

Utah Bar[®] JOURNAL

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Cover Photo

Milky Way over Pass Lake, taken in the high Uinta mountains by Utah State Bar member Steven T. Waterman.

STEVEN T. WATERMAN is a partner in the Salt Lake office of Dorsey & Whitney LLP. Steve focuses the majority of his photography on night skies and wildlife. This is a photo of the Milky Way above and reflecting in Pass Lake – off the Mirror Lake Highway. Nikon D4s with Nikkor 14-24mm f/2.8, at 17mm, f/2.8, 6400 ISO, 17 seconds.



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

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

GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

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

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

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

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

NO FOOTNOTES: Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial endnotes to convey the author's intended message may be more suitable

for another publication.

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

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

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

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Letter to the Editor

Dear Editor,

I was thrilled to read the President's Message regarding the newly formed Utah Center for Legal Inclusion in the March/April 2017 edition of the *Utah Bar Journal*. I applaud the efforts of UCLI's founders and board to promote diversity in the legal profession. Our bar, bench and community at large are richer when they include the experiences and wisdom of all of our diverse citizens. Please join me in donating to UCLI at www.utahcli.org.

Laura Milliken Gray

LETTER SUBMISSION GUIDELINES

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

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Effecting Change through an Adversarial Process

by Robert O. Rice

I have always liked litigators. My father was a litigator and so was his father. Before law school, I was a *Deseret News* reporter, where my favorite assignment was the courts beat, sitting in the back row watching trial lawyers. Today, many of my good friends are litigators. As I look around the Utah State Bar, many of the lawyers I admire most are litigators.

Not everyone, however, shares my admiration for the trial lawyer. Lawyers hardly live and die by approval ratings, but if we did, our self-esteem would surely suffer. An American Bar Association survey found that Americans view lawyers as “greedy, manipulative, and corrupt,” that “Americans are also uncomfortable with the connections that lawyers have with politics, the judiciary, government, big business, and law enforcement,” and that attorneys “do a poor job of policing themselves.” Leo J. Shapiro & Assoc., *Public Perception of Lawyers Consumer Research Findings*, 2002 A.B.A. LITIG. SEC. REP. 4.

Our poor ratings may be founded on the misconception that our courts are clogged by a rising and out-of-control tide of lawsuits filed by litigators representing big business. The fact is, however, on a per capita basis fewer lawsuits are filed today than in the early nineteenth century. ALEXANDRA LAHAV, IN PRAISE OF LITIGATION, 145 (Oxford Univ. Press 2017). Other statistics belie the common perception that the courts are the playground of trial lawyers and big business. “About 60 percent of the cases [in federal court] involve individuals suing organizations, and only 20 percent involve organizations suing one another.” *Id.* at 12. In other words, in our federal courts, lawyers are not waging corporate litigation wars on behalf of their business clients against other well-funded business clients. Instead, litigators are representing individuals vindicating their rights against organizations, many of whom are businesses and other organizations that may have injured the little guy.

So, one can hardly say that litigators are trigger-happy serial claim filers churning cases on behalf of well-heeled business clients. This is, of course, not to say that all is well in our courts

and law firms. The cost of litigation is a huge issue in Utah and elsewhere. Access to justice for the low- and middle-income Utahns is a major issue and dominates most agendas during Utah Bar Commission meetings. But these are systemic problems (more on that later) that are not caused by my friends, the litigators.

To the contrary, it is the litigator that has helped shape governance in our society in fundamental ways. *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) may be the best example of how litigators “can spur social change.” *Labav* at 43. *Brown*, of course, struck down laws segregating America’s schools. Some scholars argue that ensuing social unrest that led to the Civil Rights Act of 1964 was triggered by *Brown* and the slow rate at which some states responded to *Brown*’s order to desegregate “with all deliberate speed.” 349 U.S. at 301. In any event, it was the litigators who made their appearances in a federal court in *Brown* who took the first steps to seek a judicial remedy that was desperately needed.

There are further examples of litigators expanding the democratic universe. Litigators fought off the Nixon administration’s attempt to enjoin the New York Times from publishing the pentagon papers. *New York Times v. United States*, 403 U.S. 713 (1971). That “lawsuit helped enforce the law – in this case enforcing the First Amendment’s protection of freedom of the press.” LAHAV at 4. There are other examples of litigators changing the world. Not so long ago, a disabled veteran confined to a wheelchair could not eat at Taco Bell. In 2002, however, four plaintiffs sued the restaurant seeking relief under the Americans with Disabilities Act. *Moeller v. Taco Bell Corp.*, 816 F.Supp.2d 831 (N.D. Cal 2011). After years fighting for their clients, litigators succeeded in settling with Taco Bell and the restaurant implemented physical changes that met and even exceeded ADA requirements. LAHAV at 31. In perhaps less profound, but nonetheless historic, ways, litigators have changed the nature of everyday living for us all. Two years ago, litigators convinced a federal court judge to rule in their



client's favor in a case seeking to determine that the song "Happy Birthday to You" did not enjoy copyright protection. The victory for these litigators now allows you to sing this common refrain without the threat of having to pay royalties. Ben Sisario, *"Happy Birthday" Copyright Case Reaches a Settlement*, N.Y. TIMES, Dec. 10, 2015, at B8.

Many of my litigator friends are subject to unfortunate criticism for their participation in the adversarial process.

There are a lot of things wrong with litigation in the United States, and these problems have been pointed out by critics on the right and on the left of the political spectrum. One would think, however, that litigation is all cost and no benefit. Policymakers and judges seem to have forgotten that lawsuits are a social institution with democratic benefits and, as a result, have been willing to champion reforms of the legal system that limit lawsuits without appreciating that these limitations erode our democratic form of government.

LAHAV at x. The fact is that litigators, including your friends and colleagues in the Utah Bar, have moved mountains to effect social change through the adversarial process.

Take, for example, Alan Sullivan, a long-time litigator who led the case to exonerate Debra Brown, who spent seventeen years in prison for a murder she did not commit, before Sullivan convinced a Utah court of her factual innocence in post-conviction litigation. If Sullivan's efforts do not contribute to giving back to litigators their good name, nothing will. Then there is Chris Wharton, a family law litigator who obtained the first same-sex common law marriage adjudication in Utah, which allowed his client to collect needed benefits from a spouse. Remember the late Brian Barnard, a Utah civil rights lawyer who fought against government endorsement of religion, private clubs that barred access to women, and overcrowded jails. He was a litigator through and through. Utah Bar Commissioner Cara Tangaro, and her co-counsel, Scott Williams, recently succeeded in obtaining an acquittal for their client, John Swallow, the subject of one of the most intensive prosecutorial efforts in recent history.

These litigation heroes aside, there is a lot about litigation that is broken. The cost of litigation continues to escalate, making access to justice unattainable for many. But even here, litigators lead the charge to correct this systemic problem. The Utah State Bar, comprised of litigators and other practitioners, is working

hard to improve access to justice. The Bar's Pro Bono Commission and Modest Means Program have greatly expanded legal services to low- and middle-income Utahns. Not coincidentally, it is litigators who contribute their time, for free and at reduced rates, to these programs. Utah Supreme Court Justice Dino Himonas (not surprisingly, a former litigator) is leading the effort to create a new kind of legal professional, the licensed paralegal practitioner, to provide low-cost legal services where it is needed most, in family law, debt collection, and landlord-tenant disputes. Utah President-Elect John Lund (you guessed it, a litigator himself) has created Licensedlawyer.org, an innovative website where consumers can find low-cost legal representation. The Bar's new Limited Scope Representation section, comprised of family law practitioners and other litigators, is identifying new ways to provide affordable, a' la carte litigation services to further expand access to justice.

We litigators, and the craft we practice, make significant contributions to the world in which we live. Our adversarial system is far from perfect, but still it is the litigator who strives to improve our deficiencies. So, hail to the litigator and cheers to litigation.

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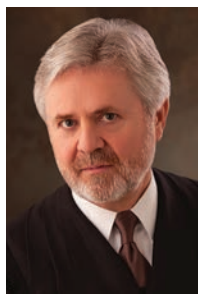
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Understanding the 14th Amendment

Editor's Note: The following short essays appeared in the Law Day special edition sponsored by the Utah State Bar, the Utah Judiciary, and the Utah Commission on Civic & Character Education. The special edition was included in the print version of Utah's leading newspapers. Although written with a lay audience in mind, these essays contain worthwhile messages, and we reprint them here, with the authors' permission, in case any of our readers missed them.

Bending Toward Justice

by Judge J. Frederic Voros, Jr., Presiding Judge, Utah Court of Appeals



Twice in the last month – once in a law office and once in an art museum – I saw a print of a 1963 painting by Norman Rockwell. He called it “The Problem We All Live With.” It depicts a six-year-old girl walking to school. Two deputy U.S. marshals walk ahead of her, two behind. The girl, dressed in a white

dress and carrying her schoolbooks, is African-American. Her name is Ruby Bridges.

The school was William Frantz Elementary in New Orleans. Rockwell shows the girl and the marshals but not the protestors. They were throwing things and shouting. We can all imagine the hateful things they shouted. But the girl walked on. One of the marshals later recalled, “She showed a lot of courage. She never cried. She didn’t whimper. She just marched along like a little soldier.”

White parents kept their children home from school and teachers refused to teach. For over a year Ruby’s teacher, Barbara Henry, taught Ruby one-on-one “as if she were teaching a whole class.” But not that first day. Amid all the commotion, Ruby spent the day in the principal’s office. On the second day, a white Methodist minister named Lloyd Anderson Foreman walked his five-year-old daughter through the angry mob. Later more white children began to attend, some teachers returned, and protests subsided.

Ruby’s family paid a price for daring to claim the promise of equality. Her father lost his job, their local grocery store refused

to sell to them, and her sharecropping grandparents lost their land. But the Bridges family also had allies. Neighbors hired her father, protected their house, and walked behind the marshals’ car on the way to school. Fifty years later, Ruby Bridges and the minister’s daughter, Pam Foreman Testroet, met again at a Frantz Elementary School reunion – sisters in the struggle to transform American democracy.

Paving the way for the integration of Frantz Elementary School was the United States Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). A unanimous Court held that racially segregated public schools denied black Americans equal protection of the law under the Fourteenth Amendment to the United States Constitution.

That amendment, adopted in 1868, states in part, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” As Justice Harlan wrote for the Court in 1896, that amendment declares, “All citizens are equal before the law.” *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896).

But equality under the law is easier to promise than to deliver; Constitutional promises are not self-executing. Equality must be won one battle at a time – some fought by soldiers at places like Gettysburg and Cold Harbor, some fought by civilians at places like the Edmund Pettus Bridge and William Frantz Elementary School. But these battles have indeed transformed American democracy.



Norman Rockwell's *The Problem We All Live With* with courtesy of the Norman Rockwell estate.

Only 6% of Americans were entitled to vote in the election of 1789; really, only landed white men could be said to be “equal before the law.” But thanks to the Reconstruction Amendments, African Americans, female Americans, and gay Americans can now claim a measure of equality under the Constitution. So far the history of America has borne out the words often attributed to Dr. Martin Luther King, “The arc of the moral universe is

long, but it bends toward justice.”

But battles remain to be fought – the mass incarceration of young black men comes to mind. Realizing the promise of equality, more fully transforming American democracy, will require many more Americans with the courage and moral conviction of Ruby Bridges.

Gender Discrimination and the 14th Amendment: Equality Under the Law

by Judge Michele Christiansen, Utah Court of Appeals



At the heart of the United States Constitution's guarantee of equal protection lies the simple command that the government must treat all citizens as competent and worthy individuals, not simply as a stereotype.

— Justice Sandra Day O'Connor

It was only 145 years ago, in 1873, that the United States Supreme Court issued its infamous decision rejecting female lawyer Myra Bradwell's bid for a law license. Bradwell sought to challenge the Illinois law that barred women from obtaining law licenses and argued that her right to a livelihood was protected by the United States Constitution. The Court observed that the “difference in the respective spheres and destinies of man and

woman” prevented women like Bradwell from assuming an equal place beside men in the workforce because “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.” *Bradwell v. State*, 16 Wall. 130, 141 (1873). The Court’s decision treated Bradwell not as an equal citizen under the law, but instead limited Bradwell’s ambitions to practice law alongside her husband due to a characteristic over which she had no control – her sex. Bradwell’s challenge to the Illinois law was based on the Fourteenth Amendment to the United States Constitution. Just five years before the decision in Bradwell’s case, on July 28, 1868, the Fourteenth Amendment to the United States Constitution was ratified by the required three-fourths of the states. The Equal Protection Clause of that amendment provides that, “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Thus, the plain language of the Equal Protection Clause imposes a duty on state actors to treat similarly-situated individuals alike. However, using equal protection constitutional principles to protect against gender discrimination has been a relatively recent idea, and the recognition of American women as equal citizens and possessors of constitutionally-protected rights has only slowly evolved over the course of our country’s history.

For many years, the prevailing notion was that state and federal governments could withhold from women the same opportunities afforded to men. As recognized by the Supreme Court in *Frontiero v. Richardson*, these notions contributed to our nation’s “long and unfortunate history of sex discrimination.” It was not until the middle of the twentieth century that the Supreme Court began to apply equal protection principles to strike down government practices of racial discrimination and became receptive to arguments about the applicability of equal protection principles to gender discrimination. While duly enacted legislation is generally presumed valid and federal courts are not meant to be agents of social change, the Constitution requires courts to consider state action that makes suspect distinctions between similarly-situated groups of people with varying levels of skepticism.



Myra Bradwell

The level of scrutiny applied to an equal protection claim is relevant because it often affects the outcome of the case; the more rigorous the scrutiny of the governmental action, the more likely that state action is to be ruled unconstitutional. Courts traditionally analyze alleged equal protection violations using one of the following three standards of review: strict scrutiny, intermediate scrutiny, or rational basis review. Since 1971, the Supreme Court has held that laws or government policies that draw distinctions on the basis of gender are subject to heightened intermediate judicial scrutiny.

Of course, this does not mean that no law can discriminate or make classifications, only that a law cannot discriminate on an improper basis. To be sure, the sexes are not alike in every regard and the Supreme Court has upheld differential treatment of men and women based on relevant sex-specific biological differences. “‘inherent differences’ between men and women . . . remain cause for celebration,” *U.S. v. Virginia*, 518 U.S. 515, 533 (1996). Thus, the Equal Protection Clause cannot and should not be read in a way that requires absolute equality for everyone, but rather can be legitimately applied in a way to provide both genders freedom from discrimination, as one’s gender bears no relation to one’s ability to perform or contribute to society. As Justice Ginsburg stated in *U.S. v. Virginia*, the Court has repeatedly recognized that equal protection requires that both genders have “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *Id.* at 516. As equal members of society, women’s contribution to our communities, schools, businesses, and courts can be accomplished through the application of the same qualities that male citizens have undertaken for years – intelligence, hard work, patience, and a commitment to integrity, honesty and fair dealing – and shouldn’t be limited because of stereotypical notions. Fortunately, the Supreme Court has recognized that generalizations about women no longer justify denying them equal opportunities. Myra Bradwell would be proud.

A Primer for Young People – Due Process in Juvenile Court

by Judge Michael F. Leavitt, Fifth District Juvenile Court



The clock on the car's dashboard reads "12:17" as you pull into the driveway. Once again, you have violated your twelve o'clock curfew. "Dad is gonna be so mad," you mutter as you scramble out of the car to get inside. As you open the front door, your father is seated in his easy chair with reading glasses perched on the end of his nose and book in hand.

"You are late," he says. "Again."

"But, Dad, I can explain..."

He cuts you off. "Not another word. You're grounded for a week."

And just like that, in a matter of seconds, you were charged, tried, and sentenced for failure to obey curfew without a chance to even state your case.

When young people are charged with allegations that would be crimes if committed by adults, they often have to come to juvenile court to answer to those allegations. Many assume that their encounter with the juvenile court judge will be just like dad in the middle of the night. Not so. While parents (unfortunately!) are not bound to the due process provisions of the United States and Utah Constitutions, juvenile courts are. That means that when young people attend juvenile court, they have the right to have a judge hear them out, to explain themselves, and even require a prosecutor to prove beyond a reasonable doubt that they violated the law.

It has not always been that way. Before 1967, juvenile courts were extremely informal. To focus on rehabilitation, rather than punishment, the prevailing belief was that informality allowed courts the flexibility to find out about a child and determine how to best send them down a law-abiding path to a successful adulthood. As such, proponents asserted that this did not necessarily require a formal trial, notice of possible consequences, or the right of the juvenile to talk to an attorney.

Good intentions, but the informality often led to unfair results.

This became evident in the United States Supreme Court landmark decision, *In re Gault*. Back in 1964, Gerald Gault was a fifteen-year-old boy living in Arizona who was arrested, along with a buddy, for making an "obscene" phone call to a neighbor. At the time he was picked up, Gerald's parents were at work and no one attempted to notify them of his arrest. He was taken to youth detention where his mother, after her own investigation as to his whereabouts, discovered him later that evening.

The next afternoon, Gerald, his mother and brother appeared before the judge in his chambers. Only the judge and two probation officers were present. Mrs. Cook, the recipient of the infamous phone call, was not. The court placed no one under oath; nor did the court record or transcribe the proceeding. According to later testimony from those present, the judge questioned Gerald about the call. The judge claimed Gerald admitted to making it, while his mother later testified that he only admitted to dialing a phone number and handing the phone to his friend. After the informal discussion, the judge decided to "think about it" and sent Gerald back to detention where he remained for five days. Upon release, he was allowed to return home, but was informed to return to court a few days later.

At the next hearing, the judge heard further statements about whether Gerald was involved in making the call. There remained a disagreement about what he actually said or did. In spite of this, the judge sentenced Gerald to be removed from his home and placed in the State Industrial School until he turned twenty-one years old.

At no point was Gerald given the right to talk to an attorney, the right to hear evidence from his accuser or ask her questions, or even have prior notice that he might be removed from his parents' custody for the remainder of his childhood.

Ultimately, Gerald's case made it all the way to the United States Supreme Court. There, the Court held that "due process has a role to play" in juvenile courts. It held that children have the right to notice of the allegations in advance of a hearing or trial with an opportunity to prepare. They have the right to have an attorney present and the right to confront witnesses and cross-examine them, and they have the right not to testify against themselves.

In the spirit of *Gault*, Utah law includes additional requirements to ensure that juveniles enjoy fundamental fairness in delinquency cases. They have the right to call their parents and an attorney immediately if they are arrested. They have the right to have their parents present at all proceedings (even if you do not want them there). Juvenile courts are required to release juveniles being held in detention to their parents unless specific findings are made justifying continued detention. In fact, just this year, the Utah Legislature amended the Juvenile Court Act, establishing additional legal requirements for juvenile courts to consider

before placing or keeping young people in detention or removing them from their parents' custody.

