

Utah Bar. JOURNAL

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Summer Convention registration inside.



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The lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity. We envision a just legal system that is understood, valued, and accessible to all.

Cover Photo

Cliff Lake, by Utah State Bar member Byron E. Harvison.

BYRON E. HARVISON is an active duty Army officer assigned to the Utah National Guard as the Staff Judge Advocate. Originally from Oklahoma, Byron has called Utah home since 2013, previously being stationed in Germany, and Ft. Bragg, NC, and being deployed to Afghanistan and Kuwait. Asked about how he came to take this photo, Byron said, "My family and I had been out for a day of climbing at Cliff Lake in the Uintas. My daughter Avery and I had just finished putting a new route up called Critter Conundrum and were walking back along the cliff band towards the lake when I stopped for this shot."



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.

Table of Contents

Letter to the Editor	8
President's Message The Summer Convention: Coming Home by H. Dickson Burton	10
Article What Style of Mediation Do You Need? by Richard A. Kaplan	12
Article Secondary Traumatic Stress Among Lawyers and Judges by Kiley Tilby and James Holbrook	20
Innovation in Law Practice Easing Conflict Rules for Brief Pro Bono Legal Advice A small rule change regarding free legal advice could improve lawyer-community relations and improve access to legal services in Utah. by Dave Duncan	24
Article Legislative Update by Douglas Foxley, Frank Pignanelli, and Steve Foxley	28
Focus on Ethics & Civility Utah Supreme Court Forms OPC Oversight Committee by Judge Diana Hagen and Keith A. Call	32
Article Responding To The Diversity And Inclusion Challenge In Utah by Aida Neimarlija and Marshall Thompson	36
Utah Law Developments Appellate Highlights by Rodney R. Parker, Dani Cepernich, Robert Cummings, Scott Elder, Nathanael Mitchell, and Adam Pace	40
State Bar News	44
Paralegal Division	61
CLE Calendar	62
Classifieds	63



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

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

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, 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 with dark hair 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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Letter to the Editor

Dear Editor:

In the January/February issue of the *Utah Bar Journal*, Mr. Jason M. Groth penned an article entitled, “Criminal Justice Reform in Utah: From Prosecution to Parole.” One of Mr. Groth’s concerns in his article dealt with the disparate incarceration rates among certain groups of individuals. Because Mr. Groth believes that prosecutors and law enforcement are somewhat responsible for the disparate incarceration rates, he provides suggestions as to how prosecutors can help limit racial disparities within the criminal justice system. Although some of Mr. Groth’s suggestions may have merit, the issue of ‘individual responsibility’ is conspicuously absent from his article. Mr. Groth advocates for more programs, resources and holding law enforcement and prosecutors more accountable to help reduce “racial

disparities.” However, a plethora of programs and maximum oversight will not result in lower criminal conduct until an individual chooses to change his/her behavior. The great Justice Reinvestment Initiative has helped empty the prison but the number of criminal cases we receive from law enforcement has not decreased. And with all due respect to Mr. Groth, the prosecutors in my office do not screen cases differently based on a person’s skin color. The ACLU is often quick to blame “The Man” or “The System” for perceived disparities but perhaps the ACLU should also consider individual responsibility.

Respectfully,
Timothy L. Taylor

A person in a dark blue suit and striped tie is holding a magnifying glass over a tablet computer. The background is a blurred office setting.

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The Summer Convention: Coming Home

by H. Dickson Burton

Last Summer, in his last *Bar Journal* article, then-President John Lund wrote about the “tribe” of Utah lawyers making its annual migration to the Summer Convention, which for the past thirty years has been, most of the time, in Sun Valley, Idaho. Every five or six years it has been held in southern California, and a very few times over the past thirty years it has been held in Colorado. But since 1988, it has always been held somewhere outside Utah, the home state of our lawyer “tribe.”

This year is different. This year we will gather in Park City. For a long time, members have frequently asked the Bar Commission to hold the Summer Convention closer to home, in Utah and specifically in Park City. Additionally, survey evidence shows us that an overwhelming majority of the Bar believe that the Summer Convention is important and should continue. A similar majority responded that they would attend the Summer Convention *if it were held in Park City*. In fact, Park City was listed by survey respondents as the number one venue of the various locations where members would like to see the convention held.

So, in 2015, the Bar Commission formalized a decision to locate the convention in Park City for the years 2019 and 2020 (commitments had already been made to hotels in San Diego and Sun Valley for the intervening years).

And this is why for the past eighteen months special planning has been underway, under the leadership of convention chairs Judge Eve Furse and Jon Hafen, with the help of an amazing committee and our incredible Bar CLE staff led by Michelle Oldroyd and Richard Dibblee, to make the 2019 convention a great success. The actual program for the Summer Convention in Park City is finalized, and you can find it in this very issue of the *Bar Journal*. There you will see the first-rate CLE that is planned, the remarkable keynotes (headlined by CNN's Wolf Blitzer), and the other great events that are scheduled.

Here are just a few of the reasons you should plan to be with us in Park City this summer:

- We are closer to home, in Utah, for the first time in decades.
- Park City is a beautiful, affordable, and fun summertime venue...filled with activities for individuals and families of all ages, budgets, interests, and abilities.
- It is likely much cooler than where you are. 😊
- Amazing keynote speakers are scheduled, including a panel of our entire Utah Supreme Court, which proved to be the highlight of our 2018 Summer Convention.
- You will find extremely affordable and luxurious lodging opportunities (especially when compared to Sun Valley and San Diego). Click <https://www.utahbar.org/summerconvention/summer-convention-accommodations/> to book now.
- All Seasons Adventures is generously partnering with our Bar to help us create some wonderful outdoor plans for our members and their families, of all ages and skill levels. Some adventures feature guides and instruction. Options include fly-fishing, hiking, mountain biking, trap shooting, whitewater rafting, and also a GPS adventure race where teams, sections of the Bar, or even firms could compete with one another! <https://allseasonsadventures.com/>
- Our Park City convention will include some of our most treasured traditions – the opening reception (Thursday, July 18), a family movie after the opening reception (Thursday, July 18), law school receptions in the afternoon (Friday, July 19), the family barbecue, which will feature a concert this year (Friday, July 19), and a judges' mixer (Saturday, July 20).
- A new tradition will include a Young Lawyers Division after-hours bowling party.



Whether you are a Summer Convention regular or someone who has never attended a Bar convention, come to Park City this summer. Book a room. Stay the whole three days. You will find some great Summer Convention traditions and some great new things to do as well. You will not regret it, though you might wonder why we waited so long, to come home, to Park City.

Why have we waited so long? Well, quite simply, in 1988 hardly anyone came. It was “too close to home.” It was not a place “to take my family.” It was “boring.” But that was 1988. A lot has changed. Park City is now a world class (and world famous), elite vacation destination. Summer as well as winter. The Bar has changed too. It is getting younger, and more of us are working solo or with small firms, where we don't have the CLE travel budgets of the large firms. And traditions can evolve, even slightly, to include a new venue in the Summer Convention rotation. We will return to Sun Valley, but for 2019 and 2020 we are “coming home.”

The tradition of the Summer Convention has been wonderful for the Utah Bar and many have made it a tradition for their entire family. Many (including me) can boast that every one of their children learned to ride bicycles in Sun Valley. Sun Valley is such a beloved venue for many that the Bar hears loud complaints whenever the convention is scheduled for somewhere else, even for San Diego. Over the years I have made many great friends and connections at the Summer Convention whom I look forward to seeing again each year, and I know others have had similar experiences. And of course it is a chance to get away from the office for a few days in July to a beautiful and much cooler setting.

But, the Summer Convention is a beloved tradition – only for those who actually attend. Remarkably, a majority of Utah attorneys have *never attended a Summer Convention* (including many of you who are reading this!), and only a small percentage attend regularly. For several years the Bar Commission has been exploring the reasons why only a few attend – and what can be done about it. The biggest reasons, by far, were the cost and the difficulties of getting to an out-of-state venue. Members wanted a local convention, in Park City, where it would cost less to get there and the lodging would be more affordable.

Why do we even have the convention? Well, for starters, the convention is the Bar's Annual Meeting, a meeting that is *mandated* by Rule 14-103(i) of the Supreme Court Rules of Professional Practice, which provides,

There shall be an annual meeting of the Bar, presided over by the president of the Bar, open to all members in good standing, and held at such time and place as

the Board may designate, for the discussion of the affairs of the Bar and the administration of justice.

At the Summer Convention, we get reports from the Bar President, the Chief Justice of the Supreme Court, the Chief Judge of the Federal Court, the President of the Bar Foundation and the Law School Deans. We have our traditional changing of the guard as a new Bar President and newly elected Bar Commissioners are sworn in by the Chief Justice of the Utah Supreme Court. And key awards are given, including to the Distinguished Lawyer of the Year and Judge of the Year.

But the convention is so much more. Efforts are made to present some of the highest quality CLE in diverse areas from litigation to taxation, and to bring in notable and topical keynote speakers from national media figures to the occasional Supreme Court Justice.

The Convention also provides numerous socializing and networking opportunities for young and experienced attorneys alike, including future bar leaders. Many of the activities involve not just attorneys but their spouses, significant others, their children, and some extended family. A favorite event is the convention's opening social where attorneys and their families gather and begin reconnecting over good food and drink in a relaxed, open event made for mingling, with activities for the young ones. Other days we will look forward to a mixer with state and federal judges, receptions hosted by the Utah and BYU law schools, and special events for members of our Young Lawyers' Division. And there is the ever-popular family barbeque dinner, complete with live music, as well as games and face-painting for the children. And of course there is plenty of time for outdoor activities such as hiking, biking, or fishing with family and friends.

All of these events provide opportunities to meet and make new friends and connect with old ones. They also provide opportunities to connect as professionals and as a Bar. While we all come from different backgrounds and diverse beliefs and goals, we are wonderfully united in a commitment to upholding and improving the profession, and to protecting and promoting access to justice. That is something to celebrate. This summer, come home with us to Park City and let's celebrate together.

Register for the convention <https://www.utahbar.org/summerconvention/registration/>.

Book your lodging <https://www.utahbar.org/summerconvention/summer-convention-accommodations/>.

What Style of Mediation Do You Need?

by Richard A. Kaplan

If you need a mediator, you probably know there are reputable organizations that promote panels of lawyers and retired judges who offer mediation services and there is literature available to help you narrow your search. In Utah, for example, you will find mediator biographies (self-interest alert, including mine) on utahadrservices.com or law firm websites, and of course you can work with the American Arbitration Association or other organizations depending on the subject matter. As for literature, there is a “checklist” available with thirteen separate criteria to consider; Negotiating and Settling Tort Cases, § 6.11 (updated 2009), and there are many papers with the title “Selecting a Mediator” or words to that effect. See, e.g., Weinstein & Chao, *Choosing a Mediator*, 5 BUS. & COM. LITIG. FED. COURTS § 51.35 (4th ed).

As I see it, the criteria and suggestions in the literature boil down to a few key questions: What do you need most from the mediator? Who has that particular capability? Will that person be acceptable to the parties and opposing counsel?

Deciding what you need from a mediator obviously requires both an accurate assessment of the case and a good understanding of the participants and the process. Determining which mediators provide what you need in those respects will not likely be possible based on a typical mediator biography alone. Gaining acceptance of the mediator you select may depend on how you play it.

SCENARIO ONE:

Strong Case, Formidable Adversary, Zero Progress

Let's say you represent the plaintiff in what you see as a potential \$5–6 million commercial lawsuit. Discovery is complete, you've developed good facts. On balance, the law favors your client. You consider yourself a good lawyer and an able negotiator. Still you've gotten nowhere in settlement discussions. Your adversary has a lot more experience than you do, and a rich resume of accomplishments at trial. The obstacle to serious negotiations and settlement may have something to do with your adversary's self-confidence, ego, or both. While you consider yourself “up and coming,” opposing counsel is a long-time pillar of the bar and knows it. Most importantly, he is highly regarded as a trial lawyer per se, not for settling early, cheaply, or even at all.

You demanded \$4.5 million and accompanied that demand with a written analysis of why you will win and why your damages greatly exceed your demand. He doesn't seem to understand your arguments, or, if he does, he clearly dismisses them. He's at zero. The only progress you've made is that he has agreed to voluntary mediation. How will you approach the problem of choosing a mediator?

It's not just the strengths and weaknesses of the case. It's the process and the psychodynamics you must contend with.

I've heard it said, not entirely in jest, that there are essentially three kinds of people: people who *make* things happen; people who *watch* things happen; and people who *wonder* what happened. At first blush, people who “make” things happen may sound somehow superior to people who “watch” things happen. Not so fast. That's not true at all, particularly as it relates to mediation. And, as for you and me, if truth be told, we must admit we've found ourselves wondering what happened from time to time.

As it relates to mediators, this simplistic classification of people is useful in beginning to consider what mediation style you want. All three describe not just people but skills, styles, and strategies. I want to explain the choices available to you without resorting to mediation jargon, and then to use the language of mediation to help you determine what type of mediation style you want for Scenario One. The discussion of types of mediation skills, styles, and strategies should have broad enough applicability to help you decide what you need in other scenarios as well. I'll present another, perhaps more typical, scenario toward the end.

RICHARD A. KAPLAN is a shareholder at Anderson & Karrenberg. His practice focuses on complex civil litigation and mediation, as well as independent investigations and risk assessment at the outset of commercial litigation.



Basic mediation styles and the strategies they support.

The best mediators, while open-minded, are highly skilled at seeing areas of agreement or mutual interest and even the broad outlines of a deal before it happens or while it develops. The focus here is on how they handle that knowledge.

Some of the most accomplished mediators view a deal as the overriding goal of mediation, occasionally requiring abandoning the principle of neutrality in favor of raw truth. Always having the end game in mind, they work hard to get the parties to that point by design. They may push one side or the other, or both, gently and forcefully at different times during the day. They try to “make” things happen.

Other highly skilled mediators take a much more hands-off, deliberate approach. They may nudge the parties from time to time. But they derive the most satisfaction from watching the parties strike a bargain themselves. Such mediators view neutrality during the process not just as appropriate but as fundamental. They’ve worked hard to develop that skill, to know when to talk, when not to, and when to stop. They know that approach engenders trust and thus has great value to parties

willing to negotiate. They essentially “watch” things happen. This is the style you’re looking for most of the time.

I doubt that many mediators, if any, studiously practice “wondering what happened.” But it’s worth thinking about this idea of “wonder” at a deeper level. Some mediators are simply better than others at feeling and expressing empathy and appreciation. I appreciate, and you probably do too, people who are easily able to attribute ideas to others, rather than to themselves. That quality is especially important in mediators. Whether you want to take the notion of three kinds of people further and call the third category those who have the capacity to communicate “wonder” (like a parent encouraging a child) or something else, the ability to attribute authorship of ideas or proposals to others tends to make them feel like they’re contributing and taking “ownership.”

Some highly skilled mediators are flexible and able to use multiple strategies and skills successfully, along with dozens of tactics for working through impasse. They can plan and intuit when and how to employ this, that, or the other skill or tactic in the course of a single day.

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Mediation styles, strategies, and vocabulary as applied to Scenario One.

Given the state of play in Scenario One, as plaintiff's counsel you're not ready for the subset of mediation known as "*facilitation*." A facilitator's greatest skill in mediation is assisting the parties themselves in negotiating resolution. That means working with them patiently and supportively, usually observing rather than talking as each side works through its own concerns. Excessive criticism, optimism, or pessimism are studiously avoided, because the substance or tone of such communications could be interpreted as favoring one side or the other. To be sure, most facilitators will ask hard questions or make serious suggestions, even for a "correction" if a proposed move seems way off base. But by and large a facilitator doesn't try to influence the process or direct it, because that compromises the appearance of neutrality. All mediators, regardless of style, know that the most enduring settlements are the ones the parties negotiate themselves. All mediators and most lawyers who've used mediation know that facilitation is most likely to be effective when the gap to be bridged is relatively small.

