

# Utah Bar<sup>®</sup> JOURNAL

A full-page photograph of a natural rock archway. The arch is formed by reddish-brown, textured rock. A person is standing on a ledge at the base of the arch, looking out towards a clear blue sky. The lighting is warm, suggesting late afternoon or early morning.

Volume 32 No. 2  
Mar/Apr 2019





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# The Utah Bar Journal

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## Cover Photo

*Turret Arch*, by Utah State Bar member Lane Erickson.

*LANE ERICKSON is a partner at Racine Olson PLLP. Asked about his photo, Lane said, "I captured this image of the Turret Arch in Arches National Park a few years ago while on Spring Break with my family in Moab, Utah. The contrast of warm and cool colors between the red rock and the blue sky were striking, but what really caught my eye was the silhouette of the boy standing in the shadow of the Arch, because it provided scale showing how massive this incredible rock formation really is."*



## SUBMIT A COVER PHOTO

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs (compact disk or print), along with a description of where the photographs were taken, to Utah Bar Journal, 645 South 200 East, Salt Lake City, Utah 84111, or by e-mail .jpg attachment to [barjournal@utahbar.org](mailto: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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The *Utah Bar Journal* is published bimonthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar dues. Subscription price to others: \$30; single copies, \$5. For information on advertising rates and space reservations visit [www.utahbarjournal.com](http://www.utahbarjournal.com) or contact Laniece Roberts at [utahbarjournal@gmail.com](mailto:utahbarjournal@gmail.com) or 801-910-0085. For classified advertising rates and information please call Christine Critchley at 801-297-7022.

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

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

### GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

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

#### ARTICLE LENGTH

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

#### SUBMISSION FORMAT

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

#### CITATION FORMAT

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

#### NO FOOTNOTES

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

#### ARTICLE CONTENT

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

#### EDITING

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

#### AUTHORS

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

#### PUBLICATION

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

#### LETTER SUBMISSION GUIDELINES

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to [BarJournal@UtahBar.org](mailto: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.



A photograph of three people in a professional setting. A man in a dark suit is leaning over a desk, looking at a laptop screen. A woman with dark hair, wearing a dark blazer over a light-colored top, is sitting at the desk with her hands clasped, looking at the screen. Another man in a light-colored shirt is also looking at the screen. The background is slightly blurred, showing office equipment.

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## Letter to the Editor

Dear Editor:

"Diapers and Detention: Should There Be a Minimum Age Limit for Juvenile Delinquency in Utah?" provided a solution in search of a problem.

The title of the article suggests that babies could be placed in detention. No, R574 is clear: children twelve and older can only be placed in detention for serious misdemeanor level offenses and for felony level offenses, and children ten and older can only be placed in detention for serious felony level offenses or attempts. No one under ten is going to detention on delinquency charges, and few children under twelve. Moreover, detention stays are statutorily quite limited in time.

The bulk of the article says that children can be referred to juvenile court for delinquency prosecution at any age, even as newborns. That is not true either. There is a lower limit on

prosecution, it's mens rea. A young child can't formulate it, which is why a young child can't be prosecuted.

A count of the states listed in the article that have a minimum age makes clear that those states are in a minority. A review of the U.S. Supreme Court case law cited in the article does not even suggest in dicta that the U.S. Constitution contains a minimum age limit for either nonjudicial or judicial resolution, and a reading of the U.S. Constitution does not disclose any discussion of the subject.

Thankfully there is a place where children who are still developing can have their delinquency addressed in a manner that recognizes their developmental stage. That place is juvenile court.

Paul Wake



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## President-Elect & Bar Commission Candidates

### Candidate for President-Elect

*Heather Farnsworth is the sole candidate for the office of President-elect. No other nominations were made to the Bar Commission. Utah State Bar bylaws state: "In the event that there is only one candidate for the office of President-elect, the ballot shall be considered as a retention vote and a majority of those voting shall be required to accept or reject the sole candidate."*



#### HEATHER FARNSWORTH

I am humbled to be nominated by my fellow commissioners for the opportunity to act as your President-Elect. It has been my honor to serve for seven years as a commissioner and as an ex-officio representative of the Women Lawyers of Utah. I have prepared for this opportunity

by working in leadership on the Executive Committee, as chair for the 85th Anniversary Event, and co-chair of the Awards Committee. I have also participated in multiple committees including the Futures Commission and the Summer Bar Convention Review Committee.

In addition to my bar experience, I have leadership experience as a former President of the Women Lawyers of Utah and as the co-owner of Match and Farnsworth, a high-volume small firm. It has been my goal to be a voice for those who may fall outside of the traditional practice experience, who are often under-represented in bar leadership. I will continue to share my perspective while representing your concerns. I will work to strengthen the profession and the value of bar membership. I commit to diligently represent your needs within the Bar and within the community. Thank you for considering my candidacy.

### Second Division Bar Commissioner Candidate

**Uncontested Election:** According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected." John Bradley is running uncontested in the Second Division and will therefore be declared elected.



#### JOHN BRADLEY

For the past three years it has been my pleasure to serve as the Bar Commissioner from the Second District. I would like to extend that service for a second term. The Second District bar is composed primarily of small firm, solo and government attorneys. I have done my best to keep this

demographic in mind as I listen and discuss items that come before the bar. I am currently assigned to the Government Relations Committee which reviews all proposed legislation to see if it impacts access to or the administration of justice. In three years, I believe I have only missed two Commission meetings. I provide a very balanced approach to representation. Core values are integrity, hard work, civility and forward-thinking decision making. My goal is to think of how the bar can best help, protect and move the legal profession forward and then work to accomplish that. I would greatly appreciate your support.

### First Division Bar Commissioner Candidates

Candidates to the office of Bar Commissioner from the First Division were solicited to fill the remaining one year of the unexpired term of Herm Olsen upon his resignation in July 2019 to serve as Utah State Bar President. These nominations were due March 1st and were submitted after the deadline to be included in this publication. First division candidate information will be available to review online at [www.utahbar.org](http://www.utahbar.org).



## Third Division Bar Commissioner Candidates



### GREG HOOLE

I am honored to be nominated as candidate for Bar Commission. I have enjoyed a diverse and rich law practice since graduating from the S.J. Quinney College of Law more than 20 years ago. I have practiced criminal and civil law, worked in large and small law firms, and

divided my litigation practice between plaintiffs and defense work. Now, as a mediator, I enjoy bringing adversaries together to find solutions to complex problems. I have served on several Bar committees and working groups and currently serve as co-chair of the Innovation in Law Practice Committee.

I am familiar with the many challenges facing us as Bar members, as well as our overall Bar organization. The challenges span a spectrum of issues, practice areas, geographical locations, generational differences, institutional needs, trends, and developments. Some of these challenges include renewed threats to judicial independence, potential efforts to compromise professional self-governance, revived proposals to tax legal services, and perennial budgetary concerns to properly fund our court system. I hope to have the opportunity to bring my positive energy and experience to bear in assisting the Bar as it navigates these and many other issues in our ever-changing professional landscape.

Please accept my thanks for considering my candidacy.



### MICHELLE QUIST

As attorneys, we work hard. The Utah State Bar operates to support our work and service to the public. The Commission codifies rules, takes positions on legislation, plans relevant conventions and CLEs, and generally assists groups and sections with the goals they're trying to accomplish.

I want to help ensure that the Commission engages these activities with quality, efficiency, and thrift.

During my time as Bar Commissioner I worked hard representing the Bar on the Real Women Run Organizing Committee, the Affordable Attorneys for All (AAA) Task Force, the Government Relations Committee, and the 85th Celebration Gala. I also helped facilitate tech development and flat fee agreements. I organized the Breakfast of Champions, which honors mentors and mentees throughout

the state, and was honored to be on the Executive Committee.

I started my career as a litigator in New York City with Milbank. I clerked for Judge Monroe G. McKay on the Tenth Circuit and am now in private practice in civil litigation and appellate law. I write a weekly column for *The Salt Lake Tribune* and often use that space to advocate for legal issues.

I work hard, and hope to represent you again. Thank you for your support.



### HEATHER L. THUET

Thank you for your ongoing support and your vote in the upcoming election!

Before serving on the Commission, I served as Chair of the Litigation Section. I remain passionate in serving as your advocate. I will continue to be a strong voice for financial responsibility within the Bar and for improving our profession. We face challenges. I will continue to listen to you and will not shy away from addressing important questions or, when necessary, being the sole dissent. I am enthusiastic about my service on the commission and excited to continue. Thank you for your support. Please make sure to vote in the upcoming election.

Cheers!

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# Revisiting the Lighthouse Research Results: How Can We Thrive in a Changing World?

by H. Dickson Burton

What do your clients think of you? Why don't more people hire an attorney to help with some of life's most difficult challenges? How do people choose an attorney? And why do people think attorneys cost too much?

As you will remember, under John Lund's leadership last year the Bar contracted with Lighthouse Research, a Salt Lake City research firm, to conduct phone surveys and focus groups of individual and business clients to address these and other related questions. The answers shed light on what we need to improve and what we are doing well.

You can read the full reports from the Practice Portal through the Bar's website.

And you should also revisit John Lund's excellent report on the survey in the May/June 2018 issue of the *Bar Journal*.

John R. Lund, *Meeting the Market for Legal Services, the*

*Jury is in: Legal Services are a Tough Sell*, UTAH B.J. Vol. 31 No. 3 (May/Jun 2018), available at [http://www.utahbar.org/wp-content/uploads/2018/05/May\\_June\\_2018\\_FINAL.pdf](http://www.utahbar.org/wp-content/uploads/2018/05/May_June_2018_FINAL.pdf). If you have not yet read these materials, you will especially find it worth your time to do so. A brief summary of the Lighthouse data can be found at <http://www.utahbar.org/wp-content/uploads/2019/02/Lighthouse-One-Sheets-Combined.pdf>.

So why are we still talking about it nearly a year later? Because the research provides not only useful data but a reminder that we must continually examine our practices and adapt them to meet a changing world and changing client expectations. We are all aware of the factors and pressures that are accelerating change in every aspect of our world and our lives. Arguably, it starts with the Internet and related technologies which are continuing to revolutionize everything we do including how we

access entertainment, how we shop, how we interact with the government, and how we communicate with others around the world. Other technologies are changing how businesses operate and get things done, including how they use legal services. Societal, political, and generational changes are also, both separately and relatedly, effecting changes and applying pressures on how we live and cope. And all of this impacts how we operate, or should consider operating, our law practices.

We see these changes in other industries, from the way we buy our

cars to the way we visit our doctors or buy our groceries. Consumers have access to more information than ever, and savvy consumers expect the services they use to be immediate (or nearly so), comprehensive, and fairly priced. Consider: the fastest-growing segment of healthcare is telemedicine,

which experienced a 19,000 percent growth in number of patients between 2014–2018. Why? Because it's fast, convenient, and more affordable. How are we coping in the legal profession?

Among other things, timely data, including that resulting from our Lighthouse Research study of last year, help inform us as to where we stand and what our clients and prospective clients are expecting and wanting from lawyers. For example, the research, perhaps predictably, confirmed that many potential clients believe attorneys are simply too expensive. What was less predictable was that it is not necessarily our hourly rates that causes the most concern. Respondents value an hour of an attorney's time for some services, including an initial consultation in a divorce or custody

*"[W]hat [potential clients] are afraid of is the often-unknown and unpredictable total cost of a matter. It is the open-ended nature of our billing that they fear."*





case, at more than \$500. But what they are afraid of is the often-unknown and unpredictable total cost of a matter. It is the open-ended nature of our billing that they fear. That at least tells us we need to turn more to alternative fee models, including flat-fees, blended arrangements, and performance bonuses.

And what do people think of attorneys themselves? Contrary to what many assume, most individuals and small businesses in Utah have a positive perception of attorneys. More people actually trust attorneys than trust the media or local politicians (with apologies to our lawyer legislators 😊).

The Lighthouse results also tell us the barriers against people and small businesses hiring attorneys are essentially the same. The number one reason people and small businesses don't hire an attorney is cost. The second is fear, not only of the cost but of not knowing what an outcome might be. They are entering a legal world that is known by many only from television shows – which they hope are actually fiction rather than their own nightmare reality show.

But again, with respect to cost the concern is not so much the hourly rate, but rather the open-ended nature of many of our

fees. They often cannot get the attorney to tell them a total cost for a project. "I always feel an attorney looks down on me when I ask about cost," one participant said. "They look down on me, like, 'if you have to ask how much, you can't afford it.'" Another respondent, the owner/CEO of a \$1 million per year company, said "[w]e don't hire an attorney because we have a fear of the fee skyrocketing beyond something we're capable of paying. You're in a commitment, once you sign up. It's a fear of 'when is it going to stop?'"

Another participant who used mediation for her uncontested divorce said she'd never considered using an attorney, because she did not understand her options. "I was afraid it would be \$15,000 or \$20,000," she said. "I didn't really do research. I just assumed it would cost that much."

The next-biggest barrier to people hiring attorneys is they do not know how we as attorneys can help them. Some of the most common statements heard during the Lighthouse focus groups were "I can take care of most issues myself, without a lawyer," or "I don't think an attorney would do me much good." Our profession has traditionally failed at defining our role and the benefits we can provide. "The law is a professional service



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industry where the consumer can't figure out how the professional service can actually help them," said Destinee Evers, a practice manager with the Washington State Bar.

Most small businesses did not see the value of retaining an attorney. "How do I know when I need a lawyer?" asked a business owner who reported revenues of \$1 to \$5 million. "Where is the breaking point? When is it worth the cost to hire an attorney?"

"I can go online and do an LLC for \$600," said another business owner. "If I hire an attorney, it's \$500 to \$1,000. I just don't see the value."

Survey respondents had both positive and negative thoughts that came to mind when they thought about attorneys.

"Knowledgeable," "advocate," and "capable" were some of the positive words. The most common negative words were: "aggressive," "contentious," "argumentative," and "dishonest."

The Bar's report on the Lighthouse surveys highlighted many of the things attorneys can do to breach the identified barriers. At the conclusion of the survey, each participant was asked, "imagine if you were part of a creative team tasked with increasing the usage of legal services at a law firm. What three things would you do to overcome the barriers preventing individuals or businesses from using your firm?" Here are some of the most common answers:

- Be engaged in the community (sponsorships, free clinics, and public events).
- Educate potential clients on what lawyers can do for them. "Show me why I need you."
- Demonstrate how various crises can be averted by having legal counsel – preventive care.
- Demonstrate how attorneys are different from the negative stereotypes that exist.
- Emphasize specific skills and abilities that would benefit clients.
- Offer affordable, reasonable fees, and a variety of payment options.
- Show greater accessibility in advertising.
- Show the value lawyers provide for the cost paid.

So, what do we do now? Over the past year the Bar has taken several steps to implement what we learned from Lighthouse. First, our Licensed Lawyer tool and marketing plan has been designed to address some of the major concerns people expressed during the survey. It allows users to find an attorney not only based on specialty but also based on available fee arrangements and even ability to pay. If you are not yet actively using Licensed Lawyer, you can easily do so by visiting [www.licensedlawyer.org](http://www.licensedlawyer.org), at no cost to you as a member of the Bar. Second, the Bar is using social media and other channels, including a series of 15-second educational video ads, to educate the public on the value lawyers can bring to them. You can watch them at <https://m.youtube.com/watch?v=YEfNRLFXbyM&feature=youtu.be>. We are also promoting the availability of free and low-cost legal clinics for consumers who truly cannot afford regular rates – and to illustrate that consulting a lawyer need not be cost-prohibitive.

Importantly, the Bar's Innovation in Law Practice Committee, which is in its fourth year of existence, has already provided more educational opportunities than ever to help our attorneys, including new and small-firm lawyers. These CLE opportunities can help attorneys adapt their practices to changing trends through technology, practice tools and practice management ideas, including ideas for marketing and new ways of charging for services. The Committee has sponsored stand-alone CLEs and entire tracks at our recent Bar conventions. And, on May 23, 2019, the Committee will put on its Second Annual (day-long) Innovation Symposium featuring top experts, intensive workshops, and opportunities to network and share ideas with other similarly-situated attorneys to innovate and improve your practice. The first Symposium last May had overflow attendance and received absolutely rave reviews.

At this summer's Annual Convention in Park City (yes, Park City!!) we will also have sessions addressing how to take advantage of innovation opportunities. Among our keynote speakers will be the renowned expert on legal innovation, Robert Millard, from Cambridge, England, who advocates that we can succeed in a legal environment that is being dramatically disrupted by breakthrough technologies. Indeed, his recent paper addressing law firms of the future is titled "Thriving At The Edge Of Chaos." Mr. Millard's presentation should not be missed, and I encourage you to take advantage of every opportunity to learn how to thrive in your own practice. And please continue to let us know how we can help.



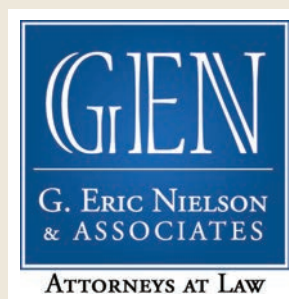
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### How the Sale of Florida Orange Groves 75 Years Ago Established Securities Law Compliance Standards for Cryptocurrencies and Other Digital Tokens Today

by Brad R. Jacobsen and Hunter S. Reynolds

#### Introduction

In 2018, William Hinman, the Director of the Division of Corporate Finance at the United States Securities and Exchange Commission, provided significant guidance on the applicability of U.S. Federal Securities Law to Initial Coin Offerings (ICO's) and the sale of digital tokens. William Hinman, Director, Division of Corporate Finance, U.S. Securities and Exchange Commission, *Address at the Yahoo Finance All Markets Summit: Digital Asset Transactions: When Howey Met Gary (Plastic)* (June 14, 2018). Director Hinman confirmed in detail that the SEC will continue to apply the “Howey Test” in determining whether the sale of digital tokens amount to the issuance and sale of a security. *Id.* (commenting that “calling the transaction an initial coin offering, or ‘ICO,’ will not take it out of the purview of the U.S. securities laws”).

Director Hinman, echoing several speeches by others at the SEC on the importance of the Howey Test,<sup>1</sup> articulated its elements:

- an investment of [value];
- in a common enterprise;
- with an expectation of profit;
- that are derived from the efforts of others

See Hinman, *supra* note 1; see also *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

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Thus, offerings that contain these elements will be deemed the sale of a security under U.S. law and, as such, will be required to conform to disclosure and compliance laws thereunder (as well as bring significant civil and criminal liability risk for failure to comply). See Hinman, *supra* note 1. This article will attempt to bridge the gap between the Supreme Court’s ruling in 1946 and the SEC’s implementation of that decision as it relates to the sale of digital tokens and other cryptocurrencies. Section II of this article will briefly summarize both the history and holdings of *SEC v. W.J. Howey Co.* Section III will discuss Director Hinman’s insights into the SEC’s plans regarding the regulation of ICO’s.

#### The History of Howey

William J. Howey founded Howey-in-the-Hills, located northwest of Orlando, Florida, in May 1925. The W.J. Howey Company owned large tracts of citrus acreage in Howey-in-the-Hills, and planted roughly 500 acres annually through the 1930s. *Howey’s History*, Howey-in-the-Hills, available at <https://howeyhillsfl.govoffice3.com/index.asp?Type=GALLERY&SEC=%7B331DFD62-65ED-4F65-A4D6-0BB7FF9B2DE2%7D> (last visited February 1, 2019). Mr. Howey also built the first citrus juice plant in Florida. *Id.* In the early 1940s, as a means to produce current income into an investment cycle with a long lead time, the W.J. Howey Company began to sell approximately half of the acres that it developed. See *W.J. Howey Co.*, 328 U.S. at 295.

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In May of 1943, the W.J. Howey Company and Howey-in-the-Hills Service, Inc. sold a significant number of their tracts in a suspect transaction. *Id.* at 296. Each prospective customer was offered both a land sales contract and a service contract, after having been told that it was not feasible to invest in a grove unless service arrangements were made. *Id.* at 295. The Supreme Court noted, “[w]hile the purchaser [was] free to make arrangements with other service companies, the superiority of Howey-in-the-Hills Service, Inc., [was] stressed. Indeed, 85% of the acreage sold during the 3-year period ending May 31, 1943, was covered by service contracts with Howey-in-the-Hills Service, Inc.” *Id.* The Supreme Court further described the transactions entered into as follows:

The service contract, generally of a 10-year duration without option of cancellation, gives Howey-in-the-Hills Service, Inc., a leasehold interest and “full and complete” possession of that acreage. For a specified fee plus the cost of labor and materials, the company is given full discretion and authority over the cultivation of the groves and the harvest and marketing of the crops. The company is well established in the citrus business and maintains a

large force of skilled personnel and a great deal of equipment, including 75 tractors, sprayer wagons, fertilizer trucks and the like. Without the consent of the company, the land owner or purchaser has no right of entry to market the crop; thus there is ordinarily no right to specific fruit. The company is accountable only for an allocation of the net profits based upon a check made at the time of picking. All the produce is pooled by the respondent companies, which do business under their names.

