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Spring Convention registration inside.



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*The lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity.
We envision a just legal system that is understood, valued, and accessible to all.*

Cover Photo

A Wintery Interlude by Utah State Bar member Gayanne K. Schmid.

Gayanne K. Schmid is a partner in the family law firm of Schmid Jacobs. Asked about her photo, Gay said: Twelve inches of fresh powder beckoned me to Big Cottonwood Canyon one morning. Enroute I noticed that my favorite mountain stream just by the road was totally obscured under the heavy snowfall. After a wonderful morning of skiing at Solitude, I paused this time at the stream, which had broken through the snow and was cascading briskly over the rocks, the crisp sound eclipsing the silent forest behind. I was fortunate to have my camera to catch this winter scene.



SUBMIT A COVER PHOTO

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



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

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

GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

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

ARTICLE LENGTH

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

SUBMISSION FORMAT

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

CITATION FORMAT

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

NO FOOTNOTES

Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial endnotes to convey the author's intended message may be more suitable for another publication.

ARTICLE CONTENT

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

EDITING

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

AUTHORS

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

PUBLICATION

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

LETTER SUBMISSION GUIDELINES

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to BarJournal@UtahBar.org or delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.



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Lawyers: A Serving Profession

by H. Dickson Burton

We have just finished a wonderful time of year, which most of us hate to see go (though it does seem to come around again more quickly every year 😊). What makes the season so warm and memorable is undoubtedly the extra emphasis on service and giving. It seems that at the end of the year, we try to consider, more than at other times, the plights and burdens of those around us. We consider how we can do something, however small, to lighten those burdens. I am in particular awe of the service many in our profession give at this time of year – and throughout the year. Indeed, I am convinced that service is a hallmark of our profession.

Leonard Burningham is one great example of a lawyer providing extraordinary service. For twenty-nine years Leonard, along with Lincoln Mead, a long-time former employee of the bar, and many others, has volunteered countless hours organizing, managing, and providing much labor to gather food, clothing, and cash donations from lawyers, law firms, their employees, court personnel, and others. Many of you have contributed to this food and winter clothing drive and do so every year. The many donations have benefited various charities and shelters in our community, particularly serving those in greatest need of the basics of food, clothing, and shelter. Thanks Leonard, for your years of remarkable service.

There are many other and even countless examples of attorneys serving in our community in diverse ways, and not just at the end of the year. Attorneys are giving of themselves throughout the year to lift up individuals and communities at food banks, charities, shelters, youth recovery and rescue organizations, and church groups. Many lawyers volunteer on community councils, non-profit boards and political organizations, youth sports groups, and on and on.

I know attorneys who spend time every week serving meals at homeless shelters and often organize other attorneys or family members to join them. Others spend regular time as big brothers and big sisters to at-risk youth. One prominent attorney friend donates perhaps twenty hours or more every week to Boy Scout

troops organized in local refugee communities. His efforts benefit literally hundreds of young men newly arrived in what is, to them, a strange new country. This attorney's donated time often includes hours of free legal advice and help to the refugee families as well.

I have also come across a number of attorneys who donate time to local youth sports clubs and organizations on boards and panels as well as administrative positions in those groups. And of course countless attorney moms and dads donate time as volunteer coaches.

All of us know attorneys in our firms and offices who are volunteering countless hours to such groups and are doing so ourselves. And all of these volunteer attorneys are motivated by the need to help others and to build our communities. And many of the opportunities particularly benefit from the unique training and good judgment lawyers possess. Other service opportunities just need willing hands and willing hearts.

Many other attorneys are not just volunteering but have chosen career paths that do not have the financial rewards or prestige of a more commonly trod path. We honor them as well. Many have devoted their careers to public interest or public service jobs which make a significant difference in our communities and in our world.

In early October I attended the Access to Justice Summit put on by the bar's Access to Justice Coordinating Committee. Part of that event included an opportunity for different organizations represented at the summit to introduce themselves to other attendees and organizations. These were entirely public interest and service organizations whose missions, while somewhat diverse, all involved serving and representing groups that are under-represented, underserved, or even persecuted in some way. All had significant if not critical needs. The sheer number (about seventy-five) and variety of organizations represented was staggering, and almost all of



them involved lawyers at the center of their activities. I was deeply moved by the number of organizations and number of lawyers who are committed to making a difference to those in serious need.

Other attorneys have chosen to contribute to our communities through public service, whether in government service or elected positions. Public defenders, prosecutors, and judges are known to us all, and we greatly respect their invaluable contributions to preserving and defending the rule of law, which is central to all we do in a free society. Many other government lawyers make important, though sometimes less visible, contributions.

Noella Sudbury is one such government-employed attorney who, through her public service with Salt Lake County has gone the extra mile to change lives and lift others. Among other things, Noella helped organize and stage an “expungement day” earlier this year by gathering a team of prosecutors, defense attorneys, judges, and others to streamline the overly complicated process to allow those who were eligible to expunge their records, clearing the way to get better employment and get their lives back on track. Literally hundreds were helped that day, and Noella is following up on the effort to make even more happen, including by helping to push legislation in this upcoming session to streamline the expungement process permanently. Committed public servants like Noella are making a difference in people’s lives.

I also want to recognize members of the Utah State Bar who are helping to make the laws with which we work. While not all legislators need to be or even should be lawyers, our training in the law, our experience as advocates, and the good judgment we hope to develop can be invaluable to the legislative process. My hat is off to all who seek to serve in our state this way. I further believe we are fortunate in Utah to have a good number of attorneys in the legislature, and we are grateful to them for their service. In the past few years I have come to know the leaders of many other state bar organizations and when our discussions turn to our respective legislatures they are always envious of the number of lawyer legislators Utah has. At the risk of inadvertently forgetting someone, I am providing you a list of our Utah lawyer-legislators below. Reach out to them and thank them for their service and, of course, let them know of issues that are of concern to you.

Rep. Patrice Arent parent@le.utah.gov

Rep. Craig Hall chall@le.utah.gov

Rep. Tim Hawkes thawkes@le.utah.gov

Rep. Ken Ivory kivory@le.utah.gov

Rep. Brian King briansking@le.utah.gov

Rep. Mike McKell mmckell@le.utah.gov

Rep. Kelly Miles kmiles@le.utah.gov

Rep. Merrill Nelson mnelson@le.utah.gov

Rep. Lowry Snow lsnow@le.utah.gov

Rep. Keven Stratton kstratton@le.utah.gov

Senator Lyle Hillyard lhillyard@le.utah.gov

Senator Jani Iwamoto jiwamoto@le.utah.gov

Senator Todd Weiler tweiler@le.utah.gov

Senator Dan McCay dmccay@le.utah.gov

Senator Daniel Hemmert dhemmert@le.utah.gov

And our newly elected lawyer-legislators:

Rep. Steve Waldrip swaldrip@le.utah.gov

Rep. Brady Brammer bbrammer@le.utah.gov

Rep. Stephanie Pitcher spitcher@le.utah.gov

Rep. Andrew Stoddard astoddard@le.utah.gov

Senator Kirk Cullimore kcullimore@le.utah.gov

Finally, I want to mention what is central to our professional responsibility as attorneys, and that is to look for and act upon opportunities to provide pro bono legal services to those who cannot afford to pay for those services. Justice Ruth Bader Ginsburg stated that for the privilege and status of having a license to practice law, “lawyers have an obligation to provide legal services to those without the wherewithal to pay, to respond to needs outside themselves, to help repair tears in their communities.” This duty is codified in our Rules of Professional Conduct 6.1, which establishes a goal of at least fifty hours of pro bono legal services each year. Most lawyers I know are motivated to provide the pro bono services of which Justice Ginsburg speaks when presented the opportunity, but we often do not do enough to seek out the opportunities. We can do more. The need is great.

At the beginning of a new year, and as we set our goals and professional objectives, let us all commit to look for – and accept – new opportunities to lift and serve those around us. One place to start is by reviewing the myriad opportunities available in Utah identified at the Utah State Bar’s web page: www.utahbar.org/public-services/pro-bono-assistance/. From there, click on “Opportunities for Lawyers.” On the same page, you will also have an opportunity to “Check Yes” by completing the short online survey that will qualify you to participate in the Pro Bono panel accessible by all state court judges.

Charles Dickens famously said “no one is useless in this world who lightens the burdens of another.” It is also true that when we lighten another’s burden, we lighten our own load in an even greater measure.

2019 Legislative Session Primer

by Doug Foxley, Frank Pignanelli, and Stephen Foxley

Mostly because of retirements, almost a third of the Utah State Legislature will be newcomers. Several of these freshmen are members of the bar, and we look forward to having the benefit of their legal experience. (An accompanying directory lists all of the lawyer legislators serving.)

As with the last several sessions, members will receive regular electronic communications on top bill filings, progress of legislation, and other items of interest. These updates will be informational. The bar adheres to Rule 14-106 of the Supreme Court Rules of Professional Practice, which governs the bar's authority to engage in legislative activities and the issues on which the bar is permitted to take a position. These updates will give individual members access to contacts where appropriate and resources to assist all sides of an issue in tracking legislation important to their practices.

Making a Difference

The Government Relations Committee is co-chaired by Jaqualin Friend Peterson and Sara Bouley. This committee is an incredible collection of attorneys and meets ahead of and during the general legislative session.

The committee is comprised of representatives from bar sections, the commission, courts, and other appropriate entities. Legislation referred by the lobbyists and the sections are reviewed to determine an active or neutral position. Recommendations are then reviewed by the entire Bar Commission every Tuesday afternoon.

Based upon the approved recommendations, the bar lobbyists then develop and implement a strategy to ensure robust participation in the legislative process. Oftentimes, members of the bar with a particular expertise will be requested to attend a meeting with key legislators to articulate the positions of the Bar Commission.

The Government Relations Committee meets during the legislative session every Tuesday at noon at the Law & Justice Center. Although we are subjective, your lobbyists cannot over

emphasize the high quality of analysis and effort undertaken by this Committee to ensure that bar members are represented.

Legislative CLE Activities

As some members may have noted, the bar is no longer hosting a Lawyer Day on Capitol Hill. Instead, the bar has hosted a number of CLE programs that provide a greater opportunity for members to learn directly from the experts regarding the legislative process. Every January, the Office of Legislative Research and General Counsel hosts a CLE seminar to assist lawyers in communicating with the legislature and staff.

Whether at annual conferences or in the forums, the bar is providing greater opportunities for lawyer legislators to present updates on legislation and activities of interest. The bar lobbyists will continue to hold a seminar in late March to review the recent legislative session.

Last November, the bar hosted an annual breakfast for lawyer-legislators, who continue to provide valuable guidance and assistance on matters of concern. The bar will continue to look for opportunities to interact with our champions on the hill.

Greater interaction between lawyers and legislators

Your lobbyists will be reaching out on a regular basis to lawmakers sponsoring legislation suggesting they utilize the various sections of the bar to ensure any proposal has the benefit of practical expertise.

We are proud members of the Utah State Bar and lobbyist community. We are honored to represent our legal colleagues at the state capitol. If you have any questions regarding any aspect of the legislature, please feel free to contact us at:

Foxley & Pignanelli

Doug Foxley – doug@fputah.com

Frank Pignanelli – frank@fputah.com

Stephen Foxley – Stephen.Foxley@regence.com

2019 Utah State Lawyer Legislative Directory

THE UTAH STATE SENATE



Lyle W. Hillyard (R) – District 25
lhillyard@le.utah.gov

Education: B.S., Utah State University; J.D., University of Utah S.J. Quinney College of Law

Practice Areas: Family Law and Mediation.



Kirk Cullimore, Jr. (R) – District 9
kcullimore@le.utah.gov

Education: B.A., Brigham Young University; J.D., University of Oklahoma School of Law

Practice Areas: Property Rights, Fair Housing, and Property Management.



Daniel Hemmert (R) – District 14
dhemmert@le.utah.gov

Education: B.A., Economics, Brigham Young University; M.B.A., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University



Jani Iwamoto (D) – District 4
jiwamoto@le.utah.gov

Education: B.S., University of Utah, Magna Cum Laude; J.D., University of California Davis School of Law



Daniel McCay (R) – District 11
dmccay@le.utah.gov

Education: Bachelors and Masters, Utah State University; J.D., Willamette University College of Law

Practice Areas: Real Estate Transactions, Land Use, and Civil Litigation.

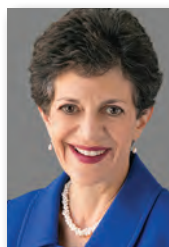


Todd Weiler (R) – District 23
tweiler@le.utah.gov

Education: Business Degree, Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Civil Litigation and Business Law.

THE UTAH STATE HOUSE OF REPRESENTATIVES



Patrice Arent (D) – District 36
parent@le.utah.gov

Education: B.S., University of Utah; J.D., Cornell Law School

Practice Areas: Adjunct Professor, S.J. Quinney College of Law – University of Utah. Past experience: Division Chief – Utah Attorney General's Office, Associate General Counsel to the Utah Legislature, and private practice.



Brady Brammer (R) – District 27
bbrammer@le.utah.gov

Education: B.A., Brigham Young University; MPA, Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Commercial, Real Estate, and Government Entity Litigation.



Craig Hall (R) – District 33
chall@le.utah.gov

Education: B.A., Utah State University; J.D., Baylor University

Practice Areas: Litigation and Health Care Law.



Timothy D. Hawkes (R) – District 18
thawkes@le.utah.gov

Education: B.A., Brigham Young University; J.D., Columbia University School of Law

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



Kenneth R. Ivory (R) – District 47
kivory@le.utah.gov

Education: B.A., Brigham Young University; J.D., California Western School of Law

Practice Areas: Mediation, General Business, Commercial Litigation, and Estate Planning.

The information in this directory is offered as a courtesy. The *Utah Bar Journal* makes its best efforts to collect information that is current at the time of publication, but this information may change. Please consult the Utah Legislature's website (le.utah.gov) or the Utah State Bar directory (services.utahbar.org/Member-Directory) for the most current information.



Brian King (D) – District 28
briansking@le.utah.gov

Education: B.S., University of Utah; J.D., University of Utah S.J. Quinney College of Law

Practice Areas: Representing claimants with life, health, and disability claims; class actions; and ERISA.



Mike McKell (R) – District 66
mmckell@le.utah.gov

Education: B.A., Southern Utah University; J.D., University of Idaho

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



Kelly Miles (R) – District 11
kmiles@le.utah.gov

Education: B.S., Weber State University; J.D., University of Utah S.J. Quinney College of Law; MBA, University of Utah Eccles School of Business

Practice Areas: Estate Planning, Elder Law, and Probate and Estate Settlement.



Merrill Nelson (R) – District 68
mnelson@le.utah.gov

Education: B.S., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Kirton McConkie – Appellate and Constitution, Risk Management, Child Protection, Adoption, Health Care, and Education.



Stephanie Pitcher (D) – District 40
spitcher@le.utah.gov

Education: J.D., University of Utah S.J. Quinney College of Law

Practice Areas: Deputy District Attorney.



Lowry Snow (R) – District 74
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Education: B.S., Brigham Young University; J.D., Gonzaga University School of Law

Practice Areas: Snow Jensen & Reece, St. George – Real Estate, Civil Litigation, Business, and Land Use Planning.



Andrew Stoddard (D) – District 44
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Education: B.S., University of Utah; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Murray City Prosecutor



Keven J. Stratton (R) – District 48
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Education: B.S., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Stratton Law Group PLLC – Business, Real Estate, and Estate Planning.



Steve Waldrip (R) – District 8
swaldrip@le.utah.gov

Education: B.A., Brigham Young University; J.D., University of Utah S.J. Quinney College of Law; LL.M., Taxation, University of Washington School of Law

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A Practical Primer on Law & Corpus Linguistics

by John Cutler

The age of big data started... yesterday. See Steve Lohr, *The Age of Big Data*, NEW YORK TIMES, Feb. 11, 2012, [available at https://www.nytimes.com/2012/02/12/sunday-review/big-datas-impact-in-the-world.html](https://www.nytimes.com/2012/02/12/sunday-review/big-datas-impact-in-the-world.html). It is time for lawyers to catch up. Corpus linguistics is one tool that can bring the power of big data to your practice. First, a few statistics. Eighty-five Westlaw secondary sources reference corpus linguistics – over one-third were published last year. Eleven judicial opinions identify this tool. But briefs in only eight cases (eleven total) apply it.¹ That means judges have been willing to look to corpus linguistics even when the parties do not. *E.g.*, *State v. Rasabout*, 2015 UT 72, ¶¶ 61, 66, 356 P.3d 1258.

Corpus linguistics is not hard. Judges are doing it. Lawyers should do more. If we do not, sooner or later we will be having hard conversations with clients about why we did not. For example, in *American Bankers Ass'n v. National Credit Union Administration*, 306 F. Supp. 3d 44 (D.D.C. 2018), the court used a mix of its own search of the Corpus of Historical American English and party-submitted Westlaw judicial opinion data on the phrase “rural district” to conclude that the agency’s expanded definition was “manifestly contrary to the statute.” *Id.* at 66–70. That’s a strong conclusion – grounded directly in corpus data. The data will not always be conclusive. But, in some cases, it can be. We owe it to our clients to understand this tool. This article will help you get up to speed.

The article proceeds in four parts: (1) background on corpus linguistics, (2) application of corpus linguistics to law, (3) corpus linguistic tools, and (4) resources to learn more.

BACKGROUND ON CORPUS LINGUISTICS

“What is corpus linguistics? Well, simply put, it is the use of computers to analyze large collections of real examples of language in use.” Tony McEnery, Lancaster University, *What is corpus linguistics?*, YouTube, https://www.youtube.com/watch?v=KabH1_Bsx4U. Corpus linguistic analysis “refocuses the study of language on what’s actually written or said rather than on what experts think people can or should say.” *Id.* “[W]e can do this because computers enable us to analyze millions,

nowadays billions, of words, of evidence to account for the changing patterns of use in written and spoken language in everyday communication.” *Id.* These large collections of naturally occurring language are called corpora (or a corpus – singular). See The ESRC Centre for Corpus Approaches to Social Science (CASS), Lancaster University, UK, *Corpus Linguistics: Some Key Terms*, at 5 (2013), [available at http://cass.lancs.ac.uk/wp-content/uploads/2013/12/CASS-Gloss-final1.pdf](http://cass.lancs.ac.uk/wp-content/uploads/2013/12/CASS-Gloss-final1.pdf), archived at <https://perma.cc/2ANY-9FP5>. The language collected in a corpus generally aims to be “representative of a particular variety of language or genre.” *Id.* At its core, corpus linguistics involves the analysis of frequency data. Stefan Th. Gries, *What Is Corpus Linguistics?*, 3 Language & Linguistic Compass 1188, 1226–27 (Sept. 2009). This frequency data includes:

- “frequencies of occurrence of linguistic elements, i.e. how often morphemes, words, grammatical patterns etc. occur in (parts of) a corpus...;”
- “frequencies of co-occurrence of these elements, i.e. how often morphemes occur with particular words, how often particular words occur in a certain grammatical construction;”
- “[whether] something (an individual element or the co-occurrence of more than one individual element) is attested in corpora; i.e. whether the observed frequency (of occurrence or co-occurrence) is 0 or larger;”
- “[whether] something is attested in corpora more often than something else; i.e. whether an

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observed frequency is larger than the observed frequency of something else;" and

- "[whether] something is observed more or less often than you would expect by chance."

Id. at 1226–27.

