

Utah Bar[®] JOURNAL



Volume 34 No. 3
May/June 2021



HUNGRY for MENTORSHIP?

LEARN THE INS AND OUTS OF PLAINTIFFS' LAW DURING YOUR LUNCH BREAK.

PLAINTIFFS' CONNECTION is an invitation-only online training hosted by Eisenberg, Cutt, Kendell, and Olson. Spend one lunch hour each month learning to successfully navigate the practical and legal challenges of plaintiffs' personal injury litigation. Attendees learn FREE-OF-CHARGE from attorneys with decades of experience trying personal injury cases.

Eisenberg, Cutt, Kendell, and Olson has been training Utah lawyers through educational seminars for more than 20 years. ECKO also works with other lawyers and firms, accepting referrals and entering into co-counsel agreements to handle all types of tort and insurance cases.

**EISENBERG
& CUTT
KENDELL
OLSON**
ATTORNEYS AT LAW

Contact us today for an invitation to the next live event or access to previously recorded sessions.

801-901-3470 | jrodriguez@eckolaw.com

Plaintiffs' Connection is a no-cost program and does not provide Utah Bar CLE credits

The Utah Bar Journal

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

BAR JOURNAL EDITORIAL BOARD

Editor-in-Chief

Alisha Giles

Departments Editor

Ryan Beckstrom

Editors Emeritus

William D. Holyoak

Judge Catherine E. Roberts (Ret.)

Paralegal Representative

Greg Wayment

Managing Editor

Andrea Valenti Arthur

Utah Law Developments Editor

Victoria Carlton

Editor at Large

Todd Zagorec

Bar Staff Liaison

Christine Critchley

Articles Editors

Victoria Luman

Jacqueline Carlton

LaShel Shaw

Jessame Reyes

Erin Burke

Judicial Advisor

Judge Gregory K. Orme

Southern Utah

Correspondent

Stephen Dent

Advertising/Design Manager

Laniece Roberts

Copy Editors

Hal Armstrong

Paul Justensen

Nicole Lagemann

Young Lawyer Representative

Cedar Q. Cosner

MISSION & VISION OF THE BAR:

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

We envision a just legal system that is understood, valued, and accessible to all.

Cover Photo

Wild flowers on Sardine Peak by Utah State Bar member Nathan Lyon.

NATHAN LYON is senior litigation counsel and a career prosecutor at the Davis County Attorney's Office. Asked how he came to take this photo, Nathan said, "I was biking Snowbasin in early summer when I rode up the peak just north of the resort. I was so focused on my pace and the trail that I nearly missed the beautiful hillside of wildflowers. I particularly like this photo because it's a subtle reminder for me that life's beautiful and serendipitous moments are all around us, but not necessarily where we're looking."



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.

Table of Contents

Letter to the Editor	8
President's Message Reflections on 2020: Did We Rise to the Challenge? by Heather Farnsworth	11
Article Uncle Dee and Me by Eric Benson	14
Article Do You See What I See Part II: Litigating Utah Rule of Evidence 617 by Louisa M. A. Heiny	18
Utah Law Developments Appellate Highlights by Rodney R. Parker, Dani Cepernich, Robert Cummings, Nathanael Mitchell, Adam Pace, and Andrew Roth	27
Southern Utah The Southern Correspondent by Stephen P. Dent	32
Lawyer Well-Being Lawyers Helping Lawyers by Danielle Hawkes	36
Article Advancing the Cause of Truth and Civility: The Utah Supreme Court Weighs In by Gregory N. Hoole	38
Focus on Ethics & Civility Lawyer Discipline Process by Adam M. Pace and Keith A. Call	46
State Bar News	48
Young Lawyers Division Estate Planning as COVID-19 Continues: What You Need to Know by Dara R. Cohen	62
Paralegal Division Leadership by Greg Wayment	64
CLE Calendar	66
Classified Ads	67



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

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

Statements or opinions expressed by contributors are those of the authors and are not necessarily those of the *Utah Bar Journal* or the Utah State Bar. Publication of advertisements is not to be considered an endorsement of the product or service advertised.

Copyright © 2021 by the Utah State Bar. All rights reserved.



30
years

1990
2020

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

Internationally Recognized Trial Attorneys



PUBLIC JUSTICE™
2021 MEMBER

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

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.

AUTHOR(S): Author(s) must include with all submissions a sentence identifying their place of employment. Unless otherwise expressly stated, the views expressed are understood to be those of the author(s) only. Authors are encouraged to submit a headshot 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.



UCLI

UTAH CENTER FOR LEGAL INCLUSION

UCLI THANKS ITS FOUNDING SPONSORS WHO EMPOWER UCLI'S WORK & STRENGTHEN UTAH'S LEGAL PROFESSION

PARSONS
BEHLE &
LATIMER

KIRTON | McCONKIE

大成 DENTONS

DURHAM JONES
PINEGAR

RQ & N RAY QUINNEY
& NEBEKER

HOLLAND & HART

workman
nydegger

GT GreenbergTraurig

LONG OKURA

ZIMMERMAN BOOHER
APPELLATE ATTORNEYS

ADAMS DAVIS P.C.
— ACCIDENT TRIAL ATTORNEYS —

MANNING
CURTIS
BRADSHAW &
BEDNAR PLLC
ATTORNEYS

Fabian VanCott

PARR BROWN
GEE & LOVELESS
ATTORNEYS AT LAW

Ballard Spahr

Clyde Snow
ATTORNEYS AT LAW

Michael Best

STRONG & HANSEN
LAW FIRM

LEAH
DEAR

Michael Best

ebay

Cohne Kinghorn

RESPONSIVE. ACCOMMODATING. UNDERSTANDING.

“ *ALPS is a fantastic company and one that I very much appreciate our relationship. They are responsive and accommodating and truly understand the meaning of customer service. I would Highly recommend them to any one!* **”**

► Strong & Hanni Law Firm, A Professional Corporation, Salt Lake City, UT

Utah law firms can connect directly with ALPS Insurance Specialist, Larry Vaculik, at lvaculik@alpsinsurance.com or by calling (800) 367-2577.

Learn more about how ALPS can benefit your firm at

www.alpsinsurance.com/utah

 Trustpilot



4.8 / 5

Endorsed by



THE NATION'S LARGEST DIRECT WRITER OF LAWYERS' MALPRACTICE INSURANCE



Editor:

In the April/May, 2021, *Bar Journal*, Bar President Heather Farnsworth wrote, “We’ve Come A (Little) Way, Baby”, as a descriptive way of informing lawyers the Bar Commission is committed to diversity and inclusion. After reading the article and understanding the Bar diversity policy I think her article should be entitled “Caucasians, The New Diversity”, or “White, Now and Forever, Baby”.

The Bar President propounds that diversity is important and Commissioners are committed to fostering this ideal. We are also informed that about 7% of Bar members are from racial and ethnic groups that have been judicially determined to be protected classes which have historically suffered from discriminatory practices, rooted in prejudice, stereotype, and hate. Rather than ask why the Bar has so few minority members in this day of professed “diversity and inclusion”, or investigation of reasons for the under representation, the article pivots. Using supremacist logic, the author informs the reader that the Bar policy is, “to promote diversity with respect to geographic regions, practice settings, etc.”.

Really? The Bar defines diversity as Caucasians who practice law in St. George, or don’t earn big firm paydays or are in solo offices? Correctamundo Bar brethren. Bar diversity is White people. Minority attorneys know this. Just attend any Bar activity or see who the Bar employs. And, to exacerbate this point, a White person was appointed Diversity Director. White is alright, Baby.

The final article sentence states, in part, the Bar aspires to, “... more accurately reflect the general population of Utah in our legal community...”. It is impossible to accomplish this aspiration when you ignore the dearth of minority attorneys and welcome White appointments as equal to judicially recognized minorities who have actually suffered discrimination, not in pay or where they live but based on immutable characteristics. The Bar policy ascribed is deceitful, circumvents the real issue, and justifies a plethora of Caucasian appointments.

Michael N. Martinez

LETTER SUBMISSION GUIDELINES

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 500 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to BarJournal@UtahBar.org or delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor-in-Chief, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.



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

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



ZIMMERMAN BOOHER
APPELLATE ATTORNEYS

Medical Malpractice Co-Counsel You Can Count On



- Experienced
- Creative
- Knowledgeable
- Respected



A Recent Case

Cause: Ruptured appendix

Injury: Nerve damage

Litigation: 4 years

Costs: \$240,000

Experts: 10

RESULT: \$4,000,000

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



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

4790 Holladay Blvd. • Salt Lake City, UT 84117

801-424-9088 • www.ericnielson.com

Reflections on 2020: Did We Rise to the Challenge?

by Heather Farnsworth

It was nearing midnight, and I was loading the last of a few items into my suitcase preparing to head to St. George. Then I got the message. We needed to have an emergency meeting – it was time to call off the 2020 Spring Convention – a first in the history of the Bar. It was a punch to the gut. I was over the planning and knew firsthand the countless hours of careful planning that the chair, Abby Dizon-Maughan, the committee, and bar staff members, Richard Dibble and Michelle Oldroyd, had put into the event. But, if the Utah Jazz was calling off games, it was serious. This was the moment the pandemic became “real” for me.

We all have those moments – some individual, some collective, some joyful, some devastating – where we remember exactly what we were doing in that moment, and after that moment, life became defined as before and after. However, unlike other monumental moments, I, like most of us, still had no real insight into the scope of what

was to come. At first, we thought this may just be a few weeks, then a few months. Now, a year later, we have just wrapped up the 2021 Spring Convention. Of course this year's convention did not look like last year's convention would have. For starters, it was not in St. George. There was no annual bike ride or golf tournament. There was no browsing the “And Justice for All” auction during breaks, no welcome cocktail hour, no continental breakfast. Instead the event was 100% virtual. Still, we had record participation with over 720 registrants – which begs the question: will we ever get back to normal? More importantly, should we?

In reflecting on this past year, I stumbled upon the President's message from Herm Olsen in the May/June 2020 *Utah Bar Journal*. That article would've been written shortly after the cancellation of the Spring Convention, just weeks into the

beginning of the lockdown and restrictions, before mask mandates, and as we were just beginning to shift to a new, virtual normal. In that article, Herm reflected on forecasting, fear, and faith. He discussed precedent to our current pandemic and how those before us handled similar plagues. He asked the question: “[I]n 2020, what are we to think? Do we accept the paraphrase of Queen Elizabeth: ‘It is an Annus Horribilis?’” Herm Olsen, *Fear, Faith, and Forecasters*, 33 UTAH B.J. 9, 9–10 (May/June 2020). At this point, many of us might say yes. For some, especially those who lost loved ones, it may have been. Yet, Herm was hopeful. He stated, “Sometimes fear shouts so loudly in our ear

Change was forced upon us through this pandemic. Now that we see there are safe alternative options, I hope we continue to embrace other innovations and changes.

that we cannot hear the hope that whispers of better times. I believe there is reason for hope if we, as a profession, exercise both prudent caution and ultimate optimism.” *Id.* at 10. He further asked, “How should the profession of law deal with this unparalleled social circumstance?” *Id.* He suggested that we should “[l]et

us ourselves shine some light on the fear which still abounds. Let us go forward with decency, with kindness, and with firm confidence that we shall not only survive this little setback in history but that we shall thrive throughout.” *Id.*

We have survived, but have we thrived? Early on, the Utah Bar worked with Governor Gary Herbert who declared lawyers were performing essential services, allowing us to continue practicing with appropriate safety precautions – many of us from our couches or kitchens. Justice has persisted with Webex and Zoom as courts have adapted quickly to keep moving their dockets forward. The Bar has scaled back costs but maintained incredible CLE offerings with increased participation. In fact, many of the




attendees at this year's convention indicated it was the first time they had been able to attend a Bar convention. Several mentioned they were attorneys from out of state, and they were able to join in and participate remotely. In fact, the Fall Forum was attended by 2,892 individuals. Despite our inability to gather, a virtual bar exam was successfully administered in February, with no significant hiccups or indications of impropriety. Others were admitted via the diploma privilege, and those individuals contributed over 3,000 pro-bono legal services within our community.

Additionally, the Bar has used this time to focus on our lack of diversity, in this time of rising concern about social justice. Mirroring the court, we have created a new position to ensure that our CLE programming includes panelists of diverse backgrounds and addresses these issues. The Director of Diversity, Equity, and Inclusion position is held by Michelle Oldroyd who oversees our CLE programming. We have created a Bar Committee on Early Diversity Outreach, chaired by Mark Morris, which will work in collaboration with the Utah Center for Legal Inclusion to provide outreach to young students to encourage them to consider a career in law. We are offering a summit on the Excessive Force Statute, through the efforts of


Shawn Newall, Andrew Morse, and Rod Snow, which will bring together law enforcement, the Black Lives Matter movement, and community members to discuss this serious issue. Finally, we are supporting the ABA Judicial Intern Opportunity program, which Erik Christiansen has brought to our state. This program will provide diverse individuals the opportunity to obtain paid internships with state and federal judges. It will be locally funded and will provide our excellent law schools, Brigham Young University and the University of Utah, an additional incentive to potential minority recruits.

The Bar, like many firms and individuals, has placed an additional focus on wellness and whole attorney well-being. We have introduced monthly CLEs with this focus to provide concrete skills to improve attorney practice methods to contribute to their productivity in addition to better health. Shortly, we hope to offer monthly activities as restrictions become lifted and as our members get vaccinated. We continue to offer free anonymous counseling services through Blomquist Hale and Lawyers Helping Lawyers. Further, there has been a culture shift. Ironically, our distance from each other has created a different kind of intimacy. We ask each other how we are doing before jumping in to business. We get literal glimpses into each others' realities by seeing each other in our homes, with our kids or pets on display. In many ways, we are seeing each other as whole people now, and I hope this practice continues.

All things considered, I do believe we, collectively, have risen to the challenge. And, while I anxiously await the time we can gather again as a group, I do believe we should do our best to keep from returning "back to normal." Currently, we are planning to offer a hybrid Summer Convention in Sun Valley, Idaho, this July. The goal is to provide a safe, in-person convention to those who are able to attend, while simultaneously allowing others to attend virtually. Courts too have indicated they hope to offer a hybrid of in-person and virtual hearings. Many attorneys have indicated this has provided them with a new flexibility and efficiency. Additionally, courts have reported increases in appearances by defendants who may have otherwise failed to show, due to the convenience of the virtual format. Many of these innovations were available prior to the pandemic, but our discomfort with abandoning the normal or the traditional interfered with their utilization and our success. Change was forced upon us through this pandemic. Now that we see there are safe alternative options, I hope we continue to embrace other innovations and changes. Even as things normalize, may we continue to embrace each other, and as Herm said, "[G]o forward with decency and with kindness."



Digital Forensics • eDiscovery • Expert Testimony



Scott Tucker
 Certified Digital Forensic Expert

Call for a free case assessment.

Digital Forensics
 Analysis of forensic artifacts can reveal the who, what, when, where, how, and sometimes even why.

Electronic Discovery
 Data surrounds us: documents, messages, photos, GPS, and more in computers, mobile devices, and the cloud.

Expert Testimony
 Get written and oral testimony from an industry veteran, or for sensitive matters, a confidential consulting expert.

801.999.8171 www.aptegra.com
scott.tucker@aptegra.com

STRONG & HANNI ABOVE THE BAR

At Strong & Hanni, our attorneys strive to be above the bar in all that we do... from the way we practice law to how we devote professional time and resources to the way we use our civic influence to ensure inclusion for all.

Our appellate attorneys represent a wide range of clients with a variety of issues, including appeals stemming from large civil trials to small pro bono matters to indigent criminal matters. They are dedicated to ensuring that all clients—no matter the background—receive competent and zealous appellate advocacy. Our attorneys also strive to promote diversity and inclusion in the legal community through their work with the Utah Center for Legal Inclusion, Women Lawyers of Utah, Utah Indigent Defense Commission, and American Inns of Court.

We would love to help you with your appeal in any capacity including consultation during trial, preparation of the briefs, arranging moot courts, or handling the appeal start to finish.



Scarlet R. Smith

ssmith@strongandhanni.com



S. Spencer Brown

sbrown@strongandhanni.com

***We love the law and strive
to be “Above the Bar.”***

801.532.7080 • strongandhanni.com



Uncle Dee and Me

by Eric Benson

“May I approach the witness, Your Honor?” The young attorney, situated behind the lectern in the vast courtroom, asked with a twinge of nervousness in his voice.

I was seated in the back of the large courtroom on the second floor of the Frank E. Moss courthouse in Salt Lake City and had absolutely no idea what to do with my life. The judge presiding over the hearing was my uncle, Dee Benson. At the time, I had just finished my undergraduate degree at the University of Utah, where I had majored in mass communications, attended class occasionally, and watched SportsCenter four or five times a day. Other than parking cars at a local restaurant on nights and weekends, I didn’t have a steady job, so my days were pretty free – and one day that spring after I graduated, I came to the courthouse to check out Uncle Dee in action. That day, as I watched the lawyers offer arguments, keep track of exhibits, examine witnesses, and make objections on the fly, I thought to myself: “This is pretty cool, maybe I’ll give this a shot.”

Growing up, Dee and I were always close. He is my dad’s twin – Lee and Dee – and I had always looked up to my Uncle Dee. Early on, we shared an affinity for convenience stores, and I knew that if you were with Dee, he was always buying – a trait that made him very likeable and popular. I knew he was a lawyer of some variety, that he had been in Washington, DC, with Senator Hatch in the 1980s and helped with some hearings about Iran. I loved going to visit my cousins in Washington, DC, but didn’t really think much about my uncle’s career, or what he actually did every day.

In 1989, when I was in junior high, Uncle Dee and my cousins moved from Washington back to Utah when Dee was appointed U.S. Attorney for Utah. Again, I remained mostly clueless as to what he did exactly – although it seemed like he knew a lot about drug dealers and how they operated, which was kind of cool, and he spoke to a church youth group I was part of and somehow managed to pull out a kilo of cocaine on the spot to show us from a case he had been working on (thirty years later, I’m still not sure how he pulled that one off).



In late 1991, President George H.W. Bush appointed Dee to the bench for the district court here in Utah. I had basketball practice that day and skipped his investiture. In high school, when my friends asked if my dad’s identical twin – the resemblance was uncanny in those days – was a sportswriter like my dad, I’d respond that he wasn’t, and he was some sort of judge in Salt Lake.

My relative unfamiliarity with Dee and his career started to change that day in the courtroom as I found myself floundering in life – searching to find my own way. After the hearing, I walked past his longtime loyal courtroom deputy Ron Black, helped myself to a Diet Coke in the office fridge, casually slipped into Dee’s roomy chambers, reclined back in one of his leather chairs, and waited for the judge.

When he came into his office, I got right to the point: “Dee, I think I want to go to law school.”

Dee: “You? Are you nuts?”

That’s how my legal career started – and in the subsequent years a similar pattern would follow. I would seek Dee’s advice on all

ERIC BENSON is an attorney with the law firm of Potter Handy, LLP. He focuses his practice primarily on civil litigation and government investigations.



manner of subjects in both life and the law, and Dee would respond with his trademark humor and frank assessment of the situation.

I had no idea the depth of the mother lode of jurisprudence I'd tapped into, certainly not then and not even now, decades later. His impact on me was as profound as it was life-transforming. It cannot be overstated.

After we talked things through a bit, Dee warmed to the idea about me studying law but still wanted to see if I was really serious and not simply trying to avoid getting a real job for another three years – which, in actuality, I probably was.

I set out to show him I was committed. I studied for and took the LSAT. I attended Dee's evidence classes at the University of Utah and BYU before I had even enrolled in law school. I listened to him talk about the law. He had me watch episodes of "Law & Order" and "My Cousin Vinny," which he showed without fail to all his law classes. I hung around chambers and got to know his clerks. I vividly remember asking one of his clerks around the time I was signing up for the LSAT, "What exactly is litigation?" I had a lot to learn.

He did not spare me. When I was a 1L in law school, I sent him a brief I'd labored over and hoped he might praise. I'll never forget his response. He said,

You know that fence Luke and I are building in the backyard? You put in one slat and it leans just a little, then you put in the next one and it leans a little more, and so on, until finally you step back at the fence and you know you have to tear it down and do it all over because it's leaning way too much. That's your paper.

Over the next nearly twenty years, Uncle Dee taught me nearly everything I know about the law and, through his quiet example, how to lead a good life and earn respect from people. He shaped my opinions about politics, world events, and social issues. We traveled together. We rode bikes together. We played golf together. We ate hot dogs and burgers on his deck after twilight rounds of golf at Willow Creek Golf Course in Sandy, listening to the creek behind his house as we discussed various and sundry issues such as: dying declarations, excited utterances, the confrontation clause, and his general distaste for temporary restraining orders.

CONYERS NIX

CRIMINAL DEFENSE ATTORNEYS



*We welcome your referrals and
the opportunity to work with you.*

WWW.CONYERSNIX.COM | 801-839-4649

He was able to steer me to my clerkship, with then-Tenth Circuit Court of Appeals Judge Monroe McKay, who had taught Dee in law school; then to a position as an Assistant United States Attorney under Paul Warner. I was single in those days and stopped in at Dee's chambers pretty much every day, turning his office into my personal clubhouse – along with the rest of the clerks. We played foosball, watched ball games, threw darts, and Dee even invented this peculiar game called “catch ball” where we would sit in chairs about six feet apart and hurl an old Utah Jazz mini basketball as fast as we could possibly throw it at one another until someone injured their hand, or a piece of furniture was badly damaged – whichever came first.

Over the years, I took on more responsibility, got married (I even met my wife through one of Dee's clerks), had kids, left my job at the U.S. Attorney's Office, and entered private practice. While my life and practice changed significantly over the years, my reliance on Uncle Dee and his ubiquitous counsel didn't. I called upon him virtually daily as my practice evolved, and I met with new challenges. As I shifted gears, and took on new areas of the law, neither his patience nor his wisdom ever wavered. No matter the issue, he always had a good response, and one that made sense. As I got to know my Uncle Dee better, especially as I have been practicing law, the thing that most impressed me about him was his ability to take a seemingly complicated issue, quickly boil it down to its core, and offer a solution that was brilliantly simple. Not only did he give me wise counsel, he cared about my problems and followed up with me without any prompting. I remember one time where I agonized over an evidence question and bent his ear for a couple of hours on the phone, with me hand-wringing throughout. A week or two later, I looked down at my cell phone, and it was Dee calling out of the blue, his words echoing off some distant cell tower, “Hey Eric, I'm in the middle of Idaho, and I couldn't stop thinking about your evidence issue ... here are a couple of thoughts.”

