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Volume 30 No. 5  
Sep/Oct 2017

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# The Utah Bar Journal

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*Neffs Canyon*, by Utah State Bar member David R. York.

*DAVID R. YORK is an attorney, certified public accountant, and managing partner with the Salt Lake City law firm of York Howell & Guymon. This photo was taken at the top of Neffs Canyon trail at the base of Mount Olympus. From there you can continue up to Mount Olympus or bike over to Millcreek Canyon.*



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

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

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

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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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# Letters to the Editor

Dear Editor,

Thank you for publishing Judge J. Frederic Voros, Jr.'s thoughtful remarks on civility in the July/August 2017 issue of the *Utah Bar Journal*. Initially I was planning to skip over the article, expecting that like so many other judges on the subject, Judge Voros would complain about lawyers and cite some platitudes. Then the phrase "gems from the late Justice Antonin Scalia," caught my eye and I wondered if it could be that he was criticizing Justice Scalia for his incivility. The answer was yes and then some; Judge Voros held not only Justice Scalia but all judges accountable for conducting themselves with civility ("To be honest, I think it [incivility] started at the top.") I found his honesty and willingness to speak openly about holding the highest colleagues of his profession to a civility standard refreshing and encouraging. The message needs to go to all in our profession, not just the practicing lawyers but judges as well. I still wince remembering more than one instance where a judge in Utah state or federal court was, for no reason, so uncivil to my opposing colleague that I felt defensive for him – I didn't consider it a win but an embarrassment, one that I felt I had to make right (not really possible I know) by apologizing to him for the judge's behavior.

Very truly yours,  
Lois A. Baar

Dear Editor:

I write this letter in response to Martha Pierce's recent article.

In my view, the article was a disservice to PGALs and the court staff. I never said that a PGAL is or should serve as a defacto custody evaluator. I simply stated the common reality that persons who are financially strapped frequently opt to have a PGAL appointed rather than paying for a custody evaluation. I also suggest that attorneys who serve as a PGAL could greatly benefit from becoming a member of the AFCC. Indeed, the AFCC regularly holds CLEs designed to help PGALs serve more effectively. My article states that Utah's PGAL statute requires counsel to conduct an investigation, and to make a recommendation to the court regarding the child. I stated what I have learned in conducting more effective investigations by attending AFCC seminars.

Ms. Pierce states that PGALs do not file reports. However, U.C.A. § 78A-2-705(14) states that a PGAL *shall* make a recommendation regarding the child's best interest, *and* disclose the factors associated with that recommendation to the Court.

While it may be the practice of the public guardian ad litem's office not to file written reports, I have found that commissioners very much appreciate when I write a detailed report which supports my recommendation. Doing so eliminates surprise to the parties and to the court, and provides commissioners with sufficient time to formulate their recommendations.

In conclusion, while I believe that it is good for colleagues to share their differing points of view in the *Bar Journal* forum, in light of our electronic age – where potential clients can access articles from the *Utah Bar Journal* at the drop of a hat – the editorial board should insure that such comments are accurate and civil – particularly where they criticize a colleague's views.

Ted Weckel

## LETTER SUBMISSION GUIDELINES

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





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### *Broadening Our Bailiwick*

by John R. Lund

Friends,

I am excited for us. I am excited about our prospects as lawyers and as a profession. Why? Because people need us. They need us more than ever. Literally every minute, the world becomes more complex. And that means there should be more demand for clear thinkers, well-trained advocates, wise counselors, and principled professionals.

Why then do people with serious issues in their lives and businesses increasingly turn elsewhere? Why are so many going it alone, or at least lawyer-less, in court? You have likely heard the stat that in 80% of the domestic cases in the Utah courts, neither party has a lawyer. Maybe lots of those folks need simple, uncontested divorces, but even that is still a major upheaval and realignment of their lives.

Recently I helped a client with her simple divorce. There were no kids, no significant assets, no major issues. To save her money, I asked her to go to Utah's On Line Court Assistance Program site, [www.utcourts.gov/ocap/](http://www.utcourts.gov/ocap/), and fill out the forms as best she could. As a millennial with a smart phone she was completely capable of using that technology; but, what about the cat? Did the cat need to be listed as part of the marital estate? Maybe something like that is simple or obvious to those of us with access to the statutes, law, and customs. Not so for those thousands of people going DIY in the court system.

It is not just individuals with their personal problems. It's businesses too, both big and small. Calling the lawyer is the last thing they want to do. They'll pull a form for a lease off the internet, have their financial guy handle HR issues, and decide where and how to form a new business entity based on wikihow. See *wikiHow to Create a Business Entity*, <http://www.wikihow.com/Create-a-Business-Entity> (last visited Aug. 8, 2017). Let's ask wikihow this: How did we lawyers become the option of last resort, instead of a company's first call? Everyone knows about the importance of preventive medicine? Why aren't more people endorsing preventive law? See *National Center for Preventive law*, <http://www.preventivelawyer.org> (last visited Aug. 8, 2017).

No doubt there are lots of reasons. One might be the modern reality: Everything that Anyone Knows or Thinks about Anything is at Everyone's Fingertips. That is no exaggeration, and it is truly awesome in many ways. However, there is no filter. There is no judgment being applied to which factoid matters and which one doesn't.<sup>1</sup> Maybe artificial intelligence will get there, but so far it's tough to digitize wisdom and practical experience. And even if Watson gets admitted to practice law in Utah, he/she/it won't be there to say a soothing word, calm an irate opponent, or high five the client on a deal getting closed. See IBM Research, The DeepQA Research Team, [http://researcher.watson.ibm.com/researcher/view\\_group.php?id=2099](http://researcher.watson.ibm.com/researcher/view_group.php?id=2099) (last visited Aug. 8, 2017).

That, my friends, is where we come in. Or at least we should. Yet people are more apt to take advice from tax preparers, real estate agents, and investment advisors than from lawyers. Do those "professionals" really know more about contract formation and government regulations than we do? Or has their willingness to advertise their services and price them in affordable ways simply made them a more accessible source for such advice?

The fact is people think we are very expensive and rightly so. Lawyers seem fond of noting that they could not afford themselves, yet are we coming up with affordable options for people? Their question is not: "What can you do for me for \$250 per hour?" Their question is: "What can you do for me for \$250?" So, are we providing limited options that get them the best value for the dollars they have to spend? Have we leveraged technology to make it less expensive for clients or simply to make it more profitable for us?

People also think that lawyers complicate things and make the matter take longer and be more difficult to resolve. Since we usually charge more when a case takes longer or becomes more complicated, that could be where they get that impression. Plus it's likely easy for clients to forget that they hired us to worry for them, to actually sweat the small stuff. From Sam Glover on Lawyerist.com:





I don't know if the public really appreciates what a lawyer agrees to do for her clients when we sign a retainer. In fact, I think some lawyers need to be reminded. It's true that many clients just want to get out of jail or a contract or for their insurance company to pay up. But in order to do that, lawyers commit to much more. . . . After a client signs a retainer with me, I look them in the eye and tell them "Okay, you don't have to worry about this any more. Your problems are now my problems." It is just a thing I say, but it is a true thing I say. My clients go home and sleep soundly for the first time in weeks or months. I go home and think about the legal issues all evening. At night I dream about my client's case. Sometimes I wake up in a cold sweat and pull up the scheduling order on my phone, convinced I blew a deadline. When I am at the playground with my kids, I check my email in case I get something from opposing counsel or the court. When I go out to dinner with my wife, I talk about hearings and depositions.

Sam Glover, *Why Are Lawyers So Expensive? I'll Tell You Why*, Lawyerist.com (Feb. 12, 2016), <https://lawyerist.com/lawyers-expensive-ill-tell>.

I agree with Mr. Glover. We are here to be entrusted with people's problems. It's what we do. Plus, we offer careful analysis. We offer objectivity. We offer good process and put things in context. How many of you are called on regularly by your family for advice about issues far afield from your practice specialty? Or simply for advice about other important issues that aren't truly "legal" issues? When a lawyer is available and free, most people are glad for his or her advice about almost anything serious and important to them.

Among many wonderful speakers at the Summer Convention in late July was Mr. Bryan Stevenson, founder of the Equal Justice Initiative in Montgomery, Alabama and author of *Just Mercy*. See [eji, https://eji.org/bryan-stevenson](https://eji.org/bryan-stevenson) (last visited Aug. 7, 2017). Mr. Stevenson gave an impassioned and inspiring talk about his work on behalf of death row inmates. He spoke of how he finds power to do that work by getting close to the people in those situations, by getting proximate. He spoke of working to change narratives, such as the one that turns mere children into "super



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predators” who can then be abhorred for their acts even though they were just children. He stressed the importance of remaining hopeful, even in face of great odds and great despair. And finally he taught that nothing truly worth accomplishing can be accomplished without doing things that are uncomfortable.

In the coming year, I suggest we use these principles to reclaim our prospects as a profession. We need to get proximate to our clients and our communities. We should meet with and hear directly from individuals and businesses. We should ask them what keeps them from calling on us and what would work better for them in terms of getting services from lawyers. Lawyer’s opinions abound about how to make our profession more relevant. Wouldn’t it be good to know what our current and future clients think about that?

Let’s work to change the narrative about lawyers. How can we restore our long-standing and wide-ranging role as advisors and counselors in our communities? People should feel that if they call on us, they are going to be glad they did. They should understand that they are going to get much more than the algorithmic results of a google search or the banal advice of a pseudo-professional. If they call on us, they are going to get an advocate, a counselor,

and a confidant, all wrapped into that package we call a lawyer.

In sum, we can provide a much broader range of services than we do now. And we can make our services accessible and affordable to a much broader range of people. Did I mention that I was excited for our profession? Maybe the better word is hopeful. We should be hopeful for our profession because we have something of value to provide. But, like Mr. Stevenson says, we need to be ready to do some uncomfortable things. We need to be ready to really innovate, not just in terms of technology but across the board. We need to seriously rethink and revise our pricing models. We probably need to build apps. We might need to revisit our views on lawyer advertising. We might even need to take some risk, along with our clients, as to the cost of what we do for them and as to the results we are able to obtain for them.


In the coming year, the Utah State Bar will be operated by a great staff and led by a strong and diverse group of commissioners from across the state. There will be about 12,000 lawyers admitted in Utah with nearly 10,000 holding active licenses. Unique to our profession, we will regulate ourselves, determining who should be admitted, who must be disciplined, and so on. We will collaborate with each other in sections, committees, and affinity organizations.

Will all or any of that make us more relevant to the world around us? I certainly hope so; but maybe not if we don’t get better connected to the people we aim to serve. In that regard as your incoming president for 2017–2018, I welcome any and all suggestions and input you have. This is your bar association. And it’s your livelihood and professional future we are talking about. So please, tell me how we can better serve you, so that you can better serve your clientele.

Before closing, permit me to mention Mr. Rob Rice. During the past year as your president and for many years before that as well, he has served the Utah State Bar, its members, and the public with a dedication rarely seen. We owe him deep gratitude for all that he has done to lead the Utah State Bar. Thank you Mr. Rice! As you return to your practice at Ray Quinney & Nebeker, I wish you well in your practice but, possibly more importantly, have lots of luck chasing browns and rainbows on Utah’s rivers and streams.

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1. Even wikihow knows this: “There are many entities to choose from and each will have its own advantages and disadvantages. Evaluate each option from a tax standpoint and assess any legal liability considerations when determining which will best fit your business.” wikiHow to Create a Business Entity, <http://www.wikihow.com/Create-a-Business-Entity> (last visited Aug. 8, 2017).





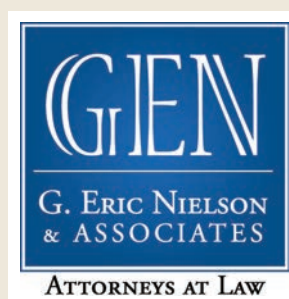
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## *The American Rule: The Genesis and Policy of the Enduring Legacy on Attorney Fee Awards*

by Aaron Bartholomew and Sharon Yamen

It is difficult to conceive of a legal rule as unique and axiomatic to legal practice in the United States as the American Rule.

The rule has applied in nearly every civil case brought before the bar of American courts for 220 years, and yet has humble beginnings in a colonial America that rejected the pomp and ceremony of contemporary English legal practice and was captured as a fifty-three word, almost-afterthought in one of the earliest decisions of the United States Supreme Court in 1796:

We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to respect of the court, till it is changed or modified, by statute.

*Arcambel v. Wiseman*, 3 U.S. 306, 3 Dall. 306, 306 (1796).

That language memorializes what we now know as the American Rule and was the then-institutionalized custom of the colonial and early-American courts: “the cost of retaining counsel could not be included as part of a damage award,” The Documentary History of the Supreme Court of the United States, 1789–1800, Vol. 7, Cases: 1796–1797, 750 (Maeva Marcus. 2003), and does not allow a prevailing litigant to recover an attorney fee from the losing litigant except to the extent prescribed by the legislature. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 Law & Contemp. Probs. 7 (1984).

AARON BARTHOLOMEW teaches business law at Utah Valley University and practices law from his office in Utah County.



“With very few exceptions, the principle that each side must bear its own legal expenses has been followed consistently since the Court first announced it in 1796, and, over time, it has come to be accepted as the ‘American Rule.’” Marcus, The Documentary History of the Supreme Court of the United States, *supra* at 754. The history of the American Rule is long and complicated and pre-dates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). To refresh your American legal history, the American Rule’s origins date to well before the doctrine of judicial review, defined as “[a] court’s power to review the actions of other branches or levels of government; esp., the courts’ power to invalidate legislative and executive actions as being unconstitutional.” Black’s Law Dictionary 349 (Pocket ed. 1996), and just a few years after the final ratification of the United States Constitution.

How did we get this rule? Why do we still have successful litigants bearing most of the expenses of vindicating themselves? Considering we find our legal roots in the common law, why is this practice such a departure from our European counterparts? It all stems from that ruling two sentences long as an ancillary footnote to a lawsuit about privateering, *Arcambel v. Wiseman*, 3 U.S. 305, 3 Dall. 306, 306 (1796). The lasting significance of this case established an important precedent that we now use today.

The facts from *Arcambel* are less widely known and understood than its legacy would imply; outside of legal academia, it is a case that no one knows, but it is a keystone to the way we practice law in America.

SHARON YAMEN is an Assistant Professor, Legal Studies Department at the Woodbury School of Business, Utah Valley University.





### Arcambel and Origins of the American Rule

The Spanish merchant vessel *Nuestra Señora del Carmen* arrived in Newport, Rhode Island, on August 19, 1795, as a vessel and cargo captured at sea by force during the war between France and Spain by the *Brutus*, a French privateer ship, commanded by Jean Antoine Gariscan, and therefore liable to be condemned or appropriated as enemy property. *See* Black's Law Dictionary 502 (Pocket ed. 1996) (defining "prize"); Marcus, *The Documentary History of the Supreme Court of the United States*, *supra* at 750. The French viewed their "prize" as the spoils of war and set out to sell the ship and its cargo at auction. However, the Spanish did not exactly see eye-to-eye with the French on this issue. The agent of the ship, Spanish Vice-consul Joseph Wismen libeled, or instituted a suit in admiralty or ecclesiastical court, regarding the *Nuestra Señora* in the federal district court of Rhode Island on August 25, 1795. *See* Black's Law Dictionary 378 (defining "libel").

The claim asserted that the *Brutus* had violated the Neutrality Act of 1794 because "the *Brutus* had been outfitted in Charleston for the purpose of committing hostilities against a nation with whom the United States was at peace." Marcus, *supra* at 750. Additionally, "the capture [of the *Nuestra Señora*] was contrary to the law of nations because no one on board the *Brutus* had a valid commission to privateer." *Id.* "Weisman asked the court attach the *Nuestra Señora* and cargo pending its decree and posted a \$4,000 bond...to cover costs and damages if his libel failed," a move to prevent the auction from going through. *Id.*

The district court judge allowed for the libel and promptly seized the ship and its cargo. *Id.*

While awaiting trial, two claims to the *Nuestra Señora* were interposed, the first of which was by Louis Aracambal, the attorney acting on behalf of the French Vice-consul. He sought restoration of the "prize" to Gariscan, and then later asked for leave to amend and have the "prize" restored directly to him, as to not hold France liable for damages should his claim fail. The second claim was made by chancellor John Jutau, acting as agent for Gariscan and the crew of the *Brutus*, and demanded that the libel be dismissed because the *Brutus* was a properly outfitted and commissioned privateer that had made its capture on the high seas at a time when France and Spain were at war. *See* Marcus, *supra* at 751. The court allowed both claims to be heard at trial.

Finally, the trial commenced on May 4, 1796, in which the judge ruled that there was insufficient evidence "to support the libel and ordered it dismissed." Marcus, *supra* at 752. However, the *Nuestra Señora* and her cargo the previous January were sold at a court-ordered auction, and the net proceeds of \$72,000 were awarded to Arcambel and Gariscan jointly. *Id.* In addition, Wiseman was ordered to pay \$8,000 in damages to the claimants as well as "such Costs of the Court as shall be taxed by Law," an amount assessed at \$22.75. Marcus, *supra* at 752. Wiseman immediately appealed to the circuit court. Arcambel, not satisfied with sharing the proceeds with Gariscan, filed a cross-appeal.



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The two appeals were argued on the same day before the same judge in federal circuit court. The dismissal of libel was affirmed, and the total damages Wiseman owed was increased to \$9,328.82. Arcambel had to give his share of the net proceeds from the auction to Gariscan. These damages had been itemized and attached to the court's decree.

Wiseman and Arcambel promptly sought review by the Court on separate writs of error. Wiseman wanted his original libel affirmed, and Arcambel wanted to overturn the circuit court ruling.

"The main question in Wiseman's claim as to the validity of the capture of the Brutus was quickly disposed," Marcus, *supra* at 753, as evidence in another case confirmed the legitimacy of the French privateer. Arcambel's claim fell short.

After decisions had been made on the core of the competing claims, a question regarding two items on the list of damages arose on the circuit court's decree. "The list included an allowance for two counselors (attorneys) in the district court and two in circuit court for a total of \$1,600.00." *Id.*

In 1793, Congress passed legislation that set lawyer practicing

fees in federal district courts. Admiralty was set at three dollars per rendered service and fees for lawyers in circuit courts "should be tied to the rates allowed in the respective state supreme courts." Marcus, *supra* at 754. The sums claimed in this case "were well in excess of any... fees specified by law." *Id.* Counsel arguing on behalf of Wiseman objected to the costs, while counsel representing Gariscan claimed "it might fairly be included under the idea of damages." *Id.* (citation omitted). The Court's ruling was concise and definitive:

We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to respect of the court, till it is changed or modified, by statute.

*Arcambel v Wiseman*, 3 U.S. 306, 3 Dall. 306, 306 (1796).

Thus, the American Rule was memorialized, officially replacing the English Rule.

### The English Rule or "loser pays."

Under the English Rule, in every case the prevailing party has their attorney fees and costs paid for by the losing party. Dale Marshall, *What is the American Rule?*, available at [www.wisegeek.com/what-is-the-american-rule](http://www.wisegeek.com/what-is-the-american-rule). Proponents of the English Rule argue that the rule has the potential to deter frivolous or unmeritorious lawsuits because, if facing such a lawsuit, a defendant has every incentive to litigate the case knowing she will almost certainly be able to recover her costs and fees from the opposing party, thereby discouraging a potential plaintiff from bringing frivolous litigation in the first place. See David Rosenberg & Stephen M. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 5 (1985). Conversely, it is thought that "the American Rule encourages frivolous suits because the rule does not create an incentive to discontinue a lawsuit: the plaintiff does not have to pay anything except his or her own fees and costs in the event of a loss." John F. Vargo, *The American Rule on Attorney Fee Allocation; The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1591 (1993). It would seem that the English Rule promotes good public policy, deterring wasteful litigation and a drain on increasingly scarce judicial resources.

