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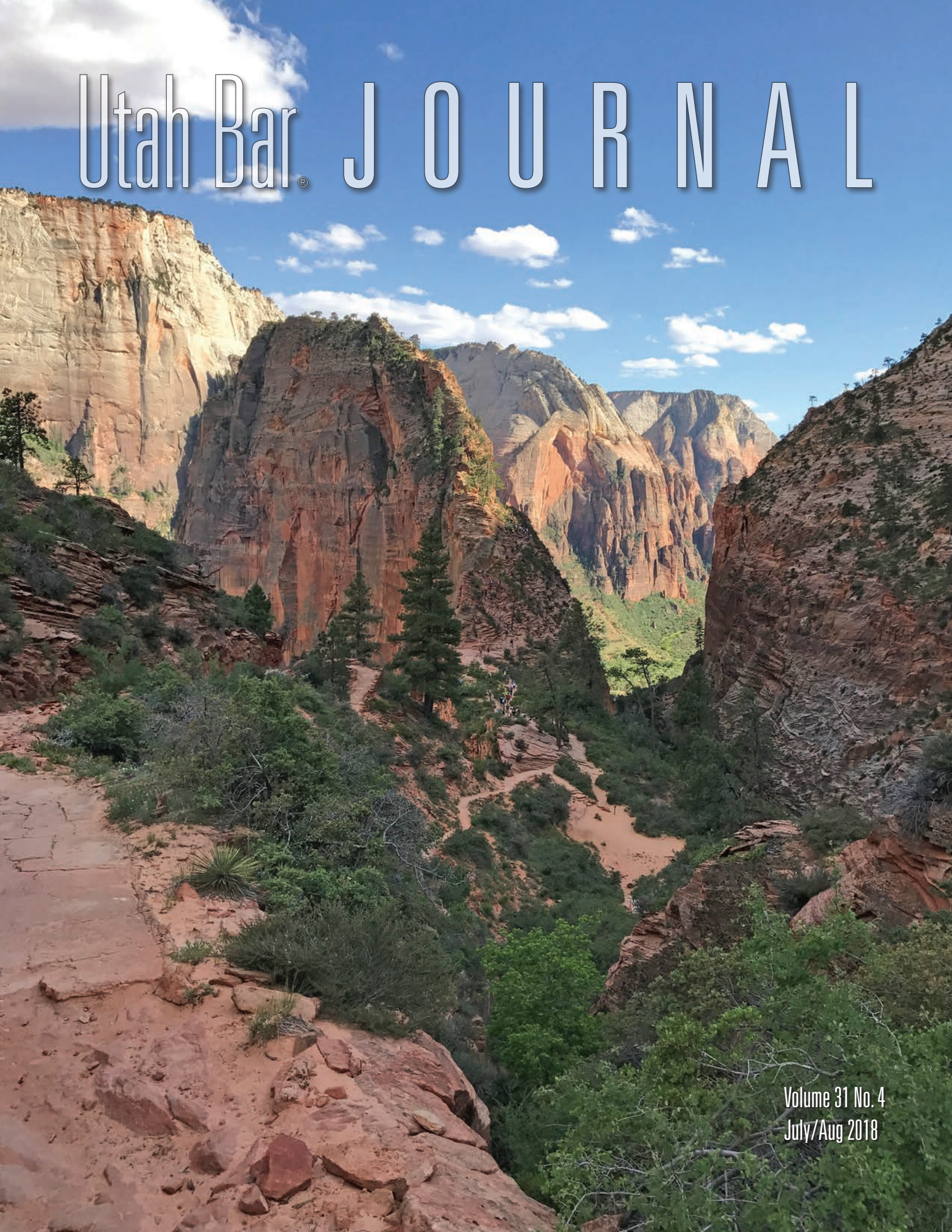

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The lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity.
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Cover Photo

Angels Landing by Utah State Bar member Vaun Hall.

VAUN HALL is a partner with the law firm of CAMPBELL HOUSER FERENCE & HALL. Asked about his photo, Vaun explained, "My older brother Aaron and I began our Trans-Zion Trek at Lee Pass Trailhead up Kolob Canyon at 2:30 a.m. We packed light and brought a water purifier. The scenery along the West Rim Trail looking down on all the sandstone structures was incredible. Thirty-eight miles and fourteen hours later, this welcome and amazing view of Angels Landing came into view near the end of our day."

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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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Letter to the Editor

Dear Utah State Bar Journal Editor:

It is my hope that the *Utah Bar Journal* will publish attorney discipline cases following trials or decisions wherein the lawyer prevails, in addition to those in which the Bar prevails.

OPC accused ALJs LaJeunesse and Hann of violating rule 8.4(d) of the rules of professional conduct (conduct prejudicial to the administration of justice). ALJ LaJeunesse asserted he interpreted Labor Commission Law to allow ALJs to request clarification of flawed reports written to the ALJs without notice to the litigants. He and Hann reasoned the authors of the reports work in an adjunct capacity to advise the ALJs regarding medical aspects of cases. LaJeunesse also asserted Rule 2.9 of the Code of Judicial Conduct allows judges to have ex parte consultations with functionaries who aid judges in carrying out adjudicative responsibilities. Acting on a complaint by the Workers' Compensation Fund of Utah, who learned Hann had returned a report for clarification without notice, the Bar accused ALJs LaJeunesse and Hann of violating the statute and rule 8.4(d).

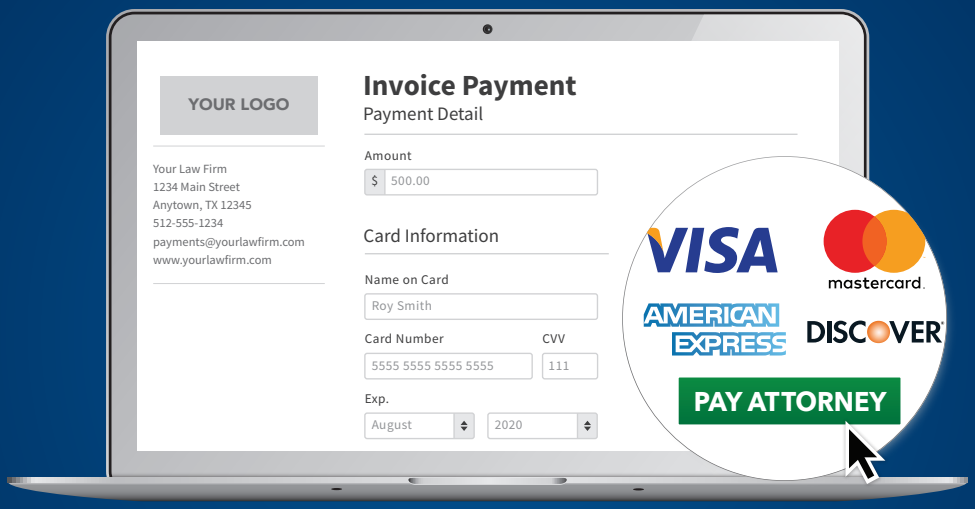
I have the pleasure of representing ALJs LaJeunesse and Hann, who prevailed. After a five-day trial, Third District Court Judge Andrew Stone authored a nineteen page decision, dismissing LaJeunesse's case. Stone wrote that attorneys and judges interpret laws all the time, and "[o]n any given day,…at least one side is generally wrong." The Utah Supreme Court affirmed the dismissal in *In re LaJeunesse*, 2018 UT 6, agreeing that "our legal system could not function if the side whose view is rejected is in jeopardy of a professional misconduct charge…." *Id.*, ¶ 39. Hann's case has now been dismissed with prejudice on her motion for summary judgment.

Inclusion of more complete litigation information is not only transparent, but should help lawyers better understand ethical norms. I look forward to the Bar's consideration.

Sincerely,
LAW OFFICE OF ELIZABETH BOWMAN, PLLC
Elizabeth A. Bowman
Attorney at Law

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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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.

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Our Tribe
Field Notes on Lawyers – Summer 2018

by John R. Lund

As summer unfolds, we can begin to observe the long-standing rituals of the species known as Utah lawyers and of their professional association. Chieftains of the various sections and committees, some long in the tooth but all still committed to their tasks, assess whether to stay on another year or cede their positions to the eager young lieutenants challenging their authority. Large law firms run their new recruits through a gauntlet of lunch-and-learns, research memos, and summer parties. The courts solicit interest in their committees, looking for fresh volunteers to aid in rulemaking and other functions. And a new crop of commissioners swear in and get indoctrinated in the sometimes obscure customs of the Board of Commissioners of the Utah State Bar.

> *"Certainly we have areas in which we can improve, most notably…gender pay equality, diversity…and access to justice for all people living in Utah."*

But the most enduring ritual is the annual migration. Usually the lawyers go northward. By late July, their vans and SUVs can be seen all along the I-15 corridor. Many of the vehicles are brimming with children and have roofs and racks festooned with enough bicycles to make up a peloton. They typically land in Sun Valley, Idaho. That mountain resort is quite similar to many of the areas typically populated by Utah lawyers in their home state. Yet, for reasons that may warrant further historical and sociological research, Utah lawyers and judges seem innately drawn to this Idaho mecca.

Once bedded down in the numerous condos and lodges in the area, the lawyers engage in other time-honored traditions. They gather on the veranda of the famous Sun Valley Lodge to rekindle acquaintances and watch the tribe's children ice skate. Yes, ice skate. It's a Sun Valley thing. The lawyers also hone their professional skills in groupings called "breakouts" and "plenaries." In terms of the vigorous communication and interaction taking place, these groupings bear striking similarity to a convention of penguins or a colony of prairie dogs. With much applause and speech-making, they honor and celebrate a selected lawyer, judge, committee, and section for their contributions to the profession.

The key benefits of this migratory collaboration appear to be the strengthening of bonds among the tribe and an increase in standards of practice from the sharing of ideas and information. Unfortunately, not all factions of the tribe participate equally in the affair. However, the tribal leaders appear devoted to broadening participation in the gathering, through scholarship and funding solutions and also by designating Park City as the location for at least some of the future rendezvous. That venue is much closer to the homes of many Utah lawyers, it is somewhat more affordable than Sun Valley, and it is more workable to include the councils and boards of Utah's judges at an in-state location.

One final ritual that occurs at the annual summer meeting is that the old president steps down and a new president is ensconced. In recent times this transfer of power has occurred without controversy or strife. And nothing has been observed in recent months to suggest that the current president, called John Lund, will attempt to hold onto the mantle of authority. Rather, he is expected to peacefully pass the mantle to the tribe's next duly chosen leader, one called Dickson Burton….

Friends,

It's been great to be your president this past year. Thank you for the opportunity. It is truly a delight to be a member of this bar. It means working with lawyers and judges who are true professionals, who are both civil and committed to serving their clients and the public. And it is especially positive to see those qualities being instilled in the young lawyers who are joining our ranks.

Certainly we have areas in which we can improve, most notably in the areas of gender pay equality, diversity from those entering law school to those being appointed to the bench, and access to justice for all people living in Utah. We have tried to bring those issues to the fore during the past year. I believe we are headed in the right direction, we just need to move faster.

In closing, I hope you will indulge me this one favorite passage from my favorite singer-songwriter. It speaks to how I'd like to see our particular tribe tackle these challenges we face. From *Shed a Little Light* by James Taylor:

> Let us turn our thoughts today to Martin Luther King
> And recognize that there are ties between us
> All men and women living on the Earth
> Ties of hope and love, sister and brotherhood
> That we are bound together
> In our desire to see the world become
> A place in which our children can grow free and strong
> We are bound together by the task that stands before us
> And the road that lies ahead
> We are bound and we are bound

I sign off with deep gratitude to all of the commissioners, bar staff, and section and committee volunteers who have so ably served this community, not only in the past year but for many years. Thank you, thank you, thank you.

John

GDPR: What (and Why) You Need to Know About EU Data Protection Law

by Kyle Petersen

The European Union General Data Protection Regulation (GDPR) went into effect on May 25, 2018. You have likely already heard of GDPR, but why should you care about EU law? You should care because GDPR expands the territorial scope of EU data protection laws, significantly increases the penalties for non-compliance, and is enshrouded with uncertainty. In other words, it should have your attention because: (i) organizations with no physical presence in the EU may be subject to GDPR; (ii) like U.S. anti-bribery and anti-trust laws, GDPR introduces extremely high fines – up to 4% of annual global turnover (an activist group in the EU filed complaints against Facebook and Google within hours of GDPR coming into effect seeking roughly $8 billion in fines); and (iii) it remains to be seen how strict EU data protection authorities will enforce GDPR. GDPR comes from a civil law legal system, which can be frustrating for U.S. trained attorneys to navigate. Civil law jurisdictions are historically highly regulated, but enforcement of those regulations is often inconsistent. For these reasons, you should be aware of GDPR and understand it enough to recognize when it might affect your clients.

The first thing to know about GDPR is to whom it applies. GDPR applies to organizations established outside the EU that: (i) process (as defined below) personal data of individuals located in the EU; (ii) offer goods or services to individuals located in the EU; or (iii) monitor behavior of individuals located in the EU. *See* Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, 2016 O.J. (L 119), art. 3. U.S. organizations will be subject to GDPR if they engage in these activities, despite not having a physical presence in the EU.

This article addresses key provisions of GDPR that are likely to affect U.S. organizations, particularly those in the business-to-business, or B2B, context. It also provides practical insights on achieving compliance and the challenges organizations will likely face in doing so. While it focuses on aspects that many consider to be the most concerning, this article addresses a mere fraction of GDPR. For example, in the B2C context, organizations need to have a legal basis for processing personal data, comply with GDPR's notice requirement, and be able to respond appropriately to individuals exercising their "data subject rights," all of which this article does not address but are equally important.

BACKGROUND ON EU DATA PROTECTION LAWS

Since 1995, the EU has regulated data privacy under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281) (Directive). A directive is EU legislation that requires member states to achieve a certain goal but allows each member state to implement its own laws on how to reach such goal. The Directive resulted in twenty-eight data protection laws across the EU. In an effort to keep pace with technology, offer greater protections and rights to EU citizens, and harmonize data protection laws, EU Parliament approved the final text of GDPR in 2016. Unlike the Directive, GDPR is a regulation – a binding legislative act that is enforceable as law in all EU member states. The immediate result of GDPR will be one comprehensive data protection law in the EU, instead of twenty-eight, although GDPR has several "opening clauses,"

KYLE PETERSEN is an associate attorney at Kirton McConkie.

which permit EU member states to modify certain provisions of GDPR. While many aspects of the Directive continue in GDPR, there are key differences that will affect U.S. organizations. Just how much effect GDPR will have on an organization will depend on whether that organization is considered a data controller or processor under GDPR.

CONTROLLER V. PROCESSOR

Before you worry about all of GDPR's ninety-nine articles, you must understand your client's business well enough to answer this question: is your client a controller, processor, or both? The answer to this question defines what regulatory duties your client has under GDPR.

GDPR defines controller as "the natural or legal person… which, alone or jointly with others, determines the purposes and means of the processing of personal data." GDPR, art. 4. Simply put, a controller is the person who owns or functionally controls the personal data. GDPR defines processor as "a natural or legal person…which processes personal data on behalf of the controller." *Id.* Processors take direction from controllers and do not have the right to determine the purpose for which personal data will be used.

Though the distinction may seem clear, in practice many organizations weave in and out of controller and processor roles. When making the controller-processor determination, it does not matter what an organization calls itself. Consider for example *Opinion 10/2006 on the processing of personal data by the Society for Worldwide Interbank Financial Telecommunication (SWIFT)*, Article 29 Working Party, Nov. 22, 2006. SWIFT, a global financial service provider that facilitates international money transfers, considered itself a processor and called itself a processor in all of its consumer contracts. After the September 11, 2001 terrorist attacks on the United States, the U.S Department of Treasury subpoenaed SWIFT to provide access to personal data for the purpose of monitoring financial transactions for terrorist activity.