The purchaser for the most part are non-residents of Florida. They are predominantly business and professional people who lack the knowledge, skill and equipment necessary for the care and cultivation of citrus trees. They are attracted by the expectation of substantial profits. It was represented, for example, that profits during the 1943–1944 season amounted to 20% and that even greater profits might be expected during the 1944–1945 season, although only a 10% annual return was to be expected over a 10-year period. Many of these purchaser are patrons of a resort

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hotel owned and operated by the Howey Company in a scenic section adjacent to the groves. The hotel's advertising mentions the fine groves in the vicinity and the attention of the patrons is drawn to the groves as they are being escorted about the surrounding countryside. They are told that the groves are for sale; if they indicate an interest in the matter they are then given a sales talk.

*Id.* at 295–297.

The SEC brought claims against Howey for offering units of citrus grove development coupled with a contract for cultivating the land, which amounted to the sale of an unregistered and nonexempt security in violation of the Securities Act of 1933. *Id.* at 294. The Supreme Court concluded that the transactions involved “investment contracts” as defined by the Securities Act of 1933. *Id.* at 299. The Court determined that Howey offered an opportunity to invest and to share in the profits of a large citrus fruit enterprise managed and partly owned by himself. *Id.* at 298–301. The Court emphasized that the offering was mainly to persons who resided in distant localities and who lacked the equipment and experience requisite to the cultivation, harvesting and marketing of the citrus products, and that such investors were attracted “solely by the prospects of a return on their investment.” *Id.* at 300. The investors’ respective shares in the “common enterprise” were evidenced by land sales contracts and warranty deeds which served as a convenient method of determining the investors’ allocable shares of the profits. *Id.* at 299–300. Thus, “[t]he resulting transfer of rights in land [was] purely incidental.” *Id.* at 300.

The Court concluded that “all the elements of a profit-seeking business venture are here” and that the “investors provide the capital and share in the earnings and profits; the promoters manage, control and operate the enterprise.” *Id.* Accordingly, “the arrangements whereby the investors’ interests [were] made manifest involve[d] investment contracts, regardless of the legal terminology in which such contracts [were] clothed.” *Id.* The Court concluded that Howey’s “failure to abide by the statutory and administrative rules in making [his] offerings, even though the failure result[ed] from a bona fide mistake as to the law, cannot be sanctioned under the Act.” *Id.*

In deciding *Howey*, the Supreme Court created a test that requires courts to look at an investment’s substance, rather than its form, to determine whether it is a security. Even if an investment is not labeled as a “stock” or a “bond,” it may very well be a security under the law, meaning that registration and

disclosure requirements apply. If an investment opportunity is open to many people and investors have little to no control of investment monies or assets, then that investment likely constitutes a security. If, on the other hand, an investment is made available only to a few close friends or associates and the investors have significant influence over how the investment is managed, it likely does not constitute a security.

## Howey Today: Securities Laws in the Era of Cryptocurrency

Using its precedent in *Howey*, the SEC announced that it will scrutinize the offering of a digital token by examining the identity of the buyer and whether the buyer will be using the token or holding onto the token to sell later for a profit in the hope that it will later rise in value (based on the efforts of others). In his June 2018 speech, Director Hinman described how the SEC will analyze digital tokens to determine whether or not a digital token offering is an “investment contract” and therefore a security. Prior to this guidance, it was unclear what facts the SEC would focus on in determining whether a digital token offering met the *Howey* test (especially given the recent comment by the Chairman of the SEC, Jay Clayton, that “every ICO I have seen is a security.”). Jay Clayton, Chairman, U.S. Securities and Exchange Commission, Testimony before the Senate Committee on Banking, Housing, and Urban Affairs, Virtual Currencies: The Oversight Role of the U.S. SEC and the U.S. CFTC (Feb. 6, 2018). Director Hinman, however, contacted Clayton and provided a set of factors that, while not exhaustive, provide guidance to those who wish to create and sell “tokens” without the onerous compliance required by securities laws:

- Is there a person or group that has sponsored or promoted the creation and sale of the digital asset, the efforts of whom play a significant role in the development and maintenance of the asset and its potential increase in value?
- Has this person or group retained a stake or other interest in the digital asset such that it would be motivated to expend efforts to cause an increase in value in the digital asset? Would purchasers reasonably believe such efforts will be undertaken and may result in a return on their investment in the digital asset?
- Has the promoter raised an amount of funds in excess of what may be needed to establish a functional network, and, if so, has it indicated how those funds may be used to support the value of the tokens or to increase the value of the enterprise? Does the promoter continue to expend funds from proceeds or operations to enhance the functionality



and/or value of the system within which the tokens operate?

- Are purchasers “investing,” that is seeking a return? In that regard, is the instrument marketed and sold to the general public instead of to potential users of the network for a price that reasonably correlates with the market value of the good or service in the network?
- Does application of the Securities Act protections make sense? Is there a person or entity others are relying on that play a key role in the profit-making of the enterprise such that disclosure of their activities and plans would be important to investors? Do informal asymmetries exist between the promoters and potential purchasers/investors in the digital asset?
- Do persons or entities other than the promoter exercise governance rights or meaningful influence? *See* Hinman, *supra* note 1.

Additionally, Dr. Hinman provided non-exhaustive guidance on how to “structure digital assets so they function more like a consumer item and less like a security” *Id.*

- Is token creation commensurate with meeting the needs of users or, rather, with feeding speculation?
- Are independent actors setting the price or is the promoter supporting the secondary market for the asset or otherwise influencing trading?
- Is it clear that the primary motivation for purchasing the digital asset is for personal use or consumption, as compared to investment? Have purchasers made representations as to their consumptive, as opposed to their investment, intent? Are the tokens available in increments that correlate with a consumptive versus investment intent?
- Is the asset marketed and distributed to potential users or the general public?
- Are the assets dispersed across a diverse user base or concentrated in the hands of a few that can exert influence over the application?
- Is the application fully functioning or in early stages of development? *See id.*

Finally, Director Hinman recently announced that the SEC plans to, in the near future, issue more guidance on when securities

law applies to cryptocurrencies in addition to guidance on custody rules for digital coins. *See* JD Alois, *Report: SEC Director of CorpFin Says Cryptocurrency Guidance Coming*, CROWDFUND INSIDER (Nov. 5, 2018). Hinman also noted that, while waiting for further guidance from the Commission, companies who are considering capital-raising options should stick to traditional securities offerings and, once more established, to then consider issuing a digital token which will be more readily identified as a utility token. *See* Ross Campbell, *Token Sale Governance: Charting Paths to Compliance*, MEDIUM (Nov. 21, 2018).

## Conclusion

Digital tokens are changing day to day and the contributions that these tokens can make to society will be immense. The SEC’s stance on whether these technologies are securities will continue to depend on the elements established by the sale of orange groves more than seventy-five years ago.

1. *See e.g.* Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission, *Address at the Medici Conference: Breaches and Bitcoin* (May 2, 2018); Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission, *Address at the University of Michigan Law School: Wolves and Wolverines* (September 24, 2018).

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## “Get out your checkbook” – Musings from Both Sides of the Litigation Aisle

by Nathan S. Morris

Just three months after attending the annual “pat-on-the-back” convention of the Utah Defense Lawyers, I was indoctrinated into the Utah Association for Justice (UAJ) when I attended the UAJ annual convention. Both conventions shared hearty chuckles at the quirks of the other side, with a sprinkling of names that incite frustration, fear, or even loathing. Each group touted impressive bonds amongst members and spun convincing “war stories” of success and failure while fighting on the front lines: a battle between right and wrong, good and evil, the *Legion of Doom* verses the *League of Justice*. For my part, I was convinced on both ends, struck by the sincerity of thought of the formidable defense bar and persuaded by the intelligent UAJ advocates, that I was indeed fighting the good fight. I consider myself fortunate and blessed to have friends on both sides of the aisle, mentors and colleagues who believe in what they do and who pass on knowledge and practice pointers with passion and dignity. When people chide me for joining the dark side – or express their conviction that I have switched to the good side – I am unsure which is which.

I’ve gleaned a few things in my personal journey from dark to light (or from good to bad) over the past two years. Like Cosmo Cramer, I often find myself in the middle of an eternal feud between Jerry and Newman; a symbiotic relationship featuring frustrating interchanges, “Bizarro World” alliances, and a realization that most often it takes both perspectives to successfully navigate the strange legal world we live in.

### Compassionate Regard for the Pressures We Live Under

But now, for the first time, I see that you are a man like me. I thought of your hand-grenades, of your bayonet, of your rifle; now I see your wife and your face and our fellowship. Forgive me comrade. We always see it too late. Why do they never tell us that you are poor devils like us, that your mothers are just as anxious as ours, and that we have the same

fear of death, and the same dying and the same agony – Forgive me, comrade; how could you be my enemy?

Erich Maria Remarque, *All Quiet On The Western Front* (1929).

It’s difficult to peer out of our foxholes to observe the burdens and stresses faced by the other side, but it’s a process we must attempt. Certainly, the demands and circumstances of a law practice fall far short of those faced in war. However, acknowledging the humanity of the opposing lawyer will ultimately lead to a more fulfilled and civil existence for us all. As the author Alain de Botton stated, “The psychological pressures are enormous... [We need to] show a compassionate, tolerant regard for the pressures we live under.” Alain de Botton, TED RADIO HOUR, *What’s A Kinder Way to Frame Success*, *National Public Radio* (Nov. 1, 2013), <https://www.npr.org/templates/transcript/transcript.php?storyId=240782763>.

Defense lawyers have tremendous pressures placed on their shoulders as a result of our modern society. Did you realize that most insurance carriers prohibit billing hours for travel time to a deposition? Through the years, this has deprived many fine, hard-working attorneys of thousands of billable hours and hundreds of thousands of dollars in collective collections. The time needs to be made up, resulting in longer hours at the office or mind-numbing and fruitless appeals to the companies that pay their bills. Endless reports and forms are required on a

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regular basis and failure to timely complete them could impact the entire firm. By the way, those reports are often non-billable as well. Young associates have billable hour requirements that determine their future fate as they scratch and claw their way to partnerships. Junior partners wrestle with the reality that their livelihood depends on their ability to develop their own clientele in a legal world dominated by competent and trusted attorneys with many more years of experience. Insurance adjusters sit in the back of an empty courtroom measuring every step taken by their retained attorney, careful to report to their superiors the competence (or lack thereof) they are witnessing. The insurance company's decision to file for trial de novo because of their perception of an "unjust or unprecedented" Arbitration Award highlights just how disappointed it is with the attorney's performance. The lucky practitioner is able to avoid the adjuster's instructions to contact and complain to the arbitrator that the Award is being appealed – lest there be any doubt that those arbitrators are likewise being judged by the companies who "pay their bills." Have you talked with a young associate about the amount of debt they have incurred to earn their degree, only to have their employers bristle over a request for a \$2,000 raise? The pressures are immense.

On the other side, living by the daily manna that we call "contingency fees" is not the best way to ease into sleep every night. The pressures are enough to drive some from the business. Endless reports on the defense side are replaced by calls from clients (sometimes daily) who can't understand how fact discovery can take a full 240 days. Clients who continually ignore requests to provide their attorney with documentation often respond in their deposition, *under oath*, that they sent the document to their attorney long ago. Many a client demands explanations for a system that makes them feel like a villain because of an errant or forgotten medical record skillfully dissected by defense attorneys during cross examination. There is immense pressure to meet deadlines and build a case. As one friend recently asked, "So, how is it building sandcastles instead of stepping on them?" The silence after a jury has issued a 50/50 verdict is deafening and the tears real; despite pre-trial explanations to that same client that there is a good chance this would happen. Those attorneys are the lucky ones who have clients to represent in a world dominated by well-equipped and talented advertising dollars. Solo practitioners grapple with unfairly hollow offers by insurance companies, forcing them to either accept less-than-full value or run the risk of losing even

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formerly of Simpson Thacher & Bartlett in Palo Alto, California joins the firm's business and finance group. Mr. Barrus received his B.S. from Brigham Young University-Idaho, *cum laude* and his J.D., *cum laude*, from Northwestern University School of Law.

#### NICHOLAS S. JONES



formerly of Manatt, Phelps & Phillips in Los Angeles, California joins the firm's real estate law group and practices in the areas of commercial leasing and real estate development, acquisitions and financing. Mr. Jones received his B.A. in English from Brigham Young University, *magna cum laude*, with University Honors, and his J.D. from Stanford Law School.

#### SARAH M. HUMPHREY



Sarah Humphrey is a member of the firm's litigation practice group. She received her B.S. in Business Management, *summa cum laude*, from Brigham Young University-Hawaii and her J.D. from Brigham Young University J. Reuben Clark Law School, *magna cum laude*, *Order of the Coif*.

#### W. ASH MCMURRAY



Ash McMurray is a member of the firm's litigation practice group. He received his B.A. in Philosophy, and a minor in both Logic and Nonprofit Management from Brigham Young University, *magna cum laude* and his J.D. from the Brigham Young University J. Reuben Clark Law School, *cum laude*.

#### JASON R. PERRY



Jason Perry is a member of the firm's business and finance group. He received a B.S. and M.S. in Civil and Environmental Engineering from Utah State University. Mr. Perry earned his J.D. from The University of Utah S.J. Quinney College of Law, *Order of the Coif*, Highest Honors.

#### DAVID P. MOOERS-PUTZER



formerly of Ballard Spahr in Salt Lake City, Utah joins the firm's commercial litigation and business and finance groups. Mr. Mooers-Putzer received his B.A. in History from Stanford University and his J.D. from The University of Utah S.J. Quinney College of Law, *Order of the Coif*, Highest Honors.

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more by going to trial. The pressures are immense.

The fictional character John Dunbar in the classic movie, *Dances with Wolves*, found himself identifying with the Sioux tribe, with whom he was forced to live in order to survive. His transformation was born of necessity, having witnessed atrocities committed by his countrymen. We sympathize with our own because we see the battles that are fought daily and we uniformly decry perceived unfairness. Meanwhile, the other side is dealing with similar, albeit different pressures. We *can* improve the environment we all work in through understanding the pressures of the other side. We *can* jointly construct a more humane and civil system brick by brick. We can *and should* educate our clients and insurers to avoid generating anger and frustration that deeply entrenches our clients, making it less likely to reach a reasonable and fair result. Maybe the best thing we can do is follow the rules we give to our jurors:

As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only

after discussing the case with your fellow jurors.

Model Utah Jury Instruction (MUJI) 2d CV137.

Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.

### Control of the Courtroom

Although trial by ambush is a distant memory, it takes a skillful lawyer to present facts in a fresh light such that your opponent (who is aware of those same facts) has not anticipated the story you are creating with those facts. This is far different, however, from the ruthless tactics we sometimes hear about. Intimidating one's opponent or the witness is different from controlling the courtroom. Aside from the fact that intimidation tactics can and will backfire with jurors, it is simply an abuse of our responsibilities as barristers.

Some of the gentlest and quietest attorneys are masters of controlling the courtroom; creating an atmosphere of trust, respect, and confidence in what that attorney is presenting. These trial lawyers dominate the courtroom through their dignity and their professionalism. Controlling the courtroom takes many forms, but after watching numerous skilled attorneys, I've seen examples that support this gentle but effective approach.

- They control the courtroom by always accepting that jurors have their own free will and that the juror may not see the facts in an "inflammatory" or "egregious" way. I've heard jurors express that they were frustrated by the complete obliteration of an expert witness when the attorney doing the questioning departed the lectern as if he had just conquered the wild beast.
- They understand that jurors probably see an attorney's "righteous indignation" as "unjustified anger." As a parent have you been asked to mediate a dispute between two angry children? How often have you come away siding with and even applauding the child who has felt justified in losing their temper? I didn't think so.
- They control the courtroom by presenting facts to the jury without belittling or berating the witness or the opponent. Jurors often identify with a witness or opponent – feeling a kinship about having their time plundered and dominated by overly inquisitive attorneys who leave no stone unturned and

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- They accept that certain facts and issues may not be in their favor, but they confront those problems by honestly and sincerely explaining their views and counterbalancing points. They gain credibility even while addressing weaknesses.
- Their objections are non-theatrical and well thought out. They object using rules of evidence or other legal terminology, and when a judge asks the reason, only then do they explain the rationale of the objection.
- They are respectful of the judge, witness, and opponent by calling them by their proper name. I still lament that I once treated a chiropractor with disdain on the stand, referring to him often as "Mr." instead of "Dr." My beliefs aside, this chiropractor had spent years in a profession that was important to him, his family, and his patients. I would have been better served presenting the facts and allowing those facts to suggest a particular result to the various jurors.
- They refrain from rolling their eyes at evidence or rulings and they don't engage in wild gyrations when something they hear is less than accurate. Have you ever been impressed by the same actions from your teenager as you explained something to him or her? Again, I didn't think so.

Perhaps the most solemn and poignant moments in history have come as one general surrenders to the other. One victorious...one defeated. Dignity on both sides is fundamental to our success as a society. President Abraham Lincoln's legacy was cemented by his humanity and magnanimous thought toward the South as he looked toward reconstruction. Many thought he was too lenient. In the aftermath of Lincoln's assassination, as the country descended into debate about the proper way to treat those who had lost, history proved the strength of his character and compassion.

### "Get Out Your Checkbook!"

The United States is a society that believes in fairness at the beginning of the race. But then once the starting pistol goes, it's winner take all... Nowadays, in America, you're a winner, or you are a loser... A loser is somebody who failed according to the rules of the game that they have signed up to.

Alain de Botton, *TED Radio Hour*, supra.

While recently grading bar exams, I was struck by the sheer number of students who put so much time into their studies to join the Bar. The line between a passing and failing grade is admittedly thin. However, there is room for everyone *if* they are competent and qualified. Imagine, instead, stepping into the bar exam and learning that only one other student was sitting for the exam. You are told that it is a pass/fail and that only one can pass. Moreover, the entire result is based on a single essay that is subjectively graded by a group of eight people who have not studied the law. Would you take those odds if your future as an attorney depended on it? Undoubtedly you feel confident in your abilities, but so much is outside of your control. You might maximize your intellectual effort, but if the other student is 1% better than you... well... better luck next time! *This* is the system in which we champion our respective clients.

The pressure to be viewed as a "winner" at trial may drive us to make trial-related decisions that betray our internal convictions that the jury system is fundamentally about reaching the right decision. I have learned that everyone (clients, jurors, attorneys, lay persons, etc.) wants to be reasonable and believes that blind justice is the way of America. On both sides of the aisle, plaintiffs

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and insurance adjusters each trumpet their desire for justice, whatever result that may be – yet the immense pressure to win and be right usually shapes our actions. As lawyers we want results to soothe our ego and reinforce the image we hope to build. Our clients demand results because of the trust they place in us.

Just after the sworn-in-bailiff escorted the jurors from the courtroom to the deliberation room in one of my trials, I rose and shook hands with the other attorney and his client. He looked at me and with sincerity said, "Well, get out your checkbook." Our two law clerks who had watched the trial with me expressed their utter shock when they heard him say this. They'd seen the trial completely differently. . . as had I. The jury's verdict confirmed our belief, but I have since reflected on his comment. I am happy that both this attorney and his client felt that the system would side with them. I am happy that the system sided with us. This is probably the best definition of a "fair trial." The rest is in the hands of the jury.

Colleagues sometimes ask whether I now feel bad about results obtained in the courtroom while defending my clients or representing an insurance company. I felt "bad" before I switched sides. As a civil defense lawyer, I knew the "deck" was often stacked against the plaintiff when it comes to a conservative Utah jury. Regardless of the injury or the merits, the smaller cases take an extra measure of persuasion by the plaintiff to convince the jury that it is acceptable to even file a lawsuit in the first instance. Plaintiffs with larger cases must employ an extra measure of persuasion

to convince the jury that they are not overreaching. As a defense lawyer it took special care and ethical consideration to argue these points and present the pieces in a fair way. I've had cases where the expectation of winning was so high that I found myself presenting evidence and making arguments that, while admissible and debatably relevant, left me feeling personally conflicted about the positive result.