But this data does not itself provide instant answers to linguistic (or legal) questions. Standing alone, "there are no meanings, no functions, no concepts in corpora— corpora are (usually text) files and all you can get out of such files is distributional (or quantitative/statistical) information." *Id.* at 1226. Transforming raw data into information useful to linguists and lawyers requires two important ingredients: (A) a sound method for analyzing corpus data and (B) a theory that the data inputs inform.

Method

Corpus linguistics frequency data are statistics. *See id.* at 1228. Like any statistic, corpus data can be bungled, mischaracterized, or manipulated by a linguist or lawyer's failure to use appropriate methods in analyzing the data. *Cf.* Joel Best, *Damned Lies And Statistics* 1-6 (Updated Edition 2012) (identifying the pitfalls and

perils inherent in statistics and the importance of methodologically sound statistics). The entire purpose of turning to corpus data was to get away from "intuiting acceptability judgments about what one can say and what one cannot" – for lawyers it is to get away from judges intuiting the ordinary meaning of statutes from their own personal experience with language usage. Gries, *supra*, at 1228. Because corpus data "provide distributional information in the sense mentioned earlier," linguists and lawyers must use tools and methods "designed to deal with distributional information": i.e. statistics. *Id.* If lawyers and linguists are going to criticize "faulty introspective judgments" of judges or theoretical linguists, "introspectively eyeball[ing] distributions and frequencies" will not cut it. *Id.*

As lawyers, we need not be expert statisticians, but we ought to familiarize ourselves with the basics. For a primer on how to be a more critical consumer of statistical information, *see generally* Best, *supra*. Statistics should not scare us. With a bit of background knowledge, eyeballing the results of a simple corpus search can offer some initial information that may shape how we proceed. For example, in the *American Bankers Ass'n* case noted in the introduction, Judge Friedrich's corpus search revealed that "the phrase *rural district* was used with some frequency in the first

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half of the twentieth century before mostly falling out of usage in the second half.” 306 F. Supp. 3d at 68 (discussing a search of the Corpus of Historical American English at corpus.byu.edu/coha). This type of corpus search is incredibly simple to perform, but the results can be quite powerful. A smart lawyer who finds potentially valuable information by eyeballing corpus data will consult with an expert in statistics to ensure the rigor of the analysis and be prepared for arguments opposing counsel or the court might raise to undermine the credibility of the corpus data.

Judges performing their own corpus analysis do not have the option of consulting with outside experts. But a judge who identifies potentially useful corpus data may invite supplemental briefing on the results – to allow the adversary process to test the judge’s initial findings. Courts do this all the time when internal research discovers legal authority missed by the parties that may materially alter the outcome of the case. Use of this process to handle judicial inquiry into corpus data allows judges to access the full panoply of interpretive tools, while also subjecting judicial corpus analysis to the crucible of testing likely to expose any problems with the court’s methodology or resulting data.

Theory

Even statistically sound data cannot advance legal interpretation unless there is a linguistic or legal theory that makes the data consequential. Gries, *supra*, at 1228–29. Among the linguistic or legal theories that can give corpus data meaning is the notion that differences in language usage reflect differences in meaning. *Id.* at 1229. The law embraces a similar theory of meaning in the mirrored interpretive canons of consistent usage and meaningful variation. See *Outfront Media, LLC v. Salt Lake City Corp.*, 2017 UT 74, ¶ 26, 416 P.3d 389 (applying the canon of meaningful variation or independent meaning); *Barneck v. Utah Dep’t of Transp.*, 2015 UT 50, ¶ 31, 353 P.3d 140 (applying the canon of consistent usage). With this theory as a backdrop, corpus data can aid us in answering certain questions. “Consider as an example the case of arguments structure, or transitivity alternations such as the ‘alternation’ between *John sent Mary the book* and *John sent the book to Mary*.” Gries, *supra*, at 1229. A corpus analysis of these slight variations in phrasing revealed that the “two most strongly preferred verbs [for the *sent Mary* phrasing] are *give* and *tell*, which prototypically involve close proximity of the agent and the recipient.” *Id.* By contrast, the “two most strongly preferred verbs [for the *sent . . . to Mary* phrasing] are *bring* and *play* (as in *he played the ball to him*), which prototypically involve larger distances.” *Id.* In this case, the data not only confirm the working theory that variation in language suggests variation in meaning, it can shed light into what those differences in meaning might be.

Alternatively, the data in some cases may rebut the theory – for example, if the two most strongly preferred verbs in the above example had been the same, this itself would be ground for arguing against application of the interpretive canon in the case at hand.

Because theory is crucial, super computers spitting out corpus linguistic frequency data will not be replacing lawyers and judges – at least not anytime soon. Lawyers have a critical role to play in framing the data in the context of existing legal theories and in making the case for additional development in the law of interpretation to account for information derived from linguistic corpora. If lawyers put corpus data to the court, judges will have to grapple with the data when they articulate the legal theory underlying their decisions. Simply saying the text’s meaning is plain will ring hollow if stated against the backdrop of data suggesting multiple meanings in similar levels of usage. Likewise, a finding of ambiguity in a case where only one of the two proffered meanings is attested in the relevant context will similarly lack its former persuasive power. When confronted with frequency data attesting actual disinterested instances of language usage both lawyers and judges will have many opportunities to think carefully about legal theory and the impact of the data on time-honored canons of legal interpretation.

APPLICATION OF CORPUS LINGUISTICS TO LAW

So, when might lawyers turn to corpus linguistics? The answer requires a closer look at theory. Lawyers can introduce corpus linguistics data in any circumstance where the governing law or theories of legal interpretation involve an inquiry that the data will inform. See Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311, 1313.

Here are a few examples to get you thinking:

- statutory interpretation;
- patent analysis of the definiteness “reasonable certainty” inquiry after *Nautilus* and *Teva*;
- e-discovery predictive coding;
- originalist research;
- authorship analysis; and
- demographic profiling.

See, e.g., Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 828–30 (2018) (statutory interpretation); Joseph Scott Miller, *Reasonable Certainty & Corpus Linguistics: Judging Definiteness after*

Nautilus & Teva, 66 U. KAN. L. REV. 39, 39–46 (2017) (patent); James R. Hietala, Jr., *Linguistic Key Words in E-Discovery*, 37 AM. J. TRIAL ADVOC. 603, 603–13 (2014) (e-discovery); Thomas R. Lee & James Cleith Phillips, *Data-Driven Originalism*, Forthcoming PENN L. REV. (Jan. 27, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036206 (originalism); Robert A. Leonard et al., *Forensic Linguistics: Applying the Science of Linguistics to Issues of Law*, 45 HOFSTRA L. REV. 881, 885–96 (2017) (authorship and demographic profiling).

In each of these example applications, corpus linguistics opens new avenues to improve legal practice. Perhaps one of the examples caught your eye. I encourage you to review the cited article to learn more. Each application involves a different set of linguistic or legal theory as well as different methods of analysis. Given the limitations of my own experience and the forum for this article, I will focus on one application that most lawyers and judges encounter: the ordinary meaning principle in statutory interpretation.

The phrase “ordinary meaning” or “plain meaning” quite frequently prefaces judicial opinions and legal briefs analyzing written legal texts.² When courts identify it, they frequently end

their interpretive analysis and apply it to the facts of the case. See Lee & Mouritsen, *supra*, at 796–97. As a lawyer, that is a big deal. On the one hand, if the court agrees with your assessment of the ordinary meaning, it is likely to discount or ignore other available interpretive tools that may be less favorable to your case. On the other hand, the magic words “plain” or “ordinary” may cover a court’s decision to discount other legally relevant and important arguments without much explanation.

Ordinary meaning analysis is often nebulous and reliant on the outcome-driven motives of lawyers and the linguistic intuition of judges. To back up intuition, lawyers and judges often look to the dictionary.³ But the dictionary was not made to answer the question of which sense of a given term is ordinary in a given context. See generally Stephen C. Mouritsen, *The Dictionary Is Not A Fortress: Definitional Fallacies and A Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. REV. 1915 (2010) (addressing a host of improper uses of dictionaries in statutory interpretation). Reliance on a court’s linguistic intuition leads to significant uncertainty for the parties. In a battle of competing dictionaries, it is anyone’s guess which meaning a court will choose and for what reasons. Corpus linguistics can provide



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objective data that the court will have to grapple with in making its decision.

But even with objective data, lawyers and judges still need to answer the fundamental question: what is the “ordinary meaning of ‘ordinary meaning.’” Lee & Mouritsen, *supra*, at 857; *see also id.* at 796–802 (introducing this problem in more detail). Perhaps because intuition has historically governed the ordinary meaning analysis, there is no current consensus on this question. There are at least three dimensions to this problem:

- what meaning;
- whose meaning; and
- meaning as of when.

Id. at 796–802, 813–24 (what); *Id.* at 824–26, 857 (whose); *Id.* at 827–28, 857 (when).

What is more, there are good reasons to accept different answers to these questions in different contexts. But do not be alarmed. In many legal contexts existing (familiar) principles of law will answer these questions. The important thing is to be aware of and thinking about these issues, because they will

inform the type of corpus data and research method applied to answer the ordinary meaning analysis. With that in mind, I offer a brief overview of these questions.

What meaning?

Does a word’s contextual meaning have to be obvious or exclusive to be ordinary? If a sense is merely permissible or attested is that ordinary? If a given sense is commonly used in the context but does not predominate over others is that enough? What about the most frequent sense, ordinary? Perhaps the first meaning that comes to mind, the prototypical sense? Which one of these meanings the law credits as “ordinary” is largely an open question, though the phrase “plain meaning” often refers to situations where the meaning of a word or phrase is obvious, i.e., that the proffered meaning is the exclusive permissible sense (or nearly so). *Id.* at 800–01.

Whose meaning?

At its core this question asks whether we give the text the meaning that would be understood by the public or the legal entity that enacted the text. *See id.* at 827–28.

Meaning as of when?

This question is likewise straightforward. Word senses can shift over time. *Id.* at 857. Do we give the legal text the meaning it had at the time it became law or do we credit the contemporary meaning?

CORPUS LINGUISTICS TOOLS


With the questions above in mind, this section will introduce concepts from the field of linguistics as they relate to each of the questions above.

Tools for analyzing frequency data

Corpus linguistics frequency data can objectively inform the *what* question. So, how do you generate the data? It’s easy enough. You type in corpus.byu.edu and you run a search in one of the many corpora listed (which one you choose will depend on answers to the *whose* meaning and meaning as of *when* questions addressed below). The simplest way to get right into the data is to run a search for collocates of the key term or phrase you are researching. Collocates are words statistically associated with the word or phrase you searched in the corpus. *See id.* at 832. Using a statistic called mutual information, the corpus will identify which words bias towards the word or phrase searched. *See id.* The list of collocates not only identifies the associated words, but it also allows you to click on any of the words to see the phrase level data with the search term and collocate highlighted for easy viewing. Simply looking through

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this data can begin to give you a better sense of how the relevant term is used in relation to other words. And as you develop your expertise you can start to do more advanced work like developing specific search terms and coding the data to compare relative frequencies. Alternatively, you may seek the help of experts in the field to assist in analyzing the data further. In any case, understanding the basics and at least looking into the freely available linguistic data will improve your ability to think carefully about the meaning of legal texts.

When properly analyzed, this data allows parties to make objective data-driven arguments about ordinary meaning. Judges will have to make decisions about precisely how frequent (or infrequent) the sense must be to make a legal difference; there is no binding frequency number. In many cases frequency data will not be dispositive. But, even then, the data may weigh in the court's analysis, in addition to other evidence of meaning, both linguistic and legal.

For instance, judges may weigh frequency data together with information derived from syntactic, semantic, and pragmatic context. "Syntax is a set of rules and principles that governs sentence formation and determines which sentences will convey meaning to members of the same speech community." *Lee & Mouritsen, supra*, at 821–22. These rules can give us additional clues about ordinary meaning. *See id.* (offering an example of how syntax can inform our search for the meaning of a given text). Likewise, "[s]emantics is the study of meaning at the word or phrase level." *Id.* at 822 (emphasis omitted). In semantic theory, the "functional role" of a word in a given phrase can inform its meaning. *Id.* For example, "[a] word has an *agentive* function if it is an instigator of the action of a verb, or an *objective* function if it is the entity that is affected by the action of the verb." *Id.* And when a word "is a force or object involved in, but not instigating, the action" it serves "an *instrumental* function." *Id.* Finally, pragmatic context is the non-verbal context of a given text or utterance. *Id.* at 823–24. This aspect of context is critically important to ordinary communication – often when, where, and to whom we speak is more important to the utterance's meaning than the actual words spoken. These same principles apply to the interpretation of legal texts.

But unlike the more formal rules or principles of linguistic theory just discussed, pragmatic context draws much of its power from shared experience and intuitions about these non-verbal components of context. If we are not careful, overreliance on our own sense of pragmatic context can reintroduce black-box decision-making. Moreover, when a legal text is created through an adversarial process (e.g., legislation involving a myriad of



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partisan votes, amendments, and competing purposes), discerning anything from the pragmatic context may raise many of the same concerns it is associated with the legal theory of purposivism. By contrast, it's possible we could glean more from the pragmatic context of legal texts generated in non-adversarial processes.

In any case, one way to take pragmatic context into account in an objective fashion is to incorporate it into analysis of corpus linguistic frequency data. For instance, “[t]he more frequently a given use of a word occurs in circumstances that reflect a physical and social setting similar to that of the statute, the more confidence we should have that the use in question is the ordinary meaning of the word in that context.” *Id.* at 824.

The linguistic concepts of speech communities, representativeness, and balance

Linguistic corpora are samples of language. If a sample does not represent the population of study, it is unlikely to provide meaningful results. In linguistics the “population” is referred to as a “speech community.” See *id.* at 827. A speech community is a group that shares “a set of linguistic norms, conventions, and expectations about linguistic behavior.” *Id.* There are numerous corpora available and there is even freely available software for building your own corpus.⁴ When selecting a corpus make sure the underlying language data comes from sources within the relevant speech community. Lee & Mouritsen, *supra*, at 830–31. The concepts of balance and representativeness relate to how well a corpus reflects the language use of the relevant speech community. Balance assesses how well the corpus diversifies the types of language data included in the corpus (written text, oral transcriptions, newspaper articles, academic writings, blog posts, tweets, etc.). See CASS, *supra*, at 4. Representativeness assesses how well a corpus parallels the makeup of the desired speech community. See *id.* at 7. Among the BYU Corpora are several that represent American language balanced across a wide variety of language sources. The Corpus of Contemporary American English covers modern usage and the Corpus of Historical American English covers historical usage. Both corpora include a large sample size from a wide variety of materials and have been used in analyzing American statutory interpretation issues.

Contemporary and historical corpora allow analysis of meaning change over time

Because meanings can change, it is important to keep in mind when the legal text you are analyzing was enacted. Reviewing both contemporary and historical corpora will help determine if meaning has changed or remained the same. Lee & Mouritsen, *supra*, at 824–25. In addition to the corpora mentioned above, BYU now has a Corpus of Founding Era American English

located at lawnci.byu.edu. This tool opens up a whole new set of possibilities for originalist research that is more systematic and rigorous than could be accomplished only a few years ago.

RESOURCES TO LEARN MORE

This primer just barely scratches the surface of the field of corpus linguistics. There are numerous freely available resources to develop greater expertise in this field. It takes a little effort to learn some new words and concepts from linguistics. But the effort will open up new ways for lawyers to serve their client and for judges to provide more compelling answers to questions about the ordinary meaning of legal texts. This article has drawn heavily from the *Yale Law Journal* Article co-written by Justice Thomas Lee and Stephen Mouritsen entitled *Judging Ordinary Meaning*. The article is available for download at <https://www.yalelawjournal.org/article/judging-ordinary-meaning>. If you read nothing else, the Yale article will give you a broad background on how to apply linguistic tools and research methods to the task of statutory interpretation. If you're looking for an interactive and class-like setting, the company *Future Learn* offers a free online course on corpus linguistics as well, available at <https://www.futurelearn.com/courses/corpus-linguistics>. The course is taught by top experts in the field of corpus linguistics and covers the basic principles of corpus linguistic analysis. Finally, the BYU law review held a law and corpus linguistics symposium in 2017, resulting in a dozen essays on a wide range of corpus linguistics topics. See 2017 BYU L. Rev. Vol 6, available at <https://digitalcommons.law.byu.edu/lawreview/vol2017/iss6/>. Reviewing these resources and getting some practice running basic searches of the available linguistic corpora will have you well on your way to incorporating big data into your practice. Remember, judges are doing it – it's time for lawyers (and more judges) to pick up the pace.

1. These statistics came from a series of Westlaw searches in the Secondary Sources, cases, and briefs databases conducted on October 13, 2018, using the following terms corpus /4 linguistic!, “corpus linguistic!,” “linguistic corpora,” “corpus.byu.edu,” and “lawnci.byu.edu.”
2. A Westlaw search of state law appellate decisions in Utah for the terms “ordinary meaning” OR “plain meaning” returned 983 cases. The same search identified 694 Utah appellate briefs using the term.
3. Drilling down a bit, of the 983 ordinary (or plain) meaning cases, 329 cite the dictionary (usually multiple times in the opinion). For briefs, 258 of 694 cite the dictionary (usually multiple times).
4. See BootCat, *Simple Utilities to Bootstrap Corpora and Terms from the Web*, available at <https://bootcat.dipintra.it/> (offering a free program for generating your own corpus text file); Laurence Anthony's Website, *AntConc Homepage*, available at <http://www.laurenceanthony.net/software/antconc/> (offering a free program for important a corpus text file and searching it for data).



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Clear as Crystal, Slippery as Ice

The importance of clarity to avoid potential pitfalls in an offer under Federal Rule 68

by Peter J. Strand

Introduction to Rule 68

Under Federal Rule of Civil Procedure 68, “Offer of Judgment,” a defendant can make an offer of judgment to the plaintiff up to fourteen days before trial. The plaintiff then has fourteen days during which to accept the offer and serve a written notice of acceptance. *See* Fed. R. Civ. P. 68(a). If the plaintiff does, then either side may request the clerk of the court to enter the judgment, and it becomes the judgment of the court. *Id.* If the plaintiff chooses to reject the offer and eventually obtains a judgment that is less favorable than the offer, the plaintiff then must pay the costs incurred after the offer was made. *See* Fed. R. Civ. P. 68(d). While initially thought to mean that the plaintiff would be responsible for its own costs, the courts have clarified this rule to require that the plaintiff would be responsible for the defendant’s costs from the offer forward. *Crossman v. Marcoccio*, 806 F.2d 329, 333 (1st Cir. 1986).

It is widely understood that the principal purpose of Federal Rule of Civil Procedure 68 is to encourage settlement and avoid litigation. *Lang v. Gates*, 36 F.3d 73, 75 (9th Cir. 1994). As tools go, this rule seems poorly built to serve that function. Its asymmetrical language provides an advantage to only one party, absent specific provisions to increase the “costs,” its penalty is too small to encourage settlement, and the very language of the rule requires a judgment instead of a settlement agreement. As to that last point, it is worth noting that, as a general rule, an accepted offer of admission is not an admission of responsibility or prima facie evidence of wrongdoing. *Johnson v. Hyatt Hotels Corp.*, No. 2:15-cv-03175-DCN, 2017 U.S. Dist. LEXIS 165850 (D.S.C. Oct. 6, 2017).

Regardless of its purpose, in Rule 68, defendants get a powerful tool with which to beat back aggressive plaintiffs. The rule demands an exacting analysis of the plaintiff’s claim’s worth, along with a settlement or the risk of having to pay costs. In

some cases, a plaintiff may use excessive demands to avoid a settlement in order to put the burden of costs on the defendant. When faced with such a case, the defendant can shift some of the burdens of costs onto the plaintiff by making an offer of judgment. *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661 (E.D. La. 1976). The offer creates a bar that the plaintiff must meet or else risk substantial losses.