Additionally, some argue that the English Rule reduces a party's incentive to drive up the opposing party's costs, particularly in the oft-abused discovery processes and motion practice, because the litigant faces the possibility of paying those costs in the event

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of a loss. The greater risk that a party bears under the English Rule – particularly if that party’s claims or defenses are weak – may be an effective and greater inducement to settlement. Theodore Eisenberg & Geoffrey P. Miller, *The English versus the American Rule on Attorney Fees: An empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 336 (2013).

Finally, the English Rule appears to truly “make whole” a successful litigant, restoring the party to the financial status prior to or “but for” the conduct of the malfeasance of the opposing party whereas the American Rule penalizes the lawsuit’s winner, despite his or her claim or defense being proven. *See Vargo, The American Rule on Attorney Fee Allocation, supra*, at 1591–92. This argument is an appealing justification for the English Rule, particularly in tort, where it has been asked “[o]n what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor’s bill but not his lawyer’s bill.” *See Albert A. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 794 (citing Judicial Council of Massachusetts, *First Report*, 11 MASS. L.Q. 7, 64 (1925)). To many a prevailing party, victory in court has rung very hollow when their attorney’s final bill arrives.

Critics of the English Rule, including early American Colonists, argued that the English Rule “was seen as stacking the deck against a poor plaintiff, who might have a good enough case, but might not be willing to gamble on a courtroom victory.” Marshall, *supra*. Which poses a problem unique to this rule: “If a plaintiff is afraid to bring suit because of limited resources that would be destroyed in the event of a loss, then justice has effectively been denied.” *Id.* The English Rule thus appears to increase the risk to litigate by eliminating the buffer that, even if a litigant loses the case, at least she will not have to pay the winner’s fees.

Some believe the American Rule has survived this long not because of an interest in justice, but because ever since attorneys had “freed themselves from fee regulation and gained the right to charge clients what the market would bear,” “the right to recover attorney fees from an opposing party became an unimportant vestige.” Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery, supra*, at 9.

Congress codified the American Rule in 1872 when it enacted Code of Civil Procedure section 1021, which states in pertinent part, “Except as attorney’s fees are specifically provided for by statute, the measure and mode of compensation of attorneys



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and counselors at law is left to the agreement, express or implied, of the parties; . . .” Cal. Civ. Proc. Code § 1021; *see, e.g., Bruno v. Bell*, 91 Cal.App.3d 776, 781, 154 Cal.Rptr. 435 (1979) (“The general American rule, codified by California’s Code of Civil Procedure section 1021.”). The California Legislature has since enacted several statutory exceptions to the American rule, and courts have relied on their “inherent equitable authority” to develop additional exceptions. *See Gray v. Don Miller & Assocs., Inc.*, 35 Cal.3d 498, 505, 674 P.2d 253 (1984); *Consumers Lobby Against Monopolies v. Pub, Utilities Com.* 25 Cal.3d 891, 906 (1979); *Serrano v. Priest*, 20 Cal.3d 25 (1977); *see generally* Richard M. Pearl, California Attorney Fee Awards, Cont. Ed. Bar (2d ed. 1994), at chapter 7.

### Policy of the American Rule

The 1796 *Arcambel* decision did nothing to justify or explain the reasoning behind the American Rule, but courts have been “quite active in stating or inventing reasons for the rule that attorney fees could not be recovered.” Leubsdorf, [*Toward a History of the American Rule on Attorney Fee Recovery*] *supra*, at 23. In the Nineteenth Century, several justifications for the rule were adopted: the objective value of legal services is

difficult to determine, *see Oelrichs v. Spain*, 82 US 211, 230–31, 21 L.Ed. 43 (1872); a party’s legal expenses are, to a certain extent, reflections of his or her own decisions regarding the litigation, for which the other party should not bear liability, *see St. Peter’s Church v Beach*, 26 Conn. 355 (1857); and an opposing party’s legal fees are too unforeseeable to be recovered, *see Stewart v. Sonneborn*, 98 US 187, 197 (1878).

More recently, the United States Supreme Court has opined that “since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel.” *Fleischmann Distilling Corp., v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *see also Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964).

### Lasting Legacy

In the decades and centuries since *Arcambel*, legislatures and the courts have carved out numerous exceptions to the American Rule, which will be the subject of a subsequent article. Like the evidentiary rules against hearsay, there are so many exceptions to the American Rule that one wonders about the effectiveness of the rule in the first instance.

Still, in most general civil cases and nearly all tort litigation the American Rule strictly applies.

Contemporary law practice has been roundly called the Age of Litigation, and it would be irresponsible to not continue to consider the questions about the American Rule and its ongoing application in our court systems: What is the policy promoted by the American Rule? Is it effective? Does it actually “do” what we think it does? Are the costs of the American Rule to successful “white hat” litigants justified? Is there something better that can discourage nonmeritorious litigation, make successful parties truly whole by awarding fees as part of a damage award, and still encourage those wronged to vindicate their rights despite the uncertainty of litigation? Would “importing” the English Rule remedy any perceived ills, or just give us different ones?

While Congress and the Utah Legislature have taken up the mental gymnastics to attempt to address these questions in the past, there does not appear to be any appetite to confront them now. So, whether justified or not, absent unforeseen court intervention, the American Rule will continue to be a fixture of civil litigation and whatever policies it portends to promote.

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## *Judicial Performance Evaluation Commission* *An Interview with Judge W. Brent West*

by Robert O. Rice

In October 2017, Utah's Judicial Performance Evaluation Commission (JPEC) will email judicial evaluation surveys to Utah lawyers. Check your inbox for the surveys, which ask Utah attorneys to evaluate up to nine judges before whom they have regularly practiced. According to JPEC, the surveys are constructed to trigger a response rate that can achieve reliability at a 95% confidence level, consistent with professional survey research practices. The surveys represent a unique opportunity for Utah lawyers to make significant contributions toward improving the administration of justice in Utah. It does not hurt that the process is anonymous, easy, and quick. Nonetheless, many Utah lawyers fail to complete the survey.

Judge W. Brent West, Presiding Judge for the Second District Court, recently spoke with Utah Bar Past-President Robert Rice about the importance of lawyers participating in the judicial evaluation process. Judge West will retire shortly, but he has spent more than thirty years on the bench. His extensive experience on the bench allows him to describe how the evaluation process has assisted him and his colleagues in improving the administration of justice in Utah and why full participation by lawyers in the judicial evaluation process is essential to the success of JPEC.

**Mr. Rice:** You've been on the bench for many years and know what it's like to be a judge before and after JPEC began the evaluation process in 2008. How is the process working nowadays?

**Judge West:** I think JPEC is doing overall a very good job. As with everything, when you're the one being judged, no pun intended, there are some things that you are concerned about. The main criticism, under the old system, where judges were reviewed by the Judicial Council, was that judicial evaluations ought to be performed by a more neutral body. I basically agree with the current process in what I call the JPEC era, where we have oversight by people who didn't necessarily come from a judicial background. Again, overall I think it's a good institution

and performs a worthwhile function.

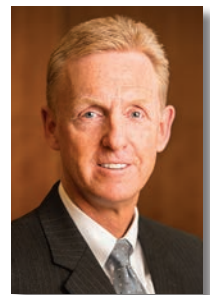
**Mr. Rice:** Is it a perfect system?

**Judge West:** No. I'm not totally happy with the court observers program. These are the people that JPEC has come into the court and observe you on the bench. Sometimes, the observers don't have the full story. For example, you're sending someone to prison because they've done a horrendous act and then you get criticized by the court observer because you didn't treat them with a great deal of kindness. Observers randomly pick a sentencing day to come in and observe. Their observations are episodic. They don't understand the history that this person did to earn the right to go to prison. Observers often criticized judges because they didn't explain everything, in detail, to the audience. That is not our role during law and motion. I'm not saying we should throw out the court observer aspect of the evaluation, but I do think JPEC needs to continue to train observers and emphasize to them what they're supposed to be looking for. If the judge is not being nice or being rude or being sarcastic or not being judicial, those are fair comments, but sometimes, they expect us to act in a manner that is not consistent with being a judge.

**Mr. Rice:** As a presiding judge, you have the opportunity to review other judges' evaluations. Is that a valuable part of the process?

**Judge West:** The valuable part of that is it gives a colleague, and someone who cares about that colleague, an opportunity to

*ROBERT O. RICE is an attorney at Ray Quinney & Nebeker and the immediate Past President of the Utah State Bar.*



go talk about situations before they become real problems for the judge. Judicial ethics place a great number of restrictions on judges and their ability to interact with others. Facing a negative evaluation can be isolating. Having someone to consult with concerning your result, good or bad, can be extremely helpful. As Presiding Judge I get to assist other judges in improving. As an example, I received some comments that I seemed crabby or cranky at the time. I thought I was focused on being a judge. But the survey caused me to rethink my conduct, and talking to other judges helped me re-examine my behavior because it was not something that I was consciously aware of. That part of the process is helpful and allows the presiding judge and others to identify concerns, confirm problems, and make suggestions on how to improve.

**Mr. Rice:** At the heart of the JPEC process is the attorney survey. Why is it important for attorneys to complete their surveys?

**Judge West:** Because I think the feedback that they give is important and we do need them and we do take their comments and

evaluations into consideration. But they should be specific and substantive. It really doesn't help us to hear general statements of glowing praise or harsh criticism. Overbroad statements about being the best or worst judge in the state are not helpful. Specifics help and judges do take those comments into consideration. If you want judges to adjust their behavior, tell them where they can improve. Good feedback may be: Judge, you're being cranky; Judge, you're not being on time; Judge, did you know you're discriminating in your sentences? Or Judge, do you know it appears you're treating female defendants different than male defendants? Specific comments on judges are very, very helpful.

**Mr. Rice:** Why is it that attorneys are well suited to complete JPEC surveys?

**Judge West:** Ideally, the more groups that can evaluate a judge, the better picture you will get about a judge's overall performance. Utilizing parties, jurors, attorneys, staff, and the public is probably the most helpful. I really think our performance should not be measured solely by the public because I don't

## Key Things to Know about the JPEC, according to Executive Director Jennifer Yim

- JPEC's website, [judges.utah.gov](http://judges.utah.gov), explains the evaluation process, collects public comment, and makes available performance evaluation reports on judges. Check it out!
- Recent improvements streamline the survey-completion process, make results more reliable, and improve courtroom-observer training.
- Judges receive midterm evaluations and use the results as a form of confidential feedback. Honest, constructive feedback from attorneys promotes judicial performance improvement.
- JPEC surveys attorneys, jurors, court staff, and juvenile court professionals about their experiences with judges in court.
- Pursuant to state statute, JPEC collects and reviews a judge's performance evaluation data in comparison to statutory performance standards. JPEC does not have authority to investigate or sanction a judge for misconduct.
- When judges stand for retention election, JPEC publishes its report and recommendations regarding retention. In the State of Utah, voters ultimately decide whether a judge should continue to serve.

**For more information, contact Jennifer Yim, executive director, [jyim@utah.gov](mailto:jyim@utah.gov), or see JPEC's webpage, [judges.utah.gov](http://judges.utah.gov).**



think they have the full picture of what it takes to be a judge. Lawyers are trained in the law. They know what to expect from judges. They know what the standard should be for judges. I think they are probably the most informed people who can give both constructive and negative observations about a judge's performance. I think they are probably the best evaluators of a judge. All we ask is that they be fair. If the judge has really done something that they have concern about, point it out to the judge. If the judge is doing things in a correct manner, point it out to the judge. Ultimately, I think the attorneys are in the best position to assess a judge's performance.

**Mr. Rice:** How do judges go about studying their surveys?

**Judge West:** In talking with my colleagues up for retention, every one of them goes through the numbers first to make sure they're okay. Then they spend all their time on the comments to seek improvement. I really think that if a judge found that his or her number was below the standard, they would focus on that first. But almost every judge goes through the numerical report and goes, '[W]hew, I passed. Now, let's look at the comments

and see what I can do to improve.'

**Mr. Rice:** You're retiring soon. After thirty-three years of service, can you identify what has been most rewarding for you as a judge?

**Judge West:** Yes. I haven't always been successful, but there's a great deal of reward in trying to solve people's problems. This is particularly applicable in the criminal law and motion area. Helping people deal with their addiction or helping them turn their lives around can bring some satisfaction. It's always nice to get a letter from someone whom you helped. Some people have even thanked me for sending them to jail or prison because it gave them an opportunity to focus on their problem. Or in a family law case, I'll make a ruling and I'll get a letter from someone who says, you know judge, that advice you gave us from the bench was the best advice we ever had. We followed it, and even though it was tough, we have a better relationship with each other or we have a better relationship with our kids. I think changing people's lives for the better and having an impact is one of the most rewarding aspects of being a judge.

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## Measuring the Legal Services Market in Utah

by David McNeill

In Utah courts, more than half of all hearings involve at least one party without an attorney. This represents a massive untapped market opportunity that I will explore in this article.

### Introduction to Me

I am not an attorney. I am married to an attorney, and as the assistant director of Open Legal Services, I work for and with attorneys. But my background is in science and business. As a business person, I am used to reading astonishingly expensive market research reports about everything from intravenous catheters to private colleges. To my surprise, I find very little research on the legal industry in general and even less about the legal market in Utah in particular. For the past year, I have been gathering data and studying the legal industry in Utah, and I offer the following “report” free of charge.

### Introduction to the Legal Market

A market is one way to allocate resources where supply (attorneys, in our case) transacts with demand (clients) at a specific price. Free markets allocate resources very efficiently; however, they do not necessarily allocate resources fairly or equitably. Thus, we choose to intervene in certain markets to provide important goods and services to a wider range of people than would receive them in a totally free market. Two examples of such market intervention are the publicly funded criminal defense system and Legal Aid.

The two main ways to measure the size of a market are:

- (1) Dollars
- (2) People

Typically, market research focuses more on the total number of dollars in a market than on the total number of people. My analysis primarily uses people to measure Utah’s legal market because:

- Data about the people in the legal market is much easier to obtain.
- Dollars represent the existing market, not the potential market.

With so many people going unrepresented in Utah’s courts, the dollars currently spent on legal services completely miss the size of this potential market.

- As the Futures Commission recommended, the Utah Bar needs to fulfill its mission to “serve the public” (i.e. people).

The questions guiding my research are about allocation of attorneys to the people that need their services:

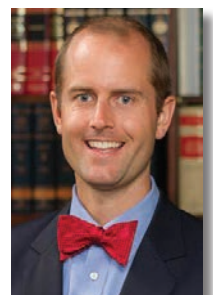
- (1) Supply: Where are Utah’s attorneys located, and what services do they provide?
- (2) Demand: What geographical and practice areas have unmet needs?

### Where are Utah’s attorneys?

The Utah State Bar provides a directory of all attorneys licensed to practice law in Utah. To capture this information, I wrote a little program that reads and downloads all of the attorney listings on the bar directory website to a spreadsheet. Don’t worry, I promise not to spam you now that I have your street and email addresses. According to the Utah State Bar directory:

- 9,359 attorneys are active and paid (i.e., are in good standing to supply legal services in the Utah market).
- 1,213 (13%) list an address outside of Utah.
- 8,144 list an address within Utah.
- two list no address.

*DAVID S. McNEILL has a PhD in Neuroscience from Johns Hopkins University and an MBA from the University of Utah. He is the assistant director of Open Legal Services, a sliding scale nonprofit law firm in Salt Lake City.*

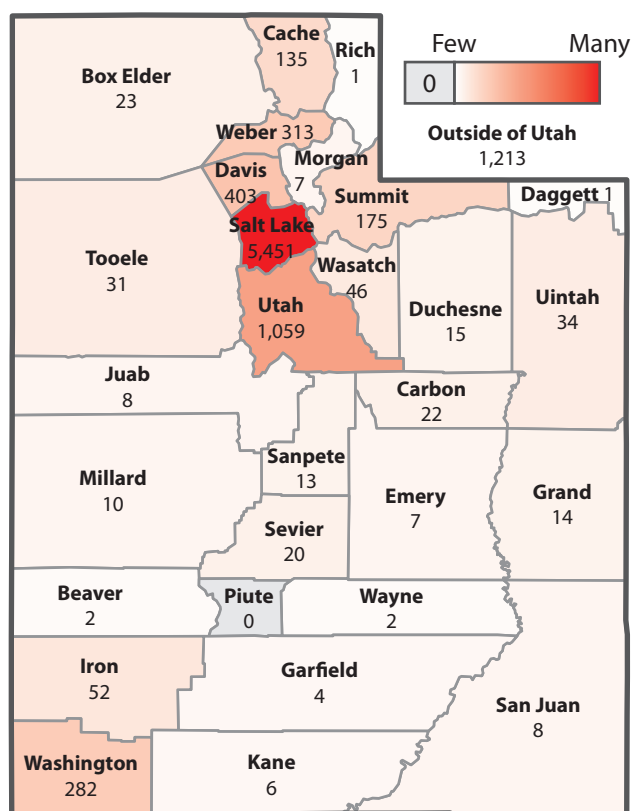




Using these addresses, I counted the number of attorneys located in each of Utah's twenty-nine counties. I am using counties to approximate geographical markets because it is easy to get data on the county level. Metropolitan areas would represent geographical markets better, but someone would have to pay me to tackle that more complicated analysis.

- Eleven counties have fewer than ten attorneys.
- Piute County has no attorneys.
- Sixty-seven percent of the active attorneys in Utah are in Salt Lake County.
- Eighty-nine percent of the active attorneys in Utah are along the Wasatch Front (Weber, Davis, Salt Lake, and Utah counties).

### Where are Utah's Attorneys?



### Density of Attorneys

It is hardly surprising that Salt Lake County contains the most attorneys because it contains the most people. Thus, to learn more about regional markets, I calculated the per capita *density* of attorneys using population data from the United States Census Bureau.

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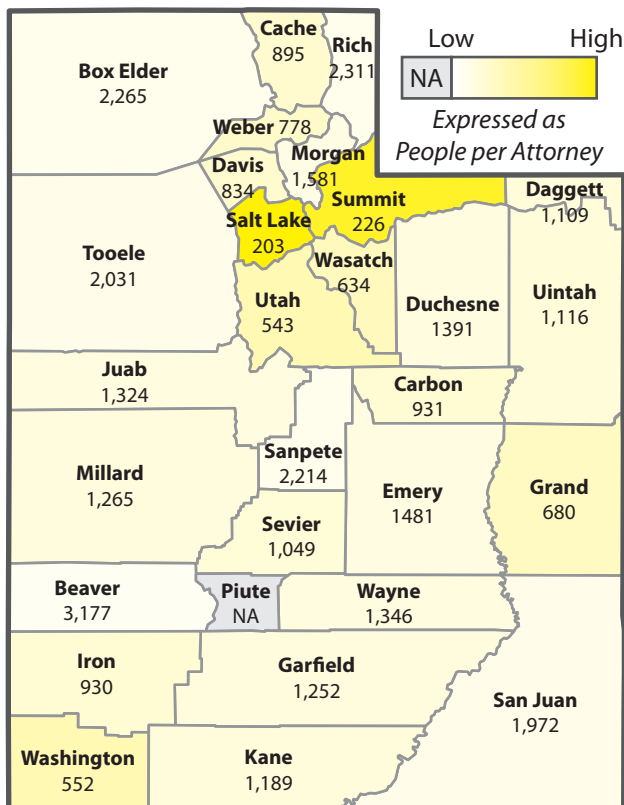


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- The counties with the fewest people are Daggett, Piute, Rich, and Wayne counties with fewer than 3,000 people each.
- Salt Lake County has the highest population at 1.1 million people or 37% of Utah's entire population.
- Statewide, the ratio of attorneys to people is 1:368.
- The two counties with the highest density of attorneys are Salt Lake (1:203) and Summit (1:226).