Ultimately, the law cannot require mom or dad to listen to your explanation for being late, whether it be a flat tire, falling asleep at your friend's house, or your cellphone battery dying. But if you find yourself in juvenile court, the Fourteenth Amendment requires your juvenile court judge to listen and consider the excuse. Just make it a good one.

Lady Justice and the Equal Protection Clause

by Judge Paul C. Farr, Third District Justice Court



One evening while eating dinner with my family, I was surprised when one of my children informed me that I was “the man.” This comment was not in the “you are awesome” sense of the phrase. Rather, its connotation was “you represent the oppressive governmental system that holds us down.” Oddly enough, I was unaware

that as a judge, I might be thought of in that way. I had previously heard of “the man,” although I had never personally met him. As I reflected for a bit, I recalled in my youth that I too had occasionally manifest some resentment for “the man.” Here I was, sitting in my kitchen, realizing that I had become “the man.”

I graduated from high school in a small Utah farming community, attended local colleges, and graduated from law school (the first in my family to do so). In 2010, after ten years of law practice, I was appointed to the judiciary as a justice court judge. Just as happens to the many other judges, I put on the black robe and became a representative of the judicial system or as my children put it, “the man.”

Judicial systems are often represented by a statue known as Lady Justice. In one hand Lady Justice holds a scale, representing her duty to weigh the merits of each side of a case in order to reach a decision. In the other hand she holds a sword, representing her authority to act or impose judgment. Perhaps Lady Justice's most important feature is a blindfold, which represents the

concept that justice is blind. Lady Justice weighs the merits of a case and imposes judgment that is blind to the individual characteristics of the parties before her.

Consider this key language of the Fourteenth Amendment to the U.S. Constitution: “nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.” In both the creation and enforcement of the law all people are to be treated equal, without regard to individual characteristics. Generally, a legislature may not create a law that treats different categories of people differently. For example, a law that sets a speed limit at 50 mph for right-handed individuals but 70 mph for those that are left-handed would violate the Equal Protection Clause. Similarly, a judge may not apply the law differently to different categories of people. For example, when on trial for theft if a judge afforded all right-handed defendants the right to be represented by an attorney but denied that right to those that were left-handed, that would violate the Equal Protection Clause (as well as other constitutional rights).

These important rights are applied in Utah courts on a daily basis. In 2016 there were 646,488 cases filed in Utah's different courts. As indicated below, these cases were presided over by 244 judges, magistrates and commissioners (all grouped below as judges, including those that serve part-time).

- Utah Supreme Court: 5 judges, 585 cases

- Utah Court of Appeals: 7 judges, 946 cases
- Utah District Courts: 83 judges, 171,620 cases
- Utah Juvenile Courts: 33 judges, 30,434 cases
- Utah Justice Courts: 98 judges, 428,809 cases
- Utah Federal District Court: 18 judges (including 3 bankruptcy judges and 6 senior judges), 2,443 civil/criminal cases and 11,651 bankruptcy cases

Each of these courts and judges play different roles. However, all are responsible for ensuring equal protection of the laws for

all individuals appearing before them. It is critical to the public's confidence in our judicial system that judges always "wear" Lady Justice's blindfold so that justice may truly be blind and that all may receive equal protection under the law.

It is an honor to serve the people of Utah as a judge. It is my goal, as I am sure it is the goal of most judges, to apply the law as written by the legislature (the people's representatives), to apply the law equally, consistently and fairly, and to treat everyone that comes into court with the professionalism and respect due every member of our community. In doing my part, I envision the day when my children view me not as "the man," but as the blindfolded lady with a sword!



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Utah's Sentencing Guidelines: A Forward-Looking, Boldly Transparent Call for Objectivity, Proportionality, and Fairness

by Jennifer L. Valencia

From August 7–9, 2016, the Utah Sentencing Commission (Commission) hosted the National Association of Sentencing Commission's Annual Conference in Salt Lake City for the first time in nineteen years. Attendees included the highest number of local representatives ever; dozens of state representatives from approximately twenty other states; federal representatives; researchers; scholars; legal practitioners; universities; legislators; members of the judiciary from Utah, Massachusetts, New York, and Pennsylvania; and international representatives from Scotland, England and South Korea. We were especially honored to have Utah Governor Gary R. Herbert and Utah Supreme Court Chief Justice Matthew Durrant welcome attendees and provide their thoughtful insights into the unique functioning of Utah government and criminal sentencing specifically.

Feedback received during and after the conference has been overwhelmingly positive and complimentary of the State of Utah and its people. In particular, attendees repeatedly noted the exemplary level of leadership, respect, and collaboration demonstrated by our states' representatives. Chief Justice Durrant's opening comments themselves were demonstrative, indicating that, "[i]n Utah, we are fortunate to have a tradition of collaboration among the various policymakers in the criminal justice system. Such collaboration is a linchpin of successful reform. This is where our Sentencing Commission has played a critical role."

Utah engaged in large-scale criminal justice reform efforts beginning in 2014 with what has been referred to as the "Justice Reinvestment Initiative" (JRI) and culminating in House Bill 348 in the 2015 Legislative Session. While not all states have engaged in JRI specifically, large-scale criminal justice reform, including sentencing reform, has occurred in a majority of the states and is pending in the federal government. The national

conference provided an opportunity to compare and contrast Utah's experience, to both learn from the experience of others and to share our own experiences.

Some of Utah's unique attributes include that:

- we have a twenty-seven-member statutorily designated Sentencing Commission with broad representation across the entire criminal justice system (most are much smaller);
- members regularly and continuously engage in sentencing policy discussions regarding not only the guidelines themselves but legislative coordination as well;
- our Commission was created by the legislature, but is accountable to, and inclusive of, all three branches of government; and
- our Commission members are sincerely diligent and considerate, not only of their own roles in the system, but of the impact of their decisions system-wide.

In many ways, the Commission is uniquely a product of the respect and collaboration demonstrated by the leaders of our three branches of government; and therefore, uniquely a product of Utah. The guidelines produced by the Commission are also uniquely a product of Utah. Federal guidelines, as well

JENNIFER L. VALENCIA is the Director of the Utah Sentencing Commission. She is an elected member of the Executive Committee of the National Association of Sentencing Commissions and serves on the Judicial Council Committee on Pretrial Release & Supervision.



as many other states' guidelines, reflect a recommended time range at or near statutory maximums. Such guidelines are often viewed as a mechanism by which mandatory minimums, or "truth-in-sentencing," schemes are implemented; a mechanism by which to ensure retribution in advance of an actual sentencing hearing. Such schemes have increased incarceration rates, corresponding costs, collateral consequences, and have shifted discretion away from judges and toward prosecutors. However, they have not demonstrably reduced crime rates, recidivism rates, or improved outcomes system-wide.

Chief Justice Durrant's comments were particularly illuminating, indicating:

Few, if any changes of this magnitude are accomplished overnight. Identifying problems and developing ideas come relatively easy. Implementation is the hard part. We will need years to accomplish what is perhaps the greatest challenge of all – changing a culture embedded in our criminal justice policies that views incarceration as the best response to crime.

In that sense, Utah's guidelines are a step ahead. Utah's guidelines have not simply embedded a policy that incarceration is the best response to crime. Utah's guidelines are not simply a backward-looking analysis of what has been done over the past three, five, ten years, or more. They are not simply a means for the criminal justice system to "formalize" doing what has always been done. They are fundamentally a forward-looking, boldly transparent call for objectivity, proportionality, and fairness at the point of sentencing and beyond. They provide much-needed structure consistent with data and research, while still ensuring that the sentencing authority retains appropriate discretion.

Utah's guidelines can be considered less punitive in comparison to other guidelines systems. Where other systems have become reactive to anecdotes and individual cases, Utah has remained committed to a more complex, proactive, long-term approach. Swift, certain, consistent, and proportionate responses to behavior (both negative and positive) at the point of sentencing and beyond is easier said than done. However, the approach is not only sound public policy but sound fiscal policy as well. If every offender served the full length of his or her sentence authorized by statute, Utah would not only need the two prisons Utah's Department of Corrections currently operates, but

forty-six prisons total. Instead of taxing Utah citizens sufficient to support a corrections budget of \$300 million, we would need to support a corrections budget of approximately \$7 billion, or twenty-three times the current budget. That cost alone does not remotely approximate the social impact upon families, the economy, education, healthcare, or the elimination of any meaningful effort to engage in restorative justice.

Utah's guidelines therefore balance not only the need for accountability and punishment but also the awareness that the criminal justice systems' response(s) can actually compound the effect of crime itself. They are by no means perfect, and the Commission will continue necessary refinement annually to incorporate ongoing research and data. However, they do provide Utah with the best opportunity to change the anticipated trajectory of individual offenders' behavior. They are an efficient and effective structure by which our criminal justice system can improve outcomes system-wide.

The complete 2016 Utah Adult Sentencing & Release Guidelines can be located at www.sentencing.utah.gov or hard copies may be requested from sentencingcommission@utah.gov.

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Co-parenting with a Non-cooperative Parent; Potential Alternatives to Reduce Conflict

by David R. Hartwig

Co-parenting is the *de facto* parenting status in Utah. But, problems do exist with the system and many participants experience ongoing conflict. Alexa N. Joyce, *High-conflict Divorce: A Form of Child Neglect*, 54 Fam. Ct. Rev. 642 (2016). The conflict adversely affects not only the parties but also the children. Whatever the cause of the conflict, very little is known about parents involved in the process and whether the options available to them are effective. Kelly Mandarino et al., *Co-parenting in a Highly Conflicted Separation / Divorce: Learning About Parents and Their Experiences of Parenting Coordination, Legal, and Mental Health Interactions*, 54 Fam. Ct. Rev. 564 (2016). This article reviews co-parenting in Utah, problems associated therewith, and available corrective resources.

GENERAL PREFERENCE FOR CO-PARENTING

In Utah, and numerous other states, courts are embracing joint, or co-parenting, custody orders as a general standard. Evidence exists to support co-parenting as the best solution for children in divorce. University of New Hampshire Cooperative Extension, *Co-Parenting After Divorce*, umassmed.edu/uploadedFiles/eap2/resources/Families_and_Parenting/Coparenting%20After%20Divorce.pdf (last visited April 1, 2016); Men's Divorce, *Parallel Parenting: A High-Conflict Co-Parenting Model*, mensdivorce.com/parallel-parenting-high-conflict/ (last visited April 1, 2016).

Co-parenting works, and is a great solution for, children of divorce where the parents are capable of working together with relatively equal power. However, when one parent is more controlling, or feels more entitled, difficulties do arise and conflict increases. Joyce, *supra*, at 644; see also Laurie S. Kohn, *The False Promise of Custody in Domestic Violence Protection Orders*, 65 DEPAUL L. REV. 1001, 1051–52 (2016). And, this problem is not limited to narcissistic or obviously controlling

parents; it involves parents who may simply feel vulnerable or attacked. See Mandarino, *supra*, at 571; Joyce, *supra*, at 644. This conflict is probably part of the reason for the divorce. Joyce, *supra*, at 644–45. The conflict continues, and escalates, during the divorce process, *id*; it also continues and increases as the controlling parent feels justified by the court's apparent support of his or her claim of joint physical custody and co-parenting. See, Kohn, *supra*; Men's Divorce, *supra*; and Vicky Campagna, *Special Masters: One Way to Deal With Difficult, Chronic Post-Divorce Conflict*, available at <http://winatttrial.com/Special%20Masters.htm> (last visited April 1, 2016).

Utah has a presumption for joint legal custody. Utah Code Ann. § 30-3-10(1)(b). Joint physical custody is defined as occurring when a child is with a parent more than 30% of the year. *Id.* § 30-3-10.1(2)(a). Under Utah's statutory minimum parent-time, the so-called non-custodial parent has the child for approximately eighty-seven overnights, or 24% of the time. *Id.* § 30-3-35. That means that a push to the 30% line is not difficult, and grants a parent more time, and lower child support. Both are an impetus for a parent to push for joint physical custody and co-parenting. Additionally, Utah's optional schedule for parent-time, Utah Code section 30-3-35.1, provides the non-custodial parent with 145 overnights, or 40% of the year, thereby creating joint physical custody. *Id.* § 30-3-35.1(1).

DAVID R. HARTWIG is a solo attorney in Salt Lake City where he practices family law and other areas of litigation. He has received training as a mediator and special master.



EFFECT OF PRESUMPTION

Despite Utah Code Section 30-3-10(1)(b), there is no presumption for joint physical custody or co-parenting. Utah Code Ann. § 30-3-10(5). But, as noted above, joint physical custody is specifically defined as having the child with a parent 30% of the time. *Id.* § 30-3-10.1(2)(a). Knowing that definition provides a controlling parent impetus to push to meet that 30% level for joint physical custody by either granting a few extra days of visitation or ordering Utah's optional schedule for parent-time. *Id.* § 30-3-35.1.

Plus, there is a certain judicial economy and safety in a judge ordering the presumptive joint legal custody along with joint physical custody, through the optional parent-time schedule or through slightly altering the statutory minimum schedule. See Maritza Karmely, *Presumption Law in Action: Why States Should not be Seduced Into Adopting a Joint Custody Presumption*, 30 NOTRE DAME J.L., ETHICS & PUB. POL'Y 321 (2016), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/ndlep30&div=17&id=&page=> (last visited April 1, 2016). Following those presumptions, any judicial decision is relatively safe from appellate reversal. And, variance from those presumptions will

require additional detailed findings of fact to justify the variance or risk reversal on appeal. As such, most counsel, and most informed litigants, know that asking for joint physical custody, or co-parenting is the best, and safest request to make. The other party will be required to carry an additional burden to rebut that preference, and custody evaluators, guardians ad litem, and others involved in the litigation know of the preference and the safe haven it can provide.

The only way to push through the presumption is to create conflict in the case. And, the controlling parent knows that. Kohn, *supra*. All the controlling parent has to do is dig in her or his, heels, and stick to co-parenting as the final result, regardless of whether that is truly in the best interests of the children. Joyce, *supra*, at 644. As such, the cooperative parent collapses and agrees, through mediation or fear of trial (and the risk of appearing to be the parent causing the conflict thereby losing custody), to give the controlling parent joint physical custody, or co-parenting. Kohn, *supra*.

Either way, the controlling parent can push through mediation using fear and control, as well as the pocket book, to obtain joint legal and physical custody of the children. Kohn, *supra*, and Joyce,

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supra, at 645. The controlling parent learns that the court will approve the same, thereby increasing the controlling parent's confidence that his or her abilities to control the cooperative parent will continue without judicial interference. Kohn, *supra*.

PROBLEMS

Post-divorce conflict is bad for the children. See *Coparenting After Divorce*, *supra*; *Parallel Parenting: A High-Conflict Co-Parenting Model*, *supra*; Campagna, *supra*; and Joyce, *supra*, at 644–47. It is also stressful for the cooperative parent, who often is forced to relinquish power and rights to the controlling parent, further increasing anxiety and conflict. Joyce, *supra*; and Kohn, *supra*.

Separation and divorce, particularly if associated with conflict, can be one of the most stressful and vulnerable times in a parent's life, which leads to destructive behavior or rage toward the other parent. Mandarino, *supra*, at 572. The controlling parent's demand upset routines, schedules, and family events often interfering with set parent-time schedules thereby causing the children to not know where they will be, when, and what they can plan. Campagna, *supra*. It can go as far as the children not even knowing when they will be with the cooperative parent or communicate with that person. *Id.*

These difficulties do occur in Utah, as noted by Julie K. Nelson, *Gatekeeping and Co-parenting after Divorce*, KSL.com, available at <http://www.ksl.com/?nid=1009&sid=28915854> (last visited April 1, 2016). She confirms that divorce is frequently followed by acute hurt and shock and that a parent may use various types of conduct to strike at the person perceived to have caused the pain and to wield unreasonable power. She uses the term “gatekeeping,” but to this author, it is simply the controlling parent. Some of the behaviors she lists include making communications with the child difficult; refusing to communicate with the other parent about the child; being derogatory or using negative nonverbal communications about the other parent to or with the child; not accommodating requests for adjustments when requested while demanding that his or her demands for adjustment be granted; scheduling conflicting activities for the child; being intrusive to, or disruptive of, the other parent's time; and micromanaging the child's life when with the other parent. These are scenes and scenarios that are often seen by family law practitioners and which are often brought before the courts. See also, Joyce, *supra*, at 644–45.

Julie K. Nelson echoes the concept of “gatekeeping,” which

appears to have been promoted by William G. Austin, Ph.D. One definition he provides is that gatekeeping is a collection of beliefs and behaviors that ultimately inhibit a collaborative effort between men and women in family work by limiting party's opportunities for learning and growing through caring for home and children. William G. Austin, *Parental Gatekeeping in Custody Disputes: Mutual Parental Support Divorce*, 25.4 *American Journal of Family Law*, 148 (2011). That definition does fit in with the concept of a controlling parent and a cooperative parent.

Associated therewith, the children are often pulled by the controlling parent. *Coparenting After Divorce*, *supra*, at 3–6; *Parallel Parenting: A High-Conflict Co-Parenting Model*, *supra*; and Joyce, *supra*, at 647. The children are coerced into meeting demands for loyalty, love, or commitment. And, the children's social structure can be upended; such things as having to miss soccer practice or make choices as to where they want to be for holiday or family events while facing the rejection of the controlling parent. Nelson, *supra*. There can also be inconsistency in rules for the children that can create a system where children use the differences to gain power over the parents. *Coparenting After Divorce*, *supra*, at 3–6; and, Joyce, *supra*, at 644–45. In any event, conflict continues and escalates. Nelson, *supra*.

SOLUTIONS

Litigation

The existence of a controlling or entitled parent is an issue that needs to be identified in order to make an appropriate decision of what is in the best interests of children involved in divorce. Be it during the divorce action itself, or post-divorce, litigation is time consuming and expensive to the parties, both financially and emotionally. Joyce, *supra*, at 644–45. In courts with commissioners, the time to a hearing is at least four weeks, if not longer. See Utah R. Civ. P. 101. And the children, through the tugs and pulls exerted to maintain if not increase the control, can experience the ill effects caused by the controlling parent. *Parallel Parenting: A High-Conflict Co-Parenting Model*, *supra*, and, Joyce, *supra*, at 644–45.

While having actual orders in place is extremely valuable, as it provides the parties with specific rights and obligations, it is the enforcement of those orders that requires repeated returns to the court. Joyce, *supra*, at 644. Again, the cooperative parent faces

the choice of increased expense of counsel and the weeks of delay to make the controlling parent comply with orders; orders which were most probably reached through mediation and agreement of the parents. Joyce, *supra*, at 647, and Kohn, *supra*.