The Belgian data protection authority (Belgian DPA) investigated SWIFT after the *New York Times* reported on the matter in 2006. The Belgian DPA ultimately found that SWIFT, despite calling itself a processor, was functionally controlling personal data, or rather, sharing personal data without permission from its

customers. The Belgian DPA found that SWIFT violated the Belgian data protection law because, as a controller of the personal data it shared with the U.S. government, it did not provide notice to, or obtain consent from, its customers as required by Belgian law. *Id*.

The SWIFT case highlights the importance of thoughtful consideration of the controller-processor classification. It also illustrates a common scenario whereby organizations act as processors and controllers with respect to different types of data (e.g., controller of human resources data but processor of payment card information).

Controller Obligations

Controllers have several obligations under GDPR. Although many requirements introduced by the Directive continue under GDPR, GDPR introduces new controller obligations that merit special attention. Of particular concern are GDPR's breach notice, third party processor, and privacy by design and default requirements.

Breach Notice

GDPR's breach notice requirements are what many consider to be the most troublesome addition, primarily due to a sweeping definition of what constitutes a breach. GDPR defines personal data breach as "a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed." GDPR, art. 4.

GDPR adopts the breach notice requirement developed in the United States, a familiar concept to many U.S. attorneys. However, unlike state requirements in the U.S., which generally only apply to unauthorized access or acquisition, GDPR broadens the definition of a breach to include alteration, destruction, or loss of personal information. By way of example, a ransomware attack not involving the extraction of personal information would not generally trigger U.S. state breach notice requirements but could trigger GDPR breach notice requirements if there is a loss of personal information (i.e., an organization's inability to access its personal information).

Article 33 provides that

> [i]n case of a personal data breach, the controller shall without undue delay and where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority…unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons.

Id. art. 33.

In addition to notifying the supervisory authority, an organization must also notify the data subject if the personal data breach "is likely to result in a high risk to the rights and freedoms of [the data subject]." *Id*. art. 34.

Organizations face several challenges with GDPR's breach notice requirement. First, organizations will likely not fully understand the extent of a breach within seventy-two hours of becoming aware of it but will be required to submit a report to a government authority – a report that may not accurately describe the breach. Such report could potentially be produced in class action litigation in the United States. Next, when is an organization considered to have become "aware" of the personal data breach? Finally, the exception to notifying the supervisory authority – if the breach is unlikely to result in a risk to the rights and freedoms of natural persons – will understandably lead to internal debates on the necessity of notification.

Third Party Processors

Article 28 requires that any processing carried out on behalf of a controller must be governed by a contract, and such contract must obligate the processor to:

- process personal data only on documented instructions from the controller;
- ensure confidentiality;
- implement appropriate security measures;
- assist the controller with its obligations to comply with certain provisions of GDPR;
- delete or return personal information upon request; and
- provide information necessary to demonstrate compliance with its obligations.

Id. art. 28. Article 28 poses a challenging task for organizations that outsource processing activities (e.g., cloud storage, payment processors, marketing communications, etc.). To comply, organizations will need to update their contracts (or put contracts

in place) with vendors that process EU personal data. While updating a standard form agreement with GDPR specific language is a relatively simple task, the real challenge is identifying current vendors that process EU personal data, locating those contracts, and explaining to vendors why you need them to take on additional burdens or liability in the middle of the term with no additional compensation.

Vendors, especially those with no nexus to the EU, will likely question why they must assist the counter party with its GDPR compliance. In many cases, U.S. vendors will be unfamiliar with GDPR. Organizations will need to carefully determine what contracts need to be updated and be prepared to explain to vendors the reason why. Whether you advise controllers or processors, watch out for language that appears GDPR-related but is too broad or narrow (i.e., the contract introduces obligations not required under Article 28 or obligations that do not meet the standards set forth in Article 28).

Privacy by Design and Default

Prior to GDPR, organizations complied with global data protection laws via privacy policies, contractual terms, registrations, etc. For the first time in the privacy arena, GDPR requires organizations to take one step further and develop products with privacy in mind. This will require different departments within an organization to work together to develop GDPR-compliant policies, procedures, and systems simultaneously with product development. This concept is known as privacy by design.

Article 25 provides that

> [t]aking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing.

Id. art. 25.

One challenge an organization may face here is whether its products or systems are capable of complying with certain requirements under GDPR. For example, GDPR grants several rights to data subjects, including the right to erasure and data portability. *Id.* art. 17, 20. That is, individuals have the right to request that a controller delete their personal information (right to erasure) or export it in a machine-readable format for their own personal use (data portability).

Many existing technology systems were not designed to delete data or export it in machine-readable format. Updating such

systems can be costly and time consuming. However, organizations may consider the cost, available technology, and risks to data subjects when deciding whether to undertake substantial engineering efforts to restructure products and systems. In other words, technical and organizational measures implemented by Facebook may not be appropriate for your client's organizaiton.

In addition to privacy by design, GDPR requires privacy by default. Article 25 further provides that "[t]he controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed." *Id*. art. 25. Privacy by default refers to procedures and settings an organization implements. It requires that organizations (i) only collect personal information for a specified purpose; (ii) retain the minimum amount of personal information necessary; and (iii) retain such personal information only as long as necessary.

Organizations will struggle to implement privacy by design and default without knowing key information about the data it collects. Specifically, an organization should know what type of data it collects (human resources, marketing, etc.), where it stores data (on-site servers, cloud, etc.), how long data is kept, and how it is used. This process is known as mapping. Data mapping will help organizations develop internal GDPR-compliant policies and procedures.

Processor Obligations

Under the Directive, only controllers had direct compliance obligations. This is not the case under GDPR. GDPR introduces several new requirements on processors and exposes them to substantial penalties and claims. While processors have fewer obligations than controllers, they will face significantly increased risk under GDPR. Key obligations on processors include the duties to notify the controller of a breach and to implement appropriate security measures.

Breach Notice

Article 33 requires processors to "notify the controller without undue delay after becoming aware of a personal data breach." *Id*. art. 33. However, a processor's obligation with respect to a data breach will likely not stop at notifying the controller. As noted above, if the controller is GDPR compliant, its contract with a processor will require the processor to assist the controller with its breach notice obligations. Therefore, processors will not only be required to notify the controller of a breach but can also expect to be contractually obligated to provide other information about the breach that will assist the controller with its compliance obligations under Article 33. A processor's failure to notify the controller of a data breach not only exposes the processor to penalties under GDPR, it may also result in a breach of contract.

Security Measures

Article 32 provides that the "processor shall implement appropriate technical and organizational measures to ensure a level of security appropriate to the risk," including pseudonymisation and encryption of personal data, the ability to ensure the ongoing confidentiality, and the ability to restore the availability and access to personal data following a technical event. *Id*. art. 32. Accordingly, processors and controllers have the same obligation to implement appropriate security measures. Under the Directive, controllers were responsible for ensuring that processors implemented such measures. GDPR now places that responsibility on processors as well.

When advising on what constitutes appropriate security measures, what may be appropriate for one processor may not be appropriate for another. Processors (and controllers) have some flexibility in making this determination because GDPR allows processors to consider the state of the art, costs of implementation, nature, scope, context, and purposes of processing, as well as the risk to data subjects.

As noted above, controllers should still contractually obligate processors to implement appropriate security measures, which means a failure of a processor to do so will result not only in a breach of contract, but also a violation of GDPR.

CONCLUSION

GDPR is here to stay and will likely become the global standard for data privacy. In today's data-driven world, you should understand GDPR well enough to recognize when it might impact your client's business. While GDPR introduces several obligations that could potentially affect U.S. organizations, you should pay particular attention to whether your client is a controller, processor, or both. Making that determination will identify what obligations your client has under GDPR. Complying with those obligations will protect your clients from claims and substantial penalties under GDPR.

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Mediating in the Red Zone – An Advocate's Checklist

by Kent B. Scott

It's first down and ten on the twenty-yard line of your opponent's goal. You are in the red zone. Here we go again. Crunch time. In lawyer's terms, it's mid-afternoon and you and your client are in the world of "mediation gridlock." What can you do to travel that last twenty yards to resolution? What have you done to prepare for this moment? This is the moment when both you and your opposition dig your heels in up to your ankles.

A "fumble" at this point could send you and your client to the showers: cold, cold showers. What you say and how you play in the red zone can bring you across the resolution goal line or result in another turnover and send you back to the litigation system. The key to success in the mediation red zone starts before the negotiation begins and requires skill and patience as the goal line approaches. The following article is designed to help the mediation advocate negotiate his or her way through the mediation red zone.

Why the Need for Better Bargaining in the Red Zone?

How are we doing as a profession in predicting the outcome of a litigated matter? A couple of recent studies revealed surprisingly identical results. Over 2,000 cases were analyzed in two separate jurisdictions. The studies compared the refused best and final settlement offer with the eventual verdict. In both studies, the plaintiffs committed decision errors in 61.2% of their cases. Defendants made decision errors in 24.3% of their cases. However, the magnitude of the error told an even more interesting story. On the average, the verdicts for the plaintiffs were $43,100 *less* than the average offer while the defendants paid on average $1,140,000 *more* than they could have to settle the case.

How can you make mediation a successful play in helping you and your clients achieve a better alternative to a litigated resolution? First, you need to determine when it is right to mediate. Second, you need to find the right mediator. Third, you need to ensure that you have properly prepared for the mediation by (1) drafting an effective and powerful mediation position paper, (2) preparing your client for the mediation process, and (3) ensuring that you have someone present with settlement authority. Finally, to make mediation successful, you must trust the mediation process.

When to Enter the Mediation Red Zone

Two phrases are responsible for not getting a matter to the bargaining table at the right time: (1) "It would be a waste of time because the other side is so unreasonable" and (2) "We are too far apart to explore settlement."

Mediation advocacy in the red zone is not trial advocacy. Good mediation advocacy requires openness, candor, and a willingness to compromise. A forthright exchange of material information is required. Preparation is key for playing in the mediation red zone. Withholding material information usually turns into a fumble that ultimately sabotages the mediation process.

Additionally, being willing to compromise is critical to operating in the mediation red zone. No mediation should be held unless all participants come to the table with a desire and willingness to compromise in good faith. Every lawsuit involves handicaps, costs, and risks. Unfortunately, the "I win, you lose" attitude just does not work. Instead, both counsel and client need to come to the mediation with a willingness to find a better option from that of a litigated resolution. The advocate or client that comes to the table with an "I win so you can lose" attitude is offside and out of bounds, a sure recipe for impasse.

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Choosing the Right Mediator

Mediator selection is critical to operating in the mediation red zone. Think of the mediator not as a coach, opposing player, or referee. Rather, the mediator is really like an unbiased color analyst that sits up in the booth and oversees the entire playing field. The mediator has the play book from both opposing teams and a computer full of information at his or her disposal that the mediator has studied. The mediator is neutral. The mediator's job is not to impose a resolution but to find pathways through which the players can navigate toward their objectives while mediating in the red zone. The following are a few factors to consider when selecting a mediator:

Style

Do you need a "facilitator" or an "evaluator"? The best mediators will use an approach that uses both styles as the circumstances of the case require. Mediators should shy away from predicting outcomes unless given the opportunity to be fully informed of all material facts and law.

Focused

The mediator must be patient, prepared, and candid. The mediator should be willing to work with the parties prior to, during, and, if requested by the parties, after the mediation until the case is resolved.

Subject Matter Expertise

Commercial lawyers generally look for a mediator with expertise in the kinds of cases like the one being mediated. The mediator will have a better learning curve and grasp of the material areas in dispute. It is commonly understood that the mediator will be able to evaluate the opposing positions. However, keep in mind that a mediator with subject matter expertise should also have adequate training and experience in mediation process skills to be able to help the parties through the red zone.

Process Expertise

Every mediator should first go through adequate training in the mediation process and be familiar with ethical standards, best practices, and standards for mediating a case. The mediator

should have a working understanding of mediator ethics, best practices, and basic mediation concepts such as confidentiality, consent, and rights of the mediation participants.

Prepare a Powerful Mediation Position Statement

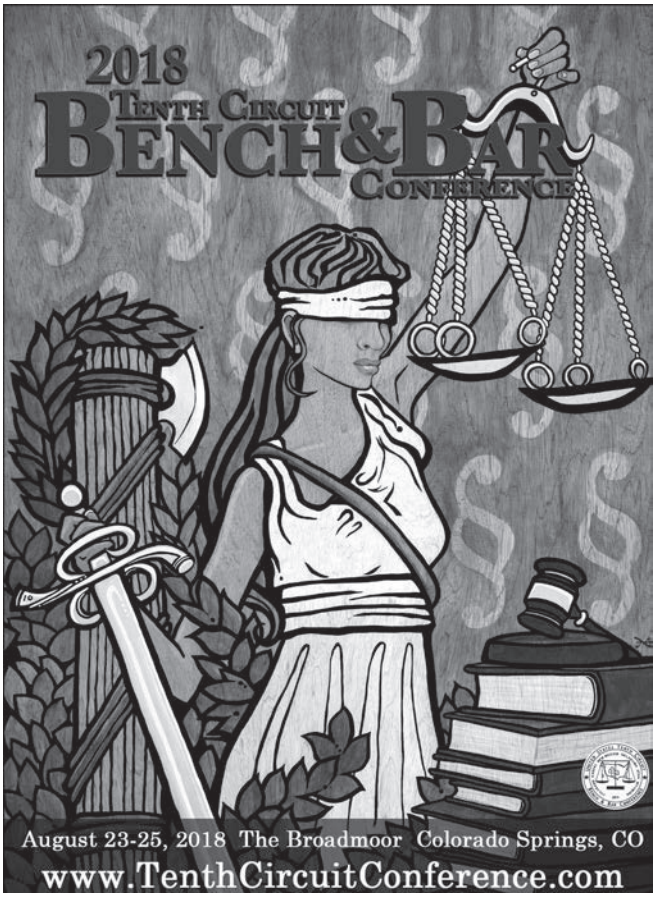
The purpose of the mediation position statement is to both educate and advocate. Your audience is the mediator and the opposition. Demonstrate the strong points of your case and set the stage for a successful red zone offense. But don't fumble around by taking positions that cannot be supported. The following suggestions will help you to write a powerful position paper that educates both mediator and the opposition:

Remember Your Objective

The goal of mediating in the red zone is to cross the goal line of resolution. The idea is to end the dispute, not add to it.

Exchange Position Papers

There is a division of thought in the legal community as to whether position papers should be exchanged. Confidential material such as mediation weaknesses and process objectives should be provided to only the mediator. Keep in mind, however, that if you are going to reach your goal, you need to educate the opposition about your strong points. To settle in mediation, you need the opposition's consent. Your chances of obtaining that consent are greater if you educate the opposition on how to see things your way. I encourage the parties to consider making some good faith exchange of information, particularly if the mediation is taking place before formal discovery, motions, or expert reports have occurred.



Support Your Statements

In reading your mediation position statement, the mediator will be interested in learning about the factual background of the case, the key issues, and the areas of agreement and disagreement. More importantly, the opposition will be looking to see how strong your position really is. Supporting arguments should be provided. Attach key documents and other exhibits as well as copies of cases that you believe to be controlling.

Pre-mediation Conferences

I am a strong proponent of holding pre-mediation conferences, with the parties or their representatives, prior to the mediation itself. These conferences are usually held via telephone. I consider these conferences to be part of the mediation process and, as such, confidential. The following is a brief outline as to what, at a minimum, I like to discuss with counsel:

- The names and authority of those attending the mediation.
- Setting adequate time for the mediation.
- Discussion of key points and issues raised in the mediation position statements.
- Identifying the areas in which the parties are at an impasse.
- Counsel's perception of the personality traits of the parties.
- Whether or not a joint session is to be used.
- Encouraging counsel to exchange the non-confidential portions of their mediation position statements.
- Where points of evaluation by the mediator are needed.
- A history of offers and counter-offers between or among the parties.

