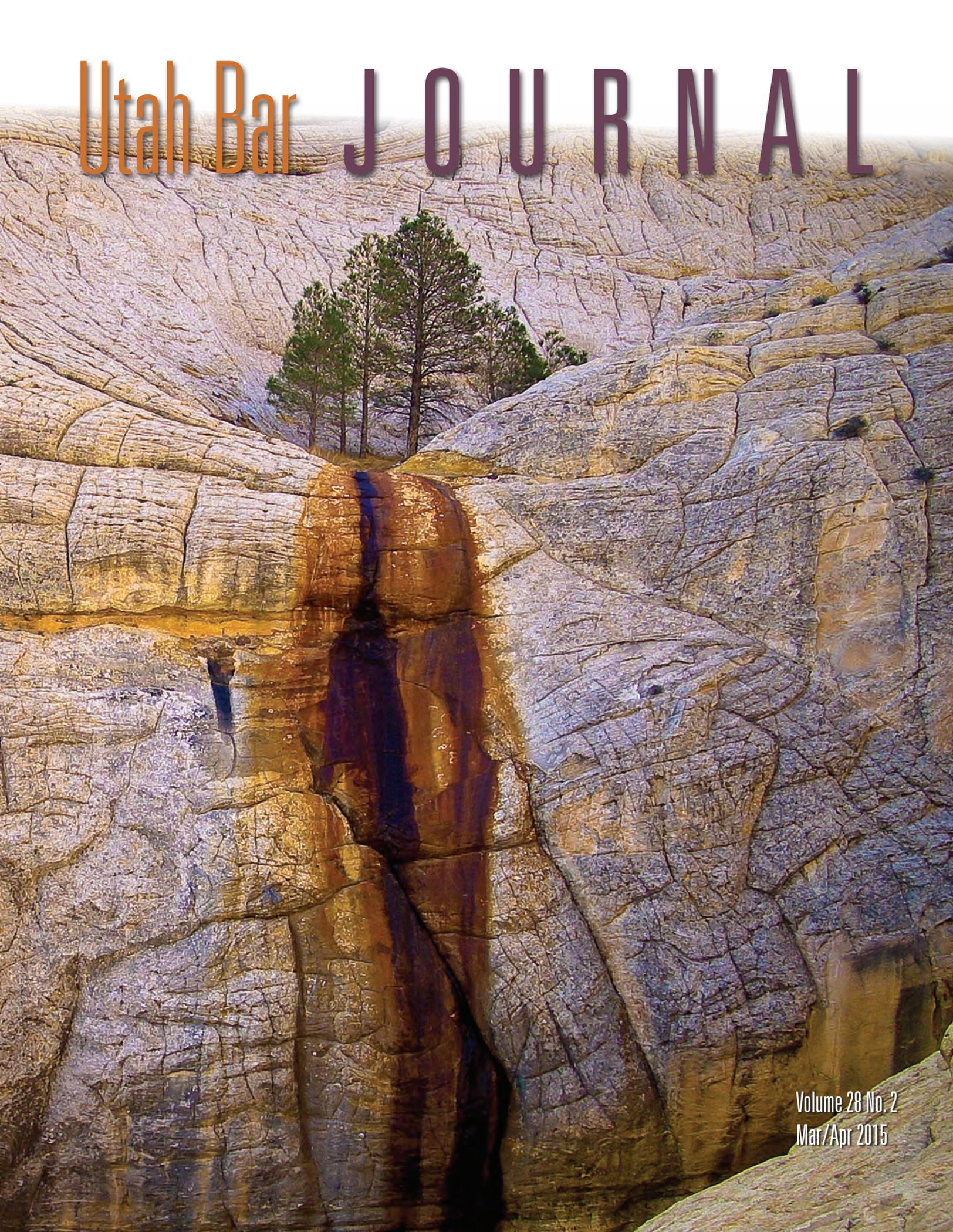


Utah Bar JOURNAL

A photograph of a rocky landscape. In the foreground, a waterfall flows down a series of horizontal rock layers. The water is dark and turbulent. The surrounding rock is light-colored, possibly limestone or sandstone, and is heavily fractured with vertical and horizontal cracks. In the middle ground, a cluster of green pine trees stands on a small plateau. The background shows more of the rocky terrain under a bright, slightly hazy sky.

Volume 28 No. 2
Mar/Apr 2015

Ten Tips for Avoiding Malpractice

by Keith A. Call

It's March. With any luck, I'll be at Major League Baseball Spring Training in Arizona when you read this. Back in 2005, after watching a spring Giants game, my family and I had dinner at the Sugar Bowl diner in Old Scottsdale. A group of retired people – obviously hearing impaired – sat at the table next to us and carried on a loud conversation we could not help but overhear. I enjoyed listening to a lengthy conversation in which they mistook *me* for a Big League pitcher. I count it the “Best Day of my Life.”

On the opposite end of the spectrum, perhaps one of the worst days of any attorney's life would be the day he learns he is being sued for malpractice. I hope that never happens to me, although I've seen it happen to some pretty great lawyers.