When I heard the news that my Uncle Dee had been diagnosed with brain cancer last year, I was devastated. Dee had done so

much for me and had literally made my career and changed my life for the better. What would I do without him? So much of what I have done in my legal career was due entirely to my loyal uncle and how much he cared for me. It's hard to describe in words how much that means to me and my family.

As he fought his illness through the infamous year of 2020, it became apparent that the cancer was terminal, and on November 30, 2020, I received word that my hero in the law and life had passed. The aftermath of his death was difficult but in the months since his passing, a number of silver linings have emerged in



the form of heartfelt tributes from those who knew him. I personally received hundreds of text messages and calls from people who knew and loved Dee. Civil litigators, prosecutors, defense attorneys, senators, law professors, court security officers, custodians, and others came out in droves to share their stories and pay their tributes.

And this was the revelation: their relationships with Uncle Dee were just like mine. The notion that I got preferential treatment because I was his favorite nephew, or so I presumed, was roundly disavowed. He treated everyone like he treated me.

One summer night as we finished up burgers on his deck after a round of twilight golf, Dee shared with me the reverence and respect he had for the late District Court Judge David Winder. He'd never forgotten how much it affected him when the judge had put him at ease during one of his first trials. As Dee told it, “I asked the judge if I could approach the witness and Judge Winder simply responded, ‘You may and you don't need to ask.’” Dee explained how much this simple expression from the bench showed control and compassion from the judge at the same time. Judge Winder had given him, a young and inexperienced attorney, the confidence he would rely on as he progressed through his career.

Seated atop his bench in the Frank E. Moss courthouse that afternoon long ago when I was watching from the gallery and trying to figure out my life, I noticed Dee nod slightly and approve the young attorney's request to enter the courtroom's well: “You may, and you don't need to ask.”

LAWPAY[®]

AN AFFINIPAY SOLUTION

POWERING PAYMENTS FOR THE LEGAL INDUSTRY

The easiest way to accept credit,
debit, and eCheck payments

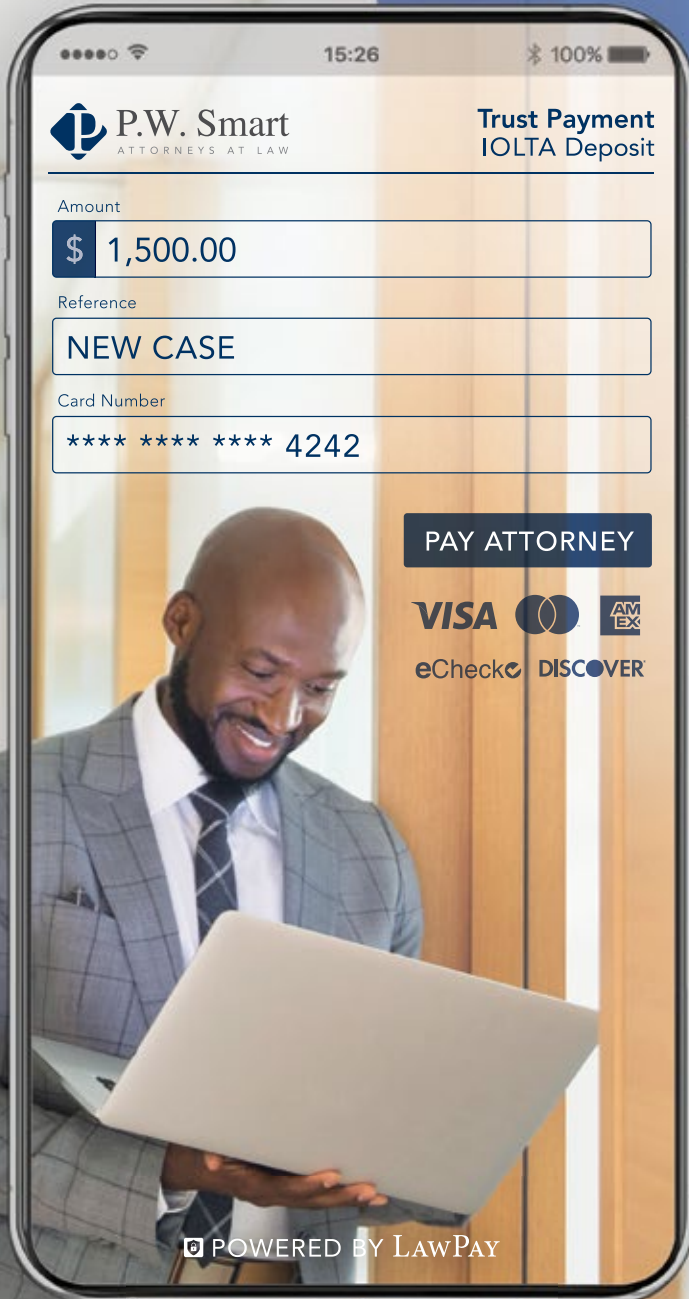
The ability to accept payments online has become vital for all firms. When you need to get it right, trust LawPay's proven solution.

As the industry standard in legal payments, LawPay is the only payment solution vetted and approved by all 50 state bar associations, 60+ local and specialty bars, the ABA, and the ALA.

Developed specifically for the legal industry to ensure trust account compliance and deliver the most secure, PCI-compliant technology, LawPay is proud to be the preferred, long-term payment partner for more than 50,000 law firms.

UTAH STATE BAR[®]

ACCEPT MORE PAYMENTS WITH LAWPAY
866-261-3937 | lawpay.com/utahbar



LawPay is a registered agent of Wells Fargo Bank N.A., Concord, CA and Synovus Bank, Columbus, GA.

Do You See What I See Part II: Litigating Utah Rule of Evidence 617

by Louisa M. A. Heiny

In Part I of *Do You See What I See?*, we examined the factors Utah courts use to determine the reliability of eyewitness identifications, as well as the science underpinning Utah Rule of Evidence 617. Louisa M.A. Heiny, *Do You See What I See? The Science Behind Utah Rule of Evidence 617*, 34 UTAH B. J. 34 (Mar./Apr. 2021) [hereinafter *Do You See What I See? Part I*]. Part II considers best practices in Rule 617 litigation, including the use of motions in limine to suppress eyewitness identification evidence, cross-examination of eyewitnesses, when and how to include expert opinions and testimony, and the role of jury instructions to help jurors gauge the reliability of eyewitness identification.

EYEWITNESS IDENTIFICATION IN PRETRIAL LITIGATION

There are three issues counsel should address in deciding when and how to litigate Rule 617: whether and when to file pretrial motions, the type of motion to file, and whether to hire an expert in support of those motions.

Strategy and Timing

While Rule 617 provides a means of challenging eyewitness identification pretrial, not every case with an eyewitness identification will be amenable to the challenge. Attorneys should assess several issues before filing pretrial motions challenging an eyewitness identification, including how crucial the eyewitness identification will be to the prosecution's case, which law enforcement agency obtained the identification, the agency's standard protocols, and the procedure used to elicit the identification. Where an agency followed a standard best practices protocol and both the identification and procedure used to elicit the identification appear facially valid, "then [don't] waste your time [or] the court's time, and your client's money for that matter, challenging something that appears to be . . . — from an admissibility . . . standpoint — solid." Louisa M. A. Heiny and the Honorable Richard McKelvie, University of Utah S.J. Quinney College of Law Continuing Legal Education Series, *Do You See What I See? The Science and Law of*

Eyewitness Identifications (Part 2), YOUTUBE (Jan. 11, 2021), <https://www.youtube.com/watch?v=y97LzFsJBzM> [hereinafter *Science and Law CLE*]. Instead, concentrate resources on trial strategy and the use of eyewitness experts at trial.

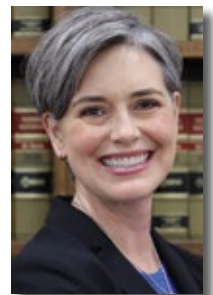
Where an eyewitness identification is amenable to a pretrial challenge, it is crucial that attorneys file pretrial motions quickly. Eyewitness identifications can easily be

polluted . . . by a subsequent introduction of the defendant or the suspect to the [eyewitness]. Because then it becomes much more difficult to . . . ascertain whether the in-court identification is a product of the witness's recollection of the offense itself or their recollection of some proceeding in which they were shown either a photograph of the suspect/defendant or actually presented to them in person.

Id. These kinds of "introductions" may occur at any time and are often outside the control of counsel. A witness who sees the defendant at a pretrial hearing, watches a news report, or gives a media interview is often getting information about the suspect that the witness may unconsciously fold into the original memory. *Id.*

For example, in one recent case the eyewitness initially identified the defendant in a photographic lineup "with eighty to ninety percent certainty." *State v. Wright*, 2021 UT App 7, ¶ 17, 481 P.3d 479. Afterward, and prior to the preliminary hearing, the "[e]yewitness had apparently downloaded a photo of [the defendant]

LOUISA M. A. HEINY is a Professor of Law at the University of Utah S.J. Quinney College of Law.



that had been circulated by the media after his arrest. [The e]yewitness then digitally superimposed various wigs on the photo until he came up with an image that he believed matched the shooter.” *Id.* The eyewitness later identified the defendant at a preliminary hearing, “with one hundred percent certainty.” *Id.* Early identification of a problematic eyewitness identification can allow the court to quickly and accurately rule on motions in limine, engage in a Rule 617 analysis based on the original identification without needing to detangle the original identification from later exposure, and make any other appropriate pretrial orders addressing the eyewitness.

Motions in Limine

There are three possible motions in limine under Rule 617, any of which may prevent the introduction of potentially unreliable eyewitness testimony: (1) a motion in limine to suppress an eyewitness identification for lack of reliability; (2) a motion in limine challenging the procedure used by law enforcement in eliciting the eyewitness identification; and (3) a motion to suppress evidence based on constitutional doctrines.

Motions in Limine to Suppress an Eyewitness Identification for Lack of Reliability

The most straightforward use of Rule 617 is through a motion in limine to exclude an eyewitness identification at trial. The party challenging the eyewitness identification bears the burden of proof and must show the court that “a factfinder . . . could not reasonably rely on the eyewitness identification.” Utah R. Evid. 617(b). Under these circumstances, the court is required to exclude the evidence. *Id.*

When determining the reliability of the identification, the court may consider expert testimony on reliability, as well as the nine factors listed in Rule 617(b)(1)–(9). These nine factors, called “estimator variables,” are “factors connected to the event, witness, or perpetrator – items over which the justice system has no control” but which “may affect the reliability of an eyewitness account.” *State v. Lujan*, 2020 UT 5, ¶ 37, 459 P.3d 992 (citations omitted). The nine factors are:

- (1) Whether the witness had an adequate opportunity to observe the suspect committing the crime;
- (2) Whether the witness’s level of attention to the suspect committing the crime was impaired because of a weapon or any other distraction;
- (3) Whether the witness had the capacity to observe the suspect committing the crime, including the physical and mental acuity to make the observation;
- (4) Whether the witness was aware a crime was taking place and whether that awareness affected the witness’s ability to perceive, remember, and relate it correctly;
- (5) Whether a difference in race or ethnicity between the witness and suspect affected the identification;
- (6) The length of time that passed between the witness’s original observation and the time the witness identified the suspect;

大成 DENTONS

DURHAM JONES
PINEGAR

Connecting you to more talent in more locations around the world than any other law firm.

Dentons Durham Jones Pinegar is a partnership member of Project Golden Spike, a series of combinations dedicated to advancing the first truly national US law firm in the world’s largest legal market capable of meeting the evolving needs and priorities of clients from coast to coast and around the world.

dentons.com

© 2020 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. Please see dentons.com for Legal Notices.

(7) Any instance in which the witness either identified or failed to identify the suspect and whether this remained consistent thereafter;

(8) Whether the witness was exposed to opinions, photographs, or any other information or influence that may have affected the independence of the witness in making the identification; and

(9) Whether any other aspect of the identification was shown to affect reliability.

Utah R. Evid. 617(b)(1)–(9). Estimator variables, and the science supporting their inclusion in the rule, are discussed at length in *Do You See What I See? Part I*. It is currently unclear whether the court will engage in this analysis under Utah Rule of Evidence 104(a) or Rule 104(b), and that issue may be subject to future litigation. *See State v. Reece*, 2015 UT 45, ¶ 57, 349 P.3d 712 (applying a preponderance of the evidence standard to conditional relevance determinations under Rule 104(b)).

The estimator variables are also encompassed in a Rule 403 challenge on the grounds that the eyewitness identification is

substantially more prejudicial than probative. Utah R. Evid. 403; *Lujan*, 2020 UT 5, ¶ 51 (“[T]he estimator and system variables that have been incorporated into rule 617, and could be considered under rule 403, encompass all of the factors relevant to the due process inquiry (and more).”); *Wright*, 2021 UT App 7, ¶ 36 (noting that both estimator and system variables “may be considered in assessing both the probative value of a given piece of eyewitness identification testimony and the possibility of it producing unfair prejudice.” (quoting *Lujan*, 2020 UT 5, ¶ 36)). Rule 403 will also play an outsized role in pre-*Lujan* cases that are pending. *See Wright*, 2021 UT App 7, ¶ 35 (reciting the supreme court’s holding in *Lujan* that “the district court and court of appeals ‘could and should have’ applied rule 403 of the Utah Rules of Evidence in assessing ‘the admissibility of the eyewitness identification testimony’” under the pre-*Lujan* *Ramirez* factors (quoting *Lujan*, 2020 UT 5, ¶ 31)).

Motions in Limine Challenging the Procedure Used by Law Enforcement in Eliciting the Eyewitness Identification

While Rule 617(b) addresses the reliability of the identification itself, counsel may instead, or additionally, wish to challenge the procedure used by law enforcement to elicit the identification. When “the procedure is contested, the court must determine whether the identification procedure was unnecessarily suggestive or conducive to mistaken identification.” Utah R. Evid. 617(c).

When adjudicating a challenge to law enforcement procedure, the court should consider both the nine factors set out in Rule 617(b) and whether law enforcement followed the best practices set out in Rule 617(c). These best practices are known as system variables, and they “consist of factors controlled by the court or law enforcement.” *See Lujan*, 2020 UT 5, ¶ 38. These best practices include using blind or double blind photo arrays, giving appropriate instructions to the witness, composing photo arrays “in a way to avoid making a suspect noticeably stand out,” documenting the witness’s response with a confidence statement, and using a variety of best practices in showup procedures. Utah R. Evid. 617(c)(1)–(2). System variables are discussed at length in *Do You See What I See? Part I*.

The court also has broad discretion to “evaluate an identification procedure using any other circumstance that the court determines is relevant.” Utah R. Evid. R. 617(c)(3). Where the court determines that “the identification procedure was unnecessarily suggestive or conducive to mistaken identification,” the “eyewitness identification must be excluded unless the court,” considering both the enumerated estimator variables in Rule 617(b) and the

Auctioneers & Appraisers

Erkelens & Olson Auctioneers has been the standing court appointed auction company for over 30 years. Our attention to detail and quality is unparalleled. We respond to all situations in a timely and efficient manner, preserving assets for creditors and trustees.

Utah’s Leading Auction & Appraisal Service



Erkelens & Olson
Auctioneers & Appraisers

3 Generations Strong!

Rob, Robert & David Olson
Auctioneers, CAGA Appraisers

Call us for a free Consultation

801-355-6655
www.salesandauction.com

New Location: 3365 W. 500 S. in Salt Lake City!

system variables in Rule 617(c), “finds that there is not a substantial likelihood of misidentification.” *Id.* R. 617(c).

Constitutional Challenges to Eyewitness Identification Evidence

Constitutional challenges to eyewitness identifications, whether under the due process clause or the Fourth Amendment, are problematic and less likely to succeed.

Judges are required under the federal due process clause to “screen the evidence for reliability pretrial.” *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012). However, “due process concerns,” which might ultimately result in a suppression of the identification, “arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary.” *Id.* at 238–39 (citations omitted). “‘The due process check for reliability’ of eyewitness identification testimony, in other words, ‘comes into play only after the defendant establishes improper police conduct.’” *State v. Lujan*, 2020 UT 5, ¶ 24, 459 P.3d 992 (quoting *Perry*, 565 U.S. at 241).

“Even when the police use such a procedure, ... suppression of the resulting identification is not the inevitable consequence.” *Perry*, 565 U.S. at 239 (citing *Manson v. Brathwaite*, 432 U.S. 98, 112–13 (1977); *Neil v. Biggers*, 409 U.S. 188, 198–99 (1972)). Instead, courts must engage in a case-by-case analysis, focusing on the reliability of the identification and “whether improper police conduct created a substantial likelihood of misidentification.” *Id.* (internal quotation marks omitted).

Under the *Perry v. New Hampshire*, 565 U.S. 228 (2012), framework, evidence is suppressed only where the “indicators of [a witness’] ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion.” *Id.* (alteration in original) (internal quotation marks omitted). Conversely, “[w]hen no improper law enforcement activity is involved,” the trial rights available to the defendant, such as “the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt” are sufficient “to test reliability.” *Id.* at 233.

The Utah Supreme Court has not yet decided “whether to endorse the *Perry* framework as a matter of the law of due process under the Utah Constitution.” *Lujan*, 2020 UT 5, ¶ 25. Although the Utah Supreme Court has emphasized that the due process clause has a “role” in eyewitness identifications elicited “in the face of

suggestive police activity,” *id.* ¶ 7 (citing *State v. Ramirez*, 817 P.2d 774, 784 (Utah 1991); *State v. Hubbard*, 2002 UT 45, ¶¶ 23, 26, 48 P.3d 953), it has also emphasized that due process “is still only a constitutional backstop to the threshold inquiry into reliability and admissibility under our rules of evidence,” *id.* Further, “that threshold inquiry under our rules may render the constitutional inquiry unnecessary in many cases.” *Id.* The question of “whether the Utah due process clause establishes a freestanding guarantee of the reliability of eyewitness identification testimony that would attach in the absence of state action in the form of suggestive police activity,” if litigated, would be a matter of first impression in Utah. *Id.* ¶ 25.

The Fourth Amendment may play a role in the admission of eyewitness identifications when law enforcement has obtained a search warrant based upon an incompetent or unreliable eyewitness identification. Defense counsel in this circumstance may argue that under Rule 617, the corrupted procedure and identification negates the probable cause required to support the warrant. However, reviewing courts “afford the magistrate’s decision” that probable cause existed “great deference and consider the affidavit relied upon by the magistrate in its entirety and in a common[] sense fashion.” *State v. Rowan*, 2017 UT

Mediator-Arbitrator

BRIAN J. BABCOCK

- Litigation attorney for approximately 30 years with experience in commercial business, real estate, and construction disputes
- ADR – Mediation and Arbitration
- Available for in-person, online or hybrid mediations/arbitrations
- Speaks Spanish



SCHEDULE THROUGH UTAH ADR SERVICES
801-943-3730 | mbstrassberg@msn.com



BABCOCK SCOTT & BABCOCK, P.C.
ATTORNEYS & COUNSELORS AT LAW, FIVE BUILD SOLUTIONS

370 East South Temple, 4th Floor
Salt Lake City, UT 84111
801-531-7000
www.babcockscott.com

88, ¶ 16, 416 P.3d 566 (alteration in original) (internal quotation marks omitted).

Successful affidavits supporting probable cause may contain hearsay or other ultimately inadmissible evidence, so the ultimate admissibility of the eyewitness identification is unlikely to significantly impact the reviewing court's determination. *See State v. Romero*, 624 P.2d 699, 703 (Utah 1981). "A warrant is not necessarily invalidated by the later discovery that some of the information supporting the warrant is inaccurate." *State v. Boyles*, 2015 UT App 185, ¶ 13, 356 P.3d 687 (citing *Maryland v. Garrison*, 480 U.S. 79, 85–86 (1987)). This is particularly true when the affidavit truthfully sets out the conditions under which the eyewitness identification was made, thus allowing the magistrate to factor estimator and system variables into the probable cause determination from the outset. *See, e.g., Biggers*, 409 U.S. at 199–200 (setting forth factors to be considered in assessing accuracy of eyewitness identification of suspect); *Metzler v. Colorado Springs*, No. 20-1079, 2021 WL 141185, at *4 (10th Cir. Jan. 15, 2021); *Creighton v. New York*, No. 12 Civ. 7454 (PGG), 2017 WL 636415, at *26–28 (S.D.N.Y. Feb. 14, 2017) (surveying cases).

However, as always, a false statement or omission in a warrant affidavit that "was made deliberately or with reckless disregard for the truth" and that "materially affected the magistrate's determination of probable cause" may result in a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). *State v. Krukowski*, 2004 UT 94, ¶ 14, 100 P.3d 1222; *see also State v. Fuller*, 2014 UT 29, ¶ 25, 332 P.3d 937; *State v. Nielsen*, 727 P.2d

188, 191 (Utah 1986) (extending *Franks* to omissions). Under those circumstances, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Krukowski*, 2004 UT 94, ¶ 14 (quoting *Franks*, 438 U.S. at 156).

The Role of Expert Witnesses in Motions in Limine

Rule 617 allows courts to consider expert testimony when ruling on motions that challenge eyewitness identifications or procedures. Utah R. Evid. 617(b). While a supporting affidavit from an expert is not required, expert testimony will likely be necessary, or extremely helpful, at a hearing on the motion. Although the rule is explicit, many of the factors that may create unreliable identifications are counter-intuitive. Hiring an eyewitness identification expert in Utah, however, is relatively easy given the depth of experience and geographic proximity of the faculty at the University of Utah.

While Rule 617 allows the use of experts during pretrial litigation, the right of indigent defendants to government-funded eyewitness identification experts at the pretrial stage is less clear. The Indigent Defense Act requires the court to "appoint an indigent defense service provider . . . to provide indigent defense services" to indigent individuals who lack private counsel. Utah Code Ann. § 78B-22-203(1)(a). "Indigent defense services" include both representation and "indigent defense resources." *Id.* § 78B-22-102(7). "Indigent defense resources" means the resources necessary to provide an effective defense for an indigent individual, including the costs for a[n] . . . expert witness . . ." *Id.* § 78B-22-102(5)(a). Further, "[u]pon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense, the witness fee shall be paid as if the witness were called on behalf of the prosecution." Utah R. Crim. P. 15.