Law school prepared each of us to fairly consider and weigh both sides of the arguments. Demanding professors forced us to put ourselves in the shoes of an opponent and think about the strengths of their positions, thereby helping us learn about our own weaknesses and strengths. But let's face it: we are competitive people. We live in a tightly-knit legal community. Our successes and failures matter, not only to our respective clients and businesses, but also to our own sense of fulfillment and confidence. But our desire to trumpet our glory on the battlefield should not *and cannot* intrude upon our basic humanity to, and respect for, our opponents.

Acknowledging the pressures we each face, especially those of the opposing lawyer, will lead to a process that jurors are proud to participate in. Striving to present our facts and case in a dignified and intellectually honest way will allow us to contribute to society, win or lose. Attempting to control the courtroom by creating an atmosphere of trust and respect will help us in our quest to obtain the best result for the client. Litigation, with all its tactics, is the great proving ground for trial lawyers.

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# Judicial Independence and Freedom of the Press

by Judge Paul C. Farr

*If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*

James Madison, the fourth President of the United States and the “Father of the Constitution,” published these words on February 8, 1788 in the Federalist, No. 51. Two primary protections the Founders put in place to ensure control of government include the freedom of the press as enshrined in the First Amendment and an independent judiciary as outlined in Article 3 of the U.S. Constitution.

In December 2018, judges Reuben Renstrom, Jeanne Robison, and I attended a conference in Washington D.C. sponsored by the National Judicial College (NJC) entitled, “Contemporary Threats to Judicial Independence and Freedom of the Press.” The faculty included distinguished state and federal judges, journalists, law professors, and government advisors. This course addressed the importance of a free press and an independent judiciary to a healthy and vibrant democracy as well as current and historical threats to these institutions.

In its description for this course the NJC states:

We have many reasons to celebrate America’s court system and its role in preserving our democracy, especially as we observe as other countries struggle to introduce the rule of law. However, there are many threats to the independence of our judiciary: some overt, some subtle, all designed to undermine public trust and confidence in our system of justice. In their purest form and in an ideal world, courts would not be subject to improper influence from other branches of government or from private or partisan

interests. This timely course explores threats to judicial independence in the United States, emphasizing current threats in the context of historical lessons. The course will also explore ways in which judges can appropriately and ethically respond to these threats. Participants will also examine the First Amendment, and the media’s role in supporting democracy.

While there was much more information presented than can be shared in this short article, I did want to share some of the highlights with the Utah Bar.

### The Judiciary and the Press: Bulwarks of Democracy

An informed citizenry is essential in a democracy. A free press gives citizens information on which they can act, including information about their government. While the press is essential, it isn’t always popular. Sometimes the information reported includes negative or unpopular views. Disagreement and frustration with such reporting are understandable. However, it is the free exchange of information and ideas that is so important to a healthy democracy. If there is disagreement with something that is reported or said, the remedy is the freedom to be able to say or report opposing views.

Sometimes individuals that disagree with, or are frustrated by, the press resort to statements and actions that attempt to silence, intimidate, or undermine the legitimacy of the press as an institution. This is something that should be carefully guarded against by a democratic society. While silencing an opponent may

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seem like a “win” or a good idea in the short term, over time it may have the effect of damaging democracy and the rule of law.

An independent judiciary, and respect for the decisions of judges, are also necessary to support the rule of law in a democracy. It is to the courts that individuals and institutions turn for relief from government overreach. Just as information published by the press may be unpopular, judicial decisions may also be unpopular. Again, disagreement and frustration over particular decisions are understandable, and even expected. We have processes in place to handle such disagreements (appeals, for example). However, statements and actions that attempt to influence a judge’s decision, or undermine the legitimacy and authority of the courts, are problematic in a democracy. The judiciary doesn’t control the police or the military. It doesn’t control the budget. The judiciary relies on the respect and trust of the citizenry and the other branches of government to comply with its orders. Anything that erodes that respect and trust erodes the authority of the judiciary.

The NJC course addressed circumstances in other countries, both historical and current, where efforts at democracy have stalled or failed. In such circumstances it is often an attack on, or a weakening of, the judiciary and the press that precedes a collapse of a democracy. These attacks may come from other branches of government, such as from an overreaching executive. They may come from outside influences and foreign governments. They may come from a dissatisfied public or an aggrieved party. No matter the source or the cause, a democracy’s fall is often preceded by the failure of an independent judiciary and free press.

### Examples of Attacks on the Press

Each year since 1927, *Time* magazine has annually selected a “Person of the Year.” For 2018 *Time* selected a group it calls “Guardians.” This group includes journalists who had been imprisoned and killed in 2018 for doing their job. The course discussed this type of physical violence and oppression and the effect it has on freedom and the rule of law. While we often think such violence occurs in other parts of the world, it occurs here in the U.S. as well. Some of the individuals recognized as “Guardians” include five journalists working for the Capital Gazette in Annapolis, Maryland in June 2018. The shooter was upset by a 2011 article. He subsequently filed a defamation suit, which was dismissed. He resorted to violence and killed these five journalists. The *Time* article provides additional details on this and other circumstances in which journalists have been

targeted in an attempt to silence or marginalize them.

Attacks against the press can include more than just physical violence. The course discussed criticisms and verbal attacks on the press by members of the executive branch of governments around the world. One member of a panel discussion on this topic was Laura Weffer, a journalist and native of Venezuela who covered the career of Hugo Chavez for ten years. In the 1960’s Venezuela was a healthy democracy, serving as a model for other countries in the region. Venezuela subsequently suffered from official corruption and a poor economy. In 1998 Hugo Chavez was democratically elected as president. He served until his death in 2013. Chavez called for a political revolution and specifically targeted courts and the press. The Chavez administration effectively seized control of the Supreme Court and lower courts by dismissing judges, creating new court seats, and packing courts with loyal supporters.

According to Ms. Weffer, President Chavez often criticized, marginalized, and limited the freedoms of the press in Venezuela in his efforts to strengthen the power and authority of the executive. This has resulted in a significant erosion of the

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freedom of press there. In fact, a December 28, 2017 article in *Forbes* by Kenneth Rapoza, entitled “Press Freedom is Dying in Venezuela,” documents the conditions faced by the press in Venezuela, including the arrest of sixty-six journalists and editors who covered anti-government protests earlier in the year. These efforts have resulted in Venezuela transforming from a model democracy to something much closer to a dictatorship.

Another presenter, Frank Cohn, was thirteen years old when he and his parents fled the Nazi regime in Breslau, Germany in 1938. He subsequently served in the U.S. Army, rising to the rank of Colonel. Cohn described the deteriorating conditions in Germany during Adolph Hitler’s rise to power. Hitler and the Nazis also came into power through democratic elections. Under their reign Germany quickly descended from a democracy to a totalitarian regime. Their attacks on the judiciary and the press during their rise to power are well documented.

Though not to the same extent, the United States has also seen political and verbal attacks on the press, even some by government officials. Again, we are not talking about disagreement or frustration but rather efforts to limit access or attempts to

undermine the credibility of the press. One example that was frequently cited at the conference was President Trump’s repeated labeling of the news media as “the enemy of the people.” However, such attacks are not reserved just to the current president or to a specific political party. For example, in a 2010 interview with *Rolling Stone* magazine President Obama called Fox News “destructive” and said it is “masquerading as the news.” President Richard Nixon included members of the media on his “enemies list.” There are many other examples.

While responsible people readily agree that in a civilized society physical violence against the press shouldn’t be tolerated, people are much more likely to condone these types of verbal or political attacks when they align with their own political or ideological views. However, all such attacks pose a danger to democracy and the rule of law.

### Examples of Attacks on the Judiciary

As with the press, attacks on the judiciary may include physical violence, even here in the U.S. For example, in 2004 U.S. District Court Judge Joan H. Lefkow held a white supremacist,



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Matthew Hale, in contempt of court. He was subsequently convicted of trying to have the judge killed. One year later in 2005, Judge Lefkowitz arrived home to find her husband and mother dead. It was later discovered that this had nothing to do with Hale. Rather, an unemployed electrician, Bart Ross, whose case had previously been dismissed, left letters admitting to the murders and also his intent to kill the judge. He took his own life before being caught by authorities.

Some attacks against the judiciary include coordinated efforts by government officials to intimidate and silence. Another member of the panel discussion referenced above was Sukru Say, a former tax court judge in Istanbul, Turkey. Since a failed coup in 2016, hundreds of Turkish judges have been detained and many have been tortured. Mr. Say was engaged in graduate studies in the U.S. at the time of the coup and so escaped a similar fate. He has been warned that he will be arrested if he returns to his country. Judge Say discussed how the ruling party, in seeking more power and control in the executive branch, first sought to eliminate the judiciary as a check on that power.

It was a common theme throughout the case studies we explored that an ambitious executive often looks to marginalize, intimidate, silence, or remove a judiciary that it views as standing in the way of its desires.

While physical attacks on the judiciary do happen, political and verbal attacks are more common, both from government officials and also the public. One of the panels included Judge James Robart of the U.S. District Court for the Western District of Washington. Judge Robart was nominated by President Bush in 2003 and has served as a federal judge since that time. After issuing a decision blocking a controversial travel ban, President Trump in February of 2017 criticized “the opinion of this so-called judge.” Along similar lines, the President has tweeted at various times that our court system is “broken,” “unfair,” and “a joke.” Presenters expressed concern with what is perceived to be not just disagreement with individual court decisions, but statements on the legitimacy of the judiciary and individual judges.

Again, these attacks are not limited to this particular president



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or any one political party. One of the more concerning examples of an attack on the judiciary here in the U.S. was President Franklin D. Roosevelt's court packing scheme in 1937. Roosevelt sought to increase the number of justices on the U.S. Supreme Court so that he could appoint friendly judges who would support his New Deal legislation, some of which the Court ruled unconstitutional. Roosevelt was labeled by some as a dictator and a fascist. Ultimately the court packing plan failed. However, in this example we see an executive that sought to undermine the authority of the judiciary based on a disagreement with particular decisions. There are many other examples of presidents and other officials criticizing the judiciary based upon unfavorable rulings.

Again, while it is understandable and expected that some will disagree with a judge's decision, we see a trend in recent decades of not just questioning a decision, but attacks on the legitimacy and role of the judiciary as an institution. These attacks can result in a weakening of the credibility of the judiciary and subsequently in the rule of law.

### Underlying Concerns

Presenters and panel members provided opinions on what they believe may be some of the

underlying causes of these attacks on the press and judiciary here in the U.S. One of the concerns frequently cited was the increasing polarization of our society. As we drift further apart politically, we are more likely to see and treat the "other side" as an enemy. Both sides may see a "win" over an enemy as the goal, even if the ultimate result is to weaken democratic institutions or the rule of law. Similarly, we see an increase in the lack of civility and respect in social and public discourse.

Presenters also raised concerns about the increasing politicization of the judicial selection process at the federal level and a lack of

understanding of the appropriate role and responsibility of judges. The politicized and divisive U.S. Supreme Court nomination proceedings are highly publicized and visible. The public sees judges being selected on what appears to be their political and ideological leanings. This view can also be further perpetuated when they see U.S. Supreme Court decisions on hot political topics routinely decided by 5–4 majorities split down predictable political lines. The public talks about members of the Supreme Court as liberal judges or conservative judges. More and more it

appears that judges are deciding these hot political cases not based on the law but upon their own ideology. This results in less confidence in the judiciary and the rule of law which can further erode democracy.

As a society we have also done a poor job in recent years of communicating and demonstrating what the rule of law means and what the appropriate role of a judge, as an independent and unbiased arbiter, ought to be. Many presenters lamented the decline of civics instruction in schools throughout the country. While science, math, and technology have been supported as the basis for a strong economy and future, instruction and understanding in government and civics are seen as less important.



*Judges Paul C. Farr, Jeanne Robison, and Reuben Renstrom visit the United States Supreme Court.*

### Conclusion

I came away from this conference with a greater respect for the role of the press and also the pressures its members face. I also have a greater understanding of the importance of an independent judiciary and the role it plays in perpetuating the rule of law in a healthy democracy. As judges, and as a bar, we can do a better job of setting an example and also educating the public about the importance of the rule of law and the proper role of the judiciary. To ensure the continued health and vitality of our democracy we should carefully guard the health and vitality of the press and the judiciary.





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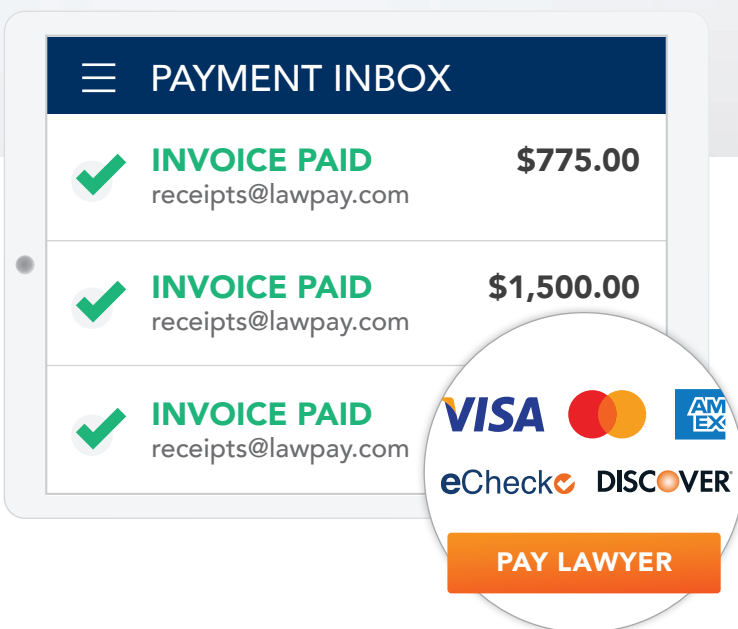
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# *Vanishing Testimony and Disappearing Justice: Preliminary Hearings After State v. Goins*

by Matthew J. Hansen and Blake R. Hills

### INTRODUCTION

Some have compared losing one's mobile phone to experiencing the five stages of grief, also known as the Kübler-Ross model. See Dean Burnett, *Losing Your Smartphone: The Five Stages of Grief*, THE GUARDIAN (Dec. 22, 2014) available at <https://www.theguardian.com/science/brain-flapping/2014/dec/22/phone-smartphone-loss-damage-grief>. In July 2012, DeSean Goins, apparently fluctuating between the anger and bargaining phases of the model, believed Gabriel Estrada had stolen his cell phone. Goins found Estrada and confronted him while holding a knife. Estrada denied such a charge and fled.

Goins kept up the search and located Jacob Omar, an associate of Estrada. Goins threatened Omar with a knife and demanded he disclose the location of Estrada. Goins and Omar came to blows. Omar had difficulty hearing Goins because during the fight Goins grabbed onto Omar's earlobe with his teeth and bit it off. Goins also stabbed Omar under his left arm. Eventually, Police arrived and arrested Goins. He was charged with one count of mayhem and two counts of aggravated assault.

At the preliminary hearing, Estrada and Omar testified and were cross-examined by defense counsel without objection by the state or any apparent restriction by the judge. *State v. Goins*, 2017 UT 61, ¶ 7, 423 P.3d 1236. Estrada did not appear for trial and the state moved the court to declare Estrada unavailable and requested to have his preliminary hearing testimony read into the record pursuant to Rule 804(b)(1) of the Utah Rules of Evidence. As part of its argument, the state regaled the court

with how it had utilized police bike patrols, checked jail rosters, and asked a local pastor to try and locate Estrada.

Goins argued that allowing the state to use Estrada's preliminary hearing testimony would violate his constitutional right to confrontation because his motive for cross-examination at the preliminary hearing differed from his motivation to cross-examine at trial. The trial court found Estrada unavailable and allowed the preliminary hearing testimony at trial. Goins was found guilty on the aggravated assault charge and threatening with or using a dangerous weapon. The Utah Court of Appeals held that the state made reasonable efforts to find Estrada and affirmed the finding of unavailability. *Id.* ¶ 15. In addition, the court stated that circumstances in a preliminary hearing closely approximate those in a typical trial and the Defendant was provided an effective opportunity for confrontation. *Id.* ¶¶ 16–17.

The Utah Supreme Court reasoned that changes to the Utah Constitution undermined its previous ruling in *State v. Brooks*, 638 P.2d 537 (Utah 1981), that defense counsel's motive and interest are the same in preliminary hearings and trial. The Utah Constitution had been amended in article I, section 12 to specify that preliminary hearings were limited to determining probable cause. The Utah Supreme Court stated:

A defense attorney who assumes that the magistrate will conduct a preliminary hearing that comports with article I, section 12 does not have an incentive

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to prepare to thoroughly cross-examine on credibility. An attorney who believes that the magistrate will not permit questioning that goes beyond that necessary to establish probable cause has no guarantee that she can present or develop positive information concerning her client at the preliminary hearing. Nor does counsel have a motive to develop affirmative defenses at a preliminary hearing. In many, if not most, instances, *Brooks's* conclusion either no longer aligns with the reality of practice, or places magistrates in the uncomfortable position of choosing between conducting preliminary hearings in fidelity with article I, section 12 and permitting the type of examinations that *Brooks* presupposes.

*Id.* ¶ 34. The supreme court held that under this standard, Estrada's preliminary hearing testimony was not admissible at trial under Rule 804(b)(1) because Goins' attorney did not have the same motive to cross-examine Estrada about credibility matters as the attorney would have at trial. *Id.* ¶¶ 46–47.

The question becomes, what is the reality of practice in preliminary hearings in Utah? Do defense attorneys limit their questions based on assumptions that magistrates will limit their questions? Do defense attorneys really have no motive to develop defenses at preliminary hearings? Most importantly, should something be done to prevent testimony from vanishing into thin air if the witness becomes unavailable for trial?

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## WHAT IS A PRELIMINARY HEARING?

After their initial appearance and being arraigned, defendants can elect to have a preliminary hearing. At this hearing, the state must present “‘sufficient evidence...that the crime charged has been committed and the defendant has committed it.’” *State v. Clark*, 2001 UT 9, ¶ 10, 20 P.3d 300 (quoting *State v. Pledger*, 896 P.2d 1226, 1229 (Utah 1995)). The sole purpose of the preliminary hearing is determining whether probable cause exists. See *State v. Aleh*, 2015 UT App 195, ¶ 14, 357 P.3d 12.

Magistrates utilize a low bindover standard at the preliminary hearing and for the most part allow the fact finder to determine the credibility of witnesses and the truthfulness of the facts at trial. *State v. Balfour*, 2008 UT App 410, ¶ 9, 198 P.3d 471 (compiling cases). This standard is the same evidentiary standard used by officers when they determine whether they may legally arrest someone. See *State v. Homer*, 2017 UT App 184, ¶ 8, 405 P.3d 958.

Although a low standard, magistrates are not just a rubber stamp for the prosecution but must assure the state has shown reasonable belief and not just speculation. See *State v. Virgin*, 2006 UT 29, ¶¶ 21–22, 137 P.3d 787.; see also *State v. Hester*, 2000 UT App 159, ¶¶ 14–17, 3 P.3d 725.

In determining whether there is reasonable belief, magistrates may disregard or discount evidence that has become so “contradictory, inconsistent, or unbelievable that it is unreasonable to base belief of an element of the prosecutor’s claim on that evidence...” *State v. Virgin*, 2006 UT 29, ¶ 25. However, the magistrate must draw all reasonable inferences in the prosecution’s favor without requiring the prosecution to eliminate alternative inferences that might be in favor of the defense. *State v. Schmidt*, 2015 UT 65, ¶ 18, 356 P.3d 1204. In fact, a “magistrate has discretion ‘to decline bindover’ only ‘where the facts presented by the prosecution provide no more than a basis for speculation – as opposed to providing a basis for a reasonable belief.’” *Id.* ¶ 18 (quoting *State v. Virgin*, 2006 UT 29, ¶ 21.)

