

Utah Bar. JOURNAL



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Capitol Reef by Utah State Bar member Adam Bevis.

ADAM BEVIS is an attorney in the Utah State Bar's Office of Professional Conduct. Asked about his photo, Adam explained, "I enjoy exploring the parts of our National Parks that don't get as much attention and traffic as some of the more famous destinations. This photo was taken from an overlook on the Cathedral Valley loop road in Capitol Reef national park, looking toward the Henry Mountains in the distance. It was a beautiful location, which we had all to ourselves that day."



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Table of Contents

President's Message Meeting the Market for Legal Services by John R. Lund	8
Article A Primer on the Element of Causation in Utah Homicide Cases by Blake R. Hills	12
Article Licensed Paralegal Practitioners by Catherine J. Dupont	16
Article The End of the ICO Gold Rush? The Regulatory Squeeze on Token Offerings as a Funding Mechanism for Blockchain-Related Ventures by Kennedy K. Luva	20
Utah Law Developments Legislative Update by Douglas Foxley, Frank Pignanelli, and Steve Foxley	26
Utah Law Developments Appellate Highlights by Rodney R. Parker, Dani N. Cepernich, Scott A. Elder, Nathanael J. Mitchell, and Adam M. Pace	30
Article Paying for Long-term Care: Basics of Traditional and New Generation Hybrid Policies by Kathie Brown Roberts	34
Innovation in Practice Give Up Trying to Manage Millennials – Work with Them Instead by Utah State Bar Innovation in Practice Committee	37
Focus on Ethics & Civility Ethics for the State and Local Government Attorney by Keith A. Call	38
State Bar News	43
Young Lawyers Division Bits and Blocks: Navigating the Legal Landscape of the Blockchain Economy by Gale L. Pooley and Larissa Lee	54
Paralegal Division Choosing the Right Document Management Software for your Firm by Greg Wayment	60
CLE Calendar	63
Classified Ads	64

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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.

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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.

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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.

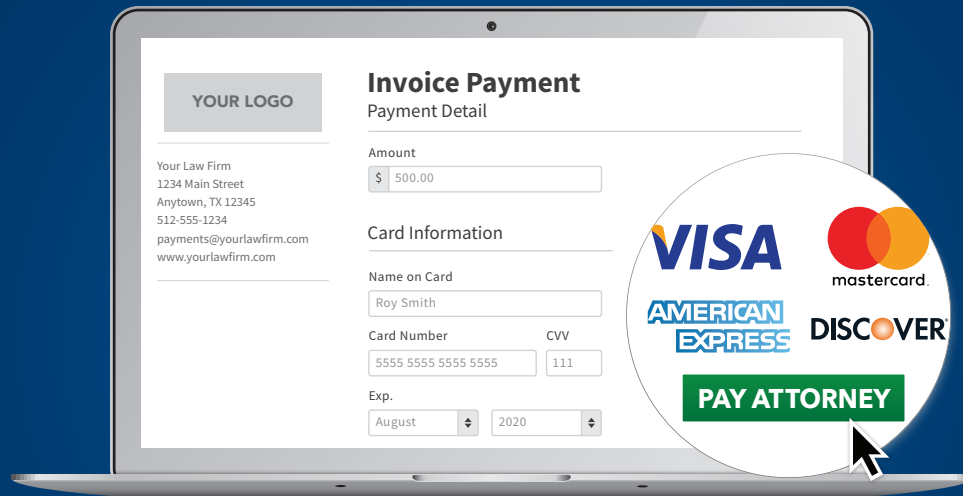
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PUBLICATION: Authors will be required to sign a standard publication agreement prior to, and as a condition of, publication of any submission.

LETTER SUBMISSION GUIDELINES

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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.
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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.
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Meeting the Market for Legal Services

The Jury is In: Legal Services are a Tough Sell

by John R. Lund

Over three million people now call Utah home and over 250,000 small businesses operate in our state. Those businesses employ over 500,000 people, which is nearly half of the private workforce. <https://www.sba.gov/sites/default/files/advocacy/Utah.pdf>. These numbers are from 2013. They are probably higher today as a result of Utah having one of the strongest economies in the nation since then. <http://www.businessinsider.com/the-15-us-states-with-the-strongest-economies-2017-3>. That is a lot of prospective clients and upside potential for lawyers, right? Well, maybe.

Of course there are thousands of us Utah lawyers who are ready, willing, and able to provide legal services to these Utahns and Utah businesses. And we lawyers know that there is an abundance of good advice and valuable assistance that we can provide to them. Hey, we are educated. We are smart. We know the law. We work hard.

Yet, very few of these people and businesses routinely use legal services. Indeed, the vast majority have never used a lawyer for anything. They look for solutions online. They buy forms. They go it alone in court. Even larger businesses increasingly try to solve legal issues on their own and only bring in outside counsel as a last resort.

Why? Why don't they call on us? We have nice websites describing our accomplishments, listing our specialties, and even offering free initial consultations. Did I mention that we are smart and could provide valuable assistance? Yet, people and businesses in all economic strata simply don't call, except maybe when they have been injured and know, from exhaustive advertising, that they should.

I wrote about this in my first President's Message in the Sep/Oct 2017 *Bar Journal* and suggested that one way to find answers is to get proximate to the people involved. We've done that now. At least we've started. We have actually asked numerous Utahns and Utah businesses why they don't utilize legal services and

similar questions. I write to report some of those results to you. They present both opportunities and challenges for anyone seeking to be gainfully employed by practicing law in Utah.

The research was conducted by Lighthouse Research, a well-regarded market research firm based here in Salt Lake City. These are people with degrees in statistics and marketing who have conducted both quantitative and qualitative research in Utah on a wide range of issues for a wide range of clients. We asked them to quantitatively research the Utah market for legal services. We asked them to focus on individuals and small businesses, where the potential to expand the demand for lawyers seemed most promising.

Specifically, Lighthouse Research was asked to determine:

- Why individuals and small businesses do or do not use lawyers?
- What obstacles or barriers prevent them from using lawyers?
- What value do legal services have to clients, and what they are willing to pay for those services?
- What sort of fee arrangements were more or less appealing to them?

Lighthouse started with phone surveys to get its answers. Statewide, they conducted 808 surveys of individuals about their legal needs. They did another 217 phone surveys of businesses, most with between three and forty-nine employees, about business-related legal needs like contracting and compliance issues. Lighthouse has tabulated the results of these surveys and has presented them with a confidence level of 95% and a margin of error of 3.45% for the individuals and of 6.64% for the businesses.



Then, based on those results, Lighthouse also conducted four focus groups, two of individuals and two of business owners and managers. Those evening efforts each involved ten to twelve participants, led by a moderator, who dug more deeply into the issues identified by the phone surveys. A subcommittee of the Bar Commission, led by Mark Morris, was able to observe these discussions from behind a one-way glass wall.

Lighthouse now has produced reports for the Bar Commission with the results of these efforts. Lighthouse has also provided some analysis of the data. Those reports are now available to all bar members via their member log in to the Practice Portal. Here is the link: <https://services.utahbar.org/Practice-Portal>.

So, what is the verdict? Well, most individuals only think they need a lawyer for things like divorce or a criminal charge. And even for those problems, many would turn instead to a friend or family member. As for other sorts of help, only 4% would go to a lawyer about problems buying or selling a home, only 9% would go to a lawyer for a personal finance matter such as a tax issue, and only 25% would go to a lawyer for help with estate planning.

In the focus groups, individuals explained a bit more of the reasoning behind this. Here are some of the comments:

"I would try to do everything on my own at first. I feel like there are a lot of things you can do on your own."

"For me to engage a lawyer, it would take a lot."

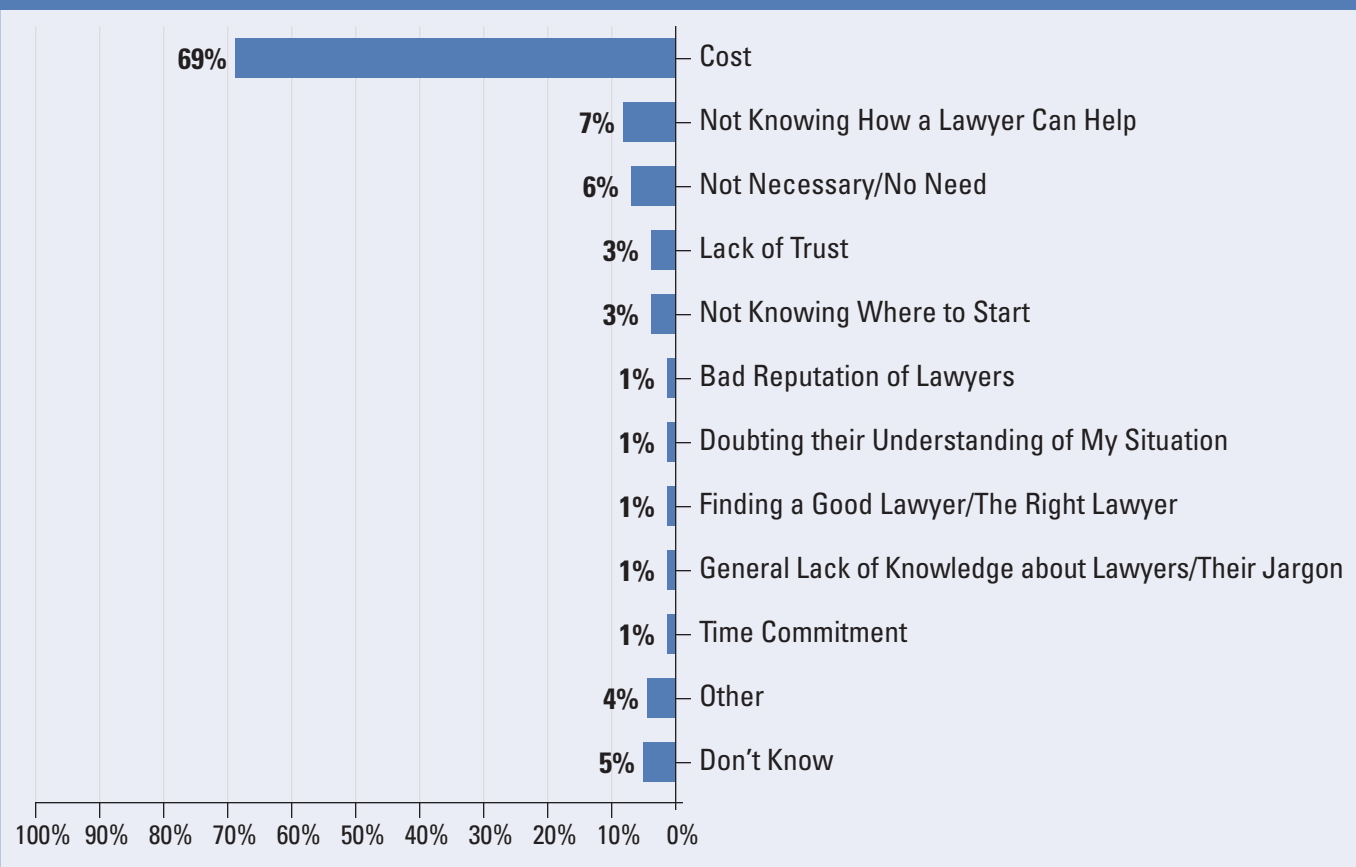
"I think mine would be probably quite a ways down the line before I get a lawyer because of the expense. The only time we ever had a lawyer they billed by the minute and it was very expensive."

Among businesses, 59% would go to a lawyer for help writing or negotiating a contract. But only 33% would go for the purchase, sale, or creation of a new business. Only 25% would go for employee procedures or problems, and only 11% would go for help with tax rules and requirements.

As for the "why," I suspect most of you could guess at the top reason the most people don't call us, even in circumstances that cry out for legal advice and counsel. But for those of us who learn visually, here is Figure 14 from the phone survey of businesses:

FIGURE 14

What do you believe is the biggest barrier preventing businesses from using services provided by a lawyer?



Lighthouse anticipated that cost was going to be the top of the list, so they asked a follow-up question as to the next biggest barrier. And nearly 25% of the people surveyed said they did not even know what the next barrier might be! What of the few who had not listed cost as the biggest barrier? Many of them listed it as the next biggest barrier.

There are certainly other reasons shown, such as not knowing how a lawyer can help or where to start looking for one. But when you combine the biggest and the next biggest reasons given by businesses for not using lawyer services, they are telling us that a whopping 82% of the reason is cost. And the data are similar for individuals.

There is no avoiding this message. It is not only statistically valid, it is shown forcefully. Moreover, it doesn't matter whether we, the sellers, consider our services to be cost-effective or "worth it." The clear perception and, I dare say, the reality for the buyers in our market is that we are offering them a Ferrari when they can only afford a Hyundai. They fear we will tell them they need a complete engine rebuild, when they only wanted an oil change. Most are really only going to hire a lawyer if they feel they are forced to do so. They have a very limited understanding of what a lawyer might

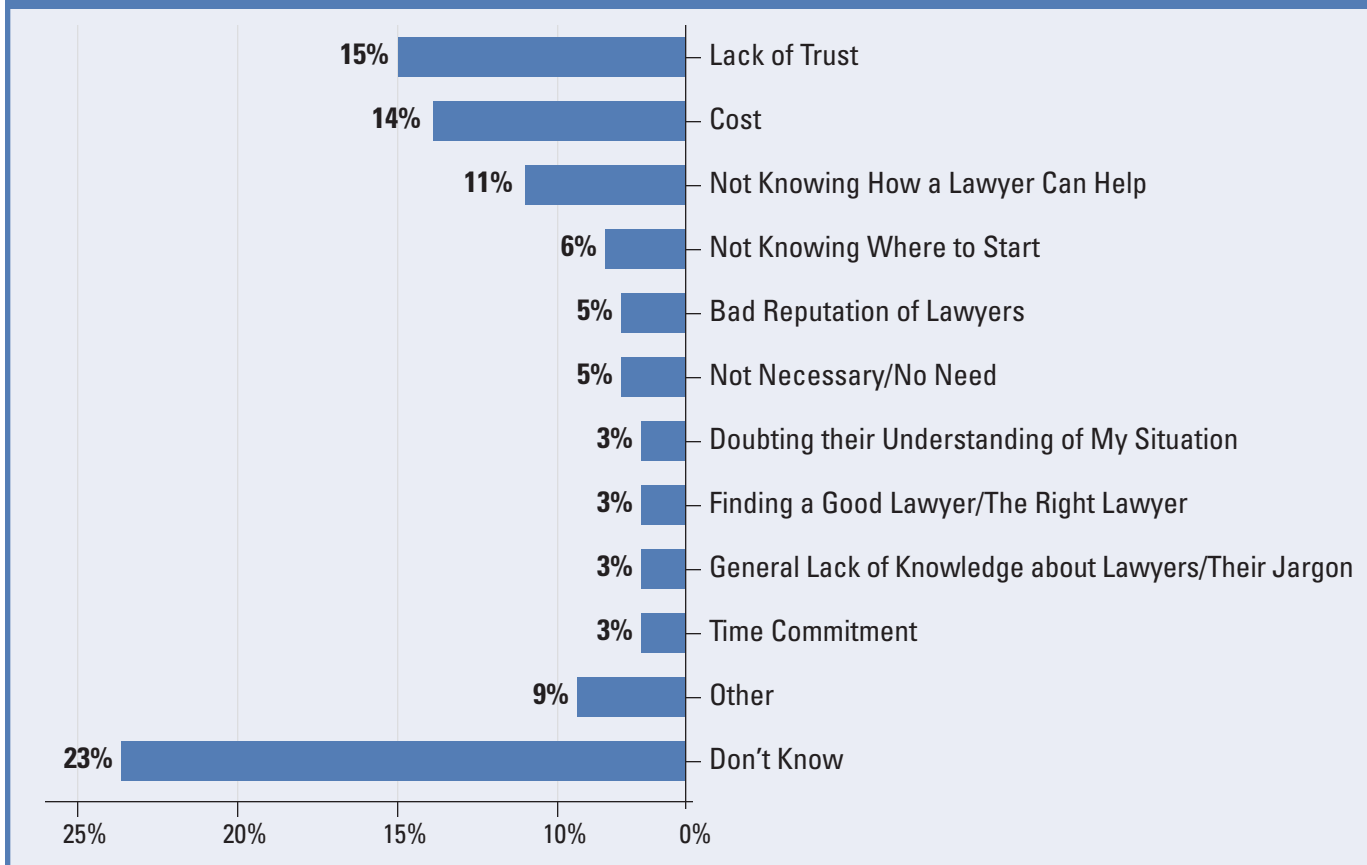
do, how much it will cost, and whether it will be worth the price.

How did we get here? Was it driven by the "hours x hourly rate = income" model used by the vast majority of private practitioners for the past fifty years? Did we decide litigation had to be more complex because it really is more complex or because we can make a good living writing motions and exchanging discovery documents? (I certainly don't claim innocence on the charge of undue motion practice.) But, for those of you lamenting the disappearance of jury trials in civil litigation, consider whether part of that is due to us fatiguing clients with endless extensions and motions, making the prospect of trial completely unappetizing.

Relatedly, why is information about the cost of legal services so obscure? I have scoured the internet for instances where a Utah lawyer is actually setting out the prices for certain tasks or for even estimates of the likely cost, and I have found precious little. To be clear, no you won't find my rate posted on my firm's website. But what is it we have to hide? Every customer, including us, wants to know up front what they will have to pay and what they will get for that payment. Perhaps our prospective buyers would be more inclined to consider using our services if they had that basic information.

FIGURE 15

What do you believe is the NEXT biggest barrier?



It is not as though the client actually sees a Ferrari at the end of the engagement. What we have to show for our efforts is usually much less tangible, albeit no less valuable. Maybe that means we should develop products and offerings for clients that are more defined and less open-ended. It might mean employing technology more aggressively. It might even mean advertising the value proposition of our offerings. "We do x, y, and z for your company. This is the price. This is when we will deliver it to you. And here is why it is worth it to you."

On that note, here are some other findings from Lighthouse that might be of interest:

1. There was a clear preference for fee structures other than hourly rate. Over 50% of the individuals surveyed said they would prefer a set price for the whole project or for a specific task or service. Only 8% said they would prefer an hourly rate.
2. Even in these days of Avvo, on-line ratings, and Superlawyers, both individuals and businesses are much more apt to find a lawyer based on a recommendation from a friend or a lawyer they know than go online.
3. While people who have used a lawyer seem to better appreciate our value, many people consider us to be confusing, mysterious, and even untrustworthy. They think we will make it worse.
4. The business respondents thought a one-hour meeting with a lawyer about the purchase or sale of their business would be "very valuable" but said they would be willing to pay an average of \$203.75 for that one-hour consultation.
5. By contrast, individuals thought a one-hour meeting with a lawyer about divorce, separation, or child custody would be "valuable" and said they would be willing to pay an average of \$527.40 for that.

I recognize that some of you may view all of this as somehow cheapening the profession. And others will be concerned that more information in the marketplace about the prices for legal services will create downward price pressure. But people, with our current approach, we are missing huge portions of the market. This is about reaching out to people who will probably not use a lawyer at all, about expanding the pie. We are becoming increasingly less relevant to both businesses and individuals as they work out other solutions to their problems. We haven't begun to convey the value lawyers can provide by giving preventative advice. We are ceding big segments of our potential market to tax advisers and financial planners and the like.

I am no market analyst. But I do think we have developed some

data that is worth analyzing. I've focused on Lighthouse's finding about cost as a barrier, but its reports contain quite a lot of other substantive information. For the bar as a whole, we intend to have it analyzed by some marketing experts. We will be asking them about how the bar, as well as practicing lawyers, can overcome the observed barriers. We will also be asking them to help Utah lawyers be innovative in developing packages of legal services that will be more attractive to the market.

What can you do with this data? You can use it. You can consider whether it suggests new approaches to your practice, not only to how you market but also what you market. If you don't consider yourself capable of doing that analysis, then you can certainly seek the advice of a marketing professional as well. Heck, you can even conduct focus groups for your own practice using the discussion guides in the appendices.

Albert Einstein said: "The world as we have created it is a process of our thinking. It cannot be changed without changing our thinking."

I encourage you to study these reports with an eye towards what opportunities they reveal for your practice. Change your thinking about the way you offer your services to Utahns and Utah businesses and you just might change your practice for the better.

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A Primer on the Element of Causation in Utah Homicide Cases

by Blake R. Hills

Every homicide offense in Utah requires proof that the defendant caused the death of another. In most cases, this element of the offense is given no real thought because it is obvious to everyone involved that the alleged actions caused the death of the victim, such as cases involving gunshot wounds or stabbing. But there are homicide cases in which the element of causation is not quite so intuitive. When handling these cases, prosecutors and defense attorneys should look at examples from case law.

CAUSATION

In Utah, the State does not have to prove that the defendant was the sole cause of the victim's death to convict him or her of a homicide offense. The following are the primary cases that address this principle of law.

