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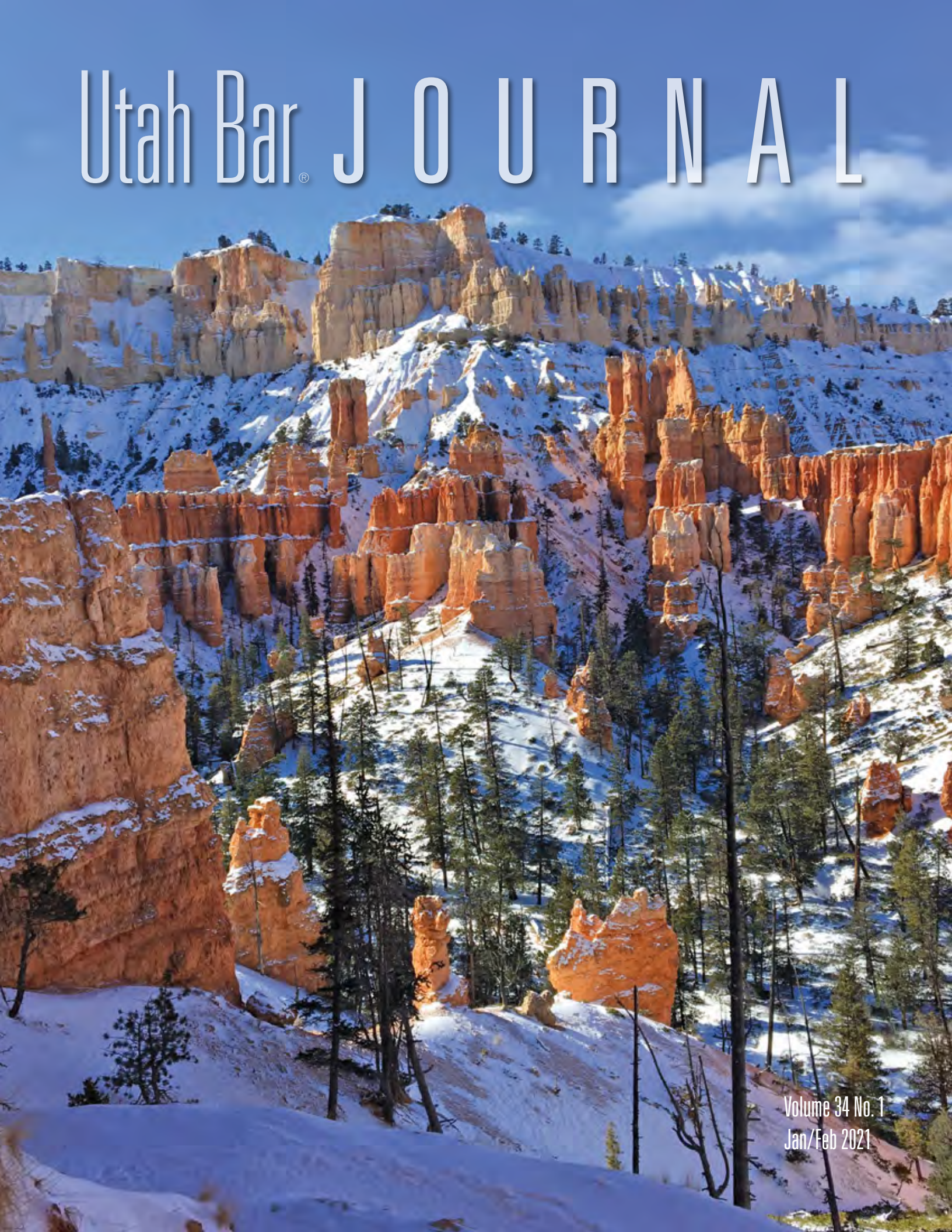

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Jan/Feb 2021

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The Utah Bar Journal

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MISSION & VISION OF THE BAR:

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

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Cover Photo

Bryce Canyon National Park in Winter by Utah State Bar member Jeffrey Hall.

JEFF HALL is a chief deputy at the Salt Lake County District Attorney's Office. When he's not at his desk, he's ski touring in the mountains, hiking in the forest, or trail running with his dog. About his cover photo, Jeff said: "Last year our family traveled to Bryce Canyon National Park at the end of December and hiked in the very cold, but beautiful snow covered red rock features of the park. I heartily encourage you to visit the park in winter. Although the thermometer read six degrees the morning I took this photo, we thoroughly bundled up, wore traction devices on our boots, and relished the bright sun and electric blue skies. Don't let the winter weather dissuade you. As my kids hear me say all the time: 'There's no such thing as bad weather, there's only inadequate gear.'"

SUBMIT A COVER PHOTO

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

Utah Bar JOURNAL

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

GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

The *Utah Bar Journal* encourages the submission of articles of practical interest to Utah attorneys and members of the bench for potential publication. Preference will be given to submissions by Utah legal professionals. 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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Creating a Culture Shift

by Heather Farnsworth

Have you heard the one about the lawyer who only sleeps two hours a night? I have. She is a local legend – lauded for her ability to bill like a machine. I remember the first time I heard the story, and I thought about how much I need (and like!) sleep and reassured myself that choosing the small firm life was the smart choice for me if that is what it takes to survive big firm life. While I do have some sense of balance I suppose, it would be laughable for me to pretend I have not been an active participant, a viable competitor even, in the arena of the stress-brag. You know what I mean – the one-upping that occurs when one person mentions how spent they are, and everyone in the room begins to recite a list of each of their obligations, piling higher and higher about how stretched thin they are, and the winner is the longest piece of pulled taffy in the room. As lawyers, it is ingrained in our culture to be proud to be over-scheduled. We assume that to be busy and stressed must equate to success.

> *"[D]espite our stress levels, the lack of work life balance, and the risks we face as a result… Utah attorneys like what we do."*

Last spring, before the days of COVID, the Bar conducted a survey of its members. One of the purposes of this survey was to compile feedback about job satisfaction and work/life balance to discover ways to improve service offerings to Bar members and to compare results from the 2011 survey to see how things have changed. More than 3,000 Bar members responded. Almost half of survey respondents believe lawyers are more likely to have work-related stress as compared to other highly educated or trained individuals who have responsibility for others' safety, financial, medical, or legal welfare. *See 2020 Utah State Bar Member Study*, Utah Bar Apr. 8, 2020, https://www.utahbar.org/wp-content/uploads/2020/11/Bar-Survey.pdf (hereinafter "*Bar Survey*"). In fact, 45% of survey respondents believe lawyers are more likely to have work-related stress as compared to others, while 34% believe they are significantly more likely. *Id*. Not surprisingly then, 42% of respondents have left or considered leaving a law firm in the past five years and 59% of those who have considered a different type of practice indicate the impetus was to maintain work/life balance. *Id*. at 152, 153. Yet, only 19% of respondents indicate they have sought out services for work-related stress in the past two years. *Id*. at 158. Therein lies culture problem number two: lawyers are notoriously reluctant to ask for or to seek help.

This reluctance to seek services is particularly troubling when considering the data from the Utah Lawyer Well Being Study. As indicated by Dr. Theise, preliminary data from this study suggests significant problems exist among practicing Utah lawyers placing us at risk. Matthew S. Thiese, *The Utah Lawyer Well Being Study: Preliminary Results Show Utah Lawyers at Risk*, 33 Utah B.J. 29 (Mar./Apr. 2020). These concerns include:

- 44.4% of responding lawyers reporting feelings of depression;
- 10.5% reporting prior drug abuse;
- 48.7% reporting some level of burnout; and
- Lawyers in the study being 8.5 times more likely to report thoughts of being "better off dead or hurting themselves" than the general working population. *Id*. at 30.

Dr. Theise notes, "When considered in terms of the magnitude of risk, this data tell us that if you are a lawyer in Utah you are more likely to experience one or more of these concerns." *Id*. He states that for the most concerning of these risks, suicidal ideation, Utah lawyers have "an odds ratio with a magnitude of 8.5…on par with the risk of lung cancer among smokers." *Id*.

But despite our stress levels, the lack of work life balance, and the risks we face as a result, the study and the survey both show Utah attorneys like what we do – with a majority of participating attorneys having a moderate (46%) or high (46%) level of job satisfaction, *id*., and more than half of survey respondents saying it is very likely they will stay in the legal profession until retirement (55% say it is very likely while 27% say it is likely), *Bar Survey,* at 142. The answer is not to change our careers but to change our culture.

Truth be told, most partners in firms are likely concerned about the individual attorneys in their office. If they see an associate struggling with substance abuse, or mental health, it is likely that most would at least encourage them to seek care. But are they interested in a wide-spread well-being initiative? They should be, not just because its "the right thing" but because – as we've learned in this year of juggling zoom meetings with home-school, self-haircuts, and cats on keyboards – lawyers are whole people and as much as we compartmentalize, at some point, our life and our lawyer life collide. Taking the steps to improve our ability to respond to and manage stress benefits us personally and professionally. Our "Psychological Capital," a state that can be thought of as mental strength and flexibility, can be incredibly effective in heightening our ability to meet challenge and manage stress. Martha Knudson, *Psychological Capital Building the Mental Strength and Flexibility to Manage Stress and Boost Performance* 33 Utah B.J. 24, (Mar./Apr. 2020). It is linked with "increased job performance over that which is related to skill and intelligence alone. And, it is also associated with higher job commitment, job satisfaction, and lower absenteeism and attrition rates, things that we and our legal organizations care about." *Id* at 25.

In 2019, the Utah Bar established The Well-Being Committee for the Legal Profession (WCLP) to advance the recommendations of the Utah Task Force on Lawyer & Judge Well-Being. I have asked the Bar Commission, in conjunction with the WCLP, to move forward with monthly CLEs focusing on a whole-person approach to lawyering. We would like to partner with sections to provide educational opportunities and activities focusing on improving lawyer well-being to shift the narrative from stress-bragging to creating space for ourselves and a culture that encourages healthy coping. If you or your section would like to sponsor an event or have suggestions for an event, please contact me at: hfarnsworth.barpresident@utahbar.org.

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2021 Legislative Session Primer

by Doug Foxley, Frank Pignanelli, and Stephen Foxley

With the global COVID-19 pandemic still causing impacts across government, the Utah State Bar is offering members an update of what changes are in store for the legislative season as the Utah Legislature prepares to convene for the 2021 General Session. We also wish to remind readers of the process that guides the Bar's advocacy.

The General Legislative Session will begin earlier than prior years, with a new commencement date of Tuesday, January 19, 2021. This is due to the passage of Constitutional Amendment F that allows the legislature to set a start date anytime in January by statute. Anticipating passage of this constitutional amendment, the legislature adopted S.B. 156 in the 2020 session, which provides, "The annual general session of the Legislature shall begin the first Tuesday after the third Monday in January."

You can expect several new limits on lobbying activity at the Capitol. For example, unlike in years past, lawmakers will not leave the House and Senate floors to speak with the public. The ability to send in blue and green notes to lawmakers from outside legislative chambers will also be eliminated. However, the legislature is still working to conduct as much business as possible in person and to allow public participation. The State Office Building just north of the Capitol is undergoing retrofitting to allow for committee hearings in large spaces that can accommodate greater social distancing. Throughout 2020, lawmakers also conducted several special sessions and interim hearings with a mixture of in-person and online participation. That hybrid will likely continue during the General Session. Other ideas have also been proposed, such as making on-demand COVID-19 testing available at the Capitol or establishing an NBA-style "Bubble."

In terms of a legislative agenda, expect the COVID-19 response, gubernatorial powers, and economic development to be front and center. Legislative leadership has expressed a desire for members to limit legislation outside of these areas to prioritize bills and issues that were addressed by committees over the past year to address the issues Utahns have experienced over the past year as a result of the pandemic. Adjusting the state's budget will also be a priority. November estimates of total collections are surprisingly strong. General and Education Funds are up by more than 32.6%. Sales tax numbers are especially strong, more than 10.2% above the prior year. Gas tax revenues are also up. The biggest growth came from the income tax, which is up by 51.8%. That eye-popping number comes primarily from the later income tax filing date, which shifted tax collections from the prior fiscal year into 2021. The current target is for revenue growth of 16.8% for the current fiscal year.

Another development for 2021 will be how Governor-elect Spencer Cox and his new administration interact with the legislature. Cox was the liaison with the legislature as Lieutenant Governor and given his experience in the legislature, there will likely be some changes from the Herbert administration. We also look forward to Governor-elect Cox continuing to name attorneys to the bench that have made our judiciary one of the best in the nation.

The Bar's legislative activities are limited by design and follow United States Supreme Court precedent outlined in *Keller v. State Bar of California*, 496 U.S. 1 (1990). When the Utah Supreme Court adopted rules that directed the Utah State Bar to engage in legislative activities, it identified specific guardrails to align with the limitations expressed in *Keller*. These defined areas

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

of the Bar's involvement in legislative activities include matters concerning the courts, rules of evidence and procedure, administration of justice, the practice of law, and access to the legal system. Public policy positions are determined by the Bar commissioners after receiving input from the Government Relations Committee (GRC). The Bar may also grant section authority to advocate a position on its behalf if it is a matter where the section has a particular interest or expertise.

The GRC is led by Jaqualin Peterson and Sara Bouley, and each section of the Bar has a designated representative. The GRC meets weekly during the legislative session, with meetings conducted online this year to allow for sufficient social distancing. The Bar posts its positions to the public on its website so members may have transparency and clarity into this process. Please contact your section leaders if you are interested in pursuing involvement with the committee or would like the Bar to take a position on a particular bill.

The recent elections delivered the dynamic of a high number of law-trained legislators. (Of course, the more lawyers the better!). In the House, there are fifteen lawyer-legislators, including three new members (Doug Owens, Jordan Teuscher, and Nelson Abbott), and in the Senate, there are five. Mike McKell joins the Senate after previously serving in the House, while Lyle Hillyard is retiring after forty years and Dan Hemmert will be joining Governor-elect Cox's administration as the Director of the Governor's Office of Economic Development.

Please note, several non-attorney lawmakers also play a major role in issues that may be relevant to your practice.

In recent years, the Bar has played an active role in major public policy debates, such as taxation of legal services, whether the supreme court should regulate the practice of law, and what criteria should be considered when filling judicial vacancies. As our state continues to grow and change, we anticipate there will be other major issues that will require the Bar's input.

We know that 2021 presents unique challenges and opportunities for the legislature and will require attorneys who interact in the legislative process to be creative and adaptive in their advocacy efforts. If you have any questions about how we can help, please feel free to reach out to the Bar or your lobbyists.

2020 Utah State Lawyer Legislative Directory

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Kirk Cullimore, Jr. (R) – District 9
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Education: B.A., Southern Utah University; J.D., University of Idaho

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

THE UTAH STATE HOUSE OF REPRESENTATIVES

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

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Unsettled Issue in a Divorce Suit: Should Granted, Unvested Stock Options Constitute a Marital Asset or a Separate Asset?

by Sharon A. Donovan and Kayla H. Quam

For domestic cases in Utah, the general rule is that courts equitably divide marital property and return premarital property, gifted property, or inherited property to the acquiring spouse. Property that is earned after entry of the decree of divorce is generally earmarked as the acquiring spouse's separate property.

With stock options granted during the marriage but that do not vest until after the entry of the decree of divorce, various state court rulings have lacked consensus. In Utah, there is no reported case law that directly addresses the question of whether granted but unvested stock options are deemed an employee spouse's separate asset or a marital asset.

This article explores that question by (1) discussing when to divide such stock options and two common methods of division; (2) examining how other state courts have addressed the issue of granted, unvested stock options; and (3) analyzing Utah cases that provide analogous reasoning that could be applicable to the issue of granted, unvested stock options in Utah courts.

Before getting into the analysis, by way of background, a stock option is defined as "the right to buy a designated stock at anytime within a specified period at a determinable price, if the holder of the option chooses." Eric Hollowell, *Divorce and Separation: Treatment of Stock Options for Purposes of Dividing Marital Property*, 46 A.L.R.4th 640, § 1[a] (originally published in 1986). The grant date is defined as the date the option "becomes the employee's property." *See* Tiffany A. McFarland, Nat'l Bus. Inst., *Dividing Stock Options in Divorce* 1 (2018). In contrast, if a stock vests, it means it is "exercisable" or "matured," and the employee may use the option to buy the stock. *See* Hollowell, *supra* at § 2[a].

Classifying and Dividing Granted, Unvested Stock Options

The first step in deciding whether a granted, unvested stock option should be divided in a divorce suit is to focus on classification of the stock option. One should ask:

- When did the grant of options occur: before the marriage, during the marriage, after separation, or after the date of divorce?
- When did or does the vesting occur?
- When did or do the options become exercisable?
- If the grant occurred during the marriage, was it toward the beginning of the marriage or at the end?
- Were the stock options granted to reward past work or to incentivize future work?

See McFarland, *supra* at 8. The last point is key. Employers offer stock options to reward past work and/or to incentivize future work. *See id*. If the grant of stock options is to reward

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past work – presumably during the marriage – the argument that the asset is a marital asset is strengthened. If the reward of the stock options is to incentivize future work – presumably after the date of the divorce – that could suggest it is one's separate asset.

To determine whether the award was for past work or to incentivize future work, one must look to the circumstances surrounding the grant, including, but not limited to:

- Was there a letter or documentation surrounding the grant explaining the reasoning for the grant?
- When did the grant occur and under what circumstances? Was it right after a big project was completed, or does the company have a regular policy of offering the grants after x years of work with the company?
    - The former could suggest it was a reward/bonus for past work (marital asset), and the latter could suggest it is an incentive to remain with the company (separate asset).
- Was it voluntarily given to the employee, or did the employee have to negotiate for it?
    - Negotiation suggests the grant could be a substitute for salary, and compensation earned during the marriage is generally considered a marital asset.
- Were the options spread out over time or front-end loaded?
    - The former could suggest an incentive to remain with the company, and the latter could suggest it is more a form of compensation.
- Did other co-workers in similar positions or tenure receive the same granting of options?
    - If it is the employer's policy to grant stock options after any employee has been with the company for x amount of time, this could suggest the grant is the company's way of compensating for loyalty to the company for past work (marital asset).