## UTAH SUPREME COURT CHANGES THE BALANCE

In 1980, the same year the Rubik’s Cube debuted, the Utah Supreme Court discussed how defense attorneys can use cross examination at preliminary hearings as a means to attack the credibility of state witnesses and thus the substance of their testimony. *State v. Anderson*, 612 P.2d 778, 786 (Utah 1980). The court noted:

[T]he adversarial qualities of the examination [in a preliminary hearing] allow the defendant an opportunity to attack the prosecution’s evidence and to present any affirmative defenses. Although

the hearing is not a trial per se, it is not an ex parte proceeding nor one-sided determination of probable cause, and the accused is granted a statutory right to cross-examine the witness against him, and the right to subpoena and present witnesses in his defense.

*Id.* at 783. The court rejected arguments that defense counsel did not have same motive and interest to cross-examine witnesses at a preliminary hearing. *State v. Brooks*, 638 P.2d 537, 541 (Utah 1981). The court found that “[d]efense counsel’s motive and interest are the same in either setting; he acts in both situations in the interest of and motivated by establishing the innocence of his client. Therefore, cross-examination takes place at preliminary hearing and at trial under the same motive and interest.” *Id.* at 541.

During the pre-*Goins* era, prosecutors had motivation to place many, if not all, of their witnesses on the stand in complex cases to preserve their testimony for trial if they became unavailable. Consequently, defense attorneys would have an abundant amount of transcript testimony available to use for impeachment at trial or to educate their client on the reality of the case when considering an offer. Defendants were able to utilize cross-examination to test the strength of affirmative defenses and potential suppression arguments. However, in *Goins*, the court changed this balance or common practice and held that cross-examinations at a preliminary hearing had limitations for the defendant and admissibility of preliminary hearing testimony at trial was dependent on a showing that “‘defense counsel really did possess the same motive and was permitted a full opportunity for cross-examination at the preliminary hearing – a showing that we conceded ‘might prove rare.’” *State v. Ellis*, 2018 UT 2, ¶ 39, 417 P.3d 86 (quoting *State v. Goins*, 2017 UT 61, ¶ 36, 423 P.3d 1236.) The court’s holding was driven by Rule 804 (b)(1)(B), the change to article I, section 12 of the Utah Constitution, and its belief that in the “‘reality of practice’ in ‘many, if not most,’ cases is that defense counsel will lack the motive to utilize cross-examination in the way it could be employed at trial.” *Id.* ¶ 39 (quoting *State v. Goins*, 2017 UT 61, ¶ 34).

Thus, the question becomes, what is the reality of practice for preliminary hearings in Utah? Should there be a change?

## A NEED FOR CHANGE

Some may argue that these changes have finally allowed preliminary hearings to comply with their intent. They are to be short hearings that flesh out whether there is probable cause. If the state wants to preserve testimony, witnesses can be examined by deposition under Rule 14(a)(8) of the Utah Rules

of Criminal Procedure. However, this process requires the state to know the witness is about to leave the state or will become so ill or infirm that they cannot attend a trial. This is a useful tool for a party who knows that a witness is being transferred out of state into federal custody or has been stricken with a terrible disease. What about witnesses who unexpectedly get ill or avoid trial out of fear after being intimidated in a gang case or case involving domestic violence? Does this new post-*Goins* reality reward defendants who intimidate witnesses they observed in preliminary hearings, knowing their testimony can't be used if they don't testify at trial? It is common knowledge that the homeless are difficult to keep apprised of trial dates, and victims – especially young children – suffer from trauma when testifying multiple times. Are domestic violence victims and homeless victims being needlessly treated poorly? As a society, is it responsible to treat victims that may be homeless, suffering from mental illness, or have experienced severe trauma from being in the same room with their assailant in the same way that the Wal-Mart loss prevention specialist is treated?

In addition, some may argue – as did the defense counsel in *Goins*,

We frequently ask questions during preliminary hearings that we would not ask at trial because evidence...admissible at...a preliminary hearing [is not necessarily] admissible in a trial. The rules of evidence are different and...we don't ask question[s] that we might ask at a trial because credibility determinations are not being made [at] a preliminary hearing. The court making the probable cause determination is not assessing the credibility of a witness, therefore we do not ask questions to get that information out.

*State v. Goins*, 2017 UT 61, ¶ 32 (alterations in original). Although technically correct, this argument does not conform with the reality of practice with preliminary hearings in Utah. The reality is that cross examinations in preliminary hearings in complex cases are rarely cursory. Defense attorneys do have the same motive at a preliminary hearing. They want to ask questions that will resolve the case quickly. Either it will show the state the case is weak or their client the case is strong. In complex cases, witnesses are routinely pinned down on every detail of their experience. The defense is motivated to gain every morsel of information to use as impeachment at trial or help with their further investigation. This is the reality of practice in Utah.

As is often argued in speedy trial motions, defense attorneys in Utah know that if witnesses die, disappear, or are not able to

recall events accurately there is prejudice. See *Barker v. Wingo*, 407 U.S. 514, 532 (1972). Similarly, the passage of time and delay may affect their defense if they don't ask about every detail of a timeline or potential witnesses that should be interviewed. See *State v. Walker*, 2009 UT App 139. There is a strong incentive to develop testimony for planned affirmative defenses, search for potential suppression arguments, and to prepare for trial. In reality, rarely is cross examination limited to the determination of probable cause.

## POTENTIAL SOLUTIONS

The current practice of allowing the preliminary hearing testimony of a witness to be rendered meaningless if the witness becomes unavailable leads to the potential for wasteful repetition and the denial of justice. There is a clear need to do things differently.

One solution would be to amend Rule 804(b)(1) to eliminate the requirement that the party against whom the prior testimony is offered had a "similar motive to develop it" during cross-examination. For example, Alabama's Rule 804(b)(1) states that prior testimony of an unavailable witness is admissible if it was taken "under circumstances affording the party against whom the witness was offered an opportunity to test his or her

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credibility by cross-examination.” Ala. R. Evid. 804(b)(1). Similarly, Virginia’s Rule 804(b)(1) allows for the admission of an unavailable witness’ prior testimony if it was “given under oath or otherwise subject to penalties for perjury” and it is being offered against a party “who examined the witness by direct examination or had the opportunity to cross-examine the witness.” Va. R. Evid. 804(b)(1). Amending Utah’s Rule 804(b)(1) to make it similar to these rules, combined with a prosecutor’s and judge’s willingness to allow a full cross-examination, would allow for preliminary hearing testimony of an unavailable witness to be admissible at trial. This would not pose a problem under the Confrontation Clause, since that clause “guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *State v. Eighth Judicial District Court*, 412 P.3d 18, 21–22 (Nev. 2018) (citation omitted).

Another solution could be to amend Rule 14(a)(8) to allow for use of depositions in criminal cases in more situations than just when a witness is out of state or is ill or infirm. For example, Minnesota allows for depositions in criminal cases when there is a “reasonable probability” that the party offering the deposition at trial will be “unable to obtain the attendance of

the witness by subpoena, order of court, or other reasonable means.” Minn. R. Crim. P. 21.01, 21.06. If depositions were allowed more liberally in Utah criminal cases, there would be less of a need to preserve testimony at a preliminary hearing. *See generally* Minn. R. Evid. 804(b)(1) (stating that testimony of a witness taken in a deposition is admissible at trial if that witness becomes unavailable).

If the relevant Utah rules are not amended, a prosecutor may be limited to putting defense counsel on notice that there is a strong likelihood that a specific witness will be unavailable at trial and that the prosecutor will seek to introduce the preliminary hearing testimony. The prosecutor would also need to refrain from objecting to the defense’s questions in cross-examination on the basis that they go beyond the determination of whether there is probable cause. The prosecution would then argue to the trial court that the testimony is admissible at trial because the defense had a “similar motive” to develop the testimony at the preliminary hearing as it would at trial. However, this approach is likely to work only in specific, narrow circumstances. It is a risky approach at best.

## CONCLUSION

The Civil War general Thomas F. Meagher once stated that, “Great interests demand great safeguards.” The need for justice in a criminal case is one of the greatest of interests. However, the current law provides safeguards that are anything but great.

Because Nostradamus and Carnac the Magnificent are not available, the future of preliminary hearings in Utah cannot be foretold with absolute certainty. However, it is not hard to predict that if prosecutors cannot use preliminary hearings to preserve testimony, they will increasingly proceed with written statements under Rule 1102(b)(8) of the Utah Rules of Evidence, rather than calling witnesses. Those preliminary hearings that do have testimony from witnesses will be stymied by endless objections asserting that the questions do not relate to probable cause. The problem is that the testimony of material witnesses will not be preserved, and that can lead to a denial of justice.

Justice is denied and judicial resources are wasted when prior testimony that has been subject to cross-examination is not admitted at trial. Utah should amend the relevant rules to ensure that this does not happen. Indeed, it is time to return to the pre-*Goins* era when it could be said that prior, cross-examined testimony actually had value in a criminal case. Victims should no longer have to grieve when their cases get dismissed because prior testimony has vanished into thin air.




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was made a partner of the firm



Ryan has been in practice since 2007, first as a Registered Patent Agent and then as a Registered Patent Attorney. He previously served as a Patent Examiner in the U.S. Patent & Trademark Office. Ryan is admitted to practice in Utah and Washington, D.C. His practice focuses on all aspects of intellectual property law.

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## Appellate Highlights

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

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

### UTAH SUPREME COURT

#### ***State v. Van Huizen*, 2019 UT 01 (Jan. 7, 2019)**

After pleading guilty to armed robbery, a juvenile defendant challenged his bindover based on a claim of judicial bias discovered after sentencing. The court of appeals vacated the conviction. Reversing, the supreme court held the court of appeals erred in exempting the defendant's judicial bias claim from the preservation rule. The court emphasized that **rules governing preservation apply to all cases**, even those presenting issues of judicial bias.

#### ***HealthBanc v. Synergy*, 2018 UT 61 (Dec. 21, 2018)**

This case arose from a dispute over a royalty agreement between a company that sold a health supplement and a buyer who asserted that the seller did not own the rights to the product as represented in the contract between them. On certification from the federal district court, the court held that **the economic loss rule barred the plaintiff's fraudulent inducement claims, which were duplicative of its breach of contract claim**. However, the court did not resolve the broader question of whether there may ever be a fraudulent inducement claim that would not be barred by the economic loss rule.

#### ***Salt Lake City v. Jordan River Restoration Network*, 2018 UT 62 (Dec. 20, 2018)**

This case involved an appeal from the district court's reversal of the Salt Lake City Records Appeal Board's determination that Salt Lake City should have granted a fee waiver to the Jordan River Restoration Network in connection with its GRAMA request. The Utah Supreme Court **rejected JRRN's contention that Salt Lake City lacked standing to petition the district court for judicial review because it was essentially appealing its own**

**ruling, given its Records Appeal Board's decision was at issue**. Having concluded Salt Lake City had standing, the court clarified the standard of review, burden of proof, and scope of review for a petition for judicial review of a GRAMA decision.

#### ***Baker v. Carlson*, 2018 UT 59 (Nov. 28, 2018)**

Holladay City approved two resolutions to enable a developer to redevelop the land on which the old Cottonwood Mall once stood. A group of Holladay citizens petitioned to subject these resolutions to vote by public referendum. Applying the test set forth in *Carter v. Lehi City*, 2012 UT 2, 269 P.3d 141, the court affirmed the district court's ruling that **the first resolution was referable because it was approved pursuant to the City's legislative power, and that the second was not referable, because it was approved pursuant to the City's administrative power**.

### UTAH COURT OF APPEALS

#### ***Arreguin-Leon v. Hadco Construction*, 2018 UT App 225 (Dec. 13, 2018)**

The district court allowed an expert witness to provide opinions regarding causation of an injury despite the fact that the expert had not disclosed this opinion in his deposition. The court of appeals reversed and remanded, holding that **when an expert has been locked into his opinions in a deposition – by such questions as “do you have any other opinions that you expect to offer at trial” – the expert is not allowed to offer additional undisclosed opinions at trial**, just as an expert who provides a report would be limited to opinions disclosed in her report.

#### ***In re Adoption of B.N.A.*, 2018 UT App 224 (Dec. 6, 2018)**

At issue in this case was whether the Utah Code section governing the district in which adoption proceedings should commence limits the district court's subject matter jurisdiction

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

or is merely a venue statute. The court held that **the statute spoke only to venue, and any district court has subject matter jurisdiction for an adoption.** If the petition was filed in the wrong district, the district court must transfer the case to the correct district upon filing of a proper request.

***State v. Hunt*, 2018 UT App 222 (Nov. 29, 2018)**

Can you castrate a horse in self-defense? The court of appeals isn't exactly sure, but still decided to reject defendant's claim that he had to counter a menacing stallion named Confetti Magic by neutering the horse once and for all. Affirming a conviction for wanton destruction of livestock, **the court reasoned that once defendant corralled the charging horse, drove three miles for help, and then returned to perform the castration, any imminent threat posed by Confetti Magic had passed.** And yet, had defendant deployed his castration tongs at the moment Confetti Magic charged him, "the analysis may well [have] be[en] different."

***Hayes v. Intermountain GeoEnvironmental Services Inc.*, 2018 UT App 223 (Nov. 29, 2018)**

In an appeal from dismissal of plaintiff's claims against one of three defendants, the court of appeals determined that it lacked appellate jurisdiction because of a deficient certification order under Utah R. Civ. P. 54(b). The order stated only that the dismissal "is deemed a final order, thus starting [the] time for appeals." **Without an express determination that there is no just reason for delay, accompanied by supporting rationale under Rule 52(a), the order failed to properly invoke the jurisdiction of the court of appeals,** requiring dismissal of the appeal.

***Rocky Mountain Power Inc. v. Marriott*, 2018 UT App 221 (Nov. 29, 2018)**

In this condemnation case, the court of appeals held that **the district court abused its discretion in excluding evidence of damages before the close of fact and expert discovery.** In a footnote, the court suggested that parties should not be allowed to circumvent the rules governing summary judgment by seeking a dispositive ruling through motions in limine.

***Osmond Senior Living LLC v. Utah Dep't of Pub. Safety*, 2018 UT App 218 (Nov. 23, 2018)**

The developer of a nursing home facility obtained a building permit to construct a new three-story facility. After construction was well underway, the State Fire Marshall told the developer that the third floor violated building codes, prompting the developer to change its plans and convert the building into a

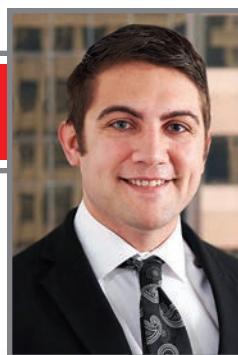
two-story facility. The developer did not appeal or otherwise seek review of the marshal's directive at that time. About six months later, the marshal reversed course, and told the developer that three story facilities were now allowed. The developer then filed this unconstitutional takings claim against the Department of Public Safety seeking to recover the millions in revenue and renovations costs it had lost. The court affirmed dismissal of the claim on jurisdictional grounds. It concluded that **the legislature has delegated adjudicative authority for interpretations of the State Fire Code to local fire protection districts, and that the developer was required to exhaust its administrative remedies prior to filing suit because the marshal's actions were within the scope of his statutory authority.**

***Utah Dep't of Transportation v. LEJ Investments LLC*, 2018 UT App 213 (Nov. 8, 2018)**

UDOT filed this condemnation action to obtain land to build a new freeway on the west side of Salt Lake City. At trial, the district court found that neither sides' appraisals were reliable. Nevertheless, at UDOT's suggestion, the district court used material and testimony from both appraisals to arrive at its own conclusion of value. UDOT argued on appeal that the district

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**Samuel M. Hall**

has joined the firm after having completed a clerkship with Judge Ryan M. Harris of the Utah Court of Appeals.



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court erred by relying on evidence that it found to be unreliable. **The court acknowledged that there may be some merit to UDOT's argument, but it affirmed the district court's ruling because UDOT invited the error.**

***Skolnick v. Exodus Healthcare Network, PLLC*, 2018 UT App 209 (Nov. 8, 2018)**

**In this appeal involving a breach of contract claim, the Utah Court of Appeals clarifies the timing requirements applicable to requests for attorney's fees under Utah R. Civ. P. 73.** If liability for fees has already been established, a party may rely on Rule 73(d), which establishes an expedited procedure under which the requesting party need not file a motion and can instead file only a declaration and proposed order. If that procedure is used, the opposing party has seven days to respond, as provided in Rule 73(d). If, however, a party files a motion for fees as provided in Rule 73(a), the opposing party has fourteen days to respond, as provided in Rule 7(d)(1). This is true even if, as in this case, the issue of liability for fees had already been determined. By electing to file a motion under Rule 73(a), the moving party triggers application of Rule 7(d)(1) for the timing of a response.

***State v. Oryall*, 2018 UT App 211 (Nov. 8, 2018)**

The defendant argued that the district court erred in denying her motion to suppress, because the officer conducted a search of her driver's license records without reasonable suspicion. Affirming, the court of appeals held that **there is no reasonable expectation of privacy in driver's license or vehicle registration records under the Utah Constitution.** In doing so, the court rejected defendant's argument that GRAMA weighed in favor of recognizing a right to privacy, in part because the act permitted governmental entities to share private records in certain contexts.

***Silva v. Silva*, 2018 UT App 210 (Nov. 8, 2018)**

Default judgment was entered against wife for failing to appear. Husband had requested alternative service, which was approved by the district court and husband followed proper procedures for alternative service. Wife brought a Rule 60(b)(1) motion, arguing for excusable neglect under as her husband had been in direct contact with her during the pendency of the case, but had not informed her of the suit. District court denied motion to set aside, holding that the alternative notice was legally adequate. On appeal, the court of appeals reversed, stating that **the inquiry in a 60(b)(1) motion to set aside default was whether husband's failure to notify wife, despite his having direct contact with her, constituted grounds for excusable neglect, independent of whether the notice was legally adequate.**

## TENTH CIRCUIT

***United States v. Easley*, 911 F.3d 1074 (10th Cir. Dec. 26, 2018)**

The defendant raised a Fourth Amendment challenge asserting she had been seized because a reasonable person in her situation would not have felt free to end the encounter with the police and leave, especially when factoring in her subjective characteristics such as race. In rejecting the adoption of a subjective analysis, the Tenth Circuit **reaffirmed that the test for a Fourth Amendment seizure is objective, and the addition of subjective characteristics would unnecessarily complicate the application of the law.**

***Schulenberg v. BNSF Railway Co.*, 911 F.3d 1276 (10th Cir. Dec. 27, 2018)**

In this negligence action against a railroad, a train engineer sought to recover for injuries allegedly caused by a train "bottoming out" while passing over rough track. The district court excluded the engineer's expert witness on railroad track maintenance and inspection, then granted summary judgment in favor of the railroad. The Tenth Circuit affirmed, holding that **the lower court did not abuse its discretion in excluding the expert's report and testimony because the expert's opinions lacked any identifiable methodology or factual foundation.** Regardless of his expert's ostensible expertise in the field, the engineer failed to identify, let alone defend, the basis of the expert's opinions.

***United States v. Bettcher*, 911 F.3d 1040 (10th Cir. Dec. 21, 2018)**

The Tenth Circuit held that **Utah's second-degree aggravated-assault offense qualifies as a "crime of violence" under the elements clause in the federal sentencing guidelines.** In doing so, it held that the Supreme Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016) overrode Tenth Circuit precedent classifying reckless harm with negligent or accidental harm.

***Wakaya Perfection, LLC v. Youngevity Int'l, Inc.*, 910 F.3d 1118 (10th Cir. 2018)**

As a matter of first impression, the Tenth Circuit held that **the Colorado River abstention doctrine does not apply to parallel cases pending in two federal forums, even if one of those cases had been removed from state court.** Instead, district courts analyzing abstention in that context should apply the "first-to-file" rule and consider, among other factors, the date on which the case was filed in state court.





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# In-House Counsel's Privilege Dilemma

by Keith A. Call

In-house lawyers wear many hats. They are, of course, legal counsel for the employer. They are also called upon to be business people, often helping to establish policies and operations that promote profitability and other business goals of the organization.

The roles of “lawyer” and “business person” are often blurred. Along with the in-house lawyer’s multi-faceted roles comes the difficult issues of identifying what is privileged legal advice, what is a non-privileged business communication, and how to protect the former. This article provides a brief overview of the law and some practice pointers.

### Some Basics

The attorney-client privilege protects confidential communications between the attorney and client made for the purpose of facilitating the rendition of professional legal services to the client. See Utah R. Evid. 504(b); Utah Code Ann. § 78B-1-137(2); 1 Restatement (Third) of the Law Governing Lawyers §§ 68-72 (2000). The privilege applies to in-house counsel just as it would any other attorney. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1974); Restatement § 72, cmt. c. The privilege extends to a corporate client’s representatives. Utah R. Evid. 504(b)(2).