***State v. Hamblin*, 676 P.2d 376 (Utah 1983)**

The defendant was driving his vehicle on a wet road at a speed that was approximately forty to fifty miles per hour faster than what was safe for the existing conditions. As the defendant approached an intersection, he observed that the light was yellow. He accelerated through the intersection as the light turned red, which happened to be the same time that the victim was turning left in front of him. The victim was thrown through the windshield and died. The defendant had a blood-alcohol level of .12, and the victim had a level of .10. Testimony indicated that the defendant would have been able to avoid the collision if he had been driving the legal speed limit. The defendant was charged and convicted of automobile homicide.

The defendant argued that he could not be convicted because the other driver was also negligent and, thus, the defendant was not the "sole proximate cause" of the death. *Hamblin*, 676 P.2d at 379. The Utah Supreme Court found that "assertion to be incredible" and rejected the argument. *Id.* The court gave the following example about the principle of causation in homicide cases:

It is obvious that death may result from more than

one cause. For example, a felon may shield himself from a pursuing officer with the body of an innocent bystander. If the officer, in an attempt to prevent the felon's escape, should shoot at the felon, but hit and kill the bystander, both the felon and the officer would be "causes" of the bystander's death. However, the felon would not be insulated from a conviction for homicide merely because he was not the sole cause of the bystander's death.

Id. The supreme court stated that this same principle applied in cases like the one before it in which the required mental state was negligence:

The state, in a criminal case, is not required to prove beyond a reasonable doubt that the defendant's negligence was the sole proximate cause of the death. When a defendant negligently creates a risk of death to another person, the fact that the person actually died as a result of the combination of that negligence plus some other contributing factor does not serve to exculpate.

Id. (citation omitted).

***State v. Gonzales*, 2002 UT App 256, 56 P.3d 969**

The defendant and his brother got into an argument with the victim, which led to the defendant punching the victim and knocking him down. The defendant and his brother began

BLAKE R. HILLS has been a career prosecutor for over seventeen years. He is currently a Prosecuting Attorney for Summit County.



kicking the victim until the brother was pulled away by another individual. The defendant continued to kick the victim until the victim's "eyes rolled back in his head and his breathing became labored." *Gonzales*, 2002 UT App 256, ¶ 3. The victim died a short time later, and subsequent testing revealed that the victim had a blood-alcohol level of .23 when he died. The medical examiner determined that the cause of death was the blows administered by the defendant combined with the victim's intoxication. The defendant was convicted of manslaughter.

The defendant argued on appeal that the trial court erred when the court instructed the jury that the jury could convict the defendant even if "some other factor also contributed in a substantial degree to the death." *Id.* ¶¶ 6–7. The court of appeals held that the conviction for manslaughter was proper, even though the victim's "intoxication played a significant part in his death." *Id.* ¶ 21. The court emphasized that the correct principle of law is that a "defendant's acts may be found to be the proximate cause of the victim's death even if the victim actually died as a result of the combination of [the defendant's acts] plus some other contributing factor." *Id.* (citation and internal quotation marks omitted).

FORESEEABILITY

It is clear from the above cases that a defendant can be guilty of a homicide offense even if there are several factors that contribute to the victim's death. However, the question then arises as to whether the other factors must be foreseeable. The following are the primary cases that address foreseeability in this context.

State v. Hallett, 619 P.2d 335 (Utah 1980)

After an evening of drinking alcohol, the defendant and other young people set out "bent on revelry and mischief." *Hallett*, 619 P.2d at 337. The defendant and another "bent over a stop sign...until it was in a position parallel to the ground" and could not be seen by approaching motorists. *Id.* The next morning, the victim drove into the intersection rather than stopping because the stop sign was not visible. The victim's vehicle crashed into another, and the victim died of massive injuries a few hours later. The defendant was charged with manslaughter and was convicted of negligent homicide in a bench trial.

The defendant argued on appeal that he did not have the required mental state for negligent homicide. The supreme court rejected this argument and held that there was proof that



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the defendant acted with criminal negligence:

[T]he trial court was justified in viewing the situation thus: The defendant could not fail to know that stop signs are placed at particular intersections where they are deemed to be necessary because of special hazards; and that without the stop sign, the hazards which caused it to be placed there would exist; and that he should have foreseen that its removal would result in setting a trap fraught with danger and possible fatal consequences to others.

From what has been delineated above, the trial judge expressly found that the defendant should have foreseen that his removal of the stop sign created a substantial risk of injury or death to others; and that his doing so constituted a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances.

Id. at 338.

The defendant also argued that his actions were not the proximate cause of the victim's death because the evidence showed that the victim had been speeding and this act of speeding was the subsequent intervening and proximate cause of her death. The supreme court rejected this argument because even if the victim had been speeding, the reasonable assumption is that she would have stopped and there would have been no collision if the stop sign had been visible. The court stated:

[W]here a party by his wrongful conduct creates a condition of peril, his action can properly be found to be the proximate cause of a resulting injury, even though later events which combined to cause the injury may also be classified as negligent, so long as the later act is something which can reasonably be expected to follow in the natural sequence of events.

Id. at 339.

***State v. Dunn*, 850 P.2d 1201 (Utah 1993)**

The defendant and co-defendant tied up a victim and kept him captive in a motor home as part of a plan to rob the victim and leave him somewhere. As the defendant was driving the motor

home, the victim was able to lock himself in the bathroom. The co-defendant forced the bathroom door open and then shot and killed the victim. The defendant claimed that the co-defendant acted on his own when he killed the victim, while the co-defendant claimed that he shot the victim because the defendant told him to do so. On appeal, the defendant argued that the evidence did not support a conviction for manslaughter because his actions did not cause the victim's death.

The supreme court began its analysis by noting that, for manslaughter charges "our case law does indicate that the linchpin of causation is whether the superseding party's acts were reasonably foreseeable." *Dunn*, 850 P.2d at 1215. The court stated that in Utah, the issue of foreseeability tracks the common law:

An intervening, independent agency will not exonerate [the] accused for criminal liability from a victim's death unless the death is solely attributable to the secondary agency, and not at all induced by the primary one. To

qualify as an intervening cause an event must be unforeseeable and one in which [the] accused does not participate; an intervening cause must be so extraordinary that it is unfair to hold [the] accused responsible for the death.

"[U]nder Utah law, a defendant can be convicted of a homicide offense even if the defendant's actions were not the only, or even the primary, cause of the victim's death."

Id. (citation and internal quotation marks omitted). The court held that causation had been established because the co-defendant's "'intervening' conduct [of shooting the victim] was reasonably foreseeable and therefore not sufficiently independent to break the causal chain." *Id.* at 1216.

CONCLUSION

It is clear that under Utah law, a defendant can be convicted of a homicide offense even if the defendant's actions were not the only, or even the primary, cause of the victim's death. It is sufficient if the defendant's actions, combined with some other factor, caused the death. It is also clear that for homicide charges requiring a mental state of criminal negligence or greater, the other factor contributing to the death must have been foreseeable. The contributing factor will be deemed to be foreseeable if it is one that could reasonably be expected to follow in the natural sequence of events and the factor is not so extraordinary that it would be unfair to hold the defendant responsible for the death.



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Licensed Paralegal Practitioners

by Catherine J. Dupont

I had an interesting cab ride from the St. George Airport to the Utah State Bar's Spring Convention. When Carol, the cabbie, heard that I work for the state courts she told me about her recent experience with a legal issue and shared her opinion that there is no justice in the legal system. She won her case, but she found the experience overwhelming and expensive. Carol is not alone. Utah's 2017 court records reveal that in family law cases 69% of respondents and 56% of petitioners were self-represented. In eviction cases and debt collection cases the numbers are even worse – more than 95% and 98% of respondents, respectively, were self-represented.

The alarming number of people navigating the legal system without representation contributes to the perception that the legal system is stacked against a person who cannot afford an attorney. The Utah Supreme Court and the Utah State Bar are dedicated to addressing barriers to legal representation through innovative projects designed to improve access to the courts. One of those projects is the creation of a new profession: Licensed Paralegal Practitioner (LPP). This spring, Utah's Supreme Court approved final rules to create and regulate LPPs as part of the practice of law, making Utah the second state in the nation to establish a license to practice law outside of a traditional law degree in designated practice areas and within a limited scope of service.

How Did the Utah Supreme Court and the Utah State Bar Develop the LPP Program?

The idea to create a market-based solution for the unmet needs of litigants started with a task force created by the Utah Supreme Court in May 2015. The recommendations of that task force were then assigned to the LPP Steering Committee, which has met frequently over the past year. The LPP Steering Committee's composition is broad, including judges from the trial and appellate courts, practitioners in each of the substantive law areas in which an LPP may practice, paralegals, representatives of colleges and universities with legal studies programs, the Dean of the University of Utah law school and a representative from BYU's law school, a former state senator, a consumer protection representative, Utah State Bar staff, and several public members. The LPP Steering Committee created working groups to develop education criteria, licensing requirements,

and rules of professional conduct. The working groups also met frequently over the last year and involved various stakeholders who could help with each group's specific task. The LPP Steering Committee's work has been deliberative and subject to approval by the Utah Supreme Court and the Judicial Council.

What is the LPP Limited Scope of Service?

Rule 14-802 of the Rules Governing the Utah State Bar creates an exception to the authorization to practice law for an LPP. The exception permits an LPP to assist a client only in the practice areas for which the LPP is licensed. The rule limits an LPP's possible practice areas to:

- Specific family law matters, such as temporary separation, divorce, parentage, cohabitant abuse, civil stalking, custody and support, or name change;
- Forcible entry and detainer; and
- Debt collection matters in which the dollar amount at issue does not exceed the statutory limit for small claims cases.

Rule 14-802 also enumerates permissible actions for LPPs within the practice areas. Under this rule, an LPP may:

- Enter into a contractual relationship with a natural person (LPPs cannot represent corporations);
- Interview a client to determine the client's needs and goals;
- Assist a client with completing approved forms and obtaining documents to support those forms;

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- Review documents of another party and explain those documents to a client;
- Inform, counsel, assist, and advocate for a client in a mediated negotiation;
- Complete a settlement agreement, sign the form, and serve the written settlement agreement;
- Communicate with another party or the party's representative regarding the relevant forms and matters; and
- Explain to a client the court's order and how it affects the client's rights and obligations.

It is important to note that an LPP may not appear in court and may not charge contingency fees. They may, however, own their own firms, own a non-controlling equity interest in a firm with attorneys, and use the courts' e-filing systems. There will be no pro hac vice admissions and no reciprocal licensing, at least for the time being. They will be required to have trust accounts and will have the obligation to provide pro bono services.

What is the Required Training for an LPP?

Rules Governing Licensed Paralegal Practitioner (RGLPP) 15-703 establishes the education and training requirements for an LPP. An LPP applicant must have one of the following degrees:

- A degree in law from an accredited law school;
- An Associate degree in paralegal studies from an accredited school;
- A Bachelor's degree in paralegal studies from an accredited school; or
- A paralegal certificate – or fifteen hours of paralegal studies from an accredited school – in addition to a Bachelor's degree in any subject from an accredited school.

In addition to those degree requirements, an applicant is required to:

- Complete 1,500 hours of substantive law-related experience within the three years prior to the application. These hours must include:

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Clyde Snow is pleased to welcome Keith M. Woodwell to its Salt Lake City office. Prior to joining Clyde Snow, Mr. Woodwell served as the Director for the Utah Division of Securities for 10 years. During his tenure at the Division, Mr. Woodwell oversaw and litigated hundreds of complex enforcement investigations. The experience and perspective he gained at the Division will complement Clyde Snow's Securities and Regulatory Enforcement, and Government Investigations and White Collar Defense practice groups. Mr. Woodwell will focus his practice on securities enforcement, regulatory defense, government and independent investigations, and white collar defense.

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- 500 hours of substantive law-related experience in family law if the applicant want to practice in that area; or
- 100 hours of substantive law-related experience in debt collection or forcible entry and detainer if the applicant wants to be licensed in those areas;
- Pass a professional ethics examination; and
- Pass a Licensed Paralegal Practitioner Examination for each practice area for which the applicant seeks to practice.

However, there is also a provision (RGLPP 15-705) allowing the bar to waive some of the minimum education requirements for the limited time of three years from the date the bar initially begins to accept LPP licensure applications. These waivers may be granted if an applicant demonstrates that he or she has completed seven years of full-time substantive law-related experience as a paralegal within the previous ten years.

Who Will Administer This New Profession?

LPPs will be officers of the court and practice law. Pursuant to authority delegated from the Utah Supreme Court, the Utah State Bar will administer all aspects of the new profession, including admissions, license renewal, and monitoring compliance with

continuing legal education requirements. Bar assistance programs, such as fee arbitration and Lawyers Helping Lawyers, will be available to LPPs. At its most recent Board of Bar Commissioners meeting, the Utah State Bar formally agreed to include in its budget the cost of administering the LPP program.

Are LPPs Subject to Ethical Standards and Discipline?

Yes. The Utah Supreme Court has adopted Licensed Paralegal Practitioner Rules of Professional Conduct, which provide ethical obligations for LPPs and establish Rules of LPP Discipline and Disability as well as standards for imposing discipline similar to those that govern attorneys. The Office of Professional Conduct will investigate and, if necessary, prosecute complaints against LPPs, and the rules make them subject to potential discipline.

Is There a Market for LPPs?

Yes. Utah undeniably has a need for more accessible legal representation. The Utah State Bar's recent survey indicates that people are often interested in self-representation with some support from a legal practitioner. The limited scope of legal services provided by an LPP is one viable solution to this issue. It's also clear that there is a strong interest among paralegals to pursue this licensing option. In a recent survey conducted by the Utah Supreme Court's LPP Steering Committee, more than 200 paralegals expressed an interest in getting licensed as an LPP. The majority were interested in establishing an LPP practice within a law firm, while about a third were interested in starting an independent LPP firm.

What Are the Next Steps?

There is still more work to prepare for the arrival of LPPs in the market. The court created a Forms Committee to examine the multitude of forms used in the courts. The Forms Committee has the herculean task of updating court forms, creating new forms, and deleting obsolete forms. This effort will benefit all legal practitioners in the state and is especially important for LPPs whose practice is limited to the use of forms approved by the Judicial Council. With that in mind, the Forms Committee is focusing first on updating and developing forms in the family law, debt collection and forcible entry and detainer areas of law.

Some have asked if creation of the LPP license is a field of dreams. If we create it, will they come? The LPP Steering Committee believes the Utah model for the LPP program is a promising solution to a growing need in the state. In the meantime, Utah Valley University is preparing to start classes for LPPs in the fall of 2018, and we hope to have our first Licensed Paralegal Practitioners in 2019.

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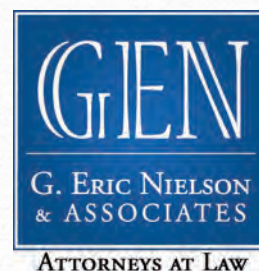


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The End of the ICO Gold Rush? *The Regulatory Squeeze on Token Offerings as a Funding Mechanism for Blockchain-Related Ventures*

by Kennedy K. Luwai

According to Coindesk.com's ico-tracker, "initial coin offerings" or "token sales" (collectively, ICOs) have been used to raise approximately \$7.3 billion through January 2018 as a means of funding early stage blockchain-related ventures, with about \$7 billion of that cumulative funding having closed in the thirteen-month span between early January 2017 and late January 2018. See <https://www.coindesk.com/ico-tracker/>. ICOs thus came of age in 2017 as the funding mechanism of choice for blockchain-related ventures, far surpassing traditional venture capital.

What is an ICO?

An ICO is a relatively new fundraising method through which virtual tokens or coins are created and distributed using distributed ledger or blockchain technology. These tokens may be denominated in fiat currencies or, more commonly, in cryptocurrencies like bitcoin or ether. After issuance, tokens may be resold in secondary markets and have their own market value independent of the cryptocurrency used on the associated platform.

Capital raised from the ICOs may be used to fund development of associated digital platforms, networks, or applications, while granting the token holder some interest in the project. In other cases, purchased tokens may be used to access the digital platform or application, or otherwise participate in the project, once it is functional. Thus, generally, tokens can be viewed as falling into two categories: "investment tokens" and "utility tokens." An investment token is analogous to a traditional security like corporate stock, LLC membership interests, or partnership interests. A utility token is intended to facilitate access to a product or service on the digital platform or network thus deriving value primarily from consumptive use, meaning that it may be analogized to a gift card or software license.

Uncertainties Surrounding ICOs

In view of an uncertain regulatory environment, the accelerated rise in 2017 of ICOs as a fundraising paradigm for blockchain-related startups has elicited some notes of caution. ICOs have drawn

criticism from some who contend that ICOs make it possible for issuers to bypass the highly regulated capital-raising process that venture capitalists, banks, and underwriters are obligated to follow in IPOs. Regulators in the United States and elsewhere appear to be concerned that ICOs, which usually involve innovative and highly technical projects disclosed in white papers, risk creating informational asymmetries between issuers and investors to the extent that disclosures are not fully and fairly made. Some markets for tokens may also be susceptible to manipulation by unscrupulous actors. Further, because blockchain technology, broadly speaking, is still in its relative infancy, there have been instances where possibilities disclosed have not ultimately materialized as advertised – a phenomenon that, though hardly unique to blockchain technology, has implications for investors.

For issuers, whether a token is deemed to be a "security" has practical implications. If a token is deemed to be a security, then its offer and sale is regulated under federal securities laws, and registration with the Securities and Exchange Commission (SEC) is required unless an exemption is available. Registration of a traditional underwritten public offering is time consuming and expensive, and, once an issuer becomes public, carries with it extensive reporting requirements. The most commonly used exemption is the "private placement" to accredited investors. In contrast to a public offering, in which anyone is eligible to invest, a private placement limited to "accredited investors" – wealthy individuals and institutions – does not require any specified disclosures or audited financial statements.

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Neither SEC registration nor an exempt offering provides the same freedom of action, lower expense, and shorter time to completion as compared to an ICO not subject to SEC regulation. Consequently, whether a particular token is deemed to be a security is a threshold question. That said, regardless of the nature of the token, i.e. whether the offering may be subject to SEC regulation, the issuer may not make any material misstatements or omit material facts in the course of the offering.

The DAO Investigative Report

While the SEC has yet to issue formal guidance that puts to rest much of the uncertainty surrounding the treatment of tokens as securities and under what circumstances that may be, it has offered some useful insight when it affirmed that whether a particular token is indeed a security depends on the specific facts and circumstances in play. The SEC began to do so in July 2017, when it issued an investigative report titled “Report of Investigation Pursuant to Section 21 (a) of the Securities Exchange Act of 1934: The DAO” (the DAO Investigative Report). The focus of the report was on the applicability of federal securities laws to tokens issued by the Decentralized Autonomous Organization (DAO) – a crowdsource venture capital platform created by Slock.it, a German entity. The DAO was a smart contract on the Ethereum blockchain that operated much like a venture fund where

tokens were sold in exchange for ether, which was then pooled. Token holders were then allowed to vote on a menu of investments to which the DAO would apply portions of pooled funds. The DAO token holders were also to share in the profits from the investments.

In its report, the SEC noted that the definition of “security” is flexible and adaptable to the variable means devised to use others’ money to fund a venture with the promise of profit. Typically, the SEC focuses on the substance (and not the form) of the overriding economic realities in determining whether an instrument is a security. In analyzing the DAO tokens, the SEC invoked the four-pronged *SEC v. W.J. Howey*, 328 U.S. 293 (1946), test under which an instrument is a security if it relates to (i) an investment of money (ii) in a common enterprise (iii) with a reasonable expectation of profits (iv) to be derived from the entrepreneurial and managerial efforts of others. The SEC concluded that the DAO tokens were securities, subject to regulation under federal securities laws.

A Leading Effort Aimed at Compliant Token Offerings and its Drawbacks

The SAFT Framework

The perceived regulatory uncertainty spawned efforts in the second half of 2017 aimed at creating regulatorily compliant ICOs and


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tokens. One such effort has yielded the Simple Agreement for Future Tokens (SAFT). The SAFT model was described in a white paper titled “The SAFT Project: Toward a Compliant Token Sale Framework” and released by Cooley LLP and Protocol Labs on October 2, 2017, *available at* <https://saftproject.com/static/SAFT-Project-Whitepaper.pdf> (last visited April 2, 2018). The SAFT model is based on the Y Combinator Simple Agreement for Future Equity (SAFE), which has been used to finance early-stage companies for a number of years.

In the SAFT model, a clear distinction is made between pre-functional utility tokens – those issued before a platform is operational – and fully functional utility tokens – those issued after the platform is functional. The model presumes that pre-functional utility tokens likely meet all four prongs of the *Howey* test and are thus securities subject to regulation by the SEC. In contrast, the model presumes that fully functional utility tokens – those purchased based on a primary motivation to access or use the platform – are unlikely to satisfy all four prongs of the *Howey* test, making them less likely to be deemed securities and, therefore, likely beyond the regulatory reach of the SEC.

The SAFT itself is a security that is offered to U.S. accredited investors for pre-functional utility tokens. Once the platform successfully launches and while the SAFT is in effect, the

company is obligated to issue the now functional utility tokens to the SAFT holder. Proponents of the SAFT model contend that there is a “strong” argument that the now fully functional utility tokens are not securities and thus not subject to SEC regulation. They further argue that the SAFT model addresses many securities, money transmitter, tax, and policy concerns based on the current legal landscape, although they cautiously note that the SAFT has yet to be scrutinized by a U.S. court or regulatory agency.

