procreating and generally wreaking havoc. Hunt finally captured the stallion, which belonged to his neighbor, and castrated it. The Iron County district attorney filed criminal charges against Hunt and demanded high restitution because of the stallion's purported value as a stud.

The facts of Hunt are redolent of hay, manure, and testosterone. As the small, pinto-fox-trotter stallion grew, he began to get "real aggressive" and would "challenge" humans by "[coming] around with his ears back and his teeth bared and ready to get after you." *Id*. ¶ 5. He was enormously prolific, but his offspring were mainly studs who had inherited his wild temperament. Hunt eventually introduced a stud of his own into the herd, which caused further deterioration of the relationship with neighbor, as this stud dominated the herd. (As I see it, Hunt and the neighbor were using the stallions in a proxy war, like the U.S. and Russia.) Hunt's stud disappeared, turned up very badly beaten in an animal shelter, and then disappeared completely. When Confetti Magic chased Hunt and his horse one day, Hunt decided enough was enough and castrated the neighbor's stallion.

Hunt was charged with a second-degree felony of wanton destruction of livestock (based on the value of the studs) and went to jury trial on the case. He was found guilty of a Class A misdemeanor (based on the jury's assessment of the stud's value) and ordered to pay damages. Then he appealed, claiming self-defense, among other issues. The Utah Court of Appeals reasoned that, even assuming that the horse was a "person" for the purposes of the rule, the threat was not "imminent" and therefore the justification did not apply. The court also upheld the jury verdict as to the value of the studs.

My takeaway from the Utah case was that you can't just castrate your neighbor's stallion, even if it's baring its teeth, charging at you, and wrecking your property. You need to go to court. Although there was no teeth-baring or charging by the stallions at the barn, I advised the ranch owner, a cowboy in his late seventies with bad hearing, to file pro se in small claims court to obtain some control over the situation. As a legal guide, I used California Civil Code Section 3080, which reinforced my conclusion that the barn owner couldn't geld these horses without permission from the horse owner, despite her ridiculous fantasy that they were extremely valuable studs.

Section 3080 informed me that this barn owner had an "agister's lien" over the horses as soon as the horse owner had stopped payment. Cal. Civ. Code § 3080 (West 2020). Agister, from ancient French, is one who keeps livestock. He was clearly an agister. Executing the lien required going to court. The barn owner risked a charge of conversion, or even a criminal charge of theft, if he gelded the horses and then gave them away. The boarder could have contractually waived the requirement that he take her to court before getting rid of her horses, but the barn owner had not been aware of that when he wrote it up – I advised him to change all future contracts, which he has done. However, the stallions were already out of that barn door.

I helped him file a small claims complaint. Serving the boarder, who lived over one hundred miles away, was a joke. The process server wandered around rural Santa Cruz County, California, for awhile, and then gave up. However, the horse owner showed up the day of court, and the judge served her and scheduled another hearing. By the time the next hearing came, I had amassed all the documents for the barn owner to show at trial, so that he could prove that the horse owner had not paid for years. As our case was called, the defendant jumped out of her seat and began screaming that I had "claimed" that I was a judge and that I should not even be allowed in the courtroom, implying that I was unduly influencing a poor old man. She also stated that she wanted to settle the case, which it appeared the judge supported as well. I was at a loss for words. I could not imagine how badly a settlement conference would go. I told the judge that I was an attorney in Utah, but not in California, and thus did not intend to represent the client before the court. The judge suggested the two go into a conference room. The longer they were there the more worried I became, and sure enough, when they came out, they had entered a verbal "agreement" I knew was as empty as they come. The judge dismissed the case without prejudice. I have never felt like less of a "real lawyer" than at that moment.

Chastened, I apologized to the barn owner for the pitiful result. Amazingly, he believed we had prevailed because now the horse owner knew we were serious about the matter. In fact, since then the horse owner has paid him (although sporadically, and without making a dent in the arrears.) Kind people at the barn have stepped forward to groom the horses, even occasionally paying their vet bills.

Nonetheless, I recommended that the barn owner take her back to district court, and go for the full amount of money, this time hiring a "real lawyer" who could stand up in court, ears back, teeth bared, and ready to get after the defendant. (By the way, mares do that too.) Meanwhile, I have retired from my brief practice as a "not-so-real" lawyer.

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Securities Fraud in Utah

by Jake Taylor

In the wake of the 2008–2009 economic crash, the Utah Division of Securities (DOS) and other investigative agencies received an increased number of securities fraud complaints. In fact, the number of new investor complaints that DOS received doubled in fiscal years 2009 and 2010 from pre-recession levels. *See* Utah Dep't of Commerce, 2010 Annual Report, *available at* https://commerce.utah.gov/docs/report2010.pdf. This was not based so much on an increase in individuals committing securities fraud. Rather, the economic crash exposed perpetrators of securities fraud who were no longer in a position to pay returns to investors. When markets experience significant declines, investors typically seek to sell some of their investment holdings and raise cash. For promoters of Ponzi schemes, these increased requests from investors to cash out inevitably lead to the collapse and unmasking of some of these schemes.

With the recent and sudden economic downturn resulting from COVID-19, it is reasonable to assume that a similar pattern will soon emerge – an increase in the number of investor complaints based on non-payment of promised returns. Many of these complaints will be investigated and referred for administrative action or criminal prosecution. In light of Utah's reputation as a hot spot for "white-collar" crime, investigators and prosecutors in Utah take securities fraud cases very seriously.

What is securities fraud?

The Utah Uniform Securities Act sets forth the elements of securities fraud in Utah:

> It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly, to:
>
> (1) employ any device, scheme, or artifice to defraud;
>
> (2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Utah Code Ann. § 61-1-1.

This section is patterned after Rule 10b-5 promulgated by the United States Securities and Exchange Commission (SEC). 17 C.F.R. 240.10b-5 (2018). Statutes in other states have comparable language. In addition, violations of this section can be the basis for a civil cause of action by a victim of fraud under Utah Code Section 61-1-22.

Most securities fraud investigations and prosecutions focus on the second prong regarding misstatements or omissions of a "material fact." In *S&F Supply Co. v. Hunter*, 527 P.2d 217 (Utah 1974), the Utah Supreme Court defined a material fact as "something which a buyer of ordinary intelligence and prudence would think to be of some importance in determining whether to buy [a security]." *Id.* at 221. The Utah Supreme Court explained that "[t]he question of materiality as it relates to the importance or significance of the omitted information is…a factual issue to be determined by the jury." *State v. Larsen*, 865 P.2d 1355, 1363 (Utah 1993). In addition, reliance on a defendant's misrepresentations and omissions is not an element of securities fraud. *See State v. Facer*, 552 P.2d 110,

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112 (Utah 1976) ("[I]t is unnecessary to prove that a victim parted with the money or property in reliance on misrepresentations." (quoting *United States v. Amick*, 439 F.2d 351, 366 (7th Cir. 1971)).