The Hazards of Writing a Rule 68 Offer

With such a powerful tool for increasing the calculable risk against the plaintiff, it seems rather remarkable that more offers of judgment are not used in the federal courts. The reasoning may, perhaps, lie in the risks associated with the offer.

Offers, once made, cannot be revoked until after the plaintiff’s time for acceptance has expired, *Kirkland v. Sunrise Opportunities*, 200 F.R.D. 159 (D. Me. 2001), and they must either be accepted before the offer time runs out or they will be deemed to be declined. *Staffend v. Lake Cent. Airlines, Inc.*, 47 F.R.D. 218 (N.D. Ohio 1969). A counteroffer will be construed as an immediate declination. *Nusom v. Comb Woodburn, Inc.*, 122 F.3d 830, 834 (9th Cir. 1997). It is easy to see how an offer to settle, which cannot be rescinded, might make a defense attorney nervous. That is especially true when one considers some of the other risks in proffering poorly considered offers.

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An offer of judgment must be explicit in what it covers as no extrinsic evidence will be considered to analyze the offer. *Lima v. Newark Police Dep't*, 658 F.3d 324, 329 (3d Cir. 2011). This becomes especially important in regard to suits brought under statutes with fee-shifting provisions. Where a statute defines costs to include attorney fees, the defendant will not only prevent the plaintiff from accruing more recoverable attorney fees after the offer, but also may put the plaintiff at risk of paying the defendant's attorney fees from the time of the offer forward, even if the plaintiff has been successful and would not otherwise have to pay such fees. *Marek v. Chesny*, 473 U.S. 1, 10 (1985). If the fee-shifting statute instead holds attorney fees are recoverable under a separate action, such as in the Fair Labor Standards Act, an offer of judgment will no longer prevent the court from providing the plaintiff his or her post-offer attorney fees. *Haworth v. Nevada*, 56 F.3d 1048, 1051 (9th Cir. 1995).

When you write an offer, you are stuck with it, so you had better make sure it says explicitly what you think it does. The next section outlines good practices in writing an offer so you do not have a problem with seller's remorse.

How to Write a Proper Offer of Judgment

Be clear! Always state whether the offer includes attorney fees and other costs. If the plaintiff asks for a clarification, you should provide it to avoid questions about the presence of an offer at all. Catch-all phrases like "all of plaintiff's claims for relief" will not be considered adequate to indicate the coverage of attorney

fees or other elements in the agreement. *Lima*, 658 F.3d at 330.

Consider the presence or absence of fee-shifting and other provisions in law or fact that might increase the defendant's pecuniary risks in such an offer. If your case involves multiple plaintiffs, consider if you want to extend the offer regardless of how many plaintiffs sign on. The courts will allow your offer to be contingent upon acceptance by all plaintiffs. *Amati v. City of Woodstock*, 176 F.3d 952, 958 (7th Cir. 1999).

When considering the amount of the offer, bear in mind the plaintiff's attorney fees at the time of the offer. When attempting to utilize Rule 68 the court will consider attorney fees to determine the adequacy of a rejected offer.

Consider alternative claims when crafting your offer. In *Wallace v. Countrywide Home Loans, Inc.*, members of a class who accepted a Rule 68 offer of judgment regarding their federal wage claims in another case were allowed to prosecute their claims under parallel state law claims. *See* No. SACV 08-1463 AG (MLGx), 2009 U.S. Dist. LEXIS 110140 (C.D. Cal. Nov. 23, 2009).

Conclusion

An offer of judgment under Rule 68 is a powerful tool for the defendant. An attorney should not hesitate to use it, but the attorney should bear in mind the importance of clarifying all of the terms. Failure to make things clear may result in state law contract principles leaving you, and your client, high and dry.

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Diapers and Detention: Should There Be a Minimum Age Limit for Juvenile Delinquency in Utah?

by Blake R. Hills and Cassidy A. Hiné

Picture a baby crawling into juvenile court to face allegations of delinquent conduct. Although this seems like an extreme example, current law could allow for this to happen in Utah.

When a child engages in conduct in Utah that would be a crime if committed by an adult, the juvenile court has jurisdiction in the vast majority of cases. Indeed, Utah law provides that the general rule for juvenile court jurisdiction is that the “juvenile court has exclusive original jurisdiction in proceedings concerning: (a) a child who has violated any federal, state, or local law or municipal ordinance or a person younger than 21 years of age who has violated any law or ordinance before becoming eighteen years of age.” Utah Code Ann. § 78A-6-103(1). A “child” is defined as “a person under 18 years of age.” *Id.* § 78A-6-105(6).

It is hardly surprising that Utah has a maximum age limit for when a child’s conduct can be labeled delinquent. However, it is surprising to most members of the public and even to many practitioners that there is no minimum age. Indeed, it is theoretically possible for a prosecutor to file a petition in juvenile court alleging that a child as young as four, two, or even a few months has engaged in delinquent conduct such as assault or robbery.

Prosecutors generally refrain from charging children of especially young age as a matter of practice. *See* Connie de la Vega et al., University of San Francisco School of Law Center for Law and Global Justice, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, 7 n.7 (2012), <https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf>.

But should it be possible, theoretically or not? The time has come to evaluate whether Utah should establish a minimum age limit for when a child’s conduct can be labeled delinquent.

CHILDREN’S CAPACITY FOR CRIMINAL INTENT

Under the common law, a child under the age of seven was irrebuttably presumed to completely lack the capacity for criminal intent and could not be prosecuted, while a child between the ages of seven and fourteen was presumed to lack the capacity for criminal intent and could not be prosecuted unless the presumption was rebutted. *See* Elizabeth S. Barnert et al., *Setting a Minimum Age for Juvenile Jurisdiction in California*, 13 INTERNATIONAL J. OF PRISONER HEALTH 49 (2017).

Scientific knowledge has increased in the time since the common law was replaced by statutes defining the rights and responsibilities of children. This research supports the common law position. Indeed, “[t]here is widespread agreement among developmental psychologists that the period between twelve and eighteen years of age is a time of very significant physical, cognitive, and emotional development.” David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1571 (2004).

Scientific technology has demonstrated that a “young child’s brain is very different from that of an older adolescent.” Larry

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Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law*, 10:2 UC DAVIS J. OF JUV. L. & POLICY 275, 281 (2006). Further, research has shown that the temporal lobes and prefrontal cortex, which are responsible for mature reasoning and self-control, are still not fully developed during late adolescence. See Dorothy Otnow Lewis et al., *Ethics Questions Raised by the Neuropsychiatric, Neuropsychological, Educational, Developmental, and Family Characteristics of 18 Juveniles Awaiting Execution in Texas*, 32 J. AM. ACAD. PSYCHIATRY & LAW 408, 409 (2004). Significantly, the research has shown that “[f]rom age two through seven, children undergo the ‘preoperational stage’ in which they learn to communicate. However, they do not have the ability to understand the consequences of their actions.” Cunningham, *supra*, at 282. Finally, the evidence suggests that young children “lack the cognitive maturity to comprehend or benefit from formal juvenile justice processing.” Barnert, *supra*, at 49.

OTHER STATES

In evaluating a potential minimum age for delinquency in Utah, it is helpful to refer to the laws of other states. Currently, Utah is among the states in which a prosecutor could theoretically file a petition in juvenile court alleging that a child as young as zero has committed a delinquent act because there is no minimum age of delinquency. See Angel Zang, JJGPS *StateScan*, U.S. Age Boundaries of Delinquency 2016, 2–3 (2017), <http://www.ncjj.org/Publication/U.S.-Age-Boundaries-of-Delinquency-2016.aspx>. Those states that have established a minimum age for delinquency have picked varying ages.

Age Six

Only one state currently has set the minimum age for delinquency at age six: North Carolina, N.C. Gen. Stat. § 7B-1501(7).

Age Seven

Four states have set the minimum age for delinquency at age seven: Connecticut, Conn. Gen. Stat. Ann. § 46b-120(1)(A)(i); Maryland, MD. Code Ann., Cts. & Jud. Proc. § 3-8A-05(d); New York, N.Y. Fam. Ct. § 301.2(1); and North Dakota, N.D. Cent. Code 12.1-04-01. In Maryland, age seven is the minimum age for delinquency based on a presumption that younger children do not have the capacity to form criminal intent. See MD. Code Ann., Cts. & Jud. Proc. § 3-8A-05(d) (“In a delinquency proceeding there is no presumption of incapacity as a result of infancy for a child who is at least 7 years old.”). Similarly, the North Dakota statute states, “Persons under the age of seven years are deemed incapable of commission of an

offense . . .” N.D. Cent. Code, 12.1-04-01.

Age Eight

Three states have set the minimum age for delinquency at age eight: Arizona, Ariz. Rev. Stat. Ann. § 8-201(15)(a)(iv); Nevada, Nev. Rev. Stat. §§ 62B.330, 194.010(1); and Washington, Wash. Rev. Code § 9A.04.050. The minimum age for delinquency in Nevada is actually a bit of a hybrid, with age eight for murder and sexual offenses, and age ten for other offenses. Nev. Rev. Stat. §§ 62B.330, 194.010. Children under the age of eight are deemed not capable of committing offenses. *Id.* § 194.010(1). Similarly, Washington law states,

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

Wash. Rev. Code § 9A.04.050.

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Age Ten

Eleven states have set the minimum age for delinquency at age ten: Arkansas, Ark. Code Ann. §§ 9-27-303(15), 9-27-306(a)(1)(A)(i); Colorado, Colo. Rev. Stat. § 19-2-104(1)(a); Kansas, Kan. Stat. Ann. § 38-2302; Louisiana, La. Child. Code Ann. art. 804(3); Minnesota, Minn. Stat. Ann. §§ 260C.007(12), 611.14(4); Mississippi, Miss. Code Ann. § 43-21-105(i); Pennsylvania, 42 Pa. Cons. Stat. Ann. § 6302; South Dakota, S.D. Codified Laws 26-8C-2; Texas, Tex. Fam. Code. § 51.02(2)(A); Vermont, Vt. Stat. Ann. tit. 33, § 5102(C); and Wisconsin, Wis. Stat. § 938.12(1). Children younger than ten in Arkansas can be subject to juvenile court jurisdiction if charged with capital murder or first-degree murder. Ark. Code Ann. § 9-27-303(15). Likewise, a child in Vermont who is alleged to have committed murder may be subject to delinquency proceedings at any age. Vt. Stat. Ann. tit. 33, § 5102(C)(iii).

Age Twelve

Two states have set the minimum age for delinquency at age twelve: California, Cal. Welf. & Inst. Code § 602 and Massachusetts, Mass. Gen. Laws ch. 119, § 54. The California statute takes effect in 2019. It sets a minimum age for delinquency of twelve for most offenses, with no minimum age for murder and certain sexual offenses committed by force. Cal. Welf. & Inst. Code § 602.

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CONCLUSION

The time has come for Utah to consider establishing a minimum age for delinquency. Doing so would allow Utah to be among the states that recognize that it does not always serve justice to prosecute a child of young age. Of course, this understanding must be balanced with the need to promote public safety and hold juvenile offenders accountable. The best balance would be a general minimum age for delinquency for the majority of offenses, but no minimum age for murder and serious violent and sexual offenses. There is no clear consensus on that minimum age amongst the other states or the researchers, but it is time to begin the discussion here in Utah.

If the Utah Legislature does not establish a minimum age of delinquency, it runs the risk that an appellate court will do so for it. Indeed, the trend would indicate that this is what would eventually happen. The United States Supreme Court abolished the death penalty for anyone who committed homicide as a juvenile in *Roper v. Simmons*, 543 U.S. 551 (2005); abolished the imposition of a sentence of life without parole for those who committed a crime other than homicide as a juvenile in *Graham v. Florida*, 560 U.S. 1 (2010); abolished mandatory sentences of life without parole for juveniles in *Miller v. Alabama*, 567 U.S. 460 (2012); and ruled that *Miller* applies retroactively in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). All four of these cases referred to the difference in developmental maturity and malleability between young people and adults.

In addition, the Supreme Court held in *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), that because of their age and development, young people perceive police custody differently than adults and their age is relevant to the *Miranda* custody analysis. Significantly, the Court stated, “A child’s age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class.” *Id.* at 2397 (citation and internal quotation marks omitted). “And, they are self-evident to anyone who was a child once himself, including any police officer or judge.” *Id.* at 2403. As a further admonishment, the Court stated: “[O]fficers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child’s age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.”

Id. at 2407. If the legislature needs a final warning that it should act before the courts do, this statement is it.



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Criminal Defense in Crisis: Training Public Defenders in Myanmar

by Kate Conyers

EDITOR'S NOTE: A previous version of this article appeared in the *Bar and Bench*. See Kate Conyers, *My Unusual Attorney Experience: The Time I Trained Public Defenders in Myanmar*, *BAR AND BENCH*, Fall 2018, at 11–16, available at <http://slcba.net/wp-content/uploads/2018/10/Bar-Bench-Fall-2018.pdf> (last visited Dec. 14, 2018). Ms. Conyers has expanded upon her experience in Myanmar for publication in the *Utah Bar Journal*.

From March to July 2018, I had a unique experience that has forever changed my perception of our American criminal justice system. During that time, I volunteered as a Fellow for the International Legal Foundation (ILF) and was tasked with training new public defenders in Myanmar. ILF is an international nongovernmental organization that assists post-conflict and transitional countries in establishing public defender systems that provide effective, quality criminal defense services for the poor. During my time, ILF had two offices in Myanmar: the first in the country's largest city, Yangon, and the second in a smaller city, Mandalay. It has since opened three more offices around the country, including in the Rakhine State, where the atrocities involving the Rohingya Muslims took place. I spent most of my time in Mandalay.

I learned about the opportunity to serve as an International Fellow through a weekly listserv sent from the American Bar Association's Standing Committee on Legal Aid and Indigent Defense. My interest in the fellowship stemmed from my practice as a public defender for eight years at Salt Lake Legal Defenders and my undergraduate education in International Relations, Asian Studies, and Human Rights Law. I chose to apply because

I needed a new challenge and I sought a greater appreciation of our criminal justice system by comparing it to others.

Myanmar is a large country formerly known as Burma in Southeast Asia, bordered by India and Bangladesh to its west,



Thailand and Laos to its east, and China to its north. Roughly, it is pronounced as "ME-an-mar." People who live there are also referred to as Myanmar people, and the language they speak is Myanmar. While the people in Myanmar do speak some English (it is taught in public schools), it is not commonly utilized by professionals outside of international business.

KATE CONYERS is a criminal defense attorney at Conyers & Nix, P.C. She was a public defender at Salt Lake Legal Defenders for almost eight years. She also serves as the President of the Women Lawyers of Utah.



Without knowing the language, I was still able to train public defenders with the resources ILF provided to me. Thankfully, the four main sources of law applicable to its criminal justice system – Myanmar’s Constitution, the Rules of Criminal Procedure, the Evidence Act, and the Penal Code – are all published in both Myanmar and English with English on the left side of the page and Myanmar on the right side of the page so they easily track each other. ILF also provided me with an interpreter/translator that doubled as the office paralegal so that I could communicate with the two lawyers in each of the offices. To further assist its Fellows, ILF also compiles a working draft of its “Myanmar Practice Manual” (the Manual or Practice Manual) that identifies common practices in the criminal justice system. ILF staff and Fellows regularly update the Manual with suggestions, wins and losses, and practical tips to improve our understanding and practice of the law. Armed with these resources and my own knowledge and experiences in the American criminal justice system, I was able to successfully train and improve the skills of the four lawyers and two paralegals (and ideally others in the legal system) as well as update the Practice Manual to the benefit of future Fellows and lawyers.

After a few days of reviewing the laws and the Practice Manual and watching the attorneys in court, I came to realize that for the most part, Myanmar is missing the “big five” rights (as I have been calling them) that our American Constitution guarantees criminal defendants. In Myanmar, there is:

- no presumption of innocence
- no right to counsel
- no right to remain silent
- no right to a jury trial
- no right to appeal

In addition to this, there is no designated method to bring pre-trial motions and judges rarely acquit because they believe doing so indicates that the judge has been bribed. To most (including most of the criminal defense attorneys I saw in Myanmar), the only way to succeed in this reality is to bribe the police early on with the hopes it will prevent a case from even being filed in the first place. Once a trial starts – a week or two after filing – it seems that there is nothing to do except to prepare a client for a long prison sentence. ILF, like most other legal aid offices, has a strict “no bribery” rule; instead, it utilizes fellows to train its attorneys to fight practically everything in every single case. Doing so trains the attorneys as well as the prosecutors, judges, and even other criminal defense lawyers about the rights defendants have or should have. In the one year that ILF has been operating in

Myanmar, it has found ways to successfully challenge evidence and judicial rulings. I even assisted in getting a case dismissed (which involved about six male defendants ages eighteen to twenty-two facing seven to twenty years in prison).

On top of all of that, Myanmar’s criminal justice system does not seem to be governed by generalized standards. ILF found a Myanmar Supreme Court case that has been repeatedly upheld that holds the government must prove its case “beyond a logical doubt,” but most judges and prosecutors I observed had never heard of this standard, and no legal standards seem to be argued or applied.

Anatomy of a Criminal Case

In Myanmar, an investigation starts when someone calls the police to report suspicious or illegal activity. The informant will remain anonymous, as will much of the information provided to the police about the activity, making it very difficult to bring a motion challenging whether there was “reasonable suspicion” to start the investigation. The police will then send an average of six to eight police officers to investigate the activity. The police will determine on the spot whether to file charges, and if so, the perpetrator will be cited or arrested and a bare bones report will be filed. Individual police officers may keep additional notes in their “police diaries,” which may be provided to the

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prosecutor and even the court; they will never be provided to the defendant or defense counsel. It is unusual for any additional investigation to be done short of a court order.

After a person is arrested, she or he will see the judge within a few days to discuss whether the defendant can be released and how the defendant pleads. If the defendant pleads “not guilty,” the law *requires* the judge to inquire about the facts justifying that plea (aka no right to remain silent). There is never any discussion about the defendant’s rights, and the defendant is not entitled to an attorney.



The trial will start the following week. At a trial, the government first presents its witnesses: usually any eyewitnesses and the six to eight police officers who responded, investigated the case, or both and who will undoubtedly provide the exact same information about the investigation (observing this feels a bit like the movie “Groundhog Day”). A good, trained attorney will ask the officers detailed questions that show they have absolutely no specific recollection about that event; an even better attorney will try to seek the testifying officer’s “police diary” that the witness will inevitably testify from and that is provided to the prosecution and the judge but not to the defendant/defense counsel except in a “recollection refreshed” sort of moment.

During trial, one witness is called to testify per week, and in my experience and the experiences of others I have talked to, each witness fails to appear an average of one time. Even though the

court has subpoena power that it utilizes to summon witnesses, there is not enough power behind the subpoena to compel witnesses to comply. In most cases, the government insists on presenting all or most of its witnesses, even if the witnesses are duplicative and it takes several times before the witness appears. This means that even a simple theft case will take at least twenty consecutive weeks to complete the government’s case at trial. This becomes incredibly frustrating because we would arrive at court around 10:00 a.m. and rarely were we told before 4:00 p.m. that a witness would not appear. Not only is this practice incredibly inefficient, courthouses also are not set up to provide

spaces, tables/chairs, WIFI, copiers, or really anything so attorneys can get work done during the wait. (I read a lot on my phone during those long court days).