Absent *deux machina*, a facilitator won't help you in Scenario One because your adversary doesn't want to be facilitated, and, in truth, you don't either. The gap couldn't be larger. The parties are simply not poised to strike a deal essentially on their own.

Suppress the "good guy" temptation.

Be wary that the mediator (whether or not a facilitator) might appeal to you to be the "good guy." That is especially likely in Scenario One, since your adversary won't touch that role and something's got to give. Reason doesn't always trump emotion, much less always prevail.

Consider what opposing counsel might have to say on the morning of the mediation regardless of who the mediator is: "It's my position and I'm sticking to it." He knows from experience that despite the mediator's entreaties ("I need you to give me something to work with, anything please"), the mediator may be wrong. There's potential success in standing pat, insisting all the while to the mediator that you, his opponent, are the one being unrealistic. Consider also that you may be the one the mediator tests, not your adversary.

The temptation can be quite strong to show the mediator that you're in fact reasonable by indicating you and your client are flexible and will in fact move in the face of a credible offer. Be aware of that trap, know it when you see it, and don't let it catch you.

Don't overplay any natural desire you may have to cooperate with the mediator, to have her like you. It may take very little to demonstrate that you're the reasonable one in the room. If you show too much flexibility, particularly early on, you put your client at risk of being pushed toward a "split-the-baby" compromise you don't really want.

Be aware that weakness is signaled in unexpected ways.

Your adversary may not "know" that you conveyed such flexibility to the mediator. The mediator can't tell him without your consent and you obviously don't give it.

Still, you must figure that your adversary has an acute sense of weakness. He will watch the mediator and listen carefully to her when she comes back from a caucus with the other side. Her body language, tone of voice, and delivery may suggest your weakness regardless of her best efforts not to. Opposing counsel will look beneath her efforts to generate movement, to see what's really there. We've all heard (and all mediators sometimes propose or use) hypotheticals: "Suppose..." Or, "I'm certainly not saying I can, but what if I can get him off of that number?" When opposing counsel hears that early on, he hears it the way he wants to: there's a lot of room here. He'll be tempted to let that dynamic play out in his favor.

Remember that despite the "win/win" paradigm that dominates current mediation literature and training, your adversary wants to "win" the old-fashioned way, and at every step along the way. Try to understand what he thinks would constitute a "win" in your case and have that low-ball number in mind as something you must avoid as you calibrate your moves. For him, "winning" in Scenario One probably doesn't mean paying zero or anything close to that. If the fair value of settlement is something north of \$4 million, he more likely thinks a "win" would involve paying something south of \$2 million, better yet \$1.5 million.

So, assume you have given the mediator the impression that you're reasonable and what you really want is a just a good settlement, somewhere in the middle. In that case the mediator will almost certainly apply pressure to move the parties, particularly your side, in that direction, consistent with the principle of neutrality. After all, you had said orally and in writing before the mediation that you want a lot, but your demeanor and choice of words now reveal that you'll take not so much. With a strong sense of that in hand, the mediator won't violate her duty of confidentiality or any other principle or duty by helping you get there. In fact, that would be in keeping with the mediator's job.

So, what type of mediator *do* you need?

I think Scenario One requires you to find a mediator who (1) has first-rate analytical skills and is highly likely to perceive the value of your case as you see it (that means you're right and she agrees); and (2) who will credibly and convincingly, perhaps brutally, convey that value to opposing counsel. In mediation jargon, that would entail "*evaluative*" mediation skills and perhaps "*transformative*" mediation skills. What "evaluative" normally means is a mediator who comes to his or her own conclusion about the value of the case and discusses it openly with both sides. All mediators surely offer the ability to estimate a range of settlement values for a case. Paradoxically though, few have the credibility to forecast the likely outcome at trial, particularly when one side is represented by a highly experienced trial lawyer and one is not. In this scenario, you need that credibility. While you're in a separate room, you want the mediator to look opposing counsel in the eye and to say something like this: "This case has a lot of jury appeal – settlement value now in the mid-seven figures. I know you are a terrific trial lawyer, but you are likely to lose this one and in all events you have significant trial risk in this case. Here are all the reasons why that is so..."

(Note: When you ask for "evaluation" you obviously run the risk that the mediator doesn't see things the way you do. Be prepared to hear that your valuation is grossly inflated and wildly off the mark. Understand that your selection of an evaluative mediator assumes that you are highly confident in your estimation of the case and able to defend it persuasively. If you can't, you need to be flexible enough to consider resetting your sights. If your views remain the same despite the mediator's contradictory assessment, you need to be willing to walk.)

What "transformative" means is the ability to get the parties and their lawyers to understand each other's perspectives and to gain respect for those opposing perspectives increasingly as the day goes on. Mutual understanding and respect drive compromises and deals.

Can you narrow this down to the right person(s) for the job?

Who is the most likely to have these abilities? How about someone who already enjoys opposing counsel's respect as a smart and accomplished trial lawyer and mediator in his or her own right? Tact, empathy, listening skills, and other such qualities are great, but they're not the heart of what you need in this case. You haven't



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gotten your adversary to take you and your case seriously yet. You need help making that happen. You want a mediator who will know, and tell your adversary, that she understands his dismissiveness is an act, a tactic that he needs to leave behind now, and that it would serve his client's interests to get the case settled as early as possible.

(Note: The mediator knows opposing counsel knows what both sides' strengths and weaknesses are. Good lawyers, like opposing counsel here, listen while pretending not to; they are always focused on their client's needs, not their own. So, the task of cutting through the smokescreen is not nearly as difficult in mediation as your experience with the guy suggests, provided you find a mediator who can do it.)

It's not just up to you. How do you get opposing counsel to accept the mediator?

If you believe you have identified just the right person, I know you realize you can't dictate who the mediator will be. Your adversary doesn't have to agree to engage the mediator you propose and will usually have other ideas of his own. As we've posited, your adversary wants to "win," and generally that means at every step along the way. Winning, for him, means selecting the mediator he wants, finding reasons to reject the people you propose, and working you over until you agree with his choice.

So, let me suggest that you surprise opposing counsel by making the choice he would have made, and he will be hard pressed to reject. Be bold. Find and propose the mediator/trial lawyer that he respects and uses more frequently than any other in town, whether he's worked with or against her 100 times, and whether you've interacted with her yourself. If he asks, tell him you're aware of the prior relationship he has with the mediator and you're not concerned about it. You have an abiding conviction she'll be fair.

You should mean it when you tell him you're not worried about bias. You should realize that, if anything, she's likely to bend over backwards to be fair to you and your client. Indeed, that concern may well occur to your adversary as he thinks through what you're doing. He may say no. If instead he hesitates, tell him you'll let her know you understand the full extent of their professional relationship and don't want her to be concerned about it. You can't force your adversary to agree, but it's hard for him to reject someone he's used often himself. Regardless, you've now set the bar high and, if you don't settle on her, you'll agree on someone like her.

There are a host of reasons for selecting a mediator "as good as" opposing counsel, and here's the main one: In this case, the

mediator is not just evaluating your case on paper. She's evaluating you, and your ability to persuade judge and jury. Who better to tell opposing counsel that you are "for real" than someone he himself considers "for real" and thus already respects and listens to? Who better to persuade him that it would be wise for him to come down from Mount Olympus and negotiate with us mortals? That's what he and his client need to hear from the mediator to get real themselves.

To be sure, you'll have to perform at your highest level to pull this off, but that should go without saying anyway.

THE MODERN CONCEPT OF MEDIATION ADVOCACY

In a leading article published almost twenty years ago in the *Ohio State Journal on Dispute Resolution*, James K.L. Lawrence advocates the concept of "Partnering with the Mediator." 15 OHIO ST. J. ON DISP. RESOL. 425 (2000). The heart of Lawrence's argument is that mediations generally have the greatest chance of success when "the mediation advocate and her client [are] engaged with the mediator in the *problem-solving process*; merely accepting or rejecting proposals from the mediator or the other side is insufficient 'engagement.'" James K.L. Lawrence, *Mediation Advocacy: Partnering With the Mediator*, 15:2 OHIO ST. J. ON DISP. RESOL. 425, at 426 (2000) (emphasis added).

While I strongly agree with Lawrence's premise, I think the "partnership" characterization probably takes the idea of collaboration a bit too far. You represent your client. The mediator is not your "partner" in achieving your client's goals, and it's dangerous to think about her that way. While sometimes it might make sense to be open and transparent at the very outset, most of the time you need to be more strategic in what you reveal, how much, and when. You want momentum to build, not wane, over the course of the day. Disclosing everything you have to say first thing in the morning may leave you with nothing left to say by noon. For example, you may think it will help the mediator to know your "walk away" number early in the process. You may think that will influence her to encourage your adversary to start well above your "walk away" number and to stay there throughout the process. On the contrary, that disclosure may be the first number the mediator actually considers and may therefore tend to anchor the mediator's thinking on the low side of the bargaining range. That early disclosure thus could lead her to work with the other side and you (despite the best of intentions and a conscious effort to maintain neutrality) to make moves toward your walk away number the rest of the day. This "anchor effect" is well documented in negotiation literature, and it could well work to your disadvantage during a mediation as well.

On the other hand, assuming opposing counsel is reasonably competent (as you should), he already knows the weaknesses in your case. In most cases, opposing counsel already knows them. You will help the mediator and your client's bargaining position, at virtually no risk, by being forthright with the mediator about those weaknesses and by authorizing the mediator to tell the other side you know exactly what they are and why they don't concern you.

Assume you're about to give the mediator a demand or offer or counteroffer for her to present to the other side. It is best if the mediator can communicate at the same time that the dollar amount (or whatever you're proposing) takes those weaknesses into account. She should add that you have carefully considered them as well as the strengths of your case, and that this proposal gives those weaknesses what you consider fair weight and value. Give her your reasons too and let her pass those on at the same time.

Among the advantages of this approach, Lawrence points out, is that by allowing the mediator to put your weaknesses on the table, and to explain how you've taken them into account in deciding what to propose, you've actually strengthened your relative bargaining position. The weaknesses you expose now can't bite you later. Sure, the mediator can come back to you with a proposal that says you didn't give those weaknesses *enough* value. But she cannot surprise you with the response that your proposal didn't consider your weaknesses *at all*, and here they are, outlined with force by the other side. Oops.

SCENARIO TWO: A Simple Example of Interest-based Negotiations

Let's say you represent the plaintiff in a lawsuit in which he buys trucking services from the defendant to pick up merchandise from his customers' warehouses and to deliver it to its destination. Assume both sides have leverage. Yours is the warranties and reps in the contract. You could likely get summary judgment. Your opponent has a different kind of leverage. For one thing, the judgment would be hard to collect because of defendant's precarious financial situation. For another, your client needs defendant's services because no one else in the area has ever provided them on a consistent or reliable basis. In these circumstances, your client and you may want a mediator ultimately to "facilitate" a business deal between the parties.

Suppose it's your first communication (a Mediation Brief) or first caucus with the mediator. You're not sure about the defendant's cash situation so you probably want to take a shot at getting complete monetary relief. You need to make your point simple and compelling: the parties entered into a contract for trucking services and the

defendant expressly warranted that he would provide them. He didn't. You had to refund \$175,000 to your customers, and you can substantiate another \$50,000 in compensable damages. The defendant took risks in the ordinary course of business, and the defendant needs to come to grips fully with your damages.

Suppose though that the mediator comes to you with a small, unacceptable cash offer and nothing more, and makes clear she believes the money just isn't there. You now have a choice where to direct the negotiations. You can of course respond in kind or not at all. You have a strong summary judgment argument based on the warranties. You can walk.

On the other hand, you can introduce the concept of a negotiated resolution containing both monetary and non-monetary components. You could tell the mediator truthfully that you understand the dispute at a deeper level and want to share your insights with her. In mediation jargon, you propose to help her understand the underlying "interests" of the parties – their needs, their desires, fears, and uncertainties. You can help her work toward a "win/win" outcome.

You might explain that the parties have had a business and personal relationship for a decade that has been fractured by this dispute. Both sides are terribly frustrated. Your client knows that over the three-day

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period when defendant breached, there was bad luck involved because most of his drivers called in with the flu. But still, you had warranties. Your adversary knows that you tried yourself to secure alternative transportation but couldn't get it. Your adversary says that's his point too; he wasn't able to get any other drivers either after trying to do that for hours and hours. Your client might stand firm on the warranties, or he might consider trying to salvage the relationship, provided the other party makes your client's customers substantially whole. You understand that the defendant doesn't have that much cash on hand, but your client might consider payment terms. That gives the mediator a smorgasbord of material to work with in developing potential compromises.

Getting your client ready.

Mediation requires not just your engagement but your client's as well. You need to help your client get emotionally invested in the process and ready to work at it throughout the day. You and he share a common purpose. Among other reasons for your client to get engaged, he's the one who is going to pay for it, including not just your fees but half the mediator's. It is better if he appreciates that the odds of success improve with his full attention and engagement.

As to subjects to be discussed, most of them are probably obvious and there's too much literature on preparation to cite here. Just a couple of points bear mention. You want to get your client ready for the mediation process (including what you know about the mediator and why you chose or agreed to hire her). Make sure you have agreement beforehand on what your goals are, what your strategy is for achieving them, and what happens if you don't. Focus on what your client needs, what he doesn't need, what is essential, and what he can give up to get something else. What is your client's best alternative to a negotiated resolution (aka BATNA)? Quantify that as best you can. What is his walk away number? Explore with your client before the mediation what his real "interests" are: Is his objective to get as much money as he can? Or would he prefer a combination of money and, for example, assurances of priority service. Recognize that your client's "interests" include probing the needs, desires, and fears that motivate him. James K.L. Lawrence, *Mediation Advocacy: Partnering With the Mediator*, 15:2 OHIO ST. J. ON DISP. RESOL. 425, at 426 (2000). Thus, in Scenario Two, for example, he's understandably fearful of keeping his relationship with the defendant, and fearful of losing it too, particularly if he can't find an alternative. He's worried about keeping his own customers. He had thought before this mess that defendant valued him a valued customer. Now he thinks that wasn't true at all. He doesn't want a new business deal with defendant unless the terms somehow reflect his valued status.

There's no substitute for understanding your client's underlying interests – business, personal, economic, and emotional – before the mediation. Think about how and when you might best weave his mixed feelings about a renewed business relationship into the conversation. You also want to research and think about your adversary's likely needs and giveaways, as well as his BATNA. In the end, a reasonable resolution may be the one that satisfies as many of the parties' mutual interests as possible. The absence of any likelihood of re-establishing the business relationship takes a host of solutions off the table. The prospect of a renewed relationship is one a facilitator who understands business deals can work with skillfully.

Finally, prepare your client for the experience – the slog – of mediation, which tends not to be fun for clients, especially if they don't feel heard and understood. This preparation requires orientation, including visualization. So talk with your client about what mediation is and the role of the mediator, what the floor plan will be, how you and your client will have privacy, whether or not the mediator is one who first brings the parties and lawyers together in the same room, what will happen if she does, how she might spend just a minute with you and your client to introduce herself and then spend an hour with the other side (or vice versa), how frustrating that can be, what to make and not make of that, where the negotiations stand before mediation, and how to understand and withstand the inevitable moments when he'll want to leave or just throw the towel in.

Getting yourself ready.

Indeed, you need to ready yourself for the same experiences throughout the day. How are you going to handle disappointments when the mediator comes back again and again with less than you expected? Will you allow a sigh of resignation? Or will you smile knowingly? Don't discount the impact of your own body language. You need to maintain your energy and resolve. You need to recognize and avoid the "good guy" trap, especially at the end of the day when it becomes most alluring.

That means remaining vigilant and positive, and helping yourself to do that by keeping your purpose squarely in mind. Keep in mind that mediations can and do flip on a dime, sometimes in the last ten minutes. To be sure, that may not happen on any given day. Your best alternative at some point may be to exercise your greatest leverage, to walk. Meanwhile, your job throughout the day is to look for and work on developing ways to create opportunity for your client, or to recognize it when it comes knocking, unexpectedly or otherwise.