Not every communication between a lawyer and client is privileged. *Gold Standard, Inc. v. Am. Barrick Res. Corp.*, 801 P.2d 909, 911 (Utah 1990). The privilege protects only those disclosures “necessary to obtain informed legal advice.” *Id.*

### The Primary Purpose and Significant Purpose Tests

For in-house counsel, many communications with the client are a mixed bag of both legal and business advice. So how do you know if your communications, written or oral, are protected?

Many courts have adopted and applied a “primary purpose” test, holding that the in-house lawyer’s communications are privileged only if the “primary purpose” of the communication

is to gain or provide legal assistance. For example, in *RCHFU, LLC v. Marriott Vacations Worldwide Corp.*, No. 16cv01301-PAB-GPG, 2018 WL 3055774 (D. Colo. Dec. 31, 2018), the plaintiff sought to compel disclosure of an unredacted copy of a strategic plan memorandum addressed to Marriott’s Corporate Growth Committee. Various lawyers within Marriott’s law department participated in preparing the memorandum over a period of six months. It contained “mostly . . . business advice but provides some smaller measure of legal advice.” *Id.* \*3. Applying the “primary purpose” test, the court found the primary purpose of the memorandum was to develop successful business strategies. The court further found that the legal advice was so intertwined with the business advice that redaction was impractical. The court ordered production of the entire unredacted memorandum. *Id.* \*\*3-4.

Many other courts have adopted the “primary purpose” test. See, e.g., *Harrington v. Freedom of Info. Comm’n*, 144 A.3d 405 (Conn. 2016). Such cases have held that the legal advice must “predominate” or “outweigh” any business purpose. See *id.* at 416–18 (and cases cited therein).

But is the “primary purpose” standard softening? Two D.C. Circuit cases authored by now-Supreme Court Justice Brett Kavanaugh suggest that it may be. In *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), the D.C. Circuit stated, “[T]he primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the

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





other.” *Id.* at 759. The court noted that trying to identify a “primary purpose” among overlapping purposes can be impossible, and proceeded to evaluate whether legal advice was one of the “significant purposes” of the communication. *Id.* at 759–60. The court held that documents related to a company’s internal fraud investigation, conducted pursuant to the company’s Code of Business Conduct and overseen by the company’s law department, were privileged. While the court did not expressly reject the “primary purpose test,” it seems quite clear it applied a relaxed “significant purpose” standard.

The D.C. Circuit issued a similar opinion, also authored by Judge Kavanaugh, in *Federal Trade Comm’n v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 892 F.3d 1264 (D.C. Cir. 2018). At least one commentator has astutely questioned whether the strategic plan memorandum addressed in the *RCHF* case would be protected under the *Kellogg* and *Boehringer* standard. See Todd Presnell, *No Room in the Inn: Marriott’s Legal Dep’t Loses Privilege over Strategic Plan Memo*, PRESNELL ON PRIVILEGES (Dec. 18, 2018), available at <https://presnellonprivileges.com/2018/12/18/no-room-in-the-inn-marriotts-legal-dept-loses-privilege-over-strategic-plan-memo/>.

### Practice Pointers

The court’s reasoning in *RCHF* suggests some ideas to help in-house counsel retain privilege for mixed business and legal communications. See also Karen Rubin, *In-House Counsel and Privilege: Opinion Offers Some Take-Home Lessons*, THE LAW FOR LAWYERS TODAY (Jan. 3, 2019), available at [https://www.thelawforlawyerstoday.com/2019/01/in-house-counsel-and-privilege-opinion-offers-some-take-home-lessons/?utm\\_source=Thompson+Hine+LLP+-+The+Law+for+Lawyers+Today&utm\\_campaign=a0505e6519-RSS\\_EMAIL\\_CAMPAIGN&utm\\_medium=email&utm\\_term=0\\_a5e44ca7ad-a0505e6519-72878029](https://www.thelawforlawyerstoday.com/2019/01/in-house-counsel-and-privilege-opinion-offers-some-take-home-lessons/?utm_source=Thompson+Hine+LLP+-+The+Law+for+Lawyers+Today&utm_campaign=a0505e6519-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_a5e44ca7ad-a0505e6519-72878029).

Ideas include:

- Identify privileged communications as such, by including headers or footers identifying the communication as privileged.
- Do your best to keep privileged legal advice separate from business communications.
- While lawyer involvement is not always determinative, make

sure to note and include lawyer involvement in all privileged legal communications.

- Educate your client, including managerial and other employees, on the importance of protecting privilege and avoiding waiver.
- The holder of the privilege has the burden to prove the privilege exists. Know that courts will expect any company with a legal department to be sophisticated enough to protect privileged information.

### Conclusion

In-house counsel have tough jobs. Your legal guidance may be integral to your company’s success. By understanding the applicable legal standards, you should be better equipped to protect privileged information in your business.

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

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# *Wheels of Justice Rides to Make a Difference*

by Gregory N. Hoole, Sean D. Reyes, and Sim Gill

One in five children in Utah will be sexually abused before they turn eighteen. Child sex abuse alone costs Utah taxpayers \$1 billion annually. And these numbers do not include the victims of the child sex trade, nor do they say anything about the many other forms of child abuse, such as physical, verbal, and emotional abuse. Wheels of Justice is committed to doing something about this.

### Wheels of Justice

Wheels of Justice is a local cycling club dedicated to ending all forms of child abuse. Wheels of Justice welcomes all types of riders (roadies, mountain bikers, triathletes, commuters, casual riders, etc.) and even non-riders to its team. A nonprofit corporation, it raises money and awareness and provides limited pro bono legal services to support four outstanding organizations making a difference in our community: Prevent Child Abuse Utah (PCAU), Friends of the Salt Lake County Children's Justice Center (Friends of the CJC), Operation Underground Railroad (O.U.R.), and the Utah Domestic Violence Coalition (UDVC). Each of these organizations addresses specific aspects of child abuse. Together, they address all facets and stages of abuse, from prevention to recovery.

### Prevent Child Abuse Utah

The mission of PCAU is to forge and guide a community commitment to prevent child abuse in all forms through education, services, and public awareness. PCAU provides prevention education to both students and adults throughout the state. Its student presentations include child abuse prevention, bullying prevention, internet safety, and healthy relationships. Its adult presentations are geared towards adults working with children and the overall community. It also administers a sexual abuse prevention

training program for parents and caregivers. All of PCAU's education is evidence-informed, age-based, and free of charge.

PCAU's logo is a blue pinwheel. PCAU explains that the pinwheel "represents the carefree and innocent childhood we all wish for the children in our lives. The pinwheel symbolizes the innocence of childhood and the bright, happy future every child deserves."

### Friends of the Salt Lake County Children's Justice Center

The Friends of the CJC is a private nonprofit that provides support to the Salt Lake County Children's Justice Center. The Children's Justice Center (CJC) is a public entity supported by state, federal, and county funding, as well as the caring generosity of donors, sponsors, and grants to provide the best possible care for children, teens, and family members impacted by crime.

The CJC's expert team empowers child abuse victims to become survivors. The team provides crisis support, onsite medical exams, sensitive forensic interview sessions to record their statements, referrals to trauma therapists, client emergency fund, and much more. The Salt Lake County CJC is administered by the Salt Lake County District Attorney to help abused children recover from their experiences and receive support through all phases of the investigation and criminal justice process.

The Utah CJC has almost thirty offices and satellite locations throughout the state. Administered by the Utah Attorney General's Office, the Utah CJC works hand-in-hand with county attorneys in assisting victims of abuse. As noted by the Salt Lake County District Attorney's Office, "It seemed a natural evolution that the two agencies would eventually merge under the same vision for the

*GREGORY N. HOOLE is the executive director of Wheels of Justice and a mediator and arbitrator at Hoole & King, where he also manages a full litigation practice.*



*SEAN D. REYES is the Utah Attorney General, an office he has held since 2013.*



*SIM GILL is the Salt Lake County District Attorney, an office he has held since 2010.*



benefit of crime victims” to accomplish the District Attorney’s goal of “no family violence from cradle to grave.” The CJC’s yellow butterfly logo represents “the delicate and beautiful nature of childhood, as well as the empowerment that comes with exercising your wings to fly.”

### Operation Underground Railroad

O.U.R. takes its name from the “Underground Railroad” network of secret routes and safe houses established in the United States during the early to mid 19th century to help African American slaves escape to free states and Canada with the aid of abolitionists, who were sympathetic to their cause. O.U.R. has taken on this name as it works to put an end to modern slavery in the form of child sex trafficking. O.U.R.’s Underground Jump Team consists of former CIA, Navy SEALs, and Special Ops operatives that lead coordinated identification and extraction efforts to free children.

Utah’s Attorney General leads the Secure Strike Force and the Utah Trafficking in Persons Task Force, focusing on ending human trafficking in Utah. Sean Reyes is a passionate supporter of O.U.R. and has gone undercover in various countries as part of O.U.R.’s rescue teams. These operations are always carried out in conjunction with law enforcement throughout the world.

Once victims are rescued, a comprehensive process involving justice for the perpetrators and recovery and rehabilitation for the survivors begins. In the past four years of its existence, O.U.R. has rescued 1,765 victims and assisted in the arrests of more than 858 traffickers around the world.

Although O.U.R.’s work extends throughout the world, human trafficking also exists right here in Utah. This prompted the Utah Attorney General’s Office and Governor’s Office to issue a proclamation last year declaring January Human Trafficking Prevention Month in Utah. The goal of the declaration – in addition to remembering victims and commending groups and individuals who work to educate and inspire others – is to “protect the inherent worth of each citizen and human being.”

### Utah Domestic Violence Coalition

A lesser-known form of child abuse occurs when children are exposed to domestic violence between adults. Children who witness domestic violence are at serious risk for long-term physical and mental health problems. Children who witness domestic violence are also six times more likely to be involved in domestic violence relationships themselves in adulthood.

## Parsons Behle & Latimer Welcomes Barbara Bagnasacco



Barbara Bagnasacco has joined Parsons Behle & Latimer as a shareholder in the firm’s Corporate Transactions and Securities department.

Her practice focuses on corporate, international compliance and securities matters. Barbara has extensive experience with domestic and international M&A, joint ventures, strategic alliances, equity and debt offerings, foreign direct investment, EB-5 investments, distribution, agency and licensing matters and market entry strategies.

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UDVC is a nonprofit organization recognized nationally for providing expertise concerning issues of domestic and sexual violence to member programs, community partners, and others in Utah. UDVC proposes, promotes, and advises on policies and practices that enhance victim safety and empowerment while raising awareness of the need for prevention and intervention.

UDVC's team works closely with community-based victim service providers, key stakeholders, policy makers, and community partners to provide comprehensive, trauma-informed, statewide services, and responses. They provide technical assistance and training to member programs, law enforcement, and community partners. They also work with media and others to raise awareness of domestic abuse and the need for prevention and intervention. Finally, they operate a 24-hour confidential hotline known as the LINKLine, 1-800-897-LINK (5465), that offers trauma-informed support and connects survivors, friends, family, service providers, and others to local resources.

### Making a Difference

Wheels of Justice provides support to these four stellar organizations in a number of ways, including fundraising through the sale of its team "kit" and other merchandise, which Utah-based DNA Cycling has made available to club members at

a steeply discounted price to assist in this effort. Wheels of Justice also sponsors a bicycle ride every September. The ride, Ain't No Mountain High Enough, is not easy. It ascends all five of Salt Lake City's riding canyons (Little Cottonwood, Big Cottonwood, Millcreek, Emigration, and City Creek) in one day. Last year, only a handful finished, but all who participated had a great time. Everyone is welcome and encouraged to participate, even if they want to ride only one or two canyons.

Though the ride is not easy, neither is the fight to put an end to child abuse and help victims. By overcoming this daunting cycling challenge – climbing more vertical feet than the most prominent peak in the continental United States and even more than the Mauna Kea volcano in Hawaii – its members show kids who have been abused that they, too, can overcome any challenge, that victims can become survivors.

Everyone who rides is given a free pancake breakfast at the Black Bear Diner in Sandy, a free finisher's medal courtesy of DNA Cycling (Drive Marketing), and a free water bottle courtesy of UtahBikingLaw.com. The ride is free. Wheels of Justice simply asks that participants consider making a donation to the cause.

The community support for Wheels of Justice has been exceptional and continues to grow. Dominion Energy and a number of Utah-based companies, including Black Diamond Equipment, Diversified Insurance, DNA Cycling, First Endurance, Gregory Mountain Products, Tour of Utah, and Traeger Grills, in addition to virtually every ski resort, have all joined the fight. A number of leading law firms have also signed on as community partners, including ClydeSnow; Feller & Wendt; Gallian Welker & Beckstrom; Goebel Anderson; Holland & Hart; Hoole & King; Kirton McConkie; Lewis Hansen; Maschoff Brennan; Nelson Jones; Richards Brandt Miller Nelson; Snow Jensen & Reece; TraskBritt; and Workman Nydegger.

Joining Wheels of Justice is easy and costs nothing. In fact, just adding your name to the list provides support for the cause. For more information, you can visit the Wheels of Justice website at [www.teamwheelsofjustice.org](http://www.teamwheelsofjustice.org).

In short, perhaps nothing harms our society more than child abuse. We are grateful for PCAU, the Friends of the CJC, O.U.R., and the UDVC, who work hand in hand with our federal, state, county, city, and community partners to eradicate abuse. The solution requires all of us to work together. This is not a partisan issue; it is a humanitarian issue. Any of our loved ones are potential victims, and we all can contribute to the solution. Wheels of Justice offers attorneys an easy and fun way to make a difference. Come, join the team.



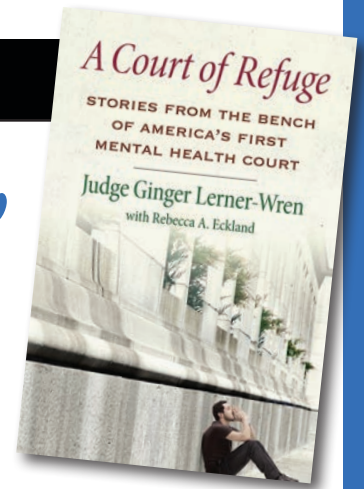
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# *A Court of Refuge: Stories from the Bench of America's First Mental Health Court*

by Judge Ginger Lerner-Wren with Rebecca A. Eckland

Reviewed by Judge Heather Brereton



In *A Court of Refuge*, Judge Ginger Lerner-Wren details the creation and evolution of the first mental health court in the United States, the Broward County Mental Health Court. The court began on June 24, 1997, held during the lunch hour of Judge Lerner-Wren's criminal calendar. Judge Lerner-Wren's court serves individuals charged with misdemeanor criminal offenses who suffer from psychiatric disorders such as schizophrenia and bipolar disorder as well as those with traumatic brain injuries, cognitive disorders, and dementia. *A Court of Refuge* is an approachable mix of the philosophy and workings of Judge Lerner-Wren's therapeutic court, her personal experiences both in and out of mental health court, and the case histories or stories of several participants in her court.

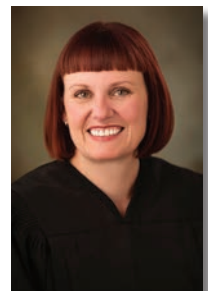
The case histories cited by Judge Lerner-Wren show how the failure of state mental health systems to adequately treat and support those with mental illness leads individuals into the criminal justice system. She details how many mentally ill individuals languish in jails where their mental illnesses oftentimes go untreated. She begins the book with the story of Aaron Winn, a Florida man who deteriorated mentally after sustaining a traumatic brain injury in a motorcycle accident. As a result, he spent two years in Florida mental hospitals after which he was released into the community with no further treatment or care plan. He had a psychotic episode during which he knocked an elderly lady to the ground where she hit a cement curb and later died from the injuries caused by the fall. Mr. Winn entered the Florida criminal justice system, charged

with first degree murder. Those involved in and concerned about Mr. Winn's case influenced the creation of the Broward County Mental Health Court.

The book does a good job of detailing the very real problem of the criminalization of mental illness facing courts in Florida and nationwide. *A Court of Refuge* traces the history of this country's treatment of the mentally ill and discusses reform movements meant to address mental illness, from those of Dorothea Dix to policy changes attempted by John Kennedy through the Community Mental Health Act of 1963. The author explains how these reforms failed to adequately treat mentally ill individuals in our communities, resulting in homelessness and involvement in the criminal

justice system for many mentally ill individuals. While Judge Lerner-Wren includes statistics detailing the number of mentally ill individuals who are homeless, involved in the criminal justice system, and incarcerated in our nation's jails and prisons, her discussion of her own mental health court consists mostly of its mission and individual case histories rather than statistics regarding outcomes or recidivism rates.

*JUDGE HEATHER BRERETON was appointed to the Third District Court in 2015 by Governor Gary Herbert. She has personal experience with the subject of the book, as she presides over one of two Mental Health Courts in the Third District.*



***A Court of Refuge:  
Stories from the Bench of  
America's First Mental Health Court***  
**by Judge Ginger Lerner-Wren  
with Rebecca A. Eckland**  
**Publisher: Beacon Press (2018)**  
**Pages: 175**  
**Available in hardcover, paperback,  
and e-book formats.**

The book is a nice introduction for those who are unfamiliar with therapeutic justice and problem solving courts. It gives an overview of the mission and workings of Judge Lerner-Wren's mental health court, which is similar to mental health courts across the nation, including those in Utah.

The case histories make the book very accessible to readers unfamiliar with the subject matter. The book has a very optimistic tone. Most of the case histories detailed offer examples of individuals who have taken advantage of the mental health services offered by the court to successfully manage their illnesses. She details the stories of several mental health court participants who are able to find housing, repair damaged family relationships, and achieve stability in their communities. The stories put a human face on the sometimes overwhelming nature of the problem of

dealing with mental illness through the criminal justice system. Though most of the case histories involve successful outcomes, Judge Lerner-Wren does detail the stories of some individuals who were unable to maintain mental health treatment, housing, and stability after mental health court. In telling these unhappy stories, *A Court of Refuge* is honest about the lack of resources available to help mentally ill individuals and the failure of mental health courts to provide ongoing intensive case management and necessary resources after court proceedings have ended.

Overall, *A Court of Refuge* is a very approachable overview of the problems faced by mentally ill individuals in and out of mental health courts and the ongoing need for therapeutic or problem solving approaches to dealing with a large segment of those involved in the criminal justice system.

## RAY QUINNEY & NEBEKER NAMES THREE NEW PARTNERS

Ray Quinney & Nebeker is pleased to announce that **Z. Ryan Pahnke, Marie Bradshaw Durrant, and John O. Carpenter** have been elected Shareholders of the Firm. RQN, one of Utah's leading full-service law firms, offers an experienced, innovative, and diverse team of attorneys supported by skilled associates, paralegals, and staff.



**Z. Ryan Pahnke** is a member of the Firm's Litigation Section and White Collar, Corporate Compliance and Government Investigations Section. He is a versatile civil litigator who assists clients in legal disputes from pre-litigation counseling through trial. Mr. Pahnke also assists clients in navigating federal and state government investigatory, enforcement, and licensing proceedings before various government agencies.



**Marie Bradshaw Durrant** is a member of the Firm's Natural Resources Section. She assists clients with environmental compliance, permitting, enforcement actions and navigating legal challenges to rulemakings. Ms. Durrant has extensive experience helping clients negotiate environmental matters at the local, state, and federal level.



**John O. Carpenter** is a member of the Firm's Intellectual Property Section offering technical experience in the optical materials and materials analysis industry. As a Registered Patent Attorney, he assists and advises clients on patent drafting, protection and prosecution, trademarks, copyrights, and trade secrets.



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## Summer Convention Award Notice

The Board of Bar Commissioners is seeking nominations for the 2019 Summer Convention Awards. These awards have a long history of publicly honoring those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession.

