



PROGRAM MATERIALS

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Best Behavior: Effective Strategies for Avoiding Ethics Mistakes in Arbitration

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Best Behavior

Effective Strategies for Avoiding Ethics Mistakes in Arbitration

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Your Presenter

Fran Griesing has over 40 years of experience representing clients in business transactions, commercial litigation, employment matters, and alternate dispute resolution. Fran serves as mediator and arbitrator in employment and business disputes and has extensive experience conducting proceedings remotely. She served as Chair of Litigation for City of Philadelphia Law Department Under Mayor Edward G. Rendell, former Governor of Pennsylvania. A highly-sought speaker and writer, she has taught at the college, law school and graduate level. Fran received many awards for professional accomplishment and civic engagement. She is an honors graduate of Binghamton University and the University of Pennsylvania Law School and admitted to practice in Arizona, New York, Pennsylvania, and Utah and the United States Supreme Court.



Scope of Program

- * Discuss the ethical and professional obligations to clients as an advocate when preparing and representing them at arbitration.
- * Learn to navigate the forum rules and prepare more effectively beyond just mastering the legal and factual issues.
- * Understand as a neutral arbitrator your obligations as to competence and diligence and how to ensure there is no actual or appearance of bias.
- * Consider as a neutral arbitrator you do not represent the parties, should not provide legal advice, and inform pro se parties of your role.
- * Discuss importance of treating all participants with professionalism and respect and honoring confidentiality.
- * Review differences between in person and remote arbitration and effective strategies for building rapport when arbitrating virtually.

Why is this important?

✧ Why:

Many contracts require parties to address disputes through arbitration rather than litigation. Arbitration is usually private, confidential and often less expensive and faster. Parties can agree to limit discovery, pre-trial motions and other common costly litigation steps.

✧ Who:

Anyone participating in arbitration or considering arbitration in agreements. Lawyers representing clients as advocates and lawyers serving as neutral arbitrators avoid common mistakes that violate ethical rules or put arbitration award at risk.

✧ Biggest Takeaways:

- As an advocate, preparing for arbitration and advocating effectively requires more than mastering relevant law and facts. It requires following rules of the forum.
- As a neutral, even if you are an experienced arbitrator, arbitration calls for patience, civility and ensuring impartiality particularly when pro se parties are involved.

Selected Model ABA Rules – States May Vary

- Rule 1.1 Competence
- Rule 1.2 Scope of Representation
- Rule 1.3 Diligence, Rule 1.4 Communication, Rule 1.6 Confidentiality
- Rules 1.7-1.9 Conflicts
- **Rule 2.4 Lawyer Serving as Third-Party Neutral**
- Rule 3.1 Meritorious Claims and Contentions
- Rule 3.2 Expediting Litigation
- Rule 3.3 Candor to the Tribunal
- Rule 4.1 Truthfulness in Statements to Others
- Rule 4.4 Respect for Rights of Third Persons
- Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers
- Rule 7.1 Communications Concerning a Lawyer's Services

Arbitration Laws & Regulations

- ✱ Federal Arbitration Act, 9 U.S.C. §§ 1-16
 - ✱ Establishing strong national policy favoring arbitration
 - ✱ Making written arbitration agreements in maritime transactions and interstate commerce valid, irrevocable, and enforceable
 - ✱ Requiring federal and state courts to stay litigation and compel arbitration when a valid agreement exists
 - ✱ Limiting judicial review of awards.
 - ✱ Section 10(a)(2) Grounds for vacating an award
 - ✱ “evident partiality or corruption in the arbitrators, or either of them”
- ✱ State laws regarding arbitration
- ✱ Court rules - if court-mandated or court-annexed

Code of Ethics for Arbitration in Commercial Disputes

* Prepared by joint committee of ABA and AAA

- * Canon I: An arbitrator should uphold integrity and fairness of the arbitration process.
- * Canon II: An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.
- * Canon III: An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.
- * Canon IV: An arbitrator should conduct the proceedings fairly and diligently.
- * Canon V: An arbitrator should make decisions in a just, independent and deliberate manner.
- * Canon VI: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.
- * Several additional Canons.

