

## Utah State Bar Commission

Friday, December 14, 2018

Utah Law & Justice Center

Salt Lake City, Utah

### Agenda

#### 1. 9:00 a.m. President's Report: Dickson Burton

- |                 |     |  |
|-----------------|-----|--|
| <i>30 Mins.</i> | 1.1 | Legislative Session Prep: <b>Doug Foxley &amp; Steve Foxley</b>      |
| <i>05 Mins.</i> | 1.2 | January Legislative Conference Call Schedule ( <b>See Calendar</b> ) |

#### 2. 9:45 a.m. Action Items

- |                 |     |  |
|-----------------|-----|--|
| <i>15 Mins.</i> | 2.1 | Military Spouse Lawyer Admissions Rule ( <b>Tab 1, Page 3</b> )      |
| <i>10 Mins.</i> | 2.2 | Rebate for ABA Delegates Expenses ( <b>Tab 2, Page 9</b> )           |
| <i>10 Mins.</i> | 2.3 | Innovation in Law Rules (6.5 & CLE Credit) ( <b>Tab 3, Page 11</b> ) |
| <i>15 Mins.</i> | 2.4 | Client Security Fund Recommendations ( <b>Tab 4, Page 32</b> )       |
| <i>15 Mins.</i> | 2.5 | Reimbursement Policies from Audit ( <b>Tab 5, Page 38</b> )          |

#### 3. 11:00 a.m. Information Items

- |                 |     |  |
|-----------------|-----|--|
| <i>05 Mins.</i> | 3.1 | Adding Public Members to Commission Report: <b>Erik Christiansen</b> |
| <i>15 Mins.</i> | 3.2 | UMBA Report: <b>Abby Dizon-Maughan</b>                               |
| <i>15 Mins.</i> | 3.3 | Judicial Council Report: <b>Rob Rice</b>                             |

**11:45 a.m. Break for Luncheon with Bar Staff**

#### 4. 1:00 p.m. Adjourn

#### **Consent Agenda (Tab 6, Page 43)**

(Approved without discussion by policy if no objection is raised)

1. Approve minutes of November 16<sup>th</sup>, 2018 Commission Meeting

#### **Attachments (Tab 7, Page 47)**

1. *Salt Lake Tribune* Article and Editorial on Proposed Tax Changes

(Over)

## Calendar

### 2019

January 2	President-elect Election Notices Due		
January 11	Executive Committee	12:00 Noon	
January 18	Commission Meeting	9:00 a.m.	Utah State Bar
January 23-28	ABA Mid-Year Meeting/NABE/NCBP		Las Vegas, Nevada
January 29	Conference Call Re: Legislature	4:00 p.m.	
February 1	Commission Election - Petitions, Statements, Photos Due		
February 5	Conference Call Re: Legislature	4:00 p.m.	
February 12	Conference Call Re: Legislature	4:00 p.m.	
February 19	Conference Call Re: Legislature	4:00 p.m.	
February 26	Conference Call Re: Legislature	4:00 p.m.	
February 26	Executive Committee	12:00 Noon	
February 26-27	Bar Examination	8:00 a.m.	Utah State Bar
March 5	Conference Call Re: Legislature	4:00 p.m.	
March 7	SUBA Luncheon	12:00 Noon	St. George, Utah
March 7	Commission Meeting	1:00 p.m.	St. George, Utah
March 7-9	Spring Convention		St. George, Utah
March 20	Election Email Message Due		
March 27-30	Western States Bar Conference		Lihue, Hawaii
April 1	Election-Online Balloting Begins		
April 5	Executive Committee	12:00 Noon	
April 9-11	ABA Day in Washington		Washington, D.C.
April 12	Commission Meeting	9:00 a.m.	?
April 15	Election-Online Balloting Ends		
May 10	Executive Committee	12:00 Noon	
May 17	Commission Meeting	9:00 a.m.	Utah State Bar
May ?	Admission Ceremony	12:00 Noon	State Capitol
July 12	Executive Committee	12:00 Noon	Utah State Bar
July 18	Commission Meeting	1:00 p.m.	Park City, Utah
July 18-20	Summer Convention		Park City, Utah

**TAB**  
**1**

**Rule 14-805. Admission for spouse of active military stationed in Utah.**

**(a) Requirements for admission of spouses of active military with permanent change of station orders to serve in Utah.**

(a)(1) For purposes of this rule, the spouse of active military is defined as the spouse of an active duty service member of the United States Uniformed Services, as defined by the Department of Defense, and the service member has received military orders for a permanent change of station to reside in Utah.

(a)(2) Absent admission under Rules 14-701 *et seq.*, the spouse of an active member of the military ("Military Spouse Attorney") may be admitted to practice law in Utah without taking the Bar Examination.

(a)(3) The defined terms set forth in Rule 14-701 are incorporated into this rule.

(a)(4) The burden of proof is on the applicant for military spouse admission to establish by clear and convincing evidence that the applicant:

(a)(4)(A) has paid half the prescribed application fees, which shall be credited toward Bar dues upon licensure, and filed the required Complete Military Spouse Application;

(a)(4)(B) has graduated with a First Professional Degree in law from an Approved Law School;

(a)(4)(C) has been admitted to the practice of law before the highest court of a U.S. state, territory or the District of Columbia;

(a)(4)(D) does not qualify for admission by motion under Rule 14-705 or admission by the transfer of a UBE score under Rule 14-712;

(a)(4)(E) has presented any score from the Multistate Bar Examination (MBE) or Uniform Bar Examination (UBE), as defined by Rule 14-701, that applicant may have used to obtain admission to the practice of law in a jurisdiction other than Utah;

(a)(4)(F) is of good moral character, satisfies the requirements of Rule 14-708, and has not previously been denied admission by the Utah State Bar or engaged in the unauthorized practice of law in Utah;

(a)(4)(G) has successfully passed the MPRE in accordance with Rule 14-713;

(a)(4)(H) is an active member in good standing in at least one state or territory of the U.S. or the District of Columbia and is a member in good standing in all jurisdictions where currently admitted;

(a)(4)(I) has a proven record of ethical, civil and professional behavior and has never been disbarred or resigned with discipline pending, or their equivalent, in any jurisdiction and is not currently subject to lawyer discipline or the subject of a pending disciplinary matter;

(a)(4)(J) if intending to practice pending admission, has identified an active member of the Bar in good standing who has agreed to actively supervise the Military Spouse Attorney in accordance with the supervisory requirements specified in subsection (b) of this rule, as evidenced by a verification signed by both the Military Spouse Attorney and the supervising attorney; and

(a)(4)(K) complies with the provisions of Rule 14-716 concerning licensing and enrollment fees.

**(b) Certificate while application is pending; required supervision.**

(b)(1) While a Military Spouse Attorney's application is pending, the Military Spouse Attorney may practice law in Utah upon issuance of a Certificate While Application is Pending under subsection (c).

(b)(2) While practicing with application pending, the Military Spouse Attorney must be fully supervised by an active member of the Bar in good standing as set forth in this rule. Required supervision ceases upon the Military Spouse Attorney's admission to the Bar under this rule.

(b)(3) For the duration of the supervision, the supervising attorney shall:

(b)(3)(A) assume full responsibility for all matters to be handled by the Military Spouse Attorney; and

(b)(3)(B) be included by name on all pleadings and papers.

**(c) Timing and processing of application.**

(c)(1) An application under this rule may be filed at any time.

(c)(2) The Bar will promptly conduct a preliminary character and fitness review of a completed application submitted by a Military Spouse Attorney.

61 (c)(3) Upon satisfactory completion of the preliminary review and upon confirming  
62 that the Military Spouse Attorney is present in Utah, the Bar will issue a Certificate  
63 While Application is Pending to the applicant.

64 (c)(3)(A) The Certificate While Application is Pending authorizes the Military  
65 Spouse Attorney to begin practice in accordance with this rule while the  
66 application is pending.

67 (c)(3)(B) The Certificate expires 120 days after issuance, but a new certificate  
68 may be issued if the applicant has not been dilatory in supplying required  
69 information during the processing of the application.

70 (d) **Jurisdiction and Authority.** The practice of a lawyer admitted under this rule  
71 shall be subject to the Utah Rules of Professional Conduct and Article 5, Lawyer  
72 Discipline and Disability, and to all other applicable laws and rules governing lawyers  
73 admitted to the Bar. Jurisdiction shall continue whether or not the Military Spouse  
74 Attorney retains the privilege to practice in Utah and irrespective of the residence or  
75 domicile of the Military Spouse Attorney.

76 (e) **Continuing legal education.** Applicants admitted under this rule who have two  
77 or more years of legal practice shall complete, document, and certify no later than six  
78 months following admission having attended at least 15 hours of continuing legal  
79 education on Utah practice and procedure and on ethics and civility requirements.

80 (e)(1) The Bar may by regulation specify the number of the required 15 hours  
81 that must be in particular areas of practice, procedure, ethics, and civility. Included  
82 in this mandatory 15 hours is attendance at the Bar's OPC ethics school.

83 (e)(2) On an ongoing basis, attorneys admitted under this rule must comply with  
84 the continuing legal education requirements imposed on lawyers under Article 4.

85 (f) **Mentoring and Supervision.**

86 (f)(1) A Military Spouse Attorney with less than two years of Active Practice when  
87 admitted must obtain a mentor and complete the New Lawyer Training Program  
88 (NLTP) as outlined in Rules 14-404 and 14-808.

89 (f)(2) A Military Spouse Attorney with less than two years of Active Practice who  
90 has not presented an MBE score above 134 or UBE score above 269 must be  
91 affiliated at all times with an active member of the Bar in good standing who has

agreed to supervise the Military Spouse Attorney and assume full responsibility for all matters handled by the Military Spouse Attorney. A Military Spouse Attorney subject to this supervision requirement must also enroll in the Bar's approved professional liability insurance program or obtain equivalent insurance coverage.

(g) **Annual licensing.** An attorney admitted under this rule is subject to annual licensing and enrollment fees and, during the annual licensing period, must provide to the Bar proof of continuing compliance with (a)(8) through (a)(10).

(h) **Mandatory status reporting.** An attorney admitted under this rule and any required supervising attorney are each responsible for notifying the Bar in writing within 21 days of any change that may affect the Military Spouse Attorney's license to practice law under this rule.