Parent coordinator

A parent coordinator is an individual with a specifically defined role exercising enumerated powers. Utah R. Jud. Admin. 4-509. The individual is a psychologist or counselor, not an attorney. *Id.* R. 4-509(4). The individual's training is to solve problems, identify mental or social issues, and attempt to treat or alter the offending behavior. As a parent coordinator, the individual is charged to identify personality problems and teach the parents how to alter adverse behaviors or educate the parents in ways of working with, or around, those problems. The parent coordinator's role is to consult with the parties and make recommendations directly to the parents about how the children's needs can best be served. *Id.* R. 4-509(1)(A). The role of the parent coordinator is like that of the mediator in that the parent coordinator seeks to elicit cooperation and agreement between the parents. *Id.* The function of the parent coordinator is to make suggestions to the parties that are in the best interests of the children and are solutions and compromises that the parents can accept and implement. *Id.* R. 4-509(1)(B). The parent coordinator is not trained, nor in a position, to legally interpret the court orders and applicable statutes to make a decision interpreting or applying those orders and statutes.

Additionally the parties are paying for the parent coordinator's time involved in identifying the parents' problems and attempting to educate the parents and change the parents' modes and methods of interaction. In fact, the parents are required to attend, and pay for, not less than four hours of face-to-face joint consultations. *See id.* R. 4-509(2)(a)(i). Parents engage in all these activities without the parent coordinator making a decision on the application of the order. Utah Parenting Services, *Special Master Services*, <http://utahparentservices.com/special.html> (last visited April 1, 2016); and Mandarino, *supra*, at 573. A controlling parent can easily use his or her control to manipulate the issues arguing that the order is somehow unfair and requires changes in his or her favor. A parent coordinator is not appropriate in situations where a parent is afraid of retaliation from the other parent, where a parent does not feel that he or she can be honest and open about parenting preferences, where information about the child is not openly shared, or where the other parent may present a danger to a

child. Utah Courts, *Parent Coordinator*, https://www.utcourts.gov/howto/family/parent_coordinator/ (last visited April 1, 2016); and Mandarino, *supra*, at 573.

This lack of ability to make decisions and to effectively address legal matters is a major source of difficulties experienced by parties involved with a parent coordinator. Mandarino, *supra*, at 573.

Mediation

In like manner, mediation does not provide a simple means of resolving claims or issues raised by a controlling parent. Mediation, by definition, is compromise; both parents moving toward an acceptable resolution of an issue with the assistance of a mediator. Utah Courts, *Utah Co-Parenting Mediation Program*, <https://www.utcourts.gov/mediation/cpm/> (last visited April 1, 2016).

It is useful for resolving unsettled issues, but it is not an appropriate means of enforcing already existing orders. By going to mediation to enforce an existing order, the parents are in effect reopening the issue allowing the controlling parent another opportunity to renegotiate his or her prior agreement and associated order. Mediation is another opportunity to

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control the cooperative parent and increase his or her power over the cooperative parent and the children. It can also open other issues, such as support or related financial issues, for concurrent modification through his or her control.

A mediator is not a judge. *Id.* Any resolution can only come through an agreement of the parties, and if there is conflict or a protective order in place, mediation may not be appropriate. *Id.*

Special master

A special master can be an experienced family law attorney, one who has received training through such organizations as the Association of Family and Conciliatory Courts (AFCC) on custody and co-parenting issues. The special master is appointed, either by the parent's stipulation and subsequent order or by court order. *Special Master Services, supra*, and Campagna, *supra*. The order specifies the special master's powers, all of which are subject to review by the court should either parent challenge the special master's decision on an issue. *Special Master Services, supra*. Most special masters may also include attempting to resolve any pending issue through negotiations, if such can be done quickly, prior to

making a decision. But, if time is of the essence, the special master will make a decision.

The use of a special master has been around for a number of years, see Janet Griffiths Peterson, *The Appointment of Special Masters in High Conflict Divorces*, Vol. 15 UTAH B.J. 16 (Aug./Sept. 2002), and has been recognized by our courts,¹ the bar, and literature, Campagna, *supra*; Special Master, *supra*; and *Special Master Services, supra*. It has also recently been recognized as a valued component in attempts to accomplish reconciliation of a child with a parent after a lack of contact or alienation.

An attorney special master will become acquainted with the case, the current orders controlling the parents, and statutes referenced by the orders or applicable to the situation. *Special Master, supra*, and Campagna, *supra*. If a problem arises, either parent contacts the special master, often by email, to identify the problem and that parent's position. The other parent, usually within a defined time period, presents his or her position on the issue. If appropriate, the initiating parent can provide a rebuttal. Then, if authorized and time allows, the special master can pursue some negotiations to attempt resolution. If that fails, or if time does not allow negotiations, the special master will issue a decision. *Special Master, supra*. The parents then have a resolution within a couple of days, or quicker if necessary. Campagna, *supra*. No money is spent on counsel (though counsel may be involved if the parents desire) or on repetitive arguments or delay tactics by the controlling parent.

As an example, let us take Halloween of this past year. In 2016, Halloween fell on a Monday. Halloween is a holiday designated in Utah Code section 30-3-35. Utah Code Ann. § 30-3-35(2)(6)(vi). Dad, being designated as the "non-custodial parent" is entitled to Halloween as his holiday and pressures mom claiming that he is entitled to have the child for the entire weekend prior to the holiday. It is mom's weekend, in the normal rotation. At first blush, dad is correct under Utah Code sections 30-3-35(2)(e)(i) and 30-3-35.1(9)(a). However, dad did not read far enough because under sections 30.3.35(4) and 30-3-35.1(11), the Halloween holiday cannot be extended under either section 30-3-35(2)(e)(i) or section 30-3-35.1(9)(a). If a special master had been in place in that case, a definitive answer to dad's claim could have been provided by the special master with a minimum of work and mom would have been saved from dad's continued insistence that he gets the child for the entire weekend.



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The use of a special master provides the parents with a quick and relatively inexpensive method of resolving conflict. *Special Master*, *supra*, and Campagna, *supra*. It also removes a great deal of motion practice before the courts thereby lessening the load on our court commissioners and judges. *Special Master*, *supra*; Joyce, *supra*, at 650; and Campagna, *supra*. Plus, the parents would appreciate the use of an attorney, with knowledge of the legal system and the power to make decisions. Mandarino, *supra*, at 573; and *Special Master*, *supra*.

Some arguments against a special master have been made. The three basic arguments being: (1) a special master can make a case more expensive; (2) a party may assist the other party in building that person's case; and (3) a party may be waiving rights to appeal. See Cameron Johnson, *3 Reasons Against Giving A Special Master Broad Powers In A Custody Case*, available at <http://ccplawyers.com/201408223-things-you-should-know-about-special-masters-before-appointing-one/> (last visited April 1, 2016).

The cost argument goes to the issue of adding another layer to the system. *Id.* That is potentially true, if a parent decides to appeal a special master's ruling. But, in the vast majority of the cases, the issues presented to a special master are such that the cooperating parent may not want to go through the expense of counsel and the emotional turmoil of filing pleadings and appearing for court. In the overall scheme, a special master can, in an hour or two, make a decision that answers a question and avoids a hearing. Plus, some special masters offer a sliding or reduced fee schedule for less fortunate parents. Having a special master in place would actually lessen the courts' workload as well.

As to assisting the other party build a case, the exact same can be said for litigation or mediation. True, in mediation the parties are allegedly protected under the concept of settlement negotiations. But one still discloses one's position and evidence that can be used by the other party (though not directly, as in such attempts to enter admissions or the like) if settlement is not reached.

A party does not, and will not, waive appeal rights. The ultimate decision maker is the judge, and the parties will always have the right to take their case to the judge.


As more custody evaluators decide to recommend joint legal and physical custody relying on the concept that if conflict

continues, the parties can always go back to court, the cases with conflict will simply continue, as will the litigation. Interview with Valerie Hale, Ph.D, Adjunct Assistant Professor, Psychiatry at the University of Utah (Nov. 12, 2016). A special master offers an efficient method of handling issues, reducing conflict, and can, if allowed under the orders appointing the person, communicate with other professionals to assist one, or both, of the parties or the children to address behavior problems. *Id.* A special master appears to be the most economical, financially, and emotionally method to assist co-parents who experience conflict in their co-parenting or parallel parenting endeavors.

1. *Woodward v. LaFranca*, 2016 UT App 141, 381 P.3d 1125 (addressing the use of a special master by the court when hearing a petition to modify custody, and the weight to be provided by a trial court to a special master's testimony); *Woodward v. LaFranca*, 2013 UT App 147, 305 P.3d 181; *Wolferts v. Wolferts*, 2013 UT App 235, 315 P.3d 448 (discussing a special master's role in a custody case as to compliance with court orders and the potential of contempt); *Wight v. Wight*, 2011 UT App 424, 268 P.3d 861 (discussing the appointment of a special master, and associated orders, in a matter to resolve parent-time disputes); and *Barton v. Barton*, 2001 UT App 199, 29 P.3d 13 (concerning the use of a special master to handle issues of custody and visitation, with the court retaining ultimate jurisdiction).

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The State of Non-compete Law in Utah

by Lisa R. Petersen and Judson D. Stelter

So, what does a 19th century, east coast attorney have to do with the current state of non-compete law in Utah? Quite a bit. Born in 1805, David Dudley Field II became a prominent attorney in New York, and by the 1830s, he had developed a growing conviction that American common law, both procedural and substantive, should be simplified through codification. Following a trip to Europe to survey English and French legal codes in 1836, Field embarked on a multi-decade project to codify American law.

His passion culminated in the creation of the “Field Code” in 1865, which he proposed the states adopt. Unlike American common law, the Field Code contained among its thousands of provisions a prohibition against non-compete agreements. Unfortunately for Mr. Field, most states chose not to adopt the Field Code. California, however, was a relatively young state and had a growing need to better systematize its law. California adopted the Field Code in 1872, as well as the prohibition on non-compete agreements that came with it.

Fast forward 100 years to the early 1970s. California’s Santa Clara Valley is transformed and becomes forever known as Silicon Valley, following the invention of the microprocessor. Through it all, the vestiges of the Field Code remained. From Silicon Valley’s earliest days and continuing to today, it has been rife with employment defectors – employees departing to start their own companies in competition with their former employer or to accept higher paying positions with competitors. And it has always been done with impunity within the safety of the Field Code.

LISA R. PETERSEN is a partner at Michael Best in the firm’s Labor & Employment Relations Practice Group where she focuses her practice on employment litigation.



More than 140 years after California adopted the Field Code, Utah legislators began eyeing Utah’s neighbor to the west with respect to its approach to non-compete agreements. On February 2, 2016, Representative Mike Schultz, R-Hooper, introduced H.B. 251, the Post-employment Restrictions Amendments. In its initial form, H.B. 251 contained a startling provision that followed California’s lead and banned non-compete agreements in the state of Utah completely.

News of H.B. 251 came as a surprise and was an immediate concern to many of Utah’s employers, who had been completely unaware of any groundswell to radically change what had been the law in Utah for decades. As one news publication’s editorial board stated, “We seldom have seen the sort of unified alarm from the business community that this bill has attracted. . . .” Editorial Board, *In Our Opinion: Response to Bill Regulating Business Contracts Suggests House Leadership Is at Odds with Business Community*, DESERET NEWS (March 1, 2016), available at <http://www.deseretnews.com/article/865648947/In-our-opinion-Local-business-communitys-reaction-to-HB-251-shows-its-issues.html>.

In the midst of the debate, a number of interested parties, including the Salt Lake Chamber and the Governor’s Office of Economic Development, created a working group to gather information and reach a compromise among the many competing voices. Additionally, the legislature organized a public forum to address concerns about H.B. 251. Many employers attended and voiced concern over the haste with which H.B. 251 was

JUDSON D. STELTER is senior counsel in the Labor & Employment Relations Practice Group at Michael Best. He represents management in all phases of employment law.



being pushed through the Utah Legislature. Further, many business owners questioned the need for such legislation, given Utah's low unemployment rate and robust economy.

Like Silicon Valley, however, prominent members of Utah's own tech epicenter – Silicon Slopes – voiced strong approval for abolishing non-compete agreements. DOMO CEO, Josh James, and Qualtrics CEO, Ryan Smith, both took turns at the microphone at the public forum giving prepared speeches in strong support of H.B. 251.

Ultimately, H.B. 251 passed and was signed by the governor on March 22, 2016, but the final version was very different from what Representative Schultz had initially proposed. Rather than prohibiting non-compete agreements in their entirety, H.B. 251 – after no fewer than ten versions of the bill – continued to allow non-compete agreements, but it limited the restrictive period to only one year. In addition, H.B. 251 included a mandatory award of actual damages and attorney fees in favor of an employee whose employer unsuccessfully attempts to enforce a non-compete agreement.

Following the passage of H.B. 251, the Utah Legislature partnered with the private sector to commission a research study to examine the use and effects of non-compete agreements in Utah to determine whether additional legislation was needed. The study took a multi-faceted approach to collecting and analyzing information. The study (1) conducted quantitative research, including randomized surveys distributed to a representative sample of employers and employees in Utah; (2) conducted focus groups¹ and in-depth interviews with employer and employee representatives; and (3) conducted interviews with companies considering relocating to Utah. Results from the study were released on February 25, 2017. *See Salt Lake Chamber, 2016–17 Non-Compete Study Results, available at <http://slchamber.com/noncompetestudy/>.*

The study provides interesting information related to non-compete agreements in Utah. One striking statistic from the report shows that 90% of employers – and fully 74% of employees surveyed – agree that non-compete agreements should be allowed, as long as they are reasonable and for a reasonable purpose. Not surprisingly, however, there is somewhat of a divergence of opinions

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as to what constitutes a “reasonable” non-compete agreement.

Nearly half of employees responded that restrictive periods under non-compete agreements should be capped at one year, as has been done with H.B. 251. Only 29% of employers agreed with that assessment. Roughly 22% of employers identified two years as a reasonable maximum, and 20% of employers stated that it depends on the industry or individual circumstances of employment. As far as actually attempting to enforce non-compete agreements, 65% of employers stated that they never have taken an employee to court regarding their non-compete agreements.

Also of interest are statistics related to the impact of H.B. 251. Roughly 57% of employers and 70% of employees say H.B. 251 will have little to no impact on their organization. In contrast, 36% of employers state that it will have a negative impact. When researchers approached the question from a slightly different perspective, however, there was greater concern from employers. Approximately 69% of employers believe H.B. 251 will have a negative impact on their ability to protect proprietary ideas, inventions, or processes.

Prior to the results of the study being released during the 2017 legislative session, Representative Brian M. Greene, R-Pleasant Grove, unexpectedly introduced H.B. 81, which sought to further amend Utah’s non-compete law. Among H.B. 81’s amendments was a provision that required a penalty of three times the employee’s actual damages if an employer unsuccessfully seeks to enforce a non-compete agreement. Although H.B. 81 made some initial progress, it ultimately stalled and never made it out

of the House. The results of the study were released approximately one week after H.B. 81 failed.

Shortly after the results of the study were released, Representative Schultz issued a statement regarding the study and H.B. 251, which has now been in effect for a year. Representative Schultz stated that he was “heartened that the data confirms the merit of our attention to this important issue for Utah’s economy.” Mike Schultz, R-Hooper, Utah State Legislature, *Statement from Rep. Schultz Regarding the Non-Compete Survey Results* (February 24, 2017), available at <http://slchamber.com/statement-from-rep-schultz-regarding-the-non-compete-survey-results/>. He further stated that “[t]he results of the study demonstrate that last year’s bill is working well, addresses important concerns from both sides of the issue, and strikes a balance between protecting the interests of both employees and employers.” *Id.* Rather than indicating that the legislature was fully satisfied with H.B. 251, Representative Schultz’s statement closes like a movie with a sequel already in the works. “Rather than running legislation on non-compete agreements this year, myself, and Representative Hawkes remain committed to working with our group and other stakeholders to utilize this research and build the optimal solution for Utah’s long-term economic health.” *Id.* It may very well be that Representative Schultz will revisit non-compete agreements in 2018. To be continued....

1. Lisa R. Petersen, co-author of this article, participated in one of these focus groups, representing the legal perspective on behalf of Utah employers and in favor of maintaining non-compete agreements in Utah.

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2017 Legislative Update

by Douglas S. Foxley, Frank R. Pignanelli, and Stephen D. Foxley

Utahns (especially legislators and lobbyists) breathed a collective sigh of relief with the close of the Utah General Legislative Session on March 9. In contrast with the gridlock seen in Washington and several states, Utah lawmakers passed 535 bills and a \$16+ Billion budget over a fast-paced forty-five days. Here's a recap of what happened, with a particular focus on issues of interest to the Bar.

Administration of the Courts

The Utah State Bar actively opposed H.B. 93, **Judicial Nominating Process Amendments**. This bill eliminated the Commission on Criminal and Juvenile Justice's ability to establish evaluation criteria for judicial nominees. This bill passed the House but failed to receive a favorable recommendation in the Senate Judiciary, Law Enforcement, and Criminal Justice Committee. Our thanks to the many attorneys who contacted their senators and representatives to express concerns about this bill.

The Bar supported the addition of a **Fifth District Court Judge** through H.B. 77. This position was funded by the legislature, and the application process has already opened.

With the support of the Bar, Senator Weiler sponsored an amendment to Representative Kwan's H.B. 170, **Small Claims Amendments**. This amendment will increase the small claims court's jurisdiction by \$1,000, to \$11,000, and aligns with one of the recommendations from the Futures Commission of the Utah State Bar.

The legislature also re-established the Judicial Rules Review Committee, which had been dormant for several years. This legislative body will perform a public review of existing and proposed court rules in a similar manner to the longstanding Administrative Rules Review Committee.

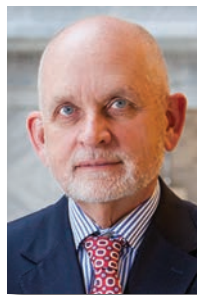
Immediately after the general session ended, Utah Supreme Court Chief Justice Matthew Durrant announced that longtime courts' lobbyist, Richard Schwermer, was appointed the new Administrator of the Courts. Richard has been with the courts since 1990 and brings an important perspective to this position.

Access to Justice

The bar commissioners voted to endorse Representative Angela Romero's H.B. 200, **Sexual Assault Kit Processing Amendments**. This bill mandates the DNA testing of all sexual assault kits. The legislature partially funded this bill that will enhance sexual assault victims' access to justice through more complete evidence when alleged attacks occur.

The Bar also supported Senator Hillyard's S.B. 76, **Post-Conviction DNA Testing Amendments**. This bill lowers the threshold to file for post-conviction DNA testing if the petitioner can show a "reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence." 2017 Utah General Session, S.B. 76. Currently, a petitioner must show that the DNA testing has the potential to establish "factual innocence." Utah Code Ann. § 78B-9-301(2)(f).

