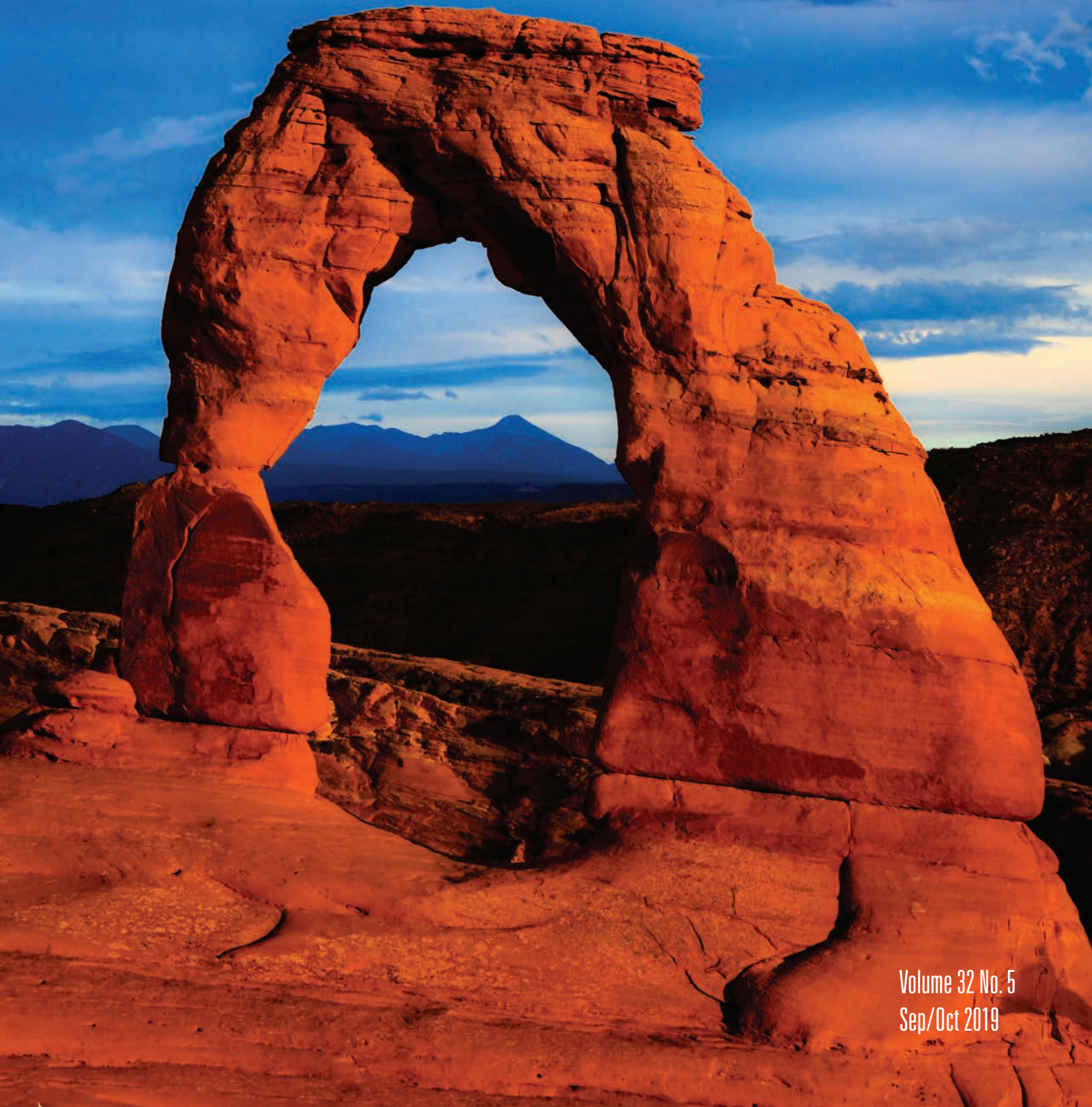


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Cover Photo

Delicate Coin Toss by Utah State Bar member Steven Black.

STEVEN BLACK is a partner at Hansen Black Anderson Ashcraft PLLC at Thanksgiving Point, Lehi, Utah. He is also an assistant tennis coach at Lone Peak High School. About his photo, Steven said: "For Labor Day weekend a few years ago, my family agreed to a 'mystery vacation.' The rules were simple. For each major intersecting roads that we encountered, we would flip a coin to see which road to take. The first coin flip was to determine whether to head north or south on I-15. Seven coin flips later, we found ourselves at Dead Horse Point State Park looking at the valley floor 2,000 feet below. We found accommodations in Moab – the closest city to where our coin flip journey had ended. We hiked to Delicate Arch for the sunset despite storm clouds in the area. While we watched rain begin to fall west of our location, the sun dropped below the cloud bank just before sunset. The result was stunning. Warm sunlight filtered through falling rain lit up Delicate Arch like I have never seen before. Ten minutes after taking the photo, the rain hit our location, which made for a wet and soggy trek back down the trail. In the end, our coin flip mystery vacation worked out very well for our family. We are reminded of the trip by various photos that are mounted on our walls."



SUBMIT A COVER PHOTO

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

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GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

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

ARTICLE LENGTH

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

SUBMISSION FORMAT

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

CITATION FORMAT

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

NO FOOTNOTES

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

ARTICLE CONTENT

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

EDITING

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

AUTHORS

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

PUBLICATION

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

LETTER SUBMISSION GUIDELINES

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

A photograph of three professionals in a meeting. A man in a light-colored shirt is seated in the foreground, looking down. A woman in a dark blazer is seated behind him, also looking down. A man in a dark suit is standing behind them, leaning over and looking at the same point. The background is a blurred office setting.

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On the Shoulders of Giants

by Herm Olsen

All of us stand on the shoulders of giants in one form or another. As I assume the responsibility of serving fellow Bar members throughout the state, I reflect on the guidance and accomplishments of those who preceded me.

Take a moment. No. Really. Take a moment and consider who grew your soul, who built your heart and character throughout your life. On whose shoulders do you stand, even now? In my world, it was Miss Veda Sorenson, my second grade teacher at Wilson Elementary School in Logan. She was kind and trusted me. She believed in me and helped me believe in myself. It was also a gentle (and terribly patient) wife, Norma, who tolerated my eccentricities over the decades. And it was, more distantly, Abraham Lincoln.

In a letter of censure to a young officer accused of quarreling with another, President Lincoln wrote:

Quarrel not at all. No man resolved to make the most of himself can spare time for personal contention. Still less can he afford to take all the consequences including the [corrupting] of his temper, and the loss of self-control. Better to give your path to a dog than be bitten by him in contesting for the right. Even killing the dog would not cure the bite.

Wait, what? Give in? Even if you're right? How does that square with our duty and moral obligation to zealously protect the rights of our client? Didn't ole Abe know about such duties?

I think he did. And I think he was saying that as to the petty stuff, on the inconsequential matters of a dispute between parties, holding bull-dog tight on the minor issues, an attorney can damage the clients' position (and certainly the clients' pocketbook) more by contesting small matters than conceding them.

I remain amazed at this man Lincoln. He spent his career as an attorney, jockeying and jostling in the legal arena. He rose in the rough and tumble world of politics where personal attacks were utterly vicious — dwarfing even the nastiness and attacks which are traded these days in Washington D.C. as daily fare. Yet, he counseled forbearance, compassion, and personal decency.

I'm reminded of an attorney in Logan, one in Ogden, and another in South Salt Lake City, and another. . . , who would spend \$100 of their clients' money on a \$10 issue. The attorney would then self-righteously argue that he'd be damned if he was going to concede a point — any point — which he could win, no matter the cost or value of the point, by wearing down his opponent.

Lincoln had a solution for this kind of attitude. A Springfield farmer recounts:

I once got into difficulty with a neighbor about the line between our farms. I went to Mr. Lincoln to secure him. Mr. Lincoln said: "Now, if you go on with this, it will cost both of your farms, and will entail an enmity that will last for generations and perhaps lead to murder. The other man has just been here to engage me. Now, I want you two to sit down in my office while I am gone to dinner and talk it over, and try to settle it. And, to secure you from any interruption, I will lock the door." He did so, and he did not return all afternoon. We two men, finding ourselves shut up together, began to laugh. This put us in good humor, and by the time Mr. Lincoln returned, the matter was settled.

There is no question that being an attorney is a hard job. The practice of law is based on contention, chaos, and turmoil. Each of us can therefore choose to be contentious, chaotic, and tumultuous.

Or we can choose, in the midst of contention, to be a little more thoughtful, a little more classy, a little more decent. So take a moment and thank the folks who have guided your life, the people who have helped you, inspired you, and elevated your soul. You stand on the shoulders of giants. Thank them for bearing your weight. They will be thrilled and you'll feel a little like a giant yourself.





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What to Expect from a Judicial Settlement Conference

by The Honorable Adam T. Mow

Prior to joining the Third District bench, I had the honor of mediating approximately 200 disputes of various types and complexities. Now as a district court judge, in addition to my regular caseload, I often conduct judicial settlement conferences for matters assigned to other judges. Many district court judges offer this service to litigants. A judicial settlement conference is an opportunity to resolve a dispute short of trial with the assistance of a judge acting as a quasi-mediator. The litigants and their attorneys meet with the settlement judge, who is not the judge assigned to the case, to discuss the issues and how to resolve them.

The assigned judge may order the parties to participate in a judicial settlement conference, especially if the case is ready for trial and other attempts to resolve it have failed. Or the parties may request a judicial settlement conference. It is up to the assigned judge whether a judicial settlement conference satisfies the alternative dispute resolution requirement under Rule 4-510.05 of the Utah Code of Judicial Administration. Rule 4-510.05 requires that nearly all contested civil matters be subject to alternative dispute resolution, such as mediation.

A judicial settlement conference is cut from the same alternative dispute resolution cloth as mediation. They are similar in that they are efficient uses of time, low risk, and relatively low cost. Like a mediated settlement agreement, an agreement reached in a judicial settlement conference offers many advantages over a judicially imposed decision. There is greater mutual satisfaction with a negotiated outcome, since the parties self-determine the result. And there is an increased likelihood of the parties abiding by their agreement because they have crafted terms they know they can meet. Contrast this with a judgment, where at least one party is typically unhappy with the outcome. There is also no guarantee that the party against whom the judgment is entered can satisfy it.

However, there are important differences between a judicial settlement conference and a mediation. Some differences are obvious. For example, the parties do not compensate a judge for time spent on the judicial settlement conference, while mediators typically charge an hourly or daily rate. The judicial settlement

conference occurs at the courthouse. Other differences are more subtle. This article explains aspects of a judicial settlement conference, including some of its differences with mediation.

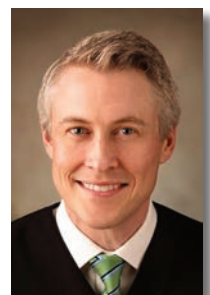
Duration and Timing

Unlike mediation, where a mediator may reserve a day or more to focus on the parties' dispute, the duration of a judicial settlement conference is limited by the judge's availability and caseload. I would gladly spend a day or more on a judicial settlement conference in an effort to resolve the dispute, but my calendar simply cannot accommodate it. I typically limit judicial settlement conferences to three hours. Even then, I often only have capacity for one or two judicial settlement conferences per month.

I generally prefer to conduct judicial settlement conferences when a case is certified ready for trial and the parties have all the necessary information to resolve their case. In all but the simplest cases, judicial settlement conference time cannot be spent on the parties learning facts or discovering the strengths and weaknesses of their legal positions. By contrast, a full day or more of mediation can better accommodate informal discovery and exploration of positions.

For more complex cases, I find that judicial settlement conferences are best used as an adjunct to mediation. A few hours in a judicial settlement conference may not be enough time to meaningfully interact with three or more parties. But a judicial settlement conference can be used to clean up discrete issues within a larger dispute or give parties a last-ditch opportunity to resolve a case prior to trial.

JUDGE ADAM T. MOW was appointed to the Third District Court in January 2018 by Governor Gary R. Herbert. Prior to his appointment, he had extensive experience as an arbitrator and mediator.



Preparation and Statements

Attorneys should largely prepare themselves and their clients for a judicial settlement conference in the same manner as preparing for mediation. Among other things, they should explore how a case might be tried and the estimated litigation fees and costs of trial; develop a negotiation strategy to include needs and wants, BATNAs (best alternatives to a negotiated agreement), and opportunities for mutual gain; understand the opposing party's interests; and realistically evaluate the risks of trial.

I ask that parties submit to me at least one week prior to a judicial settlement conference a brief statement that includes a background of the case, disputed key facts and legal issues, the status of negotiations and offers made, any perceived obstacles to settlement, the strengths and weaknesses of each party's position, and any other issues the party believes are relevant. I primarily ask for this information to educate me about the dispute, but it is also an important exercise to ensure that the parties and their counsel have made basic preparations for the judicial settlement conference.

I strongly recommend the parties share their statements with each other. This encourages the exchange of key information in advance of the judicial settlement conference. It also helps to avoid surprises over the likely topics of negotiation and respective settlement positions. If needed, the parties may also submit a separate confidential statement. A confidential statement may fully and candidly explore the weaknesses of the party's legal position and disclose a preferred outcome.

Confidentiality and Utah Rule of Evidence 408

Like mediations, Utah Rule of Evidence 408 protects offers and negotiations during a judicial settlement conference. This evidence is generally inadmissible in subsequent hearings. A judicial settlement conference has an important additional level of confidentiality that the settlement judge must respect – non-disclosure of information to the assigned judge. When acting as a settlement judge, I am careful to advise the parties at the start of the judicial settlement conference that no information that they share with me will be disclosed to the assigned judge. They must be assured that their statements, conduct, and offers during the judicial settlement conference will not hurt them if the case is not resolved; the assigned judge will only know whether the case settled. Otherwise, parties and their counsel will be hesitant to fully engage in the judicial settlement conference and the chances for resolution will suffer.

Unlike a court hearing, no audio record of the judicial settlement conference is made. The minutes my judicial assistants prepare simply reflect the date and time of the judicial settlement conference, the attendance of the parties and counsel, and whether an agreement is reached.

Case Evaluation

One of the benefits of a judicial settlement conference is that the parties get a judge to look at their case. While the settlement judge has no power to impose any decision on the parties, I find that the parties are very interested to hear my thoughts about their case. It is important that the settlement judge treads carefully in evaluating a case during a judicial settlement conference. It is appropriate for a settlement judge to give the parties an evaluation of the case, but only if the judge has sufficient information about the case. These evaluations can give the parties a crucial reality check on their positions. However, the settlement judge and the parties must recognize that any compromise must be voluntary, the settlement judge cannot impose any outcome on the parties, and the fact-finder's decision may differ from the settlement judge's evaluation due to receiving a more thorough presentation of evidence or interpreting the controlling law differently. If the settlement judge does not have adequate information about the case,

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the settlement judge acts only as a facilitator of the negotiation.

Documenting the Agreement

Like a mediated settlement, it is critical that the parties document any agreement at the end of the judicial settlement conference. The Utah Supreme Court held in *Reese v. Tingey Construction* than an oral argument reached during mediation is unenforceable. 2008 UT 7, ¶¶ 14–15, 177 P.3d 605.

It follows that judicial settlement conferences are not exempt from this requirement. The parties should document their agreement. A memorandum of understanding or a more formal written agreement is commonly used. Alternatively, some parties prefer to make an oral record of the terms of the agreement using the court's recording system. If an oral record is used, it is imperative that the terms of the agreement and the parties' assent be clear.

Reese's holding is limited to a written agreement resulting from mediation. It does not address whether an oral court record is similarly enforceable. An oral recorded agreement may satisfy the key concern in *Reese* – that a court enforcing a purported settlement agreement need not delve into confidential compromise

negotiations to ascertain the terms of the agreement – but this is an open question. Even so, whether I am the assigned judge or the settlement judge, I prefer a detailed memorandum of understanding or other written agreement to an oral record for a couple of reasons. First, a written agreement allows the parties to thoroughly review the terms to which they have agreed rather than simply voicing their consent to terms their attorney orally recites. As *Reese* explained, “[a] writing requirement . . . encourages parties to prepare a comprehensive, final settlement agreement free from misunderstandings and ambiguities.” *Id.* ¶ 13.

Second, if enforcement of the agreement becomes an issue, a document is easier for the assigned judge to review, interpret, and enforce. A lengthy oral record of a purported agreement will likely need to be reduced to a transcript and its language may be less precise than the wording of a written agreement.

Pro Se Parties

Self-represented parties may pose a unique challenge in a judicial settlement conference. Some mediators decline to work with pro se parties. I do not believe it is appropriate for a judge to avoid these judicial settlement conferences. Judges are public servants, and a judicial settlement conference is an important means to access justice. Pro se litigants should be given the same opportunities as represented parties to resolve their litigation.