As a result, indigent defendants unequivocally have the right to access a government-funded eyewitness expert at trial. *See, e.g., State v. Barber*, 2009 UT App 91, ¶ 21, 206 P.3d 1223; *State v. Burns*, 2000 UT 56, ¶ 31, 4 P.3d 795. Furthermore, Utah law guarantees indigent defendants "public assistance for expert witnesses" irrespective of whether they are represented by the Legal Defender Association (LDA) or private counsel." *Barber*, 2009 UT App 91, ¶ 21 (quoting *Burns*, 2000 UT 56, ¶¶ 31–32) ("There is no indication in [Rule 15] that a defendant must be represented by [the] LDA to qualify for this assistance.")). While a pretrial expert called to testify under Rule 617 appears to fit neatly in this field, the issue has not been squarely addressed by the Utah courts.

ANNE CAMERON MEDIATION
ATTORNEY | MEDIATOR | COLLABORATIVE PROFESSIONAL



VIRTUAL MEETINGS AND
MEDIATIONS/ZOOM SAVVY

MOVING COLLABORATIVE
CASES AND MEDIATIONS
FORWARD

FOCUSING ON FAMILY LAW

DOCUMENT DRAFTING FOR
PRO SE DIVORCE, CUSTODY,
AND FAMILY LAW

1526 UTE BLVD., SUITE 206, PARK CITY, UT 84098
1945 S 1100 E., SUITE 200, SALT LAKE CITY, UT 84106
435-640-2158 | 435-659-8732
ANNE@AACLAWUTAH.COM
WWW.AACLAWUTAH.ORG
WWW.UTAHCOLLABDIVORCE.COM

EYEWITNESS IDENTIFICATION AT TRIAL

In the event that a motion in limine is unsuccessful or not brought, counsel may wish to argue to the jury that the eyewitness identification is not reliable. Both cross-examination and expert testimony have a role in making this argument, although the latter is likely to be more effective than the former. Additionally, jury instructions crafted in light of Rule 617 will help jurors assess eyewitness reliability.

Cross-Examination of Eyewitnesses

“[V]igorous cross-examination” has long been treated as a bulwark against unreliable eyewitness identification. *Perry v. New Hampshire*, 565 U.S. 228, 233 (2012). However, it may be less effective in this context than traditionally believed. “Cross-examination, a marvelous tool for helping jurors discriminate between witnesses who are intentionally deceptive and those who are truthful, is largely useless for detecting witnesses who are trying to be truthful but are genuinely mistaken.” Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW AND HUMAN BEHAVIOR, 603, 609 (Dec. 1998).

Because many eyewitnesses, even those who are wrong, hold their identification in high confidence, cross-examination of an eyewitness may be most effective when it is used to pin down the details of the identification rather than to move a witness away from the identification itself. For example, the cross-examiner may wish to ask the witness his or her race without questioning the witness’s bias or may wish to ask whether the suspect had a

weapon without specifically asking the witness whether he or she was focused on the weapon instead of the suspect’s face. The cross-examiner could then bring an expert to explain same-race bias or weapon focus and apply those concepts to the facts of the case.

Expert Witnesses

Like many judges and attorneys, jurors are unlikely to come with an understanding of the scientific and psychological nuances that make a seemingly reliable eyewitness identification actually unreliable. Instead, many, if not most, jury members will assume that eyewitness identifications are credible, perhaps thinking of iconic scenes in film where a witness dramatically points to the defendant in the courtroom and accurately accuses him of the crime. Stephen L. Chew, *Myth: Eyewitness Testimony Is the Best Kind of Evidence*, ASS’N FOR PSYCHOLOGICAL SCI. (Aug. 20, 2018), <https://www.psychologicalscience.org/teaching/myth-eyewitness-testimony-is-the-best-kind-of-evidence.html>. The perception and memory of an eyewitness may be affected by a wide range of factors not intuitively obvious to a juror (or even a judge), and careful consideration of these factors is important in assessing the reliability or probative value of eyewitness testimony. See Utah R. Evid. 617 advisory committee’s note to subsections (e) and (f) (“[M]any scientifically established aspects of eyewitness identification memory are counterintuitive and jurors will need assistance in understanding the factors that may affect the accuracy of an identification.”). Experts are key in assisting the jury in this process.

ACKNOWLEDGE THE PROBLEM. ATTACK THE PROBLEM.

Holland & Hart is proud to partner with the Utah Center for Legal Inclusion to explore initiatives that eliminate barriers and promote inclusion.

Contact: James Barnett
801.799.5800
jbarnett@hollandhart.com
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
hollandhart.com

HOLLAND & HART 

Expert testimony is briefly addressed in Rule 617: “When the court admits eyewitness identification evidence, it may also receive related expert testimony upon request.” Utah R. Evid. 617(e). Although the admission of expert testimony is discretionary, Utah trial judges are generally affirmed when they allow experts to testify and reversed when they do not by a “shockingly disproportionate margin.” See *Science and Law CLE*. Furthermore, the national trend is toward allowing expert witness testimony on both estimator and system variables, including cross-race effects, the impact of stress on identifications, weapon focus, and suggestive lineup or showup procedures.

Under Rule 702(a),

a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Utah R. Evid. 702(a). Further, “[s]cientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony” are “reliable,” “are based upon sufficient facts or data,” and “have been reliably applied to the facts.” *Id.* R. 702(b). In what’s sometimes jokingly referred to as the “Frye-Bert” standard (a mash-up of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)), this “threshold showing . . . is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.” Utah R. Evid. 702(c); *State v. Clopten*, 2009 UT 84, ¶ 38, 223 P.3d 1103 (noting that Rule 702 subsumes the prior standard under *State v. Rimmasch*, 775 P.2d 388 (Utah 1989), into the determination of the admissibility of expert testimony and yields that same result when applied to eyewitness expert testimony).

While there’s no outright presumption that expert testimony on the reliability of eyewitness testimony is admissible, “the testimony of a qualified expert regarding factors that have been shown to contribute to inaccurate eyewitness identifications should be admitted whenever it meets the requirements of rule 702.” *Clopten*, 2009 UT 84, ¶ 30. While “trial judges have often excluded eyewitness experts on grounds that the testimony will not be helpful to the jury,” the Utah Supreme Court has held that, “in cases where eyewitnesses are identifying a stranger and where

one or more established factors affecting accuracy are present, the testimony of an eyewitness expert will meet rule 702’s requirement to ‘assist the trier of fact.’” *Id.* ¶ 32 (footnote omitted). As a result, the Utah Supreme Court “expect[ed] this application of rule 702 will result in the liberal and routine admission of eyewitness expert testimony.” *Id.* ¶ 30.

Since *State v. Clopten*, 2009 UT 84, 223 P.3d 1103, the question regarding admissibility of expert witness testimony on eyewitness identification has evolved from whether the testimony of an eyewitness expert is generally admissible to whether a particular expert will present information to the jury in a way that will “help the trier of fact.” Utah R. Evid. 702(a). Arguments that were successful in the past, such as the belief that a juror’s life experience provides sufficient information to determine the reliability of an eyewitness, that cross-examination will suffice to reveal weaknesses with the identification, and that the testimony presented by an expert will be misleading or confusing, are no longer viable. In fact, none of these are proper bases to exclude an eyewitness identification expert. *Clopten*, 2009 UT 84, ¶ 32.

Clopten also closed the door on arguments that eyewitness identification expert testimony would intrude on the province of the jury by providing an external evaluation of a witness’s reliability or that it would be an “impermissible lecture.” *Id.* ¶ 36 (internal quotation marks omitted). An expert may “give a dissertation or exposition of factors found in [a particular] case that are understood to contribute to eyewitness inaccuracy. *Id.* (internal quotation marks omitted). Rather than invading the province of the jury, an expert’s testimony assists the jury by providing tools to measure reliability outside of a juror’s intuition. Unless the expert attempts to “tell the jury that a specific eyewitness identification either is or is not accurate, then the expert has not impinged on the jury’s duty as the sole evaluator of witness credibility.” *Id.*

Despite the value of experts in challenging eyewitness identification, choosing to forego bringing in an eyewitness identification expert may be a sound trial strategy in some circumstances. Some expert testimony would serve only to highlight factors that weigh in favor of a reliable identification, particularly during cross-examination. For example, a show-up may appear overly suggestive in a particular case, but on cross-examination the prosecutor could show that its reliability is grounded in the immediacy of the identification, the lack of confirmation bias, and an absence of influence from later exposure to the defendant or additional information about the case.

While *Clopten* certainly suggests that, in general, it may be wise or even expected in appropriate cases

to present expert testimony on the inherent weaknesses of eyewitness or memory testimony, it does not go so far as to imply that a failure to do so presumptively renders counsel ineffective without regard for the circumstances of a particular case.

State v. Willey, 2011 UT App 23, ¶ 19, 248 P.3d 1014 (citation omitted). Thus, while declining to call an expert is not automatically deficient performance, counsel should be ready to articulate reasons for the decision. *See id.*

Jury Instructions

Eyewitness expert testimony is neither cumulative nor duplicative of cautionary instructions to the jury. *Clopten*, 2009 UT 84, ¶ 34. Instead, jury instructions on eyewitness identifications are allowed and sometimes required under Rule 617(f): “When the court admits eyewitness identification evidence, the court may, and shall if requested, instruct the jury consistent with the factors [addressing estimator and system variables] in subsections (b) and (c) and other relevant considerations.” Utah R. Evid. 617(f). Furthermore, failure to provide a jury instruction whenever “eyewitness identification is a central issue in a case and such an instruction is requested by the defense . . . could well deny the defendant due process of law.” *State v. Long*, 721 P.2d 483, 492 (Utah 1986), *cited in Clopten*, 2009 UT 84, ¶ 34 (reaffirming the principle that “the trial judge must provide a cautionary instruction if one is requested by the defense and eyewitness identification is a ‘central issue’” in cases where the defense does not call an eyewitness expert but otherwise modifying *Long*).

This is a basic must/may rule on the surface. If eyewitness identification evidence is introduced at trial, the court must give a jury instruction if the defense counsel requests it. If defense counsel does not request the instruction, the court may still give the instruction.

In Utah, trial judges generally will have an on-the-record discussion with defense counsel outside the jury’s presence about providing the instruction if counsel has not requested one under Rule 617. *See Science and Law CLE*. This discussion preserves any objection required by Rule 103(a), creates the necessary record for appeal, and decreases the likelihood that a judge will be reversed for abuse of discretion under Rule 617. *Id.*; *see also* Utah R. Evid. 103(a); *State v. Prawitt*, 2011 UT App 261, ¶ 8, 262 P.3d 1203 (“[T]he ultimate burden is on a defendant ‘to make certain that the record he compiles will adequately preserve his arguments for review.’” (quoting *State v. Johnson*, 2006 UT App 3, ¶ 13, 129 P.3d 282)). Counsel may also wish to submit instructions that directly address the estimator and system variables at play in the case and may

need to modify the model jury instructions to reflect Rule 617. *See* Utah Model Jury Instructions, Criminal 404 (MUJI 2d 2018).

CONCLUSION

Rule 617 provides a significant and welcome update to the rules surrounding the admissibility of eyewitness identifications. It provides best practices for eyewitness identification procedures, methods for maximizing reliability of initial identifications, clarity on the role of expert witnesses, a route to challenge unreliable identifications at the pretrial stage, and added guidance to finders of fact who must gauge the reliability of eyewitness identification. Utah is a national leader in adopting legal standards that are science-driven. Consistent application of Rule 617 will, ideally, help the Utah criminal justice system build a better eyewitness identification process that does substantial justice for defendants and victims alike.

AUTHOR’S NOTE: *The author would like to thank Professor Teneille Brown at the University of Utah S.J. Quinney College of Law; the Honorable Richard McKelvie of the Third Judicial District for the State of Utah; and Mikayla Irvin and Darian Roberts, third year research assistants and J.D. candidates at the University of Utah S.J. Quinney College of Law for their help, research, and advice.*

MEDIATOR & ARBITRATOR

Greg Hoole

- Ranked among Utah’s Legal Elite and named a Mountain States Super Lawyer in Alternative Dispute Resolution;
- Adept at bringing parties together to resolve even the most complex of disputes;
- Does not charge for travel along the Wasatch Front and St. George.

Schedule through Utah ADR Services:
801-943-3730 | miriamstrassberg@yahoo.com

gregh@hooleking.com | www.SmarterResolutions.com



Emily Adams



Cherise Bacalski



Freyja Johnson

DON'T GO IT ALONE

An appeal can feel like uncharted territory. So can a Webex trial or an important motion when the stakes are high. We can help you navigate your way. From trial consulting and motion work to handling the appeal, our appellate attorneys have got you covered. theappellategroup.com | 801.924.0854

LET'S DO THIS TOGETHER

Get free weekly case summaries and practice points from Utah Appellate Report. Subscribe: theappellategroup.com/uar



Appellate Highlights

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

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

UTAH SUPREME COURT

State v. Malloy **2021 UT 3 (Jan. 21, 2021)**

The court of appeals affirmed the district court's denial of a motion to dismiss, relying on *State v. James* which held that because officers can direct a driver to leave a vehicle incident to a traffic stop, there is no "functional" or constitutionally relevant difference if the officer opens the car door. The supreme court **repudiated and otherwise limited James, holding that "it can no longer be said that it makes no constitutional difference whether a police officer opens a car door or asks a driver to do so,"** based upon Fourth Amendment law developments shifting the focus from one of reasonable expectation of privacy to "an originalist, property-based inquiry." The court nevertheless affirmed the denial of the motion to suppress based upon the officer's objectively reasonable reliance on then-valid precedent.

Feldman v. Salt Lake City Corp. **2021 UT 4 (Jan. 28, 2021)**

Plaintiffs brought suit against a municipality after a family member was caught in a creek current while walking dogs in a historic nature park. The district court dismissed based on an application of Utah's Limitations on Landowner Liability Act. Reversing, the supreme court held (a) section 401 of the Act did not violate the Wrongful Death Clause of the Utah Constitution, but (b) the district court erred in granting the motion to dismiss because plaintiffs sufficiently alleged that the drowning was not caused by an inherent risk of the recreational activities at issue. In doing so, the court **clarified the test for determining whether a risk was an integral and natural part of a given activity under the Limitations on Landowner Liability Act.**

Kamoe v. Ridge **2021 UT 5 (Jan. 28, 2021)**

Kamoe entered a negotiated plea and was sentenced in a justice court proceeding. She then appealed to the district court but withdrew her appeal when that court denied her renewed motion to suppress. Back in justice court, Kamoe requested that the original judgment be reinstated. The prosecutor objected, arguing the operation of Utah Code § 78A-7-118(3) had voided the judgment upon Kamoe's appeal. That statute provides that an appeal of a negotiated plea voids the "negotiation with the prosecutor." Both the justice court and the district court agreed this language meant that the original judgment was voided by Kamoe's appeal. On appeal from the district court's denial of Kamoe's petition for extraordinary relief, the Utah Supreme Court reversed and remanded with instructions to restore the original judgment, holding **the plain language of § 78A-7-118(3) does not void any sentence or judgment entered by the justice court, only the negotiated plea between the defendant and prosecutor.**

Southern Utah Wilderness Alliance v. San Juan County Comm'n **2021 UT 6 (Feb. 25, 2021) and**

Southern Utah Wilderness Alliance v. Kane County Comm'n **2021 UT 7 (Feb. 25, 2021)**

In these two related appeals, the Utah Supreme Court held that **Southern Utah Wilderness Alliance both had standing to assert and had sufficiently pled a claim against San Juan and Kane County for violation of Utah's Open and Public Meetings Act based on meetings the County Commissions had with Ryan Zinke, the United States Secretary of the Interior.** The supreme court first clarified the distinction between standing and the merits of a claim. The district court erred in conflating the two when it held that SUWA lacked standing because the meetings with Secretary Zinke were not

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

subject to the Open and Public Meetings Act, such that SUWA and its members were not denied any rights under the Act. The court additionally held that the district court erred in dismissing SUWA's claims under Rule 12(b)(6). Without deciding the proper interpretation of the term "meeting," the court held that SUWA had provided fair notice of the basis of its claim. "In the context of the Act, pleadings will provide defendants with adequate notice when they specifically identify the meeting or meetings at issue and contain 'reliable indicia that lead to a strong inference' that 'matters' under the public body's jurisdiction were discussed."

UTAH COURT OF APPEALS

Blank v. Garff Enterprises, Inc. 2021 UT App 6 (Jan. 22, 2021)

The court of appeals affirmed the district court's summary judgment and directed verdict dismissing the plaintiffs' claims against the manufacturer, retailer, and distributors of an automobile involved in a high-speed rear-end collision. The court held that **the district court was within its discretion to exclude untimely supplemental expert declarations that the plaintiffs attempted to offer in opposition to the defendants' summary judgment motion, which were not harmless or excused by good cause.** The court further held that the directed verdict dismissing the plaintiffs' negligent design claims was correct, where the plaintiffs had failed to present evidence that any defendants designed the automobile or its component parts.

Anderson-Wallace v. Rusk 2021 UT App 10 (Feb. 4, 2021)

In this wrongful death case, the plaintiff argued that the semi-truck driver defendant negligently drove on the shoulder of a freeway exit, striking and killing the decedent. The driver and her employer argued that the decedent darted into the truck's lane of travel in a suicide attempt. They also sought to introduce evidence showing the decedent was seriously intoxicated at the time of the accident and had struggled with debilitating alcohol abuse in the months prior. The trial court excluded this evidence at trial, concluding that the risk of "unfair prejudice" to the plaintiff substantially outweighed the evidence's probative value under Utah R. Evid. 403. On appeal from a substantial jury verdict in favor of the plaintiff, the Utah Court of Appeals reversed, holding that **the trial court abused its discretion and prejudiced the defense by excluding the evidence of the decedent's intoxication and history**

of alcohol abuse. The evidence was highly probative on both the issue of liability and the extent of general damages, and any prejudice to the plaintiff was not "unfair" simply because it was damaging to the plaintiff's case.

Turpin v. Valley Obstetrics and Gynecology 2021 UT App 12 (Feb. 11, 2021)

This medical malpractice action involved the applicable standard of review of a district court's decision regarding whether the plaintiff had waived arbitration by substantially participating in the litigation. **Where the district court's decision compelling arbitration is based on documentary evidence alone, the appellate court will decide whether the plaintiff materially participated in the litigation before requesting arbitration and, if so, whether the defendants were prejudiced, giving no deference to the district court's decision.** Applying that standard of review, the court of appeals held that the defendants had not established the requisite prejudice.

State v. Valdez 2021 UT App 13 (Feb. 11, 2021)

Reversing convictions for kidnapping, robbery, and aggravated assault, the court of appeals held that **the defendant's right against self-incrimination under the Fifth Amendment was violated when the prosecution presented evidence that he refused to provide the swipe code to his cell phone to officers and relied upon that evidence in closing argument,** thereby inviting the jury to infer guilt from the defendant's silence.

TENTH CIRCUIT

Lance v. Morris 985 F.3d 787 (10th Cir. Jan. 19, 2021)

In this appeal from summary judgment in favor of county official defendants, **the Tenth Circuit adopted the Second Circuit's three-part test for determining whether a purported failure to train for a given situation shows deliberate indifference by policymakers in the context of 42 U.S.C. § 1983 claims.** The test asks (1) whether policymakers know "to a moral certainty that . . . employees will confront a given situation"; (2) whether the situation presents "a difficult choice of the sort that training or supervision will make less difficult"; and (3) whether a "wrong choice" by an employee "will frequently cause the deprivation of a citizen's constitutional rights."

United States v. Barrett
985 F.3d 1203 (10th Cir. Jan. 19, 2021)

In this postconviction proceeding, the Tenth Circuit considered whether the district court erred in analyzing the prejudice prong of the ineffective assistance of counsel inquiry under the Sixth Amendment. Vacating the death sentence and remanding for resentencing, the Tenth Circuit held that **defense counsel's failure to present evidence of organic brain damage, bipolar disorder, and other mental impairments during the sentence phrase resulted in prejudice** because, upon balancing the aggravating and mitigating factors, there was a reasonable probability that at least one juror would have declined to recommend the death sentence.

United States v. Chavez
985 F.3d 1234 (10th Cir. Jan. 20, 2021)

In this case involving a conviction for a felon in possession of a firearm, the Tenth Circuit reversed a denial of a motion to suppress. The district court denied the motion based upon the inventory search exception. **While the handgun was in plain view on the driver-side floorboard, which gave grounds for the officers' locating the handgun, the court held there was no exception to the Fourth Amendment that**

justified the search of the vehicle and the officers' taking possession of the gun. The owner of the car took possession of the vehicle, negating the inventory search, and there was no risk justifying the community caretaker exception.

United States v. Salazar
987 F.3d 1248 (10th Cir. Feb. 16, 2021)

Challenging the revocation of his term of supervised release and reimprisonment of ten months, the defendant argued that the district court imposed an illegal sentence because the combined term of the original sentence and ten additional months exceeded the statutory maximum. Affirming, the Tenth Circuit held **18 U.S.C. § 3583 authorizes revocation and resulting additional incarceration even when the total term exceeds the maximum possible under the statute.** In doing so, the court rejected the defendant's argument that *Johnson v. United States*, 529 U.S. 694 (2000), required aggregation of the imprisonment and reimprisonment.

Carlile v. Reliance Standard Life Ins. Co.
988 F.3d 1217 (10th Cir. Feb. 22, 2021)

This appeal arose from a dispute between an employee and an ERISA plan administrator over entitlement to long-term disability

seize the deal

LOCALLY AND GLOBALLY.

From well-known multinationals expanding their global brands to high-growth technology companies pursuing equity financing and exit strategies, dealmakers choose Dorsey for innovation, quality and efficiency. That's why, day after day and year after year, Dorsey is a leader in M&A and Venture Capital deals.