(i) **Termination of license to practice in Utah.** A Military Spouse Attorney's license terminates and a Military Spouse Attorney must cease all activities under this rule:

(i)(1) six months after the military service member is permanently transferred outside Utah on military orders with dependents authorized, unless the transfer is a remote follow-on assignment and the Military Spouse Attorney remains in Utah during the service member's remote assignment;

(i)(2) ninety days after:

(i)(2)(A) the military service member dies, separates, or retires from the United States Uniformed Services;

(i)(2)(B) the Military Spouse Attorney ceases to be a dependent as defined by the United States Department of Defense;

(i)(3) thirty days after the Military Spouse Attorney permanently relocates outside Utah for a reason other than the military service member's permanent change of station;

(i)(4) immediately upon:

(i)(4)(A) failure to comply with subsection (g);

(i)(4)(B) failure to maintain an active license in at least one other U.S. state, territory, or the District of Columbia;

(i)(4)(C) any termination of sponsorship by a supervising attorney if required by subsection (b), or the failure of a supervising attorney to be an active member of the Bar in good standing;

(i)(4)(D) admission to the Bar under any other rule; or

(i)(4)(E) an order of termination by any disciplinary proceeding in Utah or upon disbarment or suspension of any other license of the Military Spouse Attorney from another jurisdiction.

**(j) Required action after termination.** Upon termination of a license to practice under this rule, the Military Spouse Attorney must comply with Rule 1.16 of the Utah Rules of Professional Conduct, including the transfer of pending matters, written notice to clients and notification of courts, as required or necessary under the circumstances.

**(k) Failure to satisfy the notice and termination of practice requirements.** Failure to satisfy the notice and termination of practice requirements set forth in subsections (e), (h), and (i) may subject a Military Spouse Attorney to discipline, including the termination of a license granted under this rule.

**(l) Reinstatement after termination of license.** A Military Spouse Attorney whose license was terminated pursuant to paragraph (i) shall have the license reinstated if, within six months, the Military Spouse Attorney demonstrates compliance with all the requirements of this rule upon termination of the license and that the terminating event has been cured.

**(m) Service time and exception to admission by motion rule.** Any period of time a Military Spouse Attorney practices under this rule counts under all rules measuring a lawyer's time practicing law or as a member of the Bar, including Rules 14-203 and 14-705, provided that the Military Spouse Attorney has never engaged in the unauthorized practice of law in Utah.



TAB  
2

# UTAH STATE BAR

## Calculation of Legislative Activity Rebate

Financial Reporting Year License form year	4/1/14 - 3/31/15										4/1/15 - 3/31/16										4/1/16 - 3/31/17										4/1/17 - 3/31/18										4/1/18 - 3/31/19																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																					
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Actual Legislative costs - dept 20 (4/1 - 3/31)	\$	56,153	\$	36,177	\$	86,126	\$	67,807	\$	14,531	\$	56,666	\$	53,269																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																</

**TAB**  
**3**

# MEMORANDUM

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**To:** MCLE Committee  
**From:** Innovation in Law Practice Committee  
**RE:** Request for six additional hours for live CLE credit for “Virtual Learning”  
**Date:** 09/05/18

Dear MCLE Committee:

Like other businesses and professions, the practice of law has changed dramatically in recent years. The technology revolution that has swept the business world has also impacted the legal profession, including not only the way lawyers practice, but also the ways in which lawyers interact and connect with their clients and other lawyers. The technology revolution has also been paired with changing demographics among lawyers, which has seen more lawyers move away from larger firms in the city to small and solo practices in more suburban or rural areas. In recognizing those trends across the lawyer world, and specifically those in the State of Utah, the Innovation in Law Practice Committee proposes amending the MCLE Rules to allow for an additional six hours of live CLE credit for webinars and other online presentations.

Currently, the MCLE rules provide that active status lawyers:

[M]ust complete, during each two fiscal year period (July 1 through June 30), a minimum of 24 hours of Utah accredited CLE which must include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of ethics or professional responsibility must be in the area of professionalism and civility.

Supreme Court Rules of Professional Practice (“S.C.R.P.”), Rule 14-404(a).

Of the required 24 hours of Utah accredited CLE, only 12 of those hours may be completed through what the rules term as “self-study.” See S.C.R.P. 14-413(a)(2). A “self-study CLE program” is defined as “a program presented in a suitable setting where the lawyer can view approved self-study activities.” S.C.R.P. 14-402(j)(3). Included among those approved self-study

activities are “Board accredited audio and video presentations, webcasts or computer interactive telephonic programs.” S.C.R.P. 14-413(a). “One hour of self-study credit will be allowed for viewing and/or listening to 60 minutes of video presentations, webcasts or computer telephonic programs,” and “[n]o other credit is allowed for self-study programs except as expressly permitted under” Rule 14-413(a). S.C.R.P. 14-413(a)(1), (g).

As situated, active status attorneys must complete half of their required MCLE credits through in-person CLE presentations. As the Committee will note, outside of Salt Lake City and St. George, the number of in-person CLEs offered to active status lawyers is relatively small. This means that those lawyers practicing in rural areas, or lawyers practicing law from a home office or outside the traditional firm setting may have to commute several hours to attend a live CLE event, or those lawyers may have to choose more time consuming and/or more expensive CLEs to meet their 12-hour live CLE requirement. We as the Innovation in Law Practice Committee believe that this requirement should be changed to recognize the changing demographics across the legal profession, and to better align the CLE requirements with the new realities sweeping across the practice of law.

Certain other states have approved CLE credit for what they term as “distance learning.” Distance learning has been differentiated somewhat from the self-study activities described above. For instance, in Pennsylvania, the Pennsylvania Continuing Legal Education Board announced in February 2014 changes to its “Rules and Regulations that ... permit[ted] more credits to be earned via distance learning,” which allowed lawyers to obtain up to 6 of their required 12 hours of CLE credit via distance learning offered through preapproved interactive based CLE programs. *See* [https://www.pacle.org/distance\\_learning/press\\_release.asp](https://www.pacle.org/distance_learning/press_release.asp). As the Pennsylvania CLE Board recognized, “These updates to the Rules and Regulations for CLE in Pennsylvania recognize the

changing needs and realities of modern law practice,” and “[w]e hope that these changes will help lawyers to better serve their clients and the administration of justice in our Commonwealth.” *Id.* As it related specifically to distance learning, the Board stated:

This is even more so with the increase in the amount of credits that can be earned through distance learning programs. Participation through distance learning has been an option for Pennsylvania lawyers since 2003. Since then the Board has received feedback from attorneys to consider increasing the amount of distance learning credits that may apply to the CLE requirement. The Supreme Court's decision to amend this rule responds to these requests and recognizes evolving comfort levels with the online delivery of professional education.

*Id.*

Under Pennsylvania's CLE rules, distance learning is limited to preapproved interactive based CLE programs. See <https://www.pacle.org/about/rulesregs.asp>.<sup>1</sup> However, the list of distance learning providers supplied by the Pennsylvania CLE Board is quite lengthy, and includes such providers as the American Bar Association (“ABA”), American Association for Justice (“AAJ”), Lexis Nexis, and West LegalEdcenter. See [https://www.pacle.org/distance\\_learning/DL\\_providers.asp#](https://www.pacle.org/distance_learning/DL_providers.asp#). What the Pennsylvania CLE Board

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<sup>1</sup> Pennsylvania's MCLE Rules and Regulations (Section 13) set forth:

(n) Distance Learning Computer based and teleconference programs may be approved for credit in accordance with standards determined by the Board.

1. Only distance learning courses pre-approved for credit or conducted by Accredited Providers may be taken for credit.
2. Courses must provide mechanisms to ensure interactivity and/or monitor course participation.
3. Participants must complete the program in such a manner that certification of attendance is controlled by the provider.
4. Course providers shall report course attendance and evaluation data in a format determined by the Board.
5. Credits earned via distance learning in excess of the annual credit limit, will not carry over into subsequent compliance periods.

See <https://www.pacle.org/about/rulesregs.asp>.

Distance learning is further defined in Pennsylvania as “an opportunity for lawyers for lawyers to meet a portion of their annual CLE requirement by participating in preapproved interactive computer based CLE programs or teleconferences.” See [https://www.pacle.org/distance\\_learning/DL\\_Lawyer\\_QA.asp](https://www.pacle.org/distance_learning/DL_Lawyer_QA.asp).

has seemed to pick up on, and rightfully so, is that interactive webinars and other computer-based programs have become akin to in-person CLE activities. Pennsylvania has moved further toward allowing their attorneys to complete more of their CLE requirements through an online program.

In 2012, the Illinois Supreme Court Commission on Professionalism, released a report regarding lawyer feedback as it related to CLEs. See <https://www.2civility.org/wp-content/uploads/2014/02/Lawyer-Feedback-on-CLE-2012.pdf>. When asked specifically about online learning, more than half of the lawyers participating in the survey set forth they preferred to acquire their CLE online rather than through live presentation. *Id.* The Commission also solicited comments from lawyers participating in the survey. Among these comments were:

- “The constantly increasing hours of required CLE are quickly becoming a real burden. Non-online courses require travel time which often is the same as the course credit hours ... In this economy the impact on earnings is both real and significant.”
- “As a parent with a first grader, it is unbelievably helpful to be able to do CLE online.”
- “I can’t stress enough the importance of being able to take courses remotely. I do not believe that people get any more out of a course simply by attending in person – you only have to be an instructor once to know that physical presence does not necessarily signal mental presence!”
- “Online courses are more practical as they require less time out of the work day. In addition, I have found them to be more informative.”
- “I have really appreciated the on-line webinars, but I always prefer to interact 1:1. However, if it weren’t for on-line courses I probably wouldn’t be able to fulfill my requirements. Since travel money is almost non-existent, the on-line courses are almost a necessity.”



*Id.*

From the above, several lawyers in Illinois recognize the value and practicality of online CLE opportunities, and that, at least for some, there is no difference between live in-person CLE and online CLE courses. And even for those lawyers that prefer one-on-one interaction, those lawyers acknowledge how the costs associated with travel to live CLE activities can be prohibitive.