CPR Arbitration Procedures

- ✱ CPR Procedures and Clauses Administered Arbitration Rules for parties arbitrating under CPR Dispute Resolution Services (“CPR Rules”).
- ✱ CPR has additional rules for complex arbitrations.
- ✱ CPR Adopted the ABA/AAA Code of Ethics for Arbitration
- ✱ CPR Arbitrator Challenge Protocol

CPR Arbitration Procedures for Counsel and Parties

* CPR Rule 16 provides:

Whenever a party fails to comply with these Rules, or any order of the Tribunal pursuant to these Rules, in a manner deemed material by the Tribunal, the Tribunal shall, if appropriate, fix a reasonable period of time for compliance and, if the party does not comply within said period, the Tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default, the Tribunal shall require the **nondefaulting** party to produce such evidence and legal argument in support of its contentions as the Tribunal may deem appropriate. The Tribunal may receive such evidence and argument without the defaulting party's presence or participation.

Do These Rules Apply to Me?

- * ABA Model Rules are a template on which states may base their own rules of professional conduct.
- * Individual states or foreign jurisdictions may have different comments or interpretations even if the language is the same.
- * State law may also set requirements for arbitration.
- * Courts may have rules for court mandated or supervised arbitration if even parties can opt out of arbitration.
- * Private arbitration administrators, such as AAA or CPR, may have their own rules and grant arbitrator discretion on rules.
- * The parties may agree to terms under which disputes should be subject to arbitration.

Considerations for Arbitrators Beyond Rules

- How do you assess whether to accept an appointment for arbitration?
- How do you assess, disclose relationships and seek conflict waivers?
- How do you ensure confidentiality?
- Are there differences if arbitration is voluntary or court ordered?
- What is different about virtual arbitration compared to in person session?
- How do you handle difficult counsel or parties?
- What are the issues regarding artificial intelligence usage?

Considerations for Advocates Beyond Rules

- How do you negotiate effective dispute resolution terms?
- How do you select the right arbitrator for your client in this case?
- How do you ensure that the arbitrator does not have a conflict and is impartial?
- How do you prepare for the initial conference with the arbitrator?
- How do you prepare your client for the arbitration hearing?
- How and when can you use artificial intelligence?
- How do you support the arbitrator in issuing a favorable award that withstands challenge?

Key Phases to Consider

- **Drafting arbitration agreements and key terms** – Competence, Scope of Representation, Diligence, and Communications
- **Arbitrator Selection/Acceptance of Case** - Competence and Conflicts; Communications Concerning a Lawyer's Services
- **Preparation for Preliminary Conference** – Competence, Diligence, Communications
- **Discovery and Exchanging Information** - Candor to the Tribunal and Truthfulness in Statements to Others
- **Conduct at Hearing** – Competence, Civility and Professionalism

Case Study – Agreeing to Arbitrate

- * Founders One and Two, start business selling vegan meals using recipes they developed together.
- * They engage a lawyer to advise them, form an LLC, and draft operating agreement for their enterprise “Free to be V.”
- * Lawyer is **busy with other matters**, draws from **templates and AI**. Includes arbitration if dispute arises between Founders.
- * The agreement does not specify the arbitral forum or procedural rules. Founders trust lawyer’s judgment and do not ask how arbitration might work if needed.

Ethical Issues Raised by Template Arbitration Clause

- ✱ What are the ethical issues raised by counsel's reliance on a template or AI version arbitration clause that does not specify the specific forum or rules to apply?
- ✱ ABA Model Rules to consider:
 - ✱ 1.1 Competence
 - ✱ 1.2 Scope of the Representation
 - ✱ 1.3 Diligence
 - ✱ 1.4 Communication

Model Rule 1.1 Competence

✱ *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

✱ Competent representation here would have included a discussion with the Founders on dispute resolution issues.

✱ Do they want to **agree to arbitrate rather than litigate** disputes?
What are the pros and cons of each option?

✱ If they agree to arbitration, what are customary terms- mediation first, arbitration forum, applicable rules, arbitrator selection, discovery, timing, grounds for challenging award.