DOUGLAS S. FOXLEY, FRANK R. PIGNANELLI, and STEPHEN D. FOXLEY are attorneys at Foxley & Pignanelli, a government and public affairs law firm in Utah. They focus on federal, state, and local government activities on behalf of numerous corporate and individual clients and are proud to be the new government relations representatives for the Utah State Bar.



Senator Todd Weiler also drafted a technical amendment to the Bar-supported S.B. 134, **Indigent Defense Commission Amendments**, based on feedback from the Government Relations Committee. This change clarified which parties shall be provided counsel in juvenile delinquency and child welfare proceedings.

Uniform Laws

Representative Lowry Snow passed H.B. 13, **Uniform Fiduciary Access to Digital Assets Act**, after running out of time in 2016. This new law outlines the procedure for certain persons to gain access to a deceased or incapacitated individual's digital assets, such as online accounts. Senator Lyle Hillyard passed S.B. 58, **Uniform Voidable Transactions Act**, a repeal and reenactment of the current Uniform Fraudulent Transfer Act. As originally drafted, this bill excluded limited liability companies from the Act, but Senator Hillyard listened to concerns from the Bar and had that language added.

Other uniform laws that passed include the **Uniform Powers of Appointment Act** (H.B. 21), **Uniform Parentage Act Amendments** (S.B. 147, *Bar Supported*), **Uniform Unclaimed Property Act** (S.B. 175), **Utah Uniform Commercial Real Estate Receivership Act** (S.B. 208), and the **Revised Uniform Athlete Agents Act** (S.B. 243).

Other Bills of Interest to the Legal Profession

It is hard to choose which bills will have the greatest impact on the legal profession, but here are a few that we think could be of interest to a wide variety of practice areas:

For example, H.B. 41, **Utah Revised Business Corporation Act Modifications**, adds several considerations that a board may consider, other than share price, when considering an offer to purchase the corporation. The bill also puts in place certain procedural requirements for interested shareholders (those owning more than 20% of the outstanding shares) likewise seeking business combinations.

Homeowners associations will also have new hurdles to jump through if they want to take legal action against certain parties. HB 157, **Homeowners Association Revisions**, includes new requirements to obtain a minimum threshold of association members to approve the action and to set aside funds in a trust

for a portion of anticipated legal expenses. The bill does provide an exception for claims below \$75,000.

Trying to get that adult child out of your basement? H.B. 202, **Trespass Amendments**, expands the definition of criminal trespass to apply to long-term guests. However, there is some concern that the bill will conflict with longstanding eviction procedures and other landlord-tenant law.

Litigators should pay close attention the next time a case involves a governmental entity. H.B. 399, **Governmental Immunity Amendments**, reverts to previous Utah Supreme Court rule regarding the ability to waive governmental immunity in certain circumstances. It also provides a statutory savings clause for claims that are dismissed for a reason other than the merits and otherwise would be precluded by a statute of limitations having run. S.B. 98, **Excess Damages Claims**, changes the inflation-adjustment formula for the statutory cap on damages to include medical care and medical services, rather than

relying strictly on the consumer price index.

S.B. 203, **Real Estate Trustee Amendments**, allows an entity organized to provide legal services to act as a real estate trustee, so long as only attorneys

affiliated with the entity sign any relevant documents. Previously, only an individual member of the Bar could act as trustee.

If you Dare Talk Politics at Dinner Parties, What Else you Need to Know

Liquor

Although legislators declined to take down the partition concealing alcoholic beverage preparation (the so-called Zion Curtain), they have added two new options for restaurant compliance: a 10-foot buffer where children generally are not to be seated or a four-foot barrier separating the "bar" and "restaurant" area of an establishment. Restaurants built prior to 2009 will lose their grandfathered status and have to choose one of the three options. Other reforms include license consolidation, earlier weekend alcohol service (10:30 AM), and new state oversight of grocery and convenience stores through the Division of Alcoholic Beverage Control.

"There are likely many issues that impact you and your practice, so we encourage you to remain engaged in the legislative process..."

Taxes

With the exception of tweaking the gas tax formula in order to raise the levy by \$.02/gallon next year and accelerate increases to a \$.40 ceiling, the legislature rejected several proposals to overhaul the state's tax system. However, with the continuing rise in online sales and a longtime shift from a goods-focused to a service-oriented economy, expect further discussion during the 2017 interim. This includes restoring the sales tax on food, looking for ways to increase use tax compliance with online purchases, changing the corporate tax calculation to a single-sales factor, and others.

Education

Hoping to fend off the proposed Our Schools Now tax increase initiative, legislators dedicated \$90 million in new money to education, an increase of 3%. Enrollment growth was also fully funded, at \$64 million. Retired teacher and Democrat Representative Marie Poulson led the charge this year to end school letter grades in H.B. 241, **School Accountability and Assessment Amendments**. Her bill received bipartisan support and passed the House of Representatives. The bill was stopped in the Senate

where the system remains popular. Senator Ann Millner's S.B. 220, **Student Assessment and School Accountability Amendments**, replaces SAGE with the ACT for high school students, removes the curve previously used to grade schools, and makes a few other tweaks.

Homelessness

House Speaker Greg Hughes opened the session with a commitment to tackle homelessness as a statewide problem. The legislature delivered on his promise with funding to complete new shelters in Salt Lake City and a shelter outside Utah's capitol city, while upgrading the existing Midvale facility to serve families year round.

Summary

Despite our best efforts, the legislature does not always follow the advice of the Bar or its lobbyists. However, we still appreciate the 104 public servants who work diligently to represent Utah residents. There are likely many issues that impact you and your practice, so we encourage you to remain engaged in the legislative process and with your legislator over the coming year.



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Officium Tuum

by Steven Rinehart

EDITOR'S NOTE: Although the Bar Journal has rarely published poetry in the past, the editorial board has decided to do so again, with this recently-submitted piece. The judicial representatives on our editorial board would like to point out that the miscarriages of justice at the expense of St. Joan, Jean Valjean, and Jesus Christ, referenced in line sixteen of the poem, were not miscarriages of justice for which actual judges were responsible, but rather abuses of ecclesiastical, police, and executive power, respectively.

Before the bench, they each are tried, the endless, insolent hoards;
Their misdeeds they each deny; all as you sharpen Justitia's sword.
Deaf are you to their cries, and numb is your heart with power and pride;
The sins they disavow moot not the doom tattooed upon their brow.
The time 'tis nigh to denounce their crimes, and quell them with your hand supreme;
Then consign them to the tick of time, and crush their lives' esteems.

With a pen stroke you adjourn, *lex talionis* moves them each in turn.
Seventy-times-seven notches on your gavel; cobwebs on your soul;
Away the rabble straggle shackled, your apathy their brazen bull.
At your behest the invisible hand dispossesses their res upon command;
Through decades blurred by endless tears, steel to gild their jubilee;
As you climb the stairs of your career to the apogee of your esprit.

But whose dignity is put to stocks by the lucidity of your decree?
Must you put a chisel to the cenotaph of their hate for you?
Do your trysts with the poltergeists of Pilot, Freisler and de Sade,
Condone the sacrifice betrayed of Joan of Arc, Valjean and Christ?
No thought allot you kin and kith? For naught be *odio judex careat*?
For naught the casualties of faith in the court's timocracy.

Rich are they on blame and shame and richer still on pain unfeigned.
Did you see them frolic in their youth in their mother's sweet embrace?
What of the friend you failed, mistruth you spoke, or dollar you displaced?
They too dreamt of love and rings and shrove before the King of Kings;
And in a soft voice prayed you'd save, some judgment to the courts above.
May tomorrow's sorrow and this rhyme eclipse the grip of vengeance thine.

For the beauty lost to them, in the name of grace, that they be redeemed;
When condemned they sweat in streams, erase though stained and grant in time what's lost regained;
That your robes gleam white with sunlight's rays to allay the dread today purveyed;
And in magnanimity you shed, that light to those whose plight you wend.
Rouse the benignant Lares few, then mercy dare to figment in thy view;
Let this prayer for your wisdom stand, a light worth saving in every man.

STEVEN RINEHART is a registered patent attorney with Vested Law, LLP. He is licensed to practice law in the State of Utah, the Commonwealth of Virginia, and the U.S. Patent and Trademark Office.





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Irreconcilable Differences: When Can a Lawyer Terminate Representation Without Cause?

by Keith A. Call

Most of you can probably quit your job – or fire your employees – without cause. You usually wouldn't have to recite any "reason" to resign as a member of a board or association. You can even end your marriage simply by reciting the magic words, "irreconcilable differences."

But what about your client relationships? Risk managers will tell you that "bad clients" pose one of the greatest malpractice risks out there. So how do you dump a client that you simply don't like or that you think poses a future malpractice risk? Can you even do that?

The answer is, "sometimes, but not always." This article will provide some guidance on when and how to fire clients without cause.

When You Can Fire Your Client

The rules for when you "may withdraw" from a representation are found in Utah Rule of Professional Conduct 1.16(b). This rule has seven subparts, including several familiar grounds for terminating a representation "for cause." These grounds include such things as the client's criminal or fraudulent activity, the client's failure to pay or fulfill other obligations to the lawyer, and other similar reasons. Utah R. Prof'l Conduct 1.16(b).

Let's focus in on the provisions that may allow you to withdraw simply because you don't want to continue. The structure of Rule 1.16(b) makes it clear that there are two broad categories of permissive withdrawal: (1) withdrawal without material adverse effect and (2) withdrawal for "good cause" notwithstanding an adverse material effect on the client. Thus, Rule 1.16(b)(1) allows you to terminate your client relationship when "withdrawal can be accomplished without material adverse effect on the interests of the client." There is little authority in Utah (and elsewhere) defining "material adverse effect" in the context of this rule. Generally, adverse effects are less likely to be present early in the lawyer-client relationship. Especially when litigation is involved, the longer you wait to withdraw, the more likely it is to have an adverse effect on your client. If an objective person

would conclude that withdrawal would not have a material effect on your client, you may have found your get out of jail card.

There are other potential ways out of the relationship even if your client may suffer material adverse effects from your withdrawal. Rule 1.16(b)(4) allows you to withdraw if the client insists on taking action that you consider "repugnant," or with which you have a fundamental disagreement. Rule 1.16(b)(6) allows you to withdraw if the representation has been "rendered unreasonably difficult by the client." Rule 1.16(b)(7) allows you to withdraw if "other good cause" exists.

These grounds identified in subsections (4), (6), and (7) are by nature vague and subject to varying interpretations. One court found the representation was "unreasonably difficult" after the client threatened his lawyer with a malpractice action and an ethics complaint and refused to meet with the lawyer. *Njema v. Wells Fargo Bank, N.A.*, 2015 WL 12977504, **3–4 (D. Minn. 2015). The court permitted withdrawal even in the face of significant adverse effects on the client. *Id.* at *4; *see also In re Admonition Issued in Panel File No. 94-24*, 533 N.W. 2d 852, 853 (Minn. 1995) (noting that it may be in client's best interest to sever relationship if attorney believes client has no confidence in the representation). However, another court denied withdrawal even though the client was "disrespectful and no longer ha[d] confidence" in her attorney. *Cuadra v. Univison Comm'ns, Inc.*, 2012 WL 1150833, *8 (D.N.J. 2012). The court noted that "more than difficult client interactions" are required. *Id.*

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



In short, if your withdrawal will have no material adverse effect on your client, you are probably free to end the relationship. If there is the possibility of a material adverse effect, you need to consider such things as repugnant actions, fundamental disagreements, unreasonable difficulty, and other similar compelling reasons. If any of these conditions exist, it is far easier to pull the plug early in the relationship. The longer you wait to withdraw, the more entrenched you may become.

The Judge Trump Card

Even if you have great reasons to withdraw from representing your client, the judge may have the last word in a litigation setting. Rule 1.16(b) applies “[e]xcept as stated in paragraph (c).” Paragraph (c) requires a lawyer to continue representing a client whenever a judge orders the lawyer to do so.

Protecting Client Interests upon Withdrawal

Under all circumstances of withdrawal, regardless of the reason or lack thereof, you must take reasonable steps to protect your clients’ interests. This may include such things as “giving reasonable notice,” “allowing time for employment of other counsel,” and surrendering the client’s file. Utah R. Prof’l Conduct 1.16(d).

The Lawyer’s Duties to the Justice System

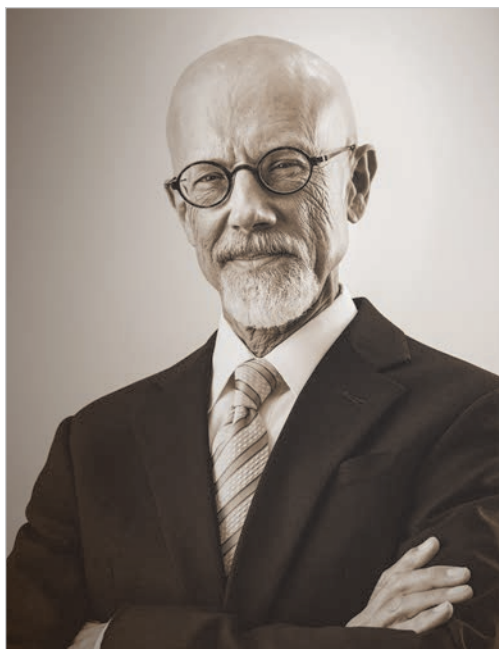
Let’s end with a platitude. (Okay “platitude” has a negative connotation, but please take this seriously.) As lawyers, we have duties beyond our own personal ambition. As one court has stated:

[A]n attorney has certain obligations and duties to a client once representation is undertaken. These obligations do not evaporate because the case becomes more complicated or the work more arduous or the retainer not as profitable as first contemplated or imagined. . . . Attorneys must never lose sight of the fact that “the profession is a branch of the administration of justice and not a mere money-getting trade.” . . . “The lawyer should not throw up the unfinished task to the detriment of his client.”

Kate A. Toomey, *Practice Pointer: When Can a Lawyer End an Attorney-Client Relationship?*, 17 UTAH B.J. 7, 7 (Aug./Sept. 2004) (quoting *Kriegsman v. Kriegsman*, 375 A.2d 1253, 1256 (N.J. Super. 1977) (citations omitted)).

You should temper whatever “right” you have to withdraw with the ethical and moral obligation to serve the system of justice at large. Our judicial system can be complicated. Clients usually need the help of a competent lawyer. Opposing parties and counsel benefit from having competent counsel on the other side. Judges usually benefit from having good lawyers present. We will obtain better outcomes in court and in society as a whole if we are willing to stick things out even when the going gets tough.

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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Aspirational Ethics and the Second Chair

by Gregory P. Hawkins and Lonn Litchfield

When we give public presentations on Corruption, Ethics, or Leadership, we often begin with some version of a moral hypothetical. The exercise turns out exactly the same no matter the group.

A father takes his only child into the state school board building where she will be tested to determine if she qualifies for a very special gifted student program. Admittance is competitive, and only truly gifted students will be admitted. As he approaches the test administrators, he is surprised to see his best friend. He is apparently the chair of the selection committee. His friend greets him very warmly and tells him not to worry, his daughter will get into the program. Both men understand the implication.

Most people will say that it is wrong for the administrator to treat his friend's daughter differently from other applicants. In many groups, there will be some who feel so strongly that it is wrong that they speak out without prompting. Yet even those who speak out will hesitate to call it "evil."

Morals are the basic internal principles that inform and govern a person's view of right and wrong, good and evil. Although morals are a universal force, they can be diverse in their application and definition – almost as diverse as individuals are from one another. Adding to our hypothetical illustrates this diversity.

The facts added do not change the action itself, but they do change the moral context by emphasizing a competing virtue.

What if the administrator and his friend were not merely lifelong

friends, but they fought together in the war, side-by-side, depending on one another for their lives? What if the father had actually, and rather dramatically, saved the administrator's life? What if the father had been wounded in his heroic effort? What if the wound had left him unable to father another child? What if he was left a paraplegic, forever reliant on a wheelchair for his mobility? As we proceed with each, "What if," more and more people begin to rethink their opinions. Often, the ones who felt so strongly about the wrongness of the administrator's actions will be among the first to change their views.

As each person in a group looks around the room at what they thought was a homogenous group, the person begins to realize that questions of right and wrong, good and evil, even in his or her very own analysis, sometime take real thought to resolve. Sometimes the questions involve good and good, right and right. Which is more important, equality or loyalty? In the abstract, this question is challenging, but it can become quite difficult if it is a question one faces in his or her own life. Which is the greater good: fairness in testing and equality of school programs or loyalty and honoring life-changing sacrifice? We have discovered that individual resolution of this issue sometimes turns on the person's life experience. For example, a veteran of combat often sees the question differently than does a president of the PTA. When the person is both a combat veteran and the president of the PTA, the question becomes intense.

Let's turn from the question of morals to the question of **ethics**. If we were to ask 100 ethicists what the definition of ethics is, we may well receive 147 different answers. For our purposes, we

GREGORY P. HAWKINS is a lawyer with thirty years of courtroom experience, author of four books, three of which are about ethics, and many published articles.



LONN LITCHFIELD is a trial lawyer of twenty years and author with a JD from the J. Reuben Clark School of Law and an LLM from the London School of Economics.



will use the working definition that “ethics are one’s discretionary behavior in relation to morals.” Some ethicists use the term ethics to mean the rules crafted by others to be applied to someone else’s moral conduct. We will refer to the creation of someone else’s rules as the **codification of ethics**. We will define codification as, simply, “the creation of an organized set of rules that if violated have a negative consequence to the violator.”

Although intended to improve the moral climate, the codification of ethics tends to decrease ethical choices. We will briefly discuss five reasons why ethical choices decrease when ethics are codified.

First is the concept of legal moralism. If the conduct is not prohibited in the code of ethics, then, by definition, it is permitted conduct. In other words, license is given to engage in conduct not specifically prohibited by the code. This is not to say that codification of ethics results in absolute legal moralism to every person in every circumstance. The question of whether the conduct is right or wrong, good or evil, for some, can simply be set aside. The rules themselves determine the right and wrong of behavior. Discretion can become irrelevant. This results in less ethical behavior. To avoid this result, continuing codification is required until all conduct that is perceived as bad is prohibited. The code must be exhaustive – a nearly impossible task.

Second, because violation of the code results in negative consequences, whenever the code is applied to an individual, that individual resists its application. The person must say, “I did not do it,” “That rule does not apply to me,” “You are reading the code incorrectly,” or a multitude of variations on this theme. Any individual to whom the code applies, now or in the future, naturally and even subconsciously resists the code. Because the individual resists the application of the code, the rules lose their ability to affect the person’s choices in relation to morals positively. Codification may result in nearly universal resistance by those who are governed.