After it presents its case, the government rests and the judge will inevitably “frame” the charges (essentially a bindover). ILF has learned that if it has a motion, the only time to bring it is between the government resting its case and before the judge frames the charges, which



may only be a matter of minutes and may be without any notice. Practically all motions are denied immediately. ILF did discover a mechanism for an “interlocutory appeal” of sorts when motions are denied: a “revision” under the Criminal Procedure Code grants the higher courts authority to hear petitions from any lower court order and to alter that order. This is not an appeal of right. Also, a revision does not stay the lower court from proceeding.

Once the charges are inevitably framed, the defense has an opportunity to present its case. Although it rarely happens, a

defendant may recall government witnesses to provide additional testimony; judges may also recall witnesses or have new witnesses testify if it will help the court in its determination (this right to recall witnesses after framing of the charges is important because trials last so long, discovery is ongoing, and critical information may be discovered during the trial process). Most defendants are not represented so they usually will not call any witnesses or have any evidence. The defendant's only witness is usually himself/herself; under the law, a defendant is required to provide a statement, even if it is a statement of guilt.

After the defendant rests her or his case, the judge will either sentence the defendant immediately after finding the defendant guilty or set over sentencing to the following week. The court will entertain brief "final arguments," but it is not expected or anticipated. At most final arguments I have been to, the prosecutor (who is rarely the prosecutor who presented the government's case) will submit on government's case without commenting on the defendant's case, and most defense attorneys will as well. ILF's practice is to submit an extensive and detailed sentencing memorandum about the purposes of sentencing and to apply it to the defendant's life and situation, and to also provide an oral argument summarizing the same. Over time, prosecutors came

to expect this and would do some preparation and make some sort of final argument.

The defense can appeal the final verdict, but it is not an appeal of right and is almost never accepted by the higher court. The argument is basically one of clear error, and because most judges do not recognize or apply any standards, it is hard to find error in a judge's ruling. Even appellate petitions based on clear constitutional errors are rarely accepted, so the judge's sentence is usually the final word in a case.

Here are a few examples of cases I handed in Myanmar:

Deodorant Theft

In this case, a woman in her mid-forties was arrested after allegedly stealing Nivea deodorant (valued at around \$3) from a convenience store. She had no criminal history. Based on the allegations from the store cashier and manager, she was immediately taken into custody by the six to eight male officers that responded. The woman was not released during trial because all thefts are "non-bailable" offenses. In fact, the law does allow release (despite the rule's name), but only in limited circumstances roughly amounting to having basically no evidence of the crime. Judges, though, strictly



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We are pleased to announce the appointment of Rodney R. Parker as our new President, Bradley R. Blackham as our new Vice President, and Samuel Alba as Chairman of the Board.

We also thank Andrew M. Morse, who completed his term as President of our firm on December 31, 2018, for his significant contributions and years of dedication.

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enforce the law as prohibiting any release.

In this case, ILF did not present much of a defense because there was not one. The defendant gave a statement denying she knew the deodorant was in her pocket while she purchased several other items and she was convicted.

Ultimately, the defendant was sentenced to one year in jail but was given credit for time served. ILF could have petitioned for an appeal (again, not an appeal of right), but the higher court is not bound by the sentence from the lower court. The judge in this case made it clear that the appellate court would likely give the maximum punishment – seven years – if we appealed, so we should be happy with one year. The defendant agreed so no appeal was filed.

Aggravated Assault

In this case, ILF was not engaged until most of the government's witnesses had already testified, including the alleged victim. Early in the case, the judge asked the defendant whether he assaulted the alleged victim and the defendant admitted that he struck him with an iron bar. Because he did not have counsel and he had no experience with the court system, he did not explain the whole story to the judge – that he got into an argument with the man,

a coworker, because the man propositioned his wife, and after being confronted about it, the man threatened the defendant with a knife. Likewise, the defendant did not know that he should cross-examine the alleged victim, who testified only to the assault.

ILF brought a 253 motion in the case, a rule in the Criminal Procedure Code that provides for dismissal if the charges are “groundless,” the same mechanism discussed earlier. Here, the motion was based on the defendant being denied his right to recall the government's witnesses and subject them to cross-examination after the framing of the charges. Here, the victim could not be located after he initially testified. In addition, the only other eyewitness to the case never testified and could not be located.

ILF also made a motion to dismiss the case based on a February 2018 Supreme Court Notification that encourages judges to dismiss cases if witnesses are not timely produced. Apparently, that court also noticed that the trial process is incredibly inefficient, with witnesses failing to show up for months on end, even years, while defendants remained in custody. That motion was also brought on the grounds that the court could not produce crucial witnesses for cross-examination (there, it is the court's and police's responsibility to produce witnesses, even when they are recalled). Unfortunately, this Notification has been largely ignored, even by appellate courts that have approved ILF's petitions for appeal on this very issue. In this case, the lower court denied both motions. ILF appealed, but its “revision” application was denied (although the higher court recognized that the defendant does have a right to recall witnesses).

As of the end of 2018, this case was still in a holding pattern while the defendant remained in custody. The defense would not rest its case because to do so would absolutely result in a conviction of twenty years in prison. One option seemed to be for the defense to find the “victim” (since the court, police and government do not seem very motivated to) and to recall him as a witness to cross-examine him about the incidents of that fateful night. Another is to seek a “writ in the nature of habeas corpus” to the Myanmar Supreme Court arguing that the defendant is being improperly or illegally detained. Most attorneys would not imagine fighting this hard for a client, but at ILF, it is common practice.

SIM card – Receipt of “Stolen” Property

One of ILF's earliest “victories” may not seem like a win at all. A woman was charged with stealing a cell phone after being found with another's SIM card in her possession. The defendant told the court that she found the SIM card in the street and that she put it in her phone. After she did so, she received a call from the apparent owner of the SIM card who wanted the card back.

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The defendant agreed to meet with the woman at a tea shop, and when she arrived, six to eight officers were waiting to arrest her for theft of the cell phone. It was uncontested that the cell phone was never located and there were never any allegations that the defendant actually stole the cell phone.

During the eight-month trial, ILF filed a 253 motion that the charge was groundless (there was absolutely no evidence she had anything to do with the theft of the phone), a revision after its motion was denied (and the revision was likewise denied), and an extensive sentencing memorandum. ILF's attorney, Yu Yu, put everything she had into final arguments. The judge convicted the woman anyway, but of a lesser charge of theft by receiving stolen property (the SIM card). The acquittal of the main charge was a huge victory, and it was also a victory that the judge ordered the woman to serve only seven months in jail, giving her credit for the eight she already had spent. The defendant did not seek appeal.

Gambling

ILF had a case where a man was accused of running a gambling operation out of his home because during a search of his home, officers located a pencil, some paper with some unintelligible notes, and about \$40 cash. As mentioned earlier, all tips to police in Myanmar remain anonymous and it is extraordinarily difficult to get any information about the tipster or the information provided. The man believed that a neighbor who did not like him called the police. What the police did not seem to care about is that the man did not have a table, chairs, or any furniture to run a

gambling operation, just a small mattress on the floor, let alone any playing cards or anything else that would generally be found at a gambling institution.

Prostitution

ILF had two cases where two different women, on two different nights, but in the same area, were arrested for prostitution. In one case, the woman was wearing pajamas and apparently trying to catch a bus. In the other, the woman was fully dressed. The same six to eight male officers responded in both cases, and the civilian witnesses were likewise the same. The court decided to hear these cases together (although there is a mechanism for joinder, I do not know that there is a rule allowing for separation of cases...it should be obvious that the two cases should not be heard together). It was clear during the entire trial and at sentencing that the judge, the witnesses, and even the prosecutor could not tell the two women apart. They were both sentenced to one year in prison.

Overall, my ILF Fellowship was an amazing experience. I love that ILF does this very difficult work in Myanmar and other post-conflict countries. I also am so impressed that ILF's attorneys show up to work every day, work incredibly hard, and file motions, investigate their cases, and do everything in their power to fight every aspect of every case, knowing that their efforts will largely be fruitless. It is rare to see passion and fight like that. I hope to channel these amazing women when the fight for my client's rights seems too hard, because it is clear from this experience that it could be a lot worse.

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Protecting Against Child Abuse Through Legal Processes

by Judge Michael F. Leavitt

Protecting kids against child abuse is an issue that seems to have universal support. *How* we do so is sometimes up for debate. Juvenile courts are the primary arena where folks try to figure it out. Too often, when seeking the court's assistance, petitioners use the wrong tool to obtain that protection. When that happens, one of two unfortunate outcomes can result. First, even if the facts do not meet the requirements for the order being sought, the court may be tempted to grant some relief for the sake of protecting a child, even if it is in error. The results can be an unconstitutional imposition on parents' rights, unnecessary involvement of children in court, and improper judicial activism. Second, and far more likely, the judge will not grant the requested relief. In that case, petitioners may not fully understand why and may conclude that the court is not an adequate forum for protecting children. And a child who needs protection may not get it.

Filing the right petition matters. If done correctly, children are protected and parents' rights properly respected. Attorneys, particularly those in the domestic arena, and victim's advocates, need to be able to advise petitioners on the type of relief they seek and how they should best obtain it.

Child Protective Orders

Most often, individuals seek to protect children from abuse through a child protective order. Any interested person may petition the court for a child protective order on behalf of a child "who is being abused or is in imminent danger of being abused," so long as they make a referral to the Division of Child and Family Services (DCFS) first. *See* Utah Code Ann. § 78B-7-202(1).

Child protective orders are limited in scope and are intended to provide immediate and urgent relief. They are reserved solely for children who are being physically or sexually abused, or are in imminent danger of such abuse. *See id.* § 78B-7-201(1). Physical abuse is "non-accidental harm" or "threatened harm" that

"results in physical injury or damage to a child." *Id.* § 78A-6-105(1), (39). Sexual abuse includes sexual intercourse, sodomy, incest, or molestation by an adult towards a child, or between two children (with limitations), or engaging in conduct that would constitute a criminal sexual offense as defined by statute. *See id.* § 78A-6-105(47). It expires after only 150 days unless the court finds good cause to extend it. *See id.* § 78B-7-205(6).

Too often, the facts stated in a petition supporting a child protective order do not meet the limited definitions of the statute. For example, actual abuse in these circumstances must be currently occurring, or the threat imminent, as opposed to past abuse or speculative future abuse. The language of the statute refers to the child "*being* abused or . . . in imminent danger of being abused." *Id.* § 78B-7-201(1) (emphasis added). This is distinct from language under the Juvenile Court Act where the court may adjudicate a child as "an abused child," which means a child "who has been subjected to abuse" with no particular reference to timing. *See id.* § 78A-6-105(2). As such, if a child protective order is the only petition before the court, a previously-abused child may not receive proper protection unless the allegations show current abuse or an imminent danger of it.

Second, the petition must be directed toward a respondent – an individual to be enjoined from committing the abuse, having contact with the child, or visiting certain places where a child may be present. *See id.* § 78B-7-204 (listing possible contents

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of a child protective order). At times, a petition may name a parent as the respondent, but the actual abuse is being committed by someone else – the respondent's partner, another family member, or a neighbor. Only where the parent has the ability and responsibility to protect the child from the abuse should that parent be the respondent in a petition.¹ Otherwise, the respondent should be the person committing the abuse, even if that person is another child. The statute does not prohibit multiple child protective orders to protect a single child or set of children, but the allegations as to each respondent must meet the limitations in the statute.

Further, facts alleged in a petition for a child protective order often show that a child is being mistreated, but that the circumstances more likely meet the definition of neglect or emotional abuse. Neither is covered under the child protective order statute, though each may assuredly lead to harm. Though it may be tempting for the court to issue a child protective order in such circumstances to avoid possible or even actual harm, it would be error to do so unless the facts also meet the definitions of physical or sexual abuse.

These limitations and the narrow scope of a child protective order are important to consider because these orders are initiated and granted *ex parte*. Utah Code Ann. § 78B-7-202(3). The statute requires the court to review the petition and determine, based only on one side of the story, whether the child is being abused or is in imminent danger of abuse. *Id.* If granted *ex parte*, the court is infringing on a parent's constitutional rights without due process, and it could be up to twenty days before that respondent-parent gets an opportunity to address the court at all. *Id.* § 78B-7-203(1). This presents a significant potential for abuse of the judicial process in denying a parent their rights. As such, judges are rightfully particular about ensuring that the grounds for issuing a child protective order remain within the legal bounds mandated by the legislature.

While a child protective order allows for immediate relief, it covers a relatively limited number of circumstances. Where it is necessary to protect a child who is in the midst of physical or sexual abuse, the expedited and *ex parte* process provides appropriate protection. It is not appropriate in other situations, however, where a child may still need protection. Other options should be explored.

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Petitions for Adult Protective Orders

Often, individuals will seek to have children protected through the use of an adult protective order issued through a district court. “Any cohabitant who has been subjected to abuse or domestic violence, or to whom there is a substantial likelihood of abuse or domestic violence” may seek a protective order. *Id.* § 78B-7-103. A child likely will not be a petitioner in this instance because he or she cannot generally meet the definition of a cohabitant for purposes of this statute. *See id.* § 78B-7-102(3) (excepting from the definition of cohabitant (a) the relationship between natural parent, adoptive parent, or step-parent to a minor or (b) the relationship between natural, adoptive, step or foster siblings who are under the age of 18 years). A person who does qualify, however, may include in the petition other parties “to be protected by the petition.” *Id.* § 78B-7-106. Often, these are children of the petitioner and the respondent is their other parent. As such, those children may be protected by the adult protective order.

In order for children to receive protection in these instances, it must appear from the petition that the petitioner first meets the legal definition of a cohabitant who has been subjected to abuse or domestic violence. *See id.* § 78B-7-106(1); *see also id.* § 78B-7-102(1) (defining abuse as “intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm.”). Too often, a petition for an adult protective order focuses on protecting the children without first meeting this requirement. If the petition fails to do so, entering an adult protective order solely for protection of the children is improper. Only where a petitioner first establishes their own statutory right to protection may they include other persons to be protected, including their children.

Petitions for Abuse, Neglect or Dependency

Less frequently, private parties file petitions with the juvenile court seeking an adjudication of a child as abused, neglected, or dependent under Utah Code section 78A-6-304 (304 petition), which are most often filed by DCFS. When private parties do file a 304 petition, they are generally relatives seeking guardianship of a child, and are usually petitioned as such, with the allegations of abuse or neglect being, at times, tangential to the request for guardianship, if included at all.

A party need not wait for DCFS to take action in these cases

once they are filed. Any interested person may file a 304 petition, seeking to have the juvenile court adjudicate a child as abused, neglected, or dependent. *See id.* § 78A-6-304(2)(a). Similar to a child protective order, the petitioner must first make a referral to DCFS. *Id.* Once the referral is made, the interested party may file a petition without regard to the status of the DCFS investigation.

Once a petition is filed, even prior to adjudication, the juvenile court “may make an order . . . providing for temporary custody of the minor.” *Id.* § 78A-6-108(5). This may result in placement of a child in the temporary custody of that interested party prior to adjudication of the petition. In addition, the court may enter a temporary restraining order “directing a party to refrain from harassing, abusing, annoying, visiting or interfering with any other party or the subject minor.” Utah R. Juv. P. 33(c).

If the court ultimately adjudicates the child as abused, neglected, or dependent, it has relatively broad authority to make any number of orders, including guardianship, parent time, treatment requirements of parents, or “other orders for the best interest of the minor and as required for the protection of the public,” which may include further prohibitions on contact with the parents if they are a danger to the children. *See* Utah Code Ann. § 78A-6-117. These orders are not restricted to 150 days but may exist as long as the court retains jurisdiction over the child, and, in cases where permanent guardianship is ordered, beyond that. *See id.* § 78A-6-118.

Too often, facts presented in a petition for a child protective order more properly qualify for relief under a 304 petition. True, the process to obtain a child protective order is simpler, and there are state-approved forms to assist the petitioner where no such forms exist for 304 petitions. Use of a child protective order makes removal of a child from the custody of an abusive parent easier.² 304 petitions require more time and notice to parties, and more familiarity with the legal system. But they also allow the court to consider more facts and circumstances, and give the court more flexibility in fashioning a remedy that ensures a child’s safety and protects the rights of a parent.

A child protective order, and where appropriate, protection of a child through an adult protective order, are “band-aids” designed to resolve an immediate problem. Adjudication of a 304 petition is a long-term treatment plan designed to eliminate

a child's exposure to abuse, neglect, or dependency. Each has its purpose. In one instance, the need for immediate action outweighs the need to provide notice and an opportunity to be heard, but the scope of redress through the court is limited. In another, the child's needs do not outweigh a parent's right to notice, but the court may more broadly address a family's concerns. Recognizing the appropriateness of each is important to ensure the proper balance between protecting parents' rights and protecting kids from danger. Practitioners and advocates are wise to understand this distinction.

1. The degree of control the respondent has in stopping the abuse should be limited in scope. In an unpublished memorandum decision, the Utah Court of Appeals upheld a child protective order brought by a mother against a father, even though there was no evidence that the father was abusing their child. *See J.P. v. M.C.*, 2009 WL 426388 at *1. There, a step-sibling in the father's home was committing the abuse, and the court held "the juvenile court was entitled to exercise its discretion and enter a protective order ensuring that Father curtailed all contact" between the step-siblings. *Id.* It is unclear how far this ability to influence the abusing party would go when a petition is brought against a parent. It likely extends to children

under that respondent's supervision but may not extend further to include others.

2. Prior to adjudicating a 304 petition, the court has the authority to remove a child from a parent or guardian's custody pursuant to a warrant, which would be an expedited process for removal. *See Utah Code Ann. § 78A-6-106.* Generally, DCFS is the party that seeks one. The statute is not clear whether a private party has the authority to petition the court for one. The Juvenile Court Act allows the court to issue a warrant "authorizing a child protective services worker or peace officer" to take a child into "protective custody" upon finding a threat of substantial harm, necessity to take the child into protective custody to avoid that harm, and that it is likely the child will "suffer substantial harm if the parent or guardian of the child is given notice and an opportunity to be heard." *Id.* § 78A-6-106(3)(a). In deciding to issue one, the court reviews "a verified petition, recorded sworn testimony or an affidavit sworn to by a peace officer or any other person." *Id.* (emphasis added). Based upon this language, one could interpret the statute as allowing any interested party to ask for a warrant.

One could argue that, because a warrant results in placement of the child in "protective custody" that the requesting party must be DCFS or law enforcement. "Protective custody" is exclusively defined in Part 3 of the Juvenile Court Act as "shelter of a child by Division of Child and Family Services." *Id.* § 78A-6-301(2). But the section dealing with warrants is in Part 1, where no such definition exists. *See id.* § 78A-6-105. As a result, it is unclear whether any interested person would be prohibited from asking the court to issue a warrant for removal, asking the court for law enforcement assistance in removing a child and placing the child with them.

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Appellate Highlights

by Rodney R. Parker, Dani N. Cepernich, Scott A. Elder, Nathanael J. Mitchell, Adam M. Pace, and Andrew Roth

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

UTAH SUPREME COURT

MacDonald v. MacDonald, 2018 UT 48 (Sept. 5, 2018)

This appeal arose from a former husband's petition to modify his former wife's alimony award. The district court denied the petition, applying a standard set forth in a line of cases from the court of appeals that allows a modification of an alimony order only if there is a substantial change in circumstances that was not contemplated in the original decree of divorce. The court of appeals affirmed this decision, but under a different standard. It repudiated the "contemplated in the decree" standard set forth in prior case law and concluded that Utah Code § 30-3-5(8)(i) allows for a modification of alimony only where there is a "substantial change in circumstances not foreseeable at the time of the divorce." On certiorari, the supreme court affirmed the court of appeals and further clarified that the foreseeability inquiry must be based on evidence that was in the record of the trial court that entered the decree.