Pitfalls of the SAFT Framework

The introduction of the SAFT framework by prominent market players as a potential option for compliant token offerings elicited a fair amount of discussion. One of the more cogent critical voices in the debate comes from the Cardozo Blockchain Project (an initiative of the Cardozo Law School), which released a research report titled “Not So Fast – Risks Related to the Use of a ‘SAFT’ for Token Sales,” *available at* https://cardozo.yu.edu/sites/default/files/Cardozo%20Blockchain%20Project%20-%20Not%20So%20Fast%20-%20SAFT%20Response_final.pdf (last visited April 2, 2018).

The research report discusses a number of concerns. First, the SAFT framework’s presumptive treatment of pre-functional utility tokens as securities and fully-functional utility tokens as non-securities blurs the true test of how tokens are analyzed under federal securities laws, which involves a highly fact-dependent inquiry. Second, the likelihood that token issuers under the SAFT framework will emphasize the pre-functional utility token’s profit-generating potential in offerings to accredited investors may increase the risk of triggering federal securities scrutiny beyond the initial SAFT sale and extending to the fully-functional tokens after network deployment. Third, the SAFT framework apparently creates a class of early investors who may be incentivized to flip their holdings instead of supporting the growth of the enterprise, thus potentially fueling speculation and ultimately harming consumers.

In sum, while the authors of the report note that the SAFT framework may be adaptable to individual cases, they conclude that the SAFT framework fails to deliver a simplified and binary compliant token sale framework as intended. Notwithstanding these views, the report authors believe that it may still be possible to structure or pre-sell utility tokens without increasing the risk that such tokens would be deemed to be securities under *Howey*.

Recent SEC Enforcement Activity

As ICO issuers and market professionals continued to grapple with the regulatory treatment of ICOs in the latter half of 2017, the SEC began instituting enforcement actions aimed at shutting down ICO offerings that clearly violate securities laws. In the

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process, the SEC appeared intent on sending a signal to the ICO issuers and market professionals, including lawyers, that it is on high alert for ICO approaches that violate the letter and spirit of federal securities laws.

REcoin Group Foundation and DRC World

In a federal complaint filed on September 29, 2017, the SEC alleged that the sponsor and his companies, REcoin Group Foundation (REcoin) and Diamond Reserve Club World (DRC), duped investors into purchasing unregulated securities in the form of digital tokens backed by fictitious assets. The alleged stated purpose of each ICO was to generate returns from (i) the appreciation in value of the investments each company would make in real estate (in the case of REcoin) or diamonds (in the case of DRC) and (ii) the appreciation in value of the digital tokens themselves – including one touted as “The First Ever Cryptocurrency Backed by Real Estate” – as the companies’ businesses grew and/or the demand for such tokens increased.

The complaint contended that the ICOs were purportedly styled as “Initial Membership Offerings” in an attempt to circumvent the federal securities laws, but the membership interests that were being offered to investors were “in all material respects identical to the ownership attributes of purchasing the purported ‘tokens’ or ‘coins’ and are securities within the meaning of the securities laws.” According to the SEC, the defendants made false promises that suggested the two companies would have sizable returns, even as neither had “any real operations.” For example, while the companies were touted as having “expert” management teams, neither had “hired or consulted any lawyers, brokers, accountants, developers, or other professionals to facilitate its investments.” The complaint further asserted that investors in the ICOs received nothing in return for their investments because the companies lacked sufficient technological expertise to create and deliver digital tokens. Based on these and other allegations, the SEC obtained an emergency order to freeze the defendants’ assets.

PlexCorps

On December 4, 2017, the SEC’s newly formed Cyber Unit obtained an emergency asset freeze to halt the sale of the token, PlexCoin, that had raised up to \$15 million from thousands of investors. In the complaint, the SEC alleged that the sponsor and his company, PlexCorps, marketed and sold securities to investors in the United States and elsewhere under a variety of false pretenses, including that PlexCoin would yield a 1,354% profit in less than twenty-nine days. The complaint sought permanent injunctions, as well as disgorgement plus interest and penalties.

The SEC’s action against PlexCoin followed actions begun by Canadian regulators months earlier. In July 2017, the Quebec

Autorité des marchés financiers (AMF) determined that PlexCoin was a security, relying in part on the *Howey* test. The Quebec Financial Markets Administrative Tribunal (the Quebec Tribunal), in response to the AMF’s determination, ordered the cessation of PlexCoin solicitations and the shutting down of PlexCoin and PlexCorp websites. The SEC complaint noted that not only did PlexCoin’s promoters defy the Quebec Tribunal, they expanded their solicitations to U.S. investors based on fraudulent and unsubstantiated representations and established banking accounts in multiple countries under misleading pretenses.

Munchee

On December 11, 2017, the SEC entered into an administrative settlement with Munchee, Inc. (Munchee) for conducting unregistered offers and sales of securities. Munchee, a California startup and blockchain-based food review service, agreed to halt its ICO and refund investor proceeds. Munchee launched an iPhone application in 2017 that allowed users to post photographs and review restaurant meals.

In October 2017, Munchee announced that it would hold a public sale of its token (MUN) through an ICO and posted a white paper on its website. Although the white paper referenced the DAO Investigative Report and stated that Munchee had done a “*Howey* analysis” and that “as currently designed, the sale of



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MUN utility tokens does not pose a significant risk of implicating the federal securities laws,” the SEC noted that the white paper did not provide any such analysis. The token sale commenced with the goal to raise \$15 million. However, the SEC contacted Munchee the day after the sale launch, and Munchee immediately stopped selling MUN tokens and refunded all proceeds.

In determining that the MUN token was a security, the SEC noted a number of factors. First, the white paper contained statements about how the MUN tokens would increase in value and how MUN holders would be able to trade MUN tokens on secondary markets. Second, Munchee made a series of marketing statements to specific audiences – cryptocurrency investors rather than the restaurant industry and its likely customer base – relating to the future profit of buying and holding MUN tokens. Third, Munchee made statements that could be construed as indicating that token purchasers could reasonably expect profits from the efforts of others, for example, how the value of the tokens would depend on the company’s ability to develop the app and build an ecosystem for the tokens.

AriseBank

On January 30, 2018, the SEC announced that it had obtained a court order cutting off AriseBank’s ICO of “AriseCoin” tokens, appointing a receiver over AriseBank and freezing AriseBank’s and its co-founders’ digital and other assets. The SEC’s complaint against AriseBank and its co-founders alleges that the ICO, in which AriseBank claimed it had raised more than \$600 million and would fund the supposedly first “decentralized bank,” was an illegal, fraudulent and unregistered securities offering in violation of securities laws. This court order follows a cease and desist order issued by the Texas Department of Banking weeks earlier in response to alleged regulatory violations by the Texas-based company. That order barred AriseBank from continuing to falsely imply that it engages in the business of banking in Texas and offering services to Texas residents.

The AriseBank ICO was officially endorsed by former boxing

champion Evander Holyfield. While Mr. Holyfield was not named in the SEC’s complaint, a prior SEC statement from November 2017 cautioned celebrities and other promoters of ICOs that they risked engaging in unlawful conduct if they promoted a token properly deemed to be a security where they failed to disclose the nature, source, or amount of compensation paid as consideration for the endorsement, among other liabilities including violations of the anti-fraud provisions of federal securities laws and the offer of unregistered securities.

SEC Chairman’s Public Statements

On the same day that the Munchee administrative settlement was announced, December 11, 2017, SEC Chairman Jay Clayton issued a public statement titled “Statement on Cryptocurrencies and Initial Coin Offerings,” *available at* <https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11> (last visited April 2, 2018). Although he expressed a belief “that initial coin offerings – whether they represent offerings of securities or not – can be effective ways for entrepreneurs and others to raise funding, including for innovative projects,” Mr. Clayton’s statement was cautionary in tone and substance. Notably, Mr. Clayton indicated that merely calling a token a “utility” or structuring it to provide some utility does not mean that the token will not be found to be security based on the facts and circumstances in play. He also noted that the ICO offerings he has seen promoted – he did not say which – involve securities. Confirming the SEC’s increased vigilance in this area, Mr. Clayton has asked the agency to “to police this area vigorously and recommend enforcement actions” against violators.

Further emphasizing his concerns while speaking at a Securities Regulation Institute conference in January 2018, Mr. Clayton is reported to have, once again, expressed some misgivings with attitudes and approaches by some market professionals, including those in the legal profession, in advising clients seeking to pursue ICOs. Mr. Clayton is said to have been disturbed by the conduct of some lawyers who appear to be assisting promoters to structure

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Volume 31 No. 3

offerings of tokens with many key features of securities offerings all the while claiming that the tokens (ostensibly and subjectively styled as “utility tokens”) are not securities in attempts to avoid regulation. Mr. Clayton is also reportedly concerned that some in the legal profession may be providing equivocal advice to ICO clients when it comes to the likelihood of regulation of tokens or ICOs. Then, clients who are willing to take the risk end up proceeding with ICOs without seeking to comply with federal securities laws.

In prepared remarks as part of his testimony before the Senate Committee on Banking, Housing, and Urban Affairs on February 6, 2018, *available at* <https://www.banking.senate.gov/imo/media/doc/Clayton%20Testimony%202-6-18.pdf>, where he appeared alongside J. Christopher Giancarlo, the chairman of the Commodity Futures Trading Commission (CFTC), Mr. Clayton commented that the SEC does not want to “undermine the fostering of innovation through our capital markets” but cautioned that there are significant risks for investors participating in non-compliant ICOs. After discussing the steps that the SEC has taken in relation to cryptocurrencies, ICOs, and related assets, Mr. Clayton stated, once again, that he has asked the SEC’s Division of Enforcement “to continue to police these markets vigorously and recommend enforcement actions against those who conduct ICOs or engage in other actions relating to cryptocurrencies in violation of the federal securities laws.” In his live testimony, Mr. Clayton stated that the SEC has some oversight power in the area but is open to collaborating with Congress, other regulators, and states on additional necessary regulations pertaining to cryptocurrencies and related assets: “We should all come together, the federal banking regulators, CFTC, the SEC – there are states involved as well – and have a coordinated plan for dealing with the virtual currency trading market.”

The SEC’s Expanded Probe of ICOs

Indicative of the SEC’s ratcheting up of regulatory pressure in the ICO arena, *The Wall Street Journal*, citing unnamed sources familiar with the matter, reported on February 28, 2018, that the SEC had issued “dozens of subpoenas and information requests to technology companies and advisors” involved in ICOs. <https://www.wsj.com/articles/sec-launches-cryptocurrency-probe-1519856266>. As reported, the “scores” of subpoenas and information requests seek disclosure of details about the structure of the token sales, including pre-sales under the SAFT framework. The SEC declined to comment when approached about the story prior to publication.

Proceed with Caution.

The SEC’s enforcement actions and expanded probe as well as the SEC Chairman’s public pronouncements appear to emphasize the likely application of federal securities laws to the offer and sale of tokens, sometimes including those promoted as having current or prospective utility. The actions and the statement further emphasize that whether an offering involves a security does not turn on the subjective labeling of the token by an issuer as a “utility token” but instead requires an assessment of the economic realities underlying the offering. Such assessments extend beyond an examination of the rights and interests granted to token purchasers to encompass the manner of the offering, including, among other factors, how the tokens are marketed and sold, how the proceeds are used, whether there is a touting of potential increase in token value, and the promoters’ promise or facilitation of secondary market trading. Accordingly, these developments highlight the need for increased caution and careful analysis by gatekeeping market professionals, particularly lawyers, in assisting ICO issuers to ensure that they are acting responsibly by steering ICO clients away from approaches that may be contrary to the spirit of federal securities laws.

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Legislative Update

by Douglas Foxley, Frank Pignanelli, and Steve Foxley

One of the implied fundamentals of American democracy is that the legislative branch enacts laws in reaction to forces and dynamics impacting their constituents. The lawmakers also readily respond to events that affect their institutions and perceived individual political prowess. This was on full display during the 2018 General Legislative Session. Because some of these bills had a direct influence on the legal profession, your Utah State Bar was involved in their deliberations and progress.

Readers may recollect the battle between the legislature, Governor Gary Herbert, and Attorney General Sean Reyes last summer. Third Congressional District Congressman Jason Chaffetz had resigned, triggering the need for a replacement. The United States Constitution, article I, section 2, and Utah Code section 20A-1-502 mandate that in the event there is a vacancy for the United States House of Representatives, the governor shall call a special election.¹

Utah has never before had a special election for a vacancy in the United States House of Representatives, and therefore there was no precedent for how it should be administered. Furthermore, the state was in the midst of a well-publicized fight with the Utah Republican Party over whether it could require access to a party primary by gathering signatures, in addition to the longstanding caucus and convention system. The legislature and governor differed on how the special election was to be implemented and whether to include the new signature-gathering option allowed under a general election.

Despite having its own counsel pursuant to Utah Constitution article VI, section 32, the legislature requested an opinion regarding this issue from the attorney general under Utah Code Subsection 67-5-1(7). The governor and lieutenant governor were already being advised by the attorney general. At this point, both branches of government could be considered clients of the attorney general, pursuant to Utah Code Subsection 67-5-1(7) and Utah Constitution article VII, section 16, on an issue where they were adverse to one another.

The attorney general did construct an opinion for the legislature but refused to release it to any party. This prompted swift reactions from the legislature, which considered legal action. In the meantime,

the lieutenant governor developed a scheme for the special election, which allowed both the delegate/convention and signature-gathering routes to the primary election. Thus, during the course of the 2017 Special Election and even afterwards, there were intense emotions among state officials over the issue of the attorney general's opinion.

This frustration resulted in H.B. 198, *Attorney General Responsibility Amendments*, being sponsored during the 2018 General Session. Under the bill, the attorney general would not be able to invoke a potential conflict of interest, or the attorney-client relationship, to withhold release of an opinion requested by the legislature. As enrolled, it also requires adherence to certain screening procedures where a potential conflict might arise within the attorney general's office.

John Lund, acting as President of the Utah State Bar, met with legislative counsel and the lawyer-legislators sponsoring H.B. 198. He expressed deep concerns with legislation that held the attorney general to a different, and arguably lower, standard than what is required of lawyers generally under the Utah Rules of Professional Conduct. The original legislation provided a completely separate structure for addressing conflicts of interest, but the bar was able to convince legislators to require the attorney general to undertake a pre-conflict analysis before fulfilling the requirement to represent both parties. Although the bar continues to have reservations about the bill, particularly the inability for the attorney general to decline to represent either party in the event of severe and unwaivable conflicts, our organization and its officers provided articulate arguments that had significant

DOUGLAS FOXLEY, FRANK PIGNANELLI, and STEVE FOXLEY are registered lobbyists for the Utah State Bar.



influence on the language and structure of the legislation.

Despite the differences of opinion, representatives of the bar were impressed with the openness, thoughtfulness, and legal acumen of the sponsors, Representative Merrill Nelson and Senator Lyle Hillyard, and that of the Office of Legislative Research and General Counsel.

H.B. 198 wasn't the only issue lawmakers addressed during the 2018 General Session. Certain individuals had become increasingly frustrated that the attorney general would enter into arrangements with private parties that challenged state law or not intervene to defend laws that the legislature believed should be upheld. In 2017, the legislature passed S.B. 257, *Case Status Updates*, which required an annual update to the legislature by the attorney general of lawsuits challenging the constitutionality of state law, including any "settlements reached, consent decrees entered, or judgments issued." But many believed more needed to be done. Still frustrated, in 2018, legislators introduced S.B. 171, *Intervention Amendments*. This bill gives the legislature an unconditional right to intervene in a state court action that challenges the constitutionality of a state statute, the validity of legislation, or any action of the legislature.

The Bar Commissioners, after a recommendation by the Government Relations Committee, voted to oppose 2018 S.B. 171. Generally, the Utah bar takes a position on legislation where the practice of law is impacted or there is a denial of access to justice. In contrast, here the bar determined that granting extraordinary rights to the legislature could be problematic to the administration of the courts and blurred the executive branch's authority to enforce legislation.

Outside of the separation of powers issues that impacted the legal profession, the bar also took interest in an issue receiving attention nationally and locally. Businesses and property owners have seen increasing actions from plaintiffs alleging violations of the federal Americans with Disabilities Act (ADA). These business interests allege that certain lawyers, in conjunction with professional plaintiffs, are sending an unreasonable number of demand letters for *de minimis* violations of the ADA.

Representative Norman Thurston, upon hearing of these problems in Utah, reached out to the Utah State Bar and the Administrative Office of the Courts, seeking action from these entities to prevent this alleged abuse of the process. For a number of reasons, including these organizations' concerns about interfering with federal law and uncertainty over their appropriate roles in



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coming up with specific steps to limit this behavior, Representative Thurston and other lawmakers became frustrated by the pace and results of these conversations. In response, he proposed H.J.R. 3, *Proposal to Amend Utah Constitution – Regarding the Practice of Law*. This resolution would have placed on the 2018 general election ballot a proposed change to the Utah Constitution to remove supervision of lawyers from the Utah Supreme Court, unless they were practicing before a Utah court. No alternative framework was proposed to regulate attorneys for their work outside the courts.

The bar swiftly moved into action after this was introduced. While maintaining discussions with Representative Thurston, the bar secured support from lawmakers in both houses to oppose this radical change. To the credit of Representative Thurston, he met with Bar President John Lund and the bar lobbyists on a number of occasions to review various methods to resolve the concerns. He also discussed options with the courts. As such, H.J.R.3 was never heard in committee.

However, Representative Thurston did move forward with H.B. 115, *Bad Faith Demand Letters Concerning Americans with Disabilities Act*, in an attempt to limit the so-called practice of “ADA trolling.” As originally drafted, the bill was modeled after patent trolling legislation passed in the state several years ago.

Eventually, the legislation was greatly changed after passionate discussions between lawyer-legislators, trial lawyers, and attorneys representing businesses. Incoming Bar President Dickson Burton also conducted numerous discussions with the supporters of the legislation, reducing its negative impacts on the judicial process despite some lingering concerns over the final version by the Government Relations Committee and the Bar Commissioners. Ultimately, the varied interests at play and wide disagreement about the best manner to address the issue prevented the bill from being heard on the senate floor, though we expect a review of legislation by an interim committee.

Even though we could not ultimately be supportive of the final version that passed, the bar was also able to successfully amend H.B. 167, *Incapacitated Person Guardianship Revisions*, by Representative Mike Winder.

Important changes to H.B. 243, *Division of Real Estate Amendments*, by Representative Gage Froerer were accomplished. We appreciate the efforts of the Steve Lovell (Business Law Section) and Tayler Fox (Real Estate Section) for their invaluable assistance.

Several other bills that the bar or its various sections supported also passed, including H.B. 51, *Administrative Office of the Courts Amendments*; H.B. 273, *Criminal Judgment Account Receivable Amendments*; H.B. 343, *Youth and Child Welfare Amendments*; H.B. 402, *Probate Code Amendments*; S.B. 24, *Local Government Indigent Defense Requirement*; S.B. 33, *DNA Amendments*; S.B. 106, *Court Records Amendments*; S.B. 107, *Third District Court Judge*; S.B. 186, *Indigent Defense Amendments*; and S.B. 219, *Court Citation Amendments*.

Overall, the 2018 General Session was successful for the Utah bar as our leaders influenced the language of legislation and enhanced the bar's relationship with lawmakers and staff. Furthermore, lawmakers and especially lawyer-legislators interacted with bar representatives at unprecedented levels.

We would like to express immense gratitude to the Government Relations Committee. Their weekly preparation and provision of insight made a tremendous difference in our abilities to communicate with legislators and other policymakers. We also wish to thank the lawyer-legislators who carry the torch for our interests, especially the Chairman of the Senate Judiciary committee Todd Weiler and the Chairman of the House Judiciary Committee Michael McKell.

If you have any questions or need additional information regarding the bar's participation with the Utah State Legislature, please contact us or the Utah bar.

1. In contrast, the governor chooses a replacement in the event of a vacancy in the U.S. Senate.

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John Sadlik
Associate

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. These summaries have been prepared by the authoring attorneys listed above, who are solely responsible for their content.

UTAH SUPREME COURT

***State v. Ogden*, 2018 UT 8 (Feb. 27, 2018)**

After the criminal defendant pled guilty to two counts of aggravated sexual abuse of a child, the district court entered orders for complete and court-ordered restitution for, among other things, the anticipated cost of mental health treatment for the remainder of the victim's life. The defendant appealed these orders. In evaluating this appeal, the Utah Supreme Court addressed, as a matter of first impression, the level of causation required by the Crime Victims Restitution Act. **It held that the Act requires a district court to include in its complete restitution determination the losses that a defendant proximately causes.** Because the district court applied a different causation standard, the court remanded for further proceedings. In doing so, it further instructed that a restitution calculation cannot be based on speculative evidence of losses a victim has incurred or is likely to incur.