Beyond Pennsylvania and Illinois, several other states allow lawyers to complete a substantial portion of their CLE requirements through distance learning, or other non- in-person settings. See [https://www.healthlawyers.org/Events/Documents/CLE\\_State\\_Chart.pdf](https://www.healthlawyers.org/Events/Documents/CLE_State_Chart.pdf). Chief among these states are states like Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Illinois, Iowa, Kentucky, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, and Virginia, which all have no limitations as it relates to CLE credits that may be earned through distance learning. *Id.* Of those listed, Alaska, Arizona, Colorado, Hawaii, Nevada, New York, and Oregon require no interactivity as part of their distance learning opportunities. *Id.* However, the other states listed require some interactivity as part of their distance learning rules and regulations.<sup>2</sup> *Id.*

Even in those states like Indiana, where lawyers may complete only six hours of distance learning as part of their overall three-year, 36-hour CLE requirements, lawyers are becoming increasingly keen on online CLE opportunities. Even as far back as 2013, Indiana lawyers were

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<sup>2</sup> The key to distinguishing “distance learning” from other CLE activities appears to be interactivity, but, as noted, not all states follow that requirement. For instance Arizona differentiates between “Interactive CLE,” which it defines as: (i) attendance at a CLE program administered by live faculty; (ii) attendance at a CLE program sponsored by a single private law firm, a single corporate law department, or a single department or office of a federal, state, or local government entity, attended by no fewer than five attorneys, including the instructor, who are active bar members in any jurisdiction; and (iii) a computer-based or on-line CLE program where the order of presentation or the content of the course material is dependent on the member's response and the member has an opportunity to respond to prompts initiated by the faculty or placed within the course material,” and “self-study,” which it defines as: “any course of legal study meeting the standards of Regulation 104 undertaken by an Active member for the member's own benefit, and may include listening to audio reproductions or viewing video reproductions of course materials, but does not include reading.”



clarifying that they were turning more and more to online programming for CLE credit. *See* <https://www.theindianalawyer.com/articles/31822-more-attorneys-are-turning-to-online-programming-to-get-cle-credit>. Scott King, who was then Director of Indiana's Continuing Legal Education Forum, said the following about online CLE programming, "I think it will evolve in some ways but it's certainly here to stay. I think it's proven to be an effective and convenient way for attorneys to get information." *Id.* An Indiana lawyer who, without the aid of online CLE opportunities said he would have to take an entire day off work and drive to Indianapolis to attend a live, in-person CLE event, stated in the article, "As long as you don't mind not being in the same room as the speaker in the CLE, I think it's a great way to get credit. It's got ultimate flexibility and convenience. This is extremely valuable to today's busy attorneys." *Id.*

In February 2017, the ABA's House of Delegates adopted the ABA Model Rule for Minimum Continuing Legal Education. *See* [https://www.americanbar.org/cle/aba-cle-blog/2017/07/the\\_aba\\_s\\_mcle\\_model.html](https://www.americanbar.org/cle/aba-cle-blog/2017/07/the_aba_s_mcle_model.html). As the ABA's blog article reporting the passage of the final rule reported, the newly minted "MCLE Model Rule represents the culmination of more than two years of work by the ABA's Standing Committee on Continuing Legal Education ... in conjunction with more than 50 volunteers, including individual lawyers, ABA leaders, CLE regulators, CLE providers, judges, academics, law firm professional development coordinators, and state/local/specialty bar association leaders. *Id.* Among the key components of the rule is the accreditation of CLE formats that include distance learning. *See* [https://www.americanbar.org/content/dam/aba/directories/policy/2017\\_hod\\_midyear\\_106.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2017_hod_midyear_106.authcheckdam.pdf). Furthermore, the rule does not limit the amount of CLE credit that can be earned via distance learning or any other particular format. *Id.*

In a report to the ABA's House of Delegates, the Standing Committee on Continuing Legal Education, explained:

[T]he continuing education needs of lawyers vary based on the lawyer's length of experience, practice setting, and area of practice. For instance, an introduction to an individual state's laws of intestacy will be helpful to a newer lawyer engaging in general practice in a single state, but of little use to a lawyer with twenty years of experience practicing products liability law in federal courts in six Jurisdictions. It is imperative that lawyers have access to high-quality CLE that most meets their educational needs. One way to achieve that goal is to allow lawyers to access CLE in person or using technology-based delivery methods such as teleconferences and webinars. This Model Rule addresses that goal by recommending that Jurisdictions allow lawyers to choose CLE offered in a variety of program delivery formats and not limit the number of credits that can be earned using a particular delivery format.

...

This Model Rule addresses that goal by recommending that Jurisdictions accredit substantive law programs, law practice programs, and technology programs, and further recommending that Jurisdictions not limit the number of credits that can be earned in a particular subject area.

*Id.*

In keeping in line with the ABA's new model MCLE rule, and the 20 states who have placed no limits on the CLE credit that may be earned through distance learning, our Committee believes it prudent to increase the number of hours that may be earned outside of traditional live-CLE settings. Currently, Utah's CLE rules do not differentiate between self-study and distance learning opportunities, but, there appears to be a definite distinction between the two as recognized by many states around the country. For several states that do not limit the credit that may be earned through distance learning, a distinction exists in their CLE rules for self-study and distance learning. In many states, like Utah, the CLE rules allow for only a certain amount of self-study CLE hours. However, unlike Utah, those states provide no limitation on interactive CLE programming, including webinars, live teleconferences, and otherwise.

As the world continues to connect more and more via computers and other electronic devices, and as more and more lawyers are practicing law in rural, or other non-traditional settings, it only seems to make sense to allow for greater flexibility in the way lawyers obtain their continuing legal education. Our Committee thinks it is in the best interests of our fellow members within the bar to earn additional live CLE credits through online opportunities. We respectfully request the MCLE committee to consider an amendment to our MCLE rules to allow Utah lawyers to obtain an additional CLE credits through online programming or other programming that may qualify.

Considering the above, we propose re-defining self-study under Utah's MCLE rules to exclude "distance learning" type activities, and to create a new category of CLE credit for "Virtual Learning" that will allow a lawyer to complete up to six (6) of his or her CLE credits through online or other technology-based learning opportunities. Included with this memo is a proposed amended version of Utah's MCLE rules, which excludes reference to virtual learning opportunities. *See* Amended S.C.R.P. 14-402, 14-409, 14-410, and 14-413. In conjunction with the amended self-study and other rules, we have drafted a proposed MCLE rule for "Virtual Learning" that allows Utah lawyers to complete up to six (6) hours of the lawyer's MCLE requirements through such learning opportunities. *See* Proposed MCLE Rule for "Virtual Learning." The proposed rule tracks in part the ABA's recently adopted "Model Rule for Continuing Legal Education." *See* [https://www.americanbar.org/content/dam/aba/directories/policy/2017\\_hod\\_midyear\\_106.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2017_hod_midyear_106.authcheckdam.pdf).

By creating a new category of CLE credit for "Virtual Learning," Utah, as many other states have already done, would recognize the difference between "self-study" and "distance learning," and would allow lawyers to earn additional live CLE credit through technology-based

delivery methods such as teleconferences, video conferences, webinars, or other online presentations. By making such changes to our MCLE Rules, Utah would be in line with many other states that allow for distance learning, whether or not distinct from self-study. Our committee believes it is important to continue moving the practice of law in a more effective and efficient direction, and by allowing for more CLE credit to be earned through distance learning, the Utah State Bar would be recognizing that the way lawyers connect with the world is changing and would further recognize the ever-changing balance of lawyer demographics.



**Rule 14-410. Accreditation of MCLE; attendance; undue hardship and special accreditation.**

(a) Accredited CLE activities provided by this article must:

(a)(1) have as their primary objective to increase lawyers' professional competency;

(a)(2) be comprised of subject matter directly related to the practice of law; and

(a)(3) comply with the specific requirements set forth in this article with respect to each activity.

(b) The Board shall assign an appropriate number of credit hours to each accredited CLE activity.

(c) Attendance. A lawyer may attend a course in person or by live, interactive audio-video communication from a Utah state courthouse to another Utah state courthouse or from the Law and Justice Center to a Utah state courthouse or remotely (in a group setting or individually).

(c)(1) The total of all hours allowable for live, interactive webcasts that are broadcast from a Utah state courthouse to another Utah state courthouse or from the Law and Justice Center to a Utah state courthouse must be authorized by the Board.

(d) Ethics and professional responsibility courses. All courses or components of courses offered to fulfill the ethics and professional responsibility requirement under 14-404(a) must be specifically accredited by the Board.

(d)(1) Professionalism and Civility. All courses or components of courses offered to fulfill the professionalism and civility requirement under 14-404(a) must be specifically accredited by the Board.

(e) Undue hardship; special accreditation. Formal instruction or educational seminars which meet the requirements of paragraph (a) lend themselves well to the fulfillment of the educational requirement imposed by this article and will be readily accredited by the Board. It is not intended that compliance with this article will impose any undue hardship upon any lawyer because the lawyer may find it difficult to attend such activities because of health or other special reasons. In addition to accrediting formal instruction at centralized locations, the Board, in its discretion, may accredit such educational activities including, but not limited to, audio and video presentations, webcast, computer interactive telephonic programs, teaching, preparation of articles and other meritorious learning experiences as provided in this article.

**Rule 14-413. MCLE credit for qualified audio and video presentations without interactivity built into the presentations; webcasts; ~~computer~~ interactive telephonic programs; writing; lecturing; teaching; live attendance.**

(a) Credit will be allowed for self-study with Board accredited audio and video presentations without interactivity built into the presentations, ~~webcasts or computer interactive telephonic programs~~ in accordance with the following.

(a)(1) One hour of self-study credit will be allowed for viewing and/or listening to 60 minutes of audio or video presentations without interactivity built into the presentations, ~~webcasts or computer interactive telephonic programs~~ in accordance with Rule 14-408(a).

(a)(2) No more than 12 hours of credit may be obtained through self-study with audio or video presentations without interactivity built into the presentations, ~~webcasts or computer interactive telephonic programs~~. Upon application to the Board, the Board may grant a waiver, permitting a lawyer on active status to obtain all required hours of credit through self-study, if the lawyer:

(a)(2)(A) does not reside in Utah; and

(a)(2)(B) is engaged in full-time volunteer work for a religious or charitable organization.

(b) Credit will be allowed for writing and publishing an article in a legal periodical in accordance with the following.

(b)(1) To be eligible for any credit, an article must:

(b)(1)(A) be written to address a lawyer audience;

(b)(1)(B) be at least 3,000 words in length;

(b)(1)(C) be published by a recognized publisher of legal material; and

(b)(1)(D) not be used in conjunction with a seminar.

(b)(2) Three credit hours will be allowed for each 3,000 words in the article. An application for accreditation of the article must be submitted at least 60 days prior to reporting the activity for credit. Two or more authors may share credit obtained pursuant to this paragraph in proportion to their contribution to the article. No more than 12 hours of credit may be obtained through writing and publishing an article or articles.

(c) Credit will be allowed for lecturing in an accredited CLE program, part-time teaching by a lawyer in an approved law school, or delivering a paper or speech on a professional subject at a meeting primarily attended by lawyers, legal assistants or law students in accordance with the following.

(c)(1) Lecturers in an accredited CLE program and part-time teachers may receive three hours of credit for each hour spent in lecturing or teaching as provided in Rule 14-408(a).

- (c)(2) No lecturing or teaching credit is available for participation in a panel discussion.
- (c)(3) No more than 12 hours of credit may be obtained through lecturing and part-time teaching.
- (d) Credit will be allowed for lecturing and teaching by full-time law school faculty members in accordance with the following.
- (d)(1) Full-time law school faculty members may receive credit for lecturing and teaching but only for lecturing and teaching accredited CLE courses.
- (d)(2) No lecturing or teaching credit is available for participation in panel discussions.
- (d)(3) No more than 12 hours of credit may be obtained through lecturing and teaching by full-time law school faculty members.
- (e) Credit will be allowed for attendance at an accredited CLE program in accordance with the following.
- (e)(1) Credit is allowed for attendance at an accredited CLE program in accordance with Rule 14-408(a).
- (e)(2) A minimum of 12 CLE hours, with no maximum restriction, must be obtained through attendance at live in-person CLE programs.
- (f) The total of all hours allowable under paragraphs (a), (b), (c), and (d) of this rule may not exceed 12 hours during a reporting period.
- (g) No credit is allowed for self-study programs except as expressly permitted under paragraph (a).