### Density of Attorneys



### Broad Market Opportunities:

#### Where are the most people with the fewest attorneys?

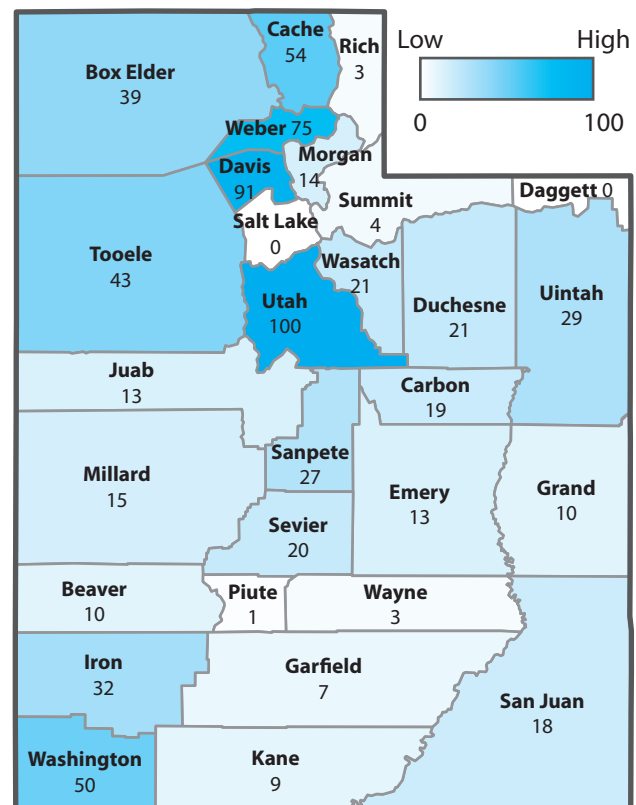
The number of people per attorney, while interesting, does not indicate the magnitude of market opportunities. For example, Daggett County literally has only one attorney for all 1,109 of its people (and of course that one attorney is a prosecutor), while Uintah County has a similar density ratio but with thirty-four times more attorneys and thirty-four times more people. All else equal, the market opportunity is better in Uintah County than in Daggett County because the maximum reachable market is larger. In addition, a larger market offers more room for attorneys to specialize.

I think the best way to quantify the size of market opportunities is to mathematically combine both the attorney density and the total number of people because the best market opportunities are in the counties with the largest populations and the lowest attorney densities. If you are interested in the mathematical details of how I combined these two metrics into what I call the Market Opportunity Index, I am happy to tell you over lunch sometime.

- Salt Lake County scores at the bottom of my Market Opportunity Index because it has the highest density of lawyers.
- Daggett County also scores at the bottom of my Market Opportunity Index because it has the smallest population.
- The greatest market opportunities are in Utah, Davis, Weber, and Washington counties because they each have a relatively low attorney density and a relatively large population.

### Broad Market Opportunity Index

Based on Population and Attorney Density



Although Salt Lake County scores at the bottom of the Market Opportunity Index, its legal market may not be quite as saturated as it appears for the following reasons:



- Salt Lake is the focal point for government, immigration, and patent attorneys.
- Many companies are headquartered in Salt Lake and thus have corporate counsel there.
- Some attorneys prefer to have their offices in Salt Lake County but drive out to serve clients in nearby counties.

This analysis reveals broad market opportunities but does not provide specific information about practice areas and pricing.

### What practice areas have the most unrepresented people?

I must credit the Utah courts for tracking self-represented parties in civil cases for over a decade. The courts kindly shared their data with me for fiscal year 2016. The data shows:

- 98,279 parties represented themselves.
- The top four categories with the greatest number of case filings (and the greatest number of self-represented parties) are:
  - Debt Collection
  - Divorce/Annulment
  - Eviction
  - Protective Orders

- These four categories account for 92% of the self-represented parties in civil cases.
- In debt collection cases, 99.9% of petitioners are represented by an attorney, while only 1% of respondents are represented by an attorney.
- 17,678 people getting divorced represented themselves in fiscal year 2016 (7,032 petitioners plus 10,646 respondents).
- If every one of the 8,144 licensed attorneys in Utah took two of these self-represented divorce cases and seven debt collection defense cases per year, there would still be people facing these types of cases without an attorney.

### Pricing: Where supply meets demand

I am still shocked that the majority of people getting divorced in Utah are not represented by an attorney. Why is the immense demand for this and other types of legal services going unmet? One answer is pricing.

As a side note, I am always happy to join attorneys in hating on the billable hour, and I think clients also dislike being billed by the hour because to them the total cost is more important than the marginal cost. We all need to work harder at thinking outside of the billable hour box, but for now hourly rates are still the primary way that attorneys price their services.

Case Type	Filings	Self-Represented Petitioner		Self-Represented Respondent	
		#	%	#	%
Debt Collection	59,496	15	0.03%	58,691	99%
Divorce/Annulment	13,353	7,032	53%	10,646	80%
Eviction	7,384	968	13%	7,057	96%
Protective Orders	4,966	2,401	48%	3,514	71%
Contracts	2,371	32	1%	1,671	70%
Custody and Support	1,272	545	43%	967	76%
Civil Stalking	950	733	77%	762	80%
Paternity	1,027	190	19%	649	63%
Temporary Separation	123	87	71%	98	80%
Adoption	1,199	196	16%	27	2%
Guardianship	1,437	860	60%	12	1%
Estate Personal Rep	2,321	298	13%	8	0.3%
Name Change	956	788	82%	6	1%
Conservatorship	161	26	16%	0	0%

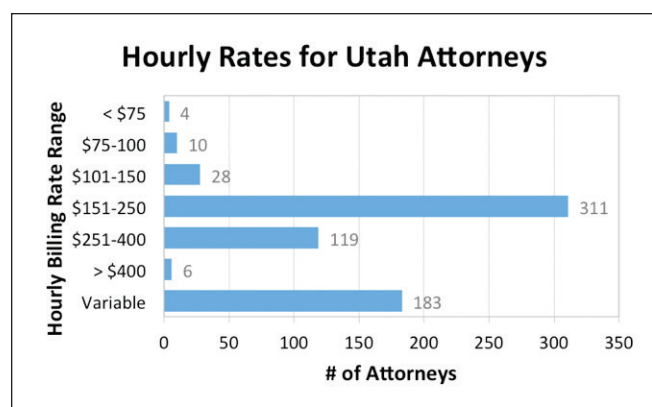
Column Color Coding



To get some idea of what Utah lawyers currently charge for their time, I coded another program to pull data from [LicensedLawyer.org](http://LicensedLawyer.org), a referral service created by the Utah State Bar for potential clients to find attorneys based on geography, practice area, and other factors. (Full disclosure: I serve on the committee that created [LicensedLawyer.org](http://LicensedLawyer.org).)

To date, 875 (9%) of the active attorneys in the bar directory have created a profile on [LicensedLawyer.org](http://LicensedLawyer.org), and 661 of these attorneys categorized themselves into preset price ranges. Note that this sample may not be representative of the entire bar because it is based on people who have self-selected to join [LicensedLawyer.org](http://LicensedLawyer.org). This analysis shows:

- The most popular rate category, by far, is \$151–200 per hour, with 47% of attorneys reporting their rates in this range.
- Only 6% of attorneys reported a rate of \$150 per hour or less.
- Twenty-eight percent of attorneys reported having variable rates. I would love to know how much the rates vary and upon what the variation is based. Case type? The client's ability to pay? The attorney's gut feeling about the client?



This data suggests that the majority of Utah's attorneys are competing for clients that can pay more than \$150 per hour.

### The mass(ive) market opportunity for affordable legal services

Sometimes you can earn more revenue by charging a higher price. Luxury goods are a classic example of products that people demand partly because they are so expensive. Some legal services fall into this category. ("Oh your lawyer charges \$750 per hour? He must be good!") But typically as prices increase, the number of people willing to pay decreases. This relationship results in the classic supply and demand curve

discussed in every entry-level economics course. Two classic strategies to maximize revenue are:

- (1) Find a few clients willing to pay you a lot.
- (2) Find a lot of clients willing to pay you a little.

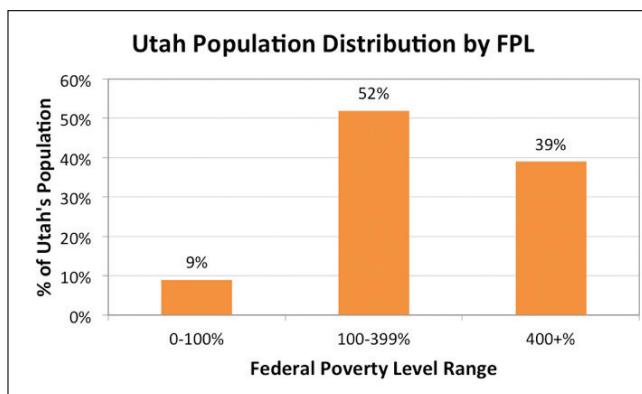
So what is the relationship between price and demand in Utah's legal market? How many people are able to pay a lot for legal services, and how many people are able to pay only a little?

Unfortunately, it is very difficult to measure ability to pay for groups of people, but we can approximate it by using the Federal Poverty Level (FPL). The FPL is calculated based on income and family size. Of course, there are many other factors that affect a person's ability to pay besides income and family size, but FPL is a widely used standard with publicly available data. Here are examples of annual income for family sizes of one to four people at 100% and 400% of the FPL:

Family Size	Annual Income	
1	\$12,060	\$48,240
2	\$16,240	\$64,960
3	\$20,420	\$81,680
4	\$24,600	\$98,400
% FPL	100%	400%

Source: U.S. Department of Health and Human Services Federal Poverty Guidelines <https://aspe.hhs.gov/poverty-guidelines>.

According to the Henry J. Kaiser Family Foundation, which provides data on the population distribution by FPL for Utah and other states, the majority of Utah's population falls in the 100–400% FPL range.

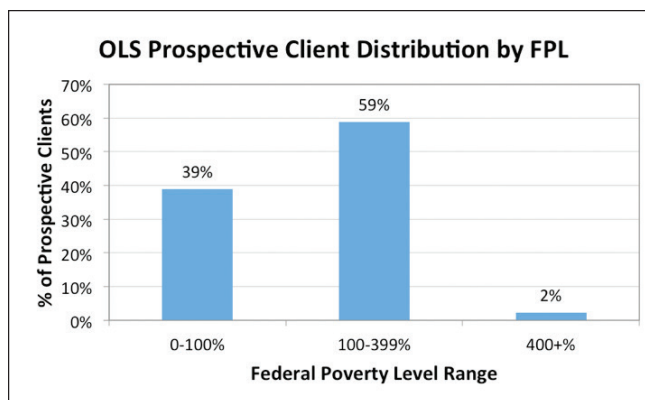


Henry J. Kaiser Family Foundation, *Distribution of Total Population by Federal Poverty Level: 2015 Data* <http://www.kff.org/other/state-indicator/distribution-by-fpl/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

The three categories in the FPL chart can be roughly described as:

- **0–100% FPL:** The poor and working poor who are traditionally eligible for free services from Legal Aid and other pro bono providers.
- **100–399% FPL:** The people with moderate income, which make up the majority of the population.
- **400+% FPL:** The upper middle class and the wealthy.

At Open Legal Services, we serve low- and moderate-income people and use an FPL-based sliding scale to charge them based on their ability to pay. We have collected FPL data from over 2,000 prospective clients over the past couple of years. It shows that the vast majority of those seeking our legal services fall in the 0–399% FPL range. While I would love to claim that this is a result of our perfectly targeted marketing, I think it more likely demonstrates the tremendous demand for legal services at an affordable price point.



I am not suggesting that all attorneys should lower their prices. Rather, I am saying:

- (1) Utah's for-profit firms primarily target the higher end of the market, representing less than 40% of the population.
- (2) Legal Aid and other free services target roughly 10% of the population.
- (3) More than half of Utah's population falls into the middle of the market. They earn too much to qualify for free legal services



**SEAN A. MONSON**

**Parsons Behle and Latimer is proud to announce that Sean A. Monson has joined the firm as Of Counsel.**

Sean's practice emphasis is employment counseling and litigation and real estate litigation and transactions. He has represented several Utah businesses in litigation matters involving claims for wrongful termination, discrimination, OSHA infractions, and labor disputes. He has also represented title companies, businesses and individuals in real property transactions and litigation matters involving boundary, ownership, title insurance and priority of interest lawsuits.

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and not enough to pay more than \$150 dollars per hour to a traditional firm. This middle market is wide open for business.

To reach this middle market, we need to create and expand firms like Open Legal Services that are specifically designed to handle cases at a lower price point.

### The IKEA Approach: Price-based costing instead of cost-based pricing

In the business world, the IKEA furniture store is famous for its price-based costing. The traditional pricing method is to build a bookshelf, tally up the cost, add on a profit margin, and then look for someone willing to buy it. IKEA inverts the process by first performing market research to determine what price most people are willing to pay for a bookshelf. Once IKEA determines the price, it designs a bookshelf that it can build for that price and still make a profit. I think law firms that adopt this market-based

pricing approach could do extremely well considering the vast untapped market for legal services at an affordable price.



### Why do our designers create the price tag first?

At IKEA, our designers' main concern is to make good quality furniture at a price that is affordable. That's why.

*IKEA explaining their price-based costing method at their Draper Location*

## WHY IS CARBON COUNTY THE MOST LITIGIOUS?

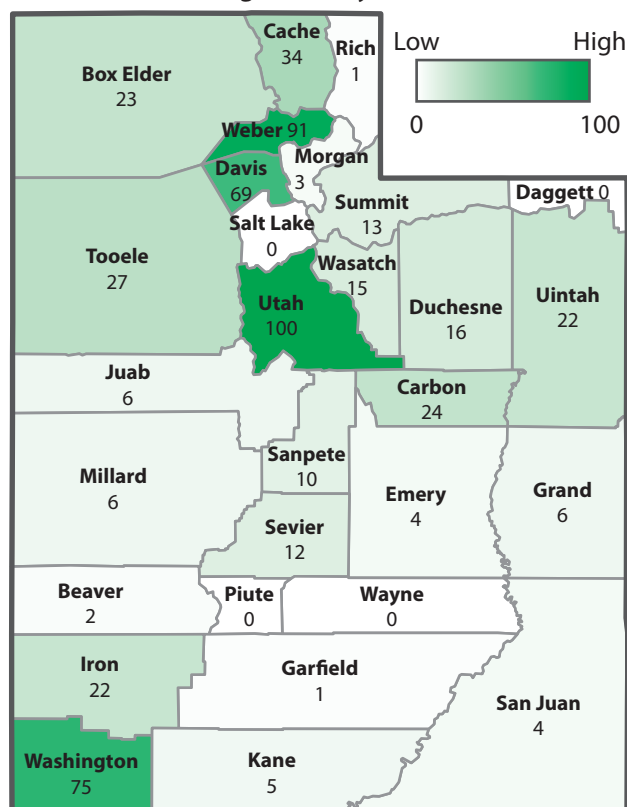
Seriously, I want to know. According to the court calendar data I have collected during this past year, Carbon County had a ratio of one court case for every four residents compared to an average of one case for every ten people statewide. Broken down by case type, it has the highest incidence in the state for six of the eight most common case types shown below. Compared to the statewide average, it has:

- A 3.5 fold higher incidence of state felony cases.
- A 3.2 fold higher incidence of debt collection cases.

Case Type	Incidence (Expressed as one case per X number of people each year)		Fold Difference
	Carbon County	Statewide Average	
Other Misdemeanor	1:11	1:32	2.9
State Felony	1:18	1:65	3.5
Traffic	1:21	1:37	1.8
Misdemeanor DUI	1:135	1:175	1.3
Small Claim	1:63	1:159	2.5
Divorce	1:297	1:394	1.3
Debt Collection	1:94	1:297	3.2
Protective Orders	1:269	1:647	2.4

## State Court Market Opportunity Index

Based on Practicing Attorneys & Number of Cases



- 5,358 different attorneys appeared on hearings in Utah state court during the past year (66% of the active attorneys in the Utah State Bar).

### State Court Market Opportunity Index

I created my previous Market Opportunity Index by using data from the bar directory and the United States Census Bureau to combine the density of attorneys with the number of people in each county. But these people may or may not need to purchase legal services and these attorneys may or may not be selling legal services.

To improve upon my Market Opportunity Index, I used the hearing data from the court calendars to determine the number of cases and the number of attorneys who made court appearances in each county. These are more focused measures of supply (attorneys actually practicing in each county) and demand (number of cases).

- Salt Lake County scores at the bottom because it has the highest number of lawyers practicing in state court.
- Daggett, Piute, and Wayne counties all score at the bottom

### Utah Court Calendars: A treasure trove of highly specific market data

Each day the Utah courts publish calendars for every district and justice court listing the next couple weeks of hearings, typically 30,000–40,000 hearings across a set of about 160 PDF text files. I created a program called [DocketReminder.com](http://DocketReminder.com) that searches these calendars and alerts attorneys about their upcoming hearings. Because of this work on [DocketReminder.com](http://DocketReminder.com), I now have data for over 700,000 scheduled hearings from the past year. This immense dataset can tell us exactly who is appearing when and where on what types of cases. Here is an overview of what a year of court calendar data reveals:

- Eighty-seven percent of hearings were for criminal cases.

These criminal hearings are broken down as follows:

- 8% infraction
- 58% misdemeanor
- 35% felony
- 0.01% capital
- Thirteen percent of hearings were for civil cases.

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because they have the fewest cases.

- This analysis once again indicates that the greatest market opportunities are in Utah, Davis, Weber, and Washington counties because they each have a relatively low number of practicing attorneys and a relatively large number of cases.

This dataset of court hearings offers all kinds of opportunities for further, more in-depth market analysis. For example, I could subdivide these market opportunities into specific case types to see which locations have unmet demand for attorneys that practice specific areas of law.

### The challenge of reaching rural markets

Finally, I will use Piute County to illustrate the difficulty of reaching rural legal markets. According to the United States Census Bureau, Piute County has a population of 1,517 people. The bar directory reveals there are no attorneys located in Piute County, yet [LicensedLawyer.org](http://LicensedLawyer.org) indicates that eighty-nine attorneys are willing to serve its residents. Unfortunately, the closest of these eighty-nine attorneys is a 1.3-hour (eighty-mile) one-way drive away from the Piute County courthouse, according to Google Maps.

This means that if a resident of Piute county wants to meet *in person* with one of these eighty-nine attorneys, the resident either has to drive *at least* 2.6 hours round trip or pay the attorney to make the trip. To appear in the Piute County courthouse, the attorney has to make the drive, which, if we assume the attorney bills on the low end at \$150 per hour, will cost *at least* \$390 (more if the client hires a more distant attorney). And that does not include any legal work. Thus, residents of Piute County, which has a median household income of only \$30,000 per year, have to pay *at least* \$390 more than residents of more attorney-dense counties each time they want to be represented in person by an attorney.

According to the Utah court calendars, twenty-three attorneys actually did appear on some of the ninety-five hearings scheduled in Piute County during the past year. Interestingly,

none of these attorneys are among the eighty-nine attorneys on [LicensedLawyer.org](http://LicensedLawyer.org) that are willing to take cases in Piute County. The closest of these twenty-three attorneys that actually practice in Piute County are a forty-five-minute drive away in Richfield.

According to the court calendars, Piute County is the least litigious with only one court case for every twenty-nine people over the past year (the statewide average is one case for every ten people). At first, this might seem like a good thing. Maybe Piute County is utopia where people rarely commit crimes or sue each other. An alternative explanation is that the barrier to hiring an attorney is so high that people rarely use the legal system to settle their disputes.

While Piute County may be an extreme example, it highlights the challenge of serving these rural markets that make up the majority of Utah's counties. These regions might be unattractive

to attorneys looking to set up traditional for-profit firms because:

(1) There is little opportunity for growth because the reachable market is so small.

(2) They would have to compete with the few attorneys already entrenched in these markets.

(3) They would have to be generalists and handle many types of cases.

Because of these factors, it is difficult for traditional for-profit firms using traditional methods to provide legal services in rural areas. Innovation is needed. Some ideas for improving service to rural areas include:

- Increase access to remote representation. Currently, attorneys can appear remotely in court but only with permission from a judge and only for certain parts of a case. If common case types could be handled entirely remotely, more attorneys could serve more people in more places.
- Schedule hearings in groups on certain days so attorneys can travel once to serve many clients on one trip.