What are the criminal penalties for securities fraud?

Utah Code Section 61-1-21 provides that a person who "willfully" violates Utah Code Section 61-1-1 is guilty of a third degree felony, which is punishable by up to five years in prison, if the property, money, or thing unlawfully obtained or sought to be obtained was worth less than $10,000. Utah Code Ann. § 61-1-21(2)(a). A person who "willfully" violates Utah Code Section 61-1-1 is guilty of a second degree felony, which is punishable from one to fifteen years in prison, if the property, money, or thing unlawfully obtained or sought to be obtained was worth $10,000 or more. *Id.* § 61-1-21(2)(b).

A person who "willfully" violates Utah Code Section 61-1-1 is guilty of a second degree felony if: (1) the property, money or thing unlawfully obtained or sought to be obtained was worth $10,000 or less; and (2) the violator "knowingly" accepted any money representing:

- equity in a person's primary residence;
- a withdrawal from an individual retirement account;
- a withdrawal from a qualified retirement plan as defined in the Internal Revenue Code;
- an investment by a person over whom the violator exercises undue influence; or
- an investment by a person that the violator knows is a vulnerable adult.

Id. § 61-1-21(3).

Moreover, a person who obtains or seeks to obtain $10,000 or more and "knowingly" accepts money from the above-listed sources is guilty of a second degree felony that is punishable by imprisonment for an enhanced prison term of not fewer than three years and more than fifteen years. *See id.* § 61-1-21(4).

What does it mean to act willfully?

Utah Code Section 76-2-103 provides that "[a] person engages in conduct…willfully with respect to the nature of his conduct or to a result of his conduct…when it is his conscious objective or desire to engage in the conduct or cause the result." Utah Code Ann. § 76-2-103(1). In the securities fraud context, to act willfully:

> means to act deliberately and purposefully, as distinguished from merely accidentally or inadvertently. Willful, when applied to the intent with which an act is done or omitted, implies a willingness to commit the act, which, in this case, is the misstatement or omission of a material fact. Willful does not require an intent to violate the law or to injure another or acquire any advantage.

Larsen, 865 P.2d at 1358 n.3.

Many defendants charged with securities fraud rely on a defense that their actions were not willful but rather negligent or careless. In one case filed in Salt Lake County, a defendant testified that his youth and lack of experience was such that he did not consciously misstate how he would use investor funds. Although the jury found the defendant not guilty of theft charges, it disagreed that his actions were not willful and found him guilty of securities fraud where he had used some investor funds for purposes unrelated to the investment, including sizeable payments to himself and loan repayments to others.

Who investigates securities fraud in Utah?

DOS, a division of the Utah Department of Commerce, investigates most securities fraud complaints in Utah. Its three primary sections are: (1) licensing and registration; (2) compliance; and (3) enforcement. The compliance section investigates complaints against individuals and firms who are licensed as broker-dealers or investment advisers, and the enforcement section investigates complaints against individuals who do not have a securities license.

The SEC also investigates securities fraud. While most criminal prosecutions that arise from SEC investigations result in federal charges, there have been some instances where the SEC has referred investigations for state prosecution. Other agencies that have investigated securities fraud include the investigations divisions at the Utah Office of the Attorney General (UAG) and Utah County Attorney's Office. In some of these investigations, the matter is not investigated as securities fraud until the investigator consults with DOS investigators or the prosecuting attorney receives a referral and recognizes that a security is involved.

What does an investigation generally involve?

Most securities fraud investigations involve an investor submitting a complaint to an investigative agency. DOS provides complaint forms on its website. *See* Utah Division of Securities, *Complaints*, https://securities.utah.gov/investors/complaints.html (last visited June 23, 2020). The complaint form requests supporting documentation such as stock certificates, promissory notes, investment contracts or agreements, checks or wire transfers, correspondence, etc. Upon receiving a complaint, DOS will determine whether the compliance or enforcement section should conduct the investigation and an investigator will be assigned. Although some DOS investigators have law enforcement backgrounds and certifications, they do not act or operate as law enforcement investigators.

Upon being assigned to review a complaint, an investigator may request additional documents and testimony from the complainant. The investigator will then conduct an analysis of whether the transactions or products involved in the case meet the definition of a "security" under state law. The definition of a security includes much more than just stocks, bonds, and other traditional investment vehicles. *See* Utah Code Ann. § 61-1-13(1)(ee). The analysis generally includes applying various legal tests for determining the existence of a security, including (1) the *Howey* test for determining the existence of an investment contract, *see S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946); or (2) the *Reves* test for determining if a note is a security, *see Reves v. Ernst & Young*, 494 U.S. 56 (1990). If the investigator determines that a security is not involved, he or she may close the investigation or, depending on the facts and circumstances, refer the matter to another investigative agency for continued investigation.

If the investigator determines that a security is involved, he or she will usually issue administrative subpoenas to financial institutions for bank records to inspect how investor funds were used. Following a review of bank records, the investigator will then likely issue a subpoena duces tecum to the subject of the complaint requiring that he or she appear at DOS at a specific date and time for an investigative interview and that he or she provide documents relating to the transaction described in the complaint. This includes documents containing the names and identities of all individuals from whom investment funds were received, an accounting of how all investor funds were used, bank records, and sales literature or other such advertising communication.

The subpoena duces tecum makes clear that the recipient is a "target" of an investigation, that the recipient may bring an attorney, and that the recipient has the right to not incriminate himself or herself. For individuals who reside far from Utah, the investigator will attempt to conduct an investigative interview by telephone. If the target appears for an investigative interview, the investigator will advise the individual that he or she may terminate the interview at any time and leave. If the target appears without counsel, the investigator will repeat to the target that he or she may have an attorney present. An attorney who has experience in securities litigation and dealing with DOS will understand the focus of DOS's investigation and can advise a client who is a target how to improve the odds against further investigation or formal action. Depending on the facts and circumstances, this advice may include appearing to answer questions, choosing to not appear, or invoking Fifth Amendment protections. And an attorney may want to advise the target that making false statements at such an interview is unlawful under Utah Code Section 61-1-16 and is punishable as a third degree felony.

Following the investigation, DOS will "round-table" the matter to determine possible action. This "round-table" process involves investigators, examiners, analysts, DOS supervisors, and legal counsel from UAG discussing the facts and merits of the case. The outcome of a "round-table" will typically include:

- taking no action and closing the investigation;
- referring the matter for criminal prosecution; or

- referring the matter for administrative or civil action.

A referral for criminal prosecution could also include a referral for administrative action. Generally, an administrative action will be stayed pending the duration of a criminal prosecution.

Who prosecutes securities fraud cases in Utah?