***Gonzalez v. Cullimore*, 2018 UT 9 (Feb. 26, 2018)**

In this suit filed to collect a debt purportedly owed to a condominium owners association, the defendant-debtor asserted a counterclaim against the law firm representing the association, arguing the law firm had violated § 1692e of the Fair Debt Collection Practices Act by misrepresenting the amount owed in demand letters the firm had sent to her. The district court dismissed this claim on summary judgment. On appeal, the Utah Supreme Court, abrogating a prior Court of Appeals' decision, **held a law firm is not entitled to reasonably rely upon its client's representation of the debt owed and must instead have procedures reasonably adapted to avoid this type of error or face liability under § 1692e.**

***Salo v. Tyler*, 2018 UT 7 (Feb. 22, 2018)**

The Court disavowed any prior suggestion in *Orvis v. Johnson*, 2008 UT 2, that the Utah summary judgment standard is distinct from the federal standard stated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and held that when the burden of production falls on the nonmoving party, the movant can carry its burden of persuasion without putting on any evidence of its own by showing that the nonmoving party has no evidence to support an essential element of a claim. Applying this standard, the court affirmed summary judgment granted to the defendants, dismissing the plaintiff's claims for defamation and intentional interference.

***State v. Lopez*, 2018 UT 5 (Feb. 9, 2018)**

The criminal defendant appealed his murder conviction, arguing the district court erred by admitting the State's expert testimony and in admitting evidence of prior acts. The supreme court reversed, agreeing on both counts. With respect to the expert testimony, **the court held the district court abused its discretion in admitting the State's expert testimony about whether the victim was suicidal.** The State had not satisfied its threshold burden of demonstrating the method of evaluating suicidal risk used by the expert was generally accepted as a means of assessing the risk of suicide in someone who had passed away or that it was reliable when used to assess suicide risk post-mortem.

***Gables at Sterling Village Homeowners Association, Inc. v. Castlewood-SterlingVillage I, LLC*, 2018 UT 4 (Feb. 9, 2018)**

After problems emerged with homes located within a planned unit development, the homeowners association asserted claims against the developer, the builders, and their principals. In reviewing the district court's grant of a directed verdict in favor of the developer, the Utah Supreme Court was asked to decide, as a matter of first impression, whether expert testimony is required to establish the standard of care in actions claiming a developer breached

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

the limited fiduciary duties recognized in *Davencourt at Pilgrims Landing Homeowners Association v. Davencourt at Pilgrims Landing*, 2009 UT 65, 221 P3d 234. **It held the general framework for analyzing the necessity of expert testimony in negligence claims applies in the breach of fiduciary duty context.**

Applying that framework to the claims in this case, the court affirmed the directed verdict on the basis that expert testimony was required to establish the relevant standard of care and the plaintiff did not produce any such testimony. The court further reversed the district court's award of attorney fees to the developer, awarded in response to a post-trial motion for indemnification based on a provision in the homeowners association's articles of incorporation. **It held that a post-trial motion was not the appropriate vehicle to litigate this claim, which had been asserted as a counterclaim and was not based upon a statute or prevailing party attorney fee clause.** By not litigating its counterclaim, the developer had waived its claim for indemnification.

***State v. Ellis*, 2018 UT 2 (Jan. 23, 2018)**

In this appeal from a conviction following a jury trial, the Utah Supreme Court addressed the circumstances required to render a witness unavailable under Rule 804 of the Utah Rules of Evidence. It held the district court erred in determining a witness who refused to attend trial because she had given birth a week before, several weeks prematurely, and her baby had come home from the hospital just three days before the trial began was "unavailable." **In order to be "unavailable" under Rule 804(a)(4) based on an illness, the illness must be "of sufficient severity and duration that the witness is unable to be present over a period of time within which the trial reasonably could be held."** There was no such showing in this case.

***Zimmerman v. Univ. of Utah*, 2018 UT 1 (Jan. 23, 2018)**

In this case, the **Utah Supreme Court declined to answer two questions certified by the United States District Court for the District of Utah.** Both questions implicated the free speech clause of the Utah Constitution. Expressing concern about the briefing, the court declined to exercise its discretionary authority to answer certified questions because the parties failed to address the precise constitutional issues.

UTAH COURT OF APPEALS

***State v. Sosa-Hurtado*, 2018 UT App 35 (Mar. 1, 2018)**

The defendant was convicted of multiple felonies, including a first-degree felony conviction for aggravated murder. The defendant argued on appeal that the aggravator (knowingly creating a great risk of death to the victim's father) was unsupported

by evidence. **Based on analysis of the two previous Utah cases in which the aggravator was at issue, as well as persuasive authority from other jurisdictions, the court identified three main factors that should influence the decision as to whether the "great risk of death" aggravator applies: (1) the chronological relationship between the defendant's actions towards the victim and the third-party; (2) the proximity of the third-party and the victim at the time of the acts constituting the murder; and (3) whether and to what extent the third-party was actually threatened.** Applying these factors, the court found all three weighed in favor of applying the aggravator, and that there was therefore sufficient evidence for the jury to find the defendant had placed the victim's father at great risk of death.

***Timothy v. Pia, Anderson, Dorius, Reynard & Moss LLC*, 2018 UT App 31 (Feb. 23, 2018)**

The plaintiff-creditors sought to recover funds that debtors paid to a law firm under a theory of fraudulent transfer. **The Utah Court of Appeals affirmed the district court's grant of summary judgment to the law firm and one of its lawyers, holding the law firm was not a "transferee" of the funds at issue under Utah's Uniform Fraudulent Transfer Act because it held the funds in its trust account in a fiduciary capacity and**

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did not have legal dominion or control over the funds.

***State v. Smith*, 2018 UT App 28 (Feb. 15, 2018)**

In an opinion emphasizing the importance of a clear record that a criminal defendant understands the consequences of waiving the right to counsel at sentencing, the Court of Appeals vacated a sentence entered without counsel for the defendant present. Although the court concluded the criminal defendant clearly expressed a desire to be sentenced without counsel, it held his waiver was not sufficiently knowing and intelligent to be valid. This was true despite the district court's attempts to conduct a colloquy with the defendant.

***Utah Dep't of Transp. v. Target Corp.*, 2018 UT App 24 (Feb. 8, 2018)**

UDOT appealed the district court's award of \$2.3 million in severance damages in connection with UDOT's condemnation of a portion of property owned by the claimants. In evaluating the claim for severance damages based on a loss of visibility, **the Court of Appeals held the presumption of causation that exists when visibility issues stem from a "structure" built on the taken property does not require the view-impairing structure to be entirely constructed within the taken parcel.** It further held the appropriate "structure" for purposes of this analysis was the freeway interchange, rather than only the component parts constructed on the taken property as UDOT maintained. Based on these and other rulings, the court affirmed the entire award of severance damages.

***Vered v. Tooele Hosp. Corp.*, 2018 UT App 15 (Jan. 25, 2018)**

This case involved an unsuccessful assertion of privilege. The district court ordered production, notwithstanding a party's claim that the care-review privilege applied. The Court of Appeals affirmed, clarifying that **Rule 26 of the Rules of Civil Procedure requires a party to provide a privilege log setting forth sufficient information to evaluate an assertion of the claim-review privilege.** Because the party asserting the privilege failed to provide an adequate privilege log or affidavit, the district court did not abuse its discretion in concluding the party failed to carry its burden of demonstrating a privilege protected the documents from discovery.

***Lee v. Williams*, 2018 UT App 16 (Jan. 25, 2018)**

The district court dismissed the plaintiff's medical malpractice claim on statute of limitations grounds after the jury found she knew that she "might have sustained an injury" more than two years before she filed her complaint. The Court of Appeals

reversed and remanded for a new trial. Among the various issues addressed on appeal, the court held **it was error for the district court to instruct the jury that "discovery of an injury from medical malpractice occurs when an ordinary person through reasonable diligence knows or should know that she *might have* sustained an injury."** The addition of the words "might have" impermissibly relaxed the burden of proof that defendants were required to meet for their statute of limitations defense. The court also held **the defendants' pre-trial ex parte contact with a nurse who had treated the plaintiff was improper and warranted a sanction under *Sorensen v. Barbuto*, 2008 UT 8, regardless of whether confidential details of the plaintiff's care were in fact discussed and regardless of whether actual prejudice resulted from the contact.**

***Lane v. Provo Rehab. & Nursing*, 2018 UT App 10 (Jan. 19, 2018)**

The plaintiff asserted a claim that the defendant residential nursing facility was vicariously liable for both its nurse's error in administering medication and subsequent concealment of that error. At trial, the jury found the defendant was not liable for the act of concealment and allocated fault to it only for the initial error. The plaintiff appealed, arguing knowledge of the mistake should have been imputed to the defendant under the principles of agency. The Court of Appeals agreed, holding that **because the nurse was acting in the course and scope of her employment when she committed the error, knowledge of the error was imputed to the employer.**

***John Kuhni & Sons v. Labor Comm'n*, 2018 UT App 6 (Jan. 5, 2018)**

The Labor Commission issued a notice of violation of regulations to the plaintiff by sending the notice via FedEx with return receipt requested. The plaintiff argued the use of FedEx rendered the notice insufficient to trigger the applicable thirty-day statute of limitations, as the Utah Occupational Safety and Health Act expressly stated the notice must be sent by certified mail. The Court of Appeals agreed, holding **the legislature intended the term "certified mail" to refer only to items sent via certified mail through the United States Postal Service, and that service by FedEx was therefore insufficient.**

***Venuti v. Cont'l Motors Inc.*, 2018 UT App 4 (Jan. 5, 2018)**

The Court of Appeals reversed the district court's determination that it had personal jurisdiction over the nonresident defendant, a manufacturer of a helicopter motor, in this lawsuit arising from a deadly crash. After a thorough analysis of the "stream of commerce" theory of specific jurisdiction applicable in product

defect cases, the court held that **the nonresident manufacturer's general business activities in Utah, which were unrelated to the subject of the lawsuit, were insufficient to establish specific personal jurisdiction.**

10TH CIRCUIT

United States v. Knox, 883 F.3d 1262 (10th Cir. Feb. 27, 2018)

In this appeal from a denial of a motion to suppress, the Tenth Circuit joined the Seventh and Ninth Circuits and held that a **district court's assessment of an officer's good-faith reliance on a warrant under *United States v. Leon* should be limited to the four-corners of the warrant affidavit, actual information submitted under oath to the issuing judge, and information related to the warrant application process.**

United States v. Lynch, 881 F.3d 812 (10th Cir. Feb. 5, 2018)

A jury found the defendant guilty of in-flight assault or intimidation of a flight attendant. In an interesting analysis of the differences between general and specific intent statutes, the **Tenth Circuit rejected the defendant's argument that *Elonis v. United States*, — U.S. —, 135 S. Ct. 2001 (2015), required specific intent for in-flight intimidation and held a general intent mens rea requirement was consistent with the plain language and purpose of the statute.**

Hasan v. Chase Bank USA, N.A., 880 F.3d 1217 (10th Cir. Jan. 26, 2018)

The plaintiff ordered from a wine vendor with Chase Bank credit cards. He then paid off the balance on the credit cards. While delivery was pending, the wine vendor filed for bankruptcy and failed to deliver almost \$1 million worth of goods. The plaintiff filed suit against Chase Bank, arguing that under the Fair Credit Billing Act, it was required to refund the money he had paid toward the purchase. The complaint was dismissed, and the plaintiff appealed. **On appeal, the Tenth Circuit interpreted the plain language of the Act as limiting recovery to those amounts outstanding at the time the claim is filed.** Because the plaintiff had paid off the balance prior to asserting a claim, he was not entitled to recover the money he had already paid.

Jackson v. Los Lunas Cmty. Program, 880 F.3d 1176 (10th Cir. Jan. 23, 2018)

In this civil rights appeal, the **Tenth Circuit clarified the standard that applies to a motion to set aside a consent decree under the equity prong of Rule 60(b)(5) of the Federal Rules of Civil Procedure.** The Tenth Circuit held the district court erred by focusing on the narrow issue of a party's

past compliance without broader consideration of whether there was an ongoing violation of federal law, and it remanded for additional findings.

Obduskey v. Wells Fargo, 879 F.3d 1216 (10th Cir. Jan. 19, 2018)

The Tenth Circuit held, as a matter of first impression, that **entities engaged in non-judicial foreclosures are not considered "debt collectors" and are not governed by the Fair Debt Collections Practices Act.**

Rocky Mountain Wild, Inc. v. United States Forest Serv., 878 F.3d 1258 (10th Cir. Jan. 5, 2018)

This case arose out of an advocacy group's request for documents relating to a land exchange proposal under the Freedom of Information Act. On appeal, the Tenth Circuit held that **the district court correctly denied the records request under FOIA**, because (a) a private contractor created the materials, (b) the Forest Service never obtained the materials, and (c) the materials should not be classified as agency records merely because the private contractor maintained the materials pursuant an agreement with the Forest Service.

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Paying for Long-term Care: Basics of Traditional and New Generation Hybrid Policies

by Kathie Brown Roberts

My dad's decline started slowly and somewhat vaguely, beginning with suspected nerve damage as result of injury from a fire, which morphed later into a diagnosis of neuropathy. He was about seventy-two. Educated, respected, entrepreneurial throughout his life, the suggestion of a caregiver was a very delicate conversation involving negotiation, hypotheticals, and finally, in the end, acceptance. His decline in mobility had three distinct phases: the "cane" phase, the "walker" phase, and lastly, the "wheelchair" phase. The cane phase was punctuated by many falls, one hospitalizing him for over a week for a brain bleed. On one of my trips to Texas to visit my parents, my mother casually asked whether insurance would pay for someone to come in and assist my dad with bathing, dressing, and transfers to and from the bathroom. She told me about certain insurance policies that she and my dad had maintained during their careers and wanted me to review the policies. It turned out that the policies both my parents purchased long ago were first generation long-term care policies from Genworth. These policies had no lifetime cap, no elimination period, \$100/day benefits (per policy), and coverage for home caregivers, assisted living, nursing care, and home health products/accessories such as grab-bars for showers and other benefits. That Genworth policy greatly assisted my parents in bringing in caregivers for many hours a day for my dad during the "cane" and "walker" phases. We learned over time that at the point where my dad could no longer transfer, home care became impossible. Now, at eighty-seven, he requires full-time nursing care and assistance with all activities of daily living including eating. The Genworth policy continues to cover about half of his \$7,000.00 per month bill. His social security income and other monthly income can pretty much cash-flow the basic cost of his long-term care.

My dad's story is not that unusual insofar as the progression of his decline. His story is unusual, however, with respect to the benefits provided in his Genworth long-term care policy.

Earlier this year, the National Academy of Elder Law Attorney (NAELA) list-serve was abuzz with commentary on two competing articles involving long-term care insurance. The first article appearing in the *Wall Street Journal (WSJ)* on January 17, 2018, and entitled "Millions Bought Insurance to Cover Retirement Health Costs. Now they Face an Awful Choice" by Leslie Scism highlighted the conundrum faced by the long-term care insurance industry in large part because of the type of policies that were sold to my mom and dad in the early to mid 1980s, when they were in their 50s. Per the *WSJ* article, consumers are having to make an "awful choice" between choosing to continue to pay ever increasing premiums for a long-term care policy or simply walking away from the policy after many years of faithful premium payment. Insurers "barreled into" the industry although there was not enough data available to set appropriate prices for the policies.

During the advent of these policies, at the time my parents bought in, insurance companies touted a "level premium" which would hold through the life of the policy. At the time a claim was filed, the premiums halted. The *WSJ* article quotes Thomas McInerney, the CEO of Genworth, saying: "We should never have done it, and the regulators never should have allowed it." Leslie Scism, *Millions Bought Insurance to Cover Retirement Health Costs. Now They Face An Awful Choice*, THE WALL STREET JOURNAL (Jan. 17, 2018), available at <https://www.wsj.com/articles/millions-bought-insurance-to-cover-retirement-health-costs->

KATHIE BROWN ROBERTS, Esq. CELA is a certified elder law attorney by the National Elder Law Foundation in private practice at Kathie Brown Roberts P.C. in Sandy, UT.



[now-they-face-an-awful-choice-1516206708](#). McNerney referred to the fact that the actuaries did not adequately account for lengthening life spans coupled with long periods of low interest rates (which otherwise serve to bolster insurance company reserves). Apparently, in 2016, Genworth's life insurance units were downgraded below investment grade. Its losses on long-term care policies exceeded \$2 billion dollars in 2016 according to the *WSJ* article.

The dissenting article published in *Forbes* on January 22, 2018, and entitled "Why The *WSJ* Is Wrong About Long Term Care Planning," points out that consumers are not faced with the choice to either pay more or drop the policy. Rather, most policies can be "modified to alter benefits or riders in order to keep costs down." Jamie Hopkins, *Why The WSJ Is Wrong About Long-Term Care Planning*, *FORBES* (Jan. 22, 2018), <https://www.forbes.com/sites/jamiehopkins/2018/01/22/why-the-wsj-is-wrong-about-long-term-care-planning/#14a8dcad6ba3>. For example, increasing the elimination period (time between claim and when policy kicks in) and/or reducing the inflation rider are also means to keep premiums in check without walking away from the policy all together.

Both the *WSJ* article and the *Forbes* article discussions involve *traditional* long-term care policies. Traditional long-term care policies require extensive underwriting and health verification, and the premiums are expensive. Moreover, if the policy lapses before a claim is made, you lose all the premiums paid into the policy. Additionally, there are very few insurance companies now offering such policies due to the problems addressed above with actuarial miscalculations.

A variation on the traditional long-term care policy, the topic of a recent NAELA article in the January 2018 issue of *NAELA News* by lawyer Lori Parker entitled "Would a Hybrid Policy Work for Your Client?" highlights a newer type of policy as a possible solution for some clients searching for long-term care insurance. A "hybrid policy" is just that: a mix of standard life insurance policy with long-term care benefits. Basically, in exchange for a hefty upfront investment, a consumer purchases an amount of long-term care coverage. If long-term care is not needed, the policy has a death benefit payable to the consumer's heirs, which is usually the value of the initial investment. Hybrids usually offer a lower level of underwriting and a level premium as well. If long-term care is required, the death benefit component is reduced. As with traditional long-term


care policies, a consumer could purchase a rider for inflation adjustment to insure against the risk of rising health care costs. Parker's article also brings up alternatives to hybrid policies such as savvy independent investment along with newer "short-term care" insurance policies, offering short periods of coverage useful during perhaps an elimination period of another policy.

I asked Kathy Jones-Price, an independent wealth manager with offices in Cottonwood Heights, to run the numbers for me. I am now at the same approximate age that my parents were when they bought their incredible yet now-unavailable Genworth policy.

Kathy requested a quote from several different companies and forwarded a proposal from Mutual of Omaha for traditional long-term care insurance for a healthy woman (hypothetically in early fifties), with a thirty (30) day elimination period, five (5) year policy, with a 3% compounded inflation rider. This policy has a lifetime limit of \$216,000 and provides benefits up to \$3,600 per month for nursing care, assisted living and home health care. My premium would be \$378.05 per month or \$4,200 per year. As suggested in the *Forbes* article as a means of reducing premiums, if I opted for no inflation rider at all, my

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yearly premium for that policy would be \$1,875.30. There are two points worth noting about current traditional long-term care insurance products. Premiums are now gender specific; females pay a higher rate than males due to the higher probability of women living longer and being more likely to file for benefits. Premiums for long-term insurance can also go up based on the insurance company's claim paying experience. While the premium quoted is fixed for now, it will likely go up.

Kathy also obtained a quote for a hybrid policy for me from Pacific Life Insurance Company. All of the same assumptions were applied as in the traditional long-term care insurance quote with an additional "full return of premium benefit." On page one of the quote, it tells me that my initial investment of \$64,392 will amount to \$228,960 even if I need long-term care on day one of the policy. At age eighty, the amount of long-term care benefits available is \$410,400. The illustration shows the internal rate of return (IRR) on my initial investment of 90.38%, in the event I needed long-term care in year one of the policy. At age eighty, the IRR is 6.26%. IRR is defined by the policy as: "the interest rate at which the net present value of all

premiums paid equals the present value of all long-term care benefits received." Page one of the quote also tells me that if I want to quit making payments, I get my initial \$64,392 back, which is quite different from paying long-term care insurance premiums potentially for a lifetime and never using the benefits. Lastly, if I died before long-term care was needed, a death benefit is paid to my policy beneficiaries. The death benefit on my quoted policy in year one as \$99,660. At age ninety-five, the death benefit would be \$86,400.

My next question to Kathy was whether she could replicate that rate of return if I invested the hypothetical premium of \$64,392 with her for thirty years. Kathy was quick to point out that the IRR on this policy is very high if I needed long-term care when I was younger. For example, ten years from now, the IRR in the quoted policy is still almost 13%, which is arguably a great return on my investment. However, if I need long-term care at the time my dad did anywhere between age seventy-two to eighty-seven, the IRR is between 5–8% but the benefits available for my care would be between \$358,000–\$455,000. Therefore, the greatest benefit of such a policy as compared to independently investing the same amount of money, would be if long-term care is required when a person is younger. Any other type of investment, however, would likely have tax ramifications while it accumulates such as dividends and interest. There could also be tax consequences when the investment is gradually liquidated to pay for long-term care expenses, so the IRR on a separately held investment must be looked at on an after-tax basis.

Kathy's mantra is "failing to plan is planning to fail." On this note, I can also see that planning against fluctuations in the market, interest rates and health variations now... and planning for a certain outcome may be worth its weight in gold for those who can afford it.