BAND 1 CORPORATE / M&A FIRM

Ranked in Utah
Chambers USA 2020

LEADING M&A AND VENTURE CAPITAL PRACTICE

25 M&A and Venture Capital Corporate Lawyers
Based in Dorsey's Salt Lake City Office

NATIONALLY RANKED M&A PRACTICE

Top 25 for U.S. M&A Deals Completed
 #17 in U.S. Mid-Market Target Deals
Thomson Reuters 2020

VENTURE CAPITAL SPECIALISTS

Utah Office Closed 50+ Venture Capital Equity and Debt Financings in 2020

dorsey.com

benefits. The relevant policy language provided coverage to an “active, Full-time employee” when the disability arose, but the administrator argued that the employee was not “active” because his termination was pending at the time of the disability. The Tenth Circuit agreed with the district court that **the phrase “active Full-time employee” was ambiguous and that it should be construed in favor of the employee finding coverage.**

United States v. Benton

988 F.3d 1231 (10th Cir. 2021) (Feb. 23, 2021)

In this criminal appeal, the Tenth Circuit joined the Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits to hold that *Rehaif v. United States*, 139 S. Ct. 2191 (2019), **did not require the government to prove that a defendant charged with possession of a firearm by a restricted person knew that his restricted status meant he could not legally possess a firearm.** Instead, *Rehaif* requires that the government prove (1) that the defendant possessed a firearm and (2) that he knew of his restricted status when he did so.

United States v. Mora

989 F.3d 794 (10th Cir. 2021) (Feb. 24, 2021)

In this alien smuggling case, police received a 911 call which led them to a Walmart parking lot with 14 individuals without IDs. The 911 caller mentioned a tractor trailer, which the police connected with defendant. The officers performed a “protective sweep” of the defendant’s home, which led to discovery of a gun safe and ammunition. The officers then used that information to obtain a warrant. On appeal challenging convictions related to the weapons, **the Tenth Circuit held there were no exigent**

circumstances to justify the protective sweep or based upon alleged alien safety. The officers arrived at the home before the suspect, negating any alien safety claim, and detained the suspect and his wife outside the home, negating any claim regarding officer safety. With the gun safe and ammunition information excised from the warrant, there was no probable cause justifying the warrant.

Tanner v. McMurray

989 F.3d 860 (10th Cir. 2021) (Mar. 2, 2021) and

Estate of Jensen by Jensen v. Clyde

989 F.3d 848 (10th Cir. 2021) (Mar. 2, 2021)

These cases both involved 42 U.S.C. § 1983 claims based upon pre-trial inmate deaths while in custody and claims of deliberate indifference involving private contractors working at the jail. In both cases, private contractors asserted qualified immunity. In *Tanner*, the Tenth Circuit reversed summary judgment for defendants based upon qualified immunity holding that “[n]either historical justifications of special government immunity nor modern policy considerations support[ed] the extension of a qualified immunity defense to . . . private medical professionals employed full-time by a multi-state, for-profit corporation systemically organized to provide medical care in correctional facilities.” In contrast, the court in *Clyde* **reversed a denial of qualified immunity to a private on-call doctor working at a jail finding that the doctor “was carrying out government responsibilities” and that “policy considerations,” including “protecting against ‘unwarranted timidity on the part of public officials’” and “ensuring ‘that talented candidates are not deterred by the threat of damages suits from entering public service,’” justified allowing the doctor to assert qualified immunity.**

S. Furniture Leasing, Inc. v. YRC, Inc.

989 F.3d 1141 (10th Cir. Mar. 3, 2021)

The Tenth Circuit affirmed the district court’s dismissal of this putative class action against several trucking companies for allegedly overcharging shippers by using inflated shipment weights when determining shipment prices. The court **interpreted § 13710(a)(3) of the Trucking Industry Regulatory Reform Act and held that the 180-day time limit described in that section applies to all claims brought by a shipper seeking to contest shipment charges, and not just to actions before the Surface Transportation Board.** The court held that the plaintiffs’ claims were time-barred because they were not brought within 180 days.



Need affordable Spanish-speaking mediation?

Michael T. Thornock

385.259.0503
michael@lawscb.com
www.lawscb.com
2225 South State Street,
Salt Lake City, Utah 84115

- Listed on both the Utah Basic and Divorce Mediation Rosters
- Available for in-person or online mediation sessions
- Experienced in Family Law, Debt Collection, Landlord/Tenant issues, and Contracts

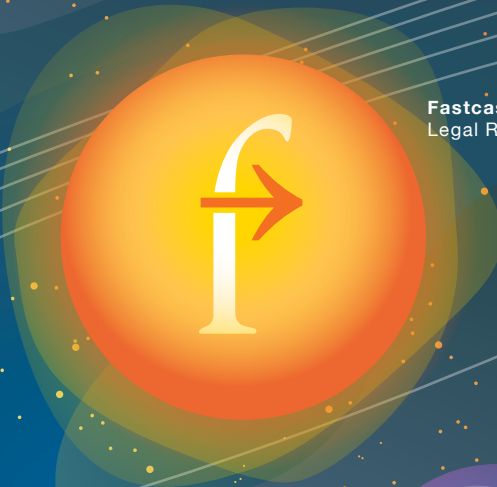
STOWELL & CRAYK BROWN PLLC

A WORLD OF DIFFERENCE

Law Street Media
Legal News



Fastcase
Legal Research



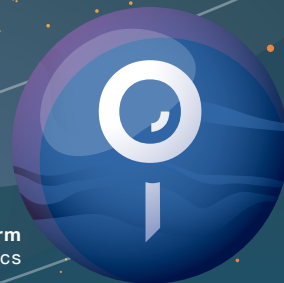
AI Sandbox
Legal Data Analysis



Full Court Press
Expert Treatises



Docket Alarm
Pleadings + Analytics



NextChapter
Bankruptcy Petitions + Filing



START YOUR JOURNEY

Fastcase is one of the planet's most innovative legal research services, and it's available free to members of the Utah State Bar.

LEARN MORE AT

www.utahbar.org

DOWNLOAD TODAY



The Southern Correspondent

by Stephen P. Dent

In 2019, I moved from the Washington, D.C. area to Washington County, Utah. Our home in Alexandria, Virginia, was surrounded with lush woods and wildlife. If you left your shoes outside at night, the neighborhood red foxes would turn them into chew toys and deposit them on the neighbor's lawn. My daily commute to the District included glimpses of memorials, monuments, and the Capitol. Now, our home is surrounded by a stunning red-rock panorama with Pine Mountain in the distance. My (much shorter) commute includes glimpses of bluffs, buttes, and old sandstone buildings. We traded the east-coast humidity for southwest desert heat. It's like trading a sauna for an oven.

What attracted us to St. George? Primarily, a dream job. Also, the region boasts beautiful landscapes, sunny winters, affordable housing, easy commutes, and friendly people. Hot summers are the price of admission for beautiful weather the rest of the year.

The quality of life in St. George is matched by the quality of law practice. In my eighteen months in town, I have met talented, collegial lawyers with expertise in various legal areas. These attorneys come from across Southern Utah — St. George, Cedar City, Kanab, and beyond.

St. George has transformed throughout the years. What began as a dusty desert settlement has grown to a burgeoning city with a dynamic local economy, world-class tourism, and high quality of life. The legal community has grown in numbers and has become busier and more specialized. But despite the change, some things have stayed the same.

Sandstone Courthouses

If you drive down St. George Boulevard, you'll see a sandstone building near Angelica's Mexican Grill: the Old Pioneer Courthouse, completed in 1876. Half a mile away, on

Tabernacle Street, you'll see another sandstone building: the Fifth District Courthouse, completed in 2009.

When the Old Pioneer Courthouse was built, St. George was a small settlement of a thousand or so people. Back then, there were county offices on the first floor, a courtroom on the second floor, and a jail in the basement. In 1880, the courthouse was a scene out of a Wild West movie. One night, a mob of miners from nearby Silver Reef stormed the jail in search of Tom Forrest, a fellow miner accused of killing a well-liked foreman. The mob found Forrest in a basement jail cell, overpowered him, and hanged him in a nearby cottonwood tree.

Now, 140 years later, the courthouse is a museum. The courtroom has original paintings of the Grand Canyon and Zion National Park. The bench is flanked by an American flag from 1896, the year Utah joined the Union. The flag bears forty-five stars. Each year, local actors reenact a trial in which Judge John Menzies Macfarlane (a 19th century songwriter, lawyer, and judge) presided over a water-theft case. The Old Pioneer Courthouse stands as a memory of a small, 19th century settlement in the desert.

St. George remained a small town as it moved into the 20th century. Its population gradually rose to around 10,000 by 1980. In 1979, Judge David Nuffer moved to St. George to begin his legal career. I asked Judge Nuffer what attracted him to St. George all those years ago. He recounted that, as a BYU law

STEPHEN P. DENT is an Assistant United States Attorney in St. George.



student, he made a road trip from Provo to St. George to interview at a law firm. The skies were blue, and the grass was unseasonably green. After the interview, and before he even had a job offer in town, he found a payphone at a local park, called his wife, and told her St. George was the place. LaMar Winward, another BYU alum, moved from Provo to St. George in 1981. He remarked that he was looking for a small-town feel, somewhere that felt like his hometown in Idaho. He also wanted to avoid the snow. St. George fit the bill.

Back then, there were only a small handful of attorneys in town – maybe fifteen or so. There was one Fifth District Court judge, J. Harlan Burns, who “rode circuit” along the entire I-15 corridor from Nephi to St. George. Judge Burns would rotate courthouses, holding monthly law and motion days in each county. Judge Burns’s court convened at 9:00 a.m. and went for hours, sometimes late into the evening. Attorneys sat in the gallery waiting for their case in the cattle call. It was their monthly opportunity to have their cases heard. It was also, as Judge Nuffer recalled, an opportunity to learn about the law, as lawyers sat for hours watching their colleagues argue a diverse array of cases.

In those days, most St. George lawyers had general practices, taking on virtually any matter that came through the door. Judge Nuffer’s practice spanned real estate, criminal law, and civil litigation. His week could consist of negotiating a real estate

transaction on Monday and trying three cases to jury verdicts on Tuesday. Winward’s early practice was similarly broad. He often followed Judge Burns to different counties on the circuit to represent clients in family, criminal, and civil cases.

Both Judge Nuffer and Winward remarked that a key feature of the small-town practice was collegiality. Attorneys repeatedly faced opposing counsel, prompting them to develop a collegial and professional culture. As Winward put it, “You have to play nice in the sandbox because we’re all coming back tomorrow.” Attorneys also engaged in informal mentoring and collaboration. Winward remembers being able to pick up the phone and call someone if he had a question or needed advice.

Forty years after Judge Nuffer and Winward began their careers, St. George and the surrounding area has grown to over 175,000 in population. Southern Utah has been one of the fastest-growing areas in the country in recent years.

As the population has grown, the legal community has kept pace. There are now dozens of law firms in town. Attorneys have developed specialized and sophisticated practices. Judge Nuffer’s former law firm, which began in 1979 as a two-person shop, is now part of a large international firm. The pace of practice has also changed. Winward notes that, instead of a monthly law and motion day, he is in court most days of the week. Gone are the days of monthly cattle calls and circuit riding.


GreenbergTraurig

Diverse by design.

We’ve made diversity, equity and inclusion integral to our legal services and civic investments, because a more just world happens only by design.

Greenberg Traurig is proud to be a **UCLF Founding Sponsor**.

#1

No. of African American & Latino Attorneys

#2

No. of LGBT Partners

#4

No. of Minority Attorneys

#6

No. of Female Partners

GREENBERG TRAURIG, LLP | ATTORNEYS AT LAW | 2200 ATTORNEYS | 40 LOCATIONS WORLDWIDE* | WWW.GTLAW.COM

Annette Jarvis | Shareholder | 222 South Main Street | 5th Floor | Salt Lake City, UT 84101 | 801.478.6900

Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ©2021 Greenberg Traurig, LLP. Attorneys at Law. All rights reserved. Attorney advertising. *These numbers are subject to fluctuation. "Diversity, Women's & LGBT Scorecards, *The American Lawyer/National Law Journal*, 2020 35185

 Greenberg Traurig, LLP
  GT_Law

 GreenbergTraurigLLP
  GT_Law

Next door to Winward's office stands the Fifth District Courthouse. The building's architects deserve credit. The sandstone exterior matches the surrounding red rock. It also matches the Old Pioneer Courthouse and many other historic buildings downtown. The white columns give a traditional feel and symbolize stability and the supremacy of law. Inside, in nonpandemic times, attorneys speak in the hallways, jurors assemble, and Fifth District judges preside from the bench.

The courthouse is also home to the U.S. District Court for the District of Utah. In 2009, District Judge Ted Stewart started coming to St. George for monthly felony sentencings. Magistrate Judge Robert Braithwaite handled all criminal pretrial matters. In 2018, the District of Utah created its Southern Region, which encompasses the state's thirteen southernmost counties. The move was based on, among other things, "the growing population of Southern Utah," "the distance between Salt Lake City and Southern Utah areas," and "the convenience" of litigants and attorneys. Judge Nuffer, who by then had spent nearly twenty-four years on the federal bench, moved back to St. George in 2019 to become the first full-time federal judge in Southern Utah. Along with Judge Nuffer, U.S. Magistrate Judge Paul Kohler has chambers in the sandstone courthouse. The flags in the courtrooms have fifty stars.

The two sandstone courthouses are symbols of how much has changed. St. George has transformed to a burgeoning city projected to triple in population in the next fifty years. Although much has changed, much has stayed the same. The skies are still blue, the rock is still red, and the people are still friendly. What's more, St. George lawyers have preserved the collegial, small-town approach to practicing law. Even today, the norm is for adverse attorneys to uphold the highest standards of professionalism and respect. All these years later, Judge Nuffer insists that "the culture and collegiality has remained the same."

The Southern Correspondent

The Southern Correspondent is a new section of the *Utah Bar Journal* dedicated to publishing articles from attorneys in the state's southern half. The purpose is to provide a platform for Southern Utah attorneys. What is considered Southern Utah? It depends on whom you ask. It is often synonymous with red rock. For purposes of this section, however, we adopt the federal court's geographically broader definition. To that end, we will accept articles from attorneys in the district court's Southern Region, comprising Beaver, Emery, Garfield, Grand, Iron, Kane, Millard, Piute, San Juan, Sanpete, Sevier, Washington, and Wayne Counties. See page six for submission guidelines and instructions.



Expert Mediation and Arbitration Services

Justice Christine Durham (Ret.)
Experienced Neutral

Justice Michael D. Zimmerman (Ret.)
Experienced Neutral

Contact Miriam Strassberg at Utah ADR Services
801.943.3730 or mbstrassberg@msn.com



ZIMMERMAN BOOHER
APPELLATE ATTORNEYS

WELL-BEING WEEK IN LAW

MAY 3-7, 2021

DAILY PARTICIPATION GUIDE



MONDAY | STAY STRONG Physical Well-Being

Watch This: Bahar Gholipour (2016). Profile of Dr. Wendy Suzuki. HuffPost Video Profile, 6:28. Dr. Suzuki talks about how exercise transformed her life and led her to research the interconnection between physical activity and peak brain functioning. www.huffpost.com/entry/exercise-brain-benefits_n_58176e4be4b0390e69d15b0d

Read This: Deborah Grayson Riegel (2021). Don't Underestimate the Power of a Walk. Harvard Business Review. hbr.org/2021/02/dont-underestimate-the-power-of-a-walk

Do This: Active Meeting Challenge. Do all of your meetings (or even just one!) on Monday while standing up or walking and post on social media about it using the hashtag #WellbeingWeekInLaw.

TUESDAY | ALIGN Spiritual Well-Being

Watch This: Jane Park (2020). Connecting With What Matters. Greater Good Magazine, 3:25 mins. Writer and "happiness guinea pig" Wajahat Ali describes his experience with a science-based Values Affirmation activity in which he focuses on his Islam religion. greatergood.berkeley.edu/video/item/how_to_connect_with_what_matters_to_you

Read This: Jessie Cohen (2017). Ways to Incorporate Your Spirituality at Work. WeWork.com. www.wework.com/ideas/worklife/ways-to-incorporate-your-spirituality-at-work

Do This: Try an Awe Walk (lawyerwellbeing.net/wp-content/uploads/2021/03/Awe-Walk_Spiritual-1.pdf) and post about your experience on social media using the hashtag #WellbeingWeekInLaw.

WEDNESDAY | ENGAGE & GROW Career & Intellectual Well-Being

Watch This: Fight Mediocrity (2015). Flow: An Animated Book Summary. YouTube, 5:20 mins. Gives a video summary of the best-selling book that proposes that fostering more "flow" (a state of complete absorption in engaging activities that are optimally challenging) in our daily lives is a key to growth and happiness. www.youtube.com/watch?v=8h6IMYRoCZw

Read This: Leo Babauta (2012). Nine Steps to Achieving Flow in Your Work. Greater Good Magazine. https://greatergood.berkeley.edu/article/item/nine_steps_to_achieving_flow_in_your_work

Do This: Complete the Job Crafting Activity Guide (lawyerwellbeing.net/wp-content/uploads/2021/03/Job-Crafting-1.pdf) and post about your experience on social media using the hashtag #WellbeingWeekInLaw.

THURSDAY | CONNECT Social Well-Being

Watch This: Shawn Stevenson (2019). The Model Health Show: The Science of Friendship & How your Community Impacts Your Health with Dhru Purohit. In this podcast/YouTube video, Dhru Purohit shares how deep and meaningful friendships can help you thrive, how strong relationships can support your well-being, and how connecting with others can help you reach your goals. 1hr, 15 min. themodelhealthshow.com/dhru-purohit/

Read This: Nelson D. Schwartz (2020). Working From Home Poses Hurdles for Employees of Color. New York Times. "Without the networks and encounters that offices provide, companies must foster the visibility of Black and Hispanic workers, diversity experts say." www.nytimes.com/cdn.ampproject.org/c/s/www.nytimes.com/2020/09/06/business/economy/working-from-home-diversity.amp.html

Do This: Complete the Loving-Kindness Meditation Activity Guide and post about your experience on social media using the hashtag #WellbeingWeekInLaw. lawyerwellbeing.net/wp-content/uploads/2021/03/LKM_Thursday.pdf

FRIDAY | FEEL WELL Emotional Well-Being

Watch This: Guy Winch (2014). Practicing Emotional First Aid. TEDx, 17:15 mins. Because too many of us deal with common psychological-health issues on our own, Dr. Guy Winch advocates for better emotional hygiene — taking care of our emotions and minds with the same diligence as we take care of our bodies. www.ted.com/talks/guy_winch_why_we_all_need_to_practice_emotional_first_aid?referrer=playlist-how_to_practice_emotional_first_aid#t-1029604

Read This: Alice Boyes (2020). Feeling Overwhelmed? Here's How to Get Through the Workday. Harvard Business Review. hbr.org/cdn.ampproject.org/c/s/hbr.org/amp/2020/11/feeling-overwhelmed-heres-how-to-get-through-the-workday

Do This: Choose one of the 8 science-based positive emotion-boosting activities in the Positive Emotions Worksheet and post about your experience on social media using the hashtag #WellbeingWeekInLaw. lawyerwellbeing.net/wp-content/uploads/2020/04/Resilient-Thinking_Positive-Emotions-Worksheet_4-1-2020.pdf

Lawyers Helping Lawyers

by Danielle Hawkes

On Friday evening, November 15, 2013, I was posting photos on Facebook laughing and lighting up the town. The photos were blurry, but the sentiment was real. I was having a blast, and all my troubles had melted away. I was also totally drunk. By morning, I was jittery and sick. I was back to feeling the overwhelming dread that had become my weekly routine. Monday was now inching closer without so much as one minute of rejuvenation under my belt. Another numbed-out Saturday night loomed. If I kept going, I'd spend yet another week overcome with suicidal thoughts and in a haze about what to do to solve my problems, or even what my problems were.

Instead, I got really honest with a friend who I knew had gone through some "stuff." She had a solution that was working for her, and, instead of going out Saturday night, I followed her to a meeting to see what she was doing. I sat crying through the entire meeting and heard nothing that was said. But I did not drink that Saturday night, nor any day or night since then.

That simple honest conversation with that friend turned everything around for me. I found a way to get sober so that I could work on some of the emotional struggles I had been having. For many years I had suffered from anxiety, depression, and thoughts of self-harm. I had worked for years with a therapist who helped me manage these issues and seek ever higher goals and accolades. But the only thing that actually made me feel better was partying with friends and numbing out. I felt that if I could take a break from drinking, I could dive deeper into the therapeutic work. So that is what I did. That was extremely successful, and after even a few months, my anxiety and depression started to fade away.

Then, after some time, I found that I wanted to stay sober, which is totally different than just getting sober. The recovery seeped in, and it has now become a way of life for me.

Before doing recovery work, I lived in a dichotomy. I absolutely loved my life. I loved being a lawyer; I loved making money; I loved the group of friends I had. But, I also hated my life. I was terrified all the time, and I constantly felt incompetent. I always felt like

the bottom was about to drop out and that I was going to lose everything. I cycled between being a Type A perfectionist during the day and trying to burn the whole barn down on the weekends.

Over seven years later, I no longer live on a pendulum of chaos. Through many hours of recovery and therapy work, I have found how to live a much simpler, calmer way of life. I was lucky in that my chronic depression and anxiety faded away totally.

Peaceful and well-balanced is not a natural place for me to be, and it takes work every single day. To make things difficult, I have decided to keep doing family law litigation, even though, at times, it makes "well-balanced" feel impossible. But I love the work and feel that it is an important way to serve our community. So, I decided to double down in recovery and figure out how to make it work for me. And I am figuring it out. And I love it.

Since that hazy Friday, my entire life has changed for the better. Since that time, I found a calm and loving spouse who would never have given me the time of day in my previous chaos. We have two adorable babies and a warm peaceful home. I credit absolutely all of it to that honest conversation that weekend.

Lawyers Helping Lawyers (LHL) hopes to provide that honest conversation between two individuals looking for solutions to everyday problems. We are a peer-to-peer volunteer group that believes that as lawyers, judges, students, and legal staff, we can help each other by sharing our own experiences honestly with one another. We can discuss these things in a confidential and low-key way with an eye toward solutions.

DANIELLE HAWKES is the owner of Hawkes Family Law and practices family law out of Salt Lake City. She currently serves as the Vice Chair of Lawyers Helping Lawyers.