State v. Fullerton, 2018 UT 49 (Sept. 11, 2018)

In this case involving an appeal from the denial of a motion to suppress statements the criminal defendant made during an interview with the police, the Utah Supreme Court addressed the proper standard for evaluating whether a person is involved in a "custodial interrogation" such that **Miranda warnings are required**. In light of the evolution of United States Supreme Court precedent on this issue, the four factors articulated in *Salt Lake City v. Carner*, 664 P.2d 1168 (Utah 1983) cannot be considered exclusively. Rather, proper use of

the *Carner* factors requires "considering them in conjunction with all other relevant circumstances." Each factor "should be considered when relevant, ignored when not, and given appropriate weight according to the circumstances."

GeoMetWatch v. Hall, 2018 UT 50 (Sept. 12, 2018)

This case came before the court as a certified question from the United States District Court of the District of Utah. At issue was whether certain Utah State University foundations were entitled to immunity under Utah's Governmental Immunity Act as instrumentalities of the state. Although the Utah Supreme Court declined to answer the ultimate question it was presented in this case, it did provide a framework for determining whether an entity acts as an instrumentality of the state: **The determination of whether an entity is an instrumentality of the state requires a comparison of the proposed entity with those entities enumerated by the statute. Specifically the court must decide "whether the entity is a branch of the state that carries out state functions," and if so whether those functions are "of the same general kind, class, character, or nature as those enumerated terms."**

Reperex, Inc. v. Coldwell Banker Commercial, 2018 UT 51 (Sept. 18, 2018)

This case involved a breach of fiduciary duty claim based on a misrepresentation that the seller earned \$310,000 in a single year, even though the figure was \$74,000. The district court granted summary judgment based on the absence of expert testimony and the court of appeals affirmed. Reversing, the supreme court held **expert testimony was not necessary, based on the particular facts of the case, where a lay person could understand the materiality of the misrepresentation without an expert's technical input.**

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

***Bryner v. Cardon Outreach, LLC*, 2018 UT 52 (Sept. 24, 2018)**

Plaintiffs filed a class action lawsuit against a group of hospitals arguing that the Hospital Lien Statute, Utah Code § 38-7-1, requires a hospital to pay its proportional share of an injured person's attorney fees and costs when a hospital lien is paid due to the efforts of the injured person's attorney. The court **affirmed the district court's grant of summary judgment to the hospital defendants, concluding that the hospital lien statute is unambiguous and that it creates a priority for the distribution of the proceeds in third-party liability cases.**

***UDOT v. Kmart Corp.*, 2018 UT 54 (Sept. 25, 2018)**

UDOT appealed a condemnation award arguing that Kmart's leasehold interest had no value because the lease contained a clause that terminated the lease upon condemnation of the subject property. The Utah Supreme Court agreed with UDOT and adopted the termination clause rule from other jurisdictions. **This rule provides that when a lease agreement provides a termination upon condemnation clause, the lessee is not entitled to a condemnation award.** Utah's constitutional guarantee of just compensation is only triggered if the party shows a protectable property interest, and in this case, a lessee has no protectable property interest.

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***EnerVest, Ltd. v. Utah State Engineer*, 2018 UT 55 (Sept. 27, 2018)**

The Utah Supreme Court addressed two jurisdictional issues in this appeal from the district court's rulings on competing motions for summary judgment in an expedited proceeding under Utah Code § 73-4-24(1) within a water rights general adjudication. The court first held **the district court's summary judgment rulings were not properly certified under Rule 54(b) because the district court did not articulate why it determined there was no just reason for delay**; the denial of two of the parties' motions for summary judgment was not a final order that would be appealable but for the fact other claims or parties remained in the action; and, due to the nature of general adjudications, there cannot be "complete finality of any water rights until the entire general adjudication has been completed." The court then held that the only appellant lacked appellate standing because it was not "aggrieved" by the district court's rulings, given that it had not objected to the State Engineer's proposed determination with respect to the particular water right at issue. The Court's discussion on these issues may have far-reaching implications in the Utah Lake/Jordan River general adjudication currently underway.

***Bank of America v. Sundquist*, 2018 UT 58 (Oct. 5, 2018)**

The court reevaluated its own prior interlocutory holding in the same case regarding the meaning of "located" in the National Bank Act, which permits a national bank to act as fiduciaries in any state if the law of the state where the bank is "located" permits it to do so. In its prior ruling, the court held that the term "located" unambiguously meant the state where the national bank acts as a fiduciary. On appeal from the subsequent judgment, the court rejected its own prior holding as "clearly erroneous," determining instead that the term "located" in the Act was ambiguous. The court then **applied Chevron deference to conclude that the Department of the Treasury's interpretation of the term "located" as the place where primary fiduciary actions and decisions are undertaken by the national bank was reasonable.** The case was remanded for a determination of which state law applied to the fiduciary appointment at issue in light of the Treasury's interpretation.

***Utah State Tax Comm'n v. See's Candies, Inc.*, 2018 UT 57 (Oct. 5, 2018)**

The court held that section 59-7-113 of the Utah Tax Code is ambiguous regarding when it is "necessary" for the Tax Commission to allocate deductions between related entities to clearly reflect income. The court **relied on federal case law**

interpreting a similar provision in the Internal Revenue Code to conclude that allocation is “necessary” in circumstances when related companies enter into transactions that do not resemble what unrelated companies dealing at arm’s length would agree to do. Applying this standard, the court concluded that See’s was entitled to deduct royalty payments it made to a sister company.

UTAH COURT OF APPEALS

Armendariz v. Armendariz, 2018 UT App 175 (Sept. 7, 2018)

In this appeal of a denial of a motion to modify a divorce decree to terminate the alimony award to the wife in light of the husband’s recent retirement, Judge Harris concurred in the affirmance. **He wrote separately in part to “urge family law practitioners and district judges, when negotiating and drafting alimony provisions in decrees of divorce, to make a practice of taking into account the parties’ likely future retirement, and making appropriate ex ante adjustments to the payor spouse’s future payment obligations to account for significant foreseeable post-retirement changes in the parties’ financial situation.”**

Chaparro v. Torero, 2018 UT App 181 (Sept. 20, 2018)

Analyzing the scope of revisions to Rule 4(b) of the Utah Rules of Appellate Procedure, the court of appeals held that the **appellant could not appeal as of right from the divorce decree under Rule 4, because the decree contemplated additional determination of the amount of attorney fees.** However, because the district court modified custody as a sanction without considering the best interests of the minor child, the court of appeals concluded that it presented an extraordinary case where it would be appropriate to exercise jurisdiction under Rule 5.

State v. King, 2018 UT App 190 (Oct. 4, 2018)

Vacating a \$400 restitution order, the court of appeals held **defendant was deprived of effective assistance of counsel, because counsel failed to object to a restitution request after filing a notice of withdrawal.** In doing so, the court noted that proper withdrawal in a criminal case requires approval of the court. See Utah R. Crim. P. 36.

Wasatch County v. Utility Facility Review Bd., 2018 UT App 191 (Oct. 4, 2018)

Wasatch County appealed a decision by the Utility Facility Review Board ordering the County to issue a conditional use permit to Rocky Mountain Power for construction of transmission towers and lines, but the County failed to seek a stay of the decision or construction with the appeals court. By the time the parties had briefed and argued the issues on appeal, the permit was issued and the towers and lines were constructed and in use. **Because the County failed to seek a stay of construction during the pendency of the appeal process, the court held that the issues on appeal were moot and dismissed the appeal.**

Dole v. Dole, 2018 UT App 195 (Oct. 12, 2018)

In this appeal of a judgment arising from a divorce proceeding, the court held that it **lacked jurisdiction to address appellant’s argument that the lower court erroneously denied his post-trial motion because he filed his notice of appeal before the post-trial motion was decided and failed to amend the notice of appeal after the decision was rendered.**

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***Warrick v. Property Reserve*, 2018 UT App 197 (Oct. 12, 2018)**

In affirming the summary judgment dismissal of a slip and fall claim, the court of appeals held that **constructive notice of a dangerous condition should not be imputed when conjecture and speculation are the only ways to determine the length of time the condition existed.** Here, in order to demonstrate that a store owner had constructive notice of an icy sidewalk, the plaintiff had an affirmative duty to present evidence of approximately when the ice formed. Because plaintiff had presented no evidence demonstrating when the ice had formed, such as temperatures on the preceding days or nights or how long ice takes to form, summary judgment was appropriate.

***Bodell Constr. Co. v. First Interstate Fin. LLC*, 2018 UT App 199 (Oct. 18, 2018)**

A jury found that the defendants defrauded the plaintiff by misrepresenting a real estate investment. On appeal, the defendants argued that they were entitled to a new trial because the court admitted prejudicial testimony regarding the details of a different fraud lawsuit against them. The court **refused to consider this argument because the defendants made no contemporaneous objection or other motion regarding the evidence at trial on which the trial court could rule, and therefore failed to preserve the issue for appeal.** The court of appeals affirmed the judgment, concluding that defendants failed to establish any error in the district court's rulings, and failed to show a significant risk that the jury improperly based its punitive damages award on harm allegedly caused to a non-party.

***State v. Hamilton*, 2018 UT App 202 (Oct. 25, 2018)**

In this securities fraud case, the State and defendant stipulated to \$38,000 in restitution and a recommendation of no time in jail, based largely on defendant's cooperation. The district court ordered defendant to serve jail time and pay restitution in the amount of \$382,085. Affirming, the court of appeals held **the parties'**

stipulation regarding restitution was not binding on the district court, and that the district court did not exceed its discretion in ordering restitution in excess of the parties' stipulation, where the district court relied the presentence report to determine the appropriate amount and applied relevant statutory factors.

***Pioneer Builders Company v. KDA Corporation*, 2018 UT App 206 (Nov. 1, 2018)**

At issue in this appeal was whether a broad provision that terminated and extinguished the rights of a subordinate trust deed holder included a waiver of the statutory right of redemption. In reversing the district court, the court of appeals held that, **because the right of redemption was statutorily guaranteed, the broad language of the provision was not sufficient to clearly and unmistakably waive this statutory right because it did not mention redemption rights nor did it refer to the statutory provision.**

TENTH CIRCUIT***Payan v. United Parcel Service*, 905 F.3d 1162 (10th Cir. Oct. 4, 2018)**

The plaintiff sued his former employer under Title VII and 42 U.S.C. § 1981, claiming racial discrimination and retaliation. After the plaintiff reported the discrimination to human resources, he was placed on an employee improvement plan, among other measures. On appeal from summary judgment in favor of the employer, the Tenth Circuit rejected the plaintiff's argument that these measures constituted materially adverse employment actions under Title VII, **joining the Seventh Circuit and four other circuit courts of appeal to hold instead that placement of an employee on an improvement plan alone does not constitute a materially adverse employment action.**

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I've Had a Data Breach. Now What?

by Keith A. Call

In 2017, a law firm cybersecurity consulting firm released an astonishing report about law firm cybersecurity. See LogicForce, *Law Firm Cybersecurity Scorecard, 2017 Q1*, <https://www.logicforce.com/2018/03/28/law-firm-cyber-security-scorecard/>. After conducting surveys and assessments of more than 200 law firms ranging in size from one attorney to more than 400, LogicForce reported:

- “Every law firm assessed was unwantedly targeted for confidential client data in 2016–2017.”
- Approximately 40% of those law firms did not even know they were breached.
- Across the law firms surveyed and tested, there were on average 10,000 intrusion attempts per day, per server.
- 4.2 billion records were compromised across 4,169 publicly confirmed breaches in 2016.
- Cyberattacks on law firms are non-discriminatory. Size and revenues do not mater.

Several years ago, I had a run of about three consecutive years of free credit reporting. Apparently, my personal credit card information had been compromised after using it at some of the nation's largest and most sophisticated retail companies. I have not had any similar problems for the past few years (knock on wood!). I wonder if internet security protocols at major retailers have improved.

My personal suspicion is that hackers are turning their attention to easier targets – like law firms. Law firms often possess a host of incredibly valuable information as part of their electronic databases, including clients' intellectual property, tax returns, bank and other financial information, business plans, medical records, and other personal client information. Large and sophisticated businesses and financial institutions have made great strides to improve internet security, but law firms may not be keeping up. One industry consultant writes, “Law firms are notorious for having low levels of data security in place...even worse than the clients they are serving.” See

Erika Winston, *Why Hackers Target Law Firms* (May 25, 2017), <https://www.timesolv.com/why-hackers-target-law-firms/>.

Unfortunately, no matter how large or small your law firm is, it is no longer a question of whether you will be attacked, but when. See Jim Calloway, *Manage Cyber-Attacks: Is It Really Not If You Will be Attacked, But When?*, LAW PRACTICE TIPS BLOG (June 8, 2017), <https://www.lawpracticetipsblog.com/2017/06/-manage-cyber-attacks-is-it-really-not-if-you-will-be-attacked-but-when.html>.

In the September/October 2017 issue of the *Utah Bar Journal*, I addressed a lawyer's ethical obligations to secure client communications and other information in an electronic world. I discussed ABA Ethics Formal Opinion No. 477R, which explained a lawyer's ethical duty to use reasonable efforts when communicating client information over the Internet. See Keith A. Call, *Securing Communication of Protected Information in an Electronic World*, 30 UTAH B. J. 38 (Sept./Oct. 2017).

Recently, the ABA issued Formal Opinion 483, which picks up where Opinion 477R left off: What are an attorney's ethical obligations after a data breach has exposed confidential client information? ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 483 (2018). The Opinion identifies several ethical duties a lawyer has after a data breach, as well as several not-so-binding *best practices*. Here are some highlights.

Monitor for Security Breaches.

Lawyers must employ reasonable efforts to monitor their technology and office resources connected to the Internet, external data sources, and external vendors. “[J]ust as lawyers must safeguard

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and monitor the security of paper files and actual client property, lawyers utilizing technology have the same obligation to safeguard and monitor the security of electronically stored client property and information.” *Id.* at 5. Without reasonable monitoring, a lawyer could be oblivious that client information has been compromised.

Stop the Breach and Restore Systems.

The Opinion suggests that lawyers and law firms develop an incident response plan *before* a lawyer is swept up in a breach. A good response plan identifies specific individuals who can and will identify and evaluate any potential intrusion, assess its nature and scope, determine if confidential information was actually accessed and compromised, quarantine the threat, prevent the exfiltration of information from the firm, eradicate the malware, and restore the integrity of the firm’s network.

Determine What Occurred.

“Just as a lawyer would need to assess which paper files were stolen from the lawyer’s office, so too lawyers must make reasonable attempts to determine whether electronic files were accessed, and if so, which ones.” *Id.* at 7.

Preserve Client Confidences.

Unauthorized access to client information is not a violation of Model Rule 1.6 (preserving client confidences) if the lawyer has made reasonable efforts to prevent access or disclosure. *See* Model R. Prof’l Cond. 1.6, cmt. [18]. Opinion 483 cautions against compounding unauthorized access to client information in the process of responding to and reporting any data breach. For example, use extreme caution – and re-read Rule 1.6 – before disclosing confidential client information to law enforcement authorities without client consent.

Inform the Client.

Model Rule 1.4(a)(3) provides that a lawyer must “keep the client reasonably informed about the status of the matter.” *See* Model R. Prof’l Conduct 1.4(a)(3). The ABA Ethics Committee concluded that whenever a data breach involves, or has a substantial likelihood of involving, material client confidential information, a lawyer has a duty to notify the client of the breach. Formal Op. 483 at 11. Disclosure is not required in ransomware situations if all client information was accessible to the lawyer at all material times. Similarly, disclosure is not required if no client information was accessed by the breach. Disclosure is required if material client information was actually or reasonably suspected to have been accessed, disclosed, or lost. The disclosure must be sufficient for the client to make an informed decision about what to do next and must include material developments in post-breach investigations. The Opinion stopped

short of requiring disclosure to former clients but encouraged lawyers to reach agreements with clients about how the client’s electronic information will be handled after the representation ends.

Consider Obligations under State and Federal Law.

The Opinion is limited to a lawyer’s ethical obligations in the event of a data breach. But it points out that all fifty states have statutory breach notification laws. Federal laws and regulations may also apply. Lawyers should evaluate whether they must provide statutory or regulatory notification to clients or others, or take other action based on these cybersecurity laws.

In sum, it is helpful to think of your electronic files as paper files. You would likely take proactive steps if you knew someone had stolen or copied your client’s confidential paper files. Similarly, you have to be proactive in the event of a breach of your electronically stored information. Opinion 483 provides some useful guidance to follow in the event your data systems are attacked and compromised.

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

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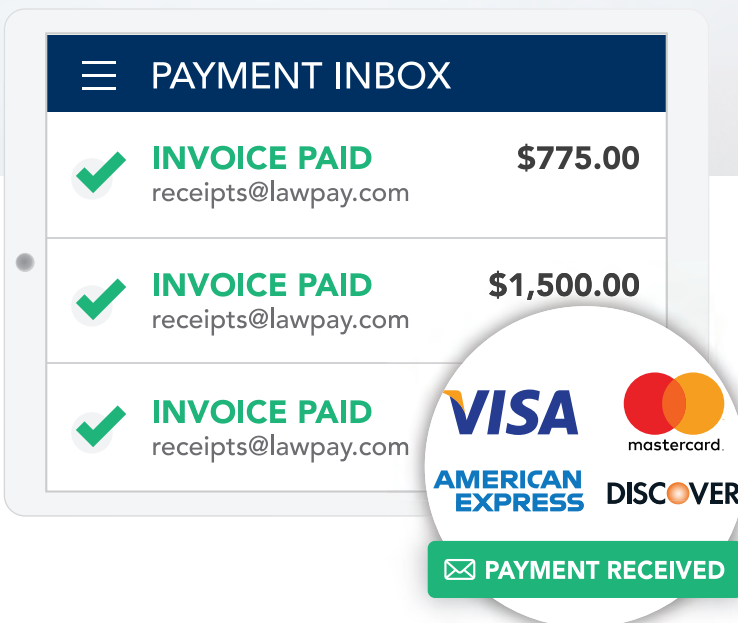
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Secure The Attachment: Best Practices and Other Tips for Email Attachments

by J.D. Lauritzen of the Innovation in Law Practice Committee

Picture this, if you will. You sit down at your desk to go through your email inbox. Among the emails in your inbox is an innocent looking email from what appears to be a trusted source. You open the email and click on the accompanying attachment. Unbeknownst to you, by opening the attachment, you have given hackers access to your computer to install a virus that tracks your keystrokes. Not knowing that your keystrokes are now being monitored, you access your firm's bank account or other firm-sensitive information. And, boom, just like that, you have given the hackers monitoring your computer access to your firm's bank account or other sensitive information. Think this sounds implausible? Well, think again.

In February 2015, a San Diego lawyer received an email from the United States Postal Service ending in usps.gov. Believing that the email was legitimate, the lawyer opened the email and clicked on the attachment. A few hours later, the lawyer tried accessing his law firm's bank account. The lawyer was transferred to a different web page that asked for his PIN, as opposed to his usual login. Near that same time, the lawyer received a call from an individual that identified himself as an employee of the bank.

The purported bank employee told the lawyer that he had noticed that the lawyer was having trouble accessing his account. The lawyer was directed to type in his PIN, along with what turned out to be a wire transfer code. Having entered the requested information, the lawyer was redirected to a page saying the bank's site was down for maintenance.