Author's Note: Special thanks to contributing editor Kathy Jones-Price, CFP®, ChFC, CLU, MBA, an independent wealth manager with KJP Wealth Management in Cottonwood Heights. Securities offered through Securities America Inc., Member FINRA/SIPC and advisory services offered through Securities America Advisors Inc., Kathy Jones-Price, Representative, KJP Wealth Management and the Securities America Companies are not affiliated. Kathy Jones-Price is not affiliated with Kathie Brown Roberts, her practice, or the Utah State Bar in any way.

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Give Up Trying to Manage Millennials – Work with Them Instead

by Utah State Bar Innovation in Practice Committee

There are many articles advising firm managing partners on how to attract and retain young lawyers. And many focus on describing the millennial generation's formulaic traits. They then proceed to list the ways a firm can embrace millennial culture in order to keep those young attorneys loyal and motivated. Ultimately, these articles ignore the basic principal that no attorney, regardless of their age, wants to be stereotyped and then "managed."

Attorneys of every generation bring a unique perspective and differing life experiences, which can contribute to the growth and success of any firm. Young attorneys have much to learn during the decades of experience that await them in the practice of law, but they also bring a fresh set of eyes to the business aspect of law. Firms could benefit from embracing a young attorney's strengths by engaging them in decision making when implementing new technology, strategizing business development opportunities, redesigning office space, or determining where to develop expertise in emerging areas of law. Engaging attorneys to contribute to the business aspects of a legal practice acknowledges and respects past accomplishments, accelerates integration into the firm, educates on the fundamentals of practice management, lays the foundation for leadership training, and ultimately builds a sense of ownership in the business before reaching partnership.

Law firms are among the slowest industries to embrace change, particularly with respect to technology. A firm could embrace generational differences by leveraging young attorneys' understanding and familiarity of technological tools. The creation of a technology committee – comprised of associates, partners and support staff – to test new legal technological tools that a firm may be considering would engage attorneys while providing the firm with realistic and meaningful feedback on the potential utility or shortcomings of any technology it may purchase. Obtaining feedback on the front end from stakeholders with differing perspectives (as opposed to the top down approach) would help avoid wasting money when a product is rolled out company-wide but ultimately has a low adoption rate among employees who weren't initially consulted

with about whether they would use the product. On the other hand, technology committee members could also serve as the champions of new technology and tout its benefits to their team. Inviting associates to participate in this type of business evaluation provides them with a better grasp of the inner workings of the firm's decision-making process, which creates a sense of purpose.

Formal mentoring programs – which are pervasive throughout legal practice – are also ripe for change. Mentor-mentee pairings can be hit or miss when it comes to developing a meaningful relationship. Firms should break the mold by focusing on office culture to allow organic mentoring relationships to develop. One way would be to build avenues for social interactions between partners and associates (and their families) outside of their legal work. A comfortable and inviting breakroom, for example, could encourage associates and partners alike to occasionally step away from the desks and get to know each other over a brief lunch break or afternoon snack. Firm-sponsored dinners would offer a similar social interaction with the added benefit of engaging family members. These social settings inevitably lead to cross-practice collaboration and strategic discussion regarding legal matters. The willingness to embrace the social aspect of life is reflective of a firm's internal culture, which also enhances friendships among attorneys and nurtures loyalty.

Firms that embrace generational differences challenge their associates to make immediate contributions to the firm and teach them about the business of law and about the organization's decision making process, which ultimately increases satisfaction and happiness amongst its attorneys. There are similar opportunities with respect to strategic long term goal setting, business development, office space selection, developing industry expertise in emerging areas of law, etc. The more an associate is brought into the fold at the beginning of his or her career, the more easily he or she develops a sense of loyalty and belonging. Such activities set them on a path to enter the ranks of firm leadership – which would inevitably lead to increased associate retention.

Ethics for the State and Local Government Attorney

by Keith A. Call

According to my unofficial count, there are approximately 255 Attorneys General in Utah. That easily makes the AG's office the largest law firm in Utah. There are approximately fifty-five U.S. Attorneys. Utah has twenty-nine counties, each of which has some form of County Attorney. As of 2010, according to the "official" internet source Wikipedia, Utah had 243 incorporated cities and towns. And there are more water, sewer, fire, snow removal, animal control, and other special service districts, commissions, boards, and committees than I know how to count.

Each of these government entities needs legal counsel, making the demand for government legal services a major part of Utah's legal economy. State and local government attorneys face unique ethical dilemmas in a unique context. This article addresses some of the more common ethical questions.

Who Is the Client?

Let's start with the biggest question of all. A government attorney's client is... [drumroll] ...the government entity, of course. But what does that really mean? Rule 1.13(a) states that an organization's attorney represents the organization "acting through its duly authorized constituents." Utah R. Prof'l Conduct 1.13(a). A government entity can act through its voters, its elected governing board, its elected officials, and its employees. To which of those groups does the attorney owe her duties of loyalty, confidentiality, and communication?

Utah Rule of Professional Conduct 1.13 contains an additional relevant provision not included in the Model Rules. Rule 1.13(h) specifically provides that the "government lawyer's client is the governmental entity except as the representation or duties are otherwise required by law." *Id.* 1.13(h). This rule recognizes that a government lawyer's duties to his or her client under Rule 1.13 can be modified by duties required by law for government entities. The comments to the rules clearly indicate a softening of rules related to conflicts and confidentiality for government lawyers. *See, e.g.*, Rule 1.13 cmt. 13a–13b.

Candidly, these special provisions for government lawyers may add more confusion than clarity. For example, government attorneys often work closely with the individuals who make up that government. Close relationships developed with those individuals may make it

difficult for the attorney to place the interests of the governing board over the interests of those individuals.

If a government attorney leads an employee to believe that the attorney represents the employee individually, the government entity may lose control over confidentiality and privilege decisions concerning the attorney's conversations with that employee. For example, in 2011, a child sex abuse scandal broke open at Penn State University when assistant football coach Jerry Sandusky was indicted on fifty-two counts of child molestation. In January 2016, a Pennsylvania appellate court ruled that the University's general counsel at the time, Cynthia Baldwin, had confused her roles, leading the University President, Graham Spanier, to believe that she represented him personally. In an appeal of Graham's motion to exclude some of the charges, the court said, "We find that Ms. Baldwin breached the attorney-client privilege and was incompetent to testify as to confidential communications between her and Spanier during her grand jury testimony." *Commonwealth v. Spanier*, 132 A.3d 481, 482 (Pa. Super. 2016). The court threw out perjury charges that were based on Ms. Baldwin's testimony. *Id.* at 482, 498.

The same concerns can arise with individual board members. Assume a county commissioner visits the office of the county attorney, closes the door, and says, "I've got something important to tell you. Can we keep this just between you and me?" As much as that attorney might want to agree, his ethical obligations should prevent him from promising to keep the conversation confidential. The attorney owes an ethical duty to the government entity as a whole, not to individual commissioners. If the commissioner tells the attorney something that affects the interests of the county, then the attorney likely has an obligation to share that information with the commission in order to protect the county's interests.

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What if a newly elected council member demands that the city attorney reveal what occurred in a closed session between the attorney and the “old” council last year? Again, the attorney’s duty of confidentiality runs to the council as a whole. The attorney has an obligation not to disclose information relating to her representation of the city – even to a member of the city council – without approval from a majority of the council. One would hope that the council would not mind if new members are briefed on past confidential discussions with the city attorney, but that is a decision for the council to make and not the attorney.

What Conversations Are Covered by a Government Entity’s Attorney-Client Privilege?

The attorney-client privilege has been codified by statute in Utah: “An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or any advice given regarding the communication in the course of the professional employment.” Utah Code Ann. § 78B-1-137(2). Similarly, Utah Rule of Evidence 504(b) provides:

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

- (1) made for the purpose of facilitating the rendition of professional legal services to the client; and
- (2) the communications were between:
 - (A) the client and the client’s representatives, lawyers, lawyer’s representatives, and lawyers representing others in matters of common interest; or
 - (B) among the client’s representatives, lawyers, lawyer’s representatives, and lawyers representing others in matters of common interest.

Utah R. Evid. 504(b).

Further, Utah courts have required a party seeking to rely on the attorney-client relationship to establish three elements: (1) an attorney-client relationship; (2) the transfer of confidential information; and (3) the purpose of the transfer was to obtain legal advice. *See, e.g., S. Utah Wilderness All. v. Automated Geographic Reference Ctr.*, 2008 UT 88, ¶ 33, 200 P.3d 643;

The attorney-client privilege exists for governments under state law. *See, e.g., id.* ¶ 32 (holding that provision of GRAMA protects records of communications between governmental entity and attorney representing the entity if the communications fall under the general statutory attorney-client privilege found in Utah

Code section 78B-1-137). The *Southern Utah* court held that the privilege is the same “regardless of the statutory source.” *Id.*

A key question for the government lawyer is, “Who is the ‘client’s representative?’” The answer is found in Rule of Evidence 504(a)(4), which defines “representative of the client” to be persons who are authorized (1) to obtain legal services, (2) to act on the legal advice provided, or (3) specifically to communicate with the lawyer concerning a legal matter. Utah R. Evid. 504(a)(4). The rules committee specifically designed this to be broader than just the “control group” for the organization. *See id.*, advisory committee note to 2011 amendment.

Thus, Utah takes a more expansive approach to the definition of privilege than some state and federal jurisdictions. Government employees who fit any of the three classes of “client representative” are protected by the privilege provided the other elements of the privilege are met.

May the Government Attorney Advise Different Agencies or Departments within One Local Government?

At first glance, this seems like a dumb question. While big cities and big counties may have large legal staffs, most local governments in Utah may have one or two attorneys providing legal assistance for all of its departments and employees. All of those departments

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and employees are part of the same client so there aren't any conflict issues to worry about, right?

That's usually true, but not always. Consider a situation in which the attorney is asked to advise a government official on a particular decision and later asked to advise the board charged with reviewing that decision. The attorney's involvement with the decision and the review of that decision could raise both conflict and due process concerns.

Consistent with Rule 1.13, the preamble to the Utah Rules of Professional Conduct includes an important provision applicable to government attorneys. It seems to limit application of the Rules of Professional Conduct in some government situations:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. *Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.*

Utah R. Prof. Conduct, Preamble: A Lawyer's Responsibilities, ¶ 18 (emphasis added).

The comments to Rule 1.13 also signal more lenient conflict of interest standards for government lawyers. For example, "In representing the legislative body and the various interests therein, the lawyer is considered to be representing one client and the rules related to conflict of interest and required consent to conflicts do not apply." Utah R. Prof'l Conduct 1.13 cmt. 13b. The comments specifically state that a government lawyer for a legislative body may concurrently represent the interests of the majority and minority leadership, members and members-elect, committee members, staff of the legislative body, and the various interests involved. *Id.* In these situations, "the rules related to conflict of interest and required consent to conflicts do not apply." *Id.*

This leaves open many questions about when the Utah Rules of

Professional Conduct apply to government lawyers and when they don't. The Utah State Bar Ethics Advisory Committee has provided some guidance.

In 1994, the Committee issued an opinion that specifically addresses conflicts within the Utah Attorney General's (AG) office. *See* Utah State Bar Ethics Advisory Op. 142 (March 10, 1994). The Committee concluded that the rules of imputed disqualification apply only on an attorney-specific basis within the AG's office. *Id.* Thus, as long as appropriate screening is implemented, different attorneys within the AG's office can engage in conflicting representation. *Id.* The Committee reasoned that the comments to Rule 1.10 defined "firm" in a way that did not include the AG's office. *Id.* More importantly, the Committee reasoned that application of the imputed disqualification rule could frustrate the AG's constitutional mandate to represent the State. *Id.* The opinion noted that the AG "may encounter conflicts so pervasive that the only prudent course of action is to hire outside counsel." *Id.* The opinion also stressed that the individual lawyer in the AG's office must satisfy the conflict rules. *Id.* The Committee subsequently extended this opinion to full-time county attorney offices. *See* Utah State Bar Ethics Advisory Op. 98-06 (Oct. 30, 1998).

In 1995, the Committee opined that the AG may ethically appeal the decision of a division of a state agency to the executive director of that division. Utah State Bar Ethics Advisory Op. 95-07 (Sept. 22, 1995). In essence, the AG can appeal an administrative decision of her own client!

In that situation, a Division within state agency was responsible for the regulation of certain licensed professionals. *Id.* A Board within the agency had authority to make recommendations to the Division affecting the rights of individual professionals. *Id.* The Director of the Division could affirm or modify the Board's recommendation. *Id.* The Director's decision could be appealed to the Agency's Executive Director. *Id.*

An Assistant AG had represented the Division in a particular disciplinary proceeding. *Id.* The Division's Board ultimately recommend sanctions much less harsh than those sought by the Division. *Id.* The Division's Director adopted the Board's recommendation. *Id.* The AG, acting in her own name and purportedly "on behalf of the public," appealed the Division's order to the Agency's Executive Director. *Id.* In essence, the AG, acting on behalf of the public, appealed the decision of her own client, the Division. *Id.*

The Committee opined the AG had authority to do this and did not violate any ethical rule in doing so. *Id.* The Committee cited constitutional and statutory responsibilities of the AG and the Preamble to the Rules and recognized that a "government attorney compelled by law to service different masters with varied interests . . . is likely to encounter conflicts of interest regularly." *Id.* The

Committee concluded that the AG has broad discretion to determine which master to serve in the “public interest.” *Id.*

Similarly, the Committee opined that different attorneys in a county attorney’s office, properly screened, may represent a county official and the county in an action to prevent unlawful payment of county funds by that county official. Utah State Bar Ethics Advisory Op. 98-06 (Oct. 30, 1998).

Finally, the Committee has ruled that an Assistant AG may act as a hearing officer (adjudicator) for a Utah government agency on a matter for which the AG’s office may subsequently take on an advocacy role on behalf of that same agency. Utah State Bar Ethics Advisory Op. 03-01 (Jan. 30, 2003).

The Rules of Professional Conduct and government lawyer’s statutory duties clearly do not fall neatly in a coherent, square box. In this complex arena, it is critical for the government lawyer to exercise good faith. In the context of Rule 1.13 at least, the government lawyer’s good faith seems to approach a safe harbor. *See* Utah R. Prof’l Conduct 1.13 cmt. 13a (“A government lawyer following these legal duties in good faith will not be considered in violation of the ethical standards of this Rule.”).

May an Attorney Represent More than One Local Government?

Yes. In a 1998 Opinion, the Ethics Advisory Opinion Committee opined that it is not per se unethical for an attorney to represent both a county and a city within the county on civil matters. Utah State Bar Ethics Advisory Op. 98-02 (April 17, 1998). In the event of a conflict on a particular matter, however, the attorney may not represent both unless he or she can comply with Rule 1.7(a)–(b). *Id.*

Plenty of attorneys represent multiple cities and counties. But attorneys must be wary of potential conflicts that could arise between those clients and be careful to address them as required by the Rules.

How Will the Attorney’s Representation of a Government Entity Affect Her Representation of Private Clients?

With many rural communities, Utah has a number of lawyers who are part-time government lawyers. Aside from the internal conflicts that can arise within a single government entity, the standard conflict rules created by Rule 1.7 apply to attorneys simultaneously representing government entities and private parties. *See* Utah R. Prof’l Conduct 1.7. The attorney may not represent clients directly adverse to his government client. *Id.* The attorney may not accept any representation that would “materially limit[]” the attorney’s efforts on behalf of the

government. *Id.* 1.7(a). For example, a part-time town attorney could not also represent a criminal defendant if town police officers will be prosecuting witnesses against that defendant.

Rule 1.11 creates special conflict of interest rules for attorneys moving in or out of government service. *Id.* 1.11. A current government attorney may not participate in matters in which the attorney “participated personally and substantially while in private practice” without government consent. *Id.* 1.11(d)(2)(i). The same rule applies in reverse for an attorney who previously represented a government; without consent, that attorney may not represent a private party on a matter in which the attorney participated “personally and substantially” while representing the government. *Id.* 1.11(a)(2). For example, an attorney who advised the city zoning administrator on a particular zoning decision could probably not represent a private party in litigation against the city about that zoning decision.

Some statutes define additional parameters for part-time government lawyers engaging in private practice. The Utah Code prohibits county and district attorneys from representing criminal defendants in any jurisdiction. A county or district attorney may not prosecute or dismiss a case in which he or she has previously acted as counsel for the accused. Utah Code Ann. § 17-18a-605.

The Utah State Bar Ethics Advisory Committee has issued a number of opinions that provide additional guidance on questions surrounding public and private representation. The following opinions are of interest:

- A part-time county attorney or deputy county attorney may not appear as counsel for a defendant in a civil action brought in the county by the State of Utah to collect delinquent child support payments. Utah State Bar Ethics Advisory Op. 89-99 (October 27, 1989).
- A private attorney who has been appointed as a special deputy county attorney to investigate and prosecute a single criminal matter may not continue to represent any criminal defendants in any jurisdiction. Utah State Bar Ethics Advisory Op. 98-04 (Apr. 17, 1998).
- A city attorney with prosecutorial functions may not represent a criminal defendant in any jurisdiction. Utah State Bar Ethics Advisory Op. 126 (Jan. 27, 1994).
- A city attorney with no prosecutorial functions, who has been appointed as city attorney pursuant to statute, may not represent a criminal defendant in that city, but may represent a criminal defendant in other jurisdictions, provided he satisfies Rule 1.7(a). *Id.*

- An attorney with no prosecutorial functions, who is retained by a city on a contract or retainer basis, may represent a criminal defendant in any jurisdiction, if Rule 1.7(a) is satisfied. *Id.*
- A part-time county attorney is not per se prohibited from representing a private client in a protective order hearing. Utah State Bar Ethics Advisory Op. 01-06A (June 12, 2002). However, strict rules of informed consent and waiver apply, and the attorney will be required to withdraw if the client becomes a criminal defendant. *Id.*
- A city attorney with prosecutorial functions may represent a defendant in a civil contempt proceeding, provided the city is not a party to the proceeding. Utah State Bar Ethics Advisory Op. 95-03 (Apr. 28, 1995).
- Members of a county attorney's office may provide pro bono legal assistance to victims of domestic violence seeking protective orders. However, the individual attorney providing the assistance cannot be involved in a subsequent prosecution of the abuser. A different attorney in the county attorney's office may be able to prosecute the abuser, provided there is appropriate screening. Utah State Bar Ethics Advisory Op. 06-01 (June 2, 2006).
- An attorney who is a partner or associate of a city attorney may not represent a criminal defendant in any situation where the city attorney is prohibited from doing so. Utah State Bar Ethics Advisory Op. 126 (Jan. 27, 1994).
- A lawyer may represent criminal defendants in the same judicial district in which a law partner sits as a justice court judge, but the lawyer may not appear before the partner. Utah State Bar Ethics Advisory Op. 95-02A (Jan. 26, 1996).
- Generally, a former government attorney is not prohibited from representing a private client in matters that involve the interpretation or application of laws, rules or ordinances directly pertaining to the attorney's employment with a government agency. Utah State Bar Ethics Advisory Op. 97-08 (July 2, 1997). However, the attorney may not represent such a client where the representation involves that same lawsuit, the same issue of fact, or conduct on which the attorney participated personally and substantially on behalf of the government agency. *Id.*
- A Utah prosecuting attorney acting as a private practitioner should avoid engaging in a civil action that involves parties and facts that have been or become subject of a criminal investigation within the prosecutor's jurisdiction. An attorney already involved in a civil matter in which a party becomes a potential criminal defendant need not withdraw if he refers the criminal matter to a conflicts attorney and stays out of the

criminal matter. Utah State Bar Ethics Advisory Op. 98-01 (Jan. 23, 1998).

- An Attorney General who formally sat on a nonprofit board (the Bid Committee for the 2002 Olympic winter games), but did not act as the board's attorney and did not have "substantial participation" on a personal, non-attorney basis could undertake an investigation of possible criminal activity by the board. Utah State Bar Ethics Advisory Op. 99-05 (July 30, 1999).
- It is not per se unethical for an elected county attorney to share and rent office space to another private attorney who may represent interests adverse to the county, but special precautions must be taken, and sharing a secretary is not advised. Utah State Bar Ethics Advisory Op. 125 (Oct. 28, 1994).

Do the Rules of Professional Conduct Pertaining to Dishonesty, Fraud and Deceit Apply to Government Lawyers?

Yes, of course they do. But perhaps surprisingly, there are exceptions. A government lawyer who participates in a lawful covert government operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for purposes of gathering relevant information does not, without more, violate the Rules of Professional Conduct. Utah State Bar Ethics Advisory Op. 02-05 (March 18, 2002). This should protect, for example, an attorney who works for a state or federal agency that performs undercover investigative work directed against criminal and terrorist groups.

Conclusion

Government lawyers face a host of ethical issues not common in private practice. Fortunately, the rules and relevant ethics opinions include specific provisions and guidance that allow significant leeway for government practitioners in some contexts. Unfortunately, the boundaries of ethical conduct and restraint are often far from clear. Advice that is often given in private practice applies with even greater force to government lawyers: Study the relevant rules, always strive to exercise good faith, don't ever act in a vacuum, and get help and advice from trustworthy peers and mentors.