UAG has traditionally prosecuted most criminal securities fraud cases in Utah. The unit at UAG that prosecutes securities fraud is known as the "Mortgage & Financial Fraud Unit" (MFFU). MFFU has on average four attorneys and one paralegal handling these prosecutions that are filed throughout the state. MFFU receives nearly all of its securities fraud cases from DOS. In addition, securities fraud cases have traditionally comprised at least half of MFFU's caseload.

A referral from DOS will generally consist of a "case summary" and accompanying exhibits. In the case summary, an investigator will provide a prosecutor with a factual outline that includes:

- an analysis of why the transaction involves a security;
- who offered or sold the security;
- who was solicited or purchased the security;
- misstatements of material fact or omissions of material fact; and
- how investor funds were used.

The case summary will also contain any civil litigation history, bankruptcy history, or criminal history pertaining to the target of the investigation. The case summary may propose additional statutes upon which charges can be based, including securities-related charges, such as unlicensed agent activity or sale of an unregistered security, and charges that are not securities related, such as theft and pattern of unlawful activity. MFFU has traditionally included the case summary as part of its discovery package to defense counsel.

MFFU usually accepts securities fraud referrals where there is a significant Utah connection. And MFFU will prosecute non-Utah residents who receive investment funds from Utah residents. Conversely, MFFU will prosecute Utah residents even if investors are located outside of Utah. Most MFFU securities fraud cases tend to involve multiple investors who are generally Utah residents.

Other agencies in Utah prosecute securities fraud but to a much lesser extent. This includes various county attorney offices including the Salt Lake County District Attorney's Office. DOS sometimes refers securities fraud cases to county attorneys where the investor or all investors reside in the same county. Quite often, considering the smaller number of investors involved, the securities fraud cases that a county attorney's office prosecutes involve monetary loss amounts that are lower than the securities fraud cases that MFFU traditionally prosecutes. Unlike UAG, most county attorney offices do not have "white-collar" units with prosecutors who can focus exclusively on "white-collar" prosecutions.

The Financial Crime Section (FCS) at the United States Attorney's Office for the District of Utah is another agency that prosecutes securities fraud in Utah. In the absence of any specific federal securities fraud statute, FCS will accept referrals from DOS and typically prosecute pursuant to federal wire fraud or mail fraud statutes. FCS also accepts referrals from the SEC. FCS customarily accepts matters only involving higher alleged loss amounts – usually in the millions. Such matters often involve lengthy prison sentences under federal sentencing guidelines.

What are investigators and prosecutors looking for?

Investigators and prosecutors want clean cases with no loose ends. Unlike street crimes or violent crimes, securities fraud investigators and prosecutors have the luxury of taking more time to build a case. In larger cases, they may also investigate and prosecute other individuals such as sales agents or individuals acting as sales agents – basically individuals who are referring investors in exchange for commissions. One problematic situation for prosecutors is where investors solicit others to invest. While such investors may truly be victims of fraud, the fact that they have solicited others to invest engenders a more compelling cross-examination by defense counsel because the investor may have made misstatements or failed to disclose material information. For instance, the investor may not have disclosed to the person she was soliciting that she (the investor) did not perform her own due diligence on the investment.

As mentioned above, a DOS investigator will analyze if a financial transaction involves a security. If a security is not involved, the investigator may refer the matter to another investigative or prosecuting agency to determine other possible criminal law violations. Such referrals may result in criminal charges of communications fraud in violation of Utah Code Sections 76-10-1801 through 1802. Unlike securities fraud, communications fraud requires a "scheme or artifice to defraud." In some situations, a prosecutor may file communications fraud charges as alternative charges to securities fraud.

What happens after a case is filed?

Following the filing of criminal charges, a securities fraud case will be assigned to a judge like any other criminal case. Many securities fraud charges filed in state district courts go to a preliminary hearing. MFFU prosecutors will sometimes file a "bench memorandum" in advance of the preliminary hearing. The bench memorandum includes a history of securities laws, the various legal tests for determining the existence of a security, the elements of securities fraud, and how appellate courts have analyzed willfulness.

A securities fraud preliminary hearing typically involves investors testifying about their communications with the defendant, including what the defendant offered and whether the investor chose to invest. Through the investor, the prosecutor will offer exhibits that include copies of stock certificates, promissory notes, and investment contracts. The prosecutor will also offer exhibits demonstrating that money changed hands, such as a check. If there are out-of-state investors, MFFU will generally present their testimony through affidavits pursuant to Rule 1102 of the Utah Rules of Evidence. In some circumstances, MFFU will arrange for out-of-state investors to appear and testify at a preliminary hearing. Moreover, MFFU will take measures to ensure that an elderly investor's preliminary hearing testimony is preserved for trial pursuant to Rule 14(a)(8) of the Utah Rules of Criminal Procedure. In many securities fraud prosecutions, investors tend to be older individuals who have substantial savings to invest. Moreover, investigators will generally testify at preliminary hearings about statements that defendants made at investigative interviews, the investigator's review of bank records, and how the defendant used investor funds.

MFFU prosecutors generally do not present securities experts or forensic accountants to testify at preliminary hearings. However, in larger cases where a bankruptcy trustee or court-appointed receiver has familiarity with how investor funds were used, the trustee or receiver may testify. In this scenario, the bankruptcy trustee or court-appointed receiver has expertise as a forensic accountant and can offer an opinion as to whether the manner in which funds were used, the commingling of funds, or the disregard of corporate formalities involve characteristics of financial fraud.

Experts will testify for the prosecution at trial. The securities experts that MFFU retains are transactional attorneys who specialize in securities law, i.e., attorneys who advise clients on public offerings and other similar issues. In MFFU prosecutions, a securities expert will usually testify as the first witness to explain to the jury what a security is and what the industry standards are with respect to materiality and making full disclosures in connection with the offering and sale of securities. The securities expert may testify again after the prosecutor has presented all of her or his evidence to opine regarding the existence of a security and whether the statements or omissions of information would have been important to an investor. The prosecutor should take care to ensure that the securities expert limits his or her opinion to whether the statements or omissions would have been important under industry standards rather than Utah law. *See State v. Larsen*, 865 P.2d 1355, 1360–63 (Utah 1993) (stating that "securities expert should [avoid] employing the specific term 'material'" because it "[transgresses] into the area reserved for the jury by instructing the jury as to what legally constitutes material information").

The forensic accountants that MFFU retains are certified public accountants and certified fraud examiners. In MFFU prosecutions, a forensic accountant would testify just as he or she might at a preliminary hearing – that he or she reviewed how investor funds were used and whether such use involves characteristics

of financial fraud. Forensic accountants who testify in securities fraud prosecutions prepare exhibits consisting of summaries of how investor funds were used. These summaries are normally admissible pursuant to Rule 1006 of the Utah Rules of Evidence. Investigators generally do not testify at trial about use of investor funds because they are not forensic accountants and, thus, are not as qualified to opine regarding characteristics of financial fraud.