Settlement judges may need to be cautious when evaluating a pro se party's case. Without the assistance and advice of counsel, an unrepresented party may give too much or too little weight to the settlement judge's impartial analysis. Similarly, settlement judges must ensure that self-determination is always respected and maintained. No pro se party should ever feel that their choices of whether to settle and on what terms have been removed or restricted.

Conclusion

Judicial settlement conferences give litigants a means to resolve their matter in lieu of trial. Like mediation, a judicial settlement conference can avoid the costs of protracted litigation while allowing parties to satisfy their interests. However, a judicial settlement conference is not always an appropriate alternative to mediation or another alternative dispute resolution process. Attorneys and their clients should carefully consider what process will best serve their needs. If parties participate in a judicial settlement conference, they should take full advantage of the opportunity and prepare accordingly – it may be their last chance to resolve the litigation on mutually acceptable terms.

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Sorting Out the Statute of Limitations for Utah Foreclosures

by Spencer Macdonald

Some practitioners of real estate law may have encountered litigation in which a borrower, citing the statute of limitations, has challenged a lender's right to foreclose. Correctly identifying and applying the appropriate statute of limitations for nonjudicial foreclosures in Utah is a surprisingly complex and somewhat unsettled area of law, as both state and federal courts have applied different statutes in different ways. This article explores the contours of this issue and also outlines additional and occasionally relevant factors to be considered.

Sorting out the Statutes

The statute of limitations for nonjudicial foreclosures consists of a series of statutes that must be read and interpreted together.

Utah Code Section 57-1-34

The first statute, Utah Code Section 57-1-34, provides that “[a] person shall, within the period prescribed by law for the commencement of an action on an obligation secured by a trust deed: (1) commence an action to foreclose the trust deed; or (2) file for record a notice of default under Section 57-1-24.” Which period is “prescribed by law” has not been immediately clear, as evidenced in Utah case law by two separate statutory schemes cited in tandem with this statute. While both schemes prescribe a six-year limitation period, they contain potentially different triggering dates for the commencement of the period.

Statute of Limitations – Mesne Profits (Utah Code Section 78B-2-309(2))

Utah Code Section 78B-2-309(1) (“Within six years – Mesne profits of real property – Instrument in writing”) provides that “[an action may be brought within six years] upon any contract, obligation, or liability founded upon an instrument in writing.” (Formerly numbered as Utah Code Ann. § 78-12-23 (2007)). This statute has previously been interpreted as six years from

the date of the borrower's default and has been invoked in various decisions pertaining to nonjudicial foreclosures. For example, in *Timm v. Dewsnup*, 2003 UT 47, 86 P.3d 699, the Utah Supreme Court interpreted a statute of limitations issue pertaining to a nonjudicial foreclosure sale by applying this statute. *Id.* ¶ 18; see also *F. M. A. Fin. Corp. v. Build, Inc.*, 404 P.2d 670, 672 (Utah 1965) (applying Utah Code Ann. § 78-12-23 (renumbered as *id.* § 78B-2-309)); *Tasila v. 698765 Isbell*, Case No. 2:12-cv-01115 (D. Utah March 30, 2015) (applying Utah Code Ann. § 78B-2-309); *DiMeo v. Nupetco Assocs., LLC*, 2013 UT App 188, ¶ 8, 309 P.3d 251 (same). However, this statute is found in “Part 3 (Other than Real Property)” of Title 78B, Chapter 2, which makes its application to foreclosures of real property potentially problematic. Moreover, most of the more recent federal and state decisions, discussed below, have declined to apply this statute in a foreclosure context.

Statute of Limitations – Uniform Commercial Code (Utah Code Section 70A-3-118(1))

An alternative statute, Utah Code section 70A-3-118(1) (“Statute of Limitations”), provides that “an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.” This statute is part of the Uniform Commercial Code, which governs negotiable instruments. Since a promissory note is a negotiable instrument,

SPENCER MACDONALD is a senior associate attorney at Halliday, Watkins & Mann, P.C., where he focuses on consumer finance, real estate, and business litigation.



see *id.* § 70A-3-104(1), and because a foreclosure of a deed of trust is an action to enforce a promissory note, this statute appears to have a more appropriate application to foreclosure actions. This conclusion is buttressed by a substantial series of recent state and federal decisions that have applied this statute to nonjudicial foreclosure disputes. See *Deleuw v. Nationstar Mortg. LLC*, 2018 UT App 59, ¶ 12, 424 P.3d 1075 (applying Utah Code Ann. § 70A-3-118);¹ *Hunt v. Citibank N.A. (In re Telford)*, Bankr. No. 16–26661, 2018 WL1224379, at *3 (Bankr. D. Utah Mar. 7, 2018) (same), *Long v. Halliday*, No. 2:17-cv-1025, 2018 WL 1054368, at *4 (D. Utah Feb. 23, 2018) (same); *Lewis v. Caliber Home Loans, Inc.*, No. 2:16-cv-01252, 2018 WL 485967, at *2 (D. Utah Jan. 18, 2018) (same); *Norton v. Wells Fargo Bank, N.A.*, Case No. 2:16-CV-1185, 2017 WL 1166340, at *8 (D. Utah Dec. 8, 2016) (same); *Van Leeuwen v. Bank of Am. N.A.*, No. 2:14-cv-00703, 2015 WL 5618048, at *3 (D. Utah Sept. 24, 2015) (same).

This second interpretation appears to be gaining traction in federal and state courts, as it refers specifically to “an action to enforce the obligation of a party to pay a note.” *Deleuw*, 2018 UT App 59, ¶ 12 (quoting Utah Code Ann. § 70A-3-118(1)). The court of appeals in *Deleuw* held that “[w]hen two statutory provisions conflict, the more specific provision governs,” and therefore “the more specific UCC statute of limitations [set forth in *id.* § 70A-3-118(1), rather than the statute of limitations set forth in *id.* § 78B-2-309] applies [to enforcement of a promissory note secured by a deed of trust].” *Id.* ¶ 13 (citation omitted). Consequently, section 70A-3-118(1) appears to be the more appropriate statute of limitations to be applied to nonjudicial foreclosures in Utah.

Clarifying the Commencement of the Statute of Limitations

Assuming that the UCC limitations statute applies to nonjudicial foreclosures, the limitations period commences upon either the last due date under the terms of the note and trust deed, or else upon the date the loan is accelerated, whichever is sooner. This conclusion comports with both the statutory language and with longstanding decisional authorities in Utah pertaining to executory contracts. For example, in *Olsen v. FAIR Co.* 2016 UT App 46, 369 P.3d 473, the Utah Court of Appeals explained that a trust deed constitutes an “executory contract,” meaning “[a] contract that remains wholly unperformed or for which there remains something still to be done on both sides.” *Id.* ¶ 11 (citation omitted). Consequently, “the statute of limitations [for executory contracts] does not begin to run until the contract is

either repudiated or complete,” and “generally does not begin to run until the time for full performance has arrived.” *Id.* ¶ 12 (citation omitted).

A deed of trust is also construed as an “installment contract.” *Anderson v. Davis*, 2008 UT App 86, at **1–2; accord *Kitches v. MSNI Benefit, LLC*, No. 2:17-cv-00628, 2017 WL 4119165, at *2, n.1 (D. Utah Sept. 15, 2017) (defining an “installment contract” as “one in which a buyer agrees to make payments over a set period of time”). The court in *Kitches* noted and applied the “Johnson Rule,” based on *Johnson v. Johnson*, 31 Utah 408 (1906), which provides that “the installment contract becomes due on some specific future date, and the obligee has done nothing to legally accelerate the future payments, the statute of limitations begins to run only after the obligor defaults on the final due date.” *Kitches*, 2017 WL 4119165, at *2 (quoting *Anderson*, 2008 UT App 86, ¶ 2).

In sum, although the body of decisional authorities addressing this issue is not a model of clarity, the clear trend is to apply the UCC statute of limitations to nonjudicial foreclosures.

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Tolling the Statute of Limitations

Notwithstanding the conclusion reached above, analysis of a statute of limitations issue may also include evaluation of whether the statute has been tolled by state and/or federal statutory provisions pertaining to the automatic stay in the bankruptcy code. *See* 11 U.S.C. § 362(a)(1) (precluding creditors from instituting an action against debtor prior to expiration of stay); Utah Code Ann. § 78B-2-112 (“The duration of an injunction or statutory prohibition which delays the filing of an action may not be counted as part of the statute of limitations.”); *accord Citicorp Mortg., Inc. v. Hardy*, 834 P.2d 554, 556 (Utah 1992) (stating that the above state and federal statutes, in conjunction, “[allow] the entire time period remaining on the claim to begin running when the automatic stay is lifted”).

Tolling can also arise under the “equitable discovery rule,” which provides that a statute of limitations “‘may be tolled until the discovery of facts forming the basis for the cause of action.’” *Jeppesen v. Bank of Utah*, 2018 UT App 234, ¶ 30, 438 P.3d 81 (citations omitted). In other words, “‘the equitable discovery rule may operate to toll an otherwise fixed statute of limitations if a plaintiff does not discover the cause of action due to the defendant’s concealment or misleading conduct or due to other exceptional circumstances that would make the application of the limitations period unjust.’” *Id.* (citations omitted)

Re-Starting the Statute of Limitations (Utah Code Section 78B-2-113)

Analysis of a statute of limitations issue may also include consideration of whether the limitations period has been or could be re-started. Utah Code section 78B-2-113(1)(b)–(c) (formerly numbered as section 78-12-44) provides that “[a]n action for recovery of a debt may be brought within the applicable statute of limitations from the date... (b) a written acknowledgment of the debt or a promise to pay is made by the debtor; or (c) a payment is made on the debt by the debtor.”

This statute re-starts the limitations period each time the borrower either makes a payment on the loan, or else acknowledges the debt in writing. In *Wells Fargo Bank, N.A. v. Temple View Investments* 2003 UT App 441, 82 P.3d 655, the Utah Court of Appeals explained that in order to file an action outside the statute of limitations based on a written acknowledgment, the written document “must be clear, distinct, direct, unqualified, and intentional.” *Id.* In addition, “[t]he acknowledgment necessary to start the statute [running] anew must be more than a hint, a reference, or a discussion of an old debt; it must

amount to a clear recognition of the claim and liability as presently existing.” *Id.* (quoting *Beck v. Dutchman Coal. Mines Co.*, 2 Utah 2d 104, 269 P.2d 867, 869–70 (1954)).

What constitutes a “written acknowledgment” is fairly broad and can presumably include statements made as part of a loan modification application. Listing the debt in a borrower’s bankruptcy petition, without identifying the debt as contingent, liquidated or disputed, may also qualify as a “written acknowledgment.”

The Impact of DiMeo

Finally, both federal and state courts in Utah have held that regardless of whether the statute of limitations has expired, the beneficiary is still entitled to foreclose. *See DiMeo v. Nupetco Assocs.*, 2013 UT App 188, ¶ 9, 2013 UT App 188 (“[T]he running of the statute of limitations only prevents Nupetco from imposing liability on Vern and Eleanor personally for amounts still due after the security is sold and the proceeds applied to the debt.”); *Koyle v. Sand Canyon Corp.*, Case No. 2:15-CV-00239, 2016 WL 917927, at *23 (D. Utah Mar. 8, 2016) (“[E]ven if the statute of limitations to enforce the note has expired, [the beneficiary] is still entitled to foreclose on the deed.”); *Christensen v. Am. Heritage Title Agency, Inc.*, 2016 UT App 36, ¶ 24, 368 P.3d 125 (explaining that the *DiMeo* decision “was based on the conclusion that the trust deed was still enforceable [even after the statute of limitations eliminates the obligors’ personal liability under the note]”).

Conclusion

Although the statute of limitations issue examined in this article is somewhat complex, the end result is that Utah law is weighted heavily in favor of holders of security interests against real property. Practitioners defending foreclosing parties may need to be familiar with how the foregoing intricacies play out, but in the end, they can usually provide assurances to their clients that these intricacies will likely not affect the ability to foreclose. Meanwhile, practitioners representing borrowers may want to reconsider the viability of legal challenges to pending foreclosures when such challenges are based on the statute of limitations.

1. After *Deleeuw*, the Utah Court of Appeals issued a contrary decision by applying Utah Code section 78B-2-309 rather than section 70A-3-118(1), noting that “[n]either side has argued that the six-year statute of limitations for negotiable instruments under the Uniform Commercial Code applies, which has potentially different triggering dates. *Cf. Deleeuw*...” *Jeppesen v. Bank of Utah*, 2018 UT App 234, ¶ 19 n.4, 438 P.3d 81.



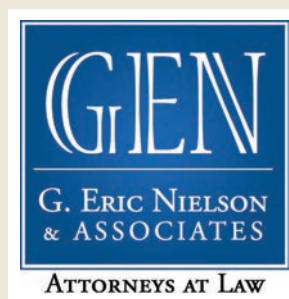
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Don't Threaten that Bar Complaint

by Kenneth Lougee

We have all been there. Lawyers handle legal matters because, for the most part, laypersons do not have the relevant expertise to represent themselves. The cases we handle involve the lives or livelihoods of our clients. Lawyers are under stress when representing clients because many times they see the outcomes more clearly than the clients. This is true whether the matter be high-level business negotiations, family law, or simply high-stakes litigation. Lawyer stress leads to frustration. Stress and frustration may also lead to lawyers attempting to intimidate their counterparts through hostile or demeaning comments. To obtain results, lawyers may resort to unfortunate conduct that does not advance their clients' interests. Far too often, these attempts at intimidation lead lawyers to threaten opposing counsel with a bar complaint. The purpose of this article is to explain that threatening a bar complaint is never proper and is indeed itself a professional violation.

The next time you find yourself wanting to threaten a bar complaint, please don't do it. Threatened bar complaints misunderstand the obligations to report under Utah Rule of Professional Conduct 8.3(a). Threats ignore many of the rules of civility. A threat of a bar complaint probably exposes the threatening lawyer to his or her own bar complaint under Utah Rules of Professional Conduct 3.1 and 4.4(a). In sum, threatening bar complaints is never an appropriate litigation or negotiation tactic. Further, it is a bad idea.

The Utah Constitution gives the Utah Supreme Court of Utah explicit authority to govern the practice of law, including discipline of persons admitted to practice law. Utah Const. art. VIII, § 4. The supreme court has adopted the Utah Rules of Professional Conduct to meet its constitutional obligations. The court has clearly set out when a report of professional misconduct is required and when it is not. Rule 8.3(a) provides: "A lawyer who knows that another legal professional has committed a violation of the applicable Rules of Professional Conduct that raises a substantial question as to that Legal Professional's honesty, trustworthiness or fitness as a legal professional in other respects shall inform the appropriate professional authority." Utah R. Prof'l Conduct R. 8.3(a).

Parsing the rule and commentary indicates that ordinary garden variety instances of everyday legal conduct are not proper subjects of bar complaints. Only complaints of substantial impropriety must be reported. There is evidence that members of the general bar do not understand their duties of reporting attorney conduct because we hear of complaints of unethical behavior arising out of ordinary litigation. Comment 3 to Rule 8.2 indicates that "if a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be professional misconduct." *Id.* R. 8.2 cmt. 3. A duty to report every violation of the Rules proved unworkable in the past because it was unenforceable. Even serious conduct went unreported and unpunished. *See Attorney U v. Mississippi State Bar*, 678 So. 2d 9623 (Miss. 1996) (noting an opposing lawyer who saw documentary evidence of a violation); *see also In re Riehlmann*, 891 So. 2d 1239 (2005) (involving a criminal defense lawyer with a good idea that the prosecutor had fudged a DNA test).

To make certain that serious complaints are reported, the comment provides: "This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent." Utah R. Prof'l. Conduct R. 8.3 cmt. 3. If opposing attorney conduct does not meet that strenuous standard, a threat to report is no more than gratuitous hot air.

What are those serious offenses? Looking at recent Utah cases, those offenses would certainly include misappropriation of funds entrusted to the lawyer. They would include perjury or suborning perjury. Serious offenses would also involve repeated violations of court orders or courtroom decorum. Serious conduct might involve charging unreasonable fees under Rule 1.5. The

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important point is that if a lawyer “knows” of a serious offense, his or her duty is to report. It is not to threaten to report to obtain litigation advantage.

Filing a bar complaint is mandatory if a lawyer has knowledge of a serious offense. The duty to report refers not to the quantum of proof known to the lawyer but rather to the seriousness of the conduct. If the lawyer knows of such serious conduct and only threatens a bar complaint for litigation advantage, that lawyer has violated his or her duties of professional conduct.