Model Rule 1.2 Scope of Representation

** (a) ... a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation...*

- * Founders engaged counsel to prepare operating agreement; that includes considering and advising on customary terms, such as jurisdiction and dispute resolution.*
- * The clients' objective was to get an operating agreement, but they did not direct how that would be accomplished.*
- * Founders could have decided to include arbitration or to forego common terms, but they were not provided the information to assess what they might need.*

Model Rule 1.3 Diligence

✱ *A lawyer shall act with reasonable diligence and promptness in representing a client.*

- ✱ *Comment [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.*
- ✱ *2] A lawyer's work load must be controlled so that each matter can be handled competently*

✱ Lawyer distracted with other work relied on template and AI without considering or discussing implications if a dispute arose.

- ✱ Should have ensured enough time and attention to identify dispute resolution options and desired terms if relying on ADR in lieu of litigation and discussed with clients.

Model Rule 1.4 Communication

✱ (a) *A lawyer shall:*

- 1. promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;*
- 2. reasonably consult with the client about the means by which the client's objectives are to be accomplished;*
- 3. keep the client reasonably informed about the status of the matter;*
- 4. promptly comply with reasonable requests for information; and*
- 5. consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.*

b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

✱ Lawyer heredit did not inform the client, get informed consent, reasonably consult, keep the client reasonably informed, or explain to permit client to make informed decisions on including arbitration clause or terms of arbitration.

Case Study – Arbitrator Selection

- ✱ Ten years later, the business is a success.
- ✱ Founder One is content with the status quo and how business is going.
- ✱ Founder Two has ambitions for *Free to be V* to franchise nationwide.
- ✱ Although One objects, Two goes full steam ahead with expansion.
- ✱ Founder One commences court action to stop this effort.
- ✱ Founder Two files to compel arbitration, and One's case is dismissed.
- ✱ Two initiates arbitration with NewCo ADR, a new ADR provider with limited formalities, rather than a more established forum such as AAA or CPR, with detailed rules and procedures.

Case Study: Arbitrator Selection

- * The Operating Agreement provides in part:
 - * *If the parties do not resolve the dispute within 30 days from the first notice of dispute, either party may commence arbitration by filing a Demand for Arbitration with a recognized provider of Alternate Dispute Resolution (“ADR”) services in the city in which the Company maintains its principal place of business.*
 - * *The parties shall agree on a mutually acceptable neutral arbitrator within 30 days of filing the Demand for Arbitration.*
- * Agreement does not define a “recognized provider” and is silent as to arbitrator qualifications and selection process.

Issues - Arbitration Language

- * Lawyer's failure to address the type of forum that would be valid, the rules that would apply, and arbitrator qualifications and selection mechanism are further failures by the drafting lawyer and pose issues for counsel representing parties in the dispute process.
- * Reference to a specific ADR provider with established rules would solve many issues by providing a procedural framework.

Lawyer Duties Selecting a Neutral arbitrator

- If you are counsel, threshold consideration is selecting right arbitrator for case and client.
- Counsel needs to **conduct due diligence** on potential arbitrators beyond the information provided on a resume.
 - Consider prior affiliations, relationships and conflicts.
 - Review subject matter expertise, work history, clients represented, and positions taken.
 - Examine speeches and writings, social media postings.
- Failure to conduct a serious assessment of potential arbitrator may breach duties under **Rule 1.1 Competence**.
- It also implicates **Rule 1.2 Scope of Representation** and **1.4 Communication** involving the client on qualifications of an arbitrator and narrowing options if forum or opposing counsel proposes arbitrators.

Lawyer Duties Accepting Neutral Arbitration Appointment

- Rule 1.1: A lawyer shall provide **competent representation to a client**.
- Some lawyers decide to serve as arbitrators because they have client representation experience. Need specialized training and ADR experience.
- See Comments to Rule 1.1 Competence
- ✱ *[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter ... Expertise in a particular field of law may be required in some circumstances.*
- ✱ *[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.*
- ✱ *Does this apply to lawyers serving as arbitrators? Are the parties your client?*

Lawyer Duties Seeking Neutral Arbitration Appointment

- **Rule 7.1 Communications Regarding a Lawyer's Services**
 - A lawyer shall **not make a false or misleading communication about the lawyer or the lawyer's services**. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.
 - This is **not just a duty to clients**. It applies to lawyers holding themselves out as providing neutral services if they overstate their qualifications or experience in the neutral role.