Defenses that are most often asserted at trial include that the defendant did not act willfully ("this was more negligence rather than willfulness") and that the use of investor funds for purposes unrelated to the investment was appropriate ("the investors knew that I wasn't working for free") or inadvertent ("I accidentally deposited an investor's funds into my checking account"). Prosecutors tend to only file actions involving blatant misuse of investor funds. One example of blatant misuse is a case filed in Utah County where a defendant received investor funds totaling $225,000 that he used in part to purchase a Mercedes-Benz vehicle for his own personal use. Another example is a case filed in Salt Lake County where a defendant tried to justify using investor funds for personal use by declaring that the victim was "investing in me."

Lesser utilized defenses include that the transaction did not involve a security ("it was a loan, not a security") or that the untrue statements or omissions were not material ("so I forgot to disclose that that I filed for bankruptcy twenty-five years ago, what's the big deal?"). Duress resulting from spousal abuse is a defense that has recently been asserted. In that case, the defendant unsuccessfully testified that her abusive husband coerced her into taking part in soliciting investments.

The majority of securities fraud cases do not go to trial. Plea agreements almost always revolve around a defendant's ability to pay restitution. Cases with lower restitution amounts are more easily resolved. These are cases where the loss amount is usually lower than six figures. In such cases, a defendant might have family or a benefactor who can help pay restitution. One defendant in Washington County was lucky to be closely acquainted with a prominent dentist in western Canada who promptly paid $100,000 upfront to satisfy the restitution.

In cases involving lower restitution amounts (usually under $100,000) and smaller numbers of investors, MFFU would often agree to a misdemeanor plea deal so long as all restitution was

paid up front and the defendant had no prior fraud or theft history. In other cases, the loss amount is high enough that there is no reasonable expectation of restitution. These cases are more likely to proceed to trial. Regardless of the size of a case, prosecutors are wary of defendants who might pay restitution by taking money from new investors. Accordingly, they will often want to confirm whether the restitution source is legitimate.

What do judges consider at sentencing?

In criminal cases, judges try to follow the traditional sentencing factors of (1) rehabilitation, (2) restitution, (3) deterrence, and (4) punishment. In securities fraud cases, judges tend to focus more on the restitution and punishment factors. If there is any chance that victim investors can get meaningful restitution, judges will try to impose a sentence that facilitates payment of restitution as a probation condition.

One creative sentence involved a judge in Washington County who sentenced the defendant to a year in jail with the possibility of early release upon payment of full restitution. Somehow, through family or otherwise, the defendant came up with the full restitution and was released after a few months. When imposing a sentence that facilitates payment of restitution, prosecutors will request a restriction that a defendant not be permitted to handle funds as a fiduciary.

Prison is more likely in cases with loss amounts approaching or exceeding $1 million, or where a defendant takes no responsibility for his or her actions and makes no attempt to pay even a small amount of restitution before sentence is imposed. In these cases, the Utah Board of Pardons and Parole may consider earlier release upon payment of full restitution.

Judges also consider input from victims, which can vary depending on the victim's relationship to the defendant and the victim's desire or need for restitution. In many cases, victims who are family members, fellow congregants, or neighbors, tend to request leniency. While all victims want restitution, those who understand that restitution is unlikely are more inclined to recommend severe or punitive sentences. Other victims request probation with the desperate hope that at least a fraction of restitution might be paid.

What are administrative and civil enforcement actions?

Utah Code Section 61-1-20 sets forth the procedures for administrative and civil enforcement actions in Utah. Under this section, the UAG may file administrative actions or civil actions on behalf of DOS. An administrative action takes the form of an order to show cause that is filed before the Utah Securities Commission, a five-member panel appointed by the governor. The outcome of an administrative action typically involves the commission issuing a cease and desist order or imposing a fine. A civil action takes the form of a complaint filed in state district court. The outcome of a civil action may include:

- issuance of a permanent or temporary injunction;
- issuance of a restraining order;
- entry of a declaratory judgment;
- appointment of a receiver;
- an order of disgorgement;
- an order of rescission;
- an order of restitution; or
- imposition of a fine.

The filing of criminal charges normally results in a stay of any related administrative or civil action. A guilty plea or conviction in a criminal action will usually have the result of concluding a stayed administrative or civil action in favor of DOS. Administrative actions are more common than civil actions. Typically, civil enforcement actions are only used in cases where there is a need for a temporary restraining order because of an ongoing threat to investors or the need to freeze assets and appoint a receiver to marshal assets and distribute those assets to victims.

Conclusion

To understand securities fraud in Utah, you need to know who the investigators and prosecutors are and the processes they follow in investigating and prosecuting securities fraud. You also need to understand the factors that judges consider and the hopes that victims have for restitution. And not every securities fraud case is the same – there is a wide range of cases ~~fro~~m promoters of Ponzi schemes who utilize multiple sales agents to raise millions to a neighbor or old friend who suggests investing just a few thousand dollars. As economic trends decline and the number of securities fraud complaints will likely rise, an understanding of the processes and issues helps considerably when litigating securities fraud cases in Utah.

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Understanding the Intersection of Technology and Attorney Ethics

by Michael Swensen

In our evolutionary society, one thing can be guaranteed, technology will continue to evolve and change. If you've ever felt overwhelmed by the sheer volume of technology that has entered the legal profession, you're not alone. From case management systems, to billing and time keeping technologies, there simply is no shortage of legal technology. With this expansive buildout of technology, you might be left wondering what your legal and ethical obligations are to your firm and clients when it comes to technology. I hope to highlight some of those obligations in this article, both ethical and professional, when it comes to technology, the practice of law, and your clients.

As attorneys we are bound by certain rules of professional conduct. Rule 1.1 of the Rules of Professional Conduct mandates that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill thoroughness, and preparation reasonably necessary for the representation."

Over the last several years, the American Bar Association and most state bar associations, have interpreted Rule 1.1 to include an obligation that attorneys stay up to date with changes in technology that could have a meaningful impact on how a client is represented. Bob Ambrogi, *A 37th State Adopts the Ethical Duty of Technology Competence*, LawSites (Sept. 18, 2019), https://www.lawsitesblog.com/2019/09/a-37th-state-adopts-the-ethical-duty-of-technology-competence.html.

To think upon the last decade, you can see why the associations are incorporating technological competency as an element of Rule 1.1. We've gone from paper filing to e-filing all matters within our system, and most firms have moved time tracking from a manual process to an automated system. And that is just to name a few of the technological changes.

Consequently, with the undeniable shift towards technology facilitating the practice of law, it is incumbent upon us as attorneys to be aware of and utilize technology in the best way to represent our clients.

So, what does it mean to be technologically competent. While no set definition exists, one thing that is clearly required is an understanding of how technology can improve or enhance the representation of your clients. It's important for all attorneys to review new technologies that may help streamline case processing, document drafting, and other tasks that may improve the overall client experience. Furthermore, attorneys must begin to acquire a basic understanding of technology terms and phrases. Understanding how to use comprehensive search tools, how to properly protect and secure digital files, and other basic technology improvements, are essential to ensuring you meet your ethical obligations.