**Rule 14-413.1. MCLE credit for qualified interactive satellite/groupcast; teleseminar; video replay; webcast/webinar; webcast/webinar replay; recorded on demand online; video or audio file; video or audio tape.**

(a) Credit will be allowed for virtual learning with Board accredited interactive satellite/groupcast, teleseminar, video replay, webcast/webinar, webcast/webinar replay, recorded on demand online, video or audio file, video or audio tape in accordance with the following:

(a)(1) One hour of virtual learning credit will be allowed for watching or listening to the following virtual learning activities in accordance with Rule 14-408(a):

(a)(1)(A) "Satellite/Groupcast" – a CLE program that is live broadcasted via technology to remote locations (*i.e.*, a classroom setting or a central viewing or listening location).

Attendees participate in the program in a group setting, and may interact in real time with the program faculty, commentators, or other attendees;

(a)(1)(B) "Teleseminar" – a CLE program that is live broadcasted via telephonic means to remote locations or to individual attendee telephone lines. Attendees may participate in the program in a group setting or individually, and may interact in real time with the program faculty, commentators, or other attendees;

(a)(1)(C) "Video Replay" – a CLE program that is recorded and presented in a group setting that is dedicated to the program with a qualified commentator answering questions before, during, or after the presentation. Attendees may interact in real time with the commentator or other attendees;

(a)(1)(d) "Webcast/Webinar" – a CLE program that is live broadcasted or recorded and broadcast online to remote locations or to individual attendees. Attendees may participate in the program in a group setting or individually, and may interact, whether in real time or otherwise, with the program faculty, commentators, or other attendees;

(a)(1)(e) "Online On Demand" – a CLE program that is recorded and delivered online to an attendee's desktop/laptop computer or other electronic device on demand where interactivity is built into the program;

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(a)(1)(f) "Video or Audio File/Tape" – a CLE program delivered through a downloadable video or audio file or delivered via a hard copy video or audio source (tape, DVD, DVR, or other formats) with interactivity built into the program.

(a)(2) No more than 6 hours of credit may be obtained through virtual learning. Upon application to the Board, the Board may grant a waiver, permitting a lawyer on active status to obtain all required hours of credit through self-study, if the lawyer:

(a)(2)(A) does not reside in Utah; and

(a)(2)(B) is engaged in full-time volunteer work for a religious or charitable organization.



## Rule 14-402. Definitions.

As used in this article:

(a) "Active emeritus" or "active emeritus lawyer" means a lawyer who has been a member of the Bar for 50 years or who is 75 years of age as of July 1 of the current year and who qualifies for active emeritus status as defined under the Bar's rules, regulations and policies;

(b) "Active status" or "active status lawyer" means a lawyer who has elected to be on active status as defined under the Bar's rules, regulations and policies; state judges, federal judges and magistrates, court commissioners, active senior judges and active justice court judges, both full and part time, meet CLE requirements through the Administrative office of the Courts;

(c) "Admission on motion applicant or lawyer" means a lawyer who has applied for reciprocal admission as defined under Rule 14-705 or has been admitted as such;

(d) "Approved law school" means an ABA approved law school as defined under Rule 14-701;

(e) "Bar" means the Utah State Bar;

(f) "Bar Examination" means the Bar Examination as defined in Rules 14-710 and 14-711 and includes the UBE, regardless of where the UBE was taken;

(g) "Board" means the Utah State Board of Mandatory Continuing Legal Education as set forth in Rule 14-403;

(h) "Board of Bar Commissioners" means the governing board of the Bar;

(i) "Certificate of Compliance" means a written report evidencing a lawyer's completion of accredited CLE as required and defined under Rule 14-414;

(j) "CLE" means continuing legal education;

(j)(1) "Live CLE" means a CLE program presented in a classroom setting where the lawyer is in the same room as the presenter;

(j)(2) "Live Attendance" means in person attendance at a Utah state courthouse where a course is streamed by live audio-visual communication from another Utah state courthouse or from the Law and Justice Center;

(j)(3) "Self-Study CLE Program" means a program presented in a suitable setting where the lawyer can view approved self-study activities;

(j)(4) "Virtual Learning" means a CLE program that is presented in a group or individual setting where the lawyer can participate in approved virtual learning activities that allow the lawyer to interact, whether in real time or otherwise, with the program, faculty,

commentator (who is available to offer comments and answer oral or written questions), or other attendees;

(k) "Comity Certificate" is a Certificate that is filed to show MCLE compliance with a reciprocal jurisdiction;

(l) "Compliance Cycle"- means the period of 2 years beginning July 1 through June 30;

(m) "Ethics" means standards set by the Utah Rules of Professional Conduct with which a lawyer must comply to remain authorized to practice law in Utah and remain in good standing;

(n) "Full exam" means all components of the Bar Examination as defined under Rule 14-710;\_

(o) "House Counsel" means a lawyer admitted with a restricted House Counsel license as defined in Rule 14-719, which is required and limits his or her practice of law to the business of his or her employer;

(p) "Inactive status" or "inactive status lawyer" means a lawyer who has elected to be on inactive status as defined under the Bar's rules, regulations and policies;

(q) "MCLE" means mandatory continuing legal education as defined under this article;

(r) "Multi-State Compliance Reciprocity" means Utah has established that MCLE compliance in certain states (Idaho, Oregon, Washington) may be used as MCLE compliance in Utah by an active lawyer whose principal practice is in one of the established reciprocal states;

(s) "New admittee" means a lawyer newly admitted to the Utah State Bar;

(t) "NLTP" means the New Lawyer Training Program as set forth in Rule 14-404 and Rule 14-808;

(u) "Presumptively approved sponsor" means those CLE sponsors or providers who qualify under the standards set forth in Rule 14-412;

(v) "Presumptive CLE accreditation" means those CLE courses or activities that qualify under the standards set forth in Rule 14-412;

(w) "Professionalism and Civility" means conduct consistent with the tenets of the legal profession by which a lawyer demonstrates civility, honesty, integrity, character, fairness, competence, ethical conduct, public service, and respect for the rules of law, the courts, clients, other lawyers, witnesses and unrepresented parties;

(x) "OPC" means the Bar's Office of Professional Conduct;

(y) "OPC ethics school" means the OPC biannual seminar on the Utah Rules of Professional Conduct which provides six CLE credit hours;

(z) "Supreme Court" means the Utah Supreme Court; and

(aa) "UBE Transfers" means applicants who gain admission by transferring a uniform bar exam score;

**Rule 14-404. Active status lawyers: MCLE, NLTP, admission on motion, multi-state compliance reciprocity, house counsel and UBE requirements.**

(a) Active status lawyers. Commencing with calendar year 2012, each lawyer admitted to practice in Utah must complete, during each two fiscal year period (July 1 through June 30), a minimum of 24 hours of Utah accredited CLE which must include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of ethics or professional responsibility must be in the area of professionalism and civility. Lawyers on inactive status are not subject to the requirements of this rule, or the NLTP requirements.

(a)(1) Lawyers on active status who reside in Utah and who are subject to the NLTP under Rule 14-808 must complete the NLTP requirements before the end of their first compliance cycle.

(b) NLTP. A lawyer who is obligated to and who successfully fulfills the requirements of the NLTP will receive 12 accredited MCLE hours for the reporting period ending June 30 of the second complete fiscal year following the lawyer's year of admission to the Bar. Twelve additional MCLE hours must also be completed during the lawyer's first compliance cycle, not including the New Lawyer Ethics program.

(b)(1) New Lawyer Ethics Program. New lawyers are required to attend the New Lawyer Ethics Program. This program satisfies the ethics requirement for the new lawyer's first compliance cycle.

(c) Admission on motion. A lawyer who fulfills the requirements of admission on motion as prescribed in Rule 14-705 satisfies the accredited MCLE requirements of this rule for the reporting cycle ending June 30 of the second complete fiscal year following the lawyer's year of admission. In addition, the admission on motion lawyer must pay the designated filing fee and must complete and certify no later than six months following the lawyer's admission that he or she has attended at least 15 hours of accredited CLE hours on Utah practice and procedure and ethics requirements as follows:

(c)(1) Nine credit hours must be comprised of accredited CLE courses on Utah practice and procedure.

(c)(2) Six credit hours must be comprised of the professional ethics course presented in OPC's ethics school.



(c)(3) Twelve of the 15 hours may be completed through self-study through the Bar's online CLE system. The 15 hours from (c)(1) and (c)(2) will apply towards the 24 hours required per two-year compliance cycle.

(d) Multi-State Reciprocity Compliance. An active lawyer whose principal practice of law is in a Multi-State Compliance Reciprocity State may elect to meet the MCLE requirements in that other state and use that state's MCLE compliance as compliance in Utah by filing a "Comity Certificate" for Utah CLE compliance.

(e) House Counsel lawyers. House Counsel lawyers must pay the designated filing fee and file with the MCLE Board by July 31 of each year a House Counsel Certificate signed by the jurisdiction where House Counsel maintains an active license evidencing that the lawyer has completed the hours of continuing legal education required of active lawyers in the jurisdiction where House Counsel is licensed. House Counsel lawyers that do not have a CLE requirement from the jurisdiction where House Counsel maintains an active license must complete 12 hours annually (July 1 – June 30) of Utah approved CLE to include 1 hour of legal ethics and 1 hour of professionalism/civility. At least half of the hours must be completed by attending live, in-person CLE.

(f) UBE Applicants. A lawyer who gains admission by transferring a UBE score and has less than two years of legal practice will comply with the New Lawyer Training Program. ~~If the lawyer gains admission by transferring a UBE score and has less than~~ two years of legal practice and receives a waiver of the New Lawyer Training Program because the lawyer lives out of the state, the lawyer will comply with the same rules as admission on motion lawyers. A lawyer who gains admission by transferring a UBE score and has more than 2 years of active practice will comply with the same rules as admission on motion lawyers. These lawyers must pay the designated filing fee and are required to complete and certify no later than six months following the lawyer's admission that he or she has attended at least 15 hours of accredited CLE hours on Utah practice and procedure and ethics requirements including the OPC's ethics school.

(g) Out-of-state CLE activities. CLE credit may be awarded for out-of-state activities that the Board determines meet standards in furthering a lawyer's legal education. The Board determines whether to accredit the activities and, if accredited, the number of hours of credit to allow for such activities. Out-of-state activities cannot substitute for the 15 mandatory CLE hours described in paragraph (c) and Rules 14-705(b) and 14-705(b)(1).