Here is a list of ten things to help you avoid a malpractice lawsuit. These tips are not meant to establish any applicable standard of care, but they are certainly “best practices” to follow.

1. Don't Accept Every Client or Every Case.

Taking on the wrong client is one of the most common paths to a malpractice lawsuit. Make an honest evaluation of whether you are qualified and can meet the client's expectations. Beware of red flags, such as clients who are changing lawyers, clients with hidden agendas, clients who are in a rush that cannot be explained, clients with unreasonable expectations, clients with a litigious history, clients who refuse to pay the required consultation fee or retainer, and any client that makes you uncomfortable for any reason. It can be difficult to fight off the feeling that you have to accept every client or case, but it's one of the best things you can do to avoid getting sued.

2. Complete a Broad Conflict Check.

And keep checking. A high percentage of legal malpractice cases involve alleged conflicts of interest. These types of cases can also be difficult to defend. Your initial conflict check should

include the names of all parties to the lawsuit, all related entities, all principals of the entities, and key players or witnesses. As the case progresses, don't forget to run conflict checks on other names that become relevant. Most importantly, heed what your conflict check results tell you. If there is any hint of a problem, address it, and resolve the conflict with informed consents or don't take the case.

3. Document Client Identity – In Writing.

Many lawsuits involve disputed claims of an attorney-client relationship. For example, a former president of a corporate entity client may not appreciate it when you, acting as the company's lawyer, take action adverse to him individually. He may feel that his “confidential relationship” with you has been breached. You can save yourself a lot of trouble if you have documented the attorney-client relationship in writing, defining who you do – and who you don't – represent.

4. Document the Scope of Your Work – In Writing.

In your representation agreement, document as precisely as you can what it is you are agreeing to do. To the extent reasonable or foreseeable, document what it is you are not agreeing to do. Be very wary of scope creep! As necessary or appropriate during the representation, clarify, preferably in writing, the scope of what you are doing and not doing for the client. To the extent you identify related or new legal issues that could impact your client, disclose those issues and document what you will and won't do to address them.

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



5. Document Fee Provisions and Hold the Client to Them.

Most clients don't like paying legal fees, especially for litigation. It's like paying for a dead horse. Fee disputes can easily lead to larger disputes about the attorney's performance. Make sure the method of calculating the fee is spelled out clearly and in writing. Make sure the client stays current on his or her payment. If the client doesn't, re-read Tip No. 1, above. That said, don't just withhold legal services on condition of payment. This can lead to its own set of problems.

6. Don't Miss Deadlines.

If you don't have or use a reliable docketing and calendaring system with built-in redundancy, start using one immediately. Enter deadlines into your system as soon as the deadline becomes known. It's okay to use your secretary or others as a backup, but remember you are the person responsible to make sure you comply with all deadlines.

7. Document Key Decisions.

Ultimately, it is the client's right and responsibility to make most strategic decisions about a lawsuit. It's your responsibility, as the lawyer, to provide information and counsel relevant to those decisions. These exchanges with your client will often be in person or by telephone. Whenever key decisions are made, it is a good idea to document them in writing, including the basis for the decision. This can often be done in a follow-up letter or email to the client to make sure communication has been clear. At a minimum, the lawyer can protect himself or herself by making contemporaneous notes or a memorandum for the file.

8. Beware of Casual Communications, Both External and Internal.

A flippant, "funny," or otherwise casual email can easily become a smoking gun in a malpractice lawsuit. Even if it doesn't become the smoking gun that proves liability, it can still be extremely embarrassing and could incite a jury to a large damage award. Many news stories have proven that email communications are never, ever completely private. Assume that everything you put in any email or similar message can and will be used against you.

9. Be Extremely Careful When Doing Business with a Client.

Courts and juries closely scrutinize business transactions between

lawyers and clients. Read and strictly follow Utah Rule of Professional Conduct 1.8. Don't provide financial assistance to clients. Don't acquire a proprietary interest in the subject matter of the litigation (except for permitted contingent fee cases and liens authorized by law). Be very cautious when accepting equity ownership in the client in lieu of a fee or when accepting a management or director position with a client.

10. Follow the Rules of Professional Conduct.

The Rules of Professional Conduct were not designed to set the applicable standard of care in a malpractice case. See Utah R. Prof'l. Cond., Preamble [20]. But understanding and following the ethical rules will always go a long way to keep you out of civil hot water. Being ethical and avoiding malpractice are often closely related.

Finally, perhaps the best advice I can offer is to take some time this summer to enjoy a baseball game. Take your client with you. If you and your client are getting along and communicating well, chances are your business relationship will go well too.

FORTIFY Your Construction Contract Case

with a

Certified
Damages
Expert

Expert Testimony

Litigation Support

Cost & Schedule Analyses

Claim Preparation & Defense

Call to discuss how
we might help:



Lynn Larsen at 801-541-9155

LARSEN
ANALYTICS

larsenanalytics.com