To define serious misconduct, the rule uses the term “substantial question of honesty or trustworthiness.” This doesn’t refer to a discovery dispute or a motion that the receiving lawyer finds inappropriate. There are means of handling such disputes that arise in the everyday practice of law. If the problem can’t be worked

out between the lawyers, the parties may resort to the courts for decisions on those matters. Comment 3 also tells the bar that “[a] measure of judgment is, therefore, required in complying with the provisions of this rule.” Utah R. Prof'l Conduct R. 8.3(a) cmt. 3. Except for frivolous pleadings violating Utah Rule of Civil Procedure 11 and Utah Rule of Professional Conduct 3.1, filing papers with a court usually doesn’t call for a bar complaint.

It is clear that members of the Utah Bar threaten bar complaints far too frequently. Consider Utah State Bar Ethics Advisory Opinion 2017-02. The committee was asked if there was a duty to report opposing counsel who was overheard contemplating forming a partnership with his non-lawyer legal assistant. The question posed to the committee was if there was a duty to report overheard conversations. The Committee rejected the notion that every idle word coming from a lawyer implies a duty

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to report misconduct. The Committee pointed out that

The offending lawyer may well read the Rule and come to the conclusion that his proposed course of action is precluded. His fellow attorney in an act of professional courtesy might also give him that knowledge in order to assist a fellow lawyer from doing that which he ought not.

State Bar Ethics Advisory Op. 2017-02 (2017).

The Preamble to the Utah Standards of Professionalism and Civility informs us that as lawyers, we have obligations to “the administration of justice, which is a truth seeking process designed to resolve human and societal problems in a rational, peaceful and efficient manner.” Conduct that is uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental purposes of our system of laws. A wrongful threat of a bar complaint for litigation advantage meets all of those criteria.

Indeed, several of the Utah Rules of Professional Conduct specifically implicate wrongful threats of bar complaints. Rule 5 tells us that lawyers should not lightly seek sanctions and never seek a sanction for an improper purpose. There is no legitimate purpose to threats of bar complaints. The conduct is either serious, in which case

a lawyer must report, or it is not serious and thus only harassment as a litigation strategy. This conclusion is supported by Rule 1, which requires lawyers to only advance the legitimate interest of their client. This does not include a threatened bar complaint.

More importantly, Rule 3 precludes expressions of scorn, superiority, or disrespect: “Legal process should not be issued merely to annoy, humiliate, intimidate or harass.” Utah R. Prof'l Conduct R. 3.1. Frivolous threats of bar complaints fall under those provisions as they have no legitimate purpose.

Indeed, before a lawyer threatens a bar complaint, he or she should consider his or her own duties under the Rules of Professional Conduct. Rule 3.1 precludes a lawyer from asserting an issue “unless there is a basis in law and fact for doing so that is not frivolous...” *Id.* A lawyer has a duty not to abuse legal procedure. Threats of bar complaints are frivolous and abusive because a lawyer has no duty to report actions unless they fall into that small and special category of conduct which a self-regulating profession may not condone.

Rule 4.4(a) precludes a lawyer from using means “that have no substantial purpose other than to embarrass, delay or burden a third person.” *Id.* R. 4.4(a). Every idle threat of a bar complaint is a violation of this rule because it has no substantive purpose.

We must also distinguish threats of bar complaints where a lawyer has a duty to report serious misconduct from threats of criminal prosecution. Threats of criminal prosecution against opposing parties are not per se violations of Rule 8.3(a) because the lawyer has no duty to report criminal conduct. Even there, however, threats are violations of Rule 4.4, if the lawyer does not have a reasonable belief that such charges are warranted by the law and the facts. *See* Utah State Bar Ethics Advisory Committee, Opinion 03-04 (2003). Applying that logic to bar complaints, an unwarranted threat of a bar complaint is grounds for discipline under Rule 4.4.

In sum, without allegations of serious misconduct, threatening a bar complaint is more likely to implicate a violation of the rules by the threatening lawyer than by the recipient. If, as a Bar, we take the duties imposed under the rules of civility seriously, such threats should stop. If we take our duties to protect the integral processes of the court, on the few occasions when serious offenses do occur, we should not threaten to file a bar complaint as a litigation tactic. If there is a serious offense, we have duties to report and not merely threaten. We can therefore conclude that there never is a justification to orally or in writing threaten a bar complaint against opposing counsel.

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Appellate Highlights

by Rodney R. Parker, Dani Cepernich, Robert Cummings, Nathanael Mitchell, Adam Pace, and Andrew Roth

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

UTAH SUPREME COURT

***Keystone Insurance Agency, LLC v. Inside Insurance, LLC* 2019 UT 20 (May 29, 2019)**

In this dispute over an operating agreement, the Utah Supreme Court affirmed the district court's grant of a motion in limine excluding the plaintiff's damages evidence. The plaintiff failed to comply with the damages disclosure requirements of Rule 26, where it did not provide any damages computation or identify a theory or methodology of damages during fact discovery, and disclosed the same for the first time at the end of expert discovery.

***Kuchcinski v. Box Elder County* 2019 UT 21 (June 3, 2019)**

Following dismissal of Section 1983 claims in federal court, a state court dismissed claims against a county and county sheriff's office alleging violation of right to bail and due process based upon failing to show a flagrant violation or to identify a specific employee that violated his rights. In reversing and remanding the due process claim, the Supreme Court held that a plaintiff need not identify a specific employee in order to demonstrate a flagrant violation of his or her constitutional rights. A plaintiff need only "plead and prove against the municipality that municipal actors committed a flagrant violation against the plaintiff and that the violation resulted from a policy or custom of the municipality."

***Rutherford v. Talisker Canyons Finance Co.* 2019 UT 27 (June 27, 2019)**

In reviewing a denial of summary judgment for the owners of the Canyons Resort, the Utah Supreme Court took the opportunity to evaluate two prior decisions dealing with personal injury liability arising from recreational activities. First, although the decision was technically superseded by a subsequent statute, the court unanimously upheld the reasoning of *Hawkins ex rel. Hawkins v. Peart*, 2001 UT 94, 37 P.3d 1062. The court held that, **absent specific legislative enactments to the contrary, preinjury releases signed by parents on behalf of minors are against public policy and unenforceable as a matter of law.**

A majority of the court also reaffirmed the interpretation of Utah's Inherent Risks of Skiing Act laid out in *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991), but "streamline[d]" *Clover's* two-step interpretive test by collapsing it into a single reasonableness inquiry. In a lengthy partial dissent, Associate Chief Justice Lee argued that *Clover's* test is incompatible with the plain statutory text, unworkable in practical terms, and ripe for overruling.

***Gardner v. Gardner* 2019 UT 28 (June 27, 2019)**

The district court reduced the amount of alimony awarded to the wife based on wife's "fault" that "substantially contributed" to the demise of the marriage. The Utah Supreme Court **interpreted the statutory requirement that the fault "substantially contributed to the breakup of the marriage" to mean that the conduct at issue must be an important or significant factor in the divorce, but it does not have to be the first cause or the only cause.** Applying this definition, the court held that the district court did not abuse its discretion in reducing the alimony awarded to the wife, even though there were other potential causes of the divorce.

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

UTAH COURT OF APPEALS

*Nave-Free v. Free***2019 UT App 83 (May 16, 2019)**

In this domestic case, the appellant argued that a post-decree reduction in medical expenses should result in a decrease of child support. The court of appeals clarified that the statute at issue, which allowed an adjustment to child support based on material changes in medical needs of a child, was directed at changes to “underlying medical conditions.” *Id.* ¶¶ 17–18. **Because the appellant addressed only costs of care, as opposed to changes in the children’s medical needs, the district court did not err in denying his petition to modify child support.**

*Willis v. Adams & Smith, Inc.***2019 UT App 84 (May 16, 2019)**

The defendant argued that the testimony of plaintiffs’ non-retained expert on the issue of valuation should have been excluded at trial because the expert was not properly disclosed under Utah R. Civ. P. 26(a)(4)(E). In rejecting this argument, the court of

appeals noted that the plaintiffs had listed the witness in their initial disclosures as a fact witness likely to testify on valuation, attached a summary of his valuations and supporting documentation to the initial disclosures, and further described his methodology in response to an interrogatory. **The court held that these steps, taken together, provided “fair notice” of the plaintiffs’ intent to call the witness as a non-retained expert and satisfied Rule 26(a)(4)(E).**

*State v. Lane***2019 UT App 86 (May 23, 2019)**

The court of appeals **reversed the defendant’s conviction for assault and possession of a dangerous weapon by a restricted person on the basis the district court applied the wrong standard in admitting prior act evidence under the doctrine of chances.** The district court’s analysis was limited to “mechanically applying *Verde*’s foundational requirements under Rule 404(b)” and did not involve a separate rule 403 analysis. In this case, the prejudicial inference that the defendant’s character predisposed him to get in knife fights and then claim self-defense substantially outweighed the State’s



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justifications for admitting the evidence. In a concurring opinion, Judge Harris raised the question – not presented by the defendant – whether it could ever be appropriate for the doctrine of chances to be applied to admit prior acts evidence to rebut a defendant's claim he acted in self-defense, noting it would be worthwhile for a future litigant to raise this issue.

Nielsen v. Retirement Board
2019 UT App 89 (May 23, 2019)

In this administrative appeal, Nielsen argued that the Utah Retirement Board erred when it concluded that she could not continue participating in a non-contributory plan offered through Utah Retirement Systems, because she failed to make an election at the time that she accepted a new position at the University of Utah. Reversing, the court held that **the board erroneously interpreted the term “one-time irrevocable election” to impose a time limit for making an election.** Instead, the phrase simply meant that an individual could make a non-reversible decision to continue participating in the plan.

Ross v. Ross
2019 UT App 104 (June 13, 2019)

Intending to move from Salt Lake County to Uintah County with her two children, the appellee filed a notice of relocation pursuant to Utah Code § 30-3-37. After a two-day evidentiary hearing, the district court granted the relocation request, which resulted in a change to the physical custody arrangement and the primary physical custodian. Analyzing the interplay between the relocation statute and Rule 106, the court of appeals reversed and held that **a party seeking to relocate cannot simply file the statutory notice but instead must file a petition to modify if the relocation will effectuate a change in custody in favor of the relocating party.**

Sprague v. Avalon Care Center
2019 UT App 107 (June 20, 2019)

An expert witness is not required to expressly state that each of his opinions on the standard of care was given within “a reasonable degree of medical certainty.” Instead, the expert's testimony should be viewed as a whole and analyzed on its substance to determine whether it is sufficiently reliable. Applying this standard, the court concluded that the expert's testimony was offered either expressly or impliedly to a reasonable degree of medical certainty, and therefore the directed verdict was properly denied.

Wilson v. Sanders
2019 UT App 126 (July 18, 2019)

The appellants sought to challenge the trial court's denial of their Rule 60 motion to vacate a judgment that was entered after a jury trial. The court of appeals concluded that it **lacked jurisdiction to consider the appeal because the notice of appeal did not specifically identify the order denying the Rule 60 motion.** Although the notice of appeal included language stating that the appeal was taken from the final judgment and orders subsumed in it, the Rule 60 motion was not subsumed in the final judgment because it was decided a week after the judgment was entered.

Hayes v. Intermountain GeoEnvironmental Servs. Inc.
2019 UT App 112 (June 27, 2019)

The court of appeals affirmed the dismissal of tort claims brought by a homeowner against a geotechnical engineering company under the statutory economic loss rule found in Utah Code § 78B-4-513(1). The court concluded that **the tort claims were “an action for defective design and construction,” within the meaning of the statute, and were therefore barred by it, because each category of damages the plaintiff sought was related to allegations of defective design or construction.** The court further concluded that the “other property” exception did not apply to permit tort claims for damage to the home that was built upon the land that the company tested.

State v. Squires
2019 UT App 113 (June 20, 2019)

The defendant was convicted of four communications fraud counts and one count of pattern of unlawful activity related to enticing his uncle to post property as collateral on a real estate investment hard money loan with the collateral ultimately lost. The court held that **the State could not establish “closed ended continuity” for purposes of the pattern count “because Squire's predicate acts of communications fraud extended over a short period of seven to eight months” and Squires' interactions with this uncle “did not ‘by its nature project[] into the future with a threat of repetition.”**

10TH CIRCUIT

United States v. Loera
923 F.3d 907 (10th Cir. May 13, 2019)

While executing a search warrant for evidence of computer fraud, federal agents discovered child pornography on certain disks in the

defendant's home. Setting those disks aside, the agents continued their search for evidence of computer fraud. The Tenth Circuit affirmed denial of the defendant's motion to suppress the evidence of child pornography, **holding that law enforcement need not stop a lawful search when evidence of crimes outside the scope of the warrant is discovered, so long as the search continues only to fulfill the original purpose of the warrant.** However, the court also held that the agents unreasonably exceeded the scope of the original warrant when they later reviewed the seized disks to prepare a second warrant to search for more child pornography. That second search, although unlawful, was nevertheless upheld under the inevitable discovery doctrine.

Hamer v. City of Trinidad

924 F.3d 1093 (10th Cir. May 15, 2019)

The Tenth Circuit **considered when and how a government entity violates Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: only when it *initially* constructs or creates a non-compliant service, program, or activity; or *repeatedly* until it affirmatively acts to remedy the non-compliant service, program, or activity.** The court held it is the latter. It then explained the differences between the continuing violation doctrine and repeated violations doctrine, holding the repeated violations doctrine applies to claims under these two statutes. Under that doctrine, the statute of limitations bars recovery only for those injuries the plaintiff incurred outside of the limitations period immediately preceding the day of suit; it does not bar recovery for injuries the plaintiff suffered within the limitations period or after the plaintiff filed suit.

Petersen v. Comm'r of Internal Revenue

924 F.3d 1111 (10th Cir. May 15, 2019)

Majority shareholders of a closely-held S corporation appealed an adverse tax decision. The Internal Revenue Service disallowed deductions based on contributions to an employee stock ownership plan (ESOP). Discussing general principles applicable to trusts and ERISA, the Tenth Circuit affirmed and held **an ESOP constitutes a trust within the meaning of I.R.C. § 267**, which meant that the corporation could not claim a deduction for contributions to its ESOP in 2009, even though expenses were incurred that year, if the corporation did not actually pay the amounts until 2010.

Kell v. Benzon

925 F.3d 448 (10th Cir. May 28, 2019)

On a habeas petition, Kell asserted two new claims after his initial petition was filed. The district court stayed one of the new claims to allow exhaustion in state court while the remaining claims

proceeded. The Government filed a notice of appeal asserting that the collateral-order doctrine applied to the stay order. The Tenth Circuit held, over a dissent by Judge Baldock, that **the collateral-order doctrine did not apply to so-called Rhines stays in the habeas context and dismissed the appeal for lack of jurisdiction.**

Kane County, Utah v. United States

928 F.3d 877 (10th Cir. June 25, 2019)

The Tenth Circuit addressed the U.S. Supreme Court's recent holding, in *Town of Chester, New York v. Laroe Estates, Inc.*, 137 S.Ct. 1645 (2017), that an intervenor as of right under Fed. R. Civ. P. 24 must meet the requirements of Article III standing if the intervenor seeks relief not already requested by an existing party. Applying this rule, a majority of the panel held that **SUWA need not show independent Article III standing because it sought the same relief as the United States, an existing party.** As part of its Rule 24 analysis, however, the majority also held that SUWA's interests may not be adequately represented by the United States, citing the government's duty to represent broad public interests, rather than specific environmental interests, in the litigation. Writing in dissent, Judge Tymkovich argued that these two holdings were fundamentally inconsistent and that SUWA lacked the imminent injury-in-fact necessary to establish Article III standing.

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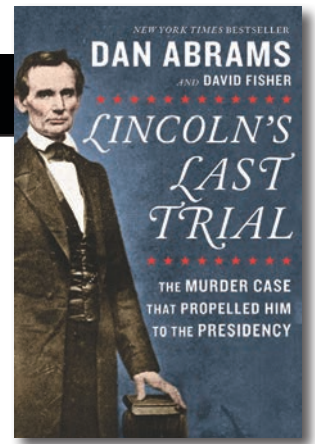
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Before Lincoln Saved the Union, He Fought to Save a Client from the Gallows

Reviewed by Brian Craig



Recent news stories involving unethical conduct by lawyers, such as misdeeds by Michael Cohen and Michael Avenatti, have tarnished the reputation of the legal profession. But the legal career of a certain self-taught country lawyer who ended up preserving the Union set a standard for all lawyers to follow in terms of professionalism and excellence.