Third, when negative consequences are threatened, a lawyer – an expert dedicated to exploiting ambiguities in the law and its application to specific facts – is invited to participate in the ensuing battle. Yes, it will be a battle, because almost no one willingly submits to his or her behavior being characterized as bad or as wrong and certainly not as evil. The lawyer’s job is to defend his or her client, not to promote generalized ethical behavior. The lawyer will find the ambiguities in the code being applied, as well as ambiguities in the underlying facts. In time, often a very short time, the code becomes diluted, its benefits reduced.

This dilution takes us to a fourth problem of codification. Like

In Memoriam – Mark W. Dykes | 1961-2017



Mark W. Dykes passed away on March 14, 2017, his 56th birthday, after a battle with pancreatic cancer.

Mark Dykes was a shareholder at Parsons Behle & Latimer for 11 years and chaired the firm’s insurance practice group. He focused his practice on drafting business agreements, litigating, and advising energy and utility companies. The Parsons family is saddened that Mark will no longer be coming into the office. He was an outstanding grandparent, father, lawyer and a tremendous colleague who will be deeply missed.

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legal moralism, dilution requires additions to the code – more codification. Dilution requires a codification that is tighter in its application and more exhaustive, which in turn will require more lawyers, and round and round and round we go.

Fifth, codification does not promote good behavior. At its best, codification can only limit bad behavior.

As a result of these and other effects, codification by its nature results in less ethical behavior. This is a significant idea and bears repeating: rules that take away discretion – choices – about moral behavior result in less ethical behavior because ethics is about discretionary behavior in relation to morals; it is about choices.

Despite the problems with the codification of ethics, no one is advocating that we do away with it. Codification of ethics will always be a part of our modern world.

In 1100 AD, there were about fifty million people inhabiting our planet. In the 1820s, we reached our first billion. In the 1920s, 100 years later, we reached our second billion. In January of 2013, we reached seven billion. In 2013, there were 206 nation-states in the world. Each country represents a somewhat, if not a radically different set of laws, rules, and principles people apply when governing their lives, grounded in numerous cultural, religious, ethnic, and racial perspectives of right and wrong, good and evil. Twenty-eight percent of the world is Christian, twenty-two percent Muslim, fifteen percent Hindu, eight-and-half percent Buddhists, fourteen percent are found in the “other religions” category, and twelve percent are categorized as nonreligious. Under each general heading, there is a vast number of denominations or sects. For example, there are over 1,500 different Christian sects or faith groups. And even within a group espousing the same morals, individuals apply them differently to real-life circumstances.

Advances in technology are bringing the earth’s seven billion diverse inhabitants into contact with each other more and more frequently. We bump into each other over and over again. The innumerable interactions mean people will witness more behavior that is wrong or evil. Therefore, there will be a growing cry, “There ought to be a law!”

This continuing call for codification of ethics – local, national or international – happens in many contexts: corporate, governmental, or across a profession or industry. This is the reality when so many people have such easy access to one another.

However, as discussed, codification alone will not result in more good behavior. We cannot expect that codification will increase good behavior nor can we choose simply not to codify. Nevertheless,

we cannot abandon our desire to increase good behavior. Nor can we abandon our confidence that, given the opportunity, most people will exercise their discretion, their choices in relation to morals, positively. This brings us to the Second Chair.

Tom Robinson was a black man accused of raping and beating a white woman in “Jim Crow” Alabama in the 1930s.

To put it mildly, due process and trial by a jury of one’s peers were not the popular approach to resolve such issues in the rural South at that time. There were 4,742 lynchings in America from 1882 to 1964. Alabama accounted for 347 of these and the South at large over 3,130. Rape, attempted rape, and insult to a white person accounted for 1,285, about 27%, of these lynchings. A black man accused of one of these crimes could reasonably expect to die without due process of law.

Tom Robinson was not destined for trial. He was jailed and charged. The local judge asked the best-liked, most respected lawyer in Maycomb County to represent Tom in this lost cause – Atticus Finch. You know the rest of the story. Harper Lee’s novel, *To Kill a Mockingbird*, won a Pulitzer Prize. It was made into a movie, and Gregory Peck won the Academy Award for his portrayal of Atticus Finch. In 2003, the American Film Institute named Atticus Finch the number one hero in 100 years of film, ahead of Indiana Jones and James Bond. But what you do not know is that an examination of this story, and thousands of others, illustrates well the principle of the Second Chair.

Harper Lee wrote *To Kill a Mockingbird* in 1960, just as the modern civil rights movement really began to heat up. She used Atticus’s young daughter, Scout, as the voice to teach us.

It was a Sunday night, and word came to Atticus that the locals were going to the jail to administer justice. Atticus went to the jail, set up a chair and a small living room lamp he had brought with him, and sat outside the jail reading and waiting. Unbeknownst to Atticus, his son, Jem, Scout, and their friend, Dill, had followed him and were hiding behind a bush, watching.

Soon local justice arrived in the form of cars filled with angry and determined southern white men. Scout did not recognize any of them. The men got out of their cars and told Atticus to leave. The moment got tense. Scout and the boys busted out from hiding and ran to Atticus. Scout was surprised at the fear that flashed across Atticus’s face at seeing the children. Scout did not understand what was happening as she looked again at the crowd for a familiar face. Harsh words were spoken telling Atticus to send the children home. Jem refused to go, sensing the danger to Atticus.

Finally, Scout recognized someone in the crowd. It was Walter Cunningham, a client of Atticus. She said, “Hey, Mr. Cunningham.” He pretended not to hear her.

She began a solo, innocent dialogue with him about his work with Atticus, about school, about his son, Walter, and so on. Mr. Cunningham tried to ignore her, and eventually she simply said, “Tell him hey for me, won’t you?” The scene remained tense, and Scout was confused. She finally asked, “What’s the matter?”

Mr. Cunningham squatted down and took Scout by the shoulders and said, “I’ll tell him you said hey, little lady.” And then he stood and said, “Let’s go boys.” Tom Robinson would live, at least for that Sunday night.

In the 1950s, Solomon E. Asch of Swarthmore College conducted an unusual psychology experiment. Although this experiment is the inspiration for what follows, we are not relying upon its purposes, findings, or applications. Rather, the experiment is merely the catalyst of thought to pursue our own applications. The participants in the experiment were informed that it was a visual perception experiment. It was not.

Six people are placed in chairs. Diagrams of lines are shown to them. On the left is shown a line of certain length. On the right are three lines of different lengths, one of which matches exactly the line on the left. The correct choice is clear and obvious.

The only person actually being tested is the person in the Fifth Chair; everyone else is a co-conspirator. When the test begins, chairs 1–4 and 6 purposely identify the wrong line as the correct match. If the correct answer is “B,” then they all say “A.” The Fifth Chair identifies the obviously correct line as the match. “It’s B.”

The co-conspirators, subtly at first, and then more directly, ridicule the Fifth Chair for choosing the “wrong” line. As the participants are shown set after set of lines, eventually, and often quite quickly, the Fifth Chair begins to give the wrong answer, the same as the co-conspirators, even though the correct answer is obvious.

Then the experiment changes. The person in the Second Chair begins to give the correct answer. Now, the Fifth Chair almost always gives the correct answer, too. With the voice of the Second Chair added, the Fifth Chair is not persuaded by the



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Jared W. Moss

jmoss@pamhlaw.com
J.D., University of Oregon, 2005
Also admitted in California



Sarah L. Brinton

sbrinton@pamhlaw.com
J.D., Stanford Law School, 2008
Also admitted in New York
and the District of Columbia



Jed Brinton

jbrinton@pamhlaw.com
J.D., Yale Law School, 2010



Dustin N. Slade

dslade@pamhlaw.com
J.D., Harvard Law School, 2010
Also admitted in Texas and New Mexico



taunts of the others to join them in giving the wrong answer. The Fifth Chair gives what he knows is the correct answer. “It’s B.”

This experiment is the backdrop for what follows. Many people sit in the Fifth Chair. The truth of something seems obvious: this line is the same length as line “B.” But the multitude of voices saying, shouting, sometimes demanding, that the correct answer is “A” creates the environment in which the Fifth Chair finds it compelling to remain quiet or even agree with the demanding but wrong voices.

When the Second Chair steps up and says, “It’s B,” when the Second Chair communicates the truth about what the Fifth Chair sees, powerful things happen.

In our earlier retelling of the jail scene from *To Kill a Mockingbird*, Scout unknowingly occupies the Second Chair and Walter Cunningham the Fifth Chair. Harper Lee artfully illustrated the power of Scout’s innocent little voice helping Walter choose what, to Harper Lee, 1960 America, and us today, was the obvious – justice does not come by a vigilante rope in the dark of night. The mob around him was saying, “It’s A,” “Let’s lynch this man.” But Scout said to Walter, “It’s B,” and Walter’s burden of choice was lifted for a moment, and he was able to act.

Let’s follow the story just a bit further. Tom Robinson goes on trial. Atticus presents evidence that to the reader, and to Atticus’s son, Jem, makes it absolutely clear that Tom Robinson could not have beaten the girl. Tom’s left arm had been permanently damaged beyond use when he was a boy. He was physically unable to strike her on the side of her body where the evidence indicated she was beaten. However, the girl’s father was left handed and known to have a very bad temper. Further, no medical evidence was introduced that showed the girl was ever raped.

Jem was elated until the verdict came. After several hours of deliberation, the jury found Tom Robinson guilty. Jem was crushed at the obvious injustice. Atticus explained to the distraught Jem that a jury would usually take only a few minutes to convict Tom – a black man accused of raping a white woman. But this jury took hours.

“You might like to know that there was one fellow who took considerable wearing down – in the beginning he was rarin’ for an outright acquittal.”

“Who?” Jem was astonished.

Atticus’s eyes twinkled. “It’s not for me to say, but I’ll tell you this much. He was one of your Old

Sarum friends...”

“One of the Cunninghams?” Jem yelled. “One of – I didn’t recognize any of ‘em...you’re jokin.” He looked at Atticus from the corners of his eyes.

“One of their connections. On a hunch, I didn’t strike him. Just on a hunch. Could’ve, but I didn’t.”

“Golly Moses,” Jem said reverently. “One minute they’re tryin’ to kill him and the next they’re tryin’ to turn him loose”...

Atticus said... “it took a thunderbolt plus another Cunningham to make one of them change his mind. **If we’d had two of that crowd, we’d’ve had a hung jury.**”

To Kill a Mockingbird, Grand Central Publishing, Hachette Book Group, Inc., April 2010 © 1960 Harper Lee, pages 297–98 (emphasis added).

Scout, the unknowing Second Chair, speaks to Walter Cunningham, the unknowing Fifth Chair, “Hey Mr. Cunningham.” Within seconds Walter says, “Let’s go,” and other Fifth Chair Cunninghams are lastingly affected. One of them becomes a Fifth Chair himself in the jury room, “rarin’ for an...acquittal.” If only he’d had a Second Chair! “If we’d had two of that crowd, we’d’ve had a hung jury.” A hung jury in 1930’s segregated, Jim Crow, Alabama with a black man accused of rape.

Let’s look at another Second Chair experience. It was August 28, 1963. Hundreds of thousands had gathered on the National Mall in Washington, D.C. facing the Lincoln Memorial. Fifteen speakers were scheduled to speak. The last speaker had been cautioned by his advisers, by the event organizer, and even by the Kennedy Administration to be careful. It is a big stage. Do not cause problems. The speech he was to give was written by others. It was well-crafted and very persuasive. Yet compared to others he had given, it was a bit bland. He had some thoughts he wanted to share and was burdened by whether to share them despite the cautions. Toward the end of his prepared remarks, as he struggled with whether to share these thoughts, a friend standing several rows behind him, Mahalia Jackson, the well-known singer, yelled out, “Tell them about the dream, Martin.”

Martin Luther King, Jr. quietly slid the prepared remarks to the side and calmly and carefully said, “I have a dream.” The rest is history. No other speaker, no other remarks are remembered from that day. The speech itself, the written text of which contains no reference to the dream, still echoes through time.

King sat burdened in the Fifth Chair with close advisers and important people occupying the First Chair. He wants to tell it; he thinks it is right; he thinks it will make a difference. They tell him he is wrong; do not cause problems; stick to the written speech. Mahalia Jackson, sitting in the Second Chair, reaches out with just a few words and, for a moment only, lifts King's Fifth Chair burden – "Tell them about the dream, Martin." Mahalia Jackson said to Martin Luther King, Jr., "It's B."

Another scene: it is 1804, and thirty-two men and a Shoshone woman drag themselves into a Nez Perce village at the western edge of the Bitterroot Mountains. The village feeds the nearly starved group. But so rich is the food that without exception they are sick and further weakened. With them they have hundreds of firearms, ammunition, and powder. The Nez Perce are a small tribe in the midst of much stronger tribes.

A council of elders (the Council) discusses what should be done. Strong voices speak to kill them and take their weapons. The weapons could very well change the balance of power among the tribes. Other voices speak to befriend them and nurse them to health. After all, men with such weapons are better friends than enemies and surely will trade for more weapons if befriended. The Council makes its decision: kill them while they are defenseless.

A woman lying on her deathbed within hearing of the Council rises with difficulty and joins the circle of elders. Her unexpected presence, her deathly appearance, and the legend of her life command the attention of the elders. Her name is Watkuweis which means, "Returned from a Far Country." She had been kidnapped at age thirteen by a neighboring tribe and traded from tribe to tribe, in time being taken 1,800 miles to the east. Her legend chronicles her deprivation and abuse. Eventually, she is helped to escape by some white settlers in the Great Lakes area and given a few supplies. Miraculously and at great cost, she makes it back to her tribe. She now stands before the tribal Council and simply says, "Men like these were good to me, do them no hurt." Watkuweis says to the Council, "It's B" and the Council changes its decision.

Among those saved that day were Meriwether Lewis and William Clark. The Shoshone woman was Sacagawea. The Lewis and Clark expedition mapped, surveyed, and explored 820,000 square miles of uncharted territory. The expedition was the tipping point for the United States' expansion. But for the word of a dying woman, sitting in the Second Chair, saying to some on the Council sitting in the Fifth Chair, "It's B," the great and historically important contributions by Lewis and Clark would have ended abruptly on the western edge of the Bitterroot Mountains.



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We refer to these experiences as ***Aspirational Ethics and the Second Chair***. As stated, ethics are discretionary behaviors in relationship to morals. Ethics are about the choices we make in relation to how we see right and wrong, good and evil. Codification can limit bad behavior, but as discussed, more and more codification is required to be effective. Codification does not encourage good behavior and tends to result in less overall ethical behavior – fewer choices in relationship to right and wrong, good and evil.

The vast majority of people when asked, “Are you good?” will hesitate to say, “Yes.” Nevertheless, when asked, “Do you want to be good?,” most say, “Yes,” without much prodding. A “Yes” answer is even more forthcoming when asked, “Do you want to do good?” It is rare, indeed, for someone to actually aspire to be evil or to do evil.

Why? Why do most people readily declare that they want to do good? David, before he became king, before he slew Goliath, said to his brother, Eliab, “Is there not a cause,” is there not a reason I am at this place, at this time? 1 Samuel 17:29.

Almost everyone feels deep inside themselves, purpose. Sometimes the feeling of purpose can get overshadowed by the moment or even by a lifetime of moments. But just like David of old – we have purpose; there is a cause, a reason, for us being in the places we find ourselves, interacting with the people with whom we are interacting.

Sometimes, the reason is to sit in the Second Chair and say to the Fifth Chair, whose purpose is temporarily overshadowed by First Chair voices, “It’s B.” When we do, just like a tuning fork resonates with the piano string, our Second Chair voice resonates with truth and purpose of the Fifth Chair and powerful things happen.

Aspirational Ethics and the Second Chair encourages awareness and choices in relationship to morals. We all sit in the Fifth Chair at times. Unfortunately, we may sometimes sit in the First Chair and get it totally wrong. But we can aspire to sit in the Second Chair. We can actively look for those sitting in the Fifth Chair whose choices are burdened with the pounding voices of those sitting in the First Chair. Our aspiration does not require heroic labors; it may be as simple as a thumbs-up or a pat on the back. The Second Chair need only communicate to the Fifth Chair, you are seeing it right, “It’s B.”

Jackie Robinson sat in the Fifth Chair. In fact, he was specifically selected and purposely placed in the Fifth Chair by Branch Rickey, general manager of the Brooklyn Dodgers. Because of his moral backbone, his controlled temper, and his athletic

ability, Jackie was the perfect choice. Many times, the First Chair piled on ridicule, racial epithets, and even death threats. Jackie felt alone. Once the manager of the Philadelphia Phillies, Ben Chapman, occupying the First Chair, verbally beat Jackie nearly to explosive anger while Jackie was at bat. He said things that today would be outrageous in public or private.

Jackie was at the point of breaking and almost walked over to Chapman to brain him with the bat. But one of Robinson’s teammates, Eddie Stanky, stepped out of the dugout, walked over to Chapman and said, in substance, “Stop it. You are wrong.” The comments had little effect on Chapman, but they had a powerful effect on Robinson. Robinson’s teammate sat in the Second Chair at a critical time for Jackie, who carried the burden of a terrible Fifth Chair dilemma: do I brain Chapman, or do I hold my peace? Robinson’s teammate lifted that burden, for just a moment, and said to Jackie, “It’s B.”

Jackie was still in the Fifth Chair on another field in Cincinnati. Pee Wee Reese, also a teammate of Robinson, sat in the Second Chair. The people in the First Chair were family and friends of Pee Wee from across the Ohio River in Kentucky. As Jackie took the field, Pee Wee’s family began to throw verbal spears at Jackie, not too different from those of Ben Chapman. Pee Wee walked across the field to where Jackie stood and in the presence of all, his family included, simply put his arm around Jackie and began to talk. Once more, a teammate sat in the Second Chair and said to Jackie, “It’s B.”

But, that’s not the end of the story. In the stands were young nephews of Pee Wee. Unbeknownst to Pee Wee, they were also in the Fifth Chair. They did not believe the terrible things the adult family members were saying; they had a choice to make. Pee Wee, by simply putting his arm around Jackie, said loud and clear, “It’s B.” They chose not to participate in their elders’ efforts to intimidate Jackie.

While we often struggle with our own Fifth Chair choices, we can aspire to sit in the Second Chair every time the opportunity arises. ***Aspirational Ethics and the Second Chair*** is about the moment. History – individual history and collective history – is about critical moments. We never know when the moment will come or how critical the moment may be. Nevertheless, we can look for and be aware of those in the Fifth Chair. We can recognize the burden placed on them by the multitude of First Chair voices. We can lift that burden, even if it is only for a moment, and inspire the choice to do good by our reaffirming voice, “It’s B.” And, when we do, powerful things will happen!

Parsons Behle & Latimer is pleased to announce that Chad Baker and Bryan L. Elwood have joined the firm as shareholders in the Salt Lake City office.