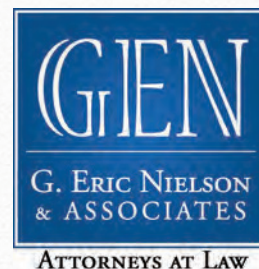


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Secondary Traumatic Stress Among Lawyers and Judges

by Kiley Tilby and James Holbrook

This article discusses secondary traumatic stress (STS) among lawyers and judges, describing what it is, risk factors, coping measures, and what steps legal and professional education should take to both mitigate the symptoms of STS and increase our resilience in dealing with it.

Trauma

Many people have experienced trauma or know family members or friends who have suffered from a single traumatic event such as a natural disaster, the sudden death of a loved one, or violent crimes such as rape or murder. Trauma also includes responses to chronic or repetitive experiences such as child and vulnerable-adult abuse and neglect and domestic violence. Lawyers' clients in many other kinds of disputes, as well as parties in court, also are often traumatized by conflict, expense, uncertainty, and lack of control of both the legal process and the ultimate outcome of a dispute or case.

To understand secondary trauma stress, we need to understand trauma. In 1980, the 3rd edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association, included fear-based Post Traumatic Stress Disorder (PTSD) as a recognized condition for the first time. the DSM-III states that PTSD occurs when "a person experienced, witnessed or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of others; and the person's response involved intense fear, helplessness or horror."

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Guilt-based PTSD occurs when a person feels extreme guilt for surviving when others did not, or feels like he or she should have done more to prevent an adverse incident from occurring to another, or feels he or she violated his or her own moral code in doing or failing to do something, or feels betrayed by a person or institution he implicitly trusted. Brett T. Litz et. al., *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCHOLOGY REVIEW 695, 695–706 (2009). See also Tony Dokoupil, *A New Theory of PTSD and Veterans: Moral Injury*, NEWSWEEK (Dec. 3, 2012), <http://www.newsweek.com/new-theory-ptsd-and-veterans-moral-injury-63539>.

The DSM-III identifies symptoms of PTSD as: fear, helplessness, horror, anger, rage, sleep disturbance, alterations in memory, irritability, difficulty concentrating, re-experiencing traumatic events, avoidance or numbing to avoid thoughts and feelings connected with the traumatic events, detachment, and estrangement from others. The latest edition of the DSM has added guilt as a symptom of PTSD.

Secondary Traumatic Stress Among Lawyers and Judges

Those who are exposed to others' trauma and then experience empathy for these trauma victims are vulnerable to STS. STS has been referred to as vicarious trauma, secondary trauma, compassion fatigue, secondary victimization, emotional contagion, and the cost of caring. Charles R. Figley, *Compassion Fatigue as Secondary Traumatic Stress Disorder: An Overview*, COMPASSION FATIGUE:

JAMES HOLBROOK is a Clinical Professor of Law at the S.J. Quinney College of Law in Salt Lake City.



SECONDARY TRAUMATIC STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED (Charles R. Figley ed., 1995). Secondary trauma occurs to those in helping professions who work with trauma victims on a regular basis and who then experience symptoms similar to PTSD. The American Counseling Association defines secondary trauma as “the emotional residue of exposure...from working with people as they are hearing their trauma stories and become witnesses to the pain, fear, and terror that trauma survivors have endured.” American Counseling Association, Fact Sheet #9, *Vicarious Trauma*, available at <https://www.counseling.org/docs/trauma-disaster/fact-sheet-9--vicarious-trauma.pdf?sfvrsn=2>.

The initial research studying STS was in the mental health professions, e.g., social workers, counselors, and psychologists. Then research occurred in other helping professions such as police officers, firefighters and, most recently, the legal profession. *Id.* In fact, STS is more likely to affect those in the legal profession than therapists and social workers. For example, lawyers hear clients’ trauma stories and judges hear trauma testimony and view other disturbing evidence in court. This then makes lawyers and judges vulnerable to secondary trauma stress and feelings of anger, rage, fear, guilt, identification with the trauma victims, and internalization of their pain and confusion. Yael Fischman, PhD, *Secondary Trauma in the Legal Professions, a Clinical Perspective*, 18(2) TORTURE, 107–15 (2008).

This is especially true of attorneys working with victims of domestic violence, high-conflict divorcing parents, and criminal defendants. These attorneys scored consistently higher on both secondary trauma and burnout in comparison even to mental health professionals. Attorneys experiencing secondary trauma have greater caseloads involving traumatized clients. PTSD symptoms, depression, burnout, and secondary trauma also are higher among these attorneys as compared with their support staff. Andrew Levin et. al., *Secondary Traumatic Stress in Attorneys and Their Administrative Support Staff Working With Trauma-Exposed Clients*, 199 THE JOURNAL OF NERVOUS AND MENTAL DISEASE 12 (2011). And female attorneys working in these fields had significantly higher secondary trauma scores than male attorneys. Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PAGE LAW REVIEW 245 (2003).

Judges handling criminal, family, and juvenile court cases also can experience STS. These judges may experience sleep disturbance, depression, and a sense of isolation. Female judges have more symptoms of secondary trauma, on average, than their male counterparts. Jared Chamberlain & Monica K. Miller, *Evidence of*

Secondary Traumatic Stress, Safety Concerns and Burnout Among a Homogeneous Group of Judges in a Single Jurisdiction, 37 J. AM. ACAD. PSYCHIATRY LAW 214–24 (2009). Judges can become personally invested in the high-emotion cases they experience day-to-day, especially cases involving traumatized victims. This secondary trauma can be exacerbated by workplace conflict, large caseloads, long work hours, and the inherent pressure of making important decisions that directly affect the lives and liberty of others. Peter Jaffe et. al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, JUVENILE AND FAMILY COURT JOURNAL (2003).

Risk factors for secondary trauma in the legal profession include: individually being more susceptible and less resilient to secondary trauma; having a high case-load; overworking; becoming over-extended with clients, including contact after hours and assisting clients with non-legal tasks such as securing housing or obtaining employment; being too empathetic; being female; having experienced personal trauma; and having a history of mental health issues.

Having one’s own personal abuse, neglect, or violent traumatic experiences in childhood, called Adverse Childhood Experiences

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(ACEs), are a significant risk factor for experiencing secondary trauma in adulthood. ACEs also contribute to a wide range of psychological and health problems – both in children and in adults – including substance abuse, emotional distress, lifetime depressive episodes, chronic health problems, and even early death. *Adverse Childhood Experiences*, SUBSTANCE ABUSE MENTAL HEALTH SERVICES ADMINISTRATION, <https://www.samhsa.gov/capt/practicing-effective-prevention/prevention-behavioral-health/adverse-childhood-experiences> (last visited Apr. 4, 2019).

Another risk factor for secondary trauma specifically among legal professionals is that lawyers and especially judges are expected to hear about others' traumatic events without showing emotion, judgment, or being noticeably affected by the information they are hearing. *What is Vicarious Trauma?*, VICARIOUS TRAUMA INSTITUTE, <https://www.vicarioustrauma.com/whatis.html> (last visited Apr. 4, 2019).

Lawyers and judges with secondary trauma also may experience: sleep disturbance and nightmares; headaches; stomach pain; and PTSD symptoms such as intrusive thoughts and memories; emotional distress; avoidance of people, places, or things that recall the trauma; irritability; angry outbursts; inability to focus; and being easily startled. Other symptoms may include extreme fatigue, negative thinking, a tendency to become easily upset, withdrawal, compromised parenting, and doubts about whether the world is a safe place. Lawyers and judges experiencing these symptoms of secondary trauma may self-medicate with drugs or alcohol. *Id.*

STS may cause attorneys to question their own competence or value in the profession. Hallie Neurman Love, *Lawyers Are at Risk for Secondary Traumatic Stress*, 56 BAR BULLETIN OF STATE BAR OF NEW MEXICO 8–10 (2017). Secondary trauma also may affect a legal professional's decision-making, lead to inhibited listening, and decrease the ability to maintain appropriate boundaries and render effective service. Yael Fischman, PhD, *Secondary Trauma in the Legal Professions, a Clinical Perspective*, 18(2) TORTURE, 107–15 (2008). And STS can lead to lawyer burnout, which has been described as a “process of disengagement” from the profession. Kate Mayer Mangan, *Keeping the Fire Burning: Stopping Lawyer Burnout*, (Feb. 12, 2016), <https://www.lawpracticetoday.org/article/stopping-lawyer-burnout/>.

To manage and mitigate secondary trauma, legal professionals must engage in self-care practices incorporated into both their personal and professional lives. These include taking breaks from work, taking vacations, getting exercise, eating healthy foods, getting adequate sleep, engaging in hobbies, and

maintaining connections with friends and family. They also include stress-reduction techniques such as yoga, meditation, mindfulness and breathing exercises, massage, and deep nervous system relaxation. Hallie Neurman Love, *Lawyers Are at Risk for Secondary Traumatic Stress*, 56 BAR BULLETIN OF STATE BAR OF NEW MEXICO 8–10 (2017).

Understanding new research in what is called “post-traumatic growth” and the impact it can have in the management of secondary trauma is helpful. Post-traumatic growth is defined as “a positive change in your life, which you experience because of your struggle with a traumatic event or a major life crisis, either in your own life or in the life of someone close to you that affected you.” *What is PTG?* Department of Psychology, Posttraumatic Growth Research Group, UNC Charlotte (2014), <https://ptgi.uncc.edu/what-is-ptg/>. Positive growth and personal transformation following the experience of trauma come from a renewed appreciation of being alive, feeling enhanced personal strength, acting on new possibilities, having improved relationships, and finding deeper spirituality.

A Call for Change in the Legal Profession

Understanding STS in the legal profession should begin in law school. Law schools should incorporate secondary trauma education as part of their curriculum, just as schools of social work and clinical psychology do. Law students should be aware of STS risk factors, self-care management, and best-practice strategies for more effectively working with clients who are victims of trauma.

Bar associations should offer continuing legal education short-courses on secondary trauma for lawyers and judges. For example, in May 2016, the American Bar Association broadcast a seminar entitled, “Understanding the Impact of Secondary Trauma on Lawyers Working with Children and Families.” See also Claire Chiamulera, *Secondary Traumatic Stress in Juvenile Court: Are You Affected?* AMERICAN BAR ASSOCIATION (Aug. 1, 2006), https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/august-2016/secondary-traumatic-stress-in-juvenile-court--are-you-affected-/.

In family law firms, criminal defense firms, and other practice areas that deal with trauma victims, attorneys should understand secondary trauma and be provided with debriefing opportunities to discuss their STS with co-workers. And STS self-care should be strongly encouraged among these lawyers.



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Easing Conflict Rules for Brief Pro Bono Legal Advice

A small rule change regarding free legal advice could improve lawyer-community relations and improve access to legal services in Utah.

by Dave Duncan

Every lawyer has been approached at a party by a friend who asks, “Can I ask a quick question?” All lawyers learn the response in law school: “I’m sorry, but I can’t give you legal advice until I complete a conflict check with my firm.” The friend quickly concludes that lawyers are unhelpful, tend to over-complicate the simple, make getting advice difficult, and are invariably driven by money. The impression is only reinforced if the lawyer mentions signing a contract before providing even simple advice.

Giving legal advice creates an attorney-client relationship. Creating a client relationship and later finding that the client is adverse to another client can cost the lawyer both clients. This is true even if one of the clients was a client who only received brief legal advice. *See* Utah R. Prof’l Conduct 1.7 (Conflict of Interest: Current Clients), *id.* 1.9 (Duties to Former Clients), *id.* 1.18 (Duties to Prospective Client). Worse, one lawyer at a firm who gives free, brief legal advice to a person can theoretically prevent all other lawyers at the firm from taking on future (perhaps, well-paying) clients who are adverse to the person who received the free, brief legal advice. *See id.* R. 1.10 (Imputation of Conflicts of Interest).

The current rules provide an exception in a few cases – when providing brief legal advice that is under the auspices of non-profit and court-annexed limited legal services programs. *See id.* R. 6.5. But these situations are very limited, and many of those who need the brief legal advice may not even know about such programs. Regardless, the current rules don’t ease the burden on the typical lawyer who is put on the spot when a friend asks a legal question – the answer to which would be simple but may still put the lawyer in an ethical predicament if provided. Does the lawyer (1) provide the advice without performing a conflict check and put current and future business at risk for the lawyer’s firm, (2) dodge the question, or (3) take the time to

explain that to give legal advice would first require performing a conflict check (which may take days) and maybe even entering an engagement agreement? None of the options meets the needs of both the lawyer and the friend.

A small refinement to the Rules of Professional Conduct could significantly improve lawyers’ relationships with the general public and improve access to legal services in Utah. By easing the conflict check requirements and implications when lawyers provide the oft-requested free, brief legal advice, lawyers could improve society’s collective perception of us and often point a questioner in a productive direction.

First, we should ease the conflict check requirements for lawyers providing free, brief legal advice. Under the proposed rule, conflict rules would only apply if the lawyer knew of a conflict between the person seeking the advice and a current or former client – just as is currently the case for brief legal advice given under the programs identified in Rule 6.5. If the lawyer recognized that the questioner was adverse to an existing or former client, the lawyer would not be able to provide legal advice. Instead, the lawyer would explain that such advice could harm an existing (or former) client. Most brief advice clients would understand and respect that situation.

Second, we should ease potential negative ramifications to a

DAVE DUNCAN is a second-year associate at Patent Law Works, in Salt Lake City, and a pro bono enthusiast; before becoming a lawyer, Dave had careers as an aircraft design engineer and a software engineer.



lawyer's firm when that lawyer provides free, brief legal advice. Other lawyers at the firm could still take on a new client who was adverse to the former (free, brief legal advice) client. However, the firm would need to establish a screen between the lawyer who gave the free, brief legal advice and the new client. Such an ethical wall could be modeled on the screening currently allowed, in some cases, under Rule 1.18.

In short, such a proposal would ease the process for giving free, brief legal advice by

- (1) eliminating the need to perform a full conflict check, and instead only implicating Rules 1.7 and 1.9 if the lawyer knew of the conflict at the time;
- (2) eliminating the imputation of the conflict to the lawyer's firm when the firm doesn't recognize the conflict; and
- (3) allowing screening of the lawyer from matters related to a new client of the firm who is adverse to the recipient of the free legal advice from the lawyer.

Below are six scenarios and how the above rule changes would (or would not) come into play.

1. A non-profit or court-sponsored program provides free short-term limited legal services.

- a. Rule 6.5(a) would explicitly forbid the program from charging clients for their services. No other changes

would result. Because such programs are typically free, most programs would see no change.

2. A person asks a lawyer a question for which the lawyer would like to provide an answer in the form of free short-term limited legal services.

- a. The lawyer need not perform a conflict check.
- b. If the lawyer knows of a conflict at any point in the discussion, then the lawyer should explain to the person that answering the question would cause a conflict of interest and the lawyer must immediately terminate all conversation about the matter.
- c. If the lawyer does not know of a conflict and wishes to proceed, the lawyer must explain to the person, who is about to become a client, that the lawyer is only providing free, short-term limited legal services and that doing so does not establish an ongoing attorney-client relationship, so as to avoid any misunderstanding that the attorney is representing the client on an ongoing basis and that no compensation is expected. The lawyer must secure the client's informed consent to these conditions before proceeding to render the free, brief legal advice.
- d. No entry need be made in any firm-wide conflict-check system.

Snow Christensen & Martineau is pleased to welcome its newest attorney **Robert B. Cummings** to the firm's Salt Lake City office.

Robert brings a wealth of experience litigating complex civil litigation and criminal matters while at Skadden, Arps, Slate, Meagher & Flom and then with The Salt Lake Lawyers, a small boutique trial firm he helped found in 2013.

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3. A lawyer's firm takes on a new client adverse to a client who received free, short-term limited legal services from a lawyer at the firm.

- a. No action need be taken unless a lawyer at the firm, likely the lawyer who rendered the free, short-term limited legal services, recognizes the conflict.
- b. When the lawyer recognizes the conflict, the firm must timely screen the conflicted lawyer and apportion no part of the fee therefrom to the conflicted lawyer.