Please submit your nomination for a 2019 Summer Convention Award no later than Friday, May 10, 2019. Use the Award Form located at [www.utahbar.org/nomination-for-utah-state-bar-awards/](http://www.utahbar.org/nomination-for-utah-state-bar-awards/) to propose your candidate in the following categories:

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

## Call for Nominations for the 2018–2019 Pro Bono Publico Awards

**The deadline for nominations is April 1, 2019.**

The following Pro Bono Publico awards will be presented at the Law Day Celebration on Wednesday, May 1, 2019:

- Young Lawyer of the Year
- Law Firm of the Year
- Law Student or Law School Group of the Year

To access and submit the online nomination form please go to: <http://www.utahbar.org/award-nominations/>. If you have questions please contact the Access to Justice Director, Nick Stiles, at: [probono@utahbar.org](mailto:probono@utahbar.org) or 801-297-7027.

## 2018 Utah Bar Journal Cover of the Year

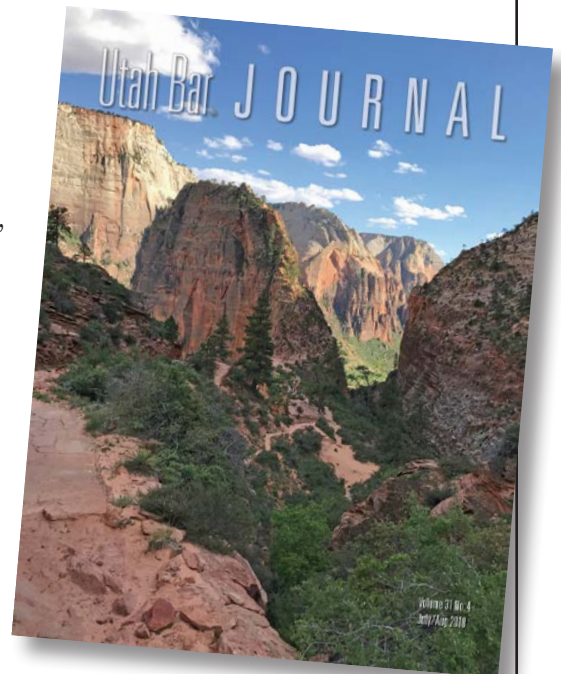


*Vaun Hall*

The winner of the *Utah Bar Journal* Cover of the Year award for 2018 is *Angels Landing*, taken by Utah State Bar member Vaun Hall. Vaun's photo appeared on the cover of the Jul/Aug 2018 issue. 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."

Congratulations to Vaun, and thank you to all of the contributors who have provided photographs for the *Bar Journal* covers over the past thirty years!

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



## Utah State Bar 2019 Spring Convention Award Recipients

The Utah State Bar presented the following awards at the 2019 'Spring Convention in St. George':



**JACEY SKINNER**

Dorothy Merrill Brothers Award  
Advancement of Women  
in the Legal Profession



**YVETTE DONOSSO**

Raymond S. Uno Award  
Advancement of Minorities  
in the Legal Profession

## The Utah State Bar gratefully acknowledges the continued support of our 2019 Spring Convention Sponsors & Exhibitors

### SPONSORS

Babcock Scott & Babcock	Family Law Section	Parsons Behle & Latimer
Ballard Spahr LLP	Health Law Section	Pro Bono Commission
Bankruptcy Law Section	Hillyard, Anderson & Olsen	Randy S. Kester
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Christensen & Jensen	International Law Section	Richards Brandt Miller & Nelson
Clyde Snow & Sessions	JensenBayles, LLP	Snell & Wilmer
Cohne Kinghorn	Jones, Waldo, Holbrook & McDonough	Snow Christensen & Martineau
Criminal Law Section	Kaufman Nichols & Kaufman	Snow Jensen & Reece
Cyber Law Section	Kipp & Christian	Strong & Hanni
DeBry & Associates	Kirton   McConkie	TraskBritt
Dispute Resolution Section	Labor & Employment Law Section	Women Lawyers of Utah
Durham, Jones & Pinegar	Litigation Section	Workman/Nydegger
Entertainment Law Section	Mercer	Young Lawyers Division
Estate Planning Section	Parr Brown Gee & Loveless	

### EXHIBITORS

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ALPS	Green Filing	S.J. Quinney College of Law
Aptegra Consulting	Injury Care Solutions	Tybera
Blomquist Hale Consulting – Lawyers Assistance Program	Litigation Services	US Bank
BYU Law School	Mercer	Utah Bar Foundation

LAW ★ DAY  
2019



Utah State Bar

# Law Day Luncheon

**Wednesday May 1, 12:00 noon**

Publik Coffee Roasters | 975 S West Temple | SLC

## AWARDS WILL BE GIVEN HONORING:

- ★ Art & the Law Project (Salt Lake County Bar Association)
- ★ Liberty Bell Award (Young Lawyers Division)
- ★ Pro Bono Publico Awards
- ★ Scott M. Matheson Award (Law-Related Education Project)
- ★ Utah's Junior & Senior High School Student Mock Trial Competition
- ★ Young Lawyer of the Year (Young Lawyers Division)

**For further information, to RSVP for the luncheon  
and/or to sponsor a table please contact:**

**Richard Dibblee | 801-297-7029 | [richard.dibblee@utahbar.org](mailto:richard.dibblee@utahbar.org)**

For other Law Day related activities visit the Bar's website:  
[lawday.utahbar.org](http://lawday.utahbar.org)

**Law Day Chair: Kurt London**  
**801-262-8915 | [klondon@robertdebry.com](mailto:klondon@robertdebry.com)**

Sponsored by the Young Lawyers Division



# Utah State Bar Request for 2019–2020 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more Bar committees which participate in regulating admissions and discipline and in fostering competency, public service and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name \_\_\_\_\_ Bar No. \_\_\_\_\_

Office Address \_\_\_\_\_

Phone # \_\_\_\_\_ Email \_\_\_\_\_ Fax # \_\_\_\_\_

## Committee Request:

1st Choice \_\_\_\_\_ 2nd Choice \_\_\_\_\_

**Please list current or prior service on Utah State Bar committees, boards or panels or other organizations:**

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**Please list any Utah State Bar sections of which you are a member:**

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**Please list pro bono activities, including organizations and approximate pro bono hours:**

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**Please list the fields in which you practice law:**

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**Please include a brief statement indicating why you wish to serve on this Utah State Bar committee and what you can contribute. You may also attach a resume or biography.**

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**Instructions to Applicants:** Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday.

Date \_\_\_\_\_ Signature \_\_\_\_\_

## Utah State Bar Committees

### Admissions

Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.

### Bar Examiner

Drafts, reviews, and grades questions and model answers for the Bar Examination.

### Character & Fitness

Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.

### CLE Advisory

Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality, and conformance.

### Disaster Legal Response

The Utah State Bar Disaster Legal Response Committee is responsible for organizing pro bono legal assistance to victims of disaster in Utah.

### Ethics Advisory Opinion

Prepares formal written opinions concerning the ethical issues that face Utah lawyers.

### Fall Forum

Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

### Fee Dispute Resolution

Holds mediation and arbitration hearings to voluntarily resolve fee disputes between members of the Bar and clients regarding fees.

### Fund for Client Protection

Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.

### Spring Convention

Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

### Summer Convention

Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

### Unauthorized Practice of Law

Reviews and investigates complaints made regarding unauthorized practice of law and takes informal actions as well as recommends formal civil actions.

**Detach & Mail by June 3, 2019 to:**

**Herm Olsen, President-Elect | 645 South 200 East | SLC, UT 84111-3834**

## *Notice of Legislative Rebate*

Bar policies provide that lawyers may receive a rebate of the proportion of their annual Bar license fee expended from April 1, 2018 to March 30, 2019 for lobbying and any legislative-related expenses by notifying Executive Director John C. Baldwin, 645 South 200 East, Salt Lake City, Utah 84111 or at [jbaldwin@utahbar.org](mailto:jbaldwin@utahbar.org).

## *Tax Notice*

Pursuant to Internal Revenue Code 6033(e)(1), no income tax deduction shall be allowed for that portion of the annual license fees allocable to lobbying or legislative-related expenditures. For the tax year 2018, that amount is 1.65% of the mandatory license fee.



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*L to R: Timothy Burton Anderson, David R. Conklin, Rachel M. Naegeli, Russell S. Mitchell, Marianne G. Sorensen, Thad D. Seegmiller, Maile L. Wilson Edwards, Brett D. Ekins and Charles W. Dahlquist, II.*

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## Pro Bono Honor Roll

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a free legal clinic in December 2018 and January 2019. To volunteer call the Utah State Bar Access to Justice Department at (801) 297-7049 or go to <http://www.utahbar.org/public-services/pro-bono-assistance/> to fill out our Check Yes! Pro Bono volunteer survey.

### Bankruptcy Case

Paul Benson  
Malone Molgard  
Ted Stokes

### Community Legal Clinic: Ogden

Jonny Benson  
Chad McKay  
Mike Studebaker  
Gary Wilkinson

### Community Legal Clinic: Salt Lake City

Jonny Benson  
Craig Ebert  
Katherine Pepin  
Brian Rothschild  
Russell Yauney

### Community Legal Clinic: Sugarhouse

Skyler Anderson  
Brent Chipman  
McKay Corbett  
Sue Crismon  
Melinda Dee  
Lynn McMurray  
Mel Moeinvaziri  
Brian Rothschild  
Reid Tateoka

### Debt Collection Pro Se Calendar – Matheson

Jose Abarca  
Paul Amann  
Michael Barnhill  
Ryan Beckstrom  
Jackie Bosshardt  
Mona Burton  
John Cooper  
Ted Cundick  
Jesse Davis  
T. Rick Davis  
Chase Dowden  
Michael Eixenberger  
Katrina Judge  
Joshua Lucherini  
Janise Macanas  
Kait Montague  
Cliff Parkinson  
Wayne Petty  
Randall Raban  
Brian Rothschild  
Reid Tateoka  
Mark Thorton  
Fran Wikstrom

### Debtor's Legal Clinic

Michael Brown  
Tony Grover  
Brian Rothschild  
Brent Wamsley

### Enhanced Services Project

Robert Culas  
Mark Emmett  
Kurt Hendricks  
David Leta  
David Miller  
Shauna O'Neil

### Expungement Law Clinic

Matt Cloward  
Kate Conyers  
Josh Egan  
Shelby Hughes  
Grant Miller  
Ian Quiel

### Family Justice Center: Provo

Elaine Cochran  
Michael Harrison  
Sandi K. Ness  
Kathy Phinney  
Samuel Poff  
Nancy Van Slooten

### Family Law Case

Alan Boyack  
Cleve Burns  
Brent Chipman  
Matthew Christensen  
Jacob Gunter  
Christian Hansen  
Ray Hingson  
Shirl LeBaron  
Maureen Minson  
Malone Molgard  
Carolyn Morrow  
Keil Myers  
Sara Payne  
Richard Plehn  
Tamara Rasch  
Orson West

### Family Law Clinic

Anabel Alvarado  
Justin Ashworth  
Clinton Brimhall  
Breanna Marchesani  
Sally McMinimee  
Stewart Ralphs  
Linda Smith

Leilani Whitmer

### Free Legal Answers

Nicholas Babilis  
Marca Brewington  
Jacob Davis  
William Melling  
Joseph Rust  
Chip Shaner  
Victor Sipos  
Simon So  
Wesley Winsor

### Guardianship Case:

Crystal Wong

### Homeless Youth Legal Clinic

Victor Copeland  
Hillary King  
Erika Larsen  
Skye Lazaro  
Jenna Millman  
Nate Mitchell  
Lisa-Marie Schull  
Dain Smoland  
Virginia Sudbury  
Nathan Williams

### Landlord/Tenant Case

Wayne Petty  
Kent Scott

### Landlord/Tenant Pro Se Calendar – Bountiful

Kirk Heaton  
Jon-David Jorgensen  
Joseph Perkins

### Landlord/Tenant Pro Se Calendar – Matheson

Paul Amann  
Megan Baker  
Matt Ball  
Nancy Black  
Marty Blaustein  
Scott Blotter  
JoAnn E. Bott  
Drew Clark  
Marcus Degen  
Don Dolton  
Brent Huff  
Becky Johnson  
Heather Lester  
Mitch Longson  
Joshua Lucherini  
Ben Machilis  
Katherine McKeen

Randy Morris  
Jack Nelson  
Brady Smith  
Nick Stiles  
Reid Tateoka  
Michael Thomson  
Mark Thorton  
Matt Vanek  
Fran Wikstrom  
Nathan Williams  
Elizabeth Wright

### Lawyer of the Day

Jared Allebest  
Jared Anderson  
Ron Ball  
Maria-Nicolle Beringer  
Justin Bond  
Brent Chipman  
Scott Cottingham  
Chris Evans  
Jonathan Grover  
Robin Kirkham  
John Kunkler  
Ben Lawrence  
Allison Librett  
Christopher Martinez  
Suzanne Marychild  
Shaunda McNeil  
Keil Myers  
Lori Nelson  
Stewart Ralphs  
Lorena Riffo-Jenson  
Jeremy Shimada  
Joshua Slade  
Linda Smith  
Laja Thompson  
Paul Tsosie  
Paul Waldron  
Brent Wamsley  
Leilani Whitmer  
Kevin Worthy

### Medical Legal Clinic

Micah Vorwallner

### Name Change Case

Aaron Randall

### Public Benefits Case

Benjamin Johnson

### Rainbow Law Clinic

Jess Couser  
Shane Dominguez  
Russell G. Evans  
Stewart Ralphs



**Senior Center Legal Clinics**

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

**Street Law Clinic**

Dara Cohen  
 Kate Conyers  
 Dave Duncan  
 Jeff Gittins  
 John Macfarlane  
 Cameron Platt  
 Brian Rothschild  
 Elliot Scuggs  
 Richard Snow  
 Katy Steffey  
 Kristin Sweeney  
 Jonathan Thorne  
 Brian Tuttle

**SUBA Talk to a Lawyer Clinic**

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

**Third District ORS Calendar**

Ryan Pahnke  
 Rob Rice  
 Adam Richards  
 Rick Rose

**Thursday Night Bar –  
Cache County**

Ashley Bown  
 Paul Gosnell  
 Matthew Lorz  
 Ray Malouf  
 Herm Olsen

**Thursday Night Bar –  
Weber County**

Jonathan Bachison  
 Michelle Lesue

**Timpanogos Legal Clinic**

Jessica Lee Anderson  
 Todd Anderson  
 Jonathan Bachison  
 Marca Tanner Brennington

Elaine Cochran  
 Rebekah-Anne Gebler  
 Chris Guymon  
 Lyn Hansen  
 Mandy Larsen  
 Megan Mustoe  
 Denton Peterson  
 Candace Reid  
 Stephen Stocks  
 Johanna Williams  
 Michael Winn

**Tuesday Night Bar**

Michael Anderson  
 Rob Andreasen  
 Alain Balmano  
 Eric Bawden  
 Mike Black  
 Lyndon Bradshaw  
 David Broadbent  
 Douglas Crapo  
 Olivia Curley  
 David Geary  
 Steve Glauser  
 Thom Gover  
 Sarah Humphrey  
 Emily Iwasaki  
 Brock Jensen  
 Brent Johnson  
 Marcie Jones  
 Larissa Lee  
 Mike Lehr  
 Victoria Luman

Chris Mack  
 Lucia Maloy  
 Ash McMurray  
 Ken Okazaki  
 Katherine Pepin  
 Jared Quist  
 Josh Randall  
 LaShel Shaw  
 Shane Stroud  
 George Sutton  
 Emily Tabak  
 Sarah Vaughn  
 Chris Wade  
 Joseph Watkins  
 Bruce Wycoff

**Veterans Legal Clinic**

Jonathan Rupp  
 Joseph Rupp  
 Katy Strand

**Wills for Heroes**

Cristie Bake  
 JeanPaul Bell  
 Leah Bryner  
 Dominica Dela Cruz  
 Josh Egan  
 John W. Murray  
 Natalia Peterson  
 Kregg Wallace

**Wills/Trusts/Estates Case**

William Frazier

## ***Notice of Utah Bar Foundation Annual Meeting and Open Board of Director Position***



The Utah Bar Foundation is a non-profit organization that administers the Utah Supreme Court IOLTA (Interest on Lawyers Trust Accounts) Program. Funds from this program are collected and donated to nonprofit organizations in our State that provide law related education and legal services for the poor and disabled.

The Utah Bar Foundation is governed by a seven-member Board of Directors, all of whom are active members of the Utah State Bar. The Utah Bar Foundation is a separate organization from the Utah State Bar.

In accordance with the by-laws, any active licensed attorney, in good standing with the Utah State Bar may be nominated to serve a three-year term on the board of the Foundation. If you are interested in nominating yourself or someone else, you must fill out a nomination form and obtain the signature of twenty-five licensed attorneys in good standing with the Utah State Bar. To obtain a nomination form, call the Foundation office at (801) 297-7046. If there are more nominations made than openings available, a ballot will be sent to each member of the Utah State Bar for a vote.

Nomination forms must be received in the Foundation office no later than 5pm on Friday, May 3, 2019 to be placed on the ballot.

The Utah Bar Foundation will be holding the Annual Meeting of the Foundation on Friday, July 19th in Park City, Utah. This meeting will be held in conjunction with the Utah State Bar's Annual Meeting.

For additional information on the Utah Bar Foundation, please visit our website at [www.utahbarfoundation.org](http://www.utahbarfoundation.org).

## ***Distinguished Paralegal of the Year Award***

The Distinguished Paralegal of the Year Award is presented by the Paralegal Division of the Utah State Bar and the Utah Paralegal Association to a paralegal who has met a standard of excellence through his or her work and service in this profession.

We invite you to submit nominations of those individuals who have met this standard. Please consider taking the time to recognize an outstanding paralegal. Nominating a paralegal is the perfect way to ensure that his or her hard work is recognized, not only by a professional organization, but by the legal community. Nomination forms and additional information are available by contacting Izamar Espinoza at [Izamar.eh19@gmail.com](mailto:Izamar.eh19@gmail.com).

The deadline for nominations is April 23, 2019, at 5:00 pm. The award will be presented at the Paralegal Day Celebration held on May 16, 2019.



## ANNUAL PARALEGAL DAY LUNCHEON

**For all Paralegals and their  
Supervising Attorneys**

**Speaker: TBA**

**May 16, 2019  
Noon to 1:00 pm**

**Marriott Hotel Downtown  
(75 South West Temple)**

## ***MCLE Reminder – Odd Year Reporting Cycle***



**July 1, 2017 – June 30, 2019**

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

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

### **Fees:**

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

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

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

**For more information and to obtain a Certificate of Compliance, please visit our website at [www.utahbar.org/mcle](http://www.utahbar.org/mcle).**

If all twenty-four hours of CLE have been entered into the MCLE database, the lawyer may comply with the CLE requirement on-line by following these few simple steps.

- Log into the Practice Portal.
- Select pay MCLE Compliance fee under the Utah Bar Portal Control Card.
- Follow prompts to pay MCLE Compliance fee.

Once you have finished this process and paid the MCLE Compliance fee, you will not need to file a Certificate of Compliance.



# 2019 Summer Convention ACCOMMODATIONS

∞ PARK CITY | CANYONS VILLAGE

## July 18–20

### Grand Summit Hotel

Standard Hotel Room	\$169
One Bedroom Suite	\$213
Two Bedroom Suite	\$336

### Sundial Lodge

Standard Hotel Room	\$139
One Bedroom Suite	\$168
Two Bedroom Suite	\$219

### Silverado Lodge

Standard Hotel Room	\$129
One Bedroom Suite	\$173
Two Bedroom Suite	\$222

All rates are subject to the prevailing taxes and fees. Currently taxes total 13.17% plus resort fee and are subject to change. Grand Summit Hotel Resort fee is \$30 per unit, per night. The Sundial and Silverado resort fee is \$20 per unit, per night.

### HOUSEKEEPING

The Grand Summit is provided with daily housekeeping service. The Sundial and Silverado are provided with midweek house-keeping on stays of five days or more. Daily service can be requested at time of booking.

### RESERVATION DEADLINE

The room block will be held until June 17, 2019. After this date, reservations will be accepted on a space available basis.

Confirmed reservations require an advance deposit equal to one night's room rental, plus tax and fee.

To expedite your reservations, please call or visit us online.

### RESERVATIONS CENTER: 1-888-416-6195

Reference: Utah State Bar 2019 Summer Convention or CF1USBB

### ONLINE BOOKINGS:

[www.utahbar.org/cle/utah-bar-conventions/](http://www.utahbar.org/cle/utah-bar-conventions/)

Find the “CLICK HERE TO REGISTER” button to receive the discounted lodging room rates for Utah State Bar 2019 Summer Convention guests.

