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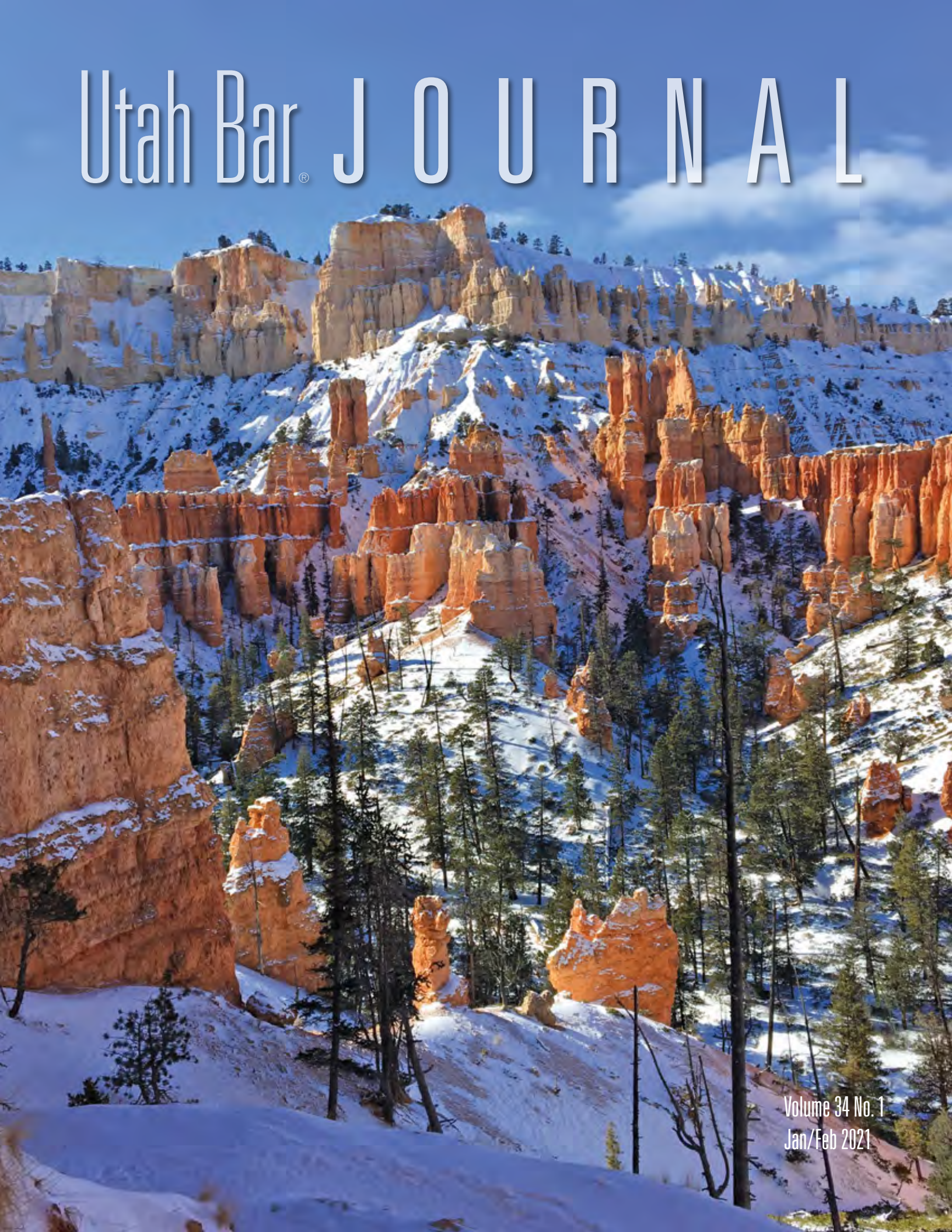

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Should I Tell My Client I Am Friends With Opposing Counsel?

by Keith A. Call

I have often wondered how Dad did it. He was a country lawyer in a small Utah town where he knew almost everyone. He had his own private practice, served as part-time county attorney, and was an ecclesiastical leader for much of the community. He knew the judge, the other lawyers, his clients, and most of the opposing parties on all his local cases. Every time he sued or prosecuted someone in the community, it was likely someone he knew, and often a religious parishioner. He shared a law library with his frequent litigation adversary, attorney Jim Smedley, who was my

Keith Call, J Harold Call, and James J. Smedley hike the Zion Narrows, in about 1979. Photo credit: likely Jud Smedley.

little league basketball coach and a great mentor. My dad and I even hiked the Zion Narrows with Jim and his son, Jud. Yet, if Dad had not found a way to navigate this web of relationships and potential conflicts, he could not have practiced law or served the community. I have enormous respect for him.

Several months ago, I wrote about the ethics of friendships between lawyers and judges. *See* Keith A. Call, *Can We Still Be Friends?*, 33 Utah B.J. 34 (Jan./Feb. 2020). The ABA recently issued a new opinion that addresses lawyer friendships with opposing counsel. Opinion 494 attempts to provide guidance on when it is and is not necessary to disclose lawyer friendships to our clients and to obtain their informed consent prior to accepting or continuing the representation. ABA Comm. on Ethics and Pro. Resp., Formal Op. 494 (2020), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-494.pdf (last visited Nov. 24, 2020) [hereinafter Opinion 494].