In an effort to quickly discuss what it might mean to be technologically competent, I want to briefly discuss two types of technologies that I believe every firm, regardless of size, should implement or at least consider implementing to fulfill their ethical obligations to their clients.

First on the list is the implementation of a document management system. Given the transition to e-filing, it only seems appropriate to discuss technologies that will store, manage, and protect firm documents. Rule 1.15 of the Rules of Professional Conduct requires an attorney to maintain client property in a secure and protected environment. In the not too distant past, firms were filled with filing cabinets and locked doors protecting large amounts of client files and documents. While this is still true, as some documents and evidence exist in paper or other tangible form, more and more documents are being stored online or in a

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cloud environment. Consequently, attorneys need to understand the what, how, and why of the cloud or other digital environment being used to store client documents and files.

For example, in reviewing digital storage systems for client files, you should verify that your digital storage system is protected from outside attacks. You want a system that offers strong protection from hackers and viruses and protects your client files from unauthorized attempts to access the digital storage system. In the best situation, your provider will have industry certifications like SOC 2 Type 2 or Privacy Shield, which establishes practices and procedures for protecting data. Accordingly, if you want a system that offers these things, you must understand what they are.

The most comprehensive digital storage systems will also enable your firm to create electronic ethical walls that will prohibit access to individuals within the firm. These ethical walls enable the firm to work without concern related to any conflicts of interest that may exist. Utilization of a document management system that offers internal ethical wall building and offers internal and external users strong security protections is becoming an essential obligation of a technologically competent attorney.

A second tool that firms may want to employ to best meet the standards of competence required by Rule 1.1, as it pertains to technology, is a case management system. A comprehensive case management system can help to ensure that cases are properly tracked from start to finish. A good case management system will automatically create a case upon it being logged into the system. It will then begin to track the process of the case as an attorney begins to perform work. A comprehensive system will allow the attorney to input all relevant dates of the case. The system should then provide updates and alerts when deadlines approach or other important tasks need to be completed. Ideally, these systems will integrate with any calendar system you have to automatically update attorney calendars and keep all individuals attached to the case on track and on task.

Finding the right system depends on your specific firms needs. A small firm might only need minimal options, while a large firm may need every option available. Understanding what your firm needs and how a specific technology fills that need is your ethical duty.

While I've only mentioned two specific types of technology that may ease and streamline some internal processes, there are undoubtedly hundreds more that exist. That's why it is so important for an attorney to be competent in technology. Failure to implement a specific technology could result in an ethics committee finding that you have violated your obligations to your client.

The most important piece of information that should be taken from this article is that it is an attorney's job and part of their ethical and professional obligation to understand technology and embrace it where appropriate. No longer can we say, "That's how we used to do it." As technology evolves, we as attorneys must evolve to better represent our clients in ways that may not have previously been possible. By embracing the challenge to learn new skills and technologies, we can be the best advocates for our clients.

Protecting Clients and the Profession When Changing Law Firms

by Keith A. Call

Several years ago I received an urgent – even frantic – phone call at 8:05 on a Monday morning. It was my elderly mom's financial advisor. He was letting me know he had just told his employer he was changing firms and was calling to make sure that my mom's account would go with him. (Given the very modest size of Mom's account, I was surprised I got the call so early.) I'm sure he was doing that with all of his clients. And so the frenzy of competing for clients upon the advisor's departure went.

Anyone who practices a significant amount of non-compete law knows this drill. A salesperson or account manager decides to change jobs, and the frantic fight to retain clients and customers ensues.

This should not be happening in the legal world, at least according to a recent American Bar Association (ABA) ethics opinion. According to the ABA, the lawyer changing law firms and the law firm have ethical duties to orchestrate a more orderly transition of clients when a lawyer changes firms. This transition must be guided by client choice. *See* ABA Standing Comm. on Ethics & Prof'l. Resp., Formal Op. 489 (Dec. 4, 2019). Opinion 489 describes the notice requirements for both the lawyer and the law firm when a lawyer changes firms.

Client Choice

A foundational principle of Opinion 489 is client choice. "Clients are not property. Law firms and lawyers may not divide up clients when a law firm dissolves or a lawyer transitions to another firm. Subject to conflicts of interest considerations, clients decide who will represent them going forward when a lawyer changes firm affiliation." *Id*. at 3. The opinion continues, "[C]lients must be notified promptly of a lawyer's decision to change firms so that the client may decide whether to go with the departing lawyer or stay with the existing firm and have new counsel at the firm assigned." *Id*. at 4. This is consistent with a Utah ethics opinion. *See* Utah State Bar Ethics Advisory Opinion Comm., Utah Ethics Op. 132 (1993) ("It is the client, and not the departing or remaining lawyers, who determines who will be its counsel and who may keep the files.").

Thus, the departing lawyer and the former law firm do not get to decide who will represent the client going forward. That is solely up to the client.

Orderly Communication

Lawyers have a duty to represent clients with diligence, keep the client reasonably informed, and make reasonable efforts to expedite litigation consistent with the interests of the client. Utah. R. Prof'l. Cond. 1.3, 1.4, & 3.2. In furtherance of these obligations, Opinion 489 asserts that "the firm and departing lawyer should attempt to agree on a joint communication to firm clients with whom the departing lawyer has had significant contact, giving the clients the option of remaining with the firm, going with the departing attorney, or choosing another attorney." Opinion 489 at 2. The opinion contemplates that this joint communication may occur before the departing lawyer actually leaves the firm. *See id*. at 2–3. While the opinion emphasizes that "[l]awyers and law firm management have ethical obligations to assure the orderly transition of client matters," *id*. at 1, the opinion recognizes that, in the absence of a joint agreement, both the departing lawyer and the law firm may unilaterally inform clients of the lawyer's impending departure at or around the same time that the lawyer provides notice to the firm, *see id*. at 2. A law firm cannot prohibit the departing lawyer from soliciting firm clients. *See id*. at 2–3.

Departing lawyers should communicate with all clients with whom the departing lawyer had significant contact. "'Significant client contact' would include [any] client identifying the departing lawyer, by name, as one of the attorneys representing the client."

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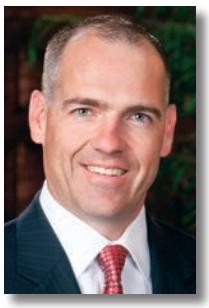


Id. at 3. A departing lawyer has not had "significant client contact" if, for example, the lawyer prepared one research memo for another attorney in the firm but never actually spoke with the client. *Id*.

"Similarly, remaining members of the firm may communicate with these clients, offering for the client to be represented by the firm, another firm, or the departing lawyer." *Id*. The firm should offer to continue representing the client only if it has the capacity or expertise (or the ability to retain lawyers with sufficient capacity and expertise) to handle the matter. Neither the departing lawyer nor the firm may engage in false or misleading statements to clients. *Id*. at 3–4.