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Chad Baker joins Parsons Behle & Latimer's Environmental, Energy & Natural Resource department. He assists clients with identifying and implementing practical approaches to environmental, natural resource, and energy issues through all phases of a project's lifecycle including due diligence, permitting, compliance and enforcement, and divestment or closure. He also has experience representing owners, engineers, construction managers, and contractors with contract negotiations, project execution, and claims management through mediation and litigation. Chad is also licensed to practice in Arizona and California.



BRYAN L. ELWOOD

Bryan Elwood joins Parsons Behle & Latimer's Corporate Transactions & Securities department. He practices in the corporate and finance sector, advising clients with asset and equity acquisitions and dispositions, corporate restructurings, and financial transactions. He has experience advising dental support organizations, dental practice groups, dentists, and other health care providers in a variety of corporate and regulatory matters. He also provides general corporate governance and business transaction services to clients across all industries. Bryan is also licensed to practice in Texas.

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Appellate Highlights

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

Editor's Note: The following appellate cases of interest were recently decided by the Utah Supreme Court, Utah Court of Appeals, and United States Tenth Circuit Court of Appeals.

***Jordan v. Jensen* 2017 UT 1 (Jan. 10, 2017)**

Uintah County sold property at a tax sale without providing the required notice of the sale to the holder of mineral rights on the property. The mineral interest owner filed suit challenging the validity of the tax sale thirteen years later, and the new owners of the property raised a four-year statute of limitations defense under Utah Code section 78B-2-206. The Utah Supreme Court held that the statute of limitations did not apply because the sale was conducted in violation of the mineral right owner's due process rights and the tax title was void to the extent it purported to convey the mineral rights on the property.

***Bank of America v. Adamson* 2017 UT 2 (Jan. 11, 2017)**

The Utah Supreme Court answered the question left open in *Federal National Mortgage Association v. Sundquist*, 2013 UT 45, 311 P.3d 1004, as to the appropriate remedy for a violation of Utah Code section 57-1-21, which requires a trustee of a nonjudicial foreclosure sale to maintain an office within the State of Utah. In doing so, the court distinguished between void, voidable, and valid trustee's deeds. Because the defendants had not presented any evidence the trustee's deed violated public policy, the district court erred in holding that it was void. And, because the defendants had not shown that they suffered prejudice as a result of ReconTrust's failure to have an in-state office, the trustee's deed was valid, not voidable.

***Brown v. Cox* 2017 UT 3, 387 P.3d 1040 (Jan. 11, 2017)**

In a dispute over election results, the Utah Supreme Court held that Utah Code section 20A-4-403(2)(a)(ii) unconstitutionally extended the court's original jurisdiction because the legislature cannot alter the court's original jurisdiction by statute.

***Hertzke v. Snyder* 2017 UT 4, 390 P.3d 307 (Jan. 18, 2017)**

This appeal arose out of a dispute over the proceeds of a life insurance policy. Before his death, the policy owner disinherited and divorced his spouse, but he failed to change the beneficiary

designation. The Utah Supreme Court held that, in the absence of express terms that reference divorce in a life insurance policy, there is a statutory presumption that a beneficiary designation of a former spouse is revoked upon divorce. The presumption may be rebutted by the express incorporation of language from Utah Code section 30-3-5(1)(e) in the divorce decree.

***Lancer Ins. Co. v. Lake Shore Motor Coach Lines, Inc.* 2017 UT 8 (Feb. 15, 2017)**

Utah Code section 31A-22-303(1), which requires motor vehicle liability insurance policies to cover damages or injuries to third parties resulting from a driver's unforeseeable loss of consciousness while driving, overrides the common law "sudden incapacity" defense and imposes strict liability in circumstances where a driver suddenly and unforeseeably becomes incapacitated. *Id.* ¶ 9. The driver's liability under these circumstances is capped by the limits set forth in the applicable insurance policy.

***State v. Thornton* 2017 UT 9 (Feb. 21, 2017)**

In this appeal involving admissibility of evidence of the defendant's past misconduct, the Utah Supreme Court repudiated the "scrupulous examination" line of cases previously used to review decisions under Rule 404(b) of the Utah Rules of Evidence. *Id.* ¶ 3. Instead, "appellate courts should simply assess whether the district judge made an error in admitting or excluding the evidence in question." *Id.* ¶ 53 (emphasis omitted).

***State v. Steed* 2017 UT App 6 (Jan. 6, 2017)**

After defendants' convictions for failure to file tax returns were overturned, the district court denied their request for a refund of tax penalties and interest they had paid pursuant to a restitution order. The Utah Court of Appeals held that the order of acquittal eliminated the court's jurisdiction to impose restitution and the Steeds were entitled to a refund. However, because the Steeds voluntarily entered into a private pay-to-stay contract with the Wasatch County

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

Jail, they were not entitled to a refund of the costs of incarceration. In addition, they were not entitled to a refund of supervision fees paid to Adult Probation and Parole, as the Steeds actually received the State's supervision services – a result the court characterized as “troubling at an intuitive level.” *Id.* ¶ 24.

State v. Martinez-Castellanos

2017 UT App 13, 389 P.3d 432 (Jan. 20, 2017)

Trial counsel's failure to provide the defendant a meaningful opportunity to participate in the in-chambers voir dire of potential jurors, either by being physically present or through discussion afterward, constituted deficient performance.

Without deciding whether voir dire is, as a general matter, a critical stage of trial at which a defendant has a right to be present at all times, the Utah Court of Appeals held that the in-chambers voir dire in this case was sufficiently important that the defendant had a right to participate.

***Rehn v. Christensen* 2017 UT App 21 (Feb. 2, 2017)**

The defendant challenged the district court's grant of summary judgment to the plaintiff on the first two elements of his slander of title claim – publication of a slanderous statement disparaging the claimant's title and that the statement was false. The defendant claimed, among other things, that he had a valid attorney's lien on the plaintiff's property. The Utah Court of Appeals affirmed the district court's holding that the defendant attorney did not have a valid statutory attorney's lien. It explained, “An attorney's single comment concerning property not at issue in the divorce and not owned by the client, made in the course of performing extensive divorce-related work for the client, is too tenuous to connect the legal work to the Property.” *Id.* ¶ 46.

***Patterson v. Knight* 2017 UT App 22 (Feb. 2, 2017)**

The parties' handwritten settlement agreement after mediation stated that it was subject to drafting a final agreement that would include a non-disparagement provision and other terms. One party sent the other a draft of a more formal agreement shortly after the mediation, and roughly a month later, the other party responded that it could not agree to the terms as drafted and that it was terminating the proposed mediation agreement. The Utah Court of Appeals affirmed enforcement of the settlement agreement, noting that the repudiating party could not rely on its own failure to follow through with reasonable efforts to craft the contemplated written agreement to defeat the condition of drafting a more formal agreement.

***Mower v. Simpson* 2017 UT App 23 (Feb. 2, 2017)**

Affirming a summary judgment, the Utah Court of Appeals held that the district court did not abuse its discretion by striking a

declaration that (a) directly contradicted the declarant's sworn deposition testimony and (b) contained conclusory and speculative statements that lacked specificity or foundation.

***Reperex, Inc. v. Child, Van Wagoner & Bradshaw* 2017 UT App 25 (Feb. 9, 2017)**


The validity of a contractual provision that released a business broker from any liability for the buyer's reliance on its statements depends on allegations or proof of fraud, not on the breadth of the clause, repudiating a prior memorandum decision of the court that suggested otherwise.

***Welty v. Retirement Board* 2017 UT App 26 (Feb. 9, 2017)**

Decedent was required under a divorce decree to designate petitioner as his life insurance beneficiary until their minor children reached the age of eighteen, but he had violated the order and changed the beneficiary to his current spouse shortly before he died. The insurer paid the death benefit to the designated beneficiary, and six years later, the ex-wife sought an order requiring benefits to be paid to her. The Utah Court of Appeals held that the plain language of the applicable statute required the Public Employees' Health Program to pay life insurance benefits to the man's last named beneficiary, which it

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had done, and the divorce decree was not part of the insurance contract, so no second payment was required.

***Brown v. Williams* 2017 UT App 29 (Feb. 16, 2017)**

An employee of the Internal Revenue Service was struck by a co-employee while walking into work in the employer's parking lot. The court held that because the accident occurred on the employer's premises, in a parking lot dedicated to its employees, workers' compensation provided the exclusive remedy.

***State v. Van Huizen* 2017 UT App 30 (Feb. 16, 2017)**

Appealing a conviction for aggravated robbery, the defendant argued that the juvenile judge should have been required to recuse herself for lack of impartiality under Utah's Code of Judicial Conduct prior to binding the defendant over to stand trial as an adult. The Utah Court of Appeals held that the judge's marriage to the chief criminal deputy in the prosecuting entity's office gave rise to an appearance of impropriety and that the defendant was entitled to another bindover hearing, even in the absence of a showing of prejudice.

***RJW Media, Inc. v. Heath* 2017 UT App 34 (Feb. 24, 2017)**

Discussing the disclosure requirements for non-retained experts for the first time since the 2011 revision to the Utah Rules of Civil Procedure, the Utah Court of Appeals held that the district court abused its discretion by allowing a party to present opinions of a non-retained expert because the party failed to provide a summary of the witness's testimony, as required by Rule 26, until four days prior to trial.

***C504750p LLC v. Baker* 2017 UT App 36 (Feb. 24, 2017)**

Faced with clear evidence that the defendant was evading service of process, the Utah Court of Appeals upheld service by publication against a due process challenge, holding the plaintiff had been reasonably diligent in its efforts to serve the defendant.

***Lindsey v. Lindsey* 2017 UT App 38 (Mar. 2, 2017)**

In this divorce case, the district court concluded, on summary judgment, that husband's business interests were separate property. Surveying the exceptions to the general presumption that separate property will not be divided, the Utah Court of Appeals affirmed, holding that wife's maintenance of the marital household, standing alone, was insufficient to demonstrate contribution to the opposing party's pre-marital business interests. The court left open the issue of whether a correctness or deference standard of review would apply to a district court's pre-trial categorization of marital property.

***Rocky Mountain Builders Supply Inc. v. Marks* 2017 UT App 41 (Mar. 3, 2017)**

A Utah resident agreed to construct two gazebos and a shed on defendant's property in Montana. The Utah Court of Appeals rejected the defendant's claim that the Utah forum selection clause in the contract was unenforceable. The court held that, although one of the parties was a business entity and the other an individual, there was no reason to conclude that the forum selection clause was unreasonable or unfair and that Utah's exercise of jurisdiction over the subject matter only requires a rational nexus to the case or parties.

Belnap v. IASIS Healthcare

844 F.3d 1272 (10th Cir. Jan. 5, 2017)

The plaintiff had signed an agreement with one of the defendants that contained the following provision regarding arbitration: "The arbitration shall be administered by JAMS and conducted in accordance with its Streamlined Arbitration Rules and Procedures . . . , except as provided otherwise herein." *Id.* at 1276 (emphasis omitted). The Tenth Circuit held that the parties to the agreement clearly and unmistakably intended to arbitrate arbitrability of the claims when they incorporated the JAMS Rules into the agreement.

United States v. Thornton

846 F.3d 1110 (10th Cir. Jan. 20, 2017)

Thornton appealed a district court's decision basing the length of his sentence, in part, on the treatment and vocational services he would receive in jail. The Tenth Circuit held that the district court erred by improperly relying on the availability of in-custody rehabilitation as a justification for the denial of a downward variance, in violation of clearly established precedent forbidding judges from using imprisonment as a means to promote correction or rehabilitation.

United States v. Hernandez

847 F.3d 1257 (10th Cir. Feb. 9, 2017)

The United States argued for the first time on appeal that evidence of a firearm was admissible under the attenuation doctrine, as established in *Utah v. Strieff*, 136 S. Ct. 2056, a 2016 United States Supreme Court decision issued after the appeal was filed. Although the Tenth Circuit recognized that the *Strieff* decision came out after the appeal was filed, it held that the attenuation argument was waived, as the United States could have raised the argument below, just as the State of Utah had done in the Supreme Court case.

***In re Cowen* 849 F.3d 943 (10th Cir. Feb. 27, 2017)**

In this bankruptcy appeal, the Tenth Circuit adopted the minority view that only affirmative acts to gain possession of, or to exercise control over, property of the estate violate the automatic stay.

On Becoming a More Effective Private Guardian ad Litem

by Ted Weckel

In 2014 the Utah Legislature enacted the private guardian ad litem statute. A private guardian ad litem (PGAL) is simply a licensed attorney who is appointed by a court to represent the interests of a child in a district court action. Utah Code Section 78A-2-705 provides a private guardian ad litem with very broad investigatory powers. Pursuant to paragraphs twelve and fourteen of the statute, one of those powers allows a PGAL to make recommendation regarding child custody. Although it may be helpful for parents who are financially strapped and cannot afford a full-blown custody evaluation from a clinical psychotherapist to ask the court to appoint a PGAL to make a recommendation regarding child custody, without proper training, a PGAL may unwittingly make a recommendation that is unreliable and/or invalid. If counsel for the parties also lack training and/or experience in the complex area of child custody, then a newer judge is likely to be unaware of how much weight to give a PGAL's recommendation. The judge may then make an erroneous child custody ruling for the parties and for the children.

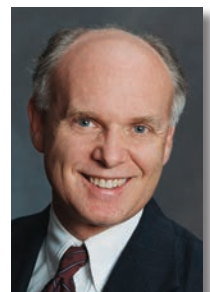
In 2015 I became a member of the Association of Family and Conciliation Courts (AFCC). The AFCC is an organization primarily comprised of family law lawyers and clinical psychotherapists, including clinical psychologists. The AFCC has published Model Standards of Practice for Custody Evaluations, along with Standards of Practice for several other subject areas. The AFCC's website provides standards published by the AFCC, the American Bar Association (ABA), and other professional organizations on the following topics: (1) examining intimate partner violence; (2) child protection mediation; (3) court-involved therapy; (4) brief focused assessments; (5) parenting coordination; (6) divorce mediation; (7) supervised visitation; (8) lawyers representing children in custody cases; and, (9) lawyers representing children in abuse and neglect cases. See Association of Family and Conciliation Courts, *available at* www.afccnet.org/Resource-Center/practice-Guidelines-and-

Standards. The American Psychological Association (an organization for clinical psychologists) has also published Guidelines for Child Custody Evaluations in Family Law Proceedings. See American Psychological Association, *available at* www.apa.org/practice/guidelines/child-custody.aspx.

The ABA standards for lawyers representing children in custody cases (published in 2003 and found on the AFCC's website) advises against lawyers to advocate for children and to represent the child's best interest at the same time. See American Bar Association, American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (August 2003), *available at* www.afccnet.org/Portals/0/PublicDocuments/Guidelines/aba.standards.pdf. However, Utah's PGAL statute allows a lawyer to serve in both capacities simultaneously. The ABA standards do not state why there is a need to segregate these roles for attorneys when representing children. Of course a conflict of interest could arise if a PGAL is representing more than one child, and if the children have competing interests. If that occurs, then pursuant to Professional Rule 1.7(a)(1), a PGAL would have to withdraw. However, if no conflict of interest exists, it seems that Utah's PGAL statute allows a PGAL to serve in both capacities. Doing so will be more economical for many financially strapped parents.

However, and more notably, the ABA standards prohibit a best interests lawyer from making a recommendation regarding

TED WECKEL practices in the areas of criminal defense, death penalty habeas appeals, family law, tax controversies, and civil litigation.



child custody, or even making a written or oral report to the court in that regard. The ABA standards require a best interest lawyer to “offer traditional evidence-based legal arguments such as other lawyers make” rather than making a recommendation. *See id.* at 3. The ABA standards also require a best interest lawyer to make a determination from objective criteria concerning the child’s needs and interests. However, it seems that the distinction between making a determination as to what is in the child’s best interest, and allowing a lawyer to make an oral or written recommendation as to what is in the child’s best interest is largely academic. That is, in either case, the lawyer needs to conduct an objective investigation, and report the facts from the investigation to the court in support of his or her determination/recommendation. The court then determines what is in the best interest of the child.

One of the problems with Utah’s PGAL statute, as I see it, is that the statute does not set forth the rationale for the need to perform an independent investigation and to interview what is known in this area of the law as “collateral sources.” The AFCC’s Standard 11 states the need for a custody evaluator to explore alternative hypotheses for a custody evaluation. AFCC

Standard 11.2 also requires evaluators to “acknowledge the limits in the ability to discern the truthfulness of oral reports from the primary participants.” The Task Force for Model Standards of Practice for Child Custody Evaluation, Association of Family and Conciliation Courts Model Standards of Practice for Child Custody Evaluation, Standard 11.2 (May 2006), *available at* www.afccnet.org/Portals/0/ModelStdsChildCustodyEvalSept2006.pdf. Similarly, under the American Psychological Association’s (APA) Guidelines, Section 10 states the rationale for multiple methods of data gathering through the use of collateral sources. American Psychological Association, Guidelines for Child Custody Evaluations in Family Law Proceedings, *available at* www.apa.org/practice/guidelines/child-custody.aspx. That is, doing so “enhance[s] the reliability and validity of the psychologist’s eventual conclusions, opinions, and recommendations.” *Id.* at 10. Section V of the ABA standards (relating to best interest lawyers) also warns such lawyers about merely relying upon their own “personal values, philosophies, and experiences” in making a best interest determination. *See* American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases, Section V. E. Considering what these three authorities have to say about potential bias in rendering a child custody recommendation, it is clear that it is important for a PGAL to interview collateral sources, or collaterals, to test his or her hypotheses when making a child custody recommendation and that these professional standards should be familiar to a PGAL in addition to the Utah statute.

However, simply interviewing collateral sources is not enough. I recently attended the AFCC’s 12th Symposium on Child Custody Evaluations. Let me share some of the information I gleaned from my notes. I learned that the closer the collateral source is to the party emotionally or by birth, the more inclined the source is to be biased in favor of that party. It is also important to tell collaterals that the information they are providing is not confidential and that it will be shared in court. Some participants at the CLE indicated that they record their interviews with collaterals to protect themselves from later accusations that what was reported was inaccurate. One technique used in interviewing collaterals is the written questionnaire. When using a questionnaire, there is no doubt as to what the collateral said. Then after receiving a collateral’s answers, it is best to go back and tell the parent what the collateral has said. It is also best to describe behavior rather than drawing inferences or applying labels when disclosing to

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the court the facts upon which the recommendation is based.

One of the things I think would be helpful in making Utah's PGAL statute better would be to alert the PGAL in the form of a commentary as to his or her own prospective bias, the very likely bias of the competing parties, and the rationale and need for interviewing collateral sources, i.e., to gain a broader sense of the interpersonal intricacies, e.g., motives, in the child's family before making a recommendation. Therefore, in my view, it would be helpful to incorporate some of the language or principles articulated in the ABA's, AFCC's, and APA's model guidelines and standards into our PGAL statute.