Rule 1.7(a) and Some General Principles

Opinion 494 relies heavily on Model Rule 1.7(a)(2), which is identical to Rule 1.7(a)(2) of the Utah Rules of Professional Conduct. The rule states,

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) [t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Opinion 494 lays down five "general principles" that apply to all types of lawyer friendships. First, some personal relationships with opposing counsel, but not all, create conflicts that require disclosure or even informed consent from the client. Opinion 494, at 1–3. Second, in determining whether a personal conflict exists, the lawyer should consider her or his actual role in the matter. *Id*. at 4. Lead counsel on a case may be more likely to have a conflict based on personal relationships with opposing counsel than subordinate counsel who has little decision-making authority and minimal contact with opposing counsel. *Id*. Third,

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the lawyer's obligations of confidentiality obviously still apply. *Id*. The lawyer must take reasonable measures to ensure that no confidential information is inadvertently disclosed to an opposing lawyer who is also a close friend. *Id*. Fourth, a lawyer who accepts a representation must withdraw if the lawyer later determines that she or he can no longer provide competent and diligent representation because of the personal relationship with opposing counsel. *Id*. Finally, personal conflicts such as friendships with opposing counsel are ordinarily not imputed to other members of the firm. *Id*. at 4–5; *see also* ABA Model Rule Pro. Conduct 1.10(a)(1) (imputation of conflicts); Utah R. Pro. Conduct 1.10(a)(1) (same).

Rules for Classes of Lawyer Friendships

Similar to the ABA's Opinion 488 on lawyer-judge relationships, *see* ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 488, at 4–6 (2019), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_488.pdf (last visited Nov. 24, 2020) [hereinafter Opinion 488], Opinion 494 addresses three categories of lawyer-lawyer friendships – (1) "intimate relationships," (2) "friendships," and (3) "acquaintances" – and provides guidance for each category. *See* ABA Comm. on Ethics & Pro. Responsibility Formal Op. 494, at 5–8 (2020), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/.

An **intimate relationship** includes lawyers who cohabit in an intimate relationship, are engaged to be married, or are engaged in an exclusive intimate relationship. Opinion 494, at 5. Before accepting representation of a client against an opposing lawyer with whom you are in an intimate relationship, the following conditions must exist: (a) you must reasonably believe that you will be able to provide competent representation to the client; (b) both lawyers must disclose the relationship to their respective clients; and (c) each client must give informed consent confirmed in writing. *Id*. Opposing lawyers who are in a non-exclusive intimate relationship must carefully consider whether disclosure and consent are required under Rule 1.7(a)(2). *Id*. at 6. "The prudent course would be to disclose to the affected clients and obtain their informed consent." *Id*.

A **friendship** may be the most difficult category to navigate. "'Friendship' implies a degree of affinity greater than being acquainted with a person . . . the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others." *Id*. at 6 (quoting Opinion 488, at 4). Close friendships should be disclosed to each affected client. *Id*. at 7. Indicia of close friendships that require disclosure and informed consent include exchanging gifts on holidays or other special occasions, regularly socializing together, regularly communicating and coordinating activities because the lawyers' children are close friends, routinely spending time at each other's homes, vacationing together, sharing a mentor-protégé relationship, or sharing confidences and intimate details of each other's lives. *Id*. at 7 (citing Opinion 488, at 4).

By contrast, friendships that might require disclosure to the affected clients but not consent include those between lawyers who "once practiced law together [and] may periodically meet for a meal" or law school classmates who "stay in touch through occasional calls or correspondence." *Id*. (alteration in original) (quoting Opinion 488, at 4). Whether disclosure or consent is required "depends on the lawyer's considered judgment as to whether . . . Rule 1.7(a)(2) applies." *Id*.

Acquaintances are "relationships that do not carry the familiarity, affinity or attachment of friendships." *Id*. at 7. Lawyers are "'acquaintances when their interactions . . . are coincidental or relatively superficial.'" *Id*. (omission in original) (quoting Opinion 488, at 4). Opinion 494 cites as examples being members of the same place of worship, being members of the same professional or civic organizations, doing joint CLE presentations, serving on bar committees or boards together, being members at the same gym, or living in the same area or neighborhood. *Id*. at 7–8. Acquaintanceships that are collegial but do not rise to the level of "friendship" described above do not have to be disclosed to clients. *Id*. at 8.

Conclusion

One thing that seems clear to me is that the question of opposing lawyer friendships leaves a large field of subjectivity and reliance on the lawyer's good judgment. Moreover, a standard that works along the Wasatch Front may not be workable in more rural parts of the state. I profoundly admire my father's work as a lawyer and general servant of humankind. But I have to doubt whether his way of handling personal relationships would have strictly measured up to Opinion 494.

If nothing else, Opinion 494 should make us all think about our personal relationships with other lawyers and whether there is anything in our relationships with opposing counsel that might materially impact our duty of undivided loyalty and zealous advocacy on behalf of our clients. If we have an intimate or close relationship with the opposing lawyer but reasonably believe we can provide uninhibited representation, then we can proceed with informed consent. Otherwise, we ought to pass on the representation.

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