(h) Activities that may be regarded as equivalent to state-sponsored self-study CLE may include, but are not limited to, viewing of approved CLE audio and video, ~~and webcast presentations, computer interactive telephonic programs,~~ writing and publishing an article in a legal periodical, part-time teaching in an approved law school, or delivering a paper or speech on a professional subject at a meeting primarily attended by lawyers, legal assistants, or law school students.

(i) A lawyer's application for accreditation of a CLE activity must be submitted in writing to the Board if the activity has not been previously approved for CLE credit in Utah.

## Proposed Change to Rule 6.5

### Purpose: to Better Accommodate Brief Pro Bono Representation

The following proposed rule change to Rule 6.5 of the Rules of Professional Conduct contains changes marked in bold text. Additions are in underlined text and deletions are in strikethrough text.

#### Rule 6.5. Short-term Limited Legal Services Nonprofit and Court-Annexed Limited Legal Services Programs:

(a) A lawyer who, ~~under the auspices of a program sponsored by a nonprofit organization or court,~~ provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will receive compensation ~~or~~ provide continuing representation in the matter:

(a)(1) is subject to Rule 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(a)(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) Notwithstanding the above, other lawyers in a firm are not disqualified from representing clients adverse to a client who received free short-term limited legal advice from a lawyer in the firm, if the lawyer who provided the free short-term limited legal advice is timely screened from any participation in the adverse clients' matters and is apportioned no part of the fees therefrom.

Alternative 6.5(a)(2) instead of 6.5(c):

(a)(2) is not subject to Rule 1.10, nor is any other lawyer at the lawyer's firm, only if neither the lawyer nor the other lawyer knows that another lawyer associated with the lawyer in a law firm the lawyer is disqualified by Rule 1.7 or 1.9(a) with respect to the matter or if the lawyer is timely screened from any participation in the matter and is apportioned no part of the fees therefrom.

Links to existing rules:

- [Rule 6.5](#)
- [Rule 1.7](#)
- [Rule 1.9](#)
- [Rule 1.10](#)
- [Rule 1.18](#)

**Scenarios to consider:**

- 1. A non-profit or court-sponsored program provides free short-term limited legal services.**
  - a. Nothing changes other than the clients of the program must not be charged for the rule to now apply. Not charging the client was not an explicit condition of the previous version of the rule (6.5(a)).
- 2. A person asks a lawyer a question for which the lawyer would like to provide free short-term limited legal services.**
  - a. The lawyer need not perform a conflict check (6.5(a)(1)), but if the lawyer knows of a conflict (6.5(a)(1)) (for example, the lawyer's firm has a client who would be adversely affected by rendering the free short-term limited legal services involved in answering the question), then the lawyer should explain to the person that answering the question would cause a conflict of interest and the lawyer must terminate all conversation about the matter immediately after recognizing the conflict.
  - b. If the lawyer does not know of a conflict and wishes to proceed, the lawyer should explain to the person, who is now a client, that the lawyer is only providing ~~free short-term limited legal services and that doing so does not establish an~~ ongoing attorney-client relationship, so as to avoid any misunderstanding that the attorney is representing the client on an ongoing basis and that no compensation is expected (6.5(a)). The lawyer must secure the client's informed consent to these conditions before proceeding (6.5 [2]).
  - c. Then the lawyer may render the free short-term limited legal services.
  - d. No entry need be made in any firm-wide conflict-check system.
- 3. A lawyer's firm takes on a new client that is adverse to a client who received free short-term limited legal services from a lawyer at the firm.**
  - a. No action need be taken unless and until the lawyer who rendered the free short-term limited legal services recognizes the conflict.
  - b. When the conflicted lawyer recognizes the conflict the firm must timely screen the conflicted lawyer and apportion no part of the fee therefrom to the conflicted lawyer (6.5(c), see also 1.18(d)(2)(1)).
- 4. A lawyer is asked to provide free short-term limited legal services for a question which the lawyer recognizes would likely cause a future conflict with potential paying clients.**
  - a. The lawyer is, of course, under no obligation to render the advice.
  - b. If the lawyer decides not to provide the advice, the lawyer should explain to the potential client that doing so could potentially cause significant future conflicts of interest, and therefore declines to engage in the matter.
- 5. A lawyer unscrupulously offers free short-term limited legal services to a client in order to gain confidential information to aid an existing or potential paying client.**

- a. Since the lawyer knows of the conflict, there would be no exemption under rule 6.5(a)(1).
  - b. In the case of an existing client, this would be an immediate violation of 1.7.
  - c. It would be a violation of rule 1.9 if and when the lawyer engaged the paying client (see rule 6.5(a)(1)).
- 6. A lawyer provides free short-term limited legal services to a client and later agrees to provide more substantial legal advice to the client for a fee.**
- a. Rule 6.5 no longer applies once the legal assistance is not "short-term limited legal services" or once there is an expectation by the lawyer or the client that the lawyer will be compensated for the legal assistance.
  - b. The lawyer should first conduct a conflict check with the lawyer's firm and the matter is subject to the normal conflict of interest rules.

**TAB**  
**4**





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November 26, 2018

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Executive Director

**Board of Bar Commissioners**

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**Board of Bar Commissioners**

Attention: H. Dickson Burton, Bar President

Utah State Bar

645 South 200 East, Suite 310

Salt Lake City, Utah 84111-3834

Re: ***Fund for Client Protection  
Meeting of November 9, 2018***

Dear President Burton:

The following is a report of the meeting of the Fund for Client Protection a/k/a Client Security Fund which was held November 9, 2018 at the Law and Justice Center. The members of the Committee that were present are Committee Chair Stephen Farr, Linda Barclay, Joanna Bell, Kim Colton, Miles Jensen, Bradley Mumford and Mickell Jiminez appeared by phone. Also present were Barbara Townsend from the Office of Professional Conduct and Staff Liaison Christine Critchley. The Committee considered various claims and makes the following factual analysis and recommendations:

A.	<b>Claimant:</b>	<b>Teresa Lees</b>
	<b>Involved Attorney:</b>	<b>Bryan Adamson</b>
	<b>Disciplinary Status:</b>	<b>1-year suspension</b>

**FACTS:** The claimant met with the attorney on one occasion. She was seeking to find out whether a debt that was being discharged by her former husband, which debt was contained within the decree of divorce, could be discharged. The attorney agreed that he would look into the matter. He also had the claimant sign a contingency fee contract for the collection of the debt. Thereafter, the attorney proceeded on behalf of the claimant to collect the debt from the ex-spouse. The attorney failed to advise the claimant that he was going forward with the case. The attorney appeared in court without the claimant, who was not notified of the court hearing. After two appearances in court, the District Court judge handling the domestic case issued a fine/attorneys fee award against the claimant in excess of \$13,000. Thereafter, the judgment creditor garnished the income of the claimant towards the collection of the debt. Claimant testified that she suffered a loss of credit and that she eventually discharged the obligation in bankruptcy. Prior to the discharge, she had paid approximately \$2,200 out-of-pocket towards the judgment creditor. Notwithstanding the fact that claimant was seeking the entire \$13,000

November 26, 2018

Page 2

judgment as an award from the client security fund, the members of the committee declined to entertain that request, and in fact felt it was more equitable to simply award to the claimant the amount of money she had actually paid towards the collection of the debt. This case presented an interesting question. In all ordinary cases, the claimant is generally seeking money back from the fund that the claimant has paid to the attorney. In this case, the claimant paid nothing to the attorney. However, claimant felt that the attorney had gone forward with the case, had not properly advised the claimant that he was doing so, and had incurred on behalf of the claimant a \$13,000 obligation in favor of her ex-husband and his attorney.

**RECOMMENDATION:** The Committee recommends an award of \$2,200.

<b>B.</b>	<b>Claimant:</b>	<b>Scott Redhair</b>
	<b>Involved Attorney:</b>	<b>Denise Larkin</b>
	<b>Disciplinary Status:</b>	<b>3-year suspension</b>

**FACTS:** The claimant had retained the services of the attorney to represent him in a domestic action. The claimant testified that he felt that the attorney had earned \$2,000 of the \$3,000 retainer fee that claimant had paid to attorney. Both the claimant and the attorney appeared before the committee and testified. Following the review of all the testimony, the committee felt that the attorney had earned a portion of the fee that was paid by Mr. Redhair, but towards the end of her representation, had failed to communicate with him, had advised him on numerous occasions that he would be receiving a refund of the unearned portion of the fee, but the attorney failed to ever furnish the claimant with a final bill, or to advise the claimant of the amount of the refund. The committee felt that the testimony of the claimant was credible and was more accurate than the information provided by the attorney

**RECOMMENDATION:** The Committee recommends an award in the amount of \$1,000 which was the amount sought by the Claimant.

<b>C.</b>	<b>Claimant:</b>	<b>Priscilla Delao</b>
	<b>Involved Attorney:</b>	<b>Sean Young</b>
	<b>Disciplinary Status:</b>	<b>3-year suspension</b>

**FACTS:** The claimant retained the services of the attorney to represent her and others in an immigration matter. She paid to the attorney the sum of \$5,000. The attorney performed some of the work necessary for the immigration issues, however the total amount of the work was not performed. In the original retainer fee of \$5,000,

this included not only the attorneys fees which were quoted by the attorney, but also included the costs that would be paid to the immigration court. The claimant appeared at the committee hearing and testified to the issues which she had raised in her claim. At the conclusion of the testimony, the committee discussed the issues and agreed upon an award to partially compensate the claimant, and which also gave the attorney credit for the amount of the fee that the committee believed he had earned.

**RECOMMENDATION:** The committee recommends an award of \$2,200 for attorney's fees and an additional award of \$670 to repay the claimant for costs paid to the attorney which were not used. The attorney claims that those unused fees would have been sent back to him by the immigration court. However, due to a divorce, he does not have access to his files and accordingly, could not produce the refund checks from the immigration court.

D.	<b>Claimants:</b> <b>Involved Attorney:</b> <b>Disciplinary Status:</b>	<b>Mario Aguilara</b> <b>Brian Boggess</b> <b>Disbarred by the Nevada Supreme Court</b>
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**FACTS:** The claimant testified that he had retained the attorney numerous years before and attorney served as the corporate attorney for several entities owned or controlled by Mr. Aguilara. Mr. Aguilara testified that attorney received between \$5,000 and \$6000 per month as the corporate attorney. Mr. Aguilara testified that due to negligence all of the attorney, one of his companies had a judgment rendered against it in the amount of \$1,905.40. Claimant also testified that the attorney had retained at least one check which was intended to be paid to the business, and converted it to his own personal funds. Claimant was requesting reimbursement in the amount of \$71,905.40. It appears that a similar action had been brought by the claimant and against the attorney in the Nevada courts. At the time of the relationship between the claimant and the attorney, both claimant and attorney were residents of the state of Nevada and all of the legal services performed by the attorney for the claimant were rendered in the state of Nevada. Claimant has brought this action seeking reimbursement from the client security fund on the grounds that attorney was also licensed to practice in the state of Utah.