*"The majority of our population is stuck in the middle of the market between Legal Aid and traditional, high-priced legal services."*



- Support the Utah courts' initiative to create a system for online dispute resolution. The courts' pilot program is scheduled to start taking test cases later this year.
- Provide more support for nonprofit service providers.

## Conclusions and Recommendations

### Research Geographic Market Opportunities

My results show that there may be significant market opportunities in Utah, Davis, Weber, and Washington counties. These opportunities warrant closer examination.

### Join [LicensedLawyer.org](http://LicensedLawyer.org)

Please set up your profile, especially if you work outside of Salt Lake County. The courts refer a steady stream of prospective clients to [LicensedLawyer.org](http://LicensedLawyer.org), and many people that live in other parts of the state have trouble finding attorneys to hire. Open Legal Services also refers a lot of people to [LicensedLawyer.org](http://LicensedLawyer.org) who do not qualify for our services.



### Expand Remote Representation

For routine cases, we need to find ways for attorneys to represent clients remotely from start to finish. At this point the barrier is more a problem of tradition, training, and implementation rather than technology.

### Simplify Procedures Based on Case Type

Change the way different cases are handled to treat small, common, and routine cases differently than large, unique, and complex cases. As a business/operations person, I am shocked that a routine consumer debt collection case follows roughly the same process as a multimillion-dollar contract dispute between two corporations, often in the same courtroom in front of the same judge.

### Increase Debt Collection Defense

It seems incredibly lopsided that in debt collection cases, the petitioner is almost always represented by an attorney while the

respondent practically never has counsel. We need to figure out innovative ways to help these respondents. One way that attorneys have already started tackling this problem is by volunteering on the debt collection pro se calendar to provide on-the-spot legal advice and information in the Matheson and Bountiful courthouses. Contact [probono@utahbar.org](mailto:probono@utahbar.org) to get involved.

### Practice Family Law

More than half of people getting divorced in Utah do not have an attorney, so this market is wide open. Our experience at Open Legal Services confirms what seems like an endless demand for divorce, custody, and other family law services.

### Provide Affordable Legal Services to the Mass Market

The majority of our population is stuck in the middle of the market between Legal Aid and traditional, high-priced legal services. Utah needs more innovative firms specifically designed to provide affordable legal services to this massive market opportunity.

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## Divorce and Co-Parent Coaching

by Elizabeth A. Dalton

Consider all the months a couple spends planning their “perfect” wedding. Often the couple uses the services of a wedding planner, a caterer, a photographer, and other professionals to design a wedding day that is beyond their “fairy tale” dreams. It should be of no surprise that couples are choosing to hire professionals to assist them in designing a “good” divorce when the time comes to uncouple.

The American Bar Association is recognizing divorce coaching as a new profession to support divorcing couples. The ABA Section of Dispute Resolution defines divorce coaching as “a flexible, goal-oriented process designed to support, motivate, and guide people going through divorce to help them make the best possible decisions for their future, based on their particular interests, needs, and concerns.” American Bar Association, *Divorce Coaching*, available at [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/divorce\\_coaching.html](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/divorce_coaching.html) (last visited May 30, 2017).

Divorce coaches come from a variety of professional backgrounds. Clients select a divorce coach based on their specific needs. For example, some divorce coaches are certified financial and tax planners. Others are mental health professionals, lawyers, or mediators with specialized training in assisting clients learn how to “consciously uncouple” in an emotionally healthy manner. If a couple has children, a co-parent coach can provide training in successful communication and problem-solving to assist them in raising their children together.

Acting as a divorce coach is distinctly different than acting in the role of a family law attorney and advocate. An attorney is an expert in all aspects of family law and is an essential advisor in protecting individual legal rights, interpreting the law, litigating disputes, and drafting stipulations and proposed court orders. A divorce attorney is not trained to “hand hold” a client through a divorce. A divorce coach is a support person who fills in the gaps. The coach explains the legal process in a patient manner and helps the client understand the backroom subtleties of how settlements come together.

A divorce coach is an educator. A divorce coach guides clients in how to calm their emotions and focus on workable solutions. Co-parent coaching can transform a parental dynamic from “high conflict” to “cooperative.” A co-parent coach trains parents in specific skills that deescalate conflict, improve communication, and build trust. Then, the parents practice new skills and behavior while being accountable to their coach.

As you may know from your personal experience, a divorce is messy. A couple has to split up everything in their life – their house, money, children, pets, and all of their stuff. A romantic break-up ignites a roller coaster of emotions – betrayal, anger, disillusionment, second-guessing, and waves of sadness.

Divorce coaches are experts in assisting clients manage and resolve their emotional challenges so that they can objectively design a successful divorce settlement. A divorce coach can work with both spouses in a neutral and impartial manner. The coach’s focus is on redesigning the dynamics of the relationship and assisting the couple move forward in a positive manner. Considering the trend toward shared parenting plans, co-parent coaching can assist a couple design a new and healthier co-parenting relationship.

Divorce coaching promotes the collaborative practice of family law. Having a divorce coach as a team player in a collaborative law process ensures that settlement meetings are successful and not derailed by emotions. In a collaborative law model, the divorce coach meets one on one with clients prior to settlement meetings and assists them in preparing emotionally and realistically for

*ELIZABETH A. DALTON is the owner of Affinity Mediation & Coaching, LLC, which provides mediation, divorce coaching, co-parent coaching, and kids coaching services throughout the state of Utah.*



settlement negotiations. During settlement meetings, the divorce coach assists the clients in remaining calm so that they and their attorneys can negotiate efficiently.

A divorce coach is also helpful in providing “client management” in traditional litigation. In this manner, a divorce coach becomes a trusted “sounding board” to whom the client may vent. The coach provides emotional support and infuses realistic expectations during protracted litigation. In this context, the divorce coach rather than the attorney is the one who deals with the frantic texts and phone calls when family conflict inevitably arises.

Sometimes, a divorce coach ends up facilitating a marriage reconciliation. When a couple starts practicing new relationship skills, their paradigm shifts. An experienced divorce coach candidly educates clients on the realities of divorce. When a couple peers over the metaphorical cliff of divorce, sometimes they get “scared straight” and suddenly find new motivation to salvage their marriage. In these circumstances, the possibility of rescuing a couple’s marriage becomes real despite previous unsuccessful efforts in marriage counseling.

If a couple is thinking about hiring a divorce coach, here are the areas that coaching is best suited for:

### Pre-Divorce Planning

Many clients contact divorce coaches before they seek formal legal advice. Clients use divorce coaches to deescalate conflict and assist them to sort through their emotions and to define their goals. Divorce coaches can help clients design a structured separation plan. A coach assists a client to calm down and not panic.

### Hand-Holding

Divorce clients will lean on family and friends but often find that their supporters push them to be adversarial or vindictive. A divorce coach is a “thinking partner” who is willing to patiently walk alongside their clients as they brainstorm and consider possible resolutions. Coaching is not mental health therapy but guidance that is psychoeducational in nature.

### Organizing

In complex cases, a divorce coach is invaluable in assisting clients organize their financial affairs. Certified divorce planners help clients analyze fair approaches to alimony, property settlements, and mutually advantageous tax planning. Financial coaches educate clients about budgeting. Divorce coaches often collaborate with estate planning attorneys who assist clients redesign their estate planning

and asset protection strategies in view of their divorce settlement.

### Supporting a Collaborative Settlement Process

If a couple has challenging legal issues, a divorce coach will recommend that they each retain an attorney trained in collaborative family law principles to assist them in resolving their issues. Their divorce coach will provide emotional support during a collaborative settlement process. A divorce coach typically attends all settlement meetings and provides coaching during the process. Because the cost of a divorce coach averages between \$100–\$200 per hour, venting to a divorce coach about one’s frustrations and concerns is more cost effective than venting to an attorney.

### Parent Coordination

Co-parent coaches believe that empathy is a teachable skill. They specialize in assisting parents to learn empathy for each other and their children. They teach co-parents how to communicate and problem solve. They assist in designing a detailed parenting plan or modification that is realistic and workable in meeting the needs and best interests of the children.

### Kids’ Coaching

Parents going through a divorce are often distracted by their emotions and experience difficulty focusing on the needs of their children. A kids’ coach is a specialized mental health professional, family educator, or coach who provides mentorship and education to children as they learn how to navigate the challenges of a parental separation or a divorce. A kids’ coach provides valuable feedback and parent education to both parents.

Divorce coaching emerged in the 2000s after the wave of life coaches emerged on the scene in the 1990s. Nevertheless, divorce coaching is still in its infancy as a profession. There is a spectrum of divorce coaches with varying backgrounds, ranging from those who have simply recovered from their own divorces to professionals who are certified and trained. It is important for clients to investigate the training and experience of a potential divorce coach and feel comfortable with their coach’s background.

Divorce coaching provides clients the guidance and resources to meet many critical needs along their divorce journey. Divorce coaching is about creating an emotionally safe, supportive, non-judgmental, and educational experience for clients. It significantly expedites the settlement process by efficiently addressing and resolving emotional barriers. A family law attorney is wise to use the new resource of a divorce and co-parent coach to expedite the resolution of divorce and paternity cases.



## *Is the Practice of Obtaining Furloughs via Court Order Illegal?*

by Sean Brian

Back in law school, Professor Troy Booher taught us: “To maximize the chances of getting what you want from the judges, you need to tell them what you want, convince them that doing what you ask for is the right thing to do, and then provide an acceptable legal path for doing it.” My experience as a law clerk in the Seventh District Court has confirmed this advice again and again. Recently, one judge asked me to look into the “legal path” to grant a pro se request for a medical furlough from the county jail. I found that judges throughout the state grant these kinds of furloughs as a matter of standard practice, but struggled to find any legal basis for doing so. Indeed, the sample of requests I was able to find cited no law at all.

In general, the court loses subject matter jurisdiction over a case after a valid sentence and final judgment is entered. *State v. Rodrigues*, 2009 UT 62, ¶ 13, 218 P.3d 610. The exceptions are (1) where the judgment or sentence is not valid and is therefore subject to correction at any time, Utah R. Crim. P. 22(e); (2) through a petition under Post-Conviction Remedies Act, Utah R. Civ. P. 65C; and (3) through a motion for extraordinary relief after all other plain, speedy, and adequate remedies are exhausted, *Id.* R. 65B.

In the context of a furlough, the sentence is admittedly valid, so a correction under Rule 22(e) and a petition under the Post-Conviction Remedies Act are ruled out. If an inmate were to argue that the incarceration coupled with the medical issue constitutes a wrongful restraint on personal liberty under the Utah Constitution’s Unnecessary Rigor Clause, a court might permissibly grant a furlough under Rule 65B. *See* Utah Const. art. I, § 9 (“Persons arrested or imprisoned shall not be treated with unnecessary rigor.”); *Dexter v. Bosko*, 2008 UT 29, ¶ 6, 184 P.3d 592. However, the court would first have to find that there is no other “plain, speedy and adequate remedy.” Utah R. Civ. P. 65B. That finding is likely precluded because two statutes provide an alternative means through which an inmate can first seek relief.

Utah Code section 77-19-3 provides that “the custodial authority at the jail may release an inmate...in accordance with the release policy of the facility...during those hours which are reasonable and necessary to accomplish any of the purposes in Subsection (2).” Utah Code Ann. § 77-19-3(1)–(2). Among the items listed in Subsection (2) are employment, education, and medical treatment. *Id.* § 77-19-3(2).

Utah Code section 64-13-14.5 gives similar authority to the Department of Corrections in the context of the state prison: “The department may extend the limits of the place of confinement of an inmate when, as established by department policies and procedures, there is cause to believe the inmate will honor the trust, by authorizing the inmate under prescribed conditions.” Utah Code Ann. § 64-13-14.5(1). The department may allow an inmate “to leave temporarily for purposes specified by department policies and procedures to visit specifically designated places for a period not to exceed 30 days.” *Id.*

These two statutes allocate the power to grant or deny a furlough to the authority operating the facility and not the courts. A judge’s decision to grant a furlough therefore appears to be judicial exercise of a power that has been allocated to the executive branch. However, I was unable to find any jail with a corresponding policy. In response to a Government Records Access and Management Act (GRAMA) request, the Davis County Jail stated, “The Davis County Jail does not deny or grant furloughs. Furloughs are the responsibility of the Courts and

*SEAN BRIAN is a prosecutor at the Carbon County Attorney’s Office.*



Judges, we at the Davis County Jail only carry out court orders.” Email from Lisa Eggett, Records Clerk, Davis County Jail, to author (Feb. 29, 2016). Utah County likewise reported that it does not have a furlough policy and cited security concerns. Email from Cort Griffin, Deputy Utah County Attorney, to author (Feb. 25, 2016). It did note, however, that it allows special releases on an individual basis with a court order. *Id.* Salt Lake County’s policy manual C04.03.01 states, “Prisoners will be processed and released from custody...6. Pursuant to court order.”

After an inmate’s request to the supervising authority is denied, Utah Rule of Civil Procedure 65B appears to offer two possible avenues for relief. The lack of a jail furlough policy or denial of the inmate’s request allows the inmate to argue that the “no other plain, speedy, and adequate remedy” requirement is met. Utah R. Civ. P. 65B(a). Under subsection (b) an inmate could argue that the denial of a furlough rises to the level of a “wrongful restraint on personal liberty,” likely through the Utah Constitution’s Unnecessary Rigor Clause. *Id.* R. 65B(b). This imposes a heavy burden when compared to the relatively permissive language of the furlough statutes. It appears that the legislature intended the furlough process to be far more simple and accessible.

A motion under subsection (d) involves a lower burden but would only allow the court to “direct the exercise of discretionary action” by requiring the supervising authority to consider release under the statute – it would not allow the court to “direct the exercise of judgment or discretion in a particular way” by ordering the supervising authority to grant the release. *Rice v. Utah Sec. Div.*, 2004 UT App 215, ¶ 7, 95 P.3d 1169. So, while perhaps more viable than subsection (b), subsection (d) is still unlikely to provide a means to secure the furlough and involves a far more convoluted and expensive process than the legislature appears to have intended.

One way to resolve this issue is through legislative ratification of the current practice. Replacing Utah Code section 77-19-3 and Utah Code section 64-13-14 with a statute allocating the authority to grant furloughs to the sentencing judge would solve the problem. Until then, defense attorneys might seek to encourage jails to adopt a furlough policy that meets the statute or, perhaps as a last resort, file motions under Rule 65B(d) to eventually compel their creation.



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## *State v. Lowther*, 2017 UT 34 – *Shickles*, Rule 403, and the Doctrine of Chances

by Deborah L. Bulkeley

### Introduction

The Utah Supreme Court recently clarified its approach to determining the admissibility of other acts evidence under Rule 404(b) of the Utah Rules of Evidence, using the doctrine of chances as adopted by *State v. Verde*, 2012 UT 60, 296 P.3d 673.

*State v. Lowther*'s key holdings are:

- The doctrine of chances is not limited to rebutting claims of fabrication. *State v. Lowther*, 2017 UT 34, ¶ 21.
- The doctrine of chances does not displace the *Shickles* factors, but Rule 403's plain language – not the *Shickles* factors – governs admissibility. *Id.*
- Rule 404(b) is neutral. It “does not carry with it an attendant presumption of either admissibility or inadmissibility.” *Id.* ¶ 30 n.40.

### Background

Rule 404(b) is a rule of evidence with many layers. The concept is simple enough: “Evidence of a crime, wrong, or other act is not admissible to prove a person’s character,” but it may be admissible for a non-character purpose “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” See Utah R. Evid. 404(b)(1)–(2). Yet, the case law defining when evidence of other acts falls into the non-character category is far from simple. Perhaps the reason for this is the nature of other acts evidence itself. “Evidence of prior misconduct often presents a jury with both a proper and an improper inference, and it won’t always be easy for the court to differentiate the two inferences or to limit the impact of the evidence to the purpose permitted under the rule.” *Verde*, 2012 UT 60, ¶ 16.

For years, the fundamental test for whether other acts evidence passed the final admissibility hurdle of the Rule 403 balancing

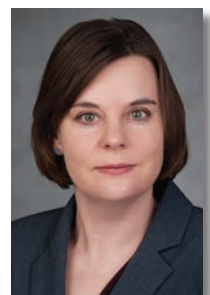
test was defined by *State v. Shickles*, 760 P.2d 291 (Utah 1988). The *Shickles* court recognized that the “general rule prohibiting evidence that a defendant committed other crimes was established, not because that evidence is logically irrelevant, but because it tends to skew or corrupt the accuracy of the fact-finding process.” *Id.* at 295. Thus, the *Shickles* court recognized that even though evidence may be relevant and offered for a non-character purpose, it must also pass the Rule 403 balancing test. *Id.* It laid out what came to be known as the *Shickles* factors to make that determination:

[T]he strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

*Id.* at 295–96 (citing E. Clearly, *McCormick on Evidence*, § 190, at 565 (3d ed. 1984)).

The court later clarified that before reaching the Rule 403 balancing using the *Shickles* factors, a court must make “a threshold determination of whether proffered evidence of prior misconduct is aimed at proper or improper purposes.” See *Verde*, 2012 UT 60, ¶ 17 (citing *State v. Nelson-Waggoner*, 2000 UT 59, ¶¶ 18–20, 6 P.3d 1120).

DEBORAH L. BULKELEY is an attorney at Carr | Woodall, PLLC. Her practice focuses primarily on appeals, and also includes estate planning, probate, and estate litigation.





However, in recent years, the court has shifted away from “the limited list of considerations outlined in *Shickles*,” holding that courts are instead “bound by the text of rule 403.” *State v. Lucero*, 2014 UT 15, ¶ 32, 328 P.3d 841; *accord State v. Cutler*, 2015 UT 95, ¶ 2, 367 P.3d 981 (“[T]he governing legal standard for evaluating whether evidence satisfies rule 403 is the plain language of the rule, nothing more and nothing less.”).

### The Doctrine of Chances

Another wrinkle in Rule 404(b) analysis is the doctrine of chances, which “rests on the objective improbability of the same rare misfortune befalling one individual over and over.” *State v. Lowther*, 2017 UT 34, ¶ 14 (quoting *State v. Verde*, 2012 UT 60, ¶ 47, 296 P.3d 673). Evidence of prior misconduct that falls into a pattern “of prior similar tragedies or accusations; [] an intermediate inference that the chance of multiple similar occurrences arising by coincidence is improbable; and [] a conclusion that one or some of the occurrences were not accidents or false accusations” “may tend to prove that the defendant more likely played a role in the events at issue than that the events occurred coincidentally.” *Verde*, 2012 UT 60, ¶¶ 50–51.

The *Verde* court reversed Verde’s conviction for sexual abuse of a child but in so doing also opened the door for the trial court to admit the testimony of Verde’s alleged former victims to rebut Verde’s claim that the charges against him were fabricated. *See id.* ¶ 63. In so doing, *Verde* outlined four “foundational requirements” that must be met before evidence could be admitted under the doctrine of chances:

1. Materiality – The uncharged misconduct evidence must relate to an issue “in bona fide dispute.” *Id.* ¶ 57 (emphasis omitted) (citation and internal quotation marks omitted).
2. Similarity – The uncharged misconduct “must be roughly similar to the charged crime.” *Id.* ¶ 58 (emphasis omitted) (citation and internal quotation marks omitted).
3. Independence – Each accusation must be independent of the others. *See id.* ¶ 60.
4. Frequency – The defendant must be accused of the crime or suffer an unusual loss “more frequently than the typical person” would endure accidentally. *Id.* ¶ 61 (citation and internal quotation marks omitted).

*Verde*, however, also left some unanswered questions as to the

continuing relevance of the *Shickles* factors and if the doctrine of chances could apply more broadly than rebutting charges of fabrication.

*Lowther* clarifies the roles of the doctrine of chances and the *Shickles* factors.