Orderly Transition

Both the departing lawyer and the law firm have a duty to protect client interests during the transition. Law firms may require departing lawyers to notify firm management contemporaneously with the departing lawyer communicating to clients, employees of the firm, or others, so that the firm and the departing lawyer can work together to assure professional transition of client matters. The firm and the departing lawyer must assure that all electronic and paper records for client matters are organized and up to date. When a client decides to stay with the firm, the departing lawyer has a responsibility to update both the client files and the lawyers taking over the client matter. The departing lawyer and law firm should in all instances endeavor to coordinate, even after departure, to protect the client's interests. *See id*. at 4; *see also* Utah Ethics Op. 132 ("[N]either a law firm nor the departing lawyer should deny the other access to information about the matter that is necessary to protect the client's interests.").

The law firm and departing lawyer also have a duty to protect confidential client information. To do so, a departing lawyer whose client is not transferring with the lawyer shall return or delete confidential client information in his or her possession. Opinion 489 at 4–5.

Notice Requirements

In order to assure the orderly transition of client matters, law firm policies and agreements may request that lawyers provide reasonable notice prior to departure. In practice, such notice periods may not be fixed or rigidly applied without regard to client instruction and may not be used to punish a lawyer for choosing to leave the firm. If such policies would affect a client's choice of counsel or serve as a financial disincentive to a competitive departure, the notification period could violate Rule 5.6 of the ABA Model Rules and the Utah Rules of Professional Conduct (restrictions on the right to practice law). Opinion at 5–6.

Access to Firm Resources during Transition Period

After the firm knows the lawyer intends to depart and before he or she actually departs, the departing lawyer must have access to adequate firm resources to competently represent the client. For example, the firm cannot require the lawyer to work from home, withhold appropriate support staff, or withhold the assistance of associates or other lawyers previously assigned to the matter. *See id*. at 6.

Once the lawyer has departed, "the firm should set automatic email responses and voicemail messages…, to provide notice of the lawyer's departure, and offer an alternative contact at the firm for inquiries." *Id*. at 7. A supervising lawyer at the firm should review the departed lawyer's mail and messages in accordance with client instructions. *See id*.

Conclusion

Being a lawyer is a time-honored service profession. For most lawyers most of the time, it is also a competitive, for-profit business. Lawyer departures can be messy. Opinion 489 provides guidance that will help lawyers and law firms navigate the discomfort of lawyer departures in an orderly and fair manner – and one that keeps client choice and protection at the forefront.

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.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the July 16, 2020 Commission Meeting held at the Law & Justice Center in Salt Lake City.

- The Bar Commission voted to appoint **Magistrate Judge Paul Kohler** and **Abby Dizon-Maughan** to co-chair the 2021 Spring Convention.

- The Bar Commission voted to adopt the findings and recommendations of the Bar's Committee on Regulatory Reform and to submit those findings and recommendations to the Utah Supreme Court.

- The Bar Commission voted to appoint the following *ex officio* Commission members for the 2020–2021 year: the Immediate Past Bar President (**Herm Olsen**); the Bar's Representatives to the ABA House of Delegates (**Nate Alder** and **Erik Christiansen**); the Bar's YLD Representative to the ABA House of Delegates (**Camila Moreno**); Utah's ABA Members' Representative to the ABA House of Delegates (**Margaret Plane**); the Utah Minority Bar Association Representative (**Raj Dhaliwal**); the Women Lawyers of Utah Representative (**Ashley Peck**); the LGBT and Allied Lawyers of Utah Representative (**Amy Fowler**); the Paralegal Division Representative (**Sarah Stronk**); the J. Reuben Clark Law School Dean (**Gordon Smith**); the S.J. Quinney College of Law Dean (**Elizabeth Kronk-Warner**);and the Young Lawyers Division Representative (**Grace Pusavat**).

- The Bar Commission voted to appoint **Heather Farnsworth**, **Heather Thuet**, **Marty Moore**, **Mark Morris**, **Michelle Quist**, and **Katie Woods** as members of the Executive Committee.

- The Bar Commission voted to approve members of the Executive Committee to serve as signatories on the Bar's checking account.

- The Bar Commission approved the June 5, 2020 Commission meeting minutes by consent.

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

MCLE Compliance Update for the 2020 and 2021 Reporting Periods

2020 CLE COMPLIANCE REPORTING PERIOD

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 has authorized the Board of Continuing Legal Education 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.

In addition, compliance deadlines have been extended 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

The Supreme Court has also authorized the Board of Continuing Legal Education 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. **PLEASE NOTE: The 2020 Compliance Reporting Period Extension does not apply to the 2021 Compliance Reporting Period.**

Utah State Bar Names New President and Commissioners

The Utah Supreme Court swore in a new president and commissioners of the Utah State Bar in an online ceremony that took place instead of the Bar's standard practice of swearing in officers at its Summer Convention.

Heather Farnsworth, a partner in the firm Match & Farnsworth, is the Bar's new president. Marty Moore was elected Commissioner from the Bar's First Division, covering Cache, Rich, and Box Elder counties. Traci Gunderson, Mark Morris, and Andrew Morse were elected commissioners from the Third Division, covering Salt Lake, Summit, and Tooele counties. Rick Hoffman, CPA and Shawn Newell were appointed by the Utah Supreme Court as Public Members of the commission, replacing Mary Kay Griffin and Steve Burt respectively. Commission members serve three-year terms, while presidents serve for one year.

Mandatory Online Licensing and Extension of Late Fees

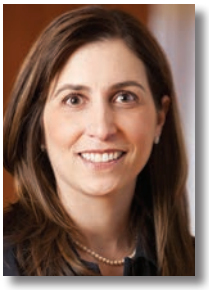
The annual Bar licensing renewal process has begun and can be done online only. An email containing the necessary steps to re-license online at https://services.utahbar.org was sent on June 5th. **Online renewals and fees must be submitted by July 1st and will be late November 1st. Your license will 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 ninety days of the deadlines for the assessment of late fees and suspension for non-payment is for this licensing year only.

Utah Bar Foundation Welcomes Two New Board Members

The Utah Bar Foundation is pleased to welcome Elaina M. Maragakis and Timothy M. Wheelwright to the Board of Directors. They join the Utah Bar Foundation Board to replace outgoing and long-time members, Leonor Perretta and Lori W. Nelson.



Elaina M. Maragakis is a shareholder and director at Ray Quinney & Nebeker, P.C. She practices in the firm's litigation section, serves as chair of the firm's Cybersecurity and Privacy practice and is a member of RQN's Executive Committee.

Timothy M. Wheelwright is a member of Durham Jones & Pinegar's Litigation section. Mr. Wheelwright's practice focuses primarily on routine and complex immigration matters for companies and individuals.