Author's Note: *The author expresses thanks for the contributions of Chris McLaughlin, J.D., Associate Professor of Public Law and Government at the University of North Carolina. Mr. McLaughlin is a contributing author to an excellent blog focused on Local Government Law in North Carolina, including several outstanding pieces on ethics for the local government attorney. You can view this blog at <https://canons.sog.unc.edu/>. Many of Mr. McLaughlin's ideas have been included in this article with permission.*

President-Elect and Bar Commission Election Results



Herm Olsen was successful in his retention election as President-elect of the Bar. He will serve as President-elect for the 2018–2019 year and then become President for 2019–2020. Congratulations goes to **Chrystal Mancuso-Smith** and **Mark Pugsley** who were elected in the Third Division, as well as **Tom Seiler** and **Kristin “Katie” Woods** who ran unopposed in the Fourth and Fifth Divisions respectively and are declared elected. Sincere appreciation goes to all of the candidates for their great campaigns and thoughtful involvement in the Bar and the profession.

Herm Olsen, President-Elect



*Chrystal Mancuso-Smith
Third Division*



*Mark Pugsley
Third Division*



*Tom Seiler
Fourth Division*



*Kristin “Katie” Woods
Fifth Division*

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the April 6, 2018 Commission Meeting held at the Law & Justice Center in Salt Lake City.

1. The Bar Commission voted to endorse a lawyer professional liability insurance provider, but requested additional information from potential providers before deciding which one to endorse.
2. The Bar Commission voted to nominate **Lesley Manley**, **Sarah Starkey**, **Marco Brown**, and **Greg Hoole** to fill an unexpired term on the Third District Judicial Nominating Commission.
3. The Bar Commission voted to appoint **Ed Brass** to fill an unexpired term on the Utah Sentencing Commission.
4. The Bar Commission voted to approve the recommendations of the Awards Committee.
5. The minutes of the March 8, 2018 Commission Meeting were approved by consent.
6. The \$5 Client Security Fund assessment for 2018–2019 was approved by consent.

The minute text of this and other meetings of the Bar Commission are available at the office of the Executive Director.

Mandatory Online Licensing

The annual online licensing renewal process will begin June 4, 2018, at which time you will receive an email outlining renewal instructions. This email will be sent to your email address of record. Utah Supreme Court Rule 14-507 requires lawyers to provide their current e-mail 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.

2018 Utah Professionals Directory



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Elder Law Pro Bono Opportunity

May is national Elder Law Month. In celebration, we invite lawyers to fulfill their pro bono requirement by volunteering to give twenty-minute legal consultations at senior citizen centers. Senior Center Legal Consultations (SCLC), a pro bono program sponsored by the Elder Law Section and the USB Access to Justice Program, is a pleasurable way for attorneys to provide valued services to senior citizens. For information on volunteering for the SCLC, please contact Joyce Maughan, Pro Bono Coordinator, Elder Law Section, (801) 359-5900 or maughanlaw@xmission.com or Nicholas Stiles, Director of the USB Access to Justice Program, (801) 297-7027 Nicholas.Stiles@utahbar.org. Thank you.

Notice of Petition for Reinstatement to the Utah State Bar by David J. Hardy

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement (Petition) filed by David J. Hardy in *In the Matter of the Discipline of David J. Hardy*, Third Judicial District Court, Civil No. 150902950. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

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, 2018, and ends June 30, 2019. 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 July 25, 2018 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.

Telephone: (801) 531-9077 | Email: jbaldwin@utahbar.org

MCLE Reminder – Even Year Reporting Cycle

July 1, 2016–June 30, 2018

Active Status Lawyers complying in 2018 are required to complete a minimum of twenty-four hours of Utah approved CLE, which must include a minimum of three hours of accredited ethics. **One of the ethics hours must be in the area of professionalism and civility.** At least twelve hours must be completed by attending live in-person CLE.

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

Fees:

- \$15.00 filing fee – Certificate of Compliance (July 1, 2016 – June 30, 2018)
- \$100.00 late filing fee will be added for CLE hours completed after June 30, 2018 OR
- Certificate of Compliance filed after July 31, 2018

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

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

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



Bar Thank You

Many attorneys volunteered their time to grade essay answers from the February 2018 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Paul Amann	Mike Colby	Tony Graf	Greg Lindley	Scott Sabey
Rachel Anderson	Kim Colton	Jacob Gunter	Steven Lovell	Leslie Slaugh
Mark Astling	Kate Conyers	Mark Hales	Colleen Magee	Marissa Sowards
Matt Ballard	Victor Copeland	Shane Hanna	Ryan Marsh	Michael Stahler
Jonathan Bauer	J. Andrew Cushing	Paul Harman	Kigan Martineau	Alan Stewart
Blake Bauman	Nicholas Cutler	Clark Harms	Lewis Miller	Michael Swensen
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		Tanya Lewis		

Pro Bono Honor Roll

Bankruptcy Case

Will Morrison
Ryan Simpson
Letitia Toombs

Cache County Bar Night

Kenneth Allsop
Tony Baird
Paul Gosnell
Danny Major
Suzanne Marychild
Marty Moore
Herm Olsen
Kelly Smith
Ted Stokes

Community Legal Clinic: Ogden

Jonny Benson
Travis Marker
Chad McKay
Francisco Roman

Community Legal Clinic: Salt Lake City

Ashley Anderson
Jonny Benson
Dan Black
Kendall Moriarty
Bryan Pitt
Brian Rothschild
Paul Simmons
Ian Wang
Mark Williams
Russell Yaune

Community Legal Clinic: Sugarhouse

Skyler Anderson
Brent Chipman
Sue Crismon
Sergio Garcia
Lynn McMurray
Mel Moeinvaziri
Reid Tateoka

Consumer Law Case

Sonia Jorgensen

Debt Collection Pro Se Calendar – Matheson

Rod Anderson
Matthew Ballard
Michael Barnhill
John Cooper
Ted Cundick
Jesse Davis
T. Rick Davis
Josh Nelson

Karra Porter
Brian Rothschild
Reid Stringham
Nathan Williams

Debtor's Legal Clinic

Tony Grover
Ellen Ostrow
Brian Rothschild
Paul Simmons
Brian Stewart
Nick Stiles
Ian Wang
Tami Gadd Willardson

Expungement Law

Kate Conyers
Rebecca Held
Trent Lowe
Mary Ann May
Stephanie Miya
Ian Quiel

Family Justice Center: Provo

Jim Backman
Chuck Carlston
Drew Clark
Elaine Cochran
Thomas Gilchrist
Michael Harrison
Chris Morales
Andrea Pace
Samuel Poff
Babata Sonnenberg
Daniel Woods

Family Law Case

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Tess Davis
Ryan Ficklin
Adam Forsyth
Randall Gaither
Christian Hansen
Ray Hingson
Barry Huntington
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Shirl LeBaron
Jennifer Lee
Amy Martz
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Carolyn Morrow
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Candace Reid
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Linda F Smith
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Trevor Bradford
Marca Brewington
Scot Jefferies
Brandie Martinez
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Platte Nielson
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Heath Waddingham
Russell Yaune

Guardianship Signature Program

Leslie Francis
Lance Gibson

Lawyer of the Day

Jared Allebest
Jared Anderson
Ron Ball
Nicole Beringer
Justin Bond
Brent Chipman
Scott Cottingham
Chris Evans
John Kunkler
Ben Lawrence
Allison Librett
Christopher Martinez
Ross Martin
Suzanne Marychild
Shaunda McNeill
Keil Myers
Lori Nelson
Stewart Ralphs
Joshua Slade
Linda F Smith
Paul Tsosie
Brent Wamsley
Leilani Whitmer
Kevin Worth

Medical Legal Clinic

Stephanie Miya
Micah Vorwaller

Post-Conviction Case

Cory Talbot

Rainbow Law Clinic

Jess Couser
Russell G Evans
Stewart Ralphs

Senior Center Legal Clinics

Kyle Barrick
Sharon Bertelsen
Richard Brown
Phillip S. Ferguson
Richard Fox
Jay Kessler
Terrell R. Lee
Joyce Maughan
Kate Nance
Kristie Parker
Rick Rappaport
Kathie Roberts
Jane Semmel
Jeannine Timothy
Timothy G. Williams

Street Law Clinic

Devin Bybee
Dara Cohen
Dave Duncan
Karma French
Jeff Gittins
Brett Hastings
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Elliot Scruggs
Jeff Simcox
Paul Simmons
Kathryn Steffey
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SUBA Talk to a Lawyer Clinic

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Dayton Hall
Eli Milne
Aaron Randall
Jonathan Wentz
Lane Wood

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Marie Durrant
Bobby Harrington
Whitney Krogue
Greg Newman
Ryan Panke

Timpanogos Legal Clinic

Leah Farrell

Scott Goodwin

Tuesday Night Bar

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Christopher Bond
David Broadbent
Leah Bryner
Josh Chandler
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West Jordan Pro Se Calendar

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Brigham Richards
Jason Sweat
Nathan Williams
Alyssa Wood

Wills/Trusts/Estate/Probate Case

Nick Angelides

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a free legal clinic in February and March of 2018. To volunteer call the Utah State Bar Access to Justice Department at (801) 297-7049 or go to <https://www.surveymonkey.com/s/UtahBarProBonoVolunteer> to fill out a volunteer survey.

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

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

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

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



ADMONITION

On February 20, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 5.5(b) and 8.1(a) of the Rules of Professional Conduct.

In summary:

The attorney performed legal services for a period of several years with a Utah law firm for a variety of clients on a variety of Utah matters. The attorney was not licensed to practice law in Utah during this time. The attorney misrepresented to the public on social media and the Utah firm website that the attorney was admitted to practice law in Utah.

The attorney completed an application with the Utah State Bar for admittance to practice law in the state of Utah. In the application, the attorney represented to have never given legal advice and/or held themselves out as an attorney, lawyer, or legal counselor in the state of Utah and represented to have never engaged in the unauthorized practice of law in the state of Utah, which were untrue representations.

Mitigating factors:

The attorney was closely and consistently supervised by a Utah attorney; and after the attorney learned that a Utah license was needed to work on Utah matters, the attorney ceased work on Utah matters and at the earliest opportunity, the attorney exhibited a willingness to take steps necessary to take and pass the Utah Bar exam to become licensed to practice law in Utah.

ADMONITION

On February 1, 2018 and March 16, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.3, 1.4(a) and 1.15(c) of the Rules of Professional Conduct in three separate matters.

In summary:

The attorney was retained to represent a client during divorce proceedings. The attorney deposited the retainer fees into the attorney's trust account but withdrew the funds before they were

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earned. The attorney mistakenly believed that because this was a flat fee arrangement, the fees were earned upon receipt. The attorney communicated with the client by calling, texting, and emailing. Several months into representation, the attorney stopped consistently communicating with the client and did not respond to the client's questions about the client's divorce proceedings. The attorney prepared a stipulation and settlement agreement for the client but did not file the document with the court. The client retained other counsel. The attorney issued a refund check to the client out of the attorney's operating account.

The attorney was retained to represent a client in divorce proceedings. The attorney received the client's retainer fees from the client's father. The attorney did not place the retainer fees into the attorney's trust account. The attorney believed that because this was a flat fee arrangement, the fees were earned upon receipt. Later the same month in which the attorney had been retained, the client asked the attorney to put everything on hold as the client and the client's spouse were trying to work things out. At that time, no work had been performed for the client. Several months later the attorney was informed that the client only had a few months to live and would no longer be pursuing a divorce. The client's father requested an accounting and a refund of the unused portion of the retainer. The client's father attempted to contact the attorney numerous times regarding the accounting, but the attorney did not respond. The client died a few months later. The client's father informed the attorney of the client's passing and again requested a refund and an accounting. The attorney told the client's father that the attorney needed to contact the Utah State Bar about the request. The client's father made numerous additional attempts to speak to the attorney without success. The attorney's delay in responding to the client's father's request was out of uncertainty in refunding the money to the client's father, who was not the attorney's client. The client's father submitted a Request for Assistance to the Office of Professional Conduct a month after the client's passing. The attorney issued a refund to the client's father approximately two weeks later.

The attorney was retained to represent a client in a divorce decree modification matter. The client paid an amount of money as a retainer in three installments. The attorney only deposited some into trust. The attorney withdrew or otherwise used the payments from the client after they were received and before they were earned. The attorney believed based on prior experience that because it was a flat fee arrangement that the fees were earned upon receipt.

Mitigating factors:

The attorney has taken substantial efforts to reform conduct to comply with rules since the time the issues in these matters occurred.

ADMONITION

On January 9, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.7(a) of the Rules of Professional Conduct.

In summary:

The attorney was retained to represent a client in a civil matter. The attorney pursued claims against two companies on behalf of the client. The attorney obtained an amount as settlement from Company A. The attorney sent a settlement demand to Company B.

About six months later, the attorney was contacted by Company B regarding an open position. The attorney submitted an application for employment with Company B.

Attorney failed to disclose to their client that they had accepted employment with Company B at the same time they were working to resolve the claim client asserted against Company B.

The attorney's explanation for not disclosing the issue to the client was credible though ultimately based on an incorrect analysis. The attorney did not actively seek to conceal the information from the client.

ADMONITION

On March 16, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.15(a) and Rule 8.1(b) of the Rules of Professional Conduct.

In summary:

The attorney received approximately six Notices of Insufficient Funds (NSF), which were generated by two banks where the attorney had IOLTA client trust accounts. The attorney mismanaged the trust accounts causing the accounts to be overdrawn on several occasions. The attorney co-mingled client funds with firm funds and third-party funds and failed to keep an accurate accounting. The attorney did not misuse any client funds as all of the problems in the trust account appeared to result from the attorney recently becoming a solo practitioner and misunderstanding the way trust accounts function. The attorney also failed to respond to two of OPC's demands for information during the investigation process.

No aggravating factors.

Mitigating factors:

Recent new solo practitioner; remorseful; demonstrated taking responsibility for actions; and put safeguards into place.

PUBLIC REPRIMAND

On February 21, 2018, the Chair of the Ethics and Discipline Committee for the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Penniann J. Schumann for violating Rule 1.8(a) (Conflict of Interest: Current Clients: Specific Rules) of the Rules of Professional Conduct.

In summary:

Ms. Schumann filed a Petition on behalf of a client for the removal and replacement of the client's son as the client's family trust's co-trustee (the Petition). The Petition affirmatively asserted that the co-trustee nominated to replace the client's son was a Utah limited liability company (the LLC) in the business of trust management. Ms. Schumann, along with her husband owned the LLC. The Petition did not disclose Ms. Schumann's ownership interest in the LLC. Ms. Schumann did not obtain a written waiver with informed consent signed by the client for the transaction whereby the LLC would become co-trustee of the client's Family Trust. The Petition was granted at a hearing and the LLC filed its acceptance of

appointment the same day. Ms. Schumann failed to disclose her pecuniary interest in the LLC and the potential conflict of interest its appointment as co-trustee created which erodes the trust and confidence that the public places in lawyers and the judicial system.

PUBLIC REPRIMAND

On February 1, 2018, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Ryan M. Springer for violating Rule 1.3 (Diligence), Rule 1.4(a) (Communication), and Rule 1.4(b) (Communication) of the Rules of Professional Conduct.

In summary:

The client hired Mr. Springer in a wrongful death lawsuit to replace prior counsel who had already filed a Complaint on the client's behalf. Approximately three months after entering his appearance in the case, Mr. Springer attended the Rule 16 case management conference and requested an additional sixty days to review fact discovery. The court set fact discovery cut-off sixty days out which under Rule 26 of the Utah Rules of Civil Procedure made the expert witness designation deadline seven days after the fact discovery cut off date. The court also ordered the parties to mediate the case. Counsel for the defendant attempted to



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ATTORNEYS AT LAW

Blithe Cravens former Senior Trial Counsel of the State Bar of California, for experienced and effective Attorney Discipline Defense.

Blithe Cravens is licensed in Utah, California, and Kansas. She brings nearly two decades of jury trial and litigation experience as a former prosecutor for the Los Angeles District Attorney's Office and Senior Trial Counsel for the State Bar of California. She represents attorneys in Utah and California facing State Bar complaints by assisting in initial responses that result in closed cases, attorneys before the screening panel, and attorneys that need effective representation in attorney discipline matters brought to District Court. She also advises corporations and individuals on ethical compliance issues such as work product, attorney and litigation privilege, and conflicts of interest.



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follow up with Mr. Springer by email and telephone to memorialize the new scheduling order but Mr. Springer never responded. Mr. Springer failed to calendar the deadlines and failed to communicate the fact discovery deadlines to the client. Mr. Springer failed to conduct any additional fact discovery and failed to take any steps to retain and designate needed experts before the expert designation deadline.

Mr. Springer's failures resulted in counsel for the defendant filing a motion for summary judgment on the grounds that the client could not establish a medical malpractice claim without expert testimony. Mr. Springer failed to inform the client about the filing of the summary judgment motion. The client learned about the summary judgment motion from a different attorney whom the client had communicated with because of the lack of communication with Mr. Springer. The client emailed the summary judgment motion to Mr. Springer and asked what was going on, but Mr. Springer failed to respond. Ultimately, as a result of Mr. Springer's failure to retain and designate needed experts before the expert designation deadline, the client was ordered to pay an amount in attorney fees to keep the case from being dismissed on summary judgment.

Mr. Springer believed the parties were working towards scheduling a mediation which would eliminate the need for incurring expenses of retaining experts. By focusing solely on mediation and failing to communicate deadlines and implications of those deadlines, Mr. Springer deprived the client of the opportunity to make informed decisions about the matters.

No aggravating factors.

Mitigating factors:

Expressed contrition and remorse for his conduct; No record of prior discipline; Apologized to the client at the hearing.

PUBLIC REPRIMAND

On February 1, 2018, the Chair of the Ethics and Discipline Committee for the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Douglas C. Shumway for violating Rule 3.3(a) (Candor toward the Tribunal) and Rule 4.4 (Respect for Rights of Third Persons) of the Rules of Professional Conduct.

In summary:

Mr. Shumway represented clients who were buyers in a new home development transaction. The transaction had been terminated by the new home developer (developer) for failure of the buyers to

close in a timely manner. Mr. Shumway disagreed stating that the transaction did close because all documents were executed by all parties and that the developer terminated the transaction prematurely. The clients entered and moved personal belongings into the home. A few days later Mr. Shumway sent a letter to the developer informing them of his representation. The clients had given Mr. Shumway a copy of a warranty deed they had received from the escrow company; however, the original warranty deed was still in the escrow company's possession. Mr. Shumway filed a Notice of Interest with the county recorder's office and attached a copy of the warranty deed he had received from the clients. Mr. Shumway's assistant affirmed that the Originating Paper Documents were originals. The warranty deed was recorded.

The developer began eviction proceedings. Mr. Shumway sent an email responding to the eviction indicating his clients were not tenants but that they "own the home via recorded warranty deed signed by your client." The developer filed an eviction action in district court. Mr. Shumway filed an Answer to the Complaint on behalf of the clients in which Mr. Shumway stated his clients were the titled owners to the property, pursuant to the signed and recorded warranty deed issued by Plaintiff to Defendant and recorded in the Recorder's Office Mr. Shumway filed an Amended Answer with the date the warranty deed was recorded. An evidentiary hearing was held, and Mr. Shumway's clients were evicted from the home. About three weeks later the developer filed a verified petition for civil wrongful lien injunction. Mr. Shumway recorded a Release of Notice of Interest about a week later.

Mr. Shumway filed pleadings with the Court indicating his clients were titled owners of property based on the warranty deed recorded by the Recorder's Office although the property was never recorded in Mr. Shumway's clients' names. Mr. Shumway delayed filing the Notice of Release of Interest in the property for nearly a month after the clients were evicted forcing the developer to file a wrongful lien injunction.

No aggravating factors.

Mitigating factors:

Absence of a prior record of discipline; inexperience in the practice of law; good character and reputation.

RECIPROCAL DISCIPLINE

On January 17, 2018, the Honorable Royal I. Hansen, Third Judicial District Court, entered an Order of Reciprocal Discipline: Public Reprimand, against David E. Hammeroff for Mr. Hammeroff's

violation of Rule 3.1 (Meritorious claims and contentions), Rule 3.3(a) (1) (Candor toward the tribunal), and Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

On May 21, 2015, the Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona issued an Order of Discipline of Admonition, Probation (Restitution), and Costs. In Arizona, an admonition is a public form of discipline and equates with a public reprimand in Utah.

Mr. Hammeroff represented a client in a collection case. Mr. Hammeroff did not have a good faith basis to file a collection case against the Complainant. The Complainant did not sign the Lease Agreement Mr. Hammeroff had in his possession when he filed the case against the Complainant. Mr. Hammeroff did not advise the Small Claims Court or the Superior Court that the Complainant never signed the Lease Agreement. Mr. Hammeroff did not acknowledge that fact even after it had been raised by the Complainant in the pleadings. Instead, Mr. Hammeroff continued to argue that the Complainant was liable based upon the credit application and the Complainant's failure to file an Answer to the Complaint notwithstanding Mr. Hammeroff's client was not entitled to the judgment in the first place.