A few days later, the lawyer received another phone call from the supposed bank employee. This time, the lawyer was asked to enter the same information as before. The lawyer was told that the information was not working, and that the lawyer was being locked out of his account for twenty-four hours.

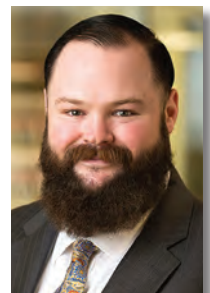
"[I]f an email is not from a trusted source, or otherwise raises a red flag, then it is probably best to delete the email or refer it to your IT department."

Within hours of being told he was locked out of his account, the lawyer discovered that \$289,000 had been transferred from his firm's account to a Chinese bank. Frantic, the lawyer reached out to his bank to see what could be done.

Unfortunately, the bank informed the lawyer that it could not cover the loss.

The foregoing story is a cautionary tale for lawyers regarding email security. However, email security is not the only issue facing lawyers when it comes to email attachments. Given that reality, this article is focused on providing lawyers with best practices and other tips for sending and receiving emails with attachments.

J.D. LAURITZEN is an associate attorney at Christensen & Jensen, P.C. J.D.'s practice includes business regulation and compliance, business litigation, civil rights litigation, plaintiff's personal injury, and white collar and criminal defense.



Be on the Lookout for Unexpected Attachments

We have all received an email with an attachment. In fact, as you are reading this article, it is very likely that your inbox is pinging with an email containing an attachment. Receiving an email with an attachment is not likely problematic if it is coming from a source that you recognize. However, it is possible that even an email from a trusted source may be part of a phishing email scam. So, how do you protect yourself against such a scam? Initially, you or your firm should invest in email threat protection systems like Mimecast or Barracuda. As part of using a threat protection system, you or your firm should consider using antivirus and anti-malware software to scan all incoming email correspondence, as well as implementing spam filters.

The software and spam filter will likely catch any suspicious emails, letting you know whether there is any need for concern when opening the email or its attachment. If the software program or spam filter alerts you to a problem, then the email can be deleted, the sender blocked, and your email system can otherwise be secured against a widespread compromise and subsequent data security breach.

Next, to the extent you or your firm cannot afford an email threat protection system or your system does not catch a phishing-type email, there are certain things you can look for that may alert you to a possible scam. Hackers often use what is known as “social engineering” to launch their attacks on unsuspecting email recipients. Social engineering is an attack that is designed to make the recipient take some sort of action, which, in the case of an email, is to click on an attachment.

To entice you to click on the attachment, hackers will employ customized personal messages that appear to be directed specifically to you. For instance, the email may say, “Dear [your name],...” or “please review the attached invoice for...” Hackers may also spoof (forge) the senders name so it appears to be from someone you know or from an otherwise trusted source. The message may have a threatening tone that indicates that “your account will be closed unless you...” or “your account will be charged if you do not...” The hackers may also make the message look as if it is coming from an official source, including the use of logos and other company identifiers. Lastly, the hackers may title the attachment in such a way as to make it look harmless.

It is also very important to understand the different type of file names and extensions. File names and extensions are important because they determine how the file will be accessed and what your computer will do with the file. You are likely familiar with the file extensions .pdf, .doc, or .xls. However, you might not be so familiar with an .exe. or a .dmg file extension. These file extensions are associated with executable files, which begin running automatically when the file is opened. Executable files are a hacker’s best friend, and oftentimes they are the way that a hacker may gain access to your computer without you even knowing it. Such was the case for the San Diego lawyer discussed above. If you receive a potentially suspicious email with an executable file attached, you should refer it to your IT department or otherwise take steps to make certain that it is not part of a scam.

You will also want to be on the lookout for encrypted/password-protected attachments. If a file attachment is encrypted, or is password protected, then it may not be able to be scanned for malicious code before it is delivered to you. Therefore, no warning will come from your email threat protection system.



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Examples of such files are .zip files, or password protected office productivity files. If you receive such an attachment, it should also be referred to your IT department or you should take whatever steps you can to ensure its safety.

Winning Friends Through Attachments

Now that you are thoroughly afraid of opening any email attachment that you receive, let us talk about best practices and other tips for sending emails with attachments. As noted above, attachments are a common way of distributing viruses and malware, which makes it increasingly likely that the email recipient's antivirus or anti-malware software will flag or block the email. Blocking .zip files is a good example of this. Because emails with attachments are more susceptible to being filtered or blocked, you or your firm likely should avoid sending emails with attachments.

Instead of sending emails with attachments, you can send the recipient a link to view the file. The link likely will not get caught up in the recipient's spam filter. It will not be subject to the file size limits generally imposed on attachments, and it will not take up unnecessary storage space on the recipient's mail server, as well as your own. The link may also allow you to control whether the attachment may be edited and who may perform such editing. Similarly, the link may also allow you to track who opened the attachment and when it was opened. These are all things for which an ordinary email attachment likely does not allow.

If you or your firm uses software programs like Microsoft's OneDrive or SharePoint, then sharing files via link is an even better way to share your files. OneDrive and SharePoint allow senders to ensure that only a single copy of a file exists, which is important for files that are going to undergo several rounds of revisions or edits. Those programs also offer the ability to co-author documents, track changes, and restore earlier versions (versioning functionality). Additionally, when you generate a link to file residing in OneDrive or SharePoint, you can specify the type of link you want to create. For instance, you can allow someone to be an editor, or you can restrict a person access to view only. You can even go so far as to require the person receiving the link to provide an authentication before he or she can access the link.

If you do need to send attachments, you or your firm should use attachments names that are simple and specific. You should also make sure to spell the attachment's name correctly. An incorrectly spelled attachment name may mean that it gets caught up in a recipient's spam filter or the email may be rejected entirely. Additionally, an incorrectly spelled attachment name is likely to be embarrassing or show a lack of attention to detail.

You can also take steps to secure the attachment that you are sending. This is especially important if the document or other information you are sending is sensitive or confidential. To protect a Microsoft Word file, you can click the File tab, then click Info tab, then click Protect Document, and then click Encrypt with Password. Once you have selected to encrypt the document with a password, an Encrypt Document box will show up. Simply type the desired password into the box and click OK. You will then be prompted to re-enter the password in a Confirm Password box.

Try to choose passwords that will be hard to guess. Passwords that are between six and twelve characters in length that

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contain at least one capital letter, one number, or one symbol are usually the safest bet. Remember not to send the password in the same email as the password protected document. Likewise, always confirm the identity of the recipient before sending a password.

In conjunction with password protecting a document, you can also encrypt a document before sending it in an email. Encryption makes it so the data in a document is unreadable or scrambled. Therefore, once the document is encrypted, it will appear as a jumbled mess of meaningless characters to anyone except the person who has the password to unscramble the document. Whether a document needs to be encrypted likely depends on the content of the document. If the document contains attorney-client privileged communications or is attorney-work product, then encryption makes sense. Similarly, if the document contains confidential or other sensitive information (i.e., bank account numbers, social security numbers, etc.) that could cause harm if it fell into the wrong hands, then the document should likely be encrypted. You can use programs like VeraCrypt, AxCrypt, or 7-Zip to encrypt your

files before sending them.

Don't Forget to Attach the Attachment



We have all likely received or sent an email that references an attachment, but the attachment is not included with the email. This is a major face palm moment for us all. However, this is a situation that can be easily avoided. Email programs like Microsoft Outlook have features that allow you to enable a forgotten attachment reminder. In Outlook, you can click on the File tab and then select Options. From there, you select Mail. You then scroll down to Send messages where you can check the box for "Warn me when I send a message that may be missing an attachment."

Other email programs like Gmail have built in forgotten email attachment reminders. Generally, Gmail will send you an alert that you may have forgotten to attach a document to an email – but after the email has been sent. If you include certain phrases like "I have attached" or "see the attached," then Gmail will remind you before the email has been sent that it may be missing an attachment.

Conclusion

As hackers become more and more inventive with their scams, lawyers and their firms should be vigilant and on the lookout for suspicious looking emails, especially when the email contains an attachment. By doing so, lawyers can likely prevent themselves or their firms from becoming a cautionary tale. Simply put, if an email is not from a trusted source, or otherwise raises a red flag, then it is probably best to delete the email or refer it to your IT department. Beyond looking for suspicious emails and attachments, lawyers can also benefit from finding new ways to send emails with links as opposed to attachments. Links allow for multiple editors and other innovations that regular email attachments do not allow for. However, if you do send an email with an attachment, you should consider password protecting or encrypting the document. This will ensure that only the email's recipient can access the information. The name of the game is security, and, as noted throughout this article, there are a number of steps you as a lawyer can take to protect yourself and others from hackers or from unsecured email attachments falling into unintended hands.

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Notice of Bar Commission Election

SECOND AND THIRD DIVISIONS

Nominations to the office of Bar Commissioner are hereby solicited for one member from the Second Division and two members from the Third Division – each to serve a three-year term. Terms will begin in July 2019. To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar. Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Nominating petitions are available at <http://www.utahbar.org/bar-operations/leadership/>. Completed petitions must be submitted to John Baldwin, Executive Director, no later than February 1, 2019, by 5:00 p.m.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1st with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15th.

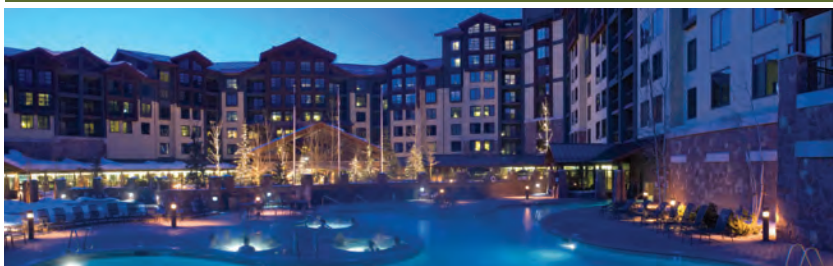
In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1. space for up to a 200-word campaign message plus a color photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions and two photographs no later than February 1st;
2. space for up to a 500-word campaign message plus a photograph on the Utah Bar Website due February 1st;
3. a set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division who are eligible to vote; and
4. a one-time email campaign message to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate.

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

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The Tuesday Night Bar – Celebrating Thirty Years of Service

Established in 1988, the Utah State Bar and Young Lawyers Division's Tuesday Night Bar legal clinic has provided high quality legal advice and referrals to the public for thirty years. The program supports and educates the public on legal rights, helping to further the mission of the state bar to promote justice.

In 1988, the Utah State Bar had already regulated the practice of law in Utah for fifty-seven years. However, the free legal clinic was an exciting addition to the bar's roster of pro bono efforts. The bar had just moved into the then new Law and Justice Center (dedicated September 7, 1988),¹ providing an opportunity and space to house the new volunteer program. The November issue of that year's Bar Journal praises the Tuesday Night Bar Committee, asserting that committee Chairperson Cecilia Espenosa, Vice Chairperson Mary Duffin, and the Young Lawyers Section are "building on the foundation laid by so many...and is moving forward."²

Tuesday Night Bar Facts and Figures

Tuesday Night Bar continues to move forward, and at a rapid pace. In 2017, volunteer attorneys across Salt Lake Valley served over 450 Utahns at the Tuesday Night Bar, providing more than 200 hours of pro bono work. This year the clinic is keeping pace: volunteers have served 492 people as of October 2018. Of

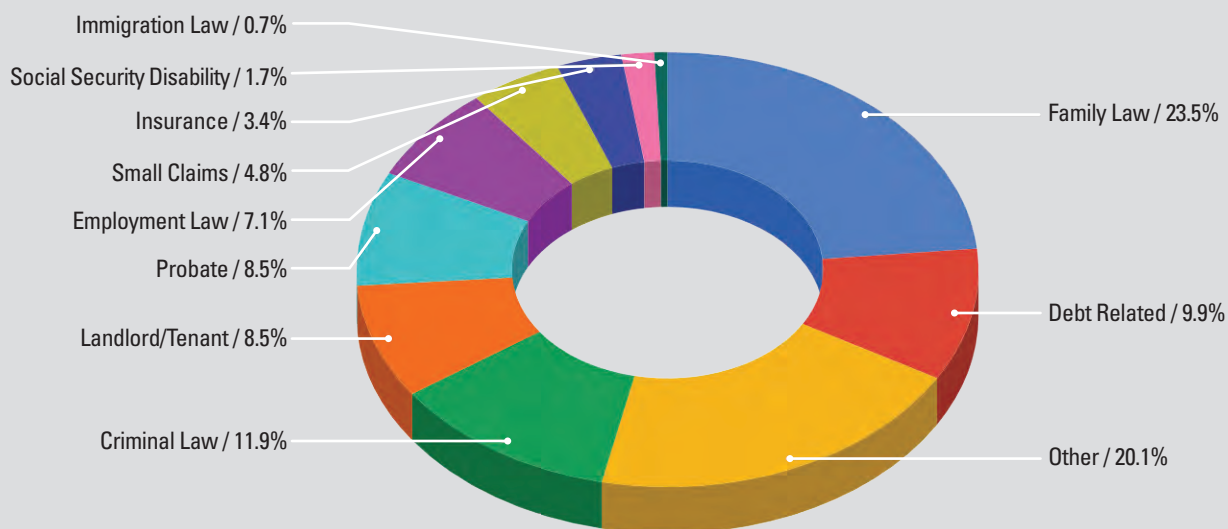
these, 47% had incomes lower than the 2018 poverty guidelines.

The Tuesday Night Bar program is unique in its dedication to providing legal advice in any area of law. As the graph illustrates, family law questions dominate the clinic. Between January and April of 2018 23.5% of all questions were family law related. However, 20.1% did not fit into any specific category. The next largest areas were criminal law, debt-related questions, landlord tenant, and probate. The clinic provides legal triage in these areas, offering practical legal advice, direction to appropriate resources, and importantly, kind and competent counsel.

Serving the Public

The bar's mission is to serve the public and legal profession with excellence, civility, and integrity. The key components of this mission are to help ensure the legal system is understood and accessible. The Tuesday Night Bar embodies the efforts of Utah's attorneys to accomplish this goal. Indeed, participating volunteers help in all areas of law and across all social and economic backgrounds. In each thirty-minute meeting, an attorney will help demystify the legal system and make justice more accessible.

Tuesday Night Bar by Area of Law



Based on clinic data from January 2018 – April 2018.

The Tuesday Night Bar serves the public in the greater Salt Lake area. However, the clinic has acted as a model for other districts. A Tuesday Night Bar in Brigham City meets on every second Tuesday. Another Tuesday Night Bar meets on the first Tuesday of each month in Park City.³ However, the Utah State Bar and the Young Lawyers Division (YLD) recognizes that many areas of Utah remain underserved. That is why in 2018, the Tuesday Night Bar traveled to the Kearns Library, making legal resources accessible to Utahns who were unable to travel to the downtown area. The clinic will return to Kearns in February 2019, and the program is currently looking for ways to serve other communities outside of the downtown area.

The Tuesday Night Bar Thanks You for Your Help

In 1988 the *Bar Journal* asked for volunteers to “provide legal assistance and referrals to the large segment of the public which does not have legal service readily available.”⁴ At the time, the clinic ran from 4:30 pm to 7:00 pm every Tuesday. Now, thanks to the support of the YLD and the law firms of Holland & Hart, Kirton McConkie, Snell & Wilmer, Zimmerman Booher, Fabian

VanCott, Durham Jones & Pinegar, Parr Brown Gee & Loveless, Clyde Snow, Jones Waldo, the Office of the Utah Attorney General, and many other firms and solo practitioners over the years, Tuesday Night Bar is about to start its thirty-first year. However, there is still a large population of Utahns without access to legal services. The Tuesday Night Bar and other programs coordinated by the Utah State Bar’s Pro Bono Commission need volunteer attorneys to help make the legal system accessible to all, regardless of financial means. If you are interested in volunteering for the Tuesday Night Bar or learning about other pro bono programs, please contact the Access to Justice Department at (801) 297-7049 or probono@utahbar.org.

1. See Kent Kasting, *President’s Message*, 1 UTAH B.J. 5, 5 (Aug./Sept. 1988), available at <http://www.utahbar.org/wp-content/uploads/2017/11/August-September-1988-Vol.-1-No.-1.pdf>.
2. The Barrister, *President’s Report*, 1 UTAH B.J. 27, 28 (Nov. 1988), available at <http://www.utahbar.org/wp-content/uploads/2017/11/November-1988-Vol.-1-No.-3.pdf>.
3. See Utah Courts Self-Help Center, Legal Clinics, Agencies & Organizations for a list of legal clinics, available at <https://www.utcourts.gov/howto/legalclinics/>.
4. *State Bar News*, 1 UTAH B.J. 19, 20 (Aug./Sept. 1988).

MCLE Reminder – Odd Year Reporting Cycle

July 1, 2017 – June 30, 2019

Active Status Lawyers complying in 2019 are required to complete a minimum of twenty-four hours of Utah approved CLE, which must include a minimum of three hours of accredited ethics. **One of the ethics hours must be in the area of professionalism and civility.** At least twelve hours must be completed by attending live in-person CLE.

Please remember that your MCLE hours must be completed by June 30 and your report must be filed by July 31.

Fees:

- \$15.00 filing fee – Certificate of Compliance (July 1, 2017 – June 30, 2019)
- \$100.00 late filing fee will be added for CLE hours completed after June 30, 2019 OR
- Certificate of Compliance filed after July 31, 2019

Rule 14-405. MCLE requirements for lawyers on inactive status

If a lawyer elects inactive status at the end of the licensing cycle (June 1–September 30) when his or her CLE reporting is due and elects to change back to active status within the first three months of the following licensing cycle, the lawyer will be required to complete the CLE requirement for the previous CLE reporting period before returning to active status.

For more information and to obtain a Certificate of Compliance, please visit our website at www.utahbar.org/mcle.



Pro Bono Honor Roll

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a free legal clinic in October and November of 2018. To volunteer call the Utah State Bar Access to Justice Department at (801) 297-7049 or go to <http://www.utahbar.org/public-services/pro-bono-assistance/> to fill out our Check Yes! Pro Bono volunteer survey.