Lawyers Helping Lawyers (LHL) went through some down time, but we have an active board now and are growing every month. We have launched a new phone number: 801-900-3834. We are ready to talk with those wanting to talk.

We are confidential. Lawyers Helping Lawyers falls under the protection of Rule 8.3 of the Utah Rules of Professional Conduct. What does that mean for you? Whether you are calling for yourself or asking for help for a colleague, we are bound and protected by Rule 8.3. That means what you say to LHL stays with LHL. Calling on behalf of a colleague who is in trouble also satisfies your requirement to report under the Rules of Professional Conduct.

Lawyers Helping Lawyers is also working hand in hand with the Well-Being Committee for the Legal Profession. That committee has been disseminating helpful information for legal professionals and creating programs that can help us all. Also in collaboration, Blomquist Hale continues to provide legal professionals and their families with therapeutic support at little to no cost.

In addition to being ready to talk to those wanting a peer-to-peer conversation, Lawyers Helping Lawyers is also in need of volunteers. We need those who have overcome struggles and who are willing to talk with others about similar problems. The issues we would like to work on include (but are not limited to): professional or business problems, family struggles, trauma, identity issues, substance abuse or misuse, overcoming adversity, and many other issues that we face. We are looking for a wide swath of volunteers to share a broad range of experience and diverse solutions. Please email our Chair, S. Brook Millard at bmillard@robertdebry.com to express interest.¹

In addition to those willing to help on an individual basis, we also need volunteers who are willing to share openly about their experience and solutions in small or large group settings. Please email me, our Vice-Chair, Dani Hawkes at danielle@hawkesfamilylaw.com if you would like to discuss this role.

1. The board of Lawyers Helping Lawyers retains full discretion on who can become or stay a volunteer.



FREE, Confidential Help is Just a Phone Call Away

STRESS
FAMILY ISSUES
DEPRESSION
ADDICTION

BLOMQUIST HALE
LAWYER ASSISTANCE PROGRAM (LAP)

Salt Lake City: 801-262-9619
Ogden: 801-392-6833
Orem: 801-225-9222
Brigham City: 435-723-1610
Logan 435-752-3241
Other Locations: 800-926-9619
blomquisthale.com

LAWYERS HELPING LAWYERS
Lawyers Assistance Program

801-900-3834
lawyershelpinglawyers.org

Advancing the Cause of Truth and Civility: The Utah Supreme Court Weighs In

by Gregory N. Hoole

In the Utah legal profession, the stakes are never higher than when a case comes before the Utah Supreme Court. Every decision, at a minimum, adds to the body of law that governs the people of Utah. Some of the decisions concern the most fundamental of principles undergirding our freedoms and way of life. And some of the decisions concern life itself.

The current court is composed, as Chief Justice Matthew Durrant notes, “of people with very strong and differing views,” each of whom comes at the issues before the court from a different perspective. Given the diverse views and high stakes at play, it is not surprising that vigorous debate accompanies the court’s decisions.

Disagreement among the justices has led to frequent dissents. These dissents and the public debate at oral argument that leads to them were discussed among the members of the court as a panel at the last in-person Utah State Bar Convention.

Chief Justice Durrant acknowledged in relation to this discussion that “disagreeing in public creates an inherent tension in our work.” Yet, as each member of the court recognized, for all the vigorous debate and inherent tension in the court’s work, the relationships and feelings among the five members of the court could not be more congenial, respectful, and even affectionate. Indeed, Justice Deno Himonas observed, “I think to a member we not only like each other but love each other.”

In the first part of this article, published in the last volume of the *Utah Bar Journal*, we discussed the critical importance that truth and civility play in our democracy and in preserving our freedoms. We discussed how attorneys, who take on the responsibility to advance the cause of truth and civility by oath, and who are trained to operate only on the basis of evidence, are uniquely positioned and uniquely obligated to lead out in this effort.

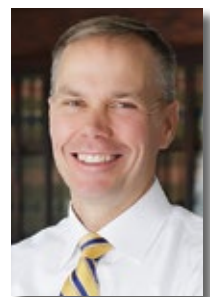
We recognized, however, that it is one thing to commit to conduct ourselves with “honesty, fidelity, professionalism, and civility,” Utah R. Pro. Conduct pmbl., and another thing entirely to put that commitment into practice, especially with respect to professionalism and civility. Drawing on the Utah Supreme Court’s panel discussion and follow-up interviews with its members, this part of the article seeks to explore the principles the court has followed in achieving an atmosphere of mutual respect and affection amidst fierce legal debate. It focuses on how we can apply these same principles not only to better our profession but also to “secure the blessings of liberty to ourselves and our posterity.” U.S. Const. pmbl.

TRUTH AND HONESTY

Given the interrelatedness of the cause of truth and civility, it should come as no surprise that an article about civility should begin with a discussion of truth. As Chief Justice Durrant observes:

Truth is at the heart of much of what it means to be civil. If you’re known as a lawyer that doesn’t cut corners or bend the truth, not only does that help you sleep at night, but it is an enormous asset in negotiations and argument. Such an asset also goes a long way in avoiding the uncivil behavior that can sometimes exist between counsel. Once you start making accusations without foundation, making assertions you can’t back up, you completely

GREGORY N. HOOLE is a mediator and arbitrator at Hoole & King.



hamstringing your ability to be a professional and effective advocate. You have to be able to back up what you say. The beauty of the judicial system is that you have to prove your assertions. The whole process is designed to help get us to the truth.

Reflecting Chief Justice Durrant's observations, of the five specific suggestions to foster civility offered by Justice Thomas Lee, three of them relate to honesty. First, Justice Lee admonishes us to "begin a challenge to another's position by conceding baseline points of agreement as a starting point." Such candidness not only enhances our credibility in the court's eyes, but it also helps engender feelings of trust and respect even in the eyes of those who oppose us.

Second, Justice Lee suggests "openly acknowledging, where possible, that a different perspective or set of values could lead to an opponent's differing view." This is not meant to be a glib concession but a mindful exercise requiring honest reflection. Working to understand another's position not only demonstrates a sincere desire to seek truth but serves also to clarify and refine one's own position. Such an honest effort tends to be infectious, leading one's opponent to do likewise. The mutual understanding that results from this process quells suspicions about others' motives and brings parties closer to accord.

Third, Justice Lee urges us to "avoid all-or-nothing or black-and-white framing of the issues in which our own

position is portrayed as unambiguously virtuous and our opponent's position as pure evil." We might believe such a tactic reflects zealous advocacy, but the intellectual dishonesty (or lack of comprehension) betrayed by this is painfully obvious and injurious to our credibility.

Similarly, we can avoid polarization and encourage productive discussion by moderating our speech. Benjamin Franklin recorded that he found himself to be far more persuasive and far more likely to avoid error by "expressing myself in terms of modest diffidence." Benjamin Franklin, *The Autobiography of Benjamin Franklin* 17 (1793). Franklin thus made a practice of couching his opinions with such moderating phrases as "It appears to me" and "If I am not mistaken." *Id.* Franklin counseled:

[Using a] dogmatical manner in advancing your sentiments may provoke contradictions and prevent a candid attention. If you wish information and improvement from the knowledge of others, and yet at the same time express yourself as firmly fix'd in your present opinions, modest, sensible [people], who do not love disputations, will probably leave you undisturbed in the possession of your error.

Id.

Regrettably, casting issues in their extreme or opining dogmatically



IN AN EVER-CHANGING WORLD,

YOU CAN EXPECT
DEPENDABLE COMPREHENSIVE
LEGAL REPRESENTATION

KIRTON | McCONKIE

SALT LAKE CITY, UT | LEHI, UT | ST. GEORGE, UT | BOISE, ID

KMCLAW.COM

with unequivocal language has become almost the norm in both our courts and public forums. This does not enhance credibility but serves only to drive factions further apart, making it all the more difficult for us to understand other legitimate points of view necessary to solve what are often complex problems.

In 2017, Princeton professor Robby George and political activist Cornel West issued a joint statement advocating the same principles suggested by the court and Franklin. The two, who typically come at issues from opposite sides of the political spectrum, see eye to eye when it comes to the need to defend truth through basic forms of civility:

[T]he maintenance of a free and democratic society require[s] the cultivation and practice of the virtues of intellectual humility, openness of mind, and, above all, love of truth. These virtues will manifest themselves and be strengthened by one's willingness to listen attentively and respectfully to intelligent people who challenge one's beliefs and who represent causes one disagrees with and points of view one does not share. . . . [S]eriously and respectfully engaging people who disagree will deepen one's understanding of the truth and sharpen one's ability to defend it.

Robert P. George and Cornel West, *Truth Seeking, Democracy, and Freedom of Thought and Expression* (Mar. 14, 2017), available at <https://jmp.princeton.edu/statement> (warning against the “idolatry of worshiping [our] own opinions and loving them above truth itself”).

HUMILITY AND LISTENING

If truth and honesty are the foundation of civility, then humility is its cornerstone. “The spirit of liberty is the spirit which is not too sure that it is right,” said Learned Hand, one of the most prominent jurists of the twentieth century. Learned Hand, *The Spirit of Liberty* (May 21, 1944), transcript available at https://www.digitalhistory.uh.edu/disp_textbook.cfm?smID=3&psid=1199. “The spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interest alongside its own without bias.” *Id.*

Echoing Judge Hand more than seventy-five years later, Senator Ben Sasse writes:

America is not a place for those so convinced of

the rightness of their every cause that they are always ready to use force to vanquish their opponents. Rather, America is a place for those who believe that fallen humanity – including me and you – is so often in error that we are reticent to use force. We would prefer to extend the debate, and try to argue and persuade another day.

Ben Sasse, *Them: Why We Hate Each Other – and How to Heal* 148 (2018).

Winston Churchill once famously observed the following about political rival Clement Attlee: “Mr. Attlee is a very modest man. Indeed, he has a lot to be modest about.” The truth is we each have a lot to be modest about. Just recognizing this facilitates a greater willingness to listen to and seek understanding from others. As Ralph Waldo Emerson observed, “Every man I meet is my superior in some way. In that, I learn of him.”

Humility is never made more manifest than through attentive listening. Herein lies one of the greatest strengths of the Durrant Court: a willingness – indeed a desire – to listen attentively in order to understand. Anyone who has argued before Chief Justice Durrant knows that he has mastered this. What was said of Harvard president Charles William Eliot can rightfully be said of Chief Justice Durrant:

Dr. Eliot's listening was not mere silence, but a form of activity. Sitting very erect on the end of his spine with hands joined in his lap, . . . he faced his interlocutor and seemed to be hearing with his eyes as well as his ears. He listened with his mind and attentively considered what you had to say while you said it. . . . At the end of an interview the person who had talked to him felt that he had had his say.

Dale Carnegie, *How to Win Friends and Influence People* 111–12 (1936) (quotation marks and citation omitted).

Attentive listening is at the heart of one of the court's core objectives – procedural fairness. “The court's first obligation is to correctly apply the law to the facts,” Chief Justice Durrant notes. However, “procedural fairness is the concept that applying the law to the facts is not enough. Courts should endeavor to address the case in a way that both parties feel heard and understood, so that the losing party at least feels that they were heard, that their argument was understood.”

We would do well to adopt procedural fairness in our public discourse. Democracy does not depend on a shared ideology but a shared commitment to a truthful and honest process to address our ideological differences. Chief Justice Durrant explains how the court members apply this same principle in their case conferences:

So, in our interactions on the court, we really work not to mischaracterize the other person's argument. We accept it at face value and address it on its merits. If the other side sees you as honestly trying to understand and being fair, it helps to improve debate and ensure it takes place on the merits. If I'm going to disagree, I want the colleague to walk away thinking she was heard. . . . This helps to facilitate robust, pure debate, uncluttered by suspicions of hidden agendas, uncluttered by mischaracterizations of argument, uncluttered by personal attack. The key is to assume the best in each other.

As one can glean from this last observation, humility exhibited by one tends to beget humility in others. Thus, humility at once reflects the power of one and reveals the fallacy that we are justified in acting uncivilly in the face of uncivility.

RESPECT

Harvard professor Arthur Brooks observes, "You can resolve problems with someone with whom you disagree, even if you disagree angrily, but you can't come to a solution with someone who holds you in contempt or for whom you have contempt."¹ Arthur C. Brooks, *Love Your Enemies: How Decent People Can Save America from the Culture of Contempt* 24 (2019). The opposite of contempt is respect.

Justice John Pearce defines respect this way:

Most of it boils down to some variation of the Golden Rule and trying to treat my colleagues the way I hope they will treat me. I do not like to be interrupted, so I try not to interrupt them. I do not enjoy when someone ignores what I just said and starts on a new topic, so I try not to do the same. When I do something clumsy or stupid, I appreciate it when I am given the benefit of the doubt and not seen as a clumsy or stupid person, but as someone who made a mistake. I appreciate being given the space to apologize and improve. I try to give my

colleagues the same understanding and space. I try to remember to take my colleagues' positions at face value. I try not to assign any motive to their actions other than a belief that they are advocating in good faith what they believe to be the best resolution to a question. And I try to listen, even when listening proves difficult, even when I don't think that I am being heard.

As advocates, it is all too easy to become so convinced in the merits of our own argument that it becomes difficult to conceive how anyone could see the issue in a different way. We do ourselves a disservice when we forget that reasonable people can, and often do, see things differently. Living by the Golden Rule as articulated by Justice Pearce is a brilliant and obvious solution to avoiding this trap.

Justice Pearce's counsel also reflects an important aspect of all relationships – the acknowledgment that we all make mistakes and the willingness to forgive. Indeed, when an opponent makes a mistake, we are given an opportunity to solidify a meaningful relationship through forgiveness that cannot be easily achieved in any other way. George Washington lived by this principle. It

CRAIG COBURN Mediation–Arbitration Services

KNOWLEDGE

Construction
Commercial
Complex Civil
Public Policy

EXPERIENCE

Litigator since 1980
ADR Neutral since 1985

COMMON SENSE

Cuts to the Chase
Resolves Disputes



Richards Brandt
801.531.2000
www.rbmn.com
Lenora-Spencer@rbmn.com

Utah ADR Services
801.865.7622
www.utahadrservices.com
mbstrassberg@msn.com

was said of him that “[h]e seemed to know implicitly that no loyalty surpassed that of a man forgiven for his faults.” Ron Chernow, *Washington: A Life* 262 (2010).

Similarly, Abraham Lincoln, a model of honesty and civility amidst the most trying of times and the most perfidious of associates, once remarked: “A man has not time to spend half his life in quarrels. If any man ceases to attack me, I never remember the past against him.” Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 665 (2006).

Some may assert that respect must be earned and feel justified in withholding the same until they feel their opponent has demonstrated sufficient worthiness for its bestowal. The wise among us, however, recognize that the giving of respect says far more about the person bestowing it than it does the person receiving it. This certainly requires an “emotionally sophisticated intelligence,” as S.J. Quinney College of Law Professor James R. Holbrook puts it, but our professionalism never shines brighter than when we remain professional in the face of unprofessionalism.

Beyond this, Arthur Brooks reminds us that poor behavior is never justified by the less-than-civil actions of others: “Your opportunity when treated with contempt is to change at least one heart – yours. You may not be able to control the actions of others, but you can absolutely control your reaction. You can break the cycle of contempt. You have the power to do that.” Arthur C. Brooks, *Love Your Enemies: How Decent People Can Save America from the Culture of Contempt* 44 (2019).

Respect does not mean refraining from vigorous debate. To the contrary. Chief Justice Durrant explains that when colleagues and opponents enjoy mutual respect, it actually frees them from some of the concerns they might otherwise have in fully engaging a colleague on an issue. Chief Justice Durrant elaborates on this with respect to oral arguments before the court:

The tricky thing is we criticize each other publicly and often very vigorously. That certainly can adversely affect a relationship. The fact that we have this mutual respect for each other and even affection for each other frees us to make arguments without fear of giving offense. So that I can attack someone’s position without that person considering that to be a personal attack.

Justice Paige Petersen agrees. Justice Petersen admits that she,

herself, does not like personal confrontation. Yet she loves the Utah Supreme Court’s conference debates. Why? Because it is intellectual; it is about the ideas; it is not personal. “[T]o me,” Justice Petersen offers, “it’s really a model of how to talk about tough issues.”

SELF-REFLECTION

Several justices specifically cited the court members’ ability and willingness to self-reflect as an integral part of the court’s success in maintaining a spirit of unity. Justice Lee, whom Justice Himonas credits with setting the standard for self-reflection among the court, noted that giving oneself “time to find distance and perspective when necessary is essential to avoiding escalation.” This can come in the form of “taking a break in an oral conversation or setting aside a written work-product for a day or two,” he offers.

Abraham Lincoln was well known for avoiding unnecessary conflict by doing the very thing Justice Lee suggests, including by taking care “not to send letters written in anger.” Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 363 (2006). Rather, after writing, he would take the time necessary to calm down and self-reflect. He would then return to the letter, revising it to ensure its tone and wording did not reflect the harshness that sometimes found its way into his original drafts. We can adopt this same practice with our own communications, especially email.

Of course, self-reflection, like the other principles of civility, is not simply about maintaining unity; it is also about our commitment to the cause of truth. Justice Durrant observes in this regard that the process of introspection causes us to remember to ask ourselves “whether we are the one that needs to make an adjustment,” which often “leads to self-correction, maybe not immediately but ultimately.” Acknowledging a mistake and apologizing to a colleague, the Chief Justice counsels, “serves to strengthen the foundation of mutual respect for the next debate with that colleague.”

HUMOR

Abraham Lincoln used humor not only to “whistle down sadness” but to assuage tensions between rivaling parties, particularly within his own cabinet. Stephen B. Oates, *With Malice Toward None: The Life of Abraham Lincoln* 123 (1977) (citations omitted). Lincoln also used wit and humor, usually self-deprecating in nature, to disarm and then win over would-be adversaries.

Justice Lee suggests we do the same. He notes that using humor, particularly, self-deprecating humor, can be highly effective in defusing a heated disagreement. Granted, not all have the gift of wit and humor, but to the extent we can inject some levity into interactions that are beginning to heat up, we will surely improve the tone, and likely the substance, of the debate.

COMPROMISE

Some equate compromise with abandoning principle. Quite the opposite is true. Compromise is about subordinating a lesser interest to a higher one. There is no better example of this than the framers' willingness to subordinate "their parochial political interests and compromise for the sake of a workable constitution." Thomas B. Griffith, *Civic Charity and the Constitution*, 43 HARV. J. OF L. & PUB. POL'Y 633, 636 (2020). There were a number of such parochial political interests that threatened to doom the Constitutional Convention – none greater than the question over proportional representation. Had the framers been unwilling to subordinate their interests regarding this important albeit lesser issue to their overriding interest for union, there likely never would have been a United States of America.

The lesson for us is never to let lesser interests rule our higher aims. Are we fighting to win the battle or the war? On a national scale, battles are composed of public policies that come and go. The war is composed of foundational principles upon which our democracy depends, principles that should never be sacrificed for a particular policy or partisan end. In the practice of law,

battles may be about a particular issue or argument. Wars are about relationships, reputation, credibility, and, in the end, establishing the truth.

CIVIC CHARITY

This article extols the virtues of civility. But Arthur Brooks argues that a standard "calling for more civility in our political discourse and tolerance of differing points of view" is "pitifully low." "Don't believe it?" Brooks asks, "Tell people, 'My spouse and I are civil to each other,' and they'll tell you to get counseling. Or say, 'My coworkers tolerate me,' and they'll ask how your job search is going." Arthur C. Brooks, *Love Your Enemies: How Decent People Can Save America from the Culture of Contempt* 12 (2019).

In a letter to Elbridge Gerry, Thomas Jefferson wrote: "It will be a great blessing to our country if we can once more restore harmony and social love among its citizens. I confess, as to myself, it is almost the first object of my heart, and one to which I would sacrifice everything but principle." Letter from Thomas Jefferson to Elbridge Gerry (Mar. 29, 1801), *available at* https://tile.loc.gov/storage-services/service/mss/mtj//mtj1/023/023_0465_0467.pdf.

In response to Justice Himonas's comment about love among the members of the court, Justice Lee offered the following perspective:

COMMITTED TO DIVERSITY & INCLUSION

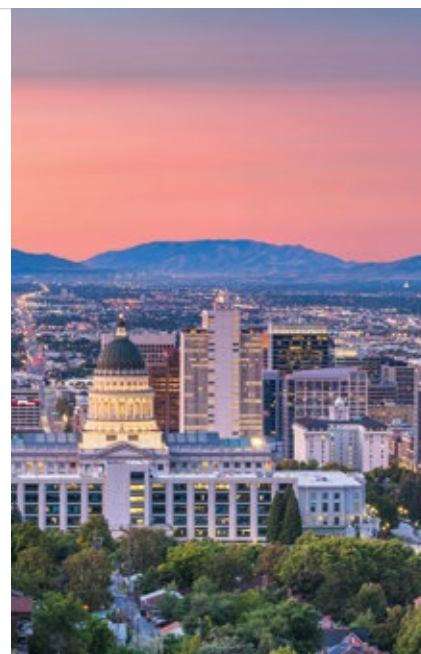
Through its commitment to diversity and inclusion, Ray Quinney & Nebeker has brought together a gifted group of diverse lawyers capable of solving any problem and representing any client. Supported by its Women Lawyers Group and Minority Lawyers Group, RQN actively recruits, trains and provides an inclusive environment for attorneys of all backgrounds. RQN's dedication to these values has been recognized in Utah's community as the 2019 "Law Firm of the Year" by the Utah Minority Bar, and its role as a Founding Diamond Sponsor of the Utah Center for Legal Inclusion.

Good People Drive Great Results



RAY QUINNEY
& NEBEKER

rqn.com
801.532.1500



I understand that the point about “loving” someone you may be opposed to could seem an unrealistic, Pollyanna view, especially as applied to an opponent in litigation. But I think there’s an important kernel of wisdom in what Justice Himonas said that can be applied more broadly. As I see it, to “love” someone in this sense is to know them and accept and appreciate them as a colleague or fellow traveler – to see and value their strengths and look for ways to validate them.