Another interesting issue, when comparing the PGAL statute with the ABA standards, is that the latter forbid an attorney who represents a child from testifying as a witness — either literally or effectively. That is, the ABA standards forbid such a lawyer from filing a report with the court or even making a best interest recommendation. Yet paragraph fourteen of Utah's statute only requires a PGAL, like an expert witness under Rule 705 of the Utah Rules of Evidence, to disclose the factors that form the basis of the PGAL's recommendation to the court (and implicitly to the parties). Utah Code Ann. § 78A-2-705(14). Again, this fine distinction between making a recommendation and formulating a conclusion for the court seems largely academic.

Another suggestion I have is that the PGAL Office require lawyers

who serve as PGALs to join the AFCC and to attend at least one CLE each year, or at least every other year. Doing so should raise the level of competency of PGALs dramatically, which will effectively help the courts to make better rulings. It also seems like a good idea to require newly appointed district court judges, i.e., judges who have been on the bench for less than three years, to do the same thing. The AFCC also publishes an outstanding quarterly journal with recent articles on family law subjects, and members receive the publication as part of their dues.

Let me share some additional things I learned at the AFCC symposium. In terms of bias, I learned that people generally are persuaded by what information they are exposed to first. Therefore, if the first party you interview seems reasonably believable, that person sets the bar fairly high for the other party in terms of his or her credibility. Also, when interviewing the children, the party who transports the children to the interview can have an effect on the temperament and/or feelings of the child when interviewed. Children are more susceptible to the influence of others, especially younger children. Therefore, you can ask the child what he or she talked about with his or her parent in driving to your office to determine whether the driving parent may have tried to influence the child and whether the child has in fact been influenced. Generally, in formulating recommendations, a PGAL should use a cautious hypothesis testing approach and try to confirm and disconfirm hypotheses on an ongoing basis to eliminate personal or collateral bias.



Jennifer Brennan
jbrennan@fjfirm.com

Frankenburg Jensen is pleased to announce that Jennifer Brennan has become a partner of the firm.

Jennifer has extensive litigation experience in state and federal courts across the U.S. Before joining Frankenburg Jensen, she spent 14 years in Washington D.C. and Los Angeles, working in private practice and for the Federal Trade Commission, both defending and prosecuting federal government investigations. Her key areas of expertise include medical malpractice defense, insurance defense, and Federal Trade Commission compliance and enforcement. In addition to Utah, Jennifer is also admitted to the state bars in Idaho, California, Virginia, and Washington D.C. She received her Juris Doctorate from UCLA School of Law.

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Another thing I learned at the symposium was that although abuse is more commonly thought of in the context of sexual or physical abuse, very recently the AFCC has come out with guidelines for intimate partner violence. Among other things, the term domestic violence has been expanded to include psychologically aggressive and coercive behaviors such as intentionally disrupting the emotional safety, security, or well-being of another, economically diminishing or limiting a person's financial security, or requiring the person to subordinate his or her will to the abuser, and/or isolating the person from others. It was reported that in 80% of divorce cases there is some kind of abuse, if one includes psychological abuse. In 50% of the divorces, there was physical abuse. In 35% of the case, kids observed some form of abuse. It was reported that children are at risk in their own relationships and may use domestic violence, may become emotionally insecure, and may have difficulty in regulating emotions later. If the child has a secure attachment to the nonviolent parent, it can greatly mitigate the effect of the abuse. Lacking emotional warmth and rejection of the child's own children are other aspects of domestic violence for children who experienced such violence in their homes. The more violence that has occurred in the home in the past, the more likely it will occur in the future. That is why it is

necessary to screen for domestic violence and to ask a child and the parents about domestic violence in any PGAL investigation. If a PGAL determines that abuse has occurred in the home, I suggest going to the AFCC's website to review its guidelines.

Being able to identify these additional kinds of abuse is an important step in making a more effective recommendation. It was reported that there is a higher rate of false allegations of abuse in the child custody setting and that they often come from the perpetrator. The safety of the child should therefore be of utmost concern for the PGAL. The AFCC guidelines state that a child custody evaluator should strive to mitigate his or her gender, cultural, or other biases related to intimate partner violence. The evaluator enhances safety by informing parents and collateral witnesses that the information they share about intimate partner violence may be disclosed to the court. Therefore, a PGAL should use the AFCC guidelines for intimate partner violence to screen for it when interviewing his or her child-client and likewise attempt to eliminate his or her biases. One of the presenters suggested reading an article by Dr. Leslie M. Drozd on this subject. I found on her website an article entitled: *Intimate Partner Violence and Child Custody Evaluation, Part I: Theoretical Framework, Forensic Model, and Assessment Issues*. Leslie M. Drozd, Ph.D., www.lesliedrozd.com/articles.html.

I also attended a presentation on relocation by Dr. William G. Austin, the initiator of the term "parental gate keeping." What this term means in the context of child custody is that the custodial parent can swing open or swing closed the gate to the non-custodial parent at his or her discretion. If the custodial parent is too restrictive with allowing the non-custodial parent contact with the children, the custodial parent is not acting in the best interest of the children. Dr. Austin's website can be found at: www.child-custody-services.com. Dr. Austin has published a relocation risk assessment model, and you can read the articles he has published on his website on this subject and on related subjects. In terms of a child's risk in feeling unduly insecure with a relocation, the more moves a child has been exposed to, the greater the stress involved for the child. If a child relocates with a loving parent, the child usually does just fine. The number one factor in a child's ability to cope with the stress of a move is the child's IQ. The more social capital the child has, the less risk for the child. The coping skills of the parents associated with the relocation are also relevant.

I hope this information is helpful to those who are serving as PGALs.

President-Elect and Bar Commission Election Results



H. Dickson Burton was successful in his retention election as President-elect of the Bar. He will serve as President-elect for the 2017–2018 year and then become President for 2018–2019. Congratulations goes to **Herm Olsen** who ran unopposed and is declared elected in the First Division, **Cara Tangaro** and **Heather Farnsworth** who were re-elected in the Third Division, and **Mark Morris** who was newly elected in the Third Division. Sincere appreciation goes to all of the candidates for their great campaigns and thoughtful involvement in the Bar and the profession.

H. Dickson Burton, President-Elect



*Herm Olsen
First Division*



*Cara Tangaro
Third Division*



*Heather Farnsworth
Third Division*



*Mark Morris
Third Division*

Mandatory Online Licensing

The annual Bar licensing renewal process will begin June 1, 2017, and will be done only online. An email outlining renewal instructions will be sent the last week of May to your email address of record. We are increasing the use of technology to improve communications and save time and resources. Utah Supreme Court Rule 14-507 requires lawyers to provide their current email address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org.

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

No separate licensing form will be sent in the mail.

You will be asked to certify that you are the licensee identified in this renewal system. Therefore, this process should only be completed by the individual licensee, not by a secretary, office manager, or other representative. Upon completion of the renewal process, you will receive a licensing confirmation email. If you do not receive the confirmation email in a timely manner, please contact licensing@utahbar.org.

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

Bar Thank You

Many attorneys volunteered their time to grade essay answers from the February 2017 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Paul Amann	Dan Garner	Greg Lindley	Scott Sabey
Mark H. Anderson	Michael Garrett	Steven Lovell	Tenley Schofield
Ken Ashton	Stephen Geary	Michael Lowe	John Sheaffer
Mark Astling	Alisha Giles	Elisabeth McOmber	Leslie Slaugh
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Notice of Legislative Rebate

Bar policies provide that lawyers may receive a rebate of the proportion of their annual Bar license fee that has been expended during the fiscal year 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.

The amount which was expended on lobbying and legislative-related expenses in the preceding fiscal year was 0.36% of the mandatory license fees. Your rebate would total: Active Status – \$1.51; Active – Admitted Under 3 Years Status – \$0.89; Inactive with Services Status – \$0.53; and Inactive with No Services Status – \$0.37.

MCLE Reminder – Odd Year Reporting Cycle

July 1, 2015–June 30, 2017

Active Status Lawyers complying in 2017 are required to complete a minimum of 24 hours of Utah approved CLE, which shall include a minimum of three hours of accredited ethics. **One of the ethics hours shall be in the area of professionalism and civility.** A minimum of twelve hours must be 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. For more information and to obtain a Certificate of Compliance, please visit our website at www.utahbar.org/mcle.

If you have any questions, please contact Sydnie Kuhre, MCLE Director at sydnie.kuhre@utahbar.org or (801) 297-7035, Laura Eldredge, MCLE Assistant at laura.eldredge@utahbar.org or (801) 297-7034, or Lindsay Keys, MCLE Assistant at lindsay.keys@utahbar.org or (801) 597-7231.

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 2017 and ends June 30, 2018. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its May 12, 2017 meeting.

The Commission is interested in assuring that the process includes as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, is available for inspection and comment at www.utahbar.org.

Please contact John Baldwin at the Bar Office with your questions or comments.

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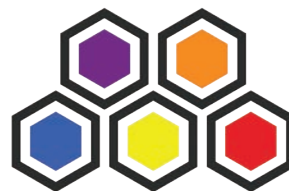
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More information about the Bar's Ethics Hotline may be found at:

www.utahbar.org/opc/office-of-professional-conduct-ethics-hotline/

Information about the formal Ethics Advisory Opinion process can be found at:

www.utahbar.org/opc/bar-committee-ethics-advisory-opinions/eaoc-rules-of-governance/.



801-531-9110

PUBLIC REPRIMAND

On February 20, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Amended Order of Discipline: Public Reprimand against Denise P. Larkin for violating Rules 1.3 (Diligence), 1.4(a) (Communication), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

Ms. Larkin was retained for representation in a divorce proceeding. The case was bifurcated and the divorce was granted, with issues of custody and division of some marital assets remaining unresolved. Ms. Larkin failed to act with diligence in completing discovery in a timely manner and in timely prosecuting her client's case. Ms. Larkin failed to timely and effectively communicate with her client. The client retained new counsel to complete the case.

The OPC sent a letter to Ms. Larkin asking her to respond to these allegations and Ms. Larkin did not respond. The OPC sent a second request to Ms. Larkin asking for a reply and Ms. Larkin did not reply. The OPC served Ms. Larkin with a Notice of Informal Complaint (NOIC) requiring her written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Ms. Larkin did not timely respond in writing to the NOIC.

Aggravating factors:

Pattern of misconduct and multiple violations.

ADMONITION

On February 27, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.6(a) (Confidentiality of Information) of the Rules of Professional Conduct.

Discipline Process Information Office Update

During the first quarter of this year, the Discipline Process Information Office opened 20 files, and Jeannine P. Timothy provided helpful information to the attorneys named as subjects of Bar complaints. Jeannine is always available to answer questions and clarify the discipline process. Please feel free to contact Jeannine with your questions.



Jeannine P. Timothy
(801) 257-5515 | DisciplineInfo@UtahBar.org

In summary:

In the course of representing a client, the attorney sent an email seeking advice from colleagues outside the attorney's firm. The email included information which provided more detail about the client than was necessary to obtain the advice being sought. The level of detail would allow others to determine the identity of the attorney's client. In the email, the attorney expressed an opinion of the client's culpability. The attorney took these actions without obtaining sufficient informed consent from the client prior to the disclosure of the confidential information.

ADMONITION

On February 28, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.15(d) (Safekeeping Property) of the Rules of Professional Conduct.

In summary:

The attorney was hired for representation in collection of a civil judgment. The client provided the attorney with case files and other materials, including a video recording. The attorney was in possession of the case files and other materials for several years. When the client requested the file materials from the attorney, the attorney provided the client with copies of only a few of the documents and failed to return the complete file materials to the client because they could not be located.

PUBLIC REPRIMAND

On February 28, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Paul E. Remy for violating Rules 1.3 (Diligence), 1.4(a) (Communication), and 5.3(b) (Responsibilities Regarding Nonlawyer Assistants) of the Rules of Professional Conduct.

In summary:

Mr. Remy was retained for representation in a civil matter. Mr. Remy filed the client's complaint but did nothing further to move the case forward until a year later when he filed a motion to amend the complaint. The client's action was ultimately dismissed for lack of prosecution.

Mr. Remy failed to reasonably communicate with his client during his representation, including failing to provide status updates to the client and failing to respond to the client's reasonable inquiries for information on the status and progress of the case.

Mr. Remy failed to supervise the work of his non-lawyer assistants, including allowing information and billing statements to be sent out to the client without Mr. Remy's review or approval. Mr. Remy also failed to conduct any follow-up with the non-lawyer assistants about his pending cases.

SCOTT DANIELS

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SUSPENSION

On March 3, 2015, the Honorable Robert P. Faust, Third Judicial District Court, entered an Order of Suspension, against Joseph P. Barrett, suspending his license to practice law for a period of 150 days, for Mr. Barrett's violation of Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct. On February 22, 2017, the Utah Supreme Court issued a Decision affirming Mr. Barrett's 150-day suspension.

In summary:

While employed at a law firm, Mr. Barrett misappropriated firm funds when he exchanged legal services for construction work on his home and yard in two cases, thereby depriving his law

firm of the legal fees accrued from those cases. He also accepted payment from a firm client and deposited the funds into his personal account without the firm's knowledge.

Aggravating circumstances:

Dishonest or selfish motive; multiple offenses; and refusal to acknowledge the wrongful nature of the misconduct.

Mitigating circumstances:

Absence of a prior record of discipline; cooperation with the OPC throughout the proceedings; and a partial understanding of what actions he should have taken with his law firm to avoid the problems.

Save the Date for these Upcoming CLEs!

JUNE 22

8:30 am–4:30 pm

Roadmap to Effective, Ethical Business Development & Client Service

- The power of relationships
- A short history of Legal Marketing
- What is considered "false and misleading"?
- Ethically networking for clients and referrals
- Client entertainment
- Online marketing and social media
- Referral fees
- Service-related ethics rules overview
- Managing client expectations
- Addressing client complaints
- Handling an angry client



Presenter: Roy S. Ginsburg, a practicing lawyer for 30+ years, is an attorney coach and law firm consultant nationwide. He also runs a part-time solo practice focusing on legal marketing ethics.

5 hrs.
Ethics
1 hr.
Prof/Civ

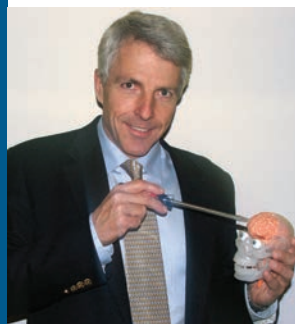
JUNE 8

9:00 am–4:25 pm

Making Your Case with a Better Memory

- Save time in court preparation
- Make polished presentations without notes
- Become a better listener in the courtroom so you can cross-examine with confidence
- Remember names of clients and jurors
- Develop better concentration
- Stop worrying about remembering a crucial point

6.5 hrs.
CLE



Presenter: Paul Mellor is a nationally recognized memory training consultant. His objective is to show you how a trained memory can increase your efficiency and productivity in all aspects of law.

Register through your Member Dashboard at:
services.utahbar.org with your login and password.
Call 801.297.7036 if you have questions.

Fit2PracticeUtah: Beginning Steps to Mastering Mindfulness and Sleep Awareness

by Michael F. Iwasaki and Atim Effiong

To say that working professionals, especially attorneys, are stressed would be an understatement; time and time again, we are faced with mounting pressures from various sources (employers, clients, family, finances, etc.). These stressors manifest themselves physically, mentally, and behaviorally, such as headaches, chest pains, anxiety, irritability, depression, drug/alcohol abuse, changes in appetite, sleep deprivation, and a number of other ailments. Mayo Clinic Staff, *Stress Symptoms: Effects on Your Body and Behavior*, available at <http://www.mayoclinic.org/healthy-lifestyle/stress-management/in-depth/stress-symptoms/art-20050987> (last updated Apr. 28, 2016). In order to combat these effects, two wellness approaches have emerged as leading treatments: mindfulness and sleep awareness.

WHAT IS MINDFULNESS?

Mindfulness revolves around the concepts of meditation and present moment awareness, paying particular attention to one's feelings, thoughts, and physical sensations. Robert Zeglovitch, *The Mindful Lawyer*, 23 GPSOLO MAGAZINE 7, (Oct./Nov. 2006), available at http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/mindfullawyer.html. By practicing mindfulness, we can self-reflect and enhance our mental and emotional connections with ourselves and others around us. This, in turn, can improve how we recognize and deal with some of the daily demands of our professional and personal lives. *Id.*

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.



MINDFULNESS EXERCISES

Most people feel they don't have enough time in the day to get their basic tasks done, let alone take time to meditate. However, the following are some simple mindfulness exercises that take no more than a few minutes.

S.T.O.P.

Stand up and take a deep breath. Tune in to your body, and focus on your present sensations and emotions. Observe your current surroundings. Look for future Possibilities and steps for moving forward from your current state. Leonie Stewart-Weeks, Psychcentral.com, *1-Minute Mindfulness Exercises*, available at <https://psychcentral.com/blog/archives/2016/01/24/1-minute-mindfulness-exercises> (Jan. 24, 2016).

Listen

Select an unfamiliar piece of music. Close your eyes, and just listen to it. Attempt to climb into the track and explore all the instruments and sounds. Ignore any outside noises, and try not to get drawn into critiquing the music. This exercise will help you practice listening in an open-minded, non-judgmental manner. Alfred James, *6 Mindfulness Exercises You Can Try Today*, available at <http://www.pocketmindfulness.com/6-mindfulness-exercises-you-can-try-today> (accessed Feb. 9, 2017).

ATIM EFFIONG is a wellness coach for busy professionals who are ready to fit fitness back into their lives. Atim has a bachelors in Exercise Science, and a master's in Public Health.



Immerse yourself

Take a routine task and pay close attention to every detail of that activity. Rather than rushing through it, try to observe and experience each action, feeling, and mental analysis associated with the task. For example, when cleaning a room, feel and become the motion when sweeping the floor. Sense the muscles you use. Observe and appreciate a room that was once dirty but is now clean. By practicing this activity, you will escape the feeling of the daily grind and develop newfound contentment in the moment. *Id.*

Breathe

Breathe in through your nose and out through your mouth, focusing only on your breath. Let go of all other thoughts and pending tasks. Just let yourself be still for one minute. Mindful breathing can be done at any time of the day, but a great time to try is when you're lying in bed. This simple exercise can calm your mind and signal your body that you're ready to sleep. Leonie Stewart-Weeks, Psychcentral.com, *1-Minute Mindfulness Exercises*, available at <https://psychcentral.com/blog/archives/2016/01/24/1-minute-mindfulness-exercises> (Jan. 24, 2016). And that takes us to the next wellness approach.