Elaina and Tim will bring vast community knowledge and involvement to the Board of the Utah Bar Foundation. Please join us in welcoming them.

Notice of Petition for Reinstatement to the Utah State Bar by Terry R. Spencer

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Office of Professional Conduct hereby publishes notice that Terry R. Spencer has filed an application for reinstatement in In the Matter of the Discipline of Terry R. Spencer, Third Judicial District Court, Civil No. 170906087. Any individuals wishing to oppose or concur with the application are requested to do so within thirty days of the date of this publication by filing notice with the Third District Court.

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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.

ADMONITION

On May 26, 2020, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.7(a) (Conflict of Interest: Current Clients) of the Rules of Professional Conduct in two instances.

In summary:
In the first matter, the attorney contacted the owner of a company (seller) introducing themself as the attorney preparing draft agreements for the sale of the business to two other parties (buyers). The attorney did not obtain written consent or waiver for the representation of the seller or buyers. The attorney communicated to seller and buyers that they were asked to prepare an operating agreement for the company. The seller retained another attorney (new attorney) to represent them on the operating agreement issues. The buyers contacted the attorney because they wanted to sue seller for breach of contract, fraud, and theft. The attorney sent an email to the new attorney asking if they would be willing to accept service.

In the second matter, agents with two state entities (agents) executed a search warrant on two facilities (facility one and facility two). The attorney represented facility two in transactional matters and acted as a registered agent for some of their locations. One of facility two's employees (employee) expressed a willingness to be interviewed by government agents and had assisted them with some documentation. The CFO of facility two told the employee that they needed representation to accompany them to the meeting with the agents and arranged for the attorney to attend the meeting with the employee.

The attorney met with the agents and indicated that they were there as the employee's attorney. The attorney indicated further that they advised the employee not to come to the meeting until they had talked to the agents. The agents told the attorney the details of the case, including that they were primarily targeting the owners of the facilities. The attorney agreed to have the employee meet with the agents later in in the day. The attorney contacted employee informing them of the new meeting time and stating that they were representing employee now and not facility two. The employee met with the attorney at facility one and asked about attorney fees. The attorney requested a dollar bill from employee and started handwriting a contract on a sticky note. After leaving to make a phone call, the attorney returned and stated they could no longer represent employee but continued filling out the sticky note contract and had employee sign it although they did not take any money from employee.

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

ADMONITION

On July 6, 2020, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law) of the Rules of Professional Conduct.

In summary:

A client retained the attorney to petition the court to recognize the client's common law marriage and the attorney filed the petition. A few weeks later, the attorney changed their license status with the Utah State Bar to inactive. Notice for a hearing was issued and the attorney attended the hearing but did not notify the client or the court of their change to inactive status. The court concluded that the client and their partner had been involved in a marriage and instructed the attorney to prepare the order. The attorney was unable to efile the final documents because of the attorney's inactive status. The client contacted the attorney to remind them that an extension for filing the client's tax returns was set to expire, but the attorney indicated the order had not been signed. The attorney hand delivered a notice to submit and findings of fact. The documents did not identify the attorney as the client's attorney. A note on the docket for the case indicates that the findings were in efiling format with no lines for the judge to sign and that the attorney attached to the case is inactive. Another note on the docket indicated the court notified the client that the attorney became inactive. The client was later able to obtain an order granting their petition.

Mitigating Factors:

Absence of a dishonest or selfish motive; personal or emotional problems; timely good faith effort to make restitution or to rectify the consequences of the misconduct involved; and physical disability.

Join us for the OPC Ethics School

Virtual Presentations:
September 16, 2020 • 2:00 pm – 5:00 pm
September 17, 2020 • 9:00 am – noon

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

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 June and July. 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.

Expungement Day

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Kathryn Bleazard
Cory Caldwell
Kenneth Carr
Michael Colby
Gregory Constantino
Melinda Dee
Daniel Diaz
Samantha Dugan
Joshua Egan
Julie Ewing
Jennifer Foresta
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Erika Larsen
R. Chet Loftis
Elisabeth McOmber
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Sandi Ness
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SUBA Talk to a Lawyer Legal Clinic

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Kevin Simon
Greg Walker
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Timpanogos Legal Center

Cleve Burns
Elaine Cochran
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Mike Black
Russell Blood
Jill Coil
Kimberly Coleman
John Cooper
Jessica Couser
Olivia Curley
Lauren DiFrancesco
Elizabeth Dunning
Matthew Earl
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Marca Tanner Brewington
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Christopher Eckels
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Diploma Privilege Candidates
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Blaine Hansen
Katie Okelberry
Jaime Wiley

President's Message

by Grace Pusavat

I am thankful for this opportunity to lead as president of the Young Lawyers Division (YLD) of the Utah State Bar for the 2020–2021 term. YLD has a strong history of providing young lawyers tools to navigate the early years of a career, opportunities to network and serve our community, and resources to grow professional skill sets. These are unprecedented times. YLD faces new challenges that it never has before. But YLD has learned and will continue to learn from adversity and explore fresh opportunities to rise to the occasion. During my term as president, YLD's strong history of serving its young lawyers and our community at large will endure.

COVID-19 has affected all of our lives in ways we never thought possible. Social gatherings have given way to social distancing. Networking now takes place in the virtual space. Adapting to a virtual world poses challenges. In many ways, each of us might feel more disconnected from our peers. But it has also brought us together. The barrier of physical proximity that before might have prevented two young lawyers in St. George and Logan from finding reason to interact now seems artificial. In some ways, we are now on equal footing, every one of us a video call away. This is a chance for growth.

This year, YLD will continue its quality programming and opportunities for its members by offering resources, CLEs, networking, and support for young lawyers in the virtual climate. Any young lawyer, anywhere in the state, will be able to access these opportunities with ease. The daily disconnect from one's immediate peers can be a stressful experience. YLD will also place an emphasis on lawyer well-being during these tumultuous times. YLD will continue to offer robust pro bono opportunities that provide significant contributions to our community, and demonstrate that physical bonds are unnecessary to maintain a tight-knit relationship with our peers. Our focus on providing virtual means of engagement allows us to invigorate and expand our service offerings to rural areas.

I believe YLD and the young lawyers it represents will grow from this opportunity. The lessons of this era will survive the pandemic. Even when we can once again hold in-person events, YLD will continue to enhance its offerings through its virtual capabilities. Together, we will create a system to ensure that all of us remain connected despite any upheavals we might face in our careers.

A True Hometown Hero – A Tribute to Krystal Hazlett

by Heather Allen

Passionate, advocate, service oriented, selfless, kind, hardworking, determined, bold, champion of others, devoted, fun, adventurous, and inspiring. These, and many more words can be and are used to describe the late Krystal Hazlett by those who knew her best.