Lowther was charged with rape or object rape in incidents involving multiple women. The charges were severed, and, in advance of the first trial, the State sought to introduce evidence of the related incidents under rule 404(b) using the doctrine of chances to show lack of consent. *Lowther*, 2017 UT 34, ¶ 13. The trial court admitted the evidence, first ruling that the doctrine of chances was a proper, non-character purpose, then applying the *Shickles* factors to conduct the Rule 403 balancing test. *Id.* ¶ 15. The court of appeals held that the trial court erred in applying the *Shickles* factors because the doctrine of chances supplanted the *Shickles* factors. *See id.* ¶ 16.

The supreme court first clarified that although the other acts evidence in *Verde* rebutted charges of fabrication, the doctrine of chances applies to other contexts as well. It then went on to clarify that the four *Verde* foundational requirements must be met *before* proceeding to a Rule 403 analysis, not as part of the Rule 403 analysis. The court described the *Verde* “foundational requirements” as a tool to determine “whether the evidence is being offered for purposes of a proper, non-character statistical inference” and as a “preliminary measure of the probative value of the evidence.” *Id.* ¶ 39. The court then restated its move away from *Shickles* when determining admissibility under Rule 403, noting that “district courts are bound by the language of rule 403 rather than any set of factors or elements.” *Id.* ¶ 41. The supreme court ruled that the trial court erred in its mechanical application of the *Shickles* factors and that it should have simply weighed the probative value of the evidence against the risk for unfair prejudice under the plain language of Rule 403, which requires the court to weigh the danger of “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting of time, or needlessly presenting cumulative evidence.” *Id.* ¶¶ 40–41.

Where does that leave practitioners? *Lowther* clarifies that the doctrine of chances can be used to demonstrate a proper, non-character purpose for admitting other acts evidence. However, *Lowther* and other recent decisions mean that trial courts should consider the *Shickles* factors only when relevant in the context of the plain language of Rule 403, along with any other relevant factors.

# Securing Communication of Protected Information in an Electronic World

by Keith A. Call

In the last installment of *Focus on Ethics and Civility*, we learned about a client that mistakenly waived the attorney-client privilege by sharing confidential information over the internet without password protection. See *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, 2017 WL 1041600 (W.D. Va. Feb. 9, 2017). This is a wakeup call in a world where lawyers and clients communicate and share information predominantly through electronic means.

On May 22, 2017, the American Bar Association issued a new opinion on a lawyer's duty to protect confidential information in an electronic world. See ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 477R (2017). The opinion provides important guidance on how lawyers can better protect client information.

### Summary of ABA Opinion

The opinion provides its own succinct summary, as follows:

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct *where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access*. However, *a lawyer may be required to take special security precautions* to protect against inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or *when the nature of the information requires a higher degree of security*.

*Id.* at 1 (emphasis added).

### Application

The ABA Opinion reminds lawyers that the duty of competent representation includes an obligation to keep abreast of the benefits and risks of using technology. As technology changes, including changes in use of technology and changes in security

risks associated with technology, lawyers have to continually educate themselves, or obtain the help of someone else who is keeping up with the changes.

For the most part, the ABA Ethics Committee rejected bright-line rules for when and how it is okay for lawyers to electronically communicate and share information. Instead, the committee's "test" relies on several factors delicately balanced on a series of sliding scales while swimming in a murky, swirling pool of "reasonableness." This lack of precision results in a greater need for lawyers to study and understand the risks of using technology.

For example, the Ethics Committee lists the following, non-exclusive factors as relevant to determining whether a lawyer acts ethically when transmitting electronic information:

- the sensitivity of the information;
- the likelihood of disclosure if additional safeguards are not employed;
- the cost of employing additional safeguards;
- the difficulty of implementing the safeguards; or
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

See ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 477R, p. 45 (2017).

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



The opinion suggests that a lawyer may generally use unencrypted email for routine, run-of-the-mill communications. A “best practice” is to mark confidential communications as “privileged and confidential.” This will alert any unintended recipients of your claim of confidentiality and will trigger a recipient lawyer’s ethical duty to treat the information as confidential until the issue is resolved. *See* Utah R. Prof’l Conduct 4.4(b).

If the information is highly confidential or sensitive (for example, private health information, personal identifiers, or valuable trade secrets), the lawyer may be obligated to take more extreme measures before communicating the information. This may include such tools as encryption, passwords (especially for email attachments), secure Wi-Fi, virtual private networks (VPN), secure internet portals, and so forth. (If you don’t know what these are, it may be a symptom of your need to become more educated or to get help.)

The Ethics Committee also highlighted the importance of discussing the appropriate use of technology with others. First and foremost, lawyers should discuss the risks of technology with their clients, taking the lead to assure that both client and lawyer use reasonably safe methods to communicate. Supervisory and managerial lawyers have a duty to train subordinate lawyers and staff. Lawyers should also take reasonable measures to assure that outside vendors, such as document processors, court reporters, and others understand how and agree to protect sensitive information.

### Law Firms Are Particularly Vulnerable

According to the opinion, the bad guy hackers are focusing more and more on law firms. That is because:

- (1) they obtain, store and use highly sensitive information about their clients while at times utilizing safeguards to shield that information that may be inferior to those deployed by the client, and
- (2) the information in their possession is more likely to be of interest to a hacker and likely less voluminous than that held by the client.

*See* ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 477R, p. 2 (2017).

The question is not whether you and your law firm’s IT systems will be attacked. The questions are when and whether your security protocols and practices will protect you and your client.

### Do Yourself a Favor: Read the ABA Opinion

Sometimes I think I’m a fool to keep writing these articles. Like when I get confronted with them in practice (and I admit sometimes legitimately), cross-examined with them, or have them cited in opposing briefs. I keep doing it anyway because I hope it will help elevate my own practice as well as yours. *See* “Do It Anyway” poem reportedly written on the wall of Mother Teresa’s home for children in Calcutta, *available at* [http://prayerfoundation.org/mother\\_teresa\\_do\\_it\\_anyway.htm](http://prayerfoundation.org/mother_teresa_do_it_anyway.htm) (last visited July 31, 2017).

In short, I’ve tried to do you a favor by writing this article. Let me suggest a way you can do yourself another favor: *Read this ABA Opinion*. It is not that long, it is well written, and it will educate you on a very real and serious danger. ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 477R (2017), *available at* [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_formal\\_opinion\\_477.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_477.authcheckdam.pdf).

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



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## 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.

### **State v. Robertson**

**2017 UT 27 (May 15, 2017)**

Overruling a prior interpretation of Utah Code section 76-1-404, the court formally abandoned the “dual sovereignty doctrine,” which had permitted subsequent criminal prosecutions by different sovereigns for the same offense. In doing so, the court determined that the *Blockburger-Sosa* test was the appropriate standard for determining whether section 76-1-404 operated as a bar to subsequent prosecution. The court then held that 76-1-404 barred a state prosecution for sexual exploitation of a minor where the federal government had already convicted the defendant based on the same offense and same conduct.

### **2010-1 RADC/CADC Venture, LLC v. Dos Lagos, LLC**

**2017 UT 29 (June 2, 2017)**

The court here affirmed a decision allowing the joinder of a co-holder of a promissory note after the statute of limitations had expired because there was identity of interest between the plaintiffs and the debtor did not suffer any prejudice. Although the court recognized that privity of contract is not alone sufficient to create identity of interest, here, where RADC and Utah First were co-holders of a single note and the action was to recover the entire amount on the note, there was sufficient identity of interest for relation back.

### **State v. Outzen**

**2017 UT 30 (June 7, 2017)**

The court held that “[a] person violates Utah Code section 41-6a-517 if he or she operates or is in actual physical control of a motor vehicle with any measurable amount or metabolite of a controlled substance in his or her body.” *Id.* ¶ 24. Section

41-6a-517 does not require an additional finding of impairment, the statute does not create a status offense that violates the Eighth and Fourteenth Amendments of the United States Constitution, and the statute does not violate the Utah Constitution’s uniform operation of laws provision. *Id.*

### **Eagle Mountain City v. Parsons, Kinghorn & Harris, P.C.**

**2017 UT 31 (June 7, 2017)**

The Utah Supreme Court held that there is a “strong presumption that legal malpractice claims are voluntarily assignable.” *Id.* ¶ 3. It explained that the public policy rationales relied on in other jurisdictions to support non-assignability are largely inapplicable or are not persuasive in this state given developments to Utah’s Rules of Civil Procedure and Rules of Professional Conduct. The court did not foreclose the possibility that certain assignments of malpractice claims would present such public policy concerns that they would not be valid. However, this case did not present any circumstances to rebut the strong presumption in favor of validity.

### **Butt v. State**

**2017 UT 33 (June 19, 2017)**

In this appeal of denial of a post-conviction petition challenging a conviction for dealing in materials harmful to minors, the supreme court held the defendant had been deprived of effective assistance of counsel where his attorney failed to raise a First Amendment defense. Discussing the First Amendment at length, the supreme court concluded that the drawings sent to defendant’s daughter were not obscene because the drawings were not aimed at appealing to a prurient interest in sex of a minor.

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

***State v. Mooers*****2017 UT 36 (June 27, 2017)**

The Utah Supreme Court held that an order of complete restitution as part of a plea in abeyance was a final, appealable order and the court of appeals had jurisdiction to hear such an appeal. The court emphasized the difference between a complete order of restitution and court-ordered restitution, the former being the entire amount necessary for complete restitution and the latter taking into account the defendant's circumstances and ability to pay. The supreme court stated that a court must make separate determinations for the two kinds of restitution and that to merge them into one order constitutes error.

***Veysey v. Nelson*****2017 UT App 77, 397 P.3d 846 (May 4, 2017)**

On remand from the court's prior ruling in *Veysey v. Veysey*, 2014 UT App 264, 339 P.3d 131, the district court held that laches barred the majority of the mother's claim for reimbursement of daycare expenses even though the statute of limitations had not yet run.

***Phillips v. Dep't of Commerce*****2017 UT App 84, 397 P.3d 863 (May 18, 2017)**

The court set aside a civil penalty of \$413,750 assessed against the petitioner for securities fraud and returned the case to the agency to reconsider the fine amount. The court held that although the Utah Securities Commission had authority to impose a fine, it could not impose a fine plus targeted assessments for other issues (in this case, investor losses and investigation costs).

***Williams v. Anderson*****2017 UT App 91 (June 2, 2017)**

The court of appeals held the district court erred in applying Utah Rule of Civil Procedure 26(a)(1)(C) to exclude evidence of damages at trial. The court concluded that the initial disclosure provided adequate notice of plaintiff's method for computing damages because the disclosure indicated that plaintiff was entitled to 30% of the price of a company based upon his ownership interest.



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**Deborah Bulkeley** is an experienced appellate attorney who served a judicial clerkship for the Hon. Carolyn B. McHugh at the Utah Court of Appeals and worked for the Criminal Appeals Division of the Utah Attorney General's Office. Deborah can handle your appeals or act as a consultant to help guide you through the process.



**Blithe Cravens** is licensed in California and Kansas, (Utah License Pending). She brings nearly two decades of jury trial and litigation experience as a former prosecutor for the Los Angeles DA's Office and Senior Trial Counsel for the State Bar of California. Her practice focuses on felonies, attorney discipline proceedings & DOPL professional licensing issues.

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***Ostler v. Ret. Bd. & Salt Lake Cmty. Coll.*****2017 UT App 96 (June 15, 2017)**

In this petition for judicial review of the Retirement Board's order denying the petitioner retirement benefits, the Utah Court of Appeals interpreted the Utah Retirement System forfeiture statute, Utah Code Section 49-11-501. It held that because "service credit requires both types of contribution, all of the service credit earned during the period of member contributions is 'based on' the member contributions." *Id.* ¶ 19. Accordingly, the Retirement Board correctly held that by withdrawing all of his member contributions, the petitioner forfeited all of his service credits earned during that employment.

***State v. Reigelsperger*****2017 UT App 101 (June 22, 2017)**

A criminal suspect involuntarily committed to a mental health facility by the state for reasons unrelated to the investigation is not in custody for *Miranda* purposes because a reasonable suspect would feel free to end the interrogation, even if he or she could not leave the facility, and the suspect was not subject to coercive pressures usually present when officers take someone into custody.

***Jones v. Needham*****856 F.3d 1284 (10th Cir. May 12, 2017)**

In this discrimination case, the employer argued that employee failed to exhaust administrative remedies because the complaint contained a quid pro quo harassment claim that was absent from the charge of discrimination. The Tenth Circuit held that the discrimination charge satisfied the exhaustion requirement where it placed the employer on notice of a claim based on sex-based remarks and discrimination, even though it did not specifically mention a quid pro quo harassment.

***United States v. Pauler*****857 F.3d 1073 (10th Cir. May 23, 2017)**

The defendant was convicted of violating 18 U.S.C. § 922(g)(9) by possessing a firearm after having previously been convicted of a misdemeanor crime for domestic violence. The Tenth Circuit held that a misdemeanor violation of a municipal ordinance did not qualify as a "misdemeanor under . . . State . . . law" for the purposes of applying the statute, and accordingly reversed and instructed the district court to vacate the defendant's conviction and sentence and to dismiss the indictment. *Id.* at 1074.

***Pioneer Centres Holding Co. Emp. Stock Ownership******Plan & Trust v. Alerus Fin., N.A.*****858 F.3d 1324 (10th Cir. June 5, 2017)**

The Tenth Circuit held that the plaintiffs have the burden to prove losses to a retirement plan resulting from an alleged breach of fiduciary duties under ERISA and rejected the argument that a burden-shifting framework should be applied. Accordingly, the court affirmed summary judgment granted to the defendants because plaintiffs failed to present non-speculative evidence of losses to the plan.

***Safe Sts Alliance v. Hickenlooper*****859 F.3d 865 (10th Cir. June 7, 2017)**

In resolving two separate actions involving challenges to Amendment 64 of the Colorado Constitution (which legalized recreational use of marijuana), the Tenth Circuit did not reach the question of whether Amendment 64 was preempted by the federal Controlled Substances Act (CSA), stating that private landowners had no viable cause of action to privately enforce the CSA's alleged preemption.

***Ghailani v. Sessions*****859 F.3d 1295 (10th Cir. June 21, 2017)**

The plaintiff prisoner was forbidden from participating in group prayer with other inmates due to prior terrorist activity. The Tenth Circuit held that the government cannot rely on special administrative measures to demonstrate the state's compelling interest required by Religious Freedom and Restoration Act because the furtherance of a compelling governmental interest is an affirmative defense and the burden is placed on the government to demonstrate the interest.

***Marlow v. New Food Guy, Inc.*****861 F.3d 1157 (10th Cir. June 30, 2017)**

The plaintiff, who was paid above minimum wage, argued that her employer was required to turn over to her a share of all tips paid by catering customers. In support of this argument, she relied on a Department of Labor (the DOL) regulation purporting to interpret the tip-credit provision of the FLSA. The Tenth Circuit held that the DOL lacked authority to promulgate the regulation because there was no "gap" in the statute to fill.





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## *A Primer on Arbitration Preparation*

*by Ralph A. Cantafio*

Arbitration occurs because of numerous circumstances; sometimes arbitration is the result of a contract term requiring arbitration, other times it is by consent. While many attorneys and litigants are familiar with how the arbitration process works in a general fashion, many parties and their lawyers possess only a dim understanding of how arbitration differs from court proceedings. The arbitration process is often further confusing because certain myths exist pertaining to the arbitration process. These myths include the notion that arbitration is typically less expensive or that arbitration can be completed more quickly than litigation. These myths, while sometimes true, complicate a meaningful understanding of the arbitration process.

The objective of this article is to assist lawyers and parties to better understand how the arbitration process works. This article is a very general outline of that process focusing on pre-arbitration hearing matters. It is not meant to address the entirety of all the issues that might arise when a claim is subject to arbitration; instead it is intended to provide background so that participants can better prepare themselves for arbitration, increasing the likelihood of a better result.

Special emphasis in this article at times is focused on arbitration involving the oil and gas industry. However, the general sentiment set forth herein is typically true of most any arbitration. Thus, although this article makes occasional reference to the oil and gas industry, the general insights set forth herein can be applied universally.

This article begins with a brief discussion pertaining to how issues come to be resolved by arbitration. Often there is a term in a controlling contract that mandates arbitration. When arbitration is called for in a contract, as is frequently the case in a commercial context, it is important to review all the salient contracts to understand the underlying terms of arbitration. Like other terms and conditions of any contract, should no one choose to enforce an arbitration provision, that unenforced provision can usually be ignored. Hence, even if a contract calls for arbitration, any party not inclined to move forward with arbitration should discuss with opposing counsel the option of waiving such a provision. Beware, even if there is consent among the parties to waive an arbitration clause, there is possibility that upon the filing of a complaint for breach of contract or other cause of action in a

court of competent jurisdiction, a presiding judge, independent of the preferences of the parties or their counsel, can refuse to allow judicial proceedings to move forward judicially. Terminology used in arbitration is also important. The party seeking relief is typically referred to as the claimant. The dispute is called a claim. The relief sought is referred to as a demand.

An initial issue involving the arbitration process involves what rules will be invoked. It is an unfortunate reality that many arbitration provisions as such exist in a contract fail to designate precisely what rules will be used in arbitration. While there are many different sets of rules of arbitration, three commonly utilized sets of rules include those of the American Arbitration Association (AAA), the Judicial Arbitration and Mediation Services (JAMS), and the Arbitration Rules of the London Court of International Arbitration (LCIA). One must be careful when designating AAA rules in a contract because several different sets of arbitration rules are used by the AAA. Common sets of rules relied upon in the positions taken in this article include AAA Commercial Arbitration Rules, JAMS Comprehensive Arbitration Rules and Procedures, and the LCIA.

It is important to become familiar with the specific rules being used in your case. If there is no designation of rules in a contract or even if the parties informally agree to arbitrate, it will be necessary for counsel to come to a resolution involving precisely what rules will be used. If the parties and their counsel cannot agree on what rules to use, a court can involve itself for a limited purpose of designating precisely which rules will be used. Unfortunately, involving a court on a limited basis to designate arbitration rules – or many of the other variables involving arbitration – can be expensive and time-consuming.

*RALPH CANTAFIO is the managing shareholder of Cantafio Hammond, P.C., a Colorado law firm. His practice emphasizes oil and gas law; civil litigation, including construction, corporate and commercial law; natural resources mediation and arbitration; and commercial transactions.*



Once a set of rules has been designated, these rules will outline exactly what must be set forth as to the substance of the claim, where the arbitration will be conducted, how an arbitrator or arbitrators will be selected, and the extent, if at all, that the rules of civil procedure (particularly involving discovery) and the rules of evidence will be utilized. Where appropriate, it is important to also become familiar with state statutes addressing the arbitration process. These statutes may establish how to proceed where a contract is silent or ambiguous as to how to proceed in cases where arbitration is called for, but insufficient specifics are provided. It is important to be aware of the laws of any given state and, as appropriate, federal statutes as well.

Even those familiar with the arbitration process are well advised to review or even re-review the rules in their entirety upon taking on an arbitration representation. As with any type of adversary proceeding, attention to detail involving deadlines at the inception of a case is paramount to increasing the likelihood of a better result. As with litigation, calendar deadlines make sure there is adequate notice with these periods. Understanding how the rules might affect not only procedure, but substance, is crucial to good representation of a client. For example, there can be significant limitations pertaining to how and when counterclaims can be asserted or amended. There can be significant limitations pertaining to objecting to the selection of a particular arbitrator or the number of arbitrators. Arbitration sometimes gets stereotyped as having fewer or even more lenient rules. While the notion that arbitration tends to be more informal than litigation is generally true, this generality does not mean that there are no enforceable rules involving arbitration. In fact, there are numerous rules. Understanding and applying these rules is critical to a better result.