See id. at 3–4.

If after conducting the above analysis, one determines the options are entirely or partially marital assets, the focus shifts to division of the asset. There are generally two ways stock options can be divided in a divorce suit: (1) net present value and (2) deferred distribution. *See* McFarland, *supra* at 9–11 (noting a third valuation method is to "reserve jurisdiction," where the division occurs once benefits are actually paid, but the analysis is similar to deferred distribution). The pros and cons of each division method are discussed below.

Net Present Value

First, with net present value, there is an immediate distribution to the non-employee spouse based on the net present value of the future benefit after reduction for the payment of taxes. To determine the present value, one looks to the current value of the stock; projected values when the stock option vests and can be exercisable; actuarial data; and other factors.

This valuation method could be beneficial to the non-employee spouse because it reduces interaction and potential conflict with the former spouse; the non-employee spouse could start investing the proceeds so the funds begin working for him or her; and it lowers the non-employee spouse's risk in the event the stock does not perform well in the future or the employee leaves the company before the options are exercisable.

Along those same lines, if the non-employee spouse is fearful the employee spouse would sabotage the non-employee's claim to the granted, unvested options, it can be advantageous to obtain

an immediate payment for his or her share of the options, even if that means accepting a discount on the funds. The authors of this article are aware of a situation where the divorcing couple agreed the stock options would be paid out equally once the options vested, which was years away. Shortly after the decree of divorce was entered, the employee spouse began negotiating with a new employer for a more remunerative salary based on the fact the employee spouse would leave unvested stock options from his prior employer. The new company agreed, and the employee spouse quit his job. While the employee spouse received the benefit of the unvested options through his new income package, the non-employee spouse was left empty-handed.

Dividing the net present value may be less desirable for the employee spouse because it is contingent upon ongoing employment. If the non-employee spouse was paid out the net present value of the stock option that fails to become exercisable, the non-employee spouse received a windfall at the employee spouse's expense. The net present value paid to the non-employee spouse may also end up being higher than the benefit actually received by the employee spouse, again resulting in a windfall to the non-employee spouse.

On the other hand, the employee spouse may be confident that the stock options will be more valuable in the future based on company projections and one's knowledge of that company and upcoming projects. By doing a lump sum payout to the non-employee spouse at the time of the divorce, the future windfall belongs to the employee spouse. Further, an attorney could negotiate a discount on the net present value as a way to factor in the risk that the employee spouse's employment may be terminated or the stock options could be worth less by the time of vesting. The lack of contact with the non-employee spouse may also be desirable.

According to this division method, which aims to make a clean break and limit contact in a divorce suit, the most effective way to divide the asset is to have a marital estate sizeable enough to afford the pay-out. Set payments for a certain period will work, but it is not preferred.

Deferred Distribution

Under the deferred distribution method, the parties divide the marital options when the options become exercisable. This method eliminates the need to agree on a current value of the stock options when the options remain unvested. This division method is also known as the wait-and-see approach. *See* Tiffany A. McFarland, Nat'l Bus. Inst., *Dividing Stock Options in Divorce*, 1, 10 (2018). The main benefit to this distribution method is that the parties share in the risk and upside. *See id*. If the business outperforms projections that were held as of the date of the divorce decree, the non-employee spouse also benefits. If the business underperforms, both parties share in the diminished returns. If the employee spouse's employment is terminated, the parties are on equal footing with the loss. Another benefit is that the figures used for the division are based on reality, not speculation. With the net value method, it is almost certain one of the parties will end up with the shorter end of the stick, but that is generally not so with the the deferred distribution method. The exception is if a party has malevolent intentions to manipulate the stock options to his or her own benefit at the expense of the non-employee spouse (such as by leaving the stock options on the table but receiving a higher salary in exchange), though courts can order constructive trusts to prevent any unjust enrichment. *See Jensen v. Jensen*, 824 So. 2d 315, 321 (Fla. Dist. Ct. App. 2002); *Callahan v. Callahan*, 361 A.2d 561, 563 (N.J. Super. Ct. Ch. Div. 1976).

This distribution method is not without complications. First, employer plans differ on whether a separate account can be set up for a non-employee spouse, and the plan's restrictions control even if a decree of divorce provides otherwise. Most plans do not allow for the transfer of options to a third party, as most grants involve at least a partial incentive for the employee

to remain with the company. *See Callahan*, 361 A.2d at 562. If the employer plan does not allow for the non-employee spouse to have a separate account, the employee spouse must exercise the option for the non-employee spouses. This involves more contact between the parties. The employee spouse would need to notify the non-employee spouse about the stock options so the non-employee spouse could make an educated decision about when to exercise the stock options.

The decree of divorce should have provisions mandating that the employee spouse inform the other spouse about the stock options, so that a contempt mechanism exists. Notice provisions to put in a decree of divorce include:

- notice must be given if the employment status of the employee spouse changes;
- notice must be given if the employee spouse exercises any options;
- notice must be given if the employer changes terms with the options, including repricing or grants replacement options; and
- notice must be given if the employer accelerates the maturity date, expiration date, or other terms surrounding the options.

See McFarland, *supra* at 10–11. The decree of divorce should include a specific plan or formula that devises the method whereby the non-employee spouse will be paid once the employee spouse has exercised the option, including reimbursement for payment of taxes to the employee spouse. The employee spouse will pay taxes upon the exercise of the option, and the tax amount will depend on what type of stock option it is (non-qualified stock options and incentive stock options). It is advisable to consult a tax professional before creating the formula for the non-employee spouse's payment and reimbursement for any paid taxes upon the exercise.

Other States' Treatment of Granted, Unvested Stock Options

Other states have addressed the issue of allocating and dividing granted, unvested stock options. As seen from the survey below, the results vary wildly across the nation. Because of the myriad holdings on this issue, this article will conclude by citing to Utah case law on deferred compensation, which could be indicative of a Utah court's ruling on the issue of granted but unvested stock options.

In *Hann v. Hann*, 655 N.E.2d 566 (Ind. Ct. App. 1995), the Indiana Court of Appeals affirmed the trial court's grant of the husband/employee spouse's motion for summary judgment determining the granted, unvested stock options were his separate property. *Id*. at 571. Specifically, the appellate court ruled that the only marital stock options are those "which are exercisable upon the date of dissolution or separation which cannot be forfeited upon termination of employment as marital property." *Id*. The court reasoned that unvested stock is "wholly contingent" on husband's continued employment with the employer, and he would have no right to exercise the options if his employment was terminated before the exercise date. *Id*.

While the *Hann* case was decided back in 1995, even recently, the *Hann* holding was reaffirmed by *Fischer v. Fischer*, 68 N.E.3d 603, 608–09 (Ind. Ct. App. 2017). In fact, the *Fischer* court took the *Hann* ruling one step further by concluding that stock options needed to vest before "final separation," which is the date the petition for dissolution was filed in order to qualify as marital property. *Id*. Otherwise, "the date of final separation seals the property to be included in the marital pot." *Id*. at 609.

Similarly, in North Carolina, the appellate court in *Hall v. Hall*, 363 S.E.2d 189 (N.C. Ct. App. 1987), held that any stock options not vested "as of the date of separation and which may be lost as a result of events occurring thereafter…should be treated as the separate property of the spouse for whom they may, depending upon circumstances, vest at some time in the future." *Id*. at 196. In that case, the court ruled that only 1,400 shares of the 5,400 shares of stock granted during the marriage were deemed marital. *Id*. at 195–96.

In contrast, several states have held that the act of granting stock options during the marriage makes the options a marital asset subject to division. In *Garcia v. Mayer*, 122 N.M. 57, 920 P.2d 522 (N.M. Ct. App. 1996), the New Mexico Court of Appeals held the district court did not err in holding that unvested stock options granted to the husband by his employer were marital property when part of the labor necessary to earn the benefit of vested options was performed during the marriage. *Id*. ¶ 11. The holding was affirmed even though the husband argued it was a contingent benefit and he had no right to exercise any of the unvested options. *Id*. ¶ 13. Specifically, the court held that "[t]he fruit of a spouse's labor before divorce is community property." *Id*. The court also noted the divide between jurisdictions on the treatment of granted, unvested stock options but stated that the majority of jurisdictions that considered the issue have decided that stock options granted during the marriage are marital property even if the stock cannot vest until after the time of divorce. *Id*. ¶ 16.

In Missouri, in *Beecher v. Beecher*, 417 S.W.3d 868 (Mo. Ct. App. 2014), the court ruled that it was the grant of stock

options, not the vesting of the options, which was dispositive to the issue of whether options could be classified as a marital asset. *See id*. at 871. There, the husband was granted stock options from his employer during the marriage, but the shares would not vest until two to three years after the entry of the decree of divorce. *See id*. In support of the claim it was his separate property, the husband testified the stock options "represented future compensation, they were offered as an incentive to stay employed, vesting was contingent on continuing employment, and the stock was subject to significant pre-vesting restrictions." *Id*. The court disagreed, holding that "[a]ny argument that options could not be treated as marital property due to contingencies was 'discredited' by Missouri dissolution cases dealing with pension plans," *id*. at 872 (citing *Warner v. Warner*, 46 S.W.3d 591, 596 (Mo. App. 2001)), and that the record did not show the options were "'entirely related to future performance.'" *Id*. (quoting *Warner*, 46 S.W.3d at 602).

Some states take a middle ground, which results in divergent rulings on this issue. Often the distinguisher between the two holdings is whether the grant was to reward past work or incentivize future work. *Compare Gilbert v. Gilbert*, 808 A.2d 688, 696 (Conn. App. Ct. 2002) (holding that unvested stock options created an enforceable right in the non-employee spouse and were deemed marital assets), *with Hopfer v. Hopfer*, 757 A.2d 673, 677 (Conn. App. Ct. 2000) (holding that the granted, unvested stock options were entirely an incentive for future services, and therefore, not a marital asset); *compare Ruberg v. Ruberg*, 858 So. 2d 1147 (Fla. Dist. Ct. App. 2003), *with Jensen v. Jensen*, 824 So. 2d 315 (Fla. Dist. Ct. App. 2002). For example, in *In re Marriage of Miller*, 915 P.2d 1314 (Colo. 1996), the Colorado court determined that when dealing with stock options granted during the marriage that have yet to vest, the main inquiry was whether the employee stock option is granted in consideration of past services (marital property) or in consideration of future services (separate property). *Id*. at 1319.

Other states have created formulas to address this issue. In *In re Marriage of Hug*, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (Cal. Ct. App. 1984), the California court recognized the broad discretion given to courts to select an equitable method to allocate marital and separate property interests with granted, unvested stock options. *Id*. at 782. In exercising its discretion, the California Court of Appeals approved of a formula known as

the time-rule to determine the marital portion of granted, unvested stock options. *Id*. at 794. In that case, the parties had been married sixteen years when the husband began employment with a new company. *Id*. at 783. After being with that company two to three years, the husband was granted a total of 3,100 shares of company stock at below-market price. *Id*. Four years after joining the company and after twenty years of marriage, the parties separated. *Id*. at 790. At issue before the court was the classification of stock options that were not exercisable until after separation. The trial court applied a time-rule formula that determined approximately two-thirds of the stock options were marital property, as follows:

> the numerator is the period in months between the commencement of the spouse's employment by the employer and the date of separation of the parties, and the denominator is the period in months between commencement of employment and the date when each option is first exercisable, multiplied by the number of shares which can be purchased on the date the option is first exercisable. The remaining options are the separate property of the employee.

Id. at 782. This formula recognizes the marital effort in earning the contractual right to receive the stock benefits, and that the years of employment during the marriage carried as much weight as the last few years after separation. *Id*. at 792.

Reasonable minds differ, however. In *Batra v. Batra*, 17 P.3d 889 (Idaho Ct. App. 2001), the Idaho Court of Appeals rejected the California time-rule laid out in *In re Marriage of Hug*, and reasoned as follows:

> [T]he *Hug* approach may result in the parties' respective property interests being tied together for a potentially long period after divorce. In particularly acrimonious divorce cases, as the one at hand, this approach increases the opportunities for mischief, misunderstanding, and subsequent litigation. The *Hug* time-rule also runs counter to Idaho's policy of separating the parties' interests in the property as quickly as possible, giving each immediate control over their share of the community property as that interest vests, while

avoiding the inequitable distribution of the assets.

Id. at 893. Instead, the Idaho court adopted the time-rule similar to the rule in *In re Marriage of Short*, 890 P.2d 12 (Wash. 1995), which provided a spouse would only be entitled to a share of those flight of options in which the year of vesting coincides with a period of the marriage. *See Batra*, 17 P.3d at 893–94. More specifically: "The community's interest in vesting flights of stock options is limited to those vesting in whole or in part during the years of marriage, eliminating whole years of vesting outside of the marriage and thereby hastening separation of the parties' interests consistent with Idaho law." *Id*. at 894. To determine the marital portion of stock that vested in whole or part during a given year of marriage, the Idaho court used the following formula: "the number of days of the marriage during the year of vesting of the flight of the stock option in question over the number of days in a year. The fraction is then converted into a percentage – the community's interest in the stock options in that particular flight." *Id*. at 893.

From the above analysis, it is clear there is no uniform formula across jurisdictions.

Utah Case Law on Deferred Compensation and Related Topics

The authors of this article could not find a reported Utah case where a trial court adjudicated the issue of classification and division of granted, unvested stock options – though a few cases dealt with setting aside stipulations awarding granted, unvested stock options. While there is not a clear ruling on this issue, Utah case law offers insight into how courts treated deferred compensation, vested or otherwise, that offers helpful analysis on this issue. Applying the law on deferred compensation to granted, unvested stock options has its support: Several other state courts have compared employment-related stock options with pensions, retirement accounts, and other forms of deferred compensation, and have used similar formulas to divide stock options. *See* Eric Howell, *Divorce and Separation: Treatment of Stock Options for Purposes of Dividing Marital Property*, 46 A.L.R.4th 640, § 2[b] (originally published in 1986); *see also Green v. Green*, 494 A.2d 721, 726–29 (Md. Ct. Spec. App. 1985) (determining that unvested stock options were comparable to pensions and other employee benefits).

In *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982), the

Utah Supreme Court held that deferred compensation – whether vested or not – should at least be considered when dividing marital assets. *Id*. at 432 ("In the context of Utah law, we find it unnecessary to consider whether or not the pension rights are 'vested or non-vested.'" (citation omitted)). In that case, the husband argued that because his pension benefit was contingent upon employment for another fifteen years, the trial court "erred in considering, as a marital asset, that portion of his pension which would be contributed by the government at some future date." *Id*. at 431. The Utah Supreme Court disagreed, ruling that the fifteen years that husband worked for the company while married were just as important to his pension payments as any future work while not married, and the wife should be entitled to a financial benefit for those early years of work. *Id*. at 431–33. More specifically, the court ruled,

> Whether that resource is subject to distribution does not turn on whether the spouse can presently use or control it, or on whether the resource can be given a present dollar value. The essential criterion is whether a right to the benefit or asset has accrued in whole or in part during the marriage. To the extent that the right has so accrued it is subject to equitable distribution.

Id. at 432–33. *See Dunn v. Dunn*, 802 P.2d 1314, 1318 (Utah Ct. App. 1990) (noting that "the right to future income is a marital asset where that right is derived from efforts or products produced during the marriage, even in cases where that right cannot be easily valued" (citations omitted)).

Limiting the sharing of financial interests between divorced parties was a key part in the *Woodward* ruling:

> Long-term and deferred sharing of financial interests are obviously too susceptible to continued strife and hostility, circumstances which our courts traditionally strive to avoid to the greatest extent possible . . . .
>
> . . . [W]here other assets for equitable distribution are inadequate or lacking altogether, or where no present value can be established and the parties are unable to reach agreement, resort must be had to a form of deferred distribution based upon fixed percentages.

656 P.2d at 433.

On the other hand, arguments can be made that suggest if stock has not matured and is contingent on future employment, the financial benefit is too speculative and uncertain. For example, in *Chambers v. Chambers*, 840 P.2d 841 (Utah Ct. App. 1992), the Utah Court of Appeals held that a basketball player's future contract payments were post-marital income and not subject to marital division, though the husband signed the contract during the marriage, and was two years into a five-year contract. *Id*. at 844–45. The court reasoned:

> Mr. Chambers's future income will be derived from his playing basketball during the term of his contract, rather than from some past effort or a product produced during the marriage. Furthermore, his right to the benefit of that salary will accrue at that time, and did not accrue during the course of the marriage. This is especially true in light of the fact that the contract payments will only be made provided that Mr. Chambers does not suffer injury, illness, disability or death as a result of participation or involvement in any one of a number of off-court activities.

Id. While one's salary is dependent on substantial future performance, the same can be said about certain unvested stock options. The *Chambers* ruling suggests the key distinction is whether the future income is a reward for past work or contingent upon future work – similar to other states' holdings on the issue of granted, unvested stock options.

Another argument to bolster the claim that unvested stock options should remain with the employee spouse is that Utah courts desire a clean break for the parties when possible: "The purpose of divorce is to end marriage and allow the parties to make as much of a clean break from each other as is reasonably possible. An award of deferred compensation which ties a couple together long after divorce can frustrate that objective." *Gardner v. Gardner*, 748 P.2d 1076, 1079 (Utah 1988); *id*. at 1079–80 (holding it was error for the trial court to not place a present value on a portion of the husband's medical assets on the ground that the assets were "futuristic" and that the wife was entitled to a finding on that issue). The Utah Supreme Court recognized that clean breaks are not always possible, and it discussed a couple methods for dividing deferred compensation that resemble the methods of distribution discussed herein. *See id*. at 1079.

In conclusion, there are many considerations to weigh when negotiating for the treatment of granted, unvested stock options. If negotiation is unsuccessful, one has a plethora of cases and arguments to rely upon to justify the argument that granted, unvested stock options should be either a marital asset or a separate asset.