In *Lincoln's Last Trial: The Murder Case that Propelled Him to the Presidency*, Dan Abrams and David Fisher provide a detailed account of the sensational 1859 murder trial in *The State of Illinois v. "Peachy" Quinn Harrison*. In his last trial before assuming the presidency, Abraham Lincoln represented "Peachy" Quinn Harrison, accused of murdering Greek Crafton. Lincoln argued that Harrison acted in self-defense, an affirmative defense not yet fully developed in 1859. Lincoln had close personal ties to the case. The murder victim, Crafton, studied the law under the tutelage of Lincoln himself. And the accused murderer, Peachy, was the son of Lincoln's close friend and a loyal supporter.

A Lost Trial Transcript Resurfaces

The original transcript written by the hand of scribe Robert Roberts Hitt remained undiscovered for more than a century until it was discovered in 1989 in a shoebox stored in a garage of the Fresno, California home once owned by Quinn Harrison's great-grandson. Abrams, ABC News chief legal affairs anchor and a Columbia University Law School graduate, adapted the old dusty transcript and takes the reader on a journey to the past looking at the case through the eyes of Hitt.

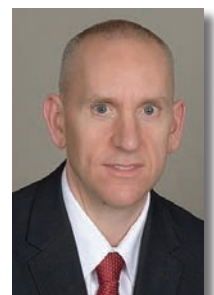
The book adds legal history tidbits to provide context and background, such as the origin of the Magna Carta and the history of the right to a trial by jury. One of the more intriguing anecdotes involves the origin of the oath taken by witnesses who testify in open court. In old Roman times, urban legend says that male Romans had to squeeze their testicles while vowing to tell the truth, as the Latin word for witness is "testis." The authors clarify that the more likely origin for "testis" comes from the ancient Greeks, meaning three, a witness being a third

person to observe events. In the Harrison trial, witnesses kissed the Bible after taking the oath in accordance with the guidance set forth in Bouvier's Law Dictionary.

The account reads more like a novel than a nonfiction scholarly book. To this end, the book lacks extensive end notes found in books published by university presses. *Lincoln's Last Trial* uses

a general bibliography, which may cause some disappointment. The book includes a helpful index, although some of the index entries could have more subentries. Black and white images of key persons and places add insight, including a photo of Lincoln sans beard taken in 1859 one month after the conclusion of the trial. Moreover, the book features other drawings and images, such as the Springfield courthouse and downtown square.

BRIAN CRAIG is an attorney in Logan, Utah with the Law Office of Brian Craig, PLLC. He is also the author of Cyberlaw: The Law of the Internet Technology and Latter Day Lawyers (with foreword by Senator Harry Reid).



***Lincoln's Last Trial:
The Murder Case That Propelled
Him to the Presidency***
by Dan Abrams and David Fisher
Publisher: Hanover Square Press (2018)
Pages: 320
**Available in hardcover, paperback,
audiobook, and e-book formats.**

Lincoln, who tried more than 2,000 cases, both criminal and civil, still holds the record for the most cases argued before the Illinois Supreme Court. During Lincoln's distinguished legal career, he argued more than 300 cases before the Illinois Supreme Court at the Old State Capitol in Springfield. The eventual 16th President of the United States delivered an address at the Old State Capitol in 1858 during one of his debates with Stephen Douglas where Lincoln gave his famous House Divided speech saying, "A house divided against itself cannot stand." But the spectacular murder trial against Peachy Harrison took place at the main courthouse in Springfield rather than the Old State Capitol. During the trial at the courthouse in Springfield where he tried several hundred cases, Lincoln displayed his oratory skills and carried his reputation as "Honest Abe" to his fellow lawyers and jurors.

The *State v. Harrison* case itself involved an altercation at a drugstore involving individuals from two well-known Springfield area families. The much smaller Harrison slashed the more physically imposing Crafton in the abdomen with a knife after Crafton and his associates grabbed Harrison with intent to "stomp his face" over vague insults to the Crafton clan. If convicted of murder, Peachy Harrison faced execution by hanging.

A Dying Declaration Made to Lincoln's Nemesis

As with many cases today, the trial boiled down to one key piece of evidence. Lincoln used his skills and experience convincing Judge Edward Rice to admit the out-of-court deathbed confession made by the victim. At the time, the dying declaration exception to the hearsay rule, like the self-defense doctrine, was still in its infancy. Yet Lincoln passionately presented his argument and properly secured admission of the critical evidence for the defense team before the male-only jury.

To make matters even more challenging and personal for Lincoln, the key witness was none other than Lincoln's long-time political enemy. As the saying goes, law and politics make for strange bedfellows. The phrase "strange bedfellows" is adapted from a line in the play *The Tempest*, by William Shakespeare: "Misery acquaints a man with strange bedfellows." The defense team's star witness, Reverend Peter Cartwright, once called Lincoln "an infidel" and a man unfit to represent good Christians. Cartwright, a revivalist Methodist, previously ran twice against Lincoln for political office. In 1846, Abraham Lincoln ran as a Whig Party candidate and defeated Reverend Cartwright and served one term in the United States Congress.



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As any zealous advocate representing the best interests of his or her client should do, Lincoln put aside his personal feelings and any animosity toward Cartwright and called the reverend to the stand. Reverend Cartwright testified that he visited the mortally wounded Greek Crafton three days after the scuffle. Facing imminent death after the stabbing, Crafton told the reverend, “I have brought it upon myself. I forgive Quinn and I want it said to all my friends that I have not enmity in my heart against any man.”

In 1859, defendants accused of a crime in Illinois could not testify on their own behalf. Thus, Harrison was considered incompetent to personally testify before the jury. Rather, Lincoln relied on other evidence, such as the testimony of Reverend Cartwright, to convince the jury that the much smaller Peachy Harrison feared for his own life and acted in self-defense in resisting his much larger attacker. The U.S. Supreme Court finally recognized in 1987 that the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment protect the right of the individual to testify on one’s own behalf at a criminal trial. *See Rock v. Arkansas*, 483 U.S. 44 (1987). Of course, the states did not ratify the Fourteenth Amendment, which incorporates certain protections of the Bill of Rights to state and local governments, until after the Civil War.

Passionate Closing Arguments

While Hitt did not make a full transcript of Lincoln’s closing arguments, readers can gain some insightful details. To make a connection to the common people, Lincoln quite often began his closing arguments with a story, often at his own expense. The book also visits some of the closing arguments utilized by Lincoln in other cases. In one medical malpractice case, Lincoln represented a doctor accused of causing permanent damage to a man’s legs. Lincoln used chicken bones as a prop during his summation to demonstrate that leg bones from a young chicken were supple and would flex and bend, while the leg bones from an older chicken were brittle and would snap far more easily.

One witness account said that Lincoln acted with “ease, elegance, and grace” when he gave his summation in the Harrison trial. Lincoln’s closing arguments lasted nearly two hours. With his shirt drenched in sweat from the blistering summer heat inside the courtroom without the benefit of modern air conditioning, Lincoln’s compassion was real as the tragedy struck close to home. A short excerpt of Lincoln’s passionate summation to the jury remains: “What happened was a tragedy, and to find Quinn Harrison guilty of anything other than being young and impetuous

and scared would do nothing but further the tragedy. (Lincoln’s) words poured out of him without even a slight pause, and sounded to Hitt almost musical in their rhythm.”

After just one hour and nine minutes of deliberations, an unusually brief period, the jury came back with a unanimous verdict. But the book’s subtitle, “The Murder Case that Propelled Him to the Presidency,” may be a slight exaggeration. While the Peachy Harrison case captured the attention of the Springfield masses, most historians generally agree that the case did not receive much fanfare at the national level. Yet Lincoln secured his reputation as an eloquent speaker as he honed his oratory skills. That reputation eventually led him to the White House as a dark horse candidate and through the difficult times during the Civil War.

Following in the Footsteps of Honest Abe

Lincoln and the other lawyers for both the prosecution and the defense team demonstrated the highest ethical behavior throughout the trial. While criminal defense lawyers sometimes have a negative public image today, Lincoln’s reputation stands largely unblemished. Lincoln rarely objected to the presentation of evidence submitted by the prosecution; a trial tactic lawyers today could emulate more. Even though some lawyers at the time twisted the law to gain their own advantage, the lawyers in this case saw to it that the law was done right. Indeed, justice was served. Lincoln and his main adversary during the trial, lead prosecutor John Palmer, remained good friends throughout their lives as Palmer eventually rose to the rank of brigadier general fighting for the Union during the Civil War with Lincoln as Commander in Chief. Palmer later became governor of Illinois and represented Illinois in the United States Senate after Lincoln’s assassination.

Lawyers today can still learn insightful lessons from the example of Honest Abe by reading *Lincoln’s Last Trial*. The words of Lincoln himself, written in a well-known 1850 essay, ring true for lawyers across all generations: “There is a vague popular belief that lawyers are necessarily dishonest. . . . Let no young man [or woman], choosing the law for a calling, for a moment yield to this popular belief.” Lincoln continued, “Resolve to be honest at all events; and if, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.” Following the words of Lincoln today remain more important than ever.

Dan Abrams’s latest book, *Theodore Roosevelt for the Defense: The Courtroom Battle to Save His Legacy*, was released in May 2019.

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Innovation Can Come from Design, Rather than Technology

by Shantelle Argyle

Many lawyers develop their practices by borrowing ideas from others, signing up for free trials of new software solutions or using Google for pressing problems and are just plugging along just trying to make a living.

We often long to solve our problems and increase efficiencies by writing a check to an expert for the newest, latest, and greatest tech. It then promptly sits idle or becomes obsolete before we ever see any benefit. It's tempting to hope that we can pass the problem on to a robot, but in reality, most lawyers simply do not have the know-how or resources for a truly automated practice.

Those firms that have devoted the time and energy to identifying and analyzing their processes are well positioned to act on that crucial information and improve, both internally and externally, for the benefit of their team and their clients.

If attorneys want to deliver exceptional service, run an efficient and productive firm, and get paid for all of that, solutions to problems need to come from human-centered design.

What is it Human-centered Design?

Human-centered Design (HCD) is a philosophy that focuses on the people affected by a problem and includes their perspectives when designing solutions. For example, imagine that a paralegal points out frustration with the process for assembling a trial binder. The paralegal mentions the supplies are located too far from the printer, which makes the whole process take longer. While the paralegal might benefit from the extra steps for the

day, lost time and efficiency also means lost money to the client.

Using both the client's perspective (paying for inefficiency inflates legal fees and decreases client satisfaction) and the paralegal's perspective (inefficiency keeps him or her from moving on to the next task), you determine that building shelving and an assembly station next to the printer will resolve the issue and

increase productivity. The client is happy that a task takes less time and therefore costs less. What was previously always a frustrating experience for the paralegal is now quicker and easier and, as a bonus, serves as a reminder that you listened to his or her perspective. This solution did not require a speck of

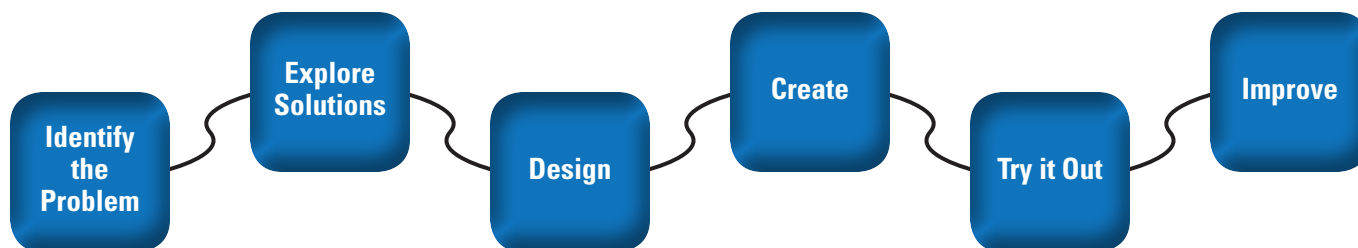
technology, and yet had a significant impact on your practice.

It's easy to make assumptions regarding what is best for clients and team members, but when that happens, it's also easy to see our solutions fail. For more information on HCD, visit <https://medium.com/dc-design/what-is-human-centered-design-6711c09e2779> (last visited June 3, 2019).

"If attorneys want to deliver exceptional service, run an efficient and productive firm, and get paid for all of that, solutions to problems need to come from human-centered design."

SHANTELE L. ARGYLE co-founded Open Legal Services, Utah's first nonprofit sliding scale law firm. After five years, Shantelle formed her own sliding scale solo practice. She continues to consult nationally with sliding scale nonprofits and law schools, while providing family and criminal law services in Utah.





The Benefits of a Design Approach to Law

As noted in the introduction above, lawyers are often tossed into the deep end after admission to practice. However, surviving does not mean thriving, and decisions made while trying to stay afloat often include some bad habits.

A design approach includes thoughtful consideration before implementing any new process, as noted in the graphic above.

Chances are pretty good you either started a firm, or joined a firm, and established in a vacuum or learned existing processes without necessarily questioning why things are, or whether they should be, done that way. When we take a step back to identify the processes we use and document them for analysis, we reap benefits both internally and externally.

This exercise enables the firm to become more agile and efficient. It provides consistency in execution, which minimizes mistakes, finger-pointing, dropped balls, and “creativity” among the team. It will enhance the team’s ability to identify issues with processes, and, with an open-door policy, encourage team members to make constructive suggestions for improvement.

Whom to Involve

The entire team should be involved. Not only does this ensure all information is captured, it also helps staff feel empowered and valued and increases empathy toward staff from attorneys. It’s easy to forget that each team member is facing a unique set of challenges within the firm model; bringing everyone together to discuss those challenges increases harmony and can improve morale.

You may also enlist the help of other lawyers in different firms to explore how they might approach similar challenges. Even professionals in other disciplines can provide fresh perspectives on ways to improve processes. If your accountant seems to have a great document-gathering system, ask if he or she might be

willing to recommend some tools. Surprisingly, lawyers don’t know everything.


What to do with the Information

Once you’ve identified your processes, determine whether any crossover, duplication, disharmony, or disparate approaches exist within the team. Maybe one team member completes steps in a different order than another; determine whether this is a problem or whether it’s an opportunity to examine the difference and declare one method to be superior. That superior method then gets documented for that process and is shared across the team.

Engaging in discussion around different approaches inevitably

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brings inefficiencies and inconsistencies to the surface. This provides a chance for leadership to dig deeper into the reasoning behind each approach, allowing team members to be heard, and facilitating the progress of the entire team toward processes that make sense.

Outcomes Measurement

The beauty of developing your own processes is you are in control – not just of the way you do business, but of determining what is important and how to get it. Since you’ve already decided there is a process you need to put in place, probably based on a problem you have encountered, identifying your goals should be a snap. However, a big mistake in implementation is diving in head-first and trying something, failing, and then giving up. Another mistake is starting a new procedure and then getting so busy you never pause to take a look at how well it’s working and if it was worth the effort. To that end, here are some tips to make sure you look before AND after you leap. Consider: *Once you have a process, do you implement fully or use a pilot program?*

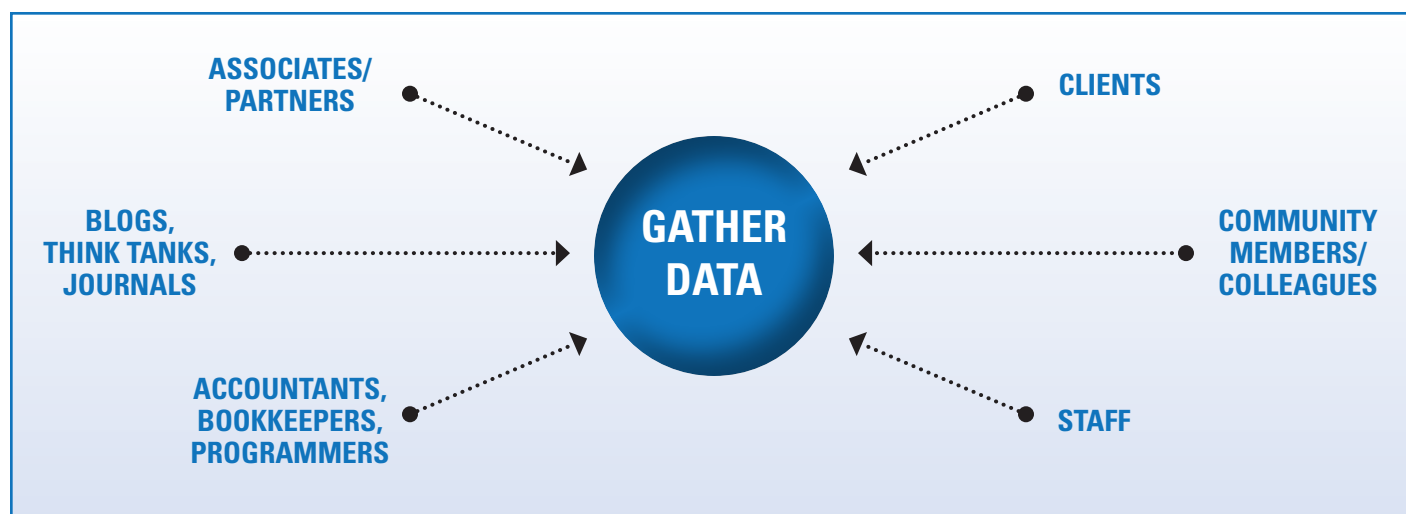
Most would love to just get started, putting everyone in the office on the new system and calling it a day. We get anxious about change, then anxious TO change, then wonder why it doesn’t work flawlessly the first time. Important factors to think about are:

- How big is your operation? If it’s large, a new system could be very disruptive, especially if the bugs have not yet been worked out. If it’s small, the whole team could be put on hold when a problem pops up.

- How savvy are the members of your team? If those who struggle with technology or whatever tools get frustrated, they will be slow to adopt or perhaps never adopt the new system. If you have a mixture of savvy and less-savvy team members, consider starting with the former and letting them help you train the latter.
- Are you willing to be the guinea pig? If you and your other developers are willing to start the pilot program, it will inform your future adjustments as well as inspire your team to adapt in the future. You can both develop and proselytize the new system to get your team excited about it.

After you have implemented either a full or pilot program, you need to consider how to test its success. Here are a few ways to get feedback on your new process.

- Send surveys to clients/staff/attorneys asking if they have noticed a positive or negative change and get their thoughts on how to improve.
- Check your performance data - have billable hours increased? Have phone calls gotten shorter? Has paper use been reduced? Pool all departments that are affected by the procedure.
- Offer an open-door policy to those impacted and encourage feedback in meetings.
- Revisit your initial goals frequently – did you see expected results? What surprised you?



If this sounds like a lot of work, that's because it is. However, putting the up-front work in will pay off big in the future. After you have collected feedback, go through these questions and then make a plan for changing the program as needed.

- Look for patterns – if everyone hates the online intake process, drill down into why that might be.
 - Is it too time-consuming?
 - Are there too many clicks?
 - Is the color annoying? (Yes, this is a real criticism from a real project.)
 - Does the language match the audience? (E.g., too much legalese.)
- Consider accessibility.

- Can everyone get to the tool? (Digital v. paper, mobile v. PC)
- Do they use it the way you expected them to? (Always on their phone, always on their computer, printing out the digital forms and writing in.)

- Circle back to your goals.
 - How close are you to meeting them?
 - Do you need to start from square one or could you make a few tweaks to get you there?

After you've determined where the weak spots are, brainstorm possible solutions with your team. Develop a new plan and start the process again. With each iteration, you should get closer and closer to meeting your goals.

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Protest Actions in Public Procurement: How to Provide Value as Counsel

by Zachary Christensen

Working with a public entity can be a beneficial arrangement for many private sector companies. The State of Utah's operating budget for Fiscal Year 2020 is \$18.5 billion, (Budget of the state of Utah, <https://le.utah.gov/interim/2019/pdf/00002717.pdf>), making the State of Utah one of the largest economic opportunities in the state.

With such a substantial number of taxpayer dollars up for grabs, there are statutes, rules, and policies and procedures that must be followed. These guidelines are the Utah Procurement Code, *see* Utah Code Ann. § 63G-6a-101 *et seq.*, and the associated Administrative Rules, *see* Utah Admin. Code R33-1. The Procurement Code and its accompanying regulations apply to every procurement. *See* Utah Code Ann. §§ 63G-6a-103(57), -105(1). The Procurement Code mandates unique deadlines, remedies, and legal procedures; failure to abide by the Procurement Code may result in your clients waiving their rights.

The public procurement professionals, known as a "procurement unit," who create the solicitations (the invitation to offer documents) promote the purposes of the Procurement Code, which include transparency, fair and equal treatment of who participate, economy for the State, and broad-based competition. *See id.* § 63G-6a-102.

However, there are times when errors are made or the code may not be followed as expected. Procurement units may not be experts in everything that they procure. For example, when I first started in procurement I was a buyer for Lockheed Martin Space Systems Company, and I bought batteries for satellites and potentiometers. While I understood the procedure that had to be followed, I did not always understand the nuances in the statements of work and specifications. I had to rely on our subject matter experts for advice.

What happens if there is a problem? The code addresses that!

Ideally, vendors can clarify problems or confusing portions of a solicitation during the Question and Answer Period (the time frame that a vendor is allowed to ask questions) of the solicitation. But if the ambiguity persists, or if the issue has not been resolved, the vendor must act. Any element of the solicitation that is ambiguous, confusing, contradictory, unduly restrictive, erroneous, or anticompetitive *must* be identified by a vendor and protested before the solicitation closes, or the vendor forfeits the right to later protest under those grounds. *See id.* § 63G-6a-1602(7).

Parts 16 and 19 of the Procurement Code govern protests. These sections dictate the format, content, timelines, and supporting information required for a valid protest. Unfortunately, many clients do not engage attorneys in response preparation or submission. Accordingly, attorneys may only be involved after an award has been made and a client/vendor feels aggrieved or after the protest has been denied. An attorney's ability to effectively assist his or her clients may be limited by when the attorney is brought into the process.

Protest

A vendor's ability to protest is limited to the closing of a stage of the solicitation. As stated above, if there are issues with the solicitation documents or requirements, the deadline to protest is the closing of the solicitation. In limited circumstances, a client may also protest seven days after the vendor knows or first has constructive knowledge of grounds for protest. *See*

ZACHARY CHRISTENSEN is the director of purchasing and contracts for the Utah State Board of Education.



Utah Code Ann. § 63G-6a-1602(2). The Procurement Code is clear that the deadline “for filing a protest may not be modified” *Id.* § 63G-6a-1602(3). Timing is essential; late protests are easily dismissed under the code. The Procurement Code instructs the Protest Officer as follows: “If the protest officer determines that the protest is not timely filed or that the protest does not fully comply with Section 63G-6a-1602, the protest office shall dismiss the protest without a hearing.” *Id.* § 63G-6a-1603(2). Moreover, by failing to file a protest on time, a vendor waives all administrative remedies and the right to file an action or appeal to the Procurement Appeals Board or through the courts. *Id.* § 63G-6a-1602(7).

Accordingly, when representing a vendor in the protest process, an attorney should carefully review the contents of the protest prior to submission. The protest process is not like litigation. There is no notice pleading or opportunity for discovery during the process; the protest must contain everything for the protest officer to make a decision in favor of your client when you submit the materials. The code requires that certain contact information be included (that’s the easy part). The grounds for

a protest, however, are limited to those listed: violation of law or rule, the procurement unit’s failure to follow the solicitation, an error of the evaluation committee, bias, failure to correctly apply or calculate scoring, or unduly restrictive requirements or specifications. Utah Code Ann. § 63G-6a-1602(4)(b).

Additionally, the grounds for protest must also include facts and evidence to support the claim. *Id.* § 63G-6a-1602(4)(a). As you work with and advise your clients, note that there are certain grounds for protest that are expressly prohibited. For example, vague and unsubstantiated claims or allegations that your client should have received a higher score or someone else should have received a lower score, or that your client did not receive individual notice is an insufficient ground for protest. *See id.* § 63G-6a-1602(5); Utah Admin. Code r. 33-16-101a(c). Also, please note that the protest process is not appropriate for requesting a debriefing or an explanation of scores. Utah Code Ann. § 63G-6a-1602(5); Utah Admin. Code r. 33-16-101a(c).

No one enters a competitive procurement process with the goal of losing. However, the fact that your client did not win does not mean anything untoward occurred. When an evaluation committee

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scores and evaluates responses, it is doing so in the best interest of the state. The courts have given great deference to these committees:

Further, the contemplated process set out by the Procurement Code grants the State substantial discretion in selecting the contractor that is most advantageous to the State. For example, while the Procurement Code contains criteria that the evaluation committee must consider, the code allows the evaluation committee broad discretion in evaluating and scoring the proposals. Indeed, the very purpose of establishing an independent evaluation committee made up of professionals in the industry is to exercise discretion in evaluating the technical ability of the potential contractors. The 2013 version of the Procurement Code, at section 63G-6a-707(8), makes clear that the “evaluation committee shall award scores to each responsive and responsible proposal.” This language demonstrates the clear intent of the legislature to give additional discretion to the evaluation committee and the State in selecting potential contractors.

The Procurement Code also contains provisions that grant the state agency discretion to reject any or all bids, in whole or in part, when it is in the best interest of the agency and the state.

PickMeUp Med. Transp., LLC v. Utah Dep’t of Health, Div. of Healthcare Fin., No. 2:13-CV-846 TS, 2013 WL 6185042, at * 5 (D. Utah Nov. 26, 2013) (citations omitted); *see also, Buckley Constr., Inc. v. Shawnee Civic & Cultural Dev. Auth.*, 933 F.2d 853, 856 (10th Cir. 1991).

Effects of a Valid Protest

The first and foremost effect of a valid protest is that your client’s grievance is heard by the Protest Officer for the procurement unit. *See* Utah Code Ann. § 63G-6a-1602. The Protest Officer will review the protest and the solicitation documents and will make a decision on the protest record. *Id.* When a protest (or appeal) has been filed, the procurement unit must stop all activities related to the protested procurement until the protest or appeal has been decided, remedies have been exhausted, or a written determination has been made. *Id.* § 63G-6a-1903. This automatic stay mandated by the code indicates that the rights of the aggrieved party cannot be violated and that they must have an opportunity to be heard. If a Protest Officer fails to make a decision within thirty days, the effect is an automatic denial, unless there is a mutually agreed upon extension. *Id.* § 63G-6a-1603(9).

The Protest Officer may or may not hold a hearing or subpoena witnesses. *Id.* § 63G-6a-1603(4)(a). The Protest Officer may also make a decision based on the protest file. *Id.* § 63G-6a-1603(a), (b). The decision of the Protest Officer is “final and conclusive” unless appealed in accordance to the code. *Id.* § 63G-6a-1603(8). The code allows a vendor to appeal these decisions; however, in order to appeal, your client must comply with Part 17 of the Utah Procurement Code, including the payment of a bond. *Id.* § 63G-6a-1703.

When advising your client through this process, help the client understand that the process is only meant for grievances rooted in the law and not as a way to delay or harass the procurement unit, the procurement professional, or a competitor. If the Procurement Appeals Board determines that an appeal has been frivolous or that the primary purpose is to harass or cause delay, your client’s bond will be forfeited to the procurement unit. *Id.* § 63G-6a-1703(5). Moreover, your client will be liable for costs, *id.* § 63G-6a-1904(2), and if your client has taken action against the procurement professional, your client may be

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guilty of a third degree felony, *id.* § 63G-6a-2404.7(2)(b)

Aggrieved vendors may appeal adverse determinations made by the procurement unit to the Utah Court of Appeals. Utah Code Ann. § 63G-6a-1802(4). The code mandates that the court of appeals “shall consider the appeal as an appellate court.” *Id.* The code also mandates that the court give deference to decisions made by the procurement unit and appeals panel during the protest and appeals process. The court will not hold a trial de novo. Rather, the court of appeals “may not overturn a finding or decision of the . . . [Procurement Policy Board], unless the finding or decision is arbitrary and capricious or clearly erroneous.” *FirstDigital Telecom, LLC. v. Procurement Policy Bd.*, 2015 UT App 47, ¶ 11, 345 P.3d 767 (alteration and omission in original).

Determinations of a Head of a Procurement Unit

The Utah Procurement Code creates an automatic stay on the solicitation when a protest or appeal is filed or when judicial proceedings are underway. However, the code also allows the head of a procurement unit to make a written determination to end the stay and move forward with the solicitation. This is a great responsibility and power, which is why the code requires the head of the procurement unit to consult with the procurement unit’s attorney (for state agencies, it is the attorney general’s office) before this course of action is taken. *See* Utah Code Ann. § 63G-6a-1903(2)(b).

The determination to move forward, notwithstanding a current protest, appeal, or judicial proceeding, was recently at issue with the procurement of the new emergency radio network by the Utah Communications Authority. A competitive procurement was held, and the award was made to Harris Corporation. Motorola also responded but was not awarded the contract. Motorola protested, and the Protest Officer did not uphold the protest. Motorola appealed, and in full disclosure, I sat on the appeals panel that reviewed and decided the appeal in favor of Utah Communications Authority. After the appeal was denied, Motorola filed for judicial review and injunctive relief. During this process, a Motion For Stay was filed and submitted to the Supreme Court of Utah. The motion was denied on June 27, 2019. Dan Harrie, for the *Salt Lake Tribune*, wrote of the hearing:

several of the justices indicated that they were unable to see how the court had jurisdiction over the matter. . . . Utah law contains no clear provision allowing appeal of that executive decision – a point which was the focus of much discussion by justices who expressed

skepticism that they had any jurisdiction in the dispute.

“How do we not deny this motion?” one wondered aloud. <https://www.sltrib.com/news/politics/2019/06/28/utah-supreme-court-clears/>, Dan Harrie, *Utah Supreme Court clears way for the state to install \$50 million emergency radio network*, SALT LAKE TRIBUNE, June 28, 2019.

Conclusion

Most attorneys are not very familiar with the Utah Procurement Code. Public procurement can be a niche area that requires time to learn the nuances and processes. If you take the time to become more familiar with the protest process, you will be in a much better position to help your clients ensure that procurement units are following the purposes of the code – that is, to ensure transparency and to treat everyone who deals with public procurement fairly. While no one wants to have their work product questioned and disputed, public procurement officers welcome valid protests. When used correctly, protests help ensure that solicitations are clear, accurate, and foster broad-based competition, and that if an error has been made, there is an opportunity to correct them.

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Utah Lawyers Give Hope to Hundreds of Utahns with Criminal Records

by Keith A. Call and Jacob Smith

In August 2017, Amy Daeshel hit rock bottom. Years before, she had a successful career in the mortgage industry. But foot surgery and prescription pain pills led to a heroin addiction. Heroin led to unemployment. Unemployment led to selling meth to feed her addiction. Homeless and hopeless, she found herself in the revolving door of arrest, jail, release, repeat. Six times. Then, in August 2017, something different happened. She was arrested again as part of Operation Rio Grande, a massive effort to root out crime in a Salt Lake neighborhood that had become known for drug dealing. As part of this arrest and \$67 million in state funding, she was given the chance to participate in genuine drug treatment. See Katie McKellar, *Want Your Records Expunged? Salt Lake County Has Hired an 'Expungement Navigator' to Help*, DESERET NEWS (June 25, 2019), available at <https://www.deseretnews.com/article/900076882/salt-lake-county-utah-record-expungement-clean-slate.html>.

Amy took the chance. She successfully completed the treatment and other requirements to graduate from drug court. She now works as a full-time peer recovery coach for Utah Support Advocates for Recovery Awareness and volunteers at other recovery programs. She has her sights on a college degree. See *id.*

"But something's still holding her back." *Id.* She still has drug-related misdemeanor charges on her criminal record, some four or five years old. She has found it "beyond frustrating" that her past criminal record prevents her from

getting housing and employment. "I did everything the justice system told me to do. I graduated drug court. I paid all of my fines. I did everything that was expected of me to get this behind me and taken care of, but yet it still lingers," she said. "It's hard enough to pull your life around from that dark of an addiction.... I know what I had to go through. I completed everything successfully.... Now I want that stigma erased and just be able to move on with my life." *Id.*

Amy, and hundreds of people like her, have found that their past criminal records prevent them from moving forward with life. So many of them hit a wall when seeking employment, housing, education, and other life-stabilizing opportunities. These barriers can lead to relapse and continuing problems in the justice system.

On June 26, 2019, the litigation section, the Utah State Bar, Salt Lake County, and several other community organizations collaborated to do something about it by hosting a free "Expungement Day." Sixty lawyers and forty-six non-lawyers volunteered their time to help people like Amy begin the process of expunging their criminal records.

Expungement is a statutory process by which reforming individuals can have certain past crimes eliminated from their formal record. Salt Lake County District Attorney Sim Gill, who may have prosecuted some of the clients served at Expungement Day, was one of the volunteers.

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



JACOB SMITH, J.D., was hired in 2019 by the Criminal Justice Advisory Council of Salt Lake County for the new position of Expungement Navigator. He asks that any attorneys interested in pro bono expungement work please contact him at JaSmith@slco.org.





The volunteers served 348 individuals seeking expungement. Out of those participants, more than 200 filled out an application, the first step toward expunging their records.

The results of these events are incredible. As part of Salt Lake County's first Expungement Day in 2018, participants were asked whether Salt Lake County could contact them six months after having their records expunged to see how their lives had changed. Many said yes, and participants reported the following:

Our whole notion of the criminal justice system is premised on the notion of rehabilitation. On the premise that when you pay your debt to society, we welcome you back into our community to be an equal partner and an equal contributor to the success of our society. Expungement Day is us delivering on that promise.

See Rosie Nguyen, *A Second Chance at Life: Hundreds Seek to Clear Criminal Record on Expungement Day*, ABC4 Utah (June 27, 2019) <https://www.abc4.com/news/a-second-chance-at-life-hundreds-seek-to-clear-criminal-record-on-expungement-day/> (last viewed July 13, 2019).

- 73% said it is now easier for them to find housing.
- 50% said they are now in stable housing, which they did not have previously.
- 30% received a raise at work.
- 15% received a promotion at work.
- 40% are now accessing educational opportunities they could not previously.
- 70% reported they feel less stress and anxiety.
- 80% reported that they are now happier about life.

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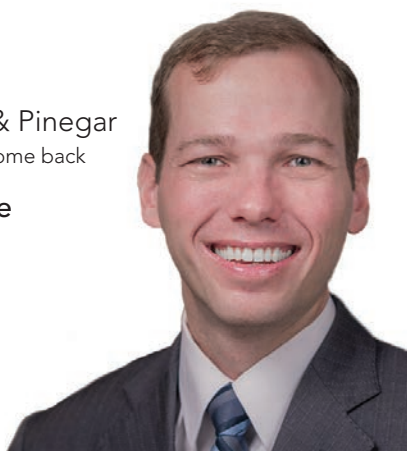
Lack of funds and a complex process play huge roles in preventing individuals from expunging their records. Of the 348 people surveyed at this year's Expungement Day, close to half reported incomes below \$30,000 per year and that they had not previously sought expungement because they lacked the financial resources and did not know how to proceed. For those with no legal training, expungement requires an "intimidating amount of paperwork, understanding of legal jargon, months of waiting, and perhaps hundreds of dollars in fees." See McKellar, *supra*. And that doesn't count the legal fees.

Utah lawyers are uniquely situated to help these individuals and families find more solid footing to move forward with life. We have the legal knowledge and skills to understand and navigate the "system." The expungement process is easy to learn. In fact, the volunteer lawyers learned all they needed to know during a short CLE taught by Utah Legal Services's Hollee Petersen at the start of Expungement Day. And volunteering our time to help those in need costs us nothing but a few hours of our time.

Utah Rule of Professional Conduct 6.1 provides, in part: "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of *pro bono publico* legal services per year..." Utah R. Prof'l Conduct R. 6.1.

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Any low-income individuals seeking expungement services are encouraged to contact Jacob Smith at JaSmith@slco.org. Some individuals may also qualify for financial assistance for fee waivers, including the fee for the required background check.

You can help, too. The litigation section, the Utah State Bar, and Salt Lake County will be teaming up for another Expungement Day in October. Watch for details, and plan to set aside a few hours in your week to make a genuine difference in the lives of Utah citizens.

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

Many thanks to those lawyers and other volunteers who donated a few hours to provide genuine service to hundreds of grateful citizens. The attorney volunteers at the June 26 Expungement Day were:

| | |
|---------------------|--------------------------|
| Paul Amann | Alex McBean |
| Elizabeth Apgood | Benjamin McMurray |
| Eric Ashton | Grant Miller |
| Robert Avery | Marlene Mohn |
| Mark Baer | Jason Nelsen |
| Warren Barnes | Phillip Nelsen |
| Matthew Barraza | Silvia Pena-Chacon |
| Franklin Bennett | Dori Petersen |
| Kevin Bischoff | Hollee Petersen |
| Kenneth Bresin | Cameron Platt |
| Brian Burn | Candice Ragsdale-Pollock |
| Elisabeth Calvert | John Riley |
| Kenneth Carr | Polly Samuels Mclean |
| John Delaney Jr. | William Schiffgen |
| Scott Dopp | Lisa Schull |
| Brenda Flanders | Lori Seppi |
| Richard Fox | Jeremy Shimada |
| Tony Graf | Nathalie Skibine |
| Aaron Hart | Douglas Springmeyer |
| Jennifer Hernandez | Deborah Stewart |
| Trina Higgins | Nicholas Stiles |
| William Holyoak | Noella Sudbury |
| Brent Huff | Travis Terry |
| Dennis James | R. Kyle Treadway |
| Edwin Jang | Tineke Van Dijk |
| Jill Jaspersen | Staci Visser |
| Richard Johnson Jr. | Joseph Watkins |
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Well-Being is Key to Maximizing Your Success as a Lawyer

by Martha Knudson

“I don’t give a damn about the happiness of lawyers.” A judge said this to a friend of mine right after he’d finished his speech on the importance of lawyer well-being. D.S. Bowling III, *Lawyers and Their Elusive Pursuit of Happiness: Does it Matter?*, 7 DUKE FORUM FOR LAW & SOCIAL CHANGE 37–52 (2015). These are some pretty strong words. But they do represent a view that, until recently, was prevalent in our profession – that your well-being is your own business, handled on your own time, and it has nothing to do with the successful practice of law. Many of us have adopted this view figuring that we can either gut it out to do well professionally, or we can have less success and be well personally. This is a false choice. Overwhelming amounts of research confirms that *being* well actually drives *doing* well. See A. Brafford, *Positive Professionals: Creating High-Performing Profitable Firms Through the Science of Engagement* 1–2 (2017). If we want to have a successful and sustainable career, happiness matters.

Think about our most important assets as lawyers. Primarily it’s our intellectual talents and the ability to think critically and manage problems that gives us a competitive advantage. These things drive our success and the success of the organizations to which we belong. As a profession we recognize this to be true and invest time and money into building these abilities. But we do little to protect these same assets from wearing down under the strain of the practice of law, even despite the sizable amount of information suggesting rising levels of lawyer distress. See Nat’l Task Force on Law. Well-Being, Am. Bar Ass’n, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (Aug. 2017) (citing research on lawyer and law student mental health).

Consider a lawyer’s job demands. We’re required to function at the highest levels cognitively, handle complicated tasks, navigate difficult matters, generate business, maintain healthy client relationships, and do so while often managing extraordinary levels of stress. People perform better under such circumstances when they are thriving. Brafford, *supra*, at 1–2. So, shouldn’t we equip ourselves with how to thrive while also practicing law? This is where the importance of well-being comes in.

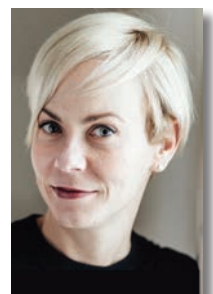
Elevated levels of well-being are strongly correlated with professional success, higher cognitive ability, better memory, improved executive functioning, physical health and longevity, better relationships, lower divorce rates, resilience to stress, better perceptions of work/life balance, and a lower risk of developing the mental health and substance use concerns that too many of our colleagues face. *Id.* These are some pretty big reasons that we all *should* “give a damn” about the happiness of lawyers.

What is Well-Being?

When defining well-being, it’s helpful to start with what it’s not. Well-being is not about being happy all of the time. Sure, sunshine and rainbows are awesome, and we do need good doses of positive emotion to thrive, but having well-being also requires things that come with a certain level of discomfort – purposeful work, close relationships, personal growth, and the pursuit of personally meaningful goals. Also, well-being is not merely being free of mental, emotional, or physical problems. Addressing dysfunction is certainly important, but the absence of these difficulties doesn’t automatically mean you are thriving in your work or in your life.

So, what is well-being? You can think of it as “a continuous process toward thriving” in all areas of our lives. *Creating A Well-Being Movement in the Utah Legal Community* 6 (Feb. 2019) (quoting Nat’l Task Force on Law, *supra*, at 9). This process is expansive. It involves developing the positive qualities, strengths, and life conditions that allow us to productively

MARTHA KNUDSON is the Executive Director of the Utah State Bar’s Well-Being Committee for the Legal Profession. In addition to her eighteen years experience as a practicing lawyer, Ms. Knudson holds a masters in applied positive psychology from The University of Pennsylvania where she also serves as a member of the graduate program’s teaching team.



engage with our work and communities, enjoy what we do and be successful doing it, recognize our own potential, achieve meaningful goals, cope with the normal stress of life in healthy ways, and still have energy left over to enjoy the other parts of life. Well-being will look a little different for each of us, but it includes our attention to the following life dimensions:

Emotional: Recognizing the important of emotions; developing the ability to identify and manage our own emotions to support mental health, achieve goals, and inform our decision-making; seeking help for mental health when needed.

Occupational: Cultivating personal satisfaction, growth, and enrichment in our work; obtaining financial stability.

Intellectual: Engaging in continuous learning and the pursuit of creating or intellectually challenging activities that foster ongoing development; monitoring cognitive wellness.

Spiritual: Developing a sense of meaning and purpose in one's life.

Physical: Striving for regular physical activity, proper diet and nutrition, sufficient sleep and recovery; minimizing the use of addictive substances; seeking help for physical health when needed.

Social: Developing a sense of connection, belonging, and a well-developed support network while also contributing to our groups and communities.

Id. at 7.

Well-Being is Very Different from "Wellness."

You might be skeptical. Maybe you've worked in places with "wellness" programs that weren't very effective for you. Maybe you've read reports about workplace wellness initiatives not having much impact. Don't let this throw you off. While the terms are often used interchangeably, wellness is not the same thing as well-being.

In contrast to the expansive and holistic definition of well-being, wellness programs generally view health as the absence of disease with efforts being mostly focused on only the physical domain. These programs offer things like gym memberships, exercise, nutrition information, and weight loss support. The idea being that if physical health is improved, absenteeism,

medical claims, and healthcare costs will go down and stress resilience will go up. Sure, physical vitality is important. But on its own, it's not enough.

Well-being is comprehensive. It takes into account more than just physical health instead embracing the entire person, both body and mind. And, unlike wellness, well-being includes the development of the positive mental states, emotions, relationships, and interpersonal strengths scientifically shown to make people not just physically and mentally healthier, but more productive and engaged at work (quoting Nat'l Task Force on Law, *supra*, at 9–10).

How Do We Begin?

We begin by making the decision that we deserve to thrive at work and in our lives, by realizing that our well-being is vital to the successful and sustainable practice of law, and by choosing to prioritize it for ourselves, our organizations, and our profession. In 2017, the National Task Force on Lawyer Well-Being challenged all of us to do so. *Id.* at 10–11. Utah is already answering that call. Recently, the Utah Task Force on Attorney and Judge Well-Being released its report, *Creating a Well-Being Movement in the Utah Legal Community*. The report examines national data on the health of legal professionals, and provides recommendations

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Among other things, the task force's recommendations include: (1) hiring independent researchers to measure the well-being levels of Utah lawyers and law students; (2) providing high quality education and training on how to develop well-being both at the individual and organizational level; (3) assisting law firms in creating policies and practices to support well-being; (4) adopting regulatory objectives that prioritize well-being; (5) modifying the rules of professional responsibility to endorse well-being as part of a lawyer's duty of competence; and (6) working to reduce the stigma attached to substance abuse and mental health disorders, and to encourage help-seeking behavior. You can review the full task force report online at <https://www.utahbar.org/wp-content/uploads/2019/07/Task-Force-Report-2.pdf>.

To carry out these recommendations, the Utah State Bar has formed a permanent Well-Being Committee for the Legal Profession (WCLP). The WCLP is co-chaired by Utah Supreme

Court Justice Paige Petersen and H. Dickson Burton. Members include Wendy Archibald, John Baldwin, Jeremy Christensen, Robert Denny, Kathy DuPont, Dr. Kim Free, Dr. Valerie Hale, Dani Hawkes, The Honorable Kim Hornack, The Honorable Elizabeth Hruby-Mills, Leilani Marshall, Cassie Medura, Brook Millard, Sean Morris, Andrew Morse, Dr. Cliff Rosky, Jamie Sorenson, Kara Southard, Cara Tangaro, and Dr. Matt Thiese. Martha Knudson has been appointed Executive Director. WCLP sponsored education, evidence-based strategies, and other well-being opportunities and news will be available in upcoming issues of the bar's monthly e.Bulletin, the *Utah Bar Journal*, and on the WCLP's webpage, www.utahbar.org/well-being/.

The bottom line is that to be the best lawyers we can be, we need to also be healthy ones. According to Jim Clifton, Gallup's chairman and CEO, "The most important dial on any leader's dashboard for the next 20 years will be well-being." We can be these leaders. Our well-being matters, it is the right thing to do, and it's time to make well-being a priority for ourselves and for our profession.



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Many attorneys volunteered their time to grade essay answers from the July 2019 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

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Photos by Harry Caston & Matthew Page

Public Wi-Fi – Should Lawyers Just Say No?

by Mark Bassingthwaighe, Esq., ALPS

Public Wi-Fi networks are practically ubiquitous. They're in airports, hotels, office buildings, coffee shops, restaurants, malls, and many other locations. While accessing one can be convenient when all you want to do is buy a new digital book on your smartphone, check your e-mail on your laptop, or rebook a flight on your tablet, there are associated risks that should never be minimized, or heaven forbid, completely dismissed. Such risks run the gamut from simple eavesdropping to allowing someone to defeat whatever two-factor authentication you had in place with the site you just logged into.

Here are just a few examples of the most common threats everyone faces when accessing public Wi-Fi.

- (1) A hacker inserts himself or herself into the conversation occurring between two users (*e.g.* you and your bank) giving him the ability to do anything from simply listening in and capturing part of the exchange to taking complete control of the entire exchange. Not only is this the most common type of attack out there, this is also one way two-factor authentication can be defeated.
- (2) You unwittingly log in to a rogue network that appears to look legitimate. It may even look identical to known and trusted networks, such as Starbucks. In reality, however, it's a bogus clone of a trusted site. Fall prey to this type of attack and all of the data in transit is being sent directly to the hacker.
- (3) You unknowingly login to a rogue access point, which is something well-meaning employees of various businesses sometimes setup. In short, wireless routers have been added to a network in order to give more customers access to the Internet. Often these routers are not configured properly, which makes them easy to hack into, even though the network itself might be secure.
- (4) You become infected with a worm. Unlike computer viruses, computer worms self-propagate and can be programmed to do all kinds of things to include stealing documents, capturing passwords, and spreading ransomware. If you happen to be on a public Wi-Fi

network and fail to have robust security in place, a worm could readily jump from another infected user currently on the network to you.

- (5) You have allowed your device to discover new and available Wi-Fi networks. As a result, you unintentionally end up connected to an ad hoc network. This means you have just directly connected your device to a hacker's computer giving the hacker free reign to do whatever he wants with your device.

I hope you're starting to get the picture. Public Wi-Fi networks are inherently insecure, and some are going to be downright dangerous. That's just the way it is. And unfortunately, it's even worse for those who fail to install robust internet security apps on the devices they use to access public Wi-Fi. Those folks are begging for trouble if you ask me.

Does this mean that lawyers and those who work for them should never access public Wi-Fi? In a perfect world, I might try to argue that one; but I can also acknowledge this wouldn't be realistic. There are going to be times when it's necessary. In fact, I will confess I use public Wi-Fi myself, but only for certain tasks. The better question is, if a lawyer has a need to use public Wi-Fi, how can the associated risks be responsibly addressed?

Let's start with the basics. All mobile devices, to include smartphones and tablets, should be protected with a robust Internet security software suite and kept current in terms of software updates. Next, approach all public Wi-Fi networks with a healthy level of distrust. For example, never connect to an unknown network, particularly if the connection is offered for free or states that no password is necessary. Also, be on the lookout for network names that are similar to the name of the local venue offering a Wi-Fi connection. This is because a network connection that happens to be named Free Starbucks Wi-Fi doesn't mean it's actually the legitimate Starbucks network. If you're not 100% certain, always ask what the proper name of the local network you are wanting to connect to is and connect to that. Most importantly, never connect to public Wi-Fi unless you have the capability to secure your own Wi-Fi session, which means you must use a VPN. VPN stands for virtual private network

and allows you to encrypt all of the data you will be passing along through the public network. Finally, while using public Wi-Fi it's best to avoid accessing online banking services and visiting any websites that store your credit card information or other personal information that might be of interest to a cybercriminal.

I can appreciate that the advice to avoid certain types of websites while using public Wi-Fi may not be received well by some. However, I stand by it because often there is a much safer option available. Simply use your mobile phone as a hotspot and connect to your carrier's network. If coupled with the use of a VPN, your entire Internet session will be about as secure as you can make it. If you don't know how to do this, ask your IT support for a quick lesson.

I wish that I could stop here but I can't, because almost every law firm I know of is comprised of more than one person. Anyone at a firm can naively or unwittingly fall prey to a cybercriminal when logging onto a public Wi-Fi network and this could result in very serious and unintended consequences for the firm and firm clients. Best practices would mandate that everyone who uses a mobile device for work be subject to a written policy regarding the appropriate use of public Wi-Fi. If your firm has no such policy, now's the time. Of course, any policy is going to be meaningless if there is no training on the risks and/or no enforcement of the provisions so keep that in mind.

Now to my initial question. Should lawyers just say no to the use of public Wi-Fi or try to prohibit anyone in their employ from using it? I don't necessarily go that far as long as all users have been made aware of the risks and given the appropriate tools that will help them minimize the risks.

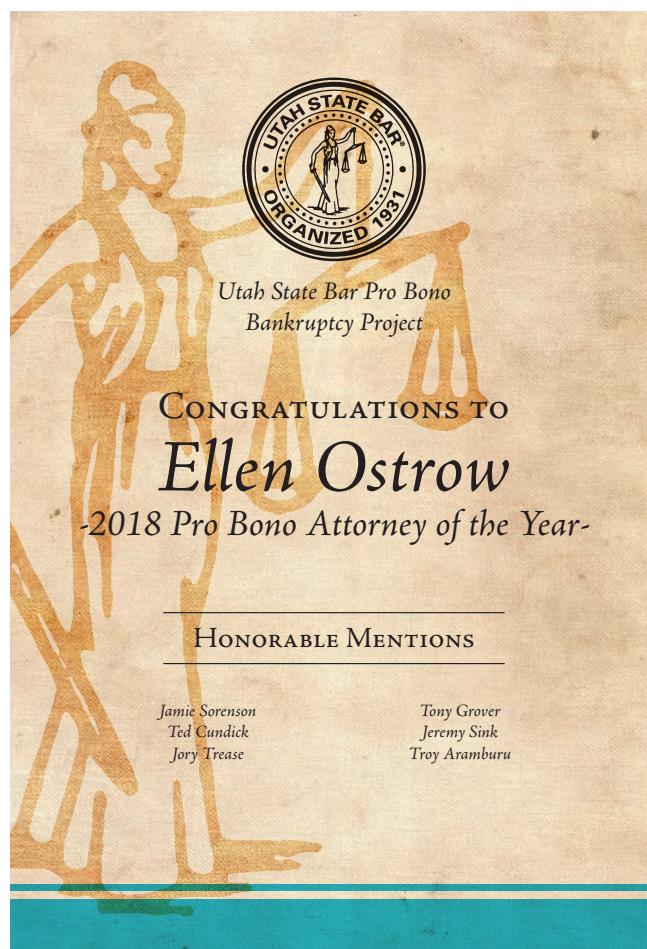
That said, let me share one final thought because I do get push back on this topic and can anticipate you will too. Some will say something along the lines of this. "The Starbucks signal is free, I've used it many times and never had a problem so why all the unnecessary fuss?" My response is always the same. How do you know you were never a victim? No one is going to send you a thank you note for allowing them to steal your credit card number or place a keylogger on your laptop. We all need to understand that hacking tools are widely available to the masses. This isn't just about who made the Wi-Fi available, it's also about what's happening on the public network while you are using it. Always remember that you are never alone while using public Wi-Fi and you simply have no way of knowing what everyone else's intentions are.

2019 Fall Forum Awards

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

Please submit your nomination for a 2019 Fall Forum Award no later than Friday, September 27, 2019. Use the Award Form located at www.utahbar.org/nomination-for-utah-state-bar-awards to propose your candidate in the following categories:

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3. Outstanding Pro Bono Service Award



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Bankruptcy Case

Mark Andrus
KC Garner
Will Morrison
Brian Wurtz

Bountiful Landlord-Tenant/Debt Collection Clinic

Kirk Heaton
Joseph Perkins

Community Legal Site – Ogden

Ali Barker
Jonny Benson
Chad McKay
Hollie Peterson

Community Legal Site – Salt Lake

Jonny Benson
Dan Black
Craig Ebert
Gabriela Mena
Katey Pepin
Brian Rothschild
Paul Simmons
Ian Wang
Russell Yaune

Community Legal Site – Sugarhouse

Skyler Anderson
Brent Chipman
Sergio Garcia
Mel Moeinvaziri
Brian Rothschild
Reid Tateoka

Debtor's Law Site

Tami Gadd-Willardson
Tony Grover
Ellen Ostrow
Brian Rothschild
Paul Simmons

Brent Wamsley

Expungement Case

Kathryn Bleazard
Andres Morelli
Mitch Vilos

Expungement Law Site

Joshua Baron
Brandon Dalley
Joshua Egan
Josie Hall
Shelby Hughes
Grant Miller
Stephanie Miya
Adam Saxby

Family Justice Center

Geidy Achecar
Steve Averett
Jim Backman
Kate Barber
Elaine Cochran
Thomas Gilcrest
Michael Harrison
Brandon Merrill
Samual Poff
Babata Sonnenberg
Nancy Van Slooten
Paul Waldren

Family Law Case

Brady Kronmiller
Chad McKay
Mark Tanner
Axel Trumbo
Rodney Snow

Family Law Site

Sally McMinimee
Stewart Ralphs
Linda F. Smith

Simon So
Sheri Throop
Leilani Whitmer

Fifth District Pro Se Guardianship Calendar

Aaron Randall

Homeless Youth Legal Clinic

Janell Bryan
Allison Fresques
Marie Kulbeth
Lisa Marie Schull

Landlord-Tenant Case

Kent Scott

Medical Legal Site

Stephanie Miya

Name Change Case

Jaelynn Jenkins

Power of Attorney Case

Donna Evans

Pro Se Debt Collection Calendar – Matheson

Jose Abarca
Greg Anjewierden
Scott Blotter
Mona Burton
Ryan Cadwallader
Ted Cundick
Jesse Davis
Rick Davis
Chase Dowden
Michael Eixenberger
Robert Falck
Rob Hughes
David Jaffa

Larissa Lee
Cliff Parkinson
Wayne Petty
Karra Porter
Randall Raban
Brian Rothschild
Gregory Sonnenberg
George Sutton
Austin Westerberg

Pro Se Landlord/Tenant Calendar – Matheson

Joel Ban
David Barlow
Marty Blaustein
Scott Blotter
Christopher Bond
JoAnn Bott
Mona Burton
Don Dalton
Marcus Degen
Christopher M. Glauser
Brent Huff
Heather Lester
Joshua Lucherini
Katherine McKeen
Jack Nelson
Nick Stiles
George Sutton
Michael Thomson
Matt Vaneck
Ashley Walker
Nathan Williams

Probate Case

Walter Bornemeier

Protective Order Case

Kevin Call
Brian Hart

Rainbow Law Site

Jess Couser
Shane Dominguez
Russell Evans
John Hurst
Beth Kennedy
Brandon Mark
Allison Phillips Belnap
Stewart Ralphs

Street Law Site

Dara Cohen
Dave Duncan
Cameron Platt
Elliot Scruggs
Shane Smith
Nick Stiles
Jonathan Thorne

SUBA Talk to a Lawyer Legal Clinic

Wm “Bill” Frazier
Aaron Randall
Lewis Reece
Chase Van Ostendorp
Jonathan Wentz
Lane Wood

Thursday Legal Night

Jonathan Batchison
Bryan Baren
Michelle Lesue

Timpanogos Legal Center

Randall Allen
James Backman
Linda Barclay
Bryan R. Baron
Cleve Burns
Trent Cahill
Justin Caplin
Melinda Checketts Hibbert
Elaine Cochran
Rebekah-Anne Gebler
Megan Mustoe
Janet Peterson
Rick Plehn
Scott Porter
Candace Reid
Zakia Richardson
Katie Secrest
Babata Sonnenberg
Marca Tanner Brewington
Liz Thompson
Paul Waldron

Tuesday Night Bar

Parker Allred
Christopher Bond
David Broadbent

Olivia Curley
Alyssa Depew
Luke Depperman
Andrew Fox
David Geary
Erika Hamblin
Rosemary Hollinger
Jessica Horton
Emily Iwasaki
Annette Jan
Parker Jenkins
Steven Jones
Erika Larsen
Ken Logsdon
Brad Lowe
David McKenzie
Ben Onofrio
Rachel Phillips
Matt Purcell
Josh Randall
Walt Romney
Andrew Roth
Clark Snelson
Gregory Sonnenberg
Nick Stiles
Charles Stormont
Shane Stroud
George Sutton
Jeff Tuttle
Bruce Wycoff

ULS’ Enhanced Services Project

Robert Culas
Mark Emmett
David Leta

Veterans Legal Site

Aaron Drake
Brent Huff
Thomas Kelley
Jonathan Rupp
Katy Strand

Ethics Advisory Opinion Committee, Opinion No. 19-03

ISSUED: MAY 14, 2019

ISSUE

If an individual licensed as an active attorney in another state and in good standing in that state establishes a home in Utah and practices law for clients from the state where the attorney is licensed, neither soliciting Utah clients nor establishing a public office in Utah, does the attorney violate the ethical prohibition against the unauthorized practice of law?

OPINION

The Utah Rules of Professional Conduct do not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed even if the out-of-state attorney does so from his private location in Utah. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah business.

BACKGROUND

Today, given electronic means of communication and legal research, attorneys can practice law “virtually” from any location. This can make it possible for attorneys licensed in other states to reside in Utah, but maintain a practice for clients from the states where they are licensed. For example:

- An attorney from New York may decide to semi-retire in St. George, Utah, but wish to continue providing some legal services for his established New York clients.
- An attorney from California may relocate to Utah for family reasons (e.g., a spouse has a job in Utah, a parent is ill and needs care) and wish to continue to handle matters for her California clients.

ANALYSIS

Rule 5.5 of the Utah Rules of Professional Conduct (the URPC), which is based upon the Model Rules of Professional Conduct, defines the “unauthorized practice of law,” and Rule 14-802 of the Utah Supreme Court Rules of Professional Practice defines the “practice of law.” In the question posed, the Ethics Advisory Opinion Committee (the EAOC) takes it as given that the out-of-state lawyer’s activities consist of the “practice of law.”

Rule 5.5(a) of the Utah Rules of Professional Conduct provides that a “lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.”

Utah R. Prof'l Conduct R 5.5(b) provides:

A lawyer who is not admitted to practice in this jurisdiction shall not:

(b)(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(b)(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Id. 5.5(b).

The Law of Lawyering explains the meaning and relationship of these two sections: “Rule 5.5(b) ... elaborates on the prohibition against unauthorized practice of law contained in Rule 5.5(a) as it concerns out-of-state lawyers. Rule 5.5(b)(1) broadly prohibits a lawyer from establishing an office or other ‘systemic and continuous presence’ for practicing law in a jurisdiction in which the lawyer is not licensed.” Geoffrey C. Hazard, Jr., W. William Hodes, Peter R. Jarvis, *The Law of Lawyering* § 49.02, at 49-7 (4th ed. 2018).

With that as our touchstone, it seems clear that the out-of-state attorney who lives in Utah but continues to handle cases for clients from the state where the attorney is licensed has not established an office or “‘other systemic and continuous presence’ for practicing law in [Utah] a jurisdiction in which the lawyer is not licensed” and is not in violation of Rule 5.5 of the Utah Rules of Professional Conduct.

While one could argue that living in Utah while practicing law for out-of-state clients does literally “establish a systematic and continuous presence in this jurisdiction for the practice of law,” and that it does not have to be “for the practice of law IN UTAH,” that reading finds no support in case law or commentary.

In *In re: Discipline of Jardine*, Utah attorney Nathan Jardine had been suspended from the practice of law in Utah for eighteen months. 2015 UT 51, ¶ 1, 353 P.3d 154. He sought reinstatement,

but the Office of Professional Conduct argued against reinstatement because he had violated Rule 14-525(e)(1) of the Utah Supreme Court Rules of Professional Practice by engaging in the unauthorized practice of law while he was suspended. 2015 UT 51, ¶¶ 6, 20. The disciplinary order allowed Mr. Jardine “with the consent of the client after full disclosure, [to] wind up or complete any matters pending on the date of entry of the order,” but “Mr. Jardine never informed [the client] that he was suspended, nor did he wind up his participation in the matter.” *Id.* ¶¶ 8–9 (quotation omitted). Instead, he continued to advise the client and sent a demand letter on the client’s behalf, giving his Utah address but indicating California licensure. *Id.* ¶ 9. Mr. Jardine argued that he did not engage in the unauthorized practice of law because this matter was for an Alaska resident and the resulting case was filed in an Idaho court. *Id.* ¶ 22. Nevertheless, the Utah Supreme Court found that Mr. Jardine engaged in the unauthorized practice of law in Utah, in violation of his disciplinary order, reasoning: “The disciplinary order expressly prohibited Mr. Jardine from ‘performing *any* legal services for others’ or ‘giving legal advice to others’ within the State of Utah.” *Id.* (emphasis added). All of the work Mr. Jardine performed for the Alaska client was performed in Mr. Jardine’s Utah office, Mr. Jardine’s text messages were made from Utah, and Mr. Jardine’s demand letter listed his Utah address. *Id.*

In re Jardine does not control the question posed. Not only did the Utah Supreme Court analyze the “unauthorized practice of law” in the context of a suspended Utah attorney violating a disciplinary order that forbid him from performing *any* legal services whatsoever for others, but Mr. Jardine was continuing his legal work out of a Utah office and using a Utah business address. The question posed here to the EAOC deals with attorneys in good standing in other states who simply establish a residence in Utah and continue to provide legal work to out-of-state clients from their private Utah residence.

We can find no case where an attorney has been disciplined for practicing law out of a private residence for out-of-state clients located in the state where the attorney is licensed. Indeed, the United States Supreme Court held in *New Hampshire v. Piper*, 470 U.S. 274 (1985), that a New Hampshire Supreme Court rule limiting bar admission to New Hampshire residents violated the rights of a Vermont resident seeking admission under the Privileges and Immunities Clause of the U.S. Constitution. *Id.* at 275–76, 288. Thus, there can be no prohibition on an attorney living in one state and being a member of the bar of the another state and practicing law in that other state.

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Rather, the concern is that an attorney not establish an office or public presence in a jurisdiction where the attorney is not admitted, and that concern is based upon the need to protect the interests of potential clients in that jurisdiction. In *Gould v. Harkness*, 470 F. Supp. 2d 1357 (S.D. Fla. 2006), a New York attorney sought to establish an office and advertise his presence in Florida, but advertise “New York Legal Matters Only” or “Federal Administrative Practice.” *Id.* at 1358. The case concerned whether his First Amendment right to freedom of commercial speech under the United States Constitution was violated by the Florida Bar’s prohibition on such advertisements. *Id.* at 1358–59. The Gould court held that the Florida Bar was entitled to prohibit such advertisements in order to protect the interests of the public – the residents of Florida. *Id.* at 1364.

Similarly, in *In re Estate of Condon*, 76 Cal. Rptr. 2d 933 (Cal. Ct. App. 1998), the court approved payment of attorney fees to a Colorado attorney who handled a California probate matter for a co-executor who lived in Colorado. *Id.* at 924. The Condon court held that the unauthorized practice of law statute “does not proscribe an award of attorney fees to an out-of-state attorney for services rendered on behalf of an out-of-state client regardless of whether the attorney is either physically or virtually present within the state of California.” *Id.* at 926. Here, too, the *Condon* court highlighted concern for in-state California clients:

In the real world of 1998 we do not live or do business in isolation within strict geopolitical boundaries. Social interaction and the conduct of business transcends state and national boundaries; it is truly global. A tension is thus created between the right of a party to have counsel of his or her choice and the right of each geopolitical entity to control the activities of those who practice law within its borders. In resolving the issue ... it is useful to look to the reason underlying the proscription [of the unauthorized practice of law....] [T]he rational is to protect California citizens from incompetent attorneys....

Id. at 927.

An interesting Ohio Supreme Court case further supports this Opinion that an out-of-state attorney practicing law for clients from the state where he is licensed should not be seen to violate

Rule 5.5 of the Utah Rules of Professional Conduct’s prohibition on the unauthorized practice of law. In *In re Application of Jones*, 2018 WL 5076017 (Ohio Oct. 17, 2018), Alice Jones was admitted to the Kentucky bar and practiced law in Kentucky for six years. *Id.* at *1–2. Her Kentucky firm merged with a firm having an office in Cincinnati, Ohio. *Id.* at *1. For personal reasons, Ms. Jones moved to Cincinnati and transferred to her firm’s Cincinnati office. *Id.* at *2. She applied for admission to the Ohio bar the month before she moved. *Id.* While awaiting the Ohio Bar’s decision, she practiced law exclusively on matters related to pending or potential proceedings in Kentucky. *Id.* Nevertheless, the Board of Commissioners on Character and Fitness chose to investigate Ms. Jones for the unauthorized practice of law and voted to deny her admission to the Ohio Bar. *Id.*

The Ohio Supreme Court unanimously reversed this decision. *Id.* at *4. A majority of the *Jones* court held that Ms. Jones’ activities did not run afoul of the unauthorized practice of law provision because Rule 5.5(c)(2) of the Ohio Rules of Professional Conduct permitted her to provide legal services on a “temporary basis” while she awaited admission to the Ohio bar. *Id.* at *3. However, three of the seven Ohio Supreme Court justices concurred on a different basis. *Id.* at *5 (DeWine, J., concurring). They found that denial of Jones’ application on these facts would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as the Ohio Constitution’s related provisions. *Id.* at *9 (DeWine, J., concurring). Both constitutions protected one’s right to pursue her profession, subject to governmental regulation only to the extent necessary to promote the health, safety, morals, or general welfare of society, provided the legislation is not arbitrary or unreasonable. *Id.* at *7–8 (DeWine, J., concurring). The concurring opinion noted that “the constitutional question here turns on identifying Ohio’s interest in prohibiting Jones from representing her Kentucky clients while working in a Cincinnati office. The short answer is that there is none.” *Id.* at *8 (DeWine, J., concurring). Two state interests supported attorney regulation – attorneys’ roles in administering justice through the state’s court system and “the protection of the public.” *Id.* (DeWine, J., concurring).

But when applied to a lawyer who is not practicing Ohio law or appearing in Ohio courts, Prof.Cond.R. 5.5(b) serves no state interest. Plainly, as applied to such a lawyer, the rule does not further the

state's interest in protecting the integrity of our court system. Jones, and others like her, are not practicing in Ohio courts. Nor does application of the rule to such lawyer serve the state's interest in protecting the Ohio public. Jones and others in her situation are not providing services to or holding themselves out as lawyers to the Ohio public. Jones's conduct as a lawyer is regulated by the state of Kentucky – the state in whose forums she appears.

Id. at *9 (DeWine, J., concurring). The three concurring Ohio Supreme Court justices concluded that Rule 5.5(b) of the Ohio Rules of Professional Conduct, as interpreted by the Ohio Board of Commissioners, would be unconstitutional when applied to Jones and others similarly situated. *Id.* (DeWine, J., concurring).

The question posed here is just as clear as the question before the Ohio Supreme Court: what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same – none.

Finally, a perusal of various other authorities uncovers no case in which an attorney was disciplined for living in a state where he was not licensed while continuing to practice law for clients from the state where he was licensed. *See Restatement (Third) of the Law Governing Lawyers* § 3 Jurisdictional Scope of the Practice of Law by a Lawyer (2000); Roy D. Simon, *Simon's NY Rules of Prof. Cond.* § 5.5:6 (Dec. 2018); and *What Constitutes "Unauthorized Practice of Law" by Out-of-State Counsel*, 83 A.L.R. 5th 497 (2000).

CONCLUSION

Accordingly, the EAOC interprets Rule 5.5(b) of the Utah Rules of Professional Conduct in a way consistent with the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution; the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution; Article 1, Section 7 of the Due Process Clause and Article 1, Section 24 of the Uniform Operation of the Laws Clause of the Utah Constitution; and all commentators and all persuasive authority in support of permitting an out-of-state attorney to establish a private residence in Utah and to practice law from that residence for clients from the state where the attorney is licensed.

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Attorney Discipline

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PUBLIC REPRIMAND

On June 6, 2019, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Frances M. Palacios for violating Rules 1.4(a) (Communication), 1.15(a) (Safekeeping Property), 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), and 5.3(c) (Responsibilities Regarding Nonlawyer Assistants) of the Rules of Professional Conduct.

In summary:

Ms. Palacios was the directing attorney for a law firm. Ms. Palacios supervised a nonlawyer manager (manager) of the law firm and credit repair business associated with the law firm. A client retained the law firm for the purpose of removing derogatory information from his credit report. The client paid the law firm and a third party who was identified as an “intermediary” for the client on the retainer and fee agreement. The manager was the point of contact for the client and the client was under the impression that the manager was an attorney. Later, the client complained that services were not rendered and was informed that he would receive a refund. The manager sent an email to the client requesting that he provide Ms. Palacios with an address to where his refund could be mailed. Over a period of several months, the client made several attempts to contact Ms. Palacios and the manager but he did not

receive a response from either Ms. Palacios or the manager. At some point, Ms. Palacios received a letter from the client which she forwarded to the manager because she no longer worked for the law firm and the manager handled the money for the credit repair. Ms. Palacios encouraged the manager to make a payment in full to the client, but he was unable to do so. Eventually, Ms. Palacios refunded the money paid by the client.

PROBATION

On May 14, 2019, the Honorable Laura S. Scott, Third Judicial District Court, entered an order of discipline against John A. Quinn, placing him on probation for a period of one year based on Mr. Quinn’s violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

The case involved Mr. Quinn’s handling of cases for three separate clients. The first client retained Mr. Quinn to represent her in divorce proceedings. The court set a pretrial conference but neither Mr. Quinn nor the client appeared. The court ordered the client’s pleadings stricken and default entered against her. The court set a judicial mediation but neither Mr.

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Quinn nor the client appeared. A two-day divorce trial was set and on the morning that trial was to begin the court clerk called Mr. Quinn. Mr. Quinn indicated he was about twenty-five minutes away; however Mr. Quinn never appeared. The court was unable to reach Mr. Quinn after several attempts. The court issued an Order to Show cause wherein Mr. Quinn was ordered to appear and explain why he should not be held in contempt. The court found that Mr. Quinn was unable to be served and a civil bench warrant was issued. The court held a hearing in which Mr. Quinn was found in contempt. The OPC sent a Notice of Informal Complaint (NOIC) requesting Mr. Quinn's response. Mr. Quinn did not timely respond to OPC.

The second client retained Mr. Quinn to assist him with having two felonies reduced to misdemeanors. The client typically emailed Mr. Quinn one or twice a month and it would take several months for Mr. Quinn to reply. The client paid Mr. Quinn an additional sum of money after Mr. Quinn offered to go to the prosecutor's office and wait to speak to him about the client's case. Mr. Quinn emailed the client and stated that he had dropped off papers with the prosecutor and he expected to get everything filed in the next week. A month later, Mr. Quinn emailed the client and stated he would make another trip to see

the prosecutor and if nothing came of the meeting, he would file a motion to reduce the offense without the prosecutor's assistance. Mr. Quinn did not file a motion with the court. The client requested a copy of all the paperwork in the case, and Mr. Quinn stated he would send him the file. The OPC sent a NOIC requesting Mr. Quinn's response. Mr. Quinn did not timely respond to the OPC.

The third client retained Mr. Quinn to represent him in a criminal matter. The client pleaded guilty to Assault, a class B misdemeanor and two days later paid Mr. Quinn to appeal his case. Mr. Quinn filed a notice of appeal and a motion to stay the sentence. The court held a remand hearing but Mr. Quinn and his client failed to appear. Mr. Quinn filed a motion to reinstate the appeal with the justice court. The justice court held a remand hearing but Mr. Quinn and his client failed to appear. The justice court set a second remand hearing which Mr. Quinn did not attend. The justice court ordered Mr. Quinn to contact the court within seven days, but he failed to do so. The court held a hearing on an Order to Show Cause. Mr. Quinn did not appear for the hearing and the client's original sentence was imposed. The OPC sent a NOIC requesting Mr. Quinn's response. Mr. Quinn did not timely respond to the OPC.

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Project Street Youth Gears Up for its 2019 Prom and Furthering its Mission this Year

by Erika M. Larsen

Each year, teenagers across Utah look forward to getting “dolled-up,” leaving their cares behind, and dancing the night away at their annual school prom dances. Meanwhile, during the same year, an estimated 4.2 million youth and young adults nationwide will experience homelessness, of which 700,000 are unaccompanied minors. *See Youth Homeless Overview*, National Conference of State Legislatures, available at <http://www.ncsl.org/research/human-services/homeless-and-run-away-youth.aspx> (last visited August 1, 2019). And at least one in thirty adolescents ages thirteen to seventeen experience some form of homelessness unaccompanied by a parent or guardian over the course of a year. *See id.* For these teenagers and young adults facing homelessness and other stability concerns, it can be hard to find the time and resources to participate in the quintessential youth milestone that is prom.

Every year, Project Street Youth, a Young Lawyers Division committee, works with local sponsors and the Volunteers of America to host a prom dance for youth facing homelessness to enjoy at the Youth Resource Center located at 888 West 900 South, in Salt Lake City. Community sponsors, attorneys, and other community members donate formal dresses, hair and makeup services, and suits and other formalwear – not only for the event, but also for these at-risk youth to utilize permanently for job interviews and other professional endeavors.

The overall goal of Project Street Youth is to work in conjunction with the Volunteers of America to educate and raise awareness about legal, economic, social, and other issues facing homeless

youth in our community. Project Street Youth also works with the Homeless Youth Legal Clinic to coordinate and foster relationships between the legal community and homeless youth, as well as provide legal services to homeless youth. Project Street Youth

strives towards this goal by developing mentorship relationships through hosting the annual prom dance and other social events for the legal and homeless youth communities, as well as volunteering at the Homeless Youth Legal Clinic.

Project Street Youth has two primary goals this year:

1. To develop a consistent volunteer rotation for the legal clinic with the help of attorneys and law firms (large and small) throughout Northern Utah; and
2. To provide training opportunities for volunteering attorneys to learn more about issues faced by the homeless youth in our community and how our legal community can help.

To that end, Project Street Youth would like to thank all attorneys and their support staff who have already helped Project Street Youth in accomplishing its mission over the years, as well as invite everyone to join us for the ride!

ERIKA M. LARSEN practices at Snow Christensen & Martineau as an insurance defense attorney. She has been volunteering with the Homeless Youth Legal Clinic at the Volunteers of America Youth Resource Center since 2017, and is now the Director of Project Street Youth for the Young Lawyers Division of the Bar.





Report on the 2019 All-Day CLE

by Greg Wayment

Well...the secret is out. Nobody holds a better all-day CLE than the Paralegal Division of the Utah State Bar. On Friday, June 21, 2019, the Paralegal Division held its annual meeting and all-day CLE Seminar. With 127 registrants, including more than forty attorneys, the CLE exceeded attendance expectations and was on all fronts a resounding success. I'd like to personally extend my thanks to the CLE chair Paula Christensen and the rest of the CLE committee for putting this event together, and congratulate them on a very successful day.

Registrants were greeted at 7:30 a.m. and took home a "swag bag" provided by our generous supporters containing everything from pens and notepads to hand sanitizer. This year, registrants also received a compact umbrella with the Paralegal Division logo.

Registration also included breakfast, and lunch which was expertly done by Catering by Bryce. Also, throughout the day, all who registered (and were in attendance) got to participate in drawings for gift baskets, gift cards, and event tickets.

Attendees could elect to receive a total of seven CLE credits, including an hour of ethics. The day started out with a presentation by Greg Saylin from Holland and Hart on Harassment and Discrimination – Avoiding Claims and How to Handle them When they Arise. This was actually a continuation of Mr. Saylin's presentation from last year's CLE and continues to be a very relevant conversation. Thanks to Greg Saylin for coming two years in a row and sharing some of his expertise.

The next speaker was Judge Kevin K. Allen from the First District Court who spoke on his time sitting on the Mental Health Court in Logan. Judge Allen had no PowerPoint or notes but spoke eloquently about the challenges of establishing the court and the challenges and rewards that have come with running the program.

Next on the agenda was Steve Kelson from Christensen & Jensen speaking on Defusing Conflicts and Difficult Situations, with an emphasis of examples of violence in the legal workplace.

After lunch, our very own Kristie Miller, community service chair of the Paralegal Division, gave a short presentation on Mediation and Yoga for work-life balance.

Following that, Diane Akiyama, Assistant Disciplinary Counsel of the Office of Professional Conduct, spoke on ethics and professionalism.

Tad May spoke on Law & Order: Salt Lake City, Understanding Who Does What in the Realm of Criminal Law. Lastly, Karra Porter of Christensen and Jensen gave an exciting overview of the cold case work she is involved in as the co-founder of the Utah Cold Case Coalition.

After the CLE presentation wrapped up, the annual meeting was held and the new board members were seated. The baton was also passed to the new chair. The division has had strong leadership this last year with Candace Gleed, who has long been an active participant in the division. Beyond that, she has the best laugh and sense of humor. We appreciate Candace stepping up as chair this year and for all her hard work. She will continue on as the paralegal representative to the Bar Commission.

The strong leadership continues with the announcement of Sarah (Stronk) Baldwin as the new chair and Tonya Wright as the chair-elect. Rest assured the Paralegal Division is in good hands as we head into the 2019–2020 year. And, if you didn't attend this year, make a note to attend next year. I have it on good authority that it's going to be a great event.

We'd like to introduce the 2019–2020 Board of Directors for the Paralegal Division. We have a few new members joining the Board and extend a warm welcome to them. We also thank outgoing Board members Loraine Wardle, Erin Stauffer, Shaleese McPhee, Terri Hines, and Robyn Dotter. This year's Board of Directors are:

Chair: Sarah Baldwin
Chair-Elect: Tonya Wright
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Director At Large: Kathryn Shelton
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Ex Officio: Candace Gleed



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 18, 2019 | 9:00 am – 3:45 pm

5 hrs. Ethics, 1 hr. Prof/Civ

OPC Ethics School.

Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=20_9016. \$245 on or before August 30, \$270 after.

October 11, 2019 | 9:00 am – 3:00 pm

Annual ADR Academy.

Tentative date. More details to follow.

October 18–19, 2019

2 hrs. CLE, 1 hr. Ethics

Litigation Section Annual Judicial Excellence Awards, CLE & Shenanigans.

Fairfield Inn & Suites by Marriott, 1863 N Hwy 191, Moab, UT. Cost: \$109 for Litigation Section members, \$189 all other attorneys, \$79 for adult guests, \$49 for guests under 16. For more information, go to the registration: https://services.utahbar.org/Events/Event-Info?sessionaltcd=20_9092.

November 15, 2019 | 8:30 am – 5:00 pm

Fall Forum.

Little America Hotel, 500 South Main St., Salt Lake City, UT 84101. More information and a full schedule of events can be found in the centerfold of this issue of the *Utah Bar Journal*.

December 18, 2019 | 8:00 am – 5:00 pm

Mangrum & Benson on Utah Evidence. Save the date!

For the latest CLE Events and information visit:

<https://www.utahbar.org/cle/>

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In search of the attorney who possibly did a Will or Trust for Regina U.E. Bierwert-Monson. Please contact Stephanie Jaramillo at Jaramillo_6@msn.com or 801-309-0634.

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Boutique Park City estate planning, trust administration, probate, and business formation law firm seeks detail-oriented associate attorney with 0–5 years of experience preferred. Some experience in areas of firm practice preferred. Must be discreet, have excellent interpersonal skills, follow-through independently, and have a professional appearance and demeanor. Compensation DOE. Submit resume to kbc@bowmancarterlaw.com. No phone calls, please.

Established and nationally recognized Salt Lake IP firm is looking to expand its practice areas through mutually beneficial relationships with commercial litigation and/or corporate transactional practices. It offers newly remodeled, state of the art space, fully equipped conference rooms, full-time IT support, professional firm management, free parking, and a desirable location. Please send resume and inquiries to confidential ad box #605 at barjournal@utahbar.org.

AV-rated Business and Estate Planning law firm with offices in St. George, UT and Mesquite, NV seeks a Utah or Nevada licensed Attorney with 3–4 years' experience for its St. George office. Experience in sophisticated Business/Transactional Law and/or Estate Planning is preferred. Ideal candidates will have a distinguished academic background or relevant law firm experience. Firm management experience would be a plus. We offer a great working environment and competitive compensation package. This is a great place to live with an abundance of recreational, cultural and family oriented opportunities. Please submit letter, resume and references to Daren Barney at dbarney@barney-mckenna.com.

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Fort Union Office Space Available For Rent to Attorney or Mediator. 7090 S. Union Park Ave, Midvale, Utah. Fully Furnished (if needed). Two Conference Rooms. Secretarial Help To Be Negotiated. 801-849-8900.

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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.

Hoole & King is looking for attorneys who are interested in lowering their overhead and receiving occasional referrals in a cost-sharing firm structure with some remote practice flexibility. Please email admin@hooleking.cocm if you are interested.

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