Selection of the arbitrators can be addressed informally among counsel where there is no arbitration agreement and arbitration is being pursued voluntarily. Even where there is a specific term or condition of a contract establishing the rules of arbitration to be used, there can be poor definition as to how the arbitrator or arbitrators are to be selected. For instance, the AAA rules, absent other contractual terms, mandate a three-person arbitration panel if claims involve an amount greater than \$1,000,000 or a single arbitrator if a claim is less than that threshold amount. In contradistinction, JAMS call for a single arbitrator unless the parties agree otherwise. The LCIA provides significant latitude in deciding the number of arbitrators in a case. This is a good example of why familiarity with your specific rules is necessary.

Even under circumstances where the number of arbitrators is either designated or agreed upon, there may still be a question as to how to select an arbitrator. Again, the first area of analysis involves that as stated in the contract. Should a contract not provide any guidance, it is then necessary to review other governing rules,

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statutes, or legal authority. Although not always the case, it is very common that the arbitrator or arbitrators will be selected from a list of potential candidates that designates who might act as an arbitrator or a member of a panel of arbitrators. Unlike picking the members of your kickball team during elementary school gym class, the process of selecting an arbitrator is often one of exclusion. Like selecting jurors, potential arbitrators are typically struck and not selected. The parties typically do not, absent agreement, pick the arbitrator, but instead strike candidates from a list of potential arbitrators deemed to be unacceptable.

It is important to emphasize that as a matter of experience or training, an arbitrator need not be an attorney or a retired judge. Particularly in disputes involving the oil and gas industry, or other subject matter such as litigation, technical, or scientific fields, it is useful for an arbitrator to have an understanding of not only the law but underlying industry practices and technological issues.

Do not underestimate the significance or the ultimate outcome of an arbitration or the identity of the arbitrator or arbitrators. This sentiment is especially significant because any appeal of an arbitration award is highly unlikely. Unlike litigation where there is almost always an appeal of right, the grounds upon which to appeal an arbitration award are significantly narrow.

The characteristics of more acceptable arbitrators can be summarized as experience involving the factual and legal issues presented without any personal or industry bias. Particularly in matters involving the oil and gas industry, experience in a particular section of the industry, whether upstream, midstream, or downstream, can be of significance. Accordingly, when moving through the process of striking potential arbitrators it is a good idea to set aside adequate time well in advance of deadlines to consider the potential strengths and weaknesses of each arbitrator being considered. Due diligence in this day and age includes an internet investigation by using Google or other search engines; telephoning other lawyers or professionals who may have had dealings with potential arbitrators; and checking appropriate websites, Facebook, and LinkedIn for information as to any lawyer or arbitrator in question.

After an arbitrator is selected, there is typically a phone conference involving the organization and administration of the arbitration proceedings. Sometimes these first meetings are referred to as preliminary hearings. However, these proceedings can also go by other names such as status conferences, scheduling conferences, etc. It is often the case that either the organization hosting the arbitration or the arbitrator himself or herself will provide, in advance, an agenda pertaining to the topics to be discussed at what are called preliminary hearings in this article.

Typically, topics addressed at preliminary hearings are limited

exclusively to that of a procedural nature. It is the goal of these preliminary hearings to establish a schedule for the entire case moving forward. Issues pertaining to discovery are often a subject of discussion. This conversation may include the type of discovery that is permitted, the breadth of such discovery, and deadlines. This preliminary hearing is also an opportunity to discuss whether the arbitrator, or arbitration panel, will be accepting motions and how they will be decided. Motions practice, as we shall touch upon, is somewhat discouraged in arbitration, although this topic alone merits an entire article on its own.

It is often the case that the arbitrator at a preliminary hearing will request a short overview of the case from counsel. This is not necessarily to be interpreted as an opportunity to argue the specifics of the case but is an exercise to generally familiarize the arbitrator or arbitrators with some of the case specifics. Remember, often at this early stage of the proceedings, all the arbitrator will have at his or her disposal is a copy of the claim. Between the limited substance of the claim and the answer, there can often be very little information available to the arbitrator at those early stages. Many claims are briefer than even the most basic of complaints filed in a court of law.

At a preliminary hearing, the arbitrator will frequently (but not always) work backward, beginning with the selection of a date for the actual arbitration hearing. As such, it is important at any preliminary hearing to have a copy not only of your own schedule, but a schedule of your client and important witnesses. This preliminary hearing is also a good opportunity to discuss with the arbitrator whether nontraditional forms of presentation of evidence will be received and how they will be analyzed. Especially with the use of Skype, WebEx, Go To Meeting, etc., the effective production of witnesses is much easier than in the past.

The presentation of facts at arbitration typically does not focus on the more technical issues envisioned by any rules of evidence. Rather, the benchmark as to the presentation of evidence at arbitration involves one of persuasiveness. Typically, the arbitrator will accept virtually all types of evidence in a case no matter how remote or even completely unsuitable, especially when compared to the acceptance of evidence for presentation at trial.

The preliminary hearing is also a good opportunity to discuss potential nontraditional methods of presentation of evidence. Typically, arbitrations are conducted consistent with generally accepted norms of trial. There is a party presenting a witness through direct examination, followed by cross-examination, redirect, and, depending upon the preference of the trier of fact, re-cross. However, arbitration affords unique presentation opportunities such as the simultaneous calling of expert witnesses. The calling of opposing expert witnesses simultaneously allows

competing evidence to be juxtaposed immediately. There are also opportunities for expert examination to be conducted not only by legal counsel, but also by the expert witnesses themselves. This approach allows each expert to cross-examine the other. While the purpose of this article is not to outline every creative approach to the presentation of expert information to the arbitrator, these nontraditional approaches are being considered and then addressed at the preliminary hearing. If nontraditional approaches are being considered, it is wise to discuss these approaches in advance of the preliminary hearing amongst counsel so that the parties can be prepared to discuss the topic in a meaningful fashion with the arbitrator or arbitrators at the preliminary hearing. Likewise, if unique facts exist, for example, those of complex or emerging technology, these topics ought to be discussed at the preliminary hearing as well. In addition, if a witness is experiencing physical problems, might be leaving the employ of a party, or might be absent from the jurisdiction for an excessive amount of time, these overarching logistical issues pertaining to not only the retention, but the presentation, of evidence ought to be addressed. This preliminary hearing is also a good time to discuss matters involving taking depositions. This is especially so where there are out-of-state witnesses. There should be discussion as to precisely how the parties might go about securing personal jurisdiction of these out-of-state witnesses so that a non-compliant witness can be brought to be deposed. Again, the process of securing the testimony of out-of-state witnesses, especially those who do not wish to participate, is worthy of its own article.

The preliminary hearing is also an opportunity to discuss precisely the type of award that is being requested of the arbitrator or arbitrators. A traditional award is basic in that it will merely

state the prevailing party and the amount of monetary damages awarded. It is not the purpose of this article to review the relative costs and benefits of a “simple” award as opposed to an award with more detail. Suffice to say, there are advantages and disadvantages to various approaches. For example, if the arbitration addresses a dispute as to a contractual term that will be used by the parties in the future, more description in an award may be of great assistance in assisting the parties in avoiding future disputes. There is also a form of award that uses a traditional organization of a court order where there is an identification of issues of fact, a discussion of law, and conclusions. Because the availability of appeal is so limited, it is often the case that participants do not want to incur the expense to have an arbitrator or arbitrators go through a detailed analysis. Irrespective, a discussion with the arbitrator or arbitrators as to the form of award is appropriate.

Because of the lower standards as to the presentation of evidence at arbitration and traditional notions that arbitration will significantly limit the utilization of discovery, it is necessary to work through discovery-related issues. To the extent depositions are allowed, there often may be either a limit on the number of depositions that can be scheduled by each party or the number of hours that can be spent taking a deposition. The use of written discovery, such as Interrogatories, Request for Production of Documents, and Requests for Admission, can be extremely limited, if not prohibited. Often, the exchange of discovery will be limited to that involving the parties.

Limitations as to the taking of depositions can be explained in part because of procedural difficulty in securing personal jurisdiction over third-party witnesses. Unlike a court of competent jurisdiction,

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an arbitrator alone has no real ability to enforce subpoenas. Yes, subpoenas can be served on virtually any witness. However, enforcing subpoenas issued by an arbitrator or legal counsel particularly on out-of-state witnesses can be problematic from an enforcement point of view. This complication is further exacerbated depending on whether the arbitration is being pursued pursuant to the Federal Arbitration Act or a private contract, not to mention the law in not only the state of the arbitration, but the state in which the deponent witness is found. The same jurisdictional and enforcement-related complications exist pertaining to the securing of written documents from non-parties. Suffice it to say, all of these topics individually are meritorious of their own articles. For the purposes of this article, keep in mind that the securing of testimony or written documents from third parties can be extremely complex in the context of arbitration — particularly across state lines.

There also may exist procedural and substantive issues pertaining to precisely who might be a party that is subject to an arbitration proceeding. It is necessary to keep in mind that arbitration tends to work better if there is a traditional aligning of parties, along the lines of Plaintiff and Defendant.

Arbitration procedure tends to focus on the arbitration hearing, not a myriad of motions to more finely define issues or eliminate claims. As a result, at any preliminary hearing, it is important to discuss what, if any, types of motions will be permitted. It is important to also discuss with the arbitrator or arbitrators the permitted length of any motions and not only the process of raising issues by motion, but responding to the same as well as the procedures leading to a ruling. Typically, motions to dismiss and motions for summary judgment are not tools utilized in arbitration.

Arbitration tends to be designed to ensure that a hearing is on the merits. Harkening back to the preliminary hearing, it is important to discuss how the arbitration hearing is to be conducted. Sometimes practices are assisted by checklists. It is often wise to discuss a broad number of topics such as: (1) Does the arbitrator want or require pre-hearing briefs, and if so, of what nature? (2) Will rules of evidence be applied, and, if so, how? (3) How are exhibits to be organized and presented? (For instance, does the arbitrator wish to have all the exhibits marked in advance of the hearing in light of the fact that virtually all of them will be “admitted” for consideration, or should there be another methodology to produce the same?) (4) Will there be opening statements, and, if so, what is the arbitrator looking for as a matter of content as well as how much time will be afforded to present the same? (5) Will the arbitrator put any restrictions on the amount of time afforded to each side to present its case? (6) How does the arbitrator wish to address matters involving the use of testimony by Skype, WebEx, videotape, etc.? (7) What type of equipment is necessary to present evidence (it

is becoming more common for entire cases to be reduced to presentation by flash drive so that the parties are merely opening files on their computer)? (8) Does the arbitrator intend to close the presentation of evidence at the end of the hearing or will he or she keep the evidence portion of the case open, and, if so, how long? (9) If there is a provision allowing for attorney fees and costs, how should this information be presented (for instance, should the issue of attorney fees be bifurcated so that the parties will not invest resources in expert witnesses or time until it is known that there is a prevailing party or who that might be)? (10) Can witnesses be presented out of order to take into account their schedules? (11) Does the arbitrator have a strict schedule pertaining to not only the beginning and end of the day, but the taking of mid-morning, lunch, and mid-afternoon breaks? (12) Is the arbitrator willing to hear matters during evening hours and weekends?

At the conclusion of the taking of evidence, there must be an award. We have discussed the various types of awards that can be issued. Yet, there are also issues of the timing of the award as well as whether there will be an opportunity for the parties to request the arbitrator to either revisit or revise that award after its publication. The latter topic is typically prescribed by rule. There ought to be discussion with the arbitrator as to how the award will be finalized so that in the unlikely event anyone attempts to appeal or, more likely, a party moves to enforce the arbitration award, an adequate record exists for a district court to act upon.

In summary, another checklist to increase the likelihood of a better arbitration result might help: (1) Make sure if the arbitration is being held pursuant to a contract that the contract that contains the arbitration provision is reviewed and understood. (2) To the extent that the parties either agree to a set of arbitration rules by contract or otherwise, it is incumbent to be knowledgeable as to those arbitration rules. (3) Make sure that any condition precedent pertaining to mediation has been satisfied prior to arbitration being sought. (4) Deadlines called for in the arbitration must be calendared. (5) Make sure to understand what is required as to the content of the arbitration claim and be familiar with whether a counterclaim is appropriate at the time of the answer or whether the filing of an independent claim is necessary. (6) Make sure to engage in adequate due diligence pertaining to any potential arbitrators, noting any and all potential conflicts of any nature, making sure to timely raise all protests involving impartiality. (7) Make sure that a preliminary hearing is scheduled in a reasonable amount of time after a claim is filed so that thereafter there is a good understanding going into the preliminary hearing exactly what is to be discussed at that proceeding. (8) Draft a checklist in advance of the preliminary hearing, outlining all issues to be discussed. (9) At the preliminary hearing, make sure to discuss matters involving the exchange of information as



well as all matters involving the use of written discovery and the taking of depositions (especially as to third parties), particularly where securing cooperation of witnesses or third parties may be complicated. (10) Particularly if there are third parties that are not participating in arbitration, but might be later joined, discuss those issues as well as how these issues might be resolved with the arbitrator at the preliminary hearing. (11) Arbitrators hate the presentation of cumulative and redundant information, particularly documents. If at all possible, documents that each side will be relying upon should be presented jointly. (12) Think through whether it is necessary or useful to have a court reporter present. Although a court reporter is not required, please recall that testimony in arbitration is a statement under oath and may have other uses outside and independent of arbitration. Make sure to consider all opportunities available as a result of possessing any statement made under oath. (13) Make sure to know whether or not pre-hearing briefs are being sought and what the arbitrator is looking for as to the content of the same. For instance, it is often the case that if the arbitration involves garden variety issues of contract law, an arbitrator does not want a significant brief on contract law merely restating what he or she already knows. On the other hand, if there are esoteric areas of law or fact, this content should be considered at this time. (14) If there are novel technical or legal issues, make sure to discuss this topic in advance with the arbitrator. For instance, if it is helpful for an arbiter to read a learned treatise pertaining to a specific area of technical or legal information, something that is not at all unusual in the field of oil and gas, it makes sense to try to provide such information to the arbitrator well in advance of the arbitration. The arbitration will go much more quickly and a considered result is more likely if the arbitrator has the ability to educate himself or herself pertaining to technical issues prior to the holding of an evidentiary hearing. From the point of view of an arbitrator, it is always difficult to simultaneously learn technical processes while hearing evidence. A party always runs the risk, particularly early in a proceeding, that if an arbitrator does not understand technical issues, evidence may be presented and not adequately considered or even understood. (15) To the extent that a deposition in whole or part will be used in a hearing, make sure to have this portion of the deposition ready for video presentation or copied from a transcript. (16) As to legal issues, if one is relying on a certain case or set of statutes, make this legal authority available to the arbitrator in advance. The more acquainted any arbitrator is with the contested areas of law, the more likely the arbitrator will be able to consider all of the evidence in an even-handed fashion. (17) Never presume that because arbitration is thought to be less formal than trial that witness preparation is not as necessary. Such is not true. Make sure to prepare direct examination and cross-examination with the same diligence as that at trial. (18) If an opening statement is allowed, make sure

to not only prepare content consistent with the wishes of the arbitrator, but to specifically be ready to ask the arbitrator whether he or she has any questions. Be ready to answer. Because arbitration is much more informal than court, arbitrators are far less likely to be concerned about issues that could result in a mistrial or an appeal. Because of the lack of motions or more technical pleadings, an arbitrator might walk into a hearing not appreciating a certain set of issues. (19) Be ready for closing argument. Remember, it is not necessary that closing argument be conducted at the immediate end of evidence. In fact, sometimes it is helpful for an arbitrator to have an opportunity to review the totality of the information presented during evidence prior to taking a closing statement. It can easily be the case that an arbitrator may close evidence on a Wednesday afternoon and thereafter allow parties to present argument either in person or telephonically on Monday. This delay not only allows the arbitrator to focus on the information provided, but also allows counsel to consider all issues of fact, law, and strategy pertaining to the presentation of argument. (20) Make sure that there is a good understanding as to when information is no longer being accepted by the arbitrator and the taking of evidence is closed. Arbitrators will sometimes allow the parties to provide additional evidence for what otherwise would be the formal close of proceedings, particularly in the event that new issues arise, such that an affidavit or witness needs to be taken out of time. While there are a multitude of circumstances that can arise, a key concept is to make sure to not allow the closing of evidence if additional evidence needs to be provided. On the other hand, make sure there is a formal close of the presentation of the evidence. (21) Lastly, it is necessary to know when and in what form an award will be provided. There also needs to be consideration as to whether there will be an opportunity to have the arbitrator reconsider his or her award or even challenge technical issues, whether they be clerical or otherwise.

Just as good preparation and organization is a solid foundation for a successful litigation result, it is an equally important foundation for a good result at arbitration. Particularly to those that have not participated in arbitration very often, there can be a sense that arbitration is so informal that preparation is not as important as in litigation. Such is not the case. Like many things, good communication and a candid discussion of issues, whether factual, legal, procedural or substantive, are all part of a well-functioning arbitration. However, there is little any party can do at an arbitration hearing to make up for inadequate preparation.

In summary, it is the goal of this article to raise issues that might be of assistance to counsel and parties well in advance of their arbitration hearing to increase the probability of a better result. Hopefully, this article has been successful in providing such information.

## Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the July 26, 2017 Commission Meeting held at the Summer Convention in Sun Valley, Idaho.

1. The Bar Commission voted to appoint **Samuel Alba** as the Bar's representative on the Executive and Judicial Compensation Committee.
2. The Bar Commission voted to approve the report on the progress of implementing the Futures Commission recommendations.
3. The Bar Commission voted to reappoint **Bryan Pattison** to the Utah Legal Services Board.
4. The Bar Commission voted to approve the Convention Review Committee Report.
5. The Bar Commission voted to approve convention reimbursement policies.
6. The Bar Commission voted to approve the August 2017 candidates for admission to the Utah State Bar.
7. The Bar Commission voted to appoint the following *ex officio* Commission members for the 2017–2018 year: the Immediate Past Bar President (**Rob Rice**); the Bar's Representatives to the ABA House of Delegates (**Nate Alder** and **Angelina Tsu**); the Bar's YLD Representative to the ABA House of Delegates (**Chris Wharton**); Utah's ABA Members' Representative to the ABA House of Delegates (**Margaret Plane**); the Utah Minority Bar Association Representative (**Jamie Sorenson**); the Women Lawyers of Utah Representative (**Diana Hagen**); the LGBT and Allied Lawyers of Utah Representative (**Amy Fowler**); the Paralegal Division Representative (**Julie Emery**); the J. Reuben Clark Law School Dean (**Gordon Smith**); the S.J. Quinney College of Law Dean (**Robert Adler**); and the Young Lawyers Division Representative (**Dani Cepernich**).
8. The Bar Commission voted to appoint **John Lund, Dickson Burton, Kate Conyers, and Katie Woods** as members of the Executive Committee.
9. The Bar Commission voted to approve members of the Executive Committee to serve as signatories on the Bar's checking account.
10. The Bar Commission approved May 12, 2017 Commission meeting minutes by consent.
11. The Bar Commission approved Online Content and Social Media Policy by consent.

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

## 2017 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2017 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or [adminasst@utahbar.org](mailto:adminasst@utahbar.org) by Friday, September 29, 2017. The award categories include:

**Distinguished Community Member Award**  
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**Outstanding Pro Bono Service Award**

View a list of past award recipients at: <http://www.utahbar.org/bar-operations/history-of-utah-state-bar-award-recipients/>.

## Utah Bar Foundation Announces New Board Members

### HONORABLE ROYAL I. HANSEN



Judge Royal I. Hansen is a Third District Court Judge and served as that court's Presiding Judge from 2011–2015. The Utah State Bar selected Judge Hansen as Judge of the Year in 2012 and as a recipient of the Judicial Excellence Award in 2015. In 2016 he was named the third Utah judge to receive the

Peacekeeper Award in recognition of his commitment to the process of peace and conflict resolution. He currently serves as the chair of the Judicial Council's Alternative Dispute Resolution Committee and as co-chair of the Utah State Bar Pro Bono Commission. He is the founding judge of the South Valley Felony Drug Court (2005) and the Utah Veterans Treatment Court (2015). Judge Hansen received a law degree from the University of Utah College of Law in 1975.