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Appellate Highlights

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

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

UTAH SUPREME COURT

In re Adoption of B.H.
2020 UT 64 (Sept. 16, 2020)

Citing the Uniform Child Custody Jurisdiction and Enforcement Act, a biological father argued Utah lacked jurisdiction over a petition to terminate his parental rights, because the child was born in Montana. **The district court had jurisdiction over the termination of parental rights because the action was filed under the Adoption Act and, as a result, was not governed by the UCCJEA.** The supreme court went on to hold that a material deficiency in a form required by the Interstate Compact on the Placement of Children does not divest the district court of subject matter jurisdiction.

State v. Stricklan
2020 UT 65 (Oct. 15, 2020)

In this criminal appeal, the Utah Supreme Court addressed a line of Utah cases, including *State v. Webb*, 779 P.2d 1108 (Utah 1989) and *State v. Ramsey*, 782 P.2d 480, 484 (Utah 1989), which suggests that a conviction based solely on an uncorroborated out-of-court statement cannot be sustained on appeal. The defendant was convicted of sexual abuse of a child despite the victim recanting her previous accusation on the stand. A majority of the court concluded that the rule articulated in *Webb* and *Ramsey* was inapplicable, since there was other evidence available for the jury to adequately evaluate both the victim's original accusation and her subsequent recantation. **Regardless, the majority noted it would likely "scrub" the *Webb/Ramsey* rule from Utah jurisprudence if asked, since the true focus of any criminal appeal alleging insufficient evidence must be the evidence presented to the jury, not the applicability of a bright-line rule.** A lengthy dissent by Chief Justice Durrant, joined by Justice Himonas, argued *Webb* and *Ramsey* applied and the conviction simply could not be sustained on the evidence presented.

State v. Marquina
2020 UT 66 (Oct. 15, 2020)

On certiorari, the court affirmed the court of appeals' decision that the trial court did not plainly err in its handling of the State's reports of a juror who fell asleep at trial. However, the court clarified that **when a trial court receives a reliable report of a sleeping or inattentive juror, the court should respond in proportion to the report, which at a minimum requires "the court to glean any facts relevant to determining whether a juror has missed a portion of the trial, and to make an informed decision about whether the juror remains qualified to decide the case."** The court stated that, going forward, a response that is not commensurate with the seriousness of the information before the court would constitute plain error.

Arave v. Pineview West Water Co.
2020 UT 67 (Oct. 15, 2020)

In this water right dispute, the Utah Supreme Court clarified **that a plaintiff asserting an interference claim "must establish that: (1) they have an enforceable water right, (2) their water right is senior to the defendant's water right, (3) their methods and means of diversion are reasonable, (4) despite their reasonable efforts, they are unable to obtain the quantity or quality of water to which they are entitled, and (5) the defendant's conduct obstructed or hindered their ability to obtain that water (causation)."**

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

Pleasant Grove City v. Terry
2020 UT 69 (Oct. 29, 2020)

Terry was convicted by a jury of domestic violence in front of a child but was acquitted of the predicate offense of domestic violence assault. The supreme court invalidated the conviction as a legally impossible verdict, explaining that both charges "turn on the same offense – domestic violence assault – and the jury's different answers are irreconcilable as a matter of law." Ultimately, the court held that **"legally impossible verdicts – in which the defendant is acquitted on the predicate offense but convicted on the compound offense – cannot stand."**

UTAH COURT OF APPEALS

Martinez v. Dale
2020 UT App 134 (Oct. 1, 2020)

In this case, the Utah Court of Appeals **discussed what is required to establish "incompetence" that tolls a statute of limitations under Utah Code § 78B-2-108.** The district court erred in holding that the "inconclusive" nature of the affidavits and medical records entitled the defendant to summary judgment. "[L]ack of conclusivity in the summary judgment context typically calls for later resolution by the fact finder – not making a decision as a matter of law."

The Honorable Dee Benson
August 25, 1948 – November 30, 2020

By Paul M. Warner

United States District Judge Dee Vance Benson loved his family, his friends, and the law. As my closest personal friend for almost fifty years, I knew Dee Benson extremely well. Dee was an unconventional man. I usually called him Judge, but he never liked that. He much preferred it when people just called him Dee. (Except when he was on the bench!) He was a humble man, without a hint of the arrogance that normally accompanies a man so accomplished. At the same time, he never lacked for self-confidence either. He was at ease with everyone, regardless of position, prominence, or prosperity.

Dee was an accidental lawyer. He was a P.E. major. He went to law school because he did not want to be a school teacher. He graduated near the top of our class in 1976. It was the Charter Class of the then new J. Reuben Clark Law School at Brigham Young University. Dee was a star in law school, but was also likely the most popular student in our class. He had an amazing intellectual gift for the law. Quite simply, he was brilliant, and everyone who has ever worked with him acknowledges it. He was also extremely well liked by both his fellow students and faculty for his genuine friendship, affability, keen wit and sense of humor.

Dee truly had a remarkable legal career. He began in private practice, but soon headed to Washington D.C. to work for Senator Orrin Hatch. He was later Associate Deputy Attorney General at the Department of Justice. He then returned to Utah after being appointed United States Attorney by President George H.W. Bush. In 1991, he was appointed to the federal bench here in Utah at the age of 43. During his 29 years on the federal bench, Dee served as the Chief Judge for the District of Utah, was appointed to serve on the Foreign Intelligence Surveillance Act (FISA) Court, and also served on the Judicial Conference of the United States Courts. It is the governing body for all the federal courts. Along the way, he taught for many years at both the University of Utah and B.Y.U. law schools. His students loved him. Dee was always more interested in what he did than in what he made. Money did not motivate him.

Dee was always in great demand for CLE presentations at bar meetings, law conferences, and other community events. His brilliant mind, combined with his wit and sense of humor, always made for entertaining presentations. Dee was enormously talented and successful in the law, and he literally worked right to the end of his life. He especially loved his chambers, his staff, his colleagues, and the court. During the past eight months of his life, an aggressive brain tumor debilitated his body. But it never touched his mind or his heart. Dee was so much more than just a brilliant legal mind. He had a generosity of heart and spirit that knew no bounds, but more often than not, it was expressed anonymously. He made everyone who knew him feel like they were his best friend.

He is survived by four children and 10 grandchildren. Dee will be missed more than words can express.

State v. Modes
2020 UT App 136 (Oct. 1, 2020)

Applying plain error review, the court of appeals **affirmed, among other things, the district court's admission pursuant to Utah R. Evid. 404(c) not only a certified copy of the defendant's prior conviction for sexual battery, but also the prior victim's testimony.** The court of appeals explained that Rule 404(c) allows admission of evidence showing the defendant had a propensity to molest children regardless of the ultimate disposition of any prior charges. "[S]elective admission of evidence would run contrary to the very purpose of Rule 404(c)."

Salt Lake City Corp. v. Kunz
2020 UT App 139 (Oct. 16, 2020)

The court of appeals affirmed the district court's grant of summary judgment dismissing a condemnation action. In doing so, the court held **the notice and opportunity to be heard requirements of § 78B-6-504(2)(c) are strict requirements. And, in the context of a condemnation action, the condemnee need not show prejudice from procedural deficiencies.**

Zendler v. Univ. of Utah Health Care
2020 UT App 143 (Oct. 22, 2020)

The court of appeals affirmed summary judgment to the defendants in this medical malpractice action, including dismissal of the plaintiff's informed consent claim. The court interpreted the informed consent statute, Utah Code § 78B-3-406, and concluded that **the requirement to inform the patient of the "substantial and significant risk[s]" of a procedure does not require the health provider to inform each patient of his or her specific increased risks.**

Brown v. Brown
2020 UT App 146 (Oct. 29, 2020)

The court of appeals affirmed the district court's decision requiring the husband to reimburse the wife for her expenses incurred during a 22-month divorce proceeding in an amount of that exceeding what the wife earned and what the husband advanced her during the proceedings. The court held that **both spouses "have 'access to the marital estate,'… and both are entitled to rely on it to cover their 'reasonable and ordinary living expenses' pending entry of the divorce decree."**

In re Adoption of B.F.S.
2020 UT App 149 (Nov. 5, 2020)

This appeal arose from the district court's denial of a Utah-based adoption agency's uncontested petition for determination of rights and interests, and a temporary custody order, to facilitate the adoption of a child. The district court held that venue in Utah was inappropriate and that the proceeding was not in the best of interest of the child, because the child's birth mother and potential adoptive parents lived in other states. On appeal, **the court held that the district court erred in dismissing the petition for lack of venue, because the petition is governed by the general catch-all venue provision in Utah Code § 78B-3-307(1) and (3), which provide that the case may be tried "in any county designated by the plaintiff in the complaint."** The court further held that the district court's finding that it was in the best interests of the child to have the petition adjudicated in another state was clearly erroneous.

Dahl v. Christensen
2020 UT App 151 (Nov. 5, 2020)

The district court concluded than an attorney's lien arising out of a divorce action was wrongful under the Wrongful Lien Act. Reversing, the court of appeals held that the lien was not wrongful, because it was based in part on a retainer for a malpractice action and fell outside the definition of a wrongful lien, because it was "signed by or authorized pursuant to a document signed by the owner of real property." Utah Code § 38-9-102. **Although the lien may have exceeded the work performed in the malpractice case, the difference in amount went to the issue of validity, not its wrongfulness under the Act.**

TENTH CIRCUIT

CGC Holding Co., LLC v. Hutchens
974 F.3d 1201, 1207 (10th Cir. Sept. 14, 2020)

The Tenth Circuit affirmed most aspects of this RICO class action judgment against participants in a fraudulent lending scheme. The court **rejected a challenge to personal jurisdiction by one of the defendants who lived in Canada, concluding that defendant had sufficient minimum contacts with the United States based on her participation in the RICO conspiracy, which was directed at the United States and its citizens.** However, the court vacated the district court's order imposing a constructive trust on assets owned by non-parties to the case, and on real estate owned by the defendant in Canada, remanding with instructions to conduct a thorough tracing analysis to determine if the real estate was purchased with the class's swindled fees.

Fedor v. United Healthcare, Inc.
976 F.3d 1100 (10th Cir. Sept. 16, 2020)

When an employee sued her employer in federal district court, the employer sought to compel arbitration of her claims based upon a purported arbitration agreement. The employee countered that she had never seen nor signed the agreement. Relying on the agreement's "delegation clause" – which granted sole authority to the arbitrator to resolve disputes as to formation of the agreement – the district court dismissed the employee's claims and compelled her to arbitrate. On appeal, the Tenth Circuit reversed, holding **a federal court evaluating a motion to compel arbitration must first determine whether an arbitration agreement actually exists before enforcing its terms.** This is true even where the party opposing arbitration fails to specifically challenge language granting the arbitrator sole authority to decide issues of formation.

Aubrey v. Koppes
975 F.3d 995 (10th Cir. Sept. 18, 2020)

Reversing summary judgment on a failure to accommodate claim under the Americans with Disability Act, the Tenth Circuit held that **a jury could find that a public employer failed to engage in the interactive process required by the ADA, even though the employer held a pre-termination hearing,** where there was evidence that the employer did not attempt to discover employee's limitations or explore the accommodations that

would allow the employee to return to work. In doing so, the court drew a distinction between the reasonable accommodation requirements under the ADA and the due process requirements for terminating a public employee.

United States v. Ansberry
976 F.3d 1108 (10th Cir. Sept. 23, 2020)

Ansberry attempted to detonate a bomb at a police station. The district court, among other things, imposed a 12-level terrorism enhancement against him finding that Ansberry's conduct was "calculated to retaliate against government conduct" and specifically refused to find whether the conduct was objectively against government conduct. In reversing, the Tenth Circuit held that, **"for a § 3A1.4 terrorism enhancement based on the defendant's retaliation against government conduct to apply, the conduct retaliated against must objectively be government conduct."**

United States v. Chavez
976 F.3d 1178 (10th Cir. Sept. 30, 2020)

In this criminal appeal, the Tenth Circuit addressed whether the "best evidence rule," codified as Fed. R. Evid. 1002, applied to the introduction of questionably translated English-language transcripts of Spanish-language conversations recorded during a controlled drug buy. At trial, the prosecution introduced excerpts of the translated transcripts into evidence, but failed to introduce the underlying recordings upon which the transcripts were based. On appeal from the subsequent conviction, **a majority of the appellate panel reversed and remanded, concluding the failure to introduce the recordings in their original language violated the best evidence rule and prejudiced the defense.** In dissent, Judge Hartz argued requiring litigants to introduce foreign-language recordings along with unchallenged English-language translations is pointless, since jurors are unlikely to understand the recordings.

United States v. Miller
978 F.3d 746 (10th Cir. Oct. 20, 2020)

The Tenth Circuit held, as a matter of first impression, that **the district court committed error when it delegated the authority to determine the maximum number of non-treatment-program drug tests taken by the defendant during supervised release to a probation officer**, based on the language of the sentencing guidelines and the supervised release statute.

United States v. Denezpi
979 F.3d 777 (10th Cir. Oct. 28, 2020)

Denezpi, a Navajo tribal member, was prosecuted twice – first by Ute Mountain Ute tribal authorities in a Court of Indian Offenses, or "CFR" court, overseen by the Department of the Interior; and later by federal prosecutors in a United States district court, based on the same alleged sexual assault of another tribal member. Upholding his federal conviction, **the Tenth Circuit determined as a matter of first impression that prosecution of Denezpi by both tribal authorities and federal prosecutors did not violate the Fifth Amendment's Double Jeopardy Clause.** Although the CFR court is technically administered by the federal government, tribal authorities exercise inherent sovereign tribal authority, rather than federal authority, in prosecuting offenders there.

Elite Oil Field Enterprises, Inc. v. Reed
979 F.3d 857 (10th Cir. Nov. 3, 2020)

The Tenth Circuit held, as a matter of first impression, that **the statutory bar to appellate review of remand order based on lack of subject matter jurisdiction found in 28 U.S.C. § 1447(d) applies to remand orders resulting from post-removal joinder of defendants that destroyed diversity jurisdiction.** The defendants had argued the bar applies only to cases remanded under § 1447(c), not § 1447(e) as in this case.

Jones Waldo and the Utah legal community have lost a great leader, mentor, and friend. Thank you for 49 years of service.

- JIM LOWRIE -
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Utah's New Remote Notary and Electronic Wills Laws

by Steve Chambers

In 2019, the Remote Notary Act (Utah Code sections 46-1-1 to 46-1-23) became effective, allowing notaries to perform their duties remotely through electronic means. On August 31, 2020, the Electronic Wills Act, a response to COVID-19, also became effective, permitting wills to be executed remotely as well. Here's a summary of the two new laws.

A Brief History of Electronic Signatures in Utah

Utah entered the electronic transaction age way back in 2000 with the passage of the Uniform Electronic Transactions Act, Utah Code sections 46-4-101 to -503 (UETA). This was a necessity given the growing e-commerce industry. UETA authorized and validated the electronic click-throughs of online purchasing, especially online applications for credit cards. But UETA went beyond that and authorized parties to conduct business electronically so long as they have agreed to. The parties' agreement to conduct business electronically is determined by the context, the parties' conduct, and the circumstances. In the only reported Utah case construing UETA, *VT Holdings LLC v. My Investing Place LLC*, 2019 UT App 37, 440 P.3d 767, the court of appeals affirmed the trial court, which found that the parties' conduct showed an agreement to conduct business electronically by way of faxing a fully executed Request for Reconveyance that resulted in the release of a trust deed. The court said:

> Here, there is sufficient evidence to support the district court's factual finding that RCF and VT Holdings had agreed to conduct business electronically. The court found that Moak accepted an email from RCF's paralegal with the Request for Reconveyance attached. Both Moak and Scott signed the Request for Reconveyance and notarized their signatures. Moak then faxed the Request for Reconveyance back to RCF without stating any conditions or otherwise informing RCF that the Request for Reconveyance was not intended to be effective. The court found that "the lack of a valid reason why everyone would go to the trouble of preparing [the Request for Reconveyance], get it signed, get it notarized, and arrange to return it [electronically], for no legal effect," is the "primary weakness" of VT Holdings' argument.

Id. ¶ 21 (alterations in original).

While UETA and this case establish the principle that significant business transactions beyond purchases from Amazon can be conducted online, they do not reach the issue of a true electronic signature in the sense that lawyers are now familiar with, the "/s/ John Doe" that we affix to pleadings.

The legislature took another step in that direction in 2014 with passage of the Uniform Real Property Electronic Recording Act, Utah Code sections 17-21a-101 to -403 (URPERA). This act permits the recording of documents with electronic signatures. Under URPERA, a "document" is information inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and that is eligible to be recorded in the land records maintained by the county recorder. A "signature" is an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document. This definition would cover "/s/" signatures or any other means of demonstrating the signer intended to sign his or her name to a document.

The problem with URPERA was that it did not make provision for notarization of documents remotely. Although URPERA said that

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a requirement that a document be notarized, acknowledged, verified, witnessed or made under oath is satisfied if the electronic signature of the person authorized to perform that act is attached or logically associated with the document, it did not describe how that could be accomplished, nor give any guidance for identifying the signer if he is not known to the notary, other than through being in the notary's physical presence and presenting valid identification.

The Remote Notary Act

Last year, 2019, the legislature did address that issue with the Remote Notary Act, Utah Code sections 46-1-1 to -23. The Remote Notary Act specifically allows a remote notary to notarize the signature of a signer while in the signer's electronic presence. Not all notaries are automatically remote notaries. To become commissioned as a remote notary, a person must first be commissioned as a Notary Public. Then that person must become affiliated with a Solution Provider. A Solution Provider is a third-party that provides secure storage and other services to remote notaries. Solution Providers are called vendors on the Notary.Utah.gov website. There is a list of approved vendors on that site.

After becoming affiliated with a vendor, the notary must complete an application to become a remote notary on forms provided by the vendor; increase her notarial bond to $10,000; obtain an electronic seal (again, through the vendor); and pass a background check. Once approved, the notary is commissioned as a remote notary and can provide notarial services remotely.