Preparing the Client

Before going to mediation, and in preparation for bargaining in the red zone, you and your client will want to prepare a playbook. You do not want to get your signals crossed. It is the attorney's

job to help the client understand that a mediation is different from a court proceeding. Both counsel and client need to be clear on the roles of the mediation participants.

When preparing to bargain in the red zone, don't spend just a few minutes on the telephone with your client. Rather, think about holding a meaningful meeting. Go over the following points:

- The objective is to find the client a better option to a litigated result. Define those objectives.
- The mediation process is confidential. The judge can be told whether a mediation was held. If the mediation resulted in an impasse, that is all the judge is told. If the mediation resulted in either a partial or full resolution and was reduced to writing, that writing can be furnished to and enforced by the court.
- Client consent is required on all matters affecting process, procedure, and settlement.
- The mediator's role is to be neutral. The mediator will not attempt to decide who is right or wrong.
- You and your client are not going to the mediation to impress the mediator; you must impress the other side.
- Talk about the level of evaluation you want from the mediator.
- Be reasonable and courteous.
- Do not damage your credibility through exaggeration or false statements.
- Discuss what you want to go into the mediation statement and whether you want the mediation statement exchanged or just furnished to the mediator.
- Develop a bargaining strategy.
- Define agreed upon bargaining objectives. But be prepared to listen to the opposition and mediator. Expect the same courtesy from both.
- Keep an open mind and do not adopt a bottom-line approach.
- Be prepared to stay until the case is resolved or until the mediator says that an impasse has been reached.
- Some cases will take more than one session to settle. Do not be discouraged if the case does not settle at the first mediation.
- Counsel and client should hold a debriefing session after any mediation resulting in impasse. Discuss whether you want the mediator to follow up with the parties and what the scope of that follow-up would entail.

A well-prepared and articulate client is the best tool an attorney has as you go forward to bargain in the mediation red zone.

Settlement Authority: Don't Leave Home Without it

The most common cause of a failed mediation is the absence of persons with real settlement authority. Settlement authority means the authority to agree to whatever is necessary and reasonable to dispose of the case or any material part thereof.

What about limited authority? Sometimes we see client representatives being sent to mediation without adequate authority to settle. They have only limited authority based upon their side's unilateral evaluation of the case. We call this situation "drinking the Kool Aid." This results in putting the handcuffs on the mediator. In doing so, that party has just sabotaged the mediation and wasted everyone's time, cost, and efforts to find a better option to a litigated result.

The lack of real authority is usually apparent to everyone. If the other side is fully empowered to settle, it will become justifiably upset at the uneven playing field and will lose interest in further mediation. Attempts to bring the other side back to the table later may not succeed.

How do you handle a situation dealing with institutional authorities that need council or board approval? In many cases there will not be any one individual who has actual settlement authority. Insurance carriers and other institutions that operate by committee will evaluate a case based on information submitted in advance. Based upon that evaluation they will send a representative who is authorized to settle but only up to a specific amount. In these situations, it is essential that the claimant provide all necessary information in a timely manner so that the maximum authority will have been granted.

It is everyone's job to see that the individuals who are authorized to settle the case are present. This should be handled at the pre-mediation conference level. If you want to have a successful mediation, do not try to mislead the mediator or the other side about this critical element of the mediation process. Bring full settlement authority and insist that the other side do the same.

Playing in the Red Zone – Let the Bargaining Begin

All disputes that arrive in the mediation red zone have stumbling blocks. Often a dispute will look too challenging to overcome. Negotiating your way through the red zone is about *persuading* as opposed to *compelling* your opponent to give you something while at the same time providing the opponent with a solution to its problem.

To reach a resolution, a case must enter the "zone of bargaining." The zone of bargaining is that place where the demands of the parties can be supported by the facts and law of the case. Get into this zone as soon as possible. JUST DO IT! This will make the process go easier on all. It really doesn't matter who makes the first move. It doesn't matter if you use baby steps, bracketing, or massive movement. JUST DO IT! Make the magic words of mediation your mantra: "Movement, Movement, Movement."

The following are a few moves out of the red zone playbook you may find useful when you find yourself with an opponent who is really digging in its heels:

- Seek first to understand the underlying reasons for your opponent's position.
- Advocate by educating. This is the art of mediation advocacy.
- Be balanced in your trade-offs. Work with the mediator to find a solution for your opponent's problems, while at the same time obtaining a solution for your client's needs. Make it easy for the other side to give you what you need by solving the other side's problem while you achieve your client's objectives in the process.
- Get real. Observe each concession and respond accordingly. Making a generous concession, if it is still within your acceptable range, should elicit a generous response from your opponent. If you make a significant concession, you should expect a reciprocal response. It may sound obvious, but if your opponent refuses to play that game, do not continue to be generous. Instead, simply go back to matching your opponent's response. Just keep the mantra of movement alive.
- The bottom line. I would discourage counsel and their clients from coming to a mediation with a bottom line in mind. Instead come with an open mind and a willingness to educate and be educated by your opposition. Be willing to listen, and seek to understand the opposition's material points. Work with your client and the mediator to evaluate the strengths and weaknesses of those points. It costs nothing to listen. There is no one compelling you to settle just because you are trying to better understand the root cause of the impasse in your case.

Trust the Process

Sometimes it pays to "take the cotton out of your ears and put it in your mouth." While you are in a mediation, you have formed a relationship based upon party consent, confidentiality, and your own creativity. Your relationship was forged in conflict. Your goal is to change the dynamics of the relationship and convert it from conflict to resolution. While bargaining in the red zone, you may experience what is known as "The Four Horsemen of Mediation": Frustration, Hopelessness, Fear, and Helplessness. These "Four Horsemen" often lead to anger, which often results in impasse.

Trust the process. The sure route to a poor outcome in the mediation red zone is to lose your composure and make an unforced error. Don't fumble the ball. Pay close attention to what your opponent is revealing about its own objectives, while calmly holding on to your own. Stop resisting and start listening. Look for a better option to a litigated resolution. If you do, you

will strengthen the prospect of a satisfactory mediation red zone result as you cross over the goal line of resolution. Don't let "The Four Horsemen of Mediation" frustrate your ultimate objective. Stay on track, and give your mediation its best chance to cross the goal line.

If everyone would take an eye for an eye, then no one would see straight. Trust the process. Work the process. By doing so you will strengthen your chances of reaching a satisfactory result, whether you settle or remain at an impasse.

Be Willing to Say "No Deal"

There may be a time where you decide to "go for broke" on fourth down rather than attempt a field goal. Whatever the circumstance, execution in the red zone is about getting what the client needs as opposed to what it may want. It is essential that both you and your client are clear and on the same page in terms of your willingness to walk away.

Abraham Lincoln may have said, "A good settlement is better than a good lawsuit," but always remember that "no deal is always better than a bad deal." Just make every effort to stay on the same page with your client.

Conclusion

The sure route to a poor outcome in the mediation red zone is to lack candor, go for a win-lose result, and lose your composure. This type of approach will result in impasse. The challenge to mediating in the red zone is to be able to find an alternative for your client that is better than a litigated resolution in terms of remedy received, money spent, and sweat, toil, and tears expended.

Remember your job as counsel. It is not up to you to get a matter settled. That is not your job, particularly when you need the consent of your opposition to achieve a bargained for resolution. Rather, your job is to work alongside your client to search for your best options given the nature of the playing field you have been asked to be a part of. Having done that, you can say, "This was a good day to be a lawyer."

I close with the words of Winston Churchill while serving as the leader of his country in its darkest hour: "Never give up. Never, never, never, never give up."

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Building on the Past and Looking to the Future: How Mediation Has Evolved to Become a Standard, Instead of Alternative, Form of Dispute Resolution

by Greg Hoole and Paul Felt

When Paul Felt started practice, the primary and almost exclusive method of resolving disputes was the traditional adversarial process, which sometimes culminated in a negotiated settlement (often on the courthouse steps on the morning of trial), and other times left the parties relying on a judge or jury to determine their fate. The process of resolving disputes was, and still is, extremely costly, time-consuming, and unpredictable. The time that it takes a case to finally make its way through the litigation process and to trial led David Porter, Microsoft Corporate Vice President of Retail Sales, to quip: "Litigation is the basic legal right which guarantees every corporation its decade in court."

Greater interest in alternative forms of dispute resolution began in the seventies. Parties, particularly sophisticated parties that were familiar with the risks associated with protracted litigation, were willing to try these various alternatives to save time and money. As lawyers and their clients became more familiar with these alternative processes, the popularity of alternative dispute resolution, and particularly mediation, took off.

The key benefits most commonly attributed to mediation include:

Self-determination and risk-avoidance

Lack of control and predictability are two of the greatest sources of stress and frustration in litigation. Mediation puts control of the outcome back into the hands of the parties. While mediation requires compromise, most parties recognize, as British poet George Herbert observed, "A lean compromise is better than a fat lawsuit." Parties in mediation wisely give up what they think might be their best day in court to avoid what they realize could be their worst.

Early resolution

As the proverb says, "The wheels of justice grind slowly." Saying this is one thing. Experiencing it is something different entirely. The average client is dismayed at the time it takes to get to court. This dismay is often only exacerbated when an appeal follows the long-awaited judgment. Mediation presents an opportunity to resolve disputes, sometimes before they are even filed, and virtually always before the litigants begin quoting another familiar legal maxim: "Justice delayed is justice denied."

Cost savings

Related to the benefits of early resolution is cost savings. There are at least three different types of cost savings afforded by

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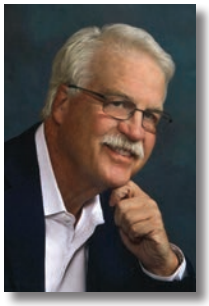

mediation. The first and most easily quantified is financial cost. The financial costs savings afforded by mediation are obvious. Court systems around the globe are charging more and more just to file a case. We may have thought our filing fee increase a few years ago was steep, but it still does not compare to the UK, where it can cost up to £10,000 just to file a civil complaint. Less obvious but likely even more significant than financial cost savings are the savings in opportunity costs. For a business or even an individual to be able to focus on its core competencies instead of being distracted by litigation is priceless. Finally, there are savings in psychological costs. The least quantifiable of the three savings, the emotional taxation of litigation, may be the single biggest factor affecting your client's quality of life and avoiding it may be the biggest personal benefit afforded by mediation.

Creative remedies

Renowned American psychologist Abraham Maslow noted, "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." Abraham H. Maslow, The Psychology of Science, 15 (1966). Because courts typically are limited to awarding money damages as a remedy, everything in litigation quickly becomes exclusively about money. However, money damages may be far from the most effective way to redress a particular wrong. In mediation, the available remedies are limited only by the mediator's and the parties' imaginations. Often a remedy can be fashioned that will at once be far more advantageous to the plaintiff and far less damaging to the defendant than a typical money damages award.

> *"[T]he mediation process itself has evolved as the scope of cases being mediated continues to grow."*

Confidentiality

Next to self-determination, confidentiality is the hallmark of mediation. The strictly confidential nature of the process allows parties, particularly defendants, to fashion remedies in a particular case without worrying about setting unwanted precedent. This, in turn, helps plaintiffs recover compensation that fairly reflects the facts of the case at hand.

Relationship preservation

One of the most overlooked benefits of mediation is that it can help preserve relationships, business and personal, that would likely be destroyed through years of heated litigation. Because it is a collaborative rather than adversarial process, and because mediation isn't inherently a win-lose process, important relationships can often be salvaged that would otherwise be lost.

Greater client satisfaction

Most people like choosing their own fate. Correspondingly, most people feel better about the decisions they come up with rather than those imposed on them by someone else, like a judge or jury. Thus, even though compromise is at the heart of every mediated solution, the solution is the client's, and they generally never look back.

As litigators and parties have become better educated about these benefits, mediation has grown from an obscure litigation alternative to being a central part of the standard litigation process. Whereas suggesting mediation at one time was perceived as weakness, parties are now expected to address mediation.

In fact, changes in Utah law have made mediation mandatory in most cases. The Utah Code of Judicial Administration was amended in 2012 to more fully implement Utah District ADR Program into civil cases. The rule now states, in relevant part: "Upon the filing of a responsive pleading, all cases subject to this rule shall be referred to the ADR program, unless the parties have participated in another ADR process, such as arbitration, collaborative law, early neutral evaluation or a settlement conference, or unless excused by the court." Utah R. Jud. Admin. 4-510.05(1)(A). Rule 4-510.06, the rule identifying the actions exempt from ADR rules, reveals that the vast majority of civil cases are subject to the ADR program. *Id.* at 4-510.06.

Federal courts are also in line. Rule 33 of the Federal Rules of Appellate Procedure was entirely rewritten in 1994 to introduce settlement efforts into pretrial conference. The Tenth Circuit's corresponding local rule endows the circuit court mediation office with the power of the court requires counsel to participate in all scheduled mediations, and gives the mediation office the power to sanction violations of the rule. 10th Cir. R. 33.1. Today, the court refers almost all private civil litigation cases between represented parties to mandatory mediation.

Utah's Appellate Mediation Office was created in 1998. Michele Mattsson, the court's Chief Appellate Mediator, in a phone

interview, noted that today, like the Tenth Circuit, the Utah Court of Appeals refers most private, represented party civil litigation cases to mediation.

Businesses, too, have begun mandating the use of mediation by their counsel. According to the Harvard Business Review, some of America's largest corporations have decided that "winning" lawsuits is too expensive.

> These companies evaluate lawyers, contract managers, and paralegals not merely on lawsuits won or lost but also on disputes avoided, costs saved, and the crafting of solutions that preserve or even enhance existing relationships. The legal departments use quantified measures and objectives to reduce systematically the number of lawsuits pending, the amount of time and money spent on each conflict, and the amount of financial exposure.

Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARVARD BUSINESS REVIEW (May–June 1994).

Finally, the mediation process itself has evolved as the scope of cases being mediated continues to grow. For example, pre-mediation conferences have become much more common, particularly with respect to cases with more complicated legal issues or fact patterns. Pre-mediation conferences provide opportunities to resolve logistical issues, address concerns, identify strategies, and customize the format as the case may dictate. For instance, a pre-mediation conference can help the mediator determine whether it would be good for a client to hear the other side's perspective of the case in an opening statement, or whether giving one themselves would help the client feel like they have had their "day in court." Conversely, a mediator could determine after a pre-mediation conference that opening statements would not be helpful to the resolution process.

In short, mediation has evolved over the past few decades to become a standard, not alternative, means of dispute resolution. As parties, counsel, and court systems continue to benefit from the many advantages mediation offers over traditional litigation, the role of mediation in our system of justice will continue to become more deeply established and valued.

Ready to Become More Tech-Savvy? Just Open Microsoft Word

by Louisa M. A. Heiny and Dave Duncan of the Innovation in Practice Committee

Macros. TAR. Ransomware. Botnets. IoT devices. AI. Blockchains. While lawyers are encouraged to keep abreast of relevant technology and integrate it into practice, many struggle to understand and implement new technologies. A dizzying array of new computer programs, apps, and acronyms are on the market. Each promises a brave new world of efficiency and efficacy. Most, however, require a significant investment of time, money, and energy to research and use. As a result, none are very appealing to lawyers unfamiliar with technology.

However, if you use Microsoft Word to prepare documents, there is an easy way to up your tech game and streamline repeated tasks without a big investment of time or money. Word is hiding a multitude of functions that make writing and formatting documents faster and easier. Word also provides excellent step-by-step guides that even neophyte users can understand.