The Utah Bar Foundation is honored to have the expertise of such a distinguished Board of Directors as they navigate the complex funding decisions ahead.

### KRISTINA RUEDAS



Ms. Ruedas is a shareholder at the firm of Richards Brandt Miller and Nelson where her practice focuses primarily on immigration law, civil litigation, and criminal defense. Ms. Ruedas is a graduate of the BYU J. Rueben Clark School of Law.

### The Utah Bar Foundation Board of Directors consists of:

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Kenton Walker

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Michael Anderson  
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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 June and July of 2017. 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.

## Bar Thank You

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

Alison Adams-Perlac	Alisha Giles	Lance Locke	James Sorenson
Paul Amann	Tony Graf	Nathan Lyon	Marissa Sowards
Jimmy Anderson	Steven Green	Colleen Magee	Ryan Stack
Mark Astling	Michele Halstenrud	Kelley Marsden	Michael Stahler
Justin Baer	Emily Holt	Heather McGinley	Charles Stormont
Sara Bouley	Randy Hunter	Peter Mifflin	Michael Swensen
Kim Buhler-Thomas	John Hurst	Jonathan Miller	Jake Taylor
Elizabeth Butler	Chris Infanger	Doug Monson	Lana Taylor
Kelly Cardon	David Jeffs	Nathan Morris	Ivy Telles
Jared Casper	Michelle Jeffs	Susan Motschieder	Dave Thomas
Gary Chrystler	Casey Jewkes	Carlos Navarro	Mark Thornton
Kim Colton	Lloyd Jones	Jason Nelson	Steve Tingey
Kate Conyers	Paul Jones	Steve Newton	Margaret Vu
Victor Copeland	Mike Kelley	Jamie Nopper	J. Kelly Walker
Nicholas Cutler	David Knowles	Ellen Ostrow	Steve Waterman
Shelley Doi	Ben Kotter	Michael Palumbo	Thaddeus Wendt
Matt Feller	Karen Kreeck	Rachel Peirce	Matt Wiese
Michael Ford	Alyssa Lambert	RobRoy Platt	Judith Wolferts
Andrea Garland	Susan Lawrence	Mark Rose	John Zidow
Barney Gesas	Michael Lichfield	Melanie Serassio	
	Lorrie Lima	Leslie Slaugh	

### ***Notice of Petition for Reinstatement to the Utah State Bar by Bruce L. Nelson***

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 Bruce L. Nelson in *In the Matter of the Discipline of Bruce L. Nelson*, Fourth Judicial District Court, Civil No. 100403156. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

### ***Notice of Petition for Reinstatement to the Utah State Bar by Bruce A. Embry***

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 Bruce A. Embry in *In the Matter of the Discipline of Bruce A. Embry*, Fourth Judicial District Court, Civil No. 050101220. 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.

## 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 may be found at:**

[www.utahbar.org/opc/office-of-professional-conduct-ethics-hotline/](http://www.utahbar.org/opc/office-of-professional-conduct-ethics-hotline/)

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

[www.utahbar.org/opc/bar-committee-ethics-advisory-opinions/eaoc-rules-of-governance/](http://www.utahbar.org/opc/bar-committee-ethics-advisory-opinions/eaoc-rules-of-governance/).



**801-531-9110**

### ADMONITION

On June 5, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.4(a) (Communication) of the Rules of Professional Conduct.

#### *In summary:*

The attorney was retained by a client to prepare, file, and serve a complaint. The attorney drafted the complaint on behalf of the client but was unable to serve the defendant. The complaint was not filed with the court. The client attempted to contact the attorney regarding the status of the case but was unable to speak with the attorney. Several months passed, then the attorney wrote to the client informing the client the next step would be to attempt to serve the defendant through publication. Approximately a month later, the client withdrew representation from the attorney. The attorney failed to provide appropriate documentation or status reports to the client.

### ADMONITION

On July 7, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.4(a) (Communication) and 1.4(b) (Communication) of the Rules of Professional Conduct.

#### *In summary:*

A client retained the attorney for representation in an eviction matter. The attorney filed a complaint and the court scheduled an immediate occupancy/eviction hearing on a certain date. The attorney had arranged for an alternate attorney to attend the client's hearing as well as a hearing for a second client the same day. The attorney did not inform the client that an alternate

attorney would be attending the hearing. The client informed the attorney that the client would be out of town on the date of the hearing and asked if the client should change the client's plane ticket to attend the hearing. The attorney informed the client that as long as the client could contact the attorney by telephone, the client did not need to attend the hearing. The client changed the plane ticket in order to attend the hearing, and emailed the attorney informing the attorney the client would be at the hearing. The client tried to contact the attorney several times to find out where the hearing was being held but the attorney was out of town without access to email and did not respond. The attorney did not appear at the hearing and the alternate attorney appeared for the second client but failed to represent the client at the client's hearing. The client met with the mediator and the client's tenant without legal counsel.

### ADMONITION

On July 10, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.15(c) (Safekeeping Property) of the Rules of Professional Conduct.

#### *In summary:*

The attorney was retained by two separate clients for legal services. The attorney did not deposit the retainer funds from either client into the trust account and instead, deposited the funds into the attorney's operating account before they were earned. The attorney did not fully understand that even though the attorney agreed to a flat fee with the clients, the attorney should have deposited the funds in the trust account and withdrawn the funds as earned, because a flat fee agreement does not, per se, make the funds earned upon receipt. There was no injury to either client, as the funds were eventually earned.



**ADMONITION**

On June 29, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.15(a) and 1.15(c) (Communication) of the Rules of Professional Conduct.

*In summary:*

The attorney was retained by a client to represent a relative in a criminal matter. The relative who was being represented requested that the retainer funds the client paid not be placed in the attorney's trust account, and the attorney subsequently placed the funds in the attorney's operating account. The attorney did not have a written agreement with the client that explained the benefits to the client of treating the funds as earned-upon-receipt and not refundable.

The attorney drafted the complaint on behalf of the client but was unable to serve the defendant. The complaint was not filed with the court. The client attempted to contact the attorney regarding the status of the case but was unable to speak with the attorney. Several months passed, then the attorney wrote to the client informing the client that the next step would be to attempt to serve the defendant through publication. Approximately a month later, the client withdrew representation from the attorney. All the funds were eventually earned, and the client suffered no injury as a result of the improper accounting.

**PUBLIC REPRIMAND**

On April 25, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Kerry F. Willets for violating Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

*In summary:*

Mr. Willets was retained to file a bankruptcy petition for a client. Over a year later Mr. Willets filed a Chapter 13 petition. The client provided Mr. Willets with her creditor information but Mr. Willets only included one creditor on the matrix he filed with the court. Two years after retaining Mr. Willets, the client attempted to contact Mr. Willets regarding a motion she wanted to file with the court but was unable to reach him for many weeks and had no way of leaving a message.

Almost three years after retaining Mr. Willets the client hired new attorneys to represent her. The new attorneys moved the court to allow them to be substituted as counsel for the client. The court granted their motion and the new attorneys filed a motion to extend the deadline to file a proof of claim, which the court also granted.

The OPC sent letters and a Notice of Informal Complaint (NOIC) over a period of several months requesting Mr. Willet's response to the client's allegations but the OPC received no response to the letters or the NOIC.

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## PUBLIC REPRIMAND

On June 29, 2017, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Christopher B. Cannon for violating Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

### *In summary:*

The OPC received non-sufficient funds (NSF) notification from the bank that holds Mr. Cannon's trust account. Over a period of approximately four months, the OPC sent two letters and a Notice of Informal Complaint (NOIC) to Mr. Cannon requesting his explanation for the deficiency. Mr. Cannon did not respond to the letters or the NOIC nor was any mail returned. Almost three months after mailing the NOIC and receiving no response, the Clerk of the Ethics and Discipline Committee mailed a calendar notice notifying Mr. Cannon of a screening panel hearing date that had been scheduled. Approximately a month and a half later, and two days prior to the hearing, Mr. Cannon responded to the NOIC.

Underlying charges concerning Mr. Cannon's NSF were dismissed due to documentation that explained the trust account issue. However, it was determined that Mr. Cannon should receive a public reprimand for his knowing failure to respond to the OPC, which caused unnecessary delay and cost in resolving the matter. The OPC was required to expend unnecessary time and resources in preparing the file for the Committee, and the Committee had to spend time preparing for and conducting the hearing. Attorneys are cautioned that failure to cooperate and provide information to the OPC may result in disciplinary action even if the underlying allegations are dismissed.

## PROBATION

On June 6, 2017, the Honorable Matthew D. Bates, Third Judicial District Court, entered an Order of Discipline: Probation, against Steve S. Christensen, placing him on probation for a period of one year for Mr. Christensen's violation of Rule 1.15(a) (Safekeeping Property) of the Rules of Professional Conduct. A Final Judgment was issued on June 13, 2017.

### *In summary:*

Mr. Christensen was hired to represent a client in a divorce proceeding and also a legal malpractice claim against the client's former lawyer. Mr. Christensen initiated a loan application to purchase a home formerly owned by the client. The transaction for the home was originally proposed to close on a certain date but the closing date was extended twice by thirty days while a final price was being agreed upon. The bank required a down payment

to finance the purchase of the home. Mr. Christensen did not have all of the required amount in his personal bank account.

There were ongoing settlement negotiations regarding the client's legal malpractice claim during the time of Mr. Christensen's loan application. The client had accumulated legal fees which were owing to the firm in connection with the divorce proceedings, and she had agreed to half of any funds she obtained from settling the legal malpractice claim would be used to pay the legal fees charged by the firm.

In order to demonstrate to the bank that he would have adequate funds to make the required down payment on the home, and in anticipation of extending the home closing date when the necessary funds from the firm's trust account had been earned, Mr. Christensen transferred a portion of the additional amount needed for his down payment from the firm's trust account on a Friday, leaving a very nominal balance. A check that had been written on the trust account a week prior presented to the bank for payment but there were insufficient funds to honor the check. OPC received a non-sufficient funds (NSF) notice from the bank for the firm's trust account. Within twelve hours of transferring the money from the firm's trust account, Mr. Christensen restored the money back to the firm's trust account by electronic transfer. Due to a Monday holiday, the electronic transfer was credited on Tuesday. By that day, the firm had sufficient funds to cover the check written the week prior and the client received payment and the check was not bounced. Mr. Christensen transferred the remaining amount needed for proof of his down payment on the home loan from the firm's operating account on the same Friday to his personal account. Twelve hours later Mr. Christensen also returned the money to the operating account but it was not credited back to the firm's operating account until Tuesday after the holiday.

Mr. Christensen used funds belonging to individuals or entities other than himself. The funds in the trust account were a combination of earned and unearned funds. Mr. Christensen's law partners did not authorize and were unaware of the transfer of funds from the firm's trust account to Mr. Christensen's personal account. Mr. Christensen's law partners did not authorize and were unaware of the transfer of funds from the firm's operating account to Mr. Christensen's personal account.

## SUSPENSION

On April 5, 2017, the Honorable Robert J. Dale, Second Judicial District Court for Davis County, entered an Order of Suspension, against Stanford A. Graham, suspending his license to practice law for a period of six months and one day for Mr. Graham's violations of Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a)

(Fees), and Rule 8.1(b) (Bar Disciplinary Matters) of the Rules of Professional Conduct.

*In summary:*

Mr. Graham was hired to represent a client's company by assisting with a lawsuit against some members of the corporation. Mr. Graham was also hired to represent the client in a bankruptcy. The client was to pay an amount for representation in the company matter and an additional amount for representation in the bankruptcy. Mr. Graham, the client, and others were subsequently named as defendants in a lawsuit filed in Third District Court (civil matter). The work performed by Mr. Graham on the case did not justify the fee charged.

More than six months after being retained, Mr. Graham filed a Petition for Bankruptcy on behalf of the client. Mr. Graham prepared a list of creditors but it was not timely filed with the bankruptcy court. A 341 Meeting of Creditors was scheduled, but Mr. Graham did not appear at the hearing. Respondents in the matter filed a motion to dismiss but Mr. Graham did not respond to the motion and did not appear at the hearing. Consequently, the motion to dismiss in the bankruptcy was granted.

About a year after being retained, a default judgment was entered against the client and Mr. Graham in the civil matter. The court ultimately set aside the judgment against the client, and entered the entire judgment against Mr. Graham for his delay and failure to comply.

The OPC sent a Notice of Informal Complaint to Mr. Graham. Mr. Graham did not respond. The OPC filed a complaint against Mr. Graham in district court. Mr. Graham did not file an Answer to the Complaint. The court entered a Default Judgment against Mr. Graham.

*Aggravating Factors:*

Dishonest or selfish motive; multiple offenses; obstruction of the disciplinary proceeding by failing to comply with rules or orders; substantial experience; and lack of good faith effort to make restitution or rectify the consequences of the misconduct.

*Mitigating Factors:*

Personal problems

## DISBARMENT

On April 21, 2017, the Honorable James D. Gardner, Third Judicial District Court, entered Findings of Fact, Conclusions of Law and Order disbaring Matthew G. Nielsen from the practice of law for his violation of Rules 8.4(b) and 8.4(c) (Misconduct) of the Rules of Professional Conduct. A Final Judgment was issued on July 6, 2017.

*In summary:*

Between 2012 and 2014, Mr. Nielsen committed and was convicted of numerous criminal acts including three counts of Assault, Attempted Failure to Stop at the Command of Law Enforcement, two counts of Child Abuse Involving Physical Injury, four counts of Obtaining a Prescription Under False Pretenses, Shoplifting, two counts of Retail Theft, Disorderly Conduct (Domestic Violence Related), Attempted Possession of a Controlled Substance Schedule I or II, Possession of a Controlled Substance Schedule I or II, Reckless Driving, and Attempted Burglary. On April 20, 2015, Mr. Nielsen was placed on Interim Suspension for having been convicted of crimes that reflect adversely on his honesty, integrity and fitness as a lawyer.

The court has now found that Mr. Nielsen violated Rule 8.4(b) by committing criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer. The court determined that Mr. Nielsen's incidents of assault, child abuse involving physical injury, disorderly conduct involving domestic violence, attempting to possess and possession of controlled substances, and burglary seriously adversely reflect on Mr. Nielsen's fitness to practice law.

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Mr. Nielsen violated Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The court determined that Mr. Nielsen's incidents of obtaining prescriptions under false pretenses, shoplifting and retail theft constitute serious criminal conduct, a necessary element of which includes misrepresentation, fraud, or theft.

The court determined that suspension was the presumptive sanction for Mr. Nielsen's violation of Rule 8.4(b) and disbarment was the presumptive sanction for violating Rule 8.4(c).

The court found the following aggravating factors: prior record of discipline, dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the misconduct, vulnerability of victim, substantial experience in the practice of law, and illegal conduct, including the use of controlled substances.

The court found the following mitigating factors: good character or reputation, imposition of other penalties, and remorse.

After balancing aggravating and mitigating factors, the court determined that the aggravating factors far outweighed any mitigating factors in Mr. Nielsen's violation of Rule 8.4(b) and warranted an increase in the level of discipline from suspension to disbarment. The court also determined the mitigating factors did not warrant a decrease in the presumptive sanction of disbarment for Mr. Nielsen's violation of Rule 8.4(c).

## DISBARMENT

On June 21, 2017, the Honorable Thomas Willmore, First Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Disbarment disbaring Charles M. Parson from the practice of law for his violation of Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a) (Fees), Rule 5.5(a) (Unauthorized Practice of Law, Multijurisdictional Practice of Law), and Rule 8.1(b) (Admission and Disciplinary Matters) of the Rules of Professional Conduct.

## *In summary:*

On December 2, 2013, Mr. Parson's license to practice law in the State of Utah was suspended for failing to comply with the mandatory continuing education requirements. On December 24, 2013, Mr. Parson received notice of his suspension via certified, registered U.S. Mail. Mr. Parson was suspended all of 2014 and part of 2015.

A client retained Mr. Parson to file a bankruptcy petition prior to his suspension in 2013. The client agreed to pay Mr. Parson a flat fee for his representation along with an additional filing amount to file the bankruptcy. Mr. Parson informed the client he would not undertake representation until fees were paid. During his suspension, Mr. Parson received payments from the client for his representation in February and March of 2014.

After receiving full payment from the client for his representation, Mr. Parson moved from his office and did not provide a new business address to the client. Months later, Mr. Parson's telephone was disconnected so the client could not contact Mr. Parson via telephone. Mr. Parson never filed the client's bankruptcy case. Mr. Parson claimed to have worked ten–twelve hours on the client's case prior to his suspension. Mr. Parson provided no evidence to support this claim. Mr. Parson never refunded the filing fee he collected from the client even though he did not file her bankruptcy case.

The OPC sent letters on two separate occasions asking Mr. Parson to respond. Mr. Parson did not respond to either letter. OPC served Mr. Parson with a Notice of Informal Complaint (NOIC) requiring his written response within twenty days pursuant to the Rules of Lawyer Discipline and Disability. Mr. Parson did not timely respond in writing to the NOIC.

## *Aggravating factors:*

Dishonesty, multiple offenses, vulnerability of victim; refusal to acknowledge the wrongful nature of the misconduct involved; and obstruction of the disciplinary proceeding by failing to comply with rules or orders of disciplinary authority.

## ***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. Most attorneys who contact Jeannine do so in the early stages of a Bar complaint. Keep in mind Jeannine is available to assist and explain the process at any stage of a Bar complaint. Call Jeannine with all your questions.



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

## *So I Got This Weird Summons...* *Understanding the Utah Lake Jordan River* *Water Rights General Adjudication*

by Emily E. Lewis

Attorneys along the Wasatch Front may have recently received inquiries from clients regarding a “weird summons” or a “strange letter about water.” If you have not yet received a call, you most likely will in the foreseeable future. Welcome to the Utah Lake Jordan River Water Rights General Adjudication (ULJR Adjudication): it is big, it is old, and it is coming for the Salt Lake Valley.

This article provides a brief introduction to Utah water rights, discusses the purpose and components of a water rights general adjudication, and offers information relevant to addressing increased activity in the ULJR Adjudication area. While most people receiving ULJR Adjudication documents will not have a valid claim to water, for those who do, this process is extremely important to protect very valuable property rights. Understanding the general adjudication process will help you determine how best to advise your clients.

Water in Utah is the property of the public, subject to existing rights to the use thereof. Utah Code Ann. § 73-1-1. Water rights are established by demonstrating that water was put to use either prior to 1903 or 1935 (for groundwater) when Utah Appropriation statutes were passed or a claimant has completed the statutory appropriation process to obtain a water right. Water rights define who can use water, where users take water from, what water can be used for, and how much water users are entitled to. Without clearly defined water rights, it is impossible for society to meet the needs of today or plan for an increasingly drier and more complex future.

Water rights are real property rights but have key elements that make them distinct and different from traditional real property rights. For example, water rights are usufructuary rights, meaning you must use the water as stated under a water right or risk forfeiting the water back to the public. You may have heard the phrase “use it or lose it.” Similarly, water is naturally found in a hydrologically connected system. Use in one part of the

system can drastically impact use elsewhere. Accordingly, settling disagreements over water use often involves technical expertise and a larger watershed perspective.

To create stability, inventory the state’s water rights, and resolve disputes, the Utah Legislature created a special statutory civil action process codified as Utah Code Title 73 Chapter 4, Determination of Water Rights. These “water rights general adjudications” are large scale quiet title suits filed in a local district court and are intended to compile all existing claims to water in a watershed, define water rights based on those claims, and confirm all water rights with a judicial decree. The state of Utah is divided into thirteen large General Adjudications with each General Adjudication being broken down into smaller divisions and subdivisions based on the contours of the local watershed. Each subdivision is given a name and numerical indicator, for example the City Creek (57-09) or Dry Creek (57-10) Subdivisions of the ULJR Adjudication. Subdivisions are also commonly referred to as “books.”