To remotely notarize a document, the signer must either be

personally known to the remote notary, or that person's identity must be proven by satisfactory evidence. Historically, this meant by way of valid identification such as driver's license, passport, or other documentation recognized by the state as evidence of a person's identity. Those principles still apply to remote notaries. In the case of a person not personally known to the remote notary, the person must send a legible copy of some form of satisfactory proof of identity to the remote notary. Alternately, identity can be determined through a third-party. If the third-party knows both the remote notary and the person, that third-party may give an oath or affirmation as to the person's identity. In the case of the third-party being a stranger to the signer, the signer's identity can be affirmed by means of a dynamic knowledge-based authentication, such as requiring the person to answer a series of questions. Readers may be familiar with these online identification techniques. The person must answer a number of questions taken from public records regarding himself such as "In which of these counties have you owned property in the past 10 years" followed by several choices. The third-party identification can also be accomplished by biometric data such as facial recognition, voice print, or fingerprint.

Once all the persons whose signatures are to be notarized are identified, the remote notary can perform the remote notarization. All parties must be in reliable, simultaneous visual and audio communication through some means. Administrative Code Rule 623-100-6 specifies that a "reliable" system consists of continuous, synchronous audio and video feed with good clarity such that all participants can always be seen and heard. It is the responsibility of the remote notary to determine if the system is reliable and terminate the session if it is not.

Whereas a regular notary may, but is not required to, keep a notarial journal, a remote notary must keep such a journal. The journal must contain this information:

(a) the date and time of day of the notarial act;

(b) the type of notarial act;

(c) the type title, or a description of the document, electronic record, or proceeding that is the subject of the notarial act;

(d) the signature and printed name and address of each individual for whom a notarial act is performed;

(e) the evidence of identity of each individual for whom a notarial act is performed, in the form of:

(i) a statement that the person is personally known to the notary;

(ii) a description of the identification document and the identification document's issuing agency, serial or identification number, and date of issuance or expiration;

(iii) the signature and printed name and address of a credible witness swearing or affirming to the person's identity; or

(iv) if used for a remote notarization, a description of the dynamic knowledge-based authentication or biometric data analysis that was used to provide satisfactory evidence of identity. . . .

Utah Code Ann. § 46-1-14(1).

The remote notary must preserve a recording of the notarial session. This recording is not part of the journal in the sense that it is not a public record the way the journal itself is, but it must be kept with the journal. One of the functions of the vendor or Solution Provider is to keep remote notarial records secured and tamper-proof. These records must be kept for five years.

The Utah Uniform Electronic Wills Act

While URPERA and UETA together covered most business transactions including real estate transactions, UETA specifically excepted any transaction that is governed by laws regarding the creation or execution of wills, codicils, or testamentary trusts. In response to COVID-19 and the shelter-in-place directives, the legislature changed that in a special session in 2020 with passage of the Uniform Electronic Wills Act, Utah Code sections 75-2-1401 through -1411 (UEWA).

An electronic will is a will executed in conformity with section 1405 and is a will for all purposes under Utah law. It includes codicils and documents designed simply to revoke prior wills. An electronic will is any record readable by text at the time of signing; is signed by the testator or someone at his direction and in his conscious presence; and is signed by at least two individuals in the physical or electronic presence of the testator, at or within a reasonable time after the testator's signature.

UEWA defines "electronic" as any means relating to technology that has electrical, digital, magnetic, wireless, optical, electro-magnetic, or similar capabilities. Under this definition of "electronic" almost anything that memorializes one's directions as text would qualify. In a pre-electronic wills time, courts have already grappled with what constitutes a writing.

In *In re Estate of Castro*, No. 2013ES00140 (Ohio Ct. Common Pleas, Prob. Div., Lorain County, June 19, 2013), the decedent dictated a will to his brother, who then wrote the will on a Samsung Galaxy tablet. The decedent signed the will on the tablet with a stylus, and two witnesses signed as well. The court admitted the will to probate because it met the requirements of a "writing" and was properly witnessed. However, because it was not notarized, it was not self-proving.

In a case from Michigan in 2018, *In re Estate of Horton*, 925 N.W. 2d 207 (Mich. Ct. App. 2018), Duane Horton handwrote a journal entry stating that a document called "Last Note" was in Evernote on his phone. The journal entry provided instructions for retrieving the note from his phone. He left both in his room before committing suicide. The Last Note contained personal comments relating to his suicide and directions for his property, including that he wanted his car to go to "Jody" and he wanted nothing to go to his mother. He typed his name at the end of the Last Note. The court considered all the circumstances (as UETA instructs, though the court did not cite UETA or a similar law) and found that the lack of a signature was harmless error. It admitted the will to probate. The court took a pragmatic view, focusing on what a will is – a document regarding the disposition of property after one's death – rather that what a will looks like. It said the Last Note was "distinctly testamentary in nature" and supported the conclusion that the decedent intended it to constitute his will.

Under UEWA, to "sign" means to execute or adopt a tangible symbol, or to affix to or logically associate with the record an electronic symbol or process, with the intent to authenticate or adopt that record. The act of signing is very similar to the traditional method of signing, with the addition that the execution or adoption of a symbol may be performed electronically.

UEWA retains the traditional requirements of writing, signing, and attestation but adapts them to the virtual world in which we now live. The requirement of a writing therefore excludes audio and video wills. UEWA is based on the Uniform Law Commission's draft from 2019. The drafters apparently felt the issues of proof and preservation of oral-only records would be too much for the legal system.

Witnesses to an electronic will can but need not be in the physical presence of the testator. If not in the physical presence, they must be in the "electronic presence," which means "the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location." Utah Code Ann. § 75-2-1402(2).

Note the difference between this definition of "electronic presence" and the Remote Notary Act's requirement that all parties be in "reliable, simultaneous visual and audio communication." While the two requirements are similar, it is conceivable that circumstances meeting one requirement might not meet the other. As a solution to this dilemma, UEWA provides that to the extent any of its provisions conflict with the Remote Notary Act, UEWA governs.

The Remote Notary Act and UEWA are boons to providing legal services. Even without COVID-19, clients who needed to sign real estate documents or update or make wills often faced real challenges getting to and from a lawyer's office. Now with a little advance planning, all this can be accomplished by the client at home. A will can be executed, witnessed, and notarized with the testator in one location, the witnesses in one or more separate locations, the notary in another location, and the attorney overseeing the process in her home office.

Emily Adams

Cherise Bacalski

Freyja Johnson

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Innovations in Funerals, Burials, and Cremation

by Natalie C. Segall

I practice in the area of estate planning and probate administration, primarily in Park City where I live and work. I regularly meet with Parkites who have pretty specific ideas about body disposition. When I raise the topic, my clients typically provide detailed plans of what they want done with their bodies when they die, the guest list for their "Celebration of Life" party, what music they want played, and even what food they want served. Ideas around what constitutes a proper burial have transformed from the days of pre-paid, pre-arranged religious funerals with a shiny casket, viewing, and internment. Today, there are new and fascinating ways to RIP, many of which are more economical and earth friendly.

Two of the biggest concerns my clients have are the cost and the environmental impacts of traditional funerals, burials, and cremation. According to The Cremation Institute, average costs for funerals and traditional cremation are:

Cremation with a traditional funeral service (casket and viewing):	$10,000–$12,000
Cremation with basic funeral service (no viewing):	$8,000–$10,000
Direct cremation (no memorial or funeral):	$2,000
Burial with traditional service (viewing then service at cemetery plot):	$15,000
Burial with memorial service (no viewing):	$10,000
Funeral home costs:	$2,000
Caskets:	$2,300
Embalming:	$600
Cemetery Plot:	$1,000–$4,000
Burial Vault:	$1,395
Headstone:	$1,500
Viewing/Calling Hours:	$450
Memorial Ceremony:	$500
Transportation:	$325
Flowers:	$500–$700

See Funeral Costs Tips for 2020: How I Surprisingly Saved $3400, Cremation Inst., https://cremationinstitute.com/funeral-costs (last visited Sept. 27, 2020).

However, People's Memorial Association, a 501(c)(3) nonprofit organization based in Washington that provides information and education on after-death arrangements, found that cremation prices may vary by as much as 750% and burial prices vary by over 400% in Washington, according to its biennial survey last done in 2018. *See Price Survey Results*, People's Mem'l Ass'n, https://peoplesmemorial.org/education-and-advocacy/price-survey.html (last visited Sept. 27, 2020); *see also Compare Mortuary At-A-Glance*, Funeral Consumers Alliance of Utah, *available at* https://www.utahfunerals.org (last visited Sept. 27, 2020), for Utah prices broken down by region.

Environmental factors are a major deterrent for traditional burials, which include the use of chemicals like formaldehyde, placing the embalmed body in a plastic-lined concrete vault, taking up "real estate" in a cemetery, and marking a grave with a protruding headstone. Becky Little, *The Environmental Toll of Cremating the Dead*, Nat'l Geographic (Nov. 5, 2019), https://www.nationalgeographic.com/science/2019/11/is-cremation-environmentally-friendly-heres-the-science/. Cremation, previously thought to be the most eco-friendly choice, actually "requires a lot of fuel, and it results in millions on tons of carbon dioxide emissions per year." *Id*. "The average U.S. cremation, for instance, 'takes up about the same amount of energy and has the same emissions as about two tanks of gas in an average car,' according to Nora Menkin, the executive director of People's Memorial Association." *Id*. It is estimated that "one cremation produces an average of 534.6 pounds of carbon dioxide" and that could mean "cremations in the U.S. account for about 360,000 metric tons of CO2 emissions each year." *Id*.

NATALIE C. SEGALL and her husband Cameron Banko, started their firm, Segall & Banko, in Park City, Utah, in 2008. They assist clients with estate planning, probate administration, real property matters, and business matters.

Eco-Burial and Green Burial

There are alternatives to cremation or being embalmed, put in a casket, which is then placed in a vault and then buried in the ground.

Eco-burials are burials where no embalming fluid is used, and there is no traditional casket or vault. Eco-burials take place quickly after death, using a biodegradable container, and bodies are typically wrapped in a simple cloth shroud, although other "container" options are available. For example, wicker baskets are popular in the United Kingdom. *See* Sussex Willow Coffins, https://sussexwillowcoffins.co.uk. You can also be buried in a cardboard container, Cardboard Coffin Company, https://cardboardcoffincompany.com, or a traditional pine box, The Old Pine Box, http://theoldpinebox.com. There are even companies that produce luxury fabric shrouds such as fine silks and infused linens. For example, Kinkaraco touts a line of fabulous silk shrouds called the "Mort Couture® Luxe Collection." *Mort Couture Luxe Collection*, Kinkaraco, https://kinkaraco.com/collections/frontpage.

In the Jewish faith, the body is not embalmed and is buried as soon as possible after death. *See Jewish Funeral Traditions*, Everplans, https://www.everplans.com/articles/jewish-funeral-traditions (last visited Sept. 27, 2020). Those of the Jewish faith are typically wrapped in a linen or muslin shroud and buried in a pine box (or simple wood box that adheres to kosher standards). *See id*. Those of the Muslim faith are also buried as soon as possible after death, are wrapped in a simple shroud, and are buried in the ground facing Mecca. *See Muslim Funeral Traditions*, Everplans, https://www.everplans.com/articles/muslim-funeral-traditions (last visited Sept. 27, 2020). Everplans.com provides a comprehensive list and explanation of different funeral traditions for most religions. *See Funeral Traditions of Different Religions*, Everplans, https://www.everplans.com/articles/funeral-traditions-of-different-religions (last visited Sept. 27, 2020).

The National Funeral Directors Association points out that there are several different "shades" of green when planning eco-friendly, or "natural" burials." *What it Means to Be Green*, Nat'l Funeral Dirs. Ass'n, https://dev.nfda.org/resources/business-technical/green-funeral-practices/what-it-means-to-be-green (last visited Sept. 27, 2020). "A 'green' burial is, technically, a sub-category and has stricter guidelines for what can officially be called 'green.'" *A Family Guide to Eco-Friendly Burials*, BurialPlanning.com (Oct. 23, 2017), https://www.burialplanning.com/blog/a-family-guide-to-eco-friendly-burials. According to the Green Burial Council (GBC), which has the highest standards for "green" burial, the following must be present to be considered a true "green" burial: (1) minimal environmental impact; (2) conservation of natural resources; (3) protection of worker health; (4) reduction of carbon emissions; (5) restoration or preservation of habitat; and (6) ongoing compliance with GBC standards. *Id*. Looking at the listing of GBC certified cemeteries reveals that there are not many in the United States. *See GBC Certified Cemeteries*, Green Burial Council, https://www.greenburialcouncil.org/gbc_certified_cemeteries.html (last visited Sept. 29, 2020). However, some traditional cemeteries have green-certified areas, like Memorial Lake View Mortuary and Cemetery in Bountiful, Utah. *See Green Burial Services*, Mem'l Mortuaries & Cemeteries, http://www.memorialutah.com/green-burial-services (last visited Sept. 27, 2020).

It is worth noting here that in all but seven states, your family can bury your loved one "naturally," meaning without embalming the body and without the assistance of a mortuary. *See* Jae Rhim Lee, *Burial Laws by State*, Coeio (July 18, 2016), http://coeio.com/burial-laws-state. Natural burials are legal in Utah. *Id*. However, Utah Administrative Rule 436-8-3 provides as follows:

> No human body may be held in any place or be in transit more than 24 hours after death and pending final disposition, unless either maintained at a temperature of not more than 40 degrees F. or embalmed by a licensed embalmer in a manner approved by the State Board of Embalming, or by the embalmer licensed to practice in the state

where the death occurred.

An eco-burial can be held anywhere the deceased or their family chooses. So-called backyard burials are still legal in the United States, but certain code requirements are in place to ensure health and safety. Family burial plots on private land still exist but must be registered with the county government. *See A Family Guide to Eco-Friendly Burials* Burial Planning, *supra*.

Water Cremation

Water cremation, or alkaline hydrolysis, has been around since the late 1800s and has traditionally been used to rapidly dispose of dead animals, whose liquid remains are often then used as fertilizer. *See* Emily Atkin, *The Fight for the Right to be Cremated by Water*, The New Republic (June 14, 2018), https://newrepublic.com/article/148997/fight-right-cremated-water-rise-alkaline-hydrolysis-america.

The process involves submerging the body "in a solution of about 95[%]water and 5[%] alkali – usually sodium hydroxide or potassium hydroxide." *Id*. "The liquid is heated and set at a high pressure to avoid boiling, causing the body to shed its proteins and fats." *Id*. "The decomposition creates a coffee-colored liquid, which contains amino acids, peptides, sugars and salts." *Id*. The liquid usually gets flushed away, and the remains (bones and any metal from the body) are crushed into ashes and given to the family of the deceased. *Id*.

The cost of water cremation is about the same as traditional cremation, ranging from $700 to $3,000, and the environmental impact is significantly reduced. *See Water Cremation: Is Resomation a Green & Bio Friendly Solution?*, Cremation Inst., https://cremationinstitute.com/water-cremation (last visited Sept. 27, 2020). Utah passed a law in 2018, known as the Funeral Services Licensing Act, allowing alkaline hydrolysis. Utah Code Ann. § 58-9-101 et seq.

Composting

A relatively new way to dispose of your body at your death involves returning the body to the earth through aided decomposition, using various means.

Coeio, a company started by Jae Rhim Lee, an MIT graduate and artist, brings your body back to nature by dressing the deceased in the "Infinity Burial Suit." The Infinity Burial Suit is a "handcrafted garment" that is "completely biodegradable." *What is the Infinity Burial Suit? How Does it Work?*, Coeio, http://coeio.com/faqs/#suit. The suit "has a built in biomix, made up of mushrooms and other microorganisms that together do three things: aid in decomposition, work to neutralize toxins found in the body [through mycoremedation] and transfer nutrients to plant life." *Id*. A fascinating TED talk featuring Jae Rhim Lee can be viewed at http://coeio.com/coeio-story, and a short film about Dennis White, who asked to be buried in the Infinity Suit, can be found at http://coeio.com/customer-stories/dennis-white-our-first-customer. For those who remember Luke Perry, the actor most famous for his role as Dylan on "Beverly Hills 90201," he was buried in an Infinity Burial Suit in March 2019. *See* Harmeet Kaur, *Luke Perry's Daughter Says He Was Buried in a Mushroom Suit*, CNN (May 6, 2019, 2:38 PM ET), *available at* https://www.cnn.com/2019/05/04/entertainment/luke-perry-mushroom-suit-trnd/index.html.

Recompose, founded in 2017 by Katrina Spade and based out of Washington state, was founded on the idea that "urban death care" could have a nature component, which became the basis of her graduate school thesis in Architecture. *See Who We Are*, Recompose, https://recompose.life/who-we-are/#team (last visited Sept. 27, 2020).

The process of body decomposition used by Recompose involves the following phases:

> Phase 1 The Cycle Begins. Natural organic reduction (NOR) is powered by beneficial microbes that occur naturally on our bodies and in the environment.
>
> Phase 2 The Laying In. [The staff at Recompose] lay the body in a cradle surrounded by wood chips, alfalfa and straw. The cradle is placed into a Recompose vessel and covered with more plant material.
>
> Phase 3 The Vessel. The body and plant material remain in the vessel for 30 days. Microbes break everything down on the molecular level, resulting in the formation of nutrient-dense soil.
>
> Phase 4 The Soil. Each body creates one cubic yard of soil amendment, which is removed from the vessel and allowed to cure. Once completed, it can be used to enrich conservation land, forests, and gardens.
>
> Phase 5 Life After Death. The resulting soil returns the nutrients from our bodies to the natural world. It restores forests, sequesters carbon and nourishes new life.

The Process, Recompose, *available at* https://recompose.life/our-model/#the-process (last visited Sept. 27, 2020).

In May 2019, Washington became the first state in the world to legalize NOR, defined as "the contained, accelerated conversion of human remains to soil." *May 2019 News-Public Policy, Washington*, Recompose, *available at* https://recompose.life/2019/senate-bill-5001/ (last visited Sept. 27, 2020). More information about this process

is explored in founder Katrina Spade's TED Talk. Katrina Spade, When I Die Recompose Me, Address at TEDxOrcasIsland (Mar. 2016), *available at* https://www.ted.com/talks/katrina_spade_when_i_die_recompose_me (posted June 2017).