**RECOMMENDATION:** The committee recommends that the claimant contact Nevada's equivalent to Utah's client security fund and proceed with the case in Nevada.

E.	<b>Claimants:</b> <b>Involved Attorney:</b> <b>Disciplinary Status:</b>	<b>Dane Parker (CFO Prof. Services)</b> <b>S. Austin Johnson</b> <b>2-year suspension</b>
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November 26, 2018

Page 4

**FACTS:** This matter involved a transaction wherein the corporation deposited funds into Attorney's trust account. There is uncertainty whether the money represented an "investment opportunity". In any event, the money was transferred to a third party and lost to the corporation. Attorney previously had an attorney/client relationship with Claimant.

**RECOMMENDATION:** The committee denied Dane Parker's claim and advised him to pursue other possible processes, such as bringing a malpractice case against the attorney.

F.	<b>Claimant:</b>	<b>Jose Luis Sauz Verdin</b>
	<b>Involved Attorney:</b>	<b>S. Austin Johnson</b>
	<b>Disciplinary Status:</b>	<b>2-year suspension</b>

**FACTS:** This involved a matter where Mr. Johnson was basically practicing law through his wife's company and that entity made representations to Mr. Sauza about his immigration status and the work they were doing that was false and ended up playing a part in deportation. They also "represented" him related to a car accident, and from the documents it seemed that Mr. Johnson or his law firm received the settlement checks from the insurance company and never gave them to the family.

**RECOMMENDATION:** The committee awarded them \$8,250. Immigration and car accident case.

G.	<b>Claimant:</b>	<b>Delores C. Horn</b>
	<b>Involved Attorney:</b>	<b>Thomas M Burton</b>
	<b>Disciplinary Status:</b>	<b>3-year suspension</b>

**FACTS:** The claimant retained the services of attorney Thomas Burton for the purpose of handling the litigation of a civil lawsuit against John David Jensen of World Securities Group. The claimant paid attorney \$5,250 as a retainer fee to handle the case. The attorney was not diligent in following up on the case. The case was eventually dismissed, refiled, and dismissed again. The claimant testified at the hearing. The attorney did not appear either in person or telephonically. From the testimony offered by the claimant, and from the physical file produced, it appeared to the committee that the attorney had provided little if any meaningful services, and had repeatedly misrepresented the true status of the case to the claimant. Further, it appeared to the committee that he had committed legal malpractice in the handling of

November 26, 2018

Page 5

the case. It was also apparent that the attorney attempted to deceive the client and failed to advise her as to the actual status of her case.

**RECOMMENDATION:** The Committee recommends an award of \$4,250.

H.	<b>Claimant:</b>	<b>Jennifer Alexander</b>
	<b>Involved Attorney:</b>	<b>Thomas Burton</b>
	<b>Disciplinary Status:</b>	<b>3-year suspension</b>

**FACTS:** The claimant retained the services of attorney Thomas Burton to commence a civil lawsuit against an entity known as the Provo Canyon School. At the outset, claimant paid to the attorney the sum of \$6,000. Attorney claimed that he would immediately commence the bringing of that action. Although a draft complaint was produced by the attorney and sent to the client for her review, no meaningful services were ever rendered to the client and the lawsuit was never filed. The attorney also let the statute of limitations run and it became impossible for claimant to find another attorney and to file her action as she had intended. The claimant testified at the hearing. The attorney failed to testify either in person or by telephone. The committee determined that it appeared the attorney had committed malpractice, that he had performed no meaningful work or services, and that he misrepresented the true status of the case to the client. Accordingly, the committee concluded that the attorney was deceitful to the client in his handling of the case.

**RECOMMENDATION:** The Committee recommends an award of \$6,000.

The Committee has made recommendations that \$24,570. be paid out as compensation for the above-referenced claims. With these payments, the Fund's balance would be approximately \$271,430. Please contact me with any comments or questions

Sincerely,

**FUND FOR CLIENT PROTECTION**

*/s/ Stephen W. Farr*

Stephen W. Farr  
Committee Chair

SWF/nh

cc: Committee Members in Attendance

TAB  
5



**Bar Commission Policies for Consideration**  
**November 16, 2018**

**Response to Tanner LLC Management Comments October 12, 2018**

**Tanner Comment:** “The following deficiencies should be considered as part of the ongoing process of modifying and improving the Bar’s internal control practices and procedures over accounting and financial reporting.”

***Company Credit Cards and Expense Reimbursements***

**Tanner #1.** The Bar currently provides company credit cards to various employees. The risk of misappropriation of Bar assets is greater when Bar credit cards are provided to employees. We recommend the Bar consider canceling Bar-issued credit cards and implementing processes and controls for reimbursing employees for authorized purchases as they use their own credit cards. A single company credit card may be maintained for purchases too large to be reasonably purchased with employees’ personal credit cards or other means of payment.

**Staff Recommendation.**

Six Bar employees have company credit cards issued in their names: John Baldwin, for some occasional general Bar and Commission charges, large and small, including hotel reservations and conference registrations for Bar officers made by office staff and some Bar-related travel charges for himself when not on his personal credit card; Richard Dibblee, for some general Bar charges, usually large, including building expenses and event food and beverage charges made by office staff when required and Bar-related travel charges when not on his personal credit card; Billy Walker, for large OPC charges when necessary and OPC-related travel charges for himself when not on his personal credit card and for other OPC staff travel; Michelle Oldroyd for some occasional large general CLE events, including hotel pre-payments and speaker reservations; and Syd Kuhre, for MCLE charges when necessary, including hotel reservations and conference registrations for MCLE Board members and some MCLE-related travel charges when not on her personal card. There is also a card issued to the IT Department which is used for recurring on-line charges for Bar and section domain names, network security reviews, and regular web services.

Travel expenses are paid for within approved budget lines and approved by supervisors. Bank charges are approved by supervisors and charges are itemized and reimbursements are reviewed by two members of the accounting department and checks are signed by the Executive Director if under \$1,000 and the Executive Director and a member of the Executive Committee if over \$1,000. Recurring charges for IT and web services are reviewed as incurred by the IT Department and the Finance Department.

We believe that the unintended risks of mistake or even the unlikely possibility of misappropriation is greatly minimized by the multiple layers of review and approval pre and post-charge. We also believe that the comment may have resulted primarily because of issues when travel charges for food events or per diem expenses have been pre-paid and employees may have had some food charges included in events or group dinners, and can represent that the use of the Bar cards is clearly tracked from use to billing and is quickly identified, confirmed and approved.

**We propose that that the convenience of helping volunteers with their hotel reservations and conference registrations should continue to be performed by Bar staff with a Bar credit card and that a Bar credit card may continue to be used for the hotel reservations and conference registrations for Bar staff, but all other travel expenses, including travel, food, transfers, appropriate incidentals and rental cars be paid for by staff and Bar officers who should then seek reimbursement according to Bar policies.**

*Tanner Comment: "Additionally, we noted several expense reimbursements during the year under audit which did not adhere to best practices, which included the following:"*

**Tanner #2.** Volunteers submitting reimbursement requests several months after the expenses are incurred.

#### Staff Recommendation.

The auditors proposed that the Bar enforce a strict limit on reimbursements of 30 days following the expenditure or permit exceptions only with the approval of the Bar president. The current policy requires that the request for reimbursement be received within 60 days or reimbursement will not be made, but the policy is not strictly followed with Commission members or volunteers due to our valuing their participation if we receive the proper documentation. We know when Commission members travel and inform them that our policy requires them to submit requests for reimbursement within 60 days of expenditures or events and we remind them regularly after travel if we have not received their requests. We also notify section leaders and other volunteers of our policy and remind them when necessary.

**We propose that the 60-day policy be retained and formally include that staff shall remind Commission members and volunteers as much as necessary to receive all requests for reimbursements with proper documentation according to current policy, but that the 60-day policy continue to not be strictly followed as long it is not regularly an issue with an individual member or volunteer.**

**Tanner #3.** Employees submitting reimbursement requests for per diem expenses prior to the associated travel.



Staff Recommendation.

Most employees are able to incur expenses on their personal credit cards when traveling, but some non-FSLA exempt employees may have issues with their limits.

**We propose that there be no per diem expenses paid to employees prior to travel except as specifically approved by the Executive Director upon the request of an employee's supervisor.**

**Tanner #4.** Regular use of credit card statements in lieu of receipts to support reimbursement requests, resulting in insufficient support to determine whether expenses are appropriate.

Staff Recommendation.

**We propose that the above be strictly followed and that only specific receipts showing that an expense is Bar-related, approved by the appropriate person, and specific to the event or expenditure be accepted as proper documentation for receipt and that credit card statements showing only the expense not be accepted.**

**Tanner #5.** Requests for reimbursement of the same expense submitted multiple times.

Staff Recommendation.

There have been only a couple of rare instances in the past where a commissioner or other volunteer has forgotten about having already submitted a request and has been reimbursed for a Bar-related expense. Those instances have been discovered by staff and the double reimbursement has not happened.

**We propose that current policy protects against this rather irregular forgetfulness by volunteers and that we will continue to have the multiple approval and checks which have served us in the past.**

**Tanner #6.** Employees and volunteers charging company credit cards and hotel master accounts for both business and personal expenses, requiring Bar administrative personnel to verify which portion of the charge relates to personal expenses and requesting reimbursement from the employee or volunteer.

Staff Recommendation.

Master accounts are used to assure housing for speakers, volunteers and staff at the lowest prices at conventions. At times, our block has allowed us to accommodate last-minute needs for Bar commissioners, volunteers, speakers and presenters. Issues arise when a commissioner or staff member has reserved a room on the master account but incidentals or additional room

nights intended to be paid for by the individual have not been put on his or her personal credit card either because it was not asked for at check-in or hotel staff failed to have it put on the personal credit card. Those instances where employees and volunteers have charged personal expenses on the master account have been discovered through the regular review by Bar staff following the convention (Richard Dibblee or Michelle Oldroyd) but the auditors suggest this is not a “best practice.”

**We propose that the Bar continue to use a master account at conventions for speakers and presenters, but that it not be available for Bar commissioners, volunteers or employees. The Bar staff will continue to help commissioners, volunteers and staff with sufficient notice and contact information to secure the best rates on the convention hotels in ample time to prepare and plan but they will no longer be on the Bar’s master account at the hotel.**

**Tanner Comment.** *“We recommend that the Bar implement stricter policies and controls surrounding its reimbursement processes to ensure that:”*

**Tanner #7.** Payments are not made without adequate support for an expense’s business purpose and appropriateness, including pre-authorization where appropriate.

Staff Recommendation.

**We agree that this should be strictly enforced by the finance and executive staff.**

**Tanner #8.** Personal expenses are kept separate from all reimbursed transactions prior to submission for reimbursement.

Staff Recommendation.