Justice Lee’s comment about “fellow travelers” touches on at least two important truths. First, viewing those whom we oppose as fellow travelers reminds us that our opponents are really no different from us. “When we start from the assumption that our opponents are like us – decent folks who want what’s best but who start from a different place – we are more likely to be respectful and to have a conversation that’s productive.” Ben Sasse, *Them: Why We Hate Each Other – and How to Heal* 148 (2018).

Second, it reminds us that we are both working toward a common destination: protecting individual and collective freedoms by preserving our system of justice and our democratic institutions. Bonds of affection develop naturally among those who are united in a common cause. We should not lose sight of the higher objectives that unite us amidst the relatively trivial distractions of an individual case or issue that otherwise could divide us.

Thus, when Justice Himonas suggests that the members of the supreme court “not only like each other but love each other,” he may be identifying the key to the court’s success. Maybe cultivating love, or civic charity, for our fellow travelers is the surest way to guarantee that we will always act civilly and respectfully toward one another.

Justice Lee offers the following practical suggestions on how we can get to know our colleagues better:

[L]ook for opportunities to get to know other members of the bar in a range of settings. This is

why bar conferences, CLEs, and other such interactions can be so important. When we get to know each other better and come to better see each other’s strengths, we won’t ignore or overlook weaknesses or concerns, and we may even call such concerns out when appropriate. But we won’t go out of our way to highlight another’s weaknesses at every opportunity, and we will begin by highlighting common ground.

Justice Himonas offers similar suggestions:

First, take the time to get to know your colleagues on a personal level. Break bread together. Open up to one another, be vulnerable. If you succeed, then

you will be well on your way to creating a family-like dynamic, which brings me to my second point. Really think of your colleagues as family. Of course, there will always be flare ups. When that happens, talk it through and let it go. If you can’t do that, then you never really

developed the necessary relationship to begin with.

Although a commitment to civility and the cause of truth are not contingent on how we are treated by others, the example of our supreme court shows that leadership in this cause can make a tremendous difference.

WORK

As can be seen, consistent civility, let alone civic charity, is not easily achieved without consistent effort. Justice Pearce emphasized: “I don’t want to give the impression that somehow it isn’t *work* not to take offense or not to give offense. Or, that it is something magical about the combination of personalities that allows this to happen.” In fact, it is his colleagues’ “willingness to put in the work not to take offense, not to give offenses” that adds to the respect Justice Pearce feels for them.

LEADERSHIP

Although a commitment to civility and the cause of truth are not contingent on how we are treated by others, the example of our supreme court shows that leadership in this cause can make a tremendous difference. Justice Himonas notes that, while each member of the court brings important attributes to the table, the Utah Supreme Court’s dynamic “wouldn’t exist in the same way that it does but for Matt Durrant.” Justice Himonas continues: “I

believe the Chief succeeds because he really does treat the other members of the court as family. . . . He leads by quiet example and delightful humor.”

Justice Pearce concurs:

Matt Durrant is wickedly smart and devilishly funny. He has the timing of a seasoned stand-up comedian. If he wanted to, he could score points off of his colleagues all day, every day. He could put on a real show at oral argument if he wanted to. But he doesn't. And I am pretty sure that is the product of a set of deliberate choices. He is the most patient member of the court. The last to complain about being interrupted or talked over. The most willing to wait until everyone else has said their piece before laying out his thoughts. He is the most willing to absorb cutting comments without responding in kind. He is the most forgiving when others need to apologize.

Justice Pearce then points out that, far from being simple niceties, these acts of civic charity have great impact:

I would also point out that, in my opinion, the Chief is the most effective member of the court. He is not in dissent very often and has a knack for helping others understand his view of the cases we hear. The Chief's thinking influences many majority opinions he does not author. I am pretty sure that we all understand that emulating the Chief would make us not only better judges but better people.

All of this praise embarrasses Chief Justice Durrant. “They give me too much credit,” he says. “What I do all the other members of the court do as well. Everyone is willing to put in the work, because it requires work.”

CONCLUSION

Judge Griffith reminds us: “When [we] take an oath to uphold the Constitution, we commit to work for unity; we make a solemn pledge that we will not be agents of division.” Thomas B. Griffith, *Civic Charity and the Constitution*, 43 HARV. J. OF L. & PUB. POL'Y 633, 638 (2020). The question for us is are we willing to follow the example of the Utah Supreme Court and work to make our commitment a reality?

As discussed in the first part of this article, our commitment to

truth and civility is not just about bettering our profession. It is about standing for and protecting the principles on which our freedoms are founded. It is not overstatement to suggest that in the post-truth era, when our country has never been more divided, we are facing challenges we never have before. Yet for the past 244 years, America has always proved equal to the challenges she has faced.


When we work for unity among our colleagues and fellow citizens by governing our actions with civility and civic love, when we advance the cause of truth by operating only on the basis of fact, we are joining the patriots who throughout our country's history have answered freedom's call. Given all that is at stake, we can do nothing less.

AUTHOR'S NOTE: *The author wishes to extend special thanks to the members of the Utah Supreme Court for their generous and invaluable contributions to this article.*

1. Brooks also notes: “If you have contempt for ‘them,’ more and more people will become ‘them.’” *Id.* at 37.

MEDIATION-ARBITRATION

STUART T. WALDRIP, JUDGE (RET.)



- 50+ years resolving disputes; 13 years ADR in Utah
- U of U Law, BYU Law Prof.
- Fellow, American College of Trial Lawyers
- Business, Construction, Professional Negligence, Insurance, P.I., Intellectual Property, Probate, Real Estate & other complex civil matters

IDR INTERMOUNTAIN DISPUTE RESOLUTION, INC.

RESULTS | CLOSURE

WWW.IDR-ADR.COM / WWW.UTAHADRSERVICES.COM

CASE ADMINISTRATOR: MIRIAM STRASBERG

UTAH ADR SERVICES | MBSTRASSBERG@MSN.COM

801-943-3730

Lawyer Discipline Process

by Adam M. Pace and Keith A. Call

Letter from the Utah Office of Professional Conduct

Dear [insert your name here]:

This is to notify you that the Office of Professional Conduct (OPC) has received information concerning your conduct as a lawyer. A copy of the information is enclosed. We recognize that having our office involved in matters such as this can be inconvenient and unsettling. Although the information received does not constitute a Bar complaint, the OPC has a duty to screen all information coming to its attention that may relate to misconduct of an attorney. We will undertake an investigation of this matter and will either open an OPC informal complaint or decline to prosecute the matter.

Sincerely, Office of Professional Conduct

Inconvenient and unsettling? That's the understatement of the year. Your initial reaction to receiving a letter like this might include going straight to the restroom, losing several nights' sleep, and becoming functionally incapacitated for a time. But then what are you going to do? We will help you understand the process.

The attorney discipline process is governed by the Rules of Lawyer Discipline, Disability, and Sanctions, which are found in Chapter 11, Article 5 of the Utah Code of Judicial Administration. The OPC functions as the prosecutor – it investigates

allegations of misconduct and decides whether to press charges. *See* R. 11-521. The process consists of three phases: preliminary investigation; screening panel proceedings; and district court proceedings.

Preliminary Investigation

First, the OPC receives a complaint from someone regarding attorney misconduct or, in some cases, files a complaint itself. R. 11-530(a). The OPC conducts a preliminary investigation to determine whether the complaint can be resolved informally. Rule 11-530(c)–(e). If the complaint cannot be resolved informally, or if good cause otherwise exists, the OPC serves on the lawyer the complaint and a notice, which identifies with particularity the possible violations of the Rules of Professional Conduct. R. 11-530(e). The lawyer then has twenty-one days to file an answer explaining the facts surrounding the complaint together with all defenses and responses to the claims of possible misconduct. R. 11-530(f). After the answer is filed, or if the lawyer fails to respond, the OPC refers the case to a screening panel comprised of five members of the Ethics and Discipline Committee, who are appointed to their positions directly by the Utah Supreme Court. R. 11-530(f); 11-510; 11-511.

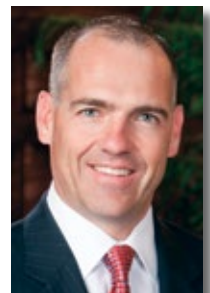
Screening Panel Proceedings

In the second phase, the screening panel considers the merits of the complaint. R. 11-531(a). The lawyer may request that the committee chair authorize service of a subpoena on a third party to produce documents. R. 11-512. Before taking any action that may result in the recommendation of an admonition

ADAM M. PACE is a shareholder at Snow, Christensen & Martineau. His practice includes professional liability defense and general commercial litigation.



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



or public reprimand or the OPC's filing of an action in district court, the screening panel must, with at least twenty-eight days' notice, afford the lawyer an opportunity to appear before it for a hearing. R. 11-531(b). The lawyer may submit a written brief, testify, call witnesses, and present oral argument at the hearing. R. 11-531(c)–(d). The lawyer may be represented by counsel and has the right to be present when evidence is presented. R. 11-531(f). The hearing is recorded so that a transcript can be generated. R. 11-531(h). After reviewing the facts developed by the complaint, answer, investigation, and hearing, the screening panel makes one of the following determinations or recommendations: dismissal; referral to the Professionalism and Civility Counseling Board; referral to the committee chair with recommendation for admonishment; referral to the Committee chair with recommendation for public reprimand; or recommendation that the OPC file an action in district court against the lawyer. R. 11-531(i). The screening panel cannot suspend or disbar a lawyer; those penalties can only be imposed by a district court.

There is an intermediate level of review available before the final determination is issued that allows either the OPC or the lawyer to submit written exceptions to the screening panel's recommendations and, in some circumstances, have another hearing. R. 11-532. If the lawyer has complied with all of the requirements to submit an exception, he or she may appeal the final committee determination directly to the Utah Supreme Court. R. 11-535. However, no exceptions are allowed if the

recommendation was for the OPC to file an action in district court. R. 11-532(c).

District Court Proceedings

If the screening panel finds probable cause to believe that there are grounds for public discipline that merit filing an action, the OPC will file an action in district court. R. 11-536. The Utah Rules of Civil Procedure and Evidence apply to the action, affording the lawyer the opportunity to assert defenses and conduct discovery. R. 11-542(a). The burden of proof is on the OPC, and it must prove its case by a preponderance of the evidence. R. 11-542(b)–(c). The case is tried to the bench, and the district court enters findings of fact and conclusions of law. R. 11-536. If the district court finds misconduct, it will hold a hearing to receive evidence relevant to aggravation and mitigation, and then will enter an order sanctioning the lawyer. R. 11-536(e). Either the OPC or the lawyer may appeal the discipline order to the Utah Supreme Court. R. 11-536(f).

With your livelihood and license to practice law potentially on the line, it may be wise to seek professional help in responding to a complaint from the OPC. A wise man once said that a lawyer who represents himself has a fool for a client.

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

Parsons Behle & Latimer is proud to be a founding Diamond Sponsor of the Utah Center for Legal Inclusion. We remain dedicated to our core values of diversity, equity and inclusion as we create an equitable environment within our firm as well as throughout the legal industry.

Please visit parsonsbehle.com/parsons-approach/community, to learn more.



NATIONAL EXPERTISE. REGIONAL LAW FIRM. parsonsbehle.com

BOISE | IDAHO FALLS | LEHI | MISSOULA | RENO | SALT LAKE CITY

201 South Main Street, Suite 1800 | Salt Lake City, Utah 84111 | 801.532.1234

President-Elect and Bar Commission Election Results



Katie Woods was successful in her retention election as President-elect of the Utah State Bar. She will serve as President-elect for the 2021–2022 year and then become President for the 2022–2023 year. Congratulations to **Tyler Young** and **Megan Mustoe** who ran unopposed in the Fourth and Fifth Divisions, respectively, as well as to **Greg Hoole** and **Chrystal Mancuso-Smith**, who were elected in the Third Division. Sincere appreciation goes to all of the candidates for their great campaigns and thoughtful involvement in the Bar and the profession.

Katie Woods,
President-Elect



Tyler Young
Fourth Division



Megan Mustoe
Fifth Division



Greg Hoole
Third Division



Chrystal Mancuso-Smith
Third Division

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the March 25, 2021 commission meeting held via Zoom.

1. The Bar Commission voted to nominate **John Hancock**, **Tegan Troutner**, and **April Hollingsworth** to serve on the 8th District Judicial Nominating Commission.
2. The Bar Commission voted to nominate **Ramzi Hamady**, **Skye Lazaro**, and **Caleb Proulx** to serve on the Utah Commission on Criminal and Juvenile Justice. **Monica Maio** was nominated at the February 5, 2021 meeting.
3. The Bar Commission voted to increase annual payment to Blomquist Hale from \$75,000 to \$91,000.
4. The Bar Commission voted to contribute \$10,000 to Utah's Judicial Intern Opportunity Program.
5. The Bar Commission approved by consent the February 5, 2021 commission meeting minutes.
6. The Bar Commission approved by consent the Client Security Fund Committee request for no fund assessment for 2021–2022.
7. The Bar Commission approved by consent the March 2021 new admittees.

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

Mandatory Online Licensing

The annual online licensing renewal process will begin the week of June 7, 2021, at which time you will receive an email outlining renewal instructions. This email will be sent to your email address of record. Utah Supreme Court Rule 14-107 requires lawyers to provide their current email address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org.

Renewing your license online is simple and efficient, taking only about five minutes. With the online system you will be able to verify and update your unique licensure information, join sections and specialty bars, answer a few questions, and pay all fees.

No separate licensing form will be sent in the mail. You will be asked to certify that you are the licensee identified in the renewal system. Therefore, this process should only be completed by the individual licensee, not by a secretary, office manager, or other representative. Upon completion of the renewal process, you will receive a licensing confirmation email. If you do not receive the confirmation email in a timely manner, please contact licensing@utahbar.org.

License renewal and fees are due July 1 and will be late August 1. If renewal is not complete and payment is not received by September 1, your license will be suspended.

Notice of Petition for Reinstatement to the Utah State Bar by Carlos J. Clark

Pursuant to Rule 11-591(d), Rules of Discipline, Disability, and Sanctions, the Office of Professional Conduct hereby publishes notice that Carlos J. Clark has filed an application for reinstatement in *In the Matter of the Discipline of Carlos J. Clark*, Third Judicial District Court, Civil No. 160904350. Any individuals wishing to oppose or concur with the application are requested to do so within thirty days of the date of this publication by filing notice with the Third District Court.

Award Announcement

The Board of Bar Commissioners is seeking nominations for the 2021 Summer Convention Awards. These awards have a long history of publicly honoring those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession.

Please submit your nomination for a 2021 Summer Convention Award no later than Friday, May 28, 2021, using the award form located at www.utahbar.org/nomination-for-utah-state-bar-awards/.

Propose your candidate in the following categories:

1. Judge of the Year
2. Lawyer of the Year
3. Section of the Year
4. Committee of the Year

IN OVER YOUR HEAD WITH A PATENT CASE?

Available as
co-counsel
for Intellectual
Property Disputes

33 YEARS
IP LITIGATION
EXPERIENCE

REGISTERED
PATENT ATTORNEY
B.S. ENGINEERING



Charles L. Roberts

WASATCH-IP.COM

As seen on Judge Judy

Amendments to MCLE Rules Effective May 1, 2021

<http://www.utcourts.gov/utc/rules-approved/>



1. CLE COMPLIANCE WILL CHANGE FROM A TWO-YEAR REPORTING PERIOD TO AN ANNUAL REPORTING PERIOD

July 1, 2019 – June 30, 2021 Reporting Period –

The CLE requirement is 24 hours of accredited CLE, to include 2 hours of legal ethics and 1 hour of professionalism and civility. The traditional in-person credit requirement has been suspended for this reporting period. Lawyers will have through June 30, 2021, to complete required CLE hours without paying late filing fees and through July 31, 2021, to file Certificate of Compliance reports without paying late filing fees. **PLEASE NOTE: Lawyers that comply with the 2021 reporting period will be required to change from a two-year CLE reporting period to an annual CLE reporting period.**

July 1, 2021 – June 30, 2022 Reporting Period –

The CLE requirement is 12 hours of accredited CLE, to include 1 hour of legal ethics and 1 hour of professionalism and civility. At least 6 hours must be live, which may include in-person, remote group CLE, or verified e-CLE. The remaining hours may include self-study or live CLE.

July 1, 2020 – June 30, 2022 Reporting Period –

The CLE requirement is 24 hours of accredited CLE, to include 2 hours of legal ethics and 1 hour of professionalism and civility. The traditional in-person credit requirement has been suspended for this reporting period. Lawyers will have through June 30, 2022, to complete required CLE hours without paying late filing fees and through July 31, 2022, to file Certificate of Compliance reports without paying late filing fees. **PLEASE NOTE: Lawyers that comply with the 2022 reporting period will be required to change from a two-year CLE reporting period to an annual CLE reporting period.**

July 1, 2022 – June 30, 2023 Reporting Period –

The CLE requirement is 12 hours of accredited CLE, to include 1 hour of legal ethics and 1 hour of professionalism and civility. At least 6 hours must be live, which may include in-person, remote group CLE, or verified e-CLE. The remaining hours may include self-study or live CLE.

2. OTHER RELEVANT CHANGES

- Streamlining rules to make them more understandable and consistent with current Bar regulations.
- Allowing for self-study credits for lawyers participating as presenters in a CLE panel presentation.
- Allowing more flexibility in broadcast CLE programming.
- Clarifying and expanding the types of programs that qualify for ethics and professionalism and civility CLE.
- Allowing for legal specialty groups to earn some credits by attending CLE programs designed specifically for and limited to those group members.

3. LICENSED PARALEGAL PRACTITIONER RULES HAVE BEEN INCORPORATED WITHIN MCLE RULES



Save on everything you need for Spring with the Utah State Bar Group Benefits website. Log in today to access your exclusive discounts:
utahbar.savings.beneplace.com

UTAH STATE BAR.

2021 SUMMER CONVENTION



JULY
28-31

JOIN US IN



SunValley

OR JOIN
US BY
ZOOM!



**A hybrid, in-person/Zoom event,
honoring our annual tradition**



**Judicial panel discussions, skills-based training,
well-being suggestions, and
equity and inclusion dialogue sessions**



**Panel discussion from Women Lawyers of Utah –
*GOOD Guys (Guys Overcoming Obstacles to Diversity)***



**Keynote session featuring a follow up on the
Police Use of Lawful & Unlawful Force series**



**Online registration and full agenda
available Monday, May 17**



MCLE accreditation pending

**PLEASE NOTE: If a restriction on gathering
size is in place in Sun Valley at the time of the
Convention, in-person registration
and attendance may be limited.**

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 February and March. To volunteer, call the Utah State Bar Access to Justice Department at (801) 297-7049.

Expungement Day

Sylvia Acosta
Todd Barfuss
Joshua Baron
Julie Bartlett
Kevin Birschhoff
Donna Bradshaw
James Cannon
Charles Carlston
Kate Conyers
Clay Crozier
Lance Dean
Melinda Dee
Daniel Diaz
Donna Drown
Joshua Egan
Adam Forsyth
Kimberly Hammond
Jesse Hansen
Brent Huff
Nathan Hyde
Adrienne Jack
Dennis James
Jeffrey Jensen
Katherine Kulbeth
Vinh Ly
Grant Miller
Stephanie Miya
Andres Morelli
Celia Ockey
Tulsi Patel
Dori Petersen
Nicholle Pitt White
Justin Pratt
Jessica Read
Taylor Smith
Susan Strauss
Noella Sudbury

Family Justice Center

Steve Averett
Jim Backman
Chuck Carlston
Dave Duncan
Tiffany R. de Gala
Michael Harrison
Brandon Merrill
Sandi Ness
Kathleen Phinney
Linda F. Smith
Babata Sonnenberg
Nancy Van Slooten
Rachel Whipple

Private Guardian ad Litem

Kaitlyn Gibbs
Laura Hansen
Celia Ockey
E. Jay Overson
Jessica Read
Amy Williamson

Pro Se Debt Collection Calendar

Mark Baer
Pamela Beatse
Anna Christiansen
Rick Davis
Jeff Daybell
Lauren DiFrancesco
John Francis
Leslie Francis
Annemarie Garrett
Gregory Gunn
Aro Han
Britten Hepworth
Annie Keller-Miguel
Zachary Lindley

Amy McDonald
Darren Neilson
Chase Nielsen
Grace Pusavat
Randall Raban
Brian Rothschild
Chris Sanders
Jess Schnedar
Zachary Shields
Greg Sonnenberg
George Sutton
Jordan Westgate

Pro Se Family Law Calendar

McKenzie Armstrong
David Blum
Camille Buhman
Brent Chipman
Hayli Dickey
Seth Ensign
Cassandra Gallegos
Sarah Giacovelli
Kim Hansen
Danielle Hawkes
Allison Librett
Orlando Luna
Bryant McConkie
Kelly Peterson
Tamara Rasch
Linda Smith
Chad Steur
Virginia Sudbury
Reid Tateoka
Diana Telfer
Michael Thornock
Peter Vanderhooff
Staci Visser
Bradley Voss
Cory Wall
Orson West
Kyle Witherspoon
Tonya Wright

**Pro Se Immediate
Occupancy Calendar**

Pamela Beatse
 Jeff Daybell
 Sagen Gearhart
 Aro Han
 Sierra Hansen
 Brent Huff
 Annie Keller-Miguel
 Nils Lofgren
 Kendall McLelland
 Tait Meskey
 Keil Myers
 Jess Schnedar
 Lauren Scholnick
 Mark Thornton

**SUBA Talk to a Lawyer
Legal Clinic**

Turia Averett
 Brent Brindley
 K. Jake Graff
 Trent Seegmiller
 Chase Van Oostendorp
 Lane Wood

Timpanogos Legal Center

Bryan Baron
 Cleve Burns
 Dave Duncan
 Babata Sonnenberg
 Michael Whiteley

**Utah Bar's Virtual
Legal Clinic**

Jonathan Benson
 Dan Black
 Mike Black
 Russell Blood
 Jill Coil
 Kimberly Coleman
 John Cooper
 Jessica Couser
 Matthew Earl