4. A lawyer is asked to provide free, short-term limited legal services for a question which the lawyer recognizes would likely cause a future conflict with potential paying clients.

- a. The lawyer is, of course, under no obligation to render the advice.
- b. If the lawyer decides not to provide the advice, the lawyer should explain to the potential client that doing so could potentially cause significant future conflicts of interest, and therefore declines to engage in the matter.
- c. If practical, the lawyer should consider referring the client to another lawyer who may not have the same concern.

5. A lawyer unscrupulously offers free short-term limited legal services to a pro bono client in order to gain confidential information to aid an existing adverse client or to aid a potential paying client who would be adverse to the pro bono client.

- a. Since the lawyer knows of the conflict, there would be no exception under Rule 6.5(a)(1).
- b. In the case of an existing client, this would be an immediate violation of Rule 1.7.
- c. This would also be a violation of Rule 1.9 if the lawyer engaged the potential paying client.

6. A lawyer provides free short-term limited legal services to a client and later agrees to provide more substantial legal advice to the client for a fee.

- a. The exceptions to Rule 6.5 no longer apply once the legal assistance is not "short-term limited legal services," or once there is an expectation by the lawyer or the client that the lawyer will be compensated for the legal assistance.
- b. Before providing the more substantial legal advice to the client, the lawyer must first conduct a conflict check with the lawyer's firm because the matter is subject to the normal conflict of interest rules.

Implementing the above rule changes would be a helpful step in addressing some of the concerns highlighted in the survey conducted last year by Lighthouse Research and highlighted in the May/June 2018 *Bar Journal* article by then-President, John Lund, including the following:

1. Not knowing how a lawyer can help;
2. Lack of trust;
3. Not knowing where to start;
4. Bad reputation of lawyers;
5. General lack of knowledge of lawyers/their jargon; and
6. Cost.

See John R. Lund, *Meeting the Market for Legal Services*, 31 UTAH B.J. 8, 9 (May/June 2018).

A rule change proposal that suggests language to address all three rule-change elements identified above has been submitted by the Utah State Bar's Innovation in Law Practice Committee and has been unanimously recommended by the Bar Commission to the Utah Supreme Court for further consideration by its Advisory Committee on the Rules of Professional Conduct.

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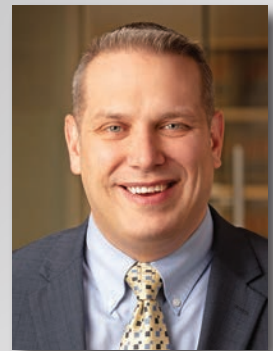
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Legislative Update

by Douglas Foxley, Frank Pignanelli, and Steve Foxley

Traditionally, a post-legislative session wrap-up would include a laundry list of bills the Bar supported or opposed along with other items of interest. But in the recently concluded 2019 Legislative General Session there was one matter that almost every lawyer in the state followed, commented on with lawmakers, and discussed with colleagues, friends, and family members.

Therefore, we provide a review of 1 H.B. 441 Substitute – Tax Equalization and Reduction Act (Rep. Quinn – Republican, Heber City) – and again ask for your help.

BACKGROUND

In December 2018 Bar leadership (along with other trade associations) were asked to meet with the Governor’s Office of Management and Budget. Bar leaders learned of the concerns regarding the General Fund and the potential diminishment of sales tax revenues as a percentage of the overall budget.

To counter this, the executive branch was seriously considering an expansion of the sales tax to include professional services.

Similar proposals have been discussed by governors in the last thirty years and gained little traction with lawmakers. However, bar lobbyists reviewed the issue with Bar leaders and suggested that preliminary research be conducted should a need to inform lawmakers as to our concerns develop. By mid-January 2019, the issue was discussed by lawmakers but with little clarity as to the extent of “broadening the base.” We remained in contact with Bar leadership and started circulating a white paper detailing the concerns of a sales tax on legal services.

In late February, our sources and the media revealed that a number of professional services were to be targeted for sales tax collection. It was at that point Bar leadership sent an email to all members requesting that they contact their legislators expressing concerns. On Wednesday, February 27, Bar President Dickson Burton emailed all Bar members and asked them to contact their elected representatives with concerns. Attached to the email was a position paper that outlined matters of concern

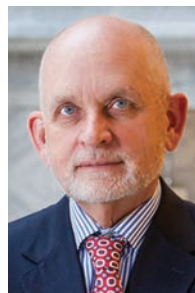
that the Bar is allowed to convey to lawmakers: access to justice, availability of legal services to all citizens, and adherence to constitutional principles. The Bar cannot make direct statements regarding policy and how it may impact regulatory and economic activities beyond the items detailed above. However, attorneys were encouraged to contact local lawmakers to express their own concerns with the proposed tax. Many members did so and had an important impact on deliberations.

The bill was formally introduced to the House of Representatives the next day, February 28.

On Friday, March 1, the House Revenue and Taxation Committee conducted a special hearing in which Representative Tim Quinn introduced the bill to the public. The presentation included a statement from the Salt Lake Chamber, which the day before had emailed its members to announce its backing of the Tax Equalization and Reduction Act and “reaffirming its support of the legislature taking bold action to implement an updated, balanced approach to Utah’s tax policy.” Individuals, businesses, and associations (including the Bar) spoke overwhelmingly in opposition.

The beginning of the following week, many lawmakers commented that the vast majority of emails they were receiving were from lawyers inside their district, but that the overall volume was less than they expected. This is important because Bar members laid the groundwork for raising questions and concerns with the legislation. By the end of that week, many other trade associations

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



— and their members — had also contacted legislators expressing their concerns. Also, Bar leaders, your lobbyists, and some of the leading law firms met with key lawmakers and others regarding the impact the legislation would have on the economy. The Bar developed and was implementing a strategy for the Senate with other legal groups. Beyond our access to justice concerns, the main argument centered on the “tax pyramiding” effect in which businesses that hire lawyers and other professionals would pay sales taxes on taxes, significantly raising the cost of doing business. In particular, Steve Young of Holland & Hart helped policymakers understand this issue.

On Thursday, March 7, there was apparently not enough votes to pass the legislation across both chambers with a super majority (to prevent a referendum). The bill was pulled and a task force created to study the issue.

ACKNOWLEDGMENTS

As contract lobbyists, we are honored to represent the Bar as one of the many clients and organizations whose interests we advocate for at the Capitol. Thus, we can make the following representation with expertise and knowledge. The Utah Bar leadership was absolutely engaged on this matter from the moment they received information from the Governor’s Office and have remained so in preparation of further study. President Dickson Burton, President-elect Herm Olsen, Director John Baldwin, and the Bar Commissioners were intensely involved in developing strategy and communications to ensure their concerns were heard. Their passion and commitment was exceptional, and members must understand they are well represented.

Steve Young is acknowledged by attorneys, economists, officials, and others as a leading tax law expert in the state. His public testimony and analysis provided to Bar leadership and other policymakers was absolutely essential in developing talking points for attorneys when engaging with lawmakers. We are grateful for his service and look forward to working with him on this matter throughout the year.

The lawyer-legislators were an invaluable tool inside the House and Senate conveying our message and providing needed information. Their commitment to justice and process is important. Members are encouraged to thank them when appropriate.

Finally, we commend lawmakers and the governor’s office for proactively dealing with what they perceive as a looming problem. It’s easy to kick the can down the road, but it takes courage and vision to attempt resolution of problems before a crisis occurs. Although we did not always agree with the process surrounding the

bill or a particular solution, we are appreciative of the lawmakers who met with us to discuss the issues for lawyers. The sponsor of the bill, Representative Quinn, was generous with his time, and we also look forward to working with him on this matter.

PLAN OF ACTION

In the final days of the legislative session, lawmakers passed H.B. 495, Tax Restructuring and Equalization Task Force. This task force is comprised of five senators and five representatives. The President of the Senate and the Speaker of the House each appoint two nonvoting members of the public with taxation expertise. Further, this task force is mandated to seek public input and coordinate with other individuals with taxation expertise. Reports on the progress and preliminary findings will be made in June 2019. Any recommendations will be made in August or September. The task force is authorized to remain in force until June 30, 2020. There may be a special session later in the year to implement any recommendations.

Your Bar leadership sent letters to legislative leadership strongly recommending that Steve Young and David Crapo, attorneys of renowned tax expertise, be appointed to serve on this task force.

MEDIATOR & ARBITRATOR

Greg Hoole

- Trained in mediation at the Straus Institute for Dispute Resolution at Pepperdine School of Law;
- Trained in advanced negotiations at the U.S. Dept. of Justice National Advocacy Center;
- Adept at bringing parties together to resolve even the most complex of disputes.



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Based upon conversations with lawmakers and others, this task force will likely study expanding the sales tax base to include professional services. But other, less radical options might also be discussed. These include re-imposing the sales tax on food, increasing the current sales tax, and a constitutional amendment allowing broader use of expenditures from the income tax, and others.

The task force will likely spend early meetings explaining to the public and other attendees the rationale for changing Utah's tax base. There may be economists from other sectors of the state who provide differing opinions as to sales tax receipts projected into the future.

Your lobbyists and Bar Commissioners will monitor the actions of the task force and report developments to members in a timely matter. Furthermore, we will provide task force members information regarding potential issues that will occur if sales taxes are imposed upon professional services-especially on attorneys-and the burden for citizens seeking justice.

YOUR INVOLVEMENT

Please remember that the Bar is limited as to what it may take positions on by rule 14-106 of the Supreme Court Rules of Professional Practice (Authority to Engage in Legislative Activities). (However, you may communicate with your elected senators, representatives, and other decision-makers on any matter.) You are encouraged to discuss with task force members and other state officials the items contained in the talking points previously sent to you, and that will be resent. These include:

1. Your opinion whether a sales tax would afflict residents at a time of stress and misfortune, especially those dealing with bankruptcy, personal injury, criminal charges, divorce, credit challenges, etc. This could be a "misery tax."
2. Taxing legal services is a burden to those taking responsibility in managing the affairs of their family and others-including guardianships, estate and probate matters, incorporating businesses, etc.
3. Increasing the cost of legal services deters individuals and businesses from retaining lawyers when needed and incurring greater later cost. Further, this will push citizens into "do-it-yourself" or other online "non-attorney" options-jeopardizing their quality of legal counsel.
4. Communications between client and lawyer are confidential, and an audit could threaten the client's privilege and create a greater burden on lawyers' efforts.

5. This tax would encourage citizens to obtain professional services from out-of-state entities.
6. The tax would discourage businesses and professionals from locating in Utah.
7. Constitutional issues with a sales tax on legal services, which include access to courts, violation of the supremacy cause for litigation in federal courts, breach of confidentiality in the right to counsel, violation of equal protection, and burdening rights guaranteed in the Constitution.

[A more detailed explanation of these items is contained in the documents sent by the Bar.]

The Bar cannot make direct representations or discussions regarding economic matters to decision-makers. However, individual members can. You may want to communicate issues that go beyond the Bar's access to justice concerns. Your practice might raise other issues, such as firms hiring counsel in other states to avoid not just paying the tax, but to avoid the pain in administering the tax. Furthermore, you might believe that the tax is "unfriendly to business" and will result in industries moving from Utah or refusing to locate in the state. Also, the "tax pyramiding effect" could have a detrimental effect on other entities who utilize legal services. There are a number of potential issues with the sales tax on professional services, which likely explains why many states choose not to impose it and why those that do have such taxes have economies that are not as robust as Utah's. Many local attorneys support policymakers who prize the competitiveness of Utah with other states economic development-maintaining our position as a leader across economic sectors, etc.

On a regular basis, and dependent on the activities of the task force, the Bar will send emails to remind members to communicate with your senators and representatives. We will also ask you to have a discussion with those members of the legislature with whom you have professional or social relationship.

There is no profession that is better suited to articulate to their clients and to policymakers the complexities and needs of tax reform to a system that is simple, fair, and creates fewer problems than it is trying to solve.

Utah attorneys made a significant difference in this debate. We look forward to working with you and Bar leadership and members into continuing to establish sound public policy and a thriving legal system in the state.



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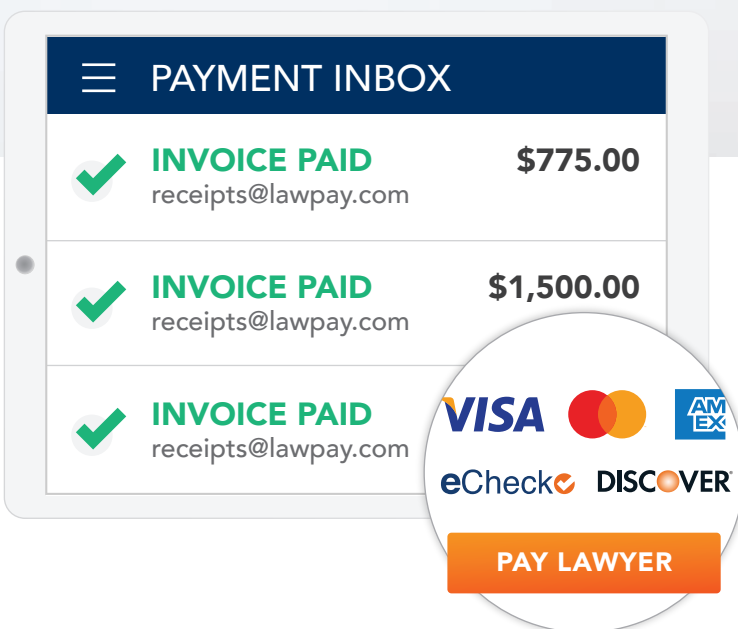
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Utah Supreme Court Forms OPC Oversight Committee

by Judge Diana Hagen and Keith A. Call

Nothing will raise a lawyer's blood pressure like getting a letter from the Office of Professional Conduct stating that you are under investigation for violation of the ethical rules. If you have ever seen such a letter, it probably included something like this: "We recognize that having our office involved in matters such as this can be inconvenient and unsettling." They are obviously Masters of Understatement.

What Is the OPC?

The Office of Professional Conduct (OPC) is comprised of a "senior counsel" appointed by the Board of Commissioners of the Utah State Bar, and other lawyers and non-lawyer staff appointed by the senior counsel. *See* Utah Sup. Ct. R. Prof'l Practice 14-504. The purpose of the OPC is three-fold: (1) investigate allegations of attorneys violating the Rules of Professional Conduct; (2) prosecute those allegations in accordance with applicable rules; and (3) provide informal guidance to members of the Bar concerning professional conduct. *See* www.utahbar.org/opc/ (last visited Mar. 30, 2019). The Bar pays the salaries of OPC counsel and their staff. Utah Sup. Ct. R. Prof'l Practice 14-505.

DIANA HAGEN is a judge on the Utah Court of Appeals. She served on the ad hoc committee that reviewed the ABA's recommendations and chairs the new Oversight Committee.



What Changed?

A few years ago, at the suggestion of the Utah State Bar, the Utah Supreme Court asked the American Bar Association (ABA) to conduct an evaluation of Utah's attorney discipline system and make recommendations for improvement. In 2017, the ABA submitted its findings in a written report available on the Utah Courts website. *See* American Bar Association, *Utah Report on the Lawyer Discipline System* (Apr. 2017), available at

https://www.utcourts.gov/resources/reports/docs/ABA-OPC_Report.pdf. While noting the many strengths of Utah's existing system, the ABA recommended specific reforms designed to increase public trust and confidence in the system as well as the speed and efficiency of the process.

"While noting the many strengths of Utah's existing system, the ABA recommended specific reforms designed to increase public trust and confidence in the system as well as the speed and efficiency of the process."

After receiving the report, the Utah Supreme Court formed an ad hoc committee to review the ABA's suggestions and make recommendations as to what changes should be implemented. The committee's recommendations (also available on the Utah Courts website) fall into two general categories. First, the committee recommended a series of procedural changes designed to improve the efficiency and effectiveness of the disciplinary system. Those changes include streamlining the complaint

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process to make it more accessible to the public, providing additional tools and resources to OPC staff to speed investigations, and simplifying the process used by screening panels to increase efficiency while providing important due process protections to attorneys accused of professional misconduct.