If you have any questions about the Resort or the accommodations, call 1-888-416-6195 or email [ParkCityReservations@vailresorts.com](mailto:ParkCityReservations@vailresorts.com)

### CHECK IN

Guaranteed by 4:00 pm.  
Check out is 11:00 am.

### CANCELLATION

Deposits are refundable if cancellation is received at least seven (7) days prior to arrival and a cancellation number is obtained.

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# “and Justice for all”

37th Annual Law Day 5K Run & Walk – May 4, 2019

S. J. Quinney College of Law at the University of Utah

383 South University Street • Salt Lake City



**Registration Info:** Register online at <http://andjusticeforall.org/law-day-5k-run-walk/>. Registration fee: before April 27: \$30 (+ \$10 for Baby Stroller Division extra t-shirt, if applicable), after April 27: \$35. Day of race registration from 7:00–7:45 a.m. Questions? Call 801-924-3182.

**Help Provide Civil Legal Aid to the Disadvantaged:** All event proceeds benefit “and Justice for all,” a collaboration of Utah’s primary providers of free civil legal aid programs for individuals and families struggling with poverty, discrimination, disability and violence in the home.

**Date:** Saturday, May 4, 2019 at 8:00 a.m. Check-in and day-of race registration in front of the Law School from 7:00–7:45 a.m.

**Location:** Race begins and ends in front of the S. J. Quinney College of Law at the University of Utah, 383 South University Street, Salt Lake City. Parking available in Rice Eccles Stadium (451 S. 1400 E.). Or take TRAX!

**Race Awards:** Prizes will be awarded to the top male and female winners of the race, the top male and female attorney winners of the race, and the top two winning speed teams. Medals will be awarded to the top three winners in every division, and the runner with the winning time in each division will receive a top prize.

**Speed Team Competition**  
**Baby Stroller Division**

**Speed Individual Attorney Competition**  
**Wheelchair Division**

**Recruiter Competition:** The organization who recruits the most participants for the Run will be awarded possession of the Recruiter Trophy for one year and a grand prize. However, all participating recruiters are awarded a prize because the success of the Law Day Run depends upon our recruiters! To become the 2019 “Team Recruiter Champion,” recruit the most registrants under your organization’s name. Be sure the Recruiting Organization is filled in on the registration form to get competition credit.

For more information visit [www.andjusticeforall.org](http://www.andjusticeforall.org).

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## 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/](http://www.utahbar.org/opc/rules-governing-eaoc/).

### PUBLIC REPRIMAND

On June 27, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Rocky C. Crofts for violating Rule 1.15(d) (Safekeeping Property) of the Rules of Professional Conduct.

#### *In summary:*

Mr. Crofts represented a client in his efforts to obtain financing for a development project. The client delivered to Mr. Crofts, via wire transfer, funds for a down payment and to pay the fees for loan processing. The client repeatedly requested an accounting of the funds Mr. Crofts was holding for him but had not received one at the time he submitted information to the OPC. The OPC requested that Mr. Crofts provide an accounting of the funds. Eventually, Mr. Crofts responded but failed to provide documentation demonstrating what happened to the funds. The OPC forwarded the accounting information to the client, who found discrepancies when he compared the information Mr. Crofts provided to the information in his records.

### RESIGNATION WITH DISCIPLINE PENDING

On November 21, 2018, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Philip J. Danielson, for violation of Rule 1.3 (Diligence), 1.4(a) (Communication), Rule 1.5(a) (Fees), Rule 1.15(d) (Safekeeping Property), Rule 1.16(d) (Declining or Terminating Representation), Rules 5.3(b) and 5.3(c) (Responsibilities Regarding Nonlawyer Assistants), Rule 5.5(a) (Unauthorized Practice of Law: Multijurisdictional Practice of Law), Rule 7.1(b) (Communications Concerning a Lawyer's Services), Rule 7.3(c) (Direct Contact with Prospective Clients), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

#### *In summary:*

#### **Matter #1**

The Federal Trade Commission filed a complaint against Mr. Danielson, d/b/a Danielson Law Group and d/b/a DLG Legal alleging that Mr. Danielson misled financially distressed homeowners nationwide by promising a loan modification in exchange for an advance fee. The complaint made numerous

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allegations including the following: Mr. Danielson misled financially distressed homeowners into paying thousands of dollars based on false promises and misrepresentations, and that he provided little, if any, meaningful assistance to modify or prevent foreclosure; Mr. Danielson sent direct mail solicitations that told consumers that they pre-qualify for mortgage relief; the direct mail solicitations, websites, radio and television advertisements and seminars violated several Mortgage Assistance Relief Services Rules and Regulations; Mr. Danielson's representatives told consumers that they were affiliated with the consumer's lender, have a strong and unique relationship with the consumer's lender, or that the lender referred Mr. Danielson to the consumer; Mr. Danielson charged a fee and told consumers that they must make the first payment before loan modification services can begin; Mr. Danielson assigned a non-attorney representative to consumers but typically they received little to no communication from his representatives; in numerous instances, consumers complained that they did not receive the services or legal representation Mr. Danielson promised.

Many consumers never met or spoke to Mr. Danielson or to an attorney licensed in the state where they reside or where the property at issue is located; after consumers paid the requested advance fees, Mr. Danielson failed to obtain loan modifications or other relief to stop foreclosures; consumers who engaged Mr. Danielson's services suffered significant economic injury, including paying hundreds or thousands of dollars and receiving little or no service in return, going into foreclosure, and even losing their homes.

The court entered a final stipulated order for permanent injunction and monetary relief in the case. In the order, Mr. Danielson agreed that the facts alleged in the complaint will be taken as true.

#### **Matter #2**

Homeowners retained Mr. Danielson to assist them with obtaining a loan modification in order to try and avoid foreclosure of their home in Missouri. Mr. Danielson is not licensed to practice law in Missouri. The homeowners paid Mr. Danielson a fee for legal services. The homeowners' mortgage company foreclosed on their home four months after they retained Mr. Danielson. The homeowners retained another attorney and requested a copy of their file. Mr. Danielson failed to provide the file.

#### **Join us for the OPC Ethics School**

**March 20, 2019 | 9:00 am – 3:45 pm.**

**Utah Law & Justice Center  
645 South 200 East, Salt Lake City**

**5 hrs. Ethics CLE Credit, 1 hr. Prof./Civ.**

Cost \$245 on or before March 6, 2019, \$270 thereafter.

#### **Matter #3**

A homeowner retained Mr. Danielson to help him avoid foreclosure of his property in Colorado. Mr. Danielson is not licensed to practice law in Colorado. The homeowner authorized Mr. Danielson's firm to debit his checking account monthly for advance fees. The homeowner called Mr. Danielson's firm numerous times, each time speaking with a different individual, not Mr. Danielson, and sent everything the firm requested. Twenty months after retaining Mr. Danielson the homeowner cancelled the agreement because he was notified that his property had gone into foreclosure proceedings.

#### **Matter #4**

Homeowners, residents of Wisconsin, retained Mr. Danielson for assistance with a loan modification. Mr. Danielson is not licensed to practice law in Wisconsin. The homeowners made monthly payments to Mr. Danielson. Twenty-two months after retaining Mr. Danielson, the homeowners' mortgage company denied their loss mitigation request. The homeowners never spoke with Mr. Danielson, just several other non-lawyer assistants in his office. Mr. Danielson did no work on the homeowners' case and sent them information to complete after that information needed to be submitted.

#### **Matter #5**

A homeowner retained Mr. Danielson for assistance with a loan modification for his home in North Carolina. Mr. Danielson is not licensed to practice law in North Carolina. The homeowner paid some advance fees but after Mr. Danielson's efforts were unsuccessful, the homeowner terminated the representation and refused to pay anything further.

#### **Matter #6**

A homeowner received a mailed solicitation letter for Mr. Danielson's home loan modification services related to the homeowner's property in Virginia. Mr. Danielson is not licensed to practice law in Virginia. The homeowner paid an advance fee for the representation. The homeowner made repeated phone calls to Mr. Danielson's office but was unable to speak with anyone. Further, during the representation, the homeowner only received four letters from Mr. Danielson: 1) the solicitation; 2) the fee agreement; 3) a letter informing him that Mr. Danielson would no longer be representing him; and 4) another solicitation letter. The homeowner's home was sold at auction.

#### **Matter #7**

Homeowners, residents of Florida, received an advertisement in the mail from a company called New Start, Inc. whose representatives assured them they could qualify for a mortgage modification.



Mr. Danielson is not licensed to practice law in Florida. The homeowners completed an application for a loan modification and money was debited from their bank account and paid to Mr. Danielson's firm. The homeowners discovered that New Start, Inc. was no longer in business and requested a refund of the money paid to Mr. Danielson. Mr. Danielson sent the homeowners a letter indicating their file had been closed and later denied their refund request. The homeowners provided requested information to Mr. Danielson, but no work was done on their case and he failed to contact their lender. The OPC sent a Notice of Informal Complaint to Mr. Danielson but he failed to respond.

#### Matter #8

Mr. Danielson solicited a homeowner residing in Maryland by mail. The mailer did not specify that it was advertising material. Mr. Danielson is not licensed to practice law in Maryland. The homeowner retained Mr. Danielson to assist her with efforts to modify her home loan, making four separate payments to him. During the modification process, the homeowner had communications with several people from Mr. Danielson's office, none of whom were attorneys. Nevertheless, each person she spoke with gave her advice. Seven months after retaining him, Mr. Danielson sent the homeowner a letter indicating that he would no longer be representing her. Mr. Danielson failed to complete meaningful work on the homeowner's case.

#### Matter #9

The State of North Carolina Department of Justice contacted Mr. Danielson regarding consumers who complained about his loan modification services. Mr. Danielson is not licensed to practice law in North Carolina. Consumer #1 contacted Mr. Danielson about a loan modification. The homeowner paid advance fees for Mr. Danielson's services but her home was being sold by her mortgage company. Mr. Danielson never contacted her mortgage company. Consumer #2 paid Mr. Danielson advance fees for a loan modification. Consumer #3 retained Mr. Danielson for a loan modification and paid advance fees. The consumer received notice of a foreclosure hearing and notified Mr. Danielson. The mortgage company denied the loan modification. Consumer #4 stated that Mr. Danielson promised a loan modification and advised her not to contact her mortgage company. The consumer paid the advance fees, but in the end her mortgage company performed a modification at no charge. Consumer #5 was contacted by Mr. Danielson's company after his mortgage became delinquent. The consumer made payments over five months for a loan modification. The North Carolina Housing Authority ultimately helped with the modification. Consumer #6 retained Mr. Danielson for a loan modification paying advance fees. The consumer's modification was denied because the documents requested by the mortgage company were not

provided. The consumer requested a refund of his retainer, but it was denied. Consumer #7 received information in the mail regarding Mr. Danielson's services and was promised a loan modification. Mr. Danielson debited the consumer's checking account for five months. The consumer contacted her mortgage company and was informed that they had received no information from Mr. Danielson. Consumer #8 retained Mr. Danielson for a loan modification and paid an advance fee. None of the consumer's creditors nor her mortgage companies had been contacted and she failed to receive a modification through Mr. Danielson. Consumer #9 worked with Mr. Danielson for over two years but failed to receive a loan modification, paying him advance fees. The consumer notified Mr. Danielson that she was terminating his services. The consumer's account was charged after the termination.

#### Matter #10

A homeowner retained Mr. Danielson to renegotiate a new payment schedule with the company that held his mortgage to avoid foreclosure of his home in New York. Mr. Danielson is not licensed to practice law in New York. The homeowner paid Mr. Danielson an advance fee. The homeowner requested information but received little or no information about what work was being performed on his case. Little or no progress was made on the homeowner's case and he terminated Mr. Danielson's representation.

## Facing a Bar Complaint?



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## Matter #11

A homeowner, a resident of California, responded to an advertisement from Mr. Danielson's firm regarding the possibility of lowering the interest rate on his home loan. Mr. Danielson is not licensed to practice law in California. The homeowner was assured that Mr. Danielson would be able to assist him with a loan modification and if he couldn't, the homeowner would receive a full refund. The lender denied the homeowner's request for a loan modification. The homeowner requested a refund from Mr. Danielson, an accounting and a copy of his file. The homeowner received three pdf files, a detailed description of the work performed on his case, but did not receive an accounting.

## SUSPENSION

On December 19, 2018, the Honorable Mark R. DeCaria, Second Judicial District, entered an Order of Suspension against Paul E. Remy, suspending his license to practice law for a period of three years. The court determined that Mr. Remy violated Rule 1.1 (Competence), Rule 1.2(a) (Scope of Representation), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.4(b) (Communication), Rule 1.5(a) (Fees), Rule 1.15(a) (Safekeeping Property), Rule 1.15(b) (Safekeeping Property), Rule 1.15(c) (Safekeeping Property), Rule 1.15(d) (Safekeeping Property), Rule 1.16(d) (Declining or Terminating Representation), Rule 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), Rule 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

### *In summary:*

The case involved Mr. Remy's handling of cases for six separate clients. The first client retained Mr. Remy to represent her in a guardianship matter. The client wanted temporary custody of two grandchildren while both parents were incarcerated and needed legal documentation so that she could register the children in

daycare and obtain medical coverage. The client paid a retainer for legal services and Mr. Remy filed a petition for guardianship. The court notified Mr. Remy that the case would be dismissed if there was no activity by a certain date. Mr. Remy filed a motion to extend time for service but did not file a request to submit the motion or proposed order. A couple of months later, Mr. Remy filed an acceptance of service and summons but there was little or no activity in the case thereafter. The client attempted to speak with Mr. Remy numerous times through phone calls and office visits to obtain a status update on her case but was unable to do so. Eventually, the court ordered that the case be dismissed due to inactivity. Mr. Remy did not inform the client that the court had ordered the case dismissed. Mr. Remy filed a motion to set aside the order, but filed nothing further in the case.

The second client retained Mr. Remy to advise her regarding her financial situation and a bankruptcy filing. The client paid a retainer for legal services and believed that Mr. Remy was working on her matter. The client later met with Mr. Remy's assistant to sign release forms and pay the bankruptcy filing fees. No bankruptcy petition was filed on behalf of the client nor was other meaningful work performed on her behalf. The client terminated Mr. Remy's representation and requested a refund. Mr. Remy did not provide a refund and charged the client for an office visit that was cancelled. Mr. Remy failed to return the client's file to her.

The third client retained Mr. Remy for a divorce/custody matter. The client's mother paid a retainer for legal services and the parties attended mediation but were unable to reach a resolution. After mediation, the client attempted to contact Mr. Remy many times to obtain a status update but was unable to do so. The client's ex-husband filed a petition to modify custody and a few days later, a motion to appoint a custody evaluator. Mr. Remy filed a motion to dismiss but did not file a memorandum supporting the motion. A hearing was held before the commissioner, and Mr. Remy was ordered to re-file the motion and a custody evaluator was appointed. The client paid additional attorney's fees to Mr. Remy. The custody evaluator emailed information to Mr. Remy regarding the custody evaluation process but he did not forward the information to the client. Opposing counsel contacted Mr. Remy about his client's failure to return the custody evaluation paperwork and threatened to file an order to show cause. A telephone conference was scheduled and the clerk was unable to reach Mr. Remy. Thereafter, opposing counsel filed an order to show cause alleging that the client failed to cooperate with the custody evaluation and Mr. Remy failed to respond to his emails. Mr. Remy did not return all documents the client provided him as part of her file at the end of the representation.

The fourth client retained Mr. Remy to represent her in a custody matter. The client paid a retainer for legal services. The client was



# Bar ReView

... a new twist on an old tradition.

**\*bar re-view** [bahr ri-vyoo] noun

1. a social gathering for lawyers and judges co-hosted by the Utah State Bar for the purpose of networking, catching up with old friends and meeting new ones. After three straight days of depositions, the exhausted partner invited her frazzled associate to join at Bar ReView where the pair caught up with old friends and got tips on how to deal with their opposing counsel.
2. a course taken to prepare for the bar exam (like Kaplan or BarBri).



### 2019 Dates to Calendar

January 31	Breakfast Bar ReView with the Litigation Section
April 14	Lawyer Trivia Bar ReView with the Federal Bar Association
May 11	Zen in Zion: Yoga and Brunch



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not notified that the opposing party had filed documents in the case and little or no action was taken by Mr. Remy to advance the matter. Eventually, Mr. Remy filed a petition to modify custody in the case but it was filed without the client's consent. The client attempted to contact Mr. Remy about her case, but he did not respond to her request. The OPC sent a Notice of Informal Complaint (NOIC) requesting Mr. Remy's response. Mr. Remy did not respond to the NOIC.

The fifth client retained Mr. Remy to represent him in two cases, a paternity matter and a criminal matter. Mr. Remy filed a motion on behalf of the client in the paternity matter. The motion was for a temporary restraining order, but the proposed order Mr. Remy submitted was for an order to show cause hearing before the commissioner essentially asking for temporary order. The court directed Mr. Remy to the rules regarding the request for temporary orders. Mr. Remy did not file a request for temporary orders until two months later. The court held an order to show cause hearing. Mr. Remy did not appear on behalf of his client at the hearing. Mr. Remy charged the client for his travel to and appearance at the hearing. A hearing was held in the criminal matter, but Mr. Remy did not appear on behalf of the client. Mr. Remy charged the client for his travel to and appearance at the hearing in the criminal matter. The client and/or his wife attempted to contact Mr. Remy but he failed to return phone calls or respond to emails. The client requested his file several times but did not receive it. The OPC sent a NOIC requesting Mr. Remy's response. Mr. Remy did not respond to the NOIC.

The sixth client retained Mr. Remy to represent her in two civil matters. The client paid Mr. Remy a retainer for one matter and a filing fee for the other matter. The client left messages on Mr. Remy's office voicemail and spoke to his receptionist, but there

was no responsive communication from Mr. Remy.

## RECIPROCAL DISCIPLINE

On November 9, 2018, the Honorable Keith A. Kelly, Third Judicial District Court, entered an Order of Reciprocal Discipline: Disbarment, against Dana C. Heinzelman, disbaring Ms. Heinzelman for her violation of Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.15(c) (Safekeeping Property), Rule 1.15(d) (Safekeeping Property), and 1.16(d) (Declining or Terminating Representation) of the Rules of Professional Conduct. Since Utah does not have a five-year suspension sanction, disbarment is equivalent discipline in Utah.

### *In summary:*

On July 20, 2017, The Supreme Court of the State of Oregon entered an Order Accepting Stipulation for Discipline suspending Ms. Heinzelman from the practice of law for a period of five years based upon the following facts:

### **Matter #1**

A client hired Ms. Heinzelman to file an uncontested divorce petition on her behalf and paid an advance fee. A written fee agreement recited that Ms. Heinzelman would hold the funds in her trust account. The parties orally agreed that part of the funds would be a flat fee for Ms. Heinzelman's time and part of the funds were to be used to pay the petition filing fee. Five months later, the client's husband paid Ms. Heinzelman for the filing fee. Ms. Heinzelman did not deposit the funds into her trust account.

Ms. Heinzelman did not file the dissolution petition. For approximately six months the client attempted to contact Ms. Heinzelman to obtain a status update on the matter and then to

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ask for an explanation for the delay. Ms. Heinzelman did not substantively respond to the client's contact attempts. Thereafter, Ms. Heinzelman stopped responding to the client altogether.

In the meantime, the client's husband retained his own attorney, who was unable to contact Ms. Heinzelman. When it became clear that Ms. Heinzelman would not respond to their contact attempts, husband's attorney completed and filed the dissolution paperwork. The client and client's husband then requested a refund of their funds. Eventually the money was repaid.

### **Matter #2**

A client retained Ms. Heinzelman to represent her as the respondent in a dissolution petition filed pro se by the client's estranged husband. The client signed a written fee agreement and paid a retainer in cash to Ms. Heinzelman. Ms. Heinzelman did not deposit the client funds into her trust account and instead commingled them with her own.

The client and her estranged husband owned a mobile home. As part of the asset division in the dissolution proceeding, the client wanted to receive the full value of the mobile home in lieu of any spousal support. Ms. Heinzelman conveyed the offer to husband. At the husband's request, Ms. Heinzelman agreed to give him a few weeks to consider the offer. That wait stretched from weeks to months. During that time, Ms. Heinzelman did not file an appearance for the client, did not take steps to monitor the status of the case, and did not provide information or updates to the client. Ms. Heinzelman arranged for a meeting with estranged husband to review and sign a stipulated agreement. Ms. Heinzelman cancelled the meeting at the last minute without notifying the client. She did not reschedule the meeting, nor did she promptly respond to the client's multiple messages asking whether the meeting had taken place.