The ULJR Adjudication is the oldest case in the Third District Court. Commenced in 1944 as the smaller dispute of *Salt Lake City Municipal Corporation v. Tamar Anderson*, the case was expanded to become the largest General Adjudication in terms of number of potential claims and complexity. The ULJR Adjudication is important because it will define water rights along the Central and Southern Wasatch Front where most of the State’s

*EMILY E. LEWIS is an Attorney at Clyde Snow & Sessions. She helps clients identify and resolve complex water law and natural resources issues. Her clients range from individual rural water users to large corporations and municipalities.*



economic and population growth is anticipated to occur. While most General Adjudications take decades to complete, to meet coming demands, the Utah Legislature allocated almost \$1.9 million dollars to speed the pace of the ULJR Adjudication. Much of this funding is targeted at starting new adjudication subdivisions in the Salt Lake valley and completing existing subdivisions commenced decades ago. The state engineer hopes to complete the ULJR Adjudication within the next five years. Accordingly, local attorneys should expect a sharp increase in inquiries as the ULJR Adjudication makes its way across the valley.

General Adjudications operate using a discreet series of statutorily defined steps starting with a petition in the local district court and ending with final judicial decree. The process is a combination of state engineer, the state authority managing water rights activity, and court action. It is essential that those with a valid claim to water follow the proper procedure to retain their water rights. Failure to do so may result in the right being decreed abandoned and no longer valid. This will result in your client losing a valuable property right. While not all steps are listed here, the primary steps practitioners should know about, or may receive questions about, are:

### Summons

To account for all potential claims to water, all property owners and water right owners of record within newly commenced ULJR Adjudication subdivisions are presently being sent a cover letter and Summons joining them to the ULJR Adjudication. Utah Code Ann. § 73-4-4. This is unlike a traditional Summons and does not require mandatory action but informs potential claimants to be looking for further information and to attend a public meeting for more information.

As many as 35,000 property owners around downtown Salt Lake and along parts of the east bench have already received a Summons as the state engineer has commenced new ULJR Adjudication subdivisions such as City Creek (57-9), Dry Creek (57-10), and Liberty Park (57-11). Presently the state engineer is commencing new subdivisions in the north central part of the Salt Lake valley and will most likely be moving their activities south as time progresses.

If your client has received a Summons and is unsure about ownership of a water right, has not used a well or other physical means of diverting water on the property, or has only ever received municipal water – they most likely do not have a valid claim to water and do not need to participate in the ULJR Adjudication. However, this should be confirmed with the state engineer or a water attorney prior to disregarding the Summons.

### Notice to File Statement of Water User's Claim

The Summons is followed by a Notice to File a Statement of Water User's Claim. This is typically a cover letter and form provided by the state engineer where a claimant can enter the various parameters and support for their claim to water. *Id.* § 73-4-5. A claim to water is generally represented by an existing perfected water right, i.e. an application to appropriate that has gone through the certification process or previously undocumented surface water use prior to 1903 or underground use prior to 1935. For a claim to water to be valid, the water user must have supportable evidence that the water has been in continuous beneficial use since use of the water was initiated.

While it may be tempting to claim a new water right for a well that was buried under your driveway twenty years ago or for the remnants of an irrigation ditch in the backyard, Water User's Claims should only be submitted for valid claims to water where the claimant can demonstrate continuous use of the water. If you are unsure whether a client should file a Water User's Claim, contact the state engineer to discuss the need for filing.

Claimants must file a Statement of Water User's Claim within ninety days of receiving the Notice to File Statement of Water User's Claim document. Water User's Claims can be filed with the state engineer or the district court. This timeframe is extremely important. Failing to timely file will forever bar a claimant from asserting a claim to water in that subdivision, and the claimant will not have their water right recognized. *Id.* § 73-4-9.

### Proposed Determination

Once all Water User's Claims are submitted, the state engineer will review the claims against the state engineer's records and conduct a field visit to verify actual use of water. The state engineer will then issue a state engineer's recommendation that recommends a contemporary definition for the water right based on their review. The state engineer only reviews the physical parameters of a water right. The state engineer does not review title or ownership issues, as those concerns are addressed in separate and distinct administrative processes before a different branch of the state engineer's office.

The state engineer's recommendations are compiled into a document called a proposed determination. The proposed determination is submitted to the court and served on all those who submitted water user's claims in the subdivision.

If your client submits a Water User's Claim that is included in a proposed determination, it is very important the client reviews



the proposed determination to ensure the state engineer's recommendation accurately reflects your client's claim. Additionally, the proposed determination should be reviewed to ensure other water rights are not defined in such a way as to adversely affect your client's claim.

### Objections to a Proposed Determination:

If there is a disagreement about a state engineer recommendation in the proposed determination, a water user must file an objection with the court within ninety days of the proposed determination being published. Once an objection is filed, it becomes a subcase to the General Adjudication and is litigated under the Utah Rules of Civil Procedure and various orders issued by a newly instituted special master, Rick Knuth. The special master is a new addition to the General Adjudication process and has jurisdiction solely over the ULJR Adjudication. The role and purpose of the special master is to issue procedures for governing and streamlining the objection resolution process.

As water rights grow in value, disputes and litigation over water rights are on the rise. These disputes often require a strong understanding of the complexities of water law, expert witness such as hydrologists and engineers, and intense discovery to reconstruct historic use patterns for the rights. Clients should

be prepared to support all objections with defensible support for their claims and documentation.

While these are the key steps to be aware of in the General Adjudication process, if you have clients who have water rights or claims to water, it may be prudent to review the entirety of Utah Code Title 73 Chapter 4. There are several other steps in the process that may be relevant to their interests.

It goes without saying that water in the west is important. Without access to safe and secure water resources, our economic, environmental, and cultural advancements wither. Utah's enterprising spirit is nowhere better exemplified than in how the state has approached water management. From the pioneers first using City Creek to grow a nascent Salt Lake City to today's state engineer office staffed by hundreds of experts, water has been, and always will be, a Utah priority. The advancement of the ULJR Adjudication is the next necessary step in securing Utah's water future. It is prudent to get ahead of the curve and be prepared to answer coming client questions on how best participate in the Utah Lake River General Adjudication and protect their property interests.

Contact Information for the Utah State Engineer: (801) 538-7240 or <https://www.waterrights.utah.gov/>.

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## *Message from the Paralegal Division*

*by Greg Wayment*

I would like to introduce the 2017–2018 Board of Directors of the Paralegal Division. We are pleased to announce the chair for the upcoming year is Lorraine Wardle. We have eight new members joining the Board of Directors and wish to extend a warm welcome to them. We also wish to thank outgoing board members Heather Allen, Sharon Andersen, Christina Cope, Julie Eriksson, Kari Jimenez, Karen McCall, and Alaina Neumeyer. This year's Board of Directors are:

**Chair: Lorraine Wardle** has been in the legal field for more than twenty-five years. She is a paralegal at the firm of Trystan Smith & Associates, Claims Litigation Counsel (CLC) for State Farm Insurance. Prior to joining State Farm's CLC, Lorraine worked at several highly esteemed insurance defense firms in Utah. She has been involved with the boards of both paralegal associations in Utah for many years. Lorraine lives in West Jordan with her husband and two golden retrievers and spends any spare time she has with her grandchildren, as well as camping, biking, and gardening.

**Chair-Elect: Candace A. Gleed** is a litigation paralegal at the firm of Eisenberg, Gilchrist & Cutt (EGC) working primarily on plaintiff's personal injury and medical malpractice cases. Prior to joining EGC, Candace worked with American Family Insurance, Utah Attorney General's (AG) Office, Salt Lake County District Attorney's Office, and for West Valley City. While working at the Utah AG's Office, Candace had the opportunity to work with the legislature and the league of cities and towns. She is also a current member of the National Association of Legal Assistants (NALA). Candace lives in West Valley and is a mother of four beautiful children, two grandchildren, and a pit bull named Bruce. She enjoys doing volunteer work for the disabled and youth sports organizations.

**Region II Director: Shaleese McPhee** is a paralegal at the Salt Lake County District Attorney's Office on the Major Crimes Unit; she's been with the office since April of 2015. Shaleese completed her Bachelor of Science in Paralegal Studies from Utah Valley University in 2011. Since that time she has worked as a paralegal in the following areas: criminal law, family law, and probate law. Shaleese served in the Utah Army National Guard from 2011 to 2017. Shaleese loves her life and the daily

adventures that it brings. Keep it interesting, and keep it true.

**Region III Director: Stefanie Ray** graduated from Utah Valley University in 1994 and has nearly twenty-three years legal experience. Stefanie is the Senior Paralegal at doTERRA International, LLC. She manages their trademarks in over thirty-six countries as well as provides litigation support, contract management, and processing garnishments and liens. Prior to working at doTERRA, Stefanie was a personal injury paralegal for Abbott & Walker in Provo, Utah, for over fourteen years. She is the mother of three children and enjoys the rural life in Santaquin, Utah.

**Region IV Director: Deborah Caleyory, CP** works in the St. George office of Durham Jones & Pinegar. Deb has taken an active role in her community and in the paralegal profession over the course of her thirty-five year career. She prepared curriculum and provided instruction for paralegal programs for Dixie State College and the Utah Chapter of the American Paralegal Association. In 1996 Deb was a charter member of the Paralegal Division of the Utah State Bar and has maintained an active role in the division since its inception. Deb served as chair of the Paralegal Division during 2001 and in 2008 was honored by Utah's legal community by being selected as the Utah's Distinguished Paralegal of the Year.

**Region V Director: Terri Hines** began working in the legal field as a prosecutorial assistant in 2001 for the Moab City Prosecutor and in 2003 began working for the Grand County Attorney's Office. In 2005 she became the office manager and still holds this position. Terri became a Paralegal in 2012 and works on felony criminal cases, juvenile, and drug court cases. Terri also participates with the Grand County Children's Justice Center Multidisciplinary Team. Terri enjoys spending time in the LaSal Mountains, travel, and reading. She has been married to her husband Art for thirty years and has three children that provide the best enjoyment to her life.

**Ex-Officio: Julie Emery** has twenty-seven years legal experience focused on complex litigation, trial practice, electronic discovery, and document management. After working as a paralegal for approximately ten years, she started and managed a litigation

support company. Julie is now with the law firm Parsons Behle & Latimer. Julie is a past adjunct instructor for the paralegal programs at Salt Lake Community College and Westminster College. She has served as a director on the Boards of Legal Assistants Association of Utah, Center for Family Development, PTSA Legacy Council, Community Council, and Eagle Aquatic Team. Julie is an avid supporter of the Road Home in Salt Lake City. Her greatest passion is spending time with her family.

**Director at Large: Paula Christensen, CP** has worked in the legal field for over thirty-seven years and has been a litigation paralegal at Christensen & Jensen since 2001. She received her Associate Degree from BYU Idaho and attained her Certified Paralegal designation from NALA in 2010. She currently works in the areas of plaintiffs' personal injury, commercial and business defense litigation, and real estate. Paula was honored to be named as Utah Paralegal of the Year in 2013. Paula often volunteers for Wills for Heroes and Serving our Seniors. Paula enjoys hiking, reading, and spending time with her family. She is the mother of four children and has six grandchildren.

**Director at Large: J. Robyn Dotterer, CP** has worked as a paralegal for over twenty-five years and has been with Strong & Hanni for eighteen years. She works primarily in the areas of insurance defense in personal injury, insurance bad faith, and legal malpractice. Robyn achieved her CP in 1994 and is a Past President of UPA. She has served on the Paralegal Division Board in several different capacities, including co-chair of the Community Service Committee and YLD Liaison for several years. Robyn was honored as Paralegal of the Year in 2014. Robyn has been married to her husband Duane for forty-three years and lives in Sandy, Utah.

**Director at Large: Cheryl Jeffs, CP** is a paralegal at Stoel Rives, where she works in the areas of litigation. Cheryl has been a paralegal for twenty-four years, having received her Paralegal Certificate from Wasatch Career Institute in 1990. She earned her CP designation from NALA in September 2005. She is the past CLE Chair of Paralegal Division 2013–2015. Cheryl has held other positions in the Paralegal Division, including UMBA liaison, and Membership Task Force.

**Director at Large: Cheryl Miller** received her paralegal certificate in 1992. From 1992–2000 she worked as a paralegal underwriter for attorney's errors and omissions insurance. In 2000, she began underwriting medical malpractice and excess insurance for large hospital systems across the United States. Cheryl joined the law firm of Eisenberg Gilchrist and Cutt (EGC) in 2012. Cheryl is still at EGC working as a litigation paralegal on plaintiff's personal injury cases. She lives in Holladay with her yellow lab, Eli, and enjoys gardening and entertaining.

**Director at Large: Erin Stauffer** is a paralegal with the law firm of Snell & Wilmer and has a B.S. in Paralegal Studies and a M.A. in Adult Education and Training. Erin began working in the legal field in 1989, and her career has covered a broad spectrum of legal practices, including contract disputes, corporate governance, personal injury, product liability, bankruptcy/adversary proceedings and intellectual property litigation. Erin is a member of NALA earning her CP in 2004 and has since earned additional advanced certifications. She serves on the Community Involvement Committee at Snell & Wilmer and belongs to the National Paralegal Honor Society of Lambda Epsilon Chi.

**Director at Large: Sarah Stronk** is a paralegal at Dorsey & Whitney, where she supports attorneys in the Corporate, Mergers & Acquisitions, and Capital Markets groups with private and public business and financing transactions. She also has experience with corporate governance and compliance matters. Sarah was on the Dean's list at Salt Lake Community College, where she earned her Paralegal Studies degree. She also earned her Bachelor of Science degree in Political Science from the University of Utah. She is currently Co-Chair of the Paralegal Division of the Utah State Bar CLE Committee and serves first responders in collaboration with the Wills for Heroes Foundation. Sarah first began working as a paralegal in 2009 and is a strong advocate for the profession.

**Director at Large: Laura Summers** is a paralegal at the firm of Dolowitz Hunnicutt. Laura began her legal career over twenty years ago and has worked for several firms specializing in insurance defense, civil rights, and corporate law. However, her primary paralegal experience is in the field of family law. She earned a B.S. in Interdisciplinary Studies from Utah State in 2015. Laura is a certified mediator with an additional certification in divorce mediation. Laura serves as the Paralegal Division liaison to the Young Lawyers Division of the Utah State Bar. Laura currently serves as the Community Service Chair for the Paralegal Division.

**Director at Large: Greg Wayment** has over thirteen years of paralegal experience and has been at the firm of Magleby Cataxinos & Greenwood for most of that time. He works primarily in the areas of intellectual property, patent prosecution, and litigation. He has been a member of the Paralegal Division, served on the board of directors, and currently serves as the Paralegal Division liaison to the Utah Bar Journal. He earned a Bachelor of Science in Professional Sales from Weber State University and a certificate in paralegal studies from an American Bar Association approved program at the Denver Career College. Greg enjoys reading biographies, running, and being a special events volunteer at Red Butte Garden.



**NEW BAR POLICY: BEFORE ATTENDING A SEMINAR/LUNCH YOUR REGISTRATION MUST BE PAID.**

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

**September 13, 2017 | 12:00 pm – 1:30 pm & 5:00–6:30 pm**

**1.5 hrs. CLE**

**Eat & Greet with Apple – Manage Paperless Document Workflow.** Cost \$15 for lunch session (includes lunch), \$10 for afternoon session (includes snacks). To register go to: [https://services.utahbar.org/Events/Event-Info?sessionaltcd=17\\_9279SEP](https://services.utahbar.org/Events/Event-Info?sessionaltcd=17_9279SEP). Be sure to select the proper session when registering.

**September 21, 2017 | 8:45 am – 5:00 pm**

**6.5 hrs. CLE**

**Writing to Persuade: The Rhetoric of Coherence and Confidence.** University of Utah S.J. Quinney College of Law, South, 383 University Street East, Salt Lake City. Price: \$100–\$200 (see registration link for more details). To register visit: [https://services.utahbar.org/Events/Event-Info?sessionaltcd=18\\_9294](https://services.utahbar.org/Events/Event-Info?sessionaltcd=18_9294).

**September 27, 2017 | 9:00 am – 3:45 pm**

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

**OPC Ethics School.** Cost: \$245 on or before 9/15/17, \$270 thereafter. To register, go to: [https://services.utahbar.org/Events/Event-Info?sessionaltcd=18\\_9016](https://services.utahbar.org/Events/Event-Info?sessionaltcd=18_9016).

**September 29, 2017 | 9:00 am – 12:00 pm**

**Utah County Golf & CLE.** Hobbie Creek Golf Course, 5984 Hobbie Creek Canyon Road, Springville. Breakfast starts at 8:30 am and golf at 12:15 pm. Presentation: “The Nuts and Bolts of Expert Witnesses from Retention to Trial” by Judge Ryan Harris and Wally Bugden.

**October 11, 2017 | 12:00 pm – 1:30 pm & 5:00–6:30 pm**

**1.5 hrs. CLE**

**Eat & Greet with Apple – Filemaker in the Legal Profession.** Cost \$15 for lunch session (includes lunch), \$10 for afternoon session (includes snacks). To register go to: [https://services.utahbar.org/Events/Event-Info?sessionaltcd=17\\_9279OCT](https://services.utahbar.org/Events/Event-Info?sessionaltcd=17_9279OCT). Be sure to select the proper session when registering.

**November 8, 2017 | 12:00 pm – 1:30 pm & 5:00–6:30 pm**

**1.5 hrs. CLE**

**Eat & Greet with Apple – Apple Services & Solutions in the Legal Practice.** Cost \$15 for lunch session (includes lunch), \$10 for afternoon session (includes snacks). To register go to: [https://services.utahbar.org/Events/Event-Info?sessionaltcd=17\\_9279NOV](https://services.utahbar.org/Events/Event-Info?sessionaltcd=17_9279NOV). Be sure to select the proper session when registering.

**November 9, 2017 | 5:30 pm – 9:00 pm**

**2 hrs. CLE**

**FALL FORUM. Judges and Lawyers Reception:** 5:30 pm – 6:30 pm. **Film Presentation Documentary: Beware the Slender Man.** University of Utah S.J. Quinney College of Law Moot Courtroom, 383 South University Street, Salt Lake City.

**November 10, 2017 | 8:30 pm – 4:45 pm**

**7 hrs. CLE, including 3 hrs. Ethics**

**Fall Forum.** 28 Tracks to choose from! Little America Hotel, 500 South Main Street, Salt Lake City.

Lawyers: \$245 before October 31, \$270 after  
 Active under three years: \$170 before October 31, \$195 after  
 Non-lawyer assistants: \$170 before October 31, \$195 after  
 Paralegal Division Members: \$130 before October 31, \$150 after

## Classified Ads

### RATES & DEADLINES

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

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

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

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**DNA-PEOPLE'S LEGAL SERVICES INTERIM EXECUTIVE DIRECTOR.** DNA is a non-profit legal services provider celebrating 50 years of service with approximately 25 attorneys delivering legal services to an underserved population in Arizona, New Mexico, and Utah. DNA is seeking an innovative growth-oriented Individual capable of revitalizing the organization and setting direction for the next 50 years. Visit [www.dnalegalservices.org](http://www.dnalegalservices.org) for more information. Email [dnaexec.dir.apps@sackstierney.com](mailto:dnaexec.dir.apps@sackstierney.com) to obtain a job description, qualifications, and procedure to apply. CLOSING DATE: Open until filled. DNA is an equal opportunity/affirmative action employer. Preference given to qualified Navajo and other Native American applicants.



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

**Beautiful remodeled office space for sublease in Holladay.** 13 X 23.5 ft with 2 large windows, a private storage closet and high speed internet. 4568 S Highland Dr. Is part of 2,000 sf office suite including 4 other offices occupied by 2 attorneys and 2 CPAs. Suite includes reception area, conference room, bathroom, mini kitchen, LED lighting, 8.5 ft. ceiling, burglar alarm, and common storage area. \$625 per mo. Contact: Mike Coombs, 801-467-2779.

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

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