Adoption Case

Brandon Baxter

American Indian Legal Clinic

Joe Bushyhead
Melinda Dee
Jason Steiert

Bankruptcy Case

Nelson Abbott
Perry Bsharah
Will Morrison
Ryan Simpson
Mark Tanner
Jory Trease

Community Legal Clinic: Ogden

Jonny Benson
Chad McKay
Francisco Roman

Community Legal Clinic: Salt Lake City

Jonny Benson
Dan Black
Craig Ebert
Karma French
Katey Pepin
Brian Rothschild
Paul Simmons
Rod Snow
Kate Sundwall
Russell Yauney

Community Legal Clinic: Sugarhouse

Skyler Anderson
Brent Chipman
Sue Crismon
Craig Ebert
Sergio Garcia
Lynn McMurray
Mel Moeivaziri
Reid Tateoka

Contract Case

Aaron Garrett

Debt Collection Pro Se Calendar – Matheson

Paul Amann
Matthew Ballard
Michael Barnhill
John Cooper
Ted Cundick
Jesse Davis
T. Rick Davis
Chase Dowden
Kim Hammond
Carley Herrick
Robert Hughes
Jon-David Jorgensen
Derek Langton
Joshua Lucherini
Janise Macanas
Michael Menssen
Cliff Parkinson
Vaughn Pedersen
Wayne Petty
Hunter Reynolds
Brian Rothschild
Charles Stormont
Mark Thorton
Fran Wikstrom
Nathan Williams
Adam Wright

Debtor's Legal Clinic

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Tami Gadd-Willardson
Ellen Ostrow
Brian Rothschild
Paul Simmons
Nick Stiles
Kregg Wallace
Brent Wamsley
Nate Williams

Enhanced Services Project

Brent Chipman
Robert Falck
Kurt Hendricks
Stephanie Hollist
Kenneth McCabe
Polly Samuels McLean

Expungement Law Clinic

Josh Egen
David Ferguson
Shelby Hughes
Grant Miller
Stephanie Miya
Bill Scarber

Family Justice Center: Provo

Elane Cochran
Thomas Gilchrist
Mike Harrison
Chris Morales
Jessica Pautm
Kathleen Phinney
Samuel Poff
Babata Sonnenberg

Family Law Case

Suzette Alles
Julia Babilis
Skyler Bentley
Jason Boren
Rob Denton
Robert Falck
Karma French
Rebekah-Anne Gebler
Michael Harrington
Ray Hingson
Sean Leonard
Colton McKay
Keil Myers
Nicholas Stiles
Scott Thorpe
Roland Uresk
Chase Van Oostendorp
Russ Weekes
Alixandria Young-Jui

Family Law Clinic

Justin Ashworth
Clinton Brimhall
Carolyn Morrow
Stewart Ralphs
Linda Smith
Leilani Whitmer

Fifth District Guardianship Pro Se Calendar

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Aaron Randall

Free Legal Answers

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Trevor Bradford
Marca Brewington
Jacob Davis
Victor Sipos
Simon So
Wesley Winsor
Russell Yauney

Homeless Youth Legal Clinic

Jake Barney
Janell Bryan
Victor Copeland
Allison Fresques
Jason Greene
Hillary King
Erika Larsen
Jenna Millman
Nubia Pena
Lisa Marie Schull
Josh Stanley
Pam Vickrey

Landlord/Tenant Pro Se Calendar – Matheson

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Marty Blaustine
Drew Clark
Don Dalton
Marcus Degan
Seth Ensign
Logan Finlay
Sarah Goldberg
Kirk Heaton
Brent Huff
Becky Johnson
Jon-David Jorgensen
Heather Lester
Randy Morris
Jack Nelson
John J. Sadlik
Nathan S. Seim
Nicholas Stiles

Mark Thorton
Matt Vanek
Nathan Williams
Elizabeth Wright
Gage Zobell

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Jared Anderson
Laina Arras
Ron Ball
Nicole Beringer
Justin Bond
Brent Chipman
Scott Cottingham
Chris Evans
Jonathan Grover
Robin Kirkham
Ben Lawrence
Allison Librett
Suzanne Marychild
Shaunda McNeil
Keil Myers
Lori Nelson
Lorena Riffo-Jenson
Jeremy Shimada
Joshua Slade
Linda Smith
Laja Thompson
Paul Tsosie
Paul Waldron
Brent Wamsley
Kevin Worthy

Medical Legal Clinic

Stephanie Miya

Minor Name Change Case

Matt Christensen

Probate Case

Jennifer Lee

Rainbow Law Clinic

Jess Couser
Shane Dominguez
Russell Evans
Stewart Ralphs

Senior Center Legal Clinics

Allison Barger
Kyle Barrick
Sharon Bertelsen
Richard Brown
Phillip S. Ferguson
Richard Fox
Jay Kessler
Joyce Maughan
Kate Nance
Rick Rappaport
Kathie Roberts
Jane Semmel
Jeanine Timothy
Jon Williams
sTimothy Williams
Amy Williamson

Street Law Clinic

Dara Cohen
Dave Duncan
John Macfarlane
Cameron Platt

Elliot Scruggs
Jeff Simcox
Richard Snow
Jay Springer
Katy Steffey
Jonathan Thorne
Brian Tuttle

SUBA Talk to a Lawyer Clinic

Bill Frazier
Christian Kesselring
Maureen Minson
Aaron Randall
Lewis Reece
Trent Seegmiller
Jonathan Wentz
Lane Wood

Timpanogos Legal Clinic

James Backman
Marca Tanner Brewington
Elaine Cochran
Leah Farrell
Chris Guymon
Mandy Larsen
Michelle Lesue
Isaac Macfarlane
Megan Mustoe
Jessica Payton
Candace Reid
Eryn Rogers
Babata Sonnenberg
Liz Thompson
Johanna Williams

Tuesday Night Bar

Michael Anderson
Alain Balmanno
Eric Bawden
Mike Black
Jeremy Brodis
Steve Combs
Rita Cornish
Olivia Curley
Karen Delpriore
Thom Gover
John Hurst
Emily Iwasaki
Bryan Johanson
Brent Johnson
Alexis Jones
Jon-David Jorgensen
Derek Kearl
Ken Logsdon
Kurt London
Lucia Maloy
April Medley
Kait Montague
Ben Onofrio
Crystal Orgill
Kyle Petersen
LaShel Shaw
Clark Snelson
C. Blake Steel

Veterans Legal Clinic

Brent Huff
Jonathan Rupp
Joseph Rupp
Katy Strand

Notice of Petition for Reinstatement to the Utah State Bar by S. Austin Johnson

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement (Petition) filed by S. Austin Johnson in *In the Matter of the Discipline of S. Austin Johnson*, Fourth Judicial District Court, Civil No. 120400436. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Notice of Petition for Reinstatement to the Utah State Bar by Bryan T. Adamson

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement (Petition) filed by Bryan T. Adamson in *In the Matter of Discipline of Bryan T. Adamson*, Fifth District Court, Civil No. 140500324. Any individuals wishing to oppose to concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

UTAH STATE BAR 2018 FALL FORUM Awards

Congratulations to the following who were honored on November 2 at the 2018 Fall Forum in Salt Lake City:



Kai Wilson
Community Member Award



Keil R. Myers
Outstanding
Pro Bono Service Award



Denise A. Dragoo
NLTIP Outstanding
Mentor Award



Jess M. Krannich
NLTIP Outstanding
Mentor Award



Shawn McGarry
Paul T. Moxley
Mentoring Award



William F. Atkin
Charlotte L. Miller
Mentoring Award



Cheryl M. Mori
James B. Lee
Mentoring Award



Terry L. Wade
Professionalism Award

Thank You to Bar Members!

Thank you to all the members of the Utah State Bar and their personnel who participated in the twenty-ninth Annual Food and Clothing Drive! We continue to enjoy strong and wonderful support from the entire Utah legal community. We had a very successful year, and that does not take into account the coordinated donations of 150 hams and all the trimmings for 150 families to prepare for their holiday feast. We also received a number of cash donations totaling approximately \$4,500, mostly for the Utah Food Bank.

We don't know how many semi-trucks your donations have filled over these twenty-nine years, but we believe it would be a very large number and we know that the donations have helped thousands of people!

We believe we were very successful in our efforts for the charities that we annually support, all through your continued generosity and efforts. We look forward to seeing you next year!

Nominations Sought for Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2019 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession.

Please submit your nomination for a 2019 Summer Convention Award no later than Monday, January 14, 2019. Use the Award Form located at utahbar.org/nomination-for-utah-state-bar-awards/ to propose your candidate in the following categories:

1. **Dorothy Merrill Brothers Award** – For the Advancement of Women in the Legal Profession.
2. **Raymond S. Uno Award** – For the Advancement of Minorities in the Legal Profession.

You can also read a description and criteria of the awards and take a look at the list of our past award recipients at the website noted, above. The Utah State Bar strives to recognize those who have had singular impact on the profession and the public. We appreciate your thoughtful nominations.

Attorney Discipline



UTAH STATE BAR ETHICS HOTLINE

Call the Bar's Ethics Hotline at 801-531-9110 Monday through Friday from 8:00 a.m. to 5:00 p.m. for fast, informal ethics advice. Leave a detailed message describing the problem and within a twenty-four-hour workday period, a lawyer from the Office of Professional Conduct will give you ethical help about small everyday matters and larger complex issues.

More information about the Bar's Ethics Hotline: <http://www.utahbar.org/?s=ethics+hotline>

Information about the formal Ethics Advisory Opinion process: www.utahbar.org/opc/rules-governing-eaoc/.

RESIGNATION WITH DISCIPLINE PENDING

On November 21, 2018, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Gary J. Anderson, for violation of Rules 8.4(c) and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Anderson was convicted of Communications Fraud, a Second Degree Felony. Mr. Anderson devised a scheme or artifice to defraud a man or to obtain from him money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and communicated directly or indirectly with the man by any means for the purpose of executing or concealing the scheme or artifice.

RESIGNATION WITH DISCIPLINE PENDING

On September 4, 2018, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Matthew S. Dunkley, for violation of Rules 1.15(a) and 1.15(d) (Safekeeping Property), Rule 8.4(b) and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

A couple retained Mr. Dunkley to represent them in a personal injury case. The couple were paid their portion of the settlement funds but learned that Medicare liens had gone to collections.

The couple reached out to Mr. Dunkley on several occasions and they were told that the problem was being handled, but ultimately they were forced to pay the liens themselves. The couple reached out to the Nevada State Bar and a grievance was initiated. Mr. Dunkley addressed the grievance and issued payment to the couple. Mr. Dunkley also issued a check for the remaining outstanding amount owed for the Medicare liens. The check for the Medicare liens was returned for insufficient funds.

The Nevada State Bar subpoenaed Mr. Dunkley's bank records and determined that he was consistently transferring large sums of money from his attorney trust account to his operating account for purposes of funding a gambling addiction and other expenses. Mr. Dunkley had hundreds of mobile and internet transfers to his operating account. These transfers were in round numbers and the majority of them did not identify a case or reason for the transfer. A corresponding analysis of Mr. Dunkley's attorney trust account similarly revealed dozens of corresponding repetitive withdrawals of cash, some of which occurred at casinos. An overall analysis of the funds in the attorney trust and operating accounts show that Mr. Dunkley's activities resulted in the misappropriation of client funds. Upon the Nevada State Bar's most recent subpoena of Mr. Dunkley's attorney trust records, they found that Mr. Dunkley continued unauthorized mobile and internet banking transfers to his operating account, demonstrating that despite treatment, he continued to engage in misconduct that resulted in harm to his clients.

Discipline Process Information Office Update

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

801-257-5515 | DisciplineInfo@UtahBar.org



**DISCIPLINE PROCESS
INFORMATION OFFICE**

RESIGNATION WITH DISCIPLINE PENDING

On October 25, 2018, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Julie C. Molloy, for violation of Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(b) (Communication), Rule 1.15(d) (Safekeeping Property), Rule 8.4(b) (Misconduct), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Ms. Molloy practiced in Massachusetts. She was hired to represent a client in a personal injury case arising from a vehicle accident. Ms. Molloy informed the client that the fee was twice the actual amount for the accident reconstruction specialist (expert). The client paid the fee, which was deposited into Ms. Molloy's trust account. Ms. Molloy paid the expert and diverted the other portion for her own purposes unrelated to the client. The expert required an additional fee after completing the report. The client gave Ms. Molloy a check for the remaining balance which she deposited into her trust account. Ms. Molloy did not pay the expert, even after receiving invoices for payment. Ms. Molloy did not inform the expert of the trial date or request that he testify and told her client that the expert was unavailable for trial. The jury returned a verdict favorable to the opposing party.

The expert filed a small claims action and obtained a default judgment against Ms. Molloy. Ms. Molloy entered into a payment plan with the expert. Ms. Molloy made one payment however, the check was dishonored, and she made no further payments.

Ms. Molloy was retained to represent a second client in a divorce matter. The client paid a retainer that was deposited into Ms. Molloy's trust account. Ms. Molloy used the funds for her personal or business purposes unrelated to the client's divorce matter. Ms. Molloy requested an additional amount of money from the client, which the client paid. Ms. Molloy deposited the money into her checking account and used the money for her personal purposes. Ms. Molloy did not file the client's complaint for divorce. The client requested a receipt for the second payment of funds and an itemized statement and accounting of the retainer funds. Ms. Molloy did not respond. The client discharged Ms. Molloy and again requested an accounting of the retainer funds and a refund of the remaining retainer. Ms. Molloy did not respond.

RECIPROCAL DISCIPLINE

On October 22, 2018, the Honorable James D. Gardner, Third Judicial District Court, entered an Order of Reciprocal Discipline: Disbarment, against Robert R. Morishita, disbaring Mr. Morishita

for his violation of Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5 (Fees), Rule 1.15(a) (Safekeeping Property), Rule 1.16(d) (Declining or Terminating Representation), Rule 8.4(b) (Misconduct), Rule 8.4(c) (Misconduct), and Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

On March 9, 2018, the Supreme Court of the State of Nevada issued an Order disbaring Mr. Morishita from the practice of law.

In August 2009, a client retained Mr. Morishita for the writing and filing of a provisional patent. The client paid Mr. Morishita and in August 2010 the patent was filed with the United States Patent and Trade Office (USPTO). In January 2016, Mr. Morishita informed the client that a Notice of Allowance for the patent was pending requiring an issuing fee. The client paid Mr. Morishita. Mr. Morishita stopped communicating with the client and abandoned his case.

The client contacted the USPTO office and was informed that the one and only office action was in March 2012 and because no response was received, the application was abandoned in October 2012. Mr. Morishita forged communication from USPTO in an effort to mislead the client into believing that the patent application was progressing.

In February 2017, the Nevada State Bar was contacted by a manager of storage units regarding Mr. Morishita's abandoned storage unit. The Nevada State Bar visited the unit and found hundreds of files. Most of the files from the storage unit were very old, but around forty-two files were no more than seven years old. The application number for each file was entered into the USPTO database. About fourteen of the forty-two files had an "abandoned status." The Nevada State Bar contacted each individual who had an "abandoned" application. Three applicants indicated that they had no knowledge that their application had been abandoned.

SUSPENSION

On September 25, 2018, the Honorable Patrick W. Corum, Third Judicial District, entered an Order of Suspension, against Carlos J. Clark, suspending his license to practice law for a period of six months and one day. The court determined that Mr. Clark violated Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.4(b) (Communication), Rule 1.15(b) (Safekeeping Property), Rule 1.15(d) (Safekeeping Property), Rule 1.15(e) (Safekeeping Property), and Rule

8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

The case involved Mr. Clark's handling of cases for two separate clients. The first client retained Mr. Clark to represent him in a Worker's Compensation claim. The client was awarded a temporary total disability payment as well as past and future reasonable and necessary medical expenses for the treatment of his injury. The payment for the client's temporary total disability was sent to Mr. Clark on the client's behalf. The client received the money but was not provided a complete accounting.

Two years later, the same client retained Mr. Clark to represent him in a personal injury claim for the injuries and damages he sustained as a result of an automobile accident. Mr. Clark settled the client's personal injury claim with the insurance company for the at-fault party and the client's under-insured motorist claim. Mr. Clark received all of the funds from the insurance companies and told the client that he would pay all outstanding bills with the settlement funds. Mr. Clark did not provide any written accounting to the client, did not inform the client of the exact amount of the settlement funds and did not inform the client of the amount of attorney's fees or costs. Mr. Clark provided payments over several months to the client but not all of the medical providers were paid. Collections actions were initiated against the client because of outstanding medical bills. A default judgment was entered against the client and the court entered a Writ of Continuing Garnishment.

The OPC sent a Notice of Informal Complaint to Mr. Clark. Mr. Clark did not respond.

The second client retained Mr. Clark to represent her in a personal injury claim for the injuries and damages she sustained as a result of an automobile accident. Mr. Clark sent a settlement demand to the insurance company concerning the client's claim but did not forward the offer to his client. One day after the statute of limitations for the client's claim expired, Mr. Clark filed a civil lawsuit against the at-fault driver on behalf of the client. The court entered an order dismissing the case for failure to serve the defendant. The client repeatedly contacted Mr. Clark requesting information on the status of her case. In each of those instances, Mr. Clark either failed to respond or responded by indicating that he would get back to her at a later time to provide information on her case. Mr. Clark did not inform the client that the case had been dismissed instead he informed her that her claim had been preserved because the case had been filed within four years of the date of the accident.

The OPC sent a Notice of Informal Complaint to Mr. Clark. Mr. Clark did not respond.

PROBATION

On September 28, 2018, the Honorable Glenn R. Dawson, Second Judicial District Court, entered an order of discipline against Mark L. Carlson, placing him on probation for a period of fifteen months or until conditions, including payment of restitution of \$ 96,953.48 for contingency fees taken on

ROBERT J. BARRON

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Personal Injury Protection (PIP) claims, are met based on Mr. Carlson's violation of Rule 5.4(a) (Professional Independence of a Lawyer) of the Rules of Professional Conduct. The court also entered two public reprimands against Mr. Carlson for his violations of Rule 1.5(a) (Fees) and Rule 1.5(c) (Fees) of the Rules of Professional Conduct. The probation has ended.

In summary:

Mr. Carlson became a partner with a firm in 2012. When he was a partner, Mr. Carlson knew that compensation of some paralegals at the firm included a percentage of the fees obtained from clients on whose cases the paralegals had worked. The practice started at the end of 2012 and ended around March 2014. Further, Mr. Carlson authorized the firm to pay a non-lawyer marketer 2% of attorneys' fees obtained from some of the clients whom she referred to the firm.

Starting in 2012, the firm accepted exclusively personal injury cases. PIP benefits are mandated by statute and are paid regardless of who was at fault in causing the accident by an individual's automobile insurance carrier. Mr. Carlson was aware of the firm's initial policy to calculate attorney fees in contingency fee cases after adding the PIP benefits to the total settlement amount. Later, Mr. Carlson's partner analyzed the attorney fees on the total settlement for reasonableness based on the amount of work performed on the entire case and not specifically the amount of work performed to obtain PIP benefits to determine whether to deviate from the agreed upon policy of taking a contingent fee on PIP benefits. The court analyzed ten cases that would be the focus of evidence related to Rule 1.5(a) and concluded that Mr. Carlson was charging a contingent fee to collect benefits from the firm's clients' own insurers while engaged on a contingent fee basis to handle personal injury claims against third parties. The court concluded that none of the clients whose cases were presented to the court were at risk of having their PIP benefits denied and that the benefits obtained in the cases were obtained by routine filing and collection efforts, and that the recovery of

the benefits was never uncertain or disputed, and it was improper for Mr. Carlson to charge a contingency fee on benefits for which there was never a risk of non-recovery.

In one case, the firm took a contingency fee without a written fee agreement specifying the percentage to be paid.

Mitigating Factors:

Absence of prior record of discipline; Absence of dishonest or selfish motive; Good faith effort to make restitution; Cooperative attitude; Inexperience in the practice of law; Good character and reputation; Interim reform; and Remorse.

Aggravating Factors:

Pattern of misconduct and Multiple Offenses.

PROBATION

On September 28, 2018, the Honorable Glenn R. Dawson, Second Judicial District Court, entered an order of discipline against R. Matthew Feller, placing him on probation for a period of fifteen months or until conditions, including payment of restitution of \$96,953.48 for contingency fees taken on Personal Injury Protection (PIP) claims, are met based on Mr. Feller's violation of Rule 5.4(a) (Professional Independence of a Lawyer) of the Rules of Professional Conduct. The court also entered two public reprimands against Mr. Feller for his violations of Rule 1.5(a) (Fees) and Rule 1.5(c) (Fees) of the Rules of Professional Conduct. The probation has ended.

In summary:

Mr. Feller had comparable managerial authority at a firm with another attorney. A third attorney became a partner in the firm in 2012. Compensation of some paralegals at the firm included a percentage of the fees obtained from clients on whose cases the paralegals had worked. The practice started at the end of 2012 and ended around March 2014.