Arbitrator Duties in Accepting Arbitration Engagement

- Selected points under the [AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes](#)
 - Canon II - An arbitrator should **disclose any interest or relationship** likely to affect **impartiality or which might create an appearance of partiality**.
 - Canon III - An arbitrator should **avoid impropriety or the appearance of impropriety in communicating with parties**.
 - Canon VIII - An arbitrator may engage in **advertising or promotion** of arbitral services which is **truthful and accurate**.

Case Study: Preparing for Initial Conference

- Founder One's counsel has considerable advocacy experience including in arbitration and prepares a checklist for the conference including issues to be discussed.
 - Conflicts and disclosures
 - Claims and defenses
 - Discovery and Confidentiality Order
 - Form of Award and other terms
- Founder Two's counsel has not handled arbitration before and expects to follow the state procedural rules, not realizing they do not apply in this forum unless the parties agree. His client also wants to drag it out hoping to wear down Founder One to sell his stake.
- Founder Two's counsel relied on Artificial Intelligence to draft the answer to the Arbitration Demand and asserts counterclaims that have no basis in law.
- Before arbitration, Founder One approaches a friend who works at the same firm as the arbitrator to ask the friend to put in a good word for them; the friend tells the arbitrator about the request. The arbitrator does not disclose that this occurred.

Preparing for Initial Conference for Advocates

- Counsel involved in arbitration should consider their **duties to clients** as to competence, scope of representation, diligence and communications.
- Some best practices for advocates representing clients in arbitration include:
 - Preparing a checklist of all issues to be addressed or that need to be addressed and discussing options with the client in advance.
 - Attempting to work out issues with opposing counsel including a proposed schedule.
 - Identifying unique issues that could be briefed early and narrow the scope of hearings.
 - Specifying relief sought and form of award.
 - Attending to conflicts and disclosures - Rules 1.7-1.9 Conflicts
 - Addressing confidentiality issues, cybersecurity issues, use and disclosures of use of AI
- Should consider **duties to opposing parties and the arbitrator or panel**
 - Rule 3.1 Meritorious Claims and Contentions, Rule 3.2 Expediting Litigation, 3.3 Candor to the Tribunal,
 - Rule 4.1 Truthfulness in Statements to Others; Rule 4.4 Respect for Rights of Third Persons

Duties to Opposing Parties & Counsel

✱ Rule 3.1 Meritorious Claims and Contentions

✱ *A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.*

✱ *Comment [2] ...* What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions...

✱ Counsel's failure to ensure accuracy of submission is a breach of competence and of meritorious claims and contentions.

Duties to Opposing Parties & Counsel

* Rule 3.2 Expediting Litigation

- * *A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.*
- * *Comment [1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose...*

- * Counsel's seeking to delay in hopes of wearing down other party, so they sell their stake in the business is improper under 3.2.

Duties to the Arbitrator

✱ Rule 3.3 Candor to the Tribunal

✱ (a) *A lawyer shall not knowingly*

- 1. make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal [Rule 1.0(m) includes arbitrations where adjudicative] by the lawyer;*
- 2. fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or*
- 3. offer evidence that the lawyer knows to be false...*

✱ If counsel persists in advancing false information or law derived from AI once **aware of inaccuracy**, that conduct would also violate Rule 3.3

Arbitrator Duties to Parties

- Rule 2.4 Lawyer Serving as Third-Party Neutral

- a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Rule 2.4 Serving as Third-Party Neutral

✱ *Comment [2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.*

Case Study: Pre-Hearing & Hearing Dynamics

- ✱ Arbitrator issues a scheduling order with deadlines for discovery requests and production.
- ✱ Counsel One ignores deadlines; doesn't respond to emails/calls from opposing counsel.
- ✱ Counsel Two persists in asserting frivolous claims based on AI research and does not withdraw, instead files dispositive motion relying on flawed submissions.
- ✱ Arbitrator schedules hearing to address the discovery and dispositive motion.
- ✱ At hearing, Counsel One calls Counsel Two insulting names rather than addressing the grounds for withholding discovery and ignoring arbitration order and counsel communications.
- ✱ Counsel Two does not appear, sends junior colleague who prepared the AI flawed filings and cannot present genuine authority. Arbitrator denies motion, dismisses counterclaims.
- ✱ Counsel Two sends Arbitrator scathing letter accusing Arbitrator of bias without basis, threatening to destroy them on social media if they don't reconsider the decision or withdraw.