Keyboard Shortcuts

Most Word users know that you can use a combination of keystrokes to accomplish a single task. For example, instead of going to the Edit Drop-Down Menu and choosing Cut, you can cut text by hitting the Command or Control key and the letter X at the same time.

Users can also create their own keyboard commands. For example, if you frequently insert a section symbol, there's no need to go to the Insert Drop-Down Menu each time and wade through the symbol options. Instead, go to the Help Drop-Down Menu and type keyboard. (See Figure 1.) Choose Get Help on Keyboard, followed by Create a Custom Keyboard Shortcut. The instructions will teach you how to create a keyboard command for almost anything.

Password Protection

Word's ubiquity has made it a frequent target of viruses and malware. As a result, Word documents can – and often should – be password protected. Password protection helps ensure that files held in insecure channels such as email or the cloud stay confidential. Be warned: Word cannot recover your password. Use a password manager program or choose a password you will remember.

To learn how to password protect your files, type password into the Help Drop-Down Menu. Choose Get Help on Password and then Password Protect a Document.

Templates

If you regularly use the same format in forms or briefs, make a template. A template pre-formats a document, including preset fonts, spacing, font size, margins, or headings. You can even set up a template containing frequently used text, such as a caption or signature line. Once you have created the template you can use it over and over again.

For instructions on creating a new template, type template into the Help Drop-Down Menu. Choose Get Help on Template, then Create and Use Your Own Template, followed by Save a Document as a Template.

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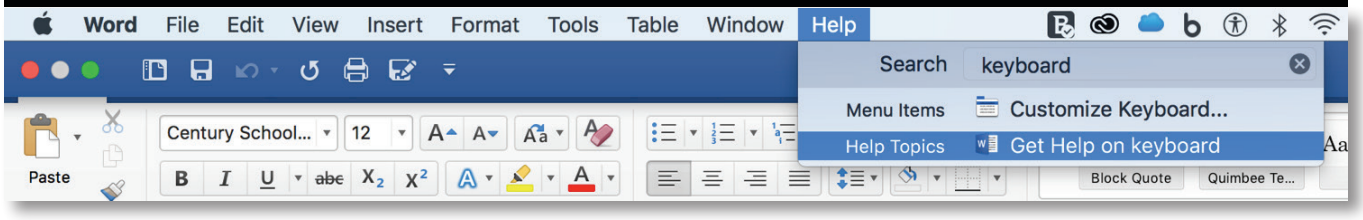
FIGURE 1



When you save your new template, you will be asked where you wish to save the template. Word will default to a template folder. You may save your new template elsewhere, but saving to the template folder means that your new template will appear in the list of available templates in the File Drop-Down Menu.

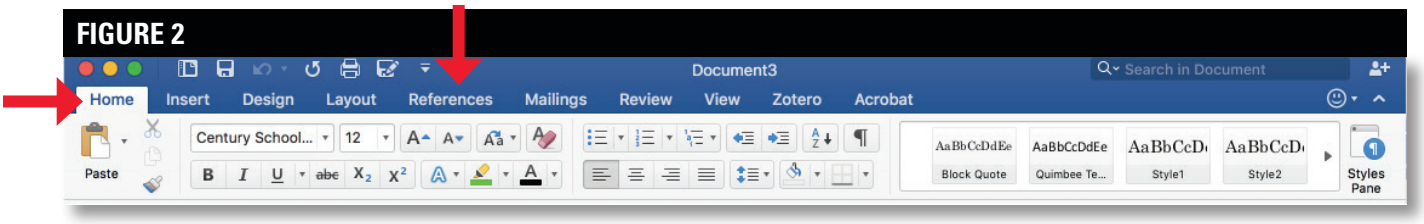
To use your new template, go to the File menu, click New from Template, and then select the template you want to use. When you are ready to save your new document, Word will ask you for a name and location for the new document. Word will save both the original template and the new file as separate files.

Styles

Have you ever noticed that every new Word file starts off with Calibri, 12-point, single-spaced font? Do you find yourself changing these presets every time you create a new document? You can easily change the default style settings for new files. For example, each new Word file could automatically open with Century Schoolbook, 13-point, double-spaced font. For step-by-step instructions on changing the default style in Word documents, type styles into the Help Drop-Down Menu. Choose Get Help on Style, followed by Customize Styles in Word. This will allow you to modify the Normal preset style.

You can also create or modify a preset style that you use repeatedly, but inconsistently, throughout various documents. For example, you may want all your headings to be in 18-point font and italicized. Click the Home tab on the far left of your screen. There are a series of boxes that look like cards on the right side of the screen. (See Figure 2.)

FIGURE 2



These cards make up the Styles Gallery. Each card represents a preset style. When you open Word and start typing you are working in Normal style. There are preset styles for everything from titles to block quotes. If you want to tweak any of these preset styles, click the card representing the style you would like to modify and follow the same steps as you would to modify the Normal preset style.

If you have already formatted your text and would like a particular style card to replicate that formatting elsewhere, you can automatically change the formatting of any style card to match the existing text. Select your formatted text and right-click on the styles card you wish to modify. Choose Update to Match Selection. The chosen style card will now reflect your formatted text, and the style can be applied to any other text in your document.

Table of Contents

A particular court or judge may require a table of contents. Even if you are not required to include a table of contents, however, doing so can be helpful to the judge who will read your work. A table of contents also helps you see the internal structure of your document. If the table of contents isn't clear and easy to follow, the document won't be, either.

In order to create a table of contents, you first need to format the headings that will appear in the table. You will find various headings among the preset styles, including default settings for Heading 1, Heading 2, and Heading 3. These headings correspond with the level of the Heading. Thus, Heading 1 represents the Roman numerals in a list, Heading 2 represents subheadings underneath each Roman numeral, and Heading 3 represents the romanettes:

I. Heading 1
   A. Heading 2
      i. Heading 3
      ii. Heading 3
   B. Heading 2
      i. Heading 3
      ii. Heading 3

To format a heading, type the text that will become the heading, click on the text, and then click on the Heading style card that matches the level of your heading.

Once you have headings in your document, creating a table of contents is simple.

For step-by-step instructions on creating a table of contents in Word documents, type table of contents into the Help Drop-Down Menu. Choose Get Help on Table of Contents, followed by Create a Table of Contents.

Word will update your table of contents and the corresponding page numbers as you continue to edit the document. For instructions, type table of contents into the Help Drop-Down Menu. Choose Get Help on Table of Contents, followed by Update a Table of Contents.

Index

Need an index in your document? Word can do that, too. For instructions, type index into the Help Drop-Down Menu. Choose Get Help on Index, followed by Create an Index.

In order to create the index, you must first identify the words or phrases that belong in the index. Word's instructions will explain how

to mark a word or phrase for inclusion in the index. You can mark all instances of the word, or pick and choose the instances to include. You can easily find all appearances of the word or phrase by clicking on the Edit Drop-Down Menu and choosing Find or Find Next.

You will need to go through the entire document and mark each word or phrase individually. As a result, there is significant up-front labor in creating an index. However, once you are done marking index entries, creating and updating the index is easy.

Table of Authorities

If your document requires a table of authorities, Word can automatically create one. Although there is a learning curve, it is well worth the initial work. Unfortunately, this is one area in which Word doesn't provide step-by-step instructions. However, the Internet is replete with straightforward instructions on creating a table of authorities. Type how to create a table of authorities in Word in your Internet browser. Any of the initial entries in the search results will walk you through the process of creating, and later updating, your table of authorities. It is helpful if your search includes terms specifying whether you are working on a Mac or in Windows. For example, if you search how to create a table of authorities in Word for Mac you will get better and more applicable results.

Track Changes

Have you ever changed text in a document and later regretted it? While the Undo Typing function under the Edit Drop-Down Menu lets you undo the most recent changes, Track Changes keeps track of all the edits in a document. You can later pick and choose the changes you want to keep. Track Changes is useful for single authors, but it really shines when multiple authors are revising or providing feedback on a document. Not only can an author's changes be reversed, but authors can leave comments for one another.

To turn on tracking, go to the Review Menu and move the Track Changes button from Off to On. You may choose how changes appear. For example, you may color-code different contributor's changes. Word also lets you view all the changes or just a portion of them, and you'll be able to accept or reject changes individually or as a group. For help on all of these options, type Track Changes into the Help Drop-Down Menu. Choose Get Help on Track Changes. The article series will walk you through the options.

Add-In Features

If you have ever worked on a Word document and said, "I wish there was a way to…," someone else has probably thought of it as well. Word has a powerful feature that allows users to create new functions. The feature is called an Add-In, and it is basically user-created software that creates new functions in Word. For example, would you like to have tabs (like web browser tabs) for multiple documents in one Word window? There is an Add-In for that. Do you need to DocuSign some of your Word documents? There is an Add-In for that, too. You can even bring document automation features to Word. The best way to find an Add-In is to type a description of the function into an Internet search browser.

There are two caveats. First, an Add-In will usually cost money – and the best Add-Ins can be pricey. Second, many Word Add-Ins only run on Windows. Before you spend money on an Add-In, search the Help Drop-Down Menu and the Internet to see if the feature already exists in Word.

This list represents just a small sample of the ways Microsoft Word can make your work faster and easier regardless of your level of expertise. Don't be afraid to search the Help Drop-Down Menu or search the Internet for other Word features. If you can dream it, Word (or a Word Add-In) can likely do it. If at first you don't find information on a feature, try a variant of the keywords describing the feature. You may be rewarded by discovering a new (to you) and useful feature in Word.

Should Alternate Jurors be Selected in a Statistically Fair, Random Method?

by Blake R. Hills and Brian C. Hills

Irritation, anger, and sometimes even outrage. These are emotions often displayed by alternate jurors when they find out that they have put their lives on hold to pay close attention during a multi-day or multi-week jury trial but do not get to participate in deliberations. They are especially upset when they find out that it was never likely that they would participate in deliberations because, although nobody told them, they were designated as alternate jurors from the very beginning. While some alternate jurors understand that this is just the way the system operates, others leave jury service feeling that the system is unfair, or at least misleading.

More should be done to ensure that alternate jurors have a positive experience and feel satisfied with their service. Decreased juror satisfaction leads to decreased participation in the entire system, which wastes court resources and hampers justice. This problem was shockingly demonstrated in December of 2017 when a mistrial was declared in a child rape case because thirty-six members of the jury pool did not show up for service. *See* McKenzie Romero, *36 No-Show Jurors Ordered to Appear Before a Judge*, Deseret News, Dec. 18, 2017, *available at* https://www.deseretnews.com/article/900005957/36-no-show-jurors-ordered-to-appear-before-a-judge.html.

It is time to reevaluate the manner in which alternate jurors are selected.

UTAH RULES

In Utah, the selection of alternate jurors is governed by Utah Rule of Criminal Procedure 18 and Utah Rule of Civil Procedure 47. Rule 18 provides:

> The court shall summon the number of the jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order.… If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.
>
> . . . .
>
> The court may impanel alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.… Alternate jurors replace jurors in the same sequence in which the alternates were selected.

Utah R. Crim. P. 18(a)(1), (g). Similarly, Rule 47 of the Utah Rules of Civil Procedure provides:

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The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, and privileges as principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict unless the parties stipulate otherwise and the court approves the stipulation. The court may withhold from the jurors the identity of the alternate jurors until the jurors begin deliberations.

. . . .

The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order.… The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

Utah R. Civ. P. 47(b), (g)(1).

Under these rules, the vast majority of jury trials begin in the same manner. All of the potential jurors are randomly placed in numbered-order. Challenges for cause and peremptory challenges then eliminate potential jurors. In the standard weeklong felony case, for example, the eight remaining potential jurors with the lowest numbers will be the jurors who deliberate. The next one or two with the lowest numbers will be the alternates, depending how many alternates are needed. The alternates are generally not informed that they are alternates.

This system works when the number of jurors who end up getting excused during the trial is the same as the number of alternates and every remaining juror gets to deliberate. However, it causes anger and irritation when there are alternates left who do not get to deliberate. Many of these alternates who are left have negative feelings towards the system. As previously mentioned, they feel that the process was unfair and misleading.

Is full disclosure the solution to this problem? Is it enough to simply tell the alternates at the beginning that they are alternates and they may not get to deliberate? As one committee has noted, this would just substitute one set of problems for another:

> The designation of jurors as alternates at the beginning of criminal trials can cause frustration, reduce the alternates' interest in the trial proceedings, and/or reduce the attentiveness of those who are designated as alternate jurors and who may feel that it is unlikely that they will be involved in deliberations. The potential for alternates to be less attentive than jurors who know they will be deliberating can be problematic if those alternates are, in fact, needed for deliberation and have not been actively engaged in the case.

Ninth Circuit Jury Trial Improvement Committee, Second Report: Recommendations and Suggested Best Practices 12 (2006). Thus, telling jurors that they are alternates at the beginning of trial, rather than the end, is not enough by itself. A better rule is one that requires the alternate jurors to be selected in a statistically fair, random basis as is done in courts of some states.

OTHER RULES

This article does not purport to be an exhaustive fifty-state survey. However, from a review of several states, three general categories of court rules from other states that provide for the random selection of alternate jurors emerge. The first consists of rules that specifically allow random selection but do not require it. For instance, the Kentucky Rules of Criminal Procedure provide:

> The court may impanel alternate jurors to hear a case. Should it become necessary to excuse a juror, the trial shall proceed unless the number of jurors is reduced below the number required by law. If the membership of the jury exceeds the number required by law, the alternate juror or jurors may be designated by agreement of the parties and the Court; otherwise, immediately before the jury retires to consider its verdict, the clerk, in open court, shall by random selection reduce the jury to the number required by law.

Ky. R. Crim. P. 9.32(1). There is no express requirement that the jury be informed up front about the possibility of random selection of alternates.

The second category of rules provide that alternate jurors shall be picked randomly. For example, the New Jersey Court Rules provide that in both civil and criminal cases:

> The court in its discretion may direct the impanelling of a jury of such number as it deems necessary to ensure that a sufficient number of jurors will remain to deliberate.... All the jurors shall sit and hear the case, but the court for good cause shown may excuse any of them from service provided the number of jurors is not reduced to less than 12 or 6 as the case may be or such other number as may be stipulated to. If more than such number are left on the jury at the conclusion of the court's charge, the clerk of the court in the jury's presence shall randomly draw such number of names as will reduce the jury to the number required to determine the issues.

N.J. Court R. 1:8-2(d)(1).

While selection of alternates is required to be conducted in a random manner, there is no express requirement that the jury be informed up front about that possibility.

The third category of rules are those that provide for both random selection of alternate jurors and for notice of that possibility to the jurors up front. The Arizona Rules of Civil Procedure provide:

> (1) Generally. The court may order that up to 6 additional jurors be called and impaneled in the same manner as other jurors under this rule, to allow the court to later designate some of the jurors as alternates.
>
> (2) Instructions. The court should explain to the jury why alternate jurors are needed and how they will be selected at the end of trial.
>
> (3) Selecting and Excusing an Alternate Juror. The court will determine the identities of the alternate jurors by a drawing held in open court after closing arguments and final jury instructions are given but before deliberations begin....

Ariz. R. Civ. P. 47(f).

AN EXTRA JUROR?

In contemplating the best method to select and excuse alternate jurors, it is worth asking whether it is absolutely necessary that alternate jurors be excused. It is not. For instance, the New Jersey rules provide that for civil cases, "instead of selecting alternate jurors, the parties may agree on the record...that all remaining jurors shall deliberate." N.J. Court R. 1:8-2(d)(2). In

addition, the Federal Rules of Civil Procedure eliminate alternate jurors altogether and provide, "A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused [for good cause]." Fed. R. Civ. P. 48(a). Alternate jurors were eliminated because "[t]he use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation." Fed. R. Civ. P. 47(b) Advisory Committee Note (1991).