The court issued a notice of intent to dismiss the case because the client had not filed an answer in the matter. The client informed Ms. Heinzelman that she had received the court's notice of intent to dismiss the case, and Ms. Heinzelman agreed to take action. Thereafter, the client made multiple inquiries with Ms. Heinzelman but no action was taken. The estranged husband filed a motion for default and entry of judgment. A default judgment was signed and entered four days later. Later that day, Ms. Heinzelman filed paper copies of a fee-deferral request, and an answer and counterclaim on the client's behalf. The filings had no effect because they had not been e-filed and because the default had already been entered. Ms. Heinzelman promised the client that she would file a motion to set aside the default, but she did not do so and did not follow up with the client to inform her of the developments.

The client asked Ms. Heinzelman to fix the situation or provide a refund. Ms. Heinzelman did neither. Ms. Heinzelman did not know, and failed to learn, the process for filing the motion to set aside the default. Ms. Heinzelman also did not respond to the client's requests for information about the matter, nor did she return the client's funds despite the client's requests.

## **RECIPROCAL DISCIPLINE**

On December 22, 2018, the Honorable Royal I. Hansen, Third Judicial District Court, entered an Order of Reciprocal Discipline: Disbarment, against April R. Morrisette, disbarring Ms. Morrisette for her violation of Rule 8.4(b) (Misconduct) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

### *In summary:*

On April 6, 2018, the Presiding Disciplinary Judge, State of Colorado, entered a Stipulation, Agreement and Affidavit containing Ms. Morrisette's Conditional Admission of Misconduct and Imposition of Disbarment. On April 10, 2018, the Presiding Disciplinary Judge, State of Colorado, issued an Order approving Conditional Admission of Misconduct and Imposing Sanctions based on the following facts:

Ms. Morrisette began working at a law firm in Colorado. Her employment with the firm was terminated. Ms. Morrisette filed an initial claim for unemployment insurance benefits by accessing the Colorado Department of Labor and Employment (CDLE) Internet site and entered the required information establishing a computer record of the claim. Soon after, Ms. Morrisette signed a verification of personal information form which warns against false statements and willful misrepresentation in order to obtain or increase benefits and returned it to the CDLE. Ms. Morrisette began collecting unemployment benefits.

Ms. Morrisette began employment as an attorney at a Colorado firm. Ms. Morrisette's employment with the firm was terminated. Ms. Morrisette intentionally continued to collect unemployment benefits even though she knew she was no longer entitled to them after being hired by the Colorado firm. In her biweekly telephonic and/or online unemployment claims, Ms. Morrisette represented that she was unemployed and had no income, concealing her employment and earnings from CDLE. Ms. Morrisette was employed during thirty-two of the fifty-four weeks that she filed for and received unemployment insurance benefits.

Based on Ms. Morrisette's conduct, she was criminally prosecuted in Colorado. Ms. Morrisette entered guilty pleas to Computer Crime, a class four felony pursuant to §18-5.5-102(1)(b) C.R.S. and Theft, a class one misdemeanor pursuant to §18-4-401(2)(e) C.R.S.

## DISBARMENT

On December 20, 2018, the Honorable Christine L. Johnson, Fourth Judicial District, entered an Order of Disbarment against Scott J. Eckersley, disbaring him from the practice of law. The court determined that Mr. Eckersley violated Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a) (Fees), and Rule 1.15(a) (Safekeeping Property) of the Rules of Professional Conduct.

### *In summary:*

A client retained Mr. Eckersley to represent his children, both minors, in a defensive asylum case before the Immigration Court. The client paid a retainer for legal fees and Mr. Eckersley attended a hearing on behalf of the client and his minor children. The client did not hear from Mr. Eckersley again regarding the case. The client was unable to see, speak to, or in any way contact Mr. Eckersley for several months and was unsure whether the asylum applications had been submitted. The client submitted a Freedom of Information Act Request (FOIA) to the Houston Asylum office to find out whether Mr. Eckersley had filed the asylum application. The office indicated that no asylum application had been submitted. The client retained new counsel who requested an accounting of legal fees to Mr. Eckersley. Mr. Eckersley did not respond to new counsel.

In another matter, a couple retained Mr. Eckersley to represent their three children in immigration removal proceedings. Their daughter came to the United States in April 2014 and Mr. Eckersley told them that their daughter qualified for asylum. The couple paid Mr. Eckersley to begin their daughter's case and had a payment plan to pay an additional fee every month until the rest of the fee was paid off. Mr. Eckersley appeared in court with the minor daughter in 2014.

The clients' sons arrived in the United States in 2015. They retained Mr. Eckersley to file an asylum application. No application was ever filed on their behalf.

In early 2015, the clients discovered that their daughter's circumstances had changed and they contacted Mr. Eckersley's office. The clients spoke with Mr. Eckersley's secretary who told them that the daughter might qualify for a U visa.

Mr. Eckersley closed his office in February 2016. After Mr. Eckersley closed his office he would not answer their calls. They would try calling one to two times per month, but Mr. Eckersley would only respond to text messages.

Mr. Eckersley filed the U Visa application on behalf of the daughter in July 2016. The daughter discovered that a hearing was scheduled by calling the immigration court's automated line. The client took the day off work to drive his daughter to court, but on the way, they spoke to Mr. Eckersley and he was adamant that no hearing was scheduled so they heeded his advice and went home. Mr. Eckersley did not attend the hearing and the daughter was ordered deported. The daughter was in a car accident two days after the scheduled hearing. Mr. Eckersley filed a motion to reopen an in absentia order on behalf of the daughter. In the motion he asserted that the daughter missed the hearing due to an automobile accident that had occurred two days after the hearing.

A hearing was held for the two sons in their immigration cases. The clients did not receive any notification from Mr. Eckersley or the immigration court that a hearing had been scheduled. The sons did not attend the hearing and they were ordered deported.

The clients also retained Mr. Eckersley to represent the wife's brother after he was detained in Texas. Mr. Eckersley stated that he would charge a certain fee. A few days later, he requested that the clients send him money via Western Union as soon as possible. Mr. Eckersley wanted the money to pay the cash bond for two other clients in another state. The brother called Mr. Eckersley because he had an interview in the detention center, but Mr. Eckersley did not answer.

The clients requested a copy of the work Mr. Eckersley had performed on behalf of the family, including a copy of a motion in the daughter's case. Mr. Eckersley stated that he only made two copies and he filed both of them with the court. He told the clients to file a FOIA request to obtain copies.

Mr. Eckersley deposited the fee paid by the family into his personal account and not into a client trust account. Mr. Eckersley did not provide an accounting to the family for work performed.

## ***Discipline Process Information Office Update***

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

**801-257-5515 | [DisciplineInfo@UtahBar.org](mailto:DisciplineInfo@UtahBar.org)**



## Fit2Practice: Ways to Improve Our Mental Health and Personal Well-Being

by Michael F. Iwasaki

How many times have we heard that being an attorney is stressful? Whether you are working at a big firm, solo practice firm, or a government agency, stress seems to be a universal theme for the legal community. As attorneys, we are trained to be tough, hard-working professionals. From day one of law school until retirement, we seem to be on a constant rollercoaster ride of highs and lows, from negotiating a huge settlement one minute to being berated and threatened by an angry client the next. It is easy to get caught up in this chaotic world and lose sight of our personal well-being. It is with this understanding that various individuals and organizations have recently begun the long-overdue task of studying and promoting mental health awareness and improvement of well-being within the legal community.

### Recognizing the Problem

In 2016, the American Bar Association Commission on Lawyer Assistance Programs (CoLAP) and the Hazelden Betty Ford Foundation conducted a study to measure the prevalence of substance abuse and mental health concerns among attorneys. Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J ADDICT MED 1 (Jan./Feb. 2016). Of the 12,825 attorneys who responded to the survey, 20.6% showed signs of potentially hazardous and harmful alcohol-dependent drinking. Furthermore, it was noted that the prevalence of mental health issues among attorneys was significant, with 28% of respondents experiencing depression, 23% having high levels of stress, and 19% showing signs of anxiety. *Id.*

The results of this study were concerning enough that it led to the creation of a task force and the ABA Working Group to Advance Well-Being in the Legal Profession. Anna Marie Kukec, *Working Toward Well-Being: Tools Help Lawyers and Legal Employers Deal with Substance-Abuse Disorders*, available at [http://www.abajournal.com/magazine/article/wellbeing\\_lawyers\\_substance\\_abuse\\_toolkit](http://www.abajournal.com/magazine/article/wellbeing_lawyers_substance_abuse_toolkit) (Jan. 2019). They developed and presented Resolution 105 in 2018, asking all stakeholders in the legal profession to review and consider recommendations made in the report *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, by the National Task Force on Lawyer Well-Being. *Id.* at 2. This report concentrated on different methods for reducing

stress and promoting well-being by providing recommendations and action plans for all legal profession stakeholders, including law schools, employers, regulators, bar associations, and the judiciary. The report further emphasized the need to avoid stigmatizing mental health issues within the legal community, as this severely reduces the likelihood that attorneys will seek assistance. National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (Aug. 2017), available at <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>.

### Eliminating the Stigma

Elimination of the stigma surrounding mental health issues is often overlooked as a plan of action for addressing substance abuse and mental health disorders. It is common for these types of personal issues and disorders to be stigmatized in society. This is especially true in the competitive and adversarial legal profession. Many attorneys are apprehensive to seek assistance for fear they will be labeled as “weak” or “incompetent.” CoLAP is working to address this problem. For example, they are creating a video with legal professionals sharing their personal experiences with these disorders. Kukec, *supra*. The hope is that by raising awareness and fostering a feeling of empathy, attorneys will come to understand they are not alone in their struggles. Furthermore, CoLAP has helped develop the *Well-Being Toolkit for Lawyers and Legal Employers*. *Id.* at 3.

### Workplace Support

The *Well-Being Toolkit for Lawyers and Legal Employers* was created to provide further tools for the workplace. It provides strategies and suggestions for encouraging well-being, including an eight-step action plan. This plan is as follows:

MICHAEL F. IWASAKI is a licensed attorney. He received his J.D. from the S.J. Quinney College of Law and B.S. in Psychology from the University of Utah. He currently works for the State of Utah.





- 1) Enlist leaders to help act as role models and supporters.
- 2) Launch a well-being committee.
- 3) Define “well-being” to help guide your agenda.
- 4) Conduct a needs assessment through stakeholder interviews and reviewing policies and procedures that may impact well-being.
- 5) Identify priorities and accumulate “small wins.”
- 6) Create and execute an action plan that involves long-term goals and sustainable activities.
- 7) Create a formal well-being policy.
- 8) Continually measure, evaluate, and improve your well-being program.

Anne M. Bradford, *Well-Being Toolkit for Lawyers and Legal Employers* (Aug. 2018), available at [https://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/lsc\\_colap\\_well-being\\_toolkit\\_for\\_lawyers\\_legal\\_employers.pdf](https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lsc_colap_well-being_toolkit_for_lawyers_legal_employers.pdf). While this action plan is not exhaustive, it is a resourceful guide for employers to implement well-being initiatives within their organizations.

In order to further encourage employers to address mental health and substance abuse within their organizations, the ABA Working Group to Advance Well-Being in the Legal Profession developed and launched the Well-Being Pledge Campaign in September 2018. Debra Cassens Weiss, *Firms Sign ABA Pledge to Tackle Lawyer Mental Health and Substance-Use Issues* (Sept. 10, 2018), available at [http://www.abajournal.com/news/article/aba\\_pledge\\_campaign\\_to\\_tackle\\_lawyer\\_mental\\_health\\_and\\_substance\\_use\\_issues](http://www.abajournal.com/news/article/aba_pledge_campaign_to_tackle_lawyer_mental_health_and_substance_use_issues). This campaign urges employers to commit to offering resources, support, and confidentiality to help improve the well-being of attorneys. At least forty-two law firms have signed the pledge as of early December 2018. Kukec, *supra*.

### Self-Help Strategies

Regardless of whether your workplace chooses to adopt any of the aforementioned support systems or not, there are a number of methods you can take to help enhance your mental, emotional,

and physical well-being. You may need to try different methods to identify those you find most effective, but these four steps can be used to guide the process:

- 1) Acknowledge where you are and how you feel about your current situation. If you are unhappy about something in your life, recognize and reflect on it. Take notes on your feelings.
- 2) After identifying parts of your life that are distressing or in need of change, begin to question them. Figure out the who, what, where, when, why, and how. At this stage, you are just gathering facts. You do not need to come up with solutions.
- 3) Change your experience by going out and trying new things. If you are curious about other areas of law, you might go to a CLE focusing on one of those areas. You could check out a networking event. Or you could volunteer at Tuesday Night Bar. The important part is that you do something different.
- 4) Change your thoughts. By enhancing and expanding your experiences, you are creating new ways of viewing your life. These new perspectives will ultimately help you determine what makes you happy and how you can continue that contentment.

Jeena Cho, *Picking the Path: Take Time to Assess and Create an Intentional, Joyful, Satisfying Life* (Dec. 2018), available at [http://www.abajournal.com/magazine/article/assess\\_create\\_intentional\\_joyful\\_life](http://www.abajournal.com/magazine/article/assess_create_intentional_joyful_life).

### Conclusion

It is clear that mental health and personal well-being have become an integral focus of the legal profession in recent years. It is essential that we, as members of the community, continue to support and actively encourage awareness regarding these issues. We will not only be doing our colleagues a service, but, perhaps more importantly, we will also be helping ourselves. As Bob Carlson, President of the American Bar Association, succinctly states, “To be an ethical, competent lawyer, you first need to be a healthy lawyer.” Bob Carlson, *It’s Time to Promote Our Health: ABA Mobilizes on Multiple Fronts to Address Well-Being in the Legal Profession* (Dec. 2018), available at [http://www.abajournal.com/magazine/article/its\\_time\\_to\\_promote\\_our\\_health](http://www.abajournal.com/magazine/article/its_time_to_promote_our_health).

## RESOURCES

Resolution 105 – <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/105.pdf>

*The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* – <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>

*Well-Being Toolkit for Lawyers and Legal Employers* – [https://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/lsc\\_colap\\_well-being\\_toolkit\\_for\\_lawyers\\_legal\\_employers.pdf](https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lsc_colap_well-being_toolkit_for_lawyers_legal_employers.pdf)

Well-Being Pledge Campaign – [https://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/lsc\\_colap\\_working\\_group\\_pledge\\_and\\_campaign.PDF](https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lsc_colap_working_group_pledge_and_campaign.PDF)

# Young Lawyers Division President's Message – Midyear Report

by Bebe Vanek

Dear Young Lawyer:

“We are YLD.

Serve, Connect with Each Other.

Advocate for Those in Need.”

I love a haiku – ask any current board member and you will hear about my over-haiku-use throughout the year. This haiku above really represents what this year has been about to me. YLD has been busy this quarter and has made significant progress towards increasing member participation and member-driven events. A goal of mine has been to focus on servant-driven leadership and work to inspire creativity in service.

To this end, we created a high school debate scholarship aimed to promote diversity in the legal profession and reinvigorated the YLD Volunteer and Outreach committee to require that the YLD provide at least four community-driven service events during this term. We saw an increase in the participation of public service and government attorneys in the YLD leadership and focused efforts to engage members statewide and reach law students and recent graduates to commit to participate in the YLD.

As the first government attorney to be YLD president in almost a decade, my goal has been to encourage attorneys in nontraditional practice areas into the leadership pipeline. I appointed ten non-private attorneys to the YLD board and have encouraged others in public service to consider service in the coming years. We created the “It’s No Debate! EMBRACING Diversity in Law” high school debate scholarship inspired by the ABA’s commitment to diversity in the profession. We effected a change in the YLD by reinvigorating our commitment to public service through events such as a coat drive, career fair, and food bank event, as well as committing to YLD-anchored pro bono clinics.

I began my service to the profession as a law student, and upon graduation, I became involved with the YLD and was elected president for the 2018–2019 term. Before my term started, I reflected on my eight years of service and identified a few areas for growth in the organization, including a dearth of engaged

members, too few events aimed to encourage law students to become active members, and a lack of community service events.

In response, I am promoting creativity to make our events more accessible to members, including location and relevance, and have increased value to YLD’s over 2000 members through understanding member needs by conducting a membership survey and responding with member-driven events, such as a monthly informal gathering for YLD members called Young Lawyer Social Hour on the last Wednesday of the month at rotating locations. We connected with recent graduates and organized Life Hacks, an evening of axe throwing and advice from YLD members. We connected with law students by organizing events relevant to law students, such as a “Day in the Life” series, an upcoming quarterly program at the University of Utah law school to introduce law students to the diversity of practice areas, and connecting students with mentors in the YLD to hopefully see an increase of engaged members upon graduation.

We’re making some progress on the special projects I identified at the beginning of my term and we hope to see nursing rooms in courthouses and more young lawyers participating in our pro bono clinics through the end of this year. YLD strives to continue to improve the services we are providing our members and to serve in close proximity to those in need in the community. Watch our listserv and website for event updates and contact YLD with questions, concerns, or to get involved.

Sincerely,  
Bebe Vanek

*BEBE VANEK is an Equal Opportunity Consultant at the University of Utah Office of Equal Opportunity and Affirmative Action. In addition to serving as the YLD President, Bebe is the Young Lawyer Delegate to the ABA House of Delegates.*





**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.

**March 7–9, 2019**

**Spring Convention in St. George.** Dixie Convention Center, 1835 S. Convention Center Dr., St. George.



**March 14, 2019 | 4:00–6:00 pm**

**2 hrs. CLE**

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

**March 20, 2019 | 9 am – 3:45 pm**

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

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

**April 4, 2019 | 4:00–6:00 pm**

**2 hrs. CLE**

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

**April 10, 2019 | 8:30 am – 1:30 pm**

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

**April 19, 2019 | 7:45 am – 2:00 pm**

**Business Law Section Annual Meeting.** Salt Lake Marriott Downtown at City Creek, 75 S W Temple.

**May 17, 2019**

**UCCR 21st Annual Utah ADR Symposium.** More details to follow.

**May 23, 2019 | 8:30 am – 4:30 pm**

**Innovation in Practice: 2nd Annual Practice Management Symposium.**

**July 18–20, 2019**

**Summer Convention in Park City.**





# 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.

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

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

## JOBS/POSITIONS AVAILABLE

**The Park City law office of Hoggan Lee Hutchinson is seeking a full-time associate with 2–5 years of litigation experience.** Past experience in real estate, construction, or business litigation preferred. To be considered for this position, please send a resume along with a current writing sample to Nancy Rosecrans at [Nancy@hlhparkcity.com](mailto:Nancy@hlhparkcity.com).

**Gross & Rooney** is seeking an associate with 4–6 years of litigation experience. We specialize in trial work on high stakes matters. Competitive salary, bonus and benefits. No phone calls. Respond via e-mail to [info@grossrooney.com](mailto:info@grossrooney.com).

**Large Salt Lake City law firm, seeks JD (LLM preferred) with 0–3 years of experience to join its high-profile tax section.** Please send resume and inquiries to confidential ad box #601 at [barjournal@utahbar.org](mailto:barjournal@utahbar.org).

## OFFICE SPACE/SHARING

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**Executive Office space available in professional building.** We have a couple of offices available at Creekside Office Plaza, located at 4764 South 900 East, Salt Lake City. Our offices are centrally located and easy to access. Parking available. \*First Month Free with 12 month lease\* Full service lease options includes gas, electric, break room and mail service. If you are interested please contact Michelle at 801-685-0552.

**Attorney in Holladay has an extra, fully-furnished office,** plus potential secretarial station for rent. Office approximately 250 square feet. \$450 per month, includes Wi-Fi. Secretarial station negotiable. Great opportunity for a younger attorney, with potential for spillover work. Contact Joe or Amanda at 801-272-2373.

**VIRTUAL OFFICE SPACE AVAILABLE:** If you want to have a face-to-face with your client or want to do some office sharing or desk sharing. Creekside Office Plaza has a Virtual Office available, located at 4764 South 900 East. The Creekside Office Plaza is centrally located and easy to access. Common conference room, break room, fax/copier/scanner, wireless internet and mail service all included. Please contact Michelle Turpin at (801) 685-0552 for more information.

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