Craig Ebert
 Jonathan Ence
 Rebecca Evans
 Thom Gover
 Robert Harrison
 Aaron Hart
 Rosemary Hollinger
 Tyson Horrocks
 Bethany Jennings
 Suzanne Marelus
 Travis Marker
 Gabriela Mena
 Tyler Needham
 Sterling Olander
 Chase Olsen
 Jacob Ong
 Ellen Ostrow
 McKay Ozuna
 Steven Park
 Clifford Parkinson
 Katherine Pepin
 Cecilee Price-Huish
 Jessica Read
 Brian Rothschild
 Chris Sanders
 Alison Satterlee
 Thomas Seiler
 Luke Shaw
 Kimberly Sherwin
 Farrah Spencer
 Liana Spendlove
 Brandon Stone
 Mike Studebaker
 George Sutton
 Jason Velez
 Kregg Wallace

Utah Legal Services Cases

Helen Anderson
 Renee Blocher
 Walter Bornemeier
 Michael Branum
 Justin Burton
 James Cannon
 Steven Chambers

Travis Christiansen
 Victoria Cramer
 Sharon Donovan
 Donna Drown
 Robert Falck
 Jonathan Felt
 Adam Forsyth
 Thomas Gunter
 Ryan James
 Parker Kenyon
 Shirl LeBaron
 Linzi Labrum
 Chad McKay
 Lillian Meredith
 Susan Morandy
 William Morrison
 Jennifer Neeley
 Graham Norris
 Devin Quackenbush
 Candice Ragsdale-Pollock
 Tamara Rasch
 Michael Reed
 James Robertson
 Ryan Simpson
 Michael Studebaker
 Noella Sudbury
 Marca Tanner-Brewington
 Stephanie Tapp
 Reid Tateoka
 Sierra Taylor
 Cory Thompson
 Ashley Waddoups
 Christian West
 Orson West
 Robert Winsor
 Samuel Woodall

Wills For Heroes

Catherine Fuge
 Blaine Hansen
 Michael Harmond
 Rob Jebson
 Grant Miller
 Katie Secrest
 Jordan Westgate

Bar Thank You

Many attorneys volunteered their time to grade essay answers from the February 2021 bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Miriam Allred	Stephen Geary	Leonard McGee
Rachel Anderson	Barney Gesas	Jonathan Miller
Ken Ashton	Michele Halstenrud	Meghann Mills
Justin Baer	David Heinhold	Douglas Monson
Ray Barrios	David Hirschi	Kim Neville
Ariana Barusch	Justin Hitt	Jamie Nopper
Allison Behjani	David Jeffs	Kara North
Wayne Bennett	William Jennings	Kerry Owens
Russell Blood	Lloyd Jones	Mark Rose
Sara Bouley	Paul Jones	Keven Rowe
Jeff Bramble	Michael Karras	Scott Sabey
Clinton Brimhall	David Knowles	Mary Silverzweig
Kim Colton	Derek Langton	Leslie Slaugh
Katia Conrad	David Leta	Doug Smith
Nicholas Cutler	Tanya Lewis	James Sorenson
Daniel Daines	Greg Lindley	Marissa Sowards
John Diamond	Michael Lowe	Michael Stahler
Abby Dizon-Maughan		Alan Stewart
Jeff Enquist		Michael Swensen
Mark Ferre		Mark Thornton
Melissa Flores		Axel Trumbo
Brandon Fuller		James Walker
Michael Garrett		Jason Wilcox



Become a Mentor



Help a New Lawyer Chart the Right Course

for a successful legal career



UTAH STATE BAR[®]
NEW LAWYER
Training Program
The first steps to success!

www.utahbar.org/member-services/nltp/mentor-faq/



Utah's Recommended Divorce Attorneys

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).

ADMONITION

On January 20, 2021, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.1 (Competence) and 1.3 (Diligence) of the Rules of Professional Conduct.

In summary:

A woman married husband number one (Husband 1) in 1984. She married husband number two (Husband 2) in 1994. A few months after the marriage, a verified complaint for divorce between the woman and Husband 1 was filed. A Decree of Divorce was entered indicating that the woman had appeared in person with her attorney at a hearing of the same date. About a year later, a Decree of Divorce was entered for the woman and Husband 2. Sometime in 2000, Husband 2 died. In 2001, the woman married husband number three (Husband 3).

In 2015, the woman applied for widow's insurance benefits on the record of Husband 2 with the Social Security Administration (SSA). The woman filed a motion to set aside the judgment in her divorce from Husband 2. The court denied the motion because she had failed to bring her action within a reasonable period of time. The SSA sent a notice of disproved claim to the woman outlining that she had sixty days to request an appeal.

The woman retained the attorney to "reverse" her divorce from Husband 2 and help her obtain widow's insurance benefits. The attorney filed a motion to set aside the woman's divorce from Husband 2. The attorney relied on representations from the woman at the time of filing that she believed herself to be married to Husband 2 at the time of his death. An order setting aside the woman's divorce from Husband 2 was entered.

The attorney provided the OPC with a copy of a SSA request for

reconsideration regarding its denial of the woman's request for widow's insurance benefits. The SSA did not receive this request for reconsideration and the woman claimed it was never filed. The SSA denied widow's benefits because of the woman's subsequent marriage.

The attorney accepted an additional retainer from the woman to pursue an annulment from Husband 3. The attorney filed the petition for annulment and it was granted by the court.

Mitigating Factor:

Inexperience in the practice of law.

PUBLIC REPRIMAND

On January 20, 2021, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Michael R. Anderson for violating Rule 5.3(c) (Responsibilities Regarding Nonlawyer Assistants) and Rule 7.1 (Communications Concerning a Lawyer's Services) of the Rules of Professional Conduct.

In summary:

Blog posts advertising Mr. Anderson's firm and/or its services were posted to false blogs created for the sole purpose of advertising. The blogs appeared to take content from other firm websites and attributed it to Mr. Anderson and/or his firm. Mr. Anderson used internet marketing companies but did not give these marketing professionals instructions on the specific ethical rules that apply to attorney advertising or even direct them to his official website so that their marketing tactics only used his content. Mr. Anderson indicated that he requested the content be removed. However, he did not know who made the posts or how to have them taken down.

Mitigating Factor:

Inexperience in the practice of law.

PUBLIC REPRIMAND

On February 16, 2021, the Honorable Adam T. Mow of the Third Judicial District entered an Order of Discipline: Public Reprimand against Brad R. Anderson for violating Rule 4.2(a) (Communication with Persons Represented by Counsel) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

While employed as an attorney at a law firm, Mr. Anderson represented a client in two criminal matters. An attorney entered an appearance with the court on behalf of the fourteen-year-old victim. Mr. Anderson was aware that the victim was represented by counsel. Mr. Anderson had a telephone conversation with the victim without her attorney present. During the conversation, Mr. Anderson requested that she put her thoughts on paper and send them to him so he could forward them to the judge in the matter. Mr. Anderson also told the victim to call his office if anything else came up or if she wanted to talk again.

The law firm terminated Mr. Anderson's employment due to his conduct with respect to the victim. At the time he was terminated, Mr. Anderson was told he was no longer allowed to access any of the firm's files or accounts. After leaving the firm, Mr. Anderson used the firm's online legal research access number, which was one of several numbers he used. The law firm was billed for Mr. Anderson's use of the service. Mr. Anderson was charged with a misdemeanor crime – theft of services.

RECIPROCAL DISCIPLINE

On February 4, 2021, the Honorable Su J. Chon, Third Judicial District Court, entered an Order of Reciprocal Discipline: Delicensure/Disbarment against Russell Collings, disbaring Mr. Collins for his violation of Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a) (Fees), Rule 1.8(a) (Conflict of Interest: Current Clients: Specific Rules), Rule 1.15(a) (Safekeeping Property), Rule 1.16(a) (Declining or Terminating Representation), Rule 3.2 (Expediting Litigation), Rule 3.4(a) (Fairness to Opposing Party and Counsel), Rule 4.2(a) (Communication with Persons Represented by Legal Professionals),

Rule 8.1(b) (Bar Admission and Disciplinary Matters), and Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

On January 27, 2020, the Nevada Supreme Court issued an Order of Suspension, suspending Mr. Collings from the practice of law for five years. The Order was predicated on the following facts in relevant part:

The facts and charges alleged in the complaint are deemed admitted because Collings failed to answer the complaint and a default was entered. 1 SCR 105(2). The record therefore establishes that Collings violated the above-referenced rules by accepting fees from clients and failing to provide legal work, failing to appear on behalf of clients, failing to communicate with clients, accepting an interest in a business in exchange for legal work, failing to respond to the State Bar's requests for information and letters of investigation, and abandoning his legal practice. In one instance, Collings's failure to appear on behalf of a client resulted in the issuance of a bench warrant against his client, which caused the client to spend several days in jail and lose his job.

Aggravating factors

Substantial experience in the practice of law, multiple offenses, bad faith obstruction of the disciplinary process, and pattern of misconduct.

Mitigating factor

Absence of prior disciplinary record.

The Utah Order of Disbarment/Delicensure confirmed that (1) the disciplinary proceedings before the Nevada authorities gave Mr. Collings notice and an opportunity to be heard and Mr. Collings received due process in Nevada; (2) the imposition of Disbarment/Delicensure is equivalent discipline in Utah and is just; and, (3) the conduct for which Mr. Collings was disciplined in Nevada would result in at least the same level of discipline in Utah.

Discipline Process Information Office

The Disciplinary Process Information Office is available to all attorneys who find themselves the subject of a Bar complaint, and Jeannine Timothy is the person to contact. Jeannine will answer all your questions about the disciplinary process, reinstatement, and readmission. Jeannine is happy to be of service to you.



801-257-5518

DisciplineInfo@UtahBar.org

RECIPROCAL DISCIPLINE

On March 9, 2021, the Honorable Robert P. Faust, Third Judicial District Court, entered an Order of Reciprocal Discipline: Delicensure/Disbarment against Paul D. Petersen, disbarring Mr. Petersen for his violation of Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:

On July 20, 2020, the Presiding Disciplinary Judge, State of Arizona issued a Judgment of Disbarment. The Judgment issued by the Presiding Disciplinary Judge was predicated on his agreement to a disbarment in Arizona. According to the record of the State Bar of Arizona, Mr. Petersen's misconduct violated Arizona ethics Rule 8.4(b), which is substantially the same as Rule 8.4(b) of the Utah Rules of Professional Conduct.

His agreement to disbarment was based upon a criminal indictment filed against him in Arizona. The criminal indictment against Mr. Petersen included charges for the following: Conspiracy, a Class 2 Felony; Fraudulent Schemes and Artifices, a Class 2 Felony; twenty-seven counts of Fraudulent Schemes and Practices, Class 5 Felonies; and Forgery, a Class 4 Felony.

The Utah Order of Disbarment/Delicensure confirmed that (1) the disciplinary proceedings before the Arizona authorities gave Mr. Petersen notice and an opportunity to be heard and Mr. Petersen received due process in Arizona; (2) the imposition of Disbarment/Delicensure is equivalent discipline in Utah and is just; and, (3) the conduct for which Mr. Petersen was disciplined in Arizona would result in at least the same level of discipline in Utah.

SUSPENSION

On December 22, 2020, the Honorable Kent R. Holmberg, Third Judicial District, entered an Order of Suspension against J. Mark Edwards, suspending his license to practice law for a period of six months and one day. The court determined that

Mr. Edwards violated Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a) (Fees), Rule 1.15(a) (Safekeeping Property), Rule 1.15(c) (Safekeeping Property), 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:

Mr. Edwards's violations arise out of conduct in two matters:

In the first matter, Mr. Edwards kept earned funds in his attorney trust account and used those funds to pay personal expenses including personal loans. Mr. Edwards used his attorney trust account to process transactions for a credit card processing business wherein funds would be both electronically deposited and withdrawn. Mr. Edwards deposited funds belonging to third parties related to that business into his attorney trust account, which had some of his own funds in it. On several occasions, Mr. Edwards's trust account was overdrawn or had insufficient funds to cover properly payable instruments presented for payment against the trust account. The way Mr. Edwards was using his attorney trust account created a risk of the funds in the account being withdrawn by creditors and ACH withdrawals due to credit card refund requests and creditor collections actions. Mr. Edwards failed to keep and maintain complete accounting records of funds deposited into his attorney trust account and accounting records related to client funds for five years. Mr. Edwards did not respond to many requests by the OPC for detailed written explanations and bank statements, accountings, and other documents related to his attorney trust account. The OPC sent a Notice of Informal Complaint (NOIC) to Mr. Edwards. Mr. Edwards did not respond to the NOIC.

In the second matter, a client paid Mr. Edwards for legal representation in two payments. Mr. Edwards did not deposit the payments into his trust account. The client paid a second

Join us for the OPC Ethics School

September 15, 2021

6 hrs. CLE Credit,

including at least 5 hrs. Ethics

(The remaining hour will be either Prof/Civ or Lawyer Wellness.)

Cost: \$100 on or before September 6, \$120 thereafter.

Sign up at: opc.utah.org

TRUST ACCOUNTING SCHOOL

Save the Date! January 26, 2022

5 hrs. CLE Credit,

including 3 hrs. Ethics

Sign up at: opc.utah.org

payment to Mr. Edwards, believing the payment was for Mr. Edwards to file a complaint in court. Mr. Edwards did not keep contemporaneous accounting records of the funds paid by the client and had not earned all the fees paid to him when he deposited the funds into his personal account. Mr. Edwards negligently used some of the payment he received from the client before fees were earned and/or costs incurred. Mr. Edwards did some work in the case but did not timely draft and file a complaint or otherwise resolve the client's case. The client made several phone calls to Mr. Edwards requesting information about the case and requesting documents related to the representation, but Mr. Edwards did not timely provide the information to the client and did not keep him timely informed about the work he was performing on the case. The client requested that Mr. Edwards send his client file to his new attorney. Mr. Edwards sent a digital file, but the new attorney was unable to open it. Later, Mr. Edwards sent the client a file by mail and charged the client for fees and costs associated with copying and returning the client file.

RESIGNATION WITH DISCIPLINE PENDING

On February 5, 2021, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Lincoln M. Nehring, for violation of Rule 8.4(b) (Misconduct) and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Nehring was the CEO of a Utah non-profit organization (non-profit) focusing on children's issues. Mr. Nehring was the registered agent and sole member of a business entity (entity) registered with the State of Utah. Mr. Nehring submitted to the non-profit an invoice from the entity and approved a check request for a payment of the invoice. The non-profit issued a check payable to the entity. The check later cleared the bank. As president and CEO of the non-profit, Mr. Nehring signed a letter agreement between the non-profit and the entity where the non-profit agreed to pay the entity for consulting services. Later, Mr. Nehring submitted an invoice from the entity and approved a check request for payment of the invoice. The non-profit issued a check payable to the entity and it cleared the bank. A staff member of the non-profit believed the checks to be suspicious, investigated, and discovered the entity was set up and established in Mr. Nehring's name. The non-profit's chair and two other members of the board's executive committee contacted Mr. Nehring and requested to meet regarding the checks. At the meeting, Mr. Nehring tendered his immediate resignation and provided a cashier's check in the amount of the two checks.

RESIGNATION WITH DISCIPLINE PENDING

On October 19, 2020, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Richard G. Uday, for violation of Rules of Professional Conduct: Rule 1.1 (Competence) (Two Counts), Rule 1.3 (Diligence) (Two Counts), Rule 1.4(a) (Communication) (Two Counts), Rule 1.5(a) (Fees) (One Count), Rule 1.15(a) (Safekeeping Property) (Two Counts), Rule 1.15(c) (Safekeeping Property) (Four Counts), Rule 1.15(d) (Safekeeping Property) (One Count), Rule 1.16(d) (Declining or Terminating Representation) (Four Counts), Rule 8.1(b) (Bar Admission and Disciplinary Matters) (Three Counts), Rule 8.4(b) (Misconduct) (One Count), Rule 8.4(c) (Misconduct) (Three Counts), and Rule 8.4(d) (Misconduct) (One Count).

In summary:

In the first matter, a client retained Mr. Uday as a private attorney in a criminal defense matter and paid legal fees. Mr. Uday did not deposit all advance fees payments made by the client into his trust account. Mr. Uday did not keep the client informed about his case nor did he diligently represent the client. Mr. Uday missed several hearings. The court set the matter for trial and ordered all motions to be filed before a certain date, and Mr. Uday did not file any motions. Mr. Uday failed to appear for a pretrial conference and a status conference. The trial dates were cancelled and the court appointed new counsel to represent the client. Mr. Uday did not refund any of the advance fees he collected.

In the second matter, a client retained Mr. Uday to represent her in a dog bite and an assault case in justice court. The client paid advance fees to Mr. Uday for both cases. Mr. Uday missed a pretrial conference in the assault case and the client terminated the representation. During this time period, Mr. Uday did not deposit into his trust account unearned advanced fees and costs and/or funds he was holding that belonged to others. The bank issued notices of insufficient funds for his trust account on several occasions because there were not enough funds available when properly payable instruments were presented for payment. Mr. Uday was untruthful with regards to monies he was supposed to be holding in trust in his trust account and/or the administration of his trust account.

In several other matters, Mr. Uday contracted to provide appellate representation for indigent defendants who had conflicts of interest with the office that provides court-appointed criminal defense services. Mr. Uday accepted appointments in at least seven criminal appeals cases as conflict counsel. Mr. Uday

received payments from the public defense office to file Appellant briefs and represent the defendants on appeal. In another case, Mr. Uday was paid funds for criminal appellate work and the cost of obtaining a transcript. Mr. Uday did not hold the advanced fees and costs he received from the public defense office and/or others for the appellate cases in his trust account and maintain them in the trust account until the fees were earned and the costs were incurred. Mr. Uday did not keep the clients informed about the status of their cases and did not timely respond to requests for information. In one case, the client sent multiple requests to Mr. Uday to provide him a copy of the summary he had given Mr. Uday and for information about his case and the work Mr. Uday had done. Mr. Uday did not file Appellant briefs for the criminal cases in all but one of the cases. In several cases, Mr. Uday received multiple extensions to file the Appellant brief but still failed to do so. In one case, the court of appeals issued three criminal default contempt orders for Mr. Uday's failure to timely file the brief. Mr. Uday caused the issuance of contempt orders and orders to show cause, which resulted in the courts holding additional hearings to appoint new counsel and further delaying the cases. The public defense office attempted to contact Mr. Uday via email, voicemail, letter, and certified letter, requesting that the client files be returned and that the advanced funds be reimbursed. Mr. Uday did not refund any funds or return the client files. Mr. Uday engaged in misrepresentations or dishonest conduct related to the misappropriation of funds. Mr. Uday failed to timely respond to the OPC's Notice of Informal Complaint.

In another matter, a client retained Mr. Uday to represent the client and file a post-conviction relief petition. The client's family paid a retainer for legal services for the petition and its appeal to the Utah Court of Appeals and the Utah Supreme Court. Mr. Uday filed the petition. The Utah Court of Appeals dismissed the petition and found that all of the client's claims were frivolous on their face. Mr. Uday filed a notice to appeal to the Utah Supreme Court. Mr. Uday requested and received four extensions of time to file Appellant's brief but he did not file anything. The court entered an order of default dismissal for Mr. Uday's failure to file the brief within the time permitted. The client and his family members attempted to contact Mr. Uday by calling and sending letters, but Mr. Uday did not respond. Mr. Uday did not refund any of the fees paid for the case nor did he provide the client with his file. Mr. Uday failed to timely respond to the OPC's Notice of Informal Complaint.

In the last matter, Mr. Uday was appellate counsel for a client. The client's convictions were affirmed by the Utah Court of

Appeals. The client wrote to Mr. Uday and requested a copy of his file. Mr. Uday did not respond. The OPC sent a Notice of Informal Complaint to Mr. Uday. Mr. Uday did not timely respond.

DISBARMENT

On February 19, 2019, the Honorable Todd Shaughnessy entered an Order of Disbarment against Brian W. Steffensen, disbaring him from the practice of law for his violation Rule 8.4(b) (Misconduct) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct. The Utah Supreme Court affirmed the District Court's Order of Disbarment on January 7, 2021.

In summary:

Mr. Steffensen incorporated the first of many law firms in 1995 (Firm 1). Mr. Steffensen repeatedly failed to maintain accounting practices that would keep his law firms viable. Additionally, Mr. Steffensen opened a new law firm each time the previous one financially floundered. Firm 1's demise resulted in the seizure of all assets by the IRS because of Mr. Steffensen's failure to pay withholding taxes. As a result of the IRS seizure, Mr. Steffensen would have been acutely aware of his obligations going forward. Mr. Steffensen established his second firm (Firm 2) shortly after the IRS seizure. Firm 2 closed due to the exact same problems with payroll and the Tax Commission as Firm 1.

Mr. Steffensen started his third firm (Firm 3) the same year that Firm 2 closed. The Tax Commission began to scrutinize Mr. Steffensen's employee tax withholding practices when the filing process of one of his employees was suspended and came under review by the Tax Commission because her W2 from Firm 3 did not have a state withholding tax number. The Tax Commission completed its investigation and uncovered a number of potential violations of tax law on Mr. Steffensen's part and recommended that Mr. Steffensen be criminally charged. Firm 1 had an unpaid outstanding withholding tax account balance. Mr. Steffensen broke seven payment arrangements regarding this balance. Regarding Firm 2, Mr. Steffensen used invalid state withholding tax identification numbers, and the W2s he distributed to employees falsely declared that money had been withheld and remitted. In operating Firm 3, Mr. Steffensen failed to file withholding returns for 2003 through 2006. He failed to remit withholdings for this firm's entire existence.

Mr. Steffensen was charged with one count each of Failing to Render a Proper Tax Return, Intent to Evade, and Unlawful Dealing of Property by a Fiduciary. Mr. Steffensen entered into a diversion agreement with the State in which he admitted that there was probable cause for the charges against him.

Estate Planning as COVID-19 Continues: What You Need to Know

by Dara R. Cohen

As the COVID-19 pandemic persists, many clients newly consider worst-case scenarios for our families, disabling illness, and mortality. Is this the right time to create an estate plan? Is this the right time to revisit the estate plan they already have? The answer to either is likely a firm and confident, “Yes.” But, of course, caveats and exemptions always exist.

If a client didn’t need an estate plan before, the client probably doesn’t need one now.

Despite a person’s status as “alive” and “owning stuff,” not everyone needs an estate plan. If a person does not own real estate, does not have dependents, has beneficiary designations on all financial assets (life insurance, retirement/investment accounts, annuities, and even checking/savings accounts), and is not overly concerned about incapacity planning, the person does not *need* an estate plan. The heirs might benefit from one, but estate planning is less urgent than for someone with more complex assets or dependents that would be at risk.