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\$270 thereafter.**

Starting in 2012, the firm accepted exclusively personal injury cases. PIP benefits are mandated by statute and are paid regardless of who was at fault in causing the accident by an individual's automobile insurance carrier. Mr. Feller and his partner made the firm's initial policy to calculate attorney fees in contingency fee cases after adding the PIP benefits to the total settlement amount. Later, Mr. Feller's partner analyzed the attorney fees on the total settlement for reasonableness based on the amount of work performed on the entire case and not specifically on the amount of work performed to obtain PIP benefits to determine whether to deviate from the agreed upon policy of taking a contingent fee on PIP benefits. The court analyzed ten cases that would be the focus of evidence related to Rule 1.5(a) and concluded that Mr. Feller was charging a contingent fee to collect benefits from the firm's clients' own insurers while engaged on a contingent fee basis to handle personal injury claims against third parties. The court concluded that none of the clients whose cases were presented to the court were at risk of having their PIP benefits denied and that the benefits obtained in the cases were obtained by routine filing and collection efforts, and that the recovery of the benefits was never uncertain or disputed, and it was improper for Mr. Feller to charge a contingent fee on benefits for which there was never a risk of non-recovery.

In one case, Mr. Feller took a contingency fee without a written fee agreement specifying the percentage to be paid.

Mitigating Factors:

Absence of prior record of discipline; Absence of dishonest or selfish motive; Good faith effort to make restitution; Cooperative attitude; Inexperience in the practice of law; Good character and reputation; Interim reform; and Remorse.

Aggravating Factors:

Pattern of misconduct and Multiple Offenses.

PROBATION

On September 28, 2018, the Honorable Glenn R. Dawson, Second Judicial District Court, entered an order of discipline against Thaddeus W. Wendt, placing him on probation for a period of fifteen months or until conditions, including payment of restitution of \$96,953.48 for contingency fees taken on Personal Injury Protection (PIP) claims, are met based on Mr. Wendt's violation of Rule 5.4(a) (Professional Independence of a Lawyer) of the Rules of Professional Conduct. The court also entered three public reprimands against Mr. Wendt for his violations of Rule 1.5(a) (Fees), Rule 1.5(c) (Fees), and Rule 1.15(d) (Safekeeping Property) of the Rules of Professional

Conduct. The probation has ended.

In summary:

Mr. Wendt had comparable managerial authority at a firm with another attorney. A third attorney became a partner in the firm in 2012. Compensation of some paralegals at the firm included a percentage of the fees obtained from clients on whose cases the paralegals had worked. The practice started at the end of 2012 and ended around March 2014.

Starting in 2012, the firm accepted exclusively personal injury cases. PIP benefits are mandated by statute and are paid regardless of who was at fault in causing the accident by an individual's automobile insurance carrier. Mr. Wendt and his partner made the firm's initial policy to calculate attorney fees in contingency fee cases after adding the PIP benefits to the total settlement amount. Later, Mr. Wendt analyzed the attorney fees on the total settlement for reasonableness based on the amount of work performed on the entire case and not specifically on the amount of work performed to obtain PIP benefits to determine whether to deviate from the agreed upon policy of taking a contingent fee on PIP benefits. The court analyzed ten cases from the time period in question that would be the focus of evidence related to Rule 1.5(a) and concluded that Mr. Wendt was charging a contingent fee to collect benefits from his clients' own insurers while engaged on a contingent fee basis to handle personal injury claims against third parties. The court concluded that none of the clients whose cases were presented to the court were at risk of having their PIP benefits denied, that the benefits obtained in the cases were obtained by routine filing and collection efforts, that the recovery of the benefits was never uncertain or disputed, and it was improper for Mr. Wendt to charge a contingent fee on benefits for which there was never a risk of non-recovery.

In one case, the firm took a contingency fee without a written fee agreement specifying the percentage to be paid. In three cases, Mr. Wendt failed to promptly deliver funds to which third parties were entitled. The funds were delivered after the non-payments were discovered.

Mitigating Factors:

Absence of prior record of discipline; Absence of dishonest or selfish motive; Good faith effort to make restitution; Cooperative attitude; Inexperience in the practice of law; Good character and reputation; Interim reform; and Remorse.

Aggravating Factors:

Pattern of misconduct and Multiple Offenses.

Criminal Justice Reform in Utah: From Prosecution to Parole

by Jason M. Groth

An overwhelming majority of Americans say that we need to fix the criminal justice system. Benenson Strategy Group, *ACLU Campaign for Smart Justice National Survey* at 3 (2017), available at <https://www.aclu.org/report/smart-justice-campaign-polling-americans-attitudes-criminal-justice>. Criminal justice reform took a big step forward in Utah when the legislature passed the Justice Reinvestment Initiative (JRI) in 2015. The JRI is rooted in the Utah Committee on Criminal and Juvenile Justice's eighteen policy recommendations, which led to legislation that, among other things, reduced penalties for drug crimes, improved criminal justice data-tracking, and addressed reentry needs for individuals leaving incarceration. Utah Comm'n on Criminal and Juvenile Justice, *Justice Reinvestment Rep.* (2014) available at https://dsamh.utah.gov/pdf/Justice_Reinvestment_Report_2014.pdf; H.B. 348, 2015 Leg., 412th Sess. (Utah 2015).

Criminal justice reform is a process, and it must be thoughtfully reviewed as we see it play out in both in our community and in the data. The JRI has been successful in reducing the prison population. It has failed, however, to address racial disparities in the prison population that were present before the JRI was enacted. In fact, racial disparities are now worse for new entrants into the prison system. Utah's racial and ethnic minorities account for only 20% of Utah's population. *ACS Demographic and Housing Estimates*, AMERICAN FACTFINDER (2016), available at https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_5YR/DP05/0400000US49. In contrast, racial and ethnic minorities with new prison sentences increased from 34% in 2015 to 43% in 2017. Utah Comm'n on Criminal and Juvenile Justice, *Utah Justice Reinvestment Initiative 2017 Ann. Rep.* at 17 (2017), available at <https://justice.utah.gov/JRI/Documents/Justice%20Reinvestment%20Initiative/JRI%202017%20Annual%20Report.pdf>. The growing disparity may seem surprising after a major reform effort like the JRI, but it makes sense when we consider that not one of the JRI's eighteen policy considerations acknowledged that racial disparities exist in the system. We must account for these disparities as we look at other criminal justice areas that need reform and accept that reform efforts are a process rather than an easy, one-time fix.

Prosecutorial Reform

Prosecutors, the entry point for the criminal justice system, are often overlooked in reform conversations. Prosecutors decide what charges to file against the accused, decide what plea deal to offer, if any, and argue whether a person should be released from jail on bond. Prosecutors may be part of the county or municipal government. A county's elected prosecutor is called either a county attorney or district attorney, and an appointed municipal prosecutor is called a city attorney. These prosecutors determine criminal justice policy within their office and can influence policy at the state level. This makes the prosecutor the most powerful person in the criminal justice system.

Acknowledging the power of prosecutors is not a condemnation of prosecutors. Rather, acknowledging prosecutorial power helps us to realize the significant role prosecutors can take in improving the criminal justice system.

There are many ways prosecutors can support or implement needed changes, from rethinking plea offers to advocating to fund rehabilitation programs. Prosecutor can take meaningful steps to address racial disparities in the system by implementing implicit bias trainings for assistant prosecutors and holding law enforcement accountable for discriminatory practices. Prosecutors can help end mass-incarceration through sentencing alternatives like electronic home monitoring, restorative justice practices, and diversion programs. Prosecutors can also shape the contours of our local jails by advocating for treatment programs that address underlying issues like alcohol and substance abuse, which, if untreated, can contribute to increased involvement with the justice system. Additionally,

JASON M. GROTH is an attorney and the Smart Justice Coordinator at the ACLU of Utah. He is also the Secretary of the Utah State Bar's Constitutional Law Section.



prosecutors can bring transparency and accountability to their own offices by establishing Conviction Integrity Units that review accusations of misconduct and wrongful convictions.

Prosecutors can be powerful actors for change while also being accountable to the public. With that in mind, it is crucial to understand that county attorneys and district attorneys are elected officials, but they often go unchallenged in Utah elections. This is true in 2018, where only nine prosecutor elections were contested in Utah's twenty-nine counties. This includes four elections only contested at the primary level in Iron, Kane, Uintah, and Wasatch counties and five contested general elections in Utah, Salt Lake, Grand, Emery, and Morgan counties. Although prosecutor elections are often overlooked down-ballot races, their impact includes not only the counties they serve but also anyone that travels through their jurisdiction. If elected prosecutors go unreviewed and unchallenged, so do their policies and their impact on the community.

Parole Reform

Reform efforts are also needed at common exit points of the criminal justice system with the Board of Pardons and Parole (BOPP) and Adult Probation and Parole (APP). BOPP, rather than a judge, determines when an individual is released from prison under the indeterminate sentencing system. If BOPP grants a person release from prison to parole, then APP supervises that person in our community. It is important to note around 94% of incarcerated persons come back into our community, and, without strong reentry programming, individuals leaving prison may not have the needed skills to succeed while on probation or parole supervision. Jennifer Loeffler-Cobia & Rob Butters, Univ. of Utah, Utah Dep't of Corr. Evidence-Based Practice Adherence Summary Rep. at 1 (2015), *available at* https://socialwork.utah.edu/wp-content/uploads/sites/4/2016/11/2015-CCJJ_UDC-EBP-Adherence-Summary-ReportFinal-for-Distribution-1.pdf.

People leaving prison transition back to a community that they have been separated from for several months or several years. A person incarcerated in 1998 may be released from prison to realize that they have not crossed a street in Salt Lake City in twenty

years and wonder why there are orange flags at the crosswalk. That same person may not understand how to purchase gas at the pump with a credit card or that many businesses only accept job applications online. Coming to terms with a world that has moved on without you is difficult, let alone trying to navigate that world without resources to help you adapt to those changes.

People who have paid their debt to society need tools and resources to successfully reenter society. To that end, the JRI has attempted to give more discretion to the BOPP and improve its decision-making process. APP has also benefited from JRI with expanded reentry programming. However, since implementing these changes, more than half of people entering prison are people that were previously supervised on parole. This is partially explained by more people being released from prison to parole supervision rather than finishing their entire sentence in prison. Utah Comm'n on Criminal and Juvenile Justice, Utah Justice Reinvestment Initiative 2017 Ann. Rep. at 19–20 (2017), *available at* <https://justice.utah.gov/JRI/Documents/Justice%20Reinvestment%20Initiative/JRI%202017%20Annual%20Report.pdf>. The increase of people released on parole makes supporting reentry programming and access to resources more important than ever. A parolee that can get housing, employment, and treatment for issues like substance abuse is more likely to be a stable member of our community and less likely to recidivate. Council of State Governments Justice Center, *Reducing Recidivism: States Deliver Results* (2014), *available at* https://csgjusticecenter.org/wp-content/uploads/2014/06/ReducingRecidivism_StatesDeliverResults.pdf.

Much of Utah's success in improving the criminal justice system comes from the JRI, but we must be mindful that legislation is not the only, or always the best, solution. A holistic approach is needed. This includes considering reform efforts at the entry points into the criminal justice system, such as prosecutors and judges, and reform efforts at the exit points from the justice system, such as the BOPP and APP. Input from all areas of the criminal justice system is needed, especially from impacted communities that are disproportionately represented in the system. Together, we can create a system that not only serves justice but also practices smart justice.

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Getting That First Job as a Paralegal

by Greg Wayment

My first piece of advice, if you want to be a paralegal: start working at a law firm. Experience is crucial. Seek a position working as a receptionist, runner, file clerk, or assistant. Any entry-level position at a firm or in the legal group of a corporation is a great stepping stone. You want to look at firms that practice in the area of law you are interested in and ones that have a structure in place where paralegals are a key part of the process.

Some firms, for example firms that specialize in personal injury and litigation, tend to utilize paralegals more than other practice areas. I work in litigation and trial support at a firm that specializes in intellectual property and commercial litigation so a lot of my advice is geared towards a career in that area, but most of these principles will apply to any paralegal job.

I recommend that you be proactive and that you seek a position out instead of passively watching the classifieds for job postings and responding to those. One suggestion would be to get a copy of the Utah Business Magazine, which annually publishes a list of the largest law firms in the State of Utah, and work your way through the list. The list is based off of number of attorneys as opposed to revenue, etc. Go online, make some telephone calls, and get email addresses for the key hiring people at these firms.

There are also many smaller, but great, firms that do not appear on this list, but which can be great places to work as well. However, the smaller the firm, the less likely they are to hire a paralegal. Larger firms tend to have more support positions and turnover. Another resource is Martindale-Hubbell, which lists attorneys and law firms, including by practice area. Once you have a name, email address, and phone number, put a professional cover letter and resume together and start sending them to the key hiring people. You may even want to call and introduce yourself, but if you do be professional and brief.

During the interview process, demonstrate what you have accomplished in the past for organizations for which you have worked. Show that you are comfortable and sure of yourself in high-pressure situations and that you understand that in a

supporting role at a law firm, you may have to work long hours at repetitive tasks. Make sure you research the firm and know what kind of work it does and what kinds of cases with which it has been involved. If you can work your knowledge of the firm into the interview discussion, it will help you stand out from others who have not done this research.

Once you get a position at a law firm, learn everything you can and constantly look for opportunities to expand your skill set. A lot of the skills necessary to be an effective paralegal are learned on the job. Find mentors from whom you can learn. People you can emulate and get ideas from, both within your firm and within the paralegal community. You will find that most paralegals are very gracious and are more than willing to explain what they do, pass along information and advice, and have an interest in your success as a paralegal.

When you have progressed far enough along that you are promoted to a legal assistant or paralegal position, start utilizing all the resources that are available to you. A great place to start is the Paralegal Division of the Utah State Bar (Paralegal Division) and the Utah Paralegal Association (UPA). These are professional organizations that exist to promote the profession and ultimately serve the community.

The Paralegal Division is sponsored by and is a division of the Utah State Bar. You have to be actively employed as a paralegal to be a part of this organization, and you have to complete ten hours annually of continuing legal education or CLE to keep your membership current. It is a great way to refresh your skills and

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learn new ones as well as meet other paralegals. It is also helpful to see what other paralegals are doing at their firms. There are some additional benefits that come along with the membership, and overall it is just a great way to promote the profession. For more information about the Paralegal Division of the Utah State Bar, visit its website at: <http://paralegals.utahbar.org>.

Another professional organization is Utah Paralegal Association, which is a branch of NALA or the National Association of Legal Assistants. These organizations are a conduit for the CLA and CP study courses, exams, and designations. Having these designations may be beneficial in showing potential employers your seriousness about being a paralegal and a professional and may help you get an interview and stand out from the crowd of applicants. Also, these designations may be important when making a job transition, especially out of state. One benefit of UPA is that it accepts students who are currently studying to work in the paralegal profession, as opposed to the Paralegal Division, which only accepts actively employed paralegals. For more information about UPA, visit its website at <https://www.utparalegalassn.org/membership>.

In tandem with your position at a firm, pursue a bachelor's degree from a reputable institution. There are some schools that offer programs in legal studies, and these schools have classes that are directly geared towards and relevant to your work as a paralegal. However, I would suggest that you study whatever it is that you really enjoy. English, accounting, or especially computer science are some examples of four-year degrees that would help you directly in a paralegal role. But, there are many other degrees that would be acceptable.

Being a well-rounded person is helpful in the paralegal profession. Many paralegals pursue post-baccalaureate certificates in paralegal studies and if you chose to pursue this route, make sure the program is approved by the American Bar Association. Whatever path you pursue, carefully weigh the educational costs with your expectations about benefits and salary and availability of jobs when you graduate. The attorneys at your firm can give you a good idea of what their educational expectations are for a paralegal.

Alright, now you have the position and the education, what skills are going to help you be a successful paralegal? The most important thing is to be a problem solver. When an attorney gives you an assignment, listen closely, pay attention to the details, take notes, and then see what you can accomplish without going back for additional clarification. If you run into a wall and cannot figure out what to do, it is okay to ask for additional guidance, but always try first to see if you can find a solution. Pull from your

resources, research on the web, and figure it out. If you need more guidance, you may be asked by the attorney what you have already done to solve the problem, and it is important that you can show how you have been working through the process.

Pay attention to the cases and what is going on at your firm. If you are working in litigation, whenever possible read the pleadings. Skim through the depositions if you do not have time to read them in their entirety. Read the hearing and trial transcripts. Review the correspondence that is going back and forth with opposing counsel. A lot of this communication is going to happen via email now, which you will not be privy to, but pay attention to the formal communication.

Know your clients and their business. It will keep you engaged, it will help you to connect to your attorneys and firm, and the clients will appreciate it. One of the biggest complaints about the legal field is unresponsive attorneys. It is a reality that the attorneys you work for will not always be able to return calls and answer emails as quickly as they would like. If the client can call you, and feel confident working with you, that is a particularly valuable asset you can bring to the firm.

Go to hearings when you can. Sit in on client meetings and depositions if you get the chance. Ingrain yourself in the process as much as possible. You will find there are always opportunities to serve.

Create your own niche. If no one is really in charge of ordering transcripts, volunteer for that responsibility. If your firm has a document database, be the in-house expert on how to use it and be ready to train new personnel.

Own projects. Take initiative. If you see a white board that needs to be hung, boxes that need to be taken to the trash, or files that need to be made, do it. As a paralegal you may be required to make copies, answer phones, clean up conference rooms, or do other things that you may think are outside your formal job description. If there is something that needs to be done, or a new process that you can initiate that will help your firm be more effective, do it.

The paralegal profession can provide a great opportunity for an engaging and satisfying career but the landscape of the profession is always changing. To be an effective paralegal you have to have the right attitude, experience, and education as a foundation. From there, effective paralegals are masterful at pulling from resources, constantly seeking to expand knowledge, and are always willing to take on new projects and responsibilities.



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

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

January 10, 2019 | 4:00–6:00 pm

2 hrs. CLE

Litigation 101 Series – Direct & Cross Examination. \$25 for YLD Section members, \$50 for all others. Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_9080C.

January 23, 2019 | 8:00 am – 12:30 pm

4 hrs. Ethics

Ethics for Lawyers: How to Manage Your Practice, Your Money and Your Files. Annual OPC CLE. \$150. To register visit: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_9094.

February 7, 2019 | 4:00–6:00 pm

2 hrs. CLE

Litigation 101 Series – Opening Statements. \$25 for YLD Section members, \$50 for all others. Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_9080D.

February 22, 2019 | 8:30–9:30 am

IP Summit. Hilton Hotel, 255 South West Temple, Salt Lake City. Save the date! More information to come.

March 7–9, 2019

Spring Convention in St. George. Dixie Convention Center, 1835 S. Convention Center Dr., St. George. Save the date! More information coming soon!

March 14, 2019 | 4:00–6:00 pm

2 hrs. CLE

Litigation 101 Series – Closing Arguments. \$25 for YLD Section members, \$50 for all others. Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_9080E.

March 20, 2019 | 9 am – 3:45 pm

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

OPC Ethics School. \$245 on or before March 6, 2019, \$270 thereafter.

April 4, 2019 | 4:00–6:00 pm

2 hrs. CLE

Litigation 101 Series – Ethics & Civility. \$25 for YLD Section members, \$50 for all others. Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_9080F.

April 10, 2019

Annual Spring Corporate Counsel Seminar. Additional details/logistics to follow.

Classified Ads

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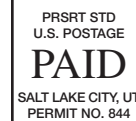
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CAVEAT – The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: April 1 deadline for May/June publication.) If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

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