The Capsula Mundi is an urn made from biodegradable materials that come from seasonal plants. *See Life never stops,* Capsula Mundi, https://www.capsulamundi.it/en (last visited Sept. 27, 2020). You can place the ashes of the deceased (smaller urn) or an entire human body in the fetal position (larger urn) and then the urn, which looks like some sort of organic alien egg, will be buried as a "seed in the earth." *See id*. A tree, chosen in life by the deceased, is then planted on top of the urn to serve as a memorial and marker. *See id*. Created in Italy by Anna Citelli and Raoul Bretzel, the urns are available on their website shop at: https://www.capsulamundi.it/shop.

Body and Organ Donation

You can give back by giving the gift of life to someone after you are gone. Organ donation and body donation are two ways to help others. There are some important distinctions between the two. *See Non-Transplant Donation and Organ Donation Comparison*, Science Care, *available at* https://global-uploads.webflow.com/5df3d56e20b6d37f8de5e660/5e0f944f6a42a418184c4747_organ-donation-vs-body-donation-to-science-v2.pdf (last visited Sept. 27, 2020).

Many Utahns have a red "Y" on their Utah driver's licenses that indicates they are an organ donor. Organ donation "is the process of surgically removing an organ or tissue from one person (an organ donor) and placing it into another living person (the recipient). Transplantation is necessary because the recipient's organ has failed or has been damaged by disease or injury." *Id*. Each state has an organ donation registry. You can find your state's organ donation registry by visiting https://www.organdonor.gov, and for Utah, you can go to https://www.yesutah.org. The organs and tissues that can be donated include the eight vital organs (heart, two kidneys, pancreas, two lungs, liver, and intestines). *See* Health Res. & Servs Admin., *What Can Be Donated*, Organdonor.gov https://www.organdonor.gov/about/what.html (last visited Sept. 27, 2020). Hands and faces have recently been added to the list. *See id*. Tissues such as corneas, skin, heart valves, bone, blood vessels, and connective tissues can also be donated as well as bone marrow and stem cells, umbilical cords, and peripheral blood stem cells. *See id*.

Body donation comes in different forms. "Donating your body to science" is something you can do before you die. You can register with private companies like Science Care, which links donors to medical researchers and educators who need to study the body for medical advancement. *See Be a Hero: Join the Science Care Registry Today*, Science Care, https://www.sciencecare.com/body-donation/register (last visited Sept. 27, 2020). There is no cost to this program. *See id*.

You can also designate that your body goes to a particular medical school or clinic directly, such as the University of Utah Department of Neurobiology and Anatomy or the Mayo Clinic. *See Body Donor Program*, Univ. of Ut. Sch. of Med., https://medicine.utah.edu/neurobiology-anatomy/body-donor-program; *Body Donation at the Mayo Clinic*, Mayo Clinic, *available at* https://www.mayoclinic.org/body-donation/making-donation. Bodies must meet certain criteria, depending on the program. After the body is used for research, most of the programs cremate the bodies and either return the cremains to the family, have a memorial service for the donors, or the cremains are interred at a local cemetery.

When a person wants to donate organs or his or her whole body, it is important for that person to make his or her wishes known, preferably in writing, and register with the appropriate facility or agency if possible. I often meet with clients that want to donate their body to the University of Utah and we complete and register the Certificate of Bequeathal, which can be found here: https://medicine.utah.edu/neurobiology-anatomy/docs/certificate_of_bequeathal.pdf.

Pretty Cool Things to Do With Ashes

If you or your loved ones decide on cremation, there are so many different things you can do with cremains. Have you ever wanted to be a diamond? The staff at Eterneva will turn your ashes into a big sparkly stone. *See* Eterneva, https://eterneva.com. Your ashes can be made into glass art, https://www.spiritpieces.com; become a tattoo, https://www.smartcremation.com/tattooing-cremation-ashes; be made into ammunition, http://www.myholysmoke.com; be turned into fireworks, https://heavenlystarsfireworks.com; become a vinyl record, https://www.andvinyly.com; or become a part of a stuffed animal, https://www.perfectmemorials.com/cremation-urn-finder?action=results&type=person&material=Fabric-&filters=701.

There is an urn for every type of person if you want to store your loved one's cremains: for the sports fan, an urn representing your favorite NFL or MLB team, or favorite sport, https://www.inthelighturns.com/street.html; artsy urns, https://www.legendurn.com/funeral-urns-cremation-ashes-keepsakes/funeral-urns-cremation-urn.html; and the ghost urn, the severed head urn, the Nokia cell phone urn, the martini glass companion urn, the sewing machine urn, the teddy bear urn, the Star Trek urn, the handbag urn, the beer bottle urn, and the motorcycle urn. *See 11 Odd and Unusual Cremation Urns That You Have Never Seen Before*, Cremation Res., *available at* https://www.cremationresource.org/urns/11-odd-unusual-cremation-urns.html (last visited Sept. 27, 2020).

If you want to have your ashes spread somewhere, your loved ones will have to follow certain rules and regulations, depending on where you choose. Each state has its own laws on scattering ashes and in the case of scattering ashes over water, federal law may take precedence over state law. *See What Can I Do With Cremation Ashes*, Neptune Soc'y, https://www.neptunesociety.com/resources/what-can-i-do-with-cremation-ashes. Under the Utah Funeral Services Licensing Act, the legal ways to dispose of cremains are: "(i) in a crypt, niche, grave, or scattering garden located in a dedicated cemetery; (ii) by scattering the cremated remains over uninhabited public land, the sea, or other public waterways, subject to health and environmental laws and regulations; or (iii) in any manner on the private property of a consenting owner." Utah Code Ann. § 58-9-611(3)(a)(i)–(iii).

If you want your ashes spread on public lands, like at Arches National Park, you will need the governing agency's permission and a special use permit. *See Memorialization (Scattering Ashes)*, Nat'l Park Serv., *available at* https://www.nps.gov/arch/planyourvisit/memorialization.htm (last visited Sept. 27, 2020).

The Federal Clean Water Act requires that ashes spread over water be at least three nautical miles from land in a container that will easily decompose or the container must be disposed of separately. *See Burial At Sea*, Envtl. Prot. Agency, *available at* https://www.epa.gov/ocean-dumping/burial-sea (last visited Sept. 4, 2020). For inland waters like lakes and rivers, you will need to check with the state agency that governs the body of water.

If you want your ashes spread from the air (plane, helicopter, or drone), you may be able to do so even though airspace is controlled by FAA regulations which state:

> [n]o pilot in command of a civil aircraft may allow any object to be dropped from that aircraft in flight that creates a hazard to persons or property. However, this section does not prohibit the dropping of any object if reasonable precautions are taken to avoid injury or damage to persons or property.

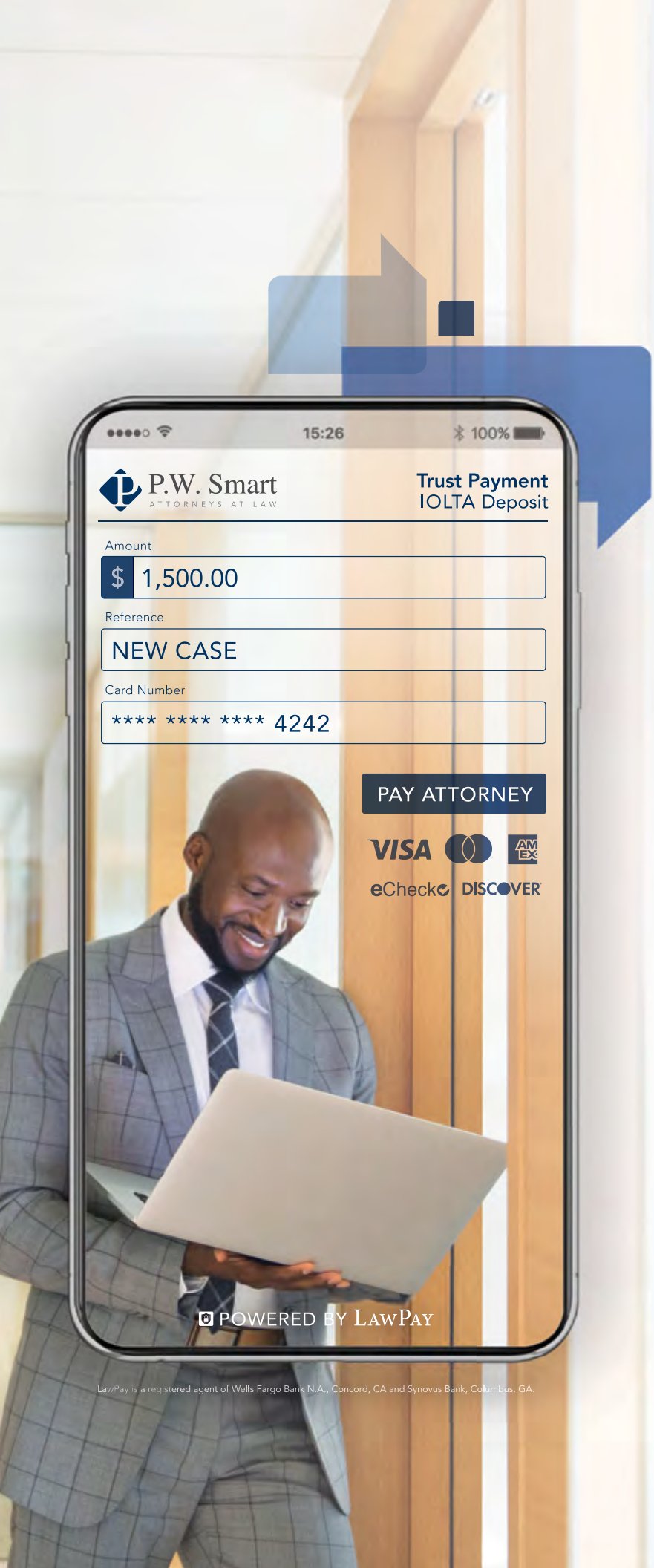
14 C.F.R. § 91.15. Ashes are likely to drift away, but bone fragments and any metal in the body are not, so you may have to sift through the ashes before taking flight.

One of most unique ways to dispose of your ashes is through the Neptune Society at the Neptune Memorial Reef. According to the website, "the reef lies 3.5 miles off the coast of Key Biscayne, Florida, and when completed, will cover sixteen acres of ocean floor." *About the Reef*, Neptune Mem'l Reef, https://www.nmreef.com/overview (last visited Sept. 27, 2020). The individual's cremains are mixed with concrete, shaped into forms such as sea stars or shells, marked with identifying information, and placed on the ocean floor. *Deployment Process*, Neptune Mem'l Reef, https://www.nmreef.com/overview (last visited Sept. 27, 2020). These forms create shelter for marine life, giving ocean lovers a chance to continue to give life after life. *See id*.

Many people subscribe to the "don't ask, don't tell" method of spreading ashes. However, if and when you do spread someone's ashes, please remember that you should be upwind!

Conclusion

I think it's fair to say that traditional funerals and burials are being challenged by innovators because consumers want alternatives that match their ideals, including protecting the planet and diminishing the financial burden for their families. From personal experience in my practice, many of my clients desire alternative burials because they "just don't want to be a burden on my family when I die." There are many ways to plan ahead and make your wishes known to your family as to your final disposition and final resting place; and more often than not, your family will carry out your wishes. So whether you want a traditional funeral, you want your ashes spread at the top of Bald Mountain at Deer Valley (very common among my clients), or you want to become a small pile of dirt, you can choose a "send off" that fits your ideals, style, and personality.



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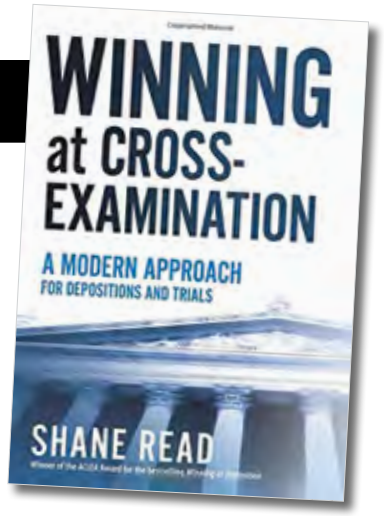

Winning at Cross-Examination:
A Modern Approach for Depositions and Trials

by Shane Read

Reviewed by Darin B. Goff

"Romero's bull-fighting gave real emotion, because he kept the absolute purity of line in his movements and always quietly and calmly let the horns pass him close each time. He did not have to emphasize their closeness."

— Ernest Hemingway, THE SUN ALSO RISES

In the public imagination, the confrontation between lawyer and witness during cross-examination is the dramatic turning point in which sinister falsehoods are exposed and justice prevails. Like Hemingway's elegant matadors in Pamplona's arena, the lawyer skillfully provokes charge after charge while stepping gracefully out of the way until the exhausted witness surrenders to the killing stroke and confesses the truth.

In non-fiction, however, the lawyer often gets gored. Flat-footed lawyers bludgeon witnesses with exhaustive pre-prepared questions on inconsequential details, indignantly argue when the witness will not concede, and lose credibility with juries when the cross-examination fails to support the lawyer's theory of the case. The lawyer returns to counsel table, wounded or worse, the witness evades what was supposed to be his fate, and the fatigued jury daydreams of lunch. In my own career of over twenty-five years, I can identify precisely two occasions where my cross in trial or deposition resulted in an admission consistent with unconditional surrender. More often, I have been drawn into close-range street fights with stubborn witnesses who could take a punch. Hand-to-hand combat with a witness does not favor the lawyer. I am convinced that I gained little or nothing for my clients in these brawls.

Shane Read's book *Winning at Cross-Examination: A Modern Approach for Depositions and Trials* aims to increase the odds of a successful confrontation in the lawyer's favor. He advocates a "ground-up" approach beginning with a thorough understanding of the relevant jury instructions and the development of themes at the inception of the case, followed by a thoughtful but limited cross-examination focused on no more than three areas. His methods, however, are not for the undisciplined or anyone lacking sufficient time to effectively work their case.

Read begins by insisting that the lawyer develop a winning case strategy at the inception of the case. He breaks this requirement down into three subparts: (1) What is the law that governs your case? (2) What is your bottom-line message? and (3) How are you going to tell your story? He argues persuasively that no cross-examination, either in deposition or trial, will be successful without a robust understanding of the law that governs the case and directs his readers to research the applicable jury instructions to gain a thorough understanding of the facts they will need to establish to prevail. Next, Read advises his readers to develop a simple but forceful bottom-line message, and all testimony solicited at trial must support this bottom line. Finally, Read urges lawyers to develop a strategy to frame their message with effective opening statements that include powerful imagery, strong quotes from anticipated testimony, and dramatic exhibits.

The heart of Read's method organizes the areas for cross-examination using the acronym "CROSS." Read insists this acronym is easy to remember, but the concept is clunky and will require repeated review by the lawyer to fully implement this approach – though the principles contained within the acronym are helpful standing on their own. The C stands for "credibility" and directs the attorney to cross-examine the witness to determine bias, favoritism, and

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trustworthiness. The R stands for "restrict" and counsels the lawyer to restrain or limit damaging testimony. The O stands for "outrageous statements," referring to statements prior to trial or during trial that are facially unbelievable. The first S stands for "statements" and refers to impeaching a witness with prior inconsistent statements. And the final S stands for "support your case." An effective cross need not include each of the letters in CROSS. Read also strongly encourages the use of visual presentations during cross-examination, as scientific research shows learning is enhanced when information is presented both aurally and visually. To that end, he advises that the lawyer have both real and demonstrative exhibits visible to the jury during most of the cross-examination.

The book also presents a series of advanced techniques culminating in another acronym, the "ABCs of Impeachment." While CROSS felt clunky and struck me as a dud, the ABCs of Impeachment should be memorized by every litigator. They are: (1) Accuse; (2) Build up; and (3) Confront. Read lays out the implementation of the ABCs of Impeachment well, starting with an authoritative accusation that the witness made a false statement on direct examination, followed by a deliberate build-up of the significance of the witness's oath, and then confrontation with the prior inconsistent statement by reading it to the witness, preferably accompanied by some form of visual aid, such as display of the text of the deposition or playing video or audio.

Winning at Cross-Examination: A Modern Approach for Depositions and Trials

by Shane Read

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Available in paperback & e-book formats.

Read's section on advanced techniques also includes excellent instruction on how to "Master the Witness Who Evades the Question." Every litigator who has been around the sun at least once since leaving law school has encountered the witness who dodges carefully articulated questions that solicit an answer of "yes" or "no." Many of us repeat the question once before turning exasperated to the judge for help. Help, however, may not be forthcoming. The judge may have been distracted and may not understand that the witness has not answered the question, consequently refusing to grant the lawyer's request for intervention. The lawyer then loses credibility with the jury members, who assume that the judge believes the lawyer was badgering the witness. Read advises another way. Simply inform the witness that he has not answered the question and repeat it, as many times as it takes until an answer is given. There are four possible outcomes to this approach, all of them favorable. The judge may grow weary of the witness's evasion tactics and direct the witness to answer the question without a request from the lawyer. Alternatively, the judge may say something like, "Counsel, you've made your point. Move on." The judge is right, and you should. The jury knows the witness is refusing to answer the question because the only straight answer the witness can give hurts them. If the judge refuses to intervene and the witness continues to evade a simple direct question, you should still move on, safe in the knowledge that the jury sees that the logical, common-sense answer to your question is damaging and the witness is deliberately avoiding it. Finally, if you are patient and careful the witness may very well acquiesce and answer. Do not expect this outcome. You do not need it.