Advising clients how to utilize beneficiary designations and other non-probate transfer tools is a valuable expertise, even if a last will and testament and trust are not part of the final service.

But everyone should have an advanced health care directive.

Anyone, regardless of assets and heirs, should have an advanced health care directive. Utah’s standardized advanced health care directive is designed to complete independently without the need for an attorney. If medical planning is a potential client’s only concern, and if they understand the advantages of a complete estate plan, attorneys can direct such a person to the free online form. The form is available in Spanish and English, and comes with comprehensive instructions: <https://ucoa.utah.edu/directives/>. The advanced health care directive allows the principal to name a first and second agent who can make medical decisions if the principal is unable to speak for her/himself.

After deciding with a client that the client needs an estate plan, start by laying out the difference between a will and a trust.

A will is a one-time, snap-shot distribution of assets at the time of death. All assets controlled by a will must pass through the probate court process. Probate in Utah is relatively efficient and economical, especially compared to larger states, though still can impose a time and financial cost. Creating a will costs less now and costs more at the time of death. Keep in mind the Utah small estate affidavit can assist the decedent’s family in avoiding probate if the estate is less than \$100,000 and does not include real estate.

A revocable trust is a metaphorical shoebox into which the client transfers assets now while alive. The client, as trustee, manages and controls the trust while alive and competent. When the client is incapacitated or dead, the “shoebox” seamlessly slides to the nominated successor trustee. The successor trustee manages assets for the client’s benefit if the client is incapacitated and distributes assets to the client’s beneficiaries when the client dies – or manages those assets long-term for beneficiaries, depending on the distribution provisions. A trust costs more now and saves money later.

There is no universal right or wrong in the decision whether to create a will or a trust. Trusts have many advantages, including avoiding probate, incapacity planning, providing financial management for beneficiaries, and creditor protection for your beneficiaries. Not everyone needs those advantages or those

DARA R. COHEN is a solo practitioner specializing exclusively in estate planning and probate.



advantages are not worth the additional cost. Wills can be an acceptable solution for some individuals and families. Those clients may elect to purchase a trust in the future depending on changes in assets and/or beneficiaries. Knowing they were thoroughly informed, with all costs and benefits plainly explained by their attorney, clients will likely return to the same attorney for further estate planning services.

Consider the different services you offer your clients, including remote sessions and trust funding.

When considering how to provide estate planning services to clients at this particular moment in time, examine the value you can provide through remote sessions and trust funding.

Despite being considered an “essential service,” many attorneys take advantage of remote sessions to minimize the client’s need to travel outside their home. Anecdotally, I’ve noticed a strong correlation between clients concerned about their estate planning and clients concerned about unnecessary exposure to other people. If you do not already offer remote client meetings, your estate planning clients will surely appreciate it.

If you provide your client with a trust-based estate plan, consider providing complete trust funding services. Trust funding is the transferring of assets into the client’s trust and updating of beneficiary designations to align with the estate plan. This additional legal service eliminates the client’s need to visit financial institutions, brokers, insurance agents, and the county recorder.

If you previously provided estate planning services, follow up with clients regarding plan and document reviews.

If you previously provided estate planning services for clients, do not neglect regularly scheduled follow-ups with those clients, possibly every one to three years. In my practice, I send a follow-up every two years. Clients may need to review their appointed agents, beneficiaries, distribution restrictions, asset titles, and beneficiary designations.

Tax law changes in 2018 and 2019 altered estate tax limits and distributions from retirement accounts after the account owner dies. If you know certain clients may be affected by these changes, such as having taxable estates or the bulk of their estate in the form of taxable retirement accounts, do not hesitate to send a personalized note to those clients. They will appreciate your attentiveness and care for their heirs.

Connect with new clients.



Opt-in to the Bar’s award-winning online attorney directory, update your profile, and start accepting new clients today.

It’s free for both you and your potential new clients.



Use your current Bar login to update your profile at www.licensedlawyer.org/login; select “My Dashboard” then “Update Profile.” Your Bar public business information is already pre-loaded for your convenience. To be included in all search options for clients looking for a new attorney, be sure to **UNCHECK** the box to “**OPT-IN**” and **CHECK** the box for “accepting new clients” when you update your profile.

Utah State Bar
Lawyers working for justice.



Leadership

by Greg Wayment

I live in a little condo building, and three or so years ago, the long-running Home Owners Association (HOA) president and the finance chair left unexpectedly. Unfortunately, they both left at roughly the same time. I was the lowest ranking member of the committee of three, and I thought for our little fifteen-member HOA, it was quite a blow. I wasn't interested in being the president, but it was one of those moments as Mitt Romney and others have said, "If not you, who? If not now, when?"

And so it was that I inherited the position. A couple of other owners were coaxed into joining, and we formed a new board. An unexpected result has been that I have learned a lot about leadership. I haven't been much of a leader as a paralegal. I've spent the last sixteen years working as the only litigation paralegal at a firm (which has only been possible because of great assistants). And although I've served many years on the Paralegal Division Board, I've managed to stay mostly in supporting roles.

As I pondered this, I wondered if any of it had any relevance for paralegals. It occurred to me that not only are there paralegals in leadership positions, almost every paralegal I know wears multiple hats. Many of you are parents and wear multiple hats for that role! But many of you are also real estate agents, adjunct instructors, athletic coaches, volunteers, or . . . HOA presidents. I think it's in the DNA of a paralegal to be asking, "Am I doing enough?" So I think, even though as paralegals we are mostly in supportive roles at work, there are a great number of opportunities to be leaders. Here are some of the things I've learned:

1. Have a plan. In the HOA world, ideally you can afford to have a reserve study professionally prepared. This is an expert evaluation of the systems of your building or community and what needs to be done now, what needs to be done in the future, and how much money you'll need to accomplish those goals. It's not always possible to have a "reserve study" as a paralegal, but when you can tackle any project or case with a plan, you will be much more effective.

2. Keep a written budget. As the HOA president, I spend every dollar on paper at the beginning of each month. We also keep QuickBooks records. My budget helps me keep track of where the money is going and how much we'll need to meet future demands. The QuickBooks records are invaluable for the accountant who prepares the tax disclosures. As a paralegal, you should be budgeting your time and your money. There are some great budget apps that are available at no charge.
3. Surround yourself with good advisors. My two board members provide invaluable insight and sometimes can accomplish things fairly easily when I feel like I've come up against a brick wall. It's also been key to build a network of experts. We have a short list of electricians, plumbers, pipe rooters, lawn care and snow removal companies, lawyers, and an accountant we know and trust. I've also heavily relied on experts as a paralegal. I've also had paralegal mentors and have heavily leaned on e-discovery, forensic, and other experts to help me be more effective.
4. Defer to your advisors often, even if the decisions they favor wouldn't be your first choice. Not only have I found that my first impulse has been wrong sometimes, most often we've been able to take someone else's chosen course and still get to the end that I'd envisioned. Deferring to your advisors empowers them, and empowered people take more ownership.

GREG WAYMENT is a paralegal at Magleby Cataxinos & Greenwood. Greg serves on the board of directors of the Paralegal Division and is currently the Division liaison to the Utah Bar Journal.



5. Sometimes you can't defer. Sometimes you have to make the hard choices and take the heat when people don't like the choice you've made. Oftentimes, indecision can be worse than making the wrong decision.
6. Adversity will come, learn how to weather storms. As an HOA, lawsuits will come, or windstorms, or earthquakes. Pipes will break, cars will get broken into. At work, conflict with people will arise, work levels will ebb and flow, and sometimes you won't be following your bliss. I'm trying to learn how to not internalize some of the adversities so much.
7. Do the work. There's no substitute for the knowledge that you gain by being hands-on. For an HOA president, this means understanding the property and knowing the property's strengths and weaknesses. For a paralegal, this is obvious. Pay attention to the shifts in e-discovery and other technologies; pay attention to your cases. Little course corrections with costs or processes can make a lot of difference.
8. Don't get hung up on rules. Most likely, the number one complaint about HOAs is rigid enforcement of arbitrary rules (the second complaint is probably cost). My perspective is that the property and the HOA exist to serve the greatest good, for the greatest number of owners as possible. But an HOA that doesn't follow any of its rules can be destructive as well. You have to choose your battles.
9. You can manage tasks efficiently, but not people. As a paralegal, it's easy to make lists and work through them. When it comes to people, you have to slow down, communicate clearly, and think from another's perspective.

Now is a great time to get involved with the leadership of the Paralegal Division or the Utah Paralegal Association. We need your voice and leadership. If not you, who? If not now, when?



**For All Paralegals & Their
Supervising Attorneys**

The Paralegal Division welcomes:



Retired Judge Thomas L. Willmore

As our distinguished speaker

*Perspectives From The Bench About
The Changing Justice System*

May 20, 2021 | Noon to 1:30 pm | 1.0 CLE hour (credit pending)

Due to COVID-19 concerns, this will be a virtual event.



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

SEMINAR LOCATION: All seminars and events are currently planned as online, Zoom events.

May 12, 2021 | 12:00 pm – 1:00 pm

1 hr. Self Study

E-Discovery Bootcamp: Collection and ECA Fundamentals. Part two of a four-part webinar, presented by the Litigation Section. Free to section members, \$10 per session for all others.

May 14, 2021 | 12:00 pm – 1:00 pm

1 hr. Self Study

E-Discovery Bootcamp: Review Fundamentals. Part three of a four-part webinar, presented by the Litigation Section. Free to section members, \$10 per session for all others.

May 17, 2021 | 12:00 pm – 1:00 pm

1 hr. CLE Credit

Adversary Proceedings and Evidentiary Hearings. Webinar, presented by the Bankruptcy Law Section. Panelists include: The Hon. R. Kimball Mosier (Judge, Bankruptcy Court), Sarah Laybourne (Law Clerk, Bankruptcy Court), and Melinda Willden (Attorney, United States Trustee Program). Free to section members, \$10 per session for all others.

May 19, 2021 | 12:00 pm – 2:00 pm

2 hrs. Self Study Credit

Victim's Rights vs. Defendant's Rights – Is our System Designed to Protect Both? Webinar, presented by the Criminal Law Section. Presenters include: Ann Marie Taliaferro, Attorney, Brown Bradshaw & Moffat; Ken Roach, Licensed Clinical Mental Health Counselor, Ed.D., Mt. Olympus Counseling Center; Avremi Zippel, Director, Young Jewish Professionals Utah, Public Speaker, Survivor, Activist for Sexual Violence Survivors. Free to all.

May 25, 2021 | 12:00 pm – 1:00 pm

1 hr. Self Study

E-Discovery Bootcamp: Production Fundamentals. Part four of a four-part webinar, presented by the Litigation Section. Free to section members, \$10 per session for all others.

June 1, 2021 | 12:00 pm – 1:00 pm

1 hr. Self Study

2021 Utah Legislative Update & Latest Utah COVID-19 Guidance. Webinar, presented by the Labor & Employment Section. Presenter: Katie Hudman, The Employers' Council. \$10 for all.

June 4, 2021 | 9:00 am – 1:00 pm

3 hrs. Self Study

Annual Family Law Section Meeting. Webinar. Keynote Speaker: Dr. JoAnne Pedro-Carroll, Ph.D., author of *Putting Children First: Proven Parenting Strategies for Helping Children Thrive Through Divorce*. \$50.

July 28–31, 2021

TBA

SUMMER CONVENTION. Sun Valley, Idaho, and online! Watch for more details to come!

All content is subject to change. For the most current CLE information and offerings, please visit:

<https://www.utahbar.org/cle/#calendar>

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

FOR SALE

"Knoll" brand locking file cabinet 78" H x 72" W x 18" D, with 8 full drawers and 2 upper cabinets, can be separated. Forest green color, excellent condition. Asking \$600. **Pacific Reporter collector set:** Pacific 1st volumes 1–227 (1883–1924), with volumes 1–109 original leather binding); Pacific 2nd volumes 1–418 (1931–1966). Good condition, impressive wall covering. Asking \$2,000. Best contact is mobile phone # 435-503-1554.

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.

Established Salt Lake City law firm seeks experienced attorney(s) with portable book of business. Salary commensurate with experience. Excellent benefits. Please send resume and writing sample to slcfirm86@gmail.com.

Snow Jensen & Reece (St. George, Utah), is seeking an associate with 1–3 years' experience in commercial litigation and other civil matters. Applicant should have excellent academic credentials, writing and communication skills and admitted in Utah State and Federal Courts. Full benefits with salary commensurate with experience. Please submit resumes to Curtis M Jensen at 912 West 1600 South, Suite B-200, St. George, Utah 84770 or e-mail sjlaw@snowjensen.com.

VERNAL UTAH CONSTRUCTION COMPANY (bhico.com) seeking in-house counsel to review and draft construction contracts, miscellaneous transactional documents and handle other corporate legal matters. Full time with benefits. Large scale projects in 25 different states. Send resume and cover letter to legal@bhico.com.

Get the Word Out!

If you need to get your message out to the 11,000+ members of the Utah State Bar...

Advertise in the Utah Bar Journal!

For current ad rates, or to place an ad in the *Utah Bar Journal*, please contact:

For **DISPLAY** ads
Laniece Roberts
801-910-0085

UtahBarJournal@gmail.com

For **CLASSIFIED** ads:
Christine Critchley
801-297-7022

ccritchley@utahbar.org

OFFICE SPACE/SHARING

NEW EXECUTIVE OFFICES ON STATE STREET! Tired of working at home! New executive offices completed in 2020. State Street and 3rd South on the fourth floor with established law firm. Receptionist services, conference rooms, parking and good camaraderie. Contact Richard at (801) 534-0909 or Richard@tjblawyers.com.

Office Sharing Space Available in Sugar House/1100 East 1945 South. Furnished executive office with conference room available to share 2 or 3 days a week. \$520–780/month depending on 2/3 days per week. Includes Wifi, shredding service, and kitchen. Contact Anne at (435) 640-2158 or anne@aaclawutah.com for more information.

OFFICE SPACE FOR RENT. Small office in suite with other attorneys, Google Fiber, one block from Third District Court, free parking, \$300.00 per month. Call 801.870.2537 or email llgr@comcast.net.

Downtown office for rent. Free parking, internet, and conference room. \$600.00 per month. Smaller office I same suite for \$300.00 per month. Call 801.870.2537

SERVICES

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.

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.

Insurance Expertise: Thirty-nine years of insurance experience, claims adjusting, claims management, claims attorney, corporate management, tried to conclusion over 100 jury trials with insurance involvement, participated in hundreds of arbitrations and appraisals. Contact Rod Saetrum J.D. licensed in Utah and Idaho. Telephone (208) 336-0484 – Email Rodsaeltrum@saetrumlaw.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.

GRAPHIC DESIGN & COPYWRITING SERVICES.

Laniece Roberts has been the graphic designer for the Utah State Bar and the *Utah Bar Journal* for 20+ years, as well as the layout editor for the *Utah Trial Journal* for 12+ years. She can assist you with: logo design and rebranding, print or online advertisements, invitations, announcements, brochures, books, newsletters, magazines, etc. Professional or personal projects are welcome. For quick examples of her work, see the ads on pages 10, 12, 20, 25, 37, 41, 51, 55, 63, 65, and 67 of this *Bar Journal*. You can reach Laniece at: LanieceRoberts@gmail.com or 801-910-0085.

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.

Certificate of Compliance

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

For July 1 _____ through June 30_____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

Email: _____

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

- 1. Active Status Lawyer** – Lawyers on active status are required to complete, during each two year fiscal period (July 1–June 30), a minimum of 24 hours of Utah accredited CLE, which shall include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of the ethics or professional responsibility shall be in the area of professionalism and civility. Please visit www.utahmcle.org for a complete explanation of Rule 14-404.
- 2. New Lawyer CLE requirement** – Lawyers newly admitted under the Bar’s full exam need to complete the following requirements during their first reporting period:
 - Complete the NLTP Program during their first year of admission to the Bar, unless NLTP exemption applies.
 - Attend one New Lawyer Ethics program during their first year of admission to the Bar. This requirement can be waived if the lawyer resides out-of-state.
 - Complete 12 hours of Utah accredited CLE.
- 3. House Counsel** – House Counsel Lawyers must file with the MCLE Board by July 31 of each year a Certificate of Compliance from the jurisdiction where House Counsel maintains an active license establishing that he or she has completed the hours of continuing legal education required of active attorneys in the jurisdiction where House Counsel is licensed.

EXPLANATION OF TYPE OF ACTIVITY

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

- 1. Self-Study CLE:** No more than 12 hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit www.utahmcle.org for a complete explanation of Rule 14-413 (a), (b), (c) and (d).
- 2. Live CLE Program:** There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at a Utah accredited CLE program. **A minimum of 12 hours must be obtained through attendance at live CLE programs during a reporting period.**

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

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

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

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

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

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

Date: _____ Signature: _____

Make checks payable to: **Utah State Board of CLE** in the amount of **\$15** or complete credit card information below.

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

Account # _____ Security Code: _____

Name on Card: _____

Cardholder Signature _____

Please Note: Your credit card statement will reflect a charge from "BarAlliance"
Returned checks will be subject to a \$20 charge.



**OVER \$1 BILLION
RECOVERED**



NEVADA REFERRAL & CO-COUNSEL RELATIONSHIPS

NEVADA'S LARGEST & HIGHEST RATED INJURY LAW FIRM

"The Richard Harris Law Firm is top of class when it comes to getting the most out of Nevada personal injury cases. I know Rick Harris well and have complete confidence in him and the amazing attorneys that make up his team. Recently Rick's firm received a \$38 million dollar verdict on a difficult premises case. If you're looking to partner with a quality Nevada law firm, Rick Harris is your best option by far."

~ Craig Swapp, Craig Swapp and Associates

RICHARD HARRIS
LAW FIRM



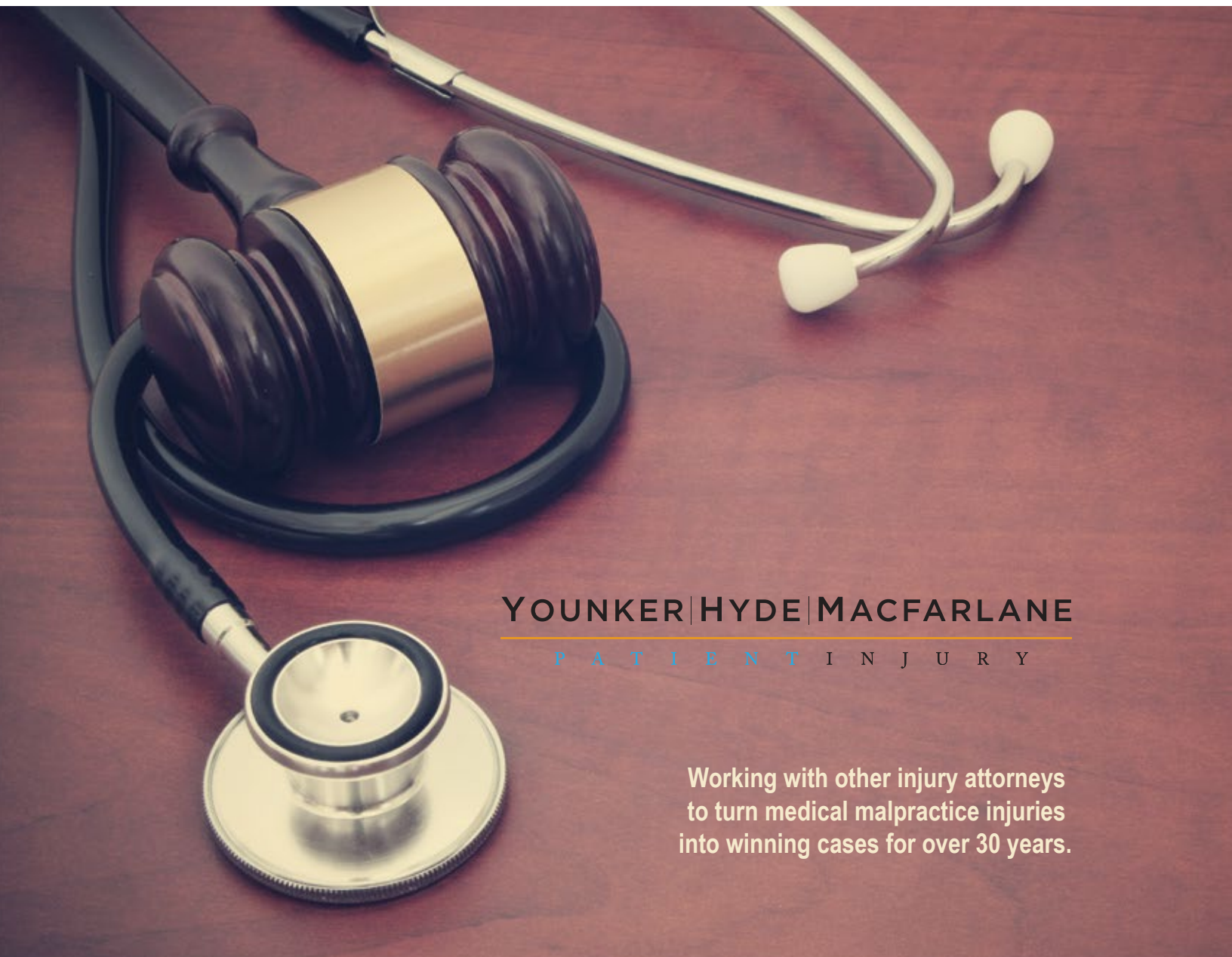
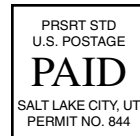
702 **444.4444**

RichardHarrisLaw.com

801 SOUTH 4TH STREET | LAS VEGAS, NV 89101



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



YOUNKER | HYDE | MACFARLANE
P A T I E N T I N J U R Y

Working with other injury attorneys
to turn medical malpractice injuries
into winning cases for over 30 years.

257 East 200 South
Suite 1080
Salt Lake City, UT 84111

Norman J. Younker, Esq.
Ashton J. Hyde Esq.
John M. Macfarlane, Esq.

801.335.6467
yhmlaw.com
www.patientinjury.com