Second, the committee recommended a series of steps to separate the OPC from the Bar. It is important for the public to understand that the OPC is part of the Utah Supreme Court's regulation of the practice of law and operates independently of the Bar. Some of the recommendations seek to correct the misperception that the OPC is part of the Bar (for instance, by separating the OPC's website from the Bar's website and changing the signs in the Utah Law and Justice Center to distinguish between the OPC and the Bar), but others are more substantive and will require rule changes (such as appointment of the OPC's Chief Disciplinary Counsel – formerly “senior counsel” – by the Utah Supreme Court, rather than the Bar Commissioners). One of those substantive changes is the creation of the new Oversight Committee.

What Is the New Oversight Committee?

On March 4, 2019, the Utah Supreme Court adopted a rule, Rule 11-501, creating a new Oversight Committee for the OPC. Utah Sup. Ct. R. Prof'l Practice 11-501. The committee is comprised of five voting members appointed by the court. The members must include at least one judge, one member of the public, one past chair or past vice chair of the Ethics and Discipline Committee, and one member with an accounting background. The executive director of the Bar is an ex-officio, non-voting member of the committee.

The purpose of the committee is to “assist the OPC in implementing the reforms to the attorney discipline process adopted by the Utah Supreme Court and to provide oversight for the OPC.” *Id.* R. 11-501(2)(A).

Oversight Committee Responsibilities

The new Rule charges the committee with the following responsibilities:

1. Implement performance metrics and annual evaluations of OPC's senior counsel;

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2. Develop an annual budget for the OPC;
3. Prepare a three- to five-year funding plan;
4. Report to the court annually; and
5. Develop formal policies for the OPC.

Id. R. 11-501(2)(B). Placing these responsibilities under the purview of the Oversight Committee underscores the OPC's independence from the Bar.

So, What Can We Expect?

The Utah Supreme Court has adopted the recommendation to create the Oversight Committee but has yet to officially approve the other recommendations. Over the next year, the Oversight Committee will present the court with concrete proposals for implementing the recommended reforms, which the court will review individually. Because many of the recommendations require changes to court rules, you can expect to see notices of proposed rule amendments in your inbox over the coming months. In short, the court is looking for ways to improve both process and perception. Members of the public may tend to believe the OPC is comprised of lawyers protecting lawyers.

Members of the Bar charged with violations of the rules may perceive they are the subject of a Star Chamber proceeding. *See, e.g., In re Nicholson*, 791 S.E.2d 776, 778 (Ga. 2016) (highlighting a respondent's claim in state bar disciplinary action that "[t]his is a Star Chamber proceeding...[a]nd you're here to do a hatchet job on me"); *see also* Bryan Garner, *Lawyer Walks Out of Hearing, Misses 10-Year Disbarment Recommendation* (June 5, 2008), http://www.abajournal.com/news/article/lawyer_walks_out_of_hearing_misses_10_year_disbarment_recommendation (last visited Mar. 3, 2019). The new Oversight Committee may be able to help with this perception on both sides by creating more transparency and recommendations for improvement.

The bottom line is to expect additional changes to the lawyer disciplinary process as the new Oversight Committee ramps up. Whatever the changes may be, I am sure you will keep hoping they stay irrelevant to you and your practice.

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.

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Responding To The Diversity And Inclusion Challenge In Utah

by Aida Neimarlija and Marshall Thompson

Utah's population is changing, but the legal profession is not keeping up. 2016 census data shows that 22.8% of Utahns belong to one or more racial minority groups, and that number is projected to increase to 30% by 2050. Women now constitute half of law school graduates. This demographic shift is certainly not peculiar to Utah. Nationwide, issues around diversity and inclusion are becoming increasingly important in government, business, and the professions.

Despite these trends, however, Utah's bar and bench remain largely homogenous and do not reflect these numbers. The *Deseret News* reported last July that "79% of judges are white men, making the Beehive State the least diverse in the country." Dennis Romboy, *Utah State Courts Lack Diversity Among Judges*, *DESERET NEWS* (July 21, 2018), available at <https://www.deseretnews.com/article/900025600/utah-state-courts-lack-diversity-among-judges.html>.

The term "diversity and inclusion" (D&I) is most commonly used to describe the effort to advance traditionally underrepresented groups defined by race/ethnicity, gender, sexual orientation, disability, and age. Experts in D&I teach that the two concepts – diversity and inclusion – are vastly different. While diversity is defined as a range of identifiers used to differentiate groups and individuals one from another, inclusion refers to intentional efforts on the part of organizations to reach their full potential, along with practices in which individuals or groups from different

backgrounds are welcomed and treated equally. Inclusion has been described as creating a sense of belonging, of having a seat at the table, and having access to leadership positions.

Most proponents of D&I consider both ideals to be moral imperatives. And in the legal field in particular, many view both concepts as inherently tied to access-to-justice issues. The American Bar Association (ABA) reported last August that our profession and the judiciary are struggling with decreased public confidence in the justice system. The report suggests that with a more diverse and inclusive legal profession, we are more likely to have the capacity to critically examine issues such as potential bias, racism, sexism, inequities, and cultural and language barriers. Earlier this year, the ABA House of Delegates passed Resolution 113 called "Promoting Diversity in the Legal Profession," which launched a detailed survey of hundreds of national law firms and urged all providers of legal services, and particularly law firms, to expand and create opportunities for diverse talents to thrive in the profession. See <https://www.americanbar.org/groups/diversity/DiversityCommission/> (last visited Apr. 2, 2019).

Investing in D&I is also becoming widely recognized as a smart business decision. This trend toward greater diversity and inclusion is already affecting Utah's businesses and legal employers. While some are quicker to adapt, all would be wise to prepare and carefully develop their policies and practices in order to ensure long-term viability.

AIDA NEIMARLIJA is Executive Director of the new Utah Center for Legal Inclusion.



MARSHALL THOMPSON is the Director of the Utah Sentencing Commission and the UCLI Communications Director



This article examines some of the national D&I trends and the impetus behind them. It further discusses how the national trends are affecting the Utah legal community. Finally, the article introduces the Utah Center for Legal Inclusion (UCLI) and its statewide effort to prepare organizations to effectively respond to demographic changes and client requirements.

Business and Governmental Interest in D&I

Research suggests that diversity in the workplace can be a key advantage over competitors as it improves the work-product and the bottom line. In a recent interview with the author, Sara Dansie Jones, a business and technology expert in D&I, explained,

In the global climate we live in, . . . customers and clients are requiring businesses to build products and provide services using a wider range of empathy, understanding, perspectives and problem-solving. Research also shows that when diversity and inclusion happen in leadership and through all areas of the company, the company achieves better team performance, productivity, profits, and revenue.

A recent whitepaper by Cisco Systems, Inc. on the return on investment of D&I summarizes studies showing that “diverse teams exhibited a higher level of creativity and a broader thought process” compared to work teams that were more homogeneous.¹ Sandy Hoffman et al., *Measurement: Proving the ROI of Global Diversity and Inclusion Efforts*, GLOBAL DIVERSITY PRIMER (2009), available at https://www.cisco.com/c/dam/en_us/about/ac49/ac55/docs/Global_Diversity_Primer_Cisco_Chapter.pdf.

The whitepaper further noted that in “a study of 506 U.S.-based businesses, each 1 percent increase in the rate of gender diversity [of employees] resulted in an approximately 3 percent increase in sales revenues.” *Id.* at 130. This should not be surprising given that women are “the world’s most powerful consumers.” Bridget Brennan, *Top 10 Things Everyone Should Know about Women Consumers*, FORBES (Jan. 21, 2015), available at <https://www.forbes.com/sites/bridgetbrennan/2015/01/21/top-10-things-everyone-should-know-about-women-consumers/#4db2b7f76a8b>. In 2013, the Harvard Business Review found that women account for at least 41% of employees with authority to make purchasing decisions. Cathy Benko & Bill Pelster, *How Women Decide*, HARVARD BUSINESS REVIEW (Sept. 2013), available at <https://hbr.org/2013/09/how-women-decide>. “Women are

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now the biggest buyers of legal services through the growing prominence of legal operations executives” said Connie Brenton, president and CEO of the Corporate Legal Operations Consortium (CLOC). Brenna Goth, *Companies Push Diversity Goals for Outside Law Firms*, BLOOMBERG (Apr. 25, 2018), <https://www.bna.com/companies-push-diversity-n57982091486/>.

As part of their own mission to promote D&I, businesses and government agencies are looking to their vendors to demonstrate a similar commitment. According to the ABA and another recent

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article for the Illinois Bar, almost two hundred of the top U.S. companies have already agreed to require and report tracking of the diversity and inclusion efforts of their legal vendors. Bloomberg and other news outlets have reported that many large corporations, including Amazon, Walmart, Microsoft, Facebook, HP, AT&T, and NBC, are specifically requiring both diversity and inclusion from their outside counsel.

Business Effect on the Utah Legal Community

National business and demographic trends are already driving significant changes in the legal industry. The ABA, Federal Bar Association, and others have made D&I a priority. National law firms are also joining the D&I effort and forming organizations, such as the CLOC, the Diversity Lab (a collaboration of over 500 national law firms), and the Leadership Council on Legal Diversity, to tackle the challenges of keeping up with client demands.

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Many Utah legal employers are also recognizing the need to invest in D&I. The Utah economy is one of the strongest in the country, and there has been a significant influx of national and international companies opening offices in Utah and employing thousands of Utahns. As part of their effort to maximize D&I, companies in Utah are hiring women and attorneys of color as their in-house counsel and requiring diversity in their outside counsel as well. Over the last year, several Utah law firms reported that they have been asked by national clients to provide information regarding diversity, hiring, retention, and inclusion-related policies.

Local businesses are also exhibiting a strong commitment to D&I. For example, Zions Bank recently invested hundreds of thousands of dollars to form the Women Leadership Institute, whose mission is to prepare women to become business leaders and CEOs. Similarly, Gail Miller of the Larry H. & Gail Miller Family Foundation has been a significant contributor to women and other diverse students, funding projects such as the David Eccles School of Business "Elevate U" women's business executive program and other diversity scholarship programs.

Utah Center for Legal Inclusion

To make the bench and Bar more reflective of Utah demographics, a group of distinguished leaders from Utah courts, law firms, law schools, government agencies, bar organizations, and affinity groups identified a need for a centralized, statewide effort focused on advancing the goals of diversity and inclusion. To that end, they formed UCLI, a 501(c)(3) organization.

UCLI strives to enhance organizational inclusion, facilitate educational opportunities and professional advancement for students and attorneys with diverse backgrounds, assist in eliminating bias in Utah's justice system, and track the progress of legal inclusion efforts throughout the state.

The organizational diversity and inclusion challenge

UCLI appreciates the unique challenges Utah legal employers face when trying to hire, retain, and promote diverse attorneys. Hiring and promoting attorneys from diverse backgrounds to leadership positions and the judiciary is difficult when there are few in the applicant pool to begin with. UCLI's mission is to increase the size of that pool.

UCLI's Education Committee is developing a comprehensive education and mentoring initiative that will serve students in achieving academic and professional goals in the law, beginning in K-12 schools and continuing through undergraduate institutions and law schools.

The Advancement Committee supports and encourages professional advancement for all attorneys. As a continuation of the mentoring efforts developed by the Education Committee, UCLI is developing an initiative that supports attorneys by providing mentoring and advancement opportunities from the time an attorney enters the legal profession in Utah and throughout her or his legal career. As a particular area of focus, UCLI will promote inclusion on Utah's bench by identifying and preparing qualified judicial candidates with diverse backgrounds and assisting the candidates during the appointment process.

UCLI's Organizational Inclusion Committee is working with the legal and business community to develop a UCLI Certification Program for Utah legal employers, which will provide law firms and other organizations an opportunity to demonstrate their commitment to D&I to potential clients, potential hires, as well as their own employees, even if their organizations' biography

pages do not yet reflect that commitment due to factors outside their control. The program, which will launch this fall, will provide legal employers with innovative evidence-based tools to meet their individual needs and the existing and future challenges they may face due to increasing client demands for diversity and the changing demographics.

Conclusion

Diversity and inclusion have become important issues for the legal community in Utah. With a deep understanding of Utah's unique history and challenges, UCLI will strive to serve the interests of the bar, the bench, employers, and educators to accomplish the mission of increasing diversity and enhancing the vibrancy, effectiveness, and legitimacy of the Utah legal community.

1. This is sometimes referred to as the Medici Effect, based on the book of the same title by Frans Johansson. Frans Johansson, *The Medici Effect: Breakthrough Insights At The Intersection Of Ideas, Concepts, And Cultures* (2004). Johansson examines how the collaboration of people with diverse backgrounds creates disruptive innovation and produces better solutions to complex problems.

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Appellate Highlights

by Rodney R. Parker, Dani Cepernich, Robert Cummings, Scott Elder, Nathanael Mitchell, and Adam Pace

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

UTAH SUPREME COURT

Noor v. State, 2019 UT 3, 435 P.3d 221 (Jan. 18, 2019)

In this appeal from the denial of a petition for post-conviction relief, the Utah Supreme Court confirmed that Utah R. Civ. P. 15(c) applies to proposed amendments to petitions under the Post-Conviction Remedies Act filed after the statute of limitations has run. The court held that to **“relate back” under Rule 15(c), “the cause of action or claim asserted must generally be the same in both pleadings, and the issue presented in the amendment must factually relate to the issue presented in the first pleading.** Applying that standard, the court held the petitioner’s proposed claim of ineffective assistance of counsel – based on the failure to obtain a competent translator to ensure that he understood those speaking at trial – related back to his original ineffective assistance of counsel claim, asserted pro se, based on trial counsel’s failure to alert the trial court to the petitioner’s lack of fluency in English.

Interestingly, the Tenth Circuit decided *United States v. Roe*, 913 F.3d 1285 (10th Cir. Jan. 29, 2019) eleven days later, in which it applied the slightly-different federal standard for Rule 15(c) that applies to a motion under 28 U.S.C. § 2255 to vacate, correct, or set aside a sentence – which the Utah Supreme Court distinguished in Noor – to hold that the criminal defendant’s proposed amended claim did not relate back to his original motion.

State v. Trujillo, 2019 UT 5 (Jan. 29, 2019)

Reversing the defendant’s conviction, the Supreme Court held that **the witness retaliation statute requires a showing that the defendant intended for the threat or harmful action to reach the targeted witness, but does not require proof that the threat actually reached the witness.**

Utah Stream Access Coal. v. VR Acquisitions, LLC, 2019 UT 7 (Feb. 20, 2019)

The Utah Supreme Court clarified that its decision in *Conatser v. Johnson*, recognizing a **public easement right to touch privately owned beds of state waters incidental to recreation**, was based on common law which can be overridden by statute, and was not a constitutional right.

C.R. England v. Swift Transportation Company, 2019 UT 8 (Feb. 27, 2019)

On a certified question from the federal district court, the Utah Supreme Court declined an invitation to overturn *St. Benedict’s Development Co. v. St. Benedict’s Hospital*, 811 P.2d 194 (Utah 1991), which held that a plaintiff alleging intentional interference with contract must show that the defendant interfered through “improper means.” Acknowledging that *St. Benedict’s* had misinterpreted prior precedent, the court nonetheless concluded that the resulting “improper means” requirement was both legally sound and firmly embedded in Utah law. The court went on to clarify that **“improper means” is defined in this context “as conduct contrary to law – such as violations of statutes, regulations, or recognized common-law rules – or the violation of an established standard of a trade or profession.”**

Belnap v. Howard, 2019 UT 9 (February 28, 2019)

In an action a surgeon brought against physicians for defamation and tortious interference with prospective economic relations, the surgeon urged a bad-faith exception to the peer review privilege contained in Utah R. Civ. P. 26(b)(1), and argued he was entitled to discovery of statements made by the physicians in that context. In upholding the claim of privilege, the Utah Supreme Court held that **under a plain language analysis of the rule, the peer review privilege unambiguously**

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

protected all information provided at any stage of a peer review, and there was no bad faith exception.