Krystal died on July 19, 2020, from natural causes in her home. This loss is a shock to her friends, family, and colleagues. Each person who knew Krystal will have memories of her that will be cherished as we learn to navigate the world without her. She made the world better and in turn made those she knew better, who in turn should make those around them better.

Krystal's career as a paralegal began in 2004 when she started working as a Legal Tech for Salt Lake City Corporation. A year later she graduated from Salt Lake Community College with her Associate of Science in Paralegal Studies. This degree was obtained after she had received her Bachelor of Science in Sociology/ Criminology in 2002 from the University of Utah. Krystal received her Certified Paralegal certificate in 2009 from NALA, the Paralegal Association. In 2015 she received her Master's Degree in Public Administration from Southern Utah University.

Her work as a paralegal was focused on supporting the Salt Lake County Special Victims Unit from 2007–2014. She worked every aspect of the cases that came through their office, fighting for the victims.

Attorney Nathan Evershed said of Krystal,

> Krystal Hazlett was a great paralegal, a staunch supporter of victims, a courageous defender of the truth, and a very loyal friend. I was privileged to work alongside her and she was one of the most devoted people I ever knew. She was tenacious, strong, compassionate, and worked very hard to make the justice system better. The positive impact she has had on individual lives, particularly victims, will be felt for a very long time. Krystal, thank you for your tireless work, your loyalty, and your friendship. You accomplished so much and made this world a much better place. You will be greatly missed.

The past five years Krystal's work took her to the Utah Governor's Office where she served first as a program manager and later as grant manager and site coordinator for Utah Sexual Assault Kit Initiative (SAKI). Krystal fought tirelessly for victims. This work helped implement the statewide kit tracking system and worked behind the scenes on legislation for restricted kits and sexual assault protective orders. Krystal also managed funds to "ensure every previously un-submitted and partially tested kit in Utah was tested." She performed her jobs with grit and determination, always professional and kind, and succeeded.

When Krystal explained her work with Utah SAKI and her passion to aid not only the victims in the cities of Utah, but to aid victims in the rural areas and the victims on the Native American reservations, it was not hard to feel the excitement with her. She and her team had worked so hard and found great joy when they had been granted access to go speak with the tribe councils. Utah SAKI, in their post on Facebook, said of Krystal, "She was a force to be reckoned with in her advocacy for victims of sexual assault…she felt culture change occurs one person at a time." Her passion for the project and her compassion for the victims were what propelled her.

Fighting for victims was during the day, and in the evenings,

Krystal used her time as an Adjunct Teacher of Paralegal Studies for Salt Lake Community College. One of her students said the following, "Krystal is wonderful! I really enjoyed her class because of how engaging and interesting she is. She shared her experiences as a paralegal and gave everyone a realistic view on the day-to-day activities of the job." Krystal showed interest in her students and wanted them to be ready and able to be the next great generation of paralegals.

Krystal sat on the board of the Paralegal Division of the Utah State Bar from 2012–2015. During that time, she was a Director at Large, Community Service Committee Co-Chair, Marketing & Publications Chair, and Chair Elect. Her true passion within the Paralegal Division was in the Community Service Committee. Even after leaving her life as a paralegal to do great things in the governor's office, she continued to volunteer for the Wills for Heroes events with the Paralegal Division. She has volunteered many Saturdays to serve those that serve our communities, taking the time to talk with and thank them.

Wills for Heroes was merely the tip of the iceberg on Krystal's community service. She participated and encouraged those in her circle to participate in charity golf events and marathon runs to support any number of causes. Krystal supported grieving children at The Sharing Place and donated time to help prevent child abuse as a Court Appointed Special Advocate. She volunteered at the Utah Food Bank as a senior food box deliverer. Collected clothing for the Salt Lake Domestic Violence Coalition, and spent time at the Candy Cane Corner and the Road Home. Krystal enjoyed giving of her time to help lift others and have some fun (Sundance). Her motto was, "Do it because it's in your heart, not because you want something in return." ~ Socrates

We feel an overwhelming sense of loss. Our thoughts go out to her family. Her memory reminds us that everyone has a footprint to place on the lives of others, that compassion is essential to our connection with others and that service always has a place within our lives.

"Give people the love they've never received before. Teach people things about life. Leave a stamp on their heart, that way they won't forget you." ~ Reyna Biddy. This is what Krystal has done.

Message from the Paralegal Division

by Greg Wayment

I would like to introduce the 2020–2021 Board of Directors of the Paralegal Division. We are pleased to announce the chair for this year is Tonya Wright. We have three new members joining the Board of Directors and wish to extend a warm welcome to them. We also wish to thank outgoing members Candace Gleed, Paula Christensen, Cheryl Miller, and Kristie Miller. This year's Board of Directors are:

Tonya Wright
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Chair-Elect | Region 2 Director | UPL Liaison | Governmental Relations

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Angie Jensen
Director at Large | Community Service Chair

Greg Wayment
Director at Large | Marketing Chair

Sarah Stronk
Immediate Past Chair

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.

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

Friday Mornings, October 1 – December 17

2020 FALL FORUM VIRTUAL CLE SERIES

Hello, friends! It has been so long since we've gathered.

We are deeply interested in our collective well-being and safety, so we have switched gears to planning online events. With those precautions in mind, we are planning to host a virtual Fall Forum for 2020.

We want to provide opportunities to learn, to update each other, and to socialize when we can. Along those lines, we are planning up to **ten hours of CLE programming**, video updates from Heather Farnsworth, Bar President, as well as a virtual exhibit hall where members can interact with one another and our vendors.

Please consider joining us over ten Friday morning sessions between October 1 and December 17. We will have pricing options allowing attendees to register for individual sessions or a group of four, called the Mini Forum, or to register for the Full Forum of ten sessions.

Please watch for a full agenda and registration to be published by September 8 for all who are interested in joining. Again, please plan that we will gather for ten individual sessions, facilitating optimal attendance at any or all learning sessions, as schedules allow.

We continue to wish you well and hope that you, too, look forward to gathering this Fall!

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

Established AV-rated business, estate planning and litigation firm with offices in St. George, UT and Mesquite, NV is seeking two attorneys. We are seeking a Utah-licensed attorney with 3–4 years' of experience. Nevada licensure is a plus. Business/real estate/transactional law and civil litigation experience preferred. Firm management experience is a plus. Also seeking a recent graduate or attorney with 1–3 years' experience for our Mesquite office. Ideal candidates will have a distinguished academic background or relevant experience. We offer a great working environment and competitive compensation package. Please send a resume and cover letter to Daren Barney at daren@bmo.law.

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.

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

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

Expert Consultant and Expert Witness in the areas of: Fiduciary Litigation; Will and Trust Contests; Estate 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.

Certificate of Compliance

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.

Billing Address: _____ Zip Code _____

Credit Card Type: ☐ MasterCard ☐ VISA Card Expiration Date: (e.g. 01/07) _____

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Please Note: Your credit card statement will reflect a charge from "BarAlliance"
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