Could the same rule apply in criminal cases? There is no constitutional reason why the parties should not be able to agree that all remaining jurors be allowed to deliberate, at least for non-capital cases. Indeed, the Utah Constitution sets a minimum number of jurors for all other cases but does not set a maximum. *See* Utah Const. art. I, § 10. Even for capital cases, "an extra juror or two probably does not violate the Sixth Amendment, which provides a minimum, not maximum size." 6 Wayne R. LaFave, Crim. Proc. § 22.1(d) (4th ed. 2017). "If anything, a larger [jury] provides more protection to a criminal defendant than the Sixth Amendment provides, not less." *Id.*

CONCLUSION

It is time to reevaluate Utah's rules governing the selection of alternate jurors. The current, generally used, method of selecting alternate jurors often leaves those jurors with negative feelings about the court system. That is not desirable.

Given that jurors are randomly placed in numbered-order at the beginning of jury selection, there is no reason why those assigned numbers should be considered sacrosanct for purposes of making the jurors with the highest numbers be the alternates. A better system is one in which the jurors are informed up front that at the end of trial, some of them will randomly be selected to be alternates in a statistically fair drawing that takes place in their presence. This should be the preferred method as

> it is undesirable to give a juror who might turn out to be involved in deciding the case a second-class status during some or all of the trial. So the argument goes, a person who is labeled as an alternate at the outset and who knows the chances of substitution are not great might not be as attentive as the regular jurors, while each member of [the] group knows that even if no juror is excused for cause he nonetheless has a very substantial chance of being involved in the deliberations.

Id. § 22.3(e).

Perhaps some trial attorneys fear the loss of their "best juror" through the random selection of alternate jurors from the panel that has heard all of the evidence. However, it is obviously just as likely that the opposing attorney will lose his or her "best juror," which provides balance to the process. Moreover, this fear should be overridden as less significant than the importance of juror satisfaction. If the perception of the jury system continues to deteriorate, there may be no such thing as a "best juror" or a "second best juror," or any juror for that matter, as another thirty-six juror no-show mistrial may become a common occurrence.

A transparent method of randomly selecting alternate jurors at the close of trial will create the incentive for all jurors to be attentive during the proceedings. It will also allow all jurors to feel that they were treated fairly and none of them were given a second-class status, especially if all jurors are allowed to deliberate. Albert Einstein once stated, "Not everything that can be counted counts, and not everything that counts can be counted." The time has come to recognize that the selection of alternate jurors should involve more than simply counting them.

Our sincere congratulations to

KARRA PORTER

for being honored by the Utah State Bar as the 2018

LAWYER OF THE YEAR

We applaud her dedication to the legal profession, the firm, and the community.

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Reasonably Suspicious: Avoiding Targeted Email Scams

by Nicholas Bernard

An email arrives in your inbox from a potential client in another country. It's not a company you have ever heard of, but that's not unusual – you have a strong web presence and you are reasonably well known. The potential client asks whether you would be willing to act as an intermediary in the sale of some heavy machinery. You agree, and the client tells you to be on the lookout for a cashier's check from the buyer's broker. Lo and behold, a couple of days later, the broker sends you that check, and the bank teller says that it's valid. Good news – you have a new client, and the client can pay!

Your new client then requests that you transfer the buyer's funds, minus your fees, from your account to the client's foreign bank account to complete the sale. You make the requested transfer, and everything seems fine. Unfortunately, not long afterward, you get a phone call from the bank. The cashier's check wasn't good after all, and you never got the money you thought you had. Even worse, to cover the shortfall from the wire transfer, the bank has cleaned out your accounts – including your trust account, containing other clients' funds – and you still owe the bank tens of thousands of dollars. Your frantic attempts to contact your client are unsuccessful, and the beneficiary of the wire transfer refuses to return the funds. Instead of making a little easy money, you have lost all the funds you had and more, and you now face potential legal consequences and disciplinary action because of the client funds that were drained from your account.

Email scams, especially those targeting professionals like attorneys, are more sophisticated than in years past. Gone are the days when scammers relied solely on numbers and gullibility, hoping that one out of every few thousand people would believe that a wealthy Nigerian prince needed their help. Scammers have learned how to develop specific targets and how to give their cons an appearance of authenticity that will hold up at least long enough to extract some cash from the victim. Once that's done, the identity they used disappears, and the money with it. It's rare for scammers to be caught and prosecuted, and the combination of low risk and potentially high reward – the scenario above is based on a real case in which the victim lost well over $100,000 – means that these sorts of rackets are unlikely to stop anytime soon.

According to the American Bar Association, the mechanics of the case above are fairly typical, but the facts vary. In many cases, the "client" purports to be a foreign corporation seeking the attorney's assistance in collecting from an American debtor. When the lawyer agrees to help, the client contacts them again with the news that the debtor paid up after hearing that the client hired an attorney. At that point, the lawyer receives an apparently legitimate cashier's check purporting to be a settlement payment. The client requests an immediate wire payment of the settlement funds, minus fees; the lawyer transfers the funds but soon discovers that the cashier's check was fraudulent and the "client" is in the wind, leaving the attorney on the hook. *Ethics Alert: Internet Scams Targeting Attorneys*, American Bar Association Committee on Professional Responsibility and Conduct, 1–2 (Jan. 2011), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/6_combined_session_documents.authcheckdam.pdf. Other cover stories are similar but may involve a request to collect from the "client's" ex-spouse or on a property settlement.

This sort of "debt collection" check fraud scam has snookered lawyers across the country, some of whom lost hundreds of thousands

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of dollars as a result. Todd C. Scott, *Scammed! Sophisticated Check Fraud Schemes Target Lawyers*, American Bar Association (Fall 2010), *available at* https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/10_fall_pm_feat1.html. Despite the money at stake and the relative sophistication of the scam, criminals can operate with minimal resources. In 2010, a federal indictment charged that just six fraudsters had managed to trick eighty lawyers in multiple states out of a total of $32 million using this kind of scheme. Debra Cassens Weiss, *Six Indicted in $32M Internet Collection Scam That Snagged 80 Lawyers*, ABA JOURNAL (Nov. 22, 2010), *available at* http://www.abajournal.com/news/article/six_indicted_in_32m_internet_collection_scam_that_snagged_80_lawyers/. With numbers like that, it's no wonder that scammers keep trying.

There are steps you can take to protect yourself and avoid falling victim to one of these scams. The first thing to do is look for red flags in the email. In our "machinery sale" case above, the "client" used a different spelling for his sender name than he did for his signature block, and both spellings were entirely different than the name in the email address. Think of an email whose sender is identified as "John Smith," but whose signature line says his name is "John Smitt" and whose email address is stevejohnson123@gmail.com, and you have got the idea. Discrepancies like that should set off alarm bells. Other warning signs include:

Extensive misspellings and grammatical errors

Typos happen, especially if a client or potential client speaks English as a second language. But most international corporations will have someone on staff with reasonably good English skills – especially if they claim to regularly engage in complex business dealings in the United States, the United Kingdom, or other English-speaking nations – so particularly poor writing may be suspicious. This is doubly true if the scammer claims, as some do, to be an American living abroad. One blog that collects scam emails posted a message from a scammer claiming to be an attorney from California who told the recipient:

> I have an Asia client that I have represented in the U.S for couple of years but I am finding it difficult to proceed further ever since I relocate to Europe and my client need legal assistance in drafting

> Purchase Agreement in the U.S. Please if you are interested for further details kindly contact my client directly with their contact details below.

Another scam email claimed to be a referral from an attorney in Maryland who wrote,

> We are presently incapacitated due to state legal boundaries to exert pressure on our delinquent customers and we request for your services accordingly. We got your contact information from your state Directory of lawyers as a result of our search for a reliable firm or individual to provide legal services as requested.

Attorney Email Scams (Sep. 2, 2017), *available at* http://lawyerscam.blogspot.com/2017/09/very-nice-personal-touch.html. Neither of the "referring attorneys" in these emails sounds like someone who is based in the United States or who has passed the bar in California or Maryland, and it's a safe bet that they're scammers.

Generic web email addresses

Corporate executives don't usually use an email address from Yahoo, Hotmail, or Gmail to conduct business. Scammers do use these services because they are free and easy to replace if the account is shut down or deleted. If someone is requesting your assistance with a multimillion-dollar purchase or sale agreement for their company's equipment, and they're emailing you from "rocketmail.com," be wary.

Unusual or highly specific, yet inaccurate, legal jargon

For instance, in the "divorce collection" check fraud scams, the scammer will often claim his or her ex-spouse owes money under a "Collaborative Participation Law Agreement." While collaborative participation agreements do exist, they are essentially an agreement by a divorcing couple to engage in alternative dispute resolution rather than litigation. The agreement would not be the basis for recovery, and it is suspicious that a potential client would use such a specific and incorrect term in place of a more widely known and accurate term like "divorce settlement." Indeed, a Google search for the phrase "Collaborative Participation Law Agreement" turns up little except scam reports.

Vague or generic greetings or explanations

If the salutation from a prospective client is "Dear Counsel" or "Attorney," rather than your name, it's possible that the scammer sent the same email to multiple attorneys. Same goes if the client states that he or she found your information in "the online lawyers directory" or "the bar directory," rather than through your firm's website or from a referral, or if the client claims to need assistance in "your state," "your area," or "your jurisdiction," instead of naming the state or region in which you work.

The request involves work that is not generally in your practice area, especially debt collection or facilitating sales

If you are a family law attorney, it's unlikely that a European manufacturing corporation would have any reason to ask for your help in selling a helicopter. If you specialize in criminal defense, you probably don't have a lot of divorcees in foreign countries asking for your help collecting a judgment from their ex-spouse. Real clients who approach an attorney out of the blue generally do so because of expertise in a particular area, not simply because the attorney happens to live in the same country or state as the opposing party.

Finally, if you do respond to a potential client, be very suspicious if the matter is quickly resolved without any effort on your part, especially if the client then asks you to send payment immediately while retaining only your fee. Always wait for a check to clear before sending the money, even if the check looks good and the bank credits the amount to your account. A reasonable client will understand the need to verify funds; if someone is demanding an immediate wire transfer before you have had time to ensure the legitimacy of a cashier's check, they may be trying to collect before you find out you have been scammed. Always remember, if something seems too good to be true, it probably is.

Unfortunately, check fraud schemes like the ones described above are not the only attorney-specific email scams. Phishing scams, in which a scammer tries to get the victim to enter personal information, have been around for some time. In a normal phishing scam, the scammer sends an email that looks like it's from your bank, your email provider, your credit card company, or another sender to whom you've given personal information before. In some cases, scammers will take advantage of current events – for example, a scammer might pretend to be affiliated with Yahoo's security team and discuss the latest developments in the massive hack revealed last year, or pose as an employee of Equifax concerned about the recent data breach. The email will explain that the sender needs you to log into a linked website due to recent unauthorized activity or concern over hacked accounts – ironically, scammers often play on consumers' fear of scams. The website may appear legitimate, but when you enter your login information, the scammers receive it and have access to your email account and any other personal information that you entered. Alternatively, the scammer may ask that you open an attachment, which will run a program giving the scammer access to your computer's hard drive and any information on your computer. The scammer can then use that information for nefarious purposes ranging from opening credit cards in your name to buying goods from online stores to using your video game accounts to play for free.

Phishing scams that target lawyers add another wrinkle. In some cases, rather than pretending to be affiliated with a bank or credit card company, the scammer may pretend to be an attorney or member of the staff in your firm or another firm or an employee of a client. The scammer accomplishes this deception by "spoofing" – that is, by making it look like their email came from a different address. In other words, instead of getting an email from "john12345@yahoo.co.uk," you might get an email from "john@yourfirm.com" or "john@clientname.com." In addition to spoofing the address, the scammer will tailor the message to the profession, asking the recipient to click on a link or open an attachment purporting to show a subpoena, a contract, or an invoice. Once the victim clicks the link or opens the attachment, the scam works much like a traditional phishing scam, running a program or asking the victim to enter personal information to "verify their identity," then using that program or information for personal gain.

Understandably, scam emails with this sort of veneer of authenticity trick victims who might not be deceived by a more obvious scam. There are still warning signs in many of these emails, however. Things to look for include:

An email from someone you've never heard of

If you get an email from "John Smith" claiming to be a lawyer in your firm, but there is no John Smith at your firm, the email is probably not legitimate.

An email from someone you recognize but with whom you don't normally communicate

If there is a John Smith at your firm, but you have never spoken to him, it would be strange for him to send you an email out of the blue. Double check with the real John Smith before you open any link or attachment.

An email address that doesn't seem correct

For instance, at my firm, we generally use the first letter plus last name convention for email addresses, so John Smith would have the email address jsmith@parsonsbehle.com. It would be unusual for me to get an email from "John@parsonsbehle.com," and I would want to follow up.

A message that references a case, a matter, or a discussion that you are not familiar with

These messages will often be purposefully vague, telling the recipient that it relates to "the invoice we discussed," "that lawsuit," or an attempt to "follow up." If a sender tells you that an attached document pertains to "the matter we discussed over the phone," but you didn't have a phone conversation with the purported sender, verify the sender's identity before opening the attachment.

On a related note, if the email contains an attachment or a purported link to a document, but you are not expecting any document of that kind, be cautious. An email out of nowhere asking you to review an invoice or sign a contract you weren't anticipating is suspicious.

Finally, check any hyperlink before you click

Scammers often use websites that are similar to legitimate websites, but slightly off. For example, the website for the United States federal courts is www.uscourts.gov. A scammer might link to www.uscourt.gov or www.uscourts.com. Even if the link looks okay, make sure to hover your mouse cursor over the link before you click. This will display the link target – the website to which the link will take you. If the link says it goes to www.uscourts.gov, but the link target is really www.uscourt.com, or a long string of letters and numbers, don't click.

This is not an exhaustive list of suspicious characteristics. Even if it were, scammers will likely continue to grow more sophisticated as they try to target an apprehensive public and undoubtedly new variations of these same scams will crop up. The only way to really stay safe is to make sure that you treat unexpected communications with a healthy dose of skepticism. Double check any suspicious email by contacting the purported sender directly or by forwarding the message to your firm's or organization's IT department and detailing your concerns. Ronald Reagan used to say that his philosophy when dealing with the Soviet Union was "trust, but verify." When it comes to suspect communications, lawyers need to reverse that philosophy, and verify before we trust.

Appellate Highlights

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

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 COURT OF APPEALS

State v. Becker,
2018 UT App 81 (May 3, 2018) – AMP

The defendant pled guilty to attempted aggravated assault for attacking the victim with a shovel. The district court held the plea in abeyance and ordered the defendant to pay restitution of $663 to the victim, purportedly to pay for an eye exam and new glasses for the victim. **The Court of Appeals reversed the restitution order and remanded to the district court with instructions to reimburse the defendant for the $663 he paid under protest. The State failed to present any evidence to show that the victim was wearing eyeglasses during the assault and failed to provide any receipts or documents from a physician with respect to the eye exam or the eyeglasses, despite having opportunities to do so at two evidentiary hearings.**

Schleger v. State,
2018 UT App 84 (May 3, 2018) – SAE

The Schlegers appealed the dismissal of their medical malpractice action against the state for failure to file a complaint within the Governmental Immunity Act's one year statute of limitations. The Schlegers argued that filing the pre-litigation claim, as required by the Utah Health Care Malpractice Act (HCMA) prior to filing a complaint, tolled the statute of limitations. **The Court of Appeals disagreed, holding that the HCMA unambiguously provides that it does not affect the requirements for filing a notice of claim under the Governmental Immunity Act.**

State v. Burnett,
2018 UT App 80 (May 3, 2018) – NJM

This appeal arose out of the defendant's convictions for rape and aggravated sexual abuse. Reversing, the court of appeals clarified the appropriate bounds of expert testimony in a sexual abuse case. While the expert could offer an opinion that certain symptoms were consistent with sexual abuse, the district court erred by allowing the expert to improperly bolster the victim's credibility by testifying that only a small percentage of children make false allegations.