Violations of ABA and AAA Rules

- ✱ Failure to abide by orders, to provide timely discovery responses, and to respond to opposing counsel, violates multiple rules regarding duties to client, opposing party and counsel, the tribunal and others.
 - ✱ These include duties of competence, diligence, communication, candor, fairness, respect.
 - ✱ They also likely violate jurisdictional codes of conduct, professionalism and civility.
- ✱ Submission of false AI generated papers and dispositive motion violates several of the same rules.
- ✱ Failure to appear on time, delegating to a colleague who is unable to handle the hearing, insulting other participants, and threatening Arbitrator also violate multiple rules, and codes of conduct, professionalism and civility.

Responsibilities of Partners, Managers, and Supervisory Lawyers

- ✱ Experienced Counsel is responsible for ensuring others under their oversight comply with the rules, including competence, diligence, candor and truthfulness.
- ✱ Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers
 - ✱ *(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.*
 - ✱ *(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.*

AAA-ICDR® Standards of Conduct for Parties and Representatives

✱ Prepared by American Arbitration Association -International Centre for Dispute Resolution

- ✱ **Requires parties and their representatives conduct themselves in an appropriate manner** when utilizing the AAA's services, to abide by the standards of conduct; failure to do so may result in AAA's declining to further administer a particular case or caseload.
- ✱ **Treat employees and others in courteous, respectful and civil manner**, respect AAA's policy against unlawful discrimination based on an individual's gender, race, ethnicity, age, religion, national origin, or any other legally-protected characteristic.
- ✱ **Participants shall not engage in harassing, threatening, or intimidating conduct** toward AAA employees or arbitrators/mediators, party representatives shall advise clients and witnesses of appropriate conduct expected during proceedings, participants shall refrain from using vulgar, profane, or otherwise inappropriate language; participants shall not threaten violence or other unlawful conduct.
- ✱ **Participants shall not repeatedly file unmeritorious demands for arbitration, plead in other papers, or engage in other tactics that the AAA or an arbitrator determines are frivolous, filed for the purpose of harassment, or primarily intended to cause unnecessary delay or increased costs.**
- ✱ **Participants shall not inform the arbitrator of an objection to the arbitrator's service**

✱ These Standards of Conduct were violated by counsel in this example.

Conclusions and Key Takeaways

- Advocates and neutrals have ethical and professional obligations in arbitration.
- ABA Model Rules of Professional Conduct, ABA Standards of Conduct for arbitrators, statutes, court rules, administering organization requirements, and parties' agreements control how lawyers and arbitrators should act.
- All participants should be bound by confidentiality.
- Arbitrators must disclose conflicts at outset and any that arise later; withdraw if not neutral, Counsel/parties have duty to disclose new information bearing on potential bias.
- Counsel should prepare checklist of procedural issues in advance of initial conference.
- Participants should be truthful, responsive, civil dealing with others including the arbitrator.
- Professionalism and civility paramount to uphold the integrity and fairness of the proceedings.
- Failure to act appropriately can result in ethics violations, sanctions, impact the outcome or the ability to appear as counsel or party or neutral service in the forum.

Additional Resources

American Arbitration Association Resources including Rules and Forms, AAA Clause Drafting AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes

AAA-ICDR® Standards of Conduct for Parties and Representatives
(www.adr.org)

CPR Dispute Resolution Services Resources, Rules, and Model Clauses
CPR-Georgetown Commission on Ethics and Standards in ADR Model Rule 4.5
The Lawyer as Third-Party Neutral (www.cpradr.org)

Griesing, F., *Before There's Trouble: How to Draft ADR Agreements that Protect Client Interests*, Utah Bar Journal, Vol. 39 No. 4, July/August 2026, pp. 50-56.



We get it done right.