Finally, Read provides practical strategies for dealing with expert witnesses. Experts for the other side present unique challenges for litigators given the expertise they have developed in their field and their experience defending their opinions in litigation. The expert typically knows more about the topic of the cross-examination than the lawyer, and even if the expert does not, he or she believes he or she does. A direct confrontation is likely to end in frustration. That said, Read provides a framework for deposing and cross-examining experts that can blunt the impact of the opinion: (1) Showing that expert's expertise is not sufficiently related to the subject on which the expert is testifying; (2) Undermining credibility by asking questions about meaningless memberships, organizations or irrelevant education identified on the expert's curriculum vitae; (3) Pointing out flaws in the expert's preparation, such as a failure to visit the scene or review relevant deposition testimony; and (4) Exploring for bias in the expert's methodology. The lawyer should, of course, lean heavily on the lawyer's own expert to identify potential areas of inquiry.

The remainder of *Winning at Cross-Examination* presents case studies of cross-examinations by the country's top trial lawyers in high-profile trials. Read makes a determined effort to analyze not only these great advocates' victories, but their lines of inquisition that flopped. The reader will be struck by how often even exceptional advocates give up hard-earned ground to a witness by asking one question too many.

My review of these methods caused me to reflect on a cross-examination I conducted as a young lawyer that tracked Read's approach. My client was charged with driving while intoxicated. She was arrested after the police were called to investigate a

report that a large pickup truck pulling a boat had become mired in mud on a road shoulder. My client and her boyfriend were the only occupants of the vehicle and were outside the vehicle when the police arrived. Both of them appeared to have been drinking. My client told the investigating officer that she was the driver and that after the truck got stuck she and her boyfriend celebrated the event by splitting a six-pack on the side of the road while they waited for help. With these facts, the case was unwinnable.

The details in the police report, however, suggested a different story. The truck and the boat were registered to the boyfriend. The boyfriend held a commercial driver's license. And most telling, the boyfriend was on probation for driving while intoxicated. It is also worth noting that this trial took place in rural Alaska, that my client was a petite woman, clearly a city-dweller, and the jury was composed primarily of loggers and commercial fishermen. I thought these gritty men might not have felt comfortable with a girlfriend visiting from the city driving their rigs. I also guessed they would be receptive to my bottom-line message: my client lied to the police to protect her boyfriend. Admitting that my client had been dishonest was risky, but in criminal defense you play the cards you are dealt. Maybe the case was winnable after all.

At trial I conducted a spare cross of the investigating officer. I ignored his technical testimony regarding my client's admission and her intoxication and instead asked a series of questions roughly as follows:

Q. It is true, is it not, that the truck belonged to the boyfriend?

A. Yes.

Q. And it is true, is it not, that the boat belonged to the boyfriend?

A. Yes.

Q. And it is true, is it not, the boyfriend holds a commercial driver's license?

A. Yes.

Q. And it is true, is it not, that boyfriend was on probation for a prior driving while intoxicated conviction?

A. Yes.

Q. And you understand, as a police officer, that a second conviction for driving while intoxicated could have serious implications for the boyfriend's commercial driver's license?

A. Yes.

Q. And you did not interview the boyfriend that night, correct?

A. Correct.

Q. So you never asked him who was driving his truck?

A. No.

Q. Towing his boat?

A. No.

Then I sat down. On redirect, the prosecutor tried to rehabilitate the officer who explained that he did not interview the boyfriend because the girlfriend had confessed, but the damage was done. The officer had acknowledged facts that made the boyfriend an obvious suspect and admitted that he had failed to investigate an obvious suspect. Later, the boyfriend testified that he had been driving the truck. My client did not testify. During closing arguments, I reiterated my basic themes and my bottom-line message. The boyfriend had been drinking (too). It was his truck. It was his boat. He had more to lose in this scenario than my client, and she lied to protect him. The jury acquitted my client after a brief deliberation. The next week the investigating officer was in my office retaining me to represent his mother. He made a point of saying that my professional cross-examination of him gave him confidence in my representation of his mother.

Winning at Cross-Examination is not a nightstand read. Written without rhetorical flourish, it is a journeyman's operator's manual. The successful implementation of Read's methods will likely require frequent revisiting of this book by the lawyer, perhaps prior to every series of depositions or trial.

Every litigator imagines conducting a dramatic cross-examination. The interrogation is poetry, the defeated witness bows in recognition of the lawyer's superior skill, and the gallery erupts in adoration. If you are lucky enough to achieve this dream, I congratulate you and advise that you fully enjoy the moment of your triumph in the arena. Expecting such an outcome, however, is generally unrealistic and striving to attain it poses unnecessary risks to your case. On the other hand, careful application of the methods in *Winning at Cross Examination* will reduce the risks associated with cross-examining a witness and increase the odds of soliciting helpful testimony. This studied approach will make every lawyer a more confident and effective litigator.

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Multiple Use on Public Land – By the Numbers

by David Halverson

Utah is a public lands state. Citizens and politicians of both parties are proud of that fact and would not have it otherwise. How those lands are managed, however, is a perennial fight, with strong feelings, and hurt feelings, on both sides. The purpose of this article is not to resolve that debate, but instead this article will look past the rhetoric and examine the current state of affairs.

The guiding principle of public lands management is found in the Federal Land Policy and Management Act (FLPMA), which provides for management "on the basis of multiple use and sustained yield." 43 U.S.C. § 1701(a)(7); *see also* 16 U.S.C. § 529 (multiple use mandate applied to the Forest Service). But, as a unanimous Supreme Court has had occasion to note, "'[m]ultiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004). Indeed, FLPMA devotes 180 words in an attempt to define "multiple use" (longer than this article thus far) and provides numerous examples of different types of uses which should specifically be considered: "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." 43 U.S.C. § 1702(c).

But since not all uses can coexist on the same spot, public land management can be a zero-sum game. The more wilderness there is, the less mineral extraction can occur, and vice versa. Since such a variety of uses is intended by statute, each user group can argue the group's piece of the pie should be bigger and others,' accordingly, smaller.

So, what do the numbers say? How is Utah doing "striking a balance among the many competing uses to which land can be put?" Below we consider the most common uses of public land in Utah, including most of the uses specifically mentioned by FLPMA.

Total Public Land

First, we can ask, "How big is the pie?" What does it mean, exactly, that Utah is a public lands state? Approximately 63% of Utah is managed by the federal government. Carol Hardy Vincent et al., Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data* 8 (2020). This puts Utah behind only Nevada in terms of highest percentage of federal public lands. Most western states have high percentages of federal ownership while most eastern states are in the single digits. Eleven western states contain, on average, 46% federally owned land while the other states (excluding Alaska) average just 4%. *See id.*

Of the thirty-three million acres of federally-owned land in Utah, the Bureau of Land Management (BLM) is responsible for the largest share by far. BLM manages 22.8 million acres in Utah, accounting alone for 43% of the state. The United States Forest Service comes in second place, managing 8.2 million acres (16% of the state). The National Park Service manages just over two million acres (4% of the state). Other federal agencies have much smaller percentages or are not subject to the multiple use mandate (such as the 800,000 acres for the United States Army Dugway Proving Ground) so they will not be considered further.

Natural Resources

FLPMA "recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands." 43 U.S.C. § 1701(a)(12). The vast majority of industrial development of

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public lands occurs on land managed by BLM, which is, after all, the state's largest landowner. Oil and gas are the primary resources in Utah, followed by coal.

BLM had leased 2.6 million acres for oil and gas production, which accounts for approximately 11% of BLM's total acreage in Utah. *See* Bureau of Land Mgmt., *Oil & Gas Statistics*, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics (last visited Nov. 25, 2020). However, not all lands that are leased become developed. Leasing allows companies to conduct exploratory activities to determine if production is economically feasible. Nationwide, less than 1% of BLM land is actually developed for oil and gas. *Utah Oil & Gas Lease Sales*, Bureau of Land Mgmt., https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/Utah (last visited Nov. 25, 2020). In Utah, 1.1 million acres are producing oil and gas. If, like me, you have trouble conceptualizing large acreage, this is about the size of the Great Salt Lake.

Coal is Utah's second most valuable natural resource, but it is a distant second in terms of public land use. Approximately 85,000 acres of land managed by BLM is devoted to coal mining, which is mostly concentrated in Carbon and Emery counties. Again, for perspective, this is about the size of Utah Lake.

Grazing is harder to quantify. Technically, grazing can occur on virtually all of public land managed by BLM, and some of the land managed by the Forest Service (and even sometimes in national parks). But it is strictly regulated based on what changing forage conditions can support, and so livestock may only allowed on particular acreage for certain months of the year. A rancher may have livestock on Forest Service land for part of the summer, on BLM land for part of the winter, and on private land for in-between times. One way to consider how much grazing is conducted on public land is to consider the number of permits BLM issues – 1,462 in *Utah Rangeland Management and Grazing*, Utah Bureau of Land Mgmt., https://www.blm.gov/programs/natural-resources/rangeland-and-grazing/rangeland-health/utah (last visited Nov. 25, 2020). This gives a general sense of how many ranching operations public lands support, though one operation may have multiple permits. Another perspective is how many animals are on the range. Permits allow a specific number of "animal unit months" (AUMs), which is measured by the forage required to support a cow and her calf for a month. Or, if you prefer wool and mutton, five sheep. In Utah, BLM permits support 1.3 million AUMs. *Id.*

The last natural resource specifically mentioned in FLPMA as part of multiple use management is timber. But public opposition to timber harvesting in National Forests has been fierce. There are virtually no commercial-scale timber operations left in Utah. Timber is left to lick the pie tin for crumbs after all the pieces have been doled out.

Recreation and Preservation

The uses generally seen as least compatible with harvesting natural resources are recreation and preservation of public land in its natural, untouched state. These uses are also specifically mentioned in statute. FLPMA encourages use of public land for outdoor recreation; natural scenic, scientific, and historical values; protection of air and water resources; and preservation. 43 U.S.C. § 1701(a)(8); *see also id.* § 1702(c). But it can be hard to quantify how much public land is available for recreation. Like with grazing, most BLM land is generally open for camping, hiking, recreational shooting, horseback

riding, and similar pursuits.

Oftentimes particular land is so ideal for recreation or preservation that it is removed from the general multiple use mandate and set aside for specialized purposes. In Utah, we have national parks, national monuments, national recreation areas, national forests, national wilderness areas, national wildlife refuges, national wild and scenic rivers, and national conservation areas, to name a few.

Land managed by the National Park Service (NPS) is the prime example. NPS manages some of the most pristine and awe-inspiring public land in the state comprising the "Mighty Five" national parks. Utah has the third most national parks of any state in the county, and Zion National Park gets more visitors than Yellowstone National Park or Yosemite National Park. But beyond the fame of the national parks, NPS also manages monuments, recreation areas, historic trails, and historical parks. More than half of NPS's public land in Utah is made up of the Glen Canyon National Recreation Area, which includes Lake Powell, the second largest man-made lake in North America. As noted above, NPS manages about two million acres, but some of what would normally be considered NPS public land is actually managed by other agencies. For example, of the eight national monuments in Utah, two – Bears Ears and Grand Staircase-Escalante – are managed by BLM. If just these two monuments were assigned to NPS, it would increase its responsibility by 1.2 million acres. Other agencies also have recreation and preservation areas, such as the Flaming Gorge National Recreation Area managed by the Forest Service.

Wilderness and Wilderness Study Areas also account for significant amounts of public land devoted to preservation. The Wilderness Act poetically defines wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain" and where the land "retain[s] its primeval character and influence." 16 U.S.C. § 1131(c). Protection of wilderness in its most natural state is intended to provide "outstanding opportunities for solitude or a primitive and unconfined type of recreation." *Id.* The act ensures that some of Utah's most remote, rugged, and untouched landscapes stay that way. Utah has approximately 1.9 million acres of wilderness and 3.4 million acres of Wilderness Study Areas. That makes this slice of pie more than twice the size as that of mineral leasing. In other words, in Utah more than twice as

much public land is reserved for solitude and primitive recreation than is allowed for production of non-renewable natural resources.

Room for All

Despite all this talk of pie-splitting, varying uses can often overlap without conflict. Most visitors would be surprised to learn grazing still occurs in Capitol Reef National Park and Glen Canyon National Recreation Area. Some uses, such as hunting, are seasonal, leaving the land open for other uses at different times of the year. Some oil and gas lease areas are restricted from having any surface occupancy; extraction must occur entirely underground, leaving sensitive surface areas undisturbed and free for other uses. Salt Lake County is a great example of how seemingly incongruous uses can exist in close proximity. On the east of Salt Lake County is Uinta-Wasatch-Cache National Forest, which boasts of both untouched natural areas and world-class skiing. On the west (albeit on private land) is Bingham Canyon Mine, which is one of the world's largest man-made open-pit mining excavations. And nestled between is the state's largest population center.

But even with thirty-three million acres of public land, sometime users cannot share. A wilderness cannot have a road, let alone an oil rig. Livestock and wildlife compete for the same forage. An open-pit mine would mar the pristine vistas of national parks. But all users – hunters and campers, drillers and miners, recreationists and ranchers – have a valid argument, based on multiple use, that their particular use should be allowed and protected in at least some areas. And so, policy makers must not focus on one use to the exclusion of others.

Courts agree. In one recent case, the Tenth Circuit reviewed a decision by the Forest Service to allow coal mining near sensitive "roadless areas" of a National Forest. *High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020). Citing multiple use, the court noted that the agency's statutory mandate includes both conservation and mineral production. *Id.* at 1224. But the Forest Service had declined to consider a middle-ground alternative that would involve some leasing and some roadless area protection. The court found that the Forest Service adopted a "one-sided approach" that focused on "only one of the agency's established objectives." *Id.* Similar reasoning is the basis of a recent decision from the United States District of Utah. In reviewing BLM's decision to offer certain areas in the Uintah Basin for oil and gas leasing, the court criticized the agency for "evalut[ing] just two polar opposite alternatives" and failing to consider two mixed alternatives that would restrict development in areas with potential environmental concerns while allowing it elsewhere. *Rocky Mountain Wild v. Bernhardt*, 2020 WL 7264914, No. 2:19-cv-00929-DBB-CMR, at *8 (D. Utah Dec. 10, 2020). In the complicated weighing of competing uses, these cases may be a victory of conservation over development, but the reasoning applies with equal force to an opposite result. If an agency were to focus solely on conservation and ignore reasonable alternatives that compromise and allow some development, the result could be just as vulnerable to challenge.

In the end, attempting to completely prohibit any one use, such as mineral extraction or grazing, is a denial of the entire purpose of multiple use. Balancing uses is difficult, but necessary. And while multiple use does not mean that all uses should happen in any one particular place, it does mean that all uses should have a place. Utah's public lands are vast and varied enough to allow room for all.

Should I Tell My Client I Am Friends With Opposing Counsel?

by Keith A. Call

I have often wondered how Dad did it. He was a country lawyer in a small Utah town where he knew almost everyone. He had his own private practice, served as part-time county attorney, and was an ecclesiastical leader for much of the community. He knew the judge, the other lawyers, his clients, and most of the opposing parties on all his local cases. Every time he sued or prosecuted someone in the community, it was likely someone he knew, and often a religious parishioner. He shared a law library with his frequent litigation adversary, attorney Jim Smedley, who was my

Keith Call, J Harold Call, and James J. Smedley hike the Zion Narrows, in about 1979. Photo credit: likely Jud Smedley.

little league basketball coach and a great mentor. My dad and I even hiked the Zion Narrows with Jim and his son, Jud. Yet, if Dad had not found a way to navigate this web of relationships and potential conflicts, he could not have practiced law or served the community. I have enormous respect for him.

Several months ago, I wrote about the ethics of friendships between lawyers and judges. *See* Keith A. Call, *Can We Still Be Friends?*, 33 Utah B.J. 34 (Jan./Feb. 2020). The ABA recently issued a new opinion that addresses lawyer friendships with opposing counsel. Opinion 494 attempts to provide guidance on when it is and is not necessary to disclose lawyer friendships to our clients and to obtain their informed consent prior to accepting or continuing the representation. ABA Comm. on Ethics and Pro. Resp., Formal Op. 494 (2020), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-494.pdf (last visited Nov. 24, 2020) [hereinafter Opinion 494].

Rule 1.7(a) and Some General Principles

Opinion 494 relies heavily on Model Rule 1.7(a)(2), which is identical to Rule 1.7(a)(2) of the Utah Rules of Professional Conduct. The rule states,

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) [t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Opinion 494 lays down five "general principles" that apply to all types of lawyer friendships. First, some personal relationships with opposing counsel, but not all, create conflicts that require disclosure or even informed consent from the client. Opinion 494, at 1–3. Second, in determining whether a personal conflict exists, the lawyer should consider her or his actual role in the matter. *Id*. at 4. Lead counsel on a case may be more likely to have a conflict based on personal relationships with opposing counsel than subordinate counsel who has little decision-making authority and minimal contact with opposing counsel. *Id*. Third,

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

the lawyer's obligations of confidentiality obviously still apply. *Id*. The lawyer must take reasonable measures to ensure that no confidential information is inadvertently disclosed to an opposing lawyer who is also a close friend. *Id*. Fourth, a lawyer who accepts a representation must withdraw if the lawyer later determines that she or he can no longer provide competent and diligent representation because of the personal relationship with opposing counsel. *Id*. Finally, personal conflicts such as friendships with opposing counsel are ordinarily not imputed to other members of the firm. *Id*. at 4–5; *see also* ABA Model Rule Pro. Conduct 1.10(a)(1) (imputation of conflicts); Utah R. Pro. Conduct 1.10(a)(1) (same).

Rules for Classes of Lawyer Friendships

Similar to the ABA's Opinion 488 on lawyer-judge relationships, *see* ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 488, at 4–6 (2019), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_488.pdf (last visited Nov. 24, 2020) [hereinafter Opinion 488], Opinion 494 addresses three categories of lawyer-lawyer friendships – (1) "intimate relationships," (2) "friendships," and (3) "acquaintances" – and provides guidance for each category. *See* ABA Comm. on Ethics & Pro. Responsibility Formal Op. 494, at 5–8 (2020), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/.