Camco Construction Inc. v. Utah Baseball Academy, Inc.,
2018 UT App 78 (Apr. 26, 2018) – DNC

In this appeal following a bench trial, which involved several challenges to the district court's rulings prior and during trial, the Court of Appeals held that many of the appellant's arguments were inadequately briefed. Among those were the appellant's challenges to two of the district court's findings of fact. The Court of Appeals reaffirmed that "[w]hen challenging factual findings on appeal, appellants are expected to carry a heavy burden." ¶ 58. It explained, "Recasting the evidence that was in front of the trial court is insufficient to demonstrate that a court's factual finding was clearly erroneous." ¶ 54.

Basin Auto Paint Specialists Inc. v. Ultimate Autobody and Accessories LLC,
2018 UT App 76 (Apr. 26, 2018) – SAE

In a case involving procedural irregularities, the Court of Appeals overturned the district court's grant of summary judgment. While the summary judgment motion was pending at the district court, counsel for Ultimate Auto Body filed an improper notice of intent to withdraw. Although arguing that the

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

notice of intent to withdraw was improper, Basin proceeded to serve subsequent filings directly to Ultimate Autobody. Ultimate Autobody did not respond to the summary judgment motion, which was then granted by the district court due to the lack of a response. **On appeal, the Court of Appeals held that the proper procedure following an improper notice to withdraw was to continue to serve filings to named counsel, or to file a notice to appear or appoint; by failing to follow this procedure, the other party was deprived of proper notice and fundamental fairness.**

State v. Mooers,
2018 UT App 74 (Apr. 26, 2018) – DNC

The criminal defendant in this case entered a plea in abeyance to the burglary and theft charges against him, in which he agreed to pay restitution for the stolen items. The district court issued a restitution order requiring the defendant to pay, among other things, the cost of installing security bars on the residential window he broke into. The defendant appealed that portion of the restitution order. **Interpreting the phrase "pecuniary damages" used in Utah Code Section 77-38a-102(6), the Court of Appeals agreed with the defendant that the cost of the security bars does not qualify.**

State v. Peraza,
2018 UT App 68 (Apr. 18, 2018) – NJM

In this criminal case, the State attempted to offer an expert opinion without providing an expert report, as required by Utah Code Section 77-17-13. Reversing the convictions, the court of appeals held that **the trial court abused its discretion by admitting the expert testimony offered by the State, because the State failed to provide the report and, as a result, the district court lacked sufficient information to make a determination as to admissibility under Rule 702.**

10TH CIRCUIT

United States v. Salas,
2018 WL 2074547 (May 4, 2018) – DNC

On appeal from a conviction and sentence under 28 U.S.C. § 924(c), the Tenth Circuit reversed and remanded, holding, **as a matter of first impression, that the residual clause in the definition of "crime of violence" for purpose of that statute is unconstitutionally vague.** This decision was based on the Supreme Court's recent holding in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), that the identical definition of "crime of violence" in 18 U.S.C. § 16(b) is unconstitutionally vague in light of the reasoning in *Johnson v. United States*, 135 S.Ct. 2551 (2015).

Moya v. Garcia,
887 F.3d 1161, 1163 (10th Cir. Apr. 24, 2018)- AMP

The plaintiffs were arrested based on outstanding warrants and detained in a county jail for 30 days or more prior to their arraignments. The arraignment delays violated New Mexico law requiring arraignment of a defendant within 15 days of arrest. The plaintiffs asserted supervisory liability claims against the sheriff and wardens of the jail under § 1983, alleging that they were deprived of due process. **The Tenth Circuit affirmed the district court's dismissal of these claims for failure to plausibly allege a factual basis for liability. It concluded that the state trial court's failure to schedule timely arraignments could not be attributed to the sheriff or to the wardens.**

Non-Compete Agreements for In-House Counsel

by Keith A. Call and Taylor P. Kordsiemon

Recent history demonstrates there are but three certainties in life: death, taxes, and an annual fight at the Utah State Legislature over non-compete agreements.

In each of the last few years, state legislators have introduced bills aimed at restricting the ability of employers to enforce non-compete agreements against their employees. Governor Herbert signed House Bill 251 into law in 2016, limiting the length of any non-compete period in an employment contract to one year. In 2017, a measure that would have required employers to pay extra consideration to enter a non-competition agreement with an employee was voted down. Finally, a law imposing a prohibition on non-compete agreements in the news media market passed earlier this year. Governor Herbert has vowed that any further attempts to legislate non-compete agreements during his administration "will be met with a veto." Dennis Romboy, *Utah Gov. Gary Herbert Reverses Previous Stance, Signs Bill Targeting Broadcasters*, Deseret News, Mar. 29, 2018, https://www.deseretnews.com/article/900014224/utah-gov-gary-herbert-reverses-previous-stance-signs-bill-targeting-broadcasters.html.

> *"Each time Utah has moved to restrict the use of non-competition agreements, it has faced intense opposition from segments of the business community."*

Even as Utah clamps down on non-compete agreements generally, there is mounting debate nationwide regarding the use of non-compete agreements for in-house attorneys.

Utah Rule of Professional Conduct 5.6 bars attorneys from entering agreements that would restrict the right to practice. The rule is generally understood as making any non-compete agreement between attorneys unenforceable. However, whether Rule 5.6 applies to in-house counsel seems less obvious.

To date, the American Bar Association (ABA) and seven state bar ethics committees have addressed the question. Two states allow non-competes for in-house counsel provided that they include a "savings clause," limiting the application of a non-compete to non-legal employment. In other words, the attorney is free to leave his or her current employer to represent competitors in a legal capacity but can be prohibited from non-legal jobs with a competitor. The ABA and each of the other five states have upheld the prohibition, opining that non-competition agreements between corporations and their in-house counsel are unenforceable. Kevin D. Horvitz, *An Unreasonable Ban on Reasonable Competition: The Legal Profession's Protectionist Stance Against Noncompete Agreements Binding In-House Counsel*, 65 Duke L.J. 1007, 1030–31 (2016); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-381 (1994).

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

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The leading ethics opinion on this subject comes from New Jersey. Deciding to uphold the prohibition against in-house lawyer non-competes, the New Jersey Committee on Professional Ethics justified its decision by asserting that the purpose behind the rule is "to ensure the freedom of clients to select counsel of their choice." N.J. Comm. on Prof'l Ethics, Formal Op. 708 (2006). That a non-competition agreement arises in a corporate context, rather than a law firm, does not matter. *See id*. at 4. Corporations must be free to hire the counsel of their choice, the same as individuals. Ethical rules concerning conflicts of interest and retaining client confidences, combined with confidentiality agreements, are sufficient to protect corporate interests regarding trade secrets and proprietary information. *Id*.

While the ABA and the majority of states that have looked at the question agree that Rule 5.6 applies to in-house counsel, that application has been subjected to intense professional and academic criticism. Critics argue that the justifications underlying the ban on non-competes for attorneys generally do not apply to in-house counsel. The concern about clients being free to hire the counsel of their choice usually arises because it is undesirable for an attorney to be prohibited from working with a current client because the attorney chooses to leave his or her firm. The client would be forced to discontinue the relationship even though the client may have formed a close and trusting relationship with his or her attorney. However, in-house counsel, by definition, only serve one client, and so could not possibly continue to serve their existing clients if they chose to leave for another company. It is thus nonsensical (the argument continues) to protect existing corporate clients from losing their choice of representation via non-compete agreements. Horvitz, *supra* at 1033–34.

Critics of applying Rule 5.6 to in-house counsel also claim that the ethical rules requiring attorneys to avoid conflicts and maintain confidentiality are insufficient to protect corporate interests. In-house attorneys often act in a dual role, acting as counsel and also providing business advice. That is important because confidentiality rules only bind a lawyer for information the lawyer obtains relating to the legal representation of the client. Therefore, an in-house attorney who moves to a competing company may not be ethically bound to protect information obtained in the attorney's role as a business professional rather than legal representative. In that way, the in-house attorney is similar to any other type of corporate employee who has access to proprietary information. Critics argue that the justifications for enforcing non-competition agreements against any other employee are equally valid when applied to in-house counsel because the confidentiality rules do not capture the full range of in-house counsel responsibilities. *See id*. at 1041–44.

Each time Utah has moved to restrict the use of non-competition agreements, it has faced intense opposition from segments of the business community. As Utah continues to attract more business, and particularly as the tech sector grows in Silicon Slopes, the importance of clarifying Rule 5.6 and its application to in-house counsel will become more pressing. As of yet, there is no clear guidance from Utah authorities on the matter. While it would not be surprising to see more debate in the Utah Legislature, we doubt the legislative branch will address non-competes among lawyers any time soon. In-house lawyers will want to stay closely tuned to see how this area of the law continues to develop.

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

Business and Commercial Litigation in Federal Courts, Fourth Edition

Edited by Robert L. Haig

Reviewed by Matthew L. Lalli

Several years ago someone gave me a gag gift, a small tin box, about 4 x 6 inches, with an elaborately painted label, "Law School in a Box." On one end of the box is a price list, almost certainly outdated now, comparing the cost of law school at a few top universities to the cost of Law School in a Box at $14.95. Inside, there is a booklet titled "Law School in 96 Pages" filled with tongue-in-cheek sections like "talking the talk" and "Latin terminology." When I received the gift, I instantly appreciated the joke on multiple levels. It was a joke about the value of law school, the cost of law school, and what many find to be the lack of any practical application to the practice of law. Mostly, the notion that three years of lectures, intense study, sometimes ruthless competition, esoteric exam questions, and training to "think like a lawyer" could be encapsulated into a 4 x 6 tin box is, well, funny. I keep the Law School in a Box on a shelf in my office as a constant reminder of the miles one travels in the law not only through law school but over a long career in practice.

Business And Commercial Litigation In Federal Courts, Fourth Edition

Editor: Robert L. Haig

Publisher: Thomson West (2016–2017)

Shelf Space: 33 inches

List Price (full set): $1,811

Individual volumes also available.

When I received the two large boxes filled with fourteen volumes of the Fourth Edition of *Business and Commercial Litigation In Federal Courts*, my first thought– all jokes aside – was this really is federal court litigation practice in a box. There are numerous valuable treatises in the law, but none so comprehensive yet so focused as this.

The range of topics in this Fourth Edition is vast, starting in volumes one and two with the procedural basics of subject matter and personal jurisdiction, removal, joinder and consolidation, multidistrict litigation, provisional remedies, and class actions. Volumes three and four cover practice pointers in discovery, including interrogatories, depositions, and experts; various kinds of motions, such as summary judgments and motions in limine; and trial, with detailed chapters on trial strategy, opening statements and closing arguments. Volumes five and six cover jury instructions and verdicts, various damages and remedies, arbitration and mediation, court costs, sanctions, appeals, and various techniques for managing and streamlining litigation.

The remainder of the treatise breaks down the various substantive issues that arise in federal court litigation. No matter how broad your federal practice is, the most skilled federal practitioner would not be able to think through and identify the multitude of topics the Fourth Edition covers – securities litigation, banking, consumer protection, intellectual property, licensing, labor, OSHA, ERISA, RICO, products liability, mass torts, partnership, joint venture, fiduciary relationships, sales, negotiable instruments, privacy,

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free speech, fraud, white collar crime, international trade, false claims, civil rights, government contracts, construction, project finance, sports and entertainment, energy, environmental, e-commerce, and even fashion and retail, just to name a few.

As broad as the Fourth Edition is, the real genius is in the detail. For the sake of illustration, consider just one of the 153 chapters, chapter eighty-five on professional liability, which is an area in which I frequently practice. There are sixty-three different sections in this chapter, ranging from basic information about what professionals are – such as auditors and lawyers – as well as various strategies to consider in cases involving professionals. In addition to the fundamentals of professional liability – duty, breach, causation, and damages – there are numerous sub-topics about which only seasoned professional liability practitioners could even know. One that jumps out to me is section 85.7, which discusses the risk of professionals appearing to evade responsibility.

> Given the nature of the client-professional relationship and that fees will likely have been paid to the professional, both judges and juries may have a negative reaction to an auditor or lawyer who appears to be claiming that the client had no rational basis on which to rely on any of their work.

This is a critical nuance in defending professionals, yet available for any first timer who reads this treatise. Another nuanced section on professional responsibility is section 85.9, which concerns the client file. Something so basic in many cases, the files maintained by professionals, especially lawyers, involve highly complicated issues that span rules of civil procedure, evidence, and professional conduct. This treatise walks you through all of those issues in easily understandable ways.

The Fourth Edition could be so complete only by entrusting the drafting of each chapter and section to veteran lawyers in each of the various topics. The volumes are heavily annotated with references to cases and secondary authorities that back up virtually every point the authors make. But this treatise goes even one step further – it provides actual forms one can use to draft virtually any document a lawyer would ever need to file in federal court, whether they be discovery, motions, stipulations, orders, jury instructions, or special verdict forms. These forms are not mere templates, but examples of actual forms that have been or could be filed in federal court with only adaptations to the specifics facts of each case.

Equally impressive are the strategy considerations that run throughout the treatise. It is one thing to spot issues, another to research and understand the law surrounding those issues, and still another to draft a document to file in court. But it is something else entirely to consider the strategy, the pros and cons, of various courses of action a lawyer might take. Recognizing there is no rote formula for practicing law, the strategy sections, developed by excellent lawyers through the school of hard knocks, provide practitioners with experience they otherwise do not have.

The fourth edition has twenty-five new chapters on topics, including civil justice reform, mediation, arbitration, social media, teaching litigation skills, regulatory litigation, health care institutions, fiduciary duty litigation, and civil rights.

In sum, this treatise truly is federal practice in a box, albeit a much larger box than the one still sitting on my office shelf, and it is for the young and old practitioners alike.

2018 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2018 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession.

Please submit your nomination for a 2018 Fall Forum Award no later than Friday, October 5, 2018. Use the Award Form at http://www.utahbar.org/nomination-for-utah-state-bar-awards to propose your candidate in the following categories:

1. Distinguished Community Member Award
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3. Outstanding *Pro Bono* Service Award

Notice of Petition for Reinstatement from Probation to the Utah State Bar by Kelly Ann Booth

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice that Kelly Ann Booth has filed a Petition for Reinstatement from Probation in *In the Matter of the Discipline of Kelly Ann Booth* Third Judicial District Court, Civil No. 160902128. Any individuals wishing to oppose or concur with the application are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

MCLE Reminder – Even Year Reporting Cycle

July 1, 2016–June 30, 2018

Active Status Lawyers complying in 2018 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, 2016 – June 30, 2018);
- $100.00 late filing fee will be added for CLE hours completed after June 30, 2018; or
- Certificate of Compliance filed after July 31, 2018.

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.

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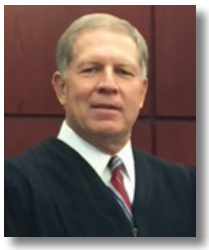

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Mandatory Online Licensing

The annual Bar licensing renewal process has begun and can be done online only. An email containing the necessary steps to re-license online at https://services.utahbar.org was sent the week of June 4th. **Online renewals and fees must be submitted by July 1 and will be late August 1. Your license will be suspended unless the online renewal is completed and payment received by September 1.**

To receive support for your online licensing transaction, please contact us either by email to onlineservices@utahbar.org or, call 801-297-7021. Additional information on licensing policies, procedures, and guidelines can be found at http://www.utahbar.org/licensing.