**We agree that this should be strictly enforced by the finance and executive staff.**

**Tanner #9.** Reimbursement requests (should be) made timely.

Staff Recommendation.

**See #2 above.**

**TAB**  
**6**

**UTAH STATE BAR  
BOARD OF BAR COMMISSIONERS  
MINUTES**

**NOVEMBER 16, 2018**

**LAW AND JUSTICE CENTER**

- In Attendance:** President H. Dickson Burton and President-elect Herm Olsen.  
Commissioners: Grace Acosta, John Bradley, Steven Burt, Heather Farnsworth, Chrystal Mancuso-Smith, Mark Morris, Mark Pugsley, Tom Seiler, Cara Tangaro, Heather Thuet, and Katie Woods.
- Ex-Officio Members:** Dean Robert Adler, Nate Alder, Erik Christiansen, Kate Conyers (for Women Lawyers), John Lund, Margaret Plane, Rob Rice, and Lorraine Wardle.
- Not in Attendance:** Mary Kay Griffin, and Ex-Officio Members: Abby Dizon-Maughan, Amy Fowler, Dean Gordon Smith, Sarah Starkey, and Bebe Vanek.
- Also in Attendance:** Executive Director John C. Baldwin, Assistant Executive Director Richard Dibblee, and General Counsel Elizabeth A. Wright.

**Minutes: 9:00 a.m. start**

**1. President's Report: H. Dickson Burton**

**1.1 Welcome.**

**1.2 Presentation of NLTP Mentoring Award to Denise Dragoo.** The Commission presented the Outstanding NLTP mentoring award to Denise Dragoo. Ms. Dragoo was not able to attend the Fall Forum, so the award was presented at this meeting.

**1.3 Legislative Breakfast Follow-Up.** Dickson Burton reported on the breakfast the Commission hosted on November 14, 2018 for lawyer legislators. The breakfast took place at the Capitol and was very well attended. The breakfast has historically been hosted in January but was moved to November in order to accommodate busy legislator schedules during the general session.

**1.4 Report on Access to Justice Summit:** John Lund reported on the Access to Justice Summit that took place on October 23, 2018 at the Law and Justice Center. The Summit was put on by the Access to Justice Commission and brought together groups that provide legal services to or legal references for low income individuals. The Summit is part of an ongoing effort to make sure organizations know what services other organizations offer and to improve coordination of those services. Mr. Lund reported that the event was well attended and received.

- 1.5 Report on Fall Forum.** Dickson Burton reported on the Fall Forum which took place on November 1 and 2, 2018. For the first time, a convention had an entire track devoted to lawyer well-being. The practical technology skills track was very well attended. The Commission discussed the need to have a common calendar so the Fall Forum and other lawyer events that took place that weekend to do not conflict.
- 1.6 Report on Professional Sales Tax Proposals.** Dickson Burton reported that the Governor's Office of Management and Budget (GOMB) is considering imposing a tax on professional services, including legal services. The GOMB projects a need for revenue because of falling sales taxes as our economy shifts to a serviced based economy. The Commission discussed the potential harmful effect of a tax on legal services and what other states have done on the issue of a tax on legal services.

## 2. Action Items

- 2.1 Lobbying Rebate Process & Calculation.** After discussing the reason for the changes, **Tom Seiler** moved to approve changes to legislative activity rebate rule 14-106 to make it consistent with the method the Bar uses to calculate the rebate. **Mark Pugsley** seconded the motion which passed unopposed.
- 2.2 Select Bar ABA Delegate.** After discussing the applicants, the Commission conducted two rounds of secret balloting and chose **Nate Alder** to serve a fourth 2-year term as one of the Bar's ABA Delegates.

## OUT OF ORDER

## 3. Information Items

- 3.1 UCLI Report.** Retired Justice Christine Durham, Fran Wickstrom and Kristen Olsen gave an update on the Utah Center for Legal Inclusion (UCLI). UCLI was created to promote diversity in the profession with programs that will ultimately begin as early as grammar school. Updates include obtaining 501(c)(3) status so fundraising can begin, hiring Aida Neimarlija to serve as Executive Director and the development of a strategic plan.
- 3.2 Innovation in Law Practice Committee Report.** Greg Hoole and Dave Duncan reported on the work of the Innovation in Law Practice Committee. Goals of the Committee include working to change the lawyer advertising rules to make them conform with new technology, put practice pointers on the Bar website and working to allow more live CLE credit for interactive web CLE programs.
- 3.3 Disaster Legal Response Committee.** Committee Chair Tracy Olson reported on the work of the Disaster Legal Response Committee. Visibility is biggest problem. Lawyers do not know the Committee exists to help lawyers know what their ethical obligations

are to clients in the event of a disaster and to provide services to affected to citizens in the event of a disaster. A *Bar Journal* article and a presentation at the Spring Convention are planned to educate members about the work of the Committee.

## **OUT OF ORDER**

**2.3 Client Security Fund Committee Report.** After discussing the Report, **John Bradley** moved to accept the Committee's report and payout of \$28,065. **Heather Farnsworth** seconded the motion which passed unopposed.

## **4. Discussion Items**

**4.1 Discipline Notice in Bar Journal.** Herm Olsen reported that attorney Elizabeth Bowen, who represented two individuals found not to have violated the Rules of Professional Conduct, thinks there should be a public record of lawyers who prevail in disciplinary actions. Margaret Plane pointed out that the ABA review of Utah's disciplinary process recommended a database of all attorney discipline outcomes. Herm Olsen and Grace Acosta will write a letter to the Supreme Court recommending more transparency in the discipline process, including a searchable database of discipline outcomes.

**4.2 Adding Public Members to Bar Commission.** The Commission discussed the fact some other Bars are adding more public members to their governing bodies to ensure the public is appropriately represented and protected. **Steve Burt, Erik Christiansen** and **Chrystal Mancusco-Smith** agreed to serve on a committee to investigate and report on whether Utah should add more public members to the Commission.

## **5. Executive Session.**

**The meeting adjourned at 1:00 p.m.**

## **Consent Agenda**

1. Approved Minutes from the October 12, 2018 Commission Meeting.
2. Approved Military Law Section By-laws.
3. Approved a \$100 Practice Pending Admission application fee.

## **Handouts:**

1. GOMB Tax Modernization Chart
2. Proposed changes to Rule 6.5
3. UCLI Strategic Plan



**TAB**  
**7**

# The Salt Lake Tribune

## Gov. Herbert's office prepares plan to expand sales tax and increase the tax on food



(Francisco Kjolseth | Tribune file photo) Gov. Gary Herbert holds a press conference to release his proposed 2018 budget at Davis Technical College in Kaysville, Dec. 13, 2017.



By Bethany Rodgers

Published: 5 days ago  
Updated: 5 days ago

Gov. Gary Herbert's office is readying a proposal to expand Utah's sales tax — potentially to increase the rate on food purchases and to tap into a ballooning service economy.

The brewing reform effort is related to concerns that consumer spending on taxed goods isn't growing as quickly as spending on services, much of which lies outside the sales-tax dragnet. While these economic shifts have been gradual, state officials are feeling heightened pressure to adapt because they're about to lose some budgetary wiggle room, said Phil Dean, state budget director and chief economist.

"We do think that, given some of the constraints that we're going to run into pretty soon on the budget flexibility side, we think it's important to act this session on these issues," Dean said.

The reform plan is still taking shape, he added, and Herbert will release more details<sup>49</sup> with the rollout of his budget proposal next week.

For the most part, policymakers are focused on broadening the sales tax to what Dean calls “consumptive services,” ones that generally require a physical presence in the state. Examples would be pest extermination, carpet cleaning, home repair and installation services, massages, haircuts and other personal care services. Officials aren’t as interested in tacking on the sales tax for financial and health care services, he said.

The governor’s proposal might also call for applying the full sales tax rate to food, which is currently taxed at a level less than half that of other goods.

Dean said these adjustments could be coupled with a slight reduction to the state’s 4.7 percent sales tax rate, potentially yielding a net tax decrease in the near term.

However, the state’s course correction could set the stage for faster revenue growth in the future. It could also mean a heavier tax burden for residents down the road, compared to what they would’ve paid without the changes, said Juliette Tennert, chief economist at the Kem C. Gardner Policy Institute at the University of Utah.

“You’d be getting back on trend with the economy,” Tennert said.

That’s because people have changed their spending habits in recent decades, and the sales tax hasn’t kept up with the transformation.

Goods, which are typically subject to the sales tax, accounted for about 53 percent of consumer spending in Utah in 1960. Now, they make up 31 percent of consumer spending, with nearly 70 percent going to largely untaxed services, according to a report released earlier this month by the policy institute.

Instead of buying movies, people are using Netflix. Instead of purchasing lawn mowers, they’re paying for landscaping crews. Instead of buying CDs, they’re subscribing to streaming services. Increased health care spending is also driving the trend, the report found.

That doesn't mean sales-tax proceeds have been drying up; data made public Wednesday showed that the state's sales tax revenues have increased by 7.2 percent so far this fiscal year compared with the same period last fiscal year. But these revenues haven't been growing as quickly as Utah's economy, Tennert said.

If people were still spending money the way they did three decades ago, the Legislature would be bringing in an additional \$650 million each year, the policy institute's report found.

Dean said the goal of the reform package would be to widen the tax base rather than straining the current system with rate increases. Raising the sales tax on food might also help distribute the weight, he said.

If they do go that route, he said, officials "feel very strongly" they need to do something to blunt the financial blow to lower-income people.

"Whether that's an income-tax credit that offsets and more than offsets that [tax increase] or if it's a reduction directly at the cash register ... some sort of regressivity offset needs to be part of that package," he said, adding that these benefits might apply to low- and middle-income families.

Bill Tibbitts, associate director of Crossroads Urban Center, said he's concerned a higher food tax would harm lower-income people, no matter how it's sliced.

"Any sort of effort to mitigate this at the state level is going to be limited," Tibbitts said. "It's going to leave a lot of people out."

For instance, an income-tax break might not help seniors or people with disabilities, he said.

While the overall trends have been moving in the right direction, Utah still has more than 100,000 households that experience food insecurity, said Gina Cornia, executive director of Utahns Against Hunger.

She said her group would generally oppose attempts to raise the sales tax on food.

“While each time you go grocery shopping, that amount that is due in taxes isn’t significant, over time, it is,” she said. “And that tax burden on lower-income families just adds up more than it does for families who aren’t low-income.”

Utah cut its sales tax on food to 1.75 percent in 2006 and 2007 at the urging of then-Gov. Jon Huntsman, whose lieutenant governor was Herbert. Since then, some legislators have attempted to return the tax on food to its full rate. Last year, Senate leaders pushed hard to hike the food tax but finally gave up in the face of House opposition.

Others have sought to eliminate the tax entirely. Rep. Tim Quinn last session advanced a bill to get rid of the state’s tax on food, but the measure failed in the Senate.