Mr. Hammeroff refused to stipulate to vacate the default judgment entered against the Complainant despite the fact she had never signed the Lease Agreement. Instead Mr. Hammeroff continued to resist the Complainant's motions and relied on procedural defenses, while continuing to ignore that Mr. Hammeroff's client

was not entitled to the judgment. As a result, Complainant continued to file motions with the Small Claims and Superior Courts in an effort to rectify Mr. Hammeroff's actions.

No aggravating or mitigating factors.

PROBATION

On February 23, 2018, the Honorable Samuel P. Chiara, Eighth Judicial District Court, entered an Order of Discipline: Probation, against Roland F. Uresk, placing him on probation for a period of three years for Mr. Uresk's violation of Rule 1.1 (Competence), Rule 1.3 (Diligence), and Rule 1.4(a) (Communication) of the Rules of Professional Conduct.

In summary:

The client was being sued in a defamation lawsuit. Before Mr. Uresk was retained, Plaintiffs in the matter filed a Motion to Compel and Request for Attorneys' Fees based on the client's failure to respond to Plaintiffs' discovery requests. Before briefing was completed on the Motion to Compel, the court entered an Order granting a Stipulated Motion to Stay in the matter. About three years later, the court denied a request for extension of the stay thereby lifting the stay. A few months later the client retained Mr. Uresk to defend her in the defamation lawsuit. The client agreed to pay a specified amount per month for Mr. Uresk's representation. No retainer agreement was signed by the client.

Shortly after Mr. Uresk entered his appearance in the case the

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Court issued a Notice of Intent to Dismiss due to lack of prosecution which was sent to Mr. Uresk and Plaintiffs' counsel. Plaintiffs filed and served a response to the Court's Notice of Intent to Dismiss and Request for Hearing requesting that the Court set a hearing on Plaintiffs' outstanding Motion to Compel and Request for Attorneys' Fees allowing time for briefing on the Motion to be completed. Mr. Uresk did not file any responsive documents. About two months later Plaintiffs filed a Request to Submit for Decision outlining actions Plaintiffs had taken over the two-month period in an effort to obtain a response to the Motion to Compel from Mr. Uresk. The court subsequently entered an Order granting Plaintiffs' Motion to Compel and awarding Plaintiffs an amount for attorney fees.

A couple of days later the court held a hearing on the outstanding discovery issues in which the parties represented to the court that they were engaged in settlement negotiations. The client did not agree to Mr. Uresk entering into settlement negotiations. The same day as the hearing Plaintiffs' counsel provided proposed settlement documents to Mr. Uresk. Mr. Uresk contacted Plaintiffs' counsel about two weeks later indicating he believed they may have a settlement, but he needed a ten-day extension to discuss the matter further with the client. Plaintiffs granted the extension. At the end of the ten-day extension Mr. Uresk requested another extension of one week to discuss matters further with his client and indicated that as a "sign of good faith" he would send Plaintiffs' counsel payment of the award of attorney fees as had been previously requested. Mr. Uresk paid the attorney fees which were previously ordered by the court. Mr. Uresk then requested yet another extension again indicating he needed to discuss matters further with the client.

Approximately four months after Plaintiffs provided the settlement documents and granted several extensions to Mr. Uresk, Plaintiffs filed a Motion to Admit Admissions and Grant Default Judgment and for Sanctions. Mr. Uresk did not file an opposition or any response on behalf of the client. The court entered an Order

granting Plaintiffs' Motion, entering default judgment against the client and awarding Plaintiffs' counsel an amount for attorney fees. Mr. Uresk did not notify the client of the default judgment and two awards for attorney fees that had been entered against her until approximately two to three months later.

Mr. Uresk filed a Motion to Set Aside Default indicating he was unaware of the Motion to Admit Admissions, Grant Default Judgment and for Sanctions filed against the client until the clerk contacted him to set up the hearing on damages, after the default had been entered. Mr. Uresk further asserted that he was unaware of the Motion because his assistant had misplaced it. The court denied the Motion to Set Aside the Default.

At the time Mr. Uresk entered his appearance on behalf of the client and based on Mr. Uresk's review of the case, he believed the case was still stayed pursuant to the court's prior Order three years earlier. Mr. Uresk did not adequately prepare for the legal representation of the client's case. He failed to review the docket of the case after being hired and before entering his appearance. Mr. Uresk did not communicate with Plaintiffs' counsel regarding the status of the case after he was hired and before entering his appearance. Mr. Uresk failed to respond to Plaintiffs' Motion to Compel and failed to respond to discovery requests on the client's behalf. Mr. Uresk also failed to file an opposition or any responses on the client's behalf to Plaintiffs' Motion to Admit Admissions, Grant Default judgment and for Sanction which resulted in a default judgment being entered against the client. Mr. Uresk failed to timely notify the client of the court's Order granting Plaintiffs' default judgment or the two awards for attorney fees entered against the client.

The client made monthly payments and continued doing so for approximately ten months after retaining Mr. Uresk. Mr. Uresk failed to communicate a full accounting of the work he performed for the client.

Discipline Process Information Office Update

The Discipline Process Information Office is available to all attorneys who find themselves the subject of a Bar complaint, and Jeannine Timothy is the person to contact. From January to mid April 2018, 25 attorneys have contacted Jeannine for help understanding the discipline process. One of those attorneys had questions regarding readmission to the Bar. Jeannine is available to assist and explain all stages of the discipline process, so call Jeannine with all your questions.



801-257-5515 |
DisciplineInfo@UtahBar.org

Mitigating factors:

Medical conditions during the timeframe related to the incidents.

SUSPENSION

On March 22, 2018, the Honorable David R. Hamilton, Second Judicial District Court for Davis County, entered an Order of Discipline: Suspension, against Denise P. Larkin, suspending her license to practice law for a period of three years for Ms. Larkin's violations of Rule 1.1 (Competence), Rule 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Lawyer), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.4(b) (Communication), Rule 1.5(a) (Fees), 1.15(d) (Safekeeping Property), Rule 1.16(a) (Declining or Terminating Representation), Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), Rule 8.1(b) (Bar Admission and Disciplinary Matters), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

The case involved a complaint that was filed against Ms. Larkin based upon information received from several individuals against Ms. Larkin concerning five separate matters. The matters were all joined in the Complaint and resulted in twenty-four counts of violations of the Rules of Professional Conduct. In all matters Ms. Larkin was hired and paid an amount as a retainer to represent the clients in various actions including two divorce proceedings, a legal guardianship of a special needs child, a custody matter, and a petition to modify.

In one matter Ms. Larkin failed to appear at a hearing on behalf of the client which resulted in the client being ordered to pay an amount for attorney fees. In the same matter Ms. Larkin failed to inform the client of another hearing and at that hearing Ms. Larkin entered into a stipulation on the client's behalf without the client's knowledge or consent agreeing to pay money for opposing counsel's attorney fees.

In four of the matters Ms. Larkin performed little work on the cases and/or failed to do what she was hired to do. In one of these matters Ms. Larkin failed to file an Answer to a Petition to Modify and Counter-Petition, failed to respond on behalf of the client's Motion for Contempt, Strike Petitioner's Pleadings and Enter Default, and failed to promptly respond to the custody evaluator's letters and requests for payments.

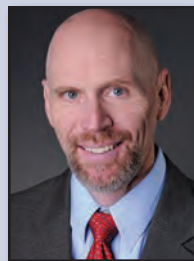
In four of the matters, Ms. Larkin failed to keep clients informed of court hearings and the status of their cases. Ms. Larkin failed to timely communicate with the clients and respond to requests for information. Ms. Larkin also failed to return telephone calls

and/or respond to other attempts to contact her.

In one matter Ms. Larkin failed to consult with the client prior to continuing scheduled court dates causing additional expense to the client for travel costs. In three matters Ms. Larkin collected fees from the clients and performed little to no work to earn the funds or did not do enough work to earn the full amount of the funds she was paid. Ms. Larkin also failed to provide an accounting of the fees she received.

In one matter Ms. Larkin failed to withdraw from the client's case after the client requested she do so. In another matter Ms. Larkin cut off all communication with the client without taking steps to terminate her representation. Ms. Larkin also failed to refund unearned fees she received from the client.

In one matter Ms. Larkin failed to properly supervise her assistant who contacted the client to inform the client that a hearing was canceled when no hearing had been scheduled and otherwise allowed the assistant to mislead the client. In the same matter Ms. Larkin made false statements to the client about having filed a petition and scheduling a court hearing for the client's case. In all matters Ms. Larkin failed to timely and honestly respond to OPC's NOIC and other requests for information.

Facing a Bar Complaint?

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Bits and Blocks: Navigating the Legal Landscape of the Blockchain Economy

by Gale L. Pooley and Larissa Lee

“We can only see a short distance ahead, but we can see plenty there that needs to be done.”

— Alan Turing

Introduction

A news website recently reported that a New York man was arrested after making millions of dollars selling purported Bitcoins, which were actually just Chuck E. Cheese coins with a capital “B” written in permanent marker. HUZLERS.COM, *Bitcoin Scam: Man Arrested After Making over \$1 Million Selling Chuck E. Cheese Tokens as “Bitcoins,”* <https://www.huzlers.com/bitcoin-scam-man-arrested-after-making-over-1-million-selling-chuck-e-cheese-tokens-as-bitcoins/> (Dec. 18, 2017). Unfortunately, most people did not scroll to the bottom of the page, which states: “Huzlers.com is the most infamous fauxtire & satire entertainment website in the world,” *id.*, and thousands proceeded to share the story of this “hero” on various social media sites. Josh Hafner, *Chuck E. Cheese Tokens Sold as Bitcoins? That’s Not a Real Story*, USA TODAY, <https://www.usatoday.com/story/news/nation-now/2017/12/21/chuck-e-cheese-tokens-sold-bitcoins-thats-not-real-story/973173001/> (last updated Dec. 21, 2017 1:59 p.m.).

As an economist and an attorney with an interest in cryptocurrencies and blockchain technology, we believe this fake news article — and the widespread sharing of this fake story — helps to demonstrate society’s general lack of understanding about Bitcoin and, more broadly, the technology that underlies it. Bitcoin is not an actual physical coin (despite the stock images you may see online), and its store of value cannot be transferred

as easily as handing a coin to someone on the street. Attorneys may encounter various situations in which a basic understanding of Bitcoin and the blockchain is helpful or even necessary to represent their clients effectively.

This article is intended to be a primer for attorneys who are (mostly) unfamiliar with this Brave New Innovation of technology and security. First, we provide an overview of Bitcoin and other cryptocurrencies. Second, we discuss the blockchain: a type of distributed ledger technology that makes all of this possible. Third, we tackle why it is (or should be) important for you, as an attorney, to have a basic understanding of this technology.

BITCOIN

What Is It?

Bitcoin first emerged as a concept in a whitepaper, published in October 2008 by the infamously pseudonymous Satoshi Nakamoto. Nakamoto envisioned a “purely peer-to-peer version of electronic cash” that would allow one party to send an online payment to another party directly, without the help of a financial institution or other intermediary. Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (Oct. 2008), <http://bitcoin.org/bitcoin.pdf>. Rather than having to rely on *trust* to secure these transactions, Nakamoto created a system that relied on *proof*. That is, cryptographic proof that is so strong that it would eliminate common issues in traditional third party approved transactions, such as high transaction costs, reversal of payments, and double spending. *Id.*

Nakamoto referred to Bitcoin as “electronic cash,” but in the

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LARISSA LEE, JD, MBA is an attorney at Jones Waldo. She is the author of *New Kids on the Blockchain: How Bitcoin’s Technology Could Reinvent the Stock Market*.





last decade there has been serious debate as to what exactly a Bitcoin is. Since 2014, the IRS has classified Bitcoin and other cryptocurrencies as property, rather than currency – the same classification used for stocks and bonds. IRS News Release, *IRS Virtual Currency Guidance: Virtual Currency is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply*, (March 25, 2014), <https://www.irs.gov/newsroom/irs-virtual-currency-guidance>. Although a Bitcoin on its own is probably not a security, depending on how it is pooled and how it is managed, it could become one. This elusive enigma known as Bitcoin is probably best described as a “cryptocurrency,” i.e., digital cash.

A Bitcoin by Any Other Name...

Bitcoin may be the first, but it is not the only cryptocurrency (or “crypto,” as the cool kids like to say). In fact, as of March 29, 2018, there are 1,594 cryptocurrencies. CRYPTO-CURRENCY MARKET CAPITALIZATIONS, <http://coinmarketcap.com> (last visited March 29, 2018). The top five by market capitalization are Bitcoin, Ethereum, Ripple, Bitcoin Cash, and Litecoin. These five currently hold 74.55% of the total market capitalization. *Id.* Like Bitcoin, these cryptocurrencies have experienced wide volatility, especially in the past few months as regulators attempt to keep up or even begin regulation. Currently,

the market capitalization for all cryptocurrencies is \$277 billion, down 66% from an all-time high of over \$817 billion in January of this year. *Id.* at <https://coinmarketcap.com/charts/>. A single Bitcoin currently sells for \$7,465.77, but on December 16, 2017, Bitcoin hit an all-time high of \$19,192.11. <https://charts.bitcoin.com/chart/price>. There are between 150,000 and 500,000 Bitcoin trades every day, and thousands more trades of other cryptocurrencies. <https://charts.bitcoin.com/chart/daily-transactions>; <https://coinmetrics.io/charts/#left=txCount>.

Legal Environment of Bitcoin

The legal status of Bitcoin and other cryptocurrencies varies widely – Japan recently recognized Bitcoin and a few other cryptocurrencies as legal tender (the first and only country to do so), while Bolivia, Ecuador, Kyrgyzstan, Bangladesh, Nepal, and Morocco have banned them entirely. Luke Graham, *As China Cracks Down, Japan is Fast Becoming the Powerhouse of the Bitcoin Market*, CNBC (last updated Sept. 29, 2017, at 12:12 p.m.); <https://www.cnn.com/2017/09/29/bitcoin-exchanges-officially-recognized-by-japan.html>; Sean Williams, *6 Countries Where Bitcoin is Banned*, MOTLEY FOOL (Dec. 3, 2017 at 9:12 a.m.) <https://www.fool.com/investing/2017/12/03/6-countries-where-bitcoin-is-banned.aspx>. China allows its citizens to trade in Bitcoin

but not its banks, and it strictly forbids initial coin offerings (ICOs). *Id.* Similar to an IPO, an ICO allows a company to raise money by exchanging capital for a “token” – i.e., a cryptocurrency. ICOs come in many varieties, only some of which come within the ambit of securities laws because the tokens function more like stock or bonds. Instead, most ICOs are for “utility tokens,” which “provide digital access to an application or service.” Naeem Aslam, *Why a Crypto Bear Market Would Only Bring the Best ICOs*, FORBES (Mar. 29, 2018, 8:31 a.m.), <https://www.forbes.com/sites/naeemaslam/2018/03/29/why-crypto-bear-market-would-only-bring-the-best-icos/#4f47a06231d2>. However, the Securities and Exchange Commission (SEC) recently clarified that simply calling a token a “utility token” does not exempt the ICO from federal securities laws if, in fact, the token functions as a security. Jay Clayton, *Statement on Cryptocurrencies and Initial Coin Offerings*, U.S. Sec. & Exch. Comm’n (Dec. 11, 2017), <https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11>. The SEC issued warnings about the potential for fraud in ICOs generally, and observed that, to date, no ICOs have been registered with the SEC, nor have any exchange-traded funds holding cryptocurrencies. *Id.*

BLOCKCHAIN

There’s No Turning Back

The key takeaway from this article is that Bitcoin is a very small piece of this puzzle. Those who conflate Bitcoin with the blockchain (the technology that Bitcoin is built upon), or conflate Bitcoin with other cryptocurrencies, are seeing only a very small tree in a giant forest. We often see attorneys roll their eyes when this topic comes up, and they shrug the whole thing off as “just another tulip bubble” or a bitcon. It is quite possible that Bitcoin is a tulip bubble, and we too are troubled by the volatility and wary of the hype. But we are confident that even if Bitcoin’s value drops to zero and no one remembers it in twenty years, the blockchain has already revolutionized the way in which we interact with each other online, and it is only getting started.

One Block at a Time

The blockchain is like a checkbook ledger that indisputably records every purchase or sale of Bitcoin. Similar to balancing your checkbook, the transactions are listed in order and each entry affects the overall balance of the account. A “block” on the blockchain represents a group of transactions. Nakamoto released or “mined” the very first block on the blockchain (called the genesis block) containing fifty Bitcoins – on January 3, 2009. The ledger is a key element in the blockchain technology. The idea is to make it both public and immune to manipulation. While your identity remains *relatively* secret (it is possible to track identities through IP addresses), the complete history of every Bitcoin transaction ever completed is public and viewable at: <https://Blockchain.info>.

The blockchain is managed by “miners.” Before you start imagining the seven dwarves whistling Heigh-Ho, or computer nerds in their parents’ basement furiously trying to solve advanced cryptographic computations, in reality these computations are automatic. Early on, a person would simply set up their computer to devote a certain amount of computational power (CPU) to verify pending transactions, and then the computer did the rest. The amount of CPU or “work” that is devoted to solving the puzzle and verifying a particular transaction is effectively a vote, with the most popular block winning the race in case of a tie. This is known as proof of work. Graphics cards eventually replaced CPU and now most miners use ASICs (Application-Specific Integrated Circuits – small but powerful computers used only for mining a specific cryptocurrency. Miners receive a small transaction fee for each transaction they successfully complete but they also receive a reward of new Bitcoin every time a new block of transactions is added to the chain.

As is usually the case with mining for any precious metal, as more Bitcoins are mined, it becomes more difficult to receive a reward, with the reward halving every few years until all twenty-one million Bitcoins have been released. As of January this year, 80%, or 16.8 million Bitcoin, have been released. Although there are fears that no one will want to mine once the rewards are gone, these fears are misplaced. First, miners will always receive a transaction fee on every transaction. Second, Nakamoto designed the difficulty level of the cryptographic puzzles to increase or decrease every two weeks so that each transaction takes an average of ten minutes to process. Protocol Rules, BITCOIN WIKI, https://en.bitcoin.it/wiki/Protocol_rules (last visited Dec. 1, 2014).

Mo’ Money, Mo’ Problems

Although proof of work is cryptologically brilliant, there are some disadvantages, namely the tremendous amount of CPU and the electricity that powers the CPU that is required to verify the transactions. Bitcoin mining currently consumes approximately thirty-one terawatt hours of energy per year, which is more than the twenty-three terawatt hours consumed in the entire country of Ireland. Scott Campbell, *Bitcoin Mining ‘Is Using So Much Energy That it Is Causing Electricity Blackouts’ Amid Fears it Will Consume More Power than the World by 2020*, DAILY MAIL (Dec. 8, 2017 at 8:25 p.m.) <http://www.dailymail.co.uk/news/article-5161765/Bitcoin-mining-causing-electricity-blackouts.html>.

Alternatives to proof of work have been developed in an effort to combat these inefficiencies. For example, *proof of stake* assigns a user’s vote a certain weight based on the number of Bitcoin the user owns. Michael J. Casey & Paul Vigna, *The Truth Machine: The Blockchain and the Future of Everything*, 89–90 (2018).

FOLLOW THE PIE CRUMB TRAIL

BITCOIN MARKET PRICE FOR THE PREVIOUS YEAR

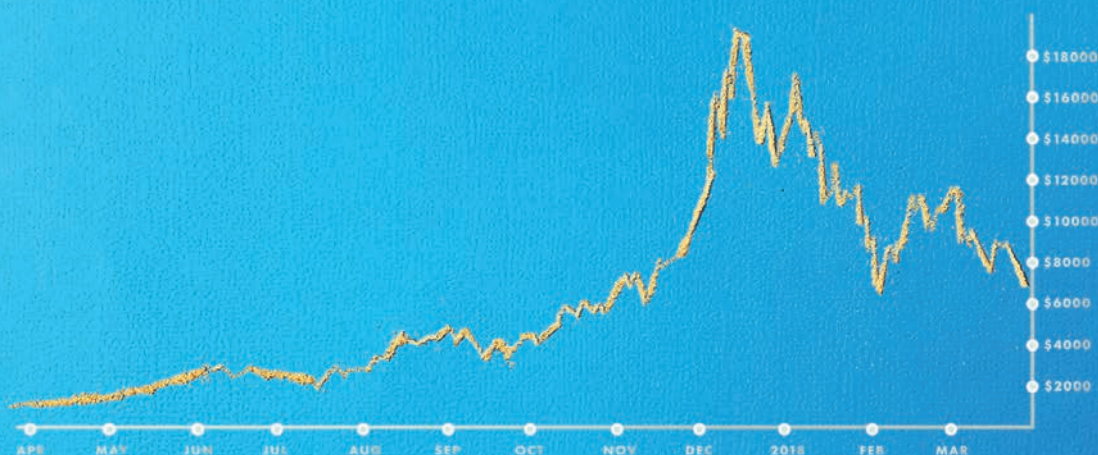


Chart by Chelsea Colette

Although this would not require the massive expenditure of CPU, it encourages hoarding, a risk of monopolization, and the potential for majority stakeholders to try to defraud the system. *Delegated proof of stake* allows users to elect delegates, who must post a small bond and vote on the performance and honesty of the stakeholders. *Id.* at 90. If a delegate behaves badly, the system automatically votes against that delegate on the next transaction. Other companies have created *mixed proof of work/proof of stake* systems that use features of both. *Proof of burn* requires traders to “burn” a small amount of the cryptocurrency with each transaction as a transaction fee, by sending this fee to a verifiably unspendable address.