Upon completion of the renewal process, you will receive a licensing confirmation email.

Ethics Advisory Opinion Committee – Recent Opinions

OPINION NUMBER 18-02

Issued January 8, 2018

ISSUE: What are the Utah attorney's duties under the Utah Rules of Professional Conduct when the attorney is retained by a law firm to act as a consulting lawyer on a specific subject matter area? It is anticipated that the consulted lawyer will not have any direct contact with the consulting firm's client, and that the consultation will be hypothetical in nature.

OPINION: In the scenario presented, the consulted lawyer does not have a client-lawyer relationship by the virtue of the consultation alone. However, the consulted lawyer may acquire a duty of confidentiality regarding the information received.

BACKGROUND: The Ethics Advisory Opinion Committee has been asked to opine as to a Utah attorney's obligations under the Utah Rules of Professional Conduct while consulting for another lawyer.

In 1998, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 98-411, "Ethical Issues in Lawyer-to-Lawyer Consultation," which provides practical guidance. This opinion referenced the American Bar Association's Standing Committee on Ethics and Professional Responsibility's 1988 Formal Opinion 88-356 "Temporary Lawyers," which also provides guidance.

OPINION NUMBER 18-01

Issued June 11, 2018

ISSUE: May a firm name continue to include the name of a founding partner who is: (1) an elected legislator in the part-time state legislature and (2) engages in very little legal work but has not formally retired?

OPINION: A firm name may continue to include the name of a partner elected to the part-time state legislature, provided that the lawyer who is a legislator actively and regularly engages in law practice when the legislature is not in session. Where a lawyer who is a legislator no longer actively and regularly engages in law practice, but spends his out-of-session working time almost exclusively on legislative matters, the firm name may not include the lawyer's name even as part of a trade name.

BACKGROUND: A partner in a law firm established decades ago is listed in the firm name. The founding partner also serves as an elected public official in Utah's part-time legislature. The partner does very little legal work for clients and focuses instead on legislative matters.

OPINION NUMBER 18-03

Issued June 12, 2018

ISSUE: Is there a conflict of interest if a member of a law firm assumes the representation of a party on appeal in a case where another member of the firm testified as an expert witness on behalf of the opposing party? The issue as presented assumes that the testifying attorney did not have an attorney-client relationship with the party that engaged the attorney to testify.

OPINION: If there is in fact no attorney-client relationship between the attorney who testified as an expert witness (the Testifying Attorney) and the party who engaged that attorney to testify, then the subsequent representation of the adverse party in an appeal of the same case by a member of the law firm of the Testifying Attorney, would not create a professional conflict of interest under either Rule 1.7 or 1.9 of the Utah Rules of Professional Conduct (the Rules) with the party who engaged the Testifying Attorney. However, the non-existence of an attorney-client relationship between the Testifying Attorney and the party who engaged that attorney to testify requires a factual analysis and should not be assumed, as discussed hereafter. Additionally, if the Testifying Attorney obtains confidential information regarding the party that engaged the witness, a disqualifying conflict could arise that could preclude representation of the adverse party.

BACKGROUND: The Testifying Attorney is a member of a law firm (the Firm) engaged to testify as an expert witness by Party A in litigation against Party B. The Firm routinely screens the Testifying Attorney's participation as an expert witness from the remaining members of the Firm. We have been asked to assume that the Testifying Attorney acts only as an expert witness, and no attorney-client relationship is created between the testifying attorney and Party A. The non-existence of an attorney-client relationship between the Testifying Attorney and the engaging party, Party A, is clearly communicated to Party A and documented. After a judgment is entered in favor of Party A, Party B elects to appeal the judgment and seeks to engage the Firm to represent it on appeal. The Firm intends to assume the representation of Party B on appeal, and continue to screen the Testifying Attorney from all matters related to the appeal.

The complete text of these and other ethics opinions are available at: www.utahbar.org/opc/eaoc-opinion-archives/.

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/.

SUSPENSION

On April 10, 2018, the Honorable Kent R. Holmberg, Third Judicial District, entered an Order of Suspension, against Thomas M. Burton, suspending his license to practice law for three years for violating Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a), Rule 1.5(b) and Rule 1.5(c) (Fees), Rule 1.7 (Conflict of Interest), Rule 1.15 (a) and Rule 1.15(c) (Safekeeping Property), Rule 1.16(a) (Declining or Terminating Representation), Rule 3.1 (Meritorious Claims and Contentions), Rule 8.1(a) (Bar Admission and Disciplinary Matters), Rule 8.4(b) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Burton represented a client in civil litigation against a person and his employer. The client made payments to Mr. Burton by transferring funds from her bank account to Mr. Burton's checking account as instructed by Mr. Burton. Mr. Burton filed a Complaint in Third District Court, but the court issued an Order of Dismissal for failure to serve the defendants within 120 days of filing the complaint. Later, Mr. Burton told the client that the court had ordered her complaint reinstated and requested that she deposit the remainder of the retainer and he would proceed on a contingency basis. Mr. Burton made a proposal to hire the client's son indicating that the client was to pay money into a non-profit foundation set up by Mr. Burton and it would

pay for the son's paralegal time. The client requested a refund after her CPA informed her that the foundation was not a tax-exempt entity. Mr. Burton filed a first amended complaint on behalf of the client, but a second notice of intent to dismiss was issued. The court held a hearing regarding dismissal but Mr. Burton did not attend and the case was dismissed.

Mr. Burton was hired by a client to pursue a second appeal on his behalf. The case had been remanded to the district court to address one narrow issue. The Utah Supreme Court upheld the conviction of Mr. Burton's client and in its opinion, the court stated that Mr. Burton had strayed far afield of the narrow issue in his brief and had failed to argue the narrow and specific issue on which it had remanded the case and had argued issues that had nothing to do with his client's case. Mr. Burton then filed a Petition for a Writ of Certiorari to the United States Supreme Court in which he raised the same non-meritorious legal arguments he raised before the Utah Supreme Court.

Mr. Burton defaulted with respect to Rule 8.4(b) and 8.4(c).

SUSPENSION

On March 13, 2018, the Honorable Robert Faust, Third Judicial District, entered an Order of Discipline: Suspension against Wesley M. Lang, suspending his license to law for a period of three years. The court determined that Mr. Lang violated Rule 1.3 (Diligence), Rule 1.15 (a), and Rule 1.15 (c) (Safekeeping Property), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Lang had an independent contractor and "of counsel" relationship with a law firm and was paid on his hourly billings each month. Mr. Lang submitted false billing statements to the firm in order to manipulate how his compensation was calculated. Mr. Lang wrote off bills to clients after he had been paid by the firm but before the clients were billed by the firm. Also, Mr. Lang had side clients (Lang clients) that were not the firm clients of which the firm was not aware and used firm resources to provide legal services to the Lang clients. Mr. Lang led some of the clients to believe that they were being represented by the firm when they were not.

Between 2012 and 2013, Mr. Lang submitted at least eight bad checks to the United States Patent and Trademark Office (USPTO) as part of the application process for a number of clients. Seven of the checks were returned for insufficient funds and one of the checks was written against an account that had been closed. Mr. Lang's submission of the bad checks caused delay in the processing of six provision and nonprovisional patent applications and the abandonment of one application for six different clients.

Mr. Lang did not keep complete records of client funds deposited into his trust account and operating account and preserve them for five years after the client representation. Mr. Lang used his operating account to pay filing fees and did not deposit funds he collected from clients and hold them available in his operating

Discipline Process Information Office Update

From January through May of this year, the Discipline Process Information Office opened forty-one files. Jeannine P. Timothy assisted thirty-two attorneys who had questions about the disciplinary process. She also explained the process to nine complainants. Jeannine is available to answer all questions about the complaint process, and she is happy to be of service to you.

DISCIPLINE PROCESS
INFORMATION OFFICE

801-257-5515 | DisciplineInfo@UtahBar.org

account to pay the required fees charged by the USPTO. Mr. Lang comingled client funds with his own funds and did not place all unearned fees in his trust account.

Mr. Lang did not timely provide all documents and fees needed to properly respond to notices of missing parts from the USPTO in at least seven provisional and nonprovisional patent applications for six different clients.

SUSPENSION

On May 2, 2018, the Honorable Keith Kelly, Third Judicial District, entered an Order of Suspension, against Jefferson B. Hunt, a South Jordan solo practitioner[1], suspending his license to practice law for a period of six months and one day. The court determined that Mr. Hunt violated Rule 5.5(a) (Unauthorized Practice of Law) and Rules 8.4(b) and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:
On June 30, 2016, the Fourth District Court for Utah County, State of Utah, convicted Mr. Hunt of Attempted Possession or Use of a Controlled Substance, a Class A Misdemeanor, Possession or Use of a Controlled Substance, a Class B Misdemeanor, and three counts of Attempted Purchase, Transfer, Possession or Use of a Firearm by a Restricted Person, a Class A Misdemeanor. Mr. Hunt was sentenced to a term of incarceration, which was suspended, and he was placed on probation for twelve months.

Mr. Hunt was suspended from the practice of law due to noncompliance with Mandatory Continuing Legal Education requirements. During the time period that Mr. Hunt's license was suspended, Mr. Hunt was unlawfully practicing law.

RESIGNATION WITH DISCIPLINE PENDING

On March 23, 2018, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning James Garrett for violation of Rules 1.15(a) and 1.15(c) (Safekeeping Property) and Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
On at least four occasions, checks or withdrawal requests were submitted to a bank for payment from funds in Mr. Garrett's trust account, but the payments were denied because the trust account contained insufficient funds. In one case, Mr. Garrett knew he had collected fees that were placed in his trust account before they were earned and he used some of those fees for business or personal use before they were earned. Eventually, the fees were earned. In a second case, Mr. Garrett knew he collected fees or other monies that were unearned or unearned from the sale of the client's property that were placed in his trust account. Mr. Garrett used some of the fees before they

were earned. Eventually, Mr. Garrett earned the remainder of the proceeds from the sale of the client's property sale.

The OPC sent multiple letters and emails requesting Mr. Garrett's explanation and certain documentation regarding the insufficient funds. Mr. Garrett did not send a timely reply. Mr. Garrett also did not timely respond in writing to the Notice of Informal Complaint.

ADMONITION

On May 2, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(d) (Safekeeping Property), and Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
A client retained the attorney to represent the client in an immigration case. At trial, the judge ordered the client deported. At the hearing, the attorney told the client that they would file an appeal on the client's behalf for no additional fee and requested a court filing fee. The client paid the filing fee for the appeal. The attorney failed to file the appeal, and the client was deported. The client and the client's spouse made multiple attempts to contact the attorney but did not receive a response.

The OPC sent letters requesting an explanation and served the attorney with a Notice of Informal Complaint (NOIC) requesting the attorney's response to the allegations. The attorney did not timely respond to the NOIC.

Mitigating factors:
Timely good faith effort to make restitution or to rectify consequences; personal or emotional problems; and remorse.

ADMONITION

On May 2, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an order of Discipline: Admonition against an attorney for violating Rule 1.1 (Competence) and Rule 1.3 (Diligence) of the Rules of Professional Conduct.

In summary, an attorney was appointed to represent a client in a criminal matter. The trial court held an evidentiary hearing on a motion to suppress evidence. At the end of the hearing, the attorney requested a copy of the dash-cam video as well as additional time to submit a brief on the matter. The attorney failed to timely file the brief and about a week after its due date, submitted a motion requesting additional time in which to file a brief. The court granted the motion, but the attorney again failed to file the brief. The court eventually denied the motion to suppress. Thereafter, the attorney filed three more motions to suppress the evidence but did not file supporting memoranda. The court denied these motions.

Before trial, the court conducted voir dire of the prospective jurors. The court also conducted additional questioning of a juror in chambers with the court and the attorney. The client was not invited into chambers for this questioning. During this questioning, it was discovered that this juror knew the trooper who made the traffic stop. Additionally, the attorney knew this juror, including the fact that this juror had been the officer in at least two cases that had been reversed on appeal because of this juror's conduct. The attorney did not discuss with the client what had occurred in chambers and exercised peremptory strikes without consulting with the client. The juror was included in the jury. Following a one-day trial, the jury convicted the client. The appellate court reversed the convictions and remanded the case to the trial court for a new trial.

Mitigating Factors:
The panel found an absence of a prior record of discipline, an absence of a dishonest or selfish motive, personal problems, including significant health-related issues that impacted the attorney's ability to function in the law practice, good faith effort to rectify the consequences of the misconduct including providing assistance to the client in securing substitute counsel, and clear communication of remorse regarding the consequences suffered by the client.

ADMONITION

On May 2, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.15(a) and 1.15(c) (Safekeeping Property) of the Rules of Professional Conduct.

In summary:
A client retained the attorney to represent the client in divorce proceedings. The client signed an engagement letter which provided that an initial fee was "earned upon receipt" and was required for the engagement and included the first portion of the attorney's work. The engagement letter further provided that a second fee was required for the next portion of work or when it was determined that the divorce would not be a stipulated divorce. The client paid the attorney a $5,000 retainer. The attorney deposited the entire amount in an operating account. The attorney did not have an IOLTA trust account at this time. The attorney eventually earned the money paid by the client.

Mitigating factors:
The attorney eventually earned the money paid by the client. Additionally, since the representation of this client, the attorney established a trust account and revised his form of engagement letter to remove the "earned upon receipt" provision.

ADMONITION

On April 20, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.2(a), 1.3, and 1.4(a) of the Rules of Professional Conduct.

In summary:
The attorney was retained to represent a sibling in a post-conviction relief case. During the representation, there were extended periods of time during which the attorney failed to prosecute the matter and did not prepare the post-conviction petition until over a year after the attorney had been retained. The attorney failed to timely respond to the client's sibling's request for updates on the case and the client terminated the representation. The attorney filed the post-conviction petition after the representation had been terminated and failed to consult with the client regarding the filing of the petition.

1. The clarification that Mr. Hunt is a South Jordan solo practitioner was added by the *Utah Bar Journal* editorial board in an effort to differentiate Mr. Hunt from other Utah State Bar members who share a similar name.

Estate Planning for Young(er) Clients: Who needs it? Who doesn't? Why bother?

by Dara R. Cohen

"Estate planning is only for old people, right?"
"Nope, sure isn't."
"So, that means everyone needs estate planning, right?"
"That's not quite right either."

Estate planning is a valuable service for clients of all ages, not just retirees and grandparents. However, blanket statements that *everyone* needs professional estate planning are overbroad and impractical. This article will discuss how to determine how clients not-yet-of-a-certain-age can benefit from common estate planning tools and those who can reasonably forego estate planning in a lawyer's office.

The first question I ask when a relatively young person asks if they need estate planning is, "How much do you care what happens to your stuff when you're dead?" If that person is not married, has no dependents, owns simple assets, and is comfortable with their beneficiaries as laid out in intestate succession, Utah Code Ann § 75-2-103, they don't necessarily need an estate plan. Intestate succession is the statutory scheme dictating how assets without a beneficiary will pass to a decedent's heirs. Most of the time, intestate succession makes logical sense. Some of the time, intestate succession sows emotional and financial chaos, particularly in blended families or families with estranged relatives.

However, estate planning is not solely property disposition at the time of death. It also encompasses planning for incapacity. A person who is not interested in planning for disposition of his or her assets upon death can greatly ease administration upon incapacity with readily available statutory forms. The Utah Advance Health Care Directive can be completed without attorney help. Search *"Utah Advance Health Care Directive"* on Google; the first link provides the form and instructions. The Utah Advance Health Care Directive, or AHCD, form provides for an agent to make medical decisions and nominates a guardian in the event one becomes necessary.