***Pilot v. Hill*, 2019 UT 10 (Mar. 1, 2019)**

Plaintiff's complaint identified this personal injury suit as a Tier 2 case, but when the jury awarded damages in excess of \$600,000, he sought to amend his tier designation post-trial under Rule 15(b)(1), which allows post-trial amendments to pleadings to conform to tried unpleaded issues. Because a tier designation is a pleaded issue, the Supreme Court held that **amendment of the Tier 2 designation post-trial was impermissible, and the trial court's reduction of the judgment to \$299,999.99 was proper.**

UTAH COURT OF APPEALS

***State v. Bowdrey*, 2019 UT App 3 (Jan. 10, 2019)**

In this criminal appeal, the Utah Court of Appeals affirmed the district court's denial of the defendant's request for a cautionary jury instruction regarding the limitations of eyewitness identification under *State v. Long*, 721 P.2d 483 (Utah 1986). The court held that ***Long* is not implicated where the identification of the defendant had occurred as part of a chain of ongoing events leading to the defendant's apprehension and was not based on the memory of the person making the identification.**

***Pinney v. Carrera*, 2019 UT App 12 (Jan. 10, 2019)**

The appellant sought to overturn the jury's award of non-economic damages to the plaintiff on the ground that she failed to show a "permanent disability or permanent impairment based upon objective findings," as required by Utah Code § 31A-22-309(1)(a)(iii). The court interpreted this statute as **requiring a plaintiff to demonstrate through evidence other than the plaintiff's own subjective testimony that he or she has suffered either an inability to work or a loss of function that is reasonably certain to continue throughout the plaintiff's life.** Applying this definition, the court concluded that the plaintiff met the threshold requirement through testimony of her chiropractor and family members that she continued to suffer the effects of a herniated disc injury.

***State v. Miller*, 2019 UT App 18 (Jan. 31, 2019)**

In this criminal appeal, the Utah Court of Appeals **affirmed the district court's denial of the defendant's motion to suppress based upon the stop being impermissibly prolonged without reasonable suspicion.** The defendant

had argued that, while the initial stop may have been justified based upon him going five MPH over the speed limit, the officer unconstitutionally prolonged the stop by having him walk back to the patrol car, engaged him in unrelated questioning, and delayed a criminal-history check until a drug-sniffing dog could be deployed. Dissenting, Judge Orme raised concerns with the stop being based on the defendant going five MPH over the speed limit with no other violations and with the officer running an enhanced background check based upon a "suspicion" that the officer had about the defendant. Relying on *Rodriguez*, Judge Orme agreed with the defendant that the officer ran the enhanced background check to "buy himself additional time to conduct the dog sniff" and otherwise was not reasonably diligent in concluding the traffic stop rendering the extension of the stop unconstitutional.

***Nebeker v. Orton*, 2019 UT App 23 (Feb. 14, 2019)**

In this appeal from an award of parent-time to a non-custodial parent, the Court of Appeals held that the lower court exceeded its discretion by awarding only minimum parent-time to an appellant father under the schedules in Utah Code §§ 30-3-35



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and 30-3-35.5. While the statutory parent-time schedules are “presumed to be in the best interests of the child,” the court cannot simply default to minimum parent-time without explanation. Instead, the court must articulate a rationale for awarding only minimum parent-time that is consistent with its factual findings. Because the lower court failed to reconcile its award of minimum parent-time with findings indicating the father was entitled to additional parent-time, a remand was necessary to reevaluate the judgment.

***Rosser v. Rosser*, 2019 UT App 25 (Feb. 14, 2019)**

This appeal arose out of a post-divorce contempt proceeding. The parties’ mediation agreement required appellant to pay 50% of a tax obligation. Both parties mistakenly believed the other had paid the tax, and the decree of divorce made Wife solely responsible for any tax and the recipient of any refund. The district court found Husband in contempt for being deceitful and failing to make payments under the mediation agreement. Reversing, the court of appeals clarified that **the fraud provision of the contempt statute applies only to fraud committed on the court**. Because Wife had failed to show deceit or a

violation of the decree, the contempt order was vacated.

***James v. Hon. Hruby-Mills*,
2019 UT App 30 (Feb. 22, 2019)**

In denying the petitioner’s petition for an extraordinary writ, the Court of Appeals held, as a matter of first impression, that **Utah R. Crim. P. 2, regarding calculation of time, applies to the calculation of a term of probation**. Applying that rule, the day of entry of the probation order did not count and the prosecution’s probation violation report, filed exactly one year later, was timely.

10TH CIRCUIT

***Cummings v. Dean*, 913 F.3d 1227 (10th Cir. Jan. 24, 2019)**

After the district court granted in part and denied in part the defendants’ motion to dismiss the due process claims asserted against them under 42 U.S.C. § 1983, holding one defendant was entitled to qualified immunity on all claims, while one defendant was not entitled to qualified immunity on the substantive due process claim, defendants and the plaintiff appealed. The Tenth Circuit **dismissed the plaintiffs’ cross-appeal for lack of jurisdiction after evaluating whether jurisdiction over the partial grant of the motion to dismiss was proper under the discretionary doctrine of pendant jurisdiction**. In doing so, the Tenth Circuit reaffirmed that exercise of pendant jurisdiction generally is disfavored in an appeal from the denial of qualified immunity. It then held the plaintiffs had failed to establish that their appeal fell within the two circumstances where pendant jurisdiction is proper: “(1) when the otherwise nonappealable decision is inextricably intertwined with the appealable decision, or (2) where review of the nonappealable decision is necessary to ensure meaningful review of the appealable one.”

***SEC v. Scoville*, 913 F.3d 1204 (10th Cir. Jan. 24, 2019)**

In an appeal involving the SEC’s civil enforcement action against an alleged Ponzi scheme based in Utah, the Tenth Circuit held that **Congress intended the antifraud provisions of the federal Securities Acts to apply extraterritorially according to the judicially-created conduct and effects test, so as to reach the sale of online advertisements to people living outside the United States**. Here, where the defendant’s conduct in the United States constituted significant

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steps in furtherance of a violation of the antifraud provisions and where the conduct occurring outside of the United States had a substantial effect within the United States, the provisions applied, and the preliminary injunctions were upheld.

***Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792 (10th Cir. Feb. 15, 2019)**

It looks like the City of Fort Collins, Colorado will just have to bear with bare breasts for now. Panicked by the prospect of partially nude protestors parading in the presence of pre-teens, the City banned women from baring their breasts without mandating any matching modesty from men. Perturbed by this prudish prohibition, Free the Nipple sought and secured a preliminary injunction preventing enforcement of the ordinance. Parting ways with the majority of courts, the Tenth Circuit affirmed issuance of the injunction, concluding that **the City's proffered justifications for disparate treatment of male and female breasts were rooted more in stereotypes and conjecture than in sound policy and therefore likely violated the Equal Protection Clause of the U.S. Constitution.**

***Feinberg v. Comm'r of Internal Revenue*, 916 F.3d 1330 (10th Cir. Feb. 26, 2019)**

The Tenth Circuit **rejected a medical marijuana dispensary's argument that it was a violation of its Fifth Amendment rights to require the dispensary to bear the burden of proving the IRS erred in applying 26 U.S.C. § 280E to disallow deductions it had claimed for business expenses.** The court reasoned that a party who asserts the privilege against self-incrimination must bear the consequences of the lack of evidence.

***High Desert Relief, Inc. v. United States*, 917 F.3d 1170 (10th Cir. Mar. 5, 2019)**

This case arose out of the efforts of the IRS to investigate the tax liability of a medical marijuana dispensary in New Mexico. The Tenth Circuit **affirmed the district court's denial of motions to quash third-party summonses the IRS issued to obtain audit information that the dispensary refused to provide. It concluded that the government had demonstrated good faith for the summonses as required under *U.S. v. Powell*, 379 U.S. 48 (1964).** The dispensary had argued that the IRS had issued the summonses for the improper purpose of mounting a de facto criminal investigation

against it. The court also rejected the dispensary's argument that 26 U.S.C. § 280E (prohibiting deductions for businesses engaged in unlawful trafficking of controlled substances) was a "dead letter" incapable of engendering adverse tax consequences due to the federal policy of non-enforcement of the Controlled Substances Act against medical marijuana dispensaries.

***United States v. Knapp*, 917 F.3d 1161 (10th Cir. Mar. 5, 2019)**

On appeal from denial of her motion to suppress, defendant argued that police searched her purse in violation of the Fourth Amendment. The government responded that the search was constitutionally permissible as a search of defendant's "person" incident to arrest. The Tenth Circuit held that **the search of a purse or similar item carried by an arrestee but not within her clothing is not a search "of the person" under Fourth Amendment jurisprudence.** The court reasoned that treating a purse or other similar item carried by the arrestee as an extension of the arrestee's "person" would erode the important distinction between the arrestee's "person" and the area within her immediate control.

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President-Elect and Bar Commission Election Results



*Heather Farnsworth,
President-Elect*

Heather Farnsworth was successful in her retention election as President-elect of the Bar. She will serve as President-elect for the 2019–2020 year and then become President for 2020–2021. Congratulations goes to **Marty Moore** and **John Bradley** who ran unopposed in the First and Second Districts respectively and are declared elected, as well as **Michelle Quist** and **Heather Thuet** who were elected in the Third Division. Moore will finish out the term of Herm Olsen, who will resign effective at his swearing-in as Bar President in July. Sincere appreciation goes to all of the candidates for their great campaigns and thoughtful involvement in the Bar and the profession.



*Marty Moore
First Division*



*John Bradley
Second Division*



*Michelle Quist
Third Division*



*Heather Thuet
Third Division*

Notice of Petition for Reinstatement to the Utah State Bar by Stuwert B. Johnson

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Motion to Terminate Suspension and Affidavit in Support of Motion to Terminate Suspension filed by Stuwert B. Johnson in *In the Matter of the Discipline of Stuwert B. Johnson*, Second District Court, Civil No, 150904992. Any individuals wishing to oppose or concur with the Motion and Affidavit are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Notice of Legislative Positions Taken by Bar and Rebate

Positions taken by the Bar on public policy issues during the 2019 Utah Legislative Session are available at www.utahbar.org/legislative. The Bar is authorized by the Utah Supreme Court to engage in legislative activities by Supreme Court Rule 14-106 which may be found at https://www.utcourts.gov/resources/rules/ucja/#Chapter_14. Lawyers may receive a rebate of the proportion of their annual Bar license fee expended during April 1, 2018 through March 30, 2019 for lobbying and any legislative-related expenses by notifying Financial Director Lauren Stout at lauren.stout@utahbar.org.

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Password Insecurity – Lessons from a Personal Story

by Mark Bassingthwaite, ALPS

Sometimes married couples see things differently and the only way to resolve the tension is by finally deciding to agree to disagree. That's how things played out in our home for a number of years on the issue of passwords. My wife viewed my focus on computer security and passwords as something approaching mild paranoia. I, on the other hand, viewed her insistence on using one easily remembered password for everything in her life the equivalent of tattooing the phrase "victim here" on her forehead. The only way for us to move forward was to reach an accord. We agreed to disagree, and things were good, at least for a while.

A few years later, after receiving an email from one of our sons, our accord began to crumble. I was informed that my wife's email account had been hacked and was actively being used to send out spam email. Of course, I did what one normally does to remedy that situation and hoped all would be good. Sadly, it wasn't to be. Our accord abruptly ended a few months later after we received written notice from a credit union on the opposite side of the country telling us that they were most displeased with my wife.

Apparently, credit unions don't like it when someone gets a new credit card, immediately maxes it out, and then fails to make any payments. Unfortunately, given that my wife wasn't the one who applied for and received that credit card, we had a new problem.

While this tale took a number of interesting twists and turns over the next few years, in the interest of time I will simply share that as a result of the initial identity theft a federal and an out-of-state tax return were also fraudulently filed in my wife's name. I spent over three years working to get everything cleaned up; but the one thing I can't do, and honestly no one can, is ever get her identity back. That's been taken and we'll have to deal with the ramifications of that for the rest of our lives. Hopefully, it's over; but only time will tell.

Today things are different around here. My focus on computer security is viewed in a much different light by my wife, and I no longer worry about any unsightly tattoos on her forehead. Our state of marital bliss has been restored because this time around we're both on the same page. Trust me, she gets it now. What's more important, however, is do you? Again, understand this entire saga started with someone managing to figure out a password, a password that, unfortunately for my wife and me, opened all kinds of doors that would have remained locked had she not used one password for everything.

I chose to share this story because I wanted to put a real-world spin on the problems that can arise when too little attention is given to the importance of passwords. Every one of us in our personal and professional lives needs to abide by some sort of password policy, formal or informal, in order to try and avoid becoming yet another victim of identity theft. And heaven help you if an identity theft occurs and it turns out to be the identity of one or more of your clients because someone got into your office network. So not good.

With this tale of woe now told, it's time to talk about how to avoid becoming a victim. I'll start by identifying typical missteps. Here is a list of things no one should ever do. (1) Use the same password on multiple devices, apps, and websites. (2) Write down passwords on easily found sticky notes. (3) Believe that passwords like "qwerty," "password," "1234567," or "letmein" are clever and acceptable. They aren't. (4) Allow computer browsers to remember passwords. (5) Choose passwords based upon easily remembered information such as birth dates,

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anniversary dates, Social Security numbers, phone numbers, names of family members, pet names, and street addresses. This kind of information just isn't as confidential as you think due to events like the Equifax breach and widespread participation in the social media space.

Knowing the common missteps, however, isn't enough. Such practices should be prohibited in a formal firmwide password policy that everyone at the firm must abide by. There can be no exceptions, period. Of course, policy provisions must also detail what to do. The most important provision of a password policy would be to mandate the use of strong passwords defined as follows. A password is strong if it is long, a minimum of fifteen characters, and it should include a few numbers, special characters, and upper and lower-case letters if the device or application you wish to secure with a password will accept it. Additional provisions worth including would be requiring that every application and device in use have its own unique password, requiring that passwords in use with mission critical devices and applications (e.g. banking login credentials, firm VPN login) be changed every six months, forbidding the reuse of old passwords, and prohibiting the sharing of user ids and passwords with anyone. Finally, make enabling two-factor authentication for any device or application that allows it compulsory.

Of course, a password policy like this creates a new problem, which is trying to keep track of all the complex passwords now mandated. I can share that between us, my wife and I have over 250 different passwords we need to keep track of in our personal and professional lives. I don't know about you, but I sure can't remember all of that information.

Fortunately, this problem can be easily managed by using a password manager such as RoboForm, LastPass, or Dashlane. (My wife agreed to commit to learning how to use a password manager shortly after her kerfuffle with the credit union and it has made a world of difference!) Such tools are often cloud-based software applications that allow users to conveniently store and manage all of their passwords. The data is encrypted and can only be accessed once a master password has been entered. Yes, users will still need to remember a long and difficult to guess master password; but having to remember one is going to be far easier than trying to remember 250. And again, no one should ever write down their master password. Everyone really must commit the master password to memory or find a way to store it in some other secure manner.

One side note here because lawyers are sometimes hesitant to place passwords in the cloud. Try to avoid allowing such a concern to become an excuse for not making any changes at all. As I see it, those of us who use password managers are far more secure than those who simply write everything down on a piece of paper or on sticky notes that are always close at hand. Further, given the robust encryption in use, these applications are also going to be more secure than keeping a list of passwords in an Excel or Word file. But here's the real value. The use of a password manager provides robust security when compared to relying on easily remembered weak passwords, using the same password on multiple devices or websites, allowing browsers to remember passwords, not changing passwords and re-using old passwords, all of which is what so many do by default.