Beyond Cryptocurrencies

The ability to send Bitcoins from one stranger to another, without a bank or other intermediary, and without the requirement of trust, was just the first revolutionary use of the blockchain. Since that time, thousands of companies and individuals have used this technology as a launching pad for other decentralized innovations. While some companies build their own blockchains from scratch, others simply build layers upon Bitcoin’s blockchain. Ripple uses its own blockchain and created its own cryptocurrency but also acts as a currency exchange and remittance network. The remittance industry is long overdue for an upset. World Bank estimated global remittances for 2017 at \$596 billion. This does not include transaction fees and other costs in sending or receiving

these payments. Traditional remittances can take several days to complete. Ripple allows users to send money globally, converting traditional (fiat) currency or cryptocurrency to any other traditional currency or cryptocurrency within seconds and at a small fraction of the cost of traditional remittances.

In 2014, nineteen-year-old Vitalik Buterin modified the original blockchain concept to create the Ethereum blockchain, with much broader capabilities than the original and using a Turing-complete programming language. Ethereum, *Vitalik Buterin Reveals Ethereum at Bitcoin Miami 2014*, YouTube (Feb. 1, 2014), <https://www.youtube.com/watch?v=l9djiN3Mwps>. This programming language is powerful enough to support a countless variety of applications, which are built on top of this master language. Gmail, Facebook, and countless other applications are similarly built on top of JavaScript. Ethereum promises to revolutionize contracts with Smart Contracts – which allow the governance of the contract to be verified through the blockchain rather than an intermediary, in which the parties to the contract “can bake the terms and implications of their agreement programmatically and conditionally, with automatic money releases when fulfilling services in a sequential manner, or incur penalties if not fulfilled.” William Mougayar, *The Blockchain is the New Database, Get Ready to Rewrite Everything*, STARTUP MGMT. (Dec. 27, 2014), <http://startupmanagement.org/2014/12/27/the-blockchain-is-the-new-database-get-ready-to-rewrite-everything/>. Ethereum’s

greatest deficiency is scalability, however, which makes the future of the company uncertain.

Blockchain technology could also be used for elections, allowing constituents to cast their vote securely and without risk of faulty counting. On March 7, 2018, Sierra Leone became the first country to use the blockchain for its presidential election. Voters followed the same process, casting their votes on a paper ballot, but then the blockchain company, Agora, recorded the votes onto its blockchain, and only parties with special permission could verify the transactions – a *permissioned blockchain*. Kristin Houser, *Sierra Leone Just Held the World's First Blockchain-Powered Election*, FUTURISM (Mar. 9, 2018), <https://futurism.com/sierra-leone-worlds-first-blockchain-powered-election/>. This included the Red Cross, University of Freiburg, and others. But as with Bitcoin's blockchain, once the votes were verified, anyone could see the election results. *Id.*

The potential to transform land and title records with blockchain technology is another highly-anticipated development, especially in third-world countries wracked with corrupt government officials, nepotism, cartels, and other fraud, which have rendered real estate ownership almost meaningless. Even the “wild deeds” and other title issues that occur here could be stemmed through blockchain technology. Ubitquity is a new company that promises to secure real estate records using the Blockchain. *See, e.g.*, UBITQUITY <https://www.ubitquity.io/web/index.html> (last visited Mar. 29, 2018).

Other potential or current applications include: decentralized social media networks in which you own your data and decide to whom to sell it (if anyone), storage of any type of sensitive data, domain name registration, and cybersecurity.

Blockchaining the Internet: Privacy and Data

The Internet was designed forty years ago, ancient in technology time. While it ushered in a whole new economy, creating billions of dollars of new wealth, it suffers from several fatal flaws. Originally designed to be decentralized, it has been captured by a few monopolies that have used their access to trillions of gigabytes of personal data to stifle innovation and destroy privacy. Google and Facebook and a few others very cleverly seized the internet and converted it to a globalized profit-generating aggregating and advertising machine.

Once you provide data to any of these companies, you can never get it back. Their business models are based on using your personal data to sell your attention to the highest bidder. We are not their customers, but we are their profits. Google recently confessed that they have been recording conversations for years. Muneeb Ali, *Rules of Impact*, THE ASSEMBLAGE, <https://www.theassemblage.com/muneeb-ali.php>. And Facebook may be in its hottest water yet, as

news that Cambridge Analytica gained access to over fifty million profiles for the Trump campaign led many to the rallying cry of #deletefacebook.

Centralizing is not safe. The data centers hosted by these internet monopolists are hot targets for hackers and curious company engineers. Equifax lost social security numbers and personal information on 143 million people. Tara Siegel Bernard et al., *Equifax Says Cyberattack May Have Affected 143 in the U.S.*, NY TIMES (Sept. 7, 2017) <https://nyti.ms/2xS95kJ>. Yahoo! lost information on 500 million users. Nicole Perlroth, *Yahoo Says Hackers Stole Data on 500 Million Users in 2014*, NY TIMES (Sept. 22, 2016) <https://nyti.ms/2mxwKkD>. NSA taps user data from Facebook, Apple, Google, Yahoo, Microsoft, and others. T.C. Sottek & Janus Kopfstein, *Everything You Need to Know About PRISM*, THE VERGE (July 17, 2013, 01:36 pm) <https://www.theverge.com/2013/7/17/4517480/nsa-spying-prism-surveillance-cheat-sheet>. Security has completely broken down on this forty-year-old artifact of 20th century thinking and computing limitations. Because digital copying typically leaves no evidence of entry, data centers may not even know they have been hacked.

Using the internet has been like leasing an apartment that allows the landlord to come into your space anytime and rummage through all your stuff, making copies and then selling these copies to others as many times as possible.

If Satoshi Nakamoto is the Newton of the blockchain, Muneeb Ali is the Einstein.

Ali is a Pakistani immigrant with a Ph.D. from Princeton. His dissertation envisions a new layer of the internet that allows users to own their data and transact directly with one another without having to rely on these large monopolies. Ali argues that the internet should work more like fee simple real estate, where you actually have property rights to your own data. Imagine Google or Facebook asking your permission to show you an advertisement and then paying you to watch it. “If you look at the internet, users don’t actually own any of their data,” says Ali. He co-founded Blockstack, an open-source startup to prove his concepts.

Blockstack is a way for users to take control and own their data and their identities. Blockstack offers better scalability, security, and developability than Ethereum or any other blockchain technology. The new blockchain layer to the internet that will turn data centers into dumb hard drives filled with encrypted information. Another part of the technology is a private encryption key so secure that it would need more energy than is present in the entire solar system to crack. He has proven his concept with Blockstack.org.

The idea is that instead of trusting a few big companies to store the information of billions of people, that personal information is decentralized across billions of separate devices, making any single breach far less damaging. Blockstack would make mass data collection impossible. What if you held all your data, instead of these data centers and only allowed temporary access with a private key? The current broken system is being replaced with mathematics and cryptography.

Rest assured, Mark Zuckerberg: Jeff Bezos and Google know full well that blockchains can make their profit models instantly obsolete.

Before the internet, individuals got surveilled one at a time. Government authorities had to convince a court to grant a subpoena. The focus was on an individual. That model worked very well for over 200 years. The internet dramatically changed this constitutional right. Now the internet allows government to surveil almost everyone simultaneously for almost no cause at almost zero marginal cost. The Blockstack technology will protect Fourth Amendment rights.

WIIFM? (What's in it for me?)

Why should you care about this stuff? Aside from being really popular at dinner parties, some aspect of this will likely creep into your practice at some point, regardless of the area of law in which you practice, and you will need to have at least a basic understanding of these concepts in order to competently represent your client.

Are you a tax attorney? As mentioned above, the IRS classifies cryptocurrencies as property, which means they are subject to capital gains tax. Miners who mine Bitcoin or other cryptocurrencies must report rewards or transaction fees as gross income. If you are an employment attorney, you may have employer clients who pay their employees in cryptocurrencies, which would still be subject to income tax withholding and payroll taxes.

Securities attorneys, consumer protection attorneys, bankruptcy

attorneys, prosecutors, and criminal defense attorneys may all find themselves working on cases involving cryptocurrency Ponzi schemes, ICOs, or other fraud.

Corporate attorneys may assist clients launching an ICO and will need to know which type of ICO it is and whether it may be subject to securities or other regulatory laws.

Trusts and estates attorneys may have to create a trust or will for a client who owns cryptocurrencies or other crypto-assets and needs. Or perhaps their clients have used smart contracts for their will or trust.

As an intellectual property attorney or a judge presiding over an IP dispute among competing blockchain companies, you will have to be able to determine whether the companies developed proprietary software or simply layered their application upon the existing blockchain technology (as most do).

The legal profession can now use the Blockstack technology described above to encrypt its data and upload it to Dropbox, Google Drive, oneDrive, Box, or iCloud. Instead of holding data that could be hacked or sold, all these cloud servers would be simply hard drive space. Users with their own private keys can easily encrypt data and upload to the cloud. Hackers who broke into data files would only find worthless encrypted bits.

One final consideration: what would you do if your client paid you in Bitcoin or another cryptocurrency? Neither the Utah bar nor Utah courts have weighed in on attorneys' ethical obligations with respect to receiving cryptocurrencies as payment for legal services. However, the Nebraska bar recently released an opinion letter concluding that attorneys could accept Bitcoin payments, so long as they converted the payment to U.S. dollars immediately upon receipt (and other requirements). Neb. Op. 1703, December 2017. This is because the volatility of cryptocurrencies enhances the risk of violating the ethical obligation not to charge unreasonable fees. On the other hand, a bust in the cryptos market could make your fee pro bono.

Scholarship Announcement

YLD is pleased to be offering six scholarships for the Summer Bar Convention. Each scholarship will be \$600, which can be used for registration, lodging, or transportation, in compliance with YLD's reimbursement and conference reimbursement policies (available on website). Scholarship recipients must be members of YLD; are expected to attend all CLE sessions as well as one networking event; and will be asked to write a short (500 word or less) reflection on their experience at the Bar Convention that can be posted on YLD's website and/or submitted to the *Bar Journal*.

To apply, please submit a statement of interest and a resume to Dani Cepernich at dnc@scmlaw.com no later than Friday, June 15 at 5:00 p.m.



Choosing the Right Document Management Software for your Firm

by Greg Wayment

I have often thought that the bane of my paralegal career has been trying to find the best software solution for managing large document productions. At my firm, it is not uncommon to have a case with 300,000 or 400,000 pages of formally produced (Bates numbered) documents, and I have had some cases with a million or more pages. It is crucial that the documents are accessible to multiple people to be able to review them, do targeted searches, make annotations, and look at them chronologically. The key documents become deposition exhibits, which become trial exhibits, which propel the narrative of the case.

When I started my career as a paralegal in 2005, most firms in Salt Lake were transitioning away from paper productions. That is not to say that I didn't have plenty of productions made by paper, nor is that to say that I haven't spent my fair share of time manually Bates numbering documents by typing in numbers on labels, printing them out (eighty Bates numbers to a page), and sticking them on the pages in the lower right hand corner. After I had prepared a set, I'd run them through the copy machine, produce the copy, and then keep the pages with the stickers in my files.

There were some hassles with this. Firstly, a lot of space was wasted storing boxes and boxes of paper. Searching and finding documents was a hassle. And once I had a case where I spent weeks redacting production documents by hand (think box of black markers and a notepad to put under the documents so I didn't color my desk).

A little side note: the terms "control number" and "Bates number" are generally used interchangeably. I've always preferred the term Bates, which was actually a brand name and was named after the inventor of the stamp, Edwin Bates. In the late 1800s, Edwin obtained several patents for the Bates stamp. Basically each time the stamp was pressed down onto a sheet of

paper, a wheel would rotate incrementally through numbers. The original Bates stamp could print numbers ranging from 0000 to 9999. After so many "punches" you would have to press the stamp against an ink pad. For large productions, this was very time consuming and messy.

Back in 2005 most Salt Lake firms were getting steered towards either Summation or Concordance. Price wise, they were about the same. My recollection is that Summation was supposed to be a little more robust but was also not as friendly to use. Most firms chose Concordance, mine chose Summation so I'll speak more to the experience of using that.

The original Summation was fairly simple in terms of layout and deployment but never quite felt as intuitive as one would have liked. Basically your screen was divided in half. On one half of the screen you would have a "column" view that was similar to a spreadsheet. On the other half of the screen, you would have an "image" view where you could see the document. Each document or page was called a "unit." All documents had to be in either TIFF or JPEG format and would exist in specific folders on your server. As you would scroll through the column view, the image viewer would look to or link to the underlying TIFF or JPEG image and show you the document.

Summation did have a feature that would allow you to load some native documents, e-mail files for example, but you had to switch to a different viewer and it complicated the review process.

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Also, if you wanted to be able to search through the actual text of the documents, you would typically have an e-discovery vendor that had more robust software that allowed them to extract the text and create TXT files that would coordinate with the TIFFs or JPEGs. This process was commonly called OCR'ing, and very few firms had the ability to do this in-house.

The strengths of both Concordance and Summation were that you could have all your Bates numbered documents in one place, you could search through them, and you could type into the column view (typically called coding) and then you could use that coding for searching, sorting, deposition preparation, etc. The weaknesses were they were expensive, the accuracy of the OCR searching was not that great, and to truly use it well, you'd have to have lots of coding done, which was labor intensive and monotonous.

Concordance and Summation are still around. In 2006, LexisNexis acquired Concordance and continues to develop, support, and sell the software. And, in 2010 AccessData, a local company based in Lindon, acquired Summation. I don't know about modern Concordance, but the product currently being offered by Summation has little if anything in common with the Summation of 2005.

So where are we today? Last summer, the Paralegal Division put together a salary survey to ask questions about compensation and also to explore other trends in the paralegal profession. One of the questions that I specifically asked be added to the salary survey was, "What software does your firm/you currently use to manage large formal document productions (Bates numbered docs)?" Of the 122 respondents, forty-three either skipped the question or didn't respond. Forty answered that they use Adobe, eleven answered that they use Concordance, eleven answered that they use iPro, two answered that they use Summation, two answered that they use Relativity, and thirteen answered that they use some other software.

I was surprised at the number of paralegals who didn't answer or skipped the question. Maybe this would suggest that they are not involved with managing document productions. More likely, many paralegals that skipped that question are using Adobe. Around November 2006, Adobe released version 8.0 of their software which had a Bates numbering function. This was actually a momentous event for paralegals (but one that largely went uncelebrated – ha). But, it really did change everything because for the first time, electronically, you could add Bates

numbers to several thousands of pages, in a matter of seconds.

So let's talk about managing document productions with Adobe. The strengths are primarily that it's inexpensive, although you do have to have a professional version. But it's easy to use, and very commonly used, and as we discussed earlier, you can Bates number thousands of pages in a matter of seconds. You can download Adobe Reader for free (and most people have it on their computer) so anyone can look at documents produced this way.

The weaknesses are you can't search through them globally, unless they are combined into one PDF. And even then, the PDF has to be OCR'd, which some professional versions will allow you to do on the fly. OCR'ing PDFs on your desktop can be time-consuming and not all that accurate. Most firms that rely on this system of document management have their assistants create an index, which is labor intensive. I've also found that PDFs can get unstable if they are too big (either in page count or data size) so you run the risk of losing your documents.

We did get several respondents reporting that they use what I consider to be the current industry leaders: Cicayda (Reprise), iPro (Eclipse), and Relativity (One). My original intention was to talk about each of these three individually and discuss their strengths and weaknesses, but they all work in a similar fashion (with some nuances) and they are all vastly differently than the document management programs from fifteen years ago. So I'll discuss the strengths and weaknesses of these databases in a more general sense.

To begin with, what I'd consider to be a leap forward is that rather than purchasing the software and hosting it in-house on your server, these new databases are typically hosted on their servers and accessed via the internet. This is useful because you don't have to have the space, or manage it, internally. Also, this allows for anyone with the address and the proper credentials to be able to access the database.

Some additional strengths are: robust ingestion, advanced searching capabilities, document relationships, and other analytics. For the most part, they all have good support and typically invoice by breaking out matters by client, so that firms can more easily pass those costs along.

Some weaknesses are: they can be expensive to set up and host monthly and they can be difficult to navigate for new users. Sometimes there can be a delay or lag when moving from

document to document. And it creates a perpetual monthly cost for clients.

There still are some firms using Summation and Concordance, but I'd chalk this up mostly to legacy use. Most original users of Summation and Concordance bought server-based licenses. Around 2010, they switched from a server-based model where you paid a support cost every year to a subscription model that was expensive.

Now, both Summation and Concordance are offering cloud-based solutions and have very similar features to the others. One other industry leader that I should mention (and we did have one person respond that he or she uses it) is Ringtail, which has never had much presence in Salt Lake.

I haven't found the perfect software for my firm yet. For me, the three most important criteria that I am constantly evaluating

are: cost, support, and functionality. All three of those things are very important and I weight them almost equally. I have personally found that using a locally-hosted version of iPro or Relativity offers more accessible and direct support. It might make sense for larger firms to work directly with the database providers or host the software on their own servers, but I have found this usually requires them to hire database engineers to deploy them. For smaller or mid-size firms, having someone else managing the import/export of data, and be there to answer questions can be invaluable.

Another suggestion, even though it's a bit hectic to learn multiple platforms, is to try three or four until you find one that works best for you and your firm. My hope is that if we continue to embrace the newest technology, not only can we keep pace with the explosive amount of data being produced, but we more effectively use that data to propel the narrative of each case.

A NEW OPPORTUNITY FOR PARALEGALS

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Registration Information
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Credit: 1 Hour of Ethics

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

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May 17, 2018 | 12:00 pm – 1:30 pm

1 hour Ethics Credit

Utah's Annual Paralegal Day Celebration & Luncheon. Radisson Hotel Salt Lake City Downtown, 215 West South Temple, Salt Lake City. Cost: Paralegals – \$45, Attorneys – \$50, Walk-ins – \$60. Please RSVP on or before 3:00 pm, Friday, May 11 by registering at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=18_9074.

May 21, 2018

Real Property Section Annual CLE and Section Meeting. Grand America Hotel. Registration forthcoming.

May 23, 2018 | 12:00 pm

1 hour Professionalism/Civility

Judges' Panel Discussion on Professionalism & Civility. Annual LRE CLE event.

May 24, 2018

Annual Corporate Counsel Section CLE. More information and registration available soon.

May 31, 2018

6 hours CLE, including Ethics & Professionalism Credits

Innovation in Practice Committee First Annual Practice Management Symposium

June 8, 2018

Annual Family Law Section CLE and Section Meeting. S. J. Quinney College of Law. Details forthcoming.

June 20, 2018

Annual Dispute Resolution Section and UCCR CLE on Professionalism and Civility in Dispute Resolution

July 25–28, 2018

2018 Summer Convention in Sun Valley. Look for more information in the centerfold of this Bar Journal!

August 10, 2018

Annual Mangrum & Benson CLE on Expert Testimony

August 17, 2018 | 9:00–10:00 am

Salt Lake County Golf & CLE. River Oaks Golf Course, 9300 Riverside Dr., Sandy, Utah. Save the date! Topic and details coming soon!

September 11, 2018 | 12:00 pm

Professionalism/Civility Credit Pending

Golden Rule & the Constitution: A Panel Discussion

September 14, 2018 | 9:00–10:00 am

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

September 19, 2018

OPC Ethics School

September 28, 2018 | 9:00–10:00 am

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

October 19, 2018 | 9:00–10:00 am

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

November 2, 2018

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

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For July 1 _____ through June 30_____

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- 1. Active Status Lawyer** – Lawyers on active status are required to complete, during each two year fiscal period (July 1–June 30), a minimum of 24 hours of Utah accredited CLE, which shall include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of the ethics or professional responsibility shall be in the area of professionalism and civility. Please visit www.utahmcle.org for a complete explanation of Rule 14-404.
- 2. New Lawyer CLE requirement** – Lawyers newly admitted under the Bar’s full exam need to complete the following requirements during their first reporting period:
 - Complete the NLTP Program during their first year of admission to the Bar, unless NLTP exemption applies.
 - Attend one New Lawyer Ethics program during their first year of admission to the Bar. This requirement can be waived if the lawyer resides out-of-state.
 - Complete 12 hours of Utah accredited CLE.
- 3. House Counsel** – House Counsel Lawyers must file with the MCLE Board by July 31 of each year a Certificate of Compliance from the jurisdiction where House Counsel maintains an active license establishing that he or she has completed the hours of continuing legal education required of active attorneys in the jurisdiction where House Counsel is licensed.

EXPLANATION OF TYPE OF ACTIVITY

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

- 1. Self-Study CLE:** No more than 12 hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit www.utahmcle.org for a complete explanation of Rule 14-413 (a), (b), (c) and (d).
- 2. Live CLE Program:** There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at a Utah accredited CLE program. **A minimum of 12 hours must be obtained through attendance at live CLE programs during a reporting period.**

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

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

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

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

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

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