WHAT IS SLEEP DEPRIVATION?

Sleep deprivation is defined as a condition that occurs if you don't get enough sleep. Natl. Insts. Health, *What Are Sleep Deprivation and Deficiency?*, available at <https://www.nhlbi.nih.gov/health/health-topics/topics/sdd> (updated Feb. 22, 2012). Lack of sleep consistency is harmful for your health. Just like you need food and water to survive, you also need sleep. Not sleeping enough can lead to physical and mental health problems and reduced productivity.

There are two types of sleep: rapid eye movement (REM) and non-REM sleep. Non-REM sleep is deep sleep; REM sleep is when you are dreaming. Your body cycles between a REM and non-REM sleep pattern three to five times per night. Getting enough of both each night is important to how well you feel and how well you function during the day. A 2009 health survey from the Centers for Disease Control and Prevention found about 35% of U.S. adults reported sleeping less than seven hours a night. Additionally, approximately 39% of adults unintentionally fall asleep during the day at least once a month. Cntrs. Disease Control and Prevention, *Unhealthy Sleep-Related Behaviors – 12 States, 2009*, 60 MORBIDITY AND MORTALITY WKLY. RPT. 233, 234 (Mar. 4, 2011).

HOW IT AFFECTS WORK AND PRODUCTIVITY

Chronic sleep deprivation is linked to increased risk for chronic diseases such as diabetes, obesity, and heart disease. That is because your body heals and repairs your heart and blood vessels during sleep. Additionally, sleep helps to regulate hormones, specifically ghrelin and leptin, which control feelings of hunger and fullness, respectively. When you do not get enough sleep, your ghrelin goes up, making you feel hungrier compared to when you are well rested. Natl. Insts. Health, *Why is Sleep Important?*, available at <https://www.nhlbi.nih.gov/health/health-topics/topics/sdd/why> (updated Feb. 22, 2012) [hereinafter *Sleep Importance*]. And let us not forget about insulin, which controls your blood sugar levels. When sleep deprived, the result is higher blood sugars, which increase your risk for diabetes. Too much insulin in the bloodstream reduces its effectiveness to collect the sugars in your blood and route them to your cells. You end up having too much ineffective insulin and too much sugar in your bloodstream, and that can happen after only one night of sleep deprivation. E. Donga, et al., *A single night of partial sleep deprivation induces insulin resistance in multiple metabolic pathways in healthy subjects*, 95 J. CLIN. ENDOCRINOL. METAB. 6, (June 2010), available at <https://www.ncbi.nlm.nih.gov/pubmed/20371664> [hereinafter *Insulin Resistance*].

Lack of sleep limits productivity because the brain needs rest. Sleep is when your brain prepares for the next day by helping you learn and remember information. Consistently getting seven or more hours of sleep per night improves your learning, enhances your problem solving skills, helps you stay focused, and helps you make decisions. When sleep deprived, your productivity drops, you may feel it takes you longer to complete tasks, and you may notice more mistakes in your work. Other issues associated with sleep deprivation include trouble making decisions, solving problems, dealing with others, and coping with change. This can explain why you opt for the donut and coffee instead of the oatmeal or Greek yogurt and why you feel grumpy after a long night of working with limited sleep. It's also linked with risk-taking behavior, depression, and suicide. *Sleep Importance, supra.*

WHAT CAN YOU DO TO GET BETTER SLEEP?

Practice sleep hygiene.

What are you doing before bed? Are you on your phone checking social media or responding to emails? If you're doing these things in bed, it conditions your body to think that your bedroom is for social media and work instead of sleeping. To help combat this, limit electronics in the bedroom. If you have to work late or you cannot sleep, leave your room and work elsewhere. Leave your bedroom for rest and relaxation. Even if you use your phone as an alarm, putting it in another room or at least further away from your bed with notifications turned off is a great option.

Have a nighttime routine.

Start with setting an alarm to tell you when it is time to start getting ready for bed. Just like you set an alarm in the morning to get up, setting an alarm to go to bed is just as beneficial. Get your body prepared for sleep by doing relaxing activities at least thirty minutes before you go to sleep. These can include brushing your teeth, washing your face, meditating, or doing some light stretching. Think of activities that relax you as opposed to keep you awake. This routine also lets your body know it is time to wind down and prepare to go to sleep. Aim to go to bed at the same time each night.

Limit caffeine later in the day.

Try some exercise, such as squats, wall-sits, or a five-minute walking break, to boost your energy. A high-protein snack such as beef jerky or hummus and vegetable sticks can give you the energy you're looking for without the sugar crash you get from soda and other sweets. Caffeine's effects can last eight to fourteen hours, which can make it harder to fall asleep when consumed later in the day. Thomas M. Heffron, *Sleep and Caffeine*, available at <http://www.sleepeducation.org/news/2013/08/01/sleep-and-caffeine> (updated Aug. 1, 2013).

Try a lightbox for a boost in energy.

Use it in the morning for about an hour or two while you are working. Because it mimics natural light, it can help regulate your circadian rhythm, thus reducing daytime sleepiness. *Insulin Resistance*, *supra*. Consider working with a sleep specialist to get your sleep in order.

This brief introduction to mindfulness and sleep awareness will hopefully motivate you to begin integrating some of these practices into your everyday routines. To take an old adage and apply some mindfulness, there's no time like the present to start.

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Client Intake for Paralegals

by Greg Wayment

As a paralegal, you should always be asking: How can I bring more value to my firm? In some professions, people try to do this by being the smartest person in the room or the first in the office every morning or by taking on extra projects. Guess what? If you try to do that in the law firm world, you're not going to have much of a life. There is always going to be someone with more education, billing more hours, or juggling more projects than they should. It's a profession of workaholics.

So that leaves other categories: Tasks the lawyers don't want to do. Tasks the lawyers don't have time to do. Tasks the lawyers don't know how to do (and aren't going to take the time to learn how to do). One of these tasks may be initial client intake, which is necessary (we all need new business coming in), but can be dangerously time draining. A well-trained paralegal can be an invaluable resource to a firm by performing the initial screening. It is also an opportunity to make a positive and professional first impression on a potential client.

My goal in this article is to lay out the framework needed for you as a paralegal to perform proper initial client screening. I also want to share some best practice tips and discuss areas that can be pitfalls. Ultimately, the goal in good client intake, for both the potential client and the firm, is to determine whether it is a good fit. In other words, to determine if a firm can help a client achieve a goal or an outcome in a way that is aligned with the client's expectations of timing and cost.

Once it has been established that you are going to be the initial contact for client intake, it is crucial to get an understanding of what your firm's practice area or specialty is. Most midsize to smaller firms specialize in certain niches and don't go too far outside of that box. For example: family law firms typically do divorce, custody fights, child visitation, and support. Many criminal defense firms do only criminal defense. Estate firms may do tax planning and probate and estate planning cases. Some attorneys specialize in transactional law, meaning they draft and review contracts or assist in the due diligence of

purchasing large commercial properties or businesses. Personal injury firms may do car accidents, workplace accident, and medical malpractice cases.

Only the larger firms are truly full-service firms, meaning they have practice groups in all areas of law. Hopefully your firm's website and marketing efforts are clear enough that you're not getting a lot of calls from people looking for some other type of work than your firm does. But do expect that it will happen.

The next thing to understand is what your firm's retainer and hourly rate requirements are. Most of the larger firms in Salt Lake are requiring a \$8,000 to \$10,000 retainer and may require more if there is immediate injunctive relief needed or a looming trial date. Hourly billing rates for attorneys have a wide degree of variance with some attorneys billing as low as maybe \$150 an hour and some billing as high as \$500 or more. Typically a firm will bill its paralegal's time too, with some paralegals billing as high as \$180 or \$200 hour.

Personal injury firms have a unique business model where they may advance all of the costs of a matter upfront, including attorney and paralegal time, and then take a percentage of the ultimate award. This is typically called taking a case on contingency. Unfortunately, because of the prevalence of personal injury firm advertising on television, many people are under the impression that lawyers take a wide array of cases on contingency, which is generally not true. So you may have to educate a potential client on the reality of the costs of legal work.

GREG WAYMENT is a paralegal at Magleby Cataxinos & Greenwood, a litigation firm in Salt Lake City specializing in patent prosecution and complex business disputes. Greg serves on the board of directors of the Paralegal Division and is currently the division liaison to the Utah Bar Journal.



What is a retainer and how does it work? Most firms require a new client to deposit a certain amount of money that the firm will hold in a trust account. If the case settles or goes away, any unused portion of a retainer is returned to the client. A retainer is typically used to provide some assurance that a firm will get paid. So, if a client runs into cash problems, the retainer might be used to pay for services rendered. Oftentimes, once a relationship is established, the retainer will either be returned or applied towards a bill. In some circumstances, an evergreen retainer might be required. This is when a certain amount must be held in the trust account at all times and if a client has to use a portion of it to pay the bill, it must be replenished.

What are the different ways a firm or lawyer gets paid? Most lawyers and paralegals keep track of their time (in six-minute increments) and send a monthly invoice requesting payment for the amount of time spent working on behalf of a client. On the other end of the spectrum are the firms (mostly personal injury) who require nothing up front from the client and may advance all the costs of litigation including the cost of depositions, expert witnesses, etc. This is called full contingency, and usually when a firm takes a case this way, when it is settled or an ultimate victory is achieved, the firm will take a third of the final amount, or sometimes as high as 40% or 50%, if it goes all the way to trial or appeals.

There is also a hybrid system called partial contingency. In some cases, this may be a good opportunity for a client to pay a reduced rate and then give the firm or lawyer a percentage of the outcome. In this fee arrangement, typically a law firm will perform work at a drastically reduced rate but still bill an hourly fee. Sometimes the client will also pay for hard costs such as e-discovery and deposition costs as the case progresses. When the case settles, or there is a victory, the firm will take a percentage of the award.

So now that you know what kind of work your firm does and how it expects to get paid, you're ready to start taking phone calls. There are three key pieces of information you should be gathering in the initial phone call: The names of all the parties involved, the basic facts of the dispute, and contact information. Getting the names of all parties involved can help you ensure there is not a conflict of interest, and getting the basic facts can help determine whether it is a good fit for your firm.

A conflict of interest is when your firm directly represents someone on the other side of a dispute or has represented

someone on the other side of dispute in the past. In this instance, the firm or an attorney might have special knowledge about the company or process that creates the potential for an unethical situation. In special circumstances, a firm may wall off certain members of a firm who have a conflict from participating in a case or having any access to the documents, but by and large if a firm has a conflict, the client must go somewhere else.

It is helpful if a you have a basic knowledge of the firm's past and present clients so that if a potential client wants to sue your firm's biggest client, for example, you can say to them immediately, "Sorry, we have a conflict or we may have a conflict, let me take your name, phone number and e-mail address and I'll follow-up." You may want to assure a potential client that any information relayed during a conflict check is absolutely confidential and will not leave the firm.

Once you have gathered the names of all the parties involved, the next step is to gain a brief overview of the legal dispute. Oftentimes, people are emotional about whatever legal issue they are having, so they may jump around, get hung up on the wrong facts, attempt to use legal jargon, or just ramble. Even though you hopefully have a good understanding that there is not a conflict, until all the members of your firm have responded

Mark your Calendars!

**Paralegal Division
Annual Meeting
and All-Day CLE**

June 23, 2017

**Utah State Bar
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**Registration Information
will be Announced**

that there is not a conflict, you can't know for sure. So it is important that you keep this summary as brief as possible.

Lastly, it is important to get the name of the client spelled correctly, the best phone number to reach him or her at, and an appropriate email address. It is usually at this point that you will want to inform the potential client of your firm's retainer and hourly rate requirements and try to gauge whether those are in alignment with expectations. Also, it is appropriate to ask the client whether there is any other information the client needs or questions the client has about the firm.

Once you have those three key pieces of information, you can send the conflict check out to your firm. Usually, if you've done a good job and determined that it is a good practice fit, there's not an obvious conflict, and the retainer and rate requirements are aligned, then the next step will be for an attorney of the firm to call the client and set up a meeting to discuss the case further. This is the appropriate time for an attorney to opine on whether the "client has a case or not," what is the best strategy, how much it may cost, etc.

Some pitfalls to avoid while doing client screening and intake:

- Being short or impatient. You may have a lot going on, but remember that most people calling a lawyer are in some state of crisis. Be professional, polite, and kind.

- The mistake of getting caught up in drama and letting someone relay too much information. You may want to say something like, "Please explain your legal issue in just a paragraph or two."
- Remember that all conflict check information is absolutely confidential. Under no circumstance do you want to relay any information gained from a potential client to anyone outside of your firm.
- Most importantly, you must be very careful about not dispensing legal advice. As a paralegal you cannot opine on a legal matter. Many people will ask, "Do you think I have a case?" or "In your opinion, is this legal or fair?" Some may be just calling around to get free legal advice or gain information. As a non-lawyer, even though in many instances you know the answer, you cannot answer because doing so would be giving a legal opinion.

Initial client screening is a great opportunity for you as a paralegal to ingratiate yourself into the process of your firm and provide a great service. In many instances, because you may be more free to take the time, you may do a better job than an attorney and provide a layer of buffer. Take the time to educate yourself on the process and jump in.

Annual Paralegal Day Luncheon

For all Paralegals & their Supervising Attorneys

Keynote Speaker: Judge Dale Kimball

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1 Hour Ethics/Civility Credit

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.

May 10, 2017 | 12:00–1:30 pm & 5:00–6:30 pm

1.5 hrs. CLE

Eat & Greet with Apple. Learn how to set up, format, and design your document. We'll show you how to collaborate and share your projects. Cost \$15.

May 18, 2017 | 12:00–2:30 pm

2 hrs. CLE

Annual Health Law Forum. \$55 for section members, \$65 for non-section members.

May 25, 2017 | 8:00 am–2:00 pm

TBA

Annual Real Property Seminar. Save the date. Grand America Hotel, 555 Main Street, Salt Lake City. More information and online registration soon to come.

June 2, 2017 | 8:30 am–4:45 pm

6 hrs. CLE + 1 hr. Ethics

Annual Family Law Seminar. University of Utah S.J. Quinney College of Law, South, 383 University St E., Salt Lake City.

June 8, 2017 | 9: am–4:25 pm

6.5 hrs. CLE

Making Your Case with a Better Memory. Join presenter Paul Mellor, a nationally recognized memory training consultant, to see how a trained memory can increase your efficiency and productivity in all aspects of law.

June 14, 2017 | 12:00–1:30 pm & 5:00–6:30 pm

1.5 hrs. CLE

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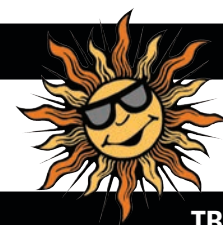
June 22, 2017 | 8:30 am–4:30 pm

5 hrs. Ethics & 1 hr. Prof/Civ

Roadmap to Effective, Ethical Business Development and Client Service. Presenter Roy S. Ginsburg, an attorney coach and law firm consultant nationwide.

July 26–29, 2017

2017 Summer Convention in Sun Valley, Idaho. Save these dates and plan to attend!
Co-Chairs: Hon. Robert J. Shelby and Amy Sorenson.



August 4, 2017 | 8:00 am–12:00 pm

TBA

**Salt Lake County Golf & CLE: Inside the Court Clerks' Office –
What the Federal and Third District Court Clerks Wish You Knew.**

8:00–8:00 am Breakfast

9:00 am–noon CLE

Noon– Golf – River Oaks Golf Course, 9300 Riverside Drive, Sandy, UT.

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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.

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OFFICE SPACE

Office Space, nice Holladay location: 4625 S 2300 E #206. Two offices in three-office suite, \$575/month each. Includes parking, conference room & copier. Call Duke 801-424-1520.

Park City – Main Street – Office space available –

For one or two Attorneys and an Assistant (457.9 sf). This lease is an ideal opportunity for attorneys in Park City or a Salt Lake Attorney/Firm seeking a Park City presence. Contact Bree Gillespie, bree@laser-law.com.

DOWNTOWN OFFICE LOCATION: Opportunity for office sharing or participation in small law firm. Full service downtown office on State Street, close to courts and State and City offices: Receptionist/Secretary, Internet, new telephone system, digital copier/fax/scanner, conference room, covered parking. Call Steve Stoker at 801-359-4000 or email sgstoker@stokerswinton.com.

Office space for lease. Total building space 5260 sf. Main floor 1829 sf, \$16/sf. Upper floor 3230 sf (may be divided), \$10/sf. Owner would consider offer to purchase. Walking distance to city and courts. Easy access to TRAX. Lots of parking. 345 South 400 East. Call Larry Long 801-328-8888.

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.

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.

PRACTICE DOWNTOWN ON MAIN STREET: Nice fifth floor Executive office in a well-established firm, now available for \$775 per month. Enjoy great associations with experienced lawyers. Contact Richard at (801) 534-0909 or richard@tjblawyers.com.

Office Space, prime Holladay location. 4625 S 2300 E #206. One office in three-office suite. \$575/month, parking, conference room, copier. Call Steve 801-424-1520.

A well-established boutique real estate law firm located on Main Street in Park City has a large office available for lease (207 sq. ft.). The lease is an ideal opportunity for an accomplished litigator and an attorney who specializes in areas not directly related to real estate laws such as trusts and estates. The firm would like to refer these types of matters to a trusted attorney in the rented office in a manner that effectively meets the needs of the clients. Contact Tassie Williams, tassiew@teschlaw.com.

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Fax: 801-531-0660
www.utahbar.org

John C. Baldwin
Executive Director
801-297-7028

Richard M. Dibblee
Assistant Executive Director
801-297-7029

Christy J. Abad
Paralegal, Executive Secretary
801-297-7031

Elizabeth Wright
General Counsel
801-297-7047

Brady Whitehead
Paralegal, Assistant to Counsel
801-297-7057

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Access to Justice Director
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Molly Barnewitz
Access to Justice Assistant
801-297-7053

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Deputy Counsel over Admissions
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Kelsey Foster
Admissions Administrator
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Stephanie Boston
Investigative Analyst
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Lexie Goates
CLE Assistant, Section Support
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Stephen Seko
CLE Assistant, Member Services
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Jeannine Timothy
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Financial Assistant, Licensing
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Phone: 801-531-9110
Fax: 801-531-9912
E-mail: opc@utahbar.org

Billy L. Walker
Senior Counsel
801-297-7039

Todd Wahlquist
Deputy Senior Counsel
801-297-7054

Diane Akiyama
Assistant Counsel
801-297-7038

Adam C. Bevis
Assistant Counsel
801-297-7042

Sharadee Fleming
Assistant Counsel
801-297-7040

Barbara Townsend
Assistant Counsel
801-297-7041

Christina Cope
Paralegal
801-297-7344

Eliza Tito
Paralegal
801-297-7043

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