In 2016, Utah adopted the Uniform Power of Attorney Act, Utah Code Ann § 75-9-101 *et. seq*., which includes statutory forms. Many banks and credit unions have internal forms and account designations where account owners can designate an agent to access funds on the owner's behalf.

These simple tools, the statutory AHCD in conjunction with statutory power of attorney, institutional power of attorney, or both, may be adequate estate planning for some individuals. And they are all do-it-yourself friendly. Moreover, nearly all financial accounts have an option in which the account owner can name a death beneficiary (i.e., beneficiary designations for life insurance, annuities, and retirement accounts, transfer–pay on death beneficiary for brokerage, checking, saving, and money market accounts) and successor owners for Utah 529 Educational Savings Plans. The financial institution holding the account can generally assist with these designations. Keep in mind, however, that these beneficiary designations result in outright transfer and do not provide management and protections available by placing the asset into a Revocable Living Trust.

On the other hand, some young clients, including those with simple assets, may need estate planning beyond what DIY forms accomplish. The biggest indicator that a client with simple assets needs professional grade estate planning is if that client has minor children. A will is the best way to name a guardian for minor children in the event that a child's parents or current guardian die or become incapacitated. The worst case scenario for a child after losing both parents, or one parent in single-parent

DARA R. COHEN, of D. R. Cohen Law, LLC, is a solo practitioner specializing in estate planning, probate, and guardianship.

families, is to be in a tug-of-war between battling family members. A properly drafted and executed will can name a successor guardian for minor children or adult disabled children who are under a guardianship. For clients with minor children, a will for the purpose of naming a guardian is more than "advisable" and is closer to "mandatory."

A client who shares custody of a minor child with their ex may be especially motivated to complete a will or trust. That client can start by asking themselves, "How financially responsible is my ex?" If the client dies intestate during the child's minority, that ex would gain control of the client's estate. Since a minor child cannot receive an inheritance outright, an inheritance is controlled by the minor's surviving parent–guardian. The parent–guardian has a fiduciary responsibility to save, spend, and invest the money for the heir's benefit. Supervision is lax at best and nonexistent at worst. For a client who shares custody, a will can create a testamentary trust and name a different fiduciary to manage a minor child's inheritance, not necessarily defaulting to the surviving parent as fiduciary. A testamentary trust is not a probate avoidance tool like a revocable living trust – all assets landing in a testamentary trust must go through the probate court process. Nonetheless, a testamentary trust is a viable option for clients who do not want to incur the hassle or cost of a revocable living trust but still need to separate financial responsibility for minor children from custodial responsibility.

Another scenario where a relatively young client may benefit from estate planning is "downstream planning," a convenient euphemism for wealthy parents or grandparents who will likely leave significant assets to the client. The 2018 tax reform law doubled the federal estate tax exemption amount, but that increased exemption may or may not be made permanent before it expires. A client who does not have significant assets now, but expects to in the future, can take steps to minimize transfer taxes over future generations. This is a great problem to have with a multitude of available solutions including strategic gifting, charitable trusts, irrevocable trusts, and additional methods to ensure the bulk of the inheritance does not become part of the client's own estate.

In summary, the tl;dr version:

- Some people need professional estate planning; some don't.
- Each client, regardless of age and circumstance, is unique and needs to be analyzed and served accordingly.
- Blanket statements with "always," "all," or "never" as applied to estate planning services are usually wrong.

2018 Paralegal Day and Distinguished Paralegal of the Year Award

by Julie Emery

On June 15, 1989, Governor Norman Bangerter signed a declaration designating a day to recognize paralegals for their contributions to the legal community. Subsequent declarations have been signed over the last twenty-nine years and the name eventually became "Paralegal Day," which takes place on the third Thursday of May every year. Governor Gary Herbert signed the most current declaration this year.

On Thursday May 17, 2018, the Paralegal Division of the Utah State Bar and the Utah Paralegal Association held their Annual Paralegal Day luncheon at the Radisson Hotel in Salt Lake City. Mayor Ben McAdams was the keynote speaker and talked about ethical responsibilities concerning homelessness. Mayor McAdams shared with us his insight on homelessness in Salt Lake County and the growing need for the community to take part in helping find solutions for homelessness and to have empathy in understanding the many reasons a person may become homeless. His address was compelling, and all who attended earned an hour of ethics CLE credit.

One of the highlights of this annual event is the opportunity to recognize individuals who have achieved their national certifications through NALA. This year there were fourteen individuals recognized: Patricia Allred, ACP; Lexi Balling, ACP; Cyndie Bayles, ACP; Andra S. Edmund, ACP; Carolyn L. Howe, CP, Whitney Johnson, ACP; Debra Kenter, ACP; Shalis M. Larsen, CP, Melissa A. Luke, CP, Susan L. Mumford, CP, Nicole L. Nielsen, CP, Shelly Sisam, ACP; and Janet Wagner, ACP. Congratulations!

Paralegal Day is also the day we recognize the Distinguished Paralegal of the Year. The purpose of this award is to honor a Utah paralegal who, over a long and distinguished career, has by his or her ethical and personal conduct, commitment, and activities exemplified for his or her fellow paralegals the epitome of professionalism and rendered extraordinary contributions and service.

This year we received many exceptional nominations, and I am thrilled to announce that the winner of the 2018 Distinguished Paralegal of the Year award is Greg Wayment. Greg is a Utah native from Harrisville, a small town north of Ogden. After he earned his Bachelor of Science degree in Professional Sales from Weber State University, Greg attended the American Bar Association's approved paralegal program at the Denver Career College where he earned his paralegal certificate.

Greg has spent most of his thirteen-year paralegal career at the law firm Magleby Cataxinos & Greenwood doing mostly commercial litigation, patent and trademark, and intellectual property disputes. A few career highlights include his participation in *Kitchen v. Herbert* (legalizing same sex marriage in Utah), *Planned Parenthood v. Herbert* (protecting pass-through federal funding for educational programs), and a six-week trial successfully ending in a $134M verdict. According to the lawyers he works with, Greg is an asset to his firm. In addition to keeping the legal team technologically relevant, he has a unique ability to bring organization and efficiency to complex commercial litigation, which results in better and more effective client representation. Greg strives to stay on the cutting edge of technology, especially relating to discovery.

In his spare time, Greg runs (he says as a hobby, but he ran a marathon in 3:26), reads biographies, serves on the Paralegal Division's Board of Directors, volunteers at Wills For Heroes, and is a special events volunteer at Red Butte Garden. His favorite biography is *Life* by Keith Richards, he would love to travel more, and he loves architecture and would like to design a house someday. Greg is civic-minded and shares his talents with many organizations, becoming a contributing asset to each.

According to Lauren Miller, the Volunteer Coordinator at Red Butte Garden, Greg has been a reliable, valued part of the volunteer team for nine years, donating over 100 hours each year. His friendly nature

makes him a staff and customer favorite, and "we could not accomplish what we do without him."

Greg is also a true asset to the Paralegal Division of the Utah State Bar, where for the last four years, I have served with him on the Board of Directors. Greg conveys thoughtful, fair-minded insight to discussions on various issues brought before the Board. He is a diligent, quiet leader who garners respect from his colleagues and through his actions promotes the paralegal profession in the most positive way.

During his time on the Board, Greg has served as the Division's liaison to the *Utah Bar Journal* and has become a valuable member of the *Bar Journal* committee. Judge Gregory K. Orme, who presented Greg with his award said, "The *Utah Bar Journal* is much the better for Greg's dedicated service." During his presentation, Judge Orme also mentioned that as Greg completes his term as the paralegal liaison to the *Bar Journal* committee, they would likely ask him to stay on as an at-large member. "He has distinguished himself in that position in a way that is unprecedented over the course of the last two decades."

Judge Gregory K. Orme presented Greg Wayment with the Paralegal of the Year Award.

In recognition of Greg's dedication to the paralegal profession including his unparalleled job performance, service to the Paralegal Division, contributions to the *Utah Bar Journal*, and community volunteer work, I am honored to recognize him as Utah's Distinguished Paralegal of the Year. Congratulations, Greg Wayment!

The Paralegal Division would also like to thank the Distinguished Paralegal of the Year Committee: Judge Todd Shaughnessy, Dickson Burton, Frank Compagni, Lorraine Wardle, and Izamar Espinoza for their time and effort in effecting a seamless nomination and selection process.

A note from the 2018 Distinguished Paralegal of the Year

by Greg Wayment

It was a real honor to receive the Paralegal of the Year award from the Paralegal Division and Utah Paralegal Association. I appreciate those who nominated me and wrote supporting letters. I am also thankful for all the paralegals who organize CLE events, facilitate Wills for Heroes and Serving our Seniors, sit on boards, teach the next generation of paralegals, and actively promote the profession every day. Thank you for your tireless work.

Message from the Chair

by Lorraine Wardle

I have served on the Board of the Paralegal Division (the Board) on and off for many years and have filled several different positions before serving as Chair. The most rewarding part of participating in the Paralegal Division has been the opportunity for me to meet and get to know the amazing and dedicated paralegals throughout Utah. I have a great deal of admiration for many of my colleagues that work tirelessly and endlessly to support their attorneys, their families, and the community. They make me proud to be part of their professional group.

The Board had a full schedule this year, and we accomplished a lot. I was excited to have nine new members of the Board this year that brought fresh ideas and worked hard to keep the Paralegal Division moving in a positive direction. Here are some of the things we accomplished this year:

- We presented valuable networking and educational opportunities for paralegals (and attorneys), including co-hosting monthly "brown bag" CLE seminars, which provided at least ten free CLE credits for Paralegal Division members (including the required Ethics credit) and provided an additional eight credit hours of CLE at minimal cost.
- We recorded CLE presentations and made them available to membership to make CLE more accessible for members outside of the Salt Lake City area.
- We presented CLE for attorneys in St. George and Logan to educate them on the benefits, profitability, and proper utilization of paralegals.
- We organized presentations for attorneys and paralegals to update them on the implementation of the new Licensed Paralegal Practitioner (LPP) program.
- We finalized extensive revisions and updates to the Bylaws.
- We published and marketed updated Paralegal Salary Survey results.
- We increased membership.
- We increased social media communications with our membership.
- We monitored electronic media and other sources to identify any instances of unauthorized practice of law or ethics violations by paralegals in the community.
- We jointly promoted and organized volunteers for Wills for Heroes, the Rocky Mountain Innocence Center project, and the Expungement Clinic.
- We had Board members involved on the *Bar Journal* Committee, Spring and Summer Convention Committees, Government Relations Committee, and the Bar Commission.
- We had articles published in each of the Bar Journal issues.
- We provided Job Bank information to membership through email and social media.

I would like to thank the Paralegal Division Board, membership, and other members of the Bar for their support and friendship throughout the year. I look forward to serving on the Bar Commission next year.

CLE Calendar

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.

July 25–28, 2018 — **15.5 hrs. CLE, including 2 hrs. Prof/Civ & up to 4 hrs. Ethics**

2018 Summer Convention in Sun Valley.

August 10, 2018

Annual Mangrum & Benson CLE on Expert Testimony

August 17, 2018 | 9:00–10:00 am — **3 hrs. CLE**

Judges' Perspectives on Effective Trial Practices – Salt Lake County Golf & CLE.
River Oaks Golf Course, 9300 Riverside Dr., Sandy, Utah. Litigation Section members: $55 for CLE only, $75 for golf and CLE; all others: $75 for CLE only, $125 for golf and CLE. To register go to: services.utahbar.org/Events.

September 11, 2018 | 12:00 pm — **Professionalism/Civility Credit Pending**

Golden Rule & the Constitution: A Panel Discussion

September 14, 2018 | 9:00–10:00 am

Cache County Golf & CLE.
Birch Creek Golf Course, 550 East 100 North, Smithfield, Utah. Save the date! Topic and details coming soon!

September 19, 2018

OPC Ethics School

September 28, 2018 | 9:00–10:00 am

Utah County Golf & CLE.
Hobble Creek Golf Course. Save the date! Topic and details coming soon!

October 19, 2018 | 9:00–10:00 am

St. George Golf & CLE.
The Ledges Golf Club, 1585 Ledges Parkway, St. George, Utah. Save the date! Topic and details coming soon!

November 2, 2018

Fall Forum.
Little America Hotel. Announcements, faculty, and breakout session information to come!

Classified Ads

RATES & DEADLINES

Bar Member Rates: 1–50 words – $50 / 51–100 words – $70. Confidential box is $10 extra. Cancellations must be in writing. For information regarding classified advertising, call 801-297-7022.

Classified Advertising Policy: It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For **display** advertising rates and information, please call 801-910-0085.

Utah Bar Journal and the Utah State Bar do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

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

WANTED

Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201.

JOBS/POSITIONS AVAILABLE

Litigation Attorney, Kipp and Christian, P.C. – Downton Salt Lake City. Kipp and Christian, P.C. has an immediate full-time position for an Associate Attorney. The candidate must have 1–5 years of experience, ability to multi-task, work under pressure, strong verbal and written communication skills. Duties include handling litigation caseload, attending court hearings and trials, preparing pleadings and letters, handling discovery requests, and taking depositions. Active Utah license required. Please send resume and writing sample to gbernardo@kippandchristian.com. Position Requirements: Active Utah Bar license (Additional license with Idaho, Montana, or Wyoming Bar preferred, but not required).

Looking for some extra work after retiring? Growing law firm in St. George, Utah looking to hire a part time semi-retired Attorney with significant experience in homeowner association and real property law. Pay depends on experience. Please send all resumes, with personal references and phone numbers, to jcs@jenkinsbagley.com.

Established SLC firm seeks to acquire or merge with boutique business firm to complement its litigation practice. Email inquiries to slcfirm86@gmail.com.

Salt Lake City law firm is hiring St. George lawyers with books of business to grow its St. George office. Inquire at attysrch@outlook.com.

OFFICE SPACE

623 East 100 South, 500 sq ft. office space; Main Floor Historic Victorian Mansion, quiet, private building 2 spaces available; shared conference room. (801) 201-2878 Johnny.

SERVICES

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

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

Certificate of Compliance

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

For July 1 _____ through June 30_____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____ Email: _____

_____

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

1. **Active Status Lawyer –** Lawyers on active status are required to complete, during each two year fiscal period (July 1–June 30), a minimum of 24 hours of Utah accredited CLE, which shall include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of the ethics or professional responsibility shall be in the area of professionalism and civility. Please visit www.utahmcle.org for a complete explanation of Rule 14-404.

2. **New Lawyer CLE requirement –** Lawyers newly admitted under the Bar's full exam need to complete the following requirements during their first reporting period:
   - Complete the NLTP Program during their first year of admission to the Bar, unless NLTP exemption applies.
   - Attend one New Lawyer Ethics program during their first year of admission to the Bar. This requirement can be waived if the lawyer resides out-of-state.
   - Complete 12 hours of Utah accredited CLE.

3. **House Counsel –** House Counsel Lawyers must file with the MCLE Board by July 31 of each year a Certificate of Compliance from the jurisdiction where House Counsel maintains an active license establishing that he or she has completed the hours of continuing legal education required of active attorneys in the jurisdiction where House Counsel is licensed.

EXPLANATION OF TYPE OF ACTIVITY

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

1. **Self-Study CLE:** No more than 12 hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit www.utahmcle.org for a complete explanation of Rule 14-413 (a), (b), (c) and (d).

2. **Live CLE Program:** There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at a Utah accredited CLE program. **A minimum of 12 hours must be obtained through attendance at live CLE programs during a reporting period.**

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

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

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

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

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

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

Date: _____ Signature: _____

Make checks payable to: **Utah State Board of CLE** in the amount of ***$15*** or complete credit card information below. Returned checks will be subject to a $20 charge.

Billing Address: _____ Zip Code _____

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