

Ethical Issues in Recent Utah Appellate Decisions

The Appellate Practice Section's annual presentation this year focuses on cases holding particular importance for the duties of lawyers in litigation. In recent decisions the Utah Supreme Court has, at least in some contexts, made disqualification of adverse counsel on more difficult by, for example, narrowing the time frame for motions to disqualify. At the same time, the Supreme Court has also narrowed the scope of the litigation privilege, creating a potential new areas of liability for lawyers and their clients.

Topics & Cases:

I. Disqualification of Counsel

DJ Investment Group v. DAE/Westbrook, 2006 UT 62, 147 P.3d 414

A motion to disqualify an attorney as a necessary witness must be brought as soon as the adverse party has reason to believe that the attorney may be a witness, whether or not it can make a showing that the attorney is a necessary witness. Determination of whether disqualification is appropriate is subject to a balancing test weighing the interests of the parties and the tribunal.

State v. Maughan, 2008 UT 27.

Addressed the standards applicable to an attempt to disqualify defense counsel in a criminal case. Counsel had traveled to Washington to interview witnesses and had been arrested there for, but never charged with, witness tampering (and all witnesses later spoke with police investigators). Court held that there was not a significant risk of actual conflict and that such conflict was waivable by the defendant.

II. Limiting the Litigation Privilege

Pratt v. Nelson, 2007 UT 41, 164 P.3d 366.

A press release and statements at a press conference may not be within the scope of the litigation privilege. Media normally do not have clear legal interest in judicial proceedings sufficient to invoke the litigation privilege and statements to the press are not sufficiently tied to promotion of truth finding within the judicial process.

III. Defamation, Public Officials, and Family Relationship Privilege.

O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214.

The court set out a standard for determining "public official" for purposes of defamation law: those with "authority to make policy affecting life, liberty or property." The Court repudiated the notion that a person could be a "public official" because of circumstances. However, it also adopted Restatement (Second) of Torts § 597 as Utah law which provides a conditional privilege for family members to speak about the well-being of a family member and the recipient's knowledge will be is use in the protection of the family member's well-being.