An **intimate relationship** includes lawyers who cohabit in an intimate relationship, are engaged to be married, or are engaged in an exclusive intimate relationship. Opinion 494, at 5. Before accepting representation of a client against an opposing lawyer with whom you are in an intimate relationship, the following conditions must exist: (a) you must reasonably believe that you will be able to provide competent representation to the client; (b) both lawyers must disclose the relationship to their respective clients; and (c) each client must give informed consent confirmed in writing. *Id*. Opposing lawyers who are in a non-exclusive intimate relationship must carefully consider whether disclosure and consent are required under Rule 1.7(a)(2). *Id*. at 6. "The prudent course would be to disclose to the affected clients and obtain their informed consent." *Id*.

A **friendship** may be the most difficult category to navigate. "'Friendship' implies a degree of affinity greater than being acquainted with a person . . . the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others." *Id*. at 6 (quoting Opinion 488, at 4). Close friendships should be disclosed to each affected client. *Id*. at 7. Indicia of close friendships that require disclosure and informed consent include exchanging gifts on holidays or other special occasions, regularly socializing together, regularly communicating and coordinating activities because the lawyers' children are close friends, routinely spending time at each other's homes, vacationing together, sharing a mentor-protégé relationship, or sharing confidences and intimate details of each other's lives. *Id*. at 7 (citing Opinion 488, at 4).

By contrast, friendships that might require disclosure to the affected clients but not consent include those between lawyers who "once practiced law together [and] may periodically meet for a meal" or law school classmates who "stay in touch through occasional calls or correspondence." *Id*. (alteration in original) (quoting Opinion 488, at 4). Whether disclosure or consent is required "depends on the lawyer's considered judgment as to whether . . . Rule 1.7(a)(2) applies." *Id*.

Acquaintances are "relationships that do not carry the familiarity, affinity or attachment of friendships." *Id*. at 7. Lawyers are "'acquaintances when their interactions . . . are coincidental or relatively superficial.'" *Id*. (omission in original) (quoting Opinion 488, at 4). Opinion 494 cites as examples being members of the same place of worship, being members of the same professional or civic organizations, doing joint CLE presentations, serving on bar committees or boards together, being members at the same gym, or living in the same area or neighborhood. *Id*. at 7–8. Acquaintanceships that are collegial but do not rise to the level of "friendship" described above do not have to be disclosed to clients. *Id*. at 8.

Conclusion

One thing that seems clear to me is that the question of opposing lawyer friendships leaves a large field of subjectivity and reliance on the lawyer's good judgment. Moreover, a standard that works along the Wasatch Front may not be workable in more rural parts of the state. I profoundly admire my father's work as a lawyer and general servant of humankind. But I have to doubt whether his way of handling personal relationships would have strictly measured up to Opinion 494.

If nothing else, Opinion 494 should make us all think about our personal relationships with other lawyers and whether there is anything in our relationships with opposing counsel that might materially impact our duty of undivided loyalty and zealous advocacy on behalf of our clients. If we have an intimate or close relationship with the opposing lawyer but reasonably believe we can provide uninhibited representation, then we can proceed with informed consent. Otherwise, we ought to pass on the representation.

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.

Notice of Bar Commission Election

THIRD, FOURTH, AND FIFTH DIVISIONS

Nominations to the office of Bar Commissioner are hereby solicited for:

Two Members in the Third Division (Salt Lake, Summit, and Tooele Counties);

One Member in the Fourth Division (Utah, Wasatch, Juab, and Millard), and

One Member in the Fifth Division (Washington, Iron, Beaver, Sanpete, Sevier, Piute, Wayne, Garfield, Kane, Carbon, Emery, Grand, and San Juan Counties).

Each position will serve a three-year term. Terms will begin in July 2021. To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar.

Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Election information and Nominating Petitions are available at http://www.utahbar.org/bar-operations/leadership/. **Completed petitions must be submitted to John Baldwin, Executive Director, no later than February 1, 2021, by 5:00 p.m.**

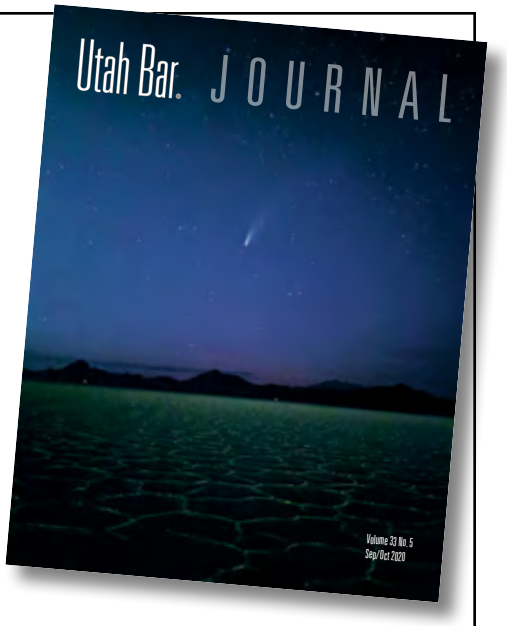
NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1st with balloting to be completed on April 15th.

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

2020 *Utah Bar Journal* Cover of the Year

Joshua C. Bishop

The winner of the *Utah Bar Journal* Cover of the Year award for 2020 is *NEOWISE*, taken by Utah State Bar member Joshua C. Bishop. Bishop's photo appeared on the cover of the Sep/Oct 2020 issue. Asked about his once in a lifetime 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."



Congratulations to Joshua, and thank you to all of the contributors who have shared their photographs of Utah on *Bar Journal* covers over the past thirty-two years!

The *Bar Journal* editors encourage members of the Utah State Bar or Paralegal Division, who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal*, to submit their photographs for consideration. For details and instructions, please see page three of this issue. **A tip for prospective photographers: preference is given to high resolution portrait (tall) rather than landscape (wide) photographs.**

IN MEMORIAM

This "In Memoriam" listing contains the names of former and current members of the Utah State Bar, as well as paralegals, and judges whose deaths occurred between January 1, 2020, and our December publication deadline, as reported to the Utah State Bar. To report the recent death of a former or current Bar member, paralegal, or judge please email BarJournal@utahbar.org.

JUDGES

Dee V. Benson

Jerald L. Jensen

Michael W. Kwan

Kay L. McIff

Monroe G. McKay

ATTORNEYS

John A. Anderson

David M. Bown

Gary Buhler

Alva J. Butler

John O. Christiansen

Jerrald D. Conder

Ralph D. Crockett

Kent C. Dugmore

J. Steven Eklund

Delano S. Findlay

Edwin B. Firmage

Kenneth R. Garrett

L. Zane Gill

Stewart W. Gollan

Narrvel E. Hall

Neal G. Hart

Barbara Page Heaney

James A. Holtkamp

Richard C. Hutchison

Sharel Reber Johnson

Ron R. Kunzler

Charles D. Larsen

Alan G. Leal

Jim Lowrie

Oscar W. McConkie, Jr.

Jay W. Mitton

Roy B. Moore

Marcus R. Mumford

Jesse P. Murff

Kathleen E. Murray

Richard S. Nemelka

Robert F. Owens

David P. Phippen, Sr.

Jaren K. Rencher

Robert D. Rose

J. Bruce Savage, Jr.

Milda Shibonis

Douglas P. Simpson

Thomas C. Sturdy

Jeff R. Thorne

David E. West

David M. Wahlquist

Gregory M. Warner

H. Mifflin Williams, III

PARALEGALS

Krystal Hazlett

Online Marketplace to Supplement Beneplace's Member Benefit Offerings

The Utah State Bar has organized a Marketplace consisting of vendors offering services to Bar Licensees. These services are designed to help you in your practice. If you have questions or need additional information, please visit the Marketplace at www.utahbar.org/marketplace.

Pro Bono Honor Roll

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

Family Justice Center

Steve Averett
James Bachman
Tiffany De Gala
Michael Harrison
Brandon Merrill
Kathleen Phinney
Linda Smith
Babata Sonnenberg
Nancy VanSlooten
Rachel Whipple

Private Guardian ad Litem

Jay Kessler
Allison Librett
Celia Ockey
Martin Olsen
Jeannine Timothy

Pro Se Family Law Calendar

Matt Bell
Marco Brown
Harry Caston
Brent Chipman
David Corbett
Jennifer Falk
Dani Hawkes
Jon Hibshman
Orlando Luna
Cassie Medura
Spencer Ricks
Martin Stolz
Doug Stowell
Virginia Sudbury
Jamie Topham
Staci Visser
Cory Wall
Greg Wall

Pro Se Debt Collection Calendar

Geena Arata
Mark Baer
Anna Christiansen
Jeff Daybell
Aro Han
Sierra Hansen
Emily Haws
Nathan Jepson
Annie Keller-Miguel
Amy MacDonald
Casey Mock
Chase Nielsen
Adam Stevens
George Sutton
Alex Vandiver
Candace Waters

Pro Se Immediate Occupancy Calendar

Kayla Armstrong
Mark Baer
Anna Christiansen
Jeff Daybell
AnnMarie Garrett
Aro Han
Luke Hanks
Sierra Hansen
Rosemary Hollinger
Brent Huff
Annie Keller-Miguel
Amy MacDonald
Alex Vandiver
Candace Waters

SUBA Talk to a Lawyer Legal Clinic

Jeff Peatross
Adam Ravitch
Jonathan Wentz
Robert Winsor
Lane Wood

Timpanogos Legal Center

Bryan Baron
Cleve Burns
Babata Sonnenberg
Marca Tanner - Brewington

Utah Bar's Virtual Legal Clinic

Julia Babilis
Jonathan Benson
Dan Black
Mike Black
Russell Blood
Adam Clark
Jill Coil
Kimberly Coleman
John Cooper
Jessica Couser
Elizabeth Dunning
Matthew Earl
Craig Ebert
Thom Gover
Robert Harrison
Aaron Hart
Rosemary Hollinger
Tyson Horrocks
Bethany Jennings
Annie Keller-Miguel
Elizabeth Lazcano
Suzanne Marelius
Travis Marker
Gabriela Mena
Tyler Needham
Sterling Olander
Jacob Ong
Ellen Ostrow
Steven Park
Clifford Parkinson
Katherine Pepin
AJ Pepper
Cecilee Price-Huish
Jessica Rancie
Jessica Read
Amanda Reynolds
Chris Sanders
Alison Satterlee
Thomas Seiler
Luke Shaw
Gregory Sonnenberg
Farrah Spencer
Liana Spendlove
Julia Stephens
Brandon Stone
Mike Studebaker
Claire Summerhill
George Sutton
Jason Velez
Kregg Wallace
Jay Wilgus

Utah Legal Services Cases

Jared Allebest
Dean Andreasen
Eric Barnes
Brandon Baxter
Christopher Beus
Walter Bornemeier
Trent Cahill
Travis Christiansen
Kody Condos
Hayley Cousin
Kirk Cullimore, Jr.
T. Edward Cundick, Jr.
Donna Drown
Carolina Duvanced
Katie Ellis
Christopher Evans
Gregory Hadley
Darin Hammond
Alan Hurst
Sheena Knox
Sarah Larsen
Niel Lund
Chad McKay
William Melton
Keil Myers
Elisse Newey
Brody O'Connor
Don Petersen
Nicholle Pitt White
Cortney Remund
Kent Scott
Emily Sharp Rains
Rick Sorensen
Christopher Sotiriou
Reid Tateoka
Daniel Tobler
Bethany Warr
Kristin Woods

Utah State Bar Executive Director

POSITION

The Utah State Bar is seeking applications for the position of Executive Director. The position is the principal administrative and operations officer of the Bar and, under direction of the Bar Commission, is responsible to carry out the mission of the Bar and provide supervision of the day-to-day regulatory operations, public services, and lawyer benefits and events; administer annual budgets; and oversee the operations and maintenance of the Utah Law and Justice Center.

QUALIFICATIONS

J.D. with minimum ten years of relevant experience required (member of the Utah State Bar a plus); successful experience managing staff, projects and processes in a public, private, or non-profit organization; exceptional administrative, communications, and organizational skills; experience and in-depth understanding of the court system, the legal profession, and the public's legal needs.

ESSENTIAL DUTIES AND RESPONSIBILITIES

Serves as Chief Operations Officer for day-to-day operations of the Bar, including "outward-facing" responsibilities and internal management of effective regulatory, public and lawyer-directed programs, services, and projects; serves as chief fiscal officer of the Bar; serves as primary staff person in assisting the Bar President, Bar President-elect and the Bar Commission members in fulfilling their duties; oversees special projects and distinct programs as directed; coordinates long-range planning and carries out short and long range goals; coordinates relations and communications with various Bar-related groups.

REQUIRED ABILITIES

Respects, embraces and promotes inclusion and diversity; understands and is able to practically manage financial issues, budgets, and provide sound fiscal oversight and leadership; has a comprehensive understanding of current and historic trends, policies, and issues involving the legal profession and their implications at the national and state levels; is an effective team builder, familiar with human resource policies and practices with an emphasis on attracting, developing and sustaining a high-performing team of staff professionals; possesses extraordinary communication skills, both written and oral; is a good listener; has the highest ethical standards and unquestioned integrity, whose personal values and professional passions are aligned with the mission of the Bar with an emphasis on professionalism, access to justice, and respect for the rule of law; is flexible and congenial; manages competing priorities effectively and regularly; is well-organized with strong attention to detail; possesses a high degree of poise, diplomacy, and tact.

SALARY AND BENEFITS

Salary depends upon on experience. Benefits include leave, insurance coverages, contribution to a 401K, continuing legal education fees, and Bar license fee. Organization: The Utah State Bar is a 501 (c) (6) non-profit corporation to which the Utah Supreme Court has delegated the regulation of the practice of law and services for the public and benefit programs for lawyers. The Utah State Bar is an Equal Opportunity Employer. More information is available at www.utahbar.org. The full position description is available at www.utahbar.org/ED.

CONTACT

Please send resumes and letters of interest to Executive Assistant Christy Abad at Christy.Abad@utahbar.org by Monday, February 28, 2021.

Brown Law

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Thank you for your referrals!

UTDIVORCEATTORNEY.COM

801-685-9999

Attorney Discipline

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

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

PROBATION

On October 19, 2020, the Honorable Amber M. Mettler, Third Judicial District Court, entered an order of discipline against Don Carlos Stirling, placing him on probation for a period of one year based on Mr. Stirling's violation of Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.15(a) (Safekeeping Property), Rule 1.15(c) (Safekeeping Property), and Rule 1.15(d) (Safekeeping Property) of the Rules of Professional Conduct.

In summary:

In summary, a client retained Mr. Stirling for a guardianship matter involving the client's adult daughter. At the time the client sought the representation, the client's daughter was incarcerated and due to the incarceration she could not be properly treated for her condition. The client paid Mr. Stirling and the money was deposited into Mr. Stirling's operating account, not an attorney trust account. A few days later, another charge was made to the client's debit card that was also deposited into Mr. Stirling's operating account. Mr. Stirling did not have an attorney trust account at the time he collected the money from the client. The client contacted Mr. Stirling because he did not authorize the additional charge. Mr. Stirling indicated the charge was made in error and that he would refund the money to the client. A refund receipt for the additional charge was emailed to the client but he did not receive the money until several months later.

The client made attempts to contact Mr. Stirling without response by leaving messages on Mr. Stirling's phone. At times, the client attempted to leave messages but Mr. Stirling's mailbox was full. Eventually, the client spoke with Mr. Stirling and made an appointment to meet; however, Mr. Stirling called the client and cancelled the appointment.

Mr. Stirling told the client he would file the guardianship and send the client the copies. Mr. Stirling did not send any documents to the client nor did he file the guardianship documents with the court.

The client filed a small claims action against Mr. Stirling. The court entered a default judgment against Mr. Stirling and a satisfaction of judgment was filed shortly thereafter.

Mitigating Factor:

Personal or emotional problems.

RECIPROCAL DISCIPLINE

On October 28, 2020, the Honorable Robert P. Faust, Third Judicial District Court, entered an Order of Reciprocal Discipline: Suspension, against Liborius I. Agwara, suspending Mr. Agwara for one year for his violation of Rule 1.15(a) (Safekeeping Property), Rule 1.4(a) (Communication), Rule 1.8(a) (Conflict of Interest: Current Clients: Specific Rules), and Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct.

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

801-257-5518
DisciplineInfo@UtahBar.org

In summary:
The OPC's case was based upon the facts of the Nevada disciplinary matter. In summary: On October 21, 2019, the Supreme Court of Nevada entered an Order Approving Conditional Guilty Plea, suspending Mr. Agwara from the practice of law for three years with two years stayed. The Order Approving Conditional Guilty Plea was predicated on the following facts in relevant part:

Mr. Agwara violated rules by commingling client funds with personal funds, misusing his client trust account and failing to keep records, failing to timely communicate with clients and lienholders, failing to pay liens and funds owed to clients in a timely manner, loaning money to a client without advising him to consult with independent counsel, and failing to respond to the State Bar's request for records when investigating clients' grievances.

SUSPENSION

On November 9, 2020, the Honorable Patrick W. Corum, Third Judicial District Court, entered an Order of Suspension, against Steven E. Rush, suspending his license to practice law for a period of three years. The court determined that Mr. Rush violated Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.15(a) (Safekeeping Property), Rule 1.15(c) (Safekeeping Property), Rule 1.16(d) (Declining or Terminating Representation), Rule 8.4(b) (Misconduct), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Client Matter
A client retained Mr. Rush to represent him in a matter involving modification of a divorce decree, paying a flat fee for the representation. The Representation Agreement signed by the client and Mr. Rush states that flat fees were deemed the property of the attorney at the time of receipt and were nonrefundable. Pursuant to the Representation Agreement, Mr. Rush did not put the client's funds in a client trust account but put the funds in his own personal account. The client paid an additional fee for a temporary stay of custody and court fees.

For several months, the client attempted to contact Mr. Rush by telephone, text, and email but did not receive a response. Mr. Rush finally responded several months later notifying the client that he would be out of state for several months for treatment. Rather than inform the client that he needed to withdraw, Mr. Rush offered to continue with the representation. The client agreed to keep Mr. Rush on as his attorney, provided Mr. Rush would inform the court of the leave of absence and get confirmation from the court that the delay was not going to affect his case. By email, Mr. Rush confirmed to the client that he had contacted the court regarding his leave and was told that they could pick up where they left off without a problem. The court docket for the client's case has no entry stating Mr. Rush contacted the court.