“Those who are less fortunate spend a disproportionate amount of their income on food,” the Heber City Republican said.

In 2017, middle-income households spent about 14 percent of their wages on food, compared to about 34 percent for the poorest households, according to the U.S. Department of Agriculture.

Quinn said he doesn’t consider grocery store credits for lower-income families a practical offset for hiking taxes on food, pointing to the possibility for fraud and abuse.

“It makes better sense to either leave it [the tax] as it is or remove it entirely,” he said.

The representative said he’s not planning on renewing his push to eliminate the tax on food this session, but he is drafting a bill that would broaden the sales tax to include certain services.

Utah Sen. Stuart Adams, incoming Senate president, said he’s pleased the governor is leading the way toward tax reform, although he wants to see Herbert’s plan before expressing an opinion on it.

Unlike many other commodities, people keep buying food in good times and bad, so fully taxing it could stabilize state revenues, he said. That way, the state doesn't have to slash aid and services as the economy ebbs and flows, he added. <sup>52</sup>

"If you can find a stable tax, you might be able to give credits that go to the low-income that stay consistent as you go through those roller-coaster cyclical events," Stuart, R-Layton, said. "That's why I'm in favor of broadening the base."

But Stuart said he wouldn't want to increase the tax on food without doing something to help lower-income families.

Tennert said the policy institute wrote its report on sales-tax modernization because there's an increasing awareness of the need for reforming the system.

One factor is the impending loss of flexibility in managing the state's general fund, Dean said. A state constitutional amendment passed in 1996 gave Utah officials the power to support public colleges and universities with income-tax revenues previously reserved for K-12 education. Since then, state officials have been shifting higher education costs from the general fund into this income tax-fed fund.

That changeover has freed up space in the general fund, which is chiefly filled with sales tax dollars. But once the transfer is complete in the next few years, Utah policymakers will have less budgetary wiggle room and will have to rely more heavily on the sales tax to fuel general fund spending growth, Dean said.

"By better aligning the sales tax with the modern economy and how it works," he said, "it changes the long-term trajectory of the sales tax to be more sustainable."



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## Utah policymakers to consider sales tax reform to keep up with modern economy

SALT LAKE CITY — Utah policymakers might consider imposing sales tax on some previously untaxed services as changing consumer spending habits, technological advances and an aging population eat away at revenue.

The sales tax base is not keeping pace with the state's growing economy, which hurts government's ability to meet public needs. Utah currently taxes most goods but few services.

"I think there is a broad understanding that there are structural trends that are impacting sales tax," said Natalie Gochmour, director of the Kem C. Gardner Policy Institute at the University of Utah.

"There is no question we have been moving to a service economy that's not taxed like goods are."

The continued growth of online shopping also affects sales tax revenue, though a recent U.S. Supreme Court ruling paves the way for states to collect on internet sales.

Gov. Gary Herbert recently said the state hasn't really considered sales tax changes because of the shifting marketplace, "but I think it's something we ought to talk about now."

"That's something we're going to have to have a debate on as we look at tax reform going forward if we want to have the optimal tax policy that will allow us to have a growing, increasing, dynamic economy," he said at a November discussion at the policy institute.

Herbert is scheduled to released his 2019-20 state budget proposal next week, including some tax reform recommendations. The Utah Legislature, which controls and approves the budget, will meet in general session starting at the end of January.

The state, he said, should be looking at ways to broaden the tax and lower the rate.

"Frankly, I think there will be opportunities to do that, which we'll be exploring," Herbert said. "We may have a tax cut in our future if we play our cards correctly."

### Related story:



## **Lawmakers looking at Jan. 1 to start online sales tax collections**

Starting Jan. 1, out-of-state online retailers affected by a recent U.S. Supreme Court ruling will have to collect sales taxes on purchases made by Utahns under a bill that could be considered in a special legislative session.

Paul Edwards, Herbert's deputy chief of staff, said the governor's budget proposal released next week will address Utah's reliance on sales tax, though it won't include lots of specifics because it's an issue the Legislature has to work out.

"We do need to find a way to have more of the economy contribute to what the state pays for," he said. "In doing so, it's our great hope that we can lower the rate and return some of the surplus to the taxpayer."

The governor's office, he said, sees the issue as a multiyear discussion.

Edwards said the governor would first look at eliminating sales tax exemptions and then at taxing "luxury" services, such as elective cosmetic surgery and use of limousines.

Services used to account for less than half of personal spending but now make up more than two-thirds. As consumer preferences continue to change, services will represent an even larger share of spending, according to a Gardner Policy Institute report released in November.

Utah now taxes 64 of 176 major services, putting it about in the middle of all states. It taxes amusement park admissions and hotel rooms, for example, but does not tax health care, prescription drugs, medical devices, haircuts, lawn care or legal services.

In the 2000s, the Legislature and governor cut sales, personal income and corporate income taxes and reduced the sales tax rate on food while significantly expanding the personal income tax base.

If lawmakers want to lower sales tax rates, they should consider fully taxing residential energy and food, the report says, posing the question, "Are there better ways to target those in need?"

Edwards said it's "awfully hard" to think of taxing necessary medical services and pharmaceuticals. But increasing the sales tax on food is a "wide-open discussion." Lawmakers have tried to both raise and eliminate the tax since it was lowered a dozen years ago.

Any increase in the sales tax on food, he said, would be offset in a "very direct way" with some type of subsidy or earned-income tax credit for lower wage earners.

Edwards said the governor's office recognizes that a necessity like food is much larger and critical part of a poor person's budget.

While Utah's average combined state and local sales tax rate is in the bottom third of Western states, the total tax burden is already relatively high compared to most neighboring states, according to the report.

The policy institute suggests dealing with the issue while the state's economy is strong.

"Can Utah use the prosperous time like now to address the structural problem in sales tax? The answer is yes," Gochmour said. "If we act now, can we avoid making more difficult decisions during hard economic times? The answer to that is yes."

Gochmour said if the governor's budget proposal addresses the issue and if legislators take action, it would be a "very forward-thinking move."

According to the report, policymakers have three options to prepare for future fiscal problems: cut or limit spending, change sales tax rates or broaden the sales tax base. A combination of the three might make the most sense, the report says.

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# TAX MODERNIZATION

*Image taken by  
STOCK*

**Back to Issues**

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## *OUR MISSION ON TAX MODERNIZATION*

***"When everyone pays their fair share,  
everyone pays less tax." - Governor Gary R.  
Herbert***

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### THE STORY:

Governor Herbert believes that our current state tax system is out-of-date and out-of-balance.



This is especially true of our sales tax structure. In the 1980s, for example, sales taxes covered about 70 percent of the economy. Today sales tax covers just over 40 percent. Much of that comes from transitioning from a goods-based to a service-based economy. If the sales tax structure remains unchanged — even with improved government efficiency — state and local governments will not be able to pay for core services in the future. Policymakers will then have to choose between increasing tax rates or forgoing basic services. Both of these options could harm the economy.

That is why, in his 2020 Fiscal Year Budget Proposal, Governor Herbert asked our state legislature to modernize our tax system — especially with respect to sales and use taxes — during the coming 2019 General Legislative Session.

Consider some peculiarities of how we collect sales and use tax.

Did you know that limousine services aren't taxed but auto repairs on the family car are taxed? Did you know that lobbyists and lawyers don't have to tax their services, but computer repair persons do? In Utah, you don't have to pay taxes on an elective liposuction procedure, but women pay taxes every time they buy feminine hygiene products.

Notice a pattern here?

Many of these tax exempt consumption services disproportionately favor those well-off enough to pay for limos, lobbyists or liposuction, while leaving the tax burden for essential services on Utahns who can't afford those services.

In fact, a Utah family of three with \$25,000 in income directly pays about 3 percent of its income in sales tax; a similar family with \$150,000 of income directly pays only about 1 percent of its income in sales tax.



Governor **GARY R. HERBERT**

We can actually reduce the sales tax rate in Utah if more goods and services like limos, lobbyists and liposuction contributed to our sales tax base.



The Governor's 2020 Budget Proposal **asks the legislature to return \$200 million in budget revenues to the taxpayers but cutting the general sales tax rate.**

I want to see some adjustments that account for how Utah taxes were inadvertently raised for large families when federal tax reform passed, and I want to cut the general sales tax rate.

When everyone pays their fair share, everyone pays less tax.

The Governor's 2020 Budget Proposal **asks the legislature to return \$200 million in budget revenues to the taxpayers but cutting the general sales tax rate.**

**In the short term, Governor Herbert's proposed tax cut will actually result in a net tax decrease for everyone.** Simultaneously, lawmakers will be asked to review industries and services that are currently going untaxed (limos, lobbyist, liposuction, and more) and be asked to remedy the inequitable application of sales tax in Utah.

A shift from goods to services will make the system more fair.

It would create a long-term path for fiscal stability that will allow state and local governments to provide essential services as our economy changes.





When everybody pays their fair share, then everybody pays less taxes.

Governor **GARY R. HERBERT**



See Governor Herbert discuss tax modernization in the video below:



## FREQUENTLY ASKED QUESTIONS:

### **Q: Will this increase the amount I pay in taxes?**

A: In the short-term it absolutely will not. Governor Herbert's proposal includes setting aside \$200 million in the state budget each year (from surplus funds) so that the sales tax rate can be cut. Ideally, this will help to lower the state sales tax rate from 4.85% to less than 4%. Currently, a Utah family of three with \$25,000 in income directly pays about **3 percent** of its income in sales tax; a similar family with \$150,000 of income directly pays about **1 percent** of its income in sales tax. Governor Herbert's plan to modernize the Sales and Use Tax will bring greater balance to everyone.

### **Q: When will the tax laws go into effect?**



A: Governor Herbert has asked our state legislature to modernize our tax system especially with respect to sales and use taxes — **during this coming legislative session**. If the legislature identifies this as a priority and proceeds with this plan, we could expect to see changes as early as July 2019.

#### **Q: What new services will be taxed?**

A: New taxable services will need to be identified and determined by the Utah Legislature, however Governor Herbert believes that services which are traditionally only accessible by- or predominately accessed by high-income households should be identified. Some questions the governor poses are:

- Did you know that limousine services aren't taxed, but auto repairs on the family car are?
- Did you know that lobbyists and lawyers don't have to tax their services, but computer repair persons do?
- In Utah, you don't have to pay taxes on an elective liposuction procedure, but women pay taxes every time they buy feminine hygiene products.

The governor believes this is unfair and has created imbalance. Many tax exempt consumption services disproportionately favor those well-off enough to pay for limos, lobbyists or liposuction, leaving the tax burden for essential services on Utahns who can't afford those services.

#### **Q: Is sales tax on food going up?**

A: Governor Herbert has expressed openness to discussing any and all options with the Utah Legislature. He is not pursuing an increase in sales and use tax as is applied to food at this time.

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*December 6, 2018*

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