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ROBERT A. MCCONNELL



Robert McConnell practices and has substantial experience in a wide variety of transactional, real estate, commercial financing transactions representing lenders, borrowers, and developers. He received

his B.A., *magna cum laude*, from Brigham Young University and his J.D. *magna cum laude*, Order of the Coif, from Brigham Young University J. Reuben Clark Law School.

DANE R. JOHANSEN



Dane Johansen, formerly of Allen & Overy in Hong Kong, joins the firm's business and finance groups and practices in the areas of securities, mergers, acquisitions, fund formations, and investment matters. Mr. Johansen received his B.A. in Chinese from Brigham Young University, his J.D. from Brigham Young University J. Reuben Clark Law School, and his LL.M. in Chinese Law from Peking University.

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JAMES S. WRIGHT



James Wright, formerly of the Office of the Property Rights Ombudsman, joins the firm practicing in the areas of real estate, land use and zoning, eminent domain, and construction law. He received his B.A. from Brigham Young University, *cum laude* and his J.D. from Harvard Law School.

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2019 Summer Convention

ACCOMMODATIONS

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July 18–20

Grand Summit Hotel

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

Sundial Lodge

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

Silverado Lodge

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

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

HOUSEKEEPING

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

RESERVATION DEADLINE

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

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

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Reference: Utah State Bar 2019 Summer Convention or CF1USBB

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www.utahbar.org/cle/utah-bar-conventions/

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

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Pro Bono Honor Roll

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

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Pro Bono Spotlight: Pro Se Calendars

by Molly Barnewitz

Pop culture tells us that the courtroom is where justice happens. However, sometimes justice takes place in the courthouse hallway. At least in the case of the Pro Bono Commission's Pro Se Calendar Signature Projects where volunteer attorneys meet their clients, negotiate, and help make the legal system more accessible, all in the courthouse hallways.

The legal system is intimidating to navigate alone. Moreover, financial and social barriers often make legal help inaccessible. In 2018, 42% of petitioners and 48% of respondents in all case types were self-represented. In the most extreme cases, even the task of appearing in court is insurmountable. To help bridge the gap in representation the Pro Se Calendars Signature Projects provide pro bono representation to unrepresented parties in a variety of different legal areas.

The Pro Se Calendar Signature Projects aim to make the legal system less daunting, and to help ensure the justice system works for everyone involved. Although it can get a little noisy in the hall, the pro se calendars support self-represented parties who cannot otherwise afford legal services.

Debt Collection and Immediate Occupancy Hearings

Attorney Charles Stormont started the Pro Se Debt Collection Calendar at the Matheson Courthouse. Along with colleagues from the Attorney General's office, Mr. Stormont provided limited-scope advice to pro se defendants in debt collection cases. In Utah, almost all debtors navigate the legal system alone. Indeed, in 2018, 98% of respondents in debt collection cases were unrepresented, while the collecting party was represented in all cases.

Similarly, in eviction cases, most respondents are self-represented. In 2018, 96% of those facing eviction didn't have an attorney, while only 11% of landlords were pro-se. In the last two years, the Pro Se Calendar project has expanded to include immediate occupancy hearings. Currently, the Access to Justice Department at the Utah State Bar coordinates two of the pro se calendars in Salt Lake City's Matheson Courthouse, one for debt collection, the other for immediate occupancy hearings. Following approval from the bench, Judge Paul Parker was assigned the debt collection and immediate occupancy calendar in order to facilitate the program. Every Wednesday in Judge Parker's courtroom, volunteer attorneys gather to lend a hand. There is also a growing dual debt collection/immediate occupancy calendar in the Second District lead by attorney Keil Myers. Additionally, a debt collection calendar in the 4th district has been proposed.

Family Law and ORS

While the power dynamics are different, the problem of representation is the same in many family law cases. Last year 61% of petitioners

and 80% of respondents in divorce cases were pro se. Thanks to support from the Utah Court's Self Help Center and Legal Aid Society, the Pro Bono Commission's signature project extended to a pro se calendar available for Family Law cases in Commissioner Joanna Sagers' courtroom. Because of the pro se calendar volunteers, attorneys are present to articulate the concerns of their clients and advocate for their needs. As a result, having an attorney present to guide pro se litigants is an asset to both clients and the court. The model set by the family law and other pro se calendars is quickly spreading to areas outside the Third District.

In 2018, the Third District ORS calendar joined the debt collection and immediate occupancy calendars in Judge Parker's courtroom. This program was temporarily supported by a local Salt Lake City law firm. However, the ORS calendar is currently seeking attorneys with experience in family law cases to help the pro se litigants with their ORS case.

Justice for All

Following the Utah Rules of Professional Conduct, "[as] advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Nevertheless, the pro se calendars provide an opportunity for attorneys to work collaboratively to find ways to ensure every party's rights are recognized. Many self-represented individuals appear in court without any materials related to their case. At this point, plaintiff's attorneys often step in to help orient the pro bono volunteer to the case. In most cases, pro bono volunteers negotiate a settlement or stipulation that is manageable for their client and acceptable to the other party.

While the pro bono attorneys may not radically alter the outcome for their clients, the pro se calendar volunteers help ensure that defendants do not feel failed by the justice system. Without pro bono attorneys available to walk clients through the legal process, many defendants could leave court feeling confused or disillusioned by the system. The pro se calendar volunteers help ensure that everyone's voice is heard in court. Regardless of outcomes, a fair day in court is a successful step towards a fair justice system.

Get Involved!

The Pro Bono Commission is grateful for all the attorneys who make the pro se calendars happen every week. Currently, six law firms and several teams of solo attorneys support the Salt Lake City and Ogden Calendars. If you or your firm is interested in volunteering for one of the weekly programs, please contact probono@utahbar.org or call the Access to Justice Department at the Utah State Bar: 801-297-7049.

MCLE Reminder – Odd Year Reporting Cycle



July 1, 2017 – June 30, 2019

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

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

Fees:

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

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

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

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

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

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

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

Mandatory Online Licensing

The annual online licensing renewal process will begin the week of June 3, 2019, at which time you will receive an email outlining renewal instructions. This email will be sent to your email address of record. Utah Supreme Court Rule 14-507 requires lawyers to provide their current e-mail address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org.


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

No separate licensing form will be sent in the mail. You will be asked to certify that you are the licensee identified in this renewal system. Therefore, this process should only be completed by the individual licensee, not by a secretary, office manager, or other representative. Upon completion of the renewal process, you will receive a licensing confirmation email. If you do not receive the confirmation email in a timely manner, please contact licensing@utahbar.org.

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

MEDIATION-ARBITRATION

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Ethics Advisory Opinion Committee – Recent Opinions

OPINION NO. 18-05

Issued November 29, 2018

ISSUES

1. To whom are the duties of professional conduct owed?
2. May a Registered Investment Advisory (RIA) firm hire an attorney to provide estate planning services for the clients of the RIA?
3. May the RIA pay the attorney's fees out of the amounts that they collect as advisory fees for their clients so that the clients will not be charged extra if they use the lawyer's estate planning services, nor less if they do not?
4. May the RIA pay the attorney higher fees when the attorney has brought the client to the RIA firm?

OPINION

1. The client. The duties of professional conduct are owed to the client.
2. Yes. A non-client may pay the attorney's fees for a client provided the requirements of Rule 1.8(f) are met – the arrangement is fully described to and consented to by the client, confidentiality is maintained with the client, and the person paying the fees does not interfere with the attorney's professional judgment.
3. No. Such an arrangement would violate Rule 5.4 that prohibits an attorney forming a partnership with a nonlawyer if any of their activities will include the practice of law and that prohibits splitting fees with a nonlawyer.
4. No. Such an arrangement would violate Rule 7.2 by giving something of value for a referral and may violate Rule 1.5 against "unreasonable fees."

The arrangement described here is almost certain to violate the rules against fee-splitting and against the lawyer charging an unreasonable fee for services performed. Both issues arise from the proposed method of computing the attorney's fee as a percentage of the fee collected by the RIA firm. Because the fee will vary substantially based on factors unrelated to the work performed by the attorney, whether the legal fee is reasonable will vary in a case-by-case basis. Further, because the total fee is split between the lawyer and the RIA, the request has not identified any principled method of determining the value of the legal services provided, and

the client does not separately negotiate a fee for the legal services, the splitting of the overall fee constitutes fee-splitting. Finally, the fact that the lawyer charges the RIA a lower fee when the client is new to the lawyer likely means that the reduced fee represents an unethical referral fee paid by the lawyer to the RIA for recommending the lawyer's services.

The employment arrangement also makes compliance with the Rules of Professional Conduct difficult if not impossible. The lawyer cannot form a partnership with the RIA without compromising the lawyer's professional independence. If the lawyer is an employee or independent contractor it is almost inevitable that the lawyer will have to choose between offering independent and candid advice to the client and advancing the interests of the lawyer's employer, the RIA.

BACKGROUND

A Registered Investment Advisory firm manages investments for many clients. The RIA firm clients often need estate planning services that make sense in light of their investments. An estate planning attorney will often recommend changes in how assets are held by a couple or family or in the mix of assets as part of the estate plan.

The RIA firm proposes to employ an estate planning attorney and make that attorney's legal services available to the RIA firm's clients. This arrangement will not require the clients to pay anything additional to receive these estate planning services. The RIA proposes to pay the attorney a percentage of the fee charged to the RIA firm's clients, but to pay a higher percentage when the attorney has referred the client to the RIA firm.

CONCLUSION

The arrangement discussed in the request is likely to violate various rules of professional conduct because it involves fee-splitting, a multi-disciplinary practice that would compromise the lawyer's professional independence, and conflicts of interest between the RIA (the lawyer's referral source and employer) and the lawyer's clients.

OPINION NO. 19-01

Issued March 8, 2019

ISSUE

Is it permissible for a firm to charge the cost of a litigation insurance policy to the client if the firm recovers funds for the client, through a settlement or positive trial verdict, and the client's liability for payment of costs is contingent on a recovery?

OPINION

A firm may charge the cost of a litigation insurance policy to the client if the firm recovers funds for the client, through settlement or positive trial verdict, and the client's liability for payment of costs is contingent on a recovery, as long as:

- (1) the terms are fair and reasonable to the client, fully disclosed to the client, and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction;
- (3) the client agrees, in a writing signed by the client, to assume the cost of the litigation insurance policy upon recovery; and
- (4) the insurance company has no decision-making power in the client's case and the insurance policy does not in any way interfere with the law firm's independence of professional judgment or the attorney-client relationship.

BACKGROUND

Typically, attorneys who undertake cases on a contingency fee basis do not charge the client "costs," but recover costs if there is a recovery. Such attorneys often advance large sums of money as "costs" during the litigation. Some attorneys have purchased insurance to cover these costs in the event of a loss or a recovery too small to cover the costs. Now the question arises whether the attorney may ethically charge the cost of this insurance to the client if the firm recovers funds for the client through a settlement or positive trial verdict and the client's liability for payment of costs is contingent on a recovery.

CONCLUSION

The Utah Rules of Professional Conduct do not preclude a firm from purchasing a litigation insurance policy and charging the cost of the policy to the client upon recovery, as long as the terms are fair and reasonable, fully disclosed in writing in a manner that can be reasonably understood by the client, the client is advised to seek independent counsel and given the opportunity to do so, the client agrees in writing to the terms of the agreement, the insurance company has no decision-making power in the client's case, and the policy does not interfere with the firm's independence of professional judgment or the attorney-client relationship.

OPINION NO. 19-02

Issued March 8, 2019

ISSUE

Is it permissible for a private lawyer to represent a client against a government department or agency and simultaneously represent a different department or agency of the same government in an unrelated matter?

OPINION

Possibly. Whether a conflict exists under Rule 1.7 of the Utah Rules of Professional Conduct (URPC) hinges on the identity of the government client and the nature of the representation. The answer to this question will vary based on the specific facts of a particular case.

Government clients are treated like organizational clients under Rule 1.13 of the Utah Rules of Professional Conduct. However, lawyers representing government clients may have expanded duties under relevant law. *See* Utah R. Prof'l Conduct Rule 1.13(h). Government clients should be clearly identified at the outset of the representation. While clients control the scope of the representation, the client's autonomy with respect to his identity must be viewed through the lens of Rule 1.7 of the Utah Rules of Professional Conduct. A lawyer may not ignore potential conflicts under Rule 1.7 by virtue of a narrow definition of the government client.

BACKGROUND

A lawyer may represent third parties against a specific government's department or agency and simultaneously be asked to represent a different department or agency of the same government. The representation against the government department or agency and the representation of the government client involve unrelated departments, agencies, and issues. For example, Partner A represents a criminal defendant–appellant against the Attorney General's office while Partner B is asked to represent the Department of Health in negotiating waivers for Medicaid coverage with the federal government.

CONCLUSION

The simultaneous representation described above is not specifically prohibited by the rules, but lawyers engaged in this practice must be aware of the increased potential for a conflict as defined by Rule 1.7. Therefore, the Utah Rules of Professional Conduct do not preclude the simultaneous representation of government and private clients against separate departments or agencies of the same government. However, lawyers engaged in this practice should exercise constant awareness of their responsibilities to their government clients, their private clients, and the public interest.

The complete text of these and other ethics opinions are available at: www.utahbar.org/opc/eaoc-opinion-archives/.

Bar Thank You

Many attorneys volunteered their time to grade essay answers from the February 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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Attorney Discipline

ADMONITION

On February 21, 2019, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating 1.15(c) (Safekeeping Property) and 5.1(a) (Responsibilities of Partners, Managers, and Supervisory Lawyers) of the Rules of Professional Conduct.

In summary:

An attorney operates immigration law offices in Utah and Nevada. Multiple attorneys worked out of the office in Salt Lake City, Utah under the attorney's name. A woman hired the attorney to represent her husband in immigration proceedings for a flat fee. Upon receiving the flat fee retainer the attorney placed those funds and any subsequent monies from the client in an operating account rather than a client trust account. The attorney failed to follow up with the Salt Lake City attorney to make sure that the case was being handled and that there was adequate communication. The attorney reasonably believed that the Salt Lake attorney was communicating with the woman regarding her husband's case. The woman was aware of developments in the case and as such, the attorney's lack of follow up was negligent. Further, the attorney earned the fees and placement in the operating account rather than a trust account was negligent. The attorney was remorseful and was working toward closing the Salt Lake City office.

ADMONITION

On March 15, 2019, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.15(c) (Safekeeping Property) and 1.15(d) (Safekeeping Property) of the Rules of Professional Conduct.

In summary:

A man hired an attorney to represent him in a domestic relations matter. The man signed a flat fee fixed agreement and paid the attorney. The attorney deposited the money directly into an operating account. The man became unsatisfied with the representation and requested an accounting of time the attorney worked on the case. The attorney was unable to provide an accounting other than an estimate of hours stating that, because it was a flat fee agreement, time was not tracked. The attorney refunded most of the retainer to the client.

ADMONITION

On February 21, 2019, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 3.3(a) (Candor Toward the Tribunal) of the Rules of Professional Conduct.

In summary:

The attorney filed a verified petition to determine parental rights on behalf of an adoption agency. The birth mother had signed a relinquishment of her parental rights to the child and a statement concerning the birth father, choosing not to disclose the name of the biological father. A third party signed a paternity acknowledgement adding his name to the minor child's birth certificate. The third party sent a letter via his attorney to the adoption agency stating that he did not consent to the adoption. The third party filed a complaint for legitimization and custody in another state and the adoption agency was served with the complaint. Shortly thereafter, a hearing to terminate the natural father's parental rights was held in Utah court and the attorney appeared on behalf of the adoption agency. During the hearing, the Judge inquired as to whether there was anything he needed to know that would prevent the court from issuing the order terminating parental rights. The attorney was aware that the third party had indeed filed a legitimization and request for custody in another state. The attorney told the court only that they were aware that the named father had consulted a lawyer but gave no details about what he had filed, including the complaint for legitimization. The court signed the order terminating the third party's parental rights. The court later vacated the order citing the concealment of the complaint as the basis for vacating the order. A DNA test later showed that the third party was not the father of the child.

Mitigating Factors:

Absence of a prior record of discipline; Good character or reputation.