The court entered an Order of Dismissal. Mr. Rush did not notify the client that the case had been dismissed.

Criminal Matter #1
In this matter, Mr. Rush pleaded guilty of one count of Possession or Use of a Controlled Substance. Mr. Rush violated the conditions of his sentence and his probation term was revoked and reinstated.

Criminal Matter #2
In this matter, Mr. Rush pleaded guilty to one count of Retail Theft (Shoplifting) and one count of Failure to Appear.

Criminal Matter #3
In this matter, Mr. Rush pleaded guilty to one count of Burglary of a Vehicle.

Criminal Matter #4
In this matter, Mr. Rush pleaded guilty to one count of Possession or Use of a Controlled Substance. Mr. Rush violated the terms of his sentence and his probation was revoked and reinstated. Mr. Rush was committed by order of the court to be held in the Salt Lake County Jail for sixty days.

Criminal Matter #5
In this matter, Mr. Rush pleaded guilty to Driving Under the Influence of Alcohol/Drugs. Mr. Rush violated the terms of his sentence and his probation was revoked and reinstated.

Mitigation
Mr. Rush provided proof of mitigating circumstances. The mitigating circumstances in this matter are that Mr. Rush attended and completed a rehabilitation treatment program and was released from probation by the court.

RECIPROCAL DISCIPLINE

On June 23, 2020, the Honorable Vernice S. Trease, Third Judicial District Court, entered an Order of Reciprocal Discipline: Disbarment, against Andrew D. Taylor, disbarring Mr. Taylor for his violation of Rule 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Lawyer), Rule 1.4(a) (Communication), Rule 1.8(a) (Conflict of Interest: Current Clients), Rule 1.8(f) (Conflict of Interest: Current Clients), Rule 1.15(a) (Safekeeping Property), Rule 1.15(c) (Safekeeping Property), Rule 3.3(a) (Candor Towards the Tribunal), Rule 3.4(a) (Fairness to Opposing Party and Counsel), Rule 4.1 (Truthfulness in Statements to Others), Rule 5.4(a) (Professional Independence of a Lawyer), Rule 8.1(a) (Bar Admission and Disciplinary Matters), Rule 8.1(b) (Bar Admission and Disciplinary Matters), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:
On July 5, 2019, the Nevada Supreme Court issued an Order of Disbarment, disbarring Mr. Taylor from the practice of law. The Order was predicated on the following facts in relevant part:

The record therefore established that Mr. Taylor misappropriated client funds. Further, he commingled personal funds with client funds and opened numerous different law firms with different trust accounts and operating accounts to mislead the Nevada State Bar and his clients. For one of those law firms, he named his non-lawyer assistant as the sole officer. Additionally, he entered into litigation advancement loan agreements on behalf of clients without their knowledge or consent, used those funds for his personal or business expenses, and failed to repay many of those loans. He failed to comply with reasonable requests for information from the Nevada State Bar and made false statements of material fact concerning his trust account to the Nevada State Bar.

Aggravating Circumstances:
Prior record of discipline; dishonest or selfish motive; pattern of misconduct, multiple offenses; obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority; refusal to acknowledge the

wrongful nature of the misconduct involved, either to the client or to the disciplinary authority; vulnerability of victim; substantial experience in the practice of law; lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved; and illegal conduct.

DISBARMENT

On October 27, 2020, the Honorable Kraig J. Powell, Fourth Judicial District Court, entered an Order of Disbarment against Cynthia M. Gordon, disbarring her from the practice of law. The court determined that Ms. Gordon violated Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.4(b) (Communication), Rule 1.5(a) (Fees), Rule 1.16(d) (Declining or Terminating Representation), and Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
This case involves four client matters. In the first matter, a client retained Ms. Gordon to represent the client in immigration proceedings. During the representation, the client attempted to contact Ms. Gordon several times but she was not responsive. The client eventually found out that Ms. Gordon was no longer occupying the office space. Ms. Gordon did not provide the client their file or a refund. The OPC sent a Notice of Informal Complaint (NOIC) to Ms. Gordon. Ms. Gordon did not respond to the NOIC.

In the second matter, a client retained Ms. Gordon to represent the client in removal proceedings. Ms. Gordon failed to submit evidence regarding the client's legal entry into the United States. The client's case was based on adjustment of status and not cancellation, a fact that Ms. Gordon failed to recognize. Ms. Gordon failed to perform the necessary functions and request the appropriate relief for the client and the application for cancellation of removal was denied and the client was ordered removed from the United States. Ms. Gordon timely filed a Notice of Appeal but failed to file a brief in support of the appeal. The appeal was summarily dismissed. The OPC sent a NOIC to Ms. Gordon. Ms. Gordon did not respond to the NOIC.

In the third matter, a client retained Ms. Gordon to assist her and her husband with several matters, including domestic, criminal and immigration matters. Ms. Gordon failed to appear for some court appearances. During its investigation, the OPC received a copy of a letter from Disciplinary Counsel for the Department of Justice, Executive Office of Immigration Review. In the letter to Ms. Gordon it was requested that she withdraw from all immigration cases given her ineligibility to practice law. Ms. Gordon remained the attorney of record for one case before the Immigration Court and four cases before the Board of Immigration Appeals. The OPC sent a NOIC to Ms. Gordon. Ms. Gordon did not respond to the NOIC.

In the fourth matter, a client retained Ms. Gordon to represent the client in an immigration matter. Three years later, the client met with Ms. Gordon and was told that he needed to make an additional payment for filing fees. The client later contacted USCIS and learned the fees were never paid. The client called Ms. Gordon frequently to get an explanation, but she did not respond to his messages. The client stopped by Ms. Gordon's office numerous times but was told by her administrative assistant that Ms. Gordon was busy. The client retained other counsel to complete his immigration matter. The client left numerous messages requesting his file and personal documents, but Ms. Gordon did not respond. Eventually, he visited Ms. Gordon's office to obtain his file but was informed by her staff that only Ms. Gordon had access to the file and that the client could not have the file. The OPC sent a NOIC to Ms. Gordon. Ms. Gordon did not respond to the NOIC.

Please Welcome the New Utah Licensed Paralegal Practitioners

by Greg Wayment

In an article written in March of this year by Julie Emery, we announced the first four licensed paralegal practitioners (LPP). We're are now pleased to announce an additional seven newly credentialed LPPs (six are featured here), bringing the total in the first year of the program to eleven. Please welcome:

Jennifer Arganbright, LPP, CP – Family Law and Housing

Jennifer Arganbright has been a paralegal for nearly thirty years. Beginning her career in collections and bankruptcy, Jenny has broadened her legal experience to also include estate planning, criminal defense, landlord/tenant issues, and family law matters. She has followed the LPP program since the formation of the task force and is excited to explore the possibilities of this new career. She holds a Certified Paralegal (CP) credential from the National Association of Legal Assistants (NALA) and is a licensed/bonded notary public and remote online notary. Jenny is currently employed with attorney Chad J. Utley of Farris & Utley, PC specializing in estate planning and family law.

Leslie Staples, LPP, CP – Family Law

Leslie Staples has been a paralegal for over twenty-seven years and more notably a family law paralegal, working directly with Christina Miller at Miller Law Group, for almost twenty-three years. Ms. Staples heard about the LPP program through the Paralegal Division of the Utah State Bar and, from the beginning, was excited for this new challenge. Ms. Staples believes the LPP program is a great opportunity to expand her legal knowledge and skills and to also give back to the community.

Through her years working as a family law paralegal, Ms. Staples has seen many, many community members, family members, and friends trudge through the difficult divorce process without representation. While some need just a little guidance and emotional support, others need cost-effective and knowledgeable legal assistance from start to finish. Ms. Staples felt this was a gap in the judicial system she could help fill. Ms. Staples has never regretted her paralegal career choice, enjoys working with clients, counsel, clerks, mediators, and advocates alike in the legal profession, and loves the everyday challenges that come with being a family law paralegal. Ms. Staples is excited and ready to embark on her LPP journey.

Rheané Swenson, LPP, CP – Housing

Rheané Swenson has been a paralegal at Peck Hadfield Baxter & Moore, LLC, in Logan, Utah, for five years, where she is also starting her LPP Practice. Peck Hadfield has been incredibly supportive of LPP practitioners and, in fact, employs two LPPs that are establishing their LPP practice at Peck Hadfield.

Rheané Swenson first became interested in the LPP program while she was studying to become a CP. The LPP program was especially intriguing to her because she felt that it was a way to help people access the justice system, when they otherwise would have not been able to. It is also a great, and feasible, way for busy paralegals to advance their careers. Rheané is excited for the LPP program and is especially interested in public outreach to promote the profession and the services it offers.

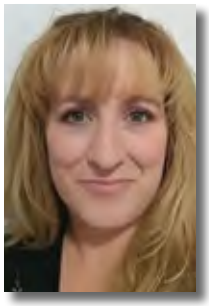
Rheané is a CP through NALA and recently earned her Associates Degree in Legal Studies from Southern Utah University. She has been a member of the Paralegal Division of the Utah State Bar since 2018 and currently serves as the Secretary and Region 1 Director.

Peter Vanderhooft, LPP, CP – Consumer Protection, Family Law, and Housing

Peter Vanderhooft is a LPP in the state of Utah. He is licensed to practice in Family Law (temporary separation, divorce, parentage, cohabitant abuse, civil stalking, custody and support, and name change), Debt Collections, and Landlord/Tenant disputes. Peter is a CP through NALA and is a current member of the Utah Paralegal Association (UPA).

Peter Vanderhooft has been a Litigation Paralegal at Wrona Law in Park City, Utah, since September 2017. He has worked on a wide variety of litigation matters including: real estate, contract disputes, family law, debt collection, unlawful detainer, medical malpractice, and personal injury. Peter is also a Librarian and Certified Records Analyst and has extensive knowledge in records organization and management.

Angela Willoughby, LPP, ACP – Consumer Protection and Family Law



Angela Willoughby has been a paralegal with Cook & Monahan, LLC in Salt Lake City, Utah, for the past thirteen years. She has been working remotely from her home town of Delta, Utah, for the past seven of those years. Currently she is wearing many hats; she is the firm's Office/Billing Manager, Receptionist and Paralegal. Angela is an (ACP) Advanced Certified Paralegal through NALA. She is a member of the Paralegal Division of the Utah State Bar.

In 2019 Angela became Utah's first licensed/bonded Remote Notary. Angela enjoys helping with Wills for Heroes and has traveled all across Utah to help.

Angela has started her own LPP firm in Delta, Utah, licensed in Family Law (temporary separation, divorce, parentage, cohabitant abuse, civil stalking, custody and support, and name change) and Debt Collections and plans on adding Landlord/Tenant disputes in March 2021.

Tonya Wright, LPP, ACP – Consumer Protection, Family Law, and Housing

Tonya Wright is a LPP in the State of Utah with over twenty years experience in Law. She is licensed in Family Law (temporary separation, divorce, parentage, cohabitant abuse, civil stalking, custody and support, and name change); Debt Collections; and Landlord/Tenant disputes. Tonya is an ACP through NALA. She is the current Chair of the Paralegal Division of the Utah State Bar (2020–2021) and has been on the Board of Directors for the Paralegal Division since 2018.

Tonya Wright has been a litigation paralegal to Shaun L Peck of Peck Hadfield Baxter & Moore, LLC, in Logan, Utah, since March 2011. She has had experience working on a wide variety of litigation matters, including personal injury, insurance disputes, contract disputes, collection disputes, sexual abuse claims, employment claims, family law, estate disputes, and malpractice claims. After working in debt collection for eight years, Tonya moved to Cache Valley and worked as a Deputy Court Clerk at the First District and Juvenile Courts in Logan from 2006 to 2011, where she gained experience working in the civil, criminal, domestic, and juvenile in-court desks.

During her time as a court clerk, Tonya saw the need for help for the self-represented first-hand. It was always a frustrating experience to have to tell pro se litigants their choices were to either go it alone or hire a lawyer. Tonya is excited to help the underdogs who cannot afford legal representation. She feels strongly about the important role experienced paralegals can play in the LPP profession and is looking forward to integrating the practice into her career.

For more information about how to hire a Utah Licensed Paralegal Practitioner, please visit the Utah State Bar's website at: https://www.licensedlawyer.org/Find-a-Lawyer/Licensed-Paralegal-Practitioners.

CLE Calendar

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

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

January 6, 2021 | 5:30 pm – 7:30 pm — **1.5 hrs. Self-Study CLE Credit**

Mock Trial Judges CLE Webinar. Forty-first annual Utah Mock Trial Competition going "Virtual" for the first time in 2021. Utah Mock Trial is a hands-on activity for High School, Jr. High and Middle School students. This CLE will cover: Utah Mock Trial Simplified Rules of Evidence Discussion, Mock Trial Case Discussion, Mock Trial Standards of Professionalism, Mock Trial Judge's Handbook, Virtual Rules for Judging.

January 12, 2021 | 2:00 pm – 3:15 pm

TRIAL ACADEMY BOOT CAMP SERIES: What Clients Want – The Flexible Irrevocable Trust. Presented by the Estate Planning Section of the Utah State Bar.

January 13, 2021 | 12:00 pm – 1:00 pm

TRIAL ACADEMY BOOT CAMP SERIES: Mediator Top Ten Tips for Success in Employment Law Mediations. Presented by the Dispute Resolution and Labor & Employment Law Sections of the Utah State Bar.

January 19, 2021 | 12:00 pm – 1:00 pm

A Storm is Coming – A Refresher on Key Bankruptcy Concepts and Discussion of Common Intersections with Non-Bankruptcy Law to Help Your Practice Weather the Predicted Bankruptcy Surge. Presented by the Young Lawyers Division of the Utah State Bar. Presenter: Sarah Laybourne, Law Clerk at the U.S. Bankruptcy Court and Ellen Ostrow, Attorney at Stoel Rives LLP.

January 26, 2021 | 4:00 pm – 6:00 pm — **2 hrs. CLE Credit**

Litigation 101 Series. Presented by Dan Garner and Gabriel White. Cost is $25 for Young Lawyers, $50 for all others.

January 27, 2021 | 11:30 am – 5:00 pm — **5 hrs. Ethics, Self-Study CLE Credit**

Trust Accounting & Law Practice Management School 2021. Presented by The Office of Professional Conduct. Topics include: Trust Accounting, Fees & Planning Ahead; IOLTA and Banking for Lawyers; Case Management Solutions (Clio); Trial Presentation Solutions (TrialPad); The Attorney Discipline Process & 10 Tips to Avoid It. Cost is $75.

February 19, 2021

IP Summit 2021. Virtual event. More details and registration to come.

February 23, 2021 | 3:00 pm – 5:00 pm — **2 hrs. CLE Credit**

Litigation 101 Series. Presented by Dan Garner and Gabriel White. Cost is $25 for Young Lawyers, $50 for all others.

March 23, 2021 | 4:00 pm – 6:00 pm — **2 hrs. CLE Credit**

Litigation 101 Series. Presented by Dan Garner and Gabriel White. Cost is $25 for Young Lawyers, $50 for all others.

March 25–27, 2021

Spring Convention in St. George – VIRTUAL EVENT.

April 20, 2021 | 4:00 pm – 6:00 pm — **2 hrs. CLE Credit**

Litigation 101 Series. Presented by Dan Garner and Gabriel White. Cost is $25 for Young Lawyers, $50 for all others.

TO ACCESS ONLINE CLE EVENTS:

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

Classified Ads

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.

Partners with Portable Book of Business. Resnick & Louis PC, a national insurance defense firm, is seeking partner level attorneys with considerable litigation experience to join our Salt Lake City office. A book of business IS required and must be licensed to practice in Utah, additional licensure is a plus. We are passionate about our work and want individuals who share excitement for litigation. Lawyers at our firm are very independent, with a flexible remote work setting, even post-COVID. We also offer aggressive compensation structures. Please send your resume and salary requirements to Managing Partner, Mitch Resnick at mresnick@rlattorneys.com.

Long Reimer Winegar LLP seeks an Associate Attorney. LRW is a regional Rocky Mountain law firm representing local and global clients. LRW seeks to grow its Park City office and is looking for a full-time Associate Attorney with at least 5 years' experience in the areas of estate planning, business law and tax planning, and should ideally be licensed to practice law in Utah. If interested, please send a cover letter, resume, and list of professional references to hgreene@lrw-law.com.

OFFICE SPACE/SHARING

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

PRACTICE DOWNTOWN ON STATE STREET. New executive office completed this year. State Street and 3rd South with established firm. Contact Richard at (801) 534-0909 or Richard@tjblawyers.com.

SERVICES

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

Expert Consultant and Expert Witness in the areas of: Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics. Charles M. Bennett, PO Box 6, Draper, Utah 84020. Fellow, the American College of Trust & Estate Counsel; former Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar. Email: cmb@cmblawyer.com.

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

IN MEMORIAM
OSCAR W. McCONKIE, JR.

MAY 26, 1926 – NOVEMBER 2, 2020

"Oscar W. McConkie, Jr. was devoted to his family, his God, and his career and found a rather unique way to blend them together. Oscar leaves behind a legacy in his posterity of the same faith, courage, and Christ-like traits that adorned Oscar's life, which posterity will remain an eternal tribute to Oscar and his dear Judy." – David M. Wahlquist

"Oscar was a man of joy, he was cheerful and had a pleasant disposition. Yet he was driven and never backed down from a cause in which he believed or from protecting his clients' interests. He was a great mentor and friend. I will ever be grateful for knowing Oscar McConkie." – James E. Ellsworth

"Oscar W. McConkie, Jr. helped set up our firm, was a great lawyer and wonderful to work with. I have been very fortunate to work with him for a long time, as he helped to hire me 39 years ago from New York City. Additionally, Oscar was an incredibly thoughtful, kind and honorable person (as also are his two lawyer sons who he raised and work here)!" – Lorin C. Barker

Kirton McConkie offers our heartfelt condolences to the family and associates of our former colleague, friend and founding partner of Kirton McConkie.

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