SUSPENSION

On March 19, 2019, the Honorable Eric A. Ludlow, Fifth Judicial District, entered an Order of Suspension against Kerry Willets, suspending his license to practice law for a period of eighteen months. The court determined that Mr. Willets violated Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a) (Fees), Rule 1.15(a) (Safekeeping Property), and Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

A client and her husband retained Mr. Willets to prepare estate planning documents and two Quit Claim Deeds transferring property into a Trust. The client's husband passed away and several years later, the client discovered that the transfer of one of the parcels of land into the Trust was ineffective. The client contacted Mr. Willets who informed her that she would need to open a probate case in order to transfer the property. The client retained Mr. Willets to revise the trust and he agreed to take care of the probate matter since the original transfer was ineffective. Mr.

Willetts' assistant brought the client documents to be signed and notarized; the documents were to be taken to the county recorder and filed. The client followed up with Mr. Willetts' assistant at least twice a week regarding the matter. Eventually, the client was unable to contact Mr. Willetts or his assistant because the answering machine would no longer take messages. At some point during the representation, Mr. Willetts closed one of his two offices and the client was unable to reach him at either location. No probate matter was filed and the transfer of the parcel was not completed.

The OPC sent a Notice of Informal Complaint (NOIC) requesting Mr. Willetts' response. Mr. Willetts did not respond to the NOIC.

A couple retained Mr. Willetts to represent them in bankruptcy proceedings. The clients paid Mr. Willetts and he filed a Chapter 13 Bankruptcy Petition on their behalf. The Trustee filed an objection to the confirmation because of irregularities in the petition but eventually it was confirmed. The Trustee filed a motion to dismiss the bankruptcy for failure to comply with the confirmation order. The clients contacted Mr. Willetts and he assured them that he would address the irregularities. The clients attempted to contact Mr. Willetts by leaving messages with his secretary and scheduling several appointments but Mr. Willetts would not return the messages and he cancelled many appointments. The Trustee filed a second motion to dismiss for failure to resolve issues stated in the preliminary report of the Trustee. Mr. Willetts was paid in fees for the bankruptcy in addition to the amount paid directly by the clients.

Mr. Willetts filed a second Chapter 13 bankruptcy petition on behalf of the clients. The Trustee filed an objection to the confirmation because of failure to file documents but eventually it was confirmed. The Trustee filed a motion to dismiss the bankruptcy for failure to comply with the confirmation order. The clients attempted to contact Mr. Willetts but he did not respond to their emails. The Trustee sent a letter to Mr. Willetts regarding unresolved issues and again moved for dismissal due to the issues. Eventually, the clients stopped receiving notices from the Trustee and assumed the issues had been resolved.

The Trustee sent notice of completed payments which the clients learned about online. The clients sent emails to Mr. Willetts

requesting a response to questions regarding their bankruptcy. The Trustee submitted a final report and awarded Mr. Willetts attorney fees. Mr. Willetts did not earn all of the money he received from the Trustees and the clients. Mr. Willetts did not hold all of the money he received from the clients in his trust account until it was earned. The clients retained a new attorney to complete the bankruptcy.

The OPC sent a NOIC requesting Mr. Willetts' response. Mr. Willetts did not respond to the NOIC.

SUSPENSION

On February 14, 2019, the Honorable Andrew H. Stone, Third Judicial District, entered an Order of Suspension against Wesley D. Hutchins, suspending his license to practice law for a period of three years. The court determined that Mr. Hutchins violated Rule 1.1 (Competence), Rule 1.2(a) (Scope of Representation), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.4(b) (Communication), Rule 1.5(a) (Fees), Rule 1.15(d) (Safekeeping Property), Rule 1.16(d) (Declining or Terminating Representation), Rule 7.1 (Communications Concerning a Lawyer's Services), Rule 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

The case involved Mr. Hutchins's handling of cases for nine separate clients. The first client retained Mr. Hutchins to represent him in an ongoing custody case. Mr. Hutchins had agreed to file a motion for contempt against the defendants and a request for discovery at the same time as he filed his notice of appearance. Two months later, Mr. Hutchins filed a notice of appearance but did not file anything further with the court in the case. Mr. Hutchins sent a letter to the custody evaluator without consulting the client and agreed to participate in mediation. The client requested his file, an accounting of time, and the unused portion of the retainer from Mr. Hutchins. The client went to Mr. Hutchins's home office to obtain the file, but Mr. Hutchins would not release the file. The client retained new counsel and requested that Mr. Hutchins file a withdrawal of counsel. The new counsel sent correspondence to Mr. Hutchins following up on the status of the withdrawal and the client's file.

Join us for the OPC Ethics School

September 18, 2019 | 9:00 am – 3:45 pm.

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

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

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

TRUST ACCOUNTING SCHOOL

January 22, 2020

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

Save the date!

Mr. Hutchins did not return the file and did not return the unearned fees to the client. The OPC sent a NOIC requesting Mr. Hutchins' response. Mr. Hutchins did not respond to the NOIC.

The second client retained Mr. Hutchins to represent him in a custody matter and paid a retainer to him. Mr. Hutchins did not provide a written fee agreement and did not inform the client that he would charge for all text messages and/or email correspondence. Mr. Hutchins sent an email to the client indicating that they had an 80% probability of prevailing in their case. Before mediation, Mr. Hutchins did not prepare a mediation brief and did not provide any documents to the client. After mediation, the client had concerns about a relevant relocation statute but Mr. Hutchins failed to fully explain how it would affect his parent time. Mr. Hutchins was directed to draft the stipulated mediation agreement between the parties but he failed to do so despite the client regularly contacting him about completing the agreement. The client requested a refund of the unused portion of the retainer. Mr. Hutchins responded by sending an invoice which included charges for repeated texts in which the client was requesting information and not receiving a response. The OPC sent a NOIC requesting Mr. Hutchins's response. Mr. Hutchins did not respond to the NOIC.

The third client retained Mr. Hutchins to represent her in matters related to paternity and the custody of her grandson. Specifically, the client hired Mr. Hutchins to evaluate the case and assist her in filing a formal complaint with the Washington State Attorney General's office and to file a civil lawsuit to have the grandchild's adoption annulled. The client lives in Washington and Mr. Hutchins agreed to serve as lead counsel and provide instruction to local counsel in Washington. Mr. Hutchins did not

communicate or contact local counsel in Washington at any time during his representation. During communications, Mr. Hutchins provided only minimal details, but informed the client that a draft of the complaint was almost completed. Eventually, Mr. Hutchins sent the client a text message asking if she had received his email with attachments of his draft of a verified complaint. The client had not received the email and had no further communications with Mr. Hutchins. The client requested a refund of the unused portion of her retainer and an accounting of time and expenses from Mr. Hutchins, but he did not respond. The OPC sent a NOIC requesting Mr. Hutchins's response. Mr. Hutchins did not respond to the NOIC.

The fourth client retained Mr. Hutchins to represent her in a divorce and custody matter. The client paid a retainer to Mr. Hutchins and he filed a notice of appearance in the case. During the representation, the client was unable to set up an appointment with Mr. Hutchins and he did not respond to questions she had about her case. Mr. Hutchins did not timely inform the client about the date set for mediation and did not respond to numerous communications by opposing counsel and the mediator. The client asked Mr. Hutchins to file a withdrawal of counsel, but the court rejected it because a motion for temporary orders was pending because Mr. Hutchins failed to request a hearing on the motion. Mr. Hutchins did not timely inform the client that the court had rejected the withdrawal of counsel. The OPC sent a NOIC requesting Mr. Hutchins's response. Mr. Hutchins did not respond to the NOIC.

The fifth client retained Mr. Hutchins to represent her in juvenile court proceedings involving her two children. Mr. Hutchins

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contacted the assistant attorney general in the case and requested that the pre-trial in the matter be rescheduled because he would be out of town. The assistant attorney general agreed to reschedule the pre-trial and set the matter for mediation and requested that Mr. Hutchins file a notice of appearance. The assistant attorney general was unable to get a hold of Mr. Hutchins to schedule the mediation and pretrial. Neither Mr. Hutchins nor the client appeared at the mediation. Because the client did not appear, a warrant for her arrest was issued and the children were removed from her care. The client retained a new attorney who requested the client's file and an invoice detailing the services Mr. Hutchins rendered on the client's behalf. Mr. Hutchins did not return to the client all the documents she provided to him nor did he provide a billing statement. The OPC sent a NOIC requesting Mr. Hutchins's response. Mr. Hutchins did not respond to the NOIC.

The sixth client retained Mr. Hutchins to represent her in obtaining custody or visitation of her daughter. The client provided Mr. Hutchins a binder of documents regarding the case and a retainer for legal services. Mr. Hutchins filed a motion for temporary orders. The court denied the motion on the grounds that the underlying petition in the present case sought to set aside an order terminating the client's parental rights in a separate adoption case. Opposing counsel filed a motion to dismiss some of the claims in the petition. Mr. Hutchins did not respond to the motion and the court entered an order granting the motion which disposed of the remaining issues in the case. Mr. Hutchins did not keep the client informed about the status of the case and did not timely respond to requests for information. The client decided that she wanted to dismiss the case with prejudice and informed Mr. Hutchins of her decision. Mr. Hutchins filed a motion to dismiss the case without prejudice. The court denied the motion. The client requested an accounting of time and expenses but she did not receive a response. The OPC sent a NOIC requesting Mr. Hutchins' response. Mr. Hutchins did not respond to the NOIC.

The seventh client retained Mr. Hutchins to represent her in a criminal matter. Mr. Hutchins set a pre-trial conference date with the court. Mr. Hutchins failed to appear at the hearing and the court issued a bench warrant for the client. The client called

the court and scheduled a bench warrant hearing and sent a text message to Mr. Hutchins a week before the hearing to remind him of the date. Mr. Hutchins failed to appear at the hearing. The OPC sent a NOIC requesting Mr. Hutchins' response. Mr. Hutchins did not respond to the NOIC.

The eighth client was involved in a car accident and retained Mr. Hutchins to represent her and her husband in a legal action against the driver of the other vehicle involved in the accident. Four years later, Mr. Hutchins filed suit on behalf of the client. Two years later, the court issued an order to show cause as to why the case should not be dismissed for failure to prosecute. The opposing party retained counsel and requested numerous medical records and releases from the client. The client completed at least one of the forms and faxed it to Mr. Hutchins's assistant. Opposing counsel filed a motion to compel the releases alleging that they had attempted to obtain the releases through numerous communications with Mr. Hutchins. Mr. Hutchins did not inform the client of the motion or of the other requested releases nor did he respond to the motion. The court ordered the client to sign the requested releases and to pay the opposing party's attorneys fees and costs. Mr. Hutchins did not inform the client about the order. Opposing counsel filed a motion to dismiss, Mr. Hutchins did not respond and the court ordered the case dismissed with prejudice. A day later, Mr. Hutchins filed a motion to permit an extension of time to respond, but took no further action with the court. The client contacted Mr. Hutchins for a status update, but he did not inform her that the case was dismissed. The OPC sent a NOIC requesting Mr. Hutchins's response. Mr. Hutchins did not respond to the NOIC.

The ninth client wanted to adopt her grandson and had filed a pro se petition for custody. Later, she retained Mr. Hutchins to represent her in the case. Mr. Hutchins provided the client a draft motion to terminate parental rights and informed her that the motion would be served that same week. The motion was never filed with the court. The client attempted to contact Mr. Hutchins but was told he left the firm where he was practicing. She was given his contact information but again was unable to contact Mr. Hutchins. The OPC sent a NOIC requesting Mr. Hutchins's response. Mr. Hutchins did not respond to the NOIC.

Discipline Process Information Office Update

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

801-257-5515 | DisciplineInfo@UtahBar.org



On March 16th, the Paralegal Division had six volunteers at the Wills for Heroes event in Park City. A shout out to Grant Miller and the Park City Police Department for a very well organized and attended event!



Pictured from left to right: Bonnie Hamp, Greg Wayment, and Mindi Mordue



Pictured from left to right: Kristie Miller, Andra Edmund, and Scott Anderson

ANNUAL PARALEGAL DAY LUNCHEON

For all Paralegals and their Supervising Attorneys

Speaker: U.S. Magistrate Judge Dustin B. Pead

Topic: Immigration Issues

May 16, 2019 | Noon to 1:00 pm

The Marriott – City Center | Capitol Ballroom

(220 South State Street | Salt Lake City)

Credit: 1 hour of Ethics

Cost: \$50 for Paralegals, \$60 for Attorneys

REGISTER before 1:00 pm May 13: <https://services.utahbar.org/Events>

Save the Date!

PARALEGAL DIVISION ANNUAL MEETING AND ALL-DAY CLE

Friday, June 21, 2019

**Utah State Bar | 645 South 200 East, Salt Lake City
Registration and Speaker Information to be Announced.**



NEW BAR POLICY: Before attending a seminar/lunch your registration must be paid.

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

May 7, 2019 | 1:00 – 2:00 pm

1 hr. CLE

Rule 4-904 Informal Trials & Pro Se Calendars – Limited Scope Section CLE. Join various commissioners and practitioners for discussion. Cost: \$25, lunch included. Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_96_LTDSCP.

May 9–11, 2019

Twelfth Annual Southern Utah Federal Law Symposium – Annual FBA Event. St. George Marriott Courtyard, 185 South 1470 East, St. George. Save the dates! More information to follow.

May 10, 2019 | 8:30 am – 4:30 pm

Annual Spring Corporate Counsel Seminar. Save the date! More information will follow as it becomes available.

May 16, 2019 | 12:00 – 1:00 pm

1 hr. Ethics

Annual Paralegal Day Luncheon. Salt Lake City Marriott City Center, 220 South State Street. \$50 for Paralegals, \$60 for Attorneys. Register at: https://services.utahbar.org/Events/Event-Info?sessionaltcd=19_106_PARA.

May 16, 2019 | 12:00 – 1:15 pm

1 hr. CLE (pending approval)

Morality Clauses in Entertainment Contracts – Entertainment Law CLE.

May 17, 2019 | 8:30 am – 5:00 pm

UCCR 21st Annual Utah ADR Symposium. S. J. Quinney College of Law. Save the date! More information to follow.

May 23, 2019 | 8:30 am – 4:30 pm

Innovation in Practice: 2nd Annual Practice Management Symposium.

May 23, 2019 | 9:00 am – 1:30 pm

Real Property Annual Meeting. Save the date! Little America Hotel. More information to follow.

June 7, 2019 | 8:00 am – 5:00 pm

2019 Annual Family Law Seminar. S. J. Quinney College of Law. Save the date! An email will be sent to all section members as more details become available and registration opens.

June 13, 2019 | 8:00 am – 12:00 pm

Annual DR/UCCR/Utah Bar CLE on Civility in Dispute Resolution.

June 21, 2019

Annual Paralegal Division Day. Save the date!

July 18–20, 2019

up to 10 hrs. CLE, including up to 4 hrs. Ethics and up to 3 hrs. Prof/Civ



Summer Convention in Park City. See the brochure in the center section of this *Bar Journal* for more details and lodging information.

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

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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.

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

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

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

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Utah State Bar | 645 South 200 East | Salt Lake City, Utah 84111
Phone: 801-531-9077 | Fax: 801-531-0660 | Email: mcle@utahbar.org

For July 1 _____ through June 30_____

Name: _____ Utah State Bar Number: _____

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Date of Activity	Sponsor Name/ Program Title	Activity Type	Regular Hours	Ethics Hours	Professionalism & Civility Hours	Total Hours
		Total Hrs.				

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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

A copy of the Supreme Court Board of Continuing Education Rules and Regulation may be viewed at www.utahmcle.org.

Date: _____ Signature: _____

Make checks payable to: **Utah State Board of CLE** in the amount of **\$15** or complete credit card information below. Returned checks will be subject to a \$20 charge.

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A photograph of an operating room. In the center is a surgical table covered with a blue drape. To the right is a large medical machine, possibly an anesthesia machine, also partially covered with a blue drape. The